THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Karl A. Folkens, Special Referee

Case Nos: 2015-CP-26-1084 / 2013-CP-26-5530

Appellate Case No.: 2017-001646

Jericho State Capital Corp. of Florida, Plaintiff,

v.

Chicago Title Insurance Company, Defendant,

AND

Lynx Jericho Partners, LLC, Plaintiff,

v.

Chicago Title Insurance Company, Defendant.

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SC Court of Appeals

Of whom Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC are the Appellants,

And Chicago Title Insurance Company is the Respondent.

RECORD ON APPEAL

VOLUME FOUR

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land was taken. I'll talk to them about the fair market value and the damage or dimunition in value, obviously that they're concerned with the fair market value on December 15, 2009, that they can also consider the highest and best use of what the parties agreed to as residential property.

Yes, sir?

DEPUTY: Yes, sir. He said we'll get the van lines up and make the car.

THE COURT: All right, sir. Very good. And gentlemen, y'all will just have to communicate with the Sheriff's office about where they need to go or ---

MR. MCCUTCHEON: Can we ask if Wade is gonna be one of the ones going?

DEPUTY: Yes, sir. I'll be the one going ---

MR. MCCUTCHEON: If we can talk to him right now, I think we can ---

THE COURT: Y'all can figure it out but if y'all need to send somebody along, then I'll let you send somebody along. I mean, I don't mind -- you know, Mr. McCutcheon and Mr. Shelton and Mr. Bellamy, if y'all want to ride out there with the deputies I'll be glad for you to do that but we need to make sure they are going to the right place and I'm going to leave that to y'all to do that.

MR. SHELTON: We'll do it.

THE COURT: All right. Now, let's talk about some

special things in it. Mr. Bellamy asked some cross examination and had some questions about circuitous route and you did, too, Mr. McCutcheon. And I gathered from the questions that the child have differing opinions as to the circuitous route. So, Mr. Shelton, is that an issue that you wanted to talk to the Jury about or not?

MR. SHELTON: I believe Touchberry in South Carolina does permit the jury to consider the circuitous access being an issue in -- as an element of damage and condemnation case is.

THE COURT: What's your position, Mr. McCutcheon?

MR. MCCUTCHEON: My position is, Your Honor, that the statute and the case law are explicit in saying that circuity of travel is not a compensable damage. And if the Court will allow me, I'll hand up a proposed charge or case in the morning.

THE COURT: I'll be glad for you to do so.

MR. SHELTON: I'll be glad it's the same.

THE COURT: And I appreciate that. Have Bolt and Touchberry been overruled?

MR. MCCUTCHEON: I don't think so.

THE COURT: The Highway Department v. Bolt and Highway Department v. Touchberry been overruled?

MR. MCCUTCHEON: No.

MR. SHELTON: And, Your Honor, the Hilton Head Auto case even says that it can be ---

THE COURT: Anyway, just going back to those cases, I don't know but y'all look at them, but it's my belief that unless those two cases have been overruled, those two cases, you know, which have some considerable age on them, like in the 60s, at least Bolt is from the 60s, allow it. It allows some charge that says that the jury can consider as an element of special damages the necessity of using a circuitous route to gain access where the Landowner's property has been severed by a controlled access highway and this is a controlled access highway, I don't think there's any question about that. If they find that that severance causes some kind of damage or decrease to the fair market value of the remaining property. I believe that's what those cases say but I'll let y'all look at that overnight and then tell me.

All right. Then we've got the special issue about noise. Is there any question, Mr. McCutcheon, that the Jury could consider an element of damage if -- of noise if they find the noise causes a decrease in the actual fair market value of the remaining property?

MR. MCCUTCHEON: I think that's what this whole case is about, Your Honor, I can't disagree ---

THE COURT: All right. How about view?

MR. MCCUTCHEON: About what?

THE COURT: View.

MR. MCCUTCHEON: We've got a problem with that, Judge.

THE COURT: All right, sir. Talk to me about that then.

MR. MCCUTCHEON: I don't have to go into that, Judge.

THE COURT: I mean, again, it's for the Jury to decide if they think it's impaired or not. So, I'm not telling them it is I'm just saying they can look at it if they want or consider it. And then, I've got -- obviously, I've got has to be a unanimous verdict. I've got a verdict form and I did it two different ways but basically got the caption of the case and they had on there, we, the Jury, by unanimous decision find that just compensation be paid to the Landowner to be -- and obviously write it out. Now, on one of them, I put underneath it something I would tell them anyway and I will tell them but I put it on the verdict form, too, that you cannot return a verdict in an amount less than the offer of $998,000 or more than the Landowner's opinion and that one was $4,010,000. So, I put that note on the verdict form.

MR. MCCUTCHEON: I have no problem with that Your Honor.

MR. SHELTON: That's fine, Your Honor.

THE COURT: You have no -- okay, so, that's the one we'll use and I'll give you a copy of it but, basically, you know, that's all it says. And then at the bottom it says, you know, knock on the door and notify the Bailiff when you finish.

One other things to me to add to that, Mr. Shelton?

MR. SHELTON: I've got -- if I may approach?

THE COURT: Yes, sir.

MR. SHELTON: --- a charge from -- regarding drainage.

THE COURT: All right. Mr. McCutcheon?

MR. MCCUTCHEON: Well, I think that's -- I think that's the law in the case, Your Honor, but I don't think there's any testimony in here that they're not doing that.

THE COURT: Okay. The only -- well, the main testimony I remember was Mr. Powell ---

MR. SHELTON: Your Honor, Mr. Barbee did as well and I asked him ---

THE COURT: Okay. But I do remember Mr. Powell specifically talking about that and the amount of water -- let me find what he said -- oh, he was talking about that with the water that was going to be dumbed down there, you know, from the bridge would go on to that 10-acre site and he was talking about the amount of cubic feet and that it would extrapolate into, you know, during a heavy rainstorm 1.2 million gallons of the water that would have to flow into the Intracoastal Waterway and cause a problem and go onto the adjacent property. And so, there's some testimony and there may be other testimony but I do remember Mr. Powell talking about that. So, I'm -- the terminology that's in this request to charge, Mr. McCutcheon, is basically one sentence. Do you have a problem with that one sentence? Mr. McCutcheon?

MR. MCCUTCHEON: Well, I still object to that ---

THE COURT: No, I understand you object to it and I

appreciate that and I understand that. I'm just saying the language, do you ---

MR. MCCUTCHEON: The language is fine, I just ---

THE COURT: All right, sir. You just don't believe it's part of this particular case and I ---

MR. MCCUTCHEON: The other thing, Your Honor, is that it's highly prejudicial because there was the bases and nobody testified as to what those numbers would be other than Mr. Powell.

THE COURT: I appreciate that, but that's gonna be for the Jury to decide. I believe there is evidence to sustain the charge to the Jury on that issue and I will use that particular sentence in the Court's charge to the Jury.

Anything else, Mr. Shelton?

MR. SHELTON: No, Your Honor.

THE COURT: All right. Very good. Now, Mr. McCutcheon, besides the issue about these circuitous route and that y'all are gonna bring to me tomorrow, anything else you would like me to consider at this point in time?

MR. MCCUTCHEON: No, but I would like to -- I'd like to make sure that I can think on it tonight.

THE COURT: That's fine. I'll be glad for y'all to do that but I wanted to go over with y'all now to kind of give you an idea what I was thinking so that if y'all had any additional ideas you'd have some opportunity to look at it

tonight.

MR. BELLAMY: Your Honor?

THE COURT: Yes, sir, Mr. Bellamy.

MR. BELLAMY: Sometimes in cases, the Court has charged the requirement of the DOT to have the property appraised and give it to the Landowner prior to condemnation which sets a time in compliance with the statute. Obviously, since the original appraisal was zero ---

THE COURT: I'm going to allow you to argue that but I -- it was also allowed to by Judge Hyman for them to amend that through he is written order. So, I'm going to let y'all argue the facts as they exist in this case but I am not going to give any kind of emphasis to that in my charge.

MR. BELLAMY: I understand.

THE COURT: All right. Anything else, gentlemen?

MR. MCCUTCHEON: No, sir.

MR. BELLAMY: No, sir.

THE COURT: All right, gentlemen. Let's get here so that we can get started at -- well, y'all be here at 9 o'clock. Obviously, we're sending the Jury out but I do want y'all to be here at 9 o'clock. We can go over the issues about the charge if that's an issue. And here's a copy of the verdict form for each of you.

With that we'll be at ease until tomorrow morning. Thank you very much.

MR. SHELTON: Thank you, Your Honor.

(END OF DAY TWO.)

*******OFF THE RECORD*******

ORIGINAL

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF HORRY	)	**2009-CP-26-11956**
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION Condemnor, vs. JERICHO STATE CAPITAL CORPORATION OF FLORIDA AND LYNX JERICHO PARTNERS, LLC, Landowners.	)	**Transcript of Record** (Volume III of III) November 19, 2014

B E F O R E:

Honorable Steven H. John
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Howell V. Bellamy, Jr., Esquire
Robert S. Shelton, Esquire
Attorney for Condemnor

John B. McCutcheon, Jr., Esquire
Attorney for Landowner

Dixie C. Eubank
Circuit Court Reporter

Transcription by:
Kay H. Richardson
Circuit Court Reporter

November 19, 2014

(REPORTER'S NOTE: The following takes place outside the presence of the Jury.)

BY THE COURT:

THE COURT: All right. As to that issue on circuitous route that we had yesterday, I've gone back and looked at Touchberry, whatever it is, and Bolt, and I'm just gonna read to you what I'm going to read and I believe it comports with what the case says. It doesn't indicate the Jury can't look at the issue, it's just how they need to look at it. So, I'm going to charge them, You may consider the necessity of using a circuitous route to gain access to remaining lands where the Landowner's property has been severed by a controlled access highway. If you find that severance causes a decrease in the actual fair market value of the remaining property and to the extent that such severance causes a decrease in the actual fair market value of the remaining property.

So, they can look at it, it's just how they have to look at it and so that's what I'm going to do.

MR. MCCUTCHEON: Just for purposes of the record, Your Honor, we would note an exception to Your Honor's charge in regards to ---

THE COURT: I appreciate that but I think it's ---

MR. MCCUTCHEON: I understand. I just want to protect the record.

THE COURT: All right. Any issues about closing? Who's first, who's second, anything like that?

MR. MCCUTCHEON: No, his first, I'm in the middle of the sandwich in his last piece of bread.

THE COURT: All right. I didn't figure there would be but I figured I'd ask just to ---

MR. MCCUTCHEON: Yeah, I think me and Mr. Shelton and Mr. Bellamy have been through this rodeo before.

THE COURT: Well, it's certainly not the first one. All right. So, with that, are y'all ready for the Jury to come in? The Landowner?

MR. BELLAMY: Yes, Your Honor.

THE COURT: And the Department?

MR. MCCUTCHEON: Yes, sir.

THE COURT: Very good. Go get them.

Now, gentlemen, I'm going to give them their pads back but I will make a note about I will tell them about, obviously, they've received all the evidence in this case so that they are clear about that.

(REPORTER'S NOTE: Jury enters courtroom.)

THE COURT: All right. If you just go ahead and hand out all the note pads and pens, just pass them around to make sure everybody's got a pen. Okay.

All right. Ladies and gentlemen, I trust that you stayed warm on your little trip.

We've reached the stage of the case where we are gonna hear, first, the closing arguments of the attorneys and then the charge on the law. Now, in regards to your notepads, if you have taken any notes, I might ask you to do one thing and maybe draw a line across where the end of your notes. If you have made any notes, just draw line across the pad. And the simple reason for doing that is to help you remember the notes above the line are about the evidence, that's what you're gonna make your decision on. The notes which you have made underneath that are not comments about the evidence. You remember that, though important and I want you to pay attention to them, the arguments, closing arguments of the attorneys, are not evidence and cannot be considered as evidence in the case. It's their argument to you based on the evidence as to what they are asking you to do as a result of your unanimous verdict in this matter. When we get done with the closing arguments then I'll give you the law that you will apply to the facts and evidence you find to be true.

So, with that, Mr. Bellamy?

MR. BELLAMY: Thank you, Your Honor.

THE COURT: Yes, sir.

CLOSING BY MR. BELLAMY:

MR. BELLAMY: Good morning, ladies and gentlemen. It finally got cold.

I want to thank you for agreeing, maybe not voluntarily,

but at least agreeing to serve because what you are doing and what you are doing is very important to our entire system. It doesn't work without the jury. It doesn't work without the jury system. And on behalf of Mr. Chwatt, and let me just tell you, he has on dark glasses this morning, unfortunately he went out to eat last night and ate some clams and had an allergic reaction and his eyes are almost swollen shut. I didn't want you to think he was in here with glasses on. He almost didn't make it this morning. But that's what happens when you eat clams sometimes.

You know, this has been -- a condemnation case is not one of these thriller things like you see on TV, a lot of technical stuff, a lot of technical information, a lot of stuff you hear some of you may be familiar with real estate values and things like that, some of you may not be. And as His Honor said to you, what I say and for that matter what Mr. McCutcheon says to you in what we call closing arguments is not evidence. And obviously what I'm going to attempt to do is to try to recall the evidence and the points, I think, that give credibility to see claim of the Landowner. And if for some reason I recall it different than y'all do, disregard what I said because I -- it's not my job to try to mislead you. It's my job to give you a fair estimate on behalf of my client as to what just compensation in this case should be. And for that reason, I thank you very much for listening and

paying attention. It's a pleasure sometimes to watch juries that listen and try to listen and try to understand and try to observe, are you paying attention, is something coming across, because you can't ask me questions and I can't ask you questions, so I have to do my job by talking about what I think are the important elements of this case. And it's divided up into three areas, His Honor, Judge John, who is the judge of law, he has -- he will give me the law, we have to accept it and you have to accept it as you apply to the facts. We don't have any discretion. He's the final judge, he is the final arbiter of what the law is but you are the final judge of the facts. And, as such, it is your duty and responsibility to judge the credibility of the evidence. What is credible? What does your common sense tell you makes sense with what the issues in this case are about? Because, if you apply the law and take the testimony as you hear it from the witness stand then you will arrive at a verdict which comes from an old Latin term veredictum which means to speak the truth and that's what we're here about. We're not asking you to give one dime more than the Landowners are entitled to or one dime less, it's just compensation.

Now, bear in mind, in this case Mr. Chwatt is the representative of a group of investors who have invested their life savings, 401Ks and things like this, into this piece of property which they ended up owning as a result of the default

of the developer. But these people own this tract of land as it sits here today and as he indicated there are several hundred people from all walks of life whose interest in this property is important because it's not necessarily today, I think we can at least agree, it's not necessarily what it was on December 15, '09 before the DOT condemned 10.1 acres. It's changed. You've had a chance to ride out there and look at it. You haven't seen the completed product but you've seen the beginning of the completed product. And I thought it was interesting as we were listening to Mr. Barbee who is the engineer for the DOT tell us that that bridge won't be completed until 2017. That's a couple of years from now. The take started on December 15, '09. The property owned by these people has been subject to that 240-foot strip of land that basically goes right through the middle of this 131-acre tract. Of course, you didn't have a survey measurement but, if you measure it, it's almost a football field wide, a big old -- right through the middle of this tract of land that severs it from one side to the other. Now, it is important to know that in the before, a lot of people including our clients thought that that's 131.4 acres was a very pristine site located on the Intracoastal Waterway that had real, real development possibilities for a first-class residential development. I don't know what it is about we people in Horry County but all of us like to live on the water. It's a --

it's something that we like but we know that that type property is more expensive than property that is off the water. And especially, and let me say to you, especially those of us who can remember what happened as a result of 2006 when everything looked like it was gonna be great and it was going to be a great world and everybody was, around here, buying up property and moving forward and then we all wake up one day in 2008 and the bottom falls out, everything goes south. Well, unfortunately, this piece of property suffered that same consequence in that -- when the market went down. But, let me say to you, the values that Mr. Jayroe gave you of the before value of this property were after he adjusted for the downturn in the market conditions. Both appraisers did that. So, what you're looking at is what was this piece of property worth in the before on December 15, '09.

Now, in that process, the DOT has the right under the Constitution as most state agencies to condemn land or take land but one of the safeguards that the framers of our Constitution of the United States and for the State put in effect provisions that if government chooses to condemn, they have to pay just compensation. That was one of the very great protections put in the Constitution under the Fifth Amendment because in this case, in a condemnation case, is the government's right to take, it's not the Landowner's privilege to say no. I can assure you it would have suited our clients

for them to build that bridge somewhere else in another location so that we wouldn't have to or they wouldn't have to deal with it because that bridge is gonna be there in perpetuity.

Now, let's talk about the process of how this all got started on December 15, '09 and it's kind of unusual because remember I asked Mr. Haskell yesterday, the DOT appraiser, the number two guy in line -- I'll talk about the first guy in minute -- but when I asked him about the value and I asked him about the take and I asked him about the situation, he basically told me he came in sometime in 2013, after Mr. Ratchford, who didn't come in this courtroom, gave an appraisal that was used to buy the DOT to go to my client and say we're going to take 10.14 acres of your land through the middle of your tract and compensation is going to be zero. Zero. Now, they weren't even going to pay for the 10.18 acres. The reason I bring that up is, if you recall, I asked Mr. Haskell, doesn't the statute require that before the Department can condemn a tract of land that they have to have an appraisal prepared and plans prepared and then give them to the Landowner and to negotiate in good faith. He said, yeah. And that is the requirement. But how do you negotiate when somebody tells you that gonna give you zero. So, at that point, you have the ability to make a determination of the credibility of the witnesses and the credibility of the

evidence and I would submit to you that when that act began that was not evidence of good faith in trying to deal with just compensation. And only after the Landowner had to go and hire a lawyer, an appraiser and an engineer to say, surely, something must be wrong. It can't be zero. Surely, something must be wrong. And then he goes to the expense and the trouble of trying to show that the property, that there was a take, and that they owed for the take, and that they owed damages as a result of the bridge, the height of the bridge and the location of the bridge, because as I indicated to you a minute ago, it's about a football field wide.

Now, with that in mind, he hires Mr. Jayroe and Mr. Powell to assist him in coming up with an appraisal, I'll get to those numbers in the second because, otherwise, this land is appropriated for a bridge without compensation. Interestingly, if you look at the point of time, how the sequence played out, after Mr. Haskell came onboard, almost three years later, because Mr. Ratchford is no longer involved, so we understand, what does he do? He comes and looks at the appraisal and he determines, well, maybe we ought to give them something for the take, 10.18 acres. And he allocates the $40,000 an acre and comes up with $407,000 and says that now is just compensation. But you remember I asked him, you didn't look at any of the things such as severance damages? No. You didn't look at proximity damages? No.

Circuity of travel, you heard Mr. McCutcheon asked him isn't it against the law -- I anticipate His Honor is going to charge you that you can consider circuity of travel. I'll let you be the judge of what he says but listen for it. Did you consider noise? No. Did you consider drainage? No. Did you consider lights? No. Did you consider the fact it was a six-lane bridge seventy feet up in the air? No. Then, as a result of that appraisal, the DOT goes out and hires Mr. Jayroe, and the information from Mr. Powell. And they bring Mr. Wilson in, who basically says -- and I know that's a complicated subject but what Wilson was talking about, I would submit to you, is there are certain criteria that the DOT has to use when they have a controlled access Highway like that, they must look at whether they have to put up sound barriers. And sometimes when you drive down 31, going down 31 towards North Myrtle Beach you see some sound barriers or some berms that are constructed. Well, do you know why they are there? They are there to deal with noise coming from the highway. And his function is, is that they have a criteria that deals with whether or not you've got to build a berm. And a lot of what he testified to concerned that issue in the DOT above a certain decibel level would have to build a berm. But ultimately what he did say was I find that 19.7 acres has been affected by noise, 61 decibel level. And I'm no sound guy, but that's pretty loud and he says that and the DOT takes that

deal and carries it and gives it to Mr. Haskell and what does he do? He doesn't call Mr. Wilson, he doesn't review it, he doesn't talk with anybody at the DOT, he does not clear it with the soul, he just adopts it makes it a part of his appraisal and said I find that that 19.7 acres has been damaged by seventy-five percent. And let me tell you where I got that number from, I got it from him because he was at $40,000 an acre, he said the noise took the value down to $10,000 an acre. The math is seventy-five percent. Well, they only damaged 9.75 acres of a tract that was 131.4 acres and he admits that the noise level in the after, as to the whole tract, was greater than it was there in the before. And he basically says I adopt it and that's what I'm doing. Well, if you take the seventy-five percent damages, that is greater than what Mr. Jayroe said of forty percent on one side and thirty-five percent of the other. But, you know, that's kind of the tenor of where this thing is. You know, the Landowner has had to come in here and fight tooth and nail to protect their right of ownership and their right of utilization of the property and I submit to you, they shouldn't have to do that if you're gonna be fair. DOT should've done a fairer job of dealing with these Landowners.

Now, let's talk a little bit about how we get to the numbers. Bear in mind you start out in the before with the value of the entire tract of land, 131.4 acres. How do you

get there? Well, you know there's no perfect way of doing it. You've got to go out and you've got to go out and -- the appraisers who are licensed to do this have to go out and try to find comparable sales of other property to assist them in determining the value of the subject tract which is 131 acres. Now, it's a judgment call, let me just say to you, it's a judgment call of the appraisers to go about. But interestingly, Mr. Jayroe went out and found six comps that were on the Waterway. Mr. Haskell only had two comps. Let me tell you the point I'm trying to make to you is both of them used one comp, and that was, if you remember, that was the sale on Enterprise Road which fronted on the Intracoastal Waterway. Do you remember that? Because Mr. McCutcheon spent a good deal of time talking to Mr. Jayroe about that's probably your best comp and Mr. Jayroe said, well, it had the least minuses and it was somewhat similar but not identical. And he said, he said this, I made the adjustments to that tract of land taking into consideration the market conditions as they existed in '09, taking into consideration its size, taking into consideration the wetlands which is 18.5 acres -- nobody basically disagrees, there's 18 1/2 acres of wetlands on this tract -- and that it had utilities available to the site. And that is to comp he used to arrive at his number of $70,000 an acre in the before. Now, there were five others but on average what he came up with was 70. Well,

interestingly if you take what Mr. Haskell did, he used the same comp because as he said, there are not a lot of sales on the Intracoastal Waterway and you try to get current sales to deal with that and he uses that same sale and after he made his adjustment for market conditions he said that sale had a value of $88,405. More than Mr. Jayroe said. And he ended up averaging out and saying that that sale had a value in the before of $66,000. What am I saying to you? I'm simply saying to you that Mr. Jayroe was at $70,000 an acre in the before. If you look at the comp that was used by Mr. Haskell, he was at 66,303, so they are within a dollar or two of each other, if you choose to believe that, if you think that's credible. Well, what have I tried to do? I've tried to give you a basis to set the value of the property in the before because you can't begin to do your job until you know what the property was worth. Well, once you work your way through that mathematical process in looking and considering about the credibility of the sales and whatever, then you've got Mr. Jayroe that gave you a number of $9,196,000, $9,196,000. If you choose to use that number, then obviously you've got a situation with Mr. Haskell who puts a lower value because he puts $40,000 an acre on it. So, the question is, which is the more credible number; 40 and acre or 70 an acre? It's not often that the two appraisers use a comp that's similar; it don't happen very often. So, use your good sense and your

good common sense to determine what is the value of the property in the before and that's your judgment and whatever you decide is whatever it is because when you go back in your jury room and you come back out, nobody will ever know how you arrived at it. We'll all scratch our heads but, obviously, arriving at your before value is a very important function because once you look at that value, then what do you look it? The question is, do you then look at the value of the take because there's no question that His Honor will charge you that the DOT owes him the 10.18 acres unless there is benefits. Now, let me clearly say to you the DOT has not claimed that this bridge benefited this piece of property; that's not an issue in evidence. They are not maintaining that. So, benefit is not before you. So, the question is, is whether the property has been damaged. Well, if you look at the take and you look at Mr. Jayroe's number, then you come up with $712,600 for the take. There's a difference between he and Mr. Haskell but I'm saying this to you, then if you are satisfied that you've arrived at a number for the take, then I would submit to you, then it becomes your responsibility or your discretion to consider whether or not the property has been damaged and how, under the statute, we came up and said on the same day, you go out there and look at it in the before and on that same day you go out there and look at it with what the take represented and what it took and what he did because

the DOT up until sometime this year did not take the position that there were any damages to this property. And I submit to you, but for Mr. Jayroe and Mr. Powell, they would have offered nothing more than the $407,000 that Mr. Haskell came up with for the take. But, you know, when you start looking at the take and damages I can just tell you that when you think about a bridge that goes through the middle of a tract of land that is 70 feet in the air at its highest point takes up 280 feet of your property with a controlled access highway, it's different then the road going through your neighborhood to your house where you can put a driveway to get to it, no, no, no, not here. Controlled access means no access. It means now you can get from one side of this tract to the other on your property. You used to could drive from one side to the other without going off the property. Now, the road divides it. Nobody at DOT thought that was important. Also, the fact that you have the height of the bridge, six lanes of travel. DOT told you first 37,000 cars a day projected, 35,000. Can you imagine waking up in the morning with that structure there and traffic going over? Is it going to be as pristine as it was before they condemned it? Don't think so. Would you be interested if you had a choice of buying a lot there or would you rather go somewhere where there's not a bridge in not noise? You know, I thought what Mr. Powell said the other day, it's like waking up one morning that you own

your piece of property and somebody puts a sawmill next door and now you've got to live with. Well, I don't know what your preference or your prejudices are but I would submit to you if you had a choice you would choose not to live by that bridge. Now, there may be a dollar amount that you could overcome the noise but you're going to pay a lot less. And what we're talking about here is how the value of this piece of property was affected. It still there but has it affected the value from the number that Mr. Jayroe gave you of $9,198,000. Has it affected that value? I would submit and hope and that you would consider that it has.

Now, there's some other things that they didn't talk about and I'll tell you about the noise right now because that's the thing that, I guess, that really -- we got through all the shenanigans about Mr. Haskell is -- the first time he did his appraisal and I ask him on cross, I said, Mr. Haskell, you didn't award any damages for noise in your first appraisal of $407,000, did you? No, sir. Then they hand you this noise thing that you didn't order and you didn't ask anybody and you didn't even bother to talk to the guy that wrote the thing and you came up and said it's been damaged seventy-five percent. It went from 40,000 to 10,000. Well, if you apply that seventy-five percent to the balance of the tract or at least to the -- he goes out hundred feet and I think -- don't hold me to that but I think Mr. Wilson's numbers went out 100 feet,

61 decibels out 100 feet. Only 9.7 acres was affected. Well, what about the rest of it? What about the rest of it? Does the noise just stop at the 19. -- same bridge, same parapet wall, same deal? No. Mr. Haskell just kind of -- reluctantly I'll submit to you -- said, okay, I'll do that. But he told me earlier, I didn't think there were any noise damages. I thought it was a contradiction again in his credibility as to what he was saying. He probably didn't like it's but my job to point at to him, he changed his story, you know.

Another thing that came out was drainage. And you heard the DOT's engineer tell you about the water. They're gonna put water on this tract. You take it as you hear it. The scuppers coming down, rocks leading -- where is it going? It's going on this tract. Was it there in the before? No, ma'am. Did he tell you that the bridge may have had some effect on the view? Would it have some effect on the view? I would say yes. He didn't think so. He just thinks that's kind of acceptable. How about the lights from the bridge? How about the noise of the cars going over the bridge? And in -- you then have those things to consider which are a lot more than zero.

So, how do you do what you need to do? Well, this is a chart that Mr. Jayroe used for the purpose of his testimony. He started out with $9,198,000 as the before value. He said $712,600, the DOT owed him for the 10.1 acres they took. Then

he does the difference because you don't want to double dip. Then you come back and he says value after the taking was $5,191,925. The difference is 3,293,475 and then you get -- you add to the value of the taking and you come up, you came up with $4,006,075 which was rounded off to $4,010,000. That's why he rounded off to be and that's what he said would be just compensation. Now, that's not a full award but it's what the land was worth after he had been adjusted for market conditions. So, you're not giving the Landowner all the money that Mr. Jayroe said it was worth. You are giving the Landowners these people, this group of people on this property. You are giving them the amount of money which would hopefully make them whole. Now, what do I mean by that? The purpose of these cases, as our legislature and the courts have said is to be sure that the Landowner is treated fairly, is to be adequately compensated and the purpose is to cause -- and I wish you can do this, I wish there was a procedure where you could say move the bridge somewhere else, go put it on some of the piece of property. You can't do that. If you could do that, that's what I would ask you to do but you can't do that. So, the only thing that we can do is, in dollars, try to compensate the Landowner for the take and the damages to the property because, hopefully, your responsibility is to determine -- not to making him any richer but not to make him any poorer but to compensate him in dollars and cents in an

amount that you deem to be sufficient to put him in the same position he would've been in on December 15, '09. The amount of money that would put him in the same position, no more, no less. And what I would ask you to do -- you know, we couldn't bring all these people that owned the interest in this property in the courtroom and Mr. Chwatt is just here as the representative but, obviously, we're not asking you for a gift, we're just asking you to do justice to this Landowner. And when you do that and write a verdict that speaks the truth, then hopefully we can leave this courtroom. But one thing for sure is that bridge is going to still be there for a long time.

Now, I thank you for listening. My intention in my argument here -- I'll talk to Mr. Shelton and find out if there's something I need to cover but hopefully not. What I will do is I -- because we have the burden to prove to you our damages beyond the 998,000, almost $1,000,000 that the DOT finally said they -- to prove the compensation of the take because of the difference. It's our burden and we accept that burden and I hope you agree that we had met that burden. But Mr. McCutcheon is going to get up and argue to you now the position of the DOT and I -- the question I would ask if I can ask him is, how in the world did y'all ever get to zero dollars for compensation on December 15, '09? And how -- why have you changed your position so many times? And I would say

to you, I have the right to come back after he finishes and close because under our rules I have the right to open and close. But, you know, again, I -- again, let me thank you for sitting and listening. It's been a pleasure to try this case in front of you because I thought you paid attention and it's important to both sides. But I want to thank you from the bottom of my heart for what you have done. Thank you.

THE COURT: All right. Mr. McCutcheon?

MR. MCCUTCHEON: Thank you, and Your Honor. May it please the Court?

THE COURT: Yes, sir.

CLOSING BY MR. MCCUTCHEON:

MR. MCCUTCHEON: Mr. Foreman, ladies and gentlemen of the Jury, it's my time now. And as Mr. Bellamy -- Mr. Bellamy and I, contrary to popular belief, are real good friends outside of this courtroom but when we get in this courtroom, this is the battleground, this is the war. And Mr. Bellamy has very ably represented his client in this case and I hope to God that I have ably represented to my client, your State of South Carolina.

Now, this is the time of this case where the lawyers get to speak directly to you about what has happened and what has transpired in this courtroom over the last 2 1/2 days. We get to do that in the beginning and we get to do that at the end. Now, somehow in the long-standing legal halls of justice, they

call this the final argument. Well, I'm not here to argue with you folks. What this really is is a summation on behalf of my client that I think may be of some assistance to you or it may not be. And the reason that what we say now doesn't constitute any evidence in this case is obviously I am bias and prejudiced in regards to a particular side, the DOT. Likewise, Mr. Bellamy is also prejudiced in regards to a particular side. So, what I'm about to say to you now is not evidence and should, during the course of my remarks, I recall some of the testimony differently from the way you recall it, I want you to disregard what I say because I would not intentionally mislead you as to anything that was said or testified to in this particular case.

Now, in this case, ladies and gentlemen of the Jury, Mr. Bellamy represents a fund comprised of several or a lot of individuals and they are represented by Mr. Chwatt. I represent the South Carolina Department of Transportation, which is simply an arm of the State of South Carolina. And what we're talking about, ladies and gentlemen, in this particular case as you have heard probably more than you wish to hear about is a piece of property in Horry County that fronts on Peachtree Road and also fronts on the Waterway. Now, I'm not gonna sit here and argue with you that Waterway property is not valuable property. I think all of us know that it is but then there are differences of opinion, if the Jury

please, as to what the values and so forth based on locations etcetera, etcetera. Today is the Landowner's only day in court. Today, likewise, is the only day in court of the DOT.

Now, my daddy told me a long time ago the more you talk to less the people are going to listen and I have learned, fortunately, I hope, to adhere to the Billy Graham thought, if I talk to you more than twenty minutes you ain't gonna listen to me. So, I'm going to try my best to stay within that. Now, I made leak over a couple or three minutes but if you'll kind of bear with me on that. But, there's one thing I want to address right up front, ladies and gentlemen of the Jury, the Landowner in this case from the very outset in this case has said to the DOT, you didn't act in good faith in regards to my client in regards to how much money the Landowner was due, etcetera, etcetera, etcetera beginning in -- on December the 15th of 2009, that's a long time ago, I agree with that, but there were things that happened between that date and the date that I actually got involved in the case. And of course, I think, there's something wrong with the fact that I went out and hired an appraiser. I submit to you that the one reason that I went out and hired an appraiser is I didn't think the first appraiser was right, so I went and got one to try to get one that was that may be closer to what is right. But there's nothing wrong, ladies and gentlemen of the Jury, with me hiring an appraiser and I hired an appraiser and he went

through and he ran his numbers and you've heard all about these numbers and I'm not going to rehash and reiterate those particular numbers and he arrived at what in his opinion was just compensation in this case. He considered all of the things that Mr. Bellamy alluded to. As far as damages were concerned, he simply found in his opinion that there were not any in this case. Now, you may believe that, you may not believe that but this, you know, that occurred and then -- I wanted to talk a little bit, ladies and gentlemen of the Jury, first of all as to what went on after that. Mr. Bellamy tells you that Mr. Chwatt had to go hire him and his crowd and they went out and hired Mr. Jayroe and Mr. Powell. At that point in time, we had none -- at that point in time being the information upon which Mr. Haskell made his appraisal. We had none of the information as contained in the reports of Mr. Powell, or the appraisal of Mr. Jayroe.

In this particular case, ladies and gentlemen of the Jury, the report of Mr. Powell was in 2013. 2013 is when he put the information in his report that he's testified to you about as the basis upon which ultimately Mr. Jayroe, for the most part, used to arrive at his particular numbers. We got Mr. -- we got Mr. Powell's report, ladies and gentlemen of the Jury, attached to the appraisal of Mr. Jayroe. And do you know when we got it? April 16th of 2014. April 16th of 2014. We had no information from Mr. Powell, the, quote, engineer or

the appraiser as to what they thought was going on with this particular piece of property. And in that report of Mr. Powell, and I think you can tell from the tone of the testimony in this case that the major, major thing that he hangs his hat on is noise going over this bridge, noise. So, whether I be a good lawyer or a bad lawyer, I see that and I say, well, maybe I need to hire somebody that can help me with that issue. So, I go out and I hire Mr. Josh Wilson to do a study for me as to what the noise impact on this particular road was. I submit to you, ladies and gentlemen of the Jury, that those things show -- well, I don't know, maybe they do or don't show good faith on behalf of the Department, because when they got that information, they decided, well, maybe we need to take a second look and they took a second look. And Mr. Wilson went out and he did his noise study and you heard him testify in this particular case about his qualification, qualifications as a noise analyst expert. I submit to you, ladies and gentlemen of the Jury, Mr. Powell is a civil engineer but he doesn't have the training that Mr. Wilson has in regards to establishing those values. And you heard his testimony and you have some of his exhibits back there as to what he says about what the impact was on this particular road and it's circled on one of his pictures. So, then as a result of the information I got from the attorneys in this case, with the two reports, and when I got Mr. Wilson's stuff I send it

to them, I also send it to Mr. Haskell to let him look at what Josh Wilson says about what impact this road had on noise. And as a result of that, he amended his appraisal up to over $800,000 and then ultimately there was one other area that was found in his appraisal and he upped it to the number that he now testifies to today and that's the $998,000. And I submit to you, ladies and gentlemen of the Jury, that what you need to look at, and I anticipate that the Judge is going to tell you that in this particular case, number one, you're the triers of the facts, he's the trier of the law. You go back in that jury room and use your good common sense and use your good common judgment and you arrive at a verdict in this case that speaks the truth. That's what the term verdict means. And he's gonna tell you that you've got to give these people at least $998,000 but you can't give these people more than $4,010,000. And it is your province, ladies and gentlemen of the Jury, anywhere within that spectrum. It doesn't have to be one or the other. It is your prerogative to establish what you feel would be a fair and just amount of just compensation in between those two.

Now, in regards to the land values in this case, and we all know that of course the values and so forth placed on land by appraisers for both sides is based on some kind of judgment call. In this particular case, one of them says 40, the other says 70. One of them -- both of them did, in fact, use the

same comparable in this particular case. But I want you to look at some of the comparables. I want you to remember some of the, quote, comparable sales that Mr. Jayroe used. There are two of his comps, ladies and gentlemen of the Jury, that or both in the vicinity of North Myrtle Beach. They are on the Waterway in North Myrtle Beach and they're near a big bridge over the water. And, if you remember the numbers, what we're talking about here is we're talking about a bridge going over the Waterway, we're talking about property that's near that bridge. Land Sale Number 2, which is Old Sandridge Road -- I don't know whether you are familiar with the new North Myrtle Beach Connector are not, but Sandridge Road is off of that North Myrtle Beach Connector and this piece of property is on the Waterway. Look what it sold for, $202,621 an acre. Does that indicate to you that property in or around on the Waterway near a bridge ain't worth nothing? Apparently, it was there. Look at Number 4, also Sandridge Road, $250,000 an acre.

Now, I want to, I want to say one thing, ladies and gentlemen of the Jury, it's almost like the tenor in this courtroom has been that there's nothing out there left that this gentleman can sell and/or develop. He's got an 84-acre tract on one side, he's got a 34-acre tract on the other side. He's got frontage along the Intracoastal Waterway, the whole frontage across there has -- some portion of it is wetlands

but you can build back behind the wetlands. He still has on both sides, I submit to you in excess of 2000 feet on the Waterway. If you look all up and down the coast or you look all up and down the Intracoastal Waterway and look at all the bridges they go down, there are developments relatively near those bridges. So, I submit to you, ladies and gentlemen of the Jury, that -- and I want to talk about one other, one other thing in just a minute but somewhere in between those two numbers, and I'm not standing up here and telling you and I want to, once again I want to say that all of the delay in this case wasn't the DOT's part. There was a lot of other things that have happened, some of which I won't get into and probably not allowed to get into, but you left this courtroom this morning -- I think some of you rode in a van and some of you rode in a car. Did they turn the lights on on the car? So, you could not get the full effect of the lights? And you drove down 544 and I think you went over and you turned right on Peachtree Drive and you rode down Peachtree Drive down to where this piece of property is beyond this piece of property. Then, you turned around and you drove back the same way. And I hope you had an opportunity to look at what is right beside been on both sides of the Highway 544 bridge. There are two developments right beside the bridge. Now, they're going to say, well, but the bridges are different. One's got six lanes, one's got four. And they're gonna say, well, the

values down there are not as high as the ones on our piece but I didn't hear Mr. Jayroe tell you what the differences may or may not have been in in regards to that.

MR. BELLAMY: Go ahead.

THE COURT: Go ahead, Mr. McCutcheon.

MR. MCCUTCHEON: Thank you. So, anyway, ladies and gentlemen of the Jury, I too want to express my thanks to each and every one of you. I know you're here against your will. Nobody -- if somebody walked around town saying I'm looking for volunteers to be on a jury, I seriously doubt anyone of you would've raised your hand but this is the system of justice that we have and we can't function without jurors to help us decide the disputes that we can't decide ahead of time.

All that I ask that you do, ladies and gentlemen of the Jury, is that when you retire to your jury room that you reach that verdict that I spoke of earlier that speaks the truth. Once you have done that, nobody can go behind your verdict; nobody can overturn your verdict; and nobody can question you about your finding of the facts. So, once again, I thank you for the kind care and attention that you have already given this case. Fortunately for you, the procedure only allows me to talk to you one time but it allows Mr. Bellamy to come back and say things about me again, or about the case. And the reason that that's a good thing is, is if it were not that way

we probably would still be here next Thursday because no lawyer likes the other one to get the last word. So, Mr. Bellamy is gonna come and talk to you now and I do, once again, thank you. And all I ask that you do is to reach a verdict that is fair for the Landowner and for the Department of Transportation. Thank you so very much.

THE COURT: Final argument, Mr. Bellamy.

MR. BELLAMY: Thank you, Your Honor.

REPLY CLOSING BY MR. BELLAMY:

MR. BELLAMY: Just a few brief comments I'd like to make. Mr. McCutcheon tells you a lot of time has gone by inferring that the DOT had nothing to do with it. Let me assure you of this, my client had nothing to do with the delay in this case coming to trial. You know, there's something that I think is basically important that Mr. McCutcheon kinda just talked over. My client didn't even have the responsibility under our law to hire an appraiser or hire an engineer. He could have come over here and testified, he could come over here and testify. But under the procedure that's before us, the DOT has the responsibility, the legal responsibility to prepare a set of plans and to prepare an appraisal, whoever they want to hire, and give it to the Landowner. That's a condition precedent to condemning the land. And what Mr. McCutcheon would say to you, they're are not required to look at everything they should look at when they give the Landowner

that appraisal; does that make sense? Because they have the duty to fully appraise the property, determine what the take is and assess any damages. And they elected not to award anything. Now, somehow or another it's -- it is now the Landowner's responsibility to tell DOT where they're wrong; that's why we're here in this courtroom. But we had no responsibility to tell the DOT what they should do. They had a set of plans. They knew how high the bridge was gonna be. They knew where it was gonna be located. They knew what the noise level -- well, really, they had an environmental impact statement, which Mr. Haskell said he didn't even read. They hired Mr. Wilson -- and let me tell you this -- Mr. Wilson is not an appraiser. He's not a valuer of land. Mr. Haskell is the one that has the responsibility of determining how to apply the noise levels. He took that 19.7 acres, and to this day I don't fully understand how part of it can be there part of it not be there, he took it and applied it and said that the property had been damaged by seventy-five percent in the area of the 19.75 acres. That's a whole lot more than what Mr. Jayroe said. But, you know, he basically said, look, I didn't read the report, I didn't understand the report, but he's the one that has the responsibility to take that report and equate it to damages and he finally got to a number and he didn't even agree, if you listen to what he said on the stand, that there weren't any damages. Still maintained that. So,

Mr. McCutcheon pointed out to you the sales that Mr. Jayroe used. And I can promise you this, none of the cops Mr. Jayroe used had a bridge going to the property, I can promise you that. It may have been near a bridge but none of the comps had a bridge going through the middle of the property and I wanted to be sure -- I figured you'd figure that out but I wanted to be sure that y'all understood that Mr. Jayroe used sales trying to come up with a number and I'm not going to go back through how I got that number, y'all can remember that. I did tell you something in my opening that the line that Mr. Wilson used was 100 feet and, I was wrong, it goes back 200 feet, it goes out 200 feet on each side and I was wrong about that. I wanted to apologize to you because I should've asked Mr. Shelton about that. But, something that's interesting about that noise, the noise factor, Mr. Wilson says that noise factor goes out to 61 decibels, which is damages. That's 200 feet. And I asked Mr. Haskell, well, when you go a foot further is it 61 feet or does it go to 60? It's still a lot of noise and it goes all the way out to the end of the property. There's a different level of noise there now than there was in the before.

You've heard the evidence. You can decide what the truth of the case is, what's fair. And I hope that when you go back, you will look at it as, hopefully, this Landowner can walk out of this courtroom, these Landowners can walk out of

this courtroom with sufficient compensation to put them monetarily in the position they were in before all this happened on December 15, '09. And when you do that, then you will have done justice and I hope that as you listen to the testimony, you recall it as you heard it, as you understand it. If you don't agree with me, disregard it, but I would never intentionally mislead you about anything; that's not my job. Mr. McCutcheon says he's prejudiced but I'm not prejudiced to the point that I would even attempt to mislead you. That would be stupid on my part. I just hope that y'all have made your notes, you've listened and you can go back and decide what would be a reasonable, fair verdict for these Landowners. And when you do that, then you will have discharged your job and responsibility. Thank you again for your time. Now it's to the point where the Judge will tell you what the law is and y'all can start deliberating and maybe we can all get home before our pipes freeze up. Thank you.

BY THE COURT:

THE COURT: All right. Ladies and gentlemen, obviously it's important that you understand the law that the Court gives to you. What I want you to do is take a very short break for five minutes. Go to the jury room, take a short break for five minutes, come back and I'll give you the law that you need to apply in this case. All right?

Thank you very much.

Just leave your pads and pens here. You will take them with you at the end when you go to deliberate.

(REPORTER'S NOTE: Jury exits courtroom.)

THE COURT: All right. Gentlemen, will take a quick break, five minutes and will come back. All right? Thank you very much.

(RECESS.)

*******OFF THE RECORD*******

(On the Record.)

THE COURT: All right. Mr. Bellamy, Mr. Shelton, are you ready for the Jury?

MR. BELLAMY: Yes, Your Honor.

MR. MCCUTCHEON: Yes, Your Honor.

THE COURT: All right. Very good. Ask the Jury come in, please.

(REPORTER'S NOTE: Jury enters courtroom.)

CHARGE TO JURY:

THE COURT: All right. Ladies and gentlemen, it is now my duty and responsibility to give you the law that you will apply to the facts and evidence that you find to be true. As I told you at the very beginning, I would not indicate to you in any way what I think the facts of this case were because it wasn't my job. It's your job and your responsibility to be the judge of the facts. And in that same vein, if you came in the courtroom with any preconceived ideas of what the law is,

what it ought to be, should be, hope it would be, you'll disregard that. You will take the law as I now give it to you and apply it to the facts and evidence you find to be true.

I'll remind you about a couple of things. Note taking, remember about the note taking I told you that we look at the collective wisdom of the Jury as a whole and because somebody has something on a piece of paper it's not any better than somebody else's memory, you put it all together and you use everybody's collective judgment and wisdom regarding that. All right?

In this particular case, and I told you at the very beginning it's what we call it eminent domain, the right of the State of South Carolina by one of its governmental entities to take condemned land for a public purpose. Now, this is the case of rightful acquisition by the South Carolina Department of Transportation. The take that you're going to be looking at is December 15, 2009, when you look at the values and everything that you've got to consider and that's what we're looking at, that particular date and I'll talk about that little bit later. And there's no dispute that some amount of monetary compensation is due the Landowner in this case, some amount of money and I'll explain that to you also. Your job will be the evaluation of facts and evidence and find that amount of money that is the just compensation for this land.

Now, let's talk about some things in general. In being the sole judges of the facts of the case, as a told you you have a duty and responsibility to be the judge of credibility and the believability of the witnesses that have come before you to testify under oath. You can believe one witness against several, several against one, you can believe a portion of what a witness says, disregard the remaining portion of it. If you've got a good sound reason for doing so, you could disregard in its entirety the testimony of a particular witness. You look at whether or not that witness has exhibited to you any kind of interest, motive, bias, prejudice that they have in giving you the testimony. Obviously, you consider the opportunity for knowledge, how did they come about that information they gave you from the witness stand. You don't have any friends to reward, you don't have any enemies to punish, your verdict has to be a result of an examination of the facts and evidence in this particular case and find that evidence which convinces you is true. The burden of proof, the Landowner has the basic burden of proof regarding the evidence and it's under the standard called the greater weight or the preponderance of the evidence. All that means is -- greater weight of the preponderance of the evidence to tip the scales ever so slightly in your favor all the things that you have to prove and basically that's going to involve the valuation of

property, just compensation for all of the things that would be to the Landowner regarding the taking of the land.

So, let's talk about just compensation, fair market value and the highest and best use for the property. Just compensation, that's what's to be paid to the Landowner. What does that mean? It means the full and perfect equivalent in money to be exchanged for the property taken so that the owner of the property, after having received the money into your hands shall be in as good a position from a standpoint of money that they were before the land was taken. Just compensation means payments of a sum of money, which will make them whole again, so that when they receive that money for giving up their land they will be no richer but they will be no poorer than they were when the land was taken. You're not here to make anybody richer, you're not here to make anybody poorer. You're giving them just compensation for what was taken.

In determining just compensation, there are two methods that were talked about in the testimony here. You can determine the fair market value of the land that was actually taken, that is the 10.18 acres that were taken and then you determine the damage, if any, to the remaining property. If you find there has been damage or diminution in value or decrease in value to the remaining part of the property, then you add those two figures together. The fair market value of

the land that was actually taken by the Department of Transportation and the damage or the diminution, decrease in value of the remaining property and the remaining property totals -- obviously, there's two tracts -- totals 121.22 acres. Another way you can look at it, you could determine the fair market value of the entire tract of land that was owned on December 15, 2009, by the Jericho State Capital Corporation. Then you determine the fair market value of the entire tract after the taking. If the value is less, then you take one from the other, deduct one from the other and that would give you just compensation. Now, remember, you're talking about the fair market value on December 15, 2009, not now, not any other date. And it's a value that had an ordinary purchaser and an ordinary seller, somebody's willing to sell, somebody's willing to buy, nobody's under any kind of force or duress to do one or the other. You've got willing buyers and willing sellers, that's the fair market value.

In considering the fair market value, you can also or you should consider the highest and best use that the property could have been used on December 15, 2009. The parties agree to R-1 residential property, that was its highest and best use on that date and the parties have so agreed to that.

Now, it's your duty and responsibility to set a price on the amount of land taken. In doing so, you will use as your guide to fair market value as it has been explained to

you. You, you must also determine whether or not the Landowner's remaining land has depreciated in value or been damaged because the other land was taken. Bear in mind, just because a portion or piece of property is taken does not in and of itself mean that the remaining land was depreciated. If the responsibility of the Landowner to establish any damage or depreciation to the remaining property. And again, that goes back to that greater weight, preponderance of the evidence, tipping the scales ever so slightly in their favor.

You can use comparable sales. You've heard that talk about the various parties. You can use them in arriving at just compensation. It is permissible to use the testimony based on the comparable sales in the area. That means the price paid for a similar property. Now, it doesn't have to be next-door. It just has to be a reasonable approximation within their guidelines, a reasonable approximation. It doesn't have to be identical, it doesn't have to be the in the exact same location. It just has to be reasonably comparable to give you a basis to arrive at just compensation. Obviously, if you don't think it's reasonable, then you don't use it, you disregard it.

You can consider in arriving at your verdict the necessity of using a circuitous route to gain access to remaining lands where the Landowner's property has been severed by a controlled access highway if you find that that

severance causes a decrease in the actual fair market value of the remaining property and to the extent that that severance causes a decrease in the fair market value of the remaining property.

When constructing highways and roadways, byways of the State of South Carolina, there is a requirement that the parties doing so are bound to furnish drainage at least equal in capacity and efficiency to that existing prior to the highway construction. You may consider noise from traffic if you find that the noise causes a decrease in the actual fair market value of the remaining property. You may consider the impairment of view from the Landowner's property caused by the construction if you find that the impairment of view causes a decrease in the fair market value of the remaining property.

That basically, ladies and gentlemen, is the law that you're going to apply to the facts and evidence you find to be true.

Now, in this we have prepared a verdict form for you, it's pretty straightforward. It has the caption of the parties, South Carolina Department of Transportation is what they call the Condemnor, basically, the party taking the property, versus Jericho State Capital Corporation of Florida, Landowner, and the other entity, Lynx Jericho Partners, LLC. We, the Jury, by unanimous decision find that just compensation be paid to the Landowner to be, and write out in

words and put the figures down just like you would on a check, whatever that number is. And there's a note, and it will probably be clear to you from the evidence, you cannot return a verdict less than the offer of $998,000 and it cannot be any more than the Landowner's opinion or amount of $4,010,000. It can be an amount anywhere in between but that amount has to be supported by your view of the evidence you find to be true. You just can't come up with something or another out of the air. It's got to be based on the evidence that you've heard in this case but you've got a bottom and the top. It can be either/or, anywhere in between, based on the evidence that you have heard in this particular case. And your verdict must be unanimous, unanimous, twelve/zero, not eleven/one, ten/two, any combination thereof.

Mr. Foreman, whatever number you write out here and you sign your name, you're telling the court when it comes back that every single member of the Jury agrees that's their verdict. So, if called upon by the Clerk, raised their right hand and said that's my verdict, all members of the Jury can do so.

What I'm going to ask that you do, the Clerk's office has also provided lunch for you. It may or may not be here or it will be here shortly. As to that, I would suggest you take a break and enjoy you lunch but you do what you want to do, however y'all want to do that. When you go back to the jury

room, do not, do not begin your deliberations until the Bailiff brings in to you the verdict form and all these exhibits. When the exhibits and the verdict form come in to you, then you can commence your deliberations and after that, you're governing how you're doing that. You know, like I said, with lunch. That's all up to y'all how you want to handle that.

So, Madam Alternate, if you would please stay with us, just stay with us here in the courtroom and, Mr. Foreman, if you will take all the other members to the jury room and await the verdict form and exhibits, please. All right? Thank you very much.

(REPORTER'S NOTE: Jury exits courtroom. The following takes place outside the presence of the Jury.)

THE COURT: As to the Alternate, is there any reason from the Landowner that the Alternate should not be excused at this time?

MR. BELLAMY: No, sir, Your Honor.

THE COURT: From the Department?

MR. MCCUTCHEON: No, sir. And we'd like to thank her for sitting here although she won't be able to ---

THE COURT: I'm sure the Landowner joins in that as well as the Court.

MR. SHELTON: Absolutely.

JUROR 112: Thank you.

THE COURT: Ms. Ercole, your job was to step in the shoes of one of the twelve members of the Jury if for some reason they couldn't go forward. I can tell you it happens much more frequently than you think it would. So, it just didn't happen in this particular case, but it does happen often. I'm able to excuse you from your jury service in this case and for the week. You've earned an exemption for three years for coming back to Circuit Court jury duty. If your local City Judge or Magistrate sends you a notice you got to go see them but you don't have to come back to see us for three years.

So, with that, you are excused. If you want to leave, you can just go through back there and just leave the pad and pen up here.

JUROR 112: Okay.

THE COURT: All right. Thank you, ma'am. The Clerk will take that.

(REPORTER'S NOTE: Alternate excused and exits courtroom.)

THE COURT: From the Landowner is there any exceptions, deletions, additions to the charge?

MR. SHELTON: None.

MR. BELLAMY: No, Your Honor.

THE COURT: From the Department?

MR. MCCUTCHEON: I have no additions, Your Honor, but ---

THE COURT: Other than the one you objected to earlier?

MR. MCCUTCHEON: --- the exception to the circuitous

route.

THE COURT: All right. Very good. Thank y'all.

Gentlemen, again, as usual, y'all did an excellent job on behalf of your clients and I appreciate it. Thank you very much.

MR. MCCUTCHEON: Thank you, Judge.

MR. SHELTON: Thank you very much, Judge.

THE COURT: Thank you. Thank y'all.

And with that, we'll be at ease then until the Jury needs us. Thank you very much.

(REPORTER'S NOTE: Deliberations begin at 12:25 P.M.)

(RECESS.)

*******OFF THE RECORD*******

(On the Record.)

THE COURT: All right. Gentlemen, I understand that the Jury has reached a verdict in this matter. Is the Landowner ready to proceed?

MR. BELLAMY: Yes, Your Honor.

THE COURT: And the Department?

MR. MCCUTCHEON: Yes, sir.

THE COURT: Very good. Ask the Jury to come in, please.

(REPORTER'S NOTE: Jury enters courtroom. 2:50 P.M.)

THE COURT: All right. Mr. Foreman, has your Jury reached a verdict in this matter?

JUROR 87: We have, Your Honor.

THE COURT: All right. Hold on one second. If you'd hand it to the Clerk, please. Thank you.

Thank you. You may have a seat. Thank you.

All right. Madame Clerk, you may publish the verdict, please, ma'am.

VERDICT OF THE JURY:

CLERK: Yes, sir. State of South Carolina, County of Horry, in the Court of Common Pleas, Case Number 2009-CP-26-11956, South Carolina Department of Transportation, Condemnor, versus Jericho State Capital Corporation of Florida, Landowner and Lynx Jericho Partners, LLC. Verdict, We, the Jury, by unanimous decision find that just compensation to be paid to the Landowner to be $2,100,000. Timothy R. Cutnaw, Foreperson, November the 9th, 2014.

Mr. Foreman, ladies and gentlemen of the Jury, is this your verdict? If so, please signify by raising your right hands.

(REPORTER'S NOTE: Jury unanimously complies.)

THE COURT: Thank you very much. Jury having affirmed their verdict by the raising of their right hand.

Does the Landowner wish the Jury polled?

MR. BELLAMY: No, Your Honor.

THE COURT: The Department?

MR. MCCUTCHEON: No, sir.

THE COURT: Very good. Ladies and gentlemen of the Jury,

I want to thank you for your service. You did exactly what the Court asked you to do, to well and truly deliberate, try this case and reach a unanimous verdict in this matter. If any of y'all are in a relationship you understand it's difficult to get two people to agree to do something sometimes. So, to get twelve of y'all to agree, I appreciate -- the parties understand it's a difficult thing but y'all diligently worked and paid attention and I really appreciate the hard work you put into this.

I'll excuse from your jury service from this case, from this week and remember you've got now an exemption for three years from coming back to Circuit Court jury duty. If your local City Judge or Magistrate sends you a summons, you got to go see them but you don't have to see us for the next three years. We really appreciate your service. Thank you very much.

(REPORTER'S NOTE: Jury exits courtroom.)

THE COURT: Anything from the Landowner?

MR. BELLAMY: No, Your Honor.

THE COURT: From the Department?

MR. MCCUTCHEON: No, sir.

THE COURT: Again, gentlemen, appreciate the way you tried the case. Thank you very much.

MR. MCCUTCHEON: Thank you.

MR. SHELTON: Thank you.

(ADJOURNED - 3:00 P.M.)

END OF DAY THREE.

ORIGINAL

C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of South Carolina Department of Transportation versus Jericho State Capital Corporation of Florida, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on November 17-19, 2014.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

Kay H. Richardson
Official Court Reporter

January 26, 2015.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2009CP2611956

PLAINTIFF(S)	DEFENDANT(S)
Department Of Transportation South Carolina	Jericho State Capital Corporation of Florida; Lynx Jericho Partners LLC
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

2014 NOV 19 PM 4:16
CLERK OF COURT

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

WE THEY JURY, FIND FOR THE LANDOWNER IN THE AMOUNT OF TWO MILLION ONE HUNDRED THOUSAND DOLLARS AND NO/100 ($2,100,000.00).

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
JERICHO STATE CAPITAL CORPORATION OF FLORIDA, LANDOWNER AND LYNX JERICHO PARTNERS LLC.	SOUTH CAROLINA DEPARTMENT OF TRANSPORATION, CONDEMNOR	$2,100,000.00

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed

such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge | 129 Judge Code | 11/19/2014 Date

For Clerk of Court Office Use Only

This judgment was entered on 11-19-14, and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Franklin Hartselle Baker 38 Spruce Drive Suches, GA 30572
Edward B. Davis Inabnit Jr. PO Box 3646 Myrtle Beach, SC 29578
John B. McCutcheon Jr. PO Box 1740 Conway, SC 29528

ATTORNEY(S) FOR THE PLAINTIFF(S)

Howell V. Bellamy Jr. Bellamy Law Firm PO Box 357 Myrtle Beach, SC 29578

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Melanie Huggins Ward
Melanie Huggins-Ward - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CASE NUMBER: 2009-CP-26-11956
South Carolina Department of Transportation, Condemnor, vs. Jericho State Capital Corporation of Florida, Landowner, and Lynx Jericho Partners, LLC.	**VERDICT**

FILED
2014 NOV 19 PM 4:16
CLERK OF COURT

We the jury, by unanimous decision, find that just compensation to be paid to the Landowner to be:

Two million one hundred thousand dollars no/100 ($2,100,000)

(Write out amount in words)

NOTE: You cannot return a verdict in an amount less than the offer of $998,000.00 or more than the landowner's opinion of $4,010,000.00

FOREPERSON'S SIGNATURE

November 19, 2014
Conway, South Carolina

PLEASE KNOCK ON THE DOOR AND NOTIFY THE BALIFF WHEN YOU ARE FINISHED.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) C/A NO: 2009-CP-26-11956
COUNTY OF HORRY)

Road/Route SC Route 31 (Carolina Bays Parkway)
File 26.036775A
Project HORR
PIN 36775 RD01
Tract 11

South Carolina Department of Transportation)
) **SATISFACTION OF**
Condemnor,) **JUDGMENT**
vs.)
)
Jericho State Capital Corporation of Florida,)
)
Landowner(s))
)
and)
)
R. E. Loans, LLC and Mortgage Fund '08, LLC,)
)
Additional Condemnee(s).)
)

2014 DEC -5 PM 3:09

The judgment above described having been paid; the lien of the said judgment is hereby declared forever discharged and satisfied; and the cancellation of said judgment upon the record thereof by the Clerk of Court is hereby authorized and directed.

Witness the due execution hereof by the owner and holder of said judgment this 5 day of December, 2014.

Signed, Sealed and Delivered
In the presence of:

Janet A. Ramsden

Jenna Jurn

Robert S. Shelton, Esquire

STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF HORRY)

Personally appeared before me the undersigned witness who, being by me duly sworn, says that (s)he was present and saw the above named Robert S. Shelton, Esquire, sign, seal and as his/her act and deed, deliver the foregoing Satisfaction of Judgment; and that (s)he with the other subscribing witness witnessed the execution thereof.

Janet A. Ramsden

SWORN TO before me this 5
day of December, 2014.

Notary Public for South Carolina
My Commission Expires: 1-10-2023

2014 DEC -5 PM 3:09

COHEN NORRIS SCHERER WEINBERGER & WOLMER

ATTORNEYS AT LAW

GARY J. COHAN*
FRED C. COHEN, P.A.**
GREGORY R. COHEN
BERNARD A. CONKOL JI(**)
RYAN S. COPPLE
DOMINIC S. LIBERI*
RICHARD J. MEEHAN*
ALFRED G. MORICI*
DAVID B. NORRIS, P.A.
PETER R. RAY
M. RICHARD SAPIR, P.A.*
KENNETH J. SCHERER, P.A.
KYLE A. SILVERMAN*
JAMES S. TELEPMAN***
ROBERT M. WEINBERGER, P.A.
BRENT G. WOLMER, P.A.

*Of Counsel
**Board Certified Real Estate
***Board Certified Business Litigation

Irvine

SL

February 26, 2009

T3225337

Via Certified Mail; Return Receipt Requested; 7007 1490 0001 0281 9720
Via Federal Express 97077 Bonneval Road, #605, Jacksonville, FL, 32216
CHICAGO TITLE INSURANCE COMPANY
P. O. Box 45023
Jacksonville, Florida 32232-5023
Attn: Claims Department

Re: Jericho State Capital Corp. of Florida ("Insured") Purchase from Peachtree Properties of North Myrtle Beach, LLC
Chicago Title Insurance Company Loan Policy #7210740-72338570

Dear Sir/Madam:

Our firm represents Jericho State Capital Corp. of Florida, its successors and/or assigns as their interest may appear with regards to the above-referenced Loan Policy (a copy of which is enclosed).

At the present time, due to the taking/condemnation of the Property in question pursuant to, amongst other documentation, the Ordinance recorded in Book 2497, Page 0986 (copy which is enclosed for your review) which Ordinance was not reflected as a title exception in the Loan Policy, my client has experienced loss and damage in excess of the policy limits.

Accordingly, demand is hereby made for the full policy limits to be paid by my clients pursuant to this claim.

This letter is not intended to waive any other rights or remedies of my clients.

I look forward to your prompt response.

Very Truly Yours,

Gregory R. Cohen

GRC/jbp
Enclosures

NEWBY, SARTIP, MASEL & CASPER, LLC

ATTORNEYS AT LAW

FRED B. NEWBY
MICHAEL H. SARTIP†□
C. SCOTT MASEL‡◇
JULIET M. CASPER◇†
MATTHEW W. VAN WIE

†ALSO ADMITTED IN N.C.
‡ALSO ADMITTED IN W. VA
◇ALSO ADMITTED IN IN.
□ALSO ADMITTED IN GA.
◊ALSO ADMITTED IN FL.

4580 OLEANDER DRIVE, SUITE 109
POST OFFICE BOX 606
MYRTLE BEACH, SOUTH CAROLINA 29578-0606

TELEPHONE (843) 449-9427
FACSIMILE (843) 449-9429
REAL ESTATE FACSIMILE (843) 429-1362
E-mail rpo@newbylaw.com

June 21, 2013

Chicago Title Insurance Company
P.O. Box 45023
Jacksonville, Florida 32232-5023
Attn: Claims Department

Re: Lynx Jericho Partners, LLC, successor assignee of Mortgage from Peachtree Properties of North Myrtle Beach, LLC to R.E. Loans, LLC
Chicago Title Insurance Company Loan Policy No. 7210740-73317401
(the "**Policy**")

Dear Sir or Madam,

Our firm represents Lynx Jericho Partners, LLC, the current owner of the mortgage referred to above, and the Chicago Title Insurance Company Loan Policy referenced. I have attached copies of the Mortgage and the Policy for your reference.

The Property insured by the Policy lies in Horry County, South Carolina. The original owner of the Property, Peachtree Properties of North Myrtle Beach, LLC, acquired the Property with financing from R.E. Loans, LLC, secured by the insured Mortgage which was recorded in Mortgage Book 4629 at page 255, records of Horry County.

Prior to the issuance of the Policy, Horry County adopted an Ordinance and recorded both the Ordinance and a map, which showed the path of a proposed road through the insured property. This encumbrance was not excepted in the policy, and was unknown to the original lender. The Mortgage has subsequently been acquired by our clients. The road, which will run through the middle of the Property will cause a considerable monetary loss to the value of the land and to our clients.

Please consider this letter as a demand by the current owner of the Mortgage, and Policy, for the full policy limits under the Policy. This letter shall not be deemed to waive any other rights or remedies which my client may have.

Please feel free to call if you have any questions.

Very truly yours,

NEWBY, SARTIP, MASEL & CASPER, LLC

Fred B. Newby

FBN/mld
Enclosures

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	**CASE NO.: 2015-CP-26-1084**
Lynx Jericho Partners, LLC,	)	
Plaintiff,	)	**PLAINTIFF'S FIRST SUPPLEMENTAL RESPONSE TO DEFENDANT'S FIRST SET OF INTERROGATORIES**
vs.	)	
Chicago Title Insurance Company,	)	
Defendant.	)	

TO: DEMETRI K. KOUTRAKOS, ESQUIRE, ATTORNEY FOR DEFENDANT:

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure the Plaintiff, Lynx Jericho Partners, LLC, hereby supplements its responses to the Defendant's First Set of Interrogatories:

Interrogatory 5, Supplemental Response: The qualifications of James R. Jayroe, Jr. are set forth in his most recent report and contained in previously provided documents paginated as Jericho F 51 through Jericho F 54. He is a certified appraiser in the States of South Carolina and Georgia and has been employed as an appraiser for approximately 30 years. The subject matter upon which Mr. Jayroe is expected to testify is the value of the Peachtree property. The substance of the facts and opinions, and the grounds for said opinions, to which Mr. Jayroe is expected to testify are comprehensively contained in two detailed reports, which have been previously provided and can be found in documents identified as (1) Jericho B 422 through Jericho B 484, in which the value of the subject property as of 12/15/09 was reduced from $9,198,000 to $4,010,000 due to the SCDOT condemnation/taking, and (2) Jericho F 5 through Jericho F 61 in which the

value of the subject property is $2,500,000 subsequent to the SCDOT condemnation/taking as of June 5, 2015.

Interrogatory 6, Supplemental Response: At the time Plaintiff's note was originally executed on or around July 5, 2006, the debt was fully secured by the subject property. The amount of debt owed on the note subsequently increased to an amount that exceeds the face amount of the loan and currently the total amount due under the Note is approximately $34,299,911.00 (see supplemental response below). Plaintiff's claim for damages is its lost security in the property due to the title defect and the state's rights/ownership of the subject property. Offsetting the current value of the property ($2,500,000 as described above) from the amount due under the note results in an amount greater than Defendant's coverage limits and therefore Plaintiff asserts damages in the amount of said coverage limits which is upon information and belief $17,071,873.33.

Interrogatory 18, Supplemental Response: Upon information and belief, no payments of principal have been made on the subject loan, leaving a principal balance of $18,520,000; Interest accruing at the stated rate of 12% from July 2006-2015 totals $20,001,600, less cure payments made in the amount of $2,279,952.50 (see 11/6/07 Order of Foreclosure) and less funds received from the condemnation award in the amount of $1,941,737.32; Total amount due under the Note is approximately $34,299,911.00.

The General Response previously set forth in Plaintiff's initial responses to these interrogatories is incorporated by reference. Plaintiff reserves the right to supplement these responses as new or additional information becomes known or available.

10/22/2015

FRED B. NEWBY
C. SCOTT MASEL
NEWBY, SARTIP, MASEL & CASPER, LLC
P.O. Box 808
Myrtle Beach, SC 29577
Telephone: 843-449-9417

Certificate of Service

The undersigned of Newby, Sartip, Masel & Casper, LLC, counsel for the Plaintiff in the above captioned matter, certify that I have this day served Plaintiff's Responses to Interrogatories and Requests for Documents to Defendant and its attorney, by sending copies of same via EMAIL this 22th day of October, 2015, addressed as follows:

JimKoutrakos@callisontighe.com
Demetri K. Koutrakos, Esquire
Callison, Tighe & Robinson, LLC
P.O. Box 1390
Columbia, SC 29202

JAYROE APPRAISAL COMPANY

APPRAISAL OF
A 121.22 ACRE TRACT OF LAND
LOCATED ON PEACHTREE ROAD
NEAR MYRTLE BEACH, HORRY COUNTY, SOUTH CAROLINA

FOR

FRED B. NEWBY, ESQUIRE
NEWBY, SARTIP, MASEL & CASPER, LLC
4593 OLEANDER DRIVE
MYRTLE BEACH, SOUTH CAROLINA 29577

DATE OF VALUATION: JUNE 5, 2015

PREPARED BY

JAYROE APPRAISAL COMPANY

JAMES R. JAYROE, JR., SENIOR APPRAISER
STATE CERTIFIED GENERAL REAL ESTATE APPRAISER
CERTIFICATION #'S CG 987 (SC), CG 6091 (GA)

J. BRIAN DONOVAN
STATE CERTIFIED GENERAL REAL ESTATE APPRAISER
CERTIFICATION #'S CG 3798 (SC), A 6432 (NC)

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Myrtle Beach, South Carolina

JAYROE APPRAISAL COMPANY

REAL ESTATE APPRAISERS AND CONSULTANTS

PHONE: (843) 497-7158
FAX: (843) 497-3765

1601 OAK STREET, SUITE 204
MYRTLE BEACH, SOUTH CAROLINA 29577

June 9, 2015

Fred B. Newby, Esq.
Newby, Sartip, Masel & Casper, LLC
4593 Oleander Drive
Myrtle Beach, SC 29577

Mr. Newby:

At your request, we have made an appraisal investigation of the certain real property which is located on Peachtree Road at the Intracoastal Waterway, in the Socastee Township, near Myrtle Beach, Horry County, South Carolina. The subject consists of a vacant tract of land containing 121.22 acres.. This property is more particularly described by a complete narrative description within the text of the following appraisal report.

The purpose of this appraisal was to estimate the market value of the fee simple interest in the subject property, as is, effective June 5, 2015. Market value, fee simple interest and other appraisal terms are defined within the text of the following report.

The estimated marketing time for sale of the subject property, at or near our opinion of value, is 12 months and assumes a similar exposure period. Marketing time estimates are based on conversations with market participants, sales of similar properties, and current market conditions presiding in the area as of the effective date. The value estimate is based upon no adverse effects upon the subject property from any environmental cause.

As a result of our investigation into those matters which affect market value, and by virtue of our experience and training, we have estimated the market value of the fee simple interest in the subject property, "*As Is*," effective June 5, 2015, to be:

TWO MILLION FIVE HUNDRED THOUSAND DOLLARS
($2,500,000)

This report was intended to be an Appraisal Report and to conform with the Appraisal Institute's Guidelines and Requirements, and the Uniform Standards of Professional Appraisal Practice (USPAP). Furthermore, this appraisal is intended to meet the standards set forth in 12 CFR 34.44, as amended. This appraisal also conforms with the competency provision set forth in the USPAP Guidelines, and the Code of Professional Ethics and Standards of Professional Conduct of the Appraisal Institute and USPAP.

NEWBY, SARTIP, MASEL & CASPER, LLC

This letter of transmittal precedes the full narrative report which follows, further describing the property and containing the reasoning and most pertinent data leading to the final value estimate. Your attention is directed to the "General Assumptions", "General Limiting Conditions" and "Certificate of Appraisal" which are considered usual for this type of assignment and are included within the text of this report.

Respectfully submitted,

JAYROE APPRAISAL COMPANY

James R. Jayroe, Jr., Senior Appraiser
State Certified General Real Estate Appraiser
Certification Numbers: CG 987 (SC)
CG 6091 (GA)

J. Brian Donovan
State Certified General Real Estate Appraiser
Certification Numbers: CG 3798 (SC)
A 6432 (NC)

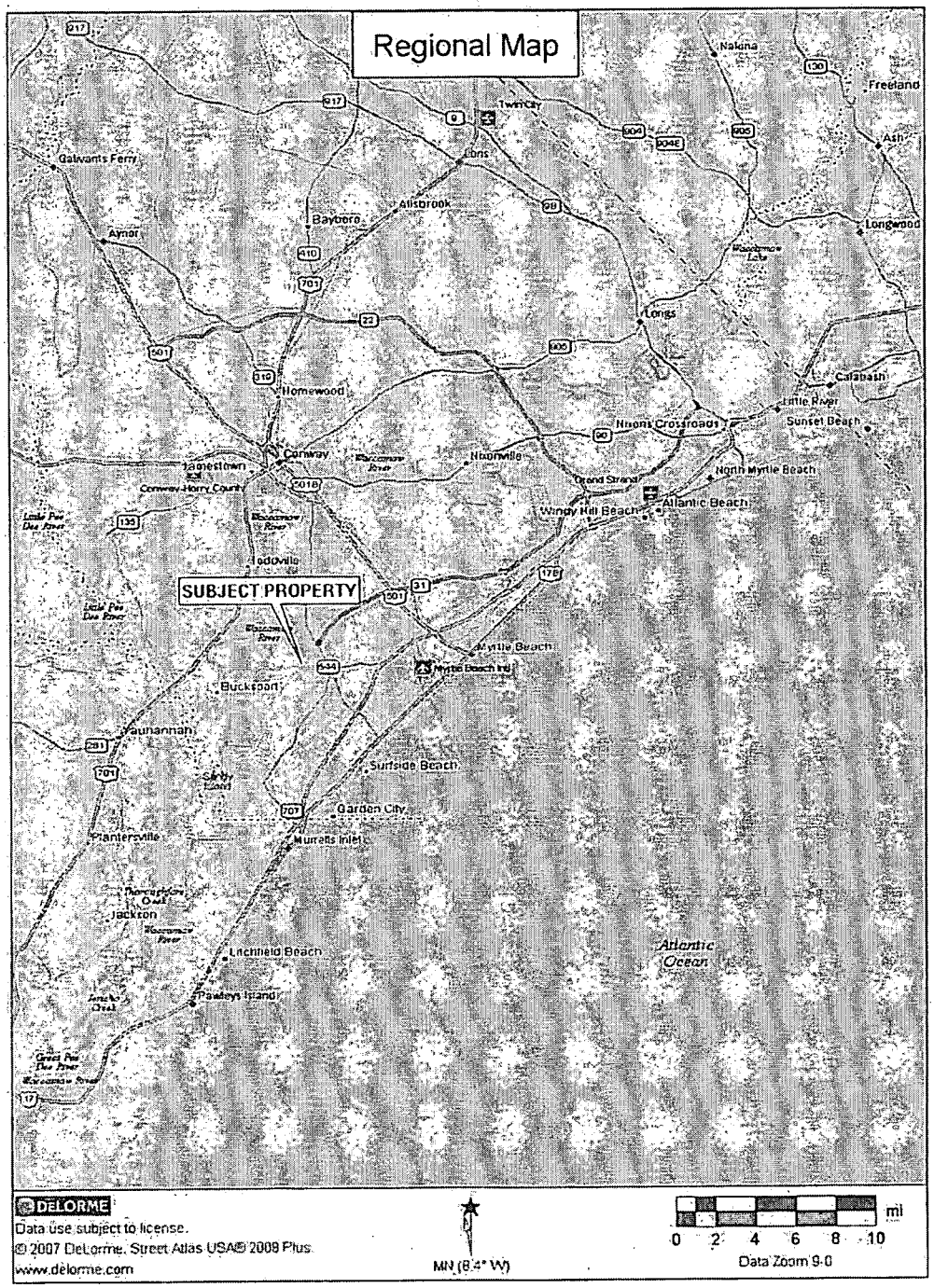
JRJ/JBD
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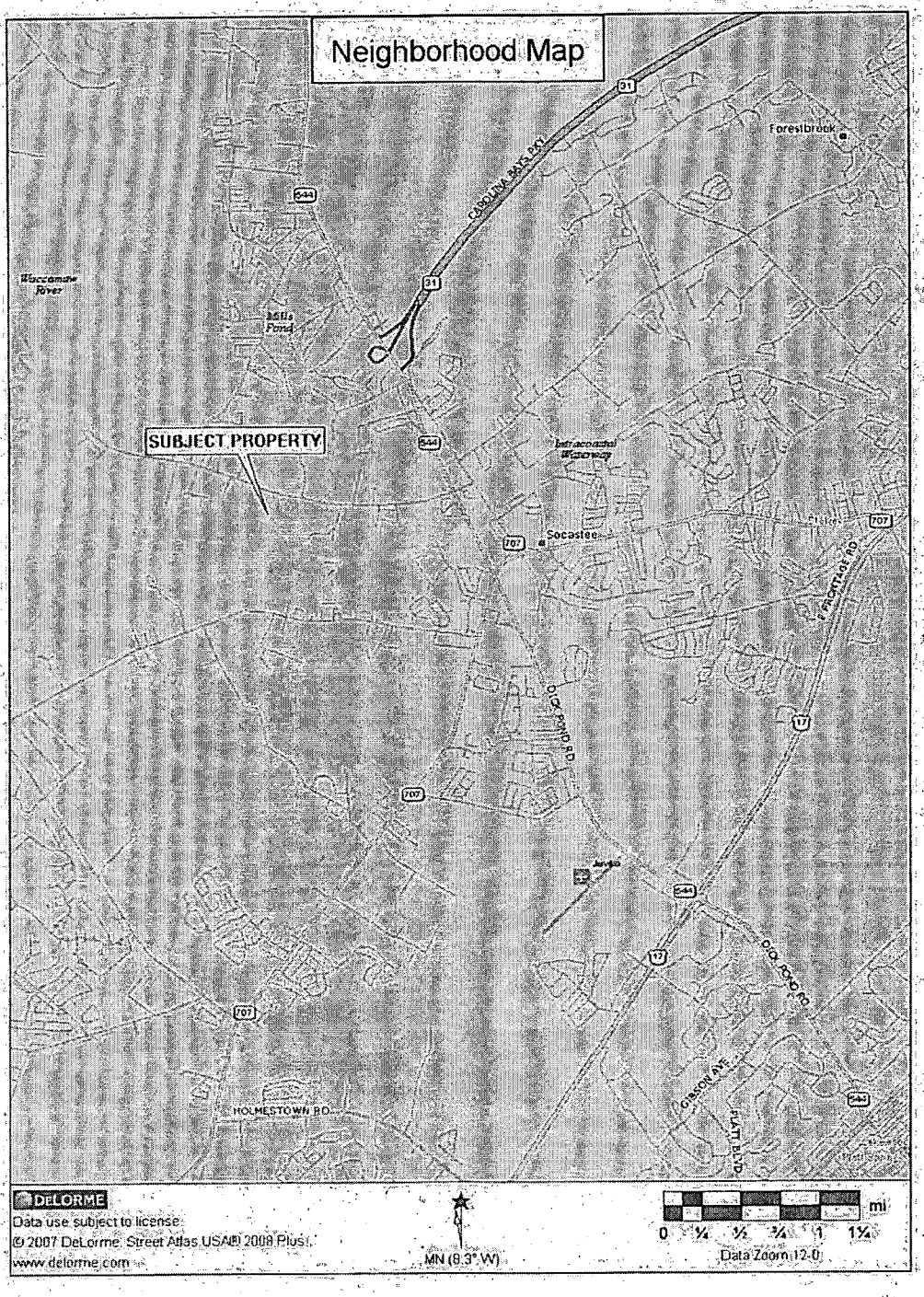
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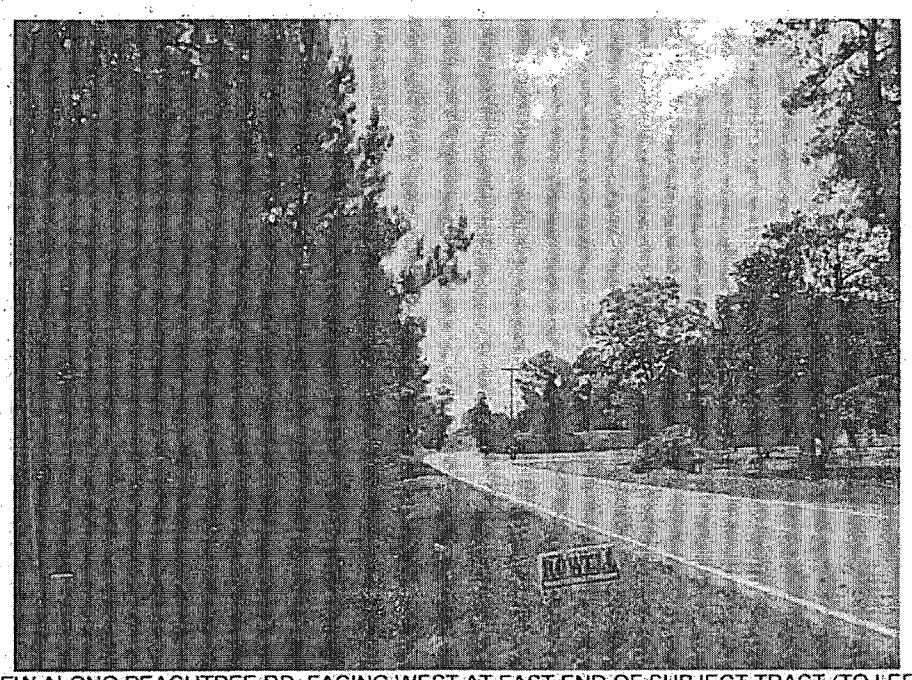
SUMMARY OF APPRAISAL

Location	The subject property is located on Peachtree Road in the Socastee Township near Myrtle Beach, Horry County, SC.
Ownership	Jericho State Capital Corporation of Florida
Tax Map Number	178-00-05-032
Type of Property	Vacant land
Site Data	121.22 acres (35.31 ac's east of bridge R/W & 85.91 ac's west of R/W)
Improvements	N/A
Zoning	PDD, Planned Development District, Horry County
Highest and Best Use As Vacant	Low to medium density single-family development
Interest in Property Appraised	Fee Simple Interest
Date of Valuation	June 5, 2015
Final Value Estimate	$2,500,000
Report Format	Appraisal Report
Conditions	This appraisal is subject to "General Assumptions" and "General Limiting Conditions" included in the text.


Regional Map
SUBJECT PROPERTY
Conway
Myrtle Beach
North Myrtle Beach
Atlantic Beach
Surfside Beach
Garden City
Murrells Inlet
Pawleys Island
Litchfield Beach
Georgetown
Andrews
Hemingway
Lake City
Florence
Dillon
Marion
Loris
Aynor
Galivants Ferry
Longs
Calabash
Sunset Beach
Little River
Nixons Crossroads
Ocean Drive
Windy Hill Beach
Grand Strand
Socastee
Homewood
Todd ville
Buckfoot
Jackson
Plantersville
Jamahannah
Nakina
Freeland
Ash
Longwood
Allsbrook
Baybero
Twin City
Atlantic Ocean
DeLorme
Data use subject to license.
© 2007 DeLorme. Street Atlas USA® 2009 Plus
www.delorme.com
MN (8.4° W)
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0 2 4 6 8 10
Data Zoom 9-0

Neighborhood Map





VIEW ALONG PEACHTREE RD. FACING WEST AT EAST END OF SUBJECT TRACT (TO LEFT)



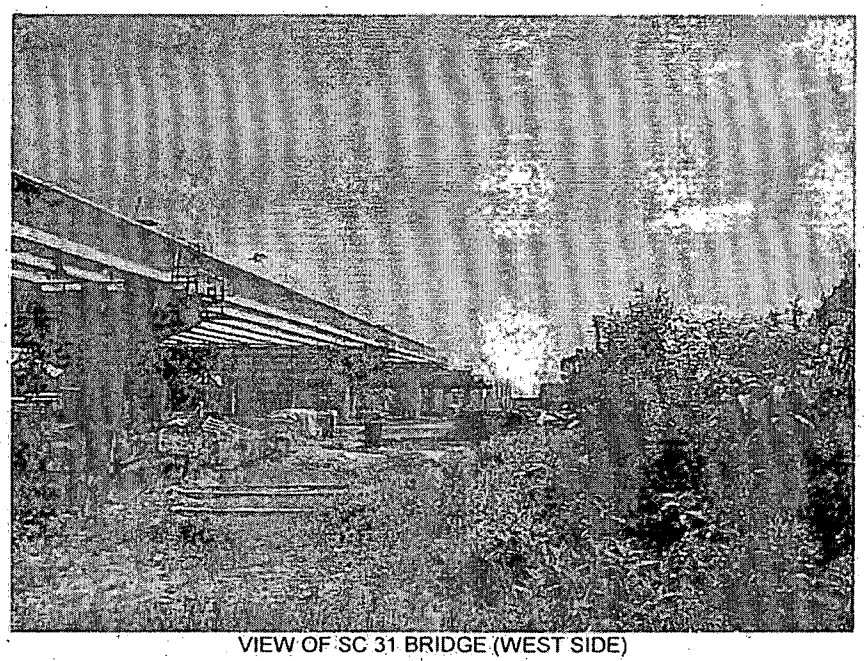
VIEW ALONG PEACHTREE RD. FACING EAST AT WEST END OF SUBJECT TRACT (TO RIGHT)



VIEW OF EAST PORTION OF SUBJECT FROM RENATA LANE



EASTERN PORTION OF SUBJECT FACING SOUTHERLY



VIEW OF SC 31 BRIDGE (WEST SIDE)



AERIAL VIEW OF SUBJECT (SC 31 R/W NOT SHOWN)

DEFINITION OF APPRAISAL TERMS

Market Value is defined as the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

a. buyer and seller are typically motivated;

b. both parties are well informed or well advised, and each acting in what he considers his own best interest;

c. a reasonable time is allowed for exposure in the open market;

d. payment is made in terms of cash in U. S. dollars or in terms of financial arrangements comparable thereto; and

e. the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.[1]

Fee Simple Estate is defined as the absolute ownership unencumbered by any other interest or estate; subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat. [2]

Leased Fee Estate is defined as an ownership interest held by a landlord with the right of use and occupancy conveyed by lease to others; the rights of lessor (the leased fee owner) and leased fee are specified by contract terms contained within the lease. [3]

Leasehold Estate is defined as the right to use and occupy real estate for a stated term and under certain conditions as conveyed by the lease. A leasehold interest arises from the margin of economic productivity of the property, subject to meeting the terms and provisions of the lease.[4]

Highest and Best Use is defined as the reasonably probable and legal use of vacant land or improved property, which is physically possible, appropriately supported, financially feasible,

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[1] _____ Office of the Comptroller of the Currency, 12 CFR Part 34, Subpart C "Real Estate Appraisals" (8/24/90), pursuant to FIRREA, Public Law 101-73, Title XI (8/18/89).
[2] _____ The Dictionary of Real Estate Appraisal, Third Edition (Chicago: The Appraisal Institute, 1993): 140.
[3] _____ The Dictionary of Real Estate Appraisal, Third Edition (Chicago: The Appraisal Institute, 1993): 177.
[4] _____ Ibid., 177.

and which results in the highest value. The four criteria the highest and best use must meet are legal permissibility, physical possibility, financial feasibility, and maximum profitability. [5]

Hypothetical Condition is that which is contrary to what exists, but is supposed for the purpose of analysis. Hypothetical conditions assume conditions contrary to known facts about physical, legal, or economic characteristics of the subject property or about conditions external to the property, such as market conditions or trends, or the integrity of data used in an analysis. [6]

Extraordinary Assumption is an assumption directly related to a specific assignment which, if found to be false, could alter the appraisers' opinions or conclusions. Extraordinary assumptions presume as fact otherwise uncertain information about physical, legal, or economic characteristics of the subject property; or about conditions external to the property, such as market conditions or trends; or about the integrity of data used in the analysis. [7]

Reasonable Marketing time is defined as an opinion of the amount of time it might take to sell a real or personal property interest at the concluded market value level during the period immediately after the effective date of an appraisal. [8]

Reasonable Exposure time is defined as the estimated length of time the property interest being appraised would have been offered on the market prior to the hypothetical consummation of a sale at market value on the effective date of the appraisal; a retrospective opinion based on an analysis of past events assuming a competitive and open market. [9]

Functional Obsolescence may be caused by a deficiency or a superadequacy; some forms are curable and others are incurable. [10]

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[5] _____ The Dictionary of Real Estate Appraisal, Third Edition (Chicago: The Appraisal Institute, 1993): 171.
[6] _____ Uniform Standards of Professional Appraisal Practice, DEFINITIONS, USPAP 2006 Edition © Appraisal Foundation: 3 (Line 91-92).
[7] _____ Uniform Standards of Professional Appraisal Practice, DEFINITIONS, USPAP 2006 Edition © Appraisal Foundation: 3 (Line 82-87).
[8] _____ Advisory Opinion 7. (AO-7) USPAP 2006 Edition © The Appraisal Foundation: 141.
[9] _____ Statement on Appraisal Standards No. 6. (SMT-6) USPAP 2006 Edition © The Appraisal Foundation: 93.
[10] _____ The Appraisal of Real Estate, Twelfth Edition, 2001 © The Appraisal Institute: 405.

SCOPE OF WORK

The "Scope of Work" is intended to mean the extent of the process of collecting, confirming and reporting data. The scope of the appraisal requires compliance with the Uniform Standards of Professional Appraisal Practice (USPAP) promulgated by the Appraisal Standards Board of the Appraisal Foundation. The Standards contain rules that must be followed and specific guidelines that deal with the procedures to be followed in developing an appraisal, analysis, or opinion. These uniform standards set the requirements to communicate the appraisers' analyses, opinions, and conclusions in a manner that will be meaningful and not misleading to the intended users. The scope of the assignment further requires compliance with the client's requirements set forth in their letter of engagement.

This appraisal report was prepared in accordance with the 2014-2015 edition of USPAP. In 2006, extensive changes to USPAP were enacted as a result of the Appraisal Standards Board examination of the proper role of the scope of work and departure concepts in the appraisal process. The most significant changes beginning with the 2006 edition of USPAP are the elimination of the Departure Rule and the introduction of the Scope of Work Rule. Other changes include the discontinued use of the terms "Complete" and "Limited" to describe the appraisal process. The Ethics Rule now also requires full disclosure of services performed on the subject property within the past 36 months and any prospective interest in the property or parties involved.

The Standards clearly impose a responsibility on the appraiser to determine the scope of work necessary in relation to the significance of the appraisal problem, and to communicate with the client the steps taken to arrive at the opinions and conclusions. The Scope of Work is intended to be unique for each appraisal assignment.

The subject of this appraisal assignment is a 121.22 acre tract of land located ON Peachtree Road in the Socastee community near Myrtle Beach, SC. In providing an opinion of value for the subject, the Sales Comparison Approach is the only applicable method of valuation.

In developing the opinions of value for the subject property, the appraiser has analyzed the forces influencing market values within the general area and neighborhood of the subject property. Regional and neighborhood data and trends are considered in the valuation process as well as the determination of highest and best use. An on-site inspection of the property was performed on June 5, 2015, which is the effective date of this report. Jayroe Appraisal Company has performed prior appraisal services on the

subject property which was communicated to the client prior to acceptance of this assignment.

The appraiser has analyzed the physically possible, legally permissible and economically feasible uses of the subject and have made a determination of the highest and best use. Factors considered in the determination of highest and best use include uses allowed by zoning, physical characteristics, supply and demand for similar properties, and land use patterns within the neighborhood.

The data collection process involved researching the subject area for comparable land sales. For comparable sales, the search area included the entire Grand Strand region. The comparable sales were selected based on their transfer dates, similar physical characteristics, location, zoning, and highest and best uses. Sources used to compile these comparables included County records, developers, my appraisal files, brokers and other appraisers in the area. Several additional sales and active listings were researched, but not used in the direct comparison.

The comparable sales were verified, either by direct participants or knowledgeable third parties, and a direct comparison was applied to the subject. The adjusted sales were then reconciled with appropriate weight placed on the individual sales and a reliable indication of value was concluded.

SUBJECT PROPERTY DATA

Purpose of the Appraisal

The purpose of this appraisal was to estimate the market value of the fee simple interest in the subject property, as is, effective June 5, 2015.

Intended Use and Users of Appraisal

The intended use of this appraisal is to assist the client in a legal matter by forming an opinion of the market value of the subject property, as of the date of inspection. The intended user is identified as Fred B. Newby, of Newby, Sartip, Masel & Casper Law Firm.

Type and Address

The subject property is located on Peachtree Road between Renata Lane and Welch Pass, in the Socastee township near Myrtle Beach, Horry County, South Carolina. The subject property consists of a 121.22 tract of land with frontage on the Intracoastal Waterway.

Legal Description

The appraisers were not provided with a complete, current legal description of the subject property. The subject is identified by Horry County as tax parcel number 178-00-05-032.

Interest Appraised

The interest appraised in this report is the fee simple interest.

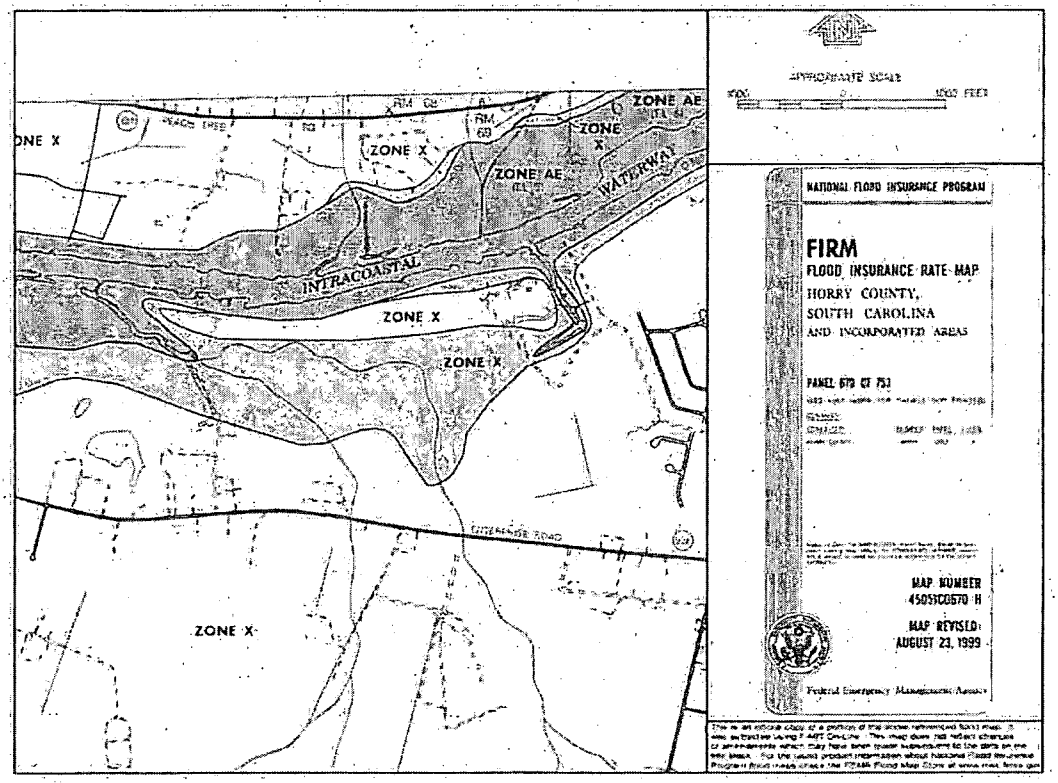
Property History

The subject property is owned by Jericho State Capital Corporation of Florida. It was acquired from the Master-in-Equity on February 25, 2008 for the consideration of $9,000,000 (high bid at public auction), as recorded in Deed Book 3317 at Page 969 in the Register of Deeds in and for Horry County. The acquisition was for 131.40 acres.

On December 15, 2009, the South Carolina Department of Transportation acquired 10.18 acres of the subject property through a condemnation action for the extension of SC 31. No other transfers were found within three years of the effective

date. To our knowledge, there are no public listings or contracts of sale involving the subject property.

Flood Hazard Statement



According to Community Map 45051CO670 H as published by the Federal Emergency Management Agency, last revised August 23, 1999, a substantial portion of the subject is located within identified flood hazard zone (Zone AE, elevation 5).

Zoning

The subject property is zoned PDD, Planned Development District, by Horry County. Zoning will be discussed further in the Highest and Best Use section.

Assessment and Taxes

The subject property is identified as Tax Parcel Number 178-00-05-032 by the Horry County Assessor's Office. As of the effective date, the subject had an assessed value of $2,448,400. Taxes in the amount of $30,597.31 were paid for the 2014 tax year.

NEIGHBORHOOD ANALYSIS

A neighborhood is defined as a group of complementary land uses; a congruous grouping of inhabitants, buildings, or business enterprises.[3] Neighborhoods are characterized by individual boundaries being either physical or socio-economic. In addition, neighborhoods are usually in one of four stages; either declining, growing, static or transitional. This portion of this appraisal will define the neighborhood, the neighborhood boundaries, and make projections as to current and future status of the neighborhood.

Location

The subject property is located on Peachtree Road in the Socastee area of southeast Horry County. The subject neighborhood is considered to be the Socastee area, which is not a municipality and has no defined political boundaries. It is located primarily on the ocean side of the Intracoastal Waterway, but includes areas on the inland side along the SC Highway 544 corridor northward to roughly Highway 814 and west to the Waccamaw National Wildlife Refuge (riverine wetlands along the Waccamaw River). East of the Waterway, the neighborhood is mainly those areas along the Highway 707 corridor from its origination at Highway 17 Bypass to the north, to roughly Holmestown Road to the south. The subject is located on the inland side of the Waterway between the Waccamaw River and SC 544.

Access

Primary access to the subject neighborhood is provided by SC Highway 707. Highway 707 is a highly traveled state highway which originates and terminates at US 17 Bypass. It is four lanes from Enterprise Road northward to US 17, with the southern portion presently being widened from two to four lanes to its southern terminus. SC 707 handles mostly local traffic. SC Highway 544 is the main east-west arterial within the neighborhood and provides access from Conway through the Socastee area to south-Strand coastal communities. SC Highway 31 (Carolina Bays Parkway) is a six-lane, limited access highway which originates at SC 544 west of the Waterway and extends northerly to SC Highway 9 west of North Myrtle Beach.

The third phase of SC 31 will extend the highway from its present termination at SC 544 southeasterly over the Waterway to SC 707 near Moss Creek Road. It will bisect

[3] The Appraisal of Real Estate, Thirteenth Edition, 2008 © The Appraisal Institute: 55.

the subject property with an elevated bridge over the Intracoastal Waterway. At the north end of the neighborhood, work was recently completed on the Highway 17 overpass at the SC 707/Farrow Parkway intersection.

Developments

Development along the Highway 707 corridor within the subject neighborhood is varied and consists of a mixture of residential and commercial developments. Commercial uses are most prevalent at the northern end of the neighborhood around the junction of SC 544 and SC 707. Uses here include Food Lion and Bi-Lo-anchored neighborhood retail centers, a Rite-Aid Drugs, banks, fast food restaurants and Socastee High and Elementary Schools. Further north, uses include several strip centers and single-tenant retail, used car lots, auto repair and other trade shops, some professional offices, churches, and the like. Commercial developments are interspersed with residential uses in this area which include older single-family homes and mobile home parks. Several well-established single-family communities are located off the highway corridor. Multi-family projects are concentrated mainly near SC 707 and US 17 and along Palmetto Pointe Boulevard, and include three large apartment complexes.

The south end of the neighborhood includes convenience stores and new fast food and retail stores at SC 707 and Holmestown Road, along with some single-and multi-tenant retail and trade shops. Commercial uses are less concentrated in the mid-portion of the neighborhood between Enterprise Road and Bay Road. The new St. James High School opened in 2003 just south of Holmestown Road off Salem Road, with additional schools planned in the Socastee area to accommodate the population growth.

New residential development in the area is primarily single-family and occurred consistently from the mid-to-late 1990's up to the market downturn in the late 2000's. New projects targeted mainly middle-income homebuyers with average new home values mostly below to near median home values area wide. The Socastee area has been one of the fastest growing sub markets in the Grand Strand due to its convenient location and good schools. Several new developments and re-starts of stalled projects are underway or in the planning stages. Much of this activity is occurring south of the subject area in the Murrells Inlet and Vurgess communities, and in the Prince Creek planned development.

Developments along Peachtree Road in the immediate vicinity of the subject, and the general character of this area are somewhat more rural in nature, but still considered suburban due to its proximity to major highway corridors and more heavily developed areas. Newer, planned residential projects are limited to the Kenzgar and Harbor Oaks subdivisions near the SC 544 bridge. Zoning is mostly low-density single-family and

commercial forest-agriculture, and uses include single-family homes and mobile homes on larger lots, some mobile parks, a few destination-based commercial uses, small agricultural tracts and vacant land.

Summary

The Socastee and bordering south-Strand areas are among the fastest growing regions along the Grand Strand. New residential growth west of Highway 17 has largely consisted of projects catering to middle-income families and the large influx of service industry workers. The subject neighborhood has experienced a transition from semi-rural-agriculture to more suburban in character over the past 10 to 15 years. This is evidenced by new commercial and residential growth occurring nearby and new schools. Vacant land is available along the highway corridors to provide future commercial services for the growing population. Of the neighborhood phases, the area is considered to be in a growth phase, with growth slowed due to economic and real estate market conditions.

The subject area in particular and the Grand Strand market in general are emerging from the housing market slump. Recent data indicate consistent increases in average home values and sales activity as well as a decrease in foreclosures. The commercial real estate market remains weak with significant recovery likely at least 12 months off.

SITE DESCRIPTION

The subject site is located on the south side of Peachtree Road between Welch Pass and Renata Lane, on the Intracoastal Waterway. The subject is located approximately three-quarter mile west of Highway 544.

Area and Dimensions

The subject has an irregular shape and contains a total of 121.22 acres. The tract has approximately 3,520 feet along Peachtree Road, net of the 280-foot SCDOT right-of-way, and is 1,740± feet deep along its western boundary. The subject has roughly 3,120 feet of frontage on the Intracoastal Waterway (also net of the SC 31 R/W), approximately one-third of which is along Socastee Creek at the west end.

Of the 121.22 acres, 35.31 acres is located on the east side of the Highway 31 elevated bridge (presently under construction) and 85.91 acres is located west of the bridge R/W. The east side acreage is also inclusive of a large pond/borrow pit which contains approximately 7.6 acres, based on GIS calculations by the appraisers.

Easements, Encroachments and Utilities

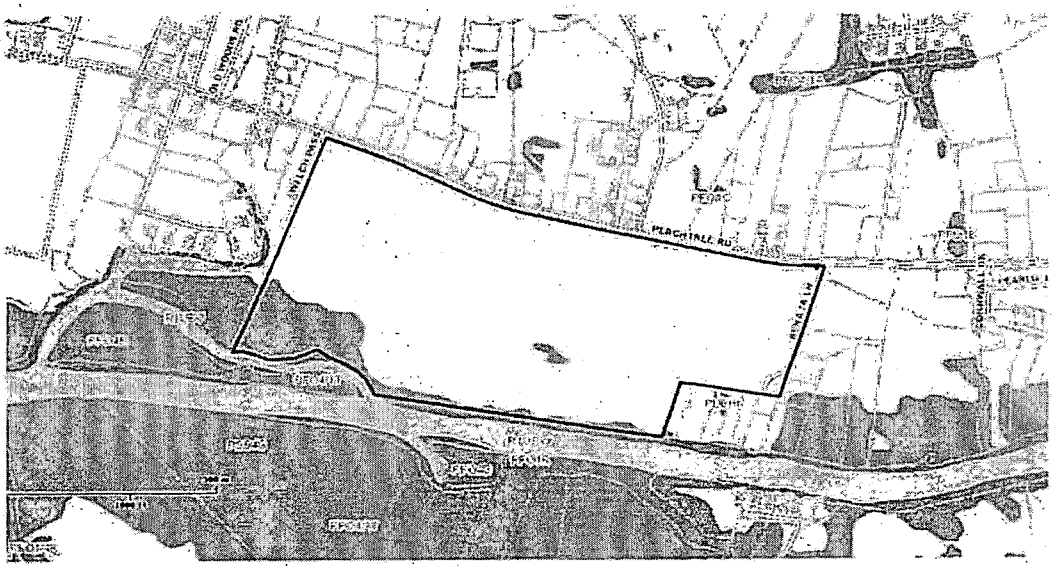
An on-site inspection revealed no apparent adverse easements or encroachments. Typical utility easements are assumed along the Peachtree Road right-of-way. All utilities, including public water and sewer, are available to the property.

Topography and Drainage

The subject site is generally level and roughly at the grade of Peachtree Road. The property has a gradual slope downward from the upland areas near the road frontage toward the Waterway. Open drainage is present along the road frontage and a ditch is present which extens from near Peachtree Road along the east side of the SC 31 R/W to the ICW. Based on an on-site inspection, drainage appears adequate.

According to a topographical map of the property prepared by Venture Engineering, the subject has 22.65 acres of wetlands, inclusive of those within the SC 31 R/W. Of this total, 22.33 acres are jurisdictional wetlands (those regulated by the US Army Corps of Engineers) and 0.32 acre is non jurisdictional. Wetlands are located mainly along the Waterway frontage and on the west portion of the property. A copy of

the referenced map is included in the Addenda of the report. The following graphic (Site Tech Services) depicts the general location of the wetland areas.



Soil and Subsoil

We assume no responsibility for hidden or unapparent conditions beyond the area of our expertise as appraisers (see Item 6 of General Assumptions). Only a visual surface inspection of the subject property was made. No soil or subsoil problems were apparent. No obvious hazardous environmental conditions on site or nearby were noted.

Access and Street Improvements

Access to the subject is via its frontage on Peachtree Road, with approximately 3,520 feet of frontage on either side of SC 31. The subject also has frontage on two minor unpaved roads at its east and west boundaries which do not appear to benefit the subject or provide access. Peachtree Road is a two lane, paved neighborhood road which intersects SC 544 approximately 0.7 mile east of the subject. It dead ends at Peachtree Landing at the Waccamaw River west of the subject.

The new SC 31 right-of-way, which was acquired from the parent tract in December 2009, contains 10.81 acres and is 280 feet wide. It bisects the tract into the eastern and western portions. As of the effective date, the new elevated bridge was under construction. The new roadwaywill be elevated at just over 17 feet (minimum vertical

clearance) at Peachtree Road, and increasing in height as it approaches and crosses the Intracoastal Waterway. The vertical clearance over the ICW will be approximately 70-75 feet at the subject's Waterway frontage. We are unaware if the SCDOT has granted or will grant an easement across their right-of-way to connect the two portions.

HIGHEST AND BEST USE ANALYSIS

The Highest and Best Use may be defined as "that reasonable and probable use that supports the highest present value, as defined, as of the effective date of the appraisal.

Alternatively, that use from among reasonable, probable and legal alternative uses, found to be physically possible, appropriately supported, financially feasible and which results in the highest land value (maximally productive).

This definition applies specifically to the Highest and Best Use of unimproved land. Implied within these definitions is recognition of the contribution of that specific use to community development goals, in addition to wealth maximization of individual property owners.

Also implied is that the determination of Highest and Best Use results from the appraiser's judgment and analytical skills, i.e., that the use determined from analysis represents an opinion, not a fact, to be found. In appraisal practice, the concept of Highest and Best Use represents the premise upon which value is based. In context of most probable selling price (Market Value), another appropriate term for Highest and Best Use would be the most profitable use."

In order to value a property at its Highest and Best Use, it is analyzed on its legal, physical and economic aspects. The Highest and Best Use for a property is estimated as both vacant and improved. Given the nature of the assignment, the Highest and Best Use is analyzed both before and after the acquisition.

Legal

The subject property is shown by Horry County as being zoned PDD, Planned Development District. The subject was rezoned to PDD from R-1, low-density single-family in June 2007. The PDD was approved for 203 single-family lots and 608 multi-family units, in addition to a 1 acre commercial lot. According to Carol Coleman with the County Planning and Zoning Department, the PDD is still in force.

As vacant, development of a mixed-use residential project is a legal use within the PDD. Development at a lower density, more consistent with current market preferences, is also considered to be a legal use but may require revisions to the PDD.

Physical

The subject essentially consists of two parcels separated by the SC 31 right-of-way and containing a total of 121.22 acres. Both the eastern and western portions of the tract have frontage on Peachtree Road as well as the Waccamaw River/Intracoastal Waterway. Of the gross area, approximately 22 acres are wetlands, most of which are jurisdictional and located on the western, Waterway frontage. This represents roughly 18% of the total area, which is typical of similar tracts with Waterway/river frontage. The location of the wetlands do not appear detrimental to site development. In addition to the wetlands, a ±7.6 acre pond is located on the eastern portion of the property. The subject is level at the road frontage, sloping down to the Waterway, and appears adequately drained. All utilities, including both public water and sewer, are available.

Physical characteristics detrimental to the subject include its adjacency to the new elevated SC 31 bridge. In addition to aesthetics, the new bridge, which will carry six lanes of traffic at a speed limit of 65 mph, will result in increased noise levels. Given the elevation of the roadway, it will not be feasible to construct berms for sound and view abatement.

As vacant, development of the subject with residential uses appears physically possible. We noted that the 7.6 acre pond was not depicted in the approved PDD plan, and the maximum density allowance may be reduced.

Financially Feasible

The financial feasibility of a property is measured by its income producing capability. Essentially, any use which produces a positive return is considered to be feasible.

The subject is located in the Socastee area of southeastern Horry County. This area has noted consistent new commercial and residential growth through much of the past 10 to 15 years. Most new residential development in the Socastee area has consisted of single-family projects with price points at to just below area-wide median new home price levels.

Following several years of depressed market conditions, the Grand Strand housing market is beginning to show signs of recovery. The recovery is mainly due to the increased demand for entry level and moderately priced single-family homes, as limited demand is present for higher-end homes as well as for resort and second home multi-family units. Little multi-family activity was noted in the immediate and surrounding areas prior to the market downturn, and less during the recent recovery.

An analysis of the market reveals that demand is increasing for both lots and single family homes. This increase is due to the declines in value that occurred over the past few years as a result of the many distressed properties on the market. Values for single-family homes continued to decline through year-end 2012, and increased for the first time in six years for year end 2013. Gross sales dollars have been increasing since 2010, and surpassed $1 billion in site-built single-family homes for the first time since 2007. Recent, historic sales of single family site built homes, including detached condo units and excluding mobile homes), as compiled by the area MLS, is shown as follows:

SF (Site Built) Home Sales

	No. Sales	% Diff.	Average SP	% Diff.	Median SP	% Diff.	Avg DOM	Gross Sales	% Diff.
2007	4,227		$ 291,924		$ 227,478		191	$ 1,233,962,748	
2008	3,096	-26.8%	$ 277,818	-4.8%	$ 210,000	-7.7%	209	$ 860,124,528	-30.3%
2009	3,255	5.1%	$ 238,368	-14.2%	$ 185,000	-11.9%	210	$ 775,887,840	-9.8%
2010	3,725	14.4%	$ 228,736	-4.0%	$ 182,500	-1.4%	180	$ 852,041,600	9.8%
2011	3,929	5.5%	$ 223,748	-2.2%	$ 171,000	-6.3%	191	$ 879,105,892	3.2%
2012	4,677	19.0%	$ 213,551	-4.6%	$ 168,999	-1.2%	183	$ 998,778,027	13.6%
2013	5,613	20.0%	$ 225,213	5.5%	$ 180,000	6.5%	178	$ 1,264,120,569	26.6%
2014	6,122	9.1%	$ 230,206	2.2%	$ 190,000	5.6%	165	$ 1,409,321,132	11.5%

Year-to-date sales figures through April 2015 indicate a continued increase in demand, with sales volume up 13.4% over the same period in 2014. The average days on market continued to decline to 161 days for the first four months of 2015, with average and median home prices increasing slightly, at 0.6% and 1.7%, respectively.

With demand for single-family lots and homes increasing, supply growth has been limited, as much of the activity occurring through 2013 has been the continuation of projects which began prior to the market downturn. As these lot inventories and existing homes continue to be absorbed, supply levels are decreasing and demand for well-located developmental tracts is increasing. Single-family new construction permits in the County were up 17% in 2014 from the previous year, with figures approaching 2003 levels.

It should be noted that most new developmental activity and value increases are occurring in coastal areas and suburban areas near the coast such as Socastee/Murrells Inlet and Carolina Forest. More inland, rural areas that began transitioning to suburban prior to the market down turn have not yet seen the increases in activity as the more desirable coastal regions.

The subject is benefitted by its location on the Intracoastal Waterway which affords location and view premiums for potential single family lots fronting on the Waterway. The large size of the tract also allows common area access to the Waterway for all homes if developed in this manner.

The new elevated roadway bisecting the subject will likely have an adverse impact on value. In the following Sales Comparison Approach, data will be presented illustrating value loss due to proximity to similar high-rise bridges. Despite the negative physical characteristics, development with a low to medium density, single-family subdivision remains a financially feasible use of the property. Although the PDD zoning permits a multi-family component, there is presently limited demand for multi-family units in the immediate area.

Maximally Productive

Among the physically possible, legally permissible and financially feasible uses, that use which produces the highest residual land value consistent with the rate of return warranted by the market, is the use that is maximally productive. It is our opinion that a low to medium density single-family project consistent with the surrounding land uses and which takes advantage of the Waterway frontage is the maximally productive use.

Exposure Time

Exposure time is not intended to be a prediction of a date of sale or a one-line statement. Instead, it is an integral part of the appraisal analysis and is based on one or more of the following:

- Statistical information about days on the market;
- Information gathered through sales verification;
- Interviews of market participants.

The reasonable exposure period is a function of price, time and use. It is not an isolated estimate of time alone. Exposure time is different for various types of real estate and under various market conditions. Exposure time is the estimated length of time the property would have been offered prior to a hypothetical market value sale on the effective date of appraisal. It is a retrospective estimate based on an analysis of recent past events, assuming a competitive and open market. It assumes not only adequate, sufficient, and reasonable time, but also adequate, sufficient, and reasonable marketing effort. Exposure time is therefore interrelated with appraisal conclusion of value. In consideration of these factors, we have analyzed the following:

- Exposure periods of comparable sales revealed during the course of this appraisal;
- The PwC Real Estate Investor Survey (2nd Quarter 2012); and
- Knowledgeable real estate professionals.

Based on the forgoing analysis and conditions presiding as of the effective date, an exposure time of 12 months is reasonable, defensible and appropriate. We assume the subject would have been competitively priced and aggressively promoted regionally.

Marketing Time Estimate

Marketing time is the period a prospective investor would forecast to sell the subject property immediately after the date of value, at the value opinion provided. The marketing time is an estimate of the number of months it will require to sell the subject from the date of value, into the future. The anticipated marketing time is essentially a measure of the perceived level of risk associated with the marketability or liquidity of the subject property. The marketing time estimate is based on the data used in estimating the reasonable exposure time, in addition to an analysis of the anticipated changes in market conditions following the date of appraisal.

The future price for the subject (at the end of the marketing time) may or may not equal the appraisal estimate. The future price depends on unpredictable changes in the physical real estate, demographic and economic trends, real estate markets in general, supply/demand characteristics for the property type and many other factors.

Based on market conditions as of the effective date, marketing times for similar properties, and the physical characteristics of the subject, the estimated marketing time for the sale of the subject, at our near our opinion of value, is roughly 12 months.

APPRAISAL PROCESS

There are three traditional approaches normally used by appraisers in the estimation of market value. These three approaches provide data from the market from three different sources when all are available. These three techniques are the Cost Approach, the Income Approach and the Sales Comparison Approach (Market Approach).

The Cost Approach is the sum of the land value and the depreciated reproduction cost new of the improvements. The Cost Approach is based on the premise that an informed, rational investor/purchaser would pay no more for an existing property than it would cost him to reproduce a substitute property with the same utility.

The Income Approach is based on the premise that a prudent investor would pay no more for the subject property than he would for another investment with similar risk and return characteristics. Since the value of an investment can be considered equal to the present worth of anticipated future benefits, dollar income or amenities, this approach estimates the market value of the net income that the property is capable of producing. This amount is capitalized at a rate which should reflect risk to the investor and the amount of income necessary to support debt service or mortgage requirements.

The Sales Comparison Approach (Market Approach) is the process of comparing prices paid for properties having satisfactory degrees of similarity to the subject property. This approach is based on the principle of substitution, which implies that a prudent purchaser will not pay more to buy a property than it would cost him to buy a comparable substitute property, without undue delay.

In providing an opinion of value for the subject, the Sales Comparison Approach is the only applicable method of valuation given the subject is a vacant tract of land.

SALES COMPARISON APPROACH

Land Value Estimate

The Sales Comparison Approach was used to value the subject property. This approach is based on the premise that a prudent buyer would pay no more for the subject property than he would for an equally desirable substitute property, similar in size, shape, location and utility (i.e., usefulness). Also known as the Market Approach, the value estimate for the subject property was made by comparing recent sales of similar properties with the subject property on some basis such as price per square foot, or price per unit, and then adjusted for differences in location, date of sale, and physical characteristics.

Several relatively recent sales having similar highest and best uses have been selected for comparison to the subject. Due to the lack of Waterway frontage sales in the subject neighborhood, sales in similar areas of the County were also used. Please refer to the individual write-ups on these land sales for information in reference to size, location, date of sale and other pertinent information on the comparable sales that were used to value the subject site.

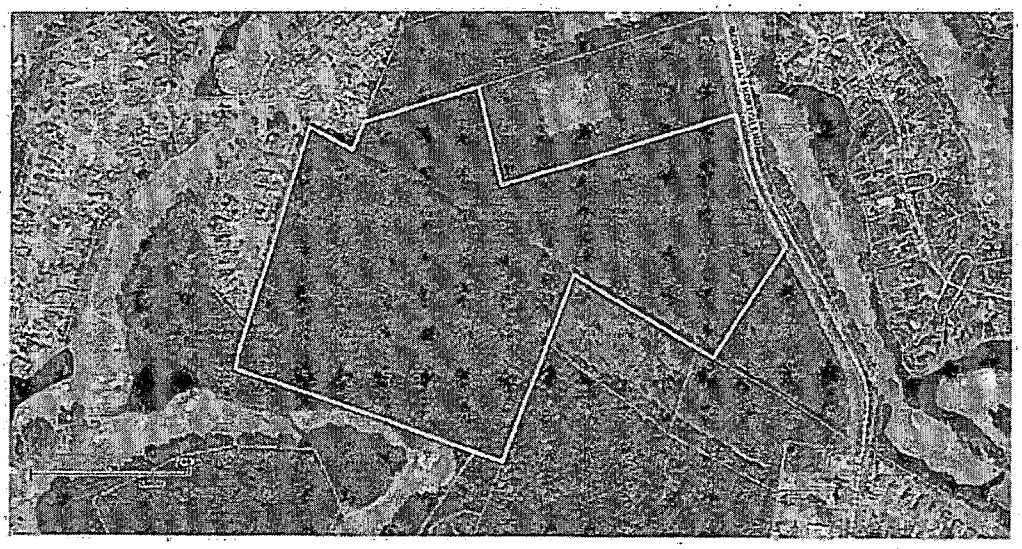
All of the following land sales are compared to the subject site and then adjusted and reconciled in order to reach the final value estimate.

LAND SALE 1



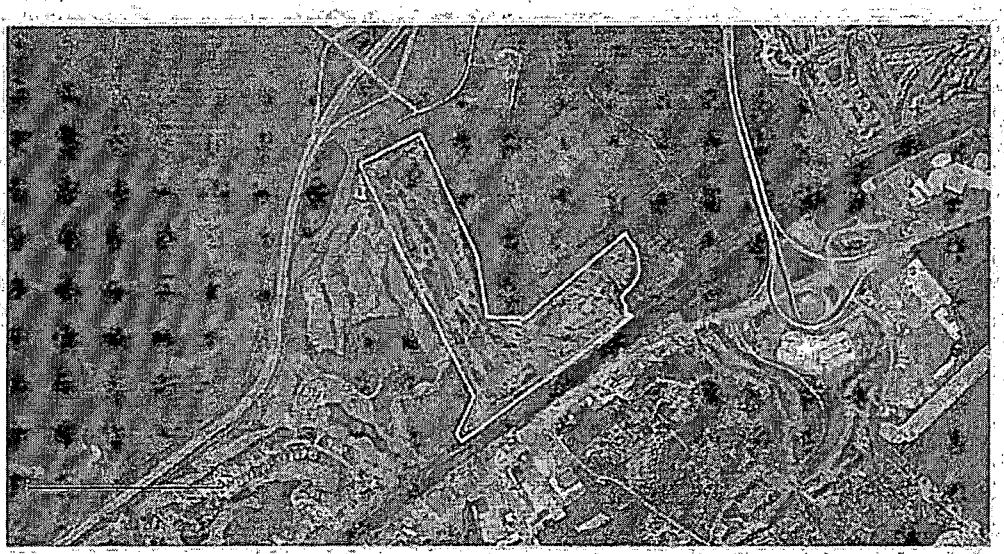
Location	West side of McDowell Shortcut Road, near Murrells Inlet, Horry County, SC.
Tax Parcel Number	194-00-02-036
Grantor	Estate of Lewis Small
Grantee	McDowell Shortcut SC, LLC
Sale Price	$1,800,000
Sale Date	December 2, 2014
Financing	Cash to seller
Verification	Grantor, inspection, Grantee & County records
Recorded	Deed Book 3782/1723
Description	Sale consists of a 60.0 acre wooded tract with approximately 1,300 feet along McDowell Shortcut Road. All utilities were available. Wetlands account for roughly 8% of the gross acreage.
Zoning	CFA (front ±30 acres) and PUD (rear acreage). See comments.
Comment	This tract is located adjacent to Brookefield Estates subdivision and abuts the International Club planned development to the rear. The site was re-zoned to MRD 3 and approved for a 151 lot single-family subdivision after purchase. The rear PUD was inadvertently included in the International Club, and was never valid. Property was on market 236 days at a list price of $32,000 per acre. The purchaser has secured a contract with a national homebuilder at a confidential contract price.
Analysis	The sale price reflects $30,000 per acre.

LAND SALE 2



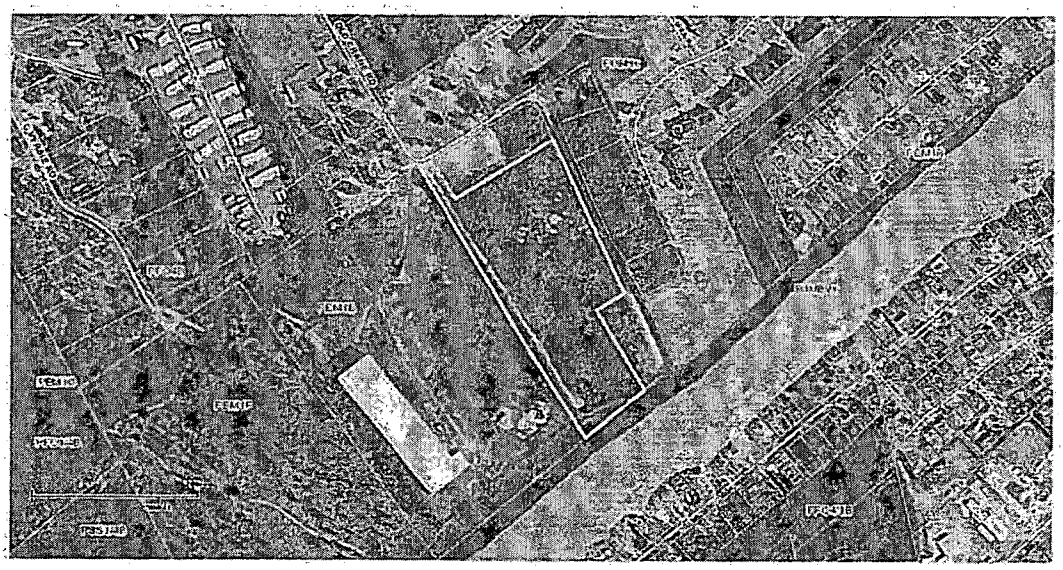
Location	This tract is located on McDowell Shorcut Road, just south of Pebble Creek subdivision, near Murrells Inlet, Horry County, SC.
Tax Parcel Number	194-00-02-223
Grantor	McDowell Cut Partners, LLC
Grantee	Founders Development, LLC
Sale Price	$2,100,000
Sale Date	April 13, 2015
Financing	Cash to seller
Verification:	Marvin Heyd, agent in transaction, County records
Recorded	Deed Book 3813/1774
Description	Sale consists of a 47.58 acre tract with roughly 600 feet of frontage on McDowell Shortcut Road. All utilities were available. Less than 10% of gross area appears to be wetlands.
Zoning	SF 10, Horry County
Comment	This tract was acquired by the Chinese investment group that has been active in acquiring Grand Strand area golf courses, and that will reportedly have other interests in the immediate area. This tract adjoins the Pebble Creek at International Club subdivision but has no direct golf frontage. The sellers acquired the property from SCBT in December 2013 for $875,000.
Analysis	The sale price reflects $44,146 per acre.

LAND SALE 3



Location	West side of ICW at Water Tower Road; in North Myrtle Beach, Horry County, SC.
Tax Parcel Number	155-00-01-001
Grantor	Myrtle Beach National Joint Venture, LLC, et al
Grantee	NGD Properties, LLC
Sale Price	$16,000,000
Sale Date	March 20, 2015
Recorded	Deed Book 3807/2628
Financing	Cash to seller
Verification	Knowledgeable third party; County records
Description	This parcel is L-shaped and contains 182.40 acres with approximately 3,000 feet of frontage on the Waterway and access from Water Tower Road via SC 31. All utilities were available.
Zoning	PDD, City of North Myrtle Beach
Comment	This is the sale of the Waterway Hills golf course by the new owners of Grande Dunes and adjacent Members Club course, who plan to redevelop the golf course. The property is part of the 1,363 acre Parkway Group PDD, which has an approved density of roughly 10 units per acre (single and multi-family). The purchaser intends to develop only 740 units as a mixed-use project.
Analysis	The sale price reflects $87,719 per acre.

LAND SALE 4



Location	West side of the Intracoastal Waterway, at Old Crane Road, near North Myrtle Beach, Horry County, SC.
Tax Parcel Number	130-00-08-117 & 217
Grantor	State Bank & Trust Company
Grantee	LR Land, LLC
Sale Price	$400,000
Sale Date	May 16, 2013
Recorded	Deed Book 3657/3110
Financing	Cash to seller
Verification	Grantor, other knowledgeable parties, County records, inspection
Description	Sale consists of two ICW frontage parcels containing a combined 11.84 acres (no wetlands) with 407 feet of ICW frontage and access via Old Crane Road. All utilities were available.
Zoning	PDD, Horry County
Comment	This was a bank sale of a development tract that was acquired in 2006 for $3,200,000 and approved for a multi-family project, contingent on improvements to Old Crane Road, which was never completed. As such, the PDD may not be in effect. Purchasers acquired for speculation.
Analysis	The sale price reflects $33,784 per acre.

LAND SALE 5

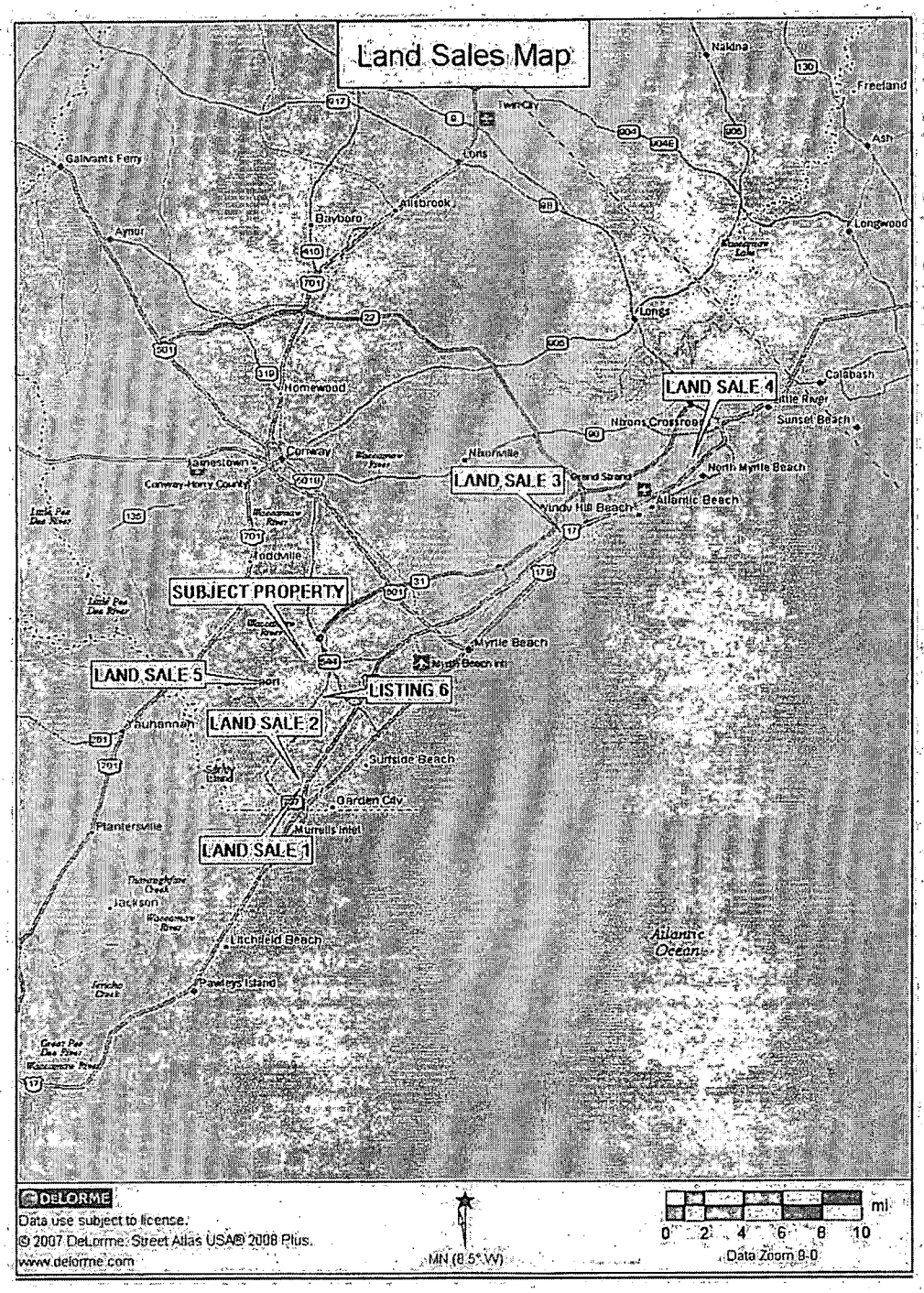


Location	North side of Enterprise Road, at terminus of Bay Road, in Socastee, Horry County, SC.
Tax Parcel No.	184-00-01-051
Grantor	Enterprise Investors, LLC
Grantee	Portrait Homes-River Bend, LLC
Sale Price	$4,200,000
Sale Date	January 6, 2005
Recorded	Deed Book 2844/1182
Verification	Third-party with knowledge of transaction; County records
Description	Site contains 52.84 acres, inclusive of 11.51 acres of wetlands (21.8%). The tract has roughly 1,680 feet of frontage on the Intracoastal Waterway / Waccamaw River and 1,875 feet on Enterprise Road. All utilities were available.
Zoning	CFA at time of sale. Re-zoned to RC (Resort Commercial).
Comment	The site was purchased for the development of the River Bend subdivision to contain 216 units (SF home sites and townhome lots). This tract does not have a spoilage easement along the Waterway frontage, as do most east side, Waterway tracts in this area.
Analysis	The sale price reflects $79,489 per acre.

LISTING 6



Location	South side of Big Block Road at SC Highway 707, Socastee, Horry County, SC.
Tax Parcel No.	185-00-02-267 & 268
Owner	Henry B. Burroughs, III
List Price	$6,200,000
Price Date	January 2015
Verification	Listing agent (MLS# 1417494)
Description	Site contains a total of 170.0 acres, exclusive of the Scipio Lane R/W, with approximately 710 feet of frontage on SC 707 and over 3,000 feet along Big Block Road. Site has 40% to 50% wetlands (preliminary estimates) and all utilities.
Zoning	CFA, Horry County
Comment	The list price was originally $7,140,000, lowered to the current amount in January 2015. The property is under contract to an undisclosed development group at a confidential price. The purchasers have agreed to sell a 30 acre portion to the Horry County School Board for $1,050,000 ($35,000 per acre) for a new middle school, per published reports. The property is presently in the rezoning process to allow for a single-family use with minimum lot sizes of 7,000 SF, the school and roughly 7 acres commercial.
Analysis	The list price reflects $36,471 per acre.


Land Sales Map
LAND SALE 4
LAND SALE 3
SUBJECT PROPERTY
LAND SALE 5
LISTING 6
LAND SALE 2
LAND SALE 1
Nakina
Freeland
Ash
Longwood
Galivants Ferry
Loris
Bayboro
Aynor
Homewood
Longs
Calabash
Sunset Beach
Nixons Crossroads
Conway
Nixonville
North Myrtle Beach
Atlantic Beach
Windy Hill Beach
Conway-Horry County
Jamestown
Andrelville
Myrtle Beach
Surfside Beach
Garden City
Murrells Inlet
Pawleys Island
Litchfield Beach
Jackson
Plantersville
Atlantic Ocean
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Land Sales Analysis

	Subject	*Land Sale 1*	*Land Sale 2*	*Land Sale 3*	*Land Sale 4*	*Land Sale 5*	*Listing 6*
Location	Peachtree Rd at ICW	McDowell Shortcut Rd, Nurrells Inlet	McDowell Shortcut Rd, Nurrells Inlet	Waterway Hills, NMB	Old Crane Rd @ ICW, NMB	Bay Rd @ ICW, Socastee	Big Block Rd, Socastee
Size-Gross Ac's	121.22	60.00	47.58	182.40	11.84	52.84	170.00
Wetlands	22.00	-	2.90	-	-	11.51	-
Net Uplands	99.22	60.00	44.68	182.40	11.84	41.33	170.00
Zoning/Density	PDD	CFA	SF-10	PDD	PDD	RC	CFA
Sale Date	N/A	12/02/14	04/13/15	03/20/15	05/16/13	01/06/05	Current
Sale Price	N/A	$ 1,800,000	$ 2,100,000	$ 16,000,000	$ 400,000	$ 4,200,000	$ 6,200,000
SP/Gross Acre		$ 30,000	$ 44,136	$ 87,719	$ 33,784	$ 79,485	$ 36,471
Trans. Adj's							
Property Rights	Fee Simple	0%	0%	0%	0%	0%	0%
Adjusted SP/Ac		$ 30,000	$ 44,136	$ 87,719	$ 33,784	$ 79,485	$ 36,471
Financing	Market	0%	0%	0%	0%	0%	0%
Adjusted SP/Ac		$ 30,000	$ 44,136	$ 87,719	$ 33,784	$ 79,485	$ 36,471
Cond's of Sale	Arm's Length	0%	-15%	0%	10%	0%	-30%
Adjusted SP/Ac		$ 30,000	$ 37,516	$ 87,719	$ 37,162	$ 79,485	$ 25,529
Market Conditions	Stable	0%	0%	0%	0%	-45%	0%
Adjusted SP/Ac		$ 30,000	$ 37,516	$ 87,719	$ 37,162	$ 43,717	$ 25,529
Physical Adj's							
Location	Socastee	-10%	-10%	-30%	5%	0%	-10%
Size	121.22	-10%	-15%	5%	-20%	-10%	5%
Zoning/Density	PDD	5%	0%	0%	0%	0%	0%
Topography	18%	-5%	-5%	-5%	-5%	0%	10%
Utilities	All available	0%	0%	0%	0%	0%	0%
ICW Frontage	Yes/Good	25%	25%	-10%	5%	0%	25%
Physical	SC 31 bridge	-35%	-35%	-35%	-35%	-35%	-35%
Net Adjustments		-30%	-40%	-75%	-50%	-45%	-5%
Ind Value/Acre	$ -	$ 21,000	$ 22,509	$ 21,930	$ 18,581	$ 24,044	$ 24,253

Mean of Adjusted Sales $ 22,053

Indicated Value of Subject		
Area-Acres	121.22	121.22
Value Per Acre	$ 20,500	$ 21,000
Value Indication	$ 2,485,010	$ 2,545,620

Reconciled at **$ 2,500,000**

Discussion of Adjustments

The first adjustments considered were transactional elements. All sales were fee simple transfers and no adjustments were made for property rights conveyed. All sales were financed at market terms and no adjustments were made *for financing*. To the extent which could be verified, most all sales had reasonably similar motivations between the buyer and seller requiring no adjustments for conditions of sale. Sale 2 was given a

downward adjustment based on the buyer's motivation to acquire the property in addition to other planned acquisitions in the area. Sale 4 was a bank sale and adjusted a plus 10% to account for the sellers' motivation to quickly liquidate the asset. The minus 30% adjustment to Listing 6 was based on the average sale-to-list price ratios for similar properties recently sold and conversations with the listing agent.

With the exception of Sale 5, all sales were recent and occurred during periods of stable market conditions and were not adjusted for changing prices over time. Sale 5, which closed in early 2005, was used since it represents a similar Waterway frontage acreage tract within the subject neighborhood. Based on an analysis of sales data occurring since this time, a downward adjustment of minus 45% is warranted.

Location was considered next. The subject is located in a suburban to-semi-rural area of Socastee on the west side of the ICW. Location adjustments are made irrespective of Waterway frontage, which is addressed separately. Factors considered were land value and development trends, distance from support services, types of surrounding uses, schools, etc. Sales 1 and 2 are located in an area experiencing a great deal of new development and are each adjusted a minus 10%. Sale 3 has a superior location adjacent to the Grande Dunes, and was adjusted a minus 30%. Sale 4 has an inferior location in the North Myrtle Beach-Little River area, requiring an upward adjustment. The downward adjustment for Listing 6 considers the commercial frontage at Highway 707 and future traffic signal.

Size adjustments were made based on the tendency for smaller tracts to sell for more per unit area than do larger tracts. Most sales were smaller than the subject and required minus adjustments. These adjustments were made to the gross area with separate adjustments made for wetlands.

The subject is zoned PDD, which apparently remains in effect. However, given the location and current market trends, the land plan and higher density approved in 2007 do not carry the same value or desirability as prior to the market downturn. As such, only minor upward adjustments (or none at all) were made to sales with lower density zonings. The lack of adjustment to Listing 6 reflects the commercial area at Highway 707 and the current status of the rezoning process.

The subject contains approximately 18% wetlands (exclusive of the 7.6 acre pond) which is average for Waterway frontage tracts of this size in this area. Although wetlands can be incorporated into land plans and used for drainage, they are generally not developable without mitigation. Listing 6 has considerably more wetlands than does the subject and required a plus adjustment of 10%. Sales 1, 2, 3 and 4 were mostly free of wetlands and were adjusted minus 5% each.

The subject has access to public water, sewer and all other utilities, as do the comparable sales. No adjustments were required for utilities.

Sales 1, 2 and Listing 6 do not have any Waterway or river frontage, and were each adjusted a plus 25%. Sale 3 has a greater amount of wetland-free ICW frontage relative to its gross area, and was adjusted a minus 10^. Conversely, Sale 4 had a lower frontage-to-depth ratio and required an upward adjustment.

The physical adjustment considered factors such as configuration, soils, easements, etc. In this analysis, the most significant physical characteristic impacting value is the elevated SC 31 bridge which bisects the subject. In order to estimate an an appropriate adjustment for the bridge, we have examined paired sales of similar land tracts as well as single-family lot sales within varying distances from similar high-rise bridges. The analysis of individual lot sales is probably the better method since the variable can be more easily isolated. There are often more variables impacting value when two paired acreage tract sales are compared.

In comparing acreage tracts we have examined two paired sales in the North Myrtle Beach area. Sale A was adjacent to the (planned at time of sale) Robert Edge Parkway, or North Myrtle Beach Connector, bridge over the Waterway is compared to Sale B which is located approximately one mile north. Sale A contains 55.7 acres and sold for $202,621 per acre in August 2005. Sale B contains 40.4 acres and sold for $168,366 per acre in February 2005. Both were zoned CFA at the time of sale and were acquired for mixed-use development.

Despite Sale A's location next to the high-rise bridge, it has much superior access to Sale B by means of the new roads which were completed subsequent to the closings. Sale A was also able to incorporate commercial areas adjacent to the bridge with the planned condo buildings located further south. Assuming Sale A to have cumulatively about 35% superior access and location to Sale B with little to no adjustments needed for size, market conditions or other factors, Sale B would adjust upward to $227,294 per acre, or a difference of approximately 12% which could be attributed to its adjacency to the bridge. Details of these two sales are contained in the appraisers' work file.

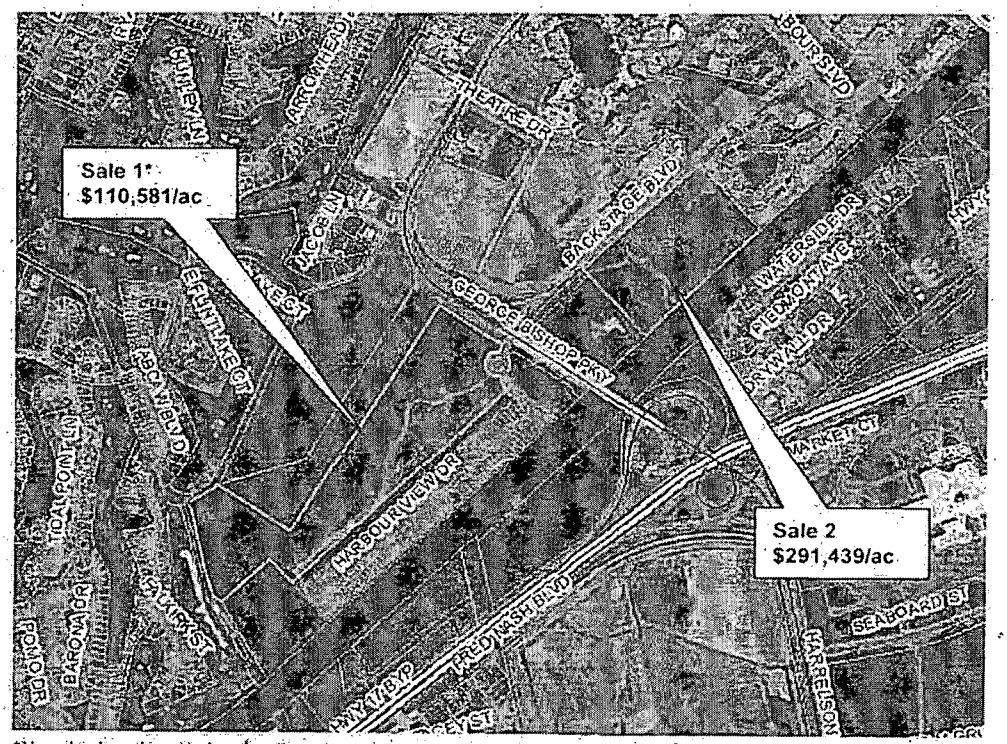
Two additional paired sales considered are located on the ICW in the Fantasy Harbor area of Myrtle Beach. Sale 1 contains 94.95 acres and sold for $10,500,000 ($110,585 per acre) in December 2004. The Waterway frontage portion of this sale was developed with the Boardwalk on the Waterway project and was approved as a PDD to contain 525 single-and multi-family units and marina. It is located on the south side of

the Fantasy Harbor high-rise bridge and was zoned Highway Commercial and Community Commercial at the time of sale.

Sale 2 is located approximately 1,250 feet north of the Fantasy Harbor bridge. It contains 27.43 acres and sold for $8,000,000 ($291,651 per acre) in October 2005. It was purchased for speculation and was zoned Resort Commercial at the time of sale. These sales are depicted below.

	Sale 1	Sale 2
Location	Adjacent to bridge	1,250' N of bridge
Deed Ref	2837/826	2991/439
Sale Date	Dec-04	Oct-05
Sale Price	$ 10,500,000	$ 8,000,000
Size	94.95	27.43
SP/Acre	$ 110,585	$ 291,651
Market Conditions	10%	
Adjusted SP/Ac	$ 121,643	
Size	30%	
Adjusted SP/Ac	158,136	$ 291,651
Percent Difference-Sale 2 to Sale 1	46%	

In order to isolate the market penalty due to Sale 1's location adjacenct to the Fantasy Harbor bridge, we have adjusted Sale 1 upward 10% for market conditions given the increases in values that were occurring between the respective dates of sale, and upward an additional 30% for size to account for Sale 1's larger gross area. The sales have relatively similar ratios of Waterway frontage, similar zonings, access, location and utilities. After adjustments, the adjusted sale price per acre for Sale 1 is 46% below Sale 2. It should be noted that the Fantasy Harbor bridge was completed in 2009, but its location and route were well known at the dates of sale.



*Note that lots along Harborview Dr and 4.5 ac's adjacent to bridge were part of original parent tract

Further evidence of reduced values caused by proximity to an elevated bridge can be found by examining lot sales within the Boardwalk on the Waterway subdivision which was developed on the Intracoastal Waterway portion of Sale 1 above. We have analyzed the original developer sales of Waterway frontage and second row lots, all of which closed in the spring of 2005. The data clearly indicate decreasing values the closer the lots are to the Fantasy Harbor bridge, which is similar in height as the planned SC 31 bridge, but with only five lanes of through traffic (three eastbound; two westbound) and a 45 mph speed limit. A sampling of the developer lot sales with distances from the bridge are shown in the following table.

ICW Frontage Sales

TMS No	Lot Size (sq. ft.)	Sale Price	Distance to Bridge
180-35-01-003	8,862	$ 274,880	500
180-35-01-004	7,908	$ 274,880	550
180-35-01-005	7,771	$ 272,880	600
180-35-01-011	9,702	$ 279,880	900
180-35-01-017	8,440	$ 289,880	1,200
180-35-01-021	7,471	$ 294,880	1,400
180-35-01-022	7,259	$ 299,880	1,450
180-35-01-030	10,046	$ 304,880	1,900
180-35-01-035	9,862	$ 299,880	2,100
180-35-01-038	8,741	$ 349,880	2,350
180-35-01-049	7,917	$ 399,880	2,850
180-35-01-050	7,737	$ 369,880	2,900

Second Row Sales

TMS No	Lot Size (sq. ft.)	Sale Price	Distance to Bridge
180-35-01-110	9,652	$ 114,880	480
180-35-01-109	9,494	$ 99,880	530
180-35-01-107	8,392	$ 99,880	630
180-35-01-104	7,428	$ 109,880	770
180-35-01-103	7,365	$ 119,880	820
180-35-01-098	8,848	$ 114,880	1,060
180-35-01-095	9,936	$ 114,880	1,210
180-35-01-087	8,795	$ 129,880	1,600
180-35-01-079	7,484	$ 129,880	1,980
180-35-01-071	9,998	$ 137,880	2,360
180-35-01-067	9,791	$ 142,880	2,560
180-35-01-063	9,711	$ 144,880	2,790
180-35-01-058	7,356	$ 149,880	3,050

**Distance to bridge calculated using Horry County GIS mapping tools*

The above lots are all relatively similar in size and utility, being 50 feet wide and of various depth. Thus it appears that the only significant variable accounting for the sale price differences is the locations of the lots within the project. The more northerly Waterway frontage lots closest to the bridge were selling roughly 20-25% less than the lots at the south end of the project away from the bridge's influences. The second row lots appear to have been slightly more impacted, with sale price differences of 25-30%. It should also be noted that the developers split a 4.57 acre parcel from the parent tract located immediately adjacent to the bridge which was slated for a dry stack marina and boat docks. The developers sold the tract in 2006 for $2,200,000. It was later foreclosed by the lender.

Based on the foregoing lot sales, it appears that residential lots as much as 2,000 feet from the bridge were impacted. The subject's smaller eastern portion is at its widest around 1,150 feet along Peachtree Road, and narrowest at the Waterway frontage (700± feet). The larger western portion contains approximately 2,830 feet of frontage on the ICW and roughly 2,400 feet on Peachtree Road. Thus, all of the eastern portion and most of the western tract will be subject to adverse influences of the new SC 31 right-of-way.

The appraisers have consulted with Steve Powell, P.E., President of Venture Engineering. Mr. Powell provided information concerning the elevation of the bridge as it enters the tract from Peachtree Road and as it crosses the ICW at the subject's Waterway frontage. Mr. Powell also estimated likely increases in noise levels as a result of the new highway. Mr. Powell estimates that noise levels at the base of the bridge would be in the range of 77 to 80 decibels (dBA) and that attenuation of the noise travelling away from the roadway will be diminished due to the height of the bridge. He

also points out a study performed by the University of California-Davis, commissioned by the Federal Highway Administration (FHWA), which indicated diminished home values in the range of 1.3% to 2.0% for every increase in dBA over ambient levels (approximately 55 dBA's).

Given the foregoing data, and also taking into account the severance of the tract by the bridge and uncertainty of crossing easements, the downward adjustment is reconciled at 35%, applied equally to all sales.

Value Reconciliation

The adjusted sales range from $18,581 to $24,259 per acre, with a mean of $22,053 per acre. In selecting a value for the subject we have accorded lesser weight to Listing 6 since it is not a closed sale, Sale 5 given its date of sale and Sale 3 given its superior location and buyer motivations. With the subject's location and physical characteristics, a value is the lower portion of the range between $20,500 and $21,000 per acre ($2,485,010 to $2,545,620) is reasonable and supported. The final opinion of value is reconciled at **$2,500,000**.

CERTIFICATE OF APPRAISAL

The undersigned hereby certify that, to the best of our knowledge and belief; the statements of fact contained in this report are true and correct; that the reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions, and are our personal, impartial, and unbiased professional analyses, opinions, and conclusions; that we have no present or prospective interest in the property that is the subject of this report, and no personal interest with respect to the parties involved; that we have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment; that our engagement in this assignment was not contingent upon developing or reporting predetermined results; our compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client; the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal; that our analyses, opinions, and conclusions were developed, and this report has been prepared in conformity with the Uniform Standards of Professional Appraisal Practice (USPAP), Standards of Professional Practice of the Appraisal Institute; and that no one provided significant professional assistance to the persons signing this report.

This appraisal assignment was not based on a requested minimum valuation, a specific valuation, or the approval of the loan.

The use of this report is subject to the requirements of the Appraisal Institute relating to peer review by its duly authorized representatives.

We do not authorize the out-of-context quoting from or partial reprinting of this appraisal report; and neither all nor part of this appraisal report shall be disseminated to the general public by use of any public communications media without the prior written consent of the undersigned appraiser.

As of the date of this report, James R. Jayroe, Jr. and J. Brian Donovan have completed the requirements of the continuing education program of the South Carolina Real Estate Appraisers Board.

The subject of this appraisal report is located on Peachtree Road in the Socastee township near Myrtle Beach, in Horry County, South Carolina. The subject is comprised of a 121.22 acre tract of land.

The undersigned State Certified General Real Estate Appraisers, James R. Jayroe, Jr. and J. Brian Donovan, certify that they have personally inspected the subject property. The client is advised that we have performed prior appraisal services regarding the property that is the subject of this report within the three-year period immediately preceding acceptance of this assignment. The undersigned have no prospective interest in the subject or the parties involved.

As a result of our investigation into those matters which affect market value, and by virtue of our experience and training, we have estimated the market value of the fee simple interest in the subject property, effective June 5, 2015, to be:

TWO MILLION FIVE HUNDRED THOUSAND DOLLARS
($2,500,000)

Respectfully Submitted,

JAYROE APPRAISAL COMPANY

James R. Jayroe, Jr., Senior Appraiser
State Certified General Real Estate Appraiser
Certification Numbers: CG 987 (SC)
CG 6091 (GA)

J. Brian Donovan
State Certified General Real Estate Appraiser
Certification Numbers: CG 3798 (SC)
A 6432 (NC)

QUALIFICATIONS OF THE APPRAISERS

JAMES R. JAYROE, JR.
JAYROE APPRAISAL COMPANY
1601 N. Oak Street Suite 204
Myrtle Beach, South Carolina 29577
Phone: 843-497-7158 Fax: 843-497-3765

• EDUCATIONAL BACKGROUND

Wingate College Wingate, North Carolina	**Associate in Arts Degree**, 1964
University of South Carolina	**BS Degree**- Business Admin., 1983
Leadership Grand Strand IV Myrtle Beach, South Carolina	**Graduate**, 1984
University of South Carolina	Real Estate Appraisal & Investment Management, 1981
Horry-Georgetown Technical College Myrtle Beach, South Carolina	Continuing Education, HP-12C WordPerfect, 1986 & 1989

• APPRAISAL COURSES: THE APPRAISAL INSTITUTE

Real Estate Appraisal Principles South Carolina Chapter	Exam 1A-1, 1988
Basic Valuation Procedures South Carolina Chapter	Exam 1A-2, 1988
Residential Valuation University of Georgia	Courses 8 - 2, 1985
Standards of Professional Practice South Carolina Chapter	Exam 023, 1986
Capitalization Theory and Techniques University of North Carolina	Part A, 1988
Capitalization Theory and Techniques University of North Carolina	Part B, 1988
Case Studies in Real Estate Valuation Florida State University	2 - 1, 1991
Report Writing and Valuation Analysis Florida State University	2 - 2, 1991
Uniform Standards of Professional Appraisal Practice South Carolina Chapter	SPP Parts A & B, 1993 SPP Part C, 2000

APPRAISAL SEMINARS: THE APPRAISAL INSTITUTE

Introduction to Income Capitalization, 1985; Recent Developments in Income Property Valuation, 1985; Capitalization Overview, Federal Home Loan Bank Board Appraisal Procedures, 1987; Narrative Appraisal Report Writing, 1988; Federal Home Loan Bank Board Memorandum R-41c, 1987; Appraising after Hurricane Hugo, 1989; Environmental Considerations in Real Estate Transactions, Discounted Cash Flow Analysis, 1990; Non-Residential Demonstration Appraisal Report Writing, 1994; The Appraisal of Golf Courses and Country Clubs, 1994; Re-Engineering Your Appraisal Business around E.D.I., 1995; The Appraiser as an Expert Witness, 1995; The Future of Appraising, Review Appraisal; 1997; New Technologies for the Real Estate Appraiser, 1998, USPAP, 1999; Eminent Domain and Condemnation Appraising, 2001; Appraising Conservation Easements, 2001; Partial Interest Valuation, Appraisal & Analysis of Proposed Subdivisions & Condominiums, 2002; Convincing Residential Appraisals, Analyzing Commercial Lease Clauses, 2003; USPAP, Residential Construction, 2004, Condemnation/Eminent Domain, 2005; Condo Hotels, 2005, Valuation Perspectives, 2006, Loss Prevention, 2006, USPAP update 2006; Inverse Condemnation 2007, Site To Do Business, 2007, Cool Tools, 2007, Wetland Valuation, 2007, USPAP Update, 2008, Business Practices and Ethics, 2008; Agreement for Services, 2010; Appraising Distressed Commercial Property, 2010; Commercial Engagement and Review, 2010, Residential Appraisal Update, 2011; The Lending World in Crisis, 2011; USPAP 2011-2012; Mold & Mildew, 2012; Environmental Issues, 2012, Conservation Easements, 2012; Marketability Studies, 2013; USPAP Update, 2014; Sales Comparison Approach, 2014; Nuts & Bolts of Green Building for Appraisers, 2014

PROFESSIONAL EXPERIENCE

Real Estate Broker in Myrtle Beach, South Carolina from 1970 through Present

Real Estate Developer in Myrtle Beach, South Carolina, 1970 through 1975 and 1980 through 1984.

Qualified as ***expert witness*** in Real Estate Valuation in County, State and Federal Courts.

Senior Appraiser, *Ratchford Group, Inc., Real Estate Appraisers and Consultants*, March 1985 through July 1987.

Senior Appraiser, ***Jayroe Appraisal Company***, July 1987 to Present.

Senior Appraiser and Executive Vice President, ***Appraisal Group Southeast, Inc.***, August 1987 through December 1994

Senior Appraiser, ***Yahnis Appraisal Services, Inc.***, August 1987 through July 1995.

TYPES OF PROPERTY APPRAISED

- Commercial
- Agricultural
- Hotels
- Shopping Centers
- Campgrounds
- Country Clubs
- Residential
- Acreage
- Motels
- Barrier Islands
- Subdivisions
- Tax Credit Apartments
- Industrial
- Golf Courses
- Resort Properties
- Wetlands
- Interval Ownerships
- Auto Dealerships

PARTIAL LIST OF CLIENTELE SERVED:

- SCDOT
- Fannie Mae
- Anchor Bank
- Wachovia Bank of S. C.
- NBSC National Bank of S. C.
- General Services Administration
- Beach First National Bank
- Coastal Federal Savings Bank
- International Paper Realty Co.
- Peoples Federal Savings & Loan
- Georgetown County Water & Sewer
- FDIC
- Resolution Trust Corporation
- Mutual Federal Savings & Loan
- Nationsbank
- First Citizens Bank
- Conway National Bank
- Master-in-Equity (County)
- Carolina First Bank
- Branch Bank and Trust
- Security Federal Savings Bank
- Grand Strand Water & Sewer Authority

MEMBERSHIPS, CIVIC & VOLUNTEER:

Grand Strand Sertoma Club	Charter Member and Past President
American Red Cross	Volunteer, Disaster Team, Water Safety Instructor, CPR & Standard First Aid
Happy Days & Special Times "The Loving Answer for Children with Cancer."	Volunteer, Counselor, and Waterfront Director- Camp Happy Days 1984-2002

PROFESSIONAL AFFILIATIONS:

Real Estate Broker	South Carolina Real Estate Commission License Number 383368553
State Certified General Real Estate Appraiser	South Carolina Real Estate Appraisers Board Certification Number CG 987
State Certified General Real Property Appraiser	Georgia Real Estate Appraisers Board Certification Number CG 6091
Associate Member of The Appraisal Institute	MAI Candidate Number: M860858
Member:	Coastal Carolina Association of REALTORS, S. C., Association of REALTORS and NATIONAL ASSOCIATION of REALTORS

SAMPLE OF PROPERTIES APPRAISED:

• Mall at Shelter Cove	Hilton Head, South Carolina
• Mountain Resort	Canaan Valley, West Virginia
• Magnolia Plaza Mall	Myrtle Beach, South Carolina
• Kure Beach Village	Carolina Beach, North Carolina
• Long Bay Club (Jack Nicklaus)	Myrtle Beach, South Carolina
• Masonboro Island	New Hanover County, North Carolina
• Tybee Island Resort	Savannah, Georgia
• Litchfield Golf & Country Club	Litchfield Beach, South Carolina
• Briarcliffe RV Resort	Myrtle Beach, South Carolina
• Nags Head Inn	Nags Head, North Carolina
• Ford's Colony Country Club	Williamsburg, Virginia
• Surf Golf & Beach Club	N. Myrtle Beach, South Carolina
• Sandpiper Bay Golf & Country Club	Calabash, North Carolina
• Carolina Opry Theatre	Myrtle Beach, South Carolina
• Myrtlewood Golf Club	Myrtle Beach, South Carolina
• Village Square Shopping Center	Myrtle Beach, South Carolina
• Brick Landing Golf & PUD	Ocean Isle, North Carolina
• Alabama Theatre	Myrtle Beach, South Carolina
• Coastal Academy School	Myrtle Beach, South Carolina
• Island West Golf Course	Hilton Head, South Carolina
• Hunter's Creek Golf Course and PUD	Greenwood, South Carolina
• Silver Creek Golf Course	Morganton, North Carolina
• Tax Credit Apartment Complex	Columbia, South Carolina
• Woodland Park School	MBAFB, Myrtle Beach, South Carolina
• Whispering Pines Golf Course	MBAFB, Myrtle Beach, South Carolina
• Myrtle Beach Air Force Base Housing	MBAFB, Myrtle Beach, South Carolina
• SCDOT Highway Condemnations	Horry & Georgetown Counties, South Carolina
• Tara Golf and Country Club	Savannah Lakes, South Carolina
• Florence Country Club	Florence, South Carolina
• Royal Amelia Golf Course	Amelia Island, Florida
• Holiday Inn Express	Various locations throughout Southeast
• Super 8 Motel	Various locations throughout Southeast
• Hampton Inn	Various locations throughout Southeast
• Wingate Inn	Various locations throughout Southeast
• Comfort Inn & Suites	Various locations throughout Southeast
• Meadowlands Golf Club	Calabash, North Carolina
• Player's Course @ St. James	Southport, South Carolina
• Briarcliffe Mall	Myrtle Beach, South Carolina
• Caravelle Resort Hotel	Myrtle Beach, South Carolina
• Sand Castle South	Myrtle Beach, South Carolina
• Crow Creek Golf Club	Calabash, North Carolina

References Available Upon Request

J. Brian Donovan
JAYROE APPRAISAL COMPANY
1601 Oak Street Suite 204
Myrtle Beach, South Carolina 29577
Phone: 843-497-7158 Fax: 843-497-3765

EDUCATIONAL BACKGROUND

Chamberlain High School Tampa, Florida	**Graduate**, 1983 Graduation Marshall, Top 10% of Class
University of South Florida Tampa Florida	**Pre-Med program**, 1983-1987
South Carolina Institute of Real Estate Columbia, South Carolina	**L1**, Foundations of Real Estate Appraisal, 1997 **L2**, Appraising the Single Family Residence, 1998 **L3**, Standards and Ethics, 1999
JT & T Seminars Pawleys Island, South Carolina	**C1**, Introduction to Income Property Appraisal, 2001 **C2**, Advanced Income Capitalization Procedures, 2001 **C3**, Applied Income Property Valuation, 2001

APPRAISAL SEMINARS /CONTINUING EDUCATION

- Supporting Capitalization Rates, 2003
- National USPAP Update, 2003
- Rates and Ratios, 2004
- Eminent Domain, National USPAP Update, Condo Hotel Valuation, 2005
- Motel Valuation, 2006
- Subdivision Valuation, 2006
- USPAP Update, Federal Land Acquisitions (Yellow Book), 2007
- Business Practices & Ethics, 2008
- USPAP Update, 2009
- Even Odder-More Oddball Appraisals, 2010 (McKissock)
- Mortgage Fraud, 2010 (McKissock)
- Private Appraisal Assignments, 2010 (McKissock)
- USPAP Update, 2011
- Appraising & Analyzing Office Buildings for Mortgage Underwriting, 2011 (McKissock)
- USPAP Update, 2012
- Appraising & Analyzing Industrial and Flex Buildings for Mortgage Underwriting, 2012 (McKissock)
- USPAP UPDATE, 2014
- The Sales Comparison Approach, 2014
- Land and Site Valuation, 2014
- Appraising Self-Storage Facilities, 2014

PROFESSIONAL EXPERIENCE

Jayroe Appraisal Company, Myrtle Beach, South Carolina 1996 to present
Research Associate, Data analyst, Market demographic studies, Appraiser

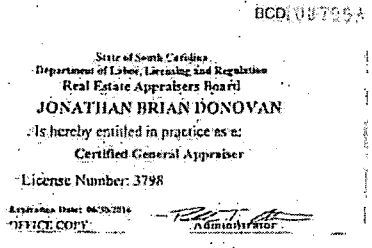
TYPES OF PROPERTY APPRAISED

- Motels
- Apartments
- Restaurants
- Auto Dealerships
- Golf Courses
- Acreage
- Subdivisions
- Manufacturing/Industrial
- Shopping Centers
- Retail Stores
- Condominiums
- Residential

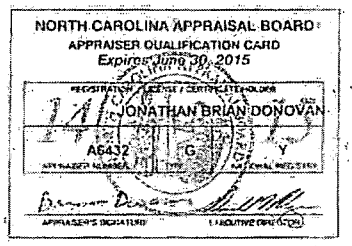
SAMPLE OF PROPERTIES APPRAISED:

Wachesaw East Golf Course	Murrells Inlet, South Carolina
Wild Wing Plantation	Conway, South Carolina
Colonial Mall	Myrtle Beach, South Carolina
Barefoot Landing, Phase III	North Myrtle Beach, South Carolina
Jordan Care Assisted Living	Conway, South Carolina
Addys Harbor Dodge	Myrtle Beach, South Carolina
Wild Water & Wheels	Surfside Beach, South Carolina
Holiday Inn West	Myrtle Beach, South Carolina
Days Inn	Various locations within SC
Microtel Inn	Myrtle Beach, South Carolina
Sand Castle Oceanfront Resort	Myrtle Beach, South Carolina
Queens Harbour Office Park & phases	Surfside Beach, South Carolina
The Galleria Shopping Center	Myrtle Beach, South Carolina
Alligator Adventure	North Myrtle Beach, South Carolina
Anderson Ocean Club & management contract	Myrtle Beach, South Carolina
Oceans One Resort & management contract	Myrtle Beach, South Carolina

References Available Upon Request


BCD-087294

State of South Carolina
Department of Labor, Licensing and Regulation
Real Estate Appraisers Board
JONATHAN BRIAN DONOVAN
Is hereby entitled to practice as a:
Certified General Appraiser
License Number: 3798
OFFICE COPY


NORTH CAROLINA APPRAISAL BOARD
APPRAISER QUALIFICATION CARD
Expires June 30, 2015
JONATHAN BRIAN DONOVAN
A6432

GENERAL ASSUMPTIONS

1. The legal description used in this report is assumed to be correct.

2. No survey of the property has been made by the consultant and no responsibility is assumed in connection with such matters. Sketches in this report are included only to assist the reader in visualizing the property.

3. No responsibility is assumed for matters of legal nature affecting title to the property nor is an opinion of title rendered.

4. Information and data furnished by others is usually assumed to be true, correct and reliable. When such information and data appear to be dubious and when it is critical to the analysis, a reasonable effort has been made to verify all such information; however, no responsibility for its accuracy is assumed by the consultant.

5. All mortgages, liens, encumbrances, leases and servitudes have been disregarded unless so specified within this report. The property is analyzed as though under responsible ownership and competent management.

6. It is assumed that there are no hidden or unapparent conditions of the property, subsoil or structures which would render it more or less valuable. No responsibility is assumed for such conditions or for engineering which may be required to discover them.

7. It is assumed that there is full compliance with all applicable federal, state and local environmental regulations and laws, unless noncompliance is stated, defined and considered in this report.

8. It is assumed that all applicable zoning and use regulations and restrictions have been complied with, unless a nonconformity has been stated, defined and considered in this report.

9. It is assumed that all required licenses, consents or other legislative or administrative authority from any local, state or national governmental or private entity or organization have been or can be obtained or renewed for any use on which the value estimate contained in this report is based.

10. It is assumed that the utilization of the land and improvements is within the bounds of property lines of the property described and that there is no encroachment or trespass unless noted in this report.

GENERAL LIMITING CONDITIONS

1. The consultant will not be required to give testimony or appear in court because of having made this analysis, with reference to the property in question, unless previous arrangements have been made thereof.

2. Possession of this report, or copy thereof, does not carry with it the right of publication. It may not be used for any purpose by any person other than the party to whom it is addressed without the written consent of the consultant and, in any event, only with proper written qualifications and only in its entirety.

3. The distribution of the total valuation in this report between land and improvements, if any, applies only under the reported highest and best use of the property. The allocations of value for land and improvements must not be used in conjunction with any other appraisal and are invalid if so used.

4. No environmental impact studies were either requested or made in conjunction with this analysis, and the consultant hereby reserves the right to alter, amend, revise, or rescind any of the value opinions based upon any subsequent environmental impact studies, research or investigation.

5. Neither all nor any part of the contents of this report, or copy thereof, shall be conveyed to the public through advertising, public relations, news, sales, or any other media without written consent and approval of the consultant. Nor shall the consultant, firm or professional organization of which the consultant is a member be identified without written consent of the consultant.

6. Unless otherwise stated in this report, the existence of hazardous material, which may or may not be present on the property, was not observed by the appraiser. The appraiser has no knowledge of the existence of such materials on or in the property. The appraiser, however, is not qualified to detect such substances. The presence of such substances as **asbestos, urea-formaldehyde foam insulation, or other potentially hazardous materials** may affect the value of the property. The value estimate is predicated on the assumption that there is no such material on or in the property that would cause a loss in value. No responsibility is assumed for any such conditions, or for them. The client is urged to retain an expert in this field, if desired.

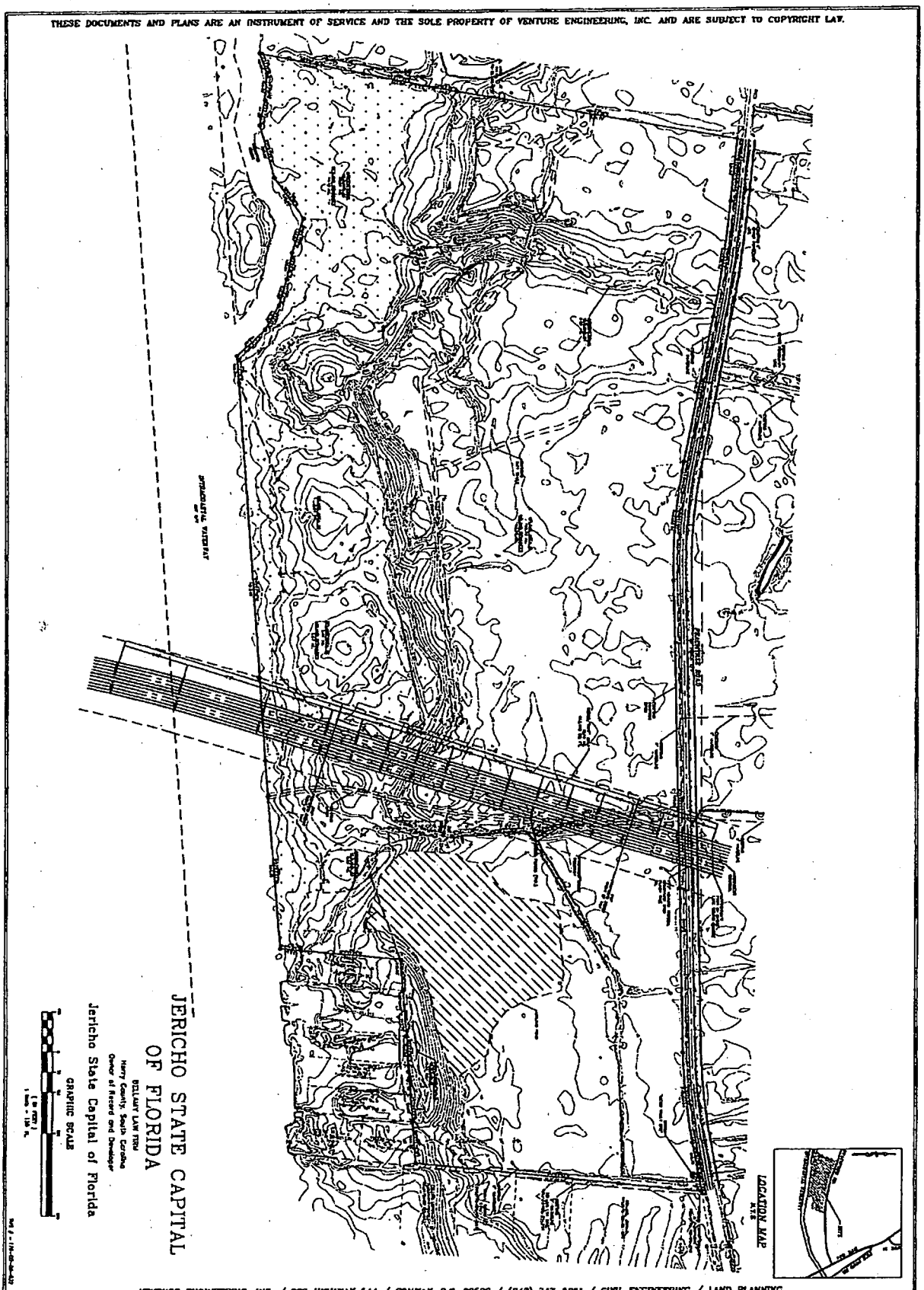
7. Unless otherwise stated in this report, no pertinent environmental laws affecting the property were made known to the appraiser, Examples of such laws include **wetlands, coastal area legislation, clean water legislation and clean air legislation.** Since the appraiser does not possess the expertise to identify these factors, a survey or proper certification by governing authorities is recommended to indicate areas of concern. Presence of wetlands, or any other environmental concern, may affect the value of the property.

8. Acceptance of this report signifies acceptance of the foregoing "General Assumptions" and "General Limiting Conditions" presented in this report.

9. In the event that any material data provided the appraiser is found to be erroneous, the sole responsibility of Jayroe Appraisal Company is to provide an amended appraisal report based upon corrected data.

ADDENDA

THESE DOCUMENTS AND PLANS ARE AN INSTRUMENT OF SERVICE AND THE SOLE PROPERTY OF VENTURE ENGINEERING, INC. AND ARE SUBJECT TO COPYRIGHT LAW.



VENTURE ENGINEERING, INC. / 209 HIGHWAY 544 / CONWAY, S.C. 29526 / (843) 347-3651 / CIVIL ENGINEERING / LAND PLANNING

JERICHO STATE CAPITAL OF FLORIDA HORRY COUNTY, SOUTH CAROLINA PREPARED FOR BELLAMY LAW FIRM	NO.	DATE	DESCRIPTION	BY	DRAWN BY: J.F./R.E.H. DATE: APRIL 25, 2013 CHECKED BY: S.S.P. DRAWING NO.: JOB NO.: SHEET 1 OF 1

AFFIDAVIT OF
J. BUSHNELL NIELSEN

Jericho State Capital Corp. of Florida,

Plaintiff,

v.

Chicago Title Insurance Company,

Defendant.

COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Case No. 2011-CP-26-6449

AFFIDAVIT OF J. BUSHNELL NIELSEN

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1. This is a declaration of my expert opinions on behalf of Chicago Title Insurance Company ("Chicago Title") in regard to the above-referenced matter.

2. I reserve the right to supplement or modify my opinions and this declaration. I have considered the documents and other reference works referenced in this declaration and which is identified in the exhibits hereto.

3. I opine on the customs and practices of claim administrators in the title insurance industry concerning the issues found in this case, in response to the claim by Jericho State that Chicago Title acted in bad faith in the handling of its claim.

4. All of my opinions are stated to a reasonable degree of certainty. My opinions are based on my experience with the industry as described in my curriculum vitae, which is Exhibit 1.

5. My prior experience in testifying as an expert witness is recited in Exhibit 2.

6. I refer to the book I wrote, *Title and Escrow Claims Guide*,[1] which distills the custom and practice employed by title insurers in the handling of claims. The book incorporates those practices that I learned and taught while I served in the industry. I have since confirmed that it reflects the customs employed by all or most title insurers in the United States. The book is the research treatise favored by claim administrators employed in the industry. It is also used by regulators, underwriting counsel and coverage counsel in private practice. The book is published by the American Land Title Association. I have updated the book annually since it was first published in 1996.

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[1] J. Bushnell Nielsen, *Title and Escrow Claims Guide*, 2014 Edition, American Land Title Association (hereafter, "*Nielsen*").

7. I have verified the following statements to be facts or have assumed them to be true.

8. In 2006, Peachtree Properties of North Myrtle Beach, LLC ("Peachtree") purchased about 131 acres of land on the Intracoastal Waterway in Socastee Township (the "Property"). Its deed was dated July 6 and recorded July 25.

9. Peachtree granted a first mortgage to R.E. Loans, LLC in the amount of $18,520,000 (the "First Mortgage"). It also granted a second mortgage, to Jericho State Capital Corporation of Florida ("Jericho State"), in the amount of $4,263,888 (the "Jericho Mortgage"). Both mortgages were also recorded on July 25, 2006.

10. Chicago Title issued an American Land Title Association 1992 form loan policy, with South Carolina modifications, to Jericho State, insuring the lien of the Jericho Mortgage, as policy number 7210740-72338570, in the amount of $4,263,888 (the "Policy"). The Policy bears a Date of Policy of July 25, 2006 at 3:27 p.m., which corresponds to the date and time on which the Jericho Mortgage was recorded.

11. The Horry County Council adopted Ordinance 88-202 (the "Ordinance"), which amended the official map for Horry County. The Ordinance was recorded on July 9, 2002 in the office of the Registrar of Deeds for Horry County. Schedule B of the Policy does not recite the Ordinance as an exception.

12. On May 15, 2007, the Horry County Council adopted its ordinance 76-07, which rezoned the Property as the Peachtree Plantation Planned Development District (the "PDD Ordinance"). That ordinance approved development of the Property as a fairly dense, mixed use development with numerous residential parcels. The PDD Ordinance stated that it was adopted based on an application submitted by the owner. It also stated:

    The property owner has agreed to donate to Horry County at no cost, property sufficient to construct that portion of the 300 ft. wide Highway 31 (Carolina Bays Parkway) right-of-way that traverse the property in issue. The property will be conveyed to Horry County by general warranty deed, free of all encumbrances within 120 days of third reading of this ordinance.

13. The PDD Ordinance went on to state a number of other agreements that had been worked out between the county and the developer about the land that the owner had agreed to donate (the "Parkway Parcel"). The PDD Ordinance was recorded with the registrar of deeds on May 17.

14. Jericho State filed a foreclosure action on June 8, 2007. A decree was entered on October 30, 2007 ordering the Property and the fixtures and personal property sold by J. Stanton Cross as master in equity for Horry County. Jericho State was the successful bidder at the foreclosure sale on December 3, 2007, with a bid of $9,000,000. It received a master's deed for the Property, which was recorded on February 26, 2008.

15. By a letter dated February 26, 2009, Jericho Capital's counsel Gregory Cohen submitted a claim notice to Chicago Title asserting that, due to the Condemnation, Jericho Capital had "experienced loss and damage in excess of the policy limits." Mr. Cohen made a demand for payment in the amount of the policy limits.

16. Nicole S. Dunn, claims counsel for Chicago Title, acknowledged the claim and requested documents from Mr. Cohen by a letter dated June 3, 2009. Mr. Cohen sent a copy of the Jericho Mortgage and the mortgage note with a letter dated June 5. He described the area that had been condemned for highway. He said that he would provide further information at a later time, but also demanded an immediate response to the claim.

17. By a letter dated December 3, 2009, Ms. Dunn wrote to Mr. Cohen again. She stated that she had conducted a further investigation, including a review of the mortgage, survey, the Ordinance and the Policy. She denied the claim based on Exclusion 1(a). She also noted that the insured had not provided a proof of loss.

18. On October 12, 2009, Jericho State filed an action in the Horry County Court of Common Pleas, as Case No. 2009-CP-26-9968, seeking a ruling by the court that the PDD Ordinance was not binding on it, and requesting that the rezoning granted by the PDD Ordinance be rescinded, along with the obligation to donate the Parkway Parcel (the "Zoning Rescission Action"). Jericho State alleged in paragraph 6 that it had not been given advance notice of the terms of the PDD Ordinance by its borrower, Horry County or the South Carolina Department of Transportation. The Zoning Rescission Action does not refer to the Ordinance.

19. On December 15, 2009, the South Carolina Department of Transportation filed a condemnation notice and tender of payment against Jericho State in the Horry County Court of Common Pleas, as Case No. 2009-CP-26-11956 (the "Condemnation Action"). In that lawsuit, the State of South Carolina condemned the Parkway Parcel for highway purposes, as part of the Carolina Bays Parkway project. The Department of Transportation added R.E. Loans, LLC and Mortgage Fund '08, LLC as additional defendants, on the premise that they might claim interests in the Property. Steven T. Moon filed a notice of appearance on behalf of those parties.

20. The Zoning Rescission Action was dismissed by stipulation on March 18, 2010. The stipulation signed by Jericho State's attorney said that the case was being dismissed because the South Carolina Department of Transportation "has filed an eminent domain action..., which action resolves the issues raised in the present declaratory judgment matter... ."

21. The Condemnation Action was dismissed at the same time the Zoning Rescission Action was dismissed. On April 20, 2011, the Department of Transportation filed a motion to restore and amend the 2009 condemnation notice and tender of payment, asserting that the Condemnation Action had been dismissed by mistake. On October 13, 2011, the court granted that motion.

22. Jericho State filed suit against Chicago Title on July 29, 2011, bringing claims for breach of contract, breach of the covenant of good faith and fair dealing, and bad faith failure to investigate and pay an insurance claim.

South Carolina Standard of Bad Faith Conduct of Insurer in Claim Denials

23. South Carolina has stated that the elements of a cause of action for bad faith refusal to pay first party benefits under a contract of insurance are: (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured.[2] "[A]n insurer acts in bad faith when there is no reasonable basis to support the insurer's decision [for contesting a claim]."[3]

24. However, where an insurer has a reasonable ground for contesting a claim, there is no bad faith.[4] Additionally, this good faith obligation includes an insurer's duty to investigate a claim.[5] An insured need not prove a breach of an express contractual provision as a prerequisite to bringing a bad faith cause of action.[6]

The Nature of a Title Insurance Policy.

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[2] *BMW of N. Am., LLC v. Complete Auto Recon Servs., Inc.*, 731 S.E.2d 902 (S.C. App. 2012), citing *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 359, 415 S.E.2d 393, 396–97 (1992).

[3] *Helena Chemical Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004).

[4] Id.

[5] *Flynn v. Nationwide Mut. Ins. Co.*, 281 S.C. 391, 395, 315 S.E.2d 817, 820 (Ct.App.1984).

[6] *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 504, 473 S.E.2d 52, 55 (1996).

25. A title insurance policy indemnifies the insured in the event he or she suffers "Actual Loss" due to a failure of title, an encumbrance or lien, the lack of a right of access to the property or the unmarketability of the title.[7]

26. The most unusual aspect of title insurance is that the policy provides coverage only against matters affecting title prior to the date of policy. Thus, unlike other lines of insurance, there is no specified policy period, and no coverage for matters that first affect title after the Policy Date. As my book explains,

> The coverages in the title insurance policy are limited to matters which exist on the date of policy. Title defects arising after that date are not covered by the policy.[8]

27. This policy limitation is stated in the Covered Risks, and reinforced by Exclusion 3(d), for matters that first affect title after the policy date.

28. The policy remains in effect as long as the insured has an interest in the property of the types as defined in the policy, which can be for decades. The insured does not pay any renewal premium. The insurer has no right to cancel policy coverage. This has been the primary unique facet of the title insurance policy since it was first conceived.[9]

29. The second unusual quality of title insurance is that it is priced and underwritten based on the premise of risk elimination rather than risk assumption. It searches the public records in order to determine which matters affect the title to the insured parcel. It then recites the recorded instruments as numbered paragraphs in Schedule B of the policy, in what is termed by the industry "special exceptions."[10] Special exceptions are really exclusions from coverage for encumbrances and liens that are specific to the insured parcel.[11] The insurer has no liability for the effect of an encumbrance on title if an exception for the instrument appears in Schedule B of the policy.[12]

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[7] See *Nielsen*, § 9.1.1, *Nature Of Assurances Provided*. Ex. 3.

[8] See *Nielsen*, § 11.5, *Post-Policy Matters*, p. 11-81. Ex. 3.

[9] See Benjamin J. Henley, *What Investors in Mortgage Loans Are Demanding in Title Insurance*, in *Title News*, Volume XXXV, Number 5, May, 1956, at p. 11. Ex. 4.

[10] See *Nielsen*, Chapter 12, unnumbered preamble. Ex. 3.

[11] See *Nielsen*, § 12.7, *Special Exceptions*. Ex. 3.

[12] *Nielsen*, § 12.7.1, *Adequacy Of Notice Given By Exception*, at p. 12-65. Ex. 3.

30. The American Land Title Association and A.M. Best have long touted the fact that approximately 90% of title premiums are spent by title insurers and their agents on risk elimination—that is, the searching and examination of title.[13] Losses have historically represented between 4% and 12% of premiums earned, making the industry profitable only when market conditions are favorable.[14] Most of the losses payable under a title insurance policy are based on title issues that might have been, but were not, discovered in the public records.

31. Title insurers do not take casualty risks. They do not take risks based on actuarial tables that predict that title will be subject to a lien in a certain percentage of cases, and thus the insurer can ignore liens and expect to pay out on claims every now and then. The premium rates they file are justified based on the cost to search and examine title, not on actuarial table predictions about unknown risks.

Title Insurance Claim Administrators' Practices Regarding Condemnation and the Condemnation Exclusion.

32. It is my opinion that it is customary in the title insurance business for a claim administrator to deny any claim based on a condemnation of all or part of the insured parcel, if the condemnation occurs after the Date of Policy or if it occurred before the Date of Policy but there was no notice of the taking in the real estate records on the Date of Policy.

33. It is my further opinion that Chicago Title's denial of Jericho State's claim followed this industry custom. Therefore, it is my opinion that Chicago Title did not act in bad faith, because its coverage denial did not lack a reasonable basis.

34. The Policy insured the validity of the lien of the Jericho Mortgage on the land described in the Policy on the Date of Policy. That lien was valid. Some of its land, the Parkway Parcel, was condemned about three and a half years later by the State of South Carolina. Jericho State was the defendant in the Condemnation Action precisely because, as the state alleged, it owned the Property when the action was filed in December of 2009. The state made an award of damages and tender of payment to Jericho State for the Parkway Parcel.

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[13] A.M. Best Special Report, *Market Review: Title*, December 13, 2010, pp. 4-6, 14. Ex. 5. Also, Robert Bozarth, *Lawyers Notes: Customers ask about title insurance forms and policies*, in *Lawyers Title News*, Fall, 1995, p. 16. Ex. 6.

[14] See A.M. Best Special Report, *Market Review: Title*, December 13, 2010, p. 14. Ex. 5.

35. The most fundamental coverage of the Policy is found in Covered Risk 1, which indemnifies the insured if it was not in fact the owner of the land described in the Policy on the Date of Policy. The Policy insures the title to the Property. The Covered Risks of the Policy are invoked only if title to the Property fails in whole or in part, or the title is encumbered by a lien or encumbrance that is not excluded from coverage, as I explain in my book:

> The title insurance policy indemnifies the policy holder against loss if the title to the described real estate is held by someone other than the person or entity named in the policy. It also indemnifies as to defects in or liens or encumbrances on title other than those shown in the policy schedules. Schedule B refers to those matters against which the insurer does not indemnify, both of general application (unfiled construction liens, for example) and those specific to the described property.
>
> * * * *
>
> The title insurance policy does not insure property, but the title to or ownership of that property. It is possible to hold flawless title to land having no value or which is not usable, and there is no claim payable under the policy.[15]

36. The Policy protects only against those matters that first affected the title before the Date of Policy. As my book explains, this unique and fundamental premise of a title insurance policy, that it covers only matters that have already occurred and not events or occurrences in the future or during a future policy term, is recited in two places in the policy.[16] First, the Covered Risks begin with this limitation:

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation, herein called the Company, insures, **as of Date of Policy shown in Schedule A,** against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of... .

37. This backward-looking coverage principle is reinforced by Exclusion 3(d), which states that the Policy does not protect against matters that attach or are created after the Date of Policy:

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[15] *Nielsen*, § 9.1.1, *Nature Of Assurances Provided*, p. 9-2 (footnotes omitted). Ex. 3.

[16] *Nielsen*, § 11.5, *Post-Policy Matters*, p. 11-81. Ex. 3.

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

* * * *

3. Defects, liens, encumbrances, adverse claims or other matters: ... (d) attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or material)... .

38. My book explains why these policy terms are fundamental to a title insurance policy:

> The post-policy exclusion is at the heart of the nature of title insurance coverage. The policy remains in effect as long as the insured owns the property. The insured pays no renewal premium. However, anything that happens to affect title after the insured obtains his or her interest in the property is not covered by the policy, as confirmed by Exclusion 3(d). Almost all such matters would be caused by the insured or due to the fact that the insured is the owner, and would also thus invoke Exclusion 3(a).
>
> > Nothing else appearing, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title which are in existence at the time the insured takes his title. [citations omitted] "It is not prospective in its operation and has no relation to liens or requirements arising thereafter." Mayers v. Van Schaick, supra. "The risks of title insurance end where the risks of other kinds begin. Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it."
>
> The only sense in which the policy extends into the future is that the notice of a title defect is ordinarily received after the date of policy.[17]

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[17] *Nielsen*, § 11.5, *Post-Policy Matters*, p. 11-82 to 11-83 (footnotes omitted), quoting from *National Mortgage Corp. v. American Title Ins. Co.*, 299 N.C. 369, 261 S.E. 2d 844 (1980), which was quoted with approval by the South Carolina Supreme Court in *Firstland Village Associates v. Lawyers Title Ins. Corp.*, 284 S.E.2d 582 (S.C. 1981). Ex. 3.

39. The Condemnation Action did not invoke the Covered Risk about the vesting of title because, on the Date of Policy, Jericho State was the owner of the Parkway Parcel that was later condemned.

40. In addition, the Policy contains an exclusion stating that the Policy does not protect Jericho State against the taking of all or some of the Property even if that taking occurred before the Date of Policy, if there was no notice of the condemnation in the public records.[18] The exclusion exists because condemnation actions in some states may be conducted by administrative agencies without the filing of any document in the real estate records. A title insurer is thus unable to either prevent the condemnation, which is an inexorable power of the state, or even to detect that a taking has occurred. The exclusion makes clear that the insurer is liable for a condemnation that has occurred on the Date of Policy only if there was record notice of the existence of that taking. My book explains the exclusion as follows:

> The ALTA policies exclude matters constituting the exercise of governmental police power, and eminent domain, unless notice of the exercise of such rights appears in the public records at Date of Policy. ... The eminent domain exclusion acknowledges and excludes from coverage actions by government to take all or some of the property for a public work. Such a taking cannot, of course, normally be resisted by the private owner. The policy makes it clear that the insurer is not a surety against the possibility that the government will, at some time, take the property for public use.[19]

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[18] See Raymond J. Werner, *The Basics of Title Insurance*, in *Title Insurance: The Lawyer's Expanding Role*, ABA Section of Real Property, Probate and Trust Law, at p. 3. Mr. Werner states: "The policy also excludes coverage for the loss resulting from the exercise of eminent domain rights unless notice of the exercise of such rights appears in the public records at the date of policy. Again, the exclusion recognizes the fact that real estate is by nature subject to the exercise of the right of eminent domain and there is no way to protect against the exercise of that right. However, this exclusion would not apply if a document such as a lis pendens relating to a pending eminent domain proceeding has been filed in the public records at the date of policy." Id. at p. 23. Ex. 7.

[19] *Nielsen*, § 11.1.5, *Police Power And Eminent Domain*, at pp. 11-20 to 11-21 (footnotes omitted). Ex. 3. That passage contains a footnote for *Bourne v. Stewart Title Guar. Co.*, 2011 WL 6101016 (D.N.H.), 2011 DNH 204 (unpublished), in which the insured sued the insurer in part because the town took actions to condemn and lay out a public road on the insured's property after the date of policy. The court said that those actions fell under the condemnation and post-policy exclusions.

41. Therefore, the analysis of a claim based on an alleged condemnation of the insured parcel is limited to one central question: had the Parkway Parcel been taken by condemnation on the Date of Policy? Title was either vested in the insured or in the condemning authority as of the Date of Policy. Land cannot be a little bit condemned. Every state's condemnation law establishes the event that causes the transfer of the title to the condemning body. If the Parkway Parcel had not yet been taken by the condemning authority on the Date of Policy, based on the application of state law, the claim administrator denies the claim based on the incipient condemnation.

42. South Carolina's condemnation law follows the same pattern as do most such statutes. The taking is complete, and the condemning authority is entitled to take possession, when the condemnation notice is given and payment is made or deposited with the clerk of court.[20] The condemnation notice must be served on the land owner and filed with the clerk of court along with the deposit of the condemnation money.[21] The condemnation notice must contain certain information in order to be effective to cause a transfer of title.[22] If the land owner disputes the amount of compensation offered by the condemning authority, the matter goes to a trial; however, the dispute over the amount of compensation does not delay the transfer of the property.[23]

43. The Parkway Parcel had not been condemned for highway on the Date of Policy. The State Department of Transportation would have had no reason to file the 2009 Condemnation Action if the Parkway Parcel had already been condemned on July 25, 2006. The state would not have alleged, in the Condemnation Action, that Jericho State was the owner of the Parkway Parcel if that land had already been taken.

44. It appears that the Condemnation Action would never have been filed but for Jericho State's filing of the Zoning Rescission Action. In the latter lawsuit, Jericho State sought to rescind the PDD Ordinance, at least in part because the rezoning was granted on the condition that the owner convey the Parkway Parcel within 90 days, for no consideration. That 2007 agreement to convey operated in lieu of condemnation. It was that obligation that Jericho State sought to rescind.

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[20] S.C. Code Ann. § 28-2-90.

[21] S.C. Code Ann. § 28-2-230.

[22] S.C. Code Ann. § 28-2-280.

[23] S.C. Code Ann. §§ 28-2-220; 28-2-230. See also, *Carolina Power & Light Co. v. Copeland*, 188 S.E.2d 188, 258 S.C. 206 (1972); *City of North Charleston v. Claxton*, 431 S.E.2d 610, 315 S.C. 56 (1994); and *City of Folly Beach v. Atlantic House Properties, Ltd.*, 467 S.E.2d 928, 321 S.C. 241 (1996).

45. The PDD Ordinance, however, was adopted a year after the Date of Policy. The Policy did not protect Jericho State against the post-policy agreement by the developer to convey the Parkway Parcel in exchange for the rezoning. As I explained above, the Policy does not protect against any matter that first affects the title to the property after the policy date.[24] Had Jericho State identified the 2007 PDD Ordinance as the source of the obligation to convey the Parkway Parcel, the application of the post-policy exclusion would have been obvious to the claim administrator. It seems likely to me that Jericho State understood that a claim based on the PDD Ordinance was not covered by the Policy. When it submitted its claim notice, Jericho State did not inform Chicago Title of the existence of the PDD Ordinance or the Zoning Rescission Action that it filed, which sought to rescind the PDD Ordinance.

46. Instead, in its claim notice, Jericho State asserted that it had suffered a loss *as of the Date of Policy* "due to the taking/condemnation of the Property." It based its claim only on the 2002 Ordinance, which was the only instrument that existed on the Date of Policy. As I discuss further below, the Ordinance was not a taking of the land. Tellingly, Jericho State did not allege in the Zoning Rescission Action that the 2002 Ordinance had operated as a taking. Rather, it sought to undo the obligation to convey the Parkway Parcel as a donation made a part of the PDD Ordinance from 2007.

47. The actual condemnation of the Parkway Parcel also was a post-policy event. When Jericho State submitted its policy claim in February of 2009, the State of South Carolina had not yet issued the condemnation notice, and had not yet filed the Condemnation Action. Therefore, on the date on which the claim notice was received by Chicago Title, the land still had not been condemned.

48. Therefore, I conclude that it would be customary in the title insurance industry for a claim administrator to deny Jericho State's claim, because no part of the Property had been condemned on the Date of Policy, and there still had been no condemnation on the date on which the claim was submitted. For these reasons, it is my opinion that Chicago Title had reasonable grounds for the denial of the claim, and did not act in bad faith by making that denial.

Title Insurance Claim Administrators' Practices Regarding the Limitations in the Condemnation Exclusion

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[24] The Covered Risks state that the coverages are limited to those matters that have occurred before the Date of Policy. In addition, Exclusion 3(d) states that the Policy does not protect against matters that attach or are created after the policy date. See *Nielsen*, § 11.5, *Post-Policy Matters*. Ex. 3.

49. It is my further opinion that it is industry custom to conclude that a zoning document such as the Ordinance is not a "notice of exercise" of a condemnation right, and thus that limitation in Exclusion 2 is not applicable to these facts.

50. The condemnation exclusion in the Policy removes coverage for the following:

> Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

51. The exclusion has three clauses. First, it excludes from coverage "rights of eminent domain." As I stated above, this exclusion is not strictly necessary, because the Policy already clearly says that it does not protect against any event that occurs in the future. In fact, the first two versions of the loan policy drafted jointly by American Land Title Association and its customers, in 1929 and 1946, did not contain an eminent domain exclusion.[25] The exclusion merely clarifies that the insurer is not obligated to pay the insured in the event it loses title later by the involuntary condemnation of the insured parcel.

52. The second clause of Exclusion 2 says "unless notice of the exercise thereof has been recorded in the public records at Date of Policy... ." This clause has been found in the ALTA policies since Exclusion 2 was added in 1962. It makes it clear that the exclusion does not apply if the condemnation right has already been exercised on the Date of Policy. If the exclusion was not so clarified, an insurer could argue that there is no coverage for a taking that had already occurred on the policy date, which would cause the exclusion to swallow the Covered Risk about the vesting of title.

53. The third clause in the exclusion says "but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge." This seems at first glance to be a repeat of the second phrase, but is slightly different. This phrase was added to the exclusion after the definition of "public records" was changed in response to a court decision. The 1962 and 1970 American Land Title Association policies did not include this phrase.

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[25] See Ex. 8.

54. The definition of the phrase "public records" in the ALTA policies was modified in 1987. That change was made in response to a very surprising 1976 court decision, which held that publication of an easement in the Congressional Federal Register, without a recording of the easement in the local land records, was binding on a buyer of the real estate.[26] The 1987 policy defined "public records" as those records that, *under state law*, are considered to impart constructive notice to buyers of real estate. This narrowed the second clause of Exclusion 2 to carve out only condemnations that had already occurred and for which notice had been filed in state real estate records.

55. Lenders did not want this change in the definition to also limit Exclusion 2 so that there was no coverage against a condemnation if the only notice of the taking was published in the Federal Register. The third phrase added to the exclusion in 1987 made it clear that the exclusion does not negate that coverage. Russ Jordan, general counsel for Lawyers Title and his company's representative on the ALTA Forms Committee, explained the addition of the third phrase to the exclusion in an article published that year:

> The new language here [in Exclusion 2] is needed because of the change in the definition of "public records" and simply indicates that the policy is not excluding a federal condemnation where a "taking" has occurred prior to or at date of policy. In other words, if there has been a federal taking at date of policy, even though same may not be recorded in the public records, as defined in the policy, then the title company is liable for this matter and must pick it up.[27]

56. Mr. Jordan took pains to point out several times in this passage that the limitation clauses in the exclusion apply only to condemnations that have already occurred on the Date of Policy, which further supports my opinion that the limitations in Exclusion 2 apply only to takings that have occurred and for which notice has been given on the Date of Policy.

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[26] *Hahn v. Alaska Title Guar. Co.*, 557 P.2d 143 (Alaska 1976), as discussed in Russ Jordan, *ALTA Forms Committee makes revisions; issues new policy forms*, in *Lawyers Title News*, May-June, 1987, p. 10. Ex. 9. See also, Russell W. Jordan, III, *ALTA Forms Committee Revises Title Insurance Policies*, in *Title Insurance: The New Policy Changes*, Practising Law Institute Real Estate Law and Practice Course Handbook Series N4-4480, at pp. 132-33. Ex. 10.

[27] Russ Jordan, *ALTA Forms Committee makes revisions; issues new policy forms*, in *Lawyers Title News*, May-June, 1987, p. 10, at p. 21. Ex. 9.

57. In summary, Exclusion 2 removes coverage for losses caused by the condemnation of all or part of the insured parcel. The first limitation clarifies that the exclusion does not apply if notice of the exercise of the condemnation power had already been recorded in the real estate records on the Date of Policy. The second limitation clarifies that the exclusion also does not apply if notice of the exercise of the condemnation power had been given in the Federal Register on or before the Date of Policy. Neither of these limitations are understood by the people in the title insurance industry, including those who were involved in their drafting, to afford any policy coverage for condemnations that are merely contemplated or proposed as of the Date of Policy.

58. I have carefully reviewed the Ordinance. It is my opinion that it is not a condemnation notice. South Carolina law mandates that a condemnation notice be captioned CONDEMNATION NOTICE, TENDER OF PAYMENT, [and if applicable, AND NOTICE TO APPOINT APPRAISER].[28] It must designate the condemning authority and all of the owners of the land being condemned, contain a legal description for the land being taken, state the basis for the right to take the land, attach a map or sketch, state where the owner may go to inspect the plans for the project, and contain the following notice:

> THE CONDEMNOR HAS DETERMINED JUST COMPENSATION FOR THE PROPERTY AND RIGHTS TO BE ACQUIRED HEREUNDER TO BE THE SUM OF (insert the amount determined under Section 28-2-70(A) in words and numbers) AND HEREBY TENDERS PAYMENT THEREOF TO THE LANDOWNER.
>
> Payment of this amount will be made to the landowner if within thirty days of service of this Condemnation Notice, the landowner in writing requests payment, and agrees to execute any instruments necessary to convey to the condemnor the property interests and rights described hereinabove. The request and agreement must be sent by first class certified mail with return receipt requested or delivered in person to the condemnor at (insert the address to which the request should be delivered). If no request and agreement is received by the condemnor within the thirty-day period, the tender is considered rejected.
>
> If the tender is rejected, the condemnor has the right to file this Condemnation Notice with the clerk of court of the county where the property is situated and deposit the tender amount with the clerk. The condemnor shall give the landowner and other condemnees notice that it has done so and may then proceed to take possession of the property interests and exercise the rights described in this Condemnation Notice.

[28] S.C. Code Ann. § 28-2-280(B).

AN ACTION CHALLENGING THE CONDEMNOR'S RIGHT TO ACQUIRE THE PROPERTY AND RIGHTS DESCRIBED HEREIN MUST BE COMMENCED IN A SEPARATE PROCEEDING IN THE COURT OF COMMON PLEAS WITHIN THIRTY DAYS OF THE SERVICE OF THIS CONDEMNATION NOTICE, OR THE LANDOWNER WILL BE CONSIDERED TO HAVE WAIVED THE CHALLENGE.[29]

59. I have compared the Ordinance to the statute. The Ordinance was recorded in the office of the registrar of deeds, not filed with the clerk of circuit court, which immediately denotes the Ordinance as being a different kind of instrument. Further, I find no similarity between the Ordinance and the required elements of a condemnation notice. Of the statements required by the statute for a condemnation notice, it is my opinion that the only element found in the Ordinance is a map or sketch of the highway. Title searchers and examiners are trained to spot and understand the significance of condemnation notices. It is my opinion that a title examiner reviewing the Ordinance would not consider it to be a condemnation notice, or even a badly-drafted attempt at such a notice. The most telling differences are the title of the instrument and its lack of the lengthy required disclosure statement.

60. My opinion is further supported by South Carolina law establishing the purpose of an official map. The Ordinance clearly stated that it was adopted to amend the city's "official map." South Carolina statutes define and authorize the filing of such maps, and state their purpose.[30] The law says that the purpose of such a map is as a land planning tool. It is used to reserve *future* locations of streets and other public land use for *future public acquisition* and to promote the efficient regulation of land use:

> Counties and municipalities may establish official maps to reserve future locations of any street, highway, or public utility rights-of-way, public building site or public open space for future public acquisition and to regulate structures or changes in land use in such rights-of-way, building sites or open spaces. This authority is declared necessary in order to promote and preserve the public safety, economy, good order, appearance, convenience, prosperity, and general welfare and is one of the several instruments of land use control authorized by this chapter for the

[29] S.C. Code Ann. § 28-2-280(C).

[30] S.C. Code Ann. § 6-7-1210 *et seq.*

implementation of comprehensive plans, or parts thereof, adopted in accordance with the provisions of this chapter.[31]

61. The official map statute is part of the land use and zoning code. It is *not* part of the condemnation statute. It is my opinion that a title examiner would immediately recognize the Ordinance as an official map and not a condemnation notice, and would disregard it because it is a land planning and zoning instrument.

62. It is common in most states for municipalities to record zoning ordinances and zoning and planning instruments. A title insurer does not insert an exception in Schedule B of a commitment or policy for a recorded zoning or land planning instrument. This can seem like faulty reasoning or, worse, negligence in a title search. In fact, however, title insurers are very deliberate in their underwriting rules that state that recorded zoning or planning instruments are not to be recited in commitments and policies.

63. This title insurance underwriting rule flows from the fact that a zoning ordinance does not affect or encumber the title to the real estate. The policy insures only the title to the real estate. Schedule B of the Policy contains exceptions (property-specific exclusions) for matters that affect the title, including instruments in the office of the registrar of deeds.

64. There are many classes of instruments that are delivered for recording by the registrar that do not affect title, and which are not covered by the policy, as my book explains:

> Certain classes of recorded instruments do not invoke any Covered Risk because they do not affect or encumber title.
>
> The claim administrator must carefully consider whether or not an instrument bearing recording data is actually a defect in, lien or encumbrance on title, or affects the marketability of, title to the insured property, or affects or limits its right of access.
>
> When the policy does not make exception for an instrument in the real estate records, and it appears that the instrument may or does not invoke a Covered Risk, the claim administrator will often obtain further information from underwriting personnel for that state to determine if there is a statute or decision that declares whether or not the instrument invokes a Covered Risk. If not, the appropriate response to a claim asserting the lack of an exception for the instrument is to advise the insured that no Covered Risk is invoked,

[31] S.C. Code Ann. § 6-7-1220.

and giving the authority for that statement, such as a court decision or statute.

* * * *

Some other instruments relate to governmental regulation of the property's use, such as building code ordinances or zoning ordinances. These classes of instruments often fall under an exclusion.[32]

65. It is my opinion that the Ordinance was a planning map of the type that a title insurer routinely does not recite in Schedule B of the policy, following the above insurance underwriting principles. Thus, it is my opinion that the lack of an exception for the Ordinance in the Policy is neither surprising nor suggestive of an error by Chicago Title in the search or examination of title performed in the issuance of the Policy. The lack of an exception in the Policy about the Ordinance does not suggest that there is coverage under the Policy for the later taking of the Parkway Parcel.[33]

66. It is my further opinion that a claim administrator would customarily determine that the Ordinance was not a "notice of exercise" of the taking of the Parkway Parcel, or a notice of a federal taking of land, and thus did not fall within the limitations to Exclusion 2 as found in the second and third clauses of the provision. The Ordinance was not notice that the Parkway Parcel had been condemned. It was not recorded for that purpose. The rationale for the two limitation clauses in the exclusion as described above does not apply to the Ordinance.

67. For these reasons, it is my opinion that Chicago Title had reasonable grounds for the denial of the claim based on the premise that the Ordinance was a taking of the Parkway Parcel, and that it did not act in bad faith by making that denial. Therefore, it is my opinion that Chicago Title did not act in bad faith, because its coverage denial did not lack a reasonable basis.

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[32] See *Nielsen*, § 9.12, *Scope Of Policy Definition Of "Public Records" And Recorded Instruments That Do Not Affect Title* (footnotes omitted). Ex. 3.

[33] A standard rule of insurance policy interpretation is that the existence or lack of an exclusion does not create a covered risk. My book states: "the removal of [an] exception is not itself a coverage," citing *First American Title Ins. Co. v. Dahlmann*, 291 Wis.2d 156, 715 N.W.2d 609, 2006 WI 65 (Wis. 2006). *Nielsen*, § 12.3.16, *Effect Of Removal Of Survey Exception*, at p. 12-52, footnote 193. Ex. 3.

The Zoning Law Exclusion

68. Chicago Title's denial letters were based on Exclusion 1, which states that the Policy does not protect against violations of zoning, building code or subdivision laws or ordinances, rather than on Exclusion 2, pertaining to eminent domain. Ms. Dunn quoted Exclusion 1 despite the fact that the insured claimed that there had been a condemnation, and that Ms. Dunn also characterized the claim as being for a condemnation. My opinions are based on the Covered Risks and Exclusion 2.

69. Nonetheless, it is my opinion that it was appropriate for Ms. Dunn to refer to Exclusion 1 in her denial letters, because the claim was based on the Ordinance, which was a map adopted by a land planning ordinance. The Ordinance thus falls under Exclusion 1, which confirms that there is no policy coverage for matters that affect the use of the Property but not its title.[34] Ms. Dunn specifically addressed the limitation in Exclusion 1 for notices of enforcement or violation that are in the public records on the Date of Policy, because she was explaining that the Ordinance was not such a notice of violation or enforcement.

70. Stated differently, a claim administrator would ordinarily expect that any claim based on the recording of the Ordinance would be the assertion that there was coverage against the effect of the Ordinance, and that the response to such a claim would be to explain the lack of coverage as shown by Exclusion 1. Jericho State's claim straddled the two exclusions, by asserting that there had been a taking based on a zoning ordinance. Thus, it is my opinion that Ms. Dunn's discussion of Exclusion 1 appropriately explained the lack of policy coverage for the claim that Jericho State might more accurately have asserted—that there was coverage against the effect of the zoning map.

71. For these reasons, it is my opinion that Chicago Title did not act in bad faith by discussing the effect of Exclusion 1 on Policy coverage in making its denial of Jericho State's claim. Therefore, it is my opinion that Chicago Title did not act in bad faith, because its discussion of Exclusion 1 in its coverage denial did not lack a reasonable basis.

72. I am compensated in this matter at $275 per hour. I am also reimbursed for actual out-of-pocket travel and lodging expenses, copy charges and other incidental expenses. I will not receive any additional compensation that is dependent on the outcome of this lawsuit.

73. I personally prepared this report. My original signature is affixed below.

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[34] See *Nielsen*, § 11.1.2, *Zoning And Other Use Regulation.*

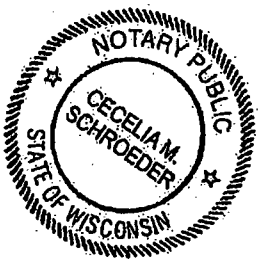
Dated this 15th day of August, 2014.

J. Bushnell Nielsen

Mailing Address:
Reinhart Boerner Van Deuren s.c.
N16 W23250 Stone Ridge Drive, Suite 1
Waukesha, WI 53188

Subscribed and sworn to before me
this 15th day of August, 2014.

Cecelia M. Schroeder
Notary Public, State of Wisconsin
My commission expires: 9/25/16



16842753

EXHIBITS

Affidavit of J. Bushnell Nielsen

***Jericho State Capital Corp. of Florida v. Chicago Title Insurance Company*, Horry County Court of Common Pleas Case No. 2011-CP-26-6449**

Exhibit

1. Curriculum Vitae
2. J. Bushnell Nielsen list of expert testimony
3. J. Bushnell Nielsen, *Title and Escrow Claims Guide*, 2014 Ed., American Land Title Association, 2014

   § 9.1.1, *Nature Of Assurances Provided*

   § 9.12, *Scope Of Policy Definition Of "Public Records" And Recorded Instruments That Do Not Affect Title*

   § 11.1.2, *Zoning And Other Use Regulation*

   § 11.1.5, *Police Power And Eminent Domain*

   § 11.5, *Post-Policy Matters*

   Chapter 12, unnumbered preamble

   § 12.3.16, *Effect Of Removal Of Survey Exception*

   § 12.7, *Special Exceptions*

   § 12.7.1, *Adequacy Of Notice Given By Exception*

4. Benjamin J. Henley, *What Investors in Mortgage Loans Are Demanding in Title Insurance*, Title News, Volume XXXV, Number 5, May 1956
5. A.M. Best Special Report, *Market Review: Title*, December 13, 2010
6. Robert Bozarth, *Lawyers Notes: Customers ask about title insurance forms and policies*, Lawyers Title News, Fall 1995
7. Raymond J. Werner, *The Basics of Title Insurance*, in *Title Insurance: The Lawyer's Expanding Role*, ABA Section of Real Property, Probate and Trust Law, 1985
8. 1929 and 1946 American Title Association Standard Loan Policy Forms

9. Russ Jordan, *ALTA Forms Committee makes revisions; issues new policy forms*, Lawyers Title News, May-June 1987

10. Russell W. Jordan, III, *ALTA Forms Committee Revises Title Insurance Policies, in* Title Insurance: The New Policy Changes, Practising Law Institute Real Estate Law and Practice Course Handbook Series N4-4480, 1987

11. List of documents reviewed

AFFIDAVIT OF J. BUSHNELL NIELSEN

EXHIBIT 1

J. Bushnell Nielsen
Reinhart Boerner Van Deuren s.c.
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SUMMARY OF CREDENTIALS

I have 32 years of work experience in and related to the land title insurance industry. I was employed by two title insurers for a total of 16 years. I held five positions with those companies. I examined title, and issued title insurance commitments and policies.

I served as chief underwriting counsel in Michigan and Wisconsin. I also closed hundreds of transactions, from residences to $500 million commercial and industrial properties located in many states, including Michigan, Ohio, Indiana, Kentucky, Illinois, Wisconsin, Minnesota, Kansas, North Carolina and Florida.

I also was a claims counsel and administrator for 14 years. I handled about 1,500 title insurance and closing claims personally. For part of that time, I served as regional claims counsel, supervising claims handlers in offices located in four states who administered claims in nine states.

I was also the manager of agency operations for Ticor Title Insurance Company in the State of Michigan, and was responsible for signing new title agents and auditing and terminating existing agents. I vetted, signed and cancelled dozens of title companies, and negotiated agency contracts with both the title companies and my company's national agency department. I managed a National Business Unit commercial title insurance operation located in Detroit, with responsibility for multi-site and multi-state transactions in all 50 states.

I have also spent 16 years in private practice, engaged almost exclusively on matters involving title insurance, real estate titles and closing liability issues. I was a member of the title insurance team at the law firm of Hinshaw & Culbertson, in its Chicago and Milwaukee offices, for three years before rejoining the industry in 1993. I am presently a shareholder at the law firm of Reinhart Boerner Van Deuren s.c. and have been with that firm for 13 years.

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

I am a past president of both the Michigan Land Title Association and the Wisconsin Land Title Association. I am a member by invitation of the American College of Real Estate Lawyers. I have received numerous awards and professional accolades, as further described in my *curriculum vitae*, which is appended. I have drafted and testified in favor of several laws concerning real estate conveyancing and closing funds.

I wrote the textbook *Title and Escrow Claims Guide*, first published in 1996 and updated annually since then. That 1,400-page treatise is national in scope. It distills the custom and practice employed by all of the national title insurers and escrow companies, and is the favored resource for land title industry members. The book is used by employees of every major title insurer in the United States, and has been cited as a learned treatise by appellate courts.

Since 1998, I have been the Editor of *The Title Insurance Law Newsletter*, a paid-subscription monthly report, national in scope and audience, that analyzes recent case law, regulations and claims issues involving title insurance policies, closing and escrow issues, closing protection letters, RESPA liability and conveyancing law. I have written about 1,800 articles about the title insurance industry, most of which have been published in the 180 issues of *The Title Insurance Law Newsletter* that I have written since 1998. The other major published articles I have written are listed in my *curriculum vitae*. I have also written book chapters, as listed in my *curriculum vitae*.

PRIOR EXPERT TESTIMONY

I have been found qualified to testify as an expert witness, and have testified, at 14 trials, two arbitrations and a class certification evidentiary hearing, conducted in Florida, Idaho, Illinois, Minnesota, Nevada, New Mexico, South Carolina, Texas and Wisconsin. In addition, my expert opinions have been admitted by courts in other cases, in affidavit form.

J. Bushnell Nielsen

Education/ License

Ripon College, 1974-76.
B.S. *cum laude*, U.Wisconsin--Stevens Point, 1978.
J.D., Marquette University Law School, 1981. *Law Review*.

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

Work History

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

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

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

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

Honors

Named a Wisconsin Super Lawyer (Real Estate) by *Law & Politics* and *Milwaukee Magazine* from 2006 through 2013.

Named in *The Best Lawyers in America*® from 2009 through 2014 in the category of Litigation--Real Estate.

Named in the Milwaukee *Business Journal* list of *Top Lawyers* for 2009 through 2011.

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

AV-rated by Lexis-Nexis Martindale-Hubbell.

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

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

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

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

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

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

Professional Associations

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

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

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

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

American Bar Association:
Member, Real Property Section, 1988 to present. Member, Title Insurance Litigation Committee, TIPS Section, 1992 to present.

Member, State Bar of Wisconsin.

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

Publications

Editor from 1998 to present of The Title Insurance Law Newsletter, national report of recent legal decisions and other matters affecting the land title industry and conveyancing law. More than 1,800 articles written to date on title insurance coverage, conveyancing, closing duties, agent-underwriter disputes, escrows and RESPA. Published by American Land Title Association.

Author of Title and Escrow Claims Guide (Second Edition), national research treatise on title insurance, escrows, conveyancing and insurance law. Published in 1996; Second Edition published in 2007; updated annually. Published by American Land Title Association.

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

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

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

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

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

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

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

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

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

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

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

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

Escrowee's Duties Regarding Recording of Documents, Chicago Title and Trust Family of Insurers Underwriting Journal, March, 1997.

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

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

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

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

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

Significant Appellate Decisions

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

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

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

Solowicz, et al. v. Forward Geneva National, Appeal No. 2008AP10, 2010 WI 10, 323 Wis.2d 556, 780 N.W.2d 111 (2010). Counsel for *amicus curiae* Wisconsin REALTORS® Association in significant Wisconsin Supreme Court decision adopting the concept of master planned communities in Wisconsin; participated in oral argument.

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

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

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

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

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

substantial, when the insurer has removed the so-called "survey" exceptions from the policy.

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

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

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

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

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

Significant Legislative and Regulatory Activities

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

Assisted in drafting of proposed law or regulation for the mandatory issuance of closing protection letters in the State of Wisconsin and the State of Michigan, 2011-2013.

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

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

Lead drafter of bill to enable affidavits of correction in Wisconsin and to modify commercial broker lien and *lis pendens* laws, in joint taskforce of Wisconsin Land Title Association, Wisconsin Registers of Deeds Association, Wisconsin Real Property Listers Association and State Bar of Wisconsin, 2008-2010. Testified in support of on Senate Bill 587 before Senate Committee on Veterans and Military Affairs, Biotechnology and Financial Institutions on March 10, 2010. Testified on Assembly Bill 821 before Committee on State Affairs and Homeland Security on March 25, 2010. Law adopted in 2010.

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

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

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

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

Significant Speeches and Seminars

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Late Recording of Mortgages, Current Payoff Issues and Closing Problems Caused by Desperate People, Chicago Title Insurance Company agent telephone and internet seminar, October, 2005.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Boundary Law in Wisconsin, National Business Institute, Madison and Milwaukee, October 17 and 18, 2002.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Title Insurance Claims--Selected Issues, Milwaukee Bar Association, Milwaukee, October 18, 1993.

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

AFFIDAVIT OF J. BUSHNELL NIELSEN

EXHIBIT 2

J. Bushnell Nielsen
Expert testimony at trial or deposition from 2000 to present

The following is a list of cases in which I have provided testimony as an expert witness at a trial, a court hearing, arbitration or by deposition, from July 1, 2000 to the present. This list is intended to comply with Federal Rule of Civil Procedure 26(a)(2), which says that an expert witness is to provide "a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years." This list also includes some cases in which my testimony was submitted to a court in affidavit form, but is not a complete list of those instances. This is not a complete list of cases in which I have been engaged as an expert witness.

1. *Town of Richfield v. Kletsch's Beach Access Ass'n*, Washington County, Wisconsin Circuit Court Case No. 99-CV-0360. Lawsuit by Wisconsin municipality to have real estate declared to have been validly dedicated to the public for lake access purposes. Trial testimony and qualification as expert witness in 2000, on behalf of municipality.

2. *Leja v. Town of Green Valley*, Shawano County, Wisconsin Circuit Court Case No. 01-CV-270. Lawsuit concerning conflicting chains of title and overlapping legal descriptions. Trial testimony and qualification as expert witness on behalf of municipality. Judgment entered in favor of municipality.

3. *Roozen v. Stratton and M & I Lake Country Bank*, Waukesha County, Wisconsin Circuit Court Case No. 00-CV-2375. Lawsuit concerning claimed slander and unmarketabilty of title due to filing of lien. Affidavit testimony accepted by court.

4. *Cebolleta Ranch Ltd. Co. LLC and Fuller v. First American Title, Inc., et al.*, No. CV-2001-1321, Dist.Ct., Bernalillo Co., N.M. Lawsuit against title insurer concerning policy coverage for threatened cutoff of access by Native American pueblo. Deposition taken. Case settled.

5. *Kennedy's Houseboats, Inc. v. City of St. Croix Falls*, Polk County, Wisconsin Case No. 99-CV-289, and related matters 99-SC-712 and 00-CV-4. Lawsuits concerning title to property conveyed by municipality. Trial testimony and qualification as expert witness on behalf of City of St. Croix Falls in January, 2003.

6. *Hampel and Wardin v. Town of East Troy*, Walworth County, Wisconsin Circuit Court Case No. 03-CV-00603. Testimony on behalf of plaintiff land owners regarding restrictions not appearing in chain of title, insufficiency of dedication of hiking path to public. Affidavit of expert opinions filed and admitted by court.

7. *Wildenradt v. Wisniewski*, Walworth County, Wisconsin Circuit Court Case No. 04-CV-00905. Testimony on behalf of plaintiff land owners regarding chains of title, ownership of disputed property. Testimony and qualification as expert witness at injunction hearing. Judgment entered in favor of plaintiff land owners.

8. *Buttacavoli v. Lawyers Title Ins. Corp.*, AAA arbitration Case No. 51-159-01850-06, Chicago, Illinois. Testimony regarding title insurance policy coverage and custom and practice in the land title industry concerning measure of loss. Testimony admitted at arbitration; title insurer received favorable arbitration award.

9. *Illinois Real Estate Lawyers Ass'n v. One World Title Corp.*, Cook County, Illinois Case No. 04-CH-232. Testimony concerning prudent considerations in a customer's selection of a title insurance agency and the insurer for whom it writes insurance. Deposition taken on August 15, 2006. Case settled.

10. *Kingwood Crossroads, L.P. v. First American Title Ins. Co.*, Cause No. 05-03-02662-CV, Montgomery County, Texas (410th Judicial District). Deposition taken in 2006.

11. *Kamin v. Lawyers Title Ins. Corp.*, AAA Case No. 51 159 E 00632 05. Testified at arbitration regarding measure of loss under title insurance policy.

12. *Somers v. Luterbach, et al.*, Waukesha County Circuit Court Case No. 04-CV-680. Testimony regarding priority of federal tax lien versus land contract vendee interest. Testified and qualified as expert witness at trial in June, 2009.

13. *Carr v. Marshall v. Chicago Title Ins. Co.*, Case No. 07 MR 1456, Lake County, Illinois Circuit Court. Testimony regarding title insurance claim administration custom and practices. Testified and qualified as expert witness at trial on November 2-3, 2009.

14. *Pullum Window Corp. v. Randy M. Deprez Custom Builder, Inc., et al.*, Oakland County, Michigan Circuit Case No. 08-093505 CH. Testimony regarding liability of title agent in the issuance of a title insurance policy. Affidavit filed in April, 2009. Case decided favorably on summary judgment in May, 2009.

15. *G & I Real Estate, LLC v. Singh,* Milwaukee County Circuit Court Case No. 2009-CV-18443. Trial testimony regarding ownership of property, marketability of title and title insurer's willingness to insure title. Testified and qualified as expert witness at trial in August, 2009.

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34. *Metro Fill Development, L.L.C., et al., v. Lawyers Title Ins. Corp.*, St. Louis County Cause No. 09SL-CC02081. Testimony concerning the nature of a title insurance commitment and an alleged implied contract to search and examine title. Deposition taken on September 9, 2012.

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49. *Roman Geronimo Martinez Mendez v. Sky View at Las Palmas, L.L.C., et al.*, Hidalgo County, Texas Cause No. C-1401-10-G. Testimony regarding customs and practices in title insurance claim administration. Deposition taken on February 4, 2014.

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54. *MT Properties, LLC v. Chicago Title Ins. Co.*, Maricopa County, Arizona Superior Court Case No. CV2013-002183. Testimony regarding customs and practices in title insurance claim administration and alleged bad faith handling of owner's title insurance policy claim. Deposition taken on June 19, 2014.

J. Bushnell Nielsen
Expert testimony at trial or deposition from 2000 to present

The following is a list of cases in which I have provided testimony as an expert witness at a trial, a court hearing, arbitration or by deposition, from July 1, 2000 to the present. This list is intended to comply with Federal Rule of Civil Procedure 26(a)(2), which says that an expert witness is to provide "a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years." This list also includes some cases in which my testimony was submitted to a court in affidavit form, but is not a complete list of those instances. This is not a complete list of cases in which I have been engaged as an expert witness.

1. *Town of Richfield v. Kletsch's Beach Access Ass'n*, Washington County, Wisconsin Circuit Court Case No. 99-CV-0360. Lawsuit by Wisconsin municipality to have real estate declared to have been validly dedicated to the public for lake access purposes. Trial testimony and qualification as expert witness in 2000, on behalf of municipality.

2. *Leja v. Town of Green Valley*, Shawano County, Wisconsin Circuit Court Case No. 01-CV-270. Lawsuit concerning conflicting chains of title and overlapping legal descriptions. Trial testimony and qualification as expert witness on behalf of municipality. Judgment entered in favor of municipality.

3. *Roozen v. Stratton and M & I Lake Country Bank*, Waukesha County, Wisconsin Circuit Court Case No. 00-CV-2375. Lawsuit concerning claimed slander and unmarketabilty of title due to filing of lien. Affidavit testimony accepted by court.

4. *Cebolleta Ranch Ltd. Co. LLC and Fuller v. First American Title, Inc., et al.*, No. CV-2001-1321, Dist.Ct., Bernalillo Co., N.M. Lawsuit against title insurer concerning policy coverage for threatened cutoff of access by Native American pueblo. Deposition taken. Case settled.

5. *Kennedy's Houseboats, Inc. v. City of St. Croix Falls*, Polk County, Wisconsin Case No. 99-CV-289, and related matters 99-SC-712 and 00-CV-4. Lawsuits concerning title to property conveyed by municipality. Trial testimony and qualification as expert witness on behalf of City of St. Croix Falls in January, 2003.

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6. *Hampel and Wardin v. Town of East Troy*, Walworth County, Wisconsin Circuit Court Case No. 03-CV-00603. Testimony on behalf of plaintiff land owners regarding restrictions not appearing in chain of title, insufficiency of dedication of hiking path to public. Affidavit of expert opinions filed and admitted by court.

7. *Wildenradt v. Wisniewski*, Walworth County, Wisconsin Circuit Court Case No. 04-CV-00905. Testimony on behalf of plaintiff land owners regarding chains of title, ownership of disputed property. Testimony and qualification as expert witness at injunction hearing. Judgment entered in favor of plaintiff land owners.

8. *Buttacavoli v. Lawyers Title Ins. Corp.*, AAA arbitration Case No. 51-159-01850-06, Chicago, Illinois. Testimony regarding title insurance policy coverage and custom and practice in the land title industry concerning measure of loss. Testimony admitted at arbitration; title insurer received favorable arbitration award.

9. *Illinois Real Estate Lawyers Ass'n v. One World Title Corp.*, Cook County, Illinois Case No. 04-CH-232. Testimony concerning prudent considerations in a customer's selection of a title insurance agency and the insurer for whom it writes insurance. Deposition taken on August 15, 2006. Case settled.

10. *Kingwood Crossroads, L.P. v. First American Title Ins. Co.*, Cause No. 05-03-02662-CV, Montgomery County, Texas (410th Judicial District). Deposition taken in 2006.

11. *Kamin v. Lawyers Title Ins. Corp.*, AAA Case No. 51 159 E 00632 05. Testified at arbitration regarding measure of loss under title insurance policy.

12. *Somers v. Luterbach, et al.*, Waukesha County Circuit Court Case No. 04-CV-680. Testimony regarding priority of federal tax lien versus land contract vendee interest. Testified and qualified as expert witness at trial in June, 2009.

13. *Carr v. Marshall v. Chicago Title Ins. Co.*, Case No. 07 MR 1456, Lake County, Illinois Circuit Court. Testimony regarding title insurance claim administration custom and practices. Testified and qualified as expert witness at trial on November 2-3, 2009.

14. *Pullum Window Corp. v. Randy M. Deprez Custom Builder, Inc., et al.*, Oakland County, Michigan Circuit Case No. 08-093505 CH. Testimony regarding liability of title agent in the issuance of a title insurance policy. Affidavit filed in April, 2009. Case decided favorably on summary judgment in May, 2009.

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AFFIDAVIT OF J. BUSHNELL NIELSEN

EXHIBIT 3

Title and Escrow Claims Guide

2014 Edition

J. Bushnell Nielsen

American Land Title Association

CTIC_00059

Title and Escrow Claims Guide

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

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This chapter discusses the various defects, liens and adverse claims against title which are covered by the owner's and loan policies, other than construction liens, which are discussed separately in Chapter 10. For the most part, this chapter is organized by the nature of the risk rather than by coverage. Section 9.9 discusses coverages added in the 2006 ALTA policy forms. Section 9.10 discusses loan policy coverages. Section 9.11 discusses coverages added by endorsement.

9.1 Nature And Scope Of Title Insurance Policy; Rules Of Construction

This section examines the general principles on which the title insurance policy is based, and the rules used to construe its provisions.

9.1.1 Nature Of Assurances Provided

The title insurance policy indemnifies the policy holder against loss if the title to the described real estate is held by someone other than the person or entity named in the policy. It also indemnifies as to defects in or liens or encumbrances on title other than those shown in the policy schedules. Schedule B refers to those matters against which the insurer does not indemnify, both of general application (unfiled construction liens, for example) and those specific to the described property.

In addition to the indemnifications as to the title, the policy indemnifies the insured if the property is found to lack a right of access, or if title is found to be unmarketable as shown in the policy. The assurance as to marketability is closely related to, but not inseparable from, the assurances about title. The access right assurance goes beyond the subject of the title to the land. Rather, it has to do with a fundamental privilege attached to the ownership of the land.

The ALTA loan policy includes four assurances specific to the mortgage or deed of trust held by the insured: indemnity as its validity, enforceability and priority generally, and priority specifically as to unfiled construction liens.

The title insurance policy does not insure property, but the title to or ownership of that property.[4] It is possible to hold flawless title to land having no value or which is not usable, and there is no claim payable under the policy.[5] The policy also does not protect against an allegation about the manner in which the insured procured title, or to overturn the contract under which the insured

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[4] "A title insurance policy does not insure the value of any particular property. In fact, it does not insure the property at all. If the value of the property appreciates or depreciates, the title policy is not affected. Instead, the defendant is insuring the title against defects which may damage the plaintiffs' interest in the property." *McLaughlin v. Attorneys' Title Guar. Fund Inc.*, 61 Ill. App.3d 911, 378 N.E. 2d 355 (1978).

[5] "An individual can hold clear title to a parcel of land, although the same parcel is valueless or considered economically unmarketable because of some restriction or regulation on its use. A title insurance policy provides protection against defects in, or liens or encumbrances on, title. Such coverage affords no protection for governmentally imposed impediments on the use of the land or for impairments in the value of the land." *Somerset Sav. Bank v. Chicago Title Ins. Co.*, 420 Mass. 422, 649 N.E.2d 1123, 1126-28 (1995); quoted with approval in *Bear Fritz Land Co. v. Kachemak Bay Title Agency*, 920 P.2d 759 (Ala. 1996).

obtained title. Such situations include actions for rescission, the imposition of a constructive trust, or to remove the insured from title because of the insured's own tortious conduct.[6] The subject of fraudulent or other wrongful procurement of title is fully discussed at §11.2.7.

Almost any party holding an interest in the real estate may qualify to obtain title insurance. The insured may hold a fee simple estate, a leasehold interest, land contract or contract for deed interest (either as buyer or seller), an easement, mortgage or deed of trust, or an option (in those states in which an option right is an interest in land).

The converse principle is that it is common industry practice not to issue a policy in favor of a person who does not have an interest in the real estate. Some state laws may prohibit the issuance of policies to persons not having an insurable interest in the property. There is one notable exception to this mostly self-imposed rule: the non-imputation endorsement. Some forms of this endorsement give an assurance to a shareholder, partner or member in the owner entity that the knowledge of a particular person will not be asserted as a defense to a claim on the policy. The assured in these endorsements is typically an incoming part or full owner of the entity holding the real estate, and thus the assured party is not the owner of the real estate.

[6] See, for example, *Safeco Title Ins. Co. v. Moskopoulos*, 172 Cal. Rptr. 248 (App. 1981) (no duty to defend an "otherwise impeccable" title when sole allegation affecting it was that insured obtained title by fraud on seller).

9.1.2 Policy Of Indemnity, Not Guaranty

The title insurance policy is generally recognized as being a policy of indemnity as opposed to a policy of guarantee or warranty.[7] The policy itself repeatedly and consistently declares that it is in the nature of an indemnification for loss.[8] A few early decisions and their progeny have likened the title insurance policy to a warranty of title.[9] This view, based on a construction of policies no longer in use, is inconsistent with the terms of modern title insurance policies.

The distinction between indemnity and guarantee or warranty is essential in two respects. First, in the event a covered defect in title is discovered, the policy is written to indemnify the insured for losses proximately resulting from that covered defect, and no more. Second, the policy is not intended as a representation or warranty as to anything recited in it.

The first issue is the assertion of the warranty analogy to attempt to steer the insurer into a particular option in resolving a claim. An insured may assert that the insurer has warranted title, and thus is required to perfect the title as warranted, no matter what the cost or labor. However, the policy gives the insurer six options in resolving claims, in recognition that some ownership problems

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[7] This rule has been stated in, for example: *Rosen v. Nations Title Ins. Co.*, 66 Cal.Rptr.2d 714, 720 (Cal.App.2 Dist. 1997); *Contini v. Western Title Ins. Co.*, 40 Cal.App.3d 536, 115 Cal.Rptr. 257 (1974); *Golden Security Thrift & Loan Ass'n v. First American Title Ins. Co.*, 53 Cal.App.4th 250, 61 Cal.Rptr.2d 442 (Cal.App. 4 Dist. 1997); *Stewart Title Guar. Co. v. West*, 110 Md.App. 114, 676 A.2d 953 (1996); *Fohn v. Title Ins. Corp. of St. Louis*, 529 S.W.2d 1 (Mo. 1975); *Flockhart Foundry Co. v. Fidelity Union Trust Co.*, 102 N.J.L. 405, 132 A. 493 (1926); *Halfmoon Professional Offices v. American Title Ins. Co.*, 652 N.Y.S.2d 390 (A.D. 3 Dept. 1997); *Pioneer Nat'l Title Ins. Co. v. Child, Inc.*, 401 A.2d 68 (Del. 1979); *Sattler v. Philadelphia Title Ins. Co.*, 192 Pa. Super. 337, 162 A.2d 22 (1960); *Securities Service Inc. v. Transamerica Title Ins. Co.*, 20 Wash.App. 664, 583 P.2d 1217 (1978); *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997); *Tri-Legends Corp. v. Ticor Title Ins. Co.*, 889 S.W.2d 432 (Tex.App. -Houston 14th Dist. 1994); *Gibraltar Sav. v. Commonwealth Land Title Ins. Co.*, 905 F.2d 1203, 1205 (8th Cir. 1990) (Minnesota); *Diversified Mortgage Investors v. U.S. Life Title Ins. Co. of N.Y.*, 544 F.2d 571, 574 n. 2 (2d Cir. 1976); *Goode v. Federal Title and Ins. Corp.*, 162 So.2d 269, 270 (Fla.Dist.Ct.App.1964) (quoting Annotation, Measure, extent, or amount of recovery on policy of title insurance, 60 A.L.R.2d 972, 975-76); and *Grunberger v. Iseson*, 75 A.D.2d 329, 331, 429 N.Y.S.2d 209, 210 (1980).

[8] The 2006 ALTA policies begin with the statement that the insurer "insures, as of Date of Policy ... against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of" the enumerated Covered Risks. Those Covered Risks are not guarantees, but statements of the conditions under which the duty to indemnify will arise, which is why they are phrased in the negative. Conditions 8 of the 2006 ALTA policies (Conditions & Stipulations 7 of the 1992 ALTA policies), which explains how loss is calculated, begins with this statement: "This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy."

[9] *Empire Development Co. v. Title Guarantee & Trust Co.*, 225 N.Y. 53, 121 N.E. 468 (1918); *Ehmer v. Title Guarantee & Trust Co.*, 156 N.Y. 10, 50 N.E. 420 (1898); *Flockhart Foundry Co. v. Fidelity Union Trust Co.*, 102 N.J.L. 405, 132 A. 493 (1926) ("A contract of title insurance being one of indemnity, it must closely resemble a covenant of seizin in a deed, and, under such a covenant, where title fails to a part of the lands, the measure of damages is the value of the lands to which title failed, with interest."); *Summonte v. First American Title Ins. Co.*, 180 N.J.Super. 605, 436 A.2d 110 (1981), aff'd 184 N.J.Super. 96, 445 A.2d 409 (1981); *Lawyers Title Ins. Corp. v. Research Loan & Invest. Corp.*, 225 F.Supp. 287 (W.D. Mo 1964), reversed by 361 F.2d 764 (8th Cir. 1966). *Empire Development* and *Flockhart* are the two cases most commonly cited for the warranty analogy.

are insoluble or cannot be resolved in the insured's favor, and others could only be solved by paying the adverse party a ransom price. In the author's experience, a demand for compensation beyond value often results from the parties' dislike of each other, which is not the insurer's burden to bear. The insurer is not obligated to pay ransom in order to fix title.[10] The insurer also is not required to prove the insured's title by lawsuit as opposed to paying the insured the diminution in value as if the defect were proven to exist.[11]

An insured may use the warranty analogy to argue the converse position also, that the failure to disclose a defect in title is a breach of the policy "warranty," the exclusive remedy for which is payment to the insured rather than the curing of title. One decision rejected the insured's insistence that the insurer's only option was to pay diminution, because it would erase the insurer's right to clear title.

> We conclude that the latter view of what constitutes a "breach"—that the insurer is not immediately in breach simply because title is defective on the day the policy is issued—is more in line with both title insurance law and the standard form title insurance policy that we have before us. As we have observed, a title insurer does not guarantee the state of the title. Instead, a title insurance policy is a contract of indemnity. The view that a title insurer is in breach simply because there are defects in the title at the time the policy is issued would turn the title insurer into the guarantor of the grantee's title.[12]

Finally, it has been argued that the policy guarantees title, and any defect or encumbrance must be compensated even if there is no evidence that the insured has suffered loss as a result. Modern courts reject this argument, because it would relieve the insured of the duty to prove a loss.[13]

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[10] In *Hillsboro Cove, Inc. v. Archibald*, 322 So.2d 585 (Fla.App. 1975), the insured paid $50,000 to get title to a 30-foot strip of land, then tendered the bill to the insurer. The court held that the insurer owed only the true value of the land, which was $6,000.

[11] *Sabatino v. First American Title Ins. Co.*, 308 Ill.App.3d 819, 721 N.E.2d 693, 242 Ill.Dec. 414 (Ill.App. 2 Dist. 1999) (insurer may elect to pay diminution rather than defend insured's title).

[12] *Stewart Title Guar. Co. v. West*, 110 Md.App. 114, 676 A.2d 953 (1996). The same analysis was used in *First Federal Savings Bank v. Stewart Title Guar. Co.*, 451 S.E.2d 916 (S.C.App. 1994), in which the court held that the insurer had the right to clear title at its option and, having done so, was not obligated to also pay diminution.

[13] In *Sattler v. Philadelphia Title Ins. Co.*, 192 Pa. Super. 337, 162 A.2d 22 (1960), there was an undisclosed lien on the property, but no evidence that it would ever be enforced before it outlawed. The court said: "A title insurance policy is a contract of indemnity and not of guaranty. Unless and until a loss occurs, there is no liability." It ruled that the insured was not damaged unless and until the lien was enforced. Also see *Schwartz v. Stewart Title Guar. Co.*, 134 Ohio App.3d 601, 731 N.E.2d 1159 (Ohio App. 8 Dist. 1999), in which the title defect was asserted by the insured in a lawsuit he filed, but his title was not attacked by anyone else. The court said: "To trigger the duty to indemnify, the insured must have a claim asserted against the title by a third party because an 'indemnity is a ... collateral promise to make good a loss or injury suffered by a policyholder in consequence of the act of a third party.' Burke, supra at § 2.1.1 at 2:4-2:5. In the case herein, we find no loss was actually sustained by the plaintiff." 134 Ohio App.3d. at 614, 731 N.E.2d at 1168.

This iteration of the guaranty theory would also render other policy provisions meaningless, in certain circumstances. For example, under the final determination provision, when there is litigation about the title defect, there is no loss payable until that lawsuit is concluded. The final determination provision will not be short-circuited by the warranty or guarantee analogy.[14] See §3.4.5 for a full discussion of the final determination clause. Also, the insured may not do an end run on the no-loss exclusion by asserting the guarantee idea. For example, when the policy mistakenly included some land which the seller did not own, and the insured had failed to submit credible evidence of the land's value, the insurer was found not to owe anything because the insured had failed to establish a value for the parcel mistakenly insured.[15]

Lenders have also asserted the warranty analogy in order to try to force insurers to pay liens before loss has been established. Most courts agree that there are three conditions to loss under a loan policy, however: a covered defect, default on the loan, and diminution in the lender's security in the property. See §3.2.4 for a complete discussion of the defect-default-diminution analysis of loss under a loan policy. If the insurer paid the lender the amount of an undisclosed lien but the lender later recovered the full debt from the collateral, the lender would be unjustly enriched by the insurer's payment. Also, if the lien of the insured mortgage is defended against the adverse claim or lien, the lender suffers no reduction in security. Therefore, the strong majority of courts have enforced the rule that the insurer is not obligated to pay an insured lender before the lender proves that it has suffered a loss.[16] A minority of courts have adopted the warranty view that the insured lender suffers a loss as of the policy date, and a duty to "indemnify" exists once the defect is known and quantified, without proof that the lender has suffered a loss.[17]

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

[15] *Summer Pond Properties, Inc. v. Transamerica Title Ins. Co.*, 1998 WL 283052 (Wash.App.Div. 1) (unpublished).

[16] "Another distinguishing characteristic of a contract to indemnify is that the loss must be actual; the mere existence of a defect covered by the policy in and of itself is not sufficient to justify recovery." *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F. 2d 1058 (1st Cir. 1990). See, for example, *Green v. Evesham Corp.*, 179 N.J.Super 105, 430 A.2d 944 (App.Div. 1981); and *Securities Service Inc. v. Transamerica Title Ins. Co.*, 20 Wash.App. 664, 583 P.2d 1217 (1978); *Title & Trust Co. of Fla. v. Parker*, 468 So.2d 520, 523 (Fla.Dist.Ct.App.1985); *Farrell v. Inter-County Title Guar. & Mortgage Co.*, 213 So.2d 518, 521 (Fla. Dist. Ct. App.1968); and *Goode v. Federal Title and Ins. Corp.*, 162 So.2d 269, 270 (Fla.Dist.Ct.App.1964).

[17] In *Bluff Ventures Limited Partnership v. Chicago Title Ins. Co.*, 950 F. 2d 139 (4th Cir. 1991), there was a judgment lien on property purchased at foreclosure sale. The insurer denied the claim because the claimant was not the named insured. The claimant then settled the judgment and sued the insurer. The court found that the claimant was an insured, and that it had fixed the "loss" as the settlement amount. The insurer argued that no loss would be suffered until the judgment was enforced. The insurer pointed to the "indemnity contract" language in the policy as a basis for distinguishing *Title Ins. Co. v. Industrial Bank of Richmond, Inc.*, 156 Va. 322, 157 S.E. 710 (1931), which had ruled that a lender need not prove a loss of security. The court instead adopted the *Industrial Bank*.

"The principal issue on appeal is whether Walde, Bluff Venture's predecessor in interest, suffered a loss covered by Chicago Title's policy. In Title Insurance Co. of Richmond v. Industrial Bank of Richmond, a case indistinguishable from the one at hand, the Supreme Court of Virginia, quoting from a case involving a purchase, held that '[t]he plaintiff's loss occurred at the time it, relying on the policy, made its purchase, and is not measured by what it might realize at some future time under other conditions.' 156 Va. 322, 334 (1931).

"Chicago Title argues that the contractual language mandates a different result than the Virginia Supreme Court

The warranty analogy is also used to argue that the insurer is liable for any inaccuracy or misstatement of the condition of title in a commitment or policy. The insurer's position is that the policy is strictly a contract of insurance, and that the insurer's sole duty on breach is to indemnify the insured. Certain risks are taken as casualty risks. Insurers argue vehemently that it is their privilege to assume a risk, even if the result is that a particular matter is not disclosed in the policy or commitment. However, several cases held that the insurer could be liable for misrepresentations contained in the title insurance commitment.[18] An entire body of law has developed from these cases on the question of whether or not the policy contains representations for which the insurer may be liable in tort if proven untrue or unreliable. Again, by its terms, the policy makes clear that it is an indemnity contract. Whenever a case suggests that a particular phrase in a policy or endorsement might be considered a representation rather than an agreement to indemnify, the industry retires that language.[19] The so-called "duty to search" is the subject of Chapter 15.

9.1.3 Rules Of Policy Construction

In most respects, the title insurance policy is construed in the same manner as are all insurance policies.[20] The following principles are applicable in most jurisdictions. States vary somewhat in the gloss they put on rules of contract interpretation, so local law must always be consulted.

9.1.3.1 General Rules Of Construction

The overall goal in interpreting an insurance policy, as with any contract, is to give effect to the expectations of the parties.[21] The policy is to be read "according to its plain and ordinary

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reached in Industrial Bank. We do not agree."

[18] See *White v. Western Title Ins. Co.*, 40 Cal.3d 870, 221 Cal.Rptr. 509, 710 P.2d 309 (1985).

[19] See the discussion of *Alliance Mortgage Co. v. Rothwell*, 32 Cal.Rptr.2d 592 (Cal.App. 1 Dist. 1994) in §15.12. In that case, the court suggested that an assurance about "any incorrectness in the following assurance" was "a guarantee, not merely a promise to indemnify, as in the conventional title policy." As a result of the *Rothwell* decision, numerous endorsement forms were altered by the California Land Title Association and American Land Title Association.

[20] "Title insurance policies are subject to the same rules of construction that apply to other types of insurance policies." *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F. 2d 1058 (1st Cir. 1990). See also *American Sav. & Loan Ass'n v. Lawyers Title Ins. Corp.*, 793 F.2d 780 (6th Cir. 1986); *Summonte v. First American Title Ins. Co.*, 180 N.J.Super. 605, 436 A.2d 110 (1981), aff'd 184 N.J.Super. 96, 445 A.2d 409 (1981); *Marandino v. Lawyers Title Ins. Corp.*, 156 Va. 696, 159 S.E. 181 (1931); *Laabs v. Chicago Title Ins. Co.*, 72 Wis.2d 503, 241 N.W.2d 434 (1976); *Brown v. St. Paul Title Ins. Corp.*, 634 F.2d 1103, 1107 (8th Cir.1980); *Lawyers Title Ins. Corp. v. Research Loan & Inv. Corp.*, 361 F.2d 764, 768 (8th Cir.1966); *Sandler v. New Jersey Realty Title Ins. Co.*, 36 N.J. 471, 479, 178 A.2d 1, 5 (1962); *Rockhold v. Fidelity Nat'l Title Ins. Co.*, 1999 WL 239053 (Tex.App.-San Antonio) (unpublished); 9 Appleman, Insurance Law and Practice §5201 (1981).

[21] *Rockhold v. Fidelity Nat'l Title Ins. Co.*, 1999 WL 239053 (Tex.App. -San Antonio) (unpublished); *Eureka Inv. Corp., N.V. v. Chicago Title Ins. Co.*, 530 F.Supp. 1110, 1118 (D.D.C.1982), aff'd in relevant part and rev'd in part, 743

pending at the date of policy was held to render title unmarketable. The building code exclusion was found inconsistent with the policy's affirmative coverage regarding marketability. This ambiguity was found to render the exclusion ambiguous and unenforceable:

> In the present case, the Title Insurance Companies urge us to construe the phrase "the effects of violations of building ordinances" in Exclusion 1 of the Policy to include building code violation litigation which was pending when the title insurance commitment and policy issued. This construction would relieve the Title Insurance Companies from any responsibility for failure to disclose many types of litigation which impair the marketability of title. Such a construction is in direct conflict with the Title Insurance Companies guarantee to insure against loss or damage sustained due to unmarketability of title. ... The purpose of title insurance would be defeated by an adoption of the statutory interpretation urged by the Title Insurance Companies. Disclosure of title surprises such as a pending lawsuit which seeks to demolish or place into receivership a parcel of real estate is just the sort of problem that a title insurance purchaser seeks to discover and/or insure against. [40]

The key finding in *Radovanov* was that, under the state law cited by the court, a building code suit makes title unmarketable. Other courts have made similar rulings.[41] See §9.8 regarding the coverage for marketability of title.

11.1.2 Zoning And Other Use Regulation

FORM 35, Appendix A
Zoning ordinance violation

Zoning ordinances regulate the use of the property, not its title. The title insurance policy, conversely, insures only the title to the property, not its use. Zoning matters are specifically excluded from coverage in Exclusion 1 of the 2006, 1992 and prior standard ALTA policies.[42]

Courts agree that the policy does not insure against restrictions on use caused by zoning

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Dist. 1989).

[40] 136 Ill.Dec. at 831.

[41] See, for example, *Kayfirst Corp. v. Washington Terminal Co.*, 813 F.Supp. 67 (D.D.C. 1993), which held that an encroachment was an encumbrance that rendered title unmarketable, invoking policy coverage.

[42] Exclusion 1 of the 2006 ALTA policies excludes from coverage any loss caused by "(a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to (i) the occupancy, use, or enjoyment of the Land... ." The ALTA Homeowner's Policy excludes zoning matters at Exclusion 1(b). Exclusion 1 of the ALTA Residential Policy negates coverage for governmental regulation of "land use," which includes zoning.

ordinances.[43] A setback requirement imposed by a municipality on a subdivision lot in connection with a zoning variance was found to be an excluded zoning matter, and not an "easement" under Insuring Provision 2. The exclusion thus applied, the court ruling:

> The 45-foot setback was created by a resolution of a board of adjustment and was indicated on a subdivision plan that was never recorded or required to be recorded. Because this claim of loss arises out of the exercise of the policy power..., the exclusion applies.[44]

Because the subdivision plat on which the setback line had been drawn had never been recorded, the restriction could only have been discovered by examining the municipality's zoning records. Those records are outside the scope of documents which affect title and which are commonly searched by title searchers. The zoning exclusion has been found to be a reasonable limitation on policy coverage.[45] The ALTA Homeowner's Policy provides limited assurances as to certain zoning matters. See a discussion of that policy's covered risks at §9.14.2, and its exclusions at §11.10.

Exclusion 1 also excludes the effect of a wetlands designation. The insurer is under no duty to know or find out if property is so designated, or to inform the proposed insured of such a designation.[46] Similarly, the violation of a zoning setback line by a deck was found to be excluded. The municipality refused to grant a certificate of occupancy to a buyer, which caused the insureds to lose the sale of the home. The court found that the subject was outside the ambit of the policy:

> The violation of a zoning regulation is not an encumbrance on the title and does not render title unmarketable. "[M]arketability of title is concerned with impairments on title to a property, i.e., the right to unencumbered ownership and possession, not with legal public regulation of the use of the property" (Voorheesville

[43] *First American Title Ins. Co. v. Grafton Partners, LLC*, 2009 WL 792263 (D.Mass.) (unpublished); *Bronen v. New York Abstract Co.*, 19 A.D.2d 821, 243 N.Y.S.2d 664 (1963); *Marine Midland Bank v. Virginia Woods, Ltd.*, 574 N.Y.S.2d 485 (Sup.Ct. 1991); *Marriott Financial Services, Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 217 S.E.2d 551 (1975), affirming 23 N.C.App. 377, 209 S.E.2d 423 (1974); *Dickins v. Stiles*, 81 Wash.App. 670, 916 P.2d 435 (1996). In *Notaro Homes, Inc. v. Chicago Title Ins. Co.*, 309 Ill.App.3d 246, 722 N.E.2d 208, 242 Ill.Dec. 719 (Ill.App. 2 Dist. 1999), the court found a zoning matter excluded, and held: "The title insurance policy insures against defects or clouds in the title to the land, not the land itself." 722 N.E.2d at 213, 242 Ill.Dec. at 724. In *Batra v. Electronic Land Services, Inc.*, 41 Misc.3d 1211(A), 2013 WL 5607243 (N.Y.Sup.), 2013 N.Y. Slip Op. 51644 (U) (unpublished), The court also dismissed a claim by the insured due to a change in zoning that occurred just before closing, saying that zoning is removed from coverage under Exclusion 1, and thus there could be no duty to disclose a fact about a subject that is excluded from coverage.

[44] *Aldrich v. Hawrylo*, 656 A.2d 1304, 1309 (N.J. Super. 1995).

[45] In *Notaro Homes, Inc. v. Chicago Title Ins. Co.*, 309 Ill.App.3d 246, 722 N.E.2d 208, 242 Ill.Dec. 719 (Ill.App. 2 Dist. 1999), the court said: "[The title insurer] was entitled to exclude coverage of zoning ordinances from the title policy. Plaintiff has not cited a case that holds that a title insurer is prohibited from excluding certain recorded instruments such as zoning ordinances from coverage." 722 N.E.2d at 214, 242 Ill.Dec. at 725.

[46] *Manley v. Cost Control Marketing & Management, Inc.*, 583 A.2d 442 (Pa.Super.Ct. 1990).

Rod & Gun Club v. E.W. Tompkins Co., 82 N.Y.2d 564, 571, 606 N.Y.S.2d 132, 626 N.E.2d 917). Since zoning laws regulate the manner in which the property can be used and do not impair title, the damages claimed by plaintiffs do not fall within the scope of the title insurance policy (see generally, Logan v. Barretto, 251 A.D.2d 552, 675 N.Y.S.2d 102; Chu v. Chicago Tit. Ins. Co., 89 A.D.2d 574, 452 N.Y.S.2d 229 14 Warren's Weed, New York Real Property, Title Insurance § 4.04[3][a] [4th ed.] at 77-78).[47]

Various other kinds of use restrictions imposed by zoning ordinances have been found excluded from policy coverage.[48] Also, in *Manor Healthcare Corp. v. Guzzo-Greco*,[49] an annexation fee imposed by a zoning ordinance was found to be excluded, even if evidence of the fee was obtainable as a public record. Further, because the fee was excluded from policy coverage, the insurer was not negligent in tort liability for not disclosing it.

A zoning ordinance does not spill out of the exclusion just because the insured labels its violation as rendering title unmarketable. In *Notaro Homes, Inc. v. Chicago Title Ins. Co.*,[50] the court conducted a painstaking analysis, after which it concluded that a zoning ordinance limiting the number of dwelling units on the property was not a lien or encumbrance. Thus, the ordinance would not release a purchaser from the obligation to buy, and the policy definition of marketability was not met. Rather, the court found that the insured had "confused marketability of title with marketability of land."[51] The court distinguished *Radovanov v. Land Title Company of America, Inc.*,[52] which had found that a lawsuit for violation of building code orders made title unmarketable, thus allowing an end-run around the building code ordinance exclusion. See §9.8.2 for a complete discussion of the difference between marketability of title and salability of the property.

The exclusion is not applicable when, on date of policy, there is constructive notice in the records which impart notice to purchasers of real estate "of the enforcement [of the regulation] or ... of a defect, lien or encumbrance resulting from a violation or alleged violation [of the regulation]." Laws or ordinances regulating land use are themselves normally public records. They are not,

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[47] *Wolf v. Commonwealth Land Title Ins. Co.*, 690 N.Y.S.2d 880, 180 Misc.2d 307, 1999 N.Y. Slip Op. 99238 (Sup.Ct., App.Term, First Dept 1999).

[48] In *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp.*, 152 F.3d 275 (4th Cir. N.C. 1998), ordinances which prohibited certain uses of property within a designated distance from the shore of a river were found not to affect title and to be excluded by Exclusion 1. In *Sonnett v. First American Title Ins. Co.*, 309 P.3d 799, 2013 WY 106 (Wyo. 2013), the court found that a "master plan" of use restrictions that an owner imposed on his own property in order to get a zoning change were part of the zoning use conditions, not a declaration of restrictions, and therefore were excluded from coverage.

[49] 1988 U.S.Dist. LEXIS 11965 (N.D.Ill.), aff'd on other grounds, 894 F.2d 919 (7th Cir. 1990).

[50] 309 Ill.App.3d 246, 722 N.W.2d 208, 242 Ill.Dec. 719 (Ill.App. 2 Dist. 1999), reh.den., app.den. 189 Ill.2d 661, 731 N.E.2d 765, 246 Ill.Dec. 916 (2000).

[51] 309 Ill.App.3d at 253, 722 N.W.2d at 213, 242 Ill.Dec. at 724.

[52] 189 Ill.App.3d 433, 545 N.E.2d 351, 136 Ill.Dec. 827 (Ill.App. 1 Dist. 1989).

however, public records which impart notice as to the state of title to a purchaser of real estate.[53] Therefore, as explained in *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp.*,[54]

> in order to be contained in the "public records," as used in the ALTA title policy, a notice of enforcement or of an encumbrance would have to be recorded in one of these public records designed to put purchasers of real property on constructive notice about matters affecting title to the property which they are purchasing.[55]

Thus, even though the ordinances in question in *Haw River* were filed in a book in the office of the register of deeds, they did not impart constructive notice as to the title to the land, and were excluded from coverage. See §9.12 about recorded instruments that do not invoke Covered Risks.

Further, the "public record notice" limitation on the exclusion applies only notice of enforcement of a law, or a defect, lien or encumbrance which results from enforcement of a violation of such a law. Thus, a distinction is drawn between the law itself, which applies to everyone, and the imposition of a sanction under the law against the specific land in question. Again, the *Haw River* decision recognized this:

> [I]n North Carolina, as elsewhere, zoning or environmental laws of general application, which are not recorded against specific parcels of property, are generally excluded from standard-form ALTA title insurance policies.[56]

Because there was no indication that a notice of enforcement or lien imposed under the ordinances had been recorded, the court found the limitation of the exclusion inapplicable. Similarly, the mere recording of a zoning ordinance was found not to be an act of enforcement in *Notaro Homes, Inc. v. Chicago Title Ins. Co.*[57] The *Notaro* court declared:

> Moreover, Black's Law Dictionary defines "enforcement" thusly: "The act of putting something such as a law into effect; the execution of a law; the carrying out of a mandate or command." Black's Law Dictionary 528 (6th ed.1990). We find nothing in that definition that supports the view that recording the amendment is an act of enforcement. Further, the subject zoning ordinance expressly states that the

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[53] See *Aldrich v. Hawrylo*, 656 A.2d 1304, 1309 (N.Y. Super. 1995), which acknowledged that general-application police power regulations are excluded because they "cannot be ascertained from an examination of the title records."

[54] 152 F.3d 275 (4th Cir. (N.C.) 1998).

[55] The reference to "one of these public records" is to the dockets or books which North Carolina statutes qualify as imparting constructive notice to purchasers: the Registration of Titles book, lien book, Record of Lis Pendens, judgment docket and Book of Wills.

[56] Id.

[57] 309 Ill.App.3d 246, 722 N.E.2d 208, 242 Ill.Dec. 719 (Ill.App. 2 Dist. 1999).

> ordinance shall be "in full force and effect from and after its passage and approval according to law." Thus, the recording of the amendment adds nothing in terms of its enforcement.[58]

Therefore, because there were no recorded notices of the violation of the ordinance, the exception to the exclusion was found not to apply. The court distinguished *1119 Delaware v. Continental Land Title Co.*,[59] because in that case a conditional use permit was found to be a restriction affecting title, and its recording provided constructive notice by law.

Finally, although the exclusion specifically includes both building and zoning ordinances, its greater subject is "laws and regulations ... restricting or regulating ... the ... use or enjoyment of the land." This applies to non-zoning laws of general application which restrict or regulate the property's use. In *Security Union Title Ins. Co. v. Usnick*,[60] treaty provisions allowing Native Americans to take shellfish from tidelands in the State of Washington were found to be excluded:

> The insurers note that treaties between the United States government and American Indian tribes are part of the "supreme Law of the Land." U.S. Const. Art. VI. They say that the purpose of the "law" exclusion is to protect the insurers from defects in title which cannot be discovered in the public records for a particular parcel, since they have general application, and because legal interpretation is by nature unpredictable. This, they say, is as true for rights based in treaties as in laws or regulations.

In response, the insureds who claimed coverage argued that the treaties created private rather than governmental rights. However, the court said, "many governmental restrictions on land and land use inure to third parties." It cited *Dyer & Moody, Inc. v. Dynamic Constructors, Inc.*[61] The court found the treaties to be "no different."

Dyer also involved a law which does not fit neatly under the heading of either building code or zoning, but still falls under the exclusion for laws regulating land use. In *Dyer*, the insured filled in a drainage ditch on his property. Judgment was entered against him for the cost of a drain pipe to be built on his land to replace the ditch, because Louisiana law prohibits tampering with a natural servitude. The seller's title insurer asserted that state civil code which imposed the burden on the owner did not affect title and was excluded under Exclusion 1. The court agreed on both counts:

> It is clear from the nature of the present lawsuit that "title" is in no way involved. The fact that an owner of the subject property obstructed a natural servitude of drainage

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[58] 309 Ill.App.3d at 255, 722 N.E.2d at 214, 242 Ill.Dec. at 724.

[59] 16 Cal.App. 4th 992, 20 Cal.Rptr.2d 438 (Cal.App. 2 Dist. 1993).

[60] Dec. 15, 1998, case no's C97-1986L and C98-1445L, U.S.Dist.Ct. W.D.Wash. (unpublished).

[61] 357 So.2d 615 (La. 1978).

> did not create a defect in the title to the subject property. ... Louisiana Civil Code Article 660 restricts the building of any work that would prevent the natural running or flow of water; and, consequently, restricts the use or enjoyment of the land within the express exclusionary clause of the subject title insurance policy.[62]

However, a conditional use permit affecting only the insured property, which was recorded in the real estate records, was found to be a restriction rather than a zoning ordinance, and thus not excluded. The conditional use permit required that at least one occupant of each dwelling unit in the 11-unit apartment building be 62 years old or physically handicapped. The court found that the restriction was not made a zoning matter by the fact that the municipality created it pursuant to its municipal code:

> As discussed *ante*, the CUP is not a law, ordinance or governmental regulation. The mere fact the San Diego Municipal Code authorizes the issuance of CUPs does no transform the instant CUP into a zoning ordinance. Accordingly, the exclusion is unavailing to Lawyers Title.[63]

The court was further influenced by the fact that the legislative history to the statute under scrutiny had been favored by the California Land Title Association because it would "enable persons dealing with real property to be apprised of the fact of any restrictions on the owner's ability to convey the real property which have been imposed by a municipality. This will be accomplished by requiring such restrictions to be recorded in a manner which will impart construction notice."[64] The court contrasted this with the fact that zoning ordinances of general application are not recorded in the chain of title, and do not affect specific named parcels of land.

11.1.3 Subdivision Laws

FORM 37, Appendix A
Subdivision law violation

Exclusion 1 of the standard ALTA policies also removes from policy coverage the effect of a violation of a subdivision law or ordinance.[65] The ALTA Homeowner's Policy provides a limited

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[62] 357 So.2d at 619.

[63] *1119 Delaware v. Continental Land Title Co.*, 16 Cal.App. 4th 992, 20 Cal.Rptr.2d 438, 445 (Cal.App. 2 Dist. 1993).

[64] 20 Cal.Rptr.2d at 445.

[65] *Yellowstone II Development Group, Inc. v. First American Title Ins. Co.*, 2001 MT 41, 304 Mont. 223, 20 P.3d 755 (Mont. 2001) (policy does not assure compliance with subdivision laws or right to make further subdivisions, even though title agent was aware that right to divide property was important factor to insured); *Whaley v. First American Title Co. of the Mid-West*, 2004 WL 316978 (Tenn.Ct.App. 2004) (unpublished) (policy does not protect against effect of illegal land division); *Dollinger DeAnza Associates v. Chicago Title Ins. Co.*, 199 Cal.App.4th 1132, 131 Cal.Rptr.3d

rejected an argument, couched in terms of public policy, that the endorsement should be read broadly to assist in the statute's stated purpose of ensuring immediate response to pollution.

Because the mere presence of hazardous material is not considered to be a defect in title under the policy, the *Lick Mill* court specifically held that it was not necessary to determine whether or not Exclusion 1(a) of the 1970 form policy, for governmental use regulation, applied. However, it did rule that an insured had no reasonable expectation of coverage against environmental cleanup charges under the 1970 policy form, when the insured obtained one 1970 form policy and two 1987 form policies in the same transaction. The logical extension of the reasoning in *Lick Mill* would be that a sophisticated insured which requests the 1970 form policy cannot reasonably expect that it is getting coverage against waste cleanup for which no lien is recorded on date of policy.

11.1.5 Police Power And Eminent Domain

FORM 33, Appendix A
Police power exclusion

FORM 72, Appendix A
Police power—denial of permit

The ALTA policies exclude matters constituting the exercise of governmental police power, and eminent domain, unless notice of the exercise of such rights appears in the public records at Date of Policy.[77] The police power exclusion applies to the exercise by government of its right to exercise control over real estate for public purposes or needs, on subjects other than building code, zoning, subdivision and other ordinances and laws listed in Exclusion 1(a).[78] The police power exclusion applied to a resolution prohibiting vehicular access to the insured property, when such access was found to be "contrary to the public peace, safety and welfare" of the local citizenry.[79] The exclusion also negates any coverage against loss claimed because the insured property has been designated a wetland.[80] The police power exclusion may also defeat liability for loss of title because of a drug forfeiture. Forfeitures are discussed in detail in §9.13.

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[77] The 2006 ALTA Owner's policy states: "The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of: 1. ... (b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6. 2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8." See §9.9.2 for a discussion of the referenced Covered Risks. The 1992 ALTA Owner's policy was essentially identical, except that it contained exceptions that have become Covered Risks in the 2006 policy.

[78] In *Commonwealth Land Title Ins. Co. v. OMG Americas, Inc.*, 2012 WL 4856391 (D.Utah) (unpublished), the court held that the exclusion was not invoked when the Bureau of Indian Affairs asserted that a lease that it had signed only five years before was invalid because the signers lacked the authority to bind the agency. The court said the BIA's termination of the lease "was based on procedural defects and not an exercise of police power."

[79] *Marriott Financial Services, Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 217 S.E.2d 551 (1975); aff'g 23 N.C. App. 377, 209 S.E.2d 423 (1974).

[80] In *Manley v. Cost Control Marketing and Managements Inc.*, the court stated: "The [trial] court ... acknowledged

The eminent domain exclusion acknowledges and excludes from coverage actions by government to take all or some of the property for a public work.[81] Such a taking cannot, of course, normally be resisted by the private owner. The policy makes it clear that the insurer is not a surety against the possibility that the government will, at some time, take the property for public use.

The current form of exclusion does not encompass a "taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge." If the insured property has already been slated for condemnation at the date of policy, the issue is whether or not a taking has occurred and, if so, whether the purchaser-insured has sufficient knowledge of the taking to be bound by it. In one case, a strip inside the insured property was shown on an acquisition map prepared before the date of policy. In a zoning petition for the insured property, the zoning board refused to include the strip in calculating the required building setback. Given these facts, the court termed the acquisition map a "lien" on the property. The policy contained an exclusion for "[z]oning restrictions or ordinances imposed by any governmental body."[82]

11.2 Created, Suffered, Assumed Or Agreed To

Exclusion 3(a) of the standard ALTA policies states that the insurer is not liable for matters that the insured has caused ("created"),[83] permitted ("suffered"), taken subject to ("assumed")[84] or to which it has consented to be bound ("agreed to"). This exclusion covers both unrecorded rights and instruments and matters appearing in the public records.[84.1] The exclusion has been found to be

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that a wetland designation is a governmental regulation restricting the use and enjoyment of the land and regulating the character, dimension and location of improvements erected on the land, a matter not disputed by Appellant. ... Appellant's allegation regarding [the title agent's] knowledge or ability to learn of the wetlands designation is irrelevant in view of the policy language." 583 A.2d 442, 444 (Sup.Ct.Pa. 1990).

[81] In *Bourne v. Stewart Title Guar. Co.*, 2011 WL 6101016 (D.N.H.), 2011 DNH 204 (unpublished), the insured sued the insurer in part because the town took actions to assert title to, condemn and lay out a public road on the insured's property after the date of policy. The court said that those actions fell under the condemnation and post-policy exclusions.

[82] *Ascot Homes, Inc. v. Lawyers Mortgage & Title Co.*, 37 Misc.2d 41, 237 N.Y.S.2d 179 (1962).

[83] See *Interpreting the Term "Created" in Policy Exclusion 3(a)*, by Leopold Z. Sher and Kerry J. Miller, in the 1998 edition of the Real Estate Law and Practice Course Handbook Series by Practicing Law Institute, PLI Order No. N0-001G.

[84] In *American Sav. & Loan v. Lawyers Title Ins. Corp.*, the words "assume" and "agreed" were illustrated as follows: "'Assume', under the definition requires knowledge of the specific title defect assumed ... And 'agreed to' carries connotations of 'contracted', requiring knowledge by the insured of the extent and amount of the claim against the insured's title." 793 F.2d at 784 [quoted with approval in *Inavest Enterprises v. TRW Title Ins. of New York, Inc.*, 189 A.D. 2d 111, 595 N.Y.S. 2d 837 (3d Dept. 1993)].

[84.1] In *JBGR LLC v. Chicago Title Ins. Co.*, 38 Misc.3d 1213(A), 966 N.Y.S.2d 346 (Table), 2013 WL 221480 (N.Y.Sup.), 2013 N.Y. Slip Op. 50089(U) (unpublished), the court rejected the insured's argument that Exclusions 3(a) and 3(b) should be spliced together, causing Exclusion 3(a) to apply only to matters that are not recorded. The court said: "Exclusion 3(a), unlike exclusion 3(b), does not contain any language indicating that it does not apply if the defect, lien, or encumbrance is recorded in public records."

11.5 Post-Policy Matters

FORM 42, Appendix A
Defect arising after Date of Policy--1992 Policy

FORM 41, Appendix A
Defect arising after Date of Policy--Residential Policy

FORM 74, Appendix A
Easement abandonment--post-policy matter

The coverages in the title insurance policy are limited to matters which exist on the date of policy. Title defects arising after that date are not covered by the policy.[345] This limitation is stated in the preamble to the Covered Risks in the 2006 ALTA policies:

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation (the "Company") insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, **after Date of Policy**, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

(emphasis added) The coverage limitation is confirmed by an exclusion in the 2006 and prior ALTA policies:

> The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:
>
> 3. Defects, liens, encumbrances, adverse claims or other matters:
> * * * *
> (d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 9 and 10)... .[346]

In addition, the 1992 ALTA Loan policy states that the insurer has no liability for advances

[345] The ALTA Homeowner's Policy provides certain assurances as to post-policy matters, as discussed in §9.14.2.

[346] The referenced Covered Risks 9 and 10 are the limited creditors' rights and gap coverages. The Residential policy exclusion reads as follows: "In addition to the Exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees, and expenses resulting from: ... 3. Title Risks: ... that first affect your title after the Policy Date -- this does not limit the labor and material lien coverage in Item 8 of Covered Title Risks... ." The Residential policy exclusion is thus identical in substance to the 1992 policy, except that it does not limit the construction lien coverage of Covered Title Risk 8.

made after the date of policy, including non-obligatory construction loan advances.[347] There is no corresponding provision in the 2006 ALTA Loan policy, but that policy does retain the post-policy exclusion.

The post-policy exclusion is at the heart of the nature of title insurance coverage. The policy remains in effect as long as the insured owns the property. The insured pays no renewal premium. However, anything that happens to affect title after the insured obtains his or her interest in the property is not covered by the policy, as confirmed by Exclusion 3(d).[348] Almost all such matters

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[347] Conditions & Stipulations 8(d) of the 1992 ALTA loan policy states that the policy does not include any liability for advances made under the insured mortgage after date of policy, except those made to protect the mortgage lien:

"The Company shall not be liable for: (i) any indebtedness created subsequent to Date of Policy except for advances made to protect the lien of the insured mortgage and secured thereby and reasonable amounts expended to prevent deterioration of improvements; or (ii) construction loan advances made subsequent to Date of Policy, except construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the land which at Date of Policy were secured by the insured mortgage and which the insured was and continued to be obligated to advance at and after Date of Policy."

On construction loans, "pending disbursement" endorsements are issued with each draw in certain areas of the country. Such endorsements extend the Date of Policy as to construction lien coverage through the date of each draw. See §10.2.1 regarding the pending disbursement endorsement. Other endorsements are also sometimes used to effectively eliminate this exclusion as to construction disbursements made after the date of policy.

[348] In *Dickins v. Stiles*, 81 Wash.App. 670, 916 P.2d 435 (1996), the insured property was subject to a disclosed restrictive covenant limiting the use of the property to "agricultural and residential purposes." The insured was sued by neighbors for making commercial use of the property. The insurer was found to have no duty either to defend or indemnify, because the policy had excepted the instrument. Further, the insured was sued for overburdening the easements benefitting the land, as a result of the commercial use. The overburdening claim was found excluded by Exclusions 3(a) and/or 3(d), since it concerned use of the property by the insured after purchase. In *Sabatino v. First American Title Ins. Co.*, 308 Ill.App.3d 819, 721 N.E.2d 693, 242 Ill.Dec. 414 (Ill.App. 2 Dist. 1999), the title insurer was found not to be obligated to defend insureds' alleged "deliberate, wrongful and intentional" disruption of an easement by necessity over the insured's land. The court held that the lawsuit concerned the insured's interference with the claimed easement, not the title to the land, and that all of the tortious conduct occurred after the date of policy. Also, in *Bourne v. Stewart Title Guar. Co.*, 2011 WL 6101016 (D.N.H.), 2011 DNH 204 (unpublished), a municipality's actions to condemn and lay out a public road on the insured's property were all found to have occurred after the date of policy, and thus were excluded. *Herr v. Forghani*, 2011 WL 1833829 (Wash.App. Div. 1) (unpublished) held that the insurer had no duty to prosecute a lawsuit or pay a loss due to the insured's claim that his neighbors overburdened the access easement that ran across the insured's land, because the use was post-policy and the easement was excepted. In *City of East Providence v. First American Title Ins. Co.*, 2011 WL 5527604 (D.R.I.) (unpublished), adopting findings of 2011 WL 5521246 (D.R.I.) (unpublished), the title insurer was not required to defend the city against the business's lawsuit for breach of a contract the city signed to develop the property, which the business owner claimed gave it beneficial ownership of the property. The court said the lawsuit was about a contract, not title; concerned post-policy breaches; and that the city created or agreed to the contracts. In *Rutst v. Connecticut Attorneys Title Ins. Co.*, 2012 WL 3854407 (Conn.Super.) (unpublished), the court found that the policy did not protect against the fact that a mortgage on the insured parcel was not paid off because the lawyers entrusted with the money stole it and recorded a forged mortgage release, since the lender delivered the money after the policy date, invoking the post-policy exclusion. In *Witkowski v. Richard W. Endlar Ins. Agency, Inc.*, 81 Mass.App.Ct. 785, 968 N.E.2d 922 (Mass.App.Ct. 2012), when the insured condominium unit was destroyed by a flood after the policy date, and the building code prevented the insured from rebuilding the unit, neither the flood nor the insured's inability to rebuild triggered policy coverage. In *Property Hackers, LLC v. Stewart Title Ins. Co.*, 96 A.D.3d 818, 949 N.Y.S.2d 70, 2012 N.Y. Slip Op. 04728 (N.Y.A.D. 2 Dept. 2012), app.den. 20 N.Y.3d 853, 982 N.E.2d 92, 2012 N.Y. Slip Op. 93255 (Table) (N.Y. Dec 11, 2012) (unpublished), the court held that the policy did not protect against the post-policy condemnation of the insured parcel. In *Murphy v. Ticor Title Ins. Co.*, 729 S.E.2d 21,

would be caused by the insured or due to the fact that the insured is the owner, and would also thus invoke Exclusion 3(a).

> Nothing else appearing, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title which are in existence at the time the insured takes his title. [citations omitted] "It is not prospective in its operation and has no relation to liens or requirements arising thereafter." Mayers v. Van Schaick, supra. "The risks of title insurance end where the risks of other kinds begin. Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it."[349]

The only sense in which the policy extends into the future is that the notice of a title defect is ordinarily received after the date of policy. The exclusion has been found to be unambiguous.[350]

The exclusion is frequently applicable in tax claims. Generally, only those taxes assessed as of the date of policy are covered.[350.1] Tax claims are fully analyzed in §9.4. A forged release of the

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12 FCDR 1657 (Ga.App. 2012), the court ruled that a neighbor's erection of a locked date and other obstructions 20 years after the policy date, which blocked the use of the insured access easement, was a post-policy event and thus excluded from coverage. In *Cavender Enterprise Leasing Family, LLC v. First States Investors 4200, LLC*, 2013 WL 495650 (W.D.La.) (unpublished), a right of first refusal granted before the policy date was excluded because the instrument evidencing the right was recorded after the policy date, and the policy contained an exception for "[r]ights or claims of parties in possession not shown by the public records." The court said the combination of the exclusion and the exception barred coverage. Conversely, in *Nastasi v. County of Suffolk*, 106 A.D.3d 1064, 966 N.Y.S.2d 172 (N.Y.A.D. 2 Dept. 2013), which concerned a conveyance of some of the insured parcel signed years before the policy date but not recorded until a few months afterward, the court held that the conveyance was not excluded as a matter "attaching or created" after the date of the policy. The distinction between *Cavender* and *Nastasi* lay in the fact that, in the former case, the policy also contained the parties in possession exception. In *Back Creek Partners, LLC v. First American Title Ins. Co.*, 213 Md.App. 703, 75 A.3d 394 (Md.App. 2013), the insurer was found not to be obligated to defend a lawsuit brought against insureds after they sold the property, about matters that occurred after the policy date. In *Moreno v. Wells Fargo Bank, N.A.*, 2013 WL 1395629 (Minn.App.) (unpublished), the borrowers' claim that their lender was not supposed to get a lien on all of their four parcels, in a 2004 refinance, could not invoke any coverage under their 2003 owner's policy, and any statement by the title agent about policy coverage did not alter the plain language of the post-policy exclusion.

[349] *National Mortgage Corp. v. American Title Ins. Co.*, 299 N.C. 369, 261 S.E. 2d 844 (1980); quoted with approval in *Firstland Village Associates v. Lawyers Title Ins. Corp.*, 284 S.E.2d 582 (S.C. 1981). In *Firstland*, a typical situation, the claim involved an amendment to restrictions which was recorded months after the policy date. The court found no duty to indemnify, clear title or issue later policies free of a reference to the amendment, stating "Title insurance is unique in that it is retrospective, not prospective." Similarly, in *Ruisi v. Connecticut Attorneys Title Ins. Co.*, 2012 WL 3854407 (Conn.Super.) (unpublished), the court said "[t]itle policy is unique in that it is retrospective, not prospective. It is designed to protect against past events, not possible future encumbrances."

[350] *Chicago Title Ins. Co. v. Citizens and Southern Nat'l Bank*, 821 F.Supp. 1492, 1495 (N.D.Ga. 1993).

[350.1] See, for example, *Yurimindi v. LandAmerica Financial Group, Inc.*, 2012 WL 8700440 (Pa.Cmwlth.) (unpublished), which held that the policy did not protect against taxes that became liens after the policy date, especially when the tax liens were likely invalid due to their late filing.

insured deed of trust is necessarily post-policy, and thus excluded. This conclusion is not affected by the fact that the insurer recorded the forged release.[351]

A claim that the insured mortgage was given as a preference is excluded, when the borrower files bankruptcy after the date of policy.[352] The claimed preference was a condition which:

> arose only because [the borrower] chose to file bankruptcy and chose to file within the critical time period. Both of these events, which might give rise to an avoidance, transpired after the title policy issued, and, therefore, the loss of the secured position would be excluded from the coverage of the policy because it was occasioned by subsequent events.[353]

In finding the matter excluded, therefore, the court determined that the source of loss was the filing of the bankruptcy within the preference period. In a second decision, in which the facts were not well developed, an adversary proceeding apparently based on preference was found not to create a duty to defend or indemnify, because the foreclosure and adversary proceeding were both post-policy matters.[354] Preference claims have also been found excluded under Exclusions 3(a) (see §11.2.6) and 3(b) (see §11.3.4). See §11.5 for a complete discussion of Exclusion 3(d), concerning post-policy matters.

When a lien or encumbrance has been recorded before the policy date but the action to enforce the interest is brought after policy date, the post-policy exclusion does not apply, because the covered matter existed when the policy was issued. Thus, the policy was found to protect against a mortgage recorded before the policy date despite the fact that the lis pendens on foreclosure of that lien was post-policy.[355]

The policy does not protect against a title defect arising after the policy date, even if the effect of such a defect is to invalidate the insured's interest as of the date of the policy. For example, a policy assured the insured lender that it had a first deed of trust on a lessee's interest, to which the fee owner's interest was subordinate. This assurance was given based on a subordination agreement from the lessor. The lessor's subordination was conditioned on the use of the loan funds for construction of a building on the property. After the policy date, the lender gave the borrower the loan funds without requiring that a building be built, and the lessor had the subordination agreement declared null. The insured sued the insurer, which defended on the post-policy exclusion. The court agreed with the insurer that the claim was not covered:

> Here, the policy of title insurance issued by defendant insured the lien of plaintiff's

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[351] *Upson v. Goodland State Bank & Tr. Co.*, 797 P. 2d 845 (Colo.App. 1990).

[352] *Chicago Title Ins. Co. v. Citizens & Southern Nat'l Bank*, 821 F.Supp. 1492 (N.D. Ga. 1993).

[353] Id. at 1495.

[354] *Capital Bank v. Commonwealth Land Title Ins. Co.*, 861 S.W.2d 84 (Tex.App.–Houston [1st Dist.] 1993).

[355] *U.S. Bank, N.A. v. Stewart Title Ins. Co.*, 37 A.D.3d 822, 832 N.Y.S.2d 223 (N.Y.A.D. 2 Dept. 2007).

> deed of trust on the Abernathy property "all as of the 18th day of July, 1969, at 12:26 p.m. the effective date of this policy." This affirmative statement of coverage is also restated in the negative as an exclusion from coverage in subparagraph 3(d) of the policy, which specifically excludes from coverage defects, liens other than certain statutory liens for labors and materials, encumbrances, adverse claims against the title as insured or other matters "attaching or created subsequent to the date hereof.[356]

Similarly, sellers brought an action to reclaim the insured property for lack of consideration, and a consent judgment was entered after the policy date by which the insured would either give a mortgage to the sellers or lose the property. The insured did not grant the mortgage, and was thus divested of title. This divestiture was a post-policy matter and thus excluded.[357] Also, when an easement was recorded before the policy date, but the easement holder first sought to reform it to encumber the insured property after the date of policy, the post-policy exclusion was found to apply.[358] When a neighbor sought to subdivide land contrary to the terms of a recorded declaration of restrictions 12 years after the policy was issued to the insured, the matter was excluded as being a post-policy act, and the insurer had no obligation to prosecute the insured's lawsuit to enforce the restriction.[359]

The post-policy exclusion applies to matters which occur on the same date but at a later hour than is stated on the policy. In *Mark Twain Kansas City Bank v. Lawyers Title Ins. Corp.*,[360] the policy was timed, at the lender's request, as of the moment of recording. The insured lender disbursed its funds less than an hour later, but not to the titleholder. Later, the mortgage was found invalid for lack of consideration to the owner. The insurer's summary judgment motion based on the post-policy exclusion was granted, the court stating:

> the policy clearly excludes coverage for defects attached or created subsequent to "Date of Policy" and unambiguously defines "Date of Policy" as embracing a specific date and time, that is, July 11, 1986 at 11:30. Although the faulty disbursement took place only fifty-one minutes later, the defect was created after the "Date of Policy" and hence is excluded from coverage.[361]

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[356] *National Mortgage Corp. v. American Title Ins. Co.*, 299 N.C. 369, 261 S.E. 2d 844 (1980).

[357] *Kramer v. Chicago Title & Trust Co.*, 69 Ill.App. 3d 1015, 387 N.E.2d 1105 (1979).

[358] *Campbell v. Ticor Title Ins. Co.*, 166 Wash.2d 466, 209 P.3d 859 (Wash. 2009).

[359] *Heyse v. Case*, 114 Conn.App. 640, 971 A.2d 699 (Conn.App. 2009), cert.den. 293 Conn. 905, 976 A.2d 705 (Conn. July 23, 2009).

[360] 807 F.Supp. 84 (E.D.Mo. 1992). Similarly, in *Ruisi v. Connecticut Attorneys Title Ins. Co.*, 2012 WL 3854407 (Conn.Super.) (unpublished), the court found that the policy did not protect against the fact that a mortgage on the insured parcel was not paid off due to the fact that the lawyers entrusted with the money stole it and recorded a forged mortgage release, because the lender delivered the money after the policy date, and thus the post-policy exclusion applied.

[361] Id. at 87.

National Mortgage and *Mark Twain* were relied on in *Rosen v. Nations Title Ins. Co.*,[362] in which the priority of the insured deeds of trust were challenged on the grounds that the lender had disbursed the loan funds, after the date of policy, contrary to the bankruptcy court order which gave the lender its priority, thus working a subordination of the lender's interest.

A Florida court also relied in part on *Mark Twain* in applying the post-policy exclusion in *Lawyers Title Ins. Co., Inc. v. Novastar Mortg., Inc.*[363] In that case, after the policy date, the insured lender rejected the loan because it detected that some of the borrower's paperwork was phony. The insured told the loan broker to sell the loan to someone else, which it did, cancelling the assignment of note and mortgage. However, the broker did not repay the insured. The lender was denied foreclosure, and the court also rejected its policy claim.[364]

The exclusion also applies to adverse rights that ripen after the policy date but were inchoate or latent on the policy date, such as an equitable lien, easement by prescription, adverse possession, or constructive trust.[365] Similarly, the exclusion negates coverage as to the insured's rights that were enforceable when the policy was issued but that are cut off or expire after the date of policy.[366] However, the exclusion typically does not apply to rights implied by law that existed on the date of policy, but which are not adjudicated until after the policy date.[367] Thus, it is important to identify whether or not, under state law, the rights at issue existed on the policy date without any requirement

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[362] 56 Cal.App.4th 1489, 66 Cal.Rptr.2d 714, 97 Cal. Daily Op.Serv. 6444 (2 Dist. 1997).

[363] 862 So.2d 793, 28 Fla. L. Weekly D2746 (Fla.App. 4 Dist. 2003), reh.den. (Jan. 28, 2004).

[364] The court said: "Novastar's failure to take any action to enforce its rights on the note, whether at the time the closing package was received without the note, at Netwide's refusal to forward the note, at the time it learned that the loan had been resold, or at any time thereafter, made the machinations of Netwide possible. It is unreasonable for an insured to expect that a title insurance policy would insure against a wrongful act such as Netwide failing to repay Novastar when it resold the loan. All of the acts that prevented Novastar from enforcing its mortgage lien occurred subsequent to the issuance of the title insurance policy and arose as a direct result of Novastar's actions or inactions. As such, Novastar's loss was either not covered by, or was excluded by the policy provisions."

[365] See *Carstensen v. Chrisland Corp.*, 442 S.E.2d 660 (Va. 1994), holding that an easement by necessity was excluded because it was not established until after the date of policy.

[366] In *Community Credit Union v. AmeriTitle & Abstract, Inc.*, 344 Wis.2d 519, 822 N.W.2d 737 (Table), 2012 WL 3930615 (Wis.App.) (unpublished), the court held that the expiration of an insured five-year access easement after the policy date did not invoke the access coverage, and the post-policy exclusion applied, because on the date of policy there was a right of access to the property.

[367] In *Blaser v. DeVries*, 2011 WL 5965762 (Mich.App.) (unpublished), the court held that a declaration of restrictions that was not recorded against the property but which other lot owners sought to impose under the doctrine of common plan of restriction attached to the property, if at all, on the date of the first deed that included the restrictions. The court relied on Michigan case law that has established that rule. The court found no coverage under this policy, not because of the post-policy exclusion bur rather due to a Schedule B exception for restrictions on "the use of the premises not appearing in the chain of title." The decision highlights the need to determine under local law when a particular right or interest is deemed to attach to property as of the policy date.

that they be adjudicated. For example, *Carstensen v. Chrisland Corp.*[368] involved a claim of an easement of necessity. The insureds contended that the exclusion did not apply, since an easement by necessity "arises at the time the dominant tract is severed from the subservient tract." The court disagreed:

> While an easement by necessity legally arises at the time the servient estate is severed from the dominant estate, the easement may remain inchoate until established through judicial order or otherwise. An easement often is not judicially established or sought to be established for many years following the initial severance. [citations omitted] If, as the Neighbors contend, this exception in the title policy is not applicable to easements by necessity established after the policy date, a title insurance company, before issuing a policy of insurance, would be required to research the title records for all contiguous properties to determine whether a latent easement by necessity existed in order to protect itself against exposure for a subsequently established easement by necessity. This is an unreasonable burden to place on the title insurance company.[369]

However, another Virginia court distinguished *Carstensen* and found that the exclusion did not apply to an easement by necessity, because the claim was made on an ALTA Residential policy, which excludes title risks "that first *affect* title after the Policy Date" rather than those "attaching or created subsequent to Date of Policy."[370]

Adverse matters created before the policy date but not recorded until afterward create a tension between the Covered Risks and the post-policy exclusion. One example is the lien which takes priority over the insured mortgage lien, even though it is recorded after the policy date. In *Citibank v. Commonwealth Land Title Ins. Co.*,[371] the policy was dated as of the date on which the insured mortgage loan closed. The mortgage was recorded three weeks after the policy date. Another mortgage was signed two weeks before the policy date, and recorded a week after the policy date but two weeks before the insured mortgage was recorded. The intervening mortgage was found to have priority over the insured mortgage based on recording dates. The insurer argued that it was not recorded on the policy date, and therefore it was not protected against. The court held the post-policy

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[368] 442 S.E.2d 660 (Va. 1994).

[369] Id. at 665.

[370] *Reams v. Southern Title Ins. Corp.*, 43 Va. Cir. 494, 1997 WL 33619877 (Va.Cir. Ct. 1997) (unpublished). The court said: "[w]hereas the *Carstensen* outcome turned on the words 'attaching or created' in order to buttress the 'inchoate' versus 'judicially established' status of an easement by necessity, the language in the instant case leads to a contrary outcome. The easement by necessity burdening the Reams' property 'affected' the tract prior to the 1986 Policy Date, even though court recognition did not occur until 1994. Such an easement arose by operation of law at the time the Reams' parcel was severed from the dominant tract. In other words, this encumbrance existed prior to the plaintiffs' acquisition of the Powhatan tract and purchase of the title insurance policy from the defendant. At the time the policy was issued it affected title."

[371] 645 N.Y.S.2d 826 (A.D. 2 Dept. 1996).

exclusion inapplicable, however, because under state law the intervening lien arose when executed, which was prior to policy date.

The policy protects against covered matters discovered after the policy date but attaching before that date. Thus, the post-policy exclusion does not apply as to matters existing on the date of policy but discovered before the insured mortgage was assigned.[372]

Another form of inchoate right is the construction lien claim. In most states, construction lien claims relate back from the date of filing or recording of the lien to an earlier date tied to the first work on the project or the construction contract itself. See Chapter 10 regarding construction liens generally. The standard exception for construction liens removes coverage for lien claims based on work done prior to the Policy Date.[373]

11.6 Lack Of Adequate Consideration

FORM 44, Appendix A
Lack of adequate consideration

The policy does not protect an insured against a claim that its title is defective because the insured failed to pay adequate consideration for the property.[374] One commentator has explained the purpose of the exclusion as follows:

> This exclusion fits in the category of those that prevent coverage of matters that the insurer cannot discover via a title search and for which the insured bears some responsibility. It prevents coverage where an insured owner or lender is deemed not to have been a purchaser for value. Such an insured will not be protected by state recording laws against claims of subsequent bona fide purchasers. The effect of the exclusion is that insureds who are not protected by state recording laws also will not be protected by their title insurance policies.
>
> Thus, under state recording statutes that give priority to subsequent bona fide purchasers for value, insured donees and devisees of real property may not only lose their priority, but also may not be indemnified for their losses because of this exclusion in their title insurance policies.[375]

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[372] *Stewart Title Guar. Co. v. National Enterprises, Inc.*, 133 F.3d 929 (Table), 1997 WL 800294, *1 (9th Cir. Cal.) (unpublished).

[373] *Clements v. Mississippi Valley Title Ins. Co.*, 612 So. 2d 1172 (Ala. 1992).

[374] Exclusion 3(e) of the 2006 ALTA Owner's policy negates coverage for defects "resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Title." Exclusion 3(e) of the 2006 ALTA Loan policy excludes loss "resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Insured Mortgage."

[375] Palomar, *Title Insurance Law*, §6.08, p. 6-69.

12 Exceptions

Every policy contains exceptions to coverage. Exclusions and exceptions are similar in that each class of items limits the coverage of the policy. However, exclusions refer to subjects beyond the ambit of the policy, while exceptions are matters generally within the scope of the insuring provisions. Exceptions appear on Schedule B of the policy.

There are two general classes of exceptions. All policies also contain exceptions specific to the liens and encumbrances on the insured property. These "special" exceptions are discussed at §12.7. In most jurisdictions, the policy also contains exceptions for parties in possession, survey matters, matters which would be disclosed by inspection, easements not shown by the public records, and taxes. This chapter analyzes these exceptions, known in some locales as "general" or "ALTA" exceptions. In this treatise, the term "standard" is used for this class of exceptions.[1] Removal of the standard exceptions is known in many jurisdictions as "extended coverage."

12.1 Standard Exceptions--Nature And Purpose

FORM 75, Appendix A
Off record risks excepted by standard exceptions

The number and wording of the standard exceptions varies somewhat from state to state and company to company. Some consistency is lent by the fact that ALTA has promulgated "suggested" wording for the standard exceptions. This treatise will refer to the ALTA-promulgated language except as noted.

The primary purpose of the standard exceptions is to remove from coverage various matters which affect title but which cannot be found in the public records.[2] This rationale has been endorsed repeatedly by the courts as being fair and enforceable. For example:

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[1] This treatise refers to all other Schedule B exceptions to title as "special" exceptions.

[2] Palomar, *Title Insurance Law*, §7.02[3], 7-12.

12.3.16 Effect Of Removal Of Survey Exception

By removing the survey exception, the insurer indemnifies against most matters related to boundary lines, encroachments and overlaps. The ALTA Residential and Homeowner's policies provide certain affirmative assurances. See §§9.14.1 and 9.14.2. The CLTA 126.1 endorsement offers the insured certain assurances which are similar to those found in the Residential policy.

The following types of survey errors or matters have specifically been held compensable when the survey exception has been removed, or affirmative assurance given, unless another exception or exclusion also applies:

1. The failure to show an encroachment of the insured's sidewalk onto the neighbor's property.[183]

2. The failure to report to the insured the existence of encroachments onto the insured property of neighboring front steps and other building improvements, as disclosed by a survey.[184]

3. The incorrect placement of a side lot line, and damages for subsequent judgment prohibiting the insured from using cellar door because it opened onto the neighbor's property.[185]

4. The incorrect placement of a power line easement 50 feet from house as opposed to the true measurement of five feet from the house.[186]

5. The incorrect labeling of an adjacent thoroughfare as a public street. The insureds built their house facing the "street." Later, they learned that the "street" was really a lot which was then built on. The insured's house faced the neighbor's new house rather than the true public street.[187]

6. The fact that the "plat" which the policy stated was "duly recorded" was a mere drawing with no distances and calls, description, or anything else necessary to establish where the insured property was located. The insurer was made to pay the

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did not negate survey exception as to issue of property's area and dimensions).

[183] *McMinn v. Damurjian*, 105 N.J.Super. 132, 251 A.2d 310 (Ch. 1969).

[184] *Glyn v. Title Guarantee & Trust Co.*, 132 App.Div. 859, 117 N.Y.S. 424 (1909).

[185] Id.

[186] *Enright v. Lubow*, 202 N.J.Super. 58, 493 A.2d 1288 (1985); app. 215 N.J. Super. 306, 521 A.2d 1300 (1987).

[187] *MacBean v. St. Paul Title Ins. Corp.*, 169 N.J.Super. 502, 405 A.2d 405 (App.Div. 1979).

cost of surveying the property.[188]

7. An incorrect statement of the amount of acreage.[189]

8. Shortage in dimensions, causing "loss" of land and damages because the lot would support fewer apartments than would a lot of the size shown on the survey.[190]

9. The encroachment of the insured's barn and fence onto the neighbor's property.[191]

10. The failure to make specific reference to an easement of record, physical evidence of which was shown on the survey. The policy exception for "dirt driveway crosses adjoining lands" did not give the insured adequate notice of the nature of the interest.[192]

Thus, the removal of the survey exception extends considerable coverage to the owner or lender as to off-record matters which are otherwise beyond the scope of the policy's protection.

However, the removal of the exception is not itself a coverage.[193] The removal of the exception is not an assurance by the insurer of the accuracy of any matter depicted on the survey which is delivered to the insurer to induce it to remove the exception.[194]

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[188] *Miller v. Lawyers Title Ins. Corp.*, 112 F.Supp. 221 (E.D. Va. 1953).

[189] *Hutsell v. U.S. Life Title Ins. Co.*, 157 Ga. App. 845, 278 S.E.2d 730 (1981).

[190] *Sunset Holding Corp. v. Home Title Ins. Co.*, 172 Misc. 759, 16 N.Y.S.2d 273 (Sup. Ct. 1939).

[191] *Rackouski v. Dobson*, 634 N.E.2d 1229 (Ill.App. 3 Dist. 1994). The court held, at 1231:
"This exception squarely addresses the dispute in the present case regarding the barn building which allegedly encroaches on plaintiff's property. However, "Schedule B" of the policy states that "[t]he standard exceptions referred to on the inside front cover are deleted." Thus, appellee expressly waived the exception to coverage that specifically deals with the allegations asserted in plaintiff's complaint. ... [W]e believe that the logical conclusion is that the policy, as executed, does cover such "encroachments, overlaps * * * which would be disclosed by an accurate survey * * *."

[192] *Amidano v. Donnelly*, 615 A.2d 654 (N.J. Super. 1992). The court may have come to the same conclusion that the insurer was liable for failing to report the recorded easement if the survey exception had not been removed. The court stated: "The careful description of easements which Meridian excepted from coverage by reference to the recorded instruments creating them, justifies a reasonable policyholder conclusion that title was insured against easements other than those specific easements, although subject to the exceptions for encumbrances in other named categories. See Caravan Products Co., Inc. v. Ritchie, 55 N.J. 71, 74-75 (1969). The Donnellys argue that had Meridian intended to except the recorded easement granted by the Ort deed, it should have listed it as 'as contained in Deed Book 237, page 340.' We agree." Id. at 658.

[193] *First American Title Ins. Co. v. Dahlmann*, 291 Wis.2d 156, 715 N.W.2d 609, 2006 WI 65 (Wis. 2006); *Community Credit Union v. AmeriTitle & Abstract, Inc.*, 344 Wis.2d 519, 822 N.W.2d 737 (Table), 2012 WL 3930615 (Wis.App.) (unpublished).

[194] *Shea Homes, LLC v. Old Republic Nat'l Title Ins. Co.*, 2007 WL 3334210 (W.D.N.C.) (unpublished) (policy did

12.7 Special Exceptions

In addition to the standard exceptions, Schedule B contains "special" exceptions (more appropriately termed exclusions that are specific to the parcel whose title is insured). These exceptions detail matters affecting the particular parcel insured as to which the policy provides no coverage.[235.1] There is a tremendous variety in the types of special exceptions which may appear in a policy. This chapter discusses the principles governing how these exceptions are construed.

Section 12.7.1 discusses what an exception must state to give adequate disclosure of the effect of the instrument. The claimed duty to highlight specific terms within an instrument is discussed below at §12.7.2. Section 12.7.4 analyzes when a general or broad exception gives notice of a specific recorded item. Section 12.7.5 considers those cases when no direct exception is made for a defect. Those states which impose a separate duty to perform an adequate search of the public records thus create a stronger duty to disclose instruments as exceptions. See §16.1 for a discussion of that subject. Finally, the insurer has no duty to remove special exceptions, or give legal advice to a proposed insured as to how exceptions can be removed, as discussed in §12.7.6.

[235.1] See *First American Title Ins. Co. v. Hegedus*, 2013 WL 4077033 (D.Del.) (unpublished), which held that the insurer was not responsible for paying a loss due to use restrictions that were excepted in Schedule B. In *Palmer v. Chicago Title Ins. Co.*, ___ F.Supp.2d ___, 2013 WL 3049343 (S.D.Tex.) (permanent citation not yet available), the insureds admitted that the insurer informed them of a new exception for a mineral instrument at closing, but they did not realize the effect of that instrument until years later. The court said that "the party claiming fraud has a duty to use reasonable diligence in protecting his own affairs, including to read documents that the party signs." It said that, because "the closing documents disclosed the mineral liens," there had been "no actionable misrepresentation... ." Also, although it would seem self-evident that the policy does not assure affirmative rights in an excepted encumbrance, the court so found in *Heyse v. Case*, 114 Conn.App. 640, 971 A.2d 699 (Conn.App. 2009), cert.den. 293 Conn. 905, 976 A.2d 705 (Conn. Jul 23, 2009). In that case, an insured demanded that the insurer prosecute a lawsuit to enforce the claimed violation of restrictions by her neighbor. The court ruled that the insurer had no such duty, in large part based on the fact that the policy excepted the restrictions.

12.7.1 Adequacy Of Notice Given By Exception

FORM 56, Appendix A
Exception gives adequate notice of defect

FORM 80, Appendix A
Exception conspicuous, plain and clear

Matters that are recited as exceptions on Schedule B of the policy are excepted (excluded) from coverage.[235.2] The insurer is not liable if it fails to disclose matters which do not, in its judgment, constitute liens or encumbrances on title.[236]

Insurers expend enormous energy crafting exceptions so that they give notice of and limit coverage as to identified risks. Sophisticated insureds also often spend great amounts of time and energy negotiating and drafting the limitations to coverage which they will accept. It is this effort to define the insurer's limitation of risk which is tested when a claimed loss occurs. The test of an exception is whether or not it gives effective notice of the defect or lien in existence.[237]

An exception that provides a plain and understandable recitation of the matter is enforceable. An exception is adequate when it is not capable of two or more constructions, and is not buried in

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[235.2] *Heyse v. Case*, 114 Conn.App. 640, 971 A.2d 699 (Conn.App. 2009), cert.den. 293 Conn. 905, 976 A.2d 705 (Conn. Jul 23, 2009) (insurer had no duty to prosecute lawsuit to enforce violation of restrictions excepted on Schedule B); *De Maio v. Commonwealth Land Title Ins. Co.*, 2008 WL 4372997 (D.Md. 2008) (unpublished) (insurer not liable to insured when utility company installed large transformer on property pursuant to excepted utility easement); *Herr v. Forghani*, 2011 WL 1833829 (Wash.App. Div. 1) (unpublished) (exception for covenants and easements as shown on plat negated coverage for claimed overburdening of an easement on the insured property, despite the insured's claim that his extended-coverage policy "did away with" the Schedule B exceptions).

[236] *Luboff v. Security Title & Guaranty Co.*, 46 Misc. 2d 599, 260 N.Y.S.2d 279 (Sup.Ct. 1965) (no duty to show developer agreement which was not a defect, lien or encumbrance); *Sala v. Security Title Ins. & Guarantee Co.*, 27 Cal.App.2d 693, 81 P.2d 578 (1938); (no duty when lis pendens not shown, then removed as cloud on title); *Peterson v. Title & Trust Co. of Fla.*, 431 So.2d 311 (Fla.App. 1983) (no duty to show or resolve applicability of restrictions not shown); *Laurence v. Kruckmeyer*, 124 Ariz. 488, 605 P.2d 466 (App. 1979) (no duty to show easement as affecting parcels which it did not affect); *Village Carver Phase I, LLC v. Fidelity Nat'l Title Ins. Co.*, ___ So.3d ___, 2013 WL 5429585 (Fla.App. 3 Dist.), 38 Fla. L. Weekly D2078 (permanent citation not yet available) (no duty to except rights barred by marketable title act). See also §9.5 regarding the insuring provision as to defect, liens and encumbrances, and §9.4 regarding the lack of duty to report that property lies in a special taxing district.

[237] "It is generally acknowledged that a title insurer's duty of disclosure regarding an instrument affecting title is satisfied by a statement of the nature of the document, recording information, etc. The underwriter is not required to set forth its contents [citation omitted], nor to provide an explanation as to its legal effect or implications [citation omitted]. An exception to coverage that is 'plain and understandable' in its statement of the subject will be effective [citation omitted]." Robert E. Ellis, *Title Insurance Law Handbook*, p. 270. See also *Stewart Title Ins. Co. v. Credit Suisse*, 2013 WL 4710264 (D.Idaho) (unpublished) (vendor's liens were removed from coverage by exception for memorandum of agreement and option because court found that, since a seller's lien must arise from a sale contract, the excepted instruments were "indispensable to the creation of the statutory liens; no liens would have arisen without them").

affirmative assuring provisions but is listed as an exception to coverage.[238] Stated another way,

> It is well settled that an "'insurer may exclude certain losses from coverage if it uses 'language which clearly and unmistakably communicates to the insured the specific circumstances under which the expected coverage will not be provided.'" [citations omitted] A provision excepting certain losses from coverage is therefore not automatically construed against the insurer. Rather, it is only when the insurer uses language that is ambiguous, that "doubt is resolved against the insurer."[239]

The insurer "is under no duty to advise the insured of the effect of the exclusion on coverage."[240] An exception for an "easement of the State of Missouri, by condemnation suit No. 215119 ..." put the insured on notice of the condemnation suit. The insurer was not liable for any loss caused by a restriction on access to the property created by the condemnation, although the exception did not recite that it restricted access to the property and copies of the condemnation petition and order were not delivered to the insured.[241] Further, the acceptance by the insured of a policy or endorsement without objection is an agreement by the insured to accept the limitation on policy coverage created by the exception.[242]

The title insurance commitment has been found to be a source of notice of recorded matters to a purchaser or lender. Arizona takes the view that an insured is bound by notice of public records disclosed by the insured's title insurer in the course of its examination of title.[243] An exception to the

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[238] *Fidelity Nat'l Title Ins. Co. v. National Westminster Bank, U.S.A.*, 1998 WL 31512, 134 F.3d 377 (Table) (9th Cir. Cal.) (unpublished). In *Blaser v. DeVries*, 2011 WL 5965762 (Mich.App.) (unpublished), the court ruled that an exception for restrictions on "the use of the premises not appearing in the chain of title" encompassed a building size restriction that was not recorded against the parcel but enforced under the common plan of restriction doctrine, despite the insured's argument that there is a distinction between a building restriction and a use restriction. In *Nuzzo v. Horvath*, 2011 WL 3795035 (N.J.Super.A.D.) (unpublished), an exception for "conditions and restrictions" stated in three recorded deeds was adequate to remove coverage for the obligation to maintain a dam, which was recited in the deeds, and the reasonable expectations doctrine did not obligate the insurer to abstract the instruments, which the court observed would be akin to the practice of law.

[239] *First American Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834 (Utah 1998), reh.den.

[240] Id. at 837.

[241] *Livingston v. Title Ins. Co. of Minn.*, 373 F.Supp. 1185 (E.D. Mo. 1974), aff'd, 504 F.2d 1110 (8th Cir. 1974).

[242] *Livingston v. Title Ins. Co. of Minn.*, 373 F.Supp. 1185 (E.D. Mo. 1974), aff'd, 504 F.2d 1110 (8th Cir. 1974); *Green Harbour Homeowners' Ass'n, Inc. v. Chicago Title Ins. Co.*, 74 A.D.3d 1655, 905 N.Y.S.2d 304 (A.D. 3 Dept. 2010), *app.den.* 2010 WL 4116983 (N.Y.), 2010 N.Y. Slip Op. 85507 (exception for "variations between the number and location of" units conveyed in prior deed and parcels shown on subdivision map was adequate to negate coverage for dispute over the ownership of lots mistakenly conveyed to both insured and subdivision association, and insurer's insertion of exception because of the very defect claimed by insured and its refusal to remove the exception were deemed strong evidence that policy did not insure against risk).

[243] In *Hall v. World Savings and Loan Ass'n*, 189 Ariz. 495, 943 P.2d 855 (1997), the deed by which the owner/borrower took title recited that nominal consideration had been paid for the property. A judgment creditor sought

title insurance policy gives the purchaser notice of substantive rights of others in the property, which can trigger the running of a statute of limitations on claims against others as to the adverse matter.[244] A real estate broker may have a fiduciary duty to the purchaser to review the commitment and highlight the matters it discloses.[245] However, what the insurer knows or has in its title plant, but does not disclose in the commitment, is not imputed to the insured merely because it obtains a policy from the insurer. California and other states do not allow imputation of notice of the public record from the insurer to the insured. See cases discussed at §9.12.1.

When the property is a condominium, the policy will typically except the documents by which the ownership regime was created. Disputes concerning the manner in which the condominium is operated or governed, or the interpretation of the governance documents, should be considered removed from coverage both by the exception for the declaration, bylaws and other governance documents, and by Exclusion 3(a), for matters "agreed to" by the insured.[245.1] However, when the validity of the insured's rights in the condominium are in dispute, the policy may be said to have assured that the insured's rights were validly granted or created by reciting the unit in Schedule A, and a court may strain to find the exception not broad enough to negate coverage for the issue.[245.2]

An exception for a recorded instrument is typically sufficient to remove coverage for all disputes concerning the instrument or its subject, including actions to enforce the instrument.[245.3] An

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to have the insured mortgage found junior to the judgment under a fraudulent conveyance statute, based on the notice provided by the title insurer. The court agreed "that the title company was [the lender] World's agent for purposes of the title report, and thus World is bound by whatever notice the title company had while acting within the scope of its authority." However, because it is not uncommon in Arizona for a deed to recite nominal consideration, "nothing on the face of the recorded documents alerted either the title company or World to the possibility of fraud or the need for further investigation."

[244] In *DiPietro v. City of New Rochelle*, 658 N.Y.S.2d 319, 237 A.D.2d 324, 1997 N.Y. Slip Op. 02182 (A.D. 2 Dept. 1997), for example, the insured "had knowledge of certain statements about the reverter provision from the title report and the title policy," which notice was found to create a duty to inquire further, and which started the limitations period as to claims against the seller.

[245] *Field v. Century 21 Klowden-Forness Realty*, 63 Cal.App. 4th 18, 73 Cal.Rptr.2d 784 (1998). Contrast *Field* with *Wright v. C & S Family Credit, Inc.*, 1998 WL 195954 (Tenn.App.) (unpublished), in which a lender was found not to be a fiduciary to its borrower, and therefore under no obligation to disclose to the borrower the existence of a judgment lien against the property. The borrower had failed to obtain a title policy as it purchased the land. Thus, the court reasoned further that, even if the lender were a fiduciary, it would have no duty to disclose the judgment, because the borrower's own "common observation or ordinary diligence would have furnished the information." Id. at 4.

[245.1] See, for example, *Schwartz v. Stewart Title Guar. Co.*, 1999 WL 475850 (Ohio App. 8 Dist.) (unpublished), finding no coverage as to an insured's assertion that his unit encroached on common elements.

[245.2] In *Piper v. Nitschke's Northern Resort Condominium Owner's Association, Inc.*, 322 Wis.2d 604, 777 N.W.2d 677, 2009 WI App 182 (Wis.App. 2009), the plaintiff unit owners asserted that one defendant's unit had been declared in an amendment to the condominium declaration that was invalid because it was not signed by all owners, and that the other defendants' units as built encroached onto common elements. The court resorted to a highly technical parsing of the exception for the condominium declaration, bylaws and other governance documents, concluding that the exception was not broad enough to negate coverage for the dispute.

[245.3] *Fatell v. Stewart Title Guar. Co.*, 2009 WL 3158166 (D.Colo.) (unpublished) (exception for unpatented mining

exception for a recorded restriction also removes coverage as to any violation by the insured of the restriction. In *Dalessio v. Williams*,[246] Schedule B stated "[t]his policy does not insure against loss or damage by reason of the following: ... 6. On the Plat of Crystal Shores Subdivision ... a. Plat Restrictions ... ." A garage built just prior to policy date violated the restrictions. The court rejected the argument by the insureds that the exception covered only the restrictions, not their violation:

> Reading exclusion 6(a) in light of the language preceding the list of exclusions, we note that the policy excluded coverage for loss or damage "by reason of" the plat restrictions. The damage to the Williamses occurred by reason of those restrictions. Under the plain language of the exclusion, First American was not obligated to compensate the Williamses for the damage arising from [the lawsuit about the restriction violation]. As such, it had no duty to defend the Williamses ... .[247]

Similarly, in *Dickins v. Stiles*,[248] the insured was sued for violating a restrictive covenant excepted in the policy. The court found that the insurer had no duty either to defend or indemnify, because of the exception. The court also found no duty to defend a claim that the restriction was part of a common plan of restriction. An exception for matters that depicted on a recorded survey was found to be broad enough to cover all such matters, even those that were not accurately shown on that survey.[249]

When a policy excepts one recorded instrument but not a second instrument on the same subject, but the excepted instrument refers to the unexcepted document, the exception may be

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claims reserved or excepted in patent sufficient to remove coverage for mining claim that was reserved in excepted patent, although mining claim might also be discoverable in public records); *CIA, Gary Gresko, S.A. v. Stewart Title Guar. Co.*, 2009 WL 1010964 (D.N.J.) (unpublished) (exception for any loss caused by lawsuit was sufficient to effectively nullify policy when insured's deed was later rescinded by the excepted litigation); *Yen v. Chicago Title Ins. Co.*, 2013 WL 5429458 (Cal.App. 4 Dist.) (unpublished) (exception for lease also negated coverage for dispute about lease); *A. Gugliotta Development, Inc. v. First American Title Ins. Co. of New York*, 112 A.D.3d 559, 976 N.Y.S.2d 172, 2013 N.Y. Slip Op. 08034 (N.Y.A.D. 2 Dept. 2013) (exception for trail easement also excepted rights of travelers to use trail).

[246] 111 Ohio App.3d 192, 675 N.E.2d 1299 (9 Dist. 1996), app.den. 77 Ohio St.3d 1481, 673 N.E.2d 142 (1996).

[247] 675 N.E.2d at 1301. A lone dissenting justice would have found coverage. The survey exception was removed. The offending garage was built after the survey date and not shown on it. The dissenter reasoned "[Insurer] admits that this [the removal of the survey exception] means coverage for items which a correct survey would show, provided they are not of public record. The violation of the plat restrictions does not show on any public record, so it seems to me that coverage exists." Id. at p. 4. This reasoning ignores the majority's logic as to the very purpose of the exception for the restrictions, and would absolve a property owner of any duty to examine and understand those recorded encumbrances that restrict the use of the property.

[248] 81 Wash.App. 670, 916 P.2d 435 (1996).

[249] *Shea Homes, LLC v. Old Republic Nat'l Title Ins.Co.*, 2007 WL 3334210 (W.D.N.C.) (unpublished) (all tree stump burial pits excepted from coverage, although exception referred only to those depicted on survey and insured argued that the covered matter was the burial pits *not* disclosed on the survey).

deemed sufficient notice of both encumbrances.[249.1] The exception directs the proposed insured to a review of the excepted document, which in turn provides notice of the non-excepted instrument.

When there are two instruments of record and the excepted document does not reference the non-excepted document, the exception may be broad enough to encompass the second instrument. However, the exception may not be deemed adequate when the instrument excepted is only remotely related to the recorded instrument that is not excepted, or the non-excepted instrument substantially affects the insured's rights.[249.2] An exception for "building lines and easements" as shown on a subdivision plat was found not to be adequate to encompass three recorded oil and gas pipeline easements encumbering the property, especially because a surveyor testified that the references to the easements on the plat were "substandard."[249.3]

In *Soluk v. Security Union Title Ins. Co.*,[250] the insured land was burdened by a private drive created when the land was divided, giving access to the rear parcel. The drive was shown on a land division map, and two covenants about its use and maintenance were recorded. The policy excepted the "effect of" the covenants, but did not specifically except the drive as shown on the map. The

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[249.1] *Nilesh Enterprises, Inc. v. Lawyers Title Ins. Corp.*, 2009 WL 2998204 (W.D.Tex.) (unpublished) (when policy excepted one recorded restriction document but not another, question of fact remained as to whether or not unexcepted restrictions caused diminution in value). In *Czarnecki v. Phillips Pipe Line Co.*, 524 S.W.2d 153 (Mo.App. 1975), one recorded encumbrance made further reference to three separate recorded easements. An exception for the encumbrance was sufficient to put the insured on notice of all three easements, negating coverage.

[249.2] See *Dulac v. Chicago Title Ins. Co.*, 2009 WL 3838999, 26 Mass.L.Rptr. 199 (Mass.Super.) (unpublished) (exception for recorded Torrens petition did not clearly encompass title defect listed in Torrens officer's report refusing the application, leaving question of fact for trial). In *Bohr v. First American Title Ins. Co.*, 2008 WL 2977353 (M.D.Fla.) (unpublished), the policy excepted an easement allowing the neighbors to use a pool on the insured property. It failed to except an amendment making the easement permanent, which the insured claimed thwarted her development plans. The insurer did not assert that the easement exception was broad enough to also cover the amendment. In *GC Finance, LLC v. Old Republic Nat'l Title Ins. Co.*, *GC Finance, LLC v. Old Republic Nat'l Title Ins. Co.*, 2010 WL 1408823 (M.D.Tenn.) (unpublished), affirmed 2011 WL 5966512 (6th Cir. (Tenn.)) (unpublished), the policy excepted a gas pipeline easement, but not a partial release of the easement that reduced its path but inserted greater rights of access for maintenance. The insured claimed that the maintenance provision in the amendment allowed the easement holder to interrupt play at the insured golf course. The court found the title insurer not liable, because the partial release limited the encumbrance and made the property more valuable, not less. In *Lawyers Title Ins. Corp. v. Stribling*, 294 Ga.App. 382, 670 S.E.2d 154 (Ga.App. 2008), the policy contained several exceptions for private drives running through the insured property. The court found that a vague complaint might claim the right to use a drive crossing the property for which there was no exception, and therefore there was a duty to defend the insured, despite the insurer's protest that the policy exceptions removed coverage for all private drives. Similarly, in *Cohn v. First American Title Ins. Co.*, 2010 WL 3342971 (Cal.App. 1 Dist.) (unpublished), an exception for an access easement "as shown upon" the filed subdivision map was found not to be broad enough to cover a claimed easement by necessity for the benefit of land outside of the subdivision, even though the easement path was placed in the same 40-foot strip shown on the subdivision map, because the easement by necessity came into being before the plat was recorded. In *Cox v. Commonwealth Land Title Ins. Co.*, 59 A.3d 1280, 2013 ME 8 (Me. 2013), the court strained to find that a policy gave coverage for an easement extinguished of record and replaced by an easement that was excepted, because the policy also excepted a condominium declaration that referred to the easement that was later extinguished.

[249.3] *Crossman v. Yacubovich*, 290 S.W.3d 775 (Mo.App.E.D. 2009).

[250] Case No. B131586, Cal.App. 2 Dist., Div. 2, 9/25/00 (unpublished).

court found that the insurer was not obligated to defend or indemnify the insured in a dispute with the neighbor over the width of the drive:

> If the Soluks elected to ignore the contents of the covenanted restrictions, that was their prerogative. However, they cannot now claim that they were entitled to a defense or indemnification when the Policy explicitly advised the Soluks that it excluded coverage for disputes over the effect of the restrictive covenants.

The court found the exception for the covenants broad enough to also encompass the map:

> There is good reason why Security Union's predecessor in interest excluded coverage for "the effect" of the Chaney covenants. The insurer undoubtedly anticipated that a lawsuit would be filed to reform the grant deeds to reflect that the parcels created by the Chaneys' subdivision are burdened by a private street, in accordance with the 1966 covenants... By signaling its refusal to defend against a dispute over "the effect" of the Chaney covenants, the insurer adequately warned the Soluks that they were purchasing the property at the risk of having "the effect" of the covenants resolved adversely to them. The exclusion advised the Soluks that the insurer would not participate in any future dispute over the covenants or the nature of the unobstructed private street...

When an easement was shown only as being set forth in a mortgage on the property, and no exception was made for the easement itself, such notice was sufficient when the insured also had actual knowledge of the easement from the seller.[251] The court stated:

> Granted the company did not indicate the easement in bold face or red letters, the fact remains that the information was made available. The effect of an easement, valid or not, was a factor to be resolved as between vendor and purchaser depending upon the terms of their contract. It was not for Inter-County, as Tomgil quietly intimates, to negotiate, renegotiate or bear the brunt of any disabilities of Tomgil's contract.[252]

An insurer that excepted outstanding taxes on a cooperative had no duty to inform an officer of the cooperative that taxes were unpaid. The taxes conflicted with a representation by the developer, but the policy itself contained no misrepresentation, and the insurer had no duty to police the transaction on behalf of the insured.[253] Similarly, a title agent had no duty to "point out any outstanding encumbrances" on title, such as that the legal description included more land than the borrower

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[251] *Sullivan v. Tomgil Building Corp.*, 260 N.Y.S. 2d 465 (Sup. Ct. 1965).

[252] Id.

[253] *Rockville Tudor Apartment Corp. v. Bodner*, Sept. 18, 1996 New York Law J. 25.

intended to mortgage.[254] Also, an insurer that excepted a set of restrictions had no duty to advise the insured that they created a homeowners' association having the power to enforce them.[255] A title insurer was not required to recite in an exception for an access easement that the easement was exclusive.[256]

The insurer does not have a duty to identify the parties to an instrument, its nature, terms or significance. For example, the insurer has no duty to explain the effect of a wetlands designation, when the fact of such designation is disclosed.[257] The insurer also has no duty to explain the risk of subsidence from mining operations, when the fact of a mineral reservation is properly noted.[258] An exception for "any claim or title of the State of California and /or the United States of America as to all or any portion of said land lying within the bed of Clear Lake ... under natural conditions" was found sufficient to except the state's later claim of title to the high water mark of the lake.[259]

A majority of states have held that a title insurance policy is not an abstract of title. See §15.12. Thus, a mistake in the information recited in an exception to coverage is not a representation and, in most states at least, the insurer is not responsible to the insured if it takes action on the assumption that the information is accurate.[260] In most cases, the exception refers to a document in the public records, which the insured can inspect; often, the insurer delivers a copy of the instrument to the insured for that purpose.

However, some older cases held the insurer liable for damages incurred by the insured in reliance on faulty information. Thus, when an exception for a utility easement recited the wrong name as the holder of the easement, the insurer was found liable to the insured for extra money paid to release the easement twice, even though the exception correctly recited the recording data for the instrument and the insured could have reviewed it himself. The court said: "A reference to an encumbrance belonging to 'A' is not a reference to an encumbrance belonging to 'B'."[261] In effect, the

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[254] *Miller v. Wilson Title Co.*, 7/26/00, 2000 WL 1023755 (Tex.App.-Dallas) (unpublished).

[255] *Shah v. Anderson*, 2000 WL 146715 (Tex.App.-Dallas) (unpublished).

[256] *Vorgitch v. Fidelity Nat'l Title Ins. Co.*, 2002 WL 86870 (Cal.App. 2 Dist.) (unpublished).

[257] *Manley v. Cost Control Mktg & Man., Inc.*, 583 A. 2d 442 (Pa.Super.Ct. 1990).

[258] *Holmes v. Alabama Title Co.*, 507 So.2d 922 (Ala. 1987).

[259] *Lyon v. Western Title Ins. Co.*, 178 Cal.App.3d 1191, 224 Cal.Rptr. 385 (1986).

[260] In *Wilmington Plantation, LLC v. Fidelity Nat'l Title Ins. Co.*, 2012 WL 2131149 (M.D.Tenn) (unpublished), the first version of a commitment exception labeled a condominium declaration as "protective covenants." The insured claimed that he did not know that the property, which was vacant land, was part of a condominium, and sought damages from the insurer for the reduced value of the land as being in a condominium regime. However, the exception provided the recording data of the excepted instrument, and a revised commitment described the declaration accurately. Also, the deed described the property as units in a condominium. The court held that the policy was not a representation, and the insurer was not liable.

[261] *J.H. Trisdale, Inc. v. Shasta County Title Co.*, 146 Cal.App.2d 831, 304 P.2d 832 (1956).

court found an exception to be a coverage, and held the insurer to the standards of an abstractor of title. The California title insurance code has since been substantially rewritten. Today, California law is clear that a title insurance policy is not an abstract of title.

In a 1977 Texas case, a policy that excepted two deeds of trust by stating that they were "securing a note for $[amount]" was found to have assured that the debt underlying the deeds of trust was no greater than the stated amounts.[262] The court said the policy obligated the insurer to pay advances above the stated amounts on those deeds of trust. However, current Texas law prohibits claims for passive rather than active misrepresentation of the state of title. See §15.12.

Similarly, a New York court ruled that, when an insurer inaccurately reported that a senior mortgage was in the amount of $100,000, although it was for $180,000, the insurer was liable for the inaccuracy.[263] However, New York also has since reversed its adherence to the negligent misrepresentation of title doctrine, and has barred such claims.

In some parts of the country, it is customary for the title insurance commitment or policy to append the statement "affects parcel ___" below the exception for a recorded instrument, when the policy insures title to two or more parcels. This type of statement is not an assurance that the document does *not* affect other parcels insured on the same policy. Rather, the statement is a courtesy to the customer to assist in the review of what is sometimes a long and complicated title report. In *Walton v. First American Title Ins. Co.*,[264] the policy insured title to two parcels, each of which was in a different but related subdivision. Each subdivision had a separate declaration of restrictions and easements. Both sets of restrictions were excepted in the policy. At the insured's request, and after the policy was issued, the insurer inserted statements below both exceptions tying them to the two respective parcels. However, one set of restrictions imposed an easement on the lot in the other subdivision, which became the source of the dispute. The court determined that the Schedule B statements were not affirmative assurances against the possibility that the restriction declarations would affect all parcels.

12.7.2 Special Terms Contained In Excepted Item

FORM 57, Appendix A
Special term contained in excepted instrument

If a document creates more than one type of interest in the property, each should be disclosed by the exception. However, the insurer has no duty to warn of special terms contained in an instrument, such as a due-on-sale clause in a reported mortgage.

The first issue is instruments which create more than one title interest or encumbrance. An exception for "restrictions" in certain deeds was found not to except the condition in the same deeds

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[262] *Southwest Title Ins. Co. v. Northland Building Corp.*, 552 S.W.2d 425 (Tex. 1977).

[263] *Chrysler First Financial Services Corp. of America v. Chicago Title Ins. Co.*, 595 N.Y.S.2d 302, 306 (Sup. Ct. 1993).

[264] 844 N.E.2d 143 (Ct.App. Ind. 2006).

AFFIDAVIT OF J. BUSHNELL NIELSEN

EXHIBIT 4

COMING EVENTS—

Date	Meeting	Where to Be Held
June 1-2	Central States Title Insurance Regional	Edgewater Beach Hotel Chicago, Illinois
June 1-2	Tennessee Title Association	Riverside Hotel Gatlinburg, Tennessee
June 4-5	Idaho Land Title Association	Challenger Inn Sun Valley, Idaho
June 8-9	New Mexico Title Association	Alvarado Hotel Albuquerque, New Mexico
June 15-16	Wyoming Title Association	Townsend Hotel Casper, Wyoming
June 21-23	Colorado Title Association	Hotel Colorado Glenwood Springs, Colo.
June 21-23	Michigan Title Association	Sheraton-Cadillac Detroit, Michigan
August 3-4	Montana Title Association	Florence Hotel Missoula, Montana
Sept. 16-18	Missouri Title Association	Hotel Robidoux St. Joseph, Missouri
September 20-22	North Dakota Title Association	Grand Forks, North Dakota
September 20-22	Oregon-Washington Title Association—Joint Meeting	Gearhart Hotel Gearhart, Oregon
Sept. 20-22	Wisconsin Title Association (50th Anniversary)	Lorraine Hotel Madison, Wisconsin
September 22-25	New York Title Association	Whiteface Inn Lake Placid, New York
September 23-24	Kansas Title Association	Allis Hotel Wichita, Kansas
October 8-11	Mortgage Bankers Association of America (43rd Annual Convention)	Conrad Hilton Hotel Chicago, Illinois
Oct. 12-13	Nebraska Title Association	Lincoln Hotel Lincoln, Nebraska
October 16-20	National Convention—American Title Association (50th Anniversary)	Hotel Fontainebleau Miami Beach, Florida
November 12-13	Ohio Title Association	Deshler-Hilton Hotel Columbus, Ohio

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stock. But the increase in mortgage demand will be much less than in recent years.

4. Many lending institutions which have devoted a large proportion of their available funds to residential loans in recent years should be planning a shift in their operations to adapt future operations to the changing mortgage market. Mortgage lending in foreign countries is one example of an outlet which needs substantial development.

5. Finally, if the government is interested in encouraging the housing industry as well as in promoting the general welfare, it should concentrate less on new sources for loanable funds and ever easier and more unsound loan terms, and devote more of its efforts to discovering practical methods for increasing the rate of demolition of slums and out-worn structures. The problem in the next five years will not be a shortage of loanable funds, but an insufficiency of demand for new houses. The only way that the demand can be increased significantly above the 1,100,000 unit level is through a concerted effort to blot out the still existing large areas of totally inadequate housing found in many of our cities.

TABLE I

NON-FARM HOUSEHOLD FORMATION PER YEAR, 1950-60

	1950-55[a]	1956-58[b]	1959-60
*Net increase in non-farm families (from causes other than undoubling of subfamilies	530,000	555,000	616,000
*Net undoubling of sub-families	95,000	30,000	5,000
*Net undoubling of second families	55,000	15,000	—
†Net increase in non-farm individuals	145,000	150,000	159,000
†Net undoubling of secondary individuals	155,000	100,000	50,000
	980,000	850,000	830,000

*The sum of these three items equals non-farm family households formed.
†The sum of these two items equals non-farm individual households formed.
[a]Estimates based on Census data.
[b]Forecast.

TABLE II

SUSTAINABLE LEVEL OF ANNUAL NON-FARM RESIDENTIAL CONSTRUCTION, 1956-60

	1950-55	1956-58	1959-6
Non-farm household formation	980,000	850,000	830,000
Net conversions (—) and demolitions (+)	180,000	125,000	135,000
Rise in non-farm vacancies	80,000	150,000	155,000
	1,240,000	1,125,000	1,120,000
Estimated transfer of existing units from farm to non-farm category	30,000	25,000	20,000
Annual non-farm construction	1,210,000	1,100,000	1,100,000
Non-farm housing stock,* end of period	45,500,000	48,440,000	50,410,000
Estimated "significant" non-farm vacancy ratio at end of period	2.8%	3.4%	3.5%

*Excluding trailers.

WHAT INVESTORS IN MORTGAGE LOANS ARE DEMANDING IN TITLE INSURANCE

BENJAMIN J. HENLEY

President, California Pacific Title Insurance Company
San Francisco, California

In the interest of realism, the title to this talk might better have been "What Investors in Mortgage Loans are Demanding from Title Insurers" than "What Investors in Mortgage Loans are Demanding in Title Insurance." That is, to say, investors in mortgage loans find it desirable, from time to time, to demand from title insurers insurance coverage which goes beyond the logical concept of title insurance and makes it difficult for the insurer to meet that demand.

What is Title Insurance, and what should it provide for the investor? Should it only set out the condition of the title to the property as it finds it and insure against loss resulting from a status of title other than that represented? Or should it in addition insure the investor against loss which might incidentally result from defects in title or claims against the property, known or unknown, at the time of insuring, as well as the ordinary risks of title insurance? What are the ordinary risks of Title Insurance?

The answer to these questions, so far as they can be answered, will be found in a review of the system of title recording which prevails in much the same form in most of the states of the United States, and its legal effect, and the methods which have been developed for the analysis of these records and the determination of the title status which, with facts outside the record, they establish.

First let us consider the recording system. Briefly speaking this system provides that private papers such as deeds, mortgages, deeds of trust, leases, agreements of sale, and numerous other types of documents relating to real estate may be filed in a public office, for public reference. In addition public documents such as judgements, tax liens, public improvement liens and zoning ordinances may be so filed or otherwise made public records. The mere filing or recording of these documents would accomplish little if it were not for the ingenius doctrine of "constructive notice" which is a vital part of the effectiveness of the recording system.

When documents provided for by law are properly executed and filed or recorded all persons dealing with the property which they affect must take notice of them and are bound by their contents. Such instruments are said to give constructive notice. Likewise, a person dealing with the property may rely upon the effect of such documents, subject, as is frequently the case with legal rules, to exceptions. As a rule the validity of an instrument, as between the parties, is not affected by a failure to record it, but as to persons dealing with the property without notice of the right created by the unrecorded document, that right can be lost, if conflicting rights are acquired and are made a matter of record prior to the recording of the document which creates the prior right.

There are at least two important exceptions to the constructive notice rule: first, any one dealing with real property must take notice of the rights of persons in possession of the property under such rights, and second, any one dealing with real property is bound if he has actual notice of any adverse right in the property

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whether the evidence of that right is or is not a matter of record. Therefore, the rights of a tenant in possession or the owner of encroaching improvements, if a right to encroach exists, or even a claim to the absolute ownership of the property by one in possession, will be preserved, even though they are not shown by the records. The same is true of the ownership of easements and rights of way. Under the second exception mentioned, if a purchaser or mortgage loan investor acquires his interest in the property with knowledge of an outstanding adverse interest, the adverse interest will prevail regardless of whether or not it is shown by the public records.

What I have said about the recording system and its limitations points up the fact that the status of title to real estate cannot be determined from the record alone nor from conditions upon the property and facts outside the record alone. I am inclined to the view that the hazards which result from difficulties created on the records are greater than those arising outside the record because it is easier to miss them and frequently more difficult to define them. So, the purchaser of or lender upon the security of real estate finds it necessary for his protection to examine the records affecting the title to the property with which he is dealing to determine the ownership of the many rights which can exist in a single parcel.

Early in the history of the recording system two serious difficulties confronted the layman in making this examination for himself. For one thing he found that the records were indexed, not with reference to the property, but only with reference to the names of the parties. Because, for instance, many deeds affecting different properties were executed by the same person, as the volume of records increased it was found difficult to locate in the records the documents necessary to show title to a specific property, but more important it was found that frequently documents which affected the title were overlooked. Then, as titles became more complicated, it was found that the layman could not understand and construe many of the complex legal documents which made up the title such as probate proceedings, including wills and testamentary trusts, other trusts, life estates created in deeds and similar matters. Naturally the job of doing this was eventually turned over to the lawyer. His opinion on the title was required before the property was purchased or a loan was made upon its security. This brought about the development of the most prevalent form of title service used in most parts of the country. The abstract and lawyer's opinion procedure.

For the preparation of his opinion the attorney must make the necessary examination of the documents affecting the property found in the public records. He finds the same difficulty as the layman in locating the particular documents, and as a result the abstractor became an institution in the business of title examination. To simplify the task of locating the matters affecting the individual property the abstractor evolved the system of assembling together in his office from day to day as the documents were recorded or other matters appeared in the record a record of all matters affecting every parcel of real estate in his county. This made it possible for him to quickly make them available and materially reduced the danger of missing some of them. Where the abstract system still prevails the abstractor furnishes for the examination of the lawyer or the title insurer a complete abstract of all documents affecting the property with a certificate that all record matters affecting the property are shown. On the basis of this abstract the attorney furnishes his opinion of the status of title.

Title insurance has its roots deeply embedded in the abstract and lawyer's opinion system of handling real estate transactions. It came about because of inherent inadequacies in the earlier procedure. Particularly in those areas where the insurer maintains its own title plant and does its own title examining, deals close much more expeditiously than in other areas. Another difficulty which

plagued the earlier procedure was the conflict in opinions of different lawyers on the same title. Then, even with the natural limitations existing on the insurance which the title insurer can give, its coverage is much broader than that provided by the lawyer's opinion. In addition, volume real estate security lenders found that the problem of examining and storing great numbers of abstracts many of which involved several volumes was almost insoluble except through title insurance. Title insurance was first issued in Philadelphia, Pennsylvania, in 1878. The first company in the West was formed in 1886, and issued its first policy in 1887.

An now, with this superficial review of the development of title insurance we are ready to discuss the questions posed above. What is Title Insurance? In its original concept it was an attempt to simplify the abstract, lawyer's opinion system of title service and to provide insurance of the status of title as found by the insurer from the records and as shown in the title evidence. Originally in most parts of the country the insurance did not go beyond the record title. Standard exceptions excluded from the coverage many matters which are now included. One form of standard exception which was used in California policy forms for many years excluded all matters, including defects in title, not shown by the public records. This excluded from the coverage acts of incompetents, forgeries, defective legal proceedings and other similar matters which are now covered by ordinary standard policy forms.

In several important particulars title insurance differs from all other forms of insurance. As indicated it is inherently intended to insure only against loss which might result if the status of title as set forth in the policy does not exist. In other words against loss occasioned by happenings of the past. Its coverage is limited to no fixed period. The liability of the insurer continues indefinitely. It does not involve the payment of recurrent premiums, and this is important from the standpoint of insurance against loss from future events such as is protected against by life, fire and casualty insurance. All other forms of insurance insure against loss resulting from the future occurrences.

Until the advent of the LIC and ATA policy forms the broadening of the coverage of title insurance policies came along slowly by natural evolution. There was no great demand from the insured for broader coverage. However, from time to time claims were made for losses arising out of risks, which were not covered by the policy forms in use, but were inherent in all titles and could not be resolved by an examination of the record. These risks involved such things as forgeries, false impersonations, acts of minors and incompetents, and the construction of doubtful legal questions. When losses occurred because of these items, it was difficult for the title insurer to explain why the insured was not protected by the policy. There being no satisfactory answer to that question, the policy coverage was gradually extended so as to include insurance against these hidden defects. It was done both as a matter of fairness to the insured and as a matter of public relations. However, in this extension of coverage, there was no change in the approach of the title insurer as to the purpose of the product nor the manner in which that purpose should be accomplished. It was still the industry view that the function of title insurance was to set forth in the policy a statement of the condition of the title as shown by the record, insuring against loss which would result if the title was not as represented, and in addition insuring against loss which might result from the invalidity of any portion of that record by reason of hidden deficiencies.

In those places where title insurance was accepted as the principle form of title evidence, until the real estate boom which followed World War I, the limited coverage offered by title insurers was considered sufficient and satisfactory by both purchasers and lenders. Prior to that time real estate financing needs were pretty generally met in the local com-

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munities in which the property was situated and lenders were sufficiently familiar with the local real estate conditions and practices, so as not to require the services of an independent agency to protect them against loss resulting from many of the risks which have been shifted to title insurers in recent years.

The growth of the country and demands for real estate credit during that period of great activity led many of the larger life insurance companies, seeking outlet for the investment of their funds, far afield from their home localities for real estate loans. At that time substantially all of the loan business of these companies was handled on the abstract and lawyer's opinion basis. As their volume of loans increased, the need for a more expeditious and less voluminous system of securing title protection was required. At the same time, title insurers were urging upon them the use of title insurance. However, these lenders urged that a broader title insurance coverage than was then being provided was necessary if they were to accept it for mortgage loans secured by property far from their home offices. As a result, a group of counsel for life insurance companies in the mid-twenties drafted a form of policy which they designed as the Life Insurance Company Standard Loan Policy, or LIC form. When required, title insurers commenced the use of that policy form and some life insurance company lenders then accepted title insurance in place of lawyer's opinions.

It was soon demonstrated that the LIC policy form was in some particulars unsatisfactory and in 1929, a committee of the American Title Association in collaboration with the group of life insurance counsel which had worked on the LIC form produced the American Title Association, A.T.A., Standard Loan Policy which, as you know, has come into general use for mortgage loans and has almost completely supplanted the LIC form. Institutional lenders now accept title insurance in this form not only in areas where title insurance has long been established, but in many other areas where the abstract-lawyer's opinion system still prevails for other types of real estate transactions.

The ATA policy form differs from the usual standard form particularly in that it eliminates standard exceptions which exclude from standard coverage forms risks such as rights of parties in possession, easements not of record, liens not of record and encroaching improvements.

In promulgating the ATA form, it was not the intent or expectation of the title insurance industry that it was departing from the theory discussed above upon which the business was founded. That is to say that it was not intended that these additional hazards would be assumed by the title insurer upon a casualty basis. It was and is the practice to determine, as far as that status can be ascertained both as to record and non-record matters, the status of title and to then insure against loss resulting from an incorrect statement in the title policy of that status. It was still the theory that the policy would have to show exceptions excluding from the coverage any known defects in the title or claims against the property.

When issuing standard policy forms which contain exceptions as to liens and other encumberances, adverse interests or claims which are not shown by the public records and conditions which would be shown by a survey, the title insurer does not inspect the property nor otherwise concern itself with things which do not appear from the record. In issuing the ATA policy, however, a complete investigation is made of all pertinent facts, whether shown by the record or not, which might affect the title. An inspection of the property is made to be sure that there are no easements which are not shown of record. If the property is improved or occupied, the rights of the occupant, are determined. The question of the location of the improvements on the subject property and on adjoining properties with regard to boundary lines is considered. Any conditions, restrictions or reservations to which the property is subject are checked to determine that the improvements and occupancy are in conformity with the restrictions and that there are no other violations.

When a broad coverage policy such as the A.T.A. is issued, the title insurer does not change the nature of its business. It broaders the coverage but it takes all steps available to it to place itself in the same position as it was when issuing a more limited coverage; that is, so far as possible, it determines the condition of the title as affected both by record and non-record matters and insures against loss resulting from a status of title other than that set up in the policy. It does not intend to insure against damage which the insured may suffer by the happening of future events incidental to title.

When the investor in mortgage loans demands coverage within the terms just outlined, the insurer has no difficulty in meeting the demand, even though it may involve risks which are concealed and are in a measure matters of chance. But, when the demand goes beyond that, the title insurer is being forced into a field of insurance which is justified neither by his charges nor his reserves as called for by the ordinary risks of title insurance.

To illustrate: let us consider the subject of title insurance protection against loss resulting from mechanic's and materialmen's liens. In California, a mechanic's lien is prior or superior to any lien on the property securing a loan unless the security instrument evidencing the loan is recorded in the office of the county recorder before the work of improvement upon which the labor or material is bestowed was commenced. The ATA policy form insures against loss or damage by reason of any such lien by the provision including in the coverage any statutory lien for labor or material which is prior to the lien upon the land of the security instrument of the lender.

The potential mechanic's lien upon property being improved, and the insurance against loss resulting therefrom contained in the A.T.A. policy, should offer no complications in issuing title insurance covering the lien of the security instrument. However, it is one of the most troublesome problems involved in title insurance affecting construction loans. It is the practice of all title insurers, I believe, to inspect property immediately following the recording of the security instrument which is to be insured. If no work is under construction, the policy issues as a routine matter. If work of improvement has commenced and the priority of mechanic's liens has been established there should be inserted in the title policy an exception showing that condition. In this event a question of credit between a lender and a borrower arises in which the title insurer should not be involved. It should not assume responsibility to pay losses which might result if mechanic's liens should be filed. This, however, is not the approach of the lender. As a rule it is urged that the loan cannot be made unless the title policy is issued clear of exception as to mechanics liens and in many instances such pressure is placed upon the title insurer that it is practically compelled to so issue the policy.

This is not title insurance, but is simply a guarantee that all mechanics and materialman who supply labor or materials to the work of improvement will be paid. It is a protection that long has been furnished by a type of insurer or bonding company which conducts that type of insurance business and which makes charges commensurate with the risk and establishes reserves which can pay losses resulting therefrom. The hazard which is involved is one of relatively short duration and is assumed in sufficient volume so that a loss experience can be established and the risk can be measured and adequately rated. This permits the fixing of proper charges and the building of proper reserves. Likewise, the hazard of insuring against mechanic's lien losses, when conducted by companies who assume all types of casualty risks, is diluted by a diversification of risks. Do I need to suggest that the title insurer is not in a position in this respect to so diversify, and that it is playing with fire when it assumes this responsi-

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bility without making adequate charges and establishing proper reserves? Is it not reasonably clear when you consider that a home development of only 50 homes involving a construction expenditure of say $10,000 per unit is a business operation involving total obligations of $500,000, that a title insurer with assets of $2,000,000 or $3,000,000, and many of them have less, is subjected to an extremely risky exposure when at the same time it is out on several such projects, as well as much larger ones, assuming responsibility for mechanic's liens? It might be added that the lender relying upon the title insurance policy for this type of protection, if it fairly looks the facts in the face, could experience some restless slumber as a result.

I have referred to the mechanics lien problem because it is one which involves such a great hazard when the title insurer departs from sound underwriting practices. There are numerous other situations where lenders are requiring coverage falling within the same category.

All of you here, I am sure, are familiar with California Land Title Association indorsement Form 100. The coverage of this form well illustrates the problem which I have been discussing. It assures the insured that there are no covenants, conditions or restrictions set forth in the policy under which the lien of the security instrument can be cut off, subordinated or otherwise disturbed, and that there are no existing violations on the land insured, of any enforceable covenants, conditions or restrictions. The title insurer can properly provide this coverage. It can reasonably be expected to determine the facts necessary to insure, but it is frequently found that there are restrictions a violation of which can cut off the lien of the security instrument. In many such cases, the owner of the reversionary right cannot be found or is a corporation which is defunct. What happens then? The lender urges that the loan cannot be made unless the title insurer insures against loss resulting from the right of reversion, and the borrower says to the insurer, if you don't insure your competitor will, and the answer is, what do you suppose? The insurer insures. There is some doubt, however, as to the soundness of the practice either from the standpoint of the lender or the insurer.

Indorsement number 100 also insures against loss resulting from any future violations on the land of covenants, conditions or restrictions. It is difficult to reconcile protection of this type with the theory of title insurance. It recognizes an encumbrance upon the property and the possibility of the encumbrance causing loss to the insured and obligates the title insurer to pay that loss. The balance of the coverage of indorsement form 100 is of similar character. It contains insurance against any loss which would be suffered if existing improvements, including lawns, shrubbery or trees, are damaged by the exercise by the owner of the easement of his right to use the easement if the improvements encroach upon such easement. What has this to do with title to the property?

Indorsement Form 100 was a product of the same procedure as the ATA Policy form. It came from a committee of title insurance representatives, working with our good friends from the life insurance companies. I participated in the discussions. I know that we of the title insurance industry who were responsible for the form recognized the fact that we were going outside our field in some of its coverage, but we wanted to go as far as possible in meeting the needs of lenders, so here we are.

Affirmative insurance is frequently asked against loss resulting from the existence of encroachments, either of improvements of the subject property upon adjoining property or improvements of the adjoining property upon the subject property. The title insurer can logically meet that demand provided the encroachments is so slight as in law to be considered as no encroachment. It is reasonable that it should make this decision. However, regardless of the extent of the encroachment, demand is frequently made that insurance be issued against loss resulting from encroachments which can cause damage if an adverse claim is made. When such insurance is issued it is not title insurance but human temperament insurance because the incidence of loss depends upon whether the owner of the adverse right is a person of good will who will not stand on his rights.

Violation of setback requirements or restrictions are frequently found. This is another situation where the insurer can logically insure, if because of other violations in the vicinity of the property, or for other reasons, the restrictions are not legally enforceable. However insurance is frequently required where the restrictions are clearly enforceable and the title insurer is asked to insure against resulting loss so that the loan can close.

There are many other similar situations which arise. It is extremely difficult for the insurer to determine whether these borderline cases are title insurance or are merely a guarantee protecting the lender or insured against loss resulting from a known claim against the property. The title insurer should, and I believe does, make every effort to cover such cases where they can be covered. It would be shortsighted for him to do otherwise because his business depends, just as yours does, upon the closing of the loan wherever possible. However, a line eventually will have to be drawn against the tendency of the lender to feel that the title insurer should provide more and more protection against hazards involved in the making of his loans which go beyond the proper scope of title insurance.

Humorously speaking, I see no reason why the logic of the present tendency should not lead to the requirement that the title insurer should insure the lender against any loss which it might suffer should the obligation secured by the security instrument not be paid. There is no more inconsistency in such a requirement than there is in the demand that the title insurer should guarantee the lender that all obligations of the borrower for construction work upon the property will be paid although those obligations are a lien upon the property prior to the security instrument.

Under the abstract and lawyer's opinion system, many of the risks referred to above which, as I have said are really credit risks, are assumed by the lender. Under that system the lender is a self-insurer and I assume that the risk is taken into consideration in his cost of doing business. In many instances the work of the title insurer in making it possible to insure against such special risks is a duplication of the work of the inspectors of the lender, and the risk of loss on many of the matters is less to the lender than to an insurer because the lender or his servicing agent has control of the loan and can work out problems relating to it with less difficulty and less expense than the insurer. In the final analysis, this question of distribution of risk between the lender and the insurer may come down to a simple question of expense to the borrower in obtaining his financing. If the insurer is assuming risks, however nominal, which logically should be carried by the lender and which involve unnecessary expense by the insurers for investigation, legal opinions and other similar services, and for the setting up of proper reserves, the financing expense is increased. The question is, should the lender impose that increased expense upon the borrower, or is it a factor in the credit risk of the transaction which can more cheaply be assumed by the lender to the advantage of all parties involved in the transaction.

In concluding this discussion I would like to leave with you one thought relating to FHA and VA loans. Where title insurance ignores known defects and attempts in so doing to make marketable a title which in fact is not marketable it is possible that these government agencies, in case of foreclosure, may question its guarantee of payment on the loan on the theory that title does not conform to its regulations. There has been little or no experience to date, so far as I know, which justifies an opinion on this question. While the title company does not insure

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against loss which might result from the possible resistance against payment of their obligations by these agencies, this question is a matter of concern to the industry.

While the tenor of this discussion may indicate to you an unwillingness on the part of the title industry to cooperate with you, I think you realize that that is not the fact. Such a position on our part would be self-destructive. Our self interest requires us to provide you with the greatest possible service and coverage. I believe that you recognize our willingness to do so. My purpose here is not to set up road blocks to service in the closing of your loans, but to emphasize to you the problems involved in the present tendency to shift to the title insurer so many of these problems involved in the closing of loans which, in fact, are not within the proper scope or field of title insurance.

THEORIES OF LIABILITY

LYLE F. HILTON

Staff Attorney, Berks Title Insurance Company, Reading, Pennsylvania

Delivered before Pennsylvania Title Association
1956 Annual Conference, Atlantic City, New Jersey.

Sooner or later every title man faces the question, "Just what does a title insurance policy cover?" We all endeavor to answer that question as part of our job of selling title insurance. Many of us have also had to consider the reverse of that question: "To what claims does the issuance of a policy of title insurance expose the insurer?" or as it may be put, "On what theories may the insurer be sued upon a policy of title insurance?" I believe that a substantial part of the answer to these questions may be found in those opinions of court which indicate the thinking of the court and the rules by which various claims have been held either to have been within or without the scope of the policies sued upon. I would therefore, with your permission, discuss with you for the next thirty minutes the various theories that the courts have applied to the standard portions of title policies and examine in detail some of the cases on which those theories have been applied.

Title insurance as a business has since its inception become of age in the courts, at least in the sense that title insurance is now recognized as a field or type of insurance and of the insurance business.[1] This implies an interesting corollary to the effect that, contrary to the attitude of many applicants, a title insurance company is not a public utility; a title insurance company is not bound to insure every title declared by the courts to be marketable. An insurer has, as an insurance company, the right to select its own risks.[2]

The rule that a title insurance company has the right to select its own risks would appear to have one significant qualification; where the company has issued an owner's policy and subsequently is asked to insure the title to the proposed mortgagee. In a New York case,[3] the title company issued an owner's policy in which it insured the owner as to an estate in fee simple but raised the following exception: "Restrictive covenants in instrument recorded in Liber 211 of conveyances, at page 13, in the Office of the Register of the County of New York." Ten years later the same company, faced with a mortgagee application, raised exception that the title was not in fee simple but on condition, the condition being expressed and set forth in the instrument excepted in owner's policy. The assured owner was put to considerable expense to clear the title for the mortgagee. The Court held such expenses to be a proper claim within the title insurance policy. The Court said, "Here the defendant is in the same position as if the mortgage loan had failed by reason of a defect against which it had insured. For a loss so sustained, the plaintiff may recover."

In accord with the general law of insurance, before a valid insurance contract or policy may be written, the applicant or prospective assured must have an insurable interest in the subject matter of the insurance. It would appear that, as to Pennsylvania companies, insurable interest is no real problem in the light of our current statutes[4] under which we operate, which reads in part: "Such insurances to be made for the benefit of owners of real estate, mortgagees, and others interested in real estate." The statute read in the light of the rule that the title insured is the estate described in the policy would indicate that the problem of insurable interest will ordinarily be resolved upon examination of the title to be insured.

Some of us have been concerned whether or not the shareholders of a corporation have, for title insurance purposes, an insurable interest in real estate owned by the corporation. The problem arises when a corporation is acquired by way of stock transfer. The new shareholders often want to be assured that the corporation's title to its real estate is good. Their reason for seeking such insurance is perfectly clear; their insurable interest is not so clear. As to property insurance generally, shareholders are found to have an insurable interest in property owned by their corporation[5] but I have found no case applying that rule to title insurance. Observe that the insurable interest, if there is one, probably arises on the date of the stock transfer. Understandably, a policy dated that day is highly desirable from the shareholder's point of view. The problem of drafting proper exceptions for such a policy is, fortunately, not within the scope of this paper.

Fundamental to considering theories of liability is the inquiry, "What is a title insurance policy in the eyes of the law?" and, secondly: "How is that policy construed?"

> "A contract of title insurance is an agreement whereby the insurer, for a valuable consideration, agrees to indemnify the assured in a specified amount against loss through defects of title to real estate, wherein the latter has an interest, either as a purchaser or otherwise; a contract to indemnify against loss through defects in title to real estate or liens or encumbrances thereon."[6]

This definition is generally in accord with cases in several jurisdictions including Pennsylvania.[7]

Further, the courts have held that a policy of title insurance is neither a wagering contract[8] nor a suretyship contract.[9]

Fundamental to the consideration of every indemnity contract, which is to say every title insurance policy, are the inquiries first: "As of what date is the contract effective?" and secondly: "As of what date, if any, is the contract of indemnity terminated?"

It would seem as if a mortgagee policy poses no real problem as to effective date. Mortgagee policies are regularly issued only after recordation of the mortgage and the recording statutes protect the mortgagee's title so-called from the date of recordation of the mortgage, with certain very narrow exceptions. The mortgagee's interest is ordinarily terminated according to rules of law, and with it, ordinarily, policy liability. One can, however, dream up extreme cases in which insurer's liability may well survive satisfaction of an insured mortgage. We have no law on that point.

As to owners, however, the problem is somewhat different. In the case of owner's insurance, we may have an owner seeking to insure his already existing title. That problem has been rather fully considered by the New York state courts and I think that the result reached there is probably completely applicable to all other jurisdictions in this country. The question was first raised in the Trenton Pot-

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AFFIDAVIT OF J. BUSHNELL NIELSEN

EXHIBIT 5

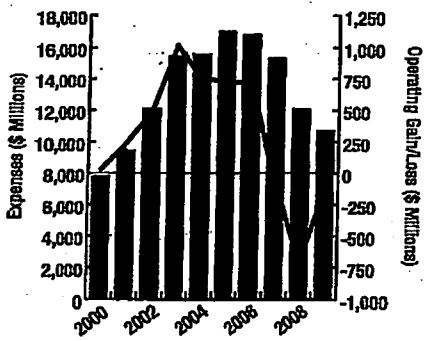
Market Review

December 13, 2010

Sector
Title

U.S. Title Insurance – Gains/Losses and Expenses (2000-2009)
($ Millions)

■ Operating Expenses ■ Losses & Loss Adj. Expenses
– Pretax Operating Gain/Loss*



Source: ALTA, NAIC.
*Pretax Operating Gain/Loss equals Underwriting Gain/Loss including income from services and fees.

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Results Partially Recover in 2009 and 2010; Job Market to Influence 2011

The title industry's operating results partially recovered in 2009, after reporting weak premium volumes and profitability in 2008. Although 2009 total industry written premiums declined from 2008 levels, premiums written trended upward in the third and fourth quarters from the same period of the prior year. During the first half of 2010, title insurance revenues stayed relatively unchanged from the first half in 2009 – aided by federal policy and tax incentives – which helped most major underwriters post positive operating margins for the first six months of 2010.

Still, the title industry faces a tough road ahead as the weak housing market continues to be hampered by economic and employment conditions. Sustaining the recent improvement in operating and capitalization trends will depend largely on the length and depth of those conditions.

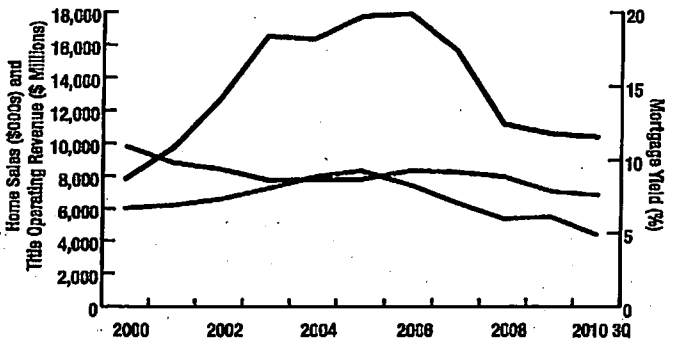
Results partially recovered in 2009 as reflected by the following:

- The industry posted a far smaller pretax operating loss of $129.5 million compared with a $711.0 million loss in 2008.

- Although total operating revenue was down somewhat in 2009 ($10.6 billion) compared with 2008 ($11.2 billion), the industry's declining expense levels ($9.7 billion in 2009 versus $10.8 billion in 2008) more than made up for the drop in revenue.

U.S. Title Insurance – Revenue and Home Sales Activity (2000-2010)

— Total Operating Revenue — Total Home Sales — 30-Year Fixed Mortgage Yield
— (as of June 30, 2010, on a rolling 12-month basis)



Notes: All data are annual averages, with the exception of 2010 numbers, which are preliminary September figures. Total home sales is the sum of new and existing home sales. 2010 home sales numbers are the most recent available and reflect seasonally adjusted annual rates.
Sources: U.S. Census Bureau, National Association of Realtors (NAR), Federal Reserve Bank (FRB), Bureau of Economic Analysis (BEA).

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Partial Recovery Seen, Job Market to Influence 2011

Industry Overview

The title industry's operating results partially recovered in 2009, after reporting weak premium volumes and profitability in 2008. Although 2009 total industry written premiums declined from 2008 levels, premiums written trended upward in the third and fourth quarters from the same period of the prior year. During the first half of 2010, title insurance revenues stayed relatively unchanged from the first half in 2009, aided by federal policy and tax incentives. This helped most major underwriters post positive operating margins for the first six months of the year, even though revenues declined in the second quarter of 2010 compared with that of the same period in 2009.

Nonetheless, the title industry still faces challenges as the housing market continues to be hampered by weaknesses in economic and employment conditions. And, sustaining the improved operating and capitalization trends of recent months will depend largely on the length and depth of those conditions. While in recent quarters home prices have inched upward, in certain geographic locations, they are still well below the level of the real estate peak year of 2006.

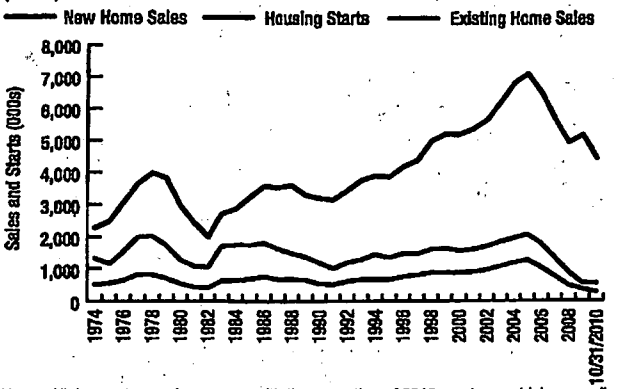
During the housing bubble from 2000 through 2006, the industry's revenue more than doubled. But just as the surge in real estate transactions drove up title insurance revenue – along with a greater incidence of title claims – the housing market downturn (see **Exhibit 1**) pared back revenue significantly, and resulted in negative profitability measures in 2008, which partially recovered in 2009 (see **Exhibits 2** and **3**). The foreclosure and default rates' upward trends, which began in the subprime mortgage segment in 2007, spread to other areas of the mortgage market. We began to see greater numbers of delinquencies and an increased rate of foreclosures in the "Alt-A" (e.g., typically borrowers with higher credit scores but little or no documentation of income or assets) segment, as well as the "prime" mortgage segments.

As a result of record losses from these segments, financial institutions have continued to tighten the availability of credit, and significantly reduce access to mortgage loans for both purchasing and refinancing. Starting in 2008 – and continuing into the first half of 2010, however – the federal government played a more active role in the mortgage market through the Federal Housing Authority (FHA) and the two housing government-sponsored entities (GSEs) Fannie Mae and Freddie Mac. These actions have helped stabilize the mortgage market and have somewhat cushioned the fall in transaction volumes following the end of the housing bubble. Recent tax legislation such as the First-Time Homebuyer Tax Credit of 2008-2009

Exhibit 1

U.S. Housing and Sales Activity (1974-2010)

(000s)



Notes: All data are annual averages, with the exception of 2010 numbers, which are preliminary September figures. Total home sales is the sum of new and existing home sales. 2010 home sales numbers are the most recent available and reflect seasonally adjusted annual rates.
Sources: U.S. Census Bureau, National Association of Realtors (NAR), Federal Reserve Bank (FRB), Bureau of Economic Analysis (BEA).

Special Report

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– which was extended for first-time buyers and included certain existing homeowners who had properties under contract as of April 30, 2010 – also helped somewhat to bring more buyers into the market and modestly rejuvenate a largely moribund housing market. While significant foreclosure activity remains a drag on overall housing prices, the incentives have benefited title insurers to some extent in 2009 through June 30, 2010.

During periods of reduced premium volume, title insurers' profit margins depend on their abilities to manage the cycle by reducing expenses. General expenses incurred as part of the title-search process typically make up 85% or more of premium volume, reflecting the loss-prevention nature of title insurance. While major title insurers posted significant losses in 2008, companies that controlled costs aggressively have managed to return to profitability in 2009 and the first half of 2010, despite some erosion in their underwriting margins. Others less actively controlling their cost structures are expected to see further erosion in their margins if premium volume continues to fall.

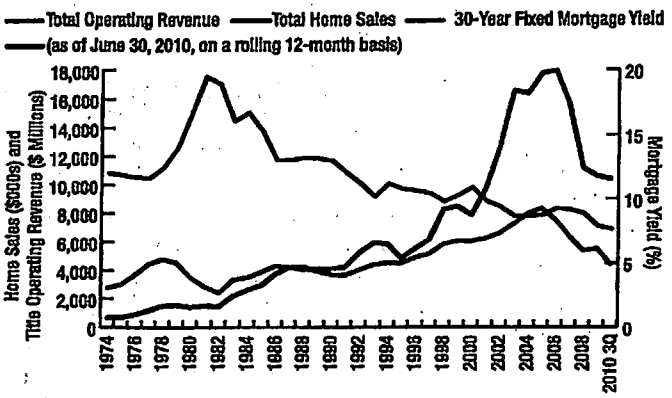
Inadequate loss-reserving practices earlier in the decade, when transaction volume was increasing dramatically, caused incurred losses to rise (see **Exhibit 4**). To make up the shortfall, some title insurers posted significant reserve increases in recent years, most notably in 2007 and 2008. Continued foreclosures and mortgage delinquencies are also driving up claims. While these need not directly lead to a claim, each triggers a title search with the potential to reveal a prior lien or other title defect overlooked during the initial title search. Loss activity stemming from agent-, consumer-, and bank-related fraud activity still remains a concern. Such activity typically goes up during periods of reduced cash flow and generally involves embezzlement of funds held in escrow, potentially resulting in severe losses.

Industry History and Purpose

The title industry continues to play a critical role in the U.S. economy by insuring the proper transfer of real estate from buyer to seller and by facilitating the growth of the secondary mortgage market. This enables Americans to have one of the highest home ownership rates in the world.

Exhibit 2

U.S. Title Insurance – Revenue and Home Sales Activity (1974-2010)

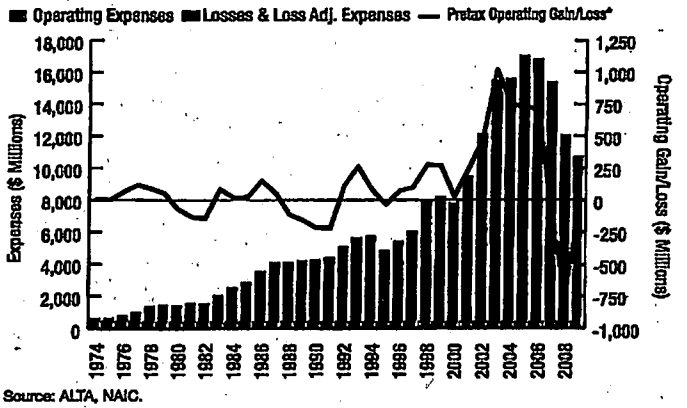


Notes: All data are annual averages, with the exception of 2010 numbers, which are preliminary September figures. Total home sales is the sum of new and existing home sales. 2010 home sales numbers are the most recent available and reflect seasonally adjusted annual rates.
Sources: U.S. Census Bureau, National Association of Realtors (NAR), Federal Reserve Bank (FRB), Bureau of Economic Analysis (BEA).

Exhibit 3

U.S. Title Insurance – Pretax Operating Gains/Losses and Expenses (1974-2009)

($ Millions)



Source: ALTA, NAIC.
*Pretax Operating Gain/Loss equals Underwriting Gain/Loss including income from services and fees.

The title assurance industry is composed of abstractors, attorneys, title insurance agents and title insurance companies. At any real estate closing, the parties involved must be assured that the title of the subject real property is as represented and expected. Members of the land title assurance industry are instrumental in helping to deliver and guarantee this assurance.

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Exhibit 4

U.S. Property/Casualty – Losses and Loss-Adjustment Expense Ratios, Various Lines (1974-2009)

Title insurance has a much lower average loss and LAE ratio as compared with the general property/casualty industry. Property/casualty figures incorporate an IBNR approach, whereas title involves paid claims.

Year	Title Industry	Surety (Stock)	Property & Casualty (Stock)	Property & Casualty (Mutual)	Boiler & Machinery (Stock)
1974	6.5%	61.6%	75.3%	76.4%	44.6%
1975	8.7	68.6	78.8	80.2	43.8
1976	6.3	49.2	74.6	77.1	36.1
1977	5.3	44.6	70.1	72.4	33.3
1978	5.0	46.8	69.0	72.9	30.8
1979	5.0	39.6	71.7	76.3	20.8
1980	6.6	53.1	73.9	77.0	33.1
1981	8.1	34.1	75.5	79.8	33.2
1982	8.4	37.4	78.6	82.1	38.6
1983	6.3	39.9	81.0	81.9	40.5
1984	7.9	49.9	88.8	87.3	53.8
1985	7.7	77.7	88.8	88.6	41.5
1986	8.8	71.6	80.3	84.3	38.7
1987	7.7	66.1	76.2	82.2	32.7
1988	9.6	49.3	76.2	83.5	44.5
1989	9.5	42.9	80.4	85.9	38.6
1990	10.0	36.3	80.2	87.0	48.2
1991	10.0	26.2	80.1	82.8	57.1
1992	7.4	38.3	89.7	84.4	53.6
1993	5.8	23.0	78.9	81.4	58.1
1994	5.4	34.5	80.3	82.4	44.9
1995	5.8	33.9	78.1	80.7	48.1
1996	4.9	27.2	77.9	79.9	44.1
1997	4.6	25.6	72.3	74.7	45.2
1998	3.8	24.5	75.0	80.1	51.0
1999	4.1	25.0	77.3	81.7	60.6
2000	5.3	27.7	79.4	85.3	51.5
2001	4.8	47.2	67.3	90.8	50.2
2002	4.6	63.7	80.5	82.9	40.0
2003	4.0	72.1	74.4	75.4	28.4
2004	4.3	69.7	72.2	72.5	32.4
2005	5.3	53.4	74.9	74.7	22.8
2006	5.0	31.6	64.1	69.5	35.8
2007	8.6	22.9	66.6	71.5	32.5
2008	11.7	21.4	76.9	79.2	34.5
2009	9.7	31.8	71.8	77.1	34.5
Averages:					
All Years	6.6	41.9	75.1	78.0	39.8
Past 10 Years	6.3	44.2	74.8	77.9	36.3
Past 20 Years	6.3	36.8	76.9	79.7	43.7

Source: Title industry figures developed from ALTA and NAIC Form 9s. All other data from BestLink and Best's Aggregates & Averages.

The functions of the title search and examination provide the basic information concerning the legal interest affecting the title to the real property. The title search and examination are more than an attempt to confirm the placement on the record of a subject mortgage; they are the underwriting process that distinguishes between significant and insignificant conditions affecting title. The search and examination very often include the curing of defects to the title necessary to complete the transaction. It is acknowledged that few properties have perfect title conditions and, as such, title insurance was developed to guarantee the current status of title, based on search and examination.

Depending on the jurisdiction, the title search and examination can require a search by title insurance personnel of numerous public documents, including tax, court-judgment, deed, encumbrance, federal and state records, as well as the evaluation of real property characteristics such as flood zone, location and construction type.

To assure that real property rights are conveyed as represented, most transactions are covered by title insurance to guarantee the condition of ownership and property rights as represented. A title insurance policy provides indemnification to an insured that has a fee interest, leasehold or mortgage lien for a specified property for any covered loss caused by a defect in title that existed as of the effective date of the policy.

Title insurance involves the acceptance of past transactional events rather than future occurrence events associated with all other property and catastrophe exposures. In addition, title insurance, unlike most other property/casualty exposures, has no termination date and no time limitation on filing claims.

Since title insurance usually involves the acceptance of prior transaction-related risk rather than future risk, the underwriting process in the title insurance industry differs markedly from the typical property/casualty underwriting process (see **Exhibit 5**). The title underwriting process is designed to limit risk exposure through a thorough search of the recorded documents affecting a particular property. The insurance component of a title product only indemnifies for existing – but unidentified, or specifically underwritten – defects in the condition of a property's title. In other words, title insurance – unlike typical property/casualty insurance – usually does not respond to future occurrences but only to past defects that were in place at the

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time the property was sold, and not recognized as a problem until after the property was transferred or was insured over.

Property/casualty underwriters are concerned with determining the probability of loss based on the characteristics of the insured risk. Title underwriters, on the other hand, are concerned with reducing the possibility of loss by discovering as much information about the past as possible through extensive searches of public records and stringent examinations of title. Some state title insurance codes provide that no policy or contract of title insurance shall be written unless it is based upon a reasonable examination of title, and unless a determination of insurability of the title has been made in accordance with sound underwriting practices.

The general underwriting examination and search requirements, coupled with the disarray and geographic dispersion of records, have fostered the development of privately owned, indexed databases or title plants. These title plants must be maintained regardless of the level of real estate activity during any given period. The Financial Accounting Standards Board (FASB) has ruled that a title plant is a unique asset that if properly updated, does not diminish in value over time. The cost to maintain the economic life of a title plant and continuously update the records is extremely high. This is one factor adding to the higher overall fixed-cost percentage for title insurers as compared with property/casualty insurers.

Both property/casualty insurers and title insurers must physically produce policies, but the processes and requirements differ significantly. A typical property/casualty policy might involve filling out a few blanks on a form, while the title policy might require the transcription of a complex legal description unique to the insured property, along with enumeration of often equally complex and unique terms of easements or other special property rights. In property and liability lines, agents' commissions generally are in the range of 10% to 25% of the premium on the policies that agents write. In title insurance, the agent retains a much larger proportion of the amount charged (see **Exhibit 6**). There was a drop in expense ratio from 97.4 in 2008, to 93.1 in 2009. There have been drops in other years, but not nearly as big. Commissions for title insurance are more properly described as agent's retention or agent's labor or work charges.

Exhibit 5
U.S. Title vs. Property/Casualty – Comparison of Key Elements
Key elements of the title insurance that distinguish it from personal lines classes of property/casualty insurance.

Features	Title Insurance	PC Insurance
Protection	Against Past Events	Against Future Events
Scope of coverage	Specific	Broad
Actuarially Defined Rates	Evolving	Yes
Administrative / Acquisition Costs	High	Low
Loss Costs	Low	High
Policy Term	Potentially Unlimited	Finite
Premium (GAAP)	Fully Earned at Issuance	Earned Over Policy Term
Rate Regulation	Varies by State	High
Rate Activity	Varies by State	Tied to Inflation and Underwriting Business Cycles
Loss Frequency	Low to Moderate	High
Loss Severity	Low	Moderate
Distribution	Agents / Direct	Agents / Direct /Mass Market
Marketing Success	Based on Service	Based on Rates
Competition	Semi-Concentrated Market	Fragmented Market
Premium Collection	After	In advance
Financial Leverage	Low	High
Sensitivity to Real Estate Markets	High	Moderate

The title insurance activities of search and examination generally are carried out locally, because the public records to be searched are usually only available locally. This activity might be performed by directly owned branch operations of the insurer or by title agents. Payments to a title agent not only reflect an origination commission but incorporate underwriting, loss-prevention and administration costs that title insurers would incur if policies were issued directly. These unique characteristics of the title insurance industry, combined with the necessity of maintaining a title plant or searching public records, contribute to the high fixed costs, the high ratio of salaries to total expenses and the high percentage of total revenues retained by agents.

In addition, with the requirement that each real estate parcel be evaluated and insured based upon the myriad and varying local laws, customs and records, the traditional insurance structure of local marketing and home-office underwriting cannot reasonably and cost-effectively be maintained in the title insurance industry. Since real estate

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Exhibit 6

U.S. Property/Casualty – Operating Expense Ratios, Various Lines (1974-2009)

Title insurance has a much higher average expense ratio as compared with traditional property/casualty lines.

Year	Title Industry	Surety (Stock)	Property & Casualty (Stock)	Property & Casualty (Mutual)	Boiler & Machinery (Stock)
1974	91.5%	52.1%	29.7%	24.8%	59.0%
1975	90.3	53.2	28.7	24.2	52.4
1976	86.0	53.8	27.4	22.5	57.6
1977	84.3	51.6	26.9	21.5	53.4
1978	88.7	50.3	27.6	21.7	53.3
1979	91.2	50.6	27.9	21.7	55.4
1980	98.3	52.8	28.5	22.1	57.7
1981	100.5	51.6	29.4	23.1	58.6
1982	101.3	51.7	30.1	23.5	62.1
1983	89.6	47.7	30.8	23.4	63.3
1984	91.2	45.6	30.1	23.3	64.5
1985	91.3	34.2	27.7	21.9	48.4
1986	87.0	45.5	26.6	21.8	48.2
1987	90.9	49.9	27.1	21.4	48.2
1988	93.1	51.2	27.8	21.1	52.6
1989	94.3	51.0	28.2	21.2	54.6
1990	95.1	51.1	28.2	21.5	52.8
1991	95.1	48.8	28.6	22.0	52.6
1992	90.4	45.4	28.7	22.3	49.5
1993	89.7	42.4	28.2	21.9	45.5
1994	93.1	48.3	27.8	22.4	43.1
1995	90.0	45.4	27.8	23.1	43.0
1996	93.6	44.0	27.8	23.1	41.9
1997	93.7	43.2	28.3	24.3	43.0
1998	92.7	43.5	29.0	24.9	44.0
1999	92.9	42.6	29.1	25.5	48.9
2000	94.7	44.1	28.6	25.2	41.8
2001	92.7	40.8	27.4	24.9	41.9
2002	91.6	51.6	25.7	24.9	39.7
2003	89.8	49.1	25.0	24.4	39.7
2004	89.4	47.2	26.3	24.4	43.7
2005	89.0	47.4	26.3	24.6	40.0
2006	89.9	48.5	26.5	25.9	40.8
2007	90.9	46.6	27.5	26.3	38.5
2008	97.4	44.6	27.8	26.6	40.3
2009	93.1	46.6	28.2	27.5	40.9
		Averages:			
All Years	89.5	46.2	27.2	22.8	47.3
Past 10 Years	91.8	46.7	28.9	25.5	40.7
Past 20 Years	92.2	46.1	27.6	24.3	43.6

Source: Title industry figures developed from ALTA and NAIC Form 9s. All other data from BestLink® and Best's Aggregates & Averages.

laws, customs and practices vary, at least on a state-by-state and sometimes on a county-by-county basis, it has not been practical for underwriting to be performed on a national basis by a team of underwriters in the home office. Therefore, the economies of scale – made possible by establishing a centralized, skilled technical support staff of actuaries and underwriters to price products and make underwriting decisions – are absent in the title industry.

Rate Regulation

Like the rates for other forms of insurance, rates for title insurance usually are regulated by state governments to ensure that premiums are not excessive, inadequate or unfairly discriminatory to the public. States have different methods of regulating title insurance rates. The types of rate regulation used are:

- **Promulgation** — State regulatory body sets the rates.
- **Prior Approval** — Insurers propose rates, which must be reviewed formally and approved explicitly or deemed approved by the regulatory body before they can be charged.
- **File and Use** — Insurers set rates, but they cannot be charged until the regulator has been notified and allowed time for review and action, if necessary. In some prior-approval states, almost the same result is achieved through a so-called deemer provision. Under a deemer, rates proposed by insurers are deemed approved if the regulatory body takes no action to disapprove a filing within a specified time, and the filer notifies the state that the rates are being deemed approved.
- **Use and File** — Insurers set rates that can be charged immediately, as long as the new rate schedule is filed with the regulatory body.
- **No Direct Rate Regulation** — Insurers set rates that can be changed at an insurer's discretion. Even in this apparent unregulated situation, a regulatory body still is charged with overseeing the title insurance industry and can question the propriety of a rate that appears to be unfairly discriminatory or otherwise violates statutory standards.

Title insurance premium rates largely are determined by operating and acquisition cost factors, as compared with property/casualty rates that are based on the actuarial determination of expected losses. The risk of title loss is a function of many factors, which can vary considerably from jurisdiction to jurisdiction and transaction to transaction. Also, the services covered by the title insurance premium vary from

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state to state. It is difficult to compare a pure title insurance risk premium with an all-inclusive rate that covers not only the risk of loss but also the title search, examination, title opinion and closing.

Rate Adequacy and Stability

Title insurance premium rates are based on five cost considerations, including those related to:

1. Maintaining current title information on property local to that operation, i.e., title plant.

2. Searching and examining the title to subject properties.

3. Resolving or clearing defects to title.

4. Covering title defects.

5. Allowing for a reasonable profit.

Loss Characteristics Among Companies

Title insurance loss experience varies considerably among individual companies based on a wide array of factors, including:

1. Experience and technical competency of agents and title underwriters.

2. Quality and quantity of title documentation and evidence (both public and private) underlying the search-and-examination process.

3. Regional differences in title insurance customs and practices, underlying title insurance risks, the mix of residential sale, residential refinance and commercial business, and defalcation risks.

4. Adequacy and effectiveness of underwriting controls and agency management systems.

5. Differences in the proportion of agency business versus direct business.

6. Differences in the proportion of commercial versus residential business.

7. Differences in claim-administration processes, such as claim recognition, evaluation, timing of settlement and recoupment.

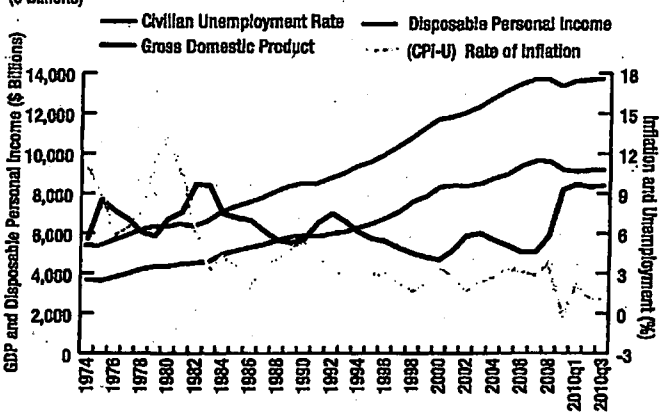
The Economy

After a period of strong growth dating back to late 2002, the economy took a sharp turn for the worse in 2008 – with gross domestic product (GDP) virtually flat compared with 2007 – while in 2009, the GDP contracted by 2.6%. The marked reversal of growth rates in 2008 and 2009 represented a significantly different growth environment than the one witnessed over the previous four years (see **Exhibit 7**). However, GDP growth did resume in 2010, although the rate of growth remained moderate with annualized growth averaging 2.9% over the first nine months of the year. The $787 billion Economic Stimulus Package of 2009 – along with that year's other tax legislation programs, "Cash for Clunkers" and the First-Time Homebuyer Tax Credit, which was extended through June 2010, both designed to boost the auto and housing sectors – has, to some extent, helped in moderating the negative impact of ongoing difficult economic circumstances. However, the outlook for the U.S. economy remains uncertain given the ongoing macro economic conditions, especially surrounding the housing sector. In addition, it remains unclear whether this positive growth trend can be sustained following the expiration of these fiscal measures.

Exhibit 7

U.S. Key Economic Figures (1974-2010)

($ Billions)



Notes: All data are annual averages. Gross domestic product (GDP) and disposable personal income (DPI) are adjusted for inflation, reported in billions of chained 2005 dollars by the Bureau of Economic Analysis (2Q-2010). Consumer Price Index (CPI) quarterly data is based upon adjusted 12-month quarter-end data. The unemployment rate is the number of unemployed as a percentage of the civilian labor force as reported by the Bureau of Labor Statistics (June 2010*). 2010 numbers are as of the 2nd quarter.

*The unemployment rate as of October 2010 is 9.6%

Sources: U.S. Census Bureau, NAR, FRB, BEA

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Exhibit 8

Top 10 Title Insurance States* by % Change in 1-Unit Housing Starts (2006-2009)

	1-Unit Privately Owned Housing Starts			
	Last 1-Year % Change (2008 - 2009)	1-Year % Change (2008-2009)	Units 2009	2006
Florida	-20.5%	-31.2%	26,636	146,236
Arizona	-19.2%	-33.0%	12,826	55,633
California	-19.1%	-21.3%	25,525	107,714
Michigan	-18.7%	-30.6%	6,236	24,782
Ohio	-15.4%	-17.7%	10,593	27,514
Texas	-14.7%	-15.8%	67,069	162,750
Virginia	-14.6%	-18.4%	16,268	36,977
New Jersey	-14.5%	-21.4%	7,211	17,113
Pennsylvania	-13.4%	-24.2%	15,341	33,121
New York	-12.9%	-24.2%	8,656	19,881

*By % of 2009 title direct premiums written.
Source: U.S. Census Bureau.

Following the initial economic slowdown, which started in the second half of 2007, the Federal Reserve cut the Fed Funds Target Rate by 1 percentage point in the fourth quarter of 2007 – reversing its three-year trend of increasing the short-term interest rate. The rate cuts were in response to a troubled mortgage and housing sector, in which many adjustable-rate mortgages were resetting at higher levels than homeowners anticipated and could afford. The cuts continued through the second quarter of 2008, as the Fed reduced its benchmark fed funds rate – the rate at which banks lend to each other – to a historic low range between 0% and 0.25%, and it has held it at that low level since that time.

Rates continued to dip to low levels as of October 2010, with the long-term 30-year fixed rate mortgage at approximately 4.3%, down from an already low rate of 5.0% in 2009. In fact, over the course of the past two years, the 30-year fixed rate mortgage has decreased nearly 2 percentage points, and has set off a "mini refinance boom" in 2009 and 2010. Along with the homebuyer tax credit legislation, these favorable conditions in personal home financing had helped to modestly stabilize home prices and boost existing home sales in 2009 and the first half of 2010. However, with the expiration of the tax credit in June 2010, sales in recent months have fallen compared to the same period in 2009 and prices have modestly retreated.

The U.S. housing market's future direction thus remains uncertain as the market deals with the expiration of these incentives. Meanwhile, questions have also been raised recently regarding the foreclosure practices of major lending institutions. While some banks and lending institutions had announced a temporary moratorium in the processing and sales of foreclosed properties as they reviewed their policies and procedures, most have since resumed processing. However, as these procedures come under greater regulatory scrutiny – as well as litigation activity – there may be a significant slowdown in the foreclosure pipeline (which comprises nearly a third of all home sales in 2010) with the REO (bank-owned properties) taking significantly longer to come to market.

In 2009, U.S. privately-owned housing starts dropped to 554,000 units, on an annual basis, down 75% from their peak year in 2005, and nearly 40% lower than the already-low 2008 annual figure. However, housing starts through October 2010 (the last period for which data is available), were relatively unchanged from the depressed 2009 levels, with approximately 550,000 units started on an annual basis (see **Exhibit 1**).

Especially hard hit by the economic downturn have been the Pacific, West, South Atlantic and Midwest regions of the United States, it is no surprise that the previously booming real estate markets of California, Florida, and Arizona have had extremely large declines in housing starts between 2006 (the peak of the boom) and 2009 (see **Exhibit 8**) due to excess inventory and weakening economies, and that conditions in these markets continue to remain weak in 2010. Driving the ongoing shrinking demand for new homes – along with relatively high costs of construction – is the persistantly high unemployment, uncertainty in the job markets and continued supply of existing homes that are stemming from the high number of foreclosed homes entering the market.

Both existing- and new-home sales have trended lower since 2005. However, while total home sales in 2008, fell 16% from 2007, total home sales were up modestly in 2009 – approximately 3% from 2008 levels – partly due to the homebuyer tax credits as well as continued low interest rates. However, since the tax incentives expired in June 2010, annualized sales through the third

quarter of 2010 have fallen approximately 20% from the levels seen during the same period of 2009. This decline is affecting both the new and resale segments of the market, and continuing to put home prices under pressure. As a result, based on the Housing Affordability Index, housing has become more affordable than it has been in the past 30 years. The Housing Affordability Index, which had increased from 169 in 2009, from 138 in 2008, for existing home sales – with a higher index reading meaning housing is more affordable – further increased to 172 at the end of September 2010 (see **Exhibit 9**). This figure – representative of a household earning the median income to qualify for a mortgage loan with a 20% down payment on a median-priced home – has continued to show steady improvement since 2006's reading of 108, when the housing boom effectively ended.

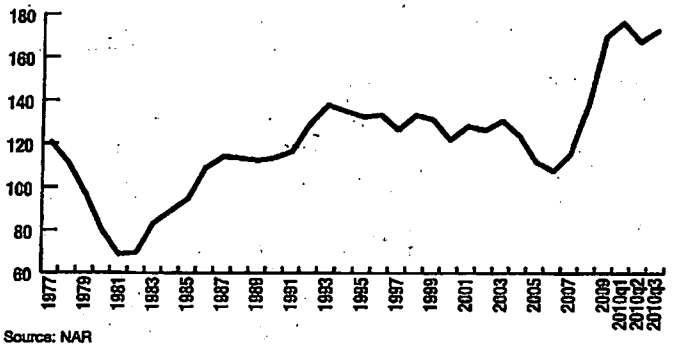
One measure of slight improvement in the housing market has been a decrease in existing homes available for sale. As of September 2010, there were 4.04 million existing homes available for sale, or approximately 10 months' supply at current sales rates. While this is still much higher than the traditional measure of six months' supply, considered as a market 'balanced' between sellers and buyers, it does represent a 12% decline from the record inventory of 4.58 million homes available for sale reached in July 2008. While this may, on the surface, seem positive, some of the decline may be due to homeowners pulling their homes off the market due to inadequate demand and/or mismatches in bid and ask prices. Nevertheless, the still-high inventory levels portend that housing starts and permits are expected to continue to decline through 2010 and possibly much of 2011.

Inflation, which had decreased dramatically in 2008, from the middle part of the decade, had actually turned negative in 2009, as the economic downturn unfolded. Although the inflation rate has turned positive in 2010, the annualized rate through the third quarter remains low. The rate of inflation, represented by the Consumer Price Index for All Urban Consumers (CPI-U) was reported down 0.4% for the 2009 year, compared with the 3.8% increase in the 2008 calendar year. As mentioned above, 2010 continues to witness a very modest pace of inflation with consumer prices at an unadjusted 1.1% year-over-year change as of September.

Exhibit 9

U.S. Housing Affordability (1977-2010)

The housing affordability index measures the percentage of income the median-income family has toward qualifying for a median-priced home with a 20% down payment. A higher index reading means housing is more affordable. As of September 2010, the median-income family – with an income of $61,652 – had 172.4% of the income needed to qualify for the median-priced home of $177,900.



Source: NAR

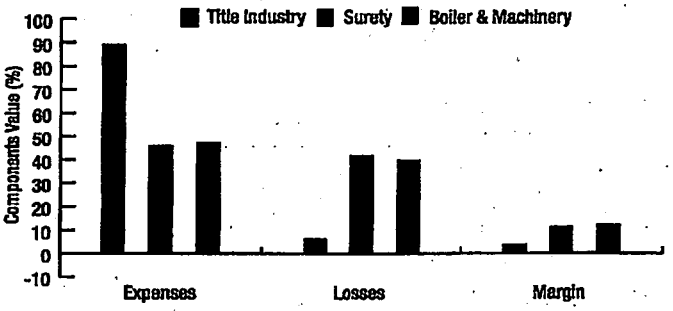
The unemployment rate, which increased significantly in late 2008 and 2009, still remains persistently high and stands at 9.6% as of October 2010, up significantly from the annual average of 5.8% in 2008. The rapid increase in unemployment poses a more traditional threat to the housing market and to the title insurance industry as it bears directly on the ability of buyers to purchase homes, and their subsequent need to obtain title insurance. (See **Exhibit 7**).

The latest data suggest that current economic trends – namely weak economic growth, low inflation, low interest rates and a weak labor market characterized by a continued high unemployment rate – may persist through at least the first half of 2011, and may result in additional pressure on factors affecting real estate demand.

The Title Industry and Real Estate Economics

The title industry is highly dependent on real estate markets, which, in turn, are highly sensitive to mortgage interest rates and the overall economic well-being. Typically, there is an inverse relationship between mortgage rate changes

Exhibit 10
U.S. Title Insurance – Title, Surety and Boiler & Machinery: Components of Combined Ratio (Average from 1974 - 2009)



Source: BestLink

and real estate activity, and therefore, operating revenue for title insurers.

As interest rates fall, real estate transactions generally increase along with the greater demand for title products, and title insurers' operating revenues generally rise. The reverse occurs when interest rates rise. Changes in mortgage interest rates create corresponding fluctuations in title insurers' total operating revenue and pretax operating gains. Since 2006, however, other factors have interfered with the conventional relationship between interest rates and real estate activity.

While the real estate market has slowed down significantly in recent years, the mortgage interest rate environment has continued to be favorable. As of the third quarter of 2010, the 30-year fixed-rate mortgage yield has decreased 24 basis points from the yield as of year-end 2009, which had declined by 99 basis points when compared to the yield as of year-end 2008 (see **Exhibit 2**). This favorable interest rate environment has helped to stabilize overall housing market activity has resulted in a "mini-refinance boom" in 2009. Although not as significant as the unprecedented refinance boom of 2003, the current mini-boom remains an important positive contributor to the modest rebound in home sales and prices in recent months.

Another significant factor has been the federal government's active role in both providing home financing through the FHA, Fannie Mae and Freddie Mac, as well as through tax incentives geared towards potential home buyers. However, the stability and eventual recovery of the housing market will, of course, depend on the future direction of long-term interest rates, and the wider availability of credit. The latter is strongly linked to a slowdown in the currently high levels of defaults and foreclosures, as well as a broader economic recovery characterized by a return to sustained growth and employment.

How Title Insurance Differs From Other Lines of Insurance

Since title insurance is an evidence-producing/loss-prevention line of insurance, its loss expense is less than – and its operating expense is greater than – that of other property/casualty lines of business. Insurance expenses are loss-prevention/underwriting-related and loss–related.

A typical loss-prevention insurance line – such as title, boiler and machinery or surety – usually has higher operating costs and lower losses than other insurance lines (see **Exhibit 10**). It should be noted that according to the statutory accounting rules for title insurance, only reported claims are reflected in the loss expense, while in other lines – both reported and unreported (incurred but not reported, or IBNR) claims are included in the loss expense. As a result, timing differences occur in the reporting of losses and loss-adjustment expenses for title insurance when compared to other lines. In addition to known claims, title insurers – unlike insurers in other lines – carry a statutory liability known as the statutory premium reserve that provides ultimate loss protection for policyholders. However, it is not counted as a loss statistic.

Because of the large service and underwriting component of title insurance, its closest property/casualty counterparts are service, underwriting and loss-control-intensive sectors. Lines of insurance containing these features include surety, and boiler and machinery.

Operating expenses are the largest component of a title company's costs. A title company's ability to expand its infrastructure and maximize operating profits in good market conditions, and to contract and control costs in poor market conditions,

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is critical to its long-term financial success and solvency. This isn't necessarily the case with property/casualty companies, where the control of loss costs is more critical to success and solvency.

Because of title insurers' dependency on the health of the real estate market and favorable interest rates – as well as their being required by law in most states to be monoline writers – title industry revenues and profitability are susceptible to volatility. To dampen this volatility, title insurers have:

- Improved their technology and work-flow processes.

- Diversified their operating revenue by introducing new title products and expanding nationally and internationally.

Investment Income Characteristics

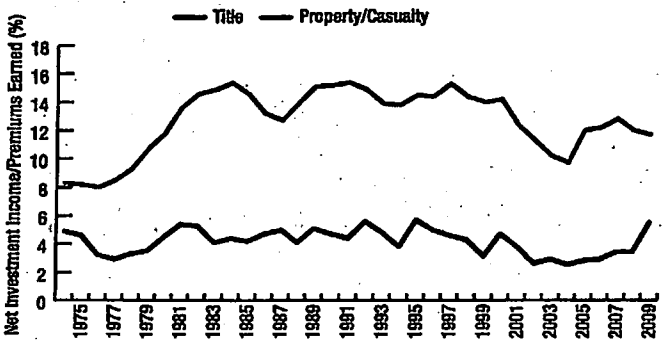
Important differences exist between title insurers' and traditional property/casualty companies in their abilities to generate investment income (see **Exhibit 11**). Property/casualty insurers collect premiums in advance and hold them until they must indemnify claimants for losses. These premiums constitute a large cash flow that companies generally invest in intermediate and long-term, investment-grade assets. The investment income generated is reinvested, and a company's asset base grows at a compounded rate until losses on policies materialize and are paid. Claims for the long-tail casualty business lines might take decades to appear and the accruing premiums can add significantly to a company's assets. As a property/casualty company's ratio of written premiums to surplus (equity) increases, the fraction of total assets that are financed by advanced premiums from policyholders also increases. In other words, writing property/casualty insurance can create financial leverage.

These property/casualty reserves are debt, in that if a policy is canceled, the reserves are owed to the former policyholder, yet they bear no rate of interest. Hence, this kind of financial leverage does not burden the property/casualty insurer with additional fixed charges and, as long as rates are adequate, it provides all the conventional benefits of leverage without much of the downside risk.

Exhibit 11

U.S. Title vs. Property/Casualty – Net Investment Income as a Percent of Premiums Earned (1974-2009)

The average ratio of net investment income earned to premiums for property/casualty insurers is about three times larger than for title insurers.



Source: ALTA, NAIC, A.M. Best Co.'s BestLink®: Statement File - 99200

Title companies collect premiums after the largest component of their costs – operating expenses – has been incurred. As shown in **Exhibit 6**, title companies' expense ratio typically averages more than 90, while the property/casualty industry's expense ratio is less than 30. The title industry's higher expense ratio results in a significant reduction in available cash flow for companies to invest. Although the remainder of the title premium is available for investment, the relative percentage of premium collected and invested is significantly less than that of the property/casualty industry. As such, the title industry's financial leverage is relatively low.

Title insurers sell protection against losses caused by problems with legal title to real property arising out of events prior to the effective date of the policy. Because most uncertainty about the past can be reduced by careful research, a title insurer can exert a great deal of control over the risks it underwrites.

For example, by looking up property tax records, a title insurer can almost eliminate the possibility that a real estate title will become encumbered by a lien for past unpaid real estate taxes. However, hidden defects in a real estate title, such as errors in public records, will cause losses. Because of the great importance of real estate titles, title insurers establish highly stringent underwriting

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criteria, eliminating all the risks they possibly can through careful examination of title before issuing insurance.

Title insurers use much of the premiums collected to cover the underwriting costs associated with the issuance of a title insurance policy. In contrast to property/casualty insurers, title insurers expend premium dollars before collection, and therefore do not retain most of the premium dollars before they are expended in the ordinary course of business.

On the other hand, the loss tail for title insurers is much longer than that of most other lines of insurance, and it constitutes a form of leverage where some percentage of premiums is set aside and held for future claims. The loss-tail leverage constitutes only a small percentage of the premiums, however.

Title Insurance Profitability

The financial strength and surplus of title companies, however, might be more critical than that of property/casualty underwriters. The title industry's premium volume and profitability is highly dependent on real estate sales and mortgage-refinancing activity. Since large infrastructures of personnel and title plants must be maintained to provide title services, a title company's profitability is highly sensitive to real estate market activity. A significant portion of a title company's cost structure is fixed, and the variable component largely is related to personnel. It is as difficult for a company to reduce its costs of doing business in the face of a downturn in real estate activity as it is to reacquire trained staff when activity rebounds.

Surplus plays a critical role by providing a cushion that permits a title insurer to ride out poor real estate markets, since not all of its costs are variable and able to be reduced. Property/casualty companies have a built-in level of demand. Many property/casualty coverages are required by law or business judgment and have to be purchased annually.

As with every industry, the title industry has certain inherent risks that must be understood to properly evaluate an individual company's operational strengths and weaknesses, balance-sheet vulnerabilities and volatility of earnings. The major business risks a title insurer faces are:

- Volatility of revenue;
- Expense control;
- Mix of business;
- Distribution mix (agency or direct);
- Defalcations;
- Rate adequacy and stability; and
- Legislative reform.

The title industry's revenue is more volatile than that of the property/casualty industry. Cyclicality in a line of insurance creates challenges but isn't always a negative quality, since it creates opportunities for well-managed companies. In such businesses, management must make sure the company's operating structure is flexible and responsive to both increases and decreases in revenue over a relatively short period. A well-managed company must be able to access trained staff to service business adequately when demand for title insurance is rising.

Likewise, when the demand for title insurance is sharply reduced, a company must be able to downsize its infrastructure and personnel in an efficient and orderly manner so that servicing of its current orders is not interrupted. Property/casualty insurers, in general, are larger and therefore have a more difficult time fluidly adjusting expenses around macroeconomic cycles; whereas the title industry's margins have historically been more controlled (see **Exhibit 12**).

Temporary personnel do not provide a total solution to this problem. Unskilled and part-time personnel can satisfy the need for an increase in title messengers or clerks, but they typically cannot fill the roles of more highly skilled positions, such as title searchers and underwriters.

Title plans also are a significant component of fixed costs. They are important because they are the raw material of the underwriting

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process and require both an initial investment and constant updating of various records. Even in slow markets, title plants must be current, with each day's recordings entered into the plant's database. If a title plant becomes outdated, it will become a source of errors and lead to title insurance losses.

The acquisition and maintenance of title plants gradually is becoming more cost effective as the business becomes computerized. Modern title insurance companies feature the computerization of order taking, title search and examinations, and policy issuance. These advances have permitted companies to increase premium volume capacity dramatically with only a modest increase in personnel. This capability not only enhances the profitability of a title company but also makes it easier to manage expense levels during slow real estate markets.

Title insurance provides coverage for the following basic types of real estate transactions listed in ascending order of underwriting complexity:

- Residential mortgage refinancing or equity lines.
- Residential resale or new construction.
- Commercial resale or new construction.

Each successive product requires a significantly increased effort to market, underwrite and administer claims. The production costs necessary to generate each of these products also vary significantly.

First, residential mortgage refinancing is a classic, high-volume, commodity business, that tends to come in waves based on the relative level and trend of mortgage interest rates. During typical economic cycles when rates go down quickly – such as in 1992-93, 2001 and 2003 – the volume of new title orders increases dramatically. During such times, title industry companies must hire large numbers of workers to service orders to maintain market share. However, the level of title orders can contract as quickly as it surges, and well-managed companies must adjust their personnel (cost) levels accordingly.

In underwriting refinance transactions, the title insurer, or its agent, performs a more limited title search than is necessary for a resale transaction. This less-comprehensive title search occurs because only the position of the lender of the refinanced mortgage has to be determined to assure the lender of its priority. No owner's coverage arises from these transactions, since the original owner's title policy, whenever purchased, continues to protect the basic title in the name of the property owner.

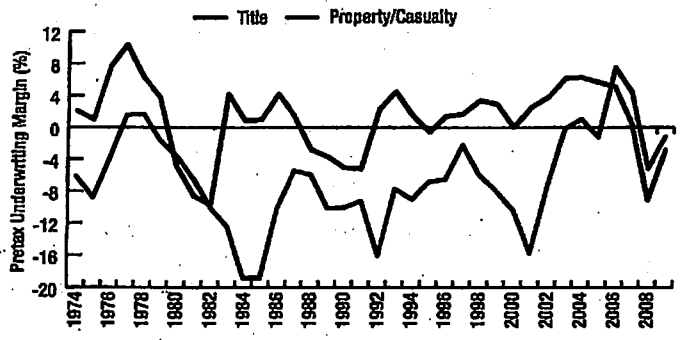
In addition to the challenges of managing the surges and contractions of title orders, companies also face difficulties managing the claims process. Some companies believe the best practice to minimize claim losses is to settle claims early to minimize legal fees, which are a large component of most claims. Other companies litigate claims when possible – which incurs more up-front expense – to establish and maintain a deterrent against fraud and future nuisance claims.

This tactic can be particularly effective in those regions where a small number of law firms specialize in representing title claimants. Whether a company's approach is successful or not can be determined only when the results of that approach are compared with industry averages.

Exhibit 12

U.S. Title vs. Property/Casualty – Pretax Underwriting Margin (1974-2009)

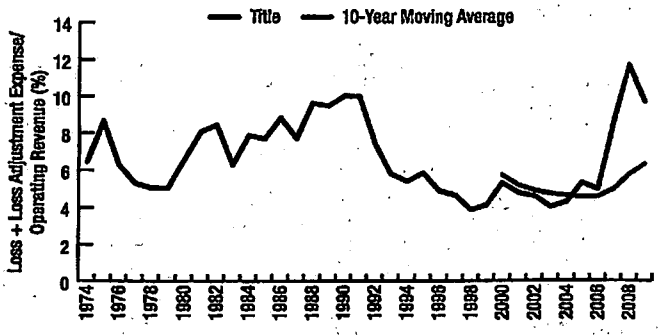
The title industry has, on average, a higher underwriting margin than property/casualty underwriters.



Source: ALTA, NAIC, A.M. Best Co.'s BestLink®: Statement File - 89200 Total US PC Industry.

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Exhibit 13
U.S. Title Insurance – Loss and Loss-Adjustment Expense as a Percentage of Operating Revenue (1974-2009)



Source: ALTA, NAIC.

Companies must recognize when it is prudent to settle small-dollar claims quickly and when to litigate certain claims in order to establish a reputation within the legal community. What's more, claims approaches are dependent on the region of the country and the local legal and claims environment.

Secondly, more profitable and complex than refinance orders is the residential purchase business. And lastly, underwriting commercial transactions represent the highest profit margin for title insurers. In a typical sale/development of an office building, both buyers and sellers generally are knowledgeable and sophisticated and retain lawyers to represent their competing interests. Generally, both title insurers and lenders assign senior underwriters to manage and underwrite commercial transactions. This more intensive underwriting process – undertaken by both the buyer and the seller – results in fewer mistakes and title defects and, consequently, reduces the risk of loss. Since title premiums are linked to property values, large-value commercial title business generally generates the highest underwriting profit.

Loss Experience in the Title Industry

Exhibit 13 shows that the average loss experience for the title industry improved dramatically from 1993 to 2009 compared with the prior 20 years. This improvement is primarily due to better up-front underwriting as well as more stringent monitoring of agents to help avoid defalcations. However, loss experience in 2007 and 2008 did deteriorate noticeably, partly as a result of inadequate reserving for future claims during the period of the housing boom of 2000-2006. The end of the housing boom and the subsequent rapid increase in defaults and foreclosures has led to significantly greater incidence of title claims arising out of those calendar years. The improved loss experience in 2009 was driven mainly by the lack of major reserve strengthening following the significant reserving actions taken in the prior years.

Title insurance policies have no set termination date and no limitation on filing claims. However, the only fees collected are the one-time charges when the policy is issued. Thus, losses reported in any one year will affect that year's profitability for statutory accounting purposes but are not, in the main, generated by that year's business activity. By the nature of the business, most title losses are reported and paid within the first five to seven years after policy issuance. However, the tail for title policy claims is at least 20 years.

All insurance companies require adequate loss reserves to cover all known and future losses, as well as adequate surplus levels to provide a cushion for reserve shortfalls, contingencies and unexpected losses from underwriting and investment activities. For title companies, the potential adverse loss-reserve development is not as problematic as it is for casualty lines of business, since losses are a relatively small percentage of the total.

Although large title claims are infrequent, they do occur. They can arise in the context of the transfer of upscale, single-family residential properties; single family or multifamily real estate developments; or office buildings, shopping centers or other commercial developments. Overlapping tasks and regulatory hurdles involved with these complex transactions complicate these claims. For instance, often there are entitlement issues, easement, ingress/egress issues and mechanic-lien risks associated with construction.

The term of a title policy generally ends upon the sale, transfer or refinancing of the underlying property, which means that title insurers are unable to determine

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which and how many of its policies still are in force. This situation arises because the title insurer is not advised of the new policy, unless that insurer is fortunate enough to have written both the new and the old coverage. This feature provides for significant differences in the nature of claims and the reporting of financial information between the property/casualty business and that of the title insurer.

Title losses vary by a wide array of factors, including the:

- Local patterns and practices of land holding.
- Local record-keeping system.
- Value of the actual property.
- Length of time the property has been owned or encumbered by mortgages or liens.

However, without the ability to pinpoint the exposure from in-force policies, companies are unable to translate this loss/claims information into definitive reserving data. Instead, they use assumptions and extrapolation methods that are detailed in the **Reserving Characteristics** section of this report.

Title claims experience has an emergence pattern similar to that of a property/casualty product line with a moderate-length tail, such as personal automobile. Like personal auto, title insurance experiences a high frequency of low-dollar claims, occasionally generating a severe claim. Title underwriters have the ability to cure modest defects that occur frequently at a nominal cost. In many cases, the defect can be solved and the title loss averted simply by recording a document to correct, or confirm, the true property interests of the parties. However, a severe title defect or agent defalcation can result in a costly claim that might take years to settle.

The typical property/casualty company operates with a loss and loss-adjustment expense ratio between 70% and 80%, depending on its lines of business. This compares with a typical title company's loss and loss-adjustment expense ratio of 5% to 10%. This difference appears dramatic and leads most property/casualty-oriented analysts to assume that the business must be extremely profitable. However, the low loss and loss-adjustment expense (LAE) ratio is the result of the large expense component associated with underwriting and servicing a title product. This brings the overall profitability of title insurance, as measured by the combined ratio, more in line with property/casualty products (see **Exhibit 14**).

Exhibit 14

U.S. Property/Casualty – Combined Ratios, Various Lines (1974-2009)

Although the components of the combined ratio are markedly different among the various insurance lines, the average combined ratios are somewhat similar.

Year	Title Industry	Surety (Stock)	Property/ Casualty (Stock)	Property/ Casualty (Mutual)	Boiler & Machinery (Stock)
1974	98.0%	113.7%	105.0%	101.2%	103.6%
1975	99.0	122.0	107.5	104.4	96.2
1976	92.3	103.0	102.0	99.6	93.7
1977	89.6	96.2	97.0	93.9	86.7
1978	93.7	97.1	96.6	94.6	84.1
1979	96.2	80.2	99.6	98.0	76.2
1980	104.9	105.9	102.4	99.1	90.8
1981	108.6	85.7	104.9	102.9	91.8
1982	109.7	89.1	108.7	105.6	100.7
1983	95.9	87.6	111.8	105.3	103.8
1984	99.1	95.5	118.9	110.6	118.3
1985	99.0	111.9	116.5	110.5	89.9
1986	95.6	117.1	106.9	106.1	86.9
1987	98.6	116.0	103.3	103.6	80.9
1988	102.7	100.5	103.9	104.6	97.1
1989	103.8	93.9	108.6	108.0	93.2
1990	105.1	87.4	108.4	98.5	101.0
1991	105.2	75.6	109.5	106.4	109.8
1992	97.7	84.2	119.1	108.4	103.3
1993	95.5	65.8	107.9	104.8	103.7
1994	98.5	83.2	108.9	106.8	88.1
1995	95.8	79.7	106.7	105.4	91.2
1996	98.5	71.5	106.3	104.6	86.0
1997	94.1	69.2	101.4	101.9	88.3
1998	98.6	68.4	104.8	103.7	95.0
1999	97.1	68.1	107.2	109.9	109.5
2000	100.0	72.3	108.0	115.2	93.3
2001	97.5	88.7	115.4	117.4	92.1
2002	96.2	116.2	108.4	109.6	79.7
2003	93.8	122.3	99.7	100.9	68.0
2004	93.7	117.8	99.0	98.4	76.2
2005	94.3	101.4	102.1	99.6	82.8
2006	94.9	81.2	90.5	97.2	76.6
2007	99.5	70.2	94.0	99.6	71.0
2008	109.1	67.1	104.9	107.2	74.7
2009	102.9	79.2	100.3	105.5	75.4
		Averages			
All Years	96.0	89.4	102.5	101.5	87.1
Past 10 Years	98.2	91.6	102.0	105.1	77.0
Past 20 Years	98.3	83.5	105.0	105.3	87.3

Source: ALTA, NAIC, A.M. Best Co.'s <<>>BestLink®: Best's Statement File - 99200 Total US PC Industry.

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Much of the stability in the title industry's loss ratio stems from the relatively low risk inherent in title insurance. The bulk of title insurance claims occurs shortly after closing and represents low-dollar costs. In these instances, the title company or its agent amends or corrects the title documentation and makes any required refilings and notifications. The policyholder might not be made aware of these technical corrections and does not receive any cash payment. Typically, the title company uses a staff underwriter or counsel to correct the problem, and the loss cost is relatively small.

Title companies that service multifamily real estate developments must have a well-trained and knowledgeable staff. Some of the larger title insurers have specialized departments dedicated to servicing these large-scale developments. In this way, title insurers limit risk by controlling the transaction at the outset and taking it through each step of the process – from acquisition work to construction disbursements to closing. Substantial costs are expended in these projects. More sophisticated title insurers have relationships with developers and are given insight into whether the transaction will be problematic at the outset. Although the magnitude of these losses can be higher than the typical title claim, the frequency of this type of loss is small.

Some of the most severe and difficult claims involve agent defalcations. Defalcation is the act of diverting fiduciary escrow funds without authority and without applying those funds to satisfy or pay off the existing mortgages, liens and encumbrances on the property that is the subject of the escrow. Defalcation losses are similar to catastrophe losses experienced by property/casualty insurers. Agent defalcation claims are the only shock-loss type of claim that has a concentrated geographic effect, depending upon the region controlled by the defrauding agent.

Because the title industry's loss reserves are more stable, have less-adverse development and represent lower exposure to the industry's surplus, it follows that less surplus is required to protect against unexpected or catastrophic underwriting events. This differs significantly from the experience of property/casualty companies, which require a relatively larger surplus cushion to protect property underwriters from catastrophes or casualty underwriters from adverse loss-reserve development.

Reserving Characteristics

Title insurance companies file annual financial statements (National Association of Insurance Commissioners Form 9) with their respective state insurance regulators in accordance with statutory accounting principles. Statutory accounting principles are more conservative than generally accepted accounting principles (GAAP) because assets and liabilities are valued on a liquidation basis versus a GAAP going-concern basis. As a result, all statutory balance-sheet items are valued as though the company intended to discontinue its business and discharge all liabilities immediately, including claims, before a final distribution of remaining assets to its shareholders. As such, only assets that consist of cash – or those that can be converted into cash in a relatively short period – generally are allowed to be admitted to a company's financial statement under statutory accounting principles. Assets that are contingent in nature, whose values are uncertain or whose collectibility is questionable, are not assigned value and are classified as nonadmitted assets.

By statute, title insurers are required to carry two liability reserves: known claims and statutory premium. The known claims reserve is the aggregate estimated amount required to settle all claims submitted to the company and unpaid as of the balance sheet date. The known claims reserve is similar to the property/casualty industry's case reserve. Over the decades, most title insurers have established reasonable baseline case reserves by tracking and analyzing historical claims data. Based on these data, individual known claims reserves are estimated by a company and are modified for special circumstances. These estimates must be reviewed at least annually and adjusted as necessary.

The statutory premium reserve is a liquidation reserve, the amount of which is determined by state-mandated formulas that establish a liability reserve and a charge to income based on the amount of business written. Defined by a formula, the initial

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reserve is reduced gradually, with an offsetting gain to income over a stated period, generally 10 to 20 years, depending on the rules of the domiciliary state.

Since title policies have no termination date, the statutory premium reserve is required and is reduced gradually to reflect the long-tail nature of the company's liability. The statutory premium reserve is equivalent to the property/casualty industry's incurred-but-not-reported (IBNR) reserve, which also is established and held for many years for long-tail liabilities. The major difference is the statutory premium reserve is determined and reduced by prescribed state formulas, whereas a property/casualty company has more discretion in establishing and reducing its IBNR reserves.

The statutory premium reserve is considered a liquidation reserve, since state statutes also require a company to segregate investment-grade assets in an amount equal to its statutory premium reserve. If a title insurer becomes insolvent, such segregated assets can be used only to pay future claims or to purchase reinsurance to settle future claims. These segregated assets may not be used to pay current claims, operating expenses or distributions to shareholders. This feature is unique to the title industry. In contrast, the assets of a property/casualty company are not segregated and are available to pay any claims.

The required segregation of assets to support reserves assures policyholders that the company will not utilize these funds to pay losses or other expenses in the ordinary course of business or make distributions to shareholders. This provision and its protections are part of the title insurance industry's regulatory framework, and much of the industry's financial structure is built around these statutory reserves.

Statutory premium reserve formulas vary significantly from state to state and reflect a state's underlying title framework and customs, but not necessarily its loss experience.

Under GAAP, the statutory premium reserve is not recognized as an expense and isn't included as part of a title insurer's liability. It does, however, exist as restricted equity. Title insurers that are required to file GAAP financial reports, or are part of a consolidated group of companies that are required to file under Securities and Exchange Commission (SEC) rules, normally develop an IBNR component like any other insurance line and include it as part of their GAAP liabilities.

For the property/casualty industry, IBNR is derived from actuarial predictions of future occurrences based on current loss data, and it is an unsecured liability. The title industry's statutory premium reserves are set by statute at a rate that is somewhat arbitrary. Few states, if any, currently can support the establishment or change of their statutory premium reserving levels based upon their title industries' actual loss experience. This situation has created inconsistent statutory premium reserves among companies across the country.

Additionally, since the statutory premium reserve is a charge to income, variances for individual title insurers' operating results (operating gain or loss) often reflect different statutory premium reserve requirements rather than actual differences in operations.

In addition to the statutory premium reserve and the known claims reserve, the title insurers' statutory financial statements provide for a supplemental reserve. Title insurers are required to have an actuarial certification of the adequacy of their reserves. If the actuary indicates that the statutory premium reserve plus the known-claims reserve is less than the estimated dollar value of known-plus-expected future claims, plus expected loss-adjustment expenses, the title company would have to fund the shortfall in the supplemental reserve. Since the supplemental reserve is not tax deductible, the best interest of title insurers is to have the statutory premium reserve as close as possible to actuarial estimates, if not actually more than the estimates.

In regions that experience significant real estate appreciation, turnover of homes is higher as owners sell their homes and use their realized gains to buy more expensive homes. Depressed regions of the country generally experience slower real estate activity as homeowners wait for the turnaround and try to avoid losing the equity in their homes.

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Although faster claims development might be one by-product of a higher turnover rate, a property becomes a better title insurance risk the more it is bought and sold because a property's title and tax records are searched each time it is sold. Frequent examination of a property's title records increases the odds of perfecting the property's title. The benefit, of course, comes from the fact that the new policy not only supersedes and effectively terminates the old policy but also generates new revenue. The term "perfecting" is the removal of any discovered potential defects in the title to real property, prior to closing.

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SR-2010-058

AFFIDAVIT OF J. BUSHNELL NIELSEN

EXHIBIT 6

LAWYERS NOTES

Customers ask about...

title insurance forms and policies

by Robert S. Bozarth,
Vice President—Major Transactions Counsel

The two avenues to coordination of insurance benefits between a borrower and lender

If mortgage lenders placed no requirement upon their borrowers to buy specified lines of insurance to protect them from non-credit risks, the insurance market in this country would be much smaller than it is. Although Canada is similar to the United States in many ways, it has never been an important market for title insurance because Canadian lenders do not require title insurance when the real property security is land located in Canada. In the U.S., lenders have developed conventional requirements to impose on borrowers which are the major source of the demand for many lines of property insurance.

Each of these insurance lines must meet the needs of the lending community to sell policies. For example, a consumer buying a new home and financing the purchase with a loan secured by a mortgage expects the lender to require homeowners' insurance against the multiple casualty and liability perils homeowners face, and title insurance to protect against title risks. Lenders routinely require homeowners' and title insurance to limit such risks. Although the two lines differ both in the way the risks are insured and in the way the insurer obligates itself simultaneously to both the borrower and the lender, the insurance is designed to meet the lender's needs.

Title insurance is an evidence producing-loss prevention line of insurance structured on a *risk elimination concept*. Most of the premium paid for title insurance pays for the title examination required for the policy.[1] Our risk management begins with that title examination.[2] The essence of title insurance is insuring the status of the title as of a specific time by assuring the policyholder that there are no recorded or hidden defects to the interest insured in addition to those listed in Schedule B of the policy.

In some cases, title insurers may use some other form of "risk elimination" to underwrite a risk, most notably, the use of an indemnity from a developer to give the developer's lender some protection against mechanics' liens in states where there is no statutory priority, but the loss experience in these cases is high. The *risk that a lien may be recorded or other defect created in the future* is a casualty risk because these future events cannot be predicted from an examination of the land title records at the date of the policy. Such casualty risks are not appropriate for title insurance. The title insurer in these cases is stepping close to the line between title and surety insurance.

The risk elimination nature of title insurance contrasts with the *assumption of risk* nature of virtually all other lines of insurance, including homeowners' insurance, which insure upon the more familiar concept of spreading risks among a body of policyholders. Homeowners,' automobile, accident, health, and life insurance lines insure on a casualty basis by forming risk pools designed by actuarial predictions of loss rates which must be adjusted periodically (usually annually or semiannually) to reflect recent loss experience. These casualty insurers manage risk by writing short-term policies and carefully evaluate their insureds. They must reevaluate their risks, premium and reserves for new policies and policy renewals.[3] Homeowners,' commercial general liability, automobile, accident, health, and life insurance lines are viewed as "conventional" lines of insurance. So all too often, observers impose their understanding of the risk assumption function of casualty lines on their analysis of title insurance. Although title insurance is a line of insurance, its risk elimination nature causes it to behave in unique ways. It is designed to be inexpensive instead of flexible. So when a title insurer faces a demand to cover a known risk, it has no actuarial or other systematic means for setting a price and establishing a reserve to cover that risk.

It is easy to understand why title insurance customers expect their title insurer to "assume" a known risk in a transaction. It is not as easy to manage that risk so it can be covered. Homeowners' and title insurance also use different

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methods when insuring both a borrower and lender. Title insurers issue an "owner's" policy to the borrower and a "loan" policy to the lender. Each form has a paragraph in the Conditions and Stipulations entitled "Liability Noncumulative" which permits the title company to pay a loss under "any policy insuring a mortgage to which exception is taken in Schedule B," and such payment will be construed "as a payment under this policy." The lender is not subject to defenses the title company may have against the borrower because it has its own policy. In addition, loan policies have more coverages, needed for the insurance of the validity, enforceability and priority of the lien of the insured mortgage.

A fire or homeowners' insurance carrier issues a single policy on a risk, but that policy usually contains a standard mortgage clause, or a loss payable clause to enable the insurer to pay the lender first; if the lender is fully paid, then the remainder of the damages are paid to the owner.

Both the title insurance and the standard mortgage clause approaches result in virtually the same end. The loan is paid off or curtailed to the extent of the payment, and the lender is not subject to defenses the insurer may have against the borrower alone. The loss payable clause approach may make the lender subject to defenses the insurer may have against the borrower, so it is not as favored as the other two approaches from the lender's perspective.

At first blush, all of these seem somewhat unfair to the borrower, who is paid last, and then only with the funds remaining after the loan is paid off. However, the borrower is relieved of the burden of paying off the loan to the extent the insurance proceeds pay the lender; thus, both borrower and lender benefit from the insurance.

ALTA title insurance policy forms

The American Land Title Association (ALTA) title insurance policy forms have been the most commonly available title insuring forms in the United States for the past 20 years. Although some other states have used local forms in the past, the trend is definitely in the direction of standardization with ALTA policy forms. When a buyer purchases a property, or a lender accepts security for extending a loan, it wants assurance that the property is as insured or that the bank can realize upon that security if the borrower defaults. Traditionally, in real estate transactions, the assurance came in the form of an opinion on title, usually rendered by an attorney or abstractor, but there are many drawbacks to an opinion on title:

i. it covers only matters of record, not "hidden risks;"

ii. recovery for a mistake is based on tort — abstractor's liability for negligence instead of contract;

iii. liability is not backed up by reserves; and

iv. a claim can be defeated by the statute of limitations, usually within a few short years.

Recognizing the inadequacies of title opinions in the late nineteenth century, some people — usually attorneys worried about their abstractors' liability — started title insurance companies. They began with title guaranty policies which, like the opinion on title, only covered the record title.

There has been a steady increase in the types of risks shifted to title companies throughout the twentieth century.

i. With the development of *title insurance* instead of *title guaranties*, insurers assumed liability for hidden risks, *e.g.*:

a) Forgery;

b) Incompetency of the grantor or mortgagor;

c) Undisclosed heirs, spouses or co-tenants;

d) Fraud; and

e) Easements or interests by prescription.

ii. As new coverages are being created and negotiated in endorsements to the policy, title insurers are accepting risks of the transaction, *e.g.*:

a) Interest rate features (ARMs, SAMs, SWAPs)

b) Whether future advances are secured by a mortgage, and their priority if secured.

An ALTA title insurance policy is a policy of indemnity against actual loss. Title insurance liability comes in two components:

i. Liability for loss or damage resulting from a matter insured against by the policy (the duty to indemnify). This liability is limited by the Amount of Insurance stated in Schedule A. It is the liability component that most customers focus on during negotiations, but title insurers are rarely called upon to indemnify policyholders. Instead, most policy loss expense is for defense and settlement with a party adverse to the policyholder.

ii. Liability for costs, attorneys' fees and expenses incurred in the defense of the title (the duty to defend). This liability is not limited by the Amount of Insurance stated in Schedule A. Although the duty to defend the title is not listed as an insuring provision, and appears almost as an afterthought following the list, it is the most important grant of insurance to a policyholder facing a claim. Few real estate attorneys recognize its importance when negotiating coverages, but litigators never underestimate its value.

All ALTA policies have at least five major segments.

i. The insuring provisions are not titled as such, but are found at the beginning of the policy, and tell the insured what insurance coverages the policy contains. The insurance given in the insuring provisions is expressly subject to the provisions in the three other sections.

ii. The Exclusions from Coverage contain preprinted exclusions from the grant of coverage in the insuring provisions.

iii. The Conditions and Stipulations contain preprinted "boilerplate" which defines the coverages and the obligations of both the insurer and the insured under the policy.

iv. Schedule A of the policy contains the Amount of Insurance, the Date of Policy, the identification of the insured and the party vested in title to the land, the estate or interest insured by the policy and the legal description of the property.

v. Schedule B contains typed numbered exceptions to the title, matters which affect the title to the interest in land described in Schedule A which have been found in the land records, revealed by a current ALTA survey or arise in the documents creating the interest insured.

vi. Many policies will be issued with one or more endorsements which tailor the coverage of the policy to meet the needs of the insured. Some endorsements are ALTA forms which can be preprinted and attached to the policy, others are created by other title organizations such as the California Land Title Association (CLTA), and many are created by the issuing title insurance company as standard or even specially fashioned forms.

In any dissection of a policy to explain the features of title insurance, usually a loan policy will be the subject of the discussion because it has most of the features of the owners' policies as well as the additional insuring clauses and exclusions that are needed for loan insurance. We will do a quick run through on both.

ALTA owners' policy forms

The four insuring clauses in an ALTA owner's policy, which are subject to the Exclusions from Coverage, the Exceptions in Schedule B and the Conditions and Stipulations, are:

1. Title vested other than as stated in the policy;
2. Any defect, lien or encumbrance on the title;
3. Unmarketability of title; and
4. Lack of a right of access to and from the land.

Although the duty to defend the title is not listed as an insuring provision, and appears almost as an afterthought following the list, it may be the most important grant of insurance to a policyholder facing a claim. Owners' policies also have a list of three Exclusions from Coverage, but subparagraphs make the actual number of items excluded much greater than three. The development of Exclusions 1 and 2 is described in detail in the later sections comparing the variants of the ALTA policies. Paragraph 3 excludes matters (a) "created, suffered, assumed, or agreed to" by the insured, (b) known to the insured but not disclosed to the title company or found in the public records, (c) resulting in no loss to the insured (title policies are policies of indemnity), (d) created after the Date of Policy or (e) resulting in loss or damage only because the insured did not pay value for the land. The definition of the the term insured in the ALTA owners' policies includes the insured named in Schedule A of the policy, but also includes:

> ...subject to any right or defenses the Company would have had against the named insured, those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors.

The Conditions and Stipulations do limit the continuation of insurance after a sale of the property to certain enumerated situations; (i) where the insured retains an interest in the land, (ii) where the insured retains a purchase money lien and (iii) where the insured is liable under covenants of warranty given in the transfer. Otherwise, the policy does not continue in force for the benefit of any purchaser from the insured. There are a number of distinctions between the Conditions and Stipulations in an ALTA Owner's Policy and those in an ALTA Loan Policy. The determination and extent of liability has fewer conditions in an owner's policy because it is easier for an owner to establish a loss than a lender. The lender's interest is only for the security of a loan. It is not sufficient for a lender to base a claim on a showing that a defect insured against caused a decrease in the value of the land. A loss will not occur until the lender realizes upon the collateral, and discovers the collateral is inadequate, at least in part because of a defect insured by the policy. Owners, on the other hand, need only show that the defect insured against caused the decrease in the value of land.

Owners must also contend with an apportionment provision which fixes the liability of the title company to each parcel of property insured at the Date of Policy, and prevents "shifting" of coverage at a later time to compensate for increases in the value of the property. In the 1987 and 1990 ALTA forms, owners' policies have introduced coinsurance provisions to protect the title insurers from underinsurance.

ALTA loan policy forms

ALTA Loan policies insure the policyholder's security in real estate as it is perfected by a mortgage or deed of trust (the term "mortgage" is frequently used in this text to refer to mortgages, deeds of trust and security deeds). Subject to the Exclusions from Coverage, Exceptions and Conditions and Stipulations, they contain the four insuring provisions listed above for the owners' policies, and add four more, for insurance against:

5. The invalidity or unenforceability of the lien of the insured mortgage;
6. The priority of any encumbrance over the lien of the insured mortgage;
7. Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:
   a. arising from an improvement begun before the Date of Policy; or
   b. if arising from an improvement begun after the Date of Policy, it must be financed by proceeds of the loan secured by the insured mortgage.
8. The invalidity or unenforceability of any assignment shown in Schedule A, or its failure to vest title to the insured mortgage in the named assignee free and clear of all liens.

To balance these additional insuring provisions, the 1970 ALTA Loan policies added another Exclusion from Coverage, the 1987 ALTA Loan policies added three to match the

three in the owner's policy, and, of course, the only change in the 1990 ALTA policies was the addition of another Exclusion. Under the 1970 ALTA policies the additional loan policy Exclusion was:

4. Unenforceability of the lien of the insured mortgage as a result of the owner of the indebtedness secured to fail to comply with the "doing business laws of the state where the property is located."

The 1987 additions arose from the process of moving exclusions formerly lodged in the insuring provisions of the 1970 ALTA policies as exceptions to specific coverages to the Exclusions. It looked as though Exclusions were added, but it was really a process of moving them to a more appropriate location.

The definition of the term "insured" in the loan policy includes (i) the insured named in Schedule A, (ii) each successor in ownership of the indebtedness (unless it is also an obligor), (iii) any governmental agency or instrumentality which insures or guarantees the indebtedness, (iv) any insured who takes title to the land by a transfer which discharges the lien of the insured mortgage, (v) any affiliate corporation of such an insured described in (iv) to whom the property is conveyed, and (vi) any government agency or instrumentality which acquires the land under a contract of insurance or guaranty insurance.

Title insurers frequently are asked to add the words "...its successors or assigns" following the name of the insured typed in Schedule A when issuing a loan policy. After a note has been assigned to another lender, it will frequently request the title company to issue an endorsement naming it as the insured assignee of the indebtedness. The definition of the term "insured" in the ALTA Loan policy makes these requests unnecessary. The policy was intentionally designed to cover these situations relieving both the policyholders and insurance companies of the burden of this extra work. Title insurers are also concerned that the words "...its successors and assigns" could be interpreted as overriding the provision which prevents an unrelated purchaser at foreclosure from asserting that it meets the definition of the term "insured."

As we have seen, the loan policy Conditions and Stipulations are missing the apportionment and coinsurance clauses found in owners' policies. The section on what the company is obligated to pay in the event the insured suffers a covered loss contains more conditions than are found in an owner's policy. Since title insurance is an indemnity line, the company is obligated to pay under the policy the least of:

i. The amount of insurance stated in Schedule A;

ii. The amount of the unpaid principal indebtedness plus unpaid interest, expenses of foreclosure and amounts advanced to protect the lien of the insured mortgage; or

iii. The difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the lien or defect insured against by the policy.

Perhaps the most enduring myth surrounding title insurance loan policies is the idea that a loan policy automatically converts to an owner's policy when the lender forecloses or otherwise takes title to the property in satisfaction of the indebtedness secured by the insured mortgage or deed of trust. There is nothing in the paragraph on "Continuation of Coverage" to indicate that when the coverage continues after such an event, that it also undergoes a metamorphosis to become an entirely different form of coverage. After a foreclosure, the lender still has a loan policy which protects the lender's security, and the rules for establishing a loss remain unchanged.

For example, assume a title policy in the amount of $100,000 the then current value of the property, but when the lender forecloses, the property has increased in value to $150,000. If a defect is discovered which diminishes the value of the property to $125,000, the lender would be unable to establish a loss because the title policy insures that the property is security for $100,000, although it is actually worth more than that.[7] Assuming the same facts for an owner (no foreclosure, of course), the company would be liable to pay the $25,000 loss suffered by the policyholder, even though the property is worth more than the Amount of Insurance stated in the policy.[8]

The Fourth Circuit Court of Appeals decision in *Bluff Ventures Limited Partnership v. Chicago Title Insurance Company*, 1991 U.S. App. LEXIS 26759 (1991), is counter to the weight of authority on this issue, but only *CMEI v. American Title* and *Green v. Evesham* of the cases referred to above were cited as authority to the court. Moreover, the plaintiff, Bluff Ventures, was the assignee of the trustee's purchase at foreclosure, not the lender; therefore, the decision may rest in part on the effect of an agreement by Chicago Title not to raise the assignment of the contract to purchase as a defense.

Confusion also arises about the liability of the title company if a total failure of title occurs, but the property has either diminished in value, or the lender is subordinate to senior lenders. Many insureds think a policy should pay full policy limits if the insured suffers a total failure of title, but the liability provisions clearly state that the company's liability is the least of the three previously listed items; thus liability is limited to placing the insured in the same position it would have been if there were no defect in the title.[7] If other factors unrelated to title have reduced the value of the property to nothing, the title company would have no liability under the policy.[8]

A claim must relate to the title. A title policy insures against loss caused by a forgery of mortgage or deed of trust, but does not insure against loss caused by a forged signature on the note secured by the mortgage or deed of trust if there is no defect in the mortgage.[9] Unmarketability of the property due to a physical defect is not *unmarketability of the title* to the property; thus the discovery of

(Continued on page 22)

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Lawyers Notes

(Continued from page 19)

hazardous waste on a property does not create liability on the part of a title insurer.[10]

Why coverages available in a loan policy are not in an owner's policy

As we have seen, the risk of loss in an owner's policy is more immediate than the risk in a loan policy. A title defect which would trigger an immediate liability to indemnify a holder of an owner's policy, may create no liability at all to the holder of a loan policy. In addition, virtually all lenders require representations and warranties concerning the title to the security from each borrower as further protection from title losses. A title insurer can often subrogate to the lender's rights under the representations and warranties to recover amounts paid on the loan policy, if it has issued no coverage against that risk to the owner. The lender's burden of establishing a loss and the obligation of the borrower to protect the lender reduce the risk of coverages extended to lenders, making more exotic coverages an acceptable risk in a loan policy, even though they might be unacceptable in an owner's policy.

A good example of a coverage routinely offered to lenders but entirely inappropriate to owners is the coverage in paragraph 3(a) of the ALTA 9 Restrictions, Encroachments, Minerals Endorsement. The coverage in paragraph 3(a) is:

> The Company insures the owner of the indebtedness secured by the insured mortgage against loss or damage sustained by reason of:
> 3. Damage to existing improvements, including lawns, shrubbery and trees:
> (a) which are located on or encroach upon that portion of the land subject to any easement excepted to in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved;....

This coverage was originated in California where lawns, shrubbery and trees are exceedingly rare, and title companies can trust utility companies to exercise care when working around them. A title insurer in the Eastern half of the country might pause before issuing such a coverage to a lender, reflecting that trees within a power line easement are an everyday problem in the Eastern United States. Utilities routinely schedule crews to clear the undergrowth beneath power lines to protect customers from power outages caused by falling limbs or interference with the lines by intruding plant growth.

This coverage is suitable for a lender because the damage to the vegetation does not so diminish the value of the property to threaten the title insurer with a loss. The unsightly gash through a neighborhood or yard caused by a utility maintenance crew may annoy the owner of the fee underlying the easement, but it will not destroy the value of the lender's security to the point where the lender will have a valid claim under its title policy. On the other hand, if this ALTA 9 coverage is extended to the owner of the underlying fee, title insurers can expect a new batch of claims each time a utility crew clears the underbrush in an easement.

This coverage in the ALTA 9 appears to protect the policyholder from the damage caused by the owner of an easement interest when that owner takes measures to maintain the easement. Since the easement owner is entitled to maintain the easement, and can be expected to do so, title insurers do not insure against the exercise of these rights in owners' policies. The landowner must accept the maintenance as one of the burdens the easement placed on the servient tract when the easement was granted, or when the property was purchased subject to the easement. LTIC

FOOTNOTES

1 If title companies had perfect information and correctly interpreted it, they would rarely be called on for indemnification. On the other hand, to acquire the information they do have and use it intelligently is an expensive process. The result - title insurance premiums are composed of a very small risk element and, proportionately, a very large expense element. This also is true of boiler and machinery insurance and elevator liability insurance but with a significant difference. Title insurance protects against past conditions; ordinarily nothing that may happen to the title after transfer is covered. Boiler and machinery and elevator liability insurance covers current and future events. They require payment, therefore, of future premiums while title insurance does not. Once a premium is paid, title insurance continues to indemnify for title defects of the past for as long as the title stays in the same hands. Leslie and Bethel, *The Title Insurance Industry: A Case for Affirmative Rate Regulation*, JOURNAL OF INSURANCE REGULATION, pp. 610-11, June 1983.

2 There is a "risk premium" in title insurance. Title companies keep careful records of premiums, losses and expenses and report this in their annual statements - "Item 9s". It follows that the better they perform the title search and related work, the lower their loss [sic]. Title insurance loss ratios should be low, certainly less than from 6 to 10 percent, or it can be concluded that the title searches are being carelessly completed. Leslie and Bethel, supra, at p. 611.

3 For example, property insurance actuaries were busy in late 1989 assessing the impact of catastrophic losses from September's Hurricane Hugo in Georgia, the Carolinas and Virginia, and the October earthquake in Northern California. In 1992, the damage from Hurricane Andrew in Southern Florida actually led some property casualty insurers to question whether they could continue to insure against this risk in that region. (See, e.g., Allstate Cuts Back In Florida, N.Y. Times, Jan. 15, 1993, at D1, Col. 6). More recently, flood insurance actuaries have been challenged by the Midwest floods of the summer of 1993 and the southeastern floods of the summer of 1994.

4 Texas moved away from its unique form of policy with its adoption of a modified version of the 1990 ALTA policies (called the ALTEX policies) in the Fall of 1991. New York abandoned its local policy variant as of January 1, 1992 by also adopting the 1990 ALTA policy forms with an endorsement to modify selected provisions. The CLTA Standard Coverage policy is still available in California, but the ALTA policies are more popular.

5 *Falmouth National Bank v. Ticor Title Insurance Company*, 920 F.2d 1058 (1st Cir. 1990); *Cole v. Transamerica Title Insurance Co.*, 275 Cal. Rptr. 107 (3rd Dist. App. 1990); *Blackhawk Production Credit Association v. Chicago Title Insurance Company*, 144 Wis. 68, 423 N.W.2d 521 (1988); *CMEI, Inc. v. American Title Insurance Company*, 447 So.2d 427 (Fla. App. 5 Dist. 1984).

6 *Green v. Evesham Corporation*, 179 N.J. Super 105, 430 A.2d 944 (1981).

7 *Blackhawk Production Credit Association v. Chicago Title Insurance Company*, 144 Wis. 68, 423 N.W.2d 521 (1988).

8 *Fleet Finance, Inc. of Georgia v. Lawyers Title Insurance Corporation*, No 1:88-cv-1672-HTW (N.D. Ga. Dec. 29, 1989).

9 *Bank of Miami Beach v. Lawyers Title Guaranty Fund*, 214 So.2d 95 (Fla. Dist. Ct. App. 1968).

10 *Lick Mill Creek Apartments v. Chicago Title Insurance Company*, 231 Cal. App. 3d 1654, 283 Cal. Rptr. 231 (1991), appeal denied, 1991 Cal. LEXIS 4097 (Aug. 29, 1991); and *Fleet Finance, Inc. of Georgia v. Lawyers Title Insurance Corporation*, No 1:88-cv-1672-HTW (N.D. Ga. Dec. 29, 1989).

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AFFIDAVIT OF J. BUSHNELL NIELSEN

EXHIBIT 7

James M. Pedowitz, *Program Chairman and Editor*

Title Insurance: The Lawyer's Expanding Role

REINHART BOERNER VAN DEUREN NORRIS IRC
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A publication of the
Section of Real Property, Probate and Trust Law
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AMERICAN BAR ASSOCIATION
SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW

TITLE INSURANCE:
The Lawyer's Expanding Role

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resolutions, zoning ordinances, building codes, [Chu v Chicago Title Ins. Co., 89 App. Div. 2d 574, 452 N.Y.S.2d 229 (1982).] subdivision laws, health codes, and the like. [See e.g. Dyer & Moody, Inc. v Dynamic Constructors, Inc., 357 So.2d 615 (La. App. 1978) which held this exclusion applicable to a state statute thatrestricted the building of any work that would restrict the natural running or flow of water.]

Recognizing the limiting effect of this exclusion, many insureds will seek a zoning endorsement which generally insures the zoning classification of the property and the uses allowed under that classification. [See ALTA Endorsements 3 and 3.1 which afford zoning coverage.] The ALTA residential policy also gives coverage against the forced removal of an existing structure or the inability to use the land for a single-family residence because of an existing zoning law.

2. Eminent Domain

The policy also excludes coverage for the loss resulting from the exercise of eminent domain rights unless notice of the exercise of such rights appears in the public records at the date of policy. Again, the exclusion recognizes the fact that real estate is by nature subject to the exercise of the right of eminent domain and there is no way to protect against the exercise of that right. However, this exclusion would not apply if a document such as a lis pendens relating to a pending eminent domain proceeding has been filed in the public records at the date of policy.

CTIC_00131

AFFIDAVIT OF J. BUSHNELL NIELSEN

EXHIBIT 8

EXHIBIT 5, SECTION E ATA MORTGAGEE'S POLICY 1929

TITLE NEWS

American Title Association Standard Loan Policy

(Page One – Or Face of Policy)

BLANK TITLE INSURANCE COMPANY

MORTGAGEE'S POLICY OF TITLE INSURANCE

Amount Number

BLANK TITLE INSURANCE COMPANY

a corporation of _____, ___ called the Company, for a valuable consideration, paid for this Policy of Title Insurance,

Does Hereby Insure _____

The name of the insured can be inserted here

or if preferred, this space ruled as shown or eliminated entirely so the policy will read to run direct to the owner of the indebtedness.

the owner of the indebtedness secured by the mortgage or deed of trust described in Schedule A, herein called said indebtedness, and each successor in interest in ownership thereof, and also any such owner who acquires the land described in Schedule A in satisfaction of said indebtedness as provided in the conditions and stipulations hereof, herein called the Insured, against loss or damage not exceeding _____ dollars, which the Insured shall sustain by reason of any defect in the execution of said mortgage or deed of trust or by reason of the invalidity of the lien thereof, or by reason of title to the land described in said Schedule A being vested at the date hereof otherwise than as therein stated, or by reason of unmarketability of the title of the mortgagor or trustor, or by reason of any defect in, or lien or encumbrance on said title at the date hereof, or any statutory lien for labor or material which now has gained or hereafter may gain priority over the lien of said mortgage or deed of trust, other than defects, liens, encumbrances and other matters set forth in Schedule B, or by reason of the priority thereto of any lien or encumbrance at the date hereof except as shown by Schedule B, all subject, however, to the conditions and stipulations hereto annexed, which conditions and stipulations together with said Schedules A and B are hereby made a part of this Policy.

Subject to the provisions of Schedule B and the conditions and stipulations hereof, the Company further insures that, at the date hereof, any assignments shown by Schedule A, whether recorded or not, are good and valid and vest title to said mortgage or deed of trust in the insured free and clear of all liens.

IN WITNESS WHEREOF, Blank Title Insurance Company has caused its corporate name and seal to be hereunto affixed by its duly authorized officers, this

BLANK TITLE INSURANCE COMPANY,

By _____
President

Attest: _____
Secretary

CTIC_00133

SCHEDULE A

1. The title to said land is at the date hereof vested in

Here can be named in whom title is vested, but if it is not desired to specifically mention and name in whom title is vested. then words necessary to make it read something as follows can be typed in, Or the Whole clause printed in the form:

"The title to said land is at the date hereof vested in mortgagor(s) / trustor(s) as mentioned in mortgage or deed of trust described in Paragraph 2 of this Schedule."

2. The mortgage or deed of trust securing the indebtedness covered by this Policy is described as follows:

3 The land referred to in this Policy is described as follows:

The specific description of the land, title to which is insured by this policy, can here be given, but if desired and preference of practice is to be relieved of this amount of clerical work and make only a general reference, that can be done by here typing the following clause, or having it printed in the policy form:

"As particularly bounded, described and set forth in said mortgage or deed of trust described in Paragraph 2 of this Schedule."

SCHEDULE B

Showing defects, liens, encumbrances and other matters against which the Company does not, by this Policy, insure.

No printed exceptions are to appear in this Schedule, for reasons set forth in the accompanying description and explanation of this policy form.

CONDITIONS AND STIPULATIONS

1. If any Insured acquires said land, or any part thereof, by foreclosure, trustee's sale, or other legal manner in satisfaction of said indebtedness, or any part thereof, this Policy shall continue in force in favor of such Insured, subject to all the conditions and stipulations hereof applicable to an owner of land.

2. The Company at its own cost shall defend the Insured in all litigation consisting of actions or proceedings commenced against the Insured, or defenses, restraining orders, or injunctions interposed against a foreclosure, or sale of said land in satisfaction of said indebtedness, which litigation is founded upon a defect, lien or encumbrance insured against by this Policy and may pursue such litigation to final determination in the court of last resort. In case any such action or proceeding shall be begun or defense interposed, or in case knowledge shall come to the Insured of any claim of title or interest adverse to the title as insured, or which might cause loss or damage for which the Company shall or may be liable by virtue of this Policy, the Insured shall at once notify the Company thereof in writing. If such notice shall not be given to the Company within ten days of the receipt of process of pleadings or if the Insured shall not, in writing, promptly notify the Company of any defect, lien or encumbrance insured against which shall come to the knowledge of the Insured, in respect to which loss or damage is apprehended, then all liability of the Company in regard to the subject matter of such action, proceeding or matter shall cease and terminate, provided, however, that failure to notify shall in no case prejudice the claim of any Insured unless the Company shall be actually prejudiced by such failure. In all cases where this Policy permits or requires the company to prosecute or defend any action or proceeding, the Insured shall secure to it the right to so prosecute or defend such action or proceeding, and all appeals therein, and permit it to use, at its option, the name of the Insured for such purpose. The word 'knowledge' in this paragraph means actual knowledge and does not refer to constructive knowledge or notice which may be imputed to the Insured by reason of any public record or otherwise.

3. If any Insured shall in good faith contract to sell the evidence of indebtedness and mortgage or deed of trust described in Schedule A; or having acquired said land as in paragraph 1 hereof provided, in good faith contracts to sell the same, and any such contract fails; or if the successful bidder at a foreclosure or trustee's sale refuses to complete the purchase, because of alleged defects in the title to said land; and, in any of such events, the said title has been declared by a court of competent jurisdiction to be defective or encumbered or otherwise unmarketable by reason of any defect, lien, or encumbrance existing at the date hereof not shown in Schedule B, the Company at its option shall either (a) pay such Insured the amount of this Policy; (b) purchase said indebtedness; (c) establish the marketability of the title by decree of court; or (d) otherwise save the Insured harmless.

4. The Company reserves the option to pay, settle, or compromise for or in the name of the Insured, any claim insured against or to pay this Policy in full, and payment or tender of payment of the full amount of this policy shall terminate all liability of the Company hereunder.

5. Whenever the Company shall have settled a claim under this Policy, all right of subrogation shall vest in the Company unaffected by an act of the Insured, but such subrogation shall be in subordination to the lien of the Insured under its said mortgagee or deed of trust and to the claim of the Insured to receive and be fully paid the amount of principal and interest and other sums, if any, secured by said mortgage or deed of trust. The Insured, if requested by the Company, shall transfer to the Company all rights, securities, and remedies against any person or property necessary in order to perfect such right of subrogation.

6. The Company has the right and option, in case any loss is claimed under this Policy, to pay the Insured the entire indebtedness of the mortgagor or trustor under said mortgage or deed of trust to the Insured, together with all costs which the Company is obligated hereunder to pay, in which case the Company shall become the owner of, and the Insured shall at once assign and transfer to the Company said mortgage or deed of trust and the indebtedness thereby secured and such payment shall terminate all liability under this policy and the Insured shall surrender the same.

7. A statement in writing of any loss or damage for which it is claimed the Company is liable under this policy shall be furnished to the Company within sixty days after such loss or damage shall have been determined and no right of action shall accrue to the Insured under this Policy until thirty days after such statement shall have been furnished, and no recovery shall be had by the Insured under this Policy unless action shall be commenced thereon within one year after expiration of said thirty-day period. Failure to furnish such statement of loss or damage, or to commence such action within the time hereinbefore specified, shall be a conclusive bar against maintenance by the Insured of any action under this Policy.

8. The Company will pay, in addition to any loss insured against by this Policy, all costs imposed upon the Insured in litigation carried on by the Company for the Insured, and in litigation carried on by the Insured with the written authorization of the Company but not otherwise. The Company will not be liable for loss or damage by reason of defects, claims or encumbrances created subsequent to the date hereof (excepting any statutory lien for labor or material insured against by this Policy) or for defects, claims or encumbrances created or suffered by the Insured claiming such loss or damage, or existing at the date of this Policy and known to the Insured claiming in such loss or damage at the date such Insured claimant acquired an insurable interest. The liability of the Company under this policy shall in no case exceed in all the actual loss of the insured and costs which the Company is obligated hereunder to pay. All payments under this Policy shall reduce the amount of the insurance pro tanto and no payment can be demanded without producing this Policy for endorsement of such payment. Payment in full by any person or voluntary satisfaction or release by the Insured of the mortgage or deed of trust described in Schedule A shall terminate all liability of the Company under this Policy.

9. Nothing contained in this policy shall be construed as an insurance against action by any governmental agency for the purpose of regulating occupancy or use of said land or any building or structure thereon.

AMERICAN TITLE ASSOCIATION STANDARD LOAN POLICY
REVISED - 1946

CHICAGO TITLE INSURANCE COMPANY

a corporation, of Missouri, herein called the Company, for a valuable consideration, paid for this Policy of Title Insurance, does hereby insure the within named insured, the owner of the indebtedness secured by the mortgage or deed of trust described in Schedule A, herein called said indebtedness, and each successor in interest in ownership thereof, and also any such owner who acquires the land referred to in this Policy in satisfaction of said indebtedness as provided in the conditions and stipulations hereof, herein called the Insured, against loss or damage not exceeding the amount of insurance set forth herein which the Insured shall sustain by reason of any defect in the execution of said mortgage or deed of trust, but only insofar as such defect affects the lien or charge of such mortgage or deed of trust upon the said land, or by reason of the invalidity of the lien thereof upon said land, or by reason of title to the said land being vested at the date hereof otherwise than as herein stated, or by reason of unmarketability of the title of the mortgagor or trustor, or by reason of any defect in, or lien or encumbrance on said title at the date hereof, or by reason of any statutory lien for labor or material which now has gained or hereafter may gain priority over the lien upon said land of said mortgage or deed of trust, other than defects, liens, encumbrances and other matters set forth in Schedule B, or by reason of the priority thereto of any lien or encumbrance at the date hereof except as shown by Schedule B, all subject, however, to the conditions and stipulations hereto annexed, which conditions and stipulations together with said Schedules A and B are hereby made a part of this Policy.

SPECIMEN

Subject to the provisions of Schedule B and the conditions and stipulations hereof, the Company further insures that, at the date hereof, any assignments shown by Schedule A, whether recorded or not, are good and valid and vest title to said mortgage or deed of trust in the Insured free and clear of all liens.

In Witness Whereof, CHICAGO TITLE INSURANCE COMPANY has caused this Policy to be signed and sealed as of the date of Policy shown in Schedule A, the Policy to become valid when countersigned by an authorized signatory.

CHICAGO TITLE INSURANCE COMPANY

By:

Richard S. Rollo

President.

CHICAGO TITLE INSURANCE COMPANY CORPORATE SEAL

ATTEST:

Robert T. Haines

Secretary.

LOAN FORM

SCHEDULE A

1 OFFICE FILE NUMBER	2 POLICY NUMBER	3 DATE OF POLICY	4 AMOUNT OF INSURANCE

1. Name of Insured:

2. The estate or interest referred to herein is at Date of Policy vested in:

3. The estate or interest in the land described in this Schedule and which is encumbered by the insured mortgage is:
Fee Simple

4. The mortgage, herein referred to as the insured mortgage, and the assignments thereof, if any, are described as follows:

5. The land referred to in this policy is described as follows:

SPECIMEN

This policy valid only if Schedule B is attached.

FORM 3213 R. 7/79

CTIC 00138

LOAN FORM

FORM 3228 R.8/73

SCHEDULE B

Policy Number _____
Loan

This policy does not insure against loss or damage by reason of the following:

SPECIMEN

Countersigned

_____
Authorized Signatory

Schedule B of this Policy consists of pages.

CONDITIONS AND STIPULATIONS

1. If any Insured acquires said land, or any part thereof, by foreclosure, trustee's sale, or other legal manner in satisfaction of said indebtedness, or any part thereof, this Policy shall continue in force in favor of such Insured, subject to all of the conditions and stipulations hereof. The benefits hereof shall inure to any federal agency or instrumentality acquiring said land under an insurance contract or guaranty insuring or guaranteeing said indebtedness, or any part thereof, whether named as an Insured herein or not, subject otherwise to the provisions hereof.

2. The Company at its own cost shall without undue delay defend the Insured in all litigation consisting of actions or proceedings commenced against the Insured, or defenses, restraining orders, or injunctions interposed against a foreclosure or sale of said land in satisfaction of said indebtedness, which litigation is founded upon a defect, lien or encumbrance insured against by this Policy, and may pursue such litigation to final determination in the court of last resort. In case any such action or proceeding shall be begun or defense interposed, or in case the knowledge shall come to the Insured of any claim of title or interest adverse to the title as insured, or which might cause loss or damage for which the Company shall or may be liable by virtue of this Policy, the Insured shall at once notify the Company thereof in writing. If such notice shall not be given to the Company within ten days of the receipt of process or pleadings or if the Insured shall not, in writing, promptly notify the Company of any defect, lien or encumbrance insured against which shall come to the knowledge of the Insured, in respect to which loss or damage is apprehended, then all liability of the Company in regard to the subject matter of such action, proceeding or matter shall cease and terminate; provided, however, that failure to notify shall in no case prejudice the claim of any Insured unless the Company shall be actually prejudiced by such failure and then only to the extent of such prejudice. In all cases where this Policy permits or requires the Company to prosecute or defend any action or proceeding the Insured shall secure to it the right to so prosecute or defend such action or proceeding, and all appeals therein, and permit it to use, at its option, the name of the Insured for such purpose. The word "knowledge" in this paragraph means actual knowledge and does not refer to constructive knowledge or notice which may be imputed to the Insured by reason of any public record or otherwise.

3. If any Insured shall in good faith contract to sell the evidence of indebtedness and mortgage or deed of trust described in Schedule A, or having acquired said land as in paragraph 1 hereof provided, in good faith contracts to sell the same, and any such contract fails, or if the successful bidder at a foreclosure or trustee's sale refuses to complete the purchase, because of alleged defects in the title to said land; and, in any of such events, the said title has been declared by a court of competent jurisdiction to be defective or encumbered or otherwise unmarketable by reason of any defect, lien or encumbrance insured against by this Policy, the Company at its option shall either (a) pay such Insured the amount of this Policy, (b) purchase said indebtedness, (c) establish the marketability of the title by decree of court, or (d) otherwise save the Insured harmless. In the event of any litigation involving refusal of title because of defects insured against hereunder, the Company will, at its own cost, promptly and diligently prosecute such action as may be available to establish title as insured and if such action is not successful, will reimburse the Insured for all costs and attorneys' fees in said litigation involving refusal of title.

4. The Company reserves the option to pay, settle, or compromise for or in the name of the Insured, any claim insured against or to pay this Policy in full, and payment or tender of payment of the full amount of this Policy shall terminate all liability of the Company hereunder. In such cases the Company shall be liable to pay in addition all costs and attorneys' fees incurred by it.

5. Whenever the Company shall have settled a claim under this Policy, all right of subrogation shall vest in the Company unaffected by any act of the Insured, except that the Insured may release or substitute the personal liability of any debtor or extend or otherwise modify the terms of payment provided such act does not result in any loss of priority of the lien of the mortgage or deed of trust herein but such subrogation shall be in subordination to the lien of the Insured under its said mortgage or deed of trust and to the right of the Insured to receive and be fully paid the amount of principal and interest and other sums, if any, secured by said mortgage or deed of trust. If loss of priority should result from any act of the Insured, such act shall not void this Policy, but the Company in that event, shall be required to pay only that part of any losses insured against hereunder which shall exceed the amount, if any, lost to the Company by reason of the impairment of the right of subrogation. The Insured, if requested by the Company, shall transfer to the Company all rights, securities, and remedies against any person or property necessary in order to perfect such right of subrogation.

6. The Company has the right and option, in case any loss is claimed under this Policy, to pay to the Insured the entire indebtedness secured by said mortgage or deed of trust to the Insured, together with all costs and attorneys' fees which the Company is obligated hereunder to pay, in which case the Company shall become the owner of, and the Insured shall at once assign and transfer to the Company said mortgage or deed of trust and the indebtedness thereby secured and such payment shall terminate all liability under this Policy and the Insured shall surrender the same.

7. A statement in writing of any loss or damage for which it is claimed the Company is liable under this Policy shall be furnished to the Company within sixty days after such loss or damage shall have been determined and no right of action shall accrue to the Insured under this Policy until thirty days after such statement shall have been furnished, and no recovery shall be had by the Insured under this Policy unless action shall be commenced thereon within one year after expiration of said thirty-day period. Failure to furnish such statement of loss or damage, or to commence such action within the time hereinbefore specified, shall be a conclusive bar against maintenance by the Insured of any action under this Policy.

8. The Company will pay, in addition to any loss insured against by this Policy, all costs imposed upon the Insured in litigation carried on by the Company for the Insured, and all costs and attorneys' fees in litigation carried on by the Insured with the written authorization of the Company or as provided in paragraph 3 of the conditions and stipulations hereof but not otherwise. The Company will not be liable for loss or damage by reason of defects, claims or encumbrances created subsequent to the date hereof (excepting any statutory lien for labor or material insured against by this Policy) or for defects, claims or encumbrances created or suffered by the Insured claiming such loss or damage, or existing at the date of this Policy and known to the Insured claiming such loss or damage at the date such Insured claimant acquired an insurable interest but not known to the Company or disclosed to it in writing by the Insured. The liability of the Company under this Policy shall in no case exceed in all the actual loss of the Insured and costs and attorneys' fees which the Company is obligated hereunder to pay. All payments under this Policy shall reduce the amount of the insurance *pro tanto* and

CONDITIONS AND STIPULATIONS (Continued on Reverse Side)

CONDITIONS AND STIPULATIONS (CONTINUED)

no payment shall be made without producing this Policy for endorsement of such payment unless the Policy be lost or destroyed, in which case proof of such loss or destruction shall be furnished to the satisfaction of the Company. Payment in full by any person or voluntary satisfaction or release by the Insured of the mortgage or deed of trust described in Schedule A shall terminate all liability of the Company under this Policy, except as provided in Condition 1.

9. Nothing contained in this Policy shall be construed as an insurance against action by any governmental agency for the purpose of regulating occupancy or use of said land or any building or structure thereon.

10. The term "land" when used herein shall be construed to include the land herein described specifically or by reference and improvements affixed thereto which by law constitute real property.

11. All notices required to be given the Company and any statement in writing required to be furnished the Company shall be addressed to it at its office at 111 West Washington Street, Chicago, Illinois 60602, or at any branch office shown hereon.

AMERICAN TITLE ASSOCIATION
STANDARD LOAN POLICY
REVISED - 1946

POLICY OF TITLE INSURANCE

CHICAGO TITLE INSURANCE COMPANY

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CTIC_00141

AFFIDAVIT OF J. BUSHNELL NIELSEN

EXHIBIT 9

ALTA Forms Committee makes revisions issues new policy forms

Editor's note: The following comprehensive explanation of the new ALTA policy forms will appear in two parts. The first section discusses the insuring provisions, exclusions and Schedules A and B. A discussion on conditions and stipulations, and endorsements concerning environmental matters will appear in the July-August issue.

by Russ Jordan, Senior Vice-President, General Counsel and Secretary, Lawyers Title Insurance Corporation

The ALTA Forms Committee has now completed its work of revising all of the ALTA policy forms—the Owner's Policy, the Loan Policy, the Leasehold Owner's Policy, the Leasehold Loan Policy, and the Construction Loan Policy.

This project has been ongoing since the fall of 1984. Since the forms had not been revised since 1970, it was thought that a general revision and update was needed in order to address new trends in real estate and real estate financing prevalent in the 1980s, and certain case law that has taken place in recent years having to do with courts finding liability outside of the title insurance contract and with the appropriate records that the title company must search.

In this article, I will be going through the ALTA Loan Policy which was used as a basis for all the revisions and explaining what the policy *did* cover and *still* covers, as well as pointing out those matters that are new or different from the 1970 forms.

All ALTA policies can be divided into five basic parts: the Insurance Provisions, the Exclusions from Coverage, the Conditions and Stipulations, and Schedule A and Schedule B.

Let's look first at the Insurance Provisions. This is where Lawyers Title gives coverage. Later in the article you'll see where the Company excludes coverage in the Exclusions from Coverage.

The Insuring Provisions begin with a preamble which tells the insured what these Insuring Provisions are "subject to".

Subject to the exclusions from coverage, the exceptions from coverage contained in Schedule B and the Conditions and Stipulations, the Company insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. "Title to the estate or interest described in Schedule A being vested other than as stated therein."

Insuring Provision 1 has not changed at all from the 1970 policies and basically insures that the title to the property is vested in the owner, and properly vested. If we insure title is vested in John Doe and it turns out to be vested in Mary Roe, then we have a problem. If we insure fee simple title and the estate turns out to be only life estate in the owner, then this insurance provision comes into play.

2. "Any defect in or lien or encumbrance on the title."

This Insuring Provision 2 comes directly from the 1970 policies, and in my opinion, is one of the most important Insuring Provisions in the policy. It would pick up almost any outstanding interest in a third party, such as a missing heir, an outstanding mineral interest, a missed mortgage or deed of trust, a federal tax lien, a judgment lien, a special assessment or a mechanic's lien. This is the "catch all" paragraph and covers almost any defect, lien or encumbrance not excepted to in the policy. Remember that this includes recorded as well as *unrecorded* matters.

3. "Unmarketability" of the title."

The 1970 policies simply insured against loss or damage by reason of "unmarketability of title" with no definition or meaning of what would constitute an "unmarketable title." This has proven to be a little broad and poses certain uncertainties and ambiguities in settling claims. How far do you have to go in establishing a marketable title? Do you have a reasonable time to cure same? When is the title unmarketable?

For the 1987 policies, the Forms Committee has come up with a definition of what would constitute an unmarketable title and this definition appears as item 1 (g) of the Conditions and Stipulations:

"An alleged or apparent matter affecting title to the land, not excepted or excluded from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or of the insured mortgage to be released from the obligation to purchase by virtue of a con-

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tractual condition requiring the delivery of a marketable title."

So if an owner plans to sell or lease his property, or obtain a mortgage loan on the property (or if a lender sells the land after foreclosure or sells the loan) and is turned down by reason of a matter insured against by the policy, then the Company would have liability by reason of this Insuring Provision. The Company would have to consider bringing a suit for specific performance, possibly purchasing the property or the mortgage loan, or making an owner a loan if the owner could not obtain a loan because of the unmarketable title.

4. "Lack of a right of access to and from the land."

There has been no change in this Insuring Provision. Note that the coverage afforded in Insuring Provision 4 represents "legal" access to and from the property and that it does not insure the nature and extent of access or the type of vehicle that one might or might not be able to use to get to and from the property.

5. "The invalidity or unenforceability of the insured mortgage upon the title."

Insuring Provisions 5 and 7 formerly had exclusionary language contained within these Insuring Provisions. This exclusionary language has now been removed from Insuring Provision 5 and Insuring Provision 7 and placed in the Exclusions from Coverage. Thus there is now no "exclusionary" language contained in any of the eight Insuring Provisions—all are affirmative statements. Except for the removal of the exclusionary language, Insuring Provision 5 remains the same.

6. "The priority of any lien or encumbrance over the lien of the insured mortgage."

There has been no change in Insuring Provision 6 from the 1970 policies.



Russell W. "Rusty" Jordan III is Senior Vice President, General Counsel and Secretary of Lawyers Title. He assumed the post at National Headquarters on February 1, succeeding Gabe Tatum, who retired January 31. In the position Jordan began his career with Lawyers Title at National Headquarters in 1969 as a title attorney. In 1971 he was named a senior title attorney and in 1974 he became assistant counsel. In 1978 he was elected assistant counsel, he became counsel and manager of the law division in 1979. In 1982 he was named assistant general counsel, and in 1985 he became vice president and associate general counsel. Jordan was graduated from Wake Forest University in Winston-Salem, North Carolina, with a B.A. degree, and from the University of Richmond's T. C. Williams School of Law in Richmond, Virginia, with a J.D. degree. He is a member of the Virginia State Bar, the Virginia Bar Association, the American Bar Association, the Richmond Bar Association, the American Land Title Association, and the Virginia Land Title Association. He is currently chairman of the corporate counsel section of the Richmond Bar Association. Jordan is also a member of the policy revision committee of ALTA and vice chairman of the condemnation committee of the American Bar Association.

7. "Lack of priority to the lien of the insured mortgage over any statutory lien for services, labor or material

(a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy, or

(b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance."

Insuring Provision 7 has been completely reworded but it is intended to offer essentially the same coverage as contained in Insuring Provision 7 of the 1970 Loan Policy. The language in the 1970 Loan Policy was always considered a little awkward since it contained an exclusion built into the affirmative language and this new language in the new policy is much clearer.

In my opinion, the 1970 ALTA Loan Policy was actually designed and suited for permanent loans only, not construction loans, but because of the broad language of Insuring Provision 7 it could be, and often was, used for construction loans. The 1987 loan policies can clearly be used for either permanent or construction loans.

The Forms Committee seriously considered the concept of a fully funded policy for permanent loans only, whereby endorsements could be added to the policy to convert the policy into a construction loan policy and thereby offer mechanics' lien coverage which would be especially suited for the particular state. The Forms Committee vascillated over this issue but the final consensus was to design an ALTA Loan Policy for both permanent and construction loans, just like the current policy is being used.

8. "The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens."

The 1970 policies referred to the assignment being "shown" in Schedule A and the new language "provided the assignment is shown in Schedule A" is perhaps a little

(Continued on page 20)

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ALTA issues new policy forms

(Continued from page 11)

stronger. If an assignment is shown in Schedule A, then such assignment is insured; if not shown in Schedule A, the assignment is not insured.

Note that in insuring an "assignment" of a mortgage, the title company must not only be concerned with liens, defects and encumbrances against the owner of the subject property, but must also be concerned with liens, defects and encumbrances against the assignor of the debt, since it will be insuring that the title to the insured mortgage vests in the assignee free and clear of all liens.

The paragraph appearing at the conclusion of the Insuring Provisions is the "defense obligation" paragraph and stipulates that the Company will pay all costs, attorneys' fees and expenses incurred in the defense of the title or the lien of the insured mortgage, but only to the extent provided for in the Conditions and Stipulations.

This obligation to pay court costs and attorneys' fees was formerly included in the preamble to the Insuring Provisions but now is contained in a separate paragraph following the Insuring Provisions.

Remember that these attorneys' fees are not included in the policy amount and indeed may even exceed the face amount of the policy. For example, you may have a policy in the face amount of $100,000 and have a $50,000 loss under the policy and yet have attorneys' fees of $75,000. Indeed, you could have attorneys' fees in the amount of $110,000 and have no loss at all under the policy, in which case the amount of insurance would never be reduced below the policy's face amount of $100,000. According to recent ALTA figures, approximately 30 to 40 percent of all losses to title insurance companies involve the subject of attorneys' fees, court costs and expenses.

Now let's look at the Exclusions from Coverage. This is where the title insurer sets forth matters that are not covered. Here the insurer is saying to the insured—"These matters are not the subject of title insurance and are expressly excluded from the coverage of this policy."

Before we get into the Exclusions, we must look at the definition of "public records" in Condition and Stipulation 1(f) which has been altered from the 1970 policies.

The definition of "public records" contained in the 1970 policies simply reads:

"those records which by law impart constructive notice of matters relating to said land."

This definition worked well for years because everyone thought that we were talking about "land records" or "title records" until a certain case arose in Alaska in 1976 called the Hahn Case, which held that easements or rights of way which were recorded in the Federal Register constituted a public record and, therefore, a place the title companies must search for purposes of certain exclusions or exceptions contained in the policy.

Simply put, title insurers, their agents, and approved attorneys are not set up or equipped to routinely examine records outside of the traditional land records—such as records in planning departments, zoning departments, safety inspectors' offices, fire marshals' offices, or the Federal Register.

So the definition of "Public Records" was reworded in the 1987 policies to more clearly indicate that what we are talking about are *land records, title records*, or *land title records*.

"public records": records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1(a)(iv) of the Exclusions from Coverage, "public records" shall also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located.

The definition of "public records" is only used in four places in the Exclusions from Coverage. Note that this definition does not necessarily prescribe or limit all those places where the title company may search for the purpose of insuring the title, and for the purpose of affording the coverage contained in the eight Insuring Provisions. But this definition does limit or prescribe where the title insurance company must search for the purpose of the affirmative assurances given within the Exclusions from Coverage.

Now with that in mind, let's begin with the preamble to the exclusions.

"The following matters are expressly excluded from the coverage of this policy *and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:*"

In the new language *italicized* above, the Forms Committee is clarifying that not only are all of the matters contained within the Exclusions excluded from coverage but also that the Company is under no obligation to pay attorneys' fees or court costs in connection therewith. This should have been true in the 1970 policies, but it is spelled out in the new policies.

1.(a) "Any law, ordinance

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governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting, or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy."

Exclusion 1 excludes building and zoning ordinances, subdivision laws, and environmental protection laws, and also excludes the effect of a violation of these matters. But note that any notice of *enforcement* or any notice of a *defect, lien* or *encumbrance* resulting from a violation (recorded in the public records), must be picked up and reported out by the title company. To this extent, the 1987 policies provide more coverage than the 1970 policies and a little more than the 1984 policies.

(b) "Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy."

Governmental "police power" is the broad power of the state to restrict or regulate property for the benefit of public health, safety or welfare. Again, if there is notice of the exercise of governmental police power or notice of a defect, lien or encumbrance resulting from a violation affecting the land (recorded in the public records), then the title company must pick it up and report it in the policy.

2. "Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but *not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge*."

The new language here is needed because of the change in the definition of "public records" and simply indicates that the policy is not excluding a federal condemnation where a "taking" has occurred prior to or at date of policy. In other words, if there has been a federal taking at date of policy, even though same may not be recorded in the public records as defined in the policy, then the title company is liable for this matter and must pick it up.

3. "Defects, liens, encumbrances, adverse claims or other matters

(a) "created, suffered, assumed or agreed to by the insured claimant;"

There has been no change here from the 1970 policies.

(b) "not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;"

The language here has been reworked but is intended to say essentially the same thing as in the 1970 policies. If the insured knows of some defect or problem with the title and doesn't disclose it to the title company, then its always a defense to the Company in accordance with this paragraph. If the insured tells the Company of the problem and the Company insures anyway, then this defense would not be applicable.

(c) "Resulting in no loss or damage to the insured claimant;"

There has been no change here from the 1970 policies. This points out that the title insurance policy is a contract of indemnity and if the insured suffers no loss, then the Company has no liability.

(d) "attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or material); or"

The language in the parenthetical having to do with the exception provided with respect to mechanics' liens has been reworded in order to track the new coverage of Insuring Provision 7.

(e) "resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage."

This exclusion is new in the 1987 policies.

4. "Unenforceability of the lien of the insured mortgage because of the *inability* or failure of the insured at Date of Policy, or the *inability* or failure of any subsequent owner of the indebtedness to comply with applicable doing business laws of the state in which the land is situated."

The word "inability" as it appears above is new in the 1987 policies.

5. "Invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law."

This exclusion is new in the

CTIC 00146

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1987 policies but comes directly from the exclusionary language formerly contained within Insuring Provision 5 having to do with usury or truth in lending laws.

6. "Any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance."

Exclusion 6 in the 1987 policies is new and tracks very closely the exclusionary language that was formerly contained in Insuring Provision 7 of the 1970 Loan Policy. This excludes mechanics' liens for an improvement contracted for and commenced after the date of the policy and not financed in whole or in part out of the proceeds of the loan which the lender has advanced or is obligated to advance. The intent here is to avoid liability (or defense obligations) for mechanics' liens that come along months or years after the mortgage is recorded and the policy is issued for work done by the owner either with his own funds or perhaps with funds from a second mortgage—like the addition of a side porch or some other addition.

Now let's look at Schedule A. There has really been very little change in Schedule A from the 1970 policies.

Date of Policy—This is the date through which the title is examined—probably the recording of the deed or the recording of the mortgage. Remember that title insurance insures against loss or damage by reason of matters occurring in the past. No insurance is afforded as to future events, except for the subject of mechanics' liens and there may be an element of future insurance for lenders with respect to special endorsements having to do with variable rate endorsements or shared appreciation mortgage endorsements.

Amount of Insurance—this is normally the amount of the mortgage in the case of the mortgagee policy. Occasionally, a mortgagee may request additional insurance to cover his foreclosure cost.

In an owner's policy, the amount of insurance should be the purchase price paid for the land. Title insurance companies generally insist on insuring for the full value of the land since their premiums are calculated based on insuring at full value, even though there may be only partial loss under the policy.

Schedule A-1 sets forth the name of the insured.

Schedule A-2 sets forth the estate or interest in the land which is encumbered by the mortgage—for example "fee simple," "leasehold," "remainder."

Schedule A-3 tells where the estate or interest in the land is vested—i.e. ABC Corporation.

Schedule A-4 sets forth a description of the mortgage and any assignments.

Schedule A-5 sets forth the legal description of the land. The 1987 policies provide that the land may be described in either Schedule A-5 or a separate Schedule C which is customary in some areas.

In Schedule B, the only real change from the 1970 policies is contained in the preamble as follows:

This policy does not insure against loss or damage (*and the Company will not pay costs, attorneys' fees or expenses*) which arise by reason of:

Again, the Company is clarifying the fact that not only are the matters contained in Schedule B excepted from coverage, but also that the Company is under no obligation to provide attorneys' fees, costs or expenses on account of such matters.

The 1987 Loan Policy also contains a Schedule B, Part 2, which sets forth matters that affect the title to the estate or interest in the land but are subordinate to the lien of the insured mortgage. LTC



Gabriel A. Ivan has retired as senior vice-president, general counsel, and secretary of Lawyers Title Insurance Corporation. He joined the company's corporate legal staff at National Headquarters in Richmond in 1971. He was appointed senior title attorney in 1974, assistant counsel in 1976, associate counsel in 1978, and corporate counsel in 1981. Ivan was named assistant general corporate counsel in 1982, vice-president and general corporate counsel in 1983, and senior vice-president, general counsel, and secretary in 1985. He was graduated from the United States Military Academy in West Point with a B. S. degree, and from Harvard University where he received his LL. B. degree with honors. Ivan is a member of the District of Columbia Bar Association.

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R.1772

AFFIDAVIT OF J. BUSHNELL NIELSEN

EXHIBIT 10

R.1774

CTIC_00149

REAL ESTATE LAW AND PRACTICE
Course Handbook Series
Number 300

Title Insurance

The New Policy Changes

Oscar H. Beasley
Chairman

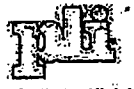
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ALTA FORMS COMMITTEE REVISES TITLE INSURANCE POLICIES

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The ALTA Forms Committee has now completed its work of revising all of the ALTA policy forms—the Owner's Policy, the Loan Policy, the Leasehold Owner's Policy, the Leasehold Loan Policy, and the Construction Loan Policy.

This project has been ongoing since the fall of 1984. Since the forms had not been revised since 1970, it was thought that a general revision and update was needed in order to address new trends in real estate and real estate financing prevalent in the 1980s, and certain case law that has taken place in recent years having to do with courts finding liability outside of the title insurance contract and with the appropriate records that the title company must search.

In this article, I will be going through the ALTA Loan Policy which was used as a basis for all the revisions and explaining what the policy *did* cover and *still* covers, as well as pointing out those matters that are new or different from the 1970 forms.

All ALTA policies can be divided into five basic parts: the Insuring Provisions, the Exclusions from Coverage, the Conditions and Stipulations, and Schedule A and Schedule B.

Insuring Provisions

Let's look first at the Insuring Provisions. This is where Lawyers Title gives coverage. Later in the article you'll see where the Company excludes coverage in the Exclusions from Coverage.

The Insuring Provisions begin with a preamble which tells the insured what these Insuring Provisions are "subject to."

"Subject to the exclusions from coverage, the exceptions from coverage contained in Schedule B and the Conditions and Stipulations, the Company insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. "Title to the estate or interest described in Schedule A being vested other than as stated therein."

Insuring Provision 1 has not changed at all from the 1970 policies and basically insures that the title to the property is vested in the owner, and properly vested. If we insure title is vested in John Doe and it turns out to be vested in Mary Roe, then we have a problem. If we insure fee simple title and the estate turns out to be a life estate in the owner, then this insurance provision comes into play.

2. "Any defect in or lien or encumbrance on the title."

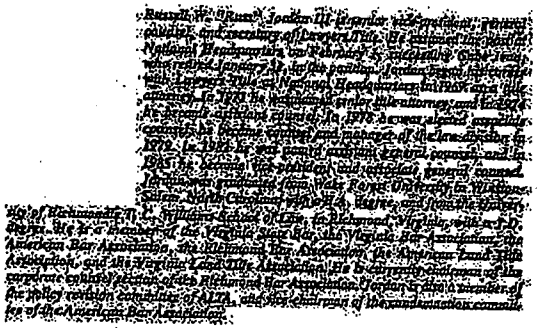
This Insuring Provision 2 comes directly from the 1970 policies, and in my opinion, is one of the most important Insuring Provisions in the policy. It would pick up almost any outstanding interest in a third party, such as a missing heir, an outstanding mineral interest, a missed mortgage or deed of trust, a federal tax lien, a judgment lien, a special assessment or a mechanic's lien. This is the "catch all" paragraph and covers almost any defect, lien or encumbrance not excepted to in the policy. Remember that this includes recorded as well as *unrecorded* matters.

3. "Unmarketability of the title."

The 1970 policies simply insured against loss or damage by reason of "unmarketability of title" with no definition or meaning of what would constitute an "unmarketable title." This has proven to be a little broad and poses certain uncertainties and ambiguities in settling claims. How far do you have to go in establishing a marketable title? Do you have a reasonable time to cure same? When is the title unmarketable?

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For the 1987 policies, the Forms Committee has come up with a definition of what would constitute an unmarketable title and this definition appears as Item (g) of the Conditions and Stipulations:

"An alleged or apparent matter affecting title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or of the insured mortgage to be relieved from the obligation to purchase by virtue of a contractual condition requiring the delivery of a marketable title."

Thus if an owner plans to sell or lease his property, or obtain a mortgage loan on the property (or if a lender sells the land after foreclosure, or sells the loan) and is turned down by reason of a matter insured against by the policy, then the Company would have liability by reason of this insuring Provision. The Company would have to consider bringing a suit for specific performance, possibly purchasing the property of the mortgage loan, or making an owner a loan if the owner would not obtain a loan because of the unmarketable title.

4. "Lack of a right of access to and from the land."

There has been no change in this Insuring Provision. Note that the coverage afforded in Insuring Provision 4 represents "legal" access to and from the property, and that it does not insure the nature and extent of access or the type of vehicle that one might or might not be able to use to get to and from the property.

5. "The invalidity or unenforceability of the insured mortgage upon the title."

Insuring Provisions 5 and 7 formerly had exclusionary language contained within these Insuring Provisions. This exclusionary language has now been removed from Insuring Provision 5 and Insuring Provision 7 and placed in the Exclusions from Coverage. Thus there is now no "exclusionary" language contained in any of the eight Insuring Provisions—all are affirmative statements. Except for the removal of the exclusionary language, Insuring Provision 5 remains the same.

6. "The priority of any lien or encumbrance over the lien of the insured mortgage."

There has been no change in Insuring Provision 6 from the 1970 policies.

7. "Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:

(a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or

(b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance."

Insuring Provision 7 has been completely reworded but it is intended to offer essentially the same coverage as contained in Insuring Provision 7 of the 1970 Loan Policy. The language in the 1970 Loan Policy was always considered a little awkward since it contained an exclusion built into the affirmative language and this new language in the new policy is much clearer.

In my opinion, the 1970 ALTA Loan Policy was actually designed and suited for permanent loans only, not construction loans, but because of the broad language of Insuring Provision 7 it could be, and often was, used for construction loans. The 1987 loan policies can clearly be used for either—permanent or construction loans.

The Forms Committee seriously considered the concept of a fully funded policy, for permanent loans only, whereby endorsements could be added to the policy to convert the policy into a construction loan policy and thereby offer mechanics' lien coverage which would be especially suited for the particular state. The Forms Committee debated over this issue but the final consensus was to design an ALTA Loan Policy for both permanent and construction loans.

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just like the current policy is being used.

8. "The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens."

The 1970 policies referred to the assignment being "shown" in Schedule A and the new language "provided the assignment is shown in Schedule A" is perhaps a little stronger. If an assignment is shown in Schedule A, then such assignment is insured; if not shown in Schedule A, the assignment is not insured.

Note that in insuring an "assignment" of a mortgage, the title company must not only be concerned with liens, defects and encumbrances against the owner of the subject property, but must also be concerned with liens, defects and encumbrances against the assignor of the debt, since it will be insuring that the title to the insured mortgage vests in the assignee free and clear of all liens.

The paragraph appearing at the conclusion of the Insuring Provisions is the "defense obligation" paragraph and stipulates that the Company will pay all costs, attorneys' fees and expenses incurred in the defense of the title or the lien of the insured mortgage, but only to the extent provided for in the Conditions and Stipulations.

This obligation to pay court costs and attorneys' fees was formerly included in the preamble to the Insuring Provisions but now is contained in a separate paragraph following the Insuring Provisions.

Remember that these attorneys' fees are not included in the policy amount and indeed may even exceed the face amount of the policy. For example, you may have a policy in the face amount of $100,000 and have a $50,000 loss under the policy and yet have attorneys' fees of $75,000. Indeed, you could have attorneys' fees in the amount of $110,000 and have no loss at all under the policy, in which case the amount of insurance would never be reduced below the policy's face amount of $100,000. According to recent ALTA figures, approximately 30 to 40 percent of all losses to title insurance companies involve the subject of attorneys' fees, court costs and expenses.

Exclusions

Now let's look at the Exclusions from Coverage. This is where the title insurer sets forth matters that are not covered. Here the insurer is saying to the insured—"These matters are not the subject of title insurance and are expressly excluded from the coverage of this policy."

Before we get into the Exclusions, we must look at the definition of "public records" in Condition and Stipulation 1(f) which has been altered from the 1970 policies.

"According to recent ALTA figures, approximately 30 to 40 percent of all losses to title insurance companies involve the subject of attorneys' fees, court costs and expenses."

The definition of "public records" contained in the 1970 policies simply reads:

"those records which by law impart constructive notice of matters relating to said land."

This definition worked well for years because everyone thought that we were talking about "land records" or "title records" until a certain case arose in Alaska in 1976 called the Hahn Case, which held that easements or rights of way which were recorded in the Federal Register constituted a public record and, therefore, a place the title companies must search for purposes of certain exclusions or exceptions contained in the policy.

Simply put, title insurers, their agents, and approved attorneys are not set up or equipped to routinely examine records outside of the traditional land records—such as records in planning departments, zoning departments, safety inspectors' offices, fire marshals' offices, or the Federal Register.

Thus the definition of "Public Records" was reworded in the 1987 policies to more clearly indicate that what we are talking about are *land records, title records,* or *land title records.*

" 'public records:' records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1(a)(iv) of the Exclusions from Coverage, 'public records' shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district in which the land is located."

The definition of "public records" is only used in four places in the Exclusions from Coverage. Note that this definition does not necessarily prescribe or limit all those places where the title company may search for the purpose of insuring the title, and for the purpose of affording the coverage contained in the eight Insuring Provisions. But this definition does limit or prescribe where the title insurance company must search for the purpose of the affirmative assurances given within the Exclusions from Coverage.

Now with that in mind, let's look at the Exclusions' preamble.

"The following matters are expressly excluded from the coverage of this policy *and the Company will not pay loss or damage, court costs, attorneys' fees or expenses which arise by reason of:"*

In the new language italicized above, the Forms Committee is clarifying that not only are all of the matters contained within the Exclusions excluded from coverage, but also that the Company is under no obligation to pay attorneys' fees or court costs in connection therewith. This should have been true in the 1970 policies, but it is spelled out in the new policies.

1.(a) "Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy."

Exclusion 1 excludes building and zoning ordinances, subdivision laws, and environmental protection laws, and also excludes the effect of a violation of these matters. But note that any notice of *enforcement* or any notice of a *defect, lien* or *encumbrance* resulting from a violation (recorded in the public records) must be picked up and reported out by the title company. To this extent, the 1987 policies pro-

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vide more coverage than the 1970 policies and a little more than the 1984 policies.

(b) "Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy."

Governmental "police power" is the broad power of the state to restrict or regulate property for the benefit of public health, safety or welfare. Again, if there is notice of the exercise of governmental police power or notice of a defect, lien or encumbrance resulting from a violation affecting the land (recorded in the public records), then the title company must pick it up and report it in the policy.

2. "Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but *not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.*"

The new language here is needed because of the change in the definition of "public records" and simply indicates that the policy is not excluding a federal condemnation where a "taking" has occurred prior to or at date of policy. In other words, if there has been a federal taking at date of policy, even though same may not be recorded in the public records, as defined in the policy, then the title company is liable for this matter and must pick it up.

3. "Defects, liens, encumbrances, adverse claims or other matters:

(a) "created, suffered, assumed or agreed to by the insured claimant;"

"Simply put, title insurers, their agents, and approved attorneys are not set up or equipped to routinely examine records outside of the traditional land records . . ."

There has been no change here from the 1970 policies.

(b) "not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;"

The language here has been reworked but is intended to say essentially the same thing as in the 1970 policies. If the insured knows of some defect or problem with the title and doesn't disclose it to the title company, then it's always a defense to the Company in accordance with this paragraph. If the insured tells the Company of the problem and the Company insures anyway, then this defense would not be applicable.

(c) "resulting in no loss or damage to the insured claimant;"

There has been no change here from the 1970 policies. This points out that the title insurance policy is a contract of indemnity and if the insured suffers no loss, then the Company has no liability.

(d) "attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or materials); or"

The language in the parentheses having to do with the exception provided with respect to mechanics' liens has been reworded in order to track the new coverage of Insuring Provision 7.

"Governmental police power is the broad power of the state to restrict or regulate property for the benefit of public health, safety or welfare. . . . If there is notice of the exercise of governmental police power or notice of a defect, lien or encumbrance (recorded in the public records) . . . then the title company must pick it up and report it in the policy."

(e) "resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage;"

This exclusion is new in the 1987 policies.

4. "Unenforceability of the lien of the insured mortgage because of the *inability* or failure of the insured at Date of Policy, or the *inability* or failure of any subsequent owner of the indebtedness, to comply with applicable doing business laws of the state in which the land is situated."

The word "inability" as it appears above is new in the 1987 policies.

5. "Invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law."

This is a new exclusion but comes directly from the exclusionary language formerly included in Insuring Provision 5 having to do with usury or truth in lending laws.

6. "Any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance."

Exclusion 6 in the 1987 policies is new and tracks very closely the exclusionary language that was formerly contained in Insuring Provision 7 of the 1970 Loan Policy. This excludes mechanics' liens for an improvement contracted for and commenced after the date of the policy and not financed in whole or in part out of the proceeds of the loan which the lender has advanced or is obligated to advance. The intent here is to avoid liability (or defense obligations) for mechanics' liens that come along months or years after the mortgage is recorded and the policy is issued for work done by the owner either with his own funds or perhaps with funds from a second mortgage—like additions such as a side porch.

Schedules A and B

Now let's look at Schedule A. There has really been very little change in Schedule A from the 1970 policies.

Date of Policy—This is the date through which the title is examined—probably the recording of the deed or the recording of the mortgage. Remember that title insurance insures against loss or damage by reason of matters occurring in the past. No insurance is afforded as to future events, except for the subject of mechanics' liens and there may be an element of future insurance for lenders with respect to special endorsements having to do with variable rate mortgages or shared appreciation mortgages.

Amount of Insurance—this is normally the amount of the mort-

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gage in the case of the mortgagee policy. Occasionally, a mortgagee may request additional insurance to cover his foreclosure costs.

In an owner's policy, the amount of insurance should be the purchase price paid for the land. Title insurance companies generally insist on insuring for the full value of the land since their premiums are calculated based on insuring at full value, even though there may be only partial loss under the policy.

Schedule A-1 sets forth the name of the insured.

Schedule A-2 sets forth the estate or interest in the land which is encumbered by the mortgage—for example "fee simple," "leasehold," "remainder."

Schedule A-3 tells where the estate or interest in the land is vested—i.e. ABC Corporation.

Schedule A-4 sets forth a description of the mortgage and any assignments.

Schedule A-5 sets forth the legal description of the land. The 1987 policies provide that the land may be described in either Schedule A-5 or a separate Schedule C which is customary in some areas.

In Schedule B, the only real change from the 1970 policies is contained in the preamble as follows:

"This policy does not insure against loss or damage *[and the Company will not pay costs, attorneys' fees or expenses]* which arise by reason of:"

Again, the Company is clarifying the fact that not only are the matters contained in Schedule B excepted from coverage, but also that the Company is under no obligation to provide attorneys' fees, costs or expenses on account of such matters.

The 1987 Loan Policy also contains a Schedule B, Part 2, which sets forth matters that affect the title to the estate or interest in the land but are subordinate to the lien of the insured mortgage.

Conditions and Stipulations

We now begin to talk about the Conditions and Stipulations—the fine print of the policy that no one really likes to read. But these Conditions and Stipulations are very important in that they spell out the contractual rights and obligations of the Company and of the insured and they tend to consolidate and complete the insurance contract between the parties.

Of all of the changes made by the ALTA Forms Committee, this may have been one of the areas of greatest need, and is perhaps the area of greatest accomplishment. Many of the Conditions and Stipulations contained in the old policy consisted of long paragraphs with several thoughts expressed in each one. The Committee tried to break these paragraphs down into sections, with as much logical order and sequence as possible, and tried to keep one thought per phrase or one thought per sentence insofar as possible.

The Conditions and Stipulations begin with a definition of terms used in the policy. Note that the definition of "insured" includes not only the insured named in Schedule A but also the owner of the indebtedness secured by the insured mortgage and each successor in ownership of the indebtedness, except a successor who is an obligor under the provisions of the new Section 12(c); thus the policy insures the owner of the debt. Note, however, that the Company reserves all rights and defenses as to any successor that the Company would have had against his predecessor, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien or encumbrance against the title.

What does all this mean? If the Company insures lender "A," and lender "A" knows of some defect in the real estate, then this will be a defense to the Company. If lender "A" sells the mortgage to lender "B" and lender "B" buys the mortgage as a bonafide purchaser, then lender "B" takes free of "A's" knowledge and free of this defense of the Company.

The term "insured" will also include any governmental agency or governmental instrumentality which is an insurer or guarantor under an insurance contract, or guaranty insuring or guaranteeing the indebtedness and, in addition, all of those parties designated in Section 2(a) of the Conditions and Stipulations.

The definition of "knowledge" or "known" is very important because of Exclusion 3(b) (matters *known* to the insured). "Knowledge" and "known" are defined as "actual knowledge," not constructive knowledge, or notice which may be imputed to an insured by reason of the public records as defined in this policy *or any other records which impart constructive notice of matters affecting the land.* The 1970 policies defined only "knowledge," while the 1987 policies define both terms. The italicized language indicated above is new and was added to clarify that the insured is only being charged with actual knowledge, not knowledge obtained from the public records or imputed through any other records intending to impart constructive notice of matters affecting the land.

The definition of "land" appearing in 1(d) is also significant and includes the land described or referred to in Schedule A or a separate Schedule C. Note that land also includes all improvements that are affixed to the land which by law constitute real property. Land does not include any property beyond the boundaries of the property described in Schedule A, nor does it include any interest or right in any street, road, alley or waterway. But nothing contained within the definition of "land" will in any way diminish the affirmative insurance the insured receives by Insuring Provision 4 with respect to access to and from the land.

"Public Records" appearing in 1(f) and "unmarketability of title" appearing in 1(g) have been discussed earlier in this article.

Section 2 of the Conditions and Stipulations deals with the continuation of insurance and serves as a good example of where the Forms

"... if there has been a federal taking at date of policy, even though same may not be recorded in the public records, as defined in the policy, then the title company is liable for this matter and must pick it up."

Committee rearranged and reworded for clarity. Item (a) has to do with the continuation of insurance in favor of a lender after acquisition of title. This paragraph provides that the coverage of the policy shall continue in force (as of date of policy) in favor of certain parties as follows:

1. An insured who acquires all or any part of the estate in the land by foreclosure, trustee's sale, deed in lieu of foreclosure, or any other legal manner which discharges the lien of the insured mortgage.

   Thus, when an insured forecloses and acquires title, he is still protected by the policy, but as of the policy's original effective date.
2. A transferee of the estate or interest from an insured corporation, provided that the transferee is the parent or the

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"If the insured knows of some defect or problem with the title and doesn't disclose it to the title company, then it's always a defense to the Company."

wholly owned subsidiary of the insured corporation.

3. Any governmental agency or governmental instrumentality which acquires all or any part of the estate pursuant to a contract of insurance or guaranty.

Item (b) of Section 2 is contained in the lender's policy and in the owner's policy and provides that the coverage of the policy will continue in force as of the date of the policy in favor of an insured as long as the insured retains an estate or interest in the land or holds an indebtedness secured by a purchase money mortgage given by the insured's purchaser. This means if we insure a lessee in an owner's policy (which lessee has been granted an option to purchase the land) and this lessee later exercises his option to purchase and takes title to the land, his old owner's policy insuring him as a lessee will continue in force to protect him against all matters that are covered by that policy; but note that the old policy does not insure his new estate in the land as "owner" and does not carry an effective date past the date of the old policy. Also, if an owner or a lender sells the property and takes back a purchase money mortgage, coverage of his owner's or lender's policy goes on to protect him as long as he holds the purchase money mortgage.

Further, the coverage of the policy always continues to protect an insured on the covenants of warranty that he might give in a deed of transfer to his purchaser. This is valuable insurance in that liabilities on warranties can last a long time and this is why we always tell our insureds to keep their policies even after they have conveyed the title.

Item (c) of Section 2 is for lenders only and has to do with the amount of insurance after the acquisition of title by the lender or after the conveyance of title by the lender. It provides that such amount of insurance shall not exceed the least of the following:

1. The amount of insurance stated in Schedule A.
2. The amount of the unpaid principal indebtedness secured by the insured mortgage at date of policy, plus interest thereon, plus expenses of foreclosure, plus amounts advanced pursuant to the mortgage to assure compliance with laws or to protect the lien of the insured mortgage, and plus *reasonable amounts expended to prevent deterioration of the improvements*, but reduced by the amount of all paybacks to the lender.
3. The amount paid by the governmental agency or instrumentality.

Section 3 of the Conditions and Stipulations in the 1970 policies had to do with two things—the defense and prosecution of actions and the notice of claim to be given by the insured claimant.

In the 1987 policies, the old Section 3 has been rewritten to procedurally and these matters now appear in the new policies as Conditions and Stipulations 3 (Notice of Claim to be Given) and 4 (Defense and Prosecution of Actions—Duty of Insured to Cooperate).

Section 3 requires the insured to give to the company notice in writing promptly in the following cases:

1. In case of any litigation;
2. In case the insured shall have knowledge of any claim of title or interest which is adverse to the title to the estate or the lien of the insured mortgage; or
3. If the title to the estate or interest or the lien of the insured mortgage is rejected as unmarketable.

As mentioned, Section 4 concerns the defense and prosecution of actions and the duty of the insured to cooperate. Item 4(a) of the Conditions and Stipulations is reworded somewhat from Item 3(a) of the 1970 policies and provides that the Company will defend the insured in all litigation when someone asserts a claim against the subject property, which claim is based upon a matter insured against by the policy, but only as to those defects, liens or encumbrances or other matters which are insured against by the policy. In other words, if the matter is covered we will provide a defense, but if the matter is not covered then we have no obligation to defend.

This section further specifies that the Company shall have the right to select counsel, but the 1987 policies provide that this right is subject to the insured's right to object to the Company's choice of counsel for a "reasonable" cause.

Section 4(b) states that the Company shall have the right, at its own option and cost, to initiate and prosecute an action or proceeding which may be necessary or desirable to establish the title or the lien of the insured mortgage or to prevent any loss or damage to the insured. In other words, if we see something that needs to be done in order to clear the title, cure the title, or avoid an adverse claim, then we don't have to sit by and watch matters get worse, but can go ahead and take action to clear the title or prevent further loss to the insured. The 1987 policies provide that if the Company exercises its rights under this paragraph, it shall do so "diligently."

Section 4(c) provides that when the Company shall have brought an action or interposed a defense, then the Company may pursue any litigation to a final determination by a court of competent jurisdiction and reserves the right, in its sole discretion, to appeal.

Section 4(d) has to do with the insured's helping the Company when the Company brings a suit or defends against a suit, and provides that where the policy permits or requires the Company to bring a suit or defend a suit, the insured shall secure for the Company the right to so prosecute or defend and shall permit the Company to use the insured's name for this purpose.

Section 5 of the Conditions and Stipulations involves a proof of loss. In addition to the notice of claim required in Section 3, Section 5 requires the insured to furnish to the Company a proof of loss or damage statement within 90 days after the insured shall ascertain facts that give rise to the loss or damage. Therefore, in pursuing a claim, the insured must do two things—(1) furnish the Company a notice of loss and, (2) furnish a proof of loss statement.

This section in the 1987 policies spells out in more definitive terms what this proof of loss damage shall contain, requires the insured to describe the defect, lien or encumbrance that is the cause of the problem and requires the insured to show, to the extent possible, the basis of his calculations of the loss or damage.

Also new in the 1987 policies is the requirement that the insured claimant submit to an examination under oath by an authorized representative of the Company and the requirement that the insured claimant produce for examination and copying all records, books, ledgers, checks and correspondence which may reasonably pertain to

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the loss or damage. The failure of the insured claimant to provide the proof of loss or damage, submit to examination under oath, or produce or grant permission to obtain reasonably necessary information, could result in the termination of the liability of the Company as to that particular claim.

Section 6, (Options to Pay or Otherwise Settle Claims—Termination of Liability) is a very important paragraph and has been rearranged for clarity. In case of a

"Title companies generally insist on insuring for the full value of the land since their premiums are based on insuring at full value, even though there may be only partial loss . . ."

claim under the policy, the Company shall have the following additional options:

1. In Part A the Company may pay or tender payment of the total amount of insurance under the policy or purchase the debt for the amount owing thereon, together with all attorneys' fees, costs and expenses. If the Company exercises either of these options, then all liability to the insured shall terminate, including any further liability to defend or continue litigation.
2. In Part B the Company may pay or otherwise settle with third parties or with the insured claimant, together with all attorneys' fees, costs and expenses. If the Company exercises either of these options, then all liability to the insured for the particular claimed loss or damage shall terminate, including any further obligation to defend.

Title insurers have had a lot of problems in recent years due to claims for damages outside of the title insurance contract. What we're talking about here are consequential damages, damages due to emotional distress, and so on.

In order to counter this and to make it clear that the title insurance contract is (and has always been) a contract of indemnity, an important preamble has been added to Section 7 as follows:

"This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of the matters insured against by this policy and only to the extent herein described."

Section 7 goes on to state that the liability of the Company under the policy shall not exceed the least of:

1. The amount of insurance stated in Schedule A;
2. The amount of the unpaid principal indebtedness secured by the insured mortgage at the time of the loss or damage;
3. The difference between the value of the insured estate as insured and the value of the insured estate subject to the defect, lien or encumbrance insured against by the policy.

Item 3 above is new in the 1987 policies and represents a classic method in which to measure loss or damage under the policy.

Section 8(a) of the 1987 policies is very similar to what was contained in the 1970 policies and provides that if the Company establishes the title, removes the alleged defect, lien or encumbrance, cures the lack of a right of access, or cures the claim of unmarketability (all in a reasonably diligent manner), then it shall have fully performed its obligation with respect to that matter.

Section 8(d) of the 1987 Loan Policy is very important and replaces Section 8(b) of the 1970 Loan Policy. It provides that the Company shall not be liable for:

1. Any indebtedness created subsequent to the date of the policy, except for advances made to protect the lien of the insured mortgage *and reasonable amounts expended to prevent deterioration of improvements* or
2. Construction loan advances made after the date of the policy, except for those advances made after the date of the policy for financing in whole or in part, the construction of improvements on the land which the insured at the date of the policy was, and continued to be, obligated to advance.

The italicized language in Item 1 above is new in the 1987 policy and represents an expansion of coverage. All of Item 2 is new in the 1987 policy.

Section 9 has to do with the reduction of insurance or the reduction or termination of liability.

Section 9(a) is very similar to what was in the 1970 policies while Section 9(b), having to do with payment in part, is new.

Section 10 (Liability Non-cumulative) is almost identical to the similar section contained in the 1970 policy but also covers a mortgage "assumed" by the lender. This simply means that if the lender acquires title to the property and assumes a mortgage or places a mortgage on the property, then any payment made under such mortgagee policy will reduce the amount of the lender's insurance under its mortgagee policy.

In Section 11 (Payment of Loss) there has been no change in the language, although these provisions don't appear in the exact place as they did in the 1970 policies. When a payment is made under the policy, the policy shall be produced for endorsement unless it is lost or destroyed, in which case proof of such loss or destruction shall be furnished to the Company. When liability and the extent of loss has been definitely fixed, the loss shall be payable within 30 days.

Section 12 (Subrogation) is a pretty complicated paragraph and I'm not going to try and go into all the details concerning the fine points of subrogation. But, basically what this paragraph said and still says is that when the Company shall have settled and paid a claim under the policy, then all rights of subrogation shall vest in the Company. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property in order to perfect such right of subrogation.

Now, notwithstanding that, both the old version and the new version provide that the lender may release or substitute the personal liability of any debtor, he may modify the terms of payment, or he may release a portion of the property or collateral security; provided, however, in so doing, he does not impair the priority of the lien of the insured mortgage.

Now in the subrogation paragraph in the 1987 policies there is a new section (12c) which extends

"The failure of the insured claimant to provide the proof of loss or damage, submit to examination under oath, or produce or grant permission to obtain reasonably necessary information, could, unless prohibited by law or regulation, terminate the liability of the Company as to that particular claim."

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the Company's right of subrogation against "non-insured obligors." It provides that the Company's right of subrogation shall exist and shall include the rights of the insured to any indemnities, guarantees, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy. In other words, if the lender has a mechanic's lien bond, or a guarantee for itself, then the title insurer will be subrogated to this bond or guarantee once it has paid the claim.

Section 13 (Arbitration) is entirely new in the 1987 policies. The Committee had been considering arbitration from the time it began to work on the policies back in 1984. As you perhaps know, there is a great trend toward alternative dispute resolution, such as mediation or arbitration, in order to avoid high court costs, attorneys' fees, and time in resolving disputes.

What we are talking about in an arbitration clause is arbitration between the insured and the Company over the scope of coverage and all matters covered by the insurance contract; we're not talking about arbitration between the Company and third party claimants.

Section 13 of the 1987 Loan Policy (Section 14 in the owner's policy) deals with arbitration and provides that unless prohibited by applicable law and upon demand of either party any controversy or claim between the insured and the Company arising out of the policy or any service provided by the Company in connection with the issuance of a policy in an amount of $1 million or less, shall be settled by binding arbitration in accordance with the "Title Insurance Arbitration Rules of the American Arbitration Association." For policy amounts in excess of $1 million, arbitration, as provided by Section 13, can be instituted only by the agreement of *both* parties.

The Forms Committee has met with the American Arbitration Association and established a set of rules particularly suited for title insurance. These rules go into such matters as how arbitration is initiated, the qualifications of arbitrators and how they are appointed, representation by counsel, the order of the proceedings, the evidence that is admissable, and the award and settlement.

The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Any judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Any award made by the arbitrator shall be binding upon both parties, but note that it is not precedent, like case law. The law of the situs of the land shall apply to the use of arbitration as a means for settling any controversy or claim under the policy. It is hoped that this new arbitration clause will prove beneficial to both insurers and insureds in resolving claims and disputes in a fair and efficient manner.

Section 14 of the Conditions and Stipulations states that the policy is the entire contract between the parties and that any claim must be based on the policy. This represents no change from the 1970 policies.

Section 15 of the Conditions and Stipulations is a "severability" clause, new in the 1987 policies, and provides that if any provision of the policy is invalid, then the policy will be deemed not to include that provision.

Finally, Section 16 tells the insured where to send notice in the event of a claim or any other need to contact the Company.

With respect to the ALTA Owner's Policy 1987, there is one significant change that does not appear in the ALTA Loan Policy. This is the inclusion of a coinsurance provision in Section 7(b) of the Conditions and Stipulations. This section provides that if the amount of insurance at date of policy is less than 80 percent of the value of the land or the full consideration paid, then, in the event of partial loss, the Company shall only pay the loss pro rata in the proportion that the amount of insurance bears to the total value of the land at date of policy. For example, if the property is worth $100,000 at date of policy but the insured only purchases $70,000 worth of insurance, the Company would pay 7/10 of the loss in the event of a partial loss as provided by Section 7(b).

The coinsurance section further provides that if subsequent to date of policy an improvement is placed on the land which increases the value of the land by more than 20 percent, then, in the event of partial loss, the Company will only pay the loss pro rata in the proportion that 120 percent of the amount of insurance bears to the sum of the amount of insurance and the amount expended for the improvement. In other words, if the insured purchases a $100,000 policy (value of land at date of policy) and later erects a $70,000 improvement on the property without purchasing further insurance, then, in the event of partial loss, the Company would pay only 120/170 of such partial loss under the provisions of Section 7(b).

Finally, the ALTA has adopted two new endorsement forms which provide limited coverage with respect to environmental protection liens—ALTA Endorsement 8 and ALTA Endorsement 8.1.

ALTA Endorsement 8 is designed for use only with the ALTA Loan Policy 1987 (or the 1987 Leasehold Loan Policy) and is effective only if the land is used or is to be used primarily for residential purposes. It insures against loss or damage by reason of the lack of priority of the lien of the insured mortgage over: (1) any environmental protection lien which is recorded at date of policy in the "public records" or which is filed in the appropriate records in the United States District Court for the district where the land is located or, (2) any environmental protection lien provided for by any *state statute* in effect at date of policy, *except* environmental protection liens provided for by the following statutes: (we then list all super lien statutes).

ALTA Endorsement 8.1 (also only for land used primarily for residential purposes) is designed to be used with both the 1970 ALTA Loan Policy and the 1984 revised version, and is supposed to provide similar coverage. The wording is somewhat different because the 1970 Policy and the policy as amended in 1984 do not carry the new definition of "Public Records." Obviously, ALTA Endorsements 8 and 8.1 will require careful underwriting and may not be available in all states.

The new ALTA policy forms and endorsements represent almost three years of work on the part of the committee and 16 to 18 policy drafts. With input and different ideas from committee members, underwriting companies, agents, and representatives of various customer groups, the resulting product is necessarily a "committee product" and thus cannot satisfy entirely all of the wishes and desires of any one group. However, it is felt that these new forms do represent a significant improvement and modernization over the 1970 forms and it is hoped that they will serve the industry and its customers well for years to come.

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AFFIDAVIT OF J. BUSHNELL NIELSEN

EXHIBIT 11

DOCUMENTS REVIEWED

1. Summons, Verified Complaint and Exhibits A –C filed July 29, 2011 in *Jericho State Capital Corp. of Florida v. Chicago Title Insurance Company*, Horry County Court of Common Pleas Case No. 2011-CP-26-6449
2. Chicago Title Insurance Company's Answer filed February 16, 2012 in *Jericho State Capital Corp. of Florida v. Chicago Title Insurance Company*, Horry County Court of Common Pleas Case No. 2011-CP-26-6449
3. Chicago Title Insurance Company's Memorandum of Law in Support of Its Motion to Dismiss filed November 28, 2011 in *Jericho State Capital Corp. of Florida v. Chicago Title Insurance Company*, Horry County Court of Common Pleas Case No. 2011-CP-26-6449
4. Plaintiff's Answer to Defendant's First Set of Interrogatories dated April 16, 2012 in *Jericho State Capital Corp. of Florida v. Chicago Title Insurance Company*, Horry County Court of Common Pleas Case No. 2011-CP-26-6449
5. Plaintiff's Supplemental Answers to Defendant's First Set of Interrogatories dated March 31, 2014 in *Jericho State Capital Corp. of Florida v. Chicago Title Insurance Company*, Horry County Court of Common Pleas Case No. 2011-CP-26-6449
6. Plaintiff's Supplemental Answers to Defendant's First Set of Interrogatories dated May 16, 2014 in *Jericho State Capital Corp. of Florida v. Chicago Title Insurance Company*, Horry County Court of Common Pleas Case No. 2011-CP-26-6449
7. Plaintiff's Supplemental Answers to Defendant's First Set of Requests for Production of documents dated May 16, 2014 and attached Appraisal completed by Jayroe Appraisal Company and letter from Steve S. Powell of Venture Engineering to Howell V. "Skeets" Bellamy, Jr. dated October 1, 2013 in *Jericho State Capital Corp. of Florida v. Chicago Title Insurance Company*, Horry County Court of Common Pleas Case No. 2011-CP-26-6449
8. Civil Action Cover Sheet, Summons, Verified Complaint and Exhibits A –C filed October 12, 2009 in *Jericho All-Weather Opportunity Fund, L.P., et al., v. Horry County, South Carolina, et al.*, Horry County Court of Common Pleas Case No. 2009-CP-26-9968
9. Stipulation of Dismissal filed March 18, 2010 in *Jericho All-Weather Opportunity Fund, L.P., et al., v. Horry County, South Carolina, et al.*, Horry County Court of Common Pleas Case No. 2009-CP-26-9968
10. Civil Action Coversheet, Notice of Filing, Lis Pendens, Summons, Condemnation Notice and Tender of Payment, and Affidavit, all filed on December 15, 2009 in *South Carolina Department of Transportation v. Jericho State Capital Corporation of Florida*, Horry County Court of Common Pleas Case No. 2009-CP-26-11956

11. Judgment in a Civil Case dated January 2011 in *South Carolina Department of Transportation v. Jericho State Capital Corporation of Florida*, Horry County Court of Common Pleas Case No. 2009-CP-26-11956

12. Motion to Restore and To Amend Condemnation Notice and Tender of Payment dated April 19, 2011 in *South Carolina Department of Transportation v. Jericho State Capital Corporation of Florida*, Horry County Court of Common Pleas Case No. 2009-CP-26-11956

13. Notice of Appearance by Steven T. Moon dated June 22, 2011 in *South Carolina Department of Transportation v. Jericho State Capital Corporation of Florida*, Horry County Court of Common Pleas Case No. 2009-CP-26-11956

14. Judgment in a Civil Case dated September 7, 2011 and filed October 13, 2011 in in *South Carolina Department of Transportation v. Jericho State Capital Corporation of Florida*, Horry County Court of Common Pleas Case No. 2009-CP-26-11956

15. Affidavit of David Carlisle Turner dated December 2, 2011

16. Horry County Ordinance No. 88-202 recorded in the office of the Horry County Register of Deeds on July 9, 2002 in Deed Book 2497, Page 986

17. Transcript of Glenn Chwatt's deposition on April 3, 2014

18. Letter from Gregory R. Cohen at Cohen Norris Scherer Weinberger & Wolmer to Chicago Title Insurance Company dated February 26, 2009

19. Letter from Nicole S. Dunn at Chicago Title Insurance Company to Gregory R. Cohen dated June 3, 2009

20. Letter from Gregory R. Cohen to Nicole S. Dunn dated June 5, 2009

21. Letter from Nicole S. Dunn to Gregory R. Cohen dated November 12, 2009

22. Letter from Nicole S. Dunn to Gregory R. Cohen dated December 3, 2009

Lynx Jericho Partners, LLC,

Plaintiff,

v.

Chicago Title Insurance Company,

Defendant.

COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Case No. No. 2015-CP-26-1084

AFFIDAVIT OF J. BUSHNELL NIELSEN

1. This is a declaration of my expert opinions on behalf of Chicago Title Insurance Company ("Chicago Title") in regard to the above-referenced matter.

2. I reserve the right to supplement or modify my opinions and this declaration. I have considered the documents and other reference works referenced in this declaration and which is identified in the exhibits hereto.

3. I opine on the customs and practices of claim administrators in the title insurance industry concerning the issues found in this case, in response to the claim by Lynx Jericho Partners, LLC ("Lynx Jericho") that Chicago Title acted in bad faith in the handling of its claim.

4. All of my opinions are stated to a reasonable degree of certainty. My opinions are based on my experience with the industry as described in my curriculum vitae, which is Exhibit 1.

5. My prior experience in testifying as an expert witness is recited in Exhibit 2.

6. I refer to the book I wrote, *Title and Escrow Claims Guide*,[1] which distills the custom and practice employed by title insurers in the handling of claims. The book incorporates those practices that I learned and taught while I served in the industry. I have since confirmed that it reflects the customs employed by all or most title insurers in the United States. The book is the research treatise favored by claim administrators employed in the industry. It is also used by regulators, underwriting counsel and coverage counsel in private practice. The book is

[1] J. Bushnell Nielsen, *Title and Escrow Claims Guide*, 2016 Edition, American Land Title Association (hereafter, "*Nielsen*").

published by the American Land Title Association. I have updated the book annually since it was first published in 1996.

7. I have verified the following statements to be facts or have assumed them to be true.

8. In 2006, Peachtree Properties of North Myrtle Beach, LLC ("Peachtree") purchased about 131 acres of land on the Intracoastal Waterway in Socastee Township (the "Property"). Its deed was dated July 6 and recorded July 25, 2006.

9. Peachtree granted a first mortgage to R.E. Loans, LLC in the amount of $18,520,000 (the "First Mortgage"). It also granted a second mortgage, to Jericho State Capital Corporation of Florida ("Jericho State"), in the amount of $4,263,888 (the "Jericho Mortgage"). Both mortgages were also recorded on July 25, 2006.

10. Chicago Title issued to R.E. Loans an American Land Title Association 1992 form loan title insurance policy, with South Carolina modifications, insuring the lien of the First Mortgage, as policy number 7210740-73317401, in the amount of $17,071,873.33 (the "Policy").

11. The Policy bears a policy date of July 25, 2007 at 3:23 p.m. A loan title insurance policy is customarily dated as of the date and time on which the insured mortgage was recorded. The date and time on the Policy corresponded to the date and time on which the First Mortgage was recorded, except that the correct year was 2006, not 2007. I have assumed for purposes of this report that the correct Date of Policy would be July 25, 2006 at 3:23 p.m. (the "Date of Policy").

12. The Horry County Council adopted Ordinance 88-202 (the "Ordinance"), which amended the official map for Horry County. The Ordinance was recorded on July 9, 2002 in the office of the Registrar of Deeds for Horry County. Schedule B of the Policy does not recite the Ordinance as an exception.

13. On May 15, 2007, the Horry County Council adopted its ordinance 76-07, which rezoned the Property as the Peachtree Plantation Planned Development District (the "PDD Ordinance"). That ordinance approved development of the Property as a fairly dense, mixed use development with numerous residential parcels. The PDD Ordinance stated that it was adopted based on an application submitted by the owner. It also stated:

> The property owner has agreed to donate to Horry County at no cost, property sufficient to construct that portion of the 300 ft. wide Highway 31 (Carolina Bays Parkway) right-of-way that traverse the property in issue. The property will be conveyed to Horry County by general warranty deed, free of

all encumbrances within 120 days of third reading of this ordinance.

14. The PDD Ordinance went on to state a number of other agreements that had been worked out between the county and the developer about the land that the owner had agreed to donate (the "Parkway Parcel"). The PDD Ordinance was recorded with the registrar of deeds on May 17, 2007.

15. Jericho State filed suit to foreclose the Jericho Mortgage on June 8, 2007. A decree was entered on October 30, 2007 ordering the Property and the fixtures and personal property sold by J. Stanton Cross as master in equity for Horry County. Jericho State was the successful bidder at the foreclosure sale on December 3, 2007, with a bid of $9,000,000. It received a master's deed for the Property, which was recorded on February 26, 2008. The title it received was subject to the First Mortgage.

16. On October 12, 2009, Jericho State filed an action in the Horry County Court of Common Pleas, as Case No. 2009-CP-26-9968, seeking a ruling by the court that the PDD Ordinance was not binding on it, and requesting that the rezoning granted by the PDD Ordinance be rescinded, along with the obligation to donate the Parkway Parcel (the "Zoning Rescission Action"). Jericho State alleged in paragraph 6 that it had not been given advance notice of the terms of the PDD Ordinance by its borrower, Horry County or the South Carolina Department of Transportation. The complaint in the Zoning Rescission Action did not refer to the Ordinance.

17. On December 15, 2009, the South Carolina Department of Transportation filed a condemnation notice and tender of payment against Jericho State in the Horry County Court of Common Pleas, as Case No. 2009-CP-26-11956 (the "Condemnation Action"). In that lawsuit, the State of South Carolina condemned the Parkway Parcel for highway purposes, as part of the Carolina Bays Parkway project. The Department of Transportation added R.E. Loans, LLC and Mortgage Fund '08, LLC as additional defendants, on the premise that they might claim interests in the Property. Steven T. Moon filed a notice of appearance on behalf of those parties.

18. The Zoning Rescission Action was dismissed by stipulation on March 18, 2010. The stipulation signed by Jericho State's attorney said that the case was being dismissed because the South Carolina Department of Transportation "has filed an eminent domain action..., which action resolves the issues raised in the present declaratory judgment matter... ."

19. The Condemnation Action was dismissed at the same time the Zoning Rescission Action was dismissed. On April 20, 2011, the Department of Transportation filed

a motion to restore and amend the 2009 condemnation notice and tender of payment, asserting that the Condemnation Action had been dismissed by mistake. On October 13, 2011, the court granted that motion.

20. The Peachtree Loan and the First Mortgage were assigned several times. R.E. Loans assigned the First Mortgage to Wells Fargo Foothill, LLC by an assignment dated July 17, 2007 and recorded on August 15, 2007 in Mortgage Book 4952, Page 1521, Horry County Register of Deeds. Wells Fargo Foothill reassigned the First Mortgage to R.E. Loans by an instrument dated March 11, 2008 and recorded on December 12, 2008 in Mortgage Book 5130, Page 2614, Horry County Register of Deeds.

21. R.E. Loans assigned the First Mortgage to Mortgage Fund '08, LLC by an instrument with an effective date of January 4, 2008 and recorded on May 16, 2008 in Mortgage Book 5071, Page 96, Horry County Register of Deeds. Mortgage Fund '08, LLC filed a Chapter 11 bankruptcy petition in 2011. Under a plan approved by the bankruptcy court in 2012, the First Mortgage loan was assigned to Susan L. Uecker as trustee of the Mortgage Fund '08 Liquidating Trust (the "Liquidating Trust").

22. On October 22, 2012, the trustee of the Liquidating Trust, Jericho State and Jericho All-Weather Opportunity Fund LP ("Jericho All-Weather") signed an engagement agreement with the law firm of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A. to have the firm represent the three parties in the Condemnation Action (the "Engagement Agreement"). Paragraph 11 of that agreement also stated that Jericho State and Jericho All-Weather had a first right of refusal for the purchase of the First Mortgage loan if the trustee obtained a third party offer to buy that loan. Mr. Chwatt testified that Jericho All-Weather was a participant in the Jericho State Loan.[2]

23. By a letter dated January 8, 2013, the MacDonald Fernandez LLP law firm, as attorneys for the Liquidating Trust, gave notice to Jericho State and Jericho All-Weather of their opportunity to purchase the Peachtree Loan for $447,725, the price allocated to that loan in an offer received from a third party for the purchase of several loans.

24. Lynx Asset Services, LLC formed Lynx Jericho Partners, LLC ("Lynx Jericho") on April 4, 2013. SRKD-SAM Advisors LLC became the Class B member of Lynx Jericho Partners, LLC on April 17, 2013.[3] Each member contributed to the

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[2] Deposition of Glenn Chwatt on April 3, 2014, p. 18.

[3] The Florida Department of State, Division of Corporations, reports that SRKD-SAM Advisors LLC was administratively dissolved for failure to file an annual report, on September 26, 2014.
(footnote continued)

company cash or property having an ascribed value of $2.5 million. The April 17, 2013 Amended and Restated Operating Agreement for the company (the "Operating Agreement") named Lynx Asset Services, LLC as the manager of the company.

25. Glenn Chwatt signed as Manager/Member of SRKD-SAM Advisors LLC. The Florida Corporations Division lists Glenn Chwatt as "manager" of SRKD-SAM Advisors, and Scott D. Svirsky as its registered agent. Mr. Chwatt is the president of Jericho State[4] and one of its three present employees.[5] Mr. Svirsky is a partner in Jericho All-Weather.[6]

26. Mr. Chwatt testified that Lynx Asset Services or Lynx Partners are controlled by the Maschler family, and that Michael McCarty may have some involvement in the entities.[7] Michael McCarty signed the Operating Agreement as president of Lynx Asset Services, LLC.[8]

27. Lynx Jericho purchased the loan made by R.E. Loans, LLC to Peachtree and another loan it made, termed the Saucepan Loan, secured by property in North

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http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail?inquirytype=OfficerRegisteredAgentName&directionType=Initial&searchNameOrder=SVIRSKYSCOTTD%20L130000465150&aggregateId=flal-l13000046515-9b04c2dd-09ba-415a-af84-05650bd5c5c3&searchTerm=Svirsky%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20Michael&listNameOrder=SVIRSKYMICHAEL%20L010000218360 (last visited January 26, 2016). Ex. 3.

[4] See http://www.corporationwiki.com/Florida/Boca-Raton/glenn-chwatt-P224416.aspx (last visited January 26, 2016). Ex. 3.

[5] Deposition of Glenn Chwatt on April 3, 2014, p. 14.

[6] Deposition of Glenn Chwatt on April 3, 2014, p. 13.

[7] Deposition of Glenn Chwatt on April 3, 2014, pp. 24-25.

[8] The 2015 annual report filed with the Florida Department of State, Division of Corporations, states that the manager of Lynx Asset Services, LLC is Lynx Investors, LLC. See http://search.sunbiz.org/Inquiry/CorporationSearch/GetDocument?aggregateId=flal-l08000095172-5e3876ca-79de-475e-a5d7-16ec947e35b3&transactionId=l08000095172-7aaaa399-8119-4748-adf7-6d99ba2ff9ca&formatType=PDF (last visited January 26, 2016). The 2015 annual report for Lynx Investors, LLC, in turn, lists Harrison Investors, LLC, of Matawan, New Jersey, as the manager of Lynx Investors, LLC. See http://search.sunbiz.org/Inquiry/CorporationSearch/GetDocument?aggregateId=flal-l03000037603-fc6c9d9a-8446-4806-8c75-2c3626a6ba07&transactionId=l03000037603-2ef0dc9a-303c-477f-a1bf-ed038c4864d4&formatType=PDF (last visited January 26, 2016). Harrison Investors, LLC is not listed as an entity that has filed reports with the Florida Department of State. Manta lists Michael McCarty as the principal of Harrison Investors, LLC. See http://www.manta.com/c/mrypr51/harrison-investors-llc (last visited January 27, 2016). Mr. McCarty is listed as the manager of Lynx Jericho Southfork Landing Partners, LLC on the 2015 annual report filed by that company in Florida. See http://search.sunbiz.org/Inquiry/CorporationSearch/GetDocument?aggregateId=flal-l13000051790-41d341db-e014-4787-8a50-a15b5297e4aa&transactionId=l13000051790-6cf5b4b6-9093-4b58-9a61-050283644f56&formatType=PDF (last visited January 26, 2016). Lynx Asset Services, Lynx Investors and the Lynx Jericho entities all list the same mailing address of 2255 Glades Road, Suite 324A, Boca Raton. Ex. 3.

Carolina.[9] Lynx Jericho paid $2,500,000 to purchase the Peachtree Loan and the Saucepan Note.[10] The trustee of the Liquidating Trust assigned the First Mortgage to Lynx Jericho by an instrument dated April 17, 2013 and recorded on May 22, 2013 in Mortgage Book 5500, Page 2940, Horry County Register of Deeds.

28. The Operating Agreement describes and defines the First Mortgage and the Peachtree Loan, and states that the Peachtree Loan and the Saucepan Note are the two "Portfolio Loans" that are assets of the company. Further, in the definition of "Eminent Domain Proceeds" in the Operating Agreement, the members agreed that they will use any money received as condemnation proceeds to repay the Portfolio Notes, as well as the proceeds paid on any title insurance policy claim *other than* the claim made on the Policy.

29. In Section 2.2(e), the Operating Agreement says that the members agree that, for three years after the effective date, there "shall be no action taken with regard to" the Portfolio Loans or the collateral for those loans without the approval of SRKD-SAM Advisors LLC as the Class B member, "it being understood that the Class B Member is related to and/or an Affiliate of the owner of such Portfolio Property, and it is based upon such forbearance/action with regard to the Portfolio Notes, the Portfolio Loans and the Portfolio Loan Documents that they have entered into this Agreement." Jericho State was still the owner of the Property in 2013.

30. Lynx Jericho submitted a claim on the Policy by a letter dated June 21, 2013. Chicago Title requested documents from Lynx Jericho as part of its investigation of the claim. Lynx Jericho provided certain documents to Chicago Title in December of 2014. By a letter dated January 30, 2015, Chicago Title denied the Lynx Jericho claim. Lynx Jericho filed this action on February 12, 2015.

31. South Carolina has stated that the elements of a cause of action for bad faith refusal to pay first party benefits under a contract of insurance are: (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing

[9] Deposition of Glenn Chwatt on April 3, 2014, pp. 17, 20-24.

[10] Deposition of Glenn Chwatt on April 3, 2014, pp. 21-22.

damage to the insured.[11] "[A]n insurer acts in bad faith when there is no reasonable basis to support the insurer's decision [for contesting a claim]."[12]

32. However, where an insurer has a reasonable ground for contesting a claim, there is no bad faith.[13] Additionally, this good faith obligation includes an insurer's duty to investigate a claim.[14] An insured need not prove a breach of an express contractual provision as a prerequisite to bringing a bad faith cause of action.[15]

33. A title insurance policy indemnifies the insured in the event he or she suffers "Actual Loss" due to a failure of title, an encumbrance or lien, the lack of a right of access to the property or the unmarketability of the title.[16]

34. The most unusual aspect of title insurance is that the policy provides coverage only against matters affecting title prior to the date of policy. Thus, unlike other lines of insurance, there is no specified policy period, and no coverage for matters that first affect title after the Policy Date. As my book explains,

> The coverages in the title insurance policy are limited to matters which exist on the date of policy. Title defects arising after that date are not covered by the policy.[17]

35. This policy limitation is stated in the Covered Risks, and reinforced by Exclusion 3(d), for matters that first affect title after the policy date.

36. The policy remains in effect as long as the insured has an interest in the property of the types as defined in the policy, which can be for decades. The insured does not pay any renewal premium. The insurer has no right to cancel policy coverage. This has been the primary unique facet of the title insurance policy since it was first conceived.[18]

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[11] *BMW of N. Am., LLC v. Complete Auto Recon Servs., Inc.*, 731 S.E.2d 902 (S.C. App. 2012), citing *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 359, 415 S.E.2d 393, 396–97 (1992).

[12] *Helena Chemical Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004).

[13] Id.

[14] *Flynn v. Nationwide Mut. Ins. Co.*, 281 S.C. 391, 395, 315 S.E.2d 817, 820 (Ct.App.1984).

[15] *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 504, 473 S.E.2d 52, 55 (1996).

[16] See *Nielsen*, § 9.1.1, *Nature Of Assurances Provided.* Ex. 4.

[17] See *Nielsen*, § 11.5, *Post-Policy Matters*, p. 11-85. Ex. 4.

[18] See Benjamin J. Henley, *What Investors in Mortgage Loans Are Demanding in Title Insurance*, in *Title News*, Volume XXXV, Number 5, May, 1956, at p. 11. Ex. 5.

37. The second unusual quality of title insurance is that it is priced and underwritten based on the premise of risk elimination rather than risk assumption. It searches the public records in order to determine which matters affect the title to the insured parcel. It then recites the recorded instruments as numbered paragraphs in Schedule B of the policy, in what is termed by the industry "special exceptions."[19] Special exceptions are really exclusions from coverage for encumbrances and liens that are specific to the insured parcel.[20] The insurer has no liability for the effect of an encumbrance on title if an exception for the instrument appears in Schedule B of the policy.[21]

38. The American Land Title Association and A.M. Best have long touted the fact that approximately 90% of title premiums are spent by title insurers and their agents on risk elimination—that is, the searching and examination of title.[22] Losses have historically represented between 4% and 12% of premiums earned, making the industry profitable only when market conditions are favorable.[23] Most of the losses payable under a title insurance policy are based on title issues that might have been, but were not, discovered in the public records.

39. Title insurers do not take casualty risks. They do not take risks based on actuarial tables that predict that title will be subject to a lien in a certain percentage of cases, and thus the insurer can ignore liens and expect to pay out on claims every now and then. The premium rates they file are justified based on the cost to search and examine title, not on actuarial table predictions about unknown risks.

40. It is my opinion that Chicago Title followed the customs of title insurance claim administrators in denying the Lynx Jericho claim based on the fact that the condemnation occurred after the Date of Policy. Therefore, it is my opinion that Chicago Title did not act in bad faith, because its coverage denial did not lack a reasonable basis.

41. The Policy insured that Peachtree was the owner of the land described in the Policy on the Date of Policy. It was. The Parkway Parcel was condemned about three and a half years later by the State of South Carolina. The state made an award of damages for the Parkway Parcel at that time.

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[19] See *Nielsen*, Chapter 12, unnumbered preamble. Ex. 4.

[20] See *Nielsen*, § 12.7, *Special Exceptions*. Ex. 4.

[21] *Nielsen*, § 12.7.1, *Adequacy Of Notice Given By Exception*, at p. 12-60. Ex. 4.

[22] A.M. Best Special Report, *Market Review: Title*, December 13, 2010, pp. 4-6, 14. Ex. 6. Also, Robert Bozarth, *Lawyers Notes: Customers ask about title insurance forms and policies*, in *Lawyers Title News*, Fall, 1995, p. 16. Ex. 7.

[23] See A.M. Best Special Report, *Market Review: Title*, December 13, 2010, p. 14. Ex. 6.

42. The most fundamental coverage of the Policy is found in Covered Risk 1, which indemnifies the insured if it was not in fact the owner of the land described in the Policy on the Date of Policy. The Policy insures the title to the Property. The Covered Risks of the Policy are invoked only if title to the Property fails in whole or in part, or the title is encumbered by a lien or encumbrance that is not excluded from coverage, as I explain in my book:

> The title insurance policy indemnifies the policy holder against loss if the title to the described real estate is held by someone other than the person or entity named in the policy. It also indemnifies as to defects in or liens or encumbrances on title other than those shown in the policy schedules. Schedule B refers to those matters against which the insurer does not indemnify, both of general application (unfiled construction liens, for example) and those specific to the described property.
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> * * * *
>
> The title insurance policy does not insure property, but the title to or ownership of that property. It is possible to hold flawless title to land having no value or which is not usable, and there is no claim payable under the policy.[24]

43. The Policy protects only against those matters that first affected the title before the Date of Policy. As my book explains, this unique and fundamental premise of a title insurance policy, that it covers only matters that have already occurred and not events or occurrences in the future or during a future policy term, is recited in two places in the policy.[25] First, the Covered Risks begin with this limitation:

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation, herein called the Company, insures, **as of Date of Policy shown in Schedule A**, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of....

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[24] *Nielsen*, § 9.1.1, *Nature Of Assurances Provided*, p. 9-2 (footnotes omitted). Ex. 4.

[25] *Nielsen*, § 11.5, *Post-Policy Matters*, p. 11-85. Ex. 4.

44. This backward-looking coverage principle is reinforced by Exclusion 3(d), which states that the Policy does not protect against matters that attach or are created after the Date of Policy:

> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:
>
> * * * *
>
> 3. Defects, liens, encumbrances, adverse claims or other matters: ... (d) attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or material)... .

45. My book explains why these policy terms are fundamental to a title insurance policy:

> The post-policy exclusion is at the heart of the nature of title insurance coverage. The policy remains in effect as long as the insured owns the property. The insured pays no renewal premium. However, anything that happens to affect title after the insured obtains his or her interest in the property is not covered by the policy, as confirmed by Exclusion 3(d). Almost all such matters would be caused by the insured or due to the fact that the insured is the owner, and would also thus invoke Exclusion 3(a):
>
> > Nothing else appearing, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title which are in existence at the time the insured takes his title. [citations omitted] "It is not prospective in its operation and has no relation to liens or requirements arising thereafter." Mayers v. Van Schaick, supra. "The risks of title insurance end where the risks of other kinds begin. Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it."

> The only sense in which the policy extends into the future is that the notice of a title defect is ordinarily received after the date of policy.[26]

46. The condemnation of the Property did not invoke the Covered Risk about the vesting of title because, on the Date of Policy, the Parkway Parcel had not yet been condemned and no transfer of the land had yet occurred.

47. The Department of Transportation paid for the condemned land after the Date of Policy. The state made that award in the Condemnation Action, to which it joined Lynx Jericho and Jericho State. Those lenders had the right to claim the condemnation money. Once that money is paid to the condemnee, it has no loss payable under the title insurance policy. This further reinforces the lack of Policy coverage for the condemnation that occurred after the Date of Policy.

48. In addition, Exclusion 2 of the Policy states that the Policy does not protect Lynx Jericho against the taking of all or some of the Property even if that taking occurred before the Date of Policy, if there was no notice of the condemnation in the public records.[27] The exclusion exists because condemnation actions in some states may be conducted by administrative agencies without the filing of any document in the real estate records. A title insurer is thus unable to either prevent the condemnation, which is an inexorable power of the state, or even to detect that a taking has occurred. The exclusion makes clear that the insurer is liable for a condemnation that has occurred on the Date of Policy only if there was record notice of the existence of that taking. My book explains the exclusion as follows:

> Exclusion 2 is for "[r]ights of eminent domain," with the important caveat that the exclusion "does not modify or limit the coverage provided under Covered Risk 7 or 8." The eminent domain exclusion negates coverage for a taking of all or some of the insured parcel that has already occurred as of the policy date. A condemnation is an involuntary transfer of

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[26] *Nielsen*, § 11.5, *Post-Policy Matters*, pp. 11-87 to 11-88 (footnotes omitted), quoting from *National Mortgage Corp. v. American Title Ins. Co.*, 299 N.C. 369, 261 S.E. 2d 844 (1980), which was quoted with approval by the South Carolina Supreme Court in *Firstland Village Associates v. Lawyers Title Ins. Corp.*, 284 S.E.2d 582 (S.C. 1981). Ex. 4.

[27] See Raymond J. Werner, *The Basics of Title Insurance*, in *Title Insurance: The Lawyer's Expanding Role*, ABA Section of Real Property, Probate and Trust Law, at p. 3. Mr. Werner states: "The policy also excludes coverage for the loss resulting from the exercise of eminent domain rights unless notice of the exercise of such rights appears in the public records at the date of policy. Again, the exclusion recognizes the fact that real estate is by nature subject to the exercise of the right of eminent domain and there is no way to protect against the exercise of that right. However, this exclusion would not apply if a document such as a lis pendens relating to a pending eminent domain proceeding has been filed in the public records at the date of policy." Id. at p. 23. Ex. 8.

> title. ... This exclusion has existed for decades because, in many jurisdictions, condemnation actions are conducted by administrative agencies without the filing of any document in the real estate records. A title insurer has no way of limiting the risk of this type of failure of title by the searching of real estate records.[28]

49. Therefore, the analysis of a claim based on an alleged condemnation of the insured parcel is limited to one central question: had the Parkway Parcel been taken by condemnation on the Date of Policy? Title was either vested in the insured or in the condemning authority as of the Date of Policy. Land cannot be a little bit condemned. Every state's condemnation law establishes the event that causes the transfer of the title to the condemning body. If the Parkway Parcel had not yet been taken by the condemning authority on the Date of Policy, based on the application of state law, the claim administrator denies the claim based on the incipient condemnation.

50. South Carolina's condemnation law follows the same pattern as do most such statutes. The taking is complete, and the condemning authority is entitled to take possession, when the condemnation notice is given and payment is made or deposited with the clerk of court.[29] The condemnation notice must be served on the land owner and filed with the clerk of court along with the deposit of the condemnation money.[30] The condemnation notice must contain certain information in order to be effective to cause a transfer of title.[31] If the land owner disputes the amount of compensation offered by the condemning authority, the matter goes to a trial; however, the dispute over the amount of compensation does not delay the transfer of the property.[32]

51. The Parkway Parcel had not been condemned for highway on the Date of Policy. The State Department of Transportation would have had no reason to file the 2009 Condemnation Action if the Parkway Parcel had already been condemned on July

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[28] *Nielsen*, § 11.1.5, *Police Power And Eminent Domain*, at p. 11-20 (footnotes omitted). Ex. 4. That passage contains a footnote for *Bourne v. Stewart Title Guar. Co.*, 2011 WL 6101016 (D.N.H.); 2011 DNH 204 (unpublished), in which the insured sued the insurer in part because the town took actions to condemn and lay out a public road on the insured's property after the date of policy. The court said that those actions fell under the condemnation and post-policy exclusions.

[29] S.C. Code Ann. § 28-2-90.

[30] S.C. Code Ann. § 28-2-230.

[31] S.C. Code Ann. § 28-2-280.

[32] S.C. Code Ann. §§ 28-2-220; 28-2-230. See also, *Carolina Power & Light Co. v. Copeland*, 188 S.E.2d 188, 258 S.C. 206 (1972); *City of North Charleston v. Claxton*, 431 S.E.2d 610, 315 S.C. 56 (1994); and *City of Folly Beach v. Atlantic House Properties, Ltd.*, 467 S.E.2d 928, 321 S.C. 241 (1996).

25, 2006. The state would not have alleged, in the Condemnation Action, that Jericho State was the owner of the Parkway Parcel if that land had already been taken.

52. It appears that the Condemnation Action would never have been filed but for the filing of the Zoning Rescission Action. In the latter lawsuit, the owner sought to rescind the PDD Ordinance, at least in part because the rezoning was granted on the condition that the owner convey the Parkway Parcel within 90 days, for no consideration. That 2007 agreement to convey operated in lieu of condemnation.

53. The PDD Ordinance, however, was adopted a year after the Date of Policy. The Policy did not protect Lynx Jericho against the post-policy agreement by the developer to convey the Parkway Parcel in exchange for the rezoning. As I explained above, the Policy does not protect against any matter that first affects the title to the property after the policy date.[33] Had Lynx Jericho identified the 2007 PDD Ordinance as the source of the obligation to convey the Parkway Parcel, the application of the post-policy exclusion would have been obvious to the claim administrator.

54. Instead, Lynx Jericho bases its claim only on the Ordinance, adopted in 2002. As I discuss further below, the Ordinance was not a taking of the land. Jericho State did not allege in the Zoning Rescission Action that the 2002 Ordinance had operated as a taking. Rather, it sought to undo the obligation to convey the Parkway Parcel as a donation that was part of the 2007 PDD Ordinance. The actual condemnation of the Parkway Parcel also was a post-policy event. The Condemnation Action was refiled in 2011.

55. Therefore, I conclude that it would be customary in the title insurance industry for a claim administrator to deny Lynx Jericho's claim, because no part of the Property had been condemned on the Date of Policy. For these reasons, it is my opinion that Chicago Title had reasonable grounds for the denial of the claim, and did not act in bad faith by making that denial.

56. It is my further opinion that the condemnation Exclusion 2, for condemnation of the Property, applies to this claim, and that it is industry custom to conclude that a zoning document such as the Ordinance is not a "notice of exercise" which is the limitation on that exclusion.

57. The condemnation exclusion in the Policy removes coverage for the following:

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[33] The Covered Risks state that the coverages are limited to those matters that have occurred before the Date of Policy. In addition, Exclusion 3(d) states that the Policy does not protect against matters that attach or are created after the policy date. See *Nielsen*, § 11.5, *Post-Policy Matters*. Ex. 4.

> Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

58. The exclusion has three clauses. First, it excludes from coverage "rights of eminent domain." As I stated above, this exclusion is not strictly necessary, because the Policy already clearly says that it does not protect against any event that occurs in the future. In fact, the 1929 and 1946 versions of the loan policy, drafted jointly by American Land Title Association and its customers, did not contain an eminent domain exclusion. The exclusion merely clarifies that the insurer is not obligated to pay the insured in the event it loses title later by the involuntary condemnation of the insured parcel.

59. The second clause of Exclusion 2 says "unless notice of the exercise thereof has been recorded in the public records at Date of Policy... ." This clause has been found in the ALTA policies since Exclusion 2 was added in 1962. It makes it clear that the exclusion does not apply if the condemnation right has already been exercised on the Date of Policy. If the exclusion was not so clarified, an insurer could argue that there is no coverage for a taking that had already occurred on the policy date, which would cause the exclusion to swallow the Covered Risk about the vesting of title.

60. The third clause in the exclusion says "but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge." This seems at first glance to be a repeat of the second phrase, but is slightly different. This phrase was added to the exclusion after the definition of "public records" was changed in response to a court decision. The 1962 and 1970 American Land Title Association policies did not include this phrase.

61. The definition of the phrase "public records" in the ALTA policies was modified in 1987. That change was made in response to a very surprising 1976 court decision, which held that publication of an easement in the Congressional Federal Register, without a recording of the easement in the local land records, was binding on a buyer of the real estate.[34] The 1987 policy defined "public records"

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[34] *Hahn v. Alaska Title Guar. Co.*, 557 P.2d 143 (Alaska 1976), as discussed in Russ Jordan, *ALTA Forms Committee makes revisions; issues new policy forms*, in *Lawyers Title News*, May-June, 1987, p. 10. Ex. 9. See also, Russell W. Jordan, III, *ALTA Forms Committee Revises Title Insurance Policies*, in *Title Insurance: The New Policy Changes*, Practising Law Institute Real Estate Law and Practice Course Handbook Series N4-4480, at pp. 132-33. Ex. 10.

as those records that, *under state law*, are considered to impart constructive notice to buyers of real estate. This narrowed the second clause of Exclusion 2 to carve out only condemnations that had already occurred and for which notice had been filed in state real estate records.

62. Lenders did not want this change in the definition to also limit Exclusion 2 so that there was no coverage against a condemnation if the only notice of the taking was published in the Federal Register. The third phrase added to the exclusion in 1987 made it clear that the exclusion does not negate that coverage. Russ Jordan, general counsel for Lawyers Title and his company's representative on the ALTA Forms Committee, explained the addition of the third phrase to the exclusion in an article published that year:

> The new language here [in Exclusion 2] is needed because of the change in the definition of "public records" and simply indicates that the policy is not excluding a federal condemnation where a "taking" has occurred prior to or at date of policy. In other words, if there has been a federal taking at date of policy, even though same may not be recorded in the public records, as defined in the policy, then the title company is liable for this matter and must pick it up.[35]

63. Mr. Jordan took pains to point out several times in this passage that the limitation clauses in the exclusion apply only to condemnations that have already occurred on the Date of Policy, which further supports my opinion that the limitations in Exclusion 2 apply only to takings that have occurred and for which notice has been given on the Date of Policy.

64. In summary, Exclusion 2 removes coverage for losses caused by the condemnation of all or part of the insured parcel. The first limitation clarifies that the exclusion does not apply if notice of the exercise of the condemnation power had already been recorded in the real estate records on the Date of Policy. The second limitation clarifies that the exclusion also does not apply if notice of the exercise of the condemnation power had been given in the Federal Register on or before the Date of Policy. Neither of these limitations are understood by the people in the title insurance industry, including those who were involved in their drafting, to afford any policy coverage for condemnations that are merely contemplated or proposed as of the Date of Policy.

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[35] Russ Jordan, *ALTA Forms Committee makes revisions; issues new policy forms*, in *Lawyers Title News*, May-June, 1987, p. 10, at p. 21. Ex. 9.

65. I have carefully reviewed the Ordinance. It is my opinion that it is not a condemnation notice. South Carolina law mandates that a condemnation notice be captioned CONDEMNATION NOTICE, TENDER OF PAYMENT, [and if applicable, AND NOTICE TO APPOINT APPRAISER].[36] It must designate the condemning authority and all of the owners of the land being condemned, contain a legal description for the land being taken, state the basis for the right to take the land, attach a map or sketch, state where the owner may go to inspect the plans for the project, and contain the following notice:

> THE CONDEMNOR HAS DETERMINED JUST COMPENSATION FOR THE PROPERTY AND RIGHTS TO BE ACQUIRED HEREUNDER TO BE THE SUM OF (insert the amount determined under Section 28-2-70(A) in words and numbers) AND HEREBY TENDERS PAYMENT THEREOF TO THE LANDOWNER.
>
> Payment of this amount will be made to the landowner if within thirty days of service of this Condemnation Notice, the landowner in writing requests payment, and agrees to execute any instruments necessary to convey to the condemnor the property interests and rights described hereinabove. The request and agreement must be sent by first class certified mail with return receipt requested or delivered in person to the condemnor at (insert the address to which the request should be delivered). If no request and agreement is received by the condemnor within the thirty-day period, the tender is considered rejected.
>
> If the tender is rejected, the condemnor has the right to file this Condemnation Notice with the clerk of court of the county where the property is situated and deposit the tender amount with the clerk. The condemnor shall give the landowner and other condemnees notice that it has done so and may then proceed to take possession of the property interests and exercise the rights described in this Condemnation Notice.
>
> AN ACTION CHALLENGING THE CONDEMNOR'S RIGHT TO ACQUIRE THE PROPERTY AND RIGHTS DESCRIBED HEREIN MUST BE COMMENCED IN A SEPARATE PROCEEDING IN THE COURT OF COMMON PLEAS WITHIN THIRTY DAYS OF THE SERVICE OF THIS CONDEMNATION NOTICE,

[36] S.C. Code Ann. § 28-2-280(B).

OR THE LANDOWNER WILL BE CONSIDERED TO HAVE WAIVED THE CHALLENGE.[37]

66. I have compared the Ordinance to the statute. The Ordinance was recorded in the office of the registrar of deeds, not filed with the clerk of circuit court, which immediately denotes the Ordinance as being a different kind of instrument. Further, I find no similarity between the Ordinance and the required elements of a condemnation notice. Of the statements required by the statute for a condemnation notice, it is my opinion that the only element found in the Ordinance is a map or sketch of the highway. Title searchers and examiners are trained to spot and understand the significance of condemnation notices. It is my opinion that a title examiner reviewing the Ordinance would not consider it to be a condemnation notice, or even a badly-drafted attempt at such a notice. The most telling differences are the title of the instrument and its lack of the lengthy required disclosure statement.

67. My opinions are further supported by South Carolina law establishing the purpose of an official map. The Ordinance clearly stated that it was adopted to amend the city's "official map." South Carolina statutes define and authorize the filing of such maps, and state their purpose.[38] The law says that the purpose of such a map is as a land planning tool. It is used to reserve *future* locations of streets and other public land use for *future public acquisition* and to promote the efficient regulation of land use:

> Counties and municipalities may establish official maps to reserve future locations of any street, highway, or public utility rights-of-way, public building site or public open space for future public acquisition and to regulate structures or changes in land use in such rights-of-way, building sites or open spaces. This authority is declared necessary in order to promote and preserve the public safety, economy, good order, appearance, convenience, prosperity, and general welfare and is one of the several instruments of land use control authorized by this chapter for the implementation of comprehensive plans, or parts thereof, adopted in accordance with the provisions of this chapter.[39]

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[37] S.C. Code Ann. § 28-2-280(C).

[38] S.C. Code Ann. § 6-7-1210 *et seq.*

[39] S.C. Code Ann. § 6-7-1220.

68. The official map statute is part of the land use and zoning code. It is *not* part of the condemnation statute. It is my opinion that a title examiner would immediately recognize the Ordinance as an official map and not a condemnation notice, and would disregard it because it is a land planning and zoning instrument.

69. It is common in most states for municipalities to record zoning ordinances and zoning and planning instruments. A title insurer does not insert an exception in Schedule B of a commitment or policy for a recorded zoning or land planning instrument. This can seem like faulty reasoning or, worse, negligence in a title search. In fact, however, title insurers are very deliberate in their underwriting rules that state that recorded zoning or planning instruments are not to be recited in commitments and policies.

70. This title insurance underwriting rule flows from the fact that a zoning ordinance does not affect or encumber the title to the real estate. The policy insures only the title to the real estate. Schedule B of the Policy contains exceptions (property-specific exclusions) for matters that affect the title, including instruments in the office of the registrar of deeds.

71. There are many classes of instruments that are delivered for recording by the registrar that do not affect title, and which are not covered by the policy, as my book explains:

> Some covered risks refer to public records as defined in the policy, while others do not. Most covered risks, however, indemnify only against matters that affect the title to the land. Certain classes of recorded instruments do not invoke any Covered Risk because they do not affect or encumber title.
>
> The claim administrator must carefully consider whether or not an instrument bearing recording data is actually a defect in, lien or encumbrance on title, or affects the marketability of, title to the insured property, or affects or limits its right of access.
>
> When the policy does not make exception for an instrument in the real estate records, and it appears that the instrument may or does not invoke a Covered Risk, the claim administrator will often obtain further information from underwriting personnel for that state to determine if there is a statute or decision that declares whether or not the instrument invokes a Covered Risk. If not, the appropriate response to a claim asserting the lack of an exception for the instrument is to advise the insured that no Covered Risk is invoked, and

> giving the authority for that statement, such as a court decision or statute.
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> * * * *
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> Some other instruments relate to governmental regulation of the property's use, such as building code ordinances or zoning ordinances. These classes of instruments often fall under an exclusion.[40]

72. It is my opinion that the Ordinance was a planning map of the type that a title insurer routinely does not recite in Schedule B of the policy, following the above insurance underwriting principles. Thus, it is my opinion that the lack of an exception for the Ordinance in the Policy is not surprising. The lack of an exception in the Policy about the Ordinance does not suggest that there is coverage under the Policy for the later taking of the Parkway Parcel.[41]

73. It is my further opinion that a claim administrator would customarily determine that the Ordinance was not a "notice of exercise" of the taking of the Parkway Parcel, or a notice of a federal taking of land, and thus did not fall within the limitations to Exclusion 2 as found in the second and third clauses of the provision. The Ordinance was not notice that the Parkway Parcel had been condemned. It was not recorded for that purpose.

74. Further, although the Ordinance was recorded with the Register of Deeds, Lynx Jericho's title searcher witness David C. Turner testified that the Register did not index the Ordinance against any parcels of land.[42] It also has not been indexed by the Register of Deeds in the grantor-grantee (name) indices, except under the name of Horry County.[43] The map attached to the Ordinance does not list the names of property owners or tax parcel numbers.[44] Mr. Turner testified that a person searching and examining the title to the Property would not find the Ordinance in the chain of title.[45] Mr. Turner only learned about the Ordinance in

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[40] See *Nielsen*, § 9.12, *Scope Of Policy Definition Of "Public Records" And Recorded Instruments That Do Not Affect Title*, pp. 9-98 to 9-99 (footnotes omitted). Ex. 4.

[41] A standard rule of insurance policy interpretation is that the existence or lack of an exclusion does not create a covered risk. My book states: "the removal of [an] exception is not itself a coverage," citing *First American Title Ins. Co. v. Dahlmann*, 291 Wis.2d 156, 715 N.W.2d 609, 2006 WI 65 (Wis. 2006). *Nielsen*, § 12.3.16, *Effect Of Removal Of Survey Exception*, at p. 12-50, footnote 200. Ex. 4.

[42] Transcript of David C. Turner deposition taken on July 14, 2014 ("Turner Deposition") at pp. 34-51.

[43] Id. at p. 35.

[44] Id. at p. 42.

[45] Id. at p. 35.

searching title when he searched the title to a different parcel of real estate, some years ago, in which Horry County received a deed for some of the land, which brought the county into the chain of title and caused Mr. Turner to search the name Horry County in the grantor-grantee indices.[46] Thus, he obtained his knowledge of the recording of the Ordinance by happenstance, in the searching of a different parcel. No such deed to Horry County was recorded in the chain of title to the Property as of the date of the Policy.

75. Based on all of the above, it is my opinion that the Ordinance is not in the nature of a recorded notice of condemnation that would fall in one of the two limitation clauses in the condemnation exclusion, because the Ordinance was not recorded for the purpose of giving notice of a condemnation of land.

76. For these reasons, it is my opinion that Chicago Title had reasonable grounds for denying the claim because the Ordinance was not a taking of the Parkway Parcel, and that the insurer did not act in bad faith in making that denial. Therefore, it is my opinion that Chicago Title did not act in bad faith, because its coverage denial did not lack a reasonable basis.

77. It is my opinion that it is customary for a title insurance claim administrator not to pay a loss to a lender due to the claimed loss of title to a portion of the insured parcel until the lender has taken title to the property by foreclosure or a deed in lieu of foreclosure. Further, it is my opinion that it is customary for a title insurance claim administrator to determine that the amount payable to a lender for the claimed loss of a portion of the insured parcel is measured based on the value of the real estate on the date on which the lender takes title.

78. The holder of the junior lien, Jericho State, foreclosed and came into title in 2008. Lynx Jericho holds the First Mortgage and has not foreclosed in the seven years since Jericho State became the owner. If Lynx Jericho foreclosed on the First Mortgage, it would come into title. To the extent that it holds any valid claim under the Policy, that claim would at last become ripe.

79. A lender that has not yet taken title to the real estate whose title is insured in the title insurance policy is unable to prove that any defect in the title will cause it to suffer a loan loss. One court cited this statement by a commentator:

> An insured mortgagee has not suffered an identifiable loss unless and until it forecloses its insured deed of trust and a title defect reduces the value of the property, thereby preventing the mortgagee from recouping its loan amount

[46] Id. at p. 38.

> upon resale. If a title defect exists, but the value of the property is nevertheless sufficient to pay the mortgagee its loan amount, then there is no damage compensable under the loan policy.[47]

80. This rule flows from the fact that a lender holds a lien on the real estate as security for its debt. If the debt is paid, or if the real estate has enough value to repay the debt when the lender takes title and resells the property, the lender will not suffer any loss due to a defect in the real estate's title.[48] Another court explained as follows: "The lending institution is only interested [in the title to the real estate] to the extent of its loan. The ultimate validity of the title, for other purposes, is simply not relevant to the lender."[49]

81. When the conditions to payment of a loss to the insured have been met, the loss is measured as the least of the policy amount, the amount of the Indebtedness, or the amount by which the lender's security in the loan collateral is reduced to less than the loan amount by the defect in title. Loss under a loan policy is not measured by the difference in the value of the insured property with and without the title defect, as under an owner's policy. Instead, loan policy loss is measured as the amount by which the diminution in value caused by a covered title defect reduces the lender's security interest in the property. For example, if the value of the property subject to the covered title defect is still greater than the amount of the insured lender's loan, the loan remains fully secured by the real estate collateral and no loss is payable to the lender due to the title issue.[50]

82. Further, a claim concerning an alleged defect in title is not ripe under a loan policy until the lender has taken title to the property. The date of foreclosure is used as the date on which loss is measured.[51] The seminal modern decision of *Karl v. Commonwealth Land Title Ins. Co.* so held:

> At [foreclosure sale], the lender's note is extinguished and replaced by assets recovered on foreclosure: either cash

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[47] *First Citizens Bank & Trust Co. v. Stewart Title Guar. Co.*, 320 P.3d 406 (Colo.App. 1 Div. 2014), quoting 2 Gregory J. Notarianni, *Colorado Practice Series: Methods of Practice* § 63:3, at 271 (Cathy S. Krendl (6th) Edition, 2012), as cited in *Nielsen*, § 3.2.4, *Determining Amount Of Loss On A Loan Policy*, p. 3-52, footnote 152. Ex. 4.

[48] See commentary and citations at *Nielsen*, § 3.2.4, *Determining Amount Of Loss On A Loan Policy*, pp. 3-51 to 3-52. Ex. 4.

[49] *Kimberly Recreation Ass'n v. Butts*, 1997 WL 170293 (Ohio App. 10 Dist.) (unpublished), quoted in *Nielsen*, § 3.2.4, *Determining Amount Of Loss On A Loan Policy*, footnote 152. Ex. 4.

[50] See *Nielsen*, § 3.2.4, *Determining Amount Of Loss On A Loan Policy*. Ex. 4.

[51] *Nielsen*, § 3.2.4.2, *Loan Policy Date Of Loss*. Ex. 4.

> as paid by a third party bidder or the realty as bought in by the foreclosing lender. It is now possible to measure the value of the recovery by the lender, and we believe the loss which is insured by the title policy should be recognized as of that time.
>
> ...The "fair market value as of foreclosure" approach also eliminates other concerns raised by the plaintiffs which otherwise are inherent in a delayed determination of loss. For example, following foreclosure lenders may invest cash or their own time and effort in renovation of the property. An increase in market value as a result of such contribution should not redound to the benefit of the insurer. Similarly, a lender's expertise in marketing which results in a sale at higher than market value should not profit the insurer [citation omitted]. Finally, it seems unfair to measure damage by a market sale which may occur at a time distant from the date of foreclosure, during which period inflation or deflation may have altered the value of the property.[52]

83. Also, if the insured lender takes a deed in lieu of foreclosure, loss is measured by the value of the property as of the date of the deed. Conversely, my book advises claim administrators that, "[w]hen the insured elects not to foreclose on the insured deed of trust despite a default, the insurer may properly respond that the amount of the loss will not be fixed unless and until the insured forecloses and comes into title."[53]

84. The value of real estate goes up and down over time. Mr. Chwatt said exactly that, and said that he understands that this "business risk" is not protected against by a title insurance policy.[54] A title insurance policy does not insure that the property has any particular value. The risk of an increase or decrease in the market value of the Property is on the owner, not the title insurer. Until the lender takes title to the insured property, the amount of its loan collateral will continue to change as the market value of the property goes up or down. That is why lenders constantly study the effect of changes in market value on the percentage of real estate loans that are considered "under water" at any given time.[55]

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[52] *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal.App. 4th 972, 984, 24 Cal.Rptr.2d 912, 920 (Cal.App. 4 Dist. 1993).

[53] *Nielsen*, § 3.2.4.2, *Loan Policy Date Of Loss*, p. 3-65. Ex. 4.

[54] Deposition of Glenn Chwatt on April 3, 2014, p. 116.

[55] See, for example, the 2014 annual report by RealtyTrac published in January of 2015, at http://www.realtytrac.com/news/mortgage-and-finance/year-end-2014-underwater-home-equity-report/, charting the (footnote continued)

85. The title insurance policy indemnifies the insured for the amount the value of the property is reduced due to something covered by the policy. However, the policy provides no "coverage" against a change in the market value of the property due to market fluctuations. A lender that has not foreclosed has not yet become an owner. It will not even begin to suffer the vagaries of changes in market value of the property until it owns the property. My book explains that:

86. When property has risen in value, even a partial failure of title can result in a loss equal to policy limits. Conversely, the risk of a decline in value is on the insured, not the insurer:

> Most states that have considered the issue follow the *Overholtzer* date-of-discovery rule. Under most circumstances, the *Overholtzer* date of loss rule favors the insured by increasing the loss to account for inflation in value from policy date to the date of discovery of the defect, or improvements that the insured has made since the policy date. When property has risen in value, even a partial failure of title can result in a loss equal to policy limits. Conversely, the risk of a decline in value is on the insured, not the insurer:
>
> > A title insurance policy does not insure the value of any particular property. In fact, it does not insure the property at all. If the value of the property appreciates or depreciates, the title policy is not affected.
>
> If the property is worth less than policy limits on the date on which the owner discovers the defect in title, recovery is limited to the fair market value as of that date.[56]

87. One commentator explained this principle this way:

> The problem with using the policy date or date of acquisition to measure the value of the land is that the risk of a decline in the land's market value because of market conditions

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decline in the number of underwater home loans from 2012 through 2014 (last visited January 26, 2016). Ex. 11. Also, see the Zillow interactive chart found at http://www.zillow.com/visuals/negative-equity/#4/39.98/-106.88 which maps by county the percentage of loans that have principal balances that are more than the market value of the property that serves as security for the loans (last visited January 26, 2016). Ex. 12.

[56] *Nielsen*, § 3.2.3.4, *Owner's Policy Date Of Loss*, pp. 3-37 to 3-38 (footnotes omitted) (quoting from *McLaughlin v. Attorneys' Title Guaranty Fund Inc.*, 61 Ill. App.3d 911, 378 N.E. 2d 355 (1978). Ex. 4.

> rightfully belongs to the investor in real estate. A title insurer accepts only the risk of the land's market value being impacted by a title matter. In a case where the value of the land decreased due to market conditions unrelated to the title defect, requiring the title insurer to pay loss based on the value of the land on the policy date would assign to the title insurer the risk the real estate investor assumed. Conversely, utilizing the policy date could unduly benefit the title insurer when the land increased in value either due to a rising real estate market or to the insured's development efforts. In those situations, if the title insurer pays only the value of the land on the policy date, then the title defect essentially deprived the insured of the gain the insured otherwise would have earned.[57]

88. Thus, it is my opinion that, even if the condemnation of a part of the Property was covered by the Policy, Lynx Jericho would not suffer a loss, and any such loss could not be measured, until it came into title by foreclosure or a deed in lieu thereof.

89. It is my opinion that, if the Court were to determine that there is any coverage under either title insurance policy for the condemnation of the highway portion of the Property, that loss would be payable to one insured only, and that the apparent efforts made by Jericho State and Lynx Jericho to preserve the notion that both have viable policy claims do not change that conclusion. It is my further opinion that certain terms of the Policy explain why only one insured may recover for such a loss.

90. The most unusual aspect of this claim is that the holder of the junior lien has foreclosed and taken title while the senior mortgage has not been foreclosed. Peachtree apparently defaulted on Peachtree Loan in 2008 or so. None of the several holders of the First Mortgage have ever foreclosed in the past five years despite that default. However, Jericho State foreclosed and took title in 2009. It apparently remains the owner of the Property, but subject to the First Mortgage.

91. However, Jericho State is powerless to prevent Lynx Jericho from foreclosing on its senior lien. If Lynx Jericho foreclosed, it would extinguish the title held by Jericho State. Its foreclosure would also extinguish any claim Jericho State could make on its title insurance policy. A loan title insurance policy terminates if the lien of the insured mortgage is involuntarily extinguished by the foreclosure of a

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[57] Matthew C. Lucas, *Now or Then? The Time of Loss in Title Insurance*, 85 Fla. Bar J. 10 (2011) (emphasis added). Ex. 13.

superior lien that is excepted in the policy. The Policy remains in effect "only so long as the insured retains an estate or interest in the land... ."[58]

92. However, Lynx Jericho has not foreclosed. Moreover, it has agreed *not* to foreclose until at least 2016. This agreement appears to me to be intended to avoid the termination of Jericho State's title insurance policy and claim. The Operating Agreement says that the members have agreed that, for three years after the entity was formed in 2013, there "shall be no action taken with regard to" the Peachtree Loan or the First Mortgage. The Operating Agreement says that this "forbearance" agreement is made because SRKD-SAM Advisors LLC, the Class B Member, "is related to and/or an Affiliate of the owner of" the Property, Jericho State. The Operating Agreement says further that SRKD-SAM was made a member of the LLC precisely because it is related to Jericho State, the owner of the Property.

93. Jericho State and Lynx Jericho may believe that, with the junior lien holder in title and the senior mortgage still of record, they may both try to recover from Chicago Title for the same claimed loss due to the condemnation. It is my opinion that a title insurer would customarily deny such double recovery for a number of reasons.

94. First, as I explained in my earlier report and above, no loss is paid to an insured due to a condemnation of a portion of the insured parcel when a condemnation award is paid for that land. By law, the condemnation award reimburses the property owner or lender for both the value of the taken land and the effect of the taking on the land retained by the owner. The definition of Eminent Domain Proceeds in the Operating Agreement clearly recites these two aspects of the condemnation award, for example.

95. If a title insurer paid the insured for condemned land, after the insured was paid by the state in the condemnation award, the insured would receive double payment for the land. The Policy bars such a double recovery. Exclusion 3(c) says that the insurer will not pay for matters that result in no loss to the insured. Conditions & Stipulations 7 says that the Policy "is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy." An insured does not suffer "actual monetary loss or damage" when land is taken by eminent domain, and the insured is paid for the land in the condemnation award.

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[58] Conditions & Stipulations 2(b) of the Policy.

96. Lynx Jericho has already received one payment for the Parkway Parcel. It received the net condemnation award of about $1,941,000. If Chicago Title paid money to Lynx Jericho for the Parkway Parcel, Lynx Jericho would receive a double payment for the value of the same land.

97. Further, the payment already received by Lynx Jericho is equal to or greater than the amount that it paid for the Peachtree Loan. The Lynx Jericho Operating Agreement said that the members agreed to apply all condemnation proceeds to the amounts owed under the Portfolio Loans. That payment was nearly equal to the $2,500,000 that Lynx Jericho paid for the Portfolio Loans, and may be *more* than the share of the loan purchase price allocable to the Peachtree Loan. If Chicago Title were to pay Lynx Jericho any money for the condemnation of the Parkway Parcel, the lender would receive more than it paid for the loan secured by the Property.

98. In addition, Lynx Jericho continues to hold the first lien on the vast majority of the real estate that secures the Peachtree Loan. It may foreclose at any time and take title to that land, and then resell it. If Chicago Title were to pay Lynx Jericho any money for the condemnation of the Parkway Parcel, Lynx Jericho would receive an unjust windfall, which is the opposite of actual monetary loss or damage.

99. Finally, if the Court were to determine that Chicago Title was required to make any loss payment due to the condemnation of the Parkway Parcel, the Policy clearly states that such loss would be payable to only one insured. Conditions & Stipulations 10 of the Policy describes how a title insurer handles a claim when there is more than one mortgage on the Property. That provision says that a payment to the senior lender is deemed to be a payment for the benefit of the junior lender also, completely negating the possibility that the insurer will pay both insureds for the same loss:

> LIABILITY NONCUMULATIVE.
> If the insured acquires title to the estate or interest in satisfaction of the indebtedness secured by the insured mortgage, or any part thereof, it is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy.

100. In my book, I tell claim administrators how to apply this policy provision in handling claims in which there is more than one lien or insured on the same parcel:

101. Conditions & Stipulations 10 of the 1992 ALTA Loan policy stated that, if the insured acquired title to the property, "payment by the insurer to a lender holding a lien on the property senior to" the mortgage insured reduced the policy amount by the amount of the payment to the senior lien holder. The premise of this provision was that any loss payment to the senior lender would increase the equity in the property to which the insured junior lien would attach. However, it is common for a first lien debt to be more than the second lien debt, and thus a payment to the senior lender is sometimes more than the policy amount of a junior mortgage policy. This provision was excised from the 2006 ALTA Loan policy. ALTA's explanation for the 2006 change was that a lender "could totally lose coverage without having benefited from any payment made under the policy... ."[59]

102. As my book explains, when an insurer has policies in favor of two lenders and makes a claim payment, the money is delivered to the senior lien holder. In this case, if Chicago Title was obligated to make any loss payment, that money would be paid to Lynx Jericho as the holder of the senior lien. That payment would simultaneously extinguish the claims on both Chicago Title policies.

103. For the above reasons, it is my opinion that, even if the Court were to find that a loss is payable by Chicago Title under one of the policies it issued on the Property, it would be industry custom to pay one loss only, and that the Policy's own terms preclude recovery for the same loss by more than one insured.

104. It is also my opinion that Chicago Title followed industry custom in asserting that Lynx Jericho "created, suffered, assumed or agreed to" the effect of the condemnation because it knew of the condemnation when it purchased the Peachtree Loan in 2013. It is my opinion that the applicability of Exclusion 3(a), for matters "created, suffered, assumed or agreed to" by the insured, is strongly bolstered by the fact that Lynx Jericho was offered the Peachtree Loan for $447,725.

105. As I explained above, Lynx Jericho has the power to foreclose and take title to the Property free and clear of other interests, including the rights of Jericho State. Lynx Jericho would then own the 121.11 acres of land remaining, after the taking by condemnation of 10.18 acres by the South Carolina Department of

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[59] *Nielsen*, § 3.2.2, *Owner's And Loan Policies Noncumulative*, p. 3-12, quoting the official American Land Title Association comparison of the 1992 Loan Policy with the 2006 ALTA Loan Policy found at http://www.alta.org/forms/, p. 30. Ex. 4.

Transportation.[60] Lynx Jericho has produced and adopted the opinions expressed in the Jayroe Appraisal Company appraisal report dated June 9, 2015, which values the Property at $2,500,000 *without* the condemned portion of the parcel.[61] The Jayroe appraisal takes into consideration "the height of this bridge, the sound, the vibration, the pollution, the noise, the liability of a thing coming off the bridge, people throwing stuff off the bridge, tractor trailers in the middle of the night at 3:00 in the morning honking their horns."[62] The Jayroe appraisal does state that it includes those factors in setting the fair market value of the Property.[63] The Jayroe appraisal adjusted the comparable sale values downward by 35% due to the "physical" condition of the "SC 31 bridge."[64] Thus, the value produced in the Jayroe appraisal contains a significant reduction in value due to the effects of the bridge.

106. Lynx Jericho "assumed" the condemnation, as that term is used in the Policy, by purchasing the Peachtree Loan. It "agreed to" take subject to the condemnation of the highway property, as that term is used in the Policy, when it purchased the Peachtree Loan for the offer price of $447,725.

107. Lynx Jericho purchased the Peachtree Loan, and obtained the right to own the Property through foreclosure, for less than a half million dollars. Its own appraiser witness, Jayroe Appraisal Company, has opined that the Property, minus the condemned land and subject to the noise and other issues created by the condemnation, is worth more than five times what Lynx Jericho paid for it.[65] Mr. Chwatt testified that Jericho State obtained the Jayroe appraisal to counter the appraisal done for the Department of Transportation, which said that, with the bridge installed, the Property is "going to be worth more money," not less.[66]

108. Lynx Jericho has not challenged the Property's assessed value of $2,648,900 as being too high.[67] Mr. Chwatt acknowledged that the Property was zoned R-1 when the Peachtree Loan was made, at which time the Property had been

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[60] See the Jayroe Appraisal Company appraisal report dated June 9, 2015 at page 11.

[61] Jayroe Appraisal Company appraisal dated June 9, 2015, pp. 1, 11.

[62] Deposition of Glenn Chwatt on April 3, 2014, p. 124.

[63] Jayroe Appraisal Company appraisal dated June 9, 2015, pp. 21, 23.

[64] Jayroe Appraisal Company appraisal dated June 9, 2015, p. 34.

[65] Mr. Chwatt testified that Lynx Jericho purchased the Peachtree Loan and the Saucepan Note together for $2,500,000. Even if the collateral securing the Saucepan Note had no value, Lynx Jericho would be fully secured as to its purchase price for both loans by the value of the Peachtree Property. Deposition of Glenn Chwatt on April 3, 2014, p. 22.

[66] Deposition of Glenn Chwatt on April 3, 2014, p. 123.

[67] Deposition of Glenn Chwatt on April 3, 2014, pp. 59-62.

appraised at $40 million.[68] Mr. Chwatt testified that the possibility that Horry County might cause the zoning of the Property to revert to R-1 could reduce the value of the Property.[69] However, he also testified that, when Horry County said it would cause the zoning to revert to R-1, he was "thrilled," because "That's what I wanted."[70]

109. Mr. Chwatt said that he did not know how the Property is presently zoned.[71] However, the Jayroe appraisal says the Property is zoned Planned Development District, and that its highest and best use is as "low to medium density single-family development."[72] The appraiser said that a county planner had confirmed that the PDD zoning is still in effect.[73] The PDD for the Property approved "203 single-family lots and 608 multi-family units, in addition to a 1 acre commercial lot."[74] The Jayroe appraisers opine that "low to medium density single-family project consistent with the surrounding land values and which takes advantage of the Waterway frontage is the maximally productive use" for the Property.[75]

110. Mr. Chwatt also testified that the value of the Property has gone down since 2006 due to the real estate crash that occurred after the Peachtree Loan was made.[76]

111. An insured cannot establish that it has suffered "actual monetary loss or damage" due to a condition that the insured knew existed, while at the same time admitting that the Property is worth more than what the insured paid for it.[77] Exclusion 3(a)

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[68] Deposition of Glenn Chwatt on April 3, 2014, pp. 57, 62.

[69] Deposition of Glenn Chwatt on April 3, 2014, pp. 55-57.

[70] Deposition of Glenn Chwatt on April 3, 2014, p. 129.

[71] Deposition of Glenn Chwatt on April 3, 2014, p. 129.

[72] Jayroe Appraisal Company appraisal dated June 9, 2015, p. 1.

[73] Jayroe Appraisal Company appraisal dated June 9, 2015, p. 20.

[74] Jayroe Appraisal Company appraisal dated June 9, 2015, p. 20.

[75] Jayroe Appraisal Company appraisal dated June 9, 2015, p. 23.

[76] Deposition of Glenn Chwatt on April 3, 2014, pp. 139-140.

[77] In my book, I state: "There is no duty to indemnify an insured when there is no evidence that the defect lessens the value of the property. For example, in *Summer Pond Properties, Inc. v. Transamerica Title Ins. Co.*, 1998 WL 283052 (Wash.App.Div. 1) (unpublished), the policy mistakenly included some land which the seller did not own and which the insurer argued the insured had not intended to purchase. The trial court found that the insured had failed to submit credible evidence of the value of the land. The appellate court affirmed, finding that the insurer did not owe anything because the insured had failed to establish a value for the parcel mistakenly insured. In *Zeiger v. Shons*, 2001 WL 470175 (Ohio App. 8 Dist.) (unpublished), the court said the insured had not suffered a loss due to the fact that the insured parcel was smaller than the insured had thought, when his own appraiser put the value of the property actually owned by the insured at more than policy limits. The 'no loss' exclusion, 3(c), states in the negative that there is no coverage if the insured does not suffer a loss in the value of the property." *Nielsen*, § 3.2.3, *Determining Amount Of Loss On An Owner's Policy*, p. 3-12, footnote 32. Ex. 4.

bars such claims, because an insured that has contracted to buy land at a certain price due to its known condition is not entitled to be "reimbursed" for a title condition that was factored into its purchase price.[78] Payment of such a claim would convert the policy from an indemnity contract to a windfall.

112. Lynx Jericho paid far less for the Peachtree Loan than the Property is worth, with full knowledge of the pending Condemnation Action and its effect on the value of the Property. Therefore, I conclude that Chicago Title followed industry custom in asserting that Lynx Jericho "created, suffered, assumed or agreed to" the effect of the condemnation when it purchased the Peachtree Loan in 2013, and that it did not suffer a compensable loss due to the condemnation.

113. I am compensated in this matter at $295 per hour. I am also reimbursed for actual out-of-pocket travel and lodging expenses, copy charges and other incidental expenses. I will not receive any additional compensation that is dependent on the outcome of this lawsuit.

114. I personally prepared this report. My original signature is affixed below.

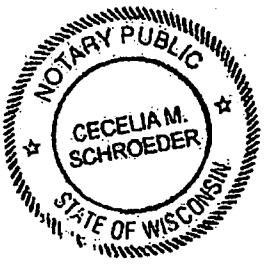
Dated this 1st day of February, 2016.

J. Bushnell Nielsen

Mailing Address:
Reinhart Boerner Van Deuren s.c.
N16 W23250 Stone Ridge Drive, Suite 1
Waukesha, WI 53188

Subscribed and sworn to before me
this 1st day of February, 2016.

Cecelia M. Schroeder
Notary Public, State of Wisconsin
My commission expires: 9/25/16



33200066

[78] See *Nielsen*, § 11.2.1, *Prior Liens "Assumed" In Purchase Agreement* and § 11.2.2, *Easements, Restrictions "Agreed To" In Purchase Agreement*. Ex. 4.

EXHIBIT 1

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Waukesha, Wisconsin 53188

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Facsimile: 262-951-4690
Email: bnielsen@reinhartlaw.com

SUMMARY OF CREDENTIALS

AND RESUME

I have 34 years of work experience in and related to the land title insurance industry. I was employed by two national title insurers for a total of 16 years. I held five positions with those companies.

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

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

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

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

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

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

I have also spent 18 years in private practice, engaged almost exclusively on matters involving title insurance, real estate titles and closing liability issues. I was a member of the title insurance team at the law firm of Hinshaw & Culbertson, in its Chicago and Milwaukee offices, for three years before rejoining the industry in 1993. I am a shareholder at the law firm of

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

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

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

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

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

I wrote the textbook *Title and Escrow Claims Guide*, first published in 1996 and updated annually since then. That 1,400-page treatise is national in scope and is published by American Land Title Association. It distills the custom and practice employed by title insurers and escrow companies, is used by employees of every major title insurer, and has been cited as a learned treatise by appellate courts.

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

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

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

PRIOR EXPERT TESTIMONY

I have been found qualified to testify as an expert witness, and have testified, at 15 trials, two arbitrations and a class certification evidentiary hearing, conducted in Florida, Idaho, Illinois, Minnesota, Missouri, Nevada, New Mexico, South Carolina, Texas, Virginia and Wisconsin. In addition, my expert opinions have been admitted by courts in other cases, in affidavit form.

J. Bushnell Nielsen

Education/ License

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

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

Work History

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

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

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

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

Honors

Named a Wisconsin Super Lawyer (Real Estate) by *Law & Politics* and *Milwaukee Magazine* from 2006 through 2015.

Named in *The Best Lawyers in America*® from 2009 through 2015 in the category of Litigation--Real Estate.

Named in the Milwaukee *Business Journal* list of *Top Lawyers* for 2009 through 2011.

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

AV-rated by Lexis-Nexis Martindale-Hubbell.

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

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

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

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

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

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

Professional Associations

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

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

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

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

American Bar Association:
Member, Real Property Section, 1988 to present. Member, Title Insurance Litigation Committee, TIPS Section, 1992 to present.

Member, State Bar of Wisconsin.

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

Publications

Editor from 1998 to present of The Title Insurance Law Newsletter, national report of recent legal decisions and other matters affecting the land title industry and conveyancing law. More than 1,800 articles written to date on title insurance coverage, conveyancing, closing duties, agent-underwriter

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Escrowee's Duties Regarding Recording of Documents, Chicago Title and Trust Family of Insurers Underwriting Journal, March, 1997.

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

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

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

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

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

Significant Appellate Decisions

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

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

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

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

Solowicz, et al. v. Forward Geneva National, Appeal No. 2008AP10, 2010 WI 10, 323 Wis.2d 556, 780 N.W.2d 111 (2010). Counsel for *amicus curiae* Wisconsin REALTORS® Association in significant Wisconsin Supreme Court decision adopting the concept of master planned communities in Wisconsin; participated in oral argument.

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

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

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

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

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

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

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

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

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

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

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

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

Significant Legislative and Regulatory Activities

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

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

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

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

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

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

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

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

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

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

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

Significant Speeches and Seminars

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Late Recording of Mortgages, Current Payoff Issues and Closing Problems Caused by Desperate People, Chicago Title Insurance Company agent telephone and internet seminar, October, 2005.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Boundary Law in Wisconsin, National Business Institute, Madison and Milwaukee, October 17 and 18, 2002.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Title Insurance Claims--Selected Issues, Milwaukee Bar Association, Milwaukee, October 18, 1993.

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

EXHIBIT 2

J. Bushnell Nielsen
Expert testimony at trial or deposition from 2000 to present

The following is a list of cases in which I have provided testimony as an expert witness at a trial, a court hearing, arbitration or by deposition, from July 1, 2000 to the present. This list is intended to comply with Federal Rule of Civil Procedure 26(a)(2), which says that an expert witness is to provide "a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years." This list also includes some cases in which my testimony was submitted to a court in affidavit form, but is not a complete list of those instances. This is not a complete list of cases in which I have been engaged as an expert witness.

1. *Town of Richfield v. Kletsch's Beach Access Ass'n*, Washington County, Wisconsin Circuit Court Case No. 99-CV-0360. Lawsuit by Wisconsin municipality to have real estate declared to have been validly dedicated to the public for lake access purposes. Testified at bench trial testimony in 2000, on behalf of municipality.

2. *Leja v. Town of Green Valley*, Shawano County, Wisconsin Circuit Court Case No. 01-CV-270. Lawsuit concerning conflicting chains of title and overlapping legal descriptions. Testified at bench trial on behalf of municipality. Judgment entered in favor of municipality.

3. *Roozen v. Stratton and M & I Lake Country Bank*, Waukesha County, Wisconsin Circuit Court Case No. 00-CV-2375. Lawsuit concerning claimed slander and unmarketabilty of title due to filing of lien. Affidavit testimony accepted by court.

4. *Cebolleta Ranch Ltd. Co. LLC and Fuller v. First American Title, Inc., et al.*, No. CV-2001-1321, Dist.Ct., Bernalillo Co., N.M. Lawsuit against title insurer concerning policy coverage for threatened cutoff of access by Native American pueblo. Deposition taken. Case settled.

5. *Kennedy's Houseboats, Inc. v. City of St. Croix Falls*, Polk County, Wisconsin Case No. 99-CV-289, and related matters 99-SC-712 and 00-CV-4. Lawsuits concerning title to property conveyed by municipality. Trial testimony and qualification as expert witness on behalf of City of St. Croix Falls in January, 2003.

6. *Hampel and Wardin v. Town of East Troy*, Walworth County, Wisconsin Circuit Court Case No. 03-CV-00603. Testimony on behalf of plaintiff land owners regarding restrictions not appearing in chain of title, insufficiency of dedication of hiking path to public. Affidavit of expert opinions filed and admitted by court.

7. *Wildenradt v. Wisniewski*, Walworth County, Wisconsin Circuit Court Case No. 04-CV-00905. Testimony on behalf of plaintiff land owners regarding chains of title, ownership of disputed property. Testimony and qualification as expert witness at injunction hearing. Judgment entered in favor of plaintiff land owners.

8. *Buttacavoli v. Lawyers Title Ins. Corp.*, AAA arbitration Case No. 51-159-01850-06, Chicago, Illinois. Testimony regarding title insurance policy coverage and custom and practice in the land title industry concerning measure of loss. Testimony admitted at arbitration; title insurer received favorable arbitration award.

9. *Illinois Real Estate Lawyers Ass'n v. One World Title Corp.*, Cook County, Illinois Case No. 04-CH-232. Testimony on behalf of title agency concerning prudent considerations in a customer's selection of a title insurance agency and the insurer for whom it writes insurance. Deposition taken on August 15, 2006. Case settled.

10. *Kingwood Crossroads, L.P. v. First American Title Ins. Co.*, Cause No. 05-03-02662-CV, Montgomery County, Texas (410th Judicial District). Deposition taken in 2006.

11. *Kamin v. Lawyers Title Ins. Corp.*, AAA Case No. 51 159 E 00632 05. Testified at arbitration regarding measure of loss under title insurance policy.

12. *Somers v. Luterbach, et al.*, Waukesha County Circuit Court Case No. 04-CV-680. Testimony on behalf of defendant land owner regarding priority of federal tax lien versus land contract vendee interest. Testified and qualified as expert witness at trial in June, 2009.

13. *Carr v. Marshall v. Chicago Title Ins. Co.*, Case No. 07 MR 1456, Lake County, Illinois Circuit Court. Testimony regarding title insurance claim administration custom and practices. Testified and qualified as expert witness at trial on November 2-3, 2009.

14. *Pullum Window Corp. v. Randy M. Deprez Custom Builder, Inc., et al.*, Oakland County, Michigan Circuit Case No. 08-093505 CH. Testimony on behalf of Greco Title regarding liability of title agent in the issuance of a title insurance policy. Affidavit filed in April, 2009. Case decided favorably on summary judgment in May, 2009.

15. *G & I Real Estate, LLC v. Singh*, Milwaukee County Circuit Court Case No. 2009-CV-18443. Testimony regarding ownership of property, marketability of title and title insurer's willingness to insure title. Testified and qualified as expert witness at bench trial in August, 2009.

16. *Larpenteur v. Burnet Realty, Inc.*, Case No. 27-CV-08-24562, Fourth Judicial District Court, Hennepin County, Minnesota. Testimony on behalf of Burnet Realty about the proper factors to be considered in the selection of a title agent and underwriter, on behalf of a real estate broker sued for allegedly breaching a fiduciary duty to steer its customers to the lowest-cost provider of title services. Testified and qualified as expert witness at class certification evidentiary hearing in January, 2010.

17. *Commonwealth Land Title Ins. Co. v. St. Johns Bank & Trust Company,* Civil Action No. 4:08-cv-01433-CAS, U.S. District Court, Eastern District of Missouri. Testimony about the correct measure of loss under a loan policy when the insured mortgage is junior to another lien on one of several parcels. Deposition taken in January, 2010.

18. *Sam N. Wilson, et al. v. Chicago Title Ins. Co., et al.*, Denton County, Texas (158th Judicial District) Cause No. 2008-20140-158. Testimony about the alleged bad faith conduct of a title insurer that denied a claim because the policy had terminated after accepting the claim, and the insured's concealment of the fact that the property had been conveyed before the claim was submitted. Deposition taken on July 1, 2010.

19. *Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co.*, E.D. Pennsylvania Case No. 05-00281. Testimony concerning industry custom and practice as to the underwriting of ALTA 9 endorsement. Expert report submitted to court by affidavit in support of summary judgment motion. On January 20, 2011, the court ruled, on a motion in limine to exclude my testimony, that I was qualified to opine and that my testimony on industry custom was admissible, but found other opinions inadmissible.

20. *USA Real Estate Investment Trust v. Security Title Guarantee Corporation of Baltimore and Sheehan*, U.S. Dist.Ct. S.D.Miss. Civil Action No. 1:09-cv-00684-HSO-JMR. Testimony in favor of insured lender against title insurer concerning closing protection letter and violation of lender's closing instructions. Deposition taken on October 13, 2010.

21. *Roger Tilkemeier, et al. v. Tim Vigil, et al.*, Santa Fe County, New Mexico Case No. D-101-CV 2009-02503. Testimony admitted at jury trial concerning limits of access coverage in title insurance policy and insurer's alleged bad faith conduct in handling of claim, conducted in March of 2011.

22. *Chesapeake Land Development Co., LLC v. Lawyers Title Ins. Corp.*, U.S. Dist.Ct. N.Dist. Texas—Fort Worth Case No. 4:10-CV-67. Testimony concerning title insurance policy coverage, including Exclusion 3(a). Deposition taken on March 15, 2011.

23. *Benninghoff, et al. v. Tilton, et al.*, Allegan County, Michigan Case No. 06-39595-CH. Testimony on behalf of plaintiff land owners concerning inverse condemnation of property by township actions, including recorded deed. Deposition taken on March 24, 2011.

24. *Stallion Funding, LLC, et al. v. Lawyers Title Ins. Corp., et al.*, District Court of Dallas County, Texas, 134th Judicial District Cause No. DC-10-07371. Testimony concerning Texas closing service letters and lack of actual or apparent authority of a title agent to conduct a settlement as the agent of a title insurer. Deposition taken on July 8, 2011.

25. *Metro Fill Development, L.L.C., et al., v. Lawyers Title Ins. Corp.*, St. Louis County Cause No. 09SL-CC02081. Testimony concerning encumbrances on title and title insurance policy coverage. Deposition taken on July 11, 2011. Also, testimony concerning the nature of a title insurance commitment and an alleged implied contract to search and examine title. Second deposition taken on September 9, 2012.

26. *Zan, LLC v. Ripley Cove, LLC, et al.*, Charleston County, South Carolina Civil Action No. 2008-CP-10-2641. Testimony concerning title industry claims practices and policy coverage. Testified at jury trial testimony on July 28, 2011.

27. *Anchorbank, FSB et al vs. Terry V. Anderson et al.*, Shawano County Case No. 2009-cv-436. Testimony concerning standard of care for construction loan disburser. Deposition taken on September 2, 2011.

28. *Williamson v. Mills, et al.*, Waukesha County Circuit Court Case No. 2010-cv-2400. Testimony concerning the custom and practice of persons engaging in hard money lending and short sales of real estate in the State of Wisconsin. Deposition taken on November 2, 2011.

29. *Quicken Loans, Inc. v. Downing, et al.*, Southern District of Indiana District Court Cause No. 1:10-CV-1565-TWP-DKL. Testimony on behalf of Quicken Loans concerning the custom and practice and standard of care for persons appointed as loans closing agents for mortgage lenders, and the standard of care for real estate closers and notaries public. Deposition taken on December 7, 2011.

30. *Fidelity National Title Ins. Co. v. Captiva Lake Investments, L.L.C.*, E.D. Mo. Dist.Ct. Case No. 4:10-cv-01890-CEJ. Testimony regarding construction loan disbursing and policy issuance. Deposition taken on June 11, 2012.

31. *Lawyers Title Ins. Corp. v. North Idaho Title Company*, Kootenai County, Idaho Case No. CV11-3050. Testimony regarding title examination methods and standards. Deposition taken on June 19, 2012. Testimony at trial on October 23, 2012.

32. *Mead and Vertes v. Lawyers Title Ins. Corp., et al.*, Maricopa County Superior Court Case No. CV 2010-029652. Testimony regarding title search and examination methods and standards concerning access coverage. Deposition taken on July 20, 2012.

33. *Stewart Title Guaranty Co. v. Shelby Realty Holdings, LLC*, N.D.Ala. Southern Division Case CV-08-P-0267-S. Testimony regarding claim administration custom and practice concerning measure of loss and other issues. Deposition taken on August 21, 2012.

34. *First American Title Ins. Co. v. Chicago Abstract Title Agency, LLC, et al.*, Cook County Chancery Division Case No. 2008 CH 41629. Testimony concerning custom and practice of title insurance industry concerning scope of title agency and alleged liability of title insurer for theft of closing funds. Deposition taken on October 8, 2012.

35. *Equity Income Partners Limited Partnership and Galileo Capital Partners, Ltd. v. Chicago Title Ins. Co.*, U.S.Dist.Ct. Arizona Case No. 2:11-cv-01614-GMS. Testimony concerning custom and practice in the title insurance industry regarding measure of loss on loan policies and alleged bad faith handling of claim. Deposition taken on December 13, 2012.

36. *Lawyers Title Ins. Corp. v. Gary F. Christensen, et al.*, Ada County, Idaho Case No. CVOC 1009768. Testimony regarding custom in title insurance industry regarding taking of construction lien indemnities and related subjects. Deposition taken on December 21, 2012.

37. *Guenther v. Old Republic National Title Insurance Company*, U.S.Dist.Ct. Idaho Case No. 1:12-CV-237-REB. Testimony concerning custom and practice in the title insurance industry regarding access coverage and alleged bad faith handling of claim. Deposition taken on December 22, 2012.

38. *The Sylvan Agency, Inc. v. Old Republic Title Company of Kansas City, Inc., et al.*, State of Missouri, Clay County Case No. 11CY-CV14181. Testimony about custom and practice in the title insurance industry regarding mechanics' lien coverage and alleged vexatious refusal to pay under Missouri law in the handling of a claim. Video deposition taken on February 18, 2013.

39. *Rickey Fontenot v. LandAmerica Commonwealth Title of Houston, Inc., et al.*, Chambers County, Texas Cause No. 25162. Testimony regarding escrow officer customs and practices. Testified at jury trial on February 28, 2013. Verdict issued finding no liability of LandAmerica Commonwealth Title. Verdict affirmed on appeal on August 28, 2014, Texas First District Court of Appeals.

40. *Moore v. Angelus, et al.*, Clark County, Nevada District Court Case No. A-10-616929-C. Testimony on behalf of plaintiff partners regarding title industry use of doctrine of equitable subrogation. Testified at bench trial on April 2, 2013. Decision issued favorable to the plaintiffs who retained me.

41. *HomeBanc, N.A. v. Old Republic National Title Insurance Company*, Palm Beach, Florida County Case No. 50 2011 CA 003124 XXXXMB. Testimony concerning the scope of a title insurance policy-issuing agency, history and regulation of closing protection letters, and title insurer practices in termination of a title agent. Deposition taken on April 5, 2013.

42. *Fiserv Solutions, Inc. v. Westchester Fire Insurance Co., et al.*, Case No. 2:11-cv-00603-CNC, United States District Court, Eastern District of Wisconsin. Testimony on behalf of Fiserv Solutions regarding the nature of title insurance policies and the type of policy issued by First American Title through Fiserv Solutions as its agent. Deposition taken on June 28, 2013.

43. *Jara v. Fidelity National Title Ins. Co.*, Cause No. 2012-03196, Harris County, Texas District Court. Testimony regarding Covered Risk 5, concerning building code violation orders, industry custom regarding payment of "lost" rent and interest, and alleged bad faith conduct of insurer in responding to the claim. Deposition taken on August 14, 2013.

44. *Stewart Title Guaranty Co. v. Credit Suisse*, Idaho U.S. Dist. Ct. Case No. 11-CV-227-BLW. Testimony regarding title insurance claim administrator custom and practice. Deposition taken on August 29, 2013.

45. *Synovus Bank v. Fidelity National Title Insurance Company*, United States District Court for the Middle District of Georgia, Columbus Division, Civil Action File No.: 4:12-CV-00244-CDL. Testimony regarding title insurance claim administrator custom and practice. Deposition taken on September 4, 2013.

46. *Cove Mini Storage, Inc. et al. v. First American Title Ins. Co.*, 91st District Court, Eastland, Texas Cause No. CV 1042068A. Testimony regarding custom and practice of title insurance claim administrators concerning prosecution of lawsuit filed by insured and how special exceptions are written by underwriting personnel and interpreted by claim administrators. Deposition taken on October 9, 2013.

47. *Embassy Marina Plaza, LLC v. Fidelity National Title Company, LLC, et al.*, Lake County, Florida Case No. 2012 CA 585. Testimony regarding interpretation of railroad deed and measure of loss under title insurance policy according to industry custom and practice. Testified at bench trial on November 13, 2013.

48. *Roman Geronimo Martinez Mendez v. Sky View at Las Palmas, L.L.C., et al.*, Hidalgo County, Texas Cause No. C-1401-10-G. Testimony regarding customs and practices in title insurance claim administration. Deposition taken on February 4, 2014.

49. *New Mexico Bank & Trust v. Commonwealth Land Title Insurance Company*, First Judicial District Court, Cause No. D-0101-CV-2011-01651. Testimony regarding customs and practices in title insurance claim administration concerning claims on loan policies. Deposition taken on February 11, 2014.

50. *Marchetti v. Chicago Title Ins. Co.*, Northern District Illinois Case No. 12-CV-5985. Testimony regarding customs and practices in title insurance claim administration concerning date of loss on owner's policies and elements of loss payable by insurer. Deposition taken on February 18, 2014.

51. *North Shore Lodging LLC v. Commonwealth Land Title Ins. Co.*, E.D. La. Civil Action No. 13-6070. Testimony regarding customs and practices in title insurance claim administration and alleged bad faith handling of owner's title insurance policy claim. Deposition taken on May 15, 2014.

52. *One Reverse Mortgage, LLC v. Chicago Title Ins. Co.*, Circuit Court of Chesterfield County, Virginia Case No. 041CL13000492-00. Testimony regarding customs and practices in title insurance claim administration and alleged bad faith handling of loan title insurance policy claim. Deposition taken on May 23, 2014; testimony at bench trial on June 9, 2014.

53. *MT Properties, LLC v. Chicago Title Ins. Co.*, Maricopa County, Arizona Superior Court Case No. CV2013-002183. Testimony regarding customs and practices in title insurance claim administration and alleged bad faith handling of owner's title insurance policy claim. Deposition taken on June 19, 2014. Testimony regarding alleged bad faith failure to pay a claim. Deposition taken on June 30, 2015.

54. *First American Title Ins. Co. and Adams Investments, LLC v. 1st Service Title & Closing, Inc. and National Union Fire Insurance Co. of Pittsburgh,* Milwaukee County Case No. 2012-CV-1072. Testimony regarding customs of title insurance title officers in examination of title and detection of red flags of forgery. Deposition taken on July 24, 2014.

55. *Northern States Power Co. v. The City of Ashland, et al.*, United States District Court, Western District of Wisconsin Case No. 12-CV-602-bbc. Testimony regarding chains of title to parcels in Ashland, Wisconsin, the interpretation of conveyances to railroads and several aspects of the public trust doctrine. Deposition taken on October 2, 2014.

56. *C1031 Properties, Inc. v. First American Title Insurance Company*, Spokane County, Washington Case No. 09-2-01656-3. Testimony regarding alleged bad faith of title insurer. Deposition taken on February 6, 2015.

57. *Nancy Brown v. Chicago Title Ins. Co.*, St. Johns County, Florida District Court Case No. CA14-949. Testimony regarding appropriate appraisal method for proof of loss under title insurance policy. Deposition taken on February 12, 2015.

58. *Fidelity Nat'l Title Ins. Co. v. Empire Title Agency of Arizona, LLC*, Maricopa County, Arizona Superior Court Case No. CV2011-014914. Testimony regarding gross negligence of title agent in issuance of policy containing an affirmative coverage by endorsement. Deposition taken on February 13, 2015.

59. *Fidelity National Title Ins. Co. v. Captiva Lake Investments, L.L.C.*, E.D. Mo. Dist.Ct. Case No. 4:10-cv-01890-CEJ. Testimony regarding construction loan disbursing and claim administration. Deposition taken on June 4, 2015. [I sat for a deposition in this case in 2012 also, which is recited above.]

60. *Jeanne Lee, et al., v. Chicago Title Insurance Company,* Mohave County, Arizona Superior Court Case No. CV2013-01220. Testimony regarding customs and practices of escrow officers. Deposition taken on June 29, 2015.

61. *C&K Residential Properties, et al. v. Commonwealth Title of Dallas, Inc., et al.*, 116th Judicial District (Dallas) Cause No. DC-13-06369-F. Testimony regarding customs and practices in title insurance claim administration and alleged bad faith handling. Deposition taken on July 7, 2015.

62. *Hawthorn Bank v. First American Title Insurance Company*, Jackson County, Missouri Circuit Court Case No. 1316-CV31342. Testimony regarding customs and practices in title insurance claim administration and vexatious refusal to pay. Deposition taken on July 15, 2015.

63. *Fidelity National Title Ins. Co. v. Captiva Lake Investments, L.L.C.*, E.D. Mo. Dist.Ct. Case No. 4:10-cv-01890-CEJ. Testimony regarding marketability of title and claim administration practices at jury trial in federal court in St. Louis, on July 22, 2015.

64. *Anderson, Frank & Mack, LLC, et al. v. Tri State Surveying Ltd., et al.*, Washoe County, Nevada Case No. CV14-00821. Testimony concerning title insurer's claim handling and alleged bad faith of insurer. Deposition taken on July 28, 2015.

65. *Kent Bank v. Rockford Title Co.*, Winnebago County, Illinois Case No. 11 L 21. Testimony concerning construction loan disbursing practices at jury trial on October 14, 2015 (my deposition was taken on May 8, 2015).

EXHIBIT 3

Detail by Officer/Registered Agent Name

Florida Limited Liability Company

SRKD-SAM ADVISORS, LLC

Filing Information

Document Number	L13000046515
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Event Date Filed	09/26/2014
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Principal Address

3176 ST ANNES DRIVE
BOCA RATON, FL 33496

Changed: 06/12/2014

Mailing Address

3835 NW BOCA RATON BLVD #200
BOCA RATON, FL 33431

Registered Agent Name & Address

SVIRSKY, SCOTT D
3835 NW BOCA RATON BLVD #200
BOCA RATON, FL 33431

Authorized Person(s) Detail

Name & Address

Title MGR

SVIRSKY, SCOTT D
3835 NW BOCA RATON BLVD #200
BOCA RATON, FL 33431

Title MGR

CHWATT, GLENN M
3835 NW BOCA RATON BLVD #200
BOCA RATON, FL 33431

Annual Reports

No Annual Reports Filed

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03/29/2013 -- Florida Limited Liability View Image In PDF format

GLENN CHWATT

Active Boca Raton, FL—President for Jericho State Capital Corp. of Florida

Glenn Chwatt has been associated with twenty-seven companies, according to public records. The companies were formed over a forty-four year period with the most recent being incorporated two years ago in March of 2013. Six of the companies are still active while the remaining twenty-one are now listed as inactive.

Learn More Background + Contact Information Available for Glenn Chwatt

Companies

Jericho State Capital Corp. of Florida (/Florida/Boca-Raton/jericho-state-capital-corp-of-florida-2830456.aspx)

Current roles include:

President

Incorporated

Florida in 1992

Status	Active
Years in Business	24
Officers Found	2

Srkd Management, LLC (/Florida/Boca-Raton/srkd-management-llc-4791964.aspx)

Current roles include:

Managing Member

Incorporated

Florida in 2008

Status	Active
Years in Business	10
Officers Found	1

GMC Tax Lien Advisors LLC (/Florida/Boca-Raton/gmc-tax-lien-advisors-llc/35905019.aspx)

Current roles include:

Managing Member

Incorporated

Florida in 2010

Status	Active
Years in Business	6
Officers Found	1

Jericho State Fund Consulting, LLC (/Florida/Boca-Raton/jericho-state-fund-consulting-llc-6123121.aspx)

Current roles include:

Managing Member

Incorporated

Florida in 2006

Status	Active
Years in Business	10
Officers Found	1

6508 Landings LLC (/Florida/Boca-Raton/6508-landings-llc/27454778.aspx)

Current roles include:

Managing Member

Incorporated

Florida in 2008

Status	Active
Years in Business	8
Officers Found	1

View twenty-two more corporations

Connections

A connection is made when two people are officers, directors, or otherwise associated with the same company. Glenn has twelve known connections and has the most companies in common with Richard Chwatt.

Lawrence B. Austin (/Florida/Hollywood/lawrence-b-austin-P581994.aspx)

Previous Chairman for Miami Subs Franchising II, Inc.
7 companies in common with Glenn

Gary Herman (/New-York/New-York/gary-herman-P2826018.aspx)

Previous President for Qsr, Inc.
7 companies in common with Glenn

Bernard H. Vogel (/Florida/Boca-Raton/bernard-h-vogel-P2254271.aspx)

Previous Director for Miami Subs Franchising II, Inc.
7 companies in common with Glenn

Ronald Devos (/New-York/Westbury/ronald-devos-P7435097.aspx)

Previous Treasurer for Mg III, Inc.
2 companies in common with Glenn

Eric Gatoff (/New-York/Westbury/eric-gatoff-P7778656.aspx)

Previous CEO for Mg III, Inc.
2 companies in common with Glenn

Howard Lorber (/New-York/Westbury/howard-lorber-P3193822.aspx)

Previous Chairman for Mg III, Inc.
2 companies in common with Glenn

Wayne Norbitz (/New-York/Nanuet/wayne-norbitz-6640785.aspx)

Chicago Title_004295

Previous Director for Mg III, Inc.
2 companies in common with Glenn

Donald L. Perlyn (/Florida/Boca-Raton/donald-l-perlyn-25950.aspx)

Previous Chairman for Mg III, Inc.
2 companies in common with Glenn

View four more connections

Locations & Mailing Addresses

2500 N Military Trl Boca Raton, FL 33431 (/Florida/Boca-Raton/2500-N-Military-Trl-Boca-Raton-FL-33431-a14724.aspx)

6300 NW 31st Ave Fort Lauderdale, FL 33309 (/Florida/Fort-Lauderdale/6300-NW-31st-Ave-Fort-Lauderdale-FL-33309-a74040.aspx)

3835 NW Boca Raton Blvd Boca Raton, FL 33431 (/Florida/Boca-Raton/3835-NW-Boca-Raton-Blvd-Boca-Raton-FL-33431-a298892.aspx)

3887 NW 52nd St Boca Raton, FL 33496 (/Florida/Boca-Raton/3887-NW-52nd-St-Boca-Raton-FL-33496-a2337454.aspx)

Source

Florida Department of State
Data last refreshed on Tuesday, January 19, 2016

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2015 FLORIDA LIMITED LIABILITY COMPANY ANNUAL REPORT

DOCUMENT# L08000095172

Entity Name: LYNX ASSET SERVICES, LLC

Current Principal Place of Business:

2255 GLADES ROAD, SUITE 324A
BOCA RATON, FL 33431

Current Mailing Address:

2255 GLADES ROAD, SUITE 324A
BOCA RATON, FL 33431 US

FEI Number: 80-0285629

FILED
Apr 20, 2015
Secretary of State
CC2368768403

Certificate of Status Desired: No

Name and Address of Current Registered Agent:

NRAI SERVICES, INC
1200 SOUTH PINE ISLAND ROAD
PLANTATION, FL 33324 US

The above named entity submits this statement for the purpose of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE: EDWARD HAND 04/20/2015
Electronic Signature of Registered Agent — Date

Authorized Person(s) Detail :

Title	MGR
Name	LYNX INVESTORS, LLC
Address	2255 GLADES RD, SUITE 324A
City-State-Zip:	BOCA RATON FL 33431

I hereby certify that the information indicated on this report or supplemental report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am a managing member or manager of the limited liability company or the receiver or trustee empowered to execute this report as required by Chapter 605, Florida Statutes; and that my name appears above, or on an attachment with all other like empowered.

SIGNATURE: MICHAEL MCCARTY MANAGER 04/20/2015
Electronic Signature of Signing Authorized Person(s) Detail — Date

Chicago Title_004299

2015 FLORIDA LIMITED LIABILITY COMPANY ANNUAL REPORT

DOCUMENT# L03000037603

Entity Name: LYNX INVESTORS, LLC

Current Principal Place of Business:

2255 GLADES ROAD, SUITE 324A
BOCA RATON, FL 33431

Current Mailing Address:

2255 GLADES ROAD, SUITE 324A
BOCA RATON, FL 33431 US

FEI Number: 57-1187686

FILED
Apr 20, 2015
Secretary of State
CC2334452822

Certificate of Status Desired: No

Name and Address of Current Registered Agent:

NRAI SERVICES, INC
1200 SOUTH PINE ISLAND ROAD
PLANTATION, FL 33324 US

The above named entity submits this statement for the purpose of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE: EDWARD HAND 04/20/2015
Electronic Signature of Registered Agent — Date

Authorized Person(s) Detail :

Title	MGR
Name	HARRISON INVESTORS, LLC
Address	30 FRENEAU AVENUE
City-State-Zip:	MATAWAN NJ 07747

I hereby certify that the information indicated on this report or supplemental report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am a managing member or manager of the limited liability company or the receiver or trustee empowered to execute this report as required by Chapter 605, Florida Statutes; and that my name appears above, or on an attachment with all other like empowered.

SIGNATURE: MICHAEL MCCARTY MGR 04/20/2015
Electronic Signature of Signing Authorized Person(s) Detail — Date

Chicago Title_004301

Harrison Investors LLC

43 Harrison Avenue
Highland Park, NJ 08904 - View Map
Phone: (732) 418-9450
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Harrison Investors LLC
A privately held company in Highland Park, NJ. *Is this your business? Claim This Profile*

More Details for Harrison Investors LLC

Categorized under Investors (Unclassified). Our records show it was established in 2010 and incorporated in New Jersey. Current estimates show this company has an annual revenue of 130000 and employs a staff of approximately 2.

Company Contacts
Is this your business? Claim This Profile

Michael Mccarty

Principal

Chicago Title_004303

2015 FLORIDA LIMITED LIABILITY COMPANY ANNUAL REPORT

FILED
Apr 20, 2015
Secretary of State
CC9939882090

DOCUMENT# L13000051790

Entity Name: LYNX JERICHO SOUTHFORK LANDING PARTNERS, LLC

Current Principal Place of Business:

2255 GLADES ROAD, SUITE 324A
BOCA RATON, FL 33431

Current Mailing Address:

2255 GLADES ROAD, SUITE 324A
BOCA RATON, FL 33431 US

FEI Number: 90-0957398

Certificate of Status Desired: No

Name and Address of Current Registered Agent:

NRAI SERVICES, INC
1200 SOUTH PINE ISLAND ROAD
PLANTATION, FL 33324 US

The above named entity submits this statement for the purpose of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE: ED HAND, ASST. SEC. 04/20/2015
Electronic Signature of Registered Agent — Date

Authorized Person(s) Detail :

Title	MGR
Name	LYNX JERICHO PARTNERS, LLC
Address	2255 GLADES ROAD, SUITE 324A
City-State-Zip:	BOCA RATON FL 33431

I hereby certify that the information indicated on this report or supplemental report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am a managing member or manager of the limited liability company or the receiver or trustee empowered to execute this report as required by Chapter 605, Florida Statutes; and that my name appears above, or on an attachment with all other like empowered.

SIGNATURE: MICHAEL MCCARTY MANAGER 04/20/2015
Electronic Signature of Signing Authorized Person(s) Detail — Date

Chicago Title_004305

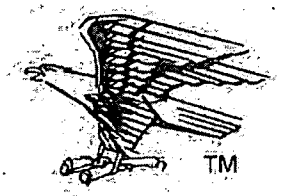
EXHIBIT 4

Title and Escrow Claims Guide

2016 Edition

J. Bushnell Nielsen

AMERICAN
LAND TITLE
ASSOCIATION



Chicago Title_004307

R.1857

Title and Escrow Claims Guide

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(d) The fair market value, at the time of the eviction, of the estate or interest of the insured in any sublease of all or part of the land existing at the date of the eviction.

(e) Damages which the insured may be obligated to pay to any sublessee on account of the breach of any sublease of all or part of the land caused by the eviction.

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

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

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

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

3.2.2 Owner's And Loan Policies Noncumulative

The ALTA Owner's policies provide that the amount of insurance is reduced by the amount of any payment made by the insurer to the holder of a mortgage "to which exception is taken in Schedule B or to which the Insured has agreed, assumed, or taken subject, or which is executed by an Insured after Date of Policy and which is a charge or lien on the Title, and the amount so paid shall be deemed a payment to the Insured under this policy."[26] This has been termed the "liability noncumulative" provision of the owner's policy. This provision acknowledges that a payment by the insurer that pays a debt owed by the insured owner, or that removes a lien on the property that the insured assumed or to which it took subject, confers a benefit on the owner in the amount of the debt or lien.

The noncumulative provision also serves a purpose similar to a lender loss payee endorsement on a homeowner's insurance policy. Such a loss payee endorsement confers on the lender the right to be paid if a loss is incurred under the policy. With title insurance policies, the lender has the right to obtain its own policy. Thus, owner's and loan policies are distinct, and the loan policy is not merely a rider to the owner's.[27] However, if title to the property fails, the owner and

---

[26] Conditions 11, 2006 ALTA Owner's policy.

[27] The exception to this rule is created by the ALTA 16 Mezzanine endorsement, in which the owner insured specifically assigns to the mezzanine lender the right to receive any claim payable to the owner, subject to the terms of the endorsement. The court construed an ALTA 16 endorsement in *16th & K Hotel, LP v. Commonwealth Land Title Ins.*

property worth $65,000, which is also the reduced policy amount.

Conditions & Stipulations 10 of the 1992 ALTA Loan policy stated that, if the insured acquired title to the property, "payment by the insurer to a lender holding a lien on the property senior to" the mortgage insured reduced the policy amount by the amount of the payment to the senior lien holder. The premise of this provision was that any loss payment to the senior lender would increase the equity in the property to which the insured junior lien would attach. However, it is common for a first lien debt to be more than the amount of a second lien debt. Thus, a payment to the senior lender is sometimes more than the amount of a junior mortgage policy. This policy provision thus frequently meant that a payment to the senior lender extinguished the policy issued to the junior lender. Conditions & Stipulations 10 was excised from the 2006 ALTA Loan policy. ALTA's explanation for the 2006 change was that a lender "could totally lose coverage without having benefited from any payment made under the policy... ."[30] The elimination of the noncumulative provision from the loan policy can affect the calculation made in the handling of certain claims. When the insurer has received claims from both a senior and junior lender, and the junior lender holds a 2006 ALTA policy, even full payment to the senior lender will not resolve the claim brought by the junior lender. Thus, if the cost to cure the title defect is more than the indebtedness under the senior lender's policy but less than the aggregate of the two insureds' debt, the claim administrator will often elect to cure the defect rather than pay the insureds.

3.2.3 Determining Amount Of Loss On An Owner's Policy

An owner's policy indemnifies the insured against actual monetary loss or damage the owner incurs as a result of a defect, lien, encumbrance or other matter covered by the policy. The policy is one of indemnity, not guaranty. See §9.1.2 on that subject. The policy also does not insure the value of the property.[31] Generally, there is no loss payable unless there is both a covered title issue and a resulting diminution in the value of the insured property.[32] However, when an owner was pursuing a claim of loss after having been foreclosed out of the property, it was held proper to consider whether

---

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

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

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

property worth $65,000, which is also the reduced policy amount.

Conditions & Stipulations 10 of the 1992 ALTA Loan policy stated that, if the insured acquired title to the property, "payment by the insurer to a lender holding a lien on the property senior to" the mortgage insured reduced the policy amount by the amount of the payment to the senior lien holder. The premise of this provision was that any loss payment to the senior lender would increase the equity in the property to which the insured junior lien would attach. However, it is common for a first lien debt to be more than the amount of a second lien debt. Thus, a payment to the senior lender is sometimes more than the amount of a junior mortgage policy. This policy provision thus frequently meant that a payment to the senior lender extinguished the policy issued to the junior lender. Conditions & Stipulations 10 was excised from the 2006 ALTA Loan policy. ALTA's explanation for the 2006 change was that a lender "could totally lose coverage without having benefited from any payment made under the policy... ."[30] The elimination of the noncumulative provision from the loan policy can affect the calculation made in the handling of certain claims. When the insurer has received claims from both a senior and junior lender, and the junior lender holds a 2006 ALTA policy, even full payment to the senior lender will not resolve the claim brought by the junior lender. Thus, if the cost to cure the title defect is more than the indebtedness under the senior lender's policy but less than the aggregate of the two insureds' debt, the claim administrator will often elect to cure the defect rather than pay the insureds.

3.2.3 Determining Amount Of Loss On An Owner's Policy

An owner's policy indemnifies the insured against actual monetary loss or damage the owner incurs as a result of a defect, lien, encumbrance or other matter covered by the policy. The policy is one of indemnity, not guaranty. See §9.1.2 on that subject. The policy also does not insure the value of the property.[31] Generally, there is no loss payable unless there is both a covered title issue and a resulting diminution in the value of the insured property.[32] However, when an owner was pursuing a claim of loss after having been foreclosed out of the property, it was held proper to consider whether

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

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

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

regarding the date of loss under an owner's policy.

The coinsurance provision of the NYBTU form of policy was discussed in *L. Smirlock Realty Corp. v. Title Guarantee Co.*[100] The subsequent improvements were found to be less than 20 percent of the policy amount, so the provision did not apply. The insurer argued that the later-built improvements should not be included in valuing the property. The court disagreed, justifying its conclusion on the language of the coinsurance provision, which the court found to contemplate the consideration of the value of later improvements.[101]

3.2.3.4 Owner's Policy Date Of Loss

When the insurer will resolve a claim by paying the diminution in value caused by a covered matter, the value of the property with and without the covered matter must be established as of the appropriate date of loss. The choice of which date is used to measure the property's value can have a significant effect on the amount of loss that is payable. The date of loss under an owner's policy is different from that under a loan policy.[102] The date of loss on loan policies is discussed at §3.2.4.2.

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

> (b) If the Company pursues its rights under Section 5 of these Conditions and is unsuccessful in establishing the Title, as insured,
>
> (i) the Amount of Insurance shall be increased by 10%, and
>
> (ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

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

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discussed below.

[100] 52 N.Y.2d 179, 437 N.Y.S.2d 57, 418 N.E.2d 650 (1981); subsequent appeals, 97 App.Div.2d 208, 469 N.Y.S.2d 415 (2nd Dep't 1983); mod. 63 N.Y.2d 955, 483 N.Y.S.2d 984, 473 N.E.2d 234 (1984).

[101] Id.

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

have been accepted by courts as the date of loss under other circumstances.

The courts in a number of states have established the date of loss to be used for owner's policy losses. The most influential modern decision is *Overholtzer v. Northern Counties Title Ins. Co.*[103] That court held that "liability should be measured by diminution in the value of the property caused by the defect in title as of the date of the discovery of the defect, measured by the use to which the property is then being devoted."[104] Most states that have considered the issue follow the *Overholtzer* date-of-discovery rule.[105] Under most circumstances, the *Overholtzer* date of loss rule favors the insured by increasing the loss to account for inflation in value from policy date to the date of discovery of the defect, or improvements that the insured has made since the policy date.[106] When property has risen in value, even a partial failure of title can result in a loss equal to policy limits.[107] Conversely, the risk of a decline in value is on the insured, not the insurer:

> A title insurance policy does not insure the value of any particular property. In fact, it does not insure the property at all. If the value of the property appreciates or depreciates, the title policy is not affected.[108]

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[103] 116 Cal.App.2d 113, 253 P.2d 116 (Cal.App. 1 Dist. 1953).

[104] 253 P.2d at 125.

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

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

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

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

If the property is worth less than policy limits on the date on which the owner discovers the defect in title, recovery is limited to the fair market value as of that date.[109]

Early decisions in several states declared that loss under an owner's policy is measured on the date of policy. However, only two states clung to those early decisions once owner's insurance became more prevalent after World War II and real estate entered a period in which values shot up rapidly.[110] Date of discovery favors the insured when values are rising. However, after real estate values declined dramatically during the real estate depression that began in 2007, several courts that considered the issue for the first time adopted the date of policy rather than date of discovery, at the request of insureds who sought to have their claims valued at pre-depression prices.[111] When the

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

[110] The Georgia Supreme court adopted the date-of-policy rule in *Beaullieu v. Atlanta Title & Trust Co.*, 60 Ga.App. 400, 4 S.E.2d 78 (1939). The rule was followed by an appeals court in *Security Union Title Ins. Co. v. RC Acres, Inc.*, 269 Ga.App. 359, 604 S.E.2d 547 (Ga.App. 2004), recons.den. (August 31, 2004), cert.den. (November 22, 2004). *Beaullieu* was quoted in *U.S. Life Title Ins. Co. v. Hutsell*, 164 Ga.App. 443, 296 S.E.2d 760 (1982). Courts in a number of other states have declined to adopt the *Beaullieu* reasoning, which analogizes to a breach of warranty claim, on which a seller is liable as of the date the warranty is given. Virginia first adopted date of policy in *The Title Ins. Co. of Richmond, Inc. v. Industrial Bank of Richmond, Inc.*, 156 Va. 322, 157 S.E. 710 (1931), which involved a special assessment and a loan policy. The insurer argued that the insured suffered no loss, because it sold the property at a profit after taking it in foreclosure. The court said that the insured was entitled to the additional money it should have received on resale if it had not had to pay off the assessment and, in order to come to that conclusion, it said that the "loss occurred at the time it, relying on the policy, made its purchase, and is not measured by what it might realize at some future time under other conditions." In *Bluff Ventures Limited Partnership v. Chicago Title Ins. Co.*, 950 F.2d 139 (4th Cir. 1991), the court rejected the insurer's argument that an insured lender did not suffer a loss due to a judgment lien, and reiterated the *Industrial Bank* holding concerning the date of loss. In *Devereux v. Commonwealth Land Title Ins. Co.*, 74 Va. Cir. 217, 2007 WL 5971429 (Va.Cir.Ct. 2007), which involved a claim on an owner's policy, the court said that the distinction between owner's and loan policies had been raised and rejected in *Industrial Bank*. The court also felt obligated to follow *Industrial Bank* despite the compelling argument that the issuance of an inflation endorsement clearly suggested that loss would be measured based on the value of the property at a date after the date of policy. The court held that the owner's loss was to be measured as of the date of purchase.

[111] In *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 732 S.E.2d 626 (S.C. 2012), the South Carolina Supreme Court answered the question certified to it by a federal court and announced that loss under an owner's title insurance policy is measured as of the date of policy, not date of discovery, despite prevailing case law and a well-reasoned dissent. Several recent decisions concerning loan policies have also adopted the policy date as the loss date. See §3.2.4.2 for those cases. In *Breck v. Moore*, 910 P.2d 599 (Alaska 1996), the Alaska Supreme Court, after citing *Overholtzer* and

3.2.4 Determining Amount Of Loss On A Loan Policy

While an owner's policy insures the owner's title to the land, the primary purpose of a loan policy is to insure the validity, priority and enforceability of the insured lender's security interest in the land. Not every defect in title impairs the lender's security position. Thus, while an owner has the right to seek a resolution of a claim as soon as he or she discovers that title is defective,[147] a lender does not suffer a loss unless three events occur. These three events are sometimes referred to as the "three Ds": a defect in title, a default by the borrower, and a diminution in property value that causes the lender's collateral to be worth less than the amount of its loan. This truism has been phrased in various ways:

> The broad rule set forth in these cases is that a secured lender suffers an indemnifiable "loss" under a title policy only if the lender fails to recoup the debt because of the insured-against senior lien.[148]

> Defining and measuring actual loss under a title insurance policy is not the same for the owner who has title to property, and a mortgagee who holds only a security interest in the borrower's title. The fee interest of an owner is immediately diminished by the presence of a lien since resale value will always reflect the cost of removing the lien. A mortgagee's loss cannot be measured unless the underlying debt is not repaid and the security for the mortgage proves inadequate. Green v. Evesham Corp., 179 N.J.Super. 105, 109, 430 A.2d 944, 946 (1981). For a mortgagee, title insurance undertakes to indemnify against loss or damage sustained by reason of defects of title or liens upon the land, but does not guarantee either that the mortgaged premises are worth the amount of the mortgage or that the mortgage debt will be paid.[149]

> [W]hile a title insurance policy insuring the interest of a real estate owner and a title insurance policy insuring the interest of a mortgagee are both contracts of indemnity,

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[147] *Green v. Evesham Corp.*, 179 N.J.Super. 105, 430 A.2d 944 (A.D.1981); *CMEI, Inc. v. American Title Ins. Co.*, 447 So.2d 427 (Fla.App. 1984); *Miller v. Title U.S.A. Ins. Corp. of New York*, 1991 WL 24537 (Tenn. 1991) (unpublished); *Cale v. Transamerica Title Ins. Co.*, 225 Cal.App.3d 422, 275 Cal.Rptr. 107 (1990).

[148] *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal.App.4th 972, 24 Cal.Rptr.2d 912, 915-6 (Cal.App. 4 Dist. 1993). In accord are *Cale v. Transamerica Title Ins. Co.*, 225 Cal.App.3d 422, 275 Cal.Rptr. 107 (1990); *Green v. Evesham*, 179 N.J.Super 105, 430 A.2d 944 (App.Div. 1981); *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F.2d 1058 (1st Cir. 1990), in addition to the cases quoted directly hereafter. The *Karl* and *Cale* cases are discussed in Carollo, *Do Title Insurance Policies Protect Lenders?*, Real Estate Review (Summer 1995), p. 57.

[149] *Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co.*, 144 Wis.2d 68, 423 N.W.2d 521, 525 (1988) [quoted in *Focus Investment Associates, Inc. v. American Title Insurance Co.*, 992 F.2d 1231, 1237, note 10 (1st Cir. 1993)]. See also, *Hodas v. First American Title Ins. Co.*, 696 A.2d 1095 (Maine 1997) and *First American Title Ins. Co. v. Patriot Bank*, 2015 WL 2228549 (Tex.App.-Houston 2015) (unpublished), in which the court held that, because a title insurer is not a guarantor of the loan, the loss payable due to total failure of title was not the loan amount but the value of the land, up to policy limits.

> ... nevertheless, substantive differences between the insured interest of an owner and that of a mortgagee results [sic] in a significant difference in what constitutes 'loss or damage' under each type of title policy. Title defects and liens directly and adversely affect the property owner because the owner is entitled to the full market value of the property and that value is immediately reduced by outstanding title defects and liens. A mortgagee's loss is measured by the extent to which the insured debt is not repaid because the value of security property is diminished or impaired by outstanding lien encumbrances or title defects covered by the title insurance. Therefore, superior liens or title defects in claims may exist which reduce the market value of the security property (the value to the owner) yet result in no loss or damage to the insured mortgagee because the effect of the title problems does not reduce the value of security property below the amount of an indebtedness secured or because the indebtedness is otherwise secured or paid.[150]

> [The insurer's] liability is limited to the lesser of: (1) Bay Loan's actual loss; (2) the amount of insurance; or (3) the indebtedness secured by the insured mortgage at the time of the loss. ... [The lender's] actual loss under each policy would be the lesser of (1) the amount uncollectible from the defaulting borrower, or (2) the fair market value of the unit at the time the prior mortgagee foreclosed.[151]

A lender that has not proven that the loan is in default and that its security had been impaired "has not yet proven that it incurred any loss."[152]

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

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

[152] *Chrysler First Financial Services Corp. of America v. Chicago Title Ins. Co.*, 156 Misc.2d 814, 595 N.Y.S.2d 302 (Sup. 1993). In accord are *Florida Home Ins. Co. v. Braverman*, 163 So.2d 512 (Fla.App. 1964) and *Goode v. Federal Title and Ins. Corp.*, 162 So.2d 269 (Fla.App. 1964); *National Title Ins. Co. v. Safeco Title Ins. Co.*, 661 So.2d 1234, 1236 (Fla.App. 3 Dist. 1995); *Kimberly Recreation Ass'n v. Butts*, 1997 WL 170293 (Ohio App. 10 Dist.) (unpublished). The *Kimberly* court put the matter this way: "The lending institution is only interested to the extent of its loan. The ultimate validity of the title, for other purposes, is simply not relevant to the lender." In *First Citizens Bank & Trust Co. v. Stewart Title Guar. Co.*, 320 P.3d 406 (Colo.App. 1 Div. 2014), the court quoted 2 Gregory J. Notarianni, *Colorado Practice Series: Methods of Practice* § 63:3, at 271 (Cathy S. Krendl ed., 6th ed., 2012), which says: "An insured mortgagee has not suffered an identifiable loss unless and until it forecloses its insured deed of trust and a title defect reduces the value of the property, thereby preventing the mortgagee from recouping its loan amount upon resale. If a title defect exists, but the value of the property is nevertheless sufficient to pay the mortgagee its loan amount, then there is no damage compensable under the loan policy." However, the court found that the insured lender was not premature in bringing suit against the insurer for payment based on its defective lien, although it was still litigating with the defaulted borrower and might obtain some payment from it. The court held that the final determination clause did not stay the coverage suit, since the insurer was not paying for the lawsuit against the borrower, and that action will not clear title. In *First American Title Ins. Co. of Texas v. Willard*, 949 S.W.2d 342 (Tex.App.-Tyler 1997), even though the borrower was not in default, the insurer was found liable for the reduction in the lender's security caused by the undisclosed easement. The court also had bad news for the lender, however: it upheld a judgment in favor of the easement holder against the lender for trespass. The court reasoned that, when the construction lender discovered the trespass, it could have ordered

The loan policy does not insure that the debt underlying the security interest is itself valid, as fully discussed at §9.10. The policy insures the validity, enforceability and priority of the lender's lien on the real estate which serves as collateral, or partial collateral, for the loan. However, as one court put it, "a title insurance contract insures only the title to the land securing the debt and not the debt itself."[153] The policy does not insure against the possibility that the mortgage cannot be enforced because the loan funds were never advanced by the loan assignor.[154]

As stated above, the second condition to loss on a loan policy is proof that the borrower has defaulted and will not pay the debt. This is typically accepted as proven when the lender has obtained a foreclosure judgment.[155] If the borrower has defaulted but the lender has elected not to foreclose the mortgage, it must show that the borrower has been sued under the note and has not paid the money judgment.[156]

The third condition to payment of loss is that the lender's security position in the real estate be sufficiently impaired or reduced by the covered matter to cause the lender to be undersecured for the loan, when all of its collateral is considered.[157] If the value of the property subject to the covered matter is still sufficient to fully secure the lender even with the existence of the covered matter, no loss is payable:

> A title insurer only undertakes to indemnify the insured lien holder if a defect causes a *loss*; without a loss there is no obligation to pay benefits. In other contexts it has been noted that a secured lender's interest in the security is limited to repayment of its loan; if the loan is fully satisfied a lender ordinarily suffers no damage. Regarding secured lenders, if the loan is fully secured as of the date of foreclosure

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the half-built house moved, but instead took an indemnity from the borrower and continued funding the loan. This fact supported the jury's verdict that the lender "aided and assisted" the borrower's trespass. The conditions to payment of loss under a loan policy are examined in Pedowitz, *Title Insurance in New York Today*, New York State Bar Journal, Vol. 68, No. 2, p. 12 (Feb. 1996). The article is a thorough analysis of the coverage of the title insurance policies.

[153] *Gerrold v. Penn Title Ins. Co.*, 637 A.2d 1293, 1295 (N.J.Super.A.D. 1994) [citing *Bank of Miami Beach v. Fidelity & Casualty Co. of New York*, 239 So.2d 97 (Fla. 1970)]. See also *Southwest Title Ins. Co. v. Northland Bldg. Corp.*, 552 S.W.2d 425 (Tex. 1977), which held that "the payment of the note is not insured. The insurer underwrites only against loss due to a defect in the security." Also, 12 Couch on Insurance § 185.88 (3d. ed.1995) says that "if the value of the mortgaged property is less than the amount due on the mortgage, it has generally been held or recognized that the mortgagee can recover only the value of the property, not the amount due on the mortgage."

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

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

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

[157] In *First Community Bank v. Commonwealth Land Title Ins. Co.*, ___ F.Supp.3d ___; 2014 WL 4720153 (M.D.La. 2014) (permanent citation not yet available), the insured lender had no security in the property, because it was insured as having a first lien but actually held a second lien that had been foreclosed. The court held that loss was the least of the debt, the property's value or policy limits, following the senior's lender foreclosure that extinguished the insured lien.

> notwithstanding the contractual default, the lender suffers no damage from such default. Here, plaintiffs were solely interested in the property as a security for their loan, and if they fully recouped all amounts due them the fact that title to the property was not as represented did not cause any cognizable loss.[158]

The subject of the proper means of determining the real estate's value is discussed beginning at §3.2.4.3.

The three conditions to payment of a loan policy loss (default, defect in title and diminished security) need not always occur in a particular order. In *Atlanta Title & Trust Co. v. Allied Mortgage Co.*,[159] the lender paid a superior lien before its loan went into default. Later, the lender sold the loan at a loss. Later still, the loan went into default. The court held that the lender had made a sufficient showing that its security had been impaired.

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

> The lender's full credit bid establishes the value of the security as being equal to the amount of the indebtedness. Hence, the lender cannot establish any impairment of security and cannot recover any damages [against the borrower] for waste.[160]

Some courts have held that this rule precludes a lender from recovering from a title insurer any amount that the lender made as a credit bid at sale, because the bid is the lender's agreement that the property it received at sale is equal in value to the bid it made.[161] The full credit bid rule corresponds

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[158] *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal.App. 4th 972, 24 Cal.Rptr.2d 912 (1993) (citations omitted). The *Karl* court recognized that *Cale v. Transamerica Title Ins. Co.*, 225 Cal.App.3d 422, 275 Cal.Rptr. 107 (1990), had adopted a seemingly inconsistent position, and the court adopted the reasoning of the dissent in *Cale* rather than the majority position. In agreement with *Karl* are *Title Ins. Co. of Richmond v. Industrial Bank of Richmond, Inc.*, 156 Va. 322, 157 S.E. 710 (1931); and *Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co.*, 144 Wis.2d 68, 423 N.W.2d 521 (1988). The *Karl* and *Cale* decisions are discussed in Carollo, *Do Title Insurance Policies Protect Lenders?*, Real Estate Review, Summer, 1995, p. 57.

[159] 60 Ga.App. 114, 3 S.E.2d 127 (1939); aff'd 64 Ga.App. 38, 12 S.E.2d 147 (1940).

[160] *Cornelison v. Kornbluth*, 15 Cal.App.3d 590, 605-6, 125 Cal.Rptr. 557, 542 P.2d 981 (1975), quoted in *Romo v. Stewart Title of California*, 35 Cal.App.4th 1613, 1615, 42 Cal.Rptr.2d 414 (Cal.App. 1 Dist. 1995).

[161] In *Freedom Mortgage Corp. v. Burnham Mortgage, Inc.*, 2006 WL 695467 (N.D.Ill., March 13, 2006) (No. 03 C 6508) (unpublished), the lender sought to recoup losses caused by loan fraud from various parties, including title insurers, after having made full credit bids at its foreclosure sales. Relying on the California cases cited above, the court held that the lender was precluded from recovering from any of the third parties, because otherwise the lender could in effect obtain double recovery: "These cases instruct that, absent proof that a lender's credit bid was the proximate result of fraud, the bid stands as against third parties (not, as Plaintiff contends, only against borrowers or junior creditors). ... In this case, Freedom was not stuck with appraisals potentially tainted by fraud. ... There simply has not been, nor could there be on the record before the Court, any allegations that the credit bids were proximately caused by any of the

to the 1992 ALTA Loan policy term stating that payment of the debt in full by any person extinguishes the policy.[162] Not all courts have agreed that a full credit bid should be deemed a payment of the debt that reduces the policy amount, and the 2006 ALTA Loan policy does not contain the same provision.[163] Nonetheless, it should not be necessary to establish a direct link

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Defendants' fraudulent misrepresentations. ... In other words, Freedom knew the actual values of the Properties, and had the power to bid the way it wanted to protect its interests." In *Federal Deposit Ins. Corp. v. Chicago Title Ins. Co.*, ___ F.Supp.3d ___, 2015 WL 5276346 (N.D.Ill. 2015) (permanent citation not yet available), the court applied *Freedom Mortgage* in a suit against a loan closer, not under a title insurance policy claim, to hold that the maximum amount that the FDIC could recover against a loan closer for its alleged failure to inform the defunct lender about double escrows was the amounts of the deficiency judgments taken by the FDIC after its credit bids on foreclosure. The FDIC made numerous arguments seeking to distinguish *Freedom Mortgage*, all of which the court rejected. In *M & I Marshall & Ilsley Bank v. Wright*, 2011 WL 181292 (D.Ariz.) (unpublished), a federal court sitting in Arizona refused to apply the full credit bid rule to a title insurance claim even though the rule has been applied by a state court to a casualty insurance claim, saying: "... casualty insurance and the title insurance policy at issue here are not the same. One is related to problems with the property itself, while another specifically addresses the mortgagee's lien. ... While it may make sense that a full credit bid should extinguish any right to demand further compensation related to the value of the property, losses arising from the unenforceability of the lien are separate, and may be resolved independently." *Wright* was rejected, however, in *Equity Income Partners LP v. Chicago Title Ins. Co.*, 2013 WL 6498144 (D.Ariz.) (unpublished), which applied the rule and found that the policy amount was reduced to zero by the bid. In *Lawyers Title Ins. Corp. v. Dedmore*, 2014 WL 4354663 (Cal.App. 1 Dist.) (unpublished), California's one-action or anti-deficiency law was applied to preclude a *title insurer* from collecting from the owners on the note after the insurer bought the loan and reconveyed the property in order to resolve the claim under the loan policy. In *Dedmore*, the insurer did not make a credit bid and did not assert in the reconveyance that the debt had been paid or discharged, so that the anti-deficiency law was not invoked.

[162] *Equity Income Partners LP v. Chicago Title Ins. Co.*, 2013 WL 6498144 (D.Ariz.) (unpublished) held that a full credit bid at a trustee's sale is deemed a payment to the lender in the amount of the bid, and invokes Conditions 9(b) of the 2006 ALTA loan policy, which states that full payment of the debt by "any person" reduces the policy amount to zero.

[163] In *M & I Marshall & Ilsley Bank v. Wright*, 2011 WL 181292 (D.Ariz.) (unpublished), a federal court sitting in Arizona refused to apply the full credit bid rule to a title insurance claim even though the rule has been applied by a state court to a casualty insurance claim, saying: "... casualty insurance and the title insurance policy at issue here are not the same. One is related to problems with the property itself, while another specifically addresses the mortgagee's lien. ... While it may make sense that a full credit bid should extinguish any right to demand further compensation related to the value of the property, losses arising from the unenforceability of the lien are separate, and may be resolved independently." In *Bank of Idaho v. First American Title Ins. Co.*, 156 Idaho 618, 329 P.3d 1066 (Idaho 2014), the court held that the lender's full credit bid at its foreclosure sale did not reduce the policy amount, pursuant to Conditions & Stipulations 9(c), which provides that "[p]ayment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations." The court said the reference to Conditions 2(a), the continuation provision, was the flaw in the insurer's analysis that the bid was a payment. The court said that the bid was the act that permitted the lender to come into title. If that same bid extinguished the policy, coverage would not continue after the lender took title. The 2006 ALTA Loan policy does not state that the policy is terminated on payment in full of the debt. Conditions 10(b) of the 2006 policy limits policy termination to the event of the "voluntary satisfaction or release of the Insured Mortgage," and states "except as provided in Section 2 of these Conditions." Similarly, in *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 751 S.E.2d 256 (S.C. 2013), the loan policy amount was $3,075,000. The loan was secured by three parcels, including a defective lien on a small parcel that the lender knew would be in second position. The lender foreclosed on the main parcel, making a credit bid of $3,250,000. By the time of that sale, the debt with interest was $3,641,190. After subtracting the bid amount, the loan balance was $391,190, just over the amount of the lost equity in the second-lien parcel. The court held that the credit bid did not extinguish the policy, saying simply that it was unfair to

between the policy's terms and the full credit bid rule in order for that doctrine to preclude a policy claim. The premise of the rule is that a lender owed a debt is deemed to have accepted title to the property in lieu of that debt by making a full credit bid. Having released the borrower from the debt, and having taken title to the property, the lender has no basis on which to assert that the title insurer should pay it additional money.

If the insured lender elects to pay off a lien without the insurer's written consent, the voluntary settlement provision of the policy bars recovery from the insurer for the amount paid.[164] Similarly, the insurer is not obligated to bond off or pay a lien which is claimed to be prior to the insured mortgage, rather than exercising its right to establish the priority of the mortgage in litigation.[165]

The policy does not protect the lender against expenses which flow from the breach of its warranties or representations to others as to the state of title, when those expenses are separate from any impairment of the lender's security in the property. For example, in *National Title Ins. Co. v. Safeco Title Ins. Co.*,[166] an insurer failed to disclose a junior mortgage given to finance the buyer's equity. By borrowing the equity funds, the owner breached the terms of the loan agreement and private mortgage insurance contract. Later, the junior mortgage was paid off and the lien satisfied. After that, the insured mortgage loan went into default. The mortgage insurance company declared its policy void for failure to disclose the second mortgage. The lender was forced to repurchase the loan from the mortgage investor. The court found that the title insurer was not responsible for the insured's expenses:

> In this case, National did not allege, nor could it have, that its security was impaired by the second mortgage, which was satisfied two years after the closing, and four years before the owners defaulted on the first mortgage. ... In short, National's loss was occasioned not by the short-lived and long-discharged second mortgage, but by the owners' default on the first mortgage. That default was not in any way attributable

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reduce the policy amount dollar-for-dollar based on the credit bid amount.

[164] For example, in *Diversified Mortgage Investors v. U.S. Life Title Insurance Co. of New York*, 544 F.2d 571 (2nd Cir. 1976), a construction lender wished to settle with lien claimants before it made additional advances. The lender was denied an injunction that would have prohibited the insurer from raising the voluntary settlement defense if it paid off the liens. See §2.14 for a complete discussion of the voluntary settlement provision.

[165] In *National Loan Investors, L.P. v. Chicago Title Ins. Co.*, 1999 WL 195819 (Conn.Super.) (unpublished), the lender claimed that the insurer had a duty to pay or bond off a construction lien rather than litigate over priority for seven years, during which time back taxes and other liens stacked up. The court refused to find such a duty, saying: "[t]he court agrees with the defendant that it did not have any contractual obligation under section 3(c) of its policy to settle the case or bond off the lien. It had a clear and unambiguous obligation to defend the claim of a superior lien by McDonald-Sharpe. This lien, as noted previously, was ultimately discharged and priority of title upheld in the defendant's insured." The court also relied on the final determination clause. See §3.4.6 for a complete discussion of the insurer's right to clear title for a lender.

[166] 661 So.2d 1234 (Fla.App. 3 Dist. 1995).

to the undisclosed second mortgage.[167]

3.2.4.1 Loan Policy Loss Equation

An insured lender's loss due to a covered lien that is superior to the insured lien, or another covered title defect or encumbrance, is equal to the amount by which the covered matter reduces its security to less than the loan amount.[168] The value of all of the collateral held by the lender as security is combined to determine if the lender is fully secured, even after considering the reduction in value due to the covered lien or encumbrance.[169] The lender's loss may not exceed the least of the policy amount, the insured's loan balance, the value of the insured parcel or the cost to remove the covered lien or encumbrance.[170] An important factor in determining the property's value is the date on which the real estate is valued. See §3.2.4.2 regarding the date on which loss is measured under a loan policy.

When the claim involves a senior lien in an amount greater than the property's value, the insured lender loses all of its security in the property. Its loss is usually the least of the insured's indebtedness, the value of the real estate, or the cost to obtain a release of the prior lien.[171] See

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[167] Id. at 1236.

[168] *National Title Ins. Co. v. Safeco Title Ins. Co.*, 661 So.2d 1234, 1236 (Fla.App.3 Dist. 1995); 60 A.L.R.2d 972. In *First American Bank v. First American Transp. Title Ins. Co.*, 759 F.3d 427 (5th Cir. (La.) 2014), the court held that the "policy provides for indemnity 'only to the extent that [the insured's] security is impaired and to the extent of the resulting loss that it sustains.' It does not 'guarantee either that the mortgaged premises are worth the amount of the mortgage or that the mortgage debt will be paid.'" In *Levi v. Commonwealth Land Title Ins. Co.*, 2011 WL 4542904 (S.D.N.Y.) (unpublished), the court found that the insured would have been fully secured if the insured mortgage had been valid, and thus had established a loss in the full amount of the loan. In *First Tennessee Bank, N.A. v. Lawyers Title Ins. Corp.*, 282 F.R.D. 423 (N.D.Ill. 2012), the court held that loss under an ALTA Residential Limited Liability Junior Loan policy is limited to the amount, if any, by which the lender's security interest in the property is reduced due to an undisclosed senior lien. In *First American Title Ins. Co. v. Patriot Bank*, 2015 WL 2228549 (Tex.App.-Houston 2015) (unpublished), the court held that, because a title insurer is not a guarantor of the loan, the loss payable due to total failure of title was not the loan amount but the value of the land, up to policy limits. See also *Southwest Title Ins. Co. v. Northland Bldg. Corp.*, 552 S.W.2d 425 (Tex. 1977), which held that "the payment of the note is not insured. The insurer underwrites only against loss due to a defect in the security."

[169] For example, see the formulae used by the courts in *Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co.* 135 Wis.2d 324, 400 N.W.2d 287 (App. 1986), rev'd and rem. 144 Wis.2d 68, 423 N.W.2d 521 (1988), in which the lender held as collateral both real and personal property, securing a farm loan.

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

[171] In *First Community Bank v. Commonwealth Land Title Ins. Co.*, ___ F.Supp.3d ___, 2014 WL 4720153 (M.D.La. 2014) (permanent citation not yet available), the insured lender had been insured as having a first lien but there was an unexcepted first lien and the senior debt was for than the property's value. The senior's lender foreclosure extinguished the insured lien. The court held that loss was the least of the insured's debt, the property's value or policy limits. In *First American Title Ins. Co. v. Patriot Bank*, 2015 WL 2228549 (Tex.App.-Houston 2015) (unpublished), the court held that, because a title insurer is not a guarantor of the loan, the loss payable due to total failure of title was not the loan amount but the value of the land, up to policy limits. Also, 12 Couch on Insurance § 185.88 (3d. ed.1995) says that "if the value of the mortgaged property is less than the amount due on the mortgage, it has generally been held or recognized that the mortgagee can recover only the value of the property, not the amount due on the mortgage."

limits or the amount of the prior lien.

Example 6—No loss on loan secured by several parcels. Assume that the insured mortgage encumbers three parcels, each of them worth $100,000; that the amount of the indebtedness secured by the mortgage is $150,000; and that one of the three parcels is encumbered by a first lien of $100,000 that is not excepted in the policy. The insured has no security in the parcel subject to the first lien for which it has coverage. However, it has no loss, because the remaining two parcels have a combined value of more than the amount of the indebtedness, so that the loan will be repaid in full on the sale of the other collateral.

3.2.4.2 Loan Policy Date Of Loss

The loan policy does not expressly state the date on which loss is to be measured. The rationale adopted by most courts as to the proper date of loss under an owner's policy does not apply in the same way to a loan policy. One early case measured loss under a loan policy as of the date on which the insured lender discovered the title defect, treating a loan policy as operating under the same principles that apply to an owner's policy.[185] However, as a number of courts have stated, an owner suffers an "immediate" loss when the insured discovers a defect in title, whereas a lender does not suffer a loss due to a title defect until it loses its loan collateral or becomes the owner of the property. See the full discussion of this distinction between the two types of policies at §3.2.4. Because of this difference in the nature of the two forms of policy, modern decisions acknowledge that the date of loss is different under the owner's policy and the loan policy, and that the date of discovery is not appropriate for a loan policy because the lender does not suffer a loss on that date.[186]

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

[186] *Associated Bank, N.A. v. Stewart Title Guar. Co.*, 881 F.Supp.2d 1058 (D.Minn. 2012) stated that "the majority of courts considering the issue have held that such loss cannot be measured until the note has not been repaid and the security for the mortgage is shown to be inadequate," and cited *Falmouth Nat'l Bank v. Ticor Title Ins. Co.*, 920 F.2d 1058 (1st Cir.1990). The courts reached the same conclusion in *Marble Bank v. Commonwealth Land Title Ins. Co.*, 914 F.Supp. 1252 (E.D.N.C.1996); and *Blackhawk Prod. Credit Ass'n v. Chicago Title Ins. Co.*, 144 Wis.2d 68, 423 N.W.2d 521, 525 (1988); and *Demopoulos v. Title Ins. Co.*, 61 N.M. 254, 298 P.2d 938, 939 (1956). The difference between the two types of policies has been acknowledged by almost all courts. See *Wedgewood Square Center Ltd. Ptnshp. v. Lincoln Land Title Co., Inc.*, 347 S.W.3d 582 (Mo.App. S.D. 2011) (acknowledging that loss is measured differently under the two types of policies); *Equity Income Partners LP v. Chicago Title Ins. Co.*, 2012 WL 3871505 (D.Ariz.) (unpublished) (date of discovery rule appropriate for owner's policies; date of policy used as date of loss on loan policies). In *First Internet Bank of Indiana v. Lawyers Title Ins. Corp.*, 2009 WL 2092782 (S.D.Ind.) (unpublished), the insured argued, based on *Overholtzer*, that loss should be measured on date of discovery for both owner's and loan policies. The court relied on *Karl* to find that loss under a loan policy is measured on the date on which the insured loses its security: "[t]he better reasoned cases have instead determined loss in a lender's title insurance policy at the date of foreclosure. Using an earlier date would necessarily require speculation and estimation about the value of the property before it is even certain whether the lender will suffer a loss, while the date of foreclosure provides a value and loss amount based on a real transaction. This rule to use the date of foreclosure does not systematically favor the insurer or the lender. Market conditions determine which party benefits from the date-of-foreclosure rule. This court predicts that Indiana would follow the consensus view that the loss in a title insurance policy for a mortgage holder is determined at the date of foreclosure." *Id.* at *6. The reasoning of *First Internet Bank* was adopted in *First American Bank v. First American Transp. Title Ins. Co.*, 759 F.3d 427 (5th Cir. (La.) 2014). That court explained that measuring loss on the date of the foreclosure of a senior lien that extinguishes the insured lien "is appropriate because the foreclosure is when the insured actually incurs a covered loss." In *Associated Bank, N.A. v. Stewart Title Guar. Co.*, 881 F.Supp.2d 1058 (D.Minn. 2012), likewise, the

Thus, although the jurisdictions are not unanimous as to the date of loss under a loan policy, there is a very strong consensus amongst the modern decisions that the date of loss is one of two dates, depending on the circumstances. Loss is measured either on the date on which the lender takes title to the property, or the date on which the insured mortgage is extinguished by a covered event, such as the foreclosure of a superior lien for which there is policy coverage. Conversely, if the insured elects to release the insured lien or allows it to be extinguished due to an event that is not covered, the policy terminates and no loss is payable, rendering moot the issue of the loss date.

Most covered title issues concern defects in or encumbrances on title. A lender does not suffer a loss due to such an issue unless and until it takes title to the property, because only when it takes title to the real estate collateral does the value of the real estate affect the lender's ability to get back the amount of its loan. Thus, when the insured forecloses the insured mortgage and takes title, most courts hold that loss payable to the insured is measured based on the covered matter's effect on the value of the property as of that date.[187] The seminal modern decision of *Karl v. Commonwealth Land Title Ins. Co.*[188] so held:

> At [foreclosure sale], the lender's note is extinguished and replaced by assets recovered on foreclosure: either cash as paid by a third party bidder or the realty as bought in by the foreclosing lender. It is now possible to measure the value of the recovery by the lender, and we believe the loss which is insured by the title policy should be recognized as of that time.
>
> ...The "fair market value as of foreclosure" approach also eliminates other concerns raised by the plaintiffs which otherwise are inherent in a delayed determination of loss. For example, following foreclosure lenders may invest cash or their own time and effort in renovation of the property. An increase in market value as a result of such contribution should not redound to the benefit of the insurer. Similarly, a lender's expertise in marketing which results in a sale at higher than market value should not profit the insurer [citation omitted]. Finally, it seems unfair to measure

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court held that, because a lender does not know it will ever suffer a loss due to a covered matter, loss cannot be measured or paid until the adverse, covered lien is enforced by foreclosure.

[187] *First American Bank v. First American Transp. Title Ins. Co.*, 759 F.3d 427 (5th Cir. (La.) 2014); *Associated Bank, N.A. v. Stewart Title Guar. Co.*, 881 F.Supp.2d 1058 (D.Minn. 2012); *Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co.*, 144 Wis.2d 68, 423 N.W.2d 521 (1988); *Trico Manufacturing Co., Inc. v. Penn Title Ins. Co.*, 657 A.2d 890 (N.J. Super. 1995); *First Commerce Realty Investors v. Peninsular Title Ins. Co.*, 355 So.2d 510 (Fla.App. 1978); *Palliser v. Title Ins. Co. of New York*, 61 Misc. 490, 115 N.Y.S. 545 (Sup. Ct. 1908); *Emigrant Mortgage Co., Inc. v. Washington Title Ins. Co.*, 78 A.D.3d 1112, 913 N.Y.S.2d 251 (N.Y.A.D. 2 Dept. 2010); *Grunberger v. Iseson*, 75 App.Div.2d 329, 429 N.Y.S.2d 209 (1980); *Stewart Title Ins. Co. v. Credit Suisse*, 2013 WL 4710264 (D.Idaho) (unpublished); and *Marble Bank v. Commonwealth Land Title Ins. Co.*, 914 F.Supp. 1252 (E.D.N.C. 1996) (citing *Karl* and adopting date of foreclosure because "[o]nly the completion of foreclosure signifies that a lender will not collect on its note"). The *Karl* and *Cale* decisions are discussed in Carollo, *Do Title Insurance Policies Protect Lenders?*, Real Estate Review, Summer, 1995, p. 57.

[188] 20 Cal.App. 4th 972, 24 Cal.Rptr.2d 912 (Cal.App. 4 Dist. 1993).

> damage by a market sale which may occur at a time distant from the date of foreclosure, during which period inflation or deflation may have altered the value of the property.[189]

Similarly, if the insured lender takes a deed in lieu of foreclosure, most states value the property as of the date of the delivery of that deed.[190] Conversely, when the insured elects not to foreclose on the insured deed of trust after the borrower defaults, the insurer may properly respond that the amount of the loss will not be fixed unless and until the insured forecloses and comes into title.[191] Similarly, no loss is payable due to a covered title risk if the validity and priority of the insured mortgage have not been challenged and the borrower has not yet defaulted. See §3.2.4 for a complete discussion of the borrower's default as a predicate to loss under a loan policy.

In other cases, the title issue concerns the priority of the insured mortgage versus a competing lien or property interest, or something that renders the insured mortgage invalid. In such cases, the threat posed to the insured is that the insured mortgage may be extinguished by the foreclosure of the competing, covered lien or other action. When the insured mortgage is extinguished, which is typically by a court order, due to an issue for which the policy provides coverage, most courts have held that the date of loss is the day on which the insured mortgage is extinguished.[192]

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[189] *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal.App. 4th 972, 984, 24 Cal.Rptr.2d 912, 920 (Cal.App. 4 Dist. 1993). The *Karl* court recognized that *Cale v. Transamerica Title Ins. Co.*, 225 Cal.App.3d 422, 275 Cal.Rptr. 107 (1990), had adopted a seemingly inconsistent position, and the court adopted the reasoning of the dissent in *Cale* rather than the majority position. The *Karl* case was remanded and refined on appeal. In *Karl v. Commonwealth Land Title Ins. Co.*, 60 Cal.App.4th 858, 70 Cal.Rptr.2d 374 (Cal.App. 4 Dist. 1997), the court rejected the insured's argument that fair market value should be reduced by the costs of resale to thus measure the insured's actual net recovery after resale. In *U.S. Bank, N.A. v. First American Title Ins. Co.*, 2012 WL 1080876 (M.D.Fla.) (unpublished), the court used the appraised value of the property at about the time of the senior lender's sheriff's sale and, because the borrower had attempted to conduct a short sale, the court also subtracted 7.4% as the costs of sale.

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

[191] In *Stewart Title Ins. Co. v. Credit Suisse*, 2013 WL 4710264 (D.Idaho) (unpublished), the insurer defended the insured lender against construction liens. That litigation was resolved, but the insured kept putting off the sheriff's sale on its foreclosure. The court held that loss could not be determined until there was a final determination in the form of a foreclosure sale. In *Wedgewood Square Center Ltd. Ptnshp. v. Lincoln Land Title Co., Inc.*, 347 S.W.3d 582 (Mo.App. S.D. 2011), the policy failed to except a lien senior to the insured deed of trust. Because the insured lender had not foreclosed, the insurer responded that no loss would be suffered or calculable until it did so. The insured then settled with the borrower by accepting a compromise amount that "was supposedly the last dollars he had," and released its deed of trust. The court determined that the insured had not proven that it suffered a loss due to the unexcepted prior deed of trust.

[192] *Chrysler Financial Services Corp. of America v. Chicago Title Ins. Co.*, 641 N.Y.S.2d 13, 14 (A.D. 1st Dept. 1996) (adopting date of foreclosure sale and allowing interest on amount payable to accrue from that date). Footnote 11 of the *Karl* decision anticipated this type of claim, and said that "our opinion in this case should not be construed as imposing upon the insured lender, who discovers a prior undisclosed lien, the unconditional obligation of curing the lien and then foreclosing, in order to cause maturation of the title company's liability." 20 Cal.App. 4th 972, 984, 24 Cal.Rptr.2d 912, 919 (Cal.App. 4 Dist. 1993). See also, *First Tennessee Bank, N.A. v. Lawyers Title Ins. Corp.*, 282 F.R.D. 423 (N.D.Ill. 2012) (loss "caused by a surprise, more-senior lien can be measured only after the foreclosure sale of the secured property" because "[o]nly then can the parties know whether the seniority of the lien actually caused a

Notwithstanding the numerous decisions that have developed the above rules in many jurisdictions, several courts have held that loss under a loan policy is to be measured on the date of policy.[193] The usual rationale for this interpretation is that the policy date is the proper loss date in a claim in which the insured mortgage was invalid when granted. The insured mortgage cannot be foreclosed if it is void or invalid. However, in many cases, the insurer is able to cure the claimed infirmity in the insured mortgage, either by litigation or otherwise. The insurer's right to clear title may not be abridged, and no loss is payable to the insured lender if the insurer delivers either title or a valid and enforceable mortgage to the insured.[194] When the insured mortgage is invalid, the insurer often takes action to clear title or to establish the lien of the mortgage as insured. In such cases, the policy provides that no loss is payable until there has been a final determination adverse to the insured (and that no loss is payable if the insurer succeeds). See §3.4.5 regarding the final determination clause, and §3.4.6, discussing the clearing of title for an insured lender.

Unfortunately, however, the policy date has been adopted as the loan policy loss date in several cases even when there was no defect in the insured mortgage.[195] Those courts have admitted

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loss."). In *U.S. Bank, N.A. v. First American Title Ins. Co.*, 2012 WL 1080876 (M.D.Fla.) (unpublished), the insured deed of trust was extinguished by the foreclosure of a senior deed of trust. The court used the appraised value of the property at about the time of the sheriff's sale to value the property. However, because the borrower had attempted to conduct a short sale, the court also subtracted 7.4% as the costs of sale. In *Morris v. Chelsea Title & Guaranty Co.*, 12 N.J.Misc. 428, 171 A. 819 (N.J. 1934), the court held that loss was to be measured as of the date on which a decree was entered that declared the mortgage invalid.

[193] *The Title Ins. Co. of Richmond, Inc. v. Industrial Bank of Richmond, Inc.*, 156 Va. 322, 157 S.E. 710 (1931), the Virginia Supreme Court held that loss under a loan policy is measured on the date of policy. *Citicorp Svgs. of Illinois v. Stewart Title Guar. Co.*, 840 F.2d 526 (7th Cir.1988), used date of policy on the premise that the insured mortgage was void at inception, even though the mortgage was replaced by an equitable lien that the lender foreclosed in order to take title. *Citicorp* has since been rejected by a number of other courts. However, in each of those decisions, the insurer admittedly took action to establish title as insured, or to impose an equitable lien on behalf of the insured lender. See the discussion of those cases at §3.4.6.2. This rule applies even where an insured mortgage has been wholly invalidated, because "[i]f the plaintiff had received a valid mortgage and foreclosed it, all he would have been able to realize would have been the value of the property." *Demopoulos v. Title Ins. Co.*, 61 N.M. 254, 298 P.2d 938, 939 (1956).

[194] See §3.4.6 concerning the clearing of title for a lender, §3.4.6.1 regarding the insurer's right to tender title to the insured lender in lieu of establishing the validity of the insured mortgage, and §3.4.6.2 concerning the insurer's right to establish an equitable lien as a means of clearing title. Also, see §3.4.7.3 concerning the doctrine of equitable subrogation, which is frequently used to establish an equitable lien in favor of the insured with priority over competing liens. In *G&B Investments, Inc. v. Henderson (In re Evans)*, 460 B.R. 848, 899 (Bankr.S.D.Miss. 2011), the insured mortgage was invalid and the title insurer was found not to have attempted to cure its invalidity. The court used the date of the loan as the loss date, relying on *Citicorp Svgs. of Illinois v. Stewart Title Guar. Co.*, 840 F.2d 526 (7th Cir.1988), which used date of policy because the insured mortgage was void at inception.

[195] In *Equity Income Partners LP v. Chicago Title Ins. Co.*, 2012 WL 3871505 (D.Ariz.) (unpublished), the court held that loss was to be measured on the date the loan was made, because according to the court that is when the lender suffered its loss. It cited *Citicorp* as its authority for selecting that loss date. However, in *Equity Income*, the court's reliance on *Citicorp* was misplaced, because the insured deed of trust was not defective. The lender conducted a successful trustee's sale and took title to the property. The claim issue was access, not the validity of the insured lien. The *Equity Income* court also relied on *G&B Investments*, 460 B.R. 848 (Bankr. S.D. Miss. 2011), which skipped the pretext of *Citicorp* and flatly held that "[a]llowing the insurer to wait to value the [insured interest] in a falling real estate market

that they adopted the policy date simply because the real estate was worth more at that time than when the lender took title to it. This use of the policy date as the loss date when the insured mortgage was not defective when granted has since been rejected, because it has the effect of causing the insurer to pay the insured for a decline in market value, which is not a loss caused by defective title.[196] One court explained:

> Having reviewed the arguments of the parties and the relevant case law, and construing those in favor of the insured, the Court finds that the loss to a lender under a title insurance policy is determined at the date of foreclosure. This is the majority approach to valuing the lender's loss. See Joyce D. Palomar, 1 *Title Insurance Law* § 10:16, *Paying the insured's loss—Date value is to be measured* (2014–2015 ed.). The risk allocation discussion supporting this view is applicable in this case because the Policy provides indemnity only to the extent a loss suffered by Credit resulting from a title defect thereby compromising its security interest in the Property. The title insurance policy does not place the risk of a decreasing real estate market upon the insurer. The Policy does not guarantee that the Property was worth the amount of the loan used to purchase it nor that the loan will be repaid. Based on the reasoning in these cases, the Court concludes that the proper valuation date is as of the date the

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works to the insurer's benefit, a result that does not construe an ambiguity in the policy in favor of the insured." An Arizona appeals court adopted the reasoning of *Equity Income* in setting the policy date as the loan policy loss date, in *First American Title Ins. Co. v. Johnson Bank*, 353 P.3d 370, 237 Ariz. 490 (Ariz.App. 1 Div. 2015), rev. granted (Jan. 5, 2016). In *Johnson Bank*, as in *Equity Income*, the insured deed of trust was not defective; the claim concerned a use restriction. The Arizona Supreme Court accepted review of the *Johnson Bank* decision, which was pending as of the publication date. Of course, the same rule concerning the date of loss should be applied both when property is depreciating and appreciating. An earlier loss date hurts the insured when property is increasing in value. In *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 732 S.E.2d 626 (S.C. 2012), the South Carolina Supreme Court held that loss under an owner's policy is measured as of the date of policy, which ruling may also apply to loan policies. See §3.2.3.4 for a complete discussion of the date of loss under an owner's policy. In *Bank of Sacramento v. Stewart Title Guar. Co.*, 2011 WL 6396533 (9th Cir. (Cal.)) (unpublished), vacating 2010 WL 3784096 (E.D.Cal.), the Ninth Circuit vacated a district court ruling that definitively stated that a bank may not collect as loss the depreciation in the property's value during the time in which the insurer is clearing title. However, the appeals court held only that the bank "has alleged legally cognizable damages caused by the claimed breach in the form of increased carrying costs for any additional time title was unmarketable due to the alleged lack of reasonable diligence." It said it did "not reach the validity of any of the other damages theories asserted by the Bank." The decision is unpublished. Decisions on owner's policies that have addressed the question of whether or not depreciation in the value of the land can be claimed as loss under the policy are discussed at §3.2.3.4 and §3.4.9.5.

[196] *Premier Community Bank v. First American Title Ins. Co.*, ___ F.Supp.3d ___, 2015 WL 3949327 (W.D.Wash. 2015) (permanent citation not yet available); *Commonwealth Land Title Ins. Co. v. Sun Valley Credit, LLC*, 2015 WL 807055 (unpublished). In *Premier Community Bank*, the insurer obtained an equitable lien on the property and converted it to title, which it tendered to the lender insured. The lender demanded to be paid the amount by which the property had declined in value from the policy date to the day on which title was tendered to it. The court rejected that claim, and found that the insurer owed no money to the lender for the decline in value. It rejected the *Citicorp* analysis, because *Citicorp* had ignored the insurer's right to tender title to the insured in full satisfaction of its policy duties. See §3.4.6.1 for a complete discussion of that principle.

loss is realized by the insured—the date of the foreclosure sale.[197]

The above quote is merely a restatement of long-established twin principles. First, a title insurance policy does not insure that the property now has or ever had any particular value.[198] Second, the insurer does not indemnify the insured lender against depreciation in the land value that is not caused by a title defect.[199] When a property's value increases, the insured receives a benefit from the fact that loss is measured as of a date well past the policy date, because that appreciation increases the amount by which a title defects reduces the land value.

Most courts have held that the policy is not ambiguous due to the lack of an express statement as to the date on which loss is measured.[200] However, several courts have found that the lack of a policy term creates an ambiguity in the policy, because that lack of a provision is what has allowed the courts to split in interpreting the policy.[201] Nonetheless, even some of those courts have

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[197] *Commonwealth Land Title Ins. Co. v. Sun Valley Credit, LLC*, 2015 WL 807055, *8 (unpublished).

[198] "A title policy is a contract of indemnity, not of guaranty, and provides reimbursement for actual loss only. A title insurance policy provides for indemnity only to the extent that [the insured's] security is impaired and to the extent of the resulting loss that it sustains." *Gibraltar Sav. v. Commonwealth Land Title Ins. Co.*, 905 F.2d 1203, 1205 (8th Cir.1990) (quotation marks and citations omitted). A title insurance policy "does not guarantee either that the mortgaged premises are worth the amount of the mortgage, or that the mortgage debt will be repaid." *Blackhawk Prod. Credit Ass'n v. Chicago Title Ins. Co.*, 144 Wis.2d 68, 423 N.W.2d 521 (1988) (the "insurable value of a mortgage on real estate is the fair market value of the realty which secures the mortgage, and is not controlled by the original purchase-price of the mortgage"); *Associated Bank, N.A. v. Stewart Title Guar. Co.*, 881 F.Supp.2d 1058 (D.Minn. 2012); *Atlanta Title & Trust Co. v. Allied Mortg. Co.*, 64 Ga.App. 38, 12 S.E.2d 147 (1941).

[199] In *U.S. Bank, N.A. v. Ticor Title Ins. Co.*, 2012 WL 2362456 (Mich.App.) (unpublished), the court rejected the insured's argument that, in order to indemnify the insured for title "as insured," the insurer must pay the insured policy limits, although the property had declined in value since the policy date. It said: "Ticor insures against defects, liens, and encumbrances; it does not insure against changes in valuation due to market fluctuations. We find that the trial court erred in simply awarding the amount of insurance to plaintiff." The court rejected the insured's claim for depreciation in value of the property in *First Federal Savings Bank v. Stewart Title Guar. Co.*, 451 S.E.2d 916 (S.C.App. 1994), in which the insurer cleared title. In *Yesilevich v. Republic Title Co.*, 2011 WL 10068810 (Ill.App. 1 Dist.) (unpublished), the court held that "[a] title insurance policy is unaffected by a change in the property's value, such as depreciation or appreciation." Likewise, in *First American Bank v. First American Transp. Title Ins. Co.*, 759 F.3d 427 (5th Cir. (La.) 2014), the court rejected the insured's attempts to value its loan collateral based on old and suspect appraisals rather than actual sale prices after foreclosure. The court also rejected the insured's argument that the earlier appraisal date should be used because the insurer delayed foreclosure by defending against the adverse lien claims.

[200] See, for example, *First Internet Bank of Indiana v. Lawyers Title Ins. Corp.*, 2009 WL 2092782 (S.D.Ind.) (unpublished); *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal.App. 4th 972, 24 Cal.Rptr.2d 912 (Cal.App. 4 Dist. 1993); and *First American Bank v. First Am. Transp. Title Ins. Co.*, 759 F.3d 427 (5th Cir. 2014).

[201] In *Equity Income Partners LP v. Chicago Title Ins. Co.*, 2012 WL 3871505 (D.Ariz.) (unpublished), the court held that the lack of a policy loss date provision rendered the policy ambiguous, and accepted the insured's contention that loss should be measured as of the policy date rather than the date on which the insured took title through foreclosure or had its lien extinguished. In in *First American Title Ins. Co. v. Johnson Bank*, 353 P.3d 370, 237 Ariz. 490 (Ariz.App. 1 Div. 2015), rev. granted (Jan. 5, 2016), the court adopted the reasoning of *Equity Income*, and its holding that the policy was rendered ambiguous due to the lack of a date of loss provision. In *Commonwealth Land Title Ins. Co. v. Sun Valley*

held that the majority view is the more rational of the two.[202]

3.2.4.3 Valuing The Property

Once the loss date is determined, the property's value may be established by one of several methods. Several courts have accepted the foreclosure sale price as establishing the value of the property.[203] However, a credit bid by the lender is not a very accurate test of value, especially when the lender is the only bidder. Thus, the majority view is that a bid by a third party at the foreclosure sale establishes fair market value, while a bid by the lender of its own debt does not.[204] Some courts have used the price at which the lender resold the property as the best evidence of its value, although such sales are often at distressed prices.[205]

When the lender makes a credit bid, the value may be established by an appraisal[206] or a stipulation between the insured and the senior mortgagee.[207] However, appraisals from the time the loan was made are inherently unreliable when they were prepared long before the foreclosure date and are based on facts that have changed or optimistic assumptions that are no longer valid.[208] See §3.2.3.7 regarding the use of appraisals for valuation of loss. Construction loans raise a special problem in establishing value, because partially built improvements are difficult to value. One method is to use the value of the property when finished, less the cost to complete.[209]

Credit, LLC, 2015 WL 807055 (unpublished), the court found that the loan policy was ambiguous because the date of loss is not defined and jurisdictions have developed two competing rules on the date of loss—date of the policy and the date on which the insured takes title through foreclosure sale. The court went on to hold that the foreclosure sale date is the more reasonable of the two rules to apply when the insured mortgage is foreclosed and the insured takes title.

[202] See *Commonwealth Land Title Ins. Co. v. Sun Valley Credit, LLC*, 2015 WL 807055 (unpublished).

[203] *Trico Manufacturing Co., Inc. v. Penn Title Ins. Co.*, 657 A.2d 890 (N.J. Super. 1995); *First Commerce Realty Investors v. Peninsular Title Ins. Co.*, 355 So.2d 510 (Fla.App. 1978); *Palliser v. Title Ins. Co. of New York*, 61 Misc. 490, 115 N.Y.S. 545 (Sup. Ct. 1908).

[204] *Marble Bank v. Commonwealth Land Title Ins. Co.*, 914 F.Supp. 1252 (E.D.N.C. 1996); *Volunteer State Life Ins. Co. v. Union Title Guarantee Co.*, 175 La. 183, 143 So. 43 (1932) (bid of $2,500 on property later resold at $12,000 and appraised at $20,000 not an accurate measure of value); *Chicago Title Ins. Co. v. The Huntington National Bank*, 719 N.E.2d 955, 87 Ohio St.3d 270 (1999) (third party bid establishes fair market value).

[205] In *Marble Bank v. Commonwealth Land Title Ins. Co.*, 914 F.Supp. 1252 (E.D.N.C. 1996), the court used the resale price even though the original asking price had been $16 million and the sale price was $7.5 million. In *First American Bank v. First American Transp. Title Ins. Co.*, 759 F.3d 427 (5th Cir. (La.) 2014), the court used resale prices. One piece of collateral was sold by the creditor and flipped on the same day at twice the value. The court used the second sale price as the best evidence of the property's value.

[206] *Chrysler First Financial Services Corp. of America v. Chicago Title Ins. Co.*, 641 N.Y.S.2d 13, 14 (A.D. 1st Dept. 1996); *Stewart Title Guar. Co. v. Treat*, 810 S.W.2d 953 (Ark. 1991) (involving partial failure of title, not a lien).

[207] *Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co.*, 144 Wis.2d 68, 423 N.W.2d 521 (1988).

[208] *First American Bank v. First American Transp. Title Ins. Co.*, 759 F.3d 427 (5th Cir. (La.) 2014).

[209] *Pennsylvania Co. for Ins. on Lives and Granting Annuities v. Central Trust & Savings Co.*, 255 Pa. 322, 99 A. 910

policy, as discussed at §9.14.6. Finally, the ALTA Expanded Coverage Residential Loan Policy is discussed at §9.14.7.

This chapter discusses the various defects, liens and adverse claims against title which are covered by the owner's and loan policies, other than construction liens, which are discussed separately in Chapter 10. For the most part, this chapter is organized by the nature of the risk rather than by coverage. Section 9.9 discusses coverages added in the 2006 ALTA policy forms. Section 9.10 discusses loan policy coverages. Section 9.11 discusses coverages added by endorsement.

9.1 Nature And Scope Of Title Insurance Policy; Rules Of Construction

This section examines the general principles on which the title insurance policy is based, and the rules used to construe its provisions.

9.1.1 Nature Of Assurances Provided

The title insurance policy indemnifies the insured against loss if the title to the insured parcel is held by someone other than the insured. It also indemnifies as to defects in or liens or encumbrances on title other than those shown in the policy schedules. Schedule B refers to those matters against which the insurer does not indemnify, both of general application (unfiled construction liens, for example) and those specific to the described property.

In addition to the indemnifications as to the title, the policy indemnifies the insured if the property is found to lack a right of access, or if title is found to be unmarketable as shown in the policy. The assurance as to marketability is closely related to, but not inseparable from, the assurances about title. The access right assurance goes beyond the subject of the title to the land. Rather, it has to do with a fundamental privilege attached to the ownership of the land.

The ALTA loan policy includes four assurances specific to the mortgage or deed of trust held by the insured: indemnity as its validity, enforceability and priority generally, and priority specifically as to unfiled construction liens.

The title insurance policy does not insure property, but the title to or ownership of that property.[4] It is possible to hold flawless title to land having no value or which is not usable, and there is no claim payable under the policy.[5] The policy also does not protect the insured against his or her own tortious conduct in obtaining title, or an action to rescind the contract under which the insured obtained title. Such situations include actions for rescission, the imposition of a constructive trust, or

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[4] "A title insurance policy does not insure the value of any particular property. In fact, it does not insure the property at all. If the value of the property appreciates or depreciates, the title policy is not affected. Instead, the defendant is insuring the title against defects which may damage the plaintiffs' interest in the property." *McLaughlin v. Attorneys' Title Guar. Fund Inc.*, 61 Ill. App.3d 911, 378 N.E. 2d 355 (1978).

[5] "An individual can hold clear title to a parcel of land, although the same parcel is valueless or considered economically unmarketable because of some restriction or regulation on its use. A title insurance policy provides protection against defects in, or liens or encumbrances on, title. Such coverage affords no protection for governmentally imposed impediments on the use of the land or for impairments in the value of the land." *Somerset Sav. Bank v. Chicago Title Ins. Co.*, 420 Mass. 422, 649 N.E.2d 1123, 1126-28 (1995); quoted with approval in *Bear Fritz Land Co. v. Kachemak Bay Title Agency*, 920 P.2d 759 (Ala. 1996).

to remove the insured from title because of the insured's own tortious conduct.[6] The subject of fraudulent or other wrongful procurement of title is fully discussed at §11.2.7.

Almost any party holding an interest in the real estate may qualify to obtain title insurance. The insured may hold a fee simple estate, a leasehold interest, land contract or contract for deed interest (either as buyer or seller), an easement, mortgage or deed of trust, or an option (in those states in which an option right is an interest in land).

The converse principle is that it is common industry practice not to issue a policy in favor of a person who does not have an interest in the real estate. Some state laws may prohibit the issuance of policies to persons not having an insurable interest in the property. See §7.1 concerning insurable interests in real estate. However, some forms of the non-imputation endorsement give an assurance to a shareholder, partner or member of the owner entity that the insurer will not assert the knowledge of a named person related to the insured as a defense to a policy claim. The assured party in such endorsements is typically an incoming owner of the entity that holds title to the real estate; thus, in such cases, the assured party is not the owner of the real estate.

9.1.2 Policy Of Indemnity, Not Guaranty

The title insurance policy is generally recognized as being a policy of indemnity as opposed to a guarantee or warranty of title.[7] The policy itself repeatedly and consistently declares that it is in the nature of an indemnification for loss.[8] A few early decisions likened the title insurance policy to a warranty of title.[9] This view, based on a construction of policies no longer in use, is inconsistent with

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[6] See, for example, *Safeco Title Ins. Co. v. Moskopoulos*, 172 Cal. Rptr. 248 (App. 1981) (no duty to defend an "otherwise impeccable" title when sole allegation affecting it was that insured obtained title by fraud on seller).

[7] This rule has been stated in, for example: *Rosen v. Nations Title Ins. Co.*, 66 Cal.Rptr.2d 714, 720 (Cal.App.2 Dist. 1997); *Contini v. Western Title Ins. Co.*, 40 Cal.App.3d 536, 115 Cal.Rptr. 257 (1974); *Golden Security Thrift & Loan Ass'n v. First American Title Ins. Co.*, 53 Cal.App.4th 250, 61 Cal.Rptr.2d 442 (Cal.App. 4 Dist. 1997); *Stewart Title Guar. Co. v. West*, 110 Md.App. 114, 676 A.2d 953 (1996); *Fohn v. Title Ins. Corp. of St. Louis*, 529 S.W.2d 1 (Mo. 1975); *Flockhart Foundry Co. v. Fidelity Union Trust Co.*, 102 N.J.L. 405, 132 A. 493 (1926); *Halfmoon Professional Offices v. American Title Ins. Co.*, 652 N.Y.S.2d 390 (A.D. 3 Dept. 1997); *Pioneer Nat'l Title Ins. Co. v. Child, Inc.*, 401 A.2d 68 (Del. 1979); *Sattler v. Philadelphia Title Ins. Co.*, 192 Pa. Super. 337, 162 A.2d 22 (1960); *Securities Service Inc. v. Transamerica Title Ins. Co.*, 20 Wash.App. 664, 583 P.2d 1217 (1978); *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997); *Tri-Legends Corp. v. Ticor Title Ins. Co.*, 889 S.W.2d 432 (Tex.App. -Houston 14th Dist. 1994); *Gibraltar Sav. v. Commonwealth Land Title Ins. Co.*, 905 F.2d 1203, 1205 (8th Cir. 1990) (Minnesota); *Diversified Mortgage Investors v. U.S. Life Title Ins. Co. of N.Y.*, 544 F.2d 571, 574 n. 2 (2nd Cir. 1976); *Goode v. Federal Title and Ins. Corp.*, 162 So.2d 269 (Fla. App.1964) (quoting Annotation, Measure, extent, or amount of recovery on policy of title insurance, 60 A.L.R.2d 972, 975-76); and *Grunberger v. Iseson*, 75 A.D.2d 329, 331, 429 N.Y.S.2d 209, 210 (1980).

[8] The 2006 ALTA policies begin with the statement that the insurer "insures, as of Date of Policy ... against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of" the enumerated Covered Risks. Those Covered Risks are not guarantees, but statements of the conditions under which the duty to indemnify will arise, which is why they are phrased in the negative. Conditions 8 of the 2006 ALTA policies (Conditions & Stipulations 7 of the 1992 ALTA policies), which explains how loss is calculated, begins with this statement: "This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy."

9.12 Scope Of Policy Definition Of "Public Records" And Recorded Instruments That Do Not Affect Title

The ALTA policies contain a definition of "public records."[416] Some covered risks refer to public records as defined in the policy, while others do not. Most covered risks, however, indemnify only against matters that affect the title to the land.[417] Certain classes of recorded instruments do not invoke any Covered Risk because they do not affect or encumber title.

The claim administrator must carefully consider whether or not an instrument bearing recording data is actually a defect in, lien or encumbrance on title, or affects the marketability of, title to the insured property, or affects or limits its right of access.

When the policy does not make exception for an instrument in the real estate records, and it appears that the instrument may or does not invoke a Covered Risk, the claim administrator will often obtain further information from underwriting personnel for that state to determine if there is a statute or decision that declares whether or not the instrument invokes a Covered Risk. If not, the appropriate response to a claim asserting the lack of an exception for the instrument is to advise the insured that no Covered Risk is invoked, and giving the authority for that statement, such as a court decision or statute.

Conversely, the policy will sometimes make exception for an instrument that does not affect title or otherwise invoke a Covered Risk. Sometimes, even when the insurer is satisfied that a class of instruments does not affect title, underwriting personnel issue standards informing title examiners to make exception for the instruments in order to avoid a claim that the policy indemnifies against the effect or subject of the instrument.

Even if it is customary in the jurisdiction to insert exceptions for such matters, no Covered Risk is invoked, and there is no loss payable, when the policy does not except a recorded instrument that does not constitute a lien or encumbrance on title.[418] See §9.6 for a discussion of cases holding that particular matters are or are not encumbrances on title. See §9.4 regarding taxes, including the lack of coverage when the policy does not make exception for the fact that the property lies in a special taxing district. Further, recorded instruments that concern the physical condition of the property do not encumber its title, as discussed at §9.8.3.

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[416] The 2006 ALTA Owner's policy defines "Public Records" as "Records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge. With respect to Covered Risk 5(d), 'Public Records' shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located."

[417] The 2006 ALTA policies also define "Title," although that definition is somewhat limited, referring only to "[t]he estate or interest described in Schedule A."

[418] *Luboff v. Security Title & Guar. Co.*, 46 Misc. 2d 599, 260 N.Y.S.2d 279 (Sup.Ct. 1965) (no policy coverage as to developer agreement that was not a defect, lien or encumbrance); *Sala v. Security Title Ins. & Guarantee Co.*, 27 Cal.App.2d 693, 81 P.2d 578 (Cal.App. 2 Dist. 1938); (no policy coverage as to lis pendens excepted, then removed as cloud on title); *Peterson v. Title & Trust Co. of Fla.*, 431 So.2d 311 (Fla.App. 1983) (no coverage as to applicability of restrictions not shown); *Laurence v. Kruckmeyer*, 124 Ariz. 488, 605 P.2d 466 (Ariz.App. 1979) (no coverage concerning statement that easement affected parcels it did not affect); *Commonwealth Land Title Ins. Co. v. Graoch Associates No. 73*, 2210 WL 1257748 (E.D.Ky. March 26, 2010) (unpublished) (possible future assessments not encumbrances because they "will not affect passing of title").

Some other instruments relate to governmental regulation of the property's use, such as building code ordinances or zoning ordinances. These classes of instruments often fall under an exclusion. See §11.1.1 regarding the exclusion for building code ordinances and §11.1.2 about the zoning exclusion. Some policies contain limited indemnification against recoded notices of violation or enforcement of such laws or ordinances, however. The claim administrator must determine if the recorded instrument is such a notice, and if a policy coverage is invoked. See §§3.2.3.1.9 and 3.2.3.1.10 concerning the handling of claims about the notice-of-enforcement Covered Risks, and §§9.9.1, 9.14.1 and 9.14.2 for a complete discussion of the Covered Risks.

Of the many classes of instruments that are recorded but that do not constitute liens or encumbrances on title, several decisions are representative. A recorded covenant giving notice of prior disposal of waste on property and advising that future owners will be responsible for the cost of any further clean-up was found not to be an encumbrance on title because it did not limit the transfer of the property.[419] Also, the court found that there was no covered loss due to a recorded notice of a person's claim to part of the proceeds from the sale of land:

> Put simply, the agreement here is not a title defect because it does not affect title. The agreement merely gives Herman Klickman a lien on one-third of the *proceeds* derived from a sale of the property in question. It does not give Herman Klickman any interest in the property, nor does it give him the right to disturb the buyers in their possession of the property. In short, the buyers could not possibly be affected by the terms of the agreement.[420]

Likewise, a covenant not to convey or encumber the property was not a lien against its title, and the insurer did not owe a duty to the lender that held the covenant to insist that the debt be paid at the time the property was transferred.[421] The appointment of a building administrator to collect rent and cure building code violations was not a defect in or lien or encumbrance on title, although a lis pendens had been recorded for the action to appoint the administrator.[422] A setback requirement imposed by a municipality on a lot in a subdivision, created in connection with a zoning variance, was found to be an excluded zoning matter, and not an "easement" under Covered Risk 2. The zoning exclusion thus applied, with the court ruling:

> The 45-foot setback was created by a resolution of a board of adjustment and was indicated on a subdivision plan that was never recorded or required to be recorded. Because this claim or loss arises out of the exercise of the policy power..., the

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[419] *Pavilion Park, LLC v. First American Title Ins. Co.*, 2011 WL 43222 (W.D.Ky.) (unpublished), which relied on *Commonwealth Land Title Ins. Co. v. Graoch Associates No. 73*, 2010 WL 1257748 (E.D.Ky.) (unpublished).

[420] *Klickman v. Title Guar. Co. of Lewis County*, 105 Wash.2d 526, 528-9, 716 P.2d 840 (1986).

[421] *Titan Management, L.P. v. First American Title Ins. Co.*, 2006 WL 3732995 (N.J.Super.A.D.) (unpublished).

[422] *Zev Cohen, LLC v. Fidelity Nat'l Title Ins. Co.*, 15 Misc.3d 798, 831 N.Y.S.2d 689 (N.Y.Sup. 2007).

In *Lick Mill Creek Apartments v. Chicago Title Ins. Co.*,[60] an endorsement issued to a lender was found to insure the lender only that its lien had priority over any lien for environmental clean-up expense. The lender had come into title after foreclosure, and then received notice of the state's intent to clean up the property. The lender sued for payment of the cleanup expense. The court held that no lien had been filed, and thus the coverage of the endorsement could not have been triggered. It also rejected an argument, couched in terms of public policy, that the endorsement should be read broadly to assist in the statute's stated purpose of ensuring immediate response to pollution.

Because the mere presence of hazardous material is not considered to be a defect in title under the policy, the *Lick Mill* court specifically held that it was not necessary to determine whether or not Exclusion 1(a) of the 1970 form ALTA policy applied. It ruled that the insured had no reasonable expectation of coverage against environmental cleanup charges based on the fact that it obtained a 1970 form policy and two 1987 form policies in the same transaction, containing different exclusions.

No decision has been issued that interprets the "environmental protection" assurance found in Covered Risk 5 of the 2006 ALTA policies.[61]

11.1.5 Police Power And Eminent Domain

FORM 33, Appendix A
Police power exclusion

FORM 72, Appendix A
Police power--denial of permit

Exclusions 1(b) and 2 of the 2006 ALTA policies negate coverage for "any governmental police power" and "rights of eminent domain." The police power exclusion, 1(b), states that it "does not modify or limit the coverage provided under Covered Risk 6." The eminent domain exclusion, 2,

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Title Guar. Co., 688 F.Supp. 803 (D.Mass. 1988). See also *Holly Hill Holdings v. Lowman*, 30 Conn.App. 204, 619 A.2d 853 (Conn.App. 1993), also finding that hazardous waste does not render title unmarketable, but in the context of a suit between buyer and seller. See also, Gosfield, *Environmental Contamination and Title Conveyance*, 25 Real Estate Review 55, No. 2, Summer, 1994.

[60] 231 Cal.App.3d 1654, 283 Cal.Rptr. 231 (Cal.App. 6 Dist. 1991).

[61] A New Jersey case concerned a recorded notice that fill (not contaminated property) had improperly been dumped on protected wetlands. The New Jersey Department of Environmental Protection recorded the notice of violation with the Somerset County Clerk. The First American policy did not except the recorded notice of violation. The notice was not discovered in the title search because it "did not name the property owner, and was not attached to or noted on the deed to the property..." The NJDEP sued the insured, an operator and the former owners to require them to restore the wetlands. The sellers and operator jointly agreed to do so, an estimated cost of $2.3 million. First American was sued for policy limits of $300,000. The trial court held that the notice of violation was a "public record." First American appealed certain issues, but voluntarily dismissed its appeal about that ruling. Thus, the appeals court did not rule on the scope of the covered risk or the exclusion. *New Jersey Dep't of Environmental Protection v. DiFlorio*, 2007 WL 4553046 (N.J.Super.A.D.) (unpublished).

Exclusion 2 is for "[r]ights of eminent domain," with the important caveat that the exclusion "does not modify or limit the coverage provided under Covered Risk 7 or 8." The eminent domain exclusion negates coverage for a taking of all or some of the insured parcel that has already occurred as of the policy date.[66] A condemnation is an involuntary transfer of title. If Exclusion 2 were not modified by Covered Risks 7 and 8, the policy would provide no indemnity for the loss of the insured land on condemnation. This exclusion has existed for decades because, in many jurisdictions, condemnation actions are conducted by administrative agencies without the filing of any document in the real estate records. A title insurer has no way of limiting the risk of this type of failure of title by the searching of real estate records.

Exclusion 2 is limited, however, by Covered Risks 7 and 8. Covered Risk 7 is for eminent domain, and Covered Risk 8 is for "takings." In most contexts, those terms are used interchangeably. Further, the two covered risks are both tied to the one exclusion, for "rights of eminent domain." This could be interpreted as a suggestion that the policy drafters viewed eminent domain and takings as two different subjects. The reality is more mundane. Exclusion 2 of the 1970 ALTA policies was for rights of eminent domain "unless notice of the exercise of such rights appears in the public records at Date of Policy." The exclusion was modified in 1987 to append to that phrase the additional phrase "but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge." The "unless..." phrase and the "but not excluding..." phrase both limited the exclusion for "rights of eminent domain," making a very ungainly policy term. When the exceptions to the exclusion were excised and converted to covered risks, they were simply turned into two coverages instead of one.

Covered Risk 7 refers to a recorded notice of the "exercise" of eminent domain, which may include notices about an intended condemnation that has not yet occurred. The 1970 policy that incorporated that language followed a New York decision from 1962, one of the few that has ever discussed policy coverage and condemnations. In that case, *Ascot Homes, Inc. v. Lawyers Mortgage & Title Co.*,[67] the insured home builder discovered after it had bought a lot in 1960 that the town had adopted an acquisition map in 1950 that showed its intent to acquire the front 14 feet of the parcel. The town refused to include that strip in setting the setback line as part of Ascot's request for a building permit, even though it had not paid for the land yet. Ascot said that it lost the home buyer as a result. Although *Ascot* was premised on the zoning exclusion, it has always been discussed in relation to the eminent domain exclusion, because that was the true subject of the acquisition map. Thus, it seems likely that the carve-out for "notice of the exercise of" eminent domain in the public records was prompted by *Ascot*. Still, the acquisition map in *Ascot Homes* was not what would

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[66] See Raymond J. Werner, *The Basics of Title Insurance*, in *Title Insurance: The Lawyer's Expanding Role*, ABA Section of Real Property, Probate and Trust Law, at p. 3. Mr. Werner states: "The policy also excludes coverage for the loss resulting from the exercise of eminent domain rights unless notice of the exercise of such rights appears in the public records at the date of policy. Again, the exclusion recognizes the fact that real estate is by nature subject to the exercise of the right of eminent domain and there is no way to protect against the exercise of that right. However, this exclusion would not apply if a document such as a lis pendens relating to a pending eminent domain proceeding has been filed in the public records at the date of policy."

[67] *Ascot Homes, Inc. v. Lawyers Mortgage & Title Co.*, 37 Misc.2d 41, 237 N.Y.S.2d 179 (1962).

11.2.1 Prior Liens "Assumed" In Purchase Agreement

FORM 84, Appendix A
Assumed or agreed to in purchase contract

When an insured purchaser deliberately contracts to take title subject to a particular lien or encumbrance, a claim against the insurer for a failure to show that item is precluded because the insured "assumed" or "agreed to" take title in such condition.[91] In such cases, the insured has not suffered a loss because of the insurer's failure to discover or report the item, since the insured has already taken it into account in establishing the purchase price. In addition, the insured cannot be said to have relied on the insurer's title evidence not disclosing the matter, since the insured was already aware of the matter.

Policy recovery has therefore been denied when the insurer proves that the insured contracted to take subject to the omitted lien. When the insured was aware of a second deed of trust before he purchased, his deed recited that title was taken subject to the mortgage, and he had made payments on the loan, the insured had "assumed" the obligation of the lien and debt.[92] Also, in *Commonwealth Land Title Ins. Co. v. Ozark Global, L.C.*,[93] the insured ordered the title insurance policy after receiving its conveyance. Further, the deed recited six state tax liens to which the property was subject. The commitment did not show the liens. Nonetheless, the court found no liability, saying: "Common sense dictates that Global 'assumed or agreed to' such defects in title by taking the land subject to the tax liens."[94]

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155 (8th Cir. (Minn.) 1978), the court said that the insurer must show knowledge and agreement by the insured: "[t]he resolution of that issue is one of fact, not law. First National's knowledge that prior encumbrances existed will not absolve the insurer from liability for them unless the insurer also establishes by a preponderance of the evidence that the bank agreed that its mortgage would occupy a secondary position to the purchase money mortgages." 572 F.2d at 162-3. In *First American Title Ins. Co. v. Lane Powell PC*, 764 F.3d 114 (1st Cir. (Mass.) 2014), the court held that knowledge is sufficient: "[a]n insured party 'assumes' or 'agrees' to a lien pursuant to Exclusion 3(a) when it takes property that is subject to an existing encumbrance it has knowledge of. It based its decision largely on *National Credit Union Administration v. Ticor Title Ins. Co.*, 873 F.Supp. 718 (D.Mass. 1995), which applied the exclusion when the insured lender's officers were fully aware of the competing lien and agreed that the new lien would be subordinate. The *Lane Powell* court also emphasized the important point that Exclusion 3(a) exists to bar an inequitable windfall. If the court raises the proof burden too high, the insured will be able to collect insurance even "where the lender assumes or agrees to liens, or where the lender stands to receive an inequitable windfall." For that proposition, it relied on *Chicago Title Ins. Co. v. Resolution Trust Corp.*, 53 F.3d 899 (8th Cir.1995).

[91] *Marr v. Commonwealth Land Title Ins. Co.*, 2009 WL 5125624 (W.D.Ky.) (unpublished) (by taking his interest with full knowledge of prior liens, insured "assumed the risk that those liens would be superior to his, and ... Commonwealth was therefore under no duty to indemnify him").

[92] *Bradford v. Thompson*, 460 S.W.2d 932 (Tex.App. Tyler, 1970); aff'd in part and rev'd in part, 470 S.W.2d 633 (Tex. 1971).

[93] 956 F.Supp. 989 (S.D.Ala. 1997).

[94] Id. at 5.

Similarly, an insured was found to have "assumed" mortgages omitted from the commitment when it purchased the property before getting title evidence, the principals of the insured were sophisticated real estate developers, no cash consideration was paid, the sellers were about to be foreclosed, the purchasers could have assumed that there would be some mortgages on the property, and the purchase contract stated "Grantee accepts property described above subject to mortgages, liens, and indebtedness of all nature, and agrees to make payment on same, without any recourse against Grantors."[95]

Most courts have found that the insured must be cognizant of the matter being "assumed," for the exclusion to apply. New York courts have been especially stringent. Mere knowledge of an assessment by the purchaser before purchasing has been held not enough to exculpate the insurer.[96] The insurer has been refused the right to deny liability for an assessment based solely on the purchaser's agreement to take title subject to an assessment known to the insured.[97]

Several courts have refused to apply the exclusion because the insurer did not show that the purchase price was reduced to compensate for the purchaser's assumption of the tax. Thus, when an insured partnership obligated itself in the purchase agreement to "pay all arrears in taxes," the court duly noted that several of the partners were real estate brokers and the partnership got a distressed-sale price in part because the insured knew that there were delinquent taxes. However, the court insisted that the insurer prove that the partnership had actual knowledge of the exact taxes that were omitted.[98] Similarly, boilerplate language of an exchange agreement that stated that the purchaser would take "subject to" all "assessments" did not establish that the insured had the requisite knowledge to have "agreed to" a $14,000 special assessment which was omitted from the preliminary report.

> The company relies heavily upon the fact that the exchange contract mentioned the word "assessments" three times--once in typewriting and twice in the printed form. We cannot say as a matter of law that the insured had knowledge of the assessment merely because he signed this agreement when the document contained neither the total amount due on the assessment nor the yearly payment on it, but only the word "assessments."[99]

The insurer also attempted to show conscious assumption of the assessment by testimony of

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[95] *Lawyers Title Ins. Corp. v. Research Loan & Invest. Corp.*, 361 F.2d 764, 769 (8th Cir. 1966).

[96] *Empire Development Co. v. Title Guarantee & Trust Co.*, 225 N.Y. 53, 121 N.E. 468 (1918).

[97] *Ackley v. Lawyers Title Insurance Corp.*, 16 Misc.2d 402, 182 N.Y.S.2d 76 (1958); *Glickman v. Home Title Guaranty Co.*, 8 Misc.2d 303, 167 N.Y.S.2d 793 (1957); 15 Misc.2d 167, 178 N.Y.S.2d 281 (Sup. 1958), aff'd 8 A.D.2d 629, 185 N.Y.S.2d 756 (Sup.Ct.App.Div. 1959). Contra: *Palliser v. Title Ins. Co. of New York*, 61 Misc. 490, 115 N.Y.S. 545 (Sup. Ct. 1908).

[98] *Inavest Enterprises v. TRW Title Ins. of New York, Inc.*, 189 A.D. 2d 111, 595 N.Y.S. 2d 837 (3d Dept. 1993).

[99] *Arizona Title Ins. & Trust Co. v. Smith*, 21 Ariz.App. 371, 519 P.2d 860 (1974).

the seller that he had told the insured, that a listing sheet referred to the assessment, and that the purchaser's broker had actual knowledge that should be imputed to the insured. The court accepted evidence of this type as valid in principle, but found the evidence insufficient in the case at bar. In *Hilliard Properties, Inc. v. Commonwealth Land Title Ins. Co.*,[100] the insurer disclosed a special assessment in the commitment but inadvertently failed to carry the exception forward into the policy. The court rejected the Exclusion 3(a) argument with this circular statement:

> Although Commonwealth argues that Hilliard, through its purchase agreements buying and selling the property, assumed the obligation to pay the assessment, the policy stated that no special assessments were attached to the property. In construing contracts, specific provisions are generally read to negate conflicting general provisions. [citation omitted] Here, the policy specifically provided coverage against the special assessments, where the exclusion terms were of a general nature. Accordingly, the assessment was insured against.[101]

Finally, at least one court adopted the view that the exclusion refers only to matters agreed to by contract. A purchaser at sheriff's sale, for example, does not come into title by contract. An auction purchaser received a deed several months after certain real estate taxes became a lien. The court held that the purchaser did not "suffer" or "assume" the tax liability as a normal incident of land ownership itself. The court admitted that a portion of the taxes covered the period after the purchaser came into title. It found no obligation to prorate the tax liability between insurer and insured, however, because the insurer had simply failed to make exception for the taxes.[102]

11.2.2 Easements, Restrictions "Agreed To" In Purchase Agreement

When the insured owner agrees in the purchase contract to take the property subject to a certain easement or restriction, the encumbrance is excluded from policy coverage as a matter "agreed to" by the insured. To invoke the exclusion as to a recorded easement or restriction not shown on the policy, the insurer must show that the insured had the requisite level of intent in the particular jurisdiction in contracting to take title subject to the encumbrance.[103]

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[100] 1997 WL 781727 (Ohio App. 8 Dist.) (unpublished), app. not allowed, 81 Ohio St.3d 1503, 691 N.E.2d 1062 (Table).

[101] Id. at 4. Despite the court's statement, the policy did not "specifically" provide coverage against the assessment. Rather, it merely did not except it.

[102] *Bragman v. Commonwealth Land Title Ins. Co.*, 421 F.Supp. 99 (E.D.Pa. 1976).

[103] In *Fidelity Nat'l Title Ins. Co. v. Doubletree Partners, L.P.*, 739 F.3d 848 (5th Cir. (Tex.) 2014), the court found that an insured buyer, Doubletree, had not contracted to take title subject to a flowage easement despite the fact that its purchase contract, deed and policy all said the buyer would take title subject to the easement, because the insured obtained a survey that put the boundary of the easement in the wrong place. The court said that the sales agreement and other documents described the flowage easement as qualified by the phrase "and shown on survey." Thus, it concluded, Doubletree did not agree to buy the property subject to the flowage easement wherever it might actually be. Thus, Doubletree "did not have the requisite intent" for the exclusion to apply. It said that, "if Doubletree intended to acquire the property with the flowage easement as a title defect, it only intended to do so to the extent that the easement was

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The exclusion was held to apply when the purchaser was made aware of restrictions before the purchase agreement was signed, and the restrictions were indirectly referenced in the commitment. The buyer's own attorney acted as closer for the insurer, stating in his "closing report" that the restrictions should be shown in the policy, which they were.[104] Similarly, the insurer was held not liable for any loss for the apparently accidental characterization of a condominium unit title as being in fee simple rather than a lease. The court noted that the insured accepted the lease and had received the condominium declaration and other documents, all of which accurately showed the interest as a leasehold. In addition, the policy was only ordered after the sale was closed; thus, the insured did not rely on the inadvertent reference to fee simple when he closed the sale.[105] Likewise, an insured's purchase agreement said that "[t]he property is also sold subject to easements, if any created, or to be created, prior to or after conveyance of title ... which may be placed on record by the Seller after execution hereof for the benefit of this property and/or community of which it is a part."[106] The seller recorded an easement over the insured property after policy date. At trial, the insured argued that the insurer was responsible if the easement was binding. On appeal that argument was dropped, with the insured conceding that, if the easement was binding on it, the matter was "agreed to" by the insured and thus excluded.[107] Also, in *Riffle v. United General Title Ins. Co.*,[108] there was no loss payable when the insured bought the property with knowledge of the title defect, the purchase price was adjusted accordingly, and the insured did not establish diminution in value beyond the reduction in sale price. The insured claimed policy limits when its access easement was found to be invalid. The trial court found, however, that "the access problem was taken into account when negotiating the sale price." Further, the property was not valueless, since the partners could get there by boat, and their intended use was recreational and not commercial. It noted that damage evidence must "allow findings from established facts and not by conjecture." Thus, the court was unwilling to award policy limits as a default measure of loss without proof of actual damage suffered. Further, the court impliedly invoked Exclusion 3(a) by hold that "[a]ppellants received what they bargained for and cannot now claim that they have suffered damages."

However, a general or boilerplate reference to restrictions or easements is not enough to

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shown on the survey." The court imposed a higher burden of intent than had been imposed in the case it distinguished, *Duncan v. First American Title Ins. Co.*, 1994 WL 2010 (Tex.App.-Hous. (14 Dist.)) (unpublished), which held that an insured assumed or agreed to an encumbrance by contracting to take title subject to it. In *JBGR LLC v. Chicago Title Ins. Co.*, 38 Misc.3d 1213(A), 966 N.Y.S.2d 346 (Table), 2013 WL 221480 (N.Y.Sup.), 2013 N.Y. Slip Op. 50089(U) (unpublished), the court found, on a motion to dismiss, that the exclusion applies when "the insured either expressly or impliedly assumed or agreed to the defects or encumbrances in the course of purchasing the property," and may apply to the declaration of restrictions at issue in the case.

[104] *Sullivan v. Tomgil Building Corp.*, 46 Misc.2d 613, 260 N.Y.S.2d 465 (Sup. Ct. 1965).

[105] *Rudolph v. Title & Trust Co. of Fla.*, 402 So.2d 1275 (Fla.App. 1981).

[106] *Carstensen v. Chrisland Corp.*, 247 Va. 433, 442 S.E.2d 660, 664 (Va. 1994).

[107] Id. at 665, n. 2.

[108] 64 Ark.App. 185, 984 S.W.2d 47 (1998).

establish the required conscious assumption of a matter. The mere fact that the seller's deed excepted "restrictive covenants" was found not to show the required intent. "The exceptions in the deed run in favor of the grantor. They are not for the benefit of the title company."[109] Also, there was found not to be sufficient intent to purchase subject to a mineral reservation based solely on the fact that it was noted in the title opinion letter prepared by the purchaser's attorney. The insured was assisted by testimony that a later purchaser rejected title because of the reservation. In addition, an unsigned endorsement setting out the reservation was found in the insurer's file, which apparently reinforced for the court that the insurer could have disclosed the matter but for its own negligence.[110]

11.2.3 Reformation Of Policy To Remove Parcel Or Alter Terms

FORM 21, Appendix A
Land erroneously included in policy and deed

The mistaken inclusion of land in the policy which the parties did not intend to make part of the transaction is excluded both as a matter "agreed to" by the purchaser, and one for which no loss is suffered.[111] In *Cohen v. Security Title & Guaranty Co.*,[112] for example, Schedule A of the policy was incorrect because it "included more property than the plaintiffs had intended to buy and the sellers had intended to sell." The insureds had discovered the error the day before closing and failed to inform either seller or insurer. Then, shortly after closing, they demanded compensation for their "loss." The court held that the insureds had "agreed to" accept title without the extra land, and that coverage was negated due to the "insured's own intentional misconduct or inequitable dealings." Also, in *Lawyers Title Ins. Corp. v. Golf Links Development Corp.*,[113] a legal description was reformed to remove a parcel accidentally included in both deed and policy. Reformation was allowed because the insured also erred, by failing to notice and correct the error during its due diligence period. See §11.4 for similar cases decided under the "no loss" exclusion.

The insurer is also entitled to reform a policy that fails to make exception for a matter that

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[109] *Holly Hotel Co. v. Title Guarantee & Trust Co.*, 147 Misc. 861, 264 N.Y.S. 3 (Sup. 1932), aff'd, 239 App.Div. 773, 264 N.Y.S. 7 (1933).

[110] *Lawyers Title Ins. Corp. v. D.S.C. of Newark Enterprises, Inc.*, 544 So. 2d 1070 (Fla.App. 1989).

[111] *Campbell v. Ticor Title Ins. Co.*, 166 Wash.2d 466, 209 P.3d 859 (Wash. 2009); *Knispel v. Transnation Title Ins. Co.*, 2012 WL 5334083 (Cal.App. 2 Dist.) (unpublished) (policy reformed to remove parcel that seller had sold the prior year, when contract included many parcels and the one at issue was not indicated on map attached to purchase agreement and was included by accident in title commitment and deed). In *Demetrio v. Stewart Title Ins. Co.*, 124 A.D.3d 824, 3 N.Y.S.3d 75 (N.Y.A.D. 2 Dept. 2015), app.den. 25 N.Y.3d 906 (May 12, 2015), when the policy described the insured property as one lot, but incorporated by reference a metes and bounds description that encompassed seven lots, the policy insured only the one lot that the insured purchased, and the insured suffered no damage due to the "loss" of the land for which it paid nothing.

[112] *Cohen v. Security Title & Guaranty Co.*, 212 Conn. 436, 562 A.2d 510 (Conn. 1989).

[113] 87 F.Supp.2d 505 (W.D.N.C. 1999).

When the insured has created a defect or deliberately agrees to take title subject to or assuming a title matter, the insured suffers no loss. For example, an insured lender suffered no loss when its loan was found void because it was usurious.[346] Similarly, in *Riffle v. United General Title Ins. Co.*,[347] the "no loss" exclusion was found to apply when the insured bought the property with knowledge of the title defect, the purchase price was adjusted accordingly, and the insured did not establish diminution in value beyond the reduction in sale price. In *Riffle*, the insured knew that the property had a questionable right of access. It obtained a discount in the purchase price and got a title policy, but dropped its efforts to get access resolved before closing. After the purchase, the insured access easement was ruled invalid. The insured sued the insurer for policy limits. The insurer raised Exclusions 3(a), 3(b) and 3(c). The court never got to the first two exclusions, because it found that the insured had not proven a loss. The appeals court noted that the partners proceeded with closing without having actually resolved the issue that had hung them up. The only valuation testimony at trial was from Mr. Riffle, who opined simply that, without a right of access, the property was "useless" and had a zero value. The trial court found, however, that "the access problem was taken into account when negotiating the sale price." The appeals court found that the property was not valueless, since the partners could get there by boat, and their intended use was recreational and not commercial. It noted that damage evidence must "allow findings from established facts and not by conjecture." Thus, the court was unwilling to award policy limits as a default measure of loss without proof of actual damage suffered. Further, the court impliedly invoked Exclusion 3(a) by hold that "[a]ppellants received what they bargained for and cannot now claim that they have suffered damages." See the discussion of *Riffle* and similar decisions in relation to Exclusion 3(a) at §11.2.1.

11.5 Post-Policy Matters

FORM 42, Appendix A
Defect arising after Date of Policy--1992 Policy

FORM 41, Appendix A
Defect arising after Date of Policy--Residential Policy

FORM 74, Appendix A
Easement abandonment--post-policy matter

The coverages in the title insurance policy are limited to matters that already exist on the date of policy. Title defects arising after that date are not covered by the policy.[348] This limitation is stated in the preamble to the Covered Risks in the 2006 ALTA policies:

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[346] *Focus Investment Associates, Inc. v. American Title Ins. Co.*, 992 F.2d 1231 (1st Cir. 1993). The effect of usury is specifically excluded under Exclusion 5 of the loan policy. See §11.7 for a discussion of that exclusion.

[347] 64 Ark.App. 185, 984 S.W.2d 47 (1998).

[348] The ALTA Homeowner's Policy provides certain assurances as to post-policy matters, as discussed in §9.14.2.

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation (the "Company") insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, **after Date of Policy**, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of... .

(emphasis added) This coverage limitation is confirmed by an exclusion in the 2006 and prior ALTA policies:

> The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:
>
> 3. Defects, liens, encumbrances, adverse claims or other matters:
> * * * *
> (d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 9 and 10)... .[349]

In addition, the 1992 ALTA Loan policy states that the insurer has no liability for advances made after the date of policy, including non-obligatory construction loan advances.[350] There is no corresponding provision in the 2006 ALTA Loan policy, but that policy does retain the post-policy exclusion.

The post-policy exclusion is at the heart of the nature of title insurance coverage. The policy

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[349] The referenced Covered Risks 9 and 10 are the limited creditors' rights and gap coverages. The Residential policy exclusion reads as follows: "In addition to the Exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees, and expenses resulting from: ... 3. Title Risks: ... that first affect your title after the Policy Date -- this does not limit the labor and material lien coverage in Item 8 of Covered Title Risks... ." The Residential policy exclusion is thus identical in substance to the 1992 policy, except that it does not limit the construction lien coverage of Covered Title Risk 8.

[350] Conditions & Stipulations 8(d) of the 1992 ALTA loan policy states that the policy does not include any liability for advances made under the insured mortgage after date of policy, except those made to protect the mortgage lien:

"The Company shall not be liable for: (i) any indebtedness created subsequent to Date of Policy except for advances made to protect the lien of the insured mortgage and secured thereby and reasonable amounts expended to prevent deterioration of improvements; or (ii) construction loan advances made subsequent to Date of Policy, except construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the land which at Date of Policy were secured by the insured mortgage and which the insured was and continued to be obligated to advance at and after Date of Policy."

On construction loans, "pending disbursement" endorsements are issued with each draw in certain areas of the country. Such endorsements extend the Date of Policy as to construction lien coverage through the date of each draw. See §10.2.1 regarding the pending disbursement endorsement. Other endorsements are also sometimes used to effectively eliminate this exclusion as to construction disbursements made after the date of policy.

remains in effect as long as the insured owns the property. The insured pays no renewal premium. However, anything that happens that affects title after the insured obtains his or her interest in the property is not covered by the policy, as confirmed by Exclusion 3(d).[351] Almost all such matters would be caused by the insured or due to the fact that the insured is the owner, and would also thus

[351] In *Dickins v. Stiles*, 81 Wash.App. 670, 916 P.2d 435 (1996), the insured property was subject to a disclosed restrictive covenant limiting the use of the property to "agricultural and residential purposes." The insured was sued by neighbors for making commercial use of the property. The insurer was found to have no duty either to defend or indemnify, because the policy had excepted the instrument. Further, the insured was sued for overburdening the easements benefitting the land, as a result of the commercial use. The overburdening claim was found excluded by Exclusions 3(a) and/or 3(d), since it concerned use of the property by the insured after purchase. In *Sabatino v. First American Title Ins. Co.*, 308 Ill.App.3d 819, 721 N.E.2d 693, 242 Ill.Dec. 414 (Ill.App. 2 Dist. 1999), the title insurer was found not to be obligated to defend insureds' alleged "deliberate, wrongful and intentional" disruption of an easement by necessity over the insured's land. The court held that the lawsuit concerned the insured's interference with the claimed easement, not the title to the land, and that all of the tortious conduct occurred after the date of policy. Also, in *Bourne v. Stewart Title Guar. Co.*, 2011 WL 6101016 (D.N.H.), 2011 DNH 204 (unpublished), a municipality's actions to condemn and lay out a public road on the insured's property were all found to have occurred after the date of policy, and thus were excluded. *Herr v. Forghani*, 2011 WL 1833829 (Wash.App. Div. 1) (unpublished) held that the insurer had no duty to prosecute a lawsuit or pay a loss due to the insured's claim that his neighbors overburdened the access easement that ran across the insured's land, because the use was post-policy and the easement was excepted. In *City of East Providence v. First American Title Ins. Co.*, 2011 WL 5527604 (D.R.I.) (unpublished), adopting findings of 2011 WL 5521246 (D.R.I.) (unpublished), the title insurer was not required to defend the city against the business's lawsuit for breach of a contract the city signed to develop the property, which the business owner claimed gave it beneficial ownership of the property. The court said the lawsuit was about a contract, not title; concerned post-policy breaches; and that the city created or agreed to the contracts. In *Ruisi v. Connecticut Attorneys Title Ins. Co.*, 2012 WL 3854407 (Conn.Super.) (unpublished), the court found that the policy did not protect against the fact that a mortgage on the insured parcel was not paid off because the lawyers entrusted with the money stole it and recorded a forged mortgage release, since the lender delivered the money after the policy date, invoking the post-policy exclusion. In *Witkowski v. Richard W. Endlar Ins. Agency, Inc.*, 81 Mass.App.Ct. 785, 968 N.E.2d 922 (Mass.App.Ct. 2012), when the insured condominium unit was destroyed by a flood after the policy date, and the building code prevented the insured from rebuilding the unit, neither the flood nor the insured's inability to rebuild triggered policy coverage. In *Property Hackers, LLC v. Stewart Title Ins. Co.*, 96 A.D.3d 818, 949 N.Y.S.2d 70, 2012 N.Y. Slip Op. 04728 (N.Y.A.D. 2 Dept. 2012), app.den. 20 N.Y.3d 853, 982 N.E.2d 92, 2012 N.Y. Slip Op. 93255 (Table) (N.Y. Dec 11, 2012) (unpublished), the court held that the policy did not protect against the post-policy condemnation of the insured parcel. In *Murphy v. Ticor Title Ins. Co.*, 729 S.E.2d 21, 12 FCDR 1657 (Ga.App. 2012), the court ruled that a neighbor's erection of a locked gate and other obstructions 20 years after the policy date, which blocked the use of the insured access easement, was a post-policy event and thus excluded from coverage. In *Cavender Enterprise Leasing Family, LLC v. First States Investors 4200, LLC*, 2013 WL 495650 (W.D.La.) (unpublished), a right of first refusal granted before the policy date was excluded because the instrument evidencing the right was recorded after the policy date, and the policy contained an exception for "[r]ights or claims of parties in possession not shown by the public records." The court said the combination of the exclusion and the exception barred coverage. Conversely, in *Nastasi v. County of Suffolk*, 106 A.D.3d 1064, 966 N.Y.S.2d 172 (N.Y.A.D. 2 Dept. 2013), which concerned a conveyance of some of the insured parcel signed years before the policy date but not recorded until a few months afterward, the court held that the conveyance was not excluded as a matter "attaching or created" after the date of the policy. The distinction between *Cavender* and *Nastasi* lay in the fact that, in the former case, the policy also contained the parties in possession exception. In *Back Creek Partners, LLC v. First American Title Ins. Co.*, 213 Md.App. 703, 75 A.3d 394 (Md.App. 2013), the insurer was found not to be obligated to defend a lawsuit brought against insureds after they sold the property, about matters that occurred after the policy date. In *Moreno v. Wells Fargo Bank, N.A.*, 2013 WL 1395629 (Minn.App.) (unpublished), the borrowers' claim that their lender was not supposed to get a lien on all of their four parcels, in a 2004 refinance, could not invoke any coverage under their 2003 owner's policy, and any statement by the title agent about policy coverage did not alter the plain language of the post-policy exclusion.

invoke Exclusion 3(a):

> Nothing else appearing, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title which are in existence at the time the insured takes his title. [citations omitted] "It is not prospective in its operation and has no relation to liens or requirements arising thereafter." Mayers v. Van Schaick, supra. "The risks of title insurance end where the risks of other kinds begin. Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it."[352]

The only sense in which the policy extends into the future is that the insured typically becomes aware of the title defect after the date of policy. The post-policy exclusion has been found to be unambiguous.[353]

The exclusion is frequently applicable in tax claims. Generally, the exclusion applies to negate liability for taxes that are levied or become due after the policy date.[354] However, when a tax is imposed after the policy date but with a retroactive lien date, the exclusion does not apply.[355] Tax

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[352] *National Mortgage Corp. v. American Title Ins. Co.*, 299 N.C. 369, 261 S.E. 2d 844 (1980); quoted with approval in *Firstland Village Associates v. Lawyers Title Ins. Corp.*, 284 S.E.2d 582 (S.C. 1981). In *Firstland*, the claim involved an amendment to restrictions that was recorded months after the policy date. The court found no duty to indemnify, clear title or issue later policies free of a reference to the amendment, stating "Title insurance is unique in that it is retrospective, not prospective." Similarly, in *Ruisi v. Connecticut Attorneys Title Ins. Co.*, 2012 WL 3854407 (Conn.Super.) (unpublished), the court said "[t]itle policy is unique in that it is retrospective, not prospective. It is designed to protect against past events, not possible future encumbrances."

[353] *Chicago Title Ins. Co. v. Citizens and Southern Nat'l Bank*, 821 F.Supp. 1492, 1495 (N.D.Ga. 1993).

[354] *Yurimindi v. LandAmerica Financial Group, Inc.*, 2012 WL 8700440 (Pa.Cmwlth.) (unpublished) held that the policy did not protect against taxes that became liens after the policy date, especially because the tax liens were likely invalid due to their late filing. In *Lone Star Equities, Inc. v. Dimitrouleas*, 34 N.E.3d 936, 2015-Ohio-2294 (Ohio App. 2 Dist. 2015), the court found that the post-policy exclusion barred liability for real estate taxes that were reassessed after the policy date, even though the dispute had begun before the closing date. In *Princeton South Investors, LLC v. First American Title Ins. Co.*, 437 N.J.Super. 283, 97 A.3d 1190 (N.J.Super.A.D. 2014), cert.den. 220 N.J. 268 (Jan. 23, 2015), the exclusion was found to apply to a tax reassessment that was pending on appeal on the policy date, but on which there was no present tax owed. In *BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co.*, ___ F.Supp.3d ___, 2015 WL 4647894 (D. Utah 2015) (permanent citation not yet available), the exclusion applied when the property was within a special taxing district that had made no assessment on the policy date. In *First Clover Leaf Bank v. National Land Title Ins. Co.*, 2015 WL 392728, 2015 IL.App (5th) 120442-U (Ill.App. 5 Dist.) (unpublished), app.den. 32 N.E.3d 673 (Table) (May 27, 2015), the exclusion negated any duty of the insurer to redeem the property from taxes that were levied after the policy date.

[355] In *Menconi v. Stewart Title of Illinois*, 2015 WL 4534148, 2015 IL App (1st) 143043-U (Ill.App. 1 Dist.) (unpublished), the court has refused to dismiss a policy suit based on a tax levy made after the date of policy for an "omitted" tax from several years prior to the policy date, because it had a retroactive lien date prior to the policy date. Following the ruling on the motion to dismiss, the insured would still be required to prove that the lien was both effective and that the statute would properly be construed to impose a lien prior to the policy date.

claims are fully analyzed in §9.4.

A forged release of the insured deed of trust is necessarily a post-policy event, and thus excluded.[356] A claim that the insured mortgage was given as a preference is excluded, when the borrower files bankruptcy after the date of policy.[357] The claimed preference was a condition which:

> arose only because [the borrower] chose to file bankruptcy and chose to file within the critical time period. Both of these events, which might give rise to an avoidance, transpired after the title policy issued, and, therefore, the loss of the secured position would be excluded from the coverage of the policy because it was occasioned by subsequent events.[358]

In finding the matter excluded, therefore, the court determined that the source of loss was the filing of the bankruptcy within the preference period. In a second decision, in which the facts were not well developed, an adversary proceeding apparently based on preference was found not to create a duty to defend or indemnify, because the foreclosure and adversary proceeding were both post-policy matters.[359] Preference claims have also been found excluded under Exclusions 3(a) (see §11.2.6) and 3(b) (see §11.3.4). See §11.5 for a complete discussion of Exclusion 3(d), concerning post-policy matters.

When the adverse title claim, lien or encumbrance existed before the policy date, the fact that the action to enforce that interest is brought or the lis pendens is recorded after the date of policy does not invoke the post-policy exclusion.[360]

The policy does not protect against a title defect arising after the policy date, even if the effect of such a defect is to invalidate the insured's interest as of the date of the policy. For example, a policy assured the insured lender that it had a first deed of trust on a lessee's interest, to which the fee

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[356] *Upson v. Goodland State Bank & Tr. Co.*, 797 P. 2d 845 (Colo.App. 1990). The court ruled that the exclusion was not negated or limited by the fact that the insurer recorded the forged release.

[357] *Chicago Title Ins. Co. v. Citizens & Southern Nat'l Bank*, 821 F.Supp. 1492 (N.D.Ga. 1993).

[358] Id. at 1495.

[359] *Capital Bank v. Commonwealth Land Title Ins. Co.*, 861 S.W.2d 84 (Tex.App.--Houston [1st Dist.] 1993).

[360] Thus, the policy was found to protect against a mortgage recorded before the policy date despite the fact that the lis pendens on foreclosure of that lien was post-policy, in *U.S. Bank, N.A. v. Stewart Title Ins. Co.*, 37 A.D.3d 822, 832 N.Y.S.2d 223 (N.Y.A.D. 2 Dept. 2007). In *San Jancinto Z, L.L.C. v. Stewart Title Guar. Co.*, 2014 WL 1317696 (Cal.App. 4 Dist.) (unpublished), modified on denial of rehearing (April 24, 2014), rev.den. June 18, 2014, a governmental body brought a condemnation lawsuit years after the policy was issued. However, at the time that action was filed, there were already several lawsuits in progress to determine who had the better claim of ownership and there were competing lien claims. The person claiming ownership adversely to the insured made the assertion in his answer to the condemnation complaint that he was the rightful owner. The court held that this assertion triggered a duty to defend, although the condemnation itself was an excluded post-policy event. In *Colonial Mortgage Service Co. v. Commonwealth Land Title Ins. Co.*, ___ F.Supp.2d ___, 2014 WL 6237852 (E.D.Pa.) (permanent citation not yet available), the court found that the fact that a lis pendens was recorded after the policy date did not invoke the exclusion, because the rights claimed by the plaintiff in the complaint existed before the policy date.

owner's interest was subordinate. This assurance was given based on a subordination agreement from the lessor. The lessor's subordination was conditioned on the use of the loan funds for construction of a building on the property. After the policy date, the lender gave the borrower the loan funds without requiring that a building be built, and the lessor had the subordination agreement declared null. The insured sued the insurer, which defended on the post-policy exclusion. The court agreed with the insurer that the claim was not covered:

> Here, the policy of title insurance issued by defendant insured the lien of plaintiff's deed of trust on the Abernathy property "all as of the 18th day of July, 1969, at 12:26 p.m. the effective date of this policy." This affirmative statement of coverage is also restated in the negative as an exclusion from coverage in subparagraph 3(d) of the policy, which specifically excludes from coverage defects, liens other than certain statutory liens for labors and materials, encumbrances, adverse claims against the title as insured or other matters "attaching or created subsequent to the date hereof.[361]

Similarly, sellers brought an action to reclaim the insured property for lack of consideration, and a consent judgment was entered after the policy date by which the insured would either give a mortgage to the sellers or lose the property. The insured did not grant the mortgage, and was thus divested of title. This divestiture was a post-policy matter and thus excluded.[362] Also, when an easement was recorded before the policy date, but the easement holder first sought to reform it to encumber the insured property after the date of policy, the post-policy exclusion was found to apply.[363] When a neighbor sought to subdivide land contrary to the terms of a recorded declaration of restrictions 12 years after the policy was issued to the insured, the matter was excluded as being a post-policy act, and the insurer had no obligation to prosecute the insured's lawsuit to enforce the restriction.[364]

Title insurance policies typically recite not only a date of policy, but the exact time of day as to which policy coverage extends. The post-policy exclusion applies to matters that occur on the policy date but after the time recited in the policy. In *Mark Twain Kansas City Bank v. Lawyers Title Ins. Corp.*,[365] the policy was timed, at the lender's request, as of the moment at which the insured mortgage was recorded. The insured lender disbursed the loan funds less than an hour later. The money was delivered to a party other than the mortgagor owner. A court later held that the mortgage was invalid because the owner received no consideration for the granting of the lien. The court granted the insurer's summary judgment motion based on the post-policy exclusion, stating:

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[361] *National Mortgage Corp. v. American Title Ins. Co.*, 299 N.C. 369, 261 S.E. 2d 844 (1980).

[362] *Kramer v. Chicago Title & Trust Co.*, 69 Ill.App. 3d 1015, 387 N.E.2d 1105 (1979).

[363] *Campbell v. Ticor Title Ins. Co.*, 166 Wash.2d 466, 209 P.3d 859 (Wash. 2009).

[364] *Heyse v. Case*, 114 Conn.App. 640, 971 A.2d 699 (Conn.App. 2009), cert.den. 293 Conn. 905, 976 A.2d 705 (Conn. July 23, 2009).

[365] 807 F.Supp. 84 (E.D.Mo. 1992).

> ... the policy clearly excludes coverage for defects attached or created subsequent to "Date of Policy" and unambiguously defines "Date of Policy" as embracing a specific date and time, that is, July 11, 1986 at 11:30. Although the faulty disbursement took place only fifty-one minutes later, the defect was created after the "Date of Policy" and hence is excluded from coverage.[366]

National Mortgage and *Mark Twain* were relied on in *Rosen v. Nations Title Ins. Co.*,[367] in which the priority of the insured deeds of trust were challenged on the grounds that the lender had disbursed the loan funds, after the date of policy, contrary to the bankruptcy court order which gave the lender its priority, thus working a subordination of the lender's interest.

A Florida court also relied in part on *Mark Twain* in applying the post-policy exclusion in *Lawyers Title Ins. Co., Inc. v. Novastar Mortg., Inc.*[368] In that case, after the policy date, the insured lender rejected the loan because it detected that some of the borrower's paperwork was phony. The insured told the loan broker to sell the loan to someone else, which it did, cancelling the assignment of note and mortgage. However, the broker did not repay the insured. The lender was denied foreclosure, and the court also rejected its policy claim.[369]

The exclusion also applies to an adverse right that ripens after the policy date but that was inchoate or latent on the policy date, such as an equitable lien, easement by prescription, adverse possession or constructive trust.[370] Similarly, the exclusion negates coverage as to the insured's rights that were enforceable when the policy was issued but that are cut off or expire after the date of

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[366] Id. at 87. Similarly, in *Ruisi v. Connecticut Attorneys Title Ins. Co.*, 2012 WL 3854407 (Conn.Super.) (unpublished), the court found that the policy did not protect against the fact that a mortgage on the insured parcel was not paid off due to the fact that the lawyers entrusted with the money stole it and recorded a forged mortgage release, because the lender delivered the money after the policy date, and thus the post-policy exclusion applied.

[367] 56 Cal.App.4th 1489, 66 Cal.Rptr.2d 714 (Cal.App. 2 Dist. 1997).

[368] 862 So.2d 793, 28 Fla. L. Weekly D2746 (Fla.App. 4 Dist. 2003), reh.den. (Jan. 28, 2004).

[369] The court said: "Novastar's failure to take any action to enforce its rights on the note, whether at the time the closing package was received without the note, at Netwide's refusal to forward the note, at the time it learned that the loan had been resold, or at any time thereafter, made the machinations of Netwide possible. It is unreasonable for an insured to expect that a title insurance policy would insure against a wrongful act such as Netwide failing to repay Novastar when it resold the loan. All of the acts that prevented Novastar from enforcing its mortgage lien occurred subsequent to the issuance of the title insurance policy and arose as a direct result of Novastar's actions or inactions. As such, Novastar's loss was either not covered by, or was excluded by the policy provisions."

[370] See *Carstensen v. Chrisland Corp.*, 442 S.E.2d 660 (Va. 1994), holding that an easement by necessity was excluded because it was not established until after the date of policy. In *Woodle v. Commonwealth Land Title Ins. Co.*, 287 Neb. 917, 844 N.W.2d 806 (Neb. 2014), the court said that, although implied easements were created on a land division that occurred before the policy date, they did not "attach" for title insurance purposes until they were declared by court order. Because that order was entered after the date of the policy, the easements fell under the post-policy exclusion.

policy.[371] However, the exclusion typically does not apply to rights implied by law that existed on the date of policy, but which are not adjudicated until after the policy date.[372] Thus, it is important to identify whether or not, under state law, the rights at issue existed on the policy date without any requirement that they be adjudicated. For example, *Carstensen v. Chrisland Corp.*[373] involved a claim of an easement of necessity. The insureds contended that the exclusion did not apply, since an easement by necessity "arises at the time the dominant tract is severed from the subservient tract." The court disagreed:

> While an easement by necessity legally arises at the time the servient estate is severed from the dominant estate, the easement may remain inchoate until established through judicial order or otherwise. An easement often is not judicially established or sought to be established for many years following the initial severance. [citations omitted] If, as the Neighbors contend, this exception in the title policy is not applicable to easements by necessity established after the policy date, a title insurance company, before issuing a policy of insurance, would be required to research the title records for all contiguous properties to determine whether a latent easement by necessity existed in order to protect itself against exposure for a subsequently established easement by necessity. This is an unreasonable burden to place on the title insurance company.[374]

However, another Virginia court distinguished *Carstensen* and found that the exclusion did not apply to an easement by necessity, because the claim was made on an ALTA Residential policy, which excludes title risks "that first *affect* title after the Policy Date" rather than those "attaching or created subsequent to Date of Policy."[375]

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[371] In *Community Credit Union v. AmeriTitle & Abstract, Inc.*, 344 Wis.2d 519, 822 N.W.2d 737 (Table), 2012 WL 3930615 (Wis.App.) (unpublished), the court held that the expiration of an insured five-year access easement after the policy date did not invoke the access coverage, and the post-policy exclusion applied, because on the date of policy there was a right of access to the property.

[372] In *Blaser v. DeVries*, 2011 WL 5965762 (Mich.App.) (unpublished), the court held that a declaration of restrictions that was not recorded against the property but which other lot owners sought to impose under the doctrine of common plan of restriction attached to the property, if at all, on the date of the first deed that included the restrictions. The court relied on Michigan case law that has established that rule. The court found no coverage under this policy, not because of the post-policy exclusion bur rather due to a Schedule B exception for restrictions on "the use of the premises not appearing in the chain of title." The decision highlights the need to determine under local law when a particular right or interest is deemed to attach to property as of the policy date.

[373] 442 S.E.2d 660 (Va. 1994).

[374] Id. at 665.

[375] *Reams v. Southern Title Ins. Corp.*, 43 Va. Cir. 494, 1997 WL 33619877 (Va.Cir.Ct. 1997) (unpublished). The court said: "[w]hereas the *Carstensen* outcome turned on the words 'attaching or created' in order to buttress the 'inchoate' versus 'judicially established' status of an easement by necessity, the language in the instant case leads to a contrary outcome. The easement by necessity burdening the Reams' property 'affected' the tract prior to the 1986 Policy Date, even though court recognition did not occur until 1994. Such an easement arose by operation of law at the time the Reams'

Adverse matters created before the policy date but not recorded until afterward create a tension between the Covered Risks and the post-policy exclusion. One example is the lien which takes priority over the insured mortgage lien, even though it is recorded after the policy date. In *Citibank v. Commonwealth Land Title Ins. Co.*,[376] the policy was dated as of the date on which the insured mortgage loan closed. The mortgage was recorded three weeks after the policy date. Another mortgage was signed two weeks before the policy date, and recorded a week after the policy date but two weeks before the insured mortgage was recorded. The intervening mortgage was found to have priority over the insured mortgage based on recording dates. The insurer argued that it was not recorded on the policy date, and therefore it was not protected against. The court held the post-policy exclusion inapplicable, however, because under state law the intervening lien arose when executed, which was prior to policy date.

The policy protects against covered matters discovered after the policy date but attaching before that date. Thus, the post-policy exclusion does not apply as to matters existing on the date of policy but discovered before the insured mortgage was assigned.[377]

Another form of inchoate right is the construction lien claim. In most states, construction lien claims relate back from the date of filing or recording of the lien to an earlier date tied to the first work on the project or the construction contract itself. See Chapter 10 regarding construction liens generally. The standard exception for construction liens removes coverage for lien claims based on work done prior to the Policy Date.[378]

11.6 Lack Of Adequate Consideration

FORM 44, Appendix A
Lack of adequate consideration

The policy does not protect an insured against a claim that its title is defective because the insured failed to pay adequate consideration for the property.[379] One commentator has explained the purpose of the exclusion as follows:

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parcel was severed from the dominant tract. In other words, this encumbrance existed prior to the plaintiffs' acquisition of the Powhatan tract and purchase of the title insurance policy from the defendant. At the time the policy was issued it affected title."

[376] 645 N.Y.S.2d 826 (A.D. 2 Dept. 1996).

[377] *Stewart Title Guar. Co. v. National Enterprises, Inc.*, 133 F.3d 929 (Table), 1997 WL 800294, *1 (9th Cir. (Cal.)) (unpublished).

[378] *Clements v. Mississippi Valley Title Ins. Co.*, 612 So. 2d 1172 (Ala. 1992).

[379] Exclusion 3(e) of the 2006 ALTA Owner's policy negates coverage for defects "resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Title." Exclusion 3(e) of the 2006 ALTA Loan policy excludes loss "resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Insured Mortgage."

12 Exceptions

Some of the exclusions in a title insurance policy appear in Schedule B. The policy preamble states that the covered risks are granted subject to the exceptions in Schedule B of the policy. These exclusions are labeled in title insurance policies as exceptions from coverage, rather than as exclusions, but they are exclusions nonetheless. Policy exceptions almost invariably describe matters that are within the scope of the covered risks but that are removed from coverage.

There are two general classes of exceptions. The first class is those that are termed "standard" or "general" exceptions (they are also occasionally known as "ALTA" exceptions, because the American Land Title Association promulgated wording for such standard exceptions some years ago). Such exceptions remove coverage for classes of risk that are not specific to any one recorded instrument or to the parcel. In this treatise, the term "standard" is used for this class of exceptions. The subjects of the standard exceptions are: parties in possession (see §12.2), survey matters (see §12.3), rights and interests that are visible on inspection (see §12.3), easements that do not appear in the public records (see §12.4), construction or mechanic's liens (see §12.5 and Chapter 10) and real estate taxes (see §12.6).

The removal of the standard exceptions is known in some states as "extended coverage." It is true that the removal of an exclusion always expands coverage. However, the term "extended coverage" should not be understood to suggest that the removal of the standard exceptions is the granting of any affirmative coverage.

The second class of exceptions is those that are specific to the insured parcel. These are known in the industry as "special" exceptions. Most commonly, a special exception negates coverage for the effect on title of a recorded instrument. Special exceptions are discussed at §12.7.

When a map was attached to the commitment with a substantial disclaimer, neither the inclusion of the map nor the disclaimer were deemed to expand or contract the coverage of the policy.[188] The attachment of a "property sketch" to the policy, with an appropriate caveat, was found not to be an affirmative coverage.[189]

12.3.16 Effect Of Removal Of Survey Exception

By removing the survey exception, the insurer indemnifies against most matters related to boundary lines, encroachments and overlaps. The ALTA Residential and Homeowner's policies provide certain affirmative assurances. See §§9.14.1 and 9.14.2. The CLTA 126.1 endorsement offers the insured certain assurances which are similar to those found in the Residential policy.

The following types of survey errors or matters have specifically been held compensable when the survey exception has been removed, or affirmative assurance given, unless another exception or exclusion also applies:

1. The failure to show an encroachment of the insured's sidewalk onto the neighbor's property.[190]

2. The failure to report to the insured the existence of encroachments onto the insured property of neighboring front steps and other building improvements, as disclosed by a survey.[191]

3. The incorrect placement of a side lot line, and damages for subsequent judgment prohibiting the insured from using cellar door because it opened onto the neighbor's property.[192]

4. The incorrect placement of a power line easement 50 feet from house as opposed to

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[188] *Santos v. Sinclair*, 884 P.2d 941, 945 (Wash.App. Div. 2 1994). The disclaimer read: "The Company has not surveyed the premises described in [blank]. The sketch below is furnished without charge solely for the purposes of assisting in locating said premises and the Company assumes no liability as to the validity, location, or ownership of any easement or other matter shown thereon, nor for the inaccuracies therein, including the accurate location of boundaries, including water boundaries. This sketch does not purport to show all highways, roads and easements adjoining or affecting said premises, nor is it a part or modification of the report, commitment, policy or other title evidence to which it may be attached."

[189] *Fee v. Stahley*, 2008 WL 4849844 (Minn.App.) (unpublished) (property sketch used to remove survey exception on loan policy only, which may have been attached to policy, was not a survey, contained a caveat about accuracy, and did not negate survey exception as to issue of property's area and dimensions).

[190] *McMinn v. Damurjian*, 105 N.J.Super. 132, 251 A.2d 310 (Ch. 1969).

[191] *Glyn v. Title Guarantee & Trust Co.*, 132 App.Div. 859, 117 N.Y.S. 424 (1909).

[192] Id.

Thus, the removal of the survey exception extends considerable coverage to the owner or lender as to off-record matters that are otherwise beyond the scope of the policy's protection.

However, the removal of the exception is not itself a coverage.[200] The removal of the exception is not an assurance by the insurer of the accuracy of any matter depicted on the survey that is delivered to the insurer to induce it to remove the exception.[201]

12.3.17 Inspection Of Premises

The inspection clause bars recovery by the purchaser from its insurer for any matters that the insured would have discovered if it had looked at the property. The most commonly form of "survey" exception used today includes this inspection clause:

> Encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises.

The inspection clause is not found in some versions of the survey exception, particularly in earlier policies.

With the inspection clause attached, the survey exception really becomes a graft of two related but not dependent universes of fact. As is discussed at §12.3, the determination of what would be revealed by an "accurate survey" is a precise, relatively objective analysis. What would show on an inspection of the premises is a separate issue. There is some overlap between what a survey would report and what a person would see by "inspection," but they are not synonymous.

The type of inspection referred to in this clause is the insured purchaser's examination of the premises. The exception removes coverage for matters by which the insured is bound because they would be discovered in an inspection of the property before a purchase.[202] As was stated by the

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except the recorded easement granted by the Ort deed, it should have listed it as 'as contained in Deed Book 237, page 340.' We agree." 615 A.2d at 658.

[200] *First American Title Ins. Co. v. Dahlmann*, 291 Wis.2d 156, 715 N.W.2d 609, 2006 WI 65 (Wis. 2006); *Community Credit Union v. AmeriTitle & Abstract, Inc.*, 344 Wis.2d 519, 822 N.W.2d 737 (Table), 2012 WL 3930615 (Wis.App.) (unpublished).

[201] *Shea Homes, LLC v. Old Republic Nat'l Title Ins. Co.*, 2007 WL 3334210 (W.D.N.C.) (unpublished) (policy did not insure limits of stump burial holes as depicted on survey). However, in *Fidelity Nat'l Title Ins. Co. v. Doubletree Partners, L.P.*, 739 F.3d 848 (5th Cir. (Tex.) 2014), the Fifth Circuit Court of Appeals ruled that the removal of a phrase from the state-mandated survey exception used in Texas increased the coverage of the policy, and in effect created a coverage against the inaccuracy of a line drawn on the survey presented to the insurer. The line was intended to depict the boundary of a flowage easement, which covered land below a certain elevation. In the same policy, an exception for the recorded flowage easement was also found not to remove coverage for the issue, because that exception was modified to add the phrase "and shown on survey dated March 22, 2006 by Mark Paine, RPLS # 5078." The court held that this limited the exception to that part of the flowed area as depicted by the surveyor.

[202] In *Mann v. Old Republic Nat'l Title Ins. Co.*, 975 S.W.2d 347 (Tex.App.-Hous. 14 Dist. 1998), the property was subject to two easements allowing the government to drop bombs on it. The easements were recorded after closing. The insured purchaser inspected the property with the seller beforehand. He saw a caliche road, signs warning of bombing

12.7 Special Exceptions

In addition to the standard exceptions, Schedule B contains "special" exceptions (more appropriately termed exclusions that are specific to the parcel whose title is insured). These exceptions detail matters that affect the title to the insured parcel for which the policy provides no coverage.[246] There is tremendous variety in the types of special exceptions that may appear in a policy. This chapter discusses the principles governing how these exceptions are construed.

Section 12.7.1 discusses what an exception must state to give adequate disclosure of the effect of the instrument. The claimed duty to highlight specific terms within an instrument is discussed below at §12.7.2. Section 12.7.4 analyzes when a general or broad exception gives notice of a specific recorded item. Section 12.7.5 considers those cases when no direct exception is made for a defect. Some states impose a separate duty to "abstract" title by reciting Schedule B exceptions, as discussed in Chapter 15. Finally, the insurer has no duty to remove special exceptions, or give legal advice to a proposed insured as to how exceptions can be removed, as discussed in §12.7.6.

12.7.1 Adequacy Of Notice Given By Exception

FORM 56, Appendix A
Exception gives adequate notice of defect

FORM 80, Appendix A
Exception conspicuous, plain and clear

Matters that are recited as exceptions on Schedule B of the policy are excepted (excluded) from coverage.[247] The insurer also has no policy liability for the lack of an exception for a recorded matter if that instrument does not constitute a lien or encumbrances on title.[248]

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[246] See *First American Title Ins. Co. v. Hegedus*, 2013 WL 4077033 (D.Del.) (unpublished), which held that the insurer was not responsible for paying a loss due to use restrictions that were excepted in Schedule B. In *Palmer v. Chicago Title Ins. Co.*, ___ F.Supp.2d ___, 2013 WL 3049343 (S.D.Tex.) (permanent citation not yet available), the insureds admitted that the insurer informed them of a new exception for a mineral instrument at closing, but they did not realize the effect of that instrument until years later. The court said that "the party claiming fraud has a duty to use reasonable diligence in protecting his own affairs, including to read documents that the party signs." It said that, because "the closing documents disclosed the mineral liens," there had been "no actionable misrepresentation... ." Also, although it would seem self-evident that the policy does not assure affirmative rights in an excepted encumbrance, the court so found in *Heyse v. Case*, 114 Conn.App. 640, 971 A.2d 699 (Conn.App. 2009), cert.den. 293 Conn. 905, 976 A.2d 705 (Conn. Jul 23, 2009). In that case, an insured demanded that the insurer prosecute a lawsuit to enforce the claimed violation of restrictions by her neighbor. The court ruled that the insurer had no such duty, in large part based on the fact that the policy excepted the restrictions. In *Flagstar Bank, FSB v. Lawyers Title Co.*, 2014 WL 1725746 (Cal.App. 2 Dist. 2014) (unpublished), the court held that a lender that bought loans that the originator claimed were first liens had neither a contract nor a fraud claim against the title insurer, when the lender later opened the policies and realized that they excepted prior deeds of trust that had not been paid off at closing. The lender's case appears to have been doomed at the summary judgment hearing, when Flagstar's lawyer was forced to say "I will concede that my client could have figured out they had been scammed sooner if they had read the policy."

[247] *Heyse v. Case*, 114 Conn.App. 640, 971 A.2d 699 (Conn.App. 2009), cert.den. 293 Conn. 905, 976 A.2d

EXHIBIT 5

COMING EVENTS—

Date	Meeting	Where to Be Held
June 1-2	Central States Title Insurance Regional	Edgewater Beach Hotel Chicago, Illinois
June 1-2	Tennessee Title Association	Riverside Hotel Gatlinburg, Tennessee
June 4-5	Idaho Land Title Association	Challenger Inn Sun Valley, Idaho
June 8-9	New Mexico Title Association	Alvarado Hotel Albuquerque, New Mexico
June 15-16	Wyoming Title Association	Townsend Hotel Casper, Wyoming
June 21-23	Colorado Title Association	Hotel Colorado Glenwood Springs, Colo.
June 21-23	Michigan Title Association	Sheraton-Cadillac Detroit, Michigan
August 3-4	Montana Title Association	Florence Hotel Missoula, Montana
Sept. 16-18	Missouri Title Association	Hotel Robidoux St. Joseph, Missouri
September 20-22	North Dakota Title Association	Grand Forks, North Dakota
September 20-22	Oregon-Washington Title Association—Joint Meeting	Gearhart Hotel Gearhart, Oregon
Sept. 20-22	Wisconsin Title Association (50th Anniversary)	Lorraine Hotel Madison, Wisconsin
September 22-25	New York Title Association	Whiteface Inn Lake Placid, New York
September 23-24	Kansas Title Association	Allis Hotel Wichita, Kansas
October 8-11	Mortgage Bankers Association of America (43rd Annual Convention)	Conrad Hilton Hotel Chicago, Illinois
Oct. 12-13	Nebraska Title Association	Lincoln Hotel Lincoln, Nebraska
October 16-20	**National Convention—American Title Association (60th Anniversary)**	**Hotel Fontainebleau Miami Beach, Florida**
November 12-13	Ohio Title Association	Deshler-Hilton Hotel Columbus, Ohio

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stock. But the increase in mortgage demand will be much less than in recent years.

4. Many lending institutions which have devoted a large proportion of their available funds to residential loans in recent years should be planning a shift in their operations to adapt future operations to the changing mortgage market. Mortgage lending in foreign countries is one example of an outlet which needs substantial development.

5. Finally, if the government is interested in encouraging the housing industry as well as in promoting the general welfare, it should concentrate less on new sources for loanable funds and ever easier and more unsound loan terms, and devote more of its efforts to discovering practical methods for increasing the rate of demolition of slums and out-worn structures. The problem in the next five years will not be a shortage of loanable funds, but an insufficiency of demand for new houses. The only way that the demand can be increased significantly above the 1,100,000 unit level is through a concerted effort to blot out the still existing large areas of totally inadequate housing found in many of our cities.

TABLE I

NON-FARM HOUSEHOLD FORMATION PER YEAR, 1950-60

	1950-55[a]	1956-58[b]	1959-60[b]
*Net increase in non-farm families (from causes other than undoubling of subfamilies	530,000	555,000	616,000
*Net undoubling of sub-families	95,000	30,000	5,000
*Net undoubling of second families	55,000	15,000	—
†Net increase in non-farm individuals	145,000	150,000	159,000
†Net undoubling of secondary individuals	155,000	100,000	50,000
	980,000	850,000	830,000

*The sum of these three items equals non-farm family households formed.
†The sum of these two items equals non-farm individual households formed.
[a]Estimates based on Census data.
[b]Forecast.

TABLE II

SUSTAINABLE LEVEL OF ANNUAL NON-FARM RESIDENTIAL CONSTRUCTION, 1956-60

	1950-55	1956-58	1959-60
Non-farm household formation	980,000	850,000	830,000
Net conversions (—) and demolitions (+)	180,000	125,000	135,000
Rise in non-farm vacancies	80,000	150,000	155,000
	1,240,000	1,125,000	1,120,000
Estimated transfer of existing units from farm to non-farm category	30,000	25,000	20,000
Annual non-farm construction	1,210,000	1,100,000	1,100,000
Non-farm housing stock,* end of period	45,500,000	48,440,000	50,410,000
Estimated "significant" non-farm vacancy ratio at end of period	2.8%	3.4%	3.8%

*Excluding trailers.

WHAT INVESTORS IN MORTGAGE LOANS ARE DEMANDING IN TITLE INSURANCE

BENJAMIN J. HENLEY
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In the interest of realism, the title to this talk might better have been "What Investors in Mortgage Loans are Demanding from Title Insurers" than "What Investors in Mortgage Loans are Demanding in Title Insurance." That is to say, investors in mortgage loans find it desirable, from time to time, to demand from title insurers insurance coverage which goes beyond the logical concept of title insurance and makes it difficult for the insurer to meet that demand.

What is Title Insurance, and what should it provide for the investor? Should it only set out the condition of the title to the property as it finds it and insure against loss resulting from a status of title other than that represented? Or should it in addition insure the investor against loss which might incidentally result from defects in title or claims against the property, known or unknown, at the time of insuring, as well as the ordinary risks of title insurance? What are the ordinary risks of Title Insurance?

The answer to these questions, so far as they can be answered, will be found in a review of the system of title recording which prevails in much the same form in most of the states of the United States, and its legal effect, and the methods which have been developed for the analysis of these records and the determination of the title status which, with facts outside the record, they establish.

First let us consider the recording system. Briefly speaking this system provides that private papers such as deeds, mortgages, deeds of trust, leases, agreements of sale, and numerous other types of documents relating to real estate may be filed in a public office for public reference. In addition public documents such as judgements, tax liens, public improvement liens and zoning ordinances may be so filed or otherwise made public records. The mere filing or recording of these documents would accomplish little if it were not for the ingenius doctrine of "constructive notice" which is a vital part of the effectiveness of the recording system.

When documents provided for by law are properly executed and filed or recorded all persons dealing with the property which they affect must take notice of them and are bound by their contents. Such instruments are said to give constructive notice. Likewise, a person dealing with the property may rely upon the effect of such documents, subject, as is frequently the case with legal rules, to exceptions. As a rule the validity of an instrument, as between the parties, is not affected by a failure to record it, but as to persons dealing with the property without notice of the right created by the unrecorded document, that right can be lost, if conflicting rights are acquired and are made a matter of record prior to the recording of the document which creates the prior right.

There are at least two important exceptions to the constructive notice rule: first, any one dealing with real property must take notice of the rights of persons in possession of the property under such rights, and second, any one dealing with real property is bound if he has actual notice of any adverse right in the property

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whether the evidence of that right is or is not a matter of record. Therefore, the rights of a tenant in possession or the owner of encroaching improvements, if a right to encroach exists, or even a claim to the absolute ownership of the property by one in possession, will be preserved, even though they are not shown by the records. The same is true of the ownership of easements and rights of way. Under the second exception mentioned, if a purchaser or mortgage loan investor acquires his interest in the property with knowledge of an outstanding adverse interest, the adverse interest will prevail regardless of whether or not it is shown by the public records.

What I have said about the recording system and its limitations points up the fact that the status of title to real estate cannot be determined from the record alone nor from conditions upon the property and facts outside the record alone. I am inclined to the view that the hazards which result from difficulties created on the records are greater than those arising outside the record because it is easier to miss them and frequently more difficult to define them. So, the purchaser of or lender upon the security of real estate finds it necessary for his protection to examine the records affecting the title to the property with which he is dealing to determine the ownership of the many rights which can exist in a single parcel.

Early in the history of the recording system two serious difficulties confronted the layman in making this examination for himself. For one thing he found that the records were indexed, not with reference to the property, but only with reference to the names of the parties. Because, for instance, many deeds affecting different properties were executed by the same person, as the volume of records increased it was found difficult to locate in the records the documents necessary to show title to a specific property, but more important it was found that frequently documents which affected the title were overlooked. Then, as titles became more complicated, it was found that the layman could not understand and construe many of the complex legal documents which made up the title such as probate proceedings, including wills and testamentary trusts, other trusts, life estates created in deeds and similar matters. Naturally, the job of doing this was eventually turned over to the lawyer. His opinion on the title was required before the property was purchased or a loan was made upon its security. This brought about the development of the most prevalent form of title service used in most parts of the country. The abstract and lawyer's opinion procedure.

For the preparation of his opinion the attorney must make the necessary examination of the documents affecting the property found in the public records. He finds the same difficulty as the layman in locating the particular documents, and as a result the abstractor became an institution in the business of title examination. To simplify the task of locating the matters affecting the individual property the abstractor evolved the system of assembling together in his office from day to day, as the documents were recorded or other matters appeared in the record, a record of all matters affecting every parcel of real estate in his county. This made it possible for him to quickly make them available and materially reduced the danger of missing some of them. Where the abstract system still prevails the abstractor furnishes for the examination of the lawyer or the title insurer a complete abstract of all documents affecting the property with a certificate that all record matters affecting the property are shown. On the basis of this abstract the attorney furnishes his opinion of the status of title.

Title insurance has its roots deeply embedded in the abstract and lawyer's opinion system of handling real estate transactions. It came about because of inherent inadequacies in the earlier procedure. Particularly in those areas where the insurer maintains its own title plant and does its own title examining, deals close much more expeditiously than in other areas. Another difficulty which

plagued the earlier procedure was the conflict in opinions of different lawyers on the same title. Then, even with the natural limitations existing on the insurance which the title insurer can give, its coverage is much broader than that provided by the lawyer's opinion. In addition, volume real estate security lenders found that the problem of examining and storing great numbers of abstracts many of which involved several volumes was almost insoluble except through title insurance. Title insurance was first issued in Philadelphia, Pennsylvania, in 1878. The first company in the West was formed in 1886, and issued its first policy in 1887.

An now, with this superficial review of the development of title insurance we are ready to discuss the questions posed above. What is Title Insurance? In its original concept it was an attempt to simplify the abstract, lawyer's opinion system of title service and to provide insurance of the status of title as found by the insurer from the records and as shown in the title evidence. Originally in most parts of the country the insurance did not go beyond the record title. Standard exceptions excluded from the coverage many matters which are now included. One form of standard exception which was used in California policy forms for many years excluded all matters, including defects in title, not shown by the public records. This excluded from the coverage acts of incompetents, forgeries, defective legal proceedings and other similar matters which are now covered by ordinary standard policy forms.

In several important particulars title insurance differs from all other forms of insurance. As indicated it is inherently intended to insure only against loss which might result if the status of title as set forth in the policy does not exist. In other words against loss occasioned by happenings of the past. Its coverage is limited to no fixed period. The liability of the insurer continues indefinitely. It does not involve the payment of recurrent premiums, and this is important from the standpoint of insurance against loss from future events such as is protected against by life, fire and casualty insurance. All other forms of insurance insure against loss resulting from the future occurrences.

Until the advent of the LIC and ATA policy forms the broadening of the coverage of title insurance policies came along slowly by natural evolution. There was no great demand from the insured for broader coverage. However, from time to time claims were made for losses arising out of risks, which were not covered by the policy forms in use, but were inherent in all titles and could not be resolved by an examination of the record. These risks involved such things as forgeries, false impersonations, acts of minors and incompetents, and the construction of doubtful legal questions. When losses occurred because of these items, it was difficult for the title insurer to explain why the insured was not protected by the policy. There being no satisfactory answer to that question, the policy coverage was gradually extended so as to include insurance against these hidden defects. It was done both as a matter of fairness to the insured and as a matter of public relations. However, in this extension of coverage, there was no change in the approach of the title insurer as to the purpose of the product nor the manner in which that purpose should be accomplished. It was still the industry view that the function of title insurance was to set forth in the policy a statement of the condition of the title as shown by the record, insuring against loss which would result if the title was not as represented, and in addition insuring against loss which might result from the invalidity of any portion of that record by reason of hidden deficiencies.

In those places where title insurance was accepted as the principle form of title evidence, until the real estate boom which followed World War I, the limited coverage offered by title insurers was considered sufficient and satisfactory by both purchasers and lenders. Prior to that time real estate financing needs were pretty generally met in the local com-

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munities in which the property was situated and lenders were sufficiently familiar with the local real estate conditions and practices, so as not to require the services of an independent agency to protect them against loss resulting from many of the risks which have been shifted to title insurers in recent years.

The growth of the country and demands for real estate credit during that period of great activity led many of the larger life insurance companies, seeking outlet for the investment of their funds, far afield from their home localities for real estate loans. At that time substantially all of the loan business of these companies was handled on the abstract and lawyer's opinion basis. As their volume of loans increased, the need for a more expeditious and less voluminous system of securing title protection was required. At the same time, title insurers were urging upon them the use of title insurance. However, these lenders urged that a broader title insurance coverage than was then being provided was necessary if they were to accept it for mortgage loans secured by property far from their home offices. As a result, a group of counsel for life insurance companies in the mid-twenties drafted a form of policy which they designed as the Life Insurance Company Standard Loan Policy, or LIC form. When required, title insurers commenced the use of that policy form and some life insurance company lenders then accepted title insurance in place of lawyer's opinions.

It was soon demonstrated that the LIC policy form was in some particulars unsatisfactory and in 1929, a committee of the American Title Association in collaboration with the group of life insurance counsel which had worked on the LIC form produced the American Title Association, A.T.A., Standard Loan Policy which, as you know, has come into general use for mortgage loans and has almost completely supplanted the LIC form. Institutional lenders now accept title insurance in this form not only in areas where title insurance has long been established, but in many other areas where the abstract-lawyer's opinion system still prevails for other types of real estate transactions.

The ATA policy form differs from the usual standard form particularly in that it eliminates standard exceptions which exclude from standard coverage forms risks such as rights of parties in possession, easements not of record, liens not of record and encroaching improvements.

In promulgating the ATA form, it was not the intent or expectation of the title insurance industry that it was departing from the theory discussed above upon which the business was founded. That is to say, that it was not intended that these additional hazards would be assumed by the title insurer upon a casualty basis. It was and is the practice to determine, as far as that status can be ascertained both as to record and non-record matters, the status of title, and to then insure against loss resulting from an incorrect statement in the title policy of that status. It was still the theory that the policy would have to show exceptions excluding from the coverage any known defects in the title of claims against the property.

When issuing standard policy forms which contain exceptions as to liens and other encumberances, adverse interests or claims which are not shown by the public records and conditions which would be shown by a survey, the title insurer does not inspect the property nor otherwise concern itself with things which do not appear from the record. In issuing the ATA policy, however, a complete investigation is made of all pertinent facts, whether shown by the record or not, which might affect the title. An inspection of the property is made to be sure that there are no easements which are not shown of record. If the property is improved or occupied, the rights of the occupant are determined. The question of the location of the improvements on the subject property and on adjoining properties with regard to boundary lines is considered. Any conditions, restrictions or reservations to which the property is subject are checked to determine that the improvements and occupancy are in conformity with the restrictions and that there are no other violations.

When a broad coverage policy such as the A.T.A. is issued, the title insurer does not change the nature of its business. It broaders the coverage but it takes all steps available to it to place itself in the same position as it was when issuing a more limited coverage; that is, so far as possible, it determines the condition of the title as affected both by record and non-record matters and insures against loss resulting from a status of title other than that set up in the policy. It does not intend to insure against damage which the insured may suffer by the happening of future events incidental to title.

When the investor in mortgage loans demands coverage within the terms just outlined, the insurer has no difficulty in meeting the demand, even though it may involve risks which are concealed and are in a measure matters of chance. But, when the demand goes beyond that, the title insurer is being forced into a field of insurance which is justified neither by his charges nor his reserves as called for by the ordinary risks of title insurance.

To illustrate: let us consider the subject of title insurance protection against loss resulting from mechanic's and materialmen's liens. In California, a mechanic's lien is prior or superior to any lien on the property securing a loan unless the security instrument evidencing the loan is recorded in the office of the county recorder before the work of improvement upon which the labor or material is bestowed was commenced. The ATA policy form insures against loss or damage by reason of any such lien by the provision including in the coverage any satutory lien for labor or material which is prior to the lien upon the land of the security instrument of the lender.

The potential mechanic's lien upon property being improved, and the insurance against loss resulting therefrom contained in the A.T.A. policy, should offer no complications in issuing title insurance covering the lien of the security instrument. However, it is one of the most troublesome problems involved in title insurance affecting construction loans. It is the practice of all title insurers, I believe, to inspect property immediately following the recording of the security instrument which is to be insured. If no work is under construction, the policy issues as a routine matter. If work of improvement has commenced and the priority of mechanic's liens has been established there should be inserted in the title policy an exception showing that condition. In this event a question of credit between a lender and a borrower arises in which the title insurer should not be involved. It should not assume responsibility to pay losses which might result if mechanic's liens should be filed. This, however, is not the approach of the lender. As a rule it is urged that the loan cannot be made unless the title policy is issued clear of exception as to mechanics liens and in many instances such pressure is placed upon the title insurer that it is practically compelled to so issue the policy.

This is not title insurance, but is simply a guarantee that all mechanics and materialman who supply labor or materials to the work of improvement will be paid. It is a protection that long has been furnished by a type of insurer or bonding company which conducts that type of insurance business and which makes charges commensurate with the risk and establishes reserves which can pay losses resulting therefrom. The hazard which is involved is one of relatively short duration and is assumed in sufficient volume so that a loss experience can be established and the risk can be measured and adequately rated. This permits the fixing of proper charges and the building of proper reserves. Likewise, the hazard of insuring against mechanic's lien losses, when conducted by companies who assume all types of casualty risks, is diluted by a diversification of risks. Do I need to suggest that the title insurer is not in a position in this respect to so diversify, and that it is playing with fire when it assumes this responsi-

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bility without making adequate charges and establishing proper reserves? Is it not reasonably clear when you consider that a home development of only 50 homes involving a construction expenditure of say $10,000 per unit is a business operation involving total obligations of $500,000, that a title insurer with assets of $2,000,000 or $3,000,000, and many of them have less, is subjected to an extremely risky exposure when at the same time it is out on several such projects, as well as much larger ones, assuming responsibility for mechanic's liens? It might be added that the lender relying upon the title insurance policy for this type of protection, if it fairly looks the facts in the face, could experience some restless slumber as a result.

I have referred to the mechanics lien problem because it is one which involves such a great hazard when the title insurer departs from sound underwriting practices. There are numerous other situations where lenders are requiring coverage falling within the same category.

All of you here, I am sure, are familiar with California Land Title Association Indorsement Form 100. The coverage of this form well illustrates the problem which I have been discussing. It assures the insured that there are no covenants, conditions or restrictions set forth in the policy under which the lien of the security instrument can be cut off, subordinated or otherwise disturbed, and that there are no existing violations on the land insured, of any enforceable covenants, conditions or restrictions. The title insurer can properly provide this coverage. It can reasonably be expected to determine the facts necessary to insure, but it is frequently found that there are restrictions a violation of which can cut off the lien of the security instrument. In many such cases, the owner of the reversionary right cannot be found or is a corporation which is defunct. What happens then? The lender urges that the loan cannot be made unless the title insurer insures against loss resulting from the right of reversion, and the borrower says to the insurer, if you don't insure your competitor will, and the answer is, what do you suppose? The insurer insures. There is some doubt, however, as to the soundness of the practice either from the standpoint of the lender or the insurer.

Indorsement number 100 also insures against loss resulting from any future violations on the land of covenants, conditions or restrictions. It is difficult to reconcile protection of this type with the theory of title insurance. It recognizes an encumbrance upon the property and the possibility of the encumbrance causing loss to the insured and obligates the title insurer to pay that loss. The balance of the coverage of indorsement form 100 is of similar character. It contains insurance against any loss which would be suffered if existing improvements, including lawns, shrubbery or trees, are damaged by the exercise by the owner of the easement of his right to use the easement if the improvements encroach upon such easement. What has this to do with title to the property?

Indorsement Form 100 was a product of the same procedure as the ATA Policy form. It came from a committee of title insurance representatives, working with our good friends from the life insurance companies. I participated in the discussions. I know that we of the title insurance industry who were responsible for the form recognized the fact that we were going outside our field in some of its coverage, but we wanted to go as far as possible in meeting the needs of lenders, so here we are.

Affirmative insurance is frequently asked against loss resulting from the existence of encroachments, either of improvements of the subject property upon adjoining property or improvements of the adjoining property upon the subject property. The title insurer can logically meet that demand provided the encroachment is so slight as in law to be considered as no encroachment. It is reasonable that it should make this decision. However, regardless of the extent of the encroachment, demand is frequently made that insurance be issued against loss resulting from encroachments which can cause damage if an adverse claim is made. When such insurance is issued it is not title insurance but human temperament insurance because the incidence of loss depends upon whether the owner of the adverse right is a person of good will who will not stand on his rights.

Violation of setback requirements of restrictions are frequently found. This is another situation where the insurer can logically insure, if because of other violations in the vicinity of the property, or for other reasons, the restrictions are not legally enforceable. However insurance is frequently required where the restrictions are clearly enforceable and the title insurer is asked to insure against resulting loss so that the loan can close.

There are many other similar situations which arise. It is extremely difficult for the insurer to determine whether these borderline cases are title insurance or are merely a guarantee protecting the lender or insured against loss resulting from a known claim against the property. The title insurer should, and I believe does, make every effort to cover such cases where they can be covered. It would be shortsighted for him to do otherwise because his business depends, just as yours does, upon the closing of the loan wherever possible. However, a line eventually will have to be drawn against the tendency of the lender to feel that the title insurer should provide more and more protection against hazards involved in the making of his loans which go beyond the proper scope of title insurance.

Humorously speaking, I see no reason why the logic of the present tendency should not lead to the requirement that the title insurer should insure the lender against any loss which it might suffer should the obligation secured by the security instrument not be paid. There is no more inconsistency in such a requirement than there is in the demand that the title insurer should guarantee the lender that all obligations of the borrower for construction work upon the property will be paid although those obligations are a lien upon the property prior to the security instrument.

Under the abstract and lawyer's opinion system, many of the risks referred to above which, as I have said are really credit risks, are assumed by the lender. Under that system the lender is a self-insurer and I assume that the risk is taken into consideration in his cost of doing business. In many instances the work of the title insurer in making it possible to insure against such special risks is a duplication of the work of the inspectors of the lender, and the risk of loss on many of the matters is less to the lender than to an insurer because the lender or his servicing agent has control of the loan and can work out problems relating to it with less difficulty and less expense than the insurer. In the final analysis, this question of distribution of risk between the lender and the insurer may come down to a simple question of expense to the borrower in obtaining his financing. If the insurer is assuming risks, however nominal, which logically should be carried by the lender and which involve unnecessary expense by the insurers for investigation, legal opinions and other similar services, and for the setting up of proper reserves, the financing expense is increased. The question is, should the lender impose that increased expense upon the borrower, or is it a factor in the credit risk of the transaction which can more cheaply be assumed by the lender to the advantage of all parties involved in the transaction.

In concluding this discussion I would like to leave with you one thought relating to FHA and VA loans. Where title insurance ignores known defects and attempts in so doing to make marketable a title which in fact is not marketable it is possible that these government agencies, in case of foreclosure, may question its guarantee of payment on the loan on the theory that title does not conform to its regulations. There has been little or no experience to date, so far as I know, which justifies an opinion on this question. While the title company does not insure

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against loss which might result from the possible resistance against payment of their obligations by these agencies, this question is a matter of concern to the industry.

While the tenor of this discussion may indicate to you an unwillingness on the part of the title industry to cooperate with you, I think you realize that that is not the fact. Such a position on our part would be self-destructive. Our self interest requires us to provide you with the greatest possible service and coverage. I believe that you recognize our willingness to do so. My purpose here is not to set up road blocks to service in the closing of your loans, but to emphasize to you the problems involved in the present tendency to shift to the title insurer so many of these problems involved in the closing of loans which, in fact, are not within the proper scope or field of title insurance.

THEORIES OF LIABILITY

LYLE F. HILTON

Staff Attorney, Berks Title Insurance Company, Reading, Pennsylvania

Delivered before Pennsylvania Title Association
1956 Annual Conference, Atlantic City, New Jersey.

Sooner or later every title man faces the question, "Just what does a title insurance policy cover?" We all endeavor to answer that question as part of our job of selling title insurance. Many of us have also had to consider the reverse of that question: "To what claims does the issuance of a policy of title insurance expose the insurer?" or as it may be put, "On what theories may the insurer be sued upon a policy of title insurance?" I believe that a substantial part of the answer to these questions may be found in those opinions of court which indicate the thinking of the court and the rules by which various claims have been held either to have been within or without the scope of the policies sued upon. I would therefore, with your permission, discuss with you for the next thirty minutes the various theories that the courts have applied to the standard portions of title policies and examine in detail some of the cases on which those theories have been applied.

Title insurance as a business has since its inception become of age in the courts, at least in the sense that title insurance is now recognized as a field or type of insurance and of the insurance business.[1] This implies an interesting corollary to the effect that, contrary to the attitude of many applicants, a title insurance company is not a public utility; a title insurance company is not bound to insure every title declared by the courts to be marketable. An insurer has, as an insurance company, the right to select its own risks.[2]

The rule that a title insurance company has the right to select its own risks would appear to have one significant qualification; where the company has issued an owner's policy and subsequently is asked to insure the title to the proposed mortgagee. In a New York case,[3] the title company issued an owner's policy in which it insured the owner as to an estate in fee simple but raised the following exception: "Restrictive covenants in instrument recorded in liber 211 of conveyances, at page 13, in the Office of the Register of the County of New York." Ten years later the same company, faced with a mortgagee application, raised exception that the title was not in fee simple but on condition, the condition being expressed and set forth in the instrument excepted in owner's policy. The assured owner was put to considerable expense to clear the title for the mortgagee. The Court held such expenses to be a proper claim within the title insurance policy. The Court said, "Here the defendant is in the same position as if the mortgage loan had failed by reason of a defect against which it had insured. For a loss so sustained, the plaintiff may recover."

In accord with the general law of insurance, before a valid insurance contract or policy may be written, the applicant or prospective assured must have an insurable interest in the subject matter of the insurance. It would appear that, as to Pennsylvania companies, insurable interest is no real problem in the light of our current statute[4] under which we operate, which reads in part: "Such insurances to be made for the benefit of owners of real estate, mortgagees, and others interested in real estate." The statute read in the light of the rule that the title insured is the estate described in the policy would indicate that the problem of insurable interest will ordinarily be resolved upon examination of the title to be insured.

Some of us have been concerned whether or not the shareholders of a corporation have, for title insurance purposes, an insurable interest in real estate owned by the corporation. The problem arises when a corporation is acquired by way of stock transfer. The new shareholders often want to be assured that the corporation's title to its real estate is good. Their reason for seeking such insurance is perfectly clear; their insurable interest is not so clear. As to property insurance generally, shareholders are found to have an insurable interest in property owned by their corporation[5] but I have found no case applying that rule to title insurance. Observe that the insurable interest, if there is one, probably arises on the date of the stock transfer. Understandably, a policy dated that day is highly desirable from the shareholder's point of view. The problem of drafting proper exceptions for such a policy is, fortunately, not within the scope of this paper.

Fundamental to considering theories of liability is the inquiry, "What is a title insurance policy in the eyes of the law?" and, secondly: "How is that policy construed?"

> "A contract of title insurance is an agreement whereby the insurer, for a valuable consideration, agrees to indemnify the assured in a specified amount against loss through defects of title to real estate, wherein the latter has an interest, either as a purchaser or otherwise; a contract to indemnify against loss through defects in title to real estate or liens or encumbrances thereon."[6]

This definition is generally in accord with cases in several jurisdictions including Pennsylvania.[7]

Further, the courts have held that a policy of title insurance is neither a wagering contract[8] nor a suretyship contract.[9]

Fundamental to the consideration of every indemnity contract, which is to say every title insurance policy, are the inquiries first: "As of what date is the contract effective?" and secondly: "As of what date, if any, is the contract of indemnity terminated?"

It would seem as if a mortgagee policy poses no real problem as to effective date. Mortgagee policies are regularly issued only after recordation of the mortgage and the recording statutes protect the mortgagee's title so-called from the date of recordation of the mortgage, with certain very narrow exceptions. The mortgagee's interest is ordinarily terminated according to rules of law, and with it, ordinarily, policy liability. One can, however, dream up extreme cases in which insurer's liability may well survive satisfaction of an insured mortgage. We have no law on that point.

As to owners, however, the problem is somewhat different. In the case of owner's insurance, we may have an owner seeking to insure his already existing title. That problem has been rather fully considered by the New York state courts and I think that the result reached there is probably completely applicable to all other jurisdictions in this country. The question was first raised in the Trenton Pot-

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EXHIBIT 6

Market Review

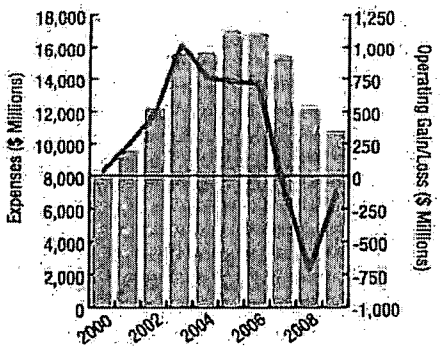
December 13, 2010

Sector
Title

U.S. Title Insurance – Gains/Losses and Expenses (2000-2009)

($ Millions)

Operating Expenses Losses & Loss Adj. Expenses Pretax Operating Gain/Loss*



Source: ALTA, NAIC.
*Pretax Operating Gain/Loss equals Underwriting Gain/Loss including income from services and fees.

Related Reports
2010 Special Report:
U.S. Title – 2009 Financial Review

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Results Partially Recover in 2009 and 2010; Job Market to Influence 2011

The title industry's operating results partially recovered in 2009, after reporting weak premium volumes and profitability in 2008. Although 2009 total industry written premiums declined from 2008 levels, premiums written trended upward in the third and fourth quarters from the same period of the prior year. During the first half of 2010, title insurance revenues stayed relatively unchanged from the first half in 2009 – aided by federal policy and tax incentives – which helped most major underwriters post positive operating margins for the first six months of 2010.

Still, the title industry faces a tough road ahead as the weak housing market continues to be hampered by economic and employment conditions. Sustaining the recent improvement in operating and capitalization trends will depend largely on the length and depth of those conditions.

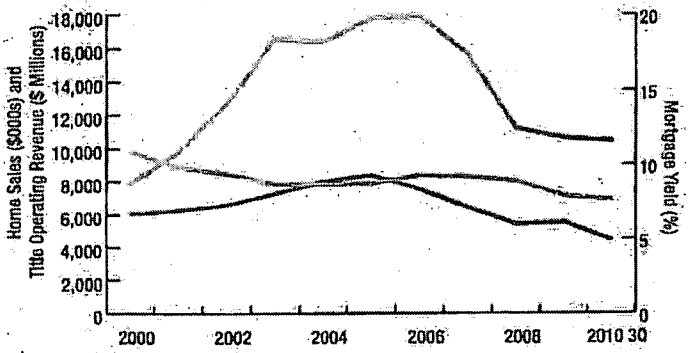
Results partially recovered in 2009 as reflected by the following:

- The industry posted a far smaller pretax operating loss of $129.5 million compared with a $711.0 million loss in 2008.

- Although total operating revenue was down somewhat in 2009 ($10.6 billion) compared with 2008 ($11.2 billion), the industry's declining expense levels ($9.7 billion in 2009 versus $10.8 billion in 2008) more than made up for the drop in revenue.

U.S. Title Insurance – Revenue and Home Sales Activity (2000-2010)

Total Operating Revenue Total Home Sales 30-Year Fixed Mortgage Yield
(as of June 30, 2010, on a rolling 12-month basis)



Notes: All data are annual averages, with the exception of 2010 numbers, which are preliminary September figures. Total home sales is the sum of new and existing home sales. 2010 home sales numbers are the most recent available and reflect seasonally adjusted annual rates.
Sources: U.S. Census Bureau, National Association of Realtors (NAR), Federal Reserve Bank (FRB), Bureau of Economic Analysis (BEA).

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Partial Recovery Seen, Job Market to Influence 2011

Industry Overview

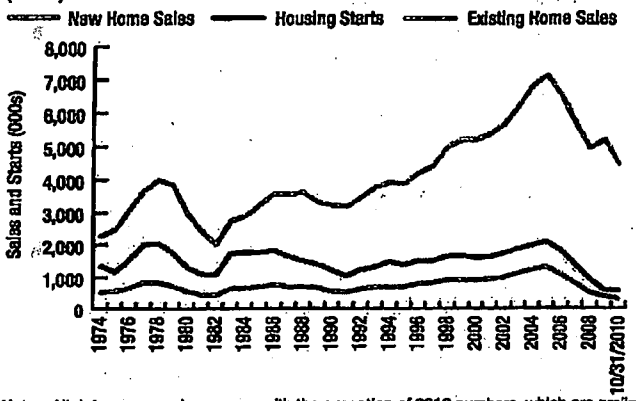
The title industry's operating results partially recovered in 2009, after reporting weak premium volumes and profitability in 2008. Although 2009 total industry written premiums declined from 2008 levels, premiums written trended upward in the third and fourth quarters from the same period of the prior year. During the first half of 2010, title insurance revenues stayed relatively unchanged from the first half in 2009, aided by federal policy and tax incentives. This helped most major underwriters post positive operating margins for the first six months of the year, even though revenues declined in the second quarter of 2010 compared with that of the same period in 2009.

Nonetheless, the title industry still faces challenges as the housing market continues to be hampered by weaknesses in economic and employment conditions. And, sustaining the improved operating and capitalization trends of recent months will depend largely on the length and depth of those conditions. While in recent quarters home prices have inched upward, in certain geographic locations, they are still well below the level of the real estate peak year of 2006.

During the housing bubble from 2000 through 2006, the industry's revenue more than doubled. But just as the surge in real estate transactions drove up title insurance revenue – along with a greater incidence of title claims – the housing market downturn (see **Exhibit 1**) pared back revenue significantly, and resulted in negative profitability measures in 2008, which partially recovered in 2009 (see **Exhibits 2** and **3**). The foreclosure and default rates' upward trends, which began in the subprime mortgage segment in 2007, spread to other areas of the mortgage market. We began to see greater numbers of delinquencies and an increased rate of foreclosures in the "Alt-A" (e.g., typically borrowers with higher credit scores but little or no documentation of income or assets) segment, as well as the "prime" mortgage segments.

As a result of record losses from these segments, financial institutions have continued to tighten the availability of credit, and significantly reduce access to mortgage loans for both purchasing and refinancing. Starting in 2008 – and continuing into the first half of 2010, however – the federal government played a more active role in the mortgage market through the Federal Housing Authority (FHA) and the two housing government-sponsored entities (GSEs) Fannie Mae and Freddie Mac. These actions have helped stabilize the mortgage market and have somewhat cushioned the fall in transaction volumes following the end of the housing bubble. Recent tax legislation such as the First-Time Homebuyer Tax Credit of 2008-2009

Exhibit 1
U.S. Housing and Sales Activity (1974-2010)
(000s)



Notes: All data are annual averages, with the exception of 2010 numbers, which are preliminary September figures. Total home sales is the sum of new and existing home sales. 2010 home sales numbers are the most recent available and reflect seasonally adjusted annual rates.
Sources: U.S. Census Bureau, National Association of Realtors (NAR), Federal Reserve Bank (FRB), Bureau of Economic Analysis (BEA).

Special Report

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– which was extended for first-time buyers and included certain existing homeowners who had properties under contract as of April 30, 2010 – also helped somewhat to bring more buyers into the market and modestly rejuvenate a largely moribund housing market. While significant foreclosure activity remains a drag on overall housing prices, the incentives have benefited title insurers to some extent in 2009 through June 30, 2010.

During periods of reduced premium volume, title insurers' profit margins depend on their abilities to manage the cycle by reducing expenses. General expenses incurred as part of the title-search process typically make up 85% or more of premium volume, reflecting the loss-prevention nature of title insurance. While major title insurers posted significant losses in 2008, companies that controlled costs aggressively have managed to return to profitability in 2009 and the first half of 2010, despite some erosion in their underwriting margins. Others less actively controlling their cost structures are expected to see further erosion in their margins if premium volume continues to fall.

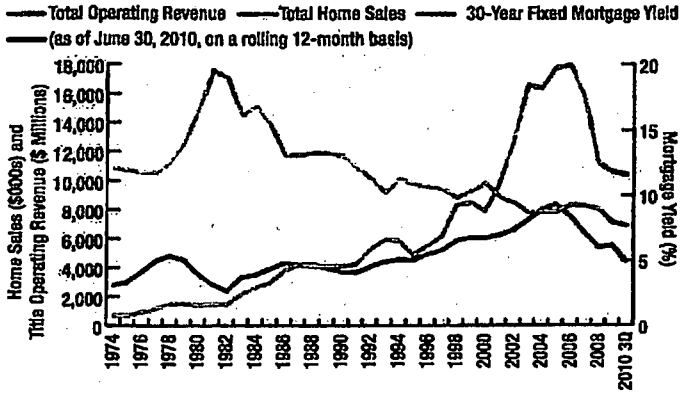
Inadequate loss-reserving practices earlier in the decade, when transaction volume was increasing dramatically, caused incurred losses to rise (see **Exhibit 4**). To make up the shortfall, some title insurers posted significant reserve increases in recent years, most notably in 2007 and 2008. Continued foreclosures and mortgage delinquencies are also driving up claims. While these need not directly lead to a claim, each triggers a title search with the potential to reveal a prior lien or other title defect overlooked during the initial title search. Loss activity stemming from agent-, consumer-, and bank-related fraud activity still remains a concern. Such activity typically goes up during periods of reduced cash flow and generally involves embezzlement of funds held in escrow, potentially resulting in severe losses.

Industry History and Purpose

The title industry continues to play a critical role in the U.S. economy by insuring the proper transfer of real estate from buyer to seller and by facilitating the growth of the secondary mortgage market. This enables Americans to have one of the highest home ownership rates in the world.

Exhibit 2

U.S. Title Insurance – Revenue and Home Sales Activity (1974-2010)

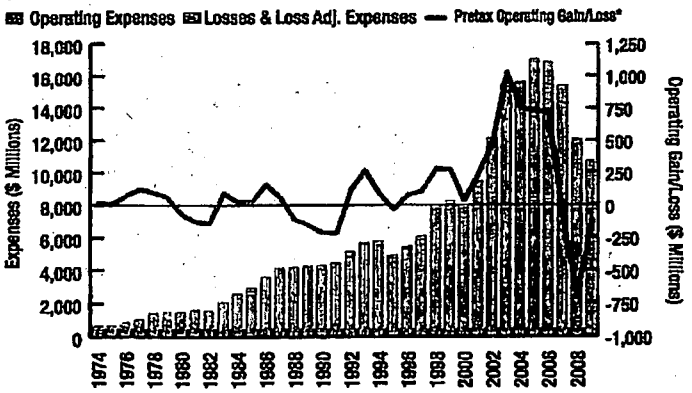


Notes: All data are annual averages, with the exception of 2010 numbers, which are preliminary September figures. Total home sales is the sum of new and existing home sales. 2010 home sales numbers are the most recent available and reflect seasonally adjusted annual rates.
Sources: U.S. Census Bureau, National Association of Realtors (NAR), Federal Reserve Bank (FRB), Bureau of Economic Analysis (BEA).

Exhibit 3

U.S. Title Insurance – Pretax Operating Gains/Losses and Expenses (1974-2009)

($ Millions)



Source: ALTA, NAIC.
*Pretax Operating Gain/Loss equals Underwriting Gain/Loss including income from services and fees.

The title assurance industry is composed of abstractors, attorneys, title insurance agents and title insurance companies. At any real estate closing, the parties involved must be assured that the title of the subject real property is as represented and expected. Members of the land title assurance industry are instrumental in helping to deliver and guarantee this assurance.

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Exhibit 4

U.S. Property/Casualty – Losses and Loss-Adjustment Expense Ratios, Various Lines (1974-2009)

Title insurance has a much lower average loss and LAE ratio as compared with the general property/casualty industry. Property/casualty figures incorporate an IBNR approach, whereas title involves paid claims.

Year	Title Industry	Surety (Stock)	Property & Casualty (Stock)	Property & Casualty (Mutual)	Boiler & Machinery (Stock)
1974	6.5%	61.6%	75.3%	76.4%	44.6%
1975	8.7	68.8	78.8	80.2	43.8
1976	6.3	49.2	74.6	77.1	36.1
1977	5.3	44.6	70.1	72.4	33.3
1978	5.0	46.8	69.0	72.9	30.8
1979	5.0	39.6	71.7	76.3	29.8
1980	6.6	53.1	73.9	77.0	33.1
1981	6.1	34.1	75.5	79.8	33.2
1982	8.4	37.4	78.6	82.1	38.8
1983	6.3	39.9	81.0	81.9	40.5
1984	7.9	49.9	88.8	87.3	53.8
1985	7.7	77.7	88.8	88.6	41.5
1986	8.8	71.6	80.3	84.3	38.7
1987	7.7	66.1	76.2	82.2	32.7
1988	9.8	49.3	76.2	83.5	44.5
1989	9.5	42.9	80.4	85.9	39.6
1990	10.0	36.3	80.2	87.0	48.2
1991	10.0	26.2	80.1	82.8	57.1
1992	7.4	38.3	89.7	84.4	53.6
1993	5.8	23.0	78.9	81.4	58.1
1994	5.4	34.5	80.3	82.4	44.9
1995	5.8	33.9	78.1	80.7	48.1
1996	4.9	27.2	77.9	79.9	44.1
1997	4.6	25.6	72.3	74.7	45.2
1998	3.8	24.5	75.0	80.1	51.0
1999	4.1	25.0	77.3	81.7	60.6
2000	5.3	27.7	79.4	85.3	51.5
2001	4.8	47.2	87.3	90.8	50.2
2002	4.6	63.7	80.5	82.9	40.0
2003	4.0	72.1	74.4	75.4	28.4
2004	4.3	69.7	72.2	72.5	32.4
2005	5.3	53.4	74.9	74.7	22.8
2006	5.0	31.6	64.1	69.5	35.8
2007	8.8	22.9	66.6	71.5	32.5
2008	11.7	21.4	78.9	79.2	34.5
2009	9.7	31.8	71.8	77.1	34.5
		Averages:			
All Years	6.6	41.9	75.1	78.0	39.8
Past 10 Years	6.3	44.2	74.8	77.9	36.3
Past 20 Years	6.3	36.8	76.9	79.7	43.7

Source: Title industry figures developed from ALTA and NAIC Form 9s. All other data from BestLink® and Best's Aggregates & Averages.

The functions of the title search and examination provide the basic information concerning the legal interest affecting the title to the real property. The title search and examination are more than an attempt to confirm the placement on the record of a subject mortgage: they are the underwriting process that distinguishes between significant and insignificant conditions affecting title. The search and examination very often include the curing of defects to the title necessary to complete the transaction. It is acknowledged that few properties have perfect title conditions and, as such, title insurance was developed to guarantee the current status of title, based on search and examination.

Depending on the jurisdiction, the title search and examination can require a search by title insurance personnel of numerous public documents, including tax, court-judgment, deed, encumbrance, federal and state records, as well as the evaluation of real property characteristics such as flood zone, location and construction type.

To assure that real property rights are conveyed as represented, most transactions are covered by title insurance to guarantee the condition of ownership and property rights as represented. A title insurance policy provides indemnification to an insured that has a fee interest, leasehold or mortgage lien for a specified property for any covered loss caused by a defect in title that existed as of the effective date of the policy.

Title insurance involves the acceptance of past transactional events rather than future occurrence events associated with all other property and catastrophe exposures. In addition, title insurance, unlike most other property/casualty exposures, has no termination date and no time limitation on filing claims.

Since title insurance usually involves the acceptance of prior transaction-related risk rather than future risk, the underwriting process in the title insurance industry differs markedly from the typical property/casualty underwriting process (see **Exhibit 5**). The title underwriting process is designed to limit risk exposure through a thorough search of the recorded documents affecting a particular property. The insurance component of a title product only indemnifies for existing – but unidentified, or specifically underwritten – defects in the condition of a property's title. In other words, title insurance – unlike typical property/casualty insurance – usually does not respond to future occurrences but only to past defects that were in place at the

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time the property was sold, and not recognized as a problem until after the property was transferred or was insured over.

Property/casualty underwriters are concerned with determining the probability of loss based on the characteristics of the insured risk. Title underwriters, on the other hand, are concerned with reducing the possibility of loss by discovering as much information about the past as possible through extensive searches of public records and stringent examinations of title. Some state title insurance codes provide that no policy or contract of title insurance shall be written unless it is based upon a reasonable examination of title, and unless a determination of insurability of the title has been made in accordance with sound underwriting practices.

The general underwriting examination and search requirements, coupled with the disarray and geographic dispersion of records, have fostered the development of privately owned, indexed databases or title plants. These title plants must be maintained regardless of the level of real estate activity during any given period. The Financial Accounting Standards Board (FASB) has ruled that a title plant is a unique asset that if properly updated, does not diminish in value over time. The cost to maintain the economic life of a title plant and continuously update the records is extremely high. This is one factor adding to the higher overall fixed-cost percentage for title insurers as compared with property/casualty insurers.

Both property/casualty insurers and title insurers must physically produce policies, but the processes and requirements differ significantly. A typical property/casualty policy might involve filling out a few blanks on a form, while the title policy might require the transcription of a complex legal description unique to the insured property, along with enumeration of often equally complex and unique terms of easements or other special property rights. In property and liability lines, agents' commissions generally are in the range of 10% to 25% of the premium on the policies that agents write. In title insurance, the agent retains a much larger proportion of the amount charged (see **Exhibit 6**). There was a drop in expense ratio from 97.4 in 2008, to 93.1 in 2009. There have been drops in other years, but not nearly as big. Commissions for title insurance are more properly described as agent's retention or agent's labor or work charges.

Exhibit 5
U.S. Title vs. Property/Casualty – Comparison of Key Elements
Key elements of the title insurance that distinguish it from personal lines classes of property/casualty insurance.

Features	Title Insurance	PC Insurance
Protection	Against Past Events	Against Future Events
Scope of coverage	Specific	Broad
Actuarially Defined Rates	Evolving	Yes
Administrative / Acquisition Costs	High	Low
Loss Costs	Low	High
Policy Term	Potentially Unlimited	Finite
Premium (GAAP)	Fully Earned at Issuance	Earned Over Policy Term
Rate Regulation	Varies by State	High
Rate Activity	Varies by State	Tied to Inflation and Underwriting Business Cycles
Loss Frequency	Low to Moderate	High
Loss Severity	Low	Moderate
Distribution	Agents / Direct	Agents / Direct /Mass Market
Marketing Success	Based on Service	Based on Rates
Competition	Semi-Concentrated Market	Fragmented Market
Premium Collection	After	In advance
Financial Leverage	Low	High
Sensitivity to Real Estate Markets	High	Moderate

The title insurance activities of search and examination generally are carried out locally, because the public records to be searched are usually only available locally. This activity might be performed by directly owned branch operations of the insurer or by title agents. Payments to a title agent not only reflect an origination commission but incorporate underwriting, loss-prevention and administration costs that title insurers would incur if policies were issued directly. These unique characteristics of the title insurance industry, combined with the necessity of maintaining a title plant or searching public records, contribute to the high fixed costs, the high ratio of salaries to total expenses and the high percentage of total revenues retained by agents.

In addition, with the requirement that each real estate parcel be evaluated and insured based upon the myriad and varying local laws, customs and records, the traditional insurance structure of local marketing and home-office underwriting cannot reasonably and cost-effectively be maintained in the title insurance industry. Since real estate

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Exhibit 6

U.S. Property/Casualty – Operating Expense Ratios, Various Lines (1974-2009)

Title insurance has a much higher average expense ratio as compared with traditional property/casualty lines.

Year	Title Industry	Surety (Stock)	Property & Casualty (Stock)	Property & Casualty (Mutual)	Boiler & Machinery (Stock)
1974	91.5%	52.1%	29.7%	24.8%	59.0%
1975	90.3	53.2	28.7	24.2	52.4
1976	86.0	53.8	27.4	22.5	57.6
1977	84.3	51.6	26.9	21.5	53.4
1978	88.7	50.3	27.6	21.7	53.3
1979	91.2	50.6	27.9	21.7	55.4
1980	98.3	52.8	28.5	22.1	57.7
1981	100.5	51.6	29.4	23.1	58.6
1982	101.3	51.7	30.1	23.5	62.1
1983	89.6	47.7	30.8	23.4	63.3
1984	91.2	45.6	30.1	23.3	64.5
1985	91.3	34.2	27.7	21.9	48.4
1986	87.0	45.5	28.6	21.8	48.2
1987	90.9	49.9	27.1	21.4	48.2
1988	93.1	51.2	27.8	21.1	52.6
1989	94.3	51.0	28.2	21.2	54.6
1990	95.1	51.1	28.2	21.5	52.8
1991	95.1	48.8	28.6	22.0	52.6
1992	90.4	45.4	28.7	22.3	49.5
1993	89.7	42.4	28.2	21.9	45.5
1994	93.1	48.3	27.8	22.4	43.1
1995	90.0	45.4	27.8	23.1	43.0
1996	93.6	44.0	27.8	23.1	41.9
1997	93.7	43.2	28.3	24.3	43.0
1998	92.7	43.5	29.0	24.9	44.0
1999	92.9	42.6	29.1	25.5	48.9
2000	94.7	44.1	28.6	25.2	41.8
2001	92.7	40.8	27.4	24.9	41.9
2002	91.6	51.6	25.7	24.9	39.7
2003	89.8	49.1	25.0	24.4	39.7
2004	89.4	47.2	26.3	24.4	43.7
2005	89.0	47.4	26.3	24.6	40.0
2006	89.9	48.5	26.5	25.9	40.8
2007	90.9	46.6	27.5	26.3	38.5
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		Averages:			
All Years	89.5	46.2	27.2	22.8	47.3
Past 10 Years	91.8	46.7	28.9	25.5	40.7
Past 20 Years	92.2	46.1	27.6	24.3	43.8

Source: Title industry figures developed from ALTA and NAIC Form 8s. All other data from BestLink® and Best's Aggregates & Averages.

laws, customs and practices vary, at least on a state-by-state and sometimes on a county-by-county basis, it has not been practical for underwriting to be performed on a national basis by a team of underwriters in the home office. Therefore, the economies of scale – made possible by establishing a centralized, skilled technical support staff of actuaries and underwriters to price products and make underwriting decisions – are absent in the title industry.

Rate Regulation

Like the rates for other forms of insurance, rates for title insurance usually are regulated by state governments to ensure that premiums are not excessive, inadequate or unfairly discriminatory to the public. States have different methods of regulating title insurance rates. The types of rate regulation used are:

- **Promulgation** — State regulatory body sets the rates.
- **Prior Approval** — Insurers propose rates, which must be reviewed formally and approved explicitly or deemed approved by the regulatory body before they can be charged.
- **File and Use** — Insurers set rates, but they cannot be charged until the regulator has been notified and allowed time for review and action, if necessary. In some prior-approval states, almost the same result is achieved through a so-called deemer provision. Under a deemer, rates proposed by insurers are deemed approved if the regulatory body takes no action to disapprove a filing within a specified time, and the filer notifies the state that the rates are being deemed approved.
- **Use and File** — Insurers set rates that can be charged immediately, as long as the new rate schedule is filed with the regulatory body.
- **No Direct Rate Regulation** — Insurers set rates that can be changed at an insurer's discretion. Even in this apparent unregulated situation, a regulatory body still is charged with overseeing the title insurance industry and can question the propriety of a rate that appears to be unfairly discriminatory or otherwise violates statutory standards.

Title insurance premium rates largely are determined by operating and acquisition cost factors, as compared with property/casualty rates that are based on the actuarial determination of expected losses. The risk of title loss is a function of many factors, which can vary considerably from jurisdiction to jurisdiction and transaction to transaction. Also, the services covered by the title insurance premium vary from

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state to state. It is difficult to compare a pure title insurance risk premium with an all-inclusive rate that covers not only the risk of loss but also the title search, examination, title opinion and closing.

Rate Adequacy and Stability

Title insurance premium rates are based on five cost considerations, including those related to:

1. Maintaining current title information on property local to that operation, i.e., title plant.

2. Searching and examining the title to subject properties.

3. Resolving or clearing defects to title.

4. Covering title defects.

5. Allowing for a reasonable profit.

Loss Characteristics Among Companies

Title insurance loss experience varies considerably among individual companies based on a wide array of factors, including:

1. Experience and technical competency of agents and title underwriters.

2. Quality and quantity of title documentation and evidence (both public and private) underlying the search-and-examination process.

3. Regional differences in title insurance customs and practices, underlying title insurance risks, the mix of residential sale, residential refinance and commercial business, and defalcation risks.

4. Adequacy and effectiveness of underwriting controls and agency management systems.

5. Differences in the proportion of agency business versus direct business.

6. Differences in the proportion of commercial versus residential business.

7. Differences in claim-administration processes, such as claim recognition, evaluation, timing of settlement and recoupment.

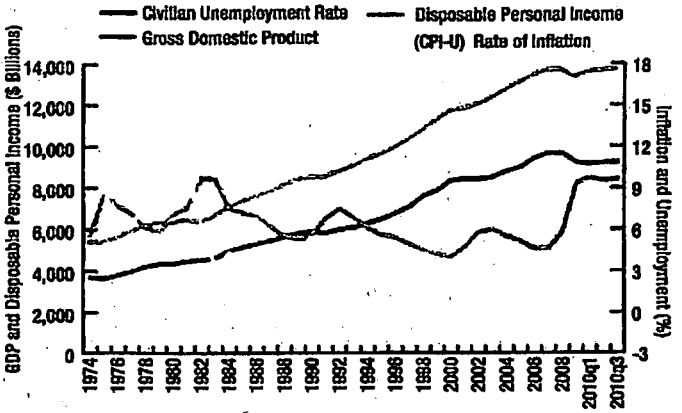
The Economy

After a period of strong growth dating back to late 2002, the economy took a sharp turn for the worse in 2008 – with gross domestic product (GDP) virtually flat compared with 2007 – while in 2009, the GDP contracted by 2.6%. The marked reversal of growth rates in 2008 and 2009 represented a significantly different growth environment than the one witnessed over the previous four years (see **Exhibit 7**). However, GDP growth did resume in 2010, although the rate of growth remained moderate with annualized growth averaging 2.9% over the first nine months of the year. The $787 billion Economic Stimulus Package of 2009 – along with that year's other tax legislation programs, "Cash for Clunkers" and the First-Time Homebuyer Tax Credit, which was extended through June 2010, both designed to boost the auto and housing sectors – has, to some extent, helped in moderating the negative impact of ongoing difficult economic circumstances. However, the outlook for the U.S. economy remains uncertain given the ongoing macro economic conditions, especially surrounding the housing sector. In addition, it remains unclear whether this positive growth trend can be sustained following the expiration of these fiscal measures.

Exhibit 7

U.S. Key Economic Figures (1974-2010)

($ Billions)



Notes: All data are annual averages. Gross domestic product (GDP) and disposable personal income (DPI) are adjusted for inflation, reported in billions of chained 2005 dollars by the Bureau of Economic Analysis (2Q-2010). Consumer Price Index (CPI) quarterly data is based upon adjusted 12-month quarter-end data. The unemployment rate is the number of unemployed as a percentage of the civilian labor force as reported by the Bureau of Labor Statistics (June 2010*). 2010 numbers are as of the 2nd quarter.
*The unemployment rate as of October 2010 is 9.6%
Sources: U.S. Census Bureau, NAR, FRB, BEA

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Exhibit 8

Top 10 Title Insurance States* by % Change in 1-Unit Housing Starts (2006-2009)

	1-Unit Privately Owned Housing Starts			
	Avg 1-Year % Change (2006 - 2009)	1-Year % Change (2008-2009)	Units 2009	2006
Florida	-20.5%	-31.2%	26,636	146,236
Arizona	-19.2%	-33.0%	12,828	55,633
California	-19.1%	-21.3%	25,525	107,714
Michigan	-18.7%	-30.6%	6,238	24,782
Ohio	-15.4%	-17.7%	10,593	27,514
Texas	-14.7%	-15.8%	67,069	162,750
Virginia	-14.6%	-18.4%	16,288	38,977
New Jersey	-14.5%	-21.4%	7,211	17,113
Pennsylvania	-13.4%	-24.2%	15,341	33,121
New York	-12.9%	-24.2%	9,658	19,981

*By % of 2009 title direct premiums written.
Source: U.S. Census Bureau.

Following the initial economic slowdown, which started in the second half of 2007, the Federal Reserve cut the Fed Funds Target Rate by 1 percentage point in the fourth quarter of 2007 – reversing its three-year trend of increasing the short-term interest rate. The rate cuts were in response to a troubled mortgage and housing sector, in which many adjustable-rate mortgages were resetting at higher levels than homeowners anticipated and could afford. The cuts continued through the second quarter of 2008, as the Fed reduced its benchmark fed funds rate – the rate at which banks lend to each other – to a historic low range between 0% and 0.25%, and it has held it at that low level since that time.

Rates continued to dip to low levels as of October 2010, with the long-term 30-year fixed rate mortgage at approximately 4.3%, down from an already low rate of 5.0% in 2009. In fact, over the course of the past two years, the 30-year fixed rate mortgage has decreased nearly 2 percentage points, and has set off a "mini refinance boom" in 2009 and 2010. Along with the homebuyer tax credit legislation, these favorable conditions in personal home financing had helped to modestly stabilize home prices and boost existing home sales in 2009 and the first half of 2010. However, with the expiration of the tax credit in June 2010, sales in recent months have fallen compared to the same period in 2009 and prices have modestly retreated.

The U.S. housing market's future direction thus remains uncertain as the market deals with the expiration of these incentives. Meanwhile, questions have also been raised recently regarding the foreclosure practices of major lending institutions. While some banks and lending institutions had announced a temporary moratorium in the processing and sales of foreclosed properties as they reviewed their policies and procedures, most have since resumed processing. However, as these procedures come under greater regulatory scrutiny – as well as litigation activity – there may be a significant slowdown in the foreclosure pipeline (which comprises nearly a third of all home sales in 2010) with the REO (bank-owned properties) taking significantly longer to come to market.

In 2009, U.S. privately-owned housing starts dropped to 554,000 units, on an annual basis, down 75% from their peak year in 2005, and nearly 40% lower than the already-low 2008 annual figure. However, housing starts through October 2010 (the last period for which data is available), were relatively unchanged from the depressed 2009 levels, with approximately 550,000 units started on an annual basis (see **Exhibit 1**).

Especially hard hit by the economic downturn have been the Pacific, West, South Atlantic and Midwest regions of the United States, it is no surprise that the previously booming real estate markets of California, Florida, and Arizona have had extremely large declines in housing starts between 2006 (the peak of the boom) and 2009 (see **Exhibit 8**) due to excess inventory and weakening economies, and that conditions in these markets continue to remain weak in 2010. Driving the ongoing shrinking demand for new homes – along with relatively high costs of construction – is the persistantly high unemployment, uncertainty in the job markets and continued supply of existing homes that are stemming from the high number of foreclosed homes entering the market.

Both existing- and new-home sales have trended lower since 2005. However, while total home sales in 2008, fell 16% from 2007, total home sales were up modestly in 2009 – approximately 3% from 2008 levels – partly due to the homebuyer tax credits as well as continued low interest rates. However, since the tax incentives expired in June 2010, annualized sales through the third

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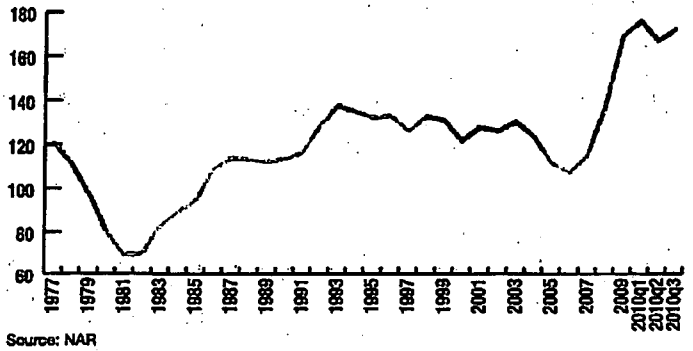
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quarter of 2010 have fallen approximately 20% from the levels seen during the same period of 2009. This decline is affecting both the new and resale segments of the market, and continuing to put home prices under pressure. As a result, based on the Housing Affordability Index, housing has become more affordable than it has been in the past 30 years. The Housing Affordability Index, which had increased from 169 in 2009, from 138 in 2008, for existing home sales – with a higher index reading meaning housing is more affordable – further increased to 172 at the end of September 2010 (see **Exhibit 9**). This figure – representative of a household earning the median income to qualify for a mortgage loan with a 20% down payment on a median-priced home – has continued to show steady improvement since 2006's reading of 108, when the housing boom effectively ended.

Exhibit 9

U.S. Housing Affordability (1977-2010)

The housing affordability index measures the percentage of income the median-income family has toward qualifying for a median-priced home with a 20% down payment. A higher index reading means housing is more affordable. As of September 2010, the median-income family – with an income of $61,652 – had 172.4% of the income needed to qualify for the median-priced home of $177,900.



Source: NAR

One measure of slight improvement in the housing market has been a decrease in existing homes available for sale. As of September 2010, there were 4.04 million existing homes available for sale, or approximately 10 months' supply at current sales rates. While this is still much higher than the traditional measure of six months' supply, considered as a market 'balanced' between sellers and buyers, it does represent a 12% decline from the record inventory of 4.58 million homes available for sale reached in July 2008. While this may, on the surface, seem positive, some of the decline may be due to homeowners pulling their homes off the market due to inadequate demand and/or mismatches in bid and ask prices. Nevertheless, the still-high inventory levels portend that housing starts and permits are expected to continue to decline through 2010 and possibly much of 2011.

Inflation, which had decreased dramatically in 2008, from the middle part of the decade, had actually turned negative in 2009, as the economic downturn unfolded. Although the inflation rate has turned positive in 2010, the annualized rate through the third quarter remains low. The rate of inflation, represented by the Consumer Price Index for All Urban Consumers (CPI-U) was reported down 0.4% for the 2009 year, compared with the 3.8% increase in the 2008 calendar year. As mentioned above, 2010 continues to witness a very modest pace of inflation with consumer prices at an unadjusted 1.1% year-over-year change as of September.

The unemployment rate, which increased significantly in late 2008 and 2009, still remains persistently high and stands at 9.6% as of October 2010, up significantly from the annual average of 5.8% in 2008. The rapid increase in unemployment poses a more-traditional threat to the housing market and to the title insurance industry as it bears directly on the ability of buyers to purchase homes, and their subsequent need to obtain title insurance. (See **Exhibit 7**).

The latest data suggest that current economic trends – namely weak economic growth, low inflation, low interest rates and a weak labor market characterized by a continued high unemployment rate – may persist through at least the first half of 2011, and may result in additional pressure on factors affecting real estate demand.

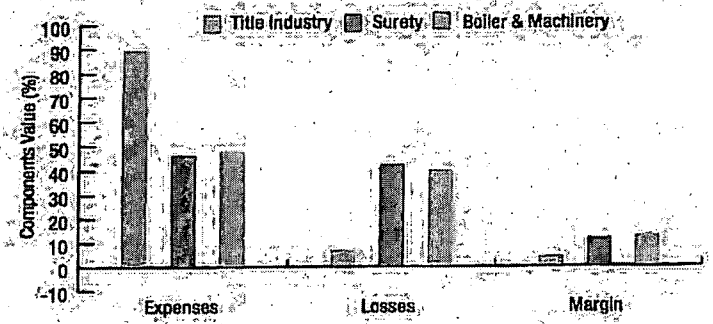
The Title Industry and Real Estate Economics

The title industry is highly dependent on real estate markets, which, in turn, are highly sensitive to mortgage interest rates and the overall economic well-being. Typically, there is an inverse relationship between mortgage rate changes

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Exhibit 10
U.S. Title Insurance – Title, Surety and Boiler & Machinery: Components of Combined Ratio (Average from 1974 - 2009)



Source: BestLink

and real estate activity, and therefore, operating revenue for title insurers.

As interest rates fall, real estate transactions generally increase along with the greater demand for title products, and title insurers' operating revenues generally rise. The reverse occurs when interest rates rise. Changes in mortgage interest rates create corresponding fluctuations in title insurers' total operating revenue and pretax operating gains. Since 2006, however, other factors have interfered with the conventional relationship between interest rates and real estate activity.

While the real estate market has slowed down significantly in recent years, the mortgage interest rate environment has continued to be favorable. As of the third quarter of 2010, the 30-year fixed-rate mortgage yield has decreased 24 basis points from the yield as of year-end 2009, which had declined by 99 basis points when compared to the yield as of year-end 2008 (see **Exhibit 2**). This favorable interest rate environment has helped to stabilize overall housing market activity has resulted in a "mini-refinance boom" in 2009. Although not as significant as the unprecedented refinance boom of 2003, the current mini-boom remains an important positive contributor to the modest rebound in home sales and prices in recent months.

Another significant factor has been the federal government's active role in both providing home financing through the FHA, Fannie Mae and Freddie Mac, as well as through tax incentives geared towards potential home buyers. However, the stability and eventual recovery of the housing market will, of course, depend on the future direction of long-term interest rates, and the wider availability of credit. The latter is strongly linked to a slowdown in the currently high levels of defaults and foreclosures, as well as a broader economic recovery characterized by a return to sustained growth and employment.

How Title Insurance Differs From Other Lines of Insurance

Since title insurance is an evidence-producing/loss-prevention line of insurance, its loss expense is less than – and its operating expense is greater than – that of other property/casualty lines of business. Insurance expenses are loss-prevention/underwriting-related and loss-related.

A typical loss-prevention insurance line – such as title, boiler and machinery or surety – usually has higher operating costs and lower losses than other insurance lines (see **Exhibit 10**). It should be noted that according to the statutory accounting rules for title insurance, only reported claims are reflected in the loss expense, while in other lines – both reported and unreported (incurred but not reported, or IBNR) claims are included in the loss expense. As a result, timing differences occur in the reporting of losses and loss-adjustment expenses for title insurance when compared to other lines. In addition to known claims, title insurers – unlike insurers in other lines – carry a statutory liability known as the statutory premium reserve that provides ultimate loss protection for policyholders. However, it is not counted as a loss statistic.

Because of the large service and underwriting component of title insurance, its closest property/casualty counterparts are service, underwriting and loss-control-intensive sectors. Lines of insurance containing these features include surety, and boiler and machinery.

Operating expenses are the largest component of a title company's costs. A title company's ability to expand its infrastructure and maximize operating profits in good market conditions, and to contract and control costs in poor market conditions,

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is critical to its long-term financial success and solvency. This isn't necessarily the case with property/casualty companies, where the control of loss costs is more critical to success and solvency.

Because of title insurers' dependency on the health of the real estate market and favorable interest rates – as well as their being required by law in most states to be monoline writers – title industry revenues and profitability are susceptible to volatility. To dampen this volatility, title insurers have:

- Improved their technology and work-flow processes.

- Diversified their operating revenue by introducing new title products and expanding nationally and internationally.

Investment Income Characteristics

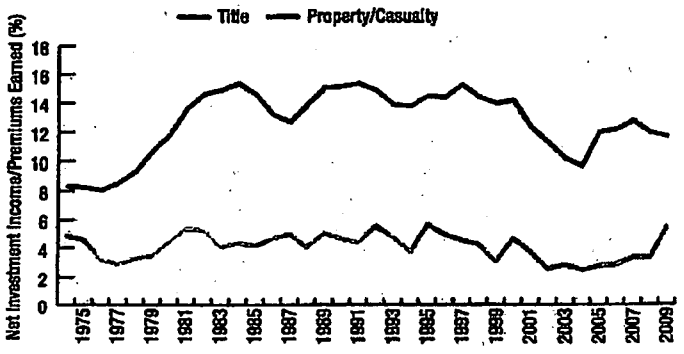
Important differences exist between title insurers' and traditional property/casualty companies in their abilities to generate investment income (see **Exhibit 11**). Property/casualty insurers collect premiums in advance and hold them until they must indemnify claimants for losses. These premiums constitute a large cash flow that companies generally invest in intermediate and long-term, investment-grade assets. The investment income generated is reinvested, and a company's asset base grows at a compounded rate until losses on policies materialize and are paid. Claims for the long-tail casualty business lines might take decades to appear and the accruing premiums can add significantly to a company's assets. As a property/casualty company's ratio of written premiums to surplus (equity) increases, the fraction of total assets that are financed by advanced premiums from policyholders also increases. In other words, writing property/casualty insurance can create financial leverage.

These property/casualty reserves are debt, in that if a policy is canceled, the reserves are owed to the former policyholder, yet they bear no rate of interest. Hence, this kind of financial leverage does not burden the property/casualty insurer with additional fixed charges and, as long as rates are adequate, it provides all the conventional benefits of leverage without much of the downside risk.

Exhibit 11

U.S. Title vs. Property/Casualty – Net Investment Income as a Percent of Premiums Earned (1974-2009)

The average ratio of net investment income earned to premiums for property/casualty insurers is about three times larger than for title insurers.



Source: ALTA, NAIC, A.M. Best Co.'s BestLink®: Statement File - 99200

Title companies collect premiums after the largest component of their costs – operating expenses – has been incurred. As shown in **Exhibit 6**, title companies' expense ratio typically averages more than 90, while the property/casualty industry's expense ratio is less than 30. The title industry's higher expense ratio results in a significant reduction in available cash flow for companies to invest. Although the remainder of the title premium is available for investment, the relative percentage of premium collected and invested is significantly less than that of the property/casualty industry. As such, the title industry's financial leverage is relatively low.

Title insurers sell protection against losses caused by problems with legal title to real property arising out of events prior to the effective date of the policy. Because most uncertainty about the past can be reduced by careful research, a title insurer can exert a great deal of control over the risks it underwrites.

For example, by looking up property tax records, a title insurer can almost eliminate the possibility that a real estate title will become encumbered by a lien for past unpaid real estate taxes. However, hidden defects in a real estate title, such as errors in public records, will cause losses. Because of the great importance of real estate titles, title insurers establish highly stringent underwriting

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criteria, eliminating all the risks they possibly can through careful examination of title before issuing insurance.

Title insurers use much of the premiums collected to cover the underwriting costs associated with the issuance of a title insurance policy. In contrast to property/casualty insurers, title insurers expend premium dollars before collection, and therefore do not retain most of the premium dollars before they are expended in the ordinary course of business.

On the other hand, the loss tail for title insurers is much longer than that of most other lines of insurance, and it constitutes a form of leverage where some percentage of premiums is set aside and held for future claims. The loss-tail leverage constitutes only a small percentage of the premiums, however.

Title Insurance Profitability

The financial strength and surplus of title companies, however, might be more critical than that of property/casualty underwriters. The title industry's premium volume and profitability is highly dependent on real estate sales and mortgage-refinancing activity. Since large infrastructures of personnel and title plants must be maintained to provide title services, a title company's profitability is highly sensitive to real estate market activity. A significant portion of a title company's cost structure is fixed, and the variable component largely is related to personnel. It is as difficult for a company to reduce its costs of doing business in the face of a downturn in real estate activity as it is to reacquire trained staff when activity rebounds.

Surplus plays a critical role by providing a cushion that permits a title insurer to ride out poor real estate markets, since not all of its costs are variable and able to be reduced. Property/casualty companies have a built-in level of demand. Many property/casualty coverages are required by law or business judgment and have to be purchased annually.

As with every industry, the title industry has certain inherent risks that must be understood to properly evaluate an individual company's operational strengths and weaknesses, balance-sheet vulnerabilities and volatility of earnings. The major business risks a title insurer faces are:

- Volatility of revenue;
- Expense control;
- Mix of business;
- Distribution mix (agency or direct);
- Defalcations;
- Rate adequacy and stability; and
- Legislative reform.

The title industry's revenue is more volatile than that of the property/casualty industry. Cyclicality in a line of insurance creates challenges but isn't always a negative quality, since it creates opportunities for well-managed companies. In such businesses, management must make sure the company's operating structure is flexible and responsive to both increases and decreases in revenue over a relatively short period. A well-managed company must be able to access trained staff to service business adequately when demand for title insurance is rising.

Likewise, when the demand for title insurance is sharply reduced, a company must be able to downsize its infrastructure and personnel in an efficient and orderly manner so that servicing of its current orders is not interrupted. Property/casualty insurers, in general, are larger and therefore have a more difficult time fluidly adjusting expenses around macroeconomic cycles; whereas the title industry's margins have historically been more controlled (see **Exhibit 12**).

Temporary personnel do not provide a total solution to this problem. Unskilled and part-time personnel can satisfy the need for an increase in title messengers or clerks, but they typically cannot fill the roles of more highly skilled positions, such as title searchers and underwriters.

Title plans also are a significant component of fixed costs. They are important because they are the raw material of the underwriting

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process and require both an initial investment and constant updating of various records. Even in slow markets, title plants must be current, with each day's recordings entered into the plant's database. If a title plant becomes outdated, it will become a source of errors and lead to title insurance losses.

The acquisition and maintenance of title plants gradually is becoming more cost effective as the business becomes computerized. Modern title insurance companies feature the computerization of order taking, title search and examinations, and policy issuance. These advances have permitted companies to increase premium volume capacity dramatically with only a modest increase in personnel. This capability not only enhances the profitability of a title company but also makes it easier to manage expense levels during slow real estate markets.

Title insurance provides coverage for the following basic types of real estate transactions listed in ascending order of underwriting complexity:

- Residential mortgage refinancing or equity lines.
- Residential resale or new construction.
- Commercial resale or new construction.

Each successive product requires a significantly increased effort to market, underwrite and administer claims. The production costs necessary to generate each of these products also vary significantly.

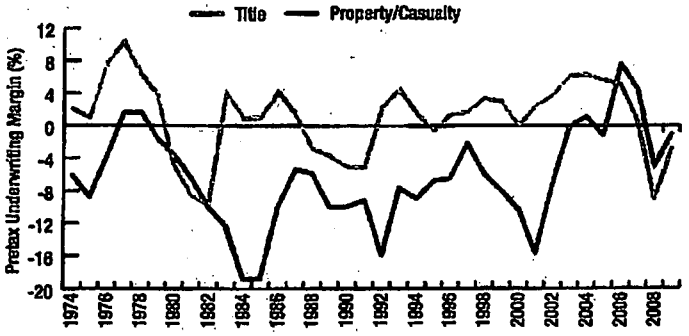
First, residential mortgage refinancing is a classic, high-volume, commodity business, that tends to come in waves based on the relative level and trend of mortgage interest rates. During typical economic cycles when rates go down quickly – such as in 1992-93, 2001 and 2003 – the volume of new title orders increases dramatically. During such times, title industry companies must hire large numbers of workers to service orders to maintain market share. However, the level of title orders can contract as quickly as it surges, and well-managed companies must adjust their personnel (cost) levels accordingly.

In underwriting refinance transactions, the title insurer, or its agent, performs a more limited title search than is necessary for a resale transaction. This less-comprehensive title search occurs because only the position of the lender of the refinanced mortgage has to be determined to assure the lender of its priority. No owner's coverage arises from these transactions, since the original owner's title policy, whenever purchased, continues to protect the basic title in the name of the property owner.

Exhibit 12

U.S. Title vs. Property/Casualty – Pretax Underwriting Margin (1974-2009)

The title industry has, on average, a higher underwriting margin than property/casualty underwriters.



Source: ALTA, NAIC, A.M. Best Co.'s BestLink®: Statement File - 99200 Total US PC Industry.

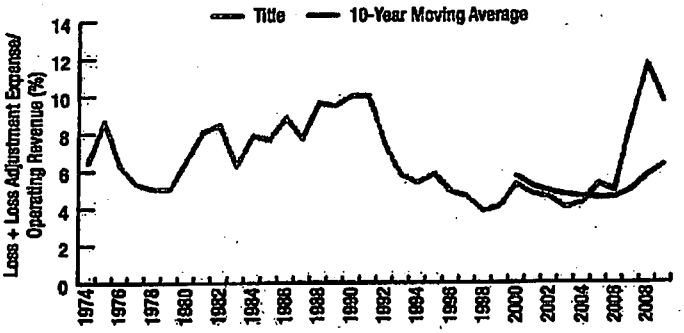
In addition to the challenges of managing the surges and contractions of title orders, companies also face difficulties managing the claims process. Some companies believe the best practice to minimize claim losses is to settle claims early to minimize legal fees, which are a large component of most claims. Other companies litigate claims when possible – which incurs more up-front expense – to establish and maintain a deterrent against fraud and future nuisance claims.

This tactic can be particularly effective in those regions where a small number of law firms specialize in representing title claimants. Whether a company's approach is successful or not can be determined only when the results of that approach are compared with industry averages.

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Exhibit 13
U.S. Title Insurance – Loss and Loss-Adjustment Expense as a Percentage of Operating Revenue (1974-2009)



Source: ALTA, NAIC.

Companies must recognize when it is prudent to settle small-dollar claims quickly and when to litigate certain claims in order to establish a reputation within the legal community. What's more, claims approaches are dependent on the region of the country and the local legal and claims environment.

Secondly, more profitable and complex than refinance orders is the residential purchase business. And lastly, underwriting commercial transactions represent the highest profit margin for title insurers. In a typical sale/development of an office building, both buyers and sellers generally are knowledgeable and sophisticated and retain lawyers to represent their competing interests. Generally, both title insurers and lenders assign senior underwriters to manage and underwrite commercial transactions. This more intensive underwriting process – undertaken by both the buyer and the seller – results in fewer mistakes and title defects and, consequently, reduces the risk of loss. Since title premiums are linked to property values, large-value commercial title business generally generates the highest underwriting profit.

Loss Experience in the Title Industry

Exhibit 13 shows that the average loss experience for the title industry improved dramatically from 1993 to 2009 compared with the prior 20 years. This improvement is primarily due to better up-front underwriting as well as more stringent monitoring of agents to help avoid defalcations. However, loss experience in 2007 and 2008 did deteriorate noticeably, partly as a result of inadequate reserving for future claims during the period of the housing boom of 2000-2006. The end of the housing boom and the subsequent rapid increase in defaults and foreclosures has led to significantly greater incidence of title claims arising out of those calendar years. The improved loss experience in 2009 was driven mainly by the lack of major reserve strengthening following the significant reserving actions taken in the prior years.

Title insurance policies have no set termination date and no limitation on filing claims. However, the only fees collected are the one-time charges when the policy is issued. Thus, losses reported in any one year will affect that year's profitability for statutory accounting purposes but are not, in the main, generated by that year's business activity. By the nature of the business, most title losses are reported and paid within the first five to seven years after policy issuance. However, the tail for title policy claims is at least 20 years.

All insurance companies require adequate loss reserves to cover all known and future losses, as well as adequate surplus levels to provide a cushion for reserve shortfalls, contingencies and unexpected losses from underwriting and investment activities. For title companies, the potential adverse loss-reserve development is not as problematic as it is for casualty lines of business, since losses are a relatively small percentage of the total.

Although large title claims are infrequent, they do occur. They can arise in the context of the transfer of upscale, single-family residential properties; single family or multifamily real estate developments; or office buildings, shopping centers or other commercial developments. Overlapping tasks and regulatory hurdles involved with these complex transactions complicate these claims. For instance, often there are entitlement issues, easement, ingress/egress issues and mechanic-lien risks associated with construction.

The term of a title policy generally ends upon the sale, transfer or refinancing of the underlying property, which means that title insurers are unable to determine

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which and how many of its policies still are in force. This situation arises because the title insurer is not advised of the new policy, unless that insurer is fortunate enough to have written both the new and the old coverage. This feature provides for significant differences in the nature of claims and the reporting of financial information between the property/casualty business and that of the title insurer.

Title losses vary by a wide array of factors, including the:

- Local patterns and practices of land holding.
- Local record-keeping system.
- Value of the actual property.
- Length of time the property has been owned or encumbered by mortgages or liens.

However, without the ability to pinpoint the exposure from in-force policies, companies are unable to translate this loss/claims information into definitive reserving data. Instead, they use assumptions and extrapolation methods that are detailed in the **Reserving Characteristics** section of this report.

Title claims experience has an emergence pattern similar to that of a property/casualty product line with a moderate-length tail, such as personal automobile. Like personal auto, title insurance experiences a high frequency of low-dollar claims, occasionally generating a severe claim. Title underwriters have the ability to cure modest defects that occur frequently at a nominal cost. In many cases, the defect can be solved and the title loss averted simply by recording a document to correct, or confirm, the true property interests of the parties. However, a severe title defect or agent defalcation can result in a costly claim that might take years to settle.

The typical property/casualty company operates with a loss and loss-adjustment expense ratio between 70% and 80%, depending on its lines of business. This compares with a typical title company's loss and loss-adjustment expense ratio of 5% to 10%. This difference appears dramatic and leads most property/casualty-oriented analysts to assume that the business must be extremely profitable. However, the low loss and loss-adjustment expense (LAE) ratio is the result of the large expense component associated with underwriting and servicing a title product. This brings the overall profitability of title insurance, as measured by the combined ratio, more in line with property/casualty products (see **Exhibit 14**).

Exhibit 14

U.S. Property/Casualty – Combined Ratios, Various Lines (1974-2009)

Although the components of the combined ratio are markedly different among the various insurance lines, the average combined ratios are somewhat similar.

Year	Title Industry	Surety (Stock)	Property/ Casualty (Stock)	Property/ Casualty (Mutual)	Boiler & Machinery (Stock)
1974	98.0%	113.7%	105.0%	101.2%	103.6%
1975	99.0	122.0	107.5	104.4	96.2
1976	92.3	103.0	102.0	99.6	93.7
1977	89.6	96.2	97.0	93.9	86.7
1978	93.7	97.1	96.6	94.6	84.1
1979	96.2	90.2	99.6	98.0	76.2
1980	104.9	105.9	102.4	99.1	90.8
1981	108.6	85.7	104.9	102.9	91.8
1982	109.7	89.1	108.7	105.6	100.7
1983	95.9	87.6	111.8	105.3	103.8
1984	99.1	95.5	118.9	110.6	118.3
1985	99.0	111.9	116.5	110.5	89.9
1986	95.8	117.1	106.9	106.1	86.9
1987	98.6	116.0	103.3	103.6	80.9
1988	102.7	100.5	103.9	104.6	97.1
1989	103.8	93.9	108.6	108.0	93.2
1990	105.1	87.4	108.4	98.5	101.0
1991	105.2	75.6	109.5	106.4	109.8
1992	97.7	84.2	118.1	108.4	103.3
1993	95.5	65.8	107.9	104.8	103.7
1994	98.5	83.2	108.9	106.8	88.1
1995	95.8	79.7	106.7	105.4	91.2
1996	98.5	71.5	106.3	104.6	88.0
1997	94.1	69.2	101.4	101.9	88.3
1998	98.6	68.4	104.8	108.7	95.0
1999	97.1	68.1	107.2	109.9	109.5
2000	100.0	72.3	108.0	115.2	93.3
2001	97.5	88.7	115.4	117.4	92.1
2002	96.2	116.2	106.4	109.6	79.7
2003	93.8	122.3	99.7	100.9	68.0
2004	93.7	117.8	99.0	98.4	76.2
2005	94.3	101.4	102.1	99.6	82.8
2006	94.9	81.2	90.5	97.2	78.6
2007	99.5	70.2	94.0	99.6	71.0
2008	109.1	67.1	104.9	107.2	74.7
2009	102.9	79.2	100.3	105.5	75.4
		Averages			
All Years	96.0	88.4	102.5	101.5	87.1
Past 10 Years	98.2	91.6	102.0	105.1	77.0
Past 20 Years	98.3	83.5	105.0	105.3	87.3

Source: ALTA, NAIC, A.M. Best Co.'s <BestLink®: Best's Statement File - 99200 Total US PC Industry.

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Much of the stability in the title industry's loss ratio stems from the relatively low risk inherent in title insurance. The bulk of title insurance claims occurs shortly after closing and represents low-dollar costs. In these instances, the title company or its agent amends or corrects the title documentation and makes any required refilings and notifications. The policyholder might not be made aware of these technical corrections and does not receive any cash payment. Typically, the title company uses a staff underwriter or counsel to correct the problem, and the loss cost is relatively small.

Title companies that service multifamily real estate developments must have a well-trained and knowledgeable staff. Some of the larger title insurers have specialized departments dedicated to servicing these large-scale developments. In this way, title insurers limit risk by controlling the transaction at the outset and taking it through each step of the process – from acquisition work to construction disbursements to closing. Substantial costs are expended in these projects. More sophisticated title insurers have relationships with developers and are given insight into whether the transaction will be problematic at the outset. Although the magnitude of these losses can be higher than the typical title claim, the frequency of this type of loss is small.

Some of the most severe and difficult claims involve agent defalcations. Defalcation is the act of diverting fiduciary escrow funds without authority and without applying those funds to satisfy or pay off the existing mortgages, liens and encumbrances on the property that is the subject of the escrow. Defalcation losses are similar to catastrophe losses experienced by property/casualty insurers. Agent defalcation claims are the only shock-loss type of claim that has a concentrated geographic effect, depending upon the region controlled by the defrauding agent.

Because the title industry's loss reserves are more stable, have less-adverse development and represent lower exposure to the industry's surplus, it follows that less surplus is required to protect against unexpected or catastrophic underwriting events. This differs significantly from the experience of property/casualty companies, which require a relatively larger surplus cushion to protect property underwriters from catastrophes or casualty underwriters from adverse loss-reserve development.

Reserving Characteristics

Title insurance companies file annual financial statements (National Association of Insurance Commissioners Form 9) with their respective state insurance regulators in accordance with statutory accounting principles. Statutory accounting principles are more conservative than generally accepted accounting principles (GAAP) because assets and liabilities are valued on a liquidation basis versus a GAAP going-concern basis. As a result, all statutory balance-sheet items are valued as though the company intended to discontinue its business and discharge all liabilities immediately, including claims, before a final distribution of remaining assets to its shareholders. As such, only assets that consist of cash – or those that can be converted into cash in a relatively short period – generally are allowed to be admitted to a company's financial statement under statutory accounting principles. Assets that are contingent in nature, whose values are uncertain or whose collectibility is questionable, are not assigned value and are classified as nonadmitted assets.

By statute, title insurers are required to carry two liability reserves: known claims and statutory premium. The known claims reserve is the aggregate estimated amount required to settle all claims submitted to the company and unpaid as of the balance sheet date. The known claims reserve is similar to the property/casualty industry's case reserve. Over the decades, most title insurers have established reasonable baseline case reserves by tracking and analyzing historical claims data. Based on these data, individual known claims reserves are estimated by a company and are modified for special circumstances. These estimates must be reviewed at least annually and adjusted as necessary.

The statutory premium reserve is a liquidation reserve, the amount of which is determined by state-mandated formulas that establish a liability reserve and a charge to income based on the amount of business written. Defined by a formula, the initial

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reserve is reduced gradually, with an offsetting gain to income over a stated period, generally 10 to 20 years, depending on the rules of the domiciliary state.

Since title policies have no termination date, the statutory premium reserve is required and is reduced gradually to reflect the long-tail nature of the company's liability. The statutory premium reserve is equivalent to the property/casualty industry's incurred-but-not-reported (IBNR) reserve, which also is established and held for many years for long-tail liabilities. The major difference is the statutory premium reserve is determined and reduced by prescribed state formulas, whereas a property/casualty company has more discretion in establishing and reducing its IBNR reserves.

The statutory premium reserve is considered a liquidation reserve, since state statutes also require a company to segregate investment-grade assets in an amount equal to its statutory premium reserve. If a title insurer becomes insolvent, such segregated assets can be used only to pay future claims or to purchase reinsurance to settle future claims. These segregated assets may not be used to pay current claims, operating expenses or distributions to shareholders. This feature is unique to the title industry. In contrast, the assets of a property/casualty company are not segregated and are available to pay any claims.

The required segregation of assets to support reserves assures policyholders that the company will not utilize these funds to pay losses or other expenses in the ordinary course of business or make distributions to shareholders. This provision and its protections are part of the title insurance industry's regulatory framework, and much of the industry's financial structure is built around these statutory reserves.

Statutory premium reserve formulas vary significantly from state to state and reflect a state's underlying title framework and customs, but not necessarily its loss experience.

Under GAAP, the statutory premium reserve is not recognized as an expense and isn't included as part of a title insurer's liability. It does, however, exist as restricted equity. Title insurers that are required to file GAAP financial reports, or are part of a consolidated group of companies that are required to file under Securities and Exchange Commission (SEC) rules, normally develop an IBNR component like any other insurance line and include it as part of their GAAP liabilities.

For the property/casualty industry, IBNR is derived from actuarial predictions of future occurrences based on current loss data, and it is an unsecured liability. The title industry's statutory premium reserves are set by statute at a rate that is somewhat arbitrary. Few states, if any, currently can support the establishment or change of their statutory premium reserving levels based upon their title industries' actual loss experience. This situation has created inconsistent statutory premium reserves among companies across the country.

Additionally, since the statutory premium reserve is a charge to income, variances for individual title insurers' operating results (operating gain or loss) often reflect different statutory premium reserve requirements rather than actual differences in operations.

In addition to the statutory premium reserve and the known claims reserve, the title insurers' statutory financial statements provide for a supplemental reserve. Title insurers are required to have an actuarial certification of the adequacy of their reserves. If the actuary indicates that the statutory premium reserve plus the known-claims reserve is less than the estimated dollar value of known-plus-expected future claims, plus expected loss-adjustment expenses, the title company would have to fund the shortfall in the supplemental reserve. Since the supplemental reserve is not tax deductible, the best interest of title insurers is to have the statutory premium reserve as close as possible to actuarial estimates, if not actually more than the estimates.

In regions that experience significant real estate appreciation, turnover of homes is higher as owners sell their homes and use their realized gains to buy more expensive homes. Depressed regions of the country generally experience slower real estate activity as homeowners wait for the turnaround and try to avoid losing the equity in their homes.

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Although faster claims development might be one by-product of a higher turnover rate, a property becomes a better title insurance risk the more it is bought and sold because a property's title and tax records are searched each time it is sold. Frequent examination of a property's title records increases the odds of perfecting the property's title. The benefit, of course, comes from the fact that the new policy not only supersedes and effectively terminates the old policy but also generates new revenue. The term "perfecting" is the removal of any discovered potential defects in the title to real property, prior to closing.

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EXHIBIT 7

LAWYERS NOTES

Customers ask about...

title insurance forms and policies

by Robert S. Bozarth,
Vice President—Major Transactions Counsel

The two avenues to coordination of insurance benefits between a borrower and lender

If mortgage lenders placed no requirement upon their borrowers to buy specified lines of insurance to protect them from non-credit risks, the insurance market in this country would be much smaller than it is. Although Canada is similar to the United States in many ways, it has never been an important market for title insurance because Canadian lenders do not require title insurance when the real property security is land located in Canada. In the U.S., lenders have developed conventional requirements to impose on borrowers which are the major source of the demand for many lines of property insurance.

Each of these insurance lines must meet the needs of the lending community to sell policies. For example, a consumer buying a new home and financing the purchase with a loan secured by a mortgage expects the lender to require homeowners' insurance against the multiple casualty and liability perils homeowners face, and title insurance to protect against title risks. Lenders routinely require homeowners' and title insurance to limit such risks. Although the two lines differ both in the way the risks are insured and in the way the insurer obligates itself simultaneously to both the borrower and the lender, the insurance is designed to meet the lender's needs.

Title insurance is an evidence producing-loss prevention line of insurance structured on a *risk elimination concept*. Most of the premium paid for title insurance pays for the title examination required for the policy.[1] Our risk management begins with that title examination.[2] The essence of title insurance is insuring the status of the title as of a specific time by assuring the policyholder that there are no recorded or hidden defects to the interest insured in addition to those listed in Schedule B of the policy.

In some cases, title insurers may use some other form of "risk elimination" to underwrite a risk, most notably, the use of an indemnity from a developer to give the developer's lender some protection against mechanics' liens in states where there is no statutory priority, but the loss experience in these cases is high. The *risk that a lien may be recorded or other defect created in the future* is a casualty risk because these future events cannot be predicted from an examination of the land title records at the date of the policy. Such casualty risks are not appropriate for title insurance. The title insurer in these cases is stepping close to the line between title and surety insurance.

The risk elimination nature of title insurance contrasts with the *assumption of risk* nature of virtually all other lines of insurance, including homeowners' insurance, which insure upon the more familiar concept of spreading risks among a body of policyholders. Homeowners,' automobile, accident, health, and life insurance lines insure on a casualty basis by forming risk pools designed by actuarial predictions of loss rates which must be adjusted periodically (usually annually or semiannually) to reflect recent loss experience. These casualty insurers manage risk by writing short-term policies and carefully evaluate their insureds. They must reevaluate their risks, premium and reserves for new policies and policy renewals.[3] Homeowners,' commercial general liability, automobile, accident, health, and life insurance lines are viewed as "conventional" lines of insurance. So all too often, observers impose their understanding of the risk assumption function of casualty lines on their analysis of title insurance. Although title insurance is a line of insurance, its risk elimination nature causes it to behave in unique ways. It is designed to be inexpensive instead of flexible. So when a title insurer faces a demand to cover a known risk, it has no actuarial or other systematic means for setting a price and establishing a reserve to cover that risk.

It is easy to understand why title insurance customers expect their title insurer to "assume" a known risk in a transaction. It is not as easy to manage that risk so it can be covered. Homeowners' and title insurance also use different

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methods when insuring both a borrower and lender. Title insurers issue an "owner's" policy to the borrower and a "loan" policy to the lender. Each form has a paragraph in the Conditions and Stipulations entitled "Liability Noncumulative" which permits the title company to pay a loss under "any policy insuring a mortgage to which exception is taken in Schedule B," and such payment will be construed "as a payment under this policy." The lender is not subject to defenses the title company may have against the borrower because it has its own policy. In addition, loan policies have more coverages, needed for the insurance of the validity, enforceability and priority of the lien of the insured mortgage.

A fire or homeowners' insurance carrier issues a single policy on a risk, but that policy usually contains a standard mortgage clause, or a loss payable clause to enable the insurer to pay the lender first, if the lender is fully paid, then the remainder of the damages are paid to the owner.

Both the title insurance and the standard mortgage clause approaches result in virtually the same end. The loan is paid off or curtailed to the extent of the payment, and the lender is not subject to defenses the insurer may have against the borrower alone. The loss payable clause approach may make the lender subject to defenses the insurer may have against the borrower, so it is not as favored as the other two approaches from the lender's perspective.

At first blush, all of these seem somewhat unfair to the borrower, who is paid last, and then only with the funds remaining after the loan is paid off. However, the borrower is relieved of the burden of paying off the loan to the extent the insurance proceeds pay the lender; thus, both borrower and lender benefit from the insurance.

ALTA title insurance policy forms

The American Land Title Association (ALTA) title insurance policy forms have been the most commonly available title insuring forms in the United States for the past 20 years. Although some other states have used local forms in the past, the trend is definitely in the direction of standardization with ALTA policy forms. When a buyer purchases a property, or a lender accepts security for extending a loan, it wants assurance that the property is as insured or that the bank can realize upon that security if the borrower defaults. Traditionally, in real estate transactions, the assurance came in the form of an opinion on title, usually rendered by an attorney or abstractor, but there are many drawbacks to an opinion on title:

i. it covers only matters of record, not "hidden risks;"

ii. recovery for a mistake is based on tort — abstractor's liability for negligence instead of contract;

iii. liability is not backed up by reserves; and

iv. a claim can be defeated by the statute of limitations, usually within a few short years.

Recognizing the inadequacies of title opinions in the late nineteenth century, some people — usually attorneys worried about their abstractors' liability — started title insurance companies. They began with title guaranty policies which, like the opinion on title, only covered the record title.

There has been a steady increase in the types of risks shifted to title companies throughout the twentieth century.

i. With the development of *title insurance* instead of *title guaranties*, insurers assumed liability for hidden risks, *e.g.*:

a) Forgery;

b) Incompetency of the grantor or mortgagor;

c) Undisclosed heirs, spouses or co-tenants;

d) Fraud; and

e) Easements or interests by prescription.

ii. As new coverages are being created and negotiated in endorsements to the policy, title insurers are accepting risks of the transaction, *e.g.*:

a) Interest rate features (ARMs, SAMs, SWAPs)

b) Whether future advances are secured by a mortgage, and their priority if secured.

An ALTA title insurance policy is a policy of indemnity against actual loss. Title insurance liability comes in two components:

i. Liability for loss or damage resulting from a matter insured against by the policy (the duty to indemnify). This liability is limited by the Amount of Insurance stated in Schedule A. It is the liability component that most customers focus on during negotiations, but title insurers are rarely called upon to indemnify policyholders. Instead, most policy loss expense is for defense and settlement with a party adverse to the policyholder.

ii. Liability for costs, attorneys' fees and expenses incurred in the defense of the title (the duty to defend). This liability is not limited by the Amount of Insurance stated in Schedule A. Although the duty to defend the title is not listed as an insuring provision, and appears almost as an afterthought following the list, it is the most important grant of insurance to a policyholder facing a claim. Few real estate attorneys recognize its importance when negotiating coverages, but litigators never underestimate its value.

All ALTA policies have at least five major segments.

i. The insuring provisions are not titled as such, but are found at the beginning of the policy, and tell the insured what insurance coverages the policy contains. The insurance given in the insuring provisions is expressly subject to the provisions in the three other sections.

ii. The Exclusions from Coverage contain preprinted exclusions from the grant of coverage in the insuring provisions.

iii. The Conditions and Stipulations contain preprinted "boilerplate" which defines the coverages and the obligations of both the insurer and the insured under the policy.

iv. Schedule A of the policy contains the Amount of Insurance, the Date of Policy, the identification of the insured and the party vested in title to the land, the estate or interest insured by the policy and the legal description of the property.

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v. Schedule B contains typed numbered exceptions to the title, matters which affect the title to the interest in land described in Schedule A which have been found in the land records, revealed by a current ALTA survey or arise in the documents creating the interest insured.

vi. Many policies will be issued with one or more endorsements which tailor the coverage of the policy to meet the needs of the insured. Some endorsements are ALTA forms which can be preprinted and attached to the policy, others are created by other title organizations such as the California Land Title Association (CLTA), and many are created by the issuing title insurance company as standard or even specially fashioned forms.

In any dissection of a policy to explain the features of title insurance, usually a loan policy will be the subject of the discussion because it has most of the features of the owners' policies as well as the additional insuring clauses and exclusions that are needed for loan insurance. We will do a quick run through on both.

ALTA owners' policy forms

The four insuring clauses in an ALTA owner's policy, which are subject to the Exclusions from Coverage, the Exceptions in Schedule B and the Conditions and Stipulations, are:

1. Title vested other than as stated in the policy;
2. Any defect, lien or encumbrance on the title;
3. Unmarketability of title; and
4. Lack of a right of access to and from the land.

Although the duty to defend the title is not listed as an insuring provision, and appears almost as an afterthought following the list, it may be the most important grant of insurance to a policyholder facing a claim. Owners' policies also have a list of three Exclusions from Coverage, but subparagraphs make the actual number of items excluded much greater than three. The development of Exclusions 1 and 2 is described in detail in the later sections comparing the variants of the ALTA policies. Paragraph 3 excludes matters (a) "created, suffered, assumed, or agreed to" by the insured, (b) known to the insured but not disclosed to the title company or found in the public records, (c) resulting in no loss to the insured (title policies are policies of indemnity), (d) created after the Date of Policy or (e) resulting in loss or damage only because the insured did not pay value for the land. The definition of the the term insured in the ALTA owners' policies includes the insured named in Schedule A of the policy, but also includes:

> ...subject to any right or defenses the Company would have had against the named insured, those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors.

The Conditions and Stipulations do limit the continuation of insurance after a sale of the property to certain enumerated situations, (i) where the insured retains an interest in the land, (ii) where the insured retains a purchase money lien and (iii) where the insured is liable under covenants of warranty given in the transfer. Otherwise, the policy does not continue in force for the benefit of any purchaser from the insured. There are a number of distinctions between the Conditions and Stipulations in an ALTA Owner's Policy and those in an ALTA Loan Policy. The determination and extent of liability has fewer conditions in an owner's policy because it is easier for an owner to establish a loss than a lender. The lender's interest is only for the security of a loan. It is not sufficient for a lender to base a claim on a showing that a defect insured against caused a decrease in the value of the land. A loss will not occur until the lender realizes upon the collateral, and discovers the collateral is inadequate, at least in part because of a defect insured by the policy. Owners, on the other hand, need only show that the defect insured against caused the decrease in the value of land.

Owners must also contend with an apportionment provision which fixes the liability of the title company to each parcel of property insured at the Date of Policy, and prevents "shifting" of coverage at a later time to compensate for increases in the value of the property. In the 1987 and 1990 ALTA forms, owners' policies have introduced coinsurance provisions to protect the title insurers from underinsurance.

ALTA loan policy forms

ALTA Loan policies insure the policyholder's security in real estate as it is perfected by a mortgage or deed of trust (the term "mortgage" is frequently used in this text to refer to mortgages, deeds of trust and security deeds). Subject to the Exclusions from Coverage, Exceptions and Conditions and Stipulations, they contain the four insuring provisions listed above for the owners' policies, and add four more, for insurance against:

5. The invalidity or unenforceability of the lien of the insured mortgage;
6. The priority of any encumbrance over the lien of the insured mortgage;
7. Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:
   a. arising from an improvement begun before the Date of Policy; or
   b. if arising from an improvement begun after the Date of Policy, it must be financed by proceeds of the loan secured by the insured mortgage.
8. The invalidity or unenforceability of any assignment shown in Schedule A, or its failure to vest title to the insured mortgage in the named assignee free and clear of all liens.

To balance these additional insuring provisions, the 1970 ALTA Loan policies added another Exclusion from Coverage, the 1987 ALTA Loan policies added three to match the

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three in the owner's policy, and, of course, the only change in the 1990 ALTA policies was the addition of another Exclusion. Under the 1970 ALTA policies the additional loan policy Exclusion was:

> 4. Unenforceability of the lien of the insured mortgage as a result of the owner of the indebtedness secured to fail to comply with the "doing business laws of the state where the property is located.

The 1987 additions arose from the process of moving exclusions formerly lodged in the insuring provisions of the 1970 ALTA policies as exceptions to specific coverages to the Exclusions. It looked as though Exclusions were added, but it was really a process of moving them to a more appropriate location.

The definition of the term "insured" in the loan policy includes (i) the insured named in Schedule A, (ii) each successor in ownership of the indebtedness (unless it is also an obligor), (iii) any governmental agency or instrumentality which insures or guarantees the indebtedness, (iv) any insured who takes title to the land by a transfer which discharges the lien of the insured mortgage, (v) any affiliate corporation of such an insured described in (iv) to whom the property is conveyed, and (vi) any government agency or instrumentality which acquires the land under a contract of insurance or guaranty insurance.

Title insurers frequently are asked to add the words "...its successors or assigns" following the name of the insured typed in Schedule A when issuing a loan policy. After a note has been assigned to another lender, it will frequently request the title company to issue an endorsement naming it as the insured assignee of the indebtedness. The definition of the term "insured" in the ALTA Loan policy makes these requests unnecessary. The policy was intentionally designed to cover these situations relieving both the policyholders and insurance companies of the burden of this extra work. Title insurers are also concerned that the words "...its successors and assigns" could be interpreted as overriding the provision which prevents an unrelated purchaser at foreclosure from asserting that it meets the definition of the term "insured."

As we have seen, the loan policy Conditions and Stipulations are missing the apportionment and coinsurance clauses found in owners' policies. The section on what the company is obligated to pay in the event the insured suffers a covered loss contains more conditions than are found in an owner's policy. Since title insurance is an indemnity line, the company is obligated to pay under the policy the least of:

i. The amount of insurance stated in Schedule A;

ii. The amount of the unpaid principal indebtedness plus unpaid interest, expenses of foreclosure and amounts advanced to protect the lien of the insured mortgage; or

iii. The difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the lien or defect insured against by the policy.

Perhaps the most enduring myth surrounding title insurance loan policies is the idea that a loan policy automatically converts to an owner's policy when the lender forecloses or otherwise takes title to the property in satisfaction of the indebtedness secured by the insured mortgage or deed of trust. There is nothing in the paragraph on "Continuation of Coverage" to indicate that when the coverage continues after such an event, that it also undergoes a metamorphosis to become an entirely different form of coverage. After a foreclosure, the lender still has a loan policy which protects the lender's security, and the rules for establishing a loss remain unchanged.

For example, assume a title policy in the amount of $100,000 the then current value of the property, but when the lender forecloses, the property has increased in value to $150,000. If a defect is discovered which diminishes the value of the property to $125,000, the lender would be unable to establish a loss because the title policy insures that the property is security for $100,000, although it is actually worth more than that.[4] Assuming the same facts for an owner (no foreclosure, of course), the company would be liable to pay the $25,000 loss suffered by the policyholder, even though the property is worth more than the Amount of Insurance stated in the policy.[5]

The Fourth Circuit Court of Appeals decision in *Bluff Ventures Limited Partnership v. Chicago Title Insurance Company*, 1991 U.S. App. LEXIS 26759 (1991), is counter to the weight of authority on this issue, but only *CMEI v. American Title* and *Green v. Evesham* of the cases referred to above were cited as authority to the court. Moreover, the plaintiff, Bluff Ventures, was the assignee of the trustee's purchase at foreclosure, not the lender, therefore, the decision may rest in part on the effect of an agreement by Chicago Title not to raise the assignment of the contract to purchase as a defense.

Confusion also arises about the liability of the title company if a total failure of title occurs, but the property has either diminished in value, or the lender is subordinate to senior lenders. Many insureds think a policy should pay full policy limits if the insured suffers a total failure of title, but the liability provisions clearly state that the company's liability is the least of the three previously listed items; thus liability is limited to placing the insured in the same position it would have been if there were no defect in the title.[7] If other factors unrelated to title have reduced the value of the property to nothing, the title company would have no liability under the policy.[8]

A claim must relate to the title. A title policy insures against loss caused by a forgery of mortgage or deed of trust, but does not insure against loss caused by a forged signature on the note secured by the mortgage or deed of trust if there is no defect in the mortgage.[9] Unmarketability of the property due to a physical defect is not *unmarketability of the title* to the property; thus the discovery of

(Continued on page 22)

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Lawyers Notes (Continued from page 19)

hazardous waste on a property does not create liability on the part of a title insurer.[10]

Why coverages available in a loan policy are not in an owner's policy

As we have seen, the risk of loss in an owner's policy is more immediate than the risk in a loan policy. A title defect which would trigger an immediate liability to indemnify a holder of an owner's policy, may create no liability at all to the holder of a loan policy. In addition, virtually all lenders require representations and warranties concerning the title to the security from each borrower as further protection from title losses. A title insurer can often subrogate to the lender's rights under the representations and warranties to recover amounts paid on the loan policy, if it has issued no coverage against that risk to the owner. The lender's burden of establishing a loss and the obligation of the borrower to protect the lender reduce the risk of coverages extended to lenders, making more exotic coverages an acceptable risk in a loan policy, even though they might be unacceptable in an owner's policy.

A good example of a coverage routinely offered to lenders but entirely inappropriate to owners is the coverage in paragraph 3(a) of the ALTA 9 Restrictions, Encroachments, Minerals Endorsement. The coverage in paragraph 3(a) is:

> The Company insures the owner of the indebtedness secured by the insured mortgage against loss or damage sustained by reason of:
> 3. Damage to existing improvements, including lawns, shrubbery and trees:
> (a) which are located on or encroach upon that portion of the land subject to any easement excepted to in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved;...

This coverage was originated in California where lawns, shrubbery and trees are exceedingly rare, and title companies can trust utility companies to exercise care when working around them. A title insurer in the Eastern half of the country might pause before issuing such a coverage to a lender, reflecting that trees within a power line easement are an everyday problem in the Eastern United States. Utilities routinely schedule crews to clear the undergrowth beneath power lines to protect customers from power outages caused by falling limbs or interference with the lines by intruding plant growth.

This coverage is suitable for a lender because the damage to the vegetation does not so diminish the value of the property to threaten the title insurer with a loss. The unsightly gash through a neighborhood or yard caused by a utility maintenance crew may annoy the owner of the fee underlying the easement, but it will not destroy the value of the lender's security to the point where the lender will have a valid claim under its title policy. On the other hand, if this ALTA 9 coverage is extended to the owner of the underlying fee, title insurers can expect a new batch of claims each time a utility crew clears the underbrush in an easement.

This coverage in the ALTA 9 appears to protect the policyholder from the damage caused by the owner of an easement interest when that owner takes measures to maintain the easement. Since the easement owner is entitled to maintain the easement, and can be expected to do so, title insurers do not insure against the exercise of these rights in owners' policies. The landowner must accept the maintenance as one of the burdens the easement placed on the servient tract when the easement was granted, or when the property was purchased subject to the easement. TTT

FOOTNOTES

[1] If title companies had perfect information and correctly interpreted it, they would rarely be called on for indemnification. On the other hand, to acquire the information they do have and use it intelligently is an expensive process. The result: title insurance premiums are composed of a very small risk element and, proportionately, a very large expense element. This also is true of boiler and machinery insurance and elevator liability insurance but with a significant difference. Title insurance protects against past conditions; ordinarily nothing that may happen to the title after transfer is covered. Boiler and machinery and elevator liability insurance cover current and future events. They require payment, therefore, of future premiums while title insurance does not. Once a premium is paid, title insurance continues to indemnify for title defects of the past for as long as the title stays in the same hands. Leslie and Bethel, *The Title Insurance Industry: A Case for Affirmative Rate Regulation*, JOURNAL OF INSURANCE REGULATION, pp. 610-11, June 1983.

[2] There is a "risk premium" in title insurance. The companies keep careful records of premiums, losses, and expenses and report this in their annual statements - their "Form 9s."... It follows that the better they perform the title search and related work, the lower their loses [sic]. Title insurance loss ratios should be low; certainly less than from 6 to 10 percent, or it can be concluded that the title searches are being carelessly completed." Leslie and Bethel, supra, at p. 611.

[3] For example, property insurance actuaries were busy in late 1989 assessing the impact of catastrophic losses from September's Hurricane Hugo in Georgia, the Carolinas and Virginia, and the October earthquake in Northern California. In 1992, the damage from Hurricane Andrew in Southern Florida actually led some property/casualty insurers to question whether they could continue to insure against this risk in that region. (*See, e.g.*, Allstate Cuts Back In Florida, N.Y. Times, Jan. 15, 1993, at D1, Col. 6). More recently, flood insurance actuaries have been challenged by the Midwest floods of the summer of 1993 and the southeastern floods of the summer of 1994.

[4] Texas moved away from its unique form of policy with its adoption of a modified version of the 1990 ALTA policies (called the ALTEX policies) in the Fall of 1991. New York abandoned its local policy variant as of January 1, 1992 by also adopting the 1990 ALTA policy forms with an endorsement to modify selected provisions. The CLTA Standard Coverage policy is still available in California, but the ALTA policies are more popular.

[5] *Falmouth National Bank v. Ticor Title Insurance Company*, 920 F.2d 1058 (1st Cir. 1990); *Cale v. Transamerica Title Insurance Co.*, 275 Cal. Rptr. 107 (3rd Dist App. 1990); *Blackhawk Production Credit Association v. Chicago Title Insurance Company*, 144 Wis. 68, 423 N.W.2d 521 (1988); *CMEI, Inc. v. American Title Insurance Company*, 447 So.2d 427 (Fla. App., 5 Dist. 1984).

[6] *Green v. Evesham Corporation*, 179 N.J. Super 105, 430 A.2d 944 (1981).

[7] *Blackhawk Production Credit Association v. Chicago Title Insurance Company*, 144 Wis. 68, 423 N.W.2d 521 (1988).

[8] *Fleet Finance, Inc. of Georgia v. Lawyers Title Insurance Corporation*, No 1:88-cv-1672-HTW (N.D. Ga. Dec. 29, 1989).

[9] *Bank of Miami Beach v. Lawyers Title Guaranty Fund*, 214 So.2d 95 (Fla. Dist. Ct. App. 1968).

[10] *Lick Mill Creek Apartments v. Chicago Title Insurance Company*, 231 Cal. App. 3d 1654, 283 Cal. Rptr 231 (1991), appeal denied, 1991 Cal. LEXIS 4097 (Aug. 29, 1991); and *Fleet Finance, Inc. of Georgia v. Lawyers Title Insurance Corporation*, No 1:88-cv-1672-HTW (N.D. Ga. Dec. 29, 1989).

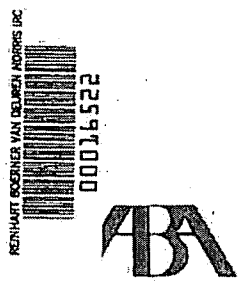
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EXHIBIT 8

James M. Pedowitz, *Program Chairman and Editor*

Title Insurance: The Lawyer's Expanding Role



A publication of the
Section of Real Property, Probate and Trust Law
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AMERICAN BAR ASSOCIATION
SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW

TITLE INSURANCE:
The Lawyer's Expanding Role

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resolutions, zoning ordinances, building codes, [Chu v Chicago Title Ins. Co., 89 App. Div. 2d 574, 452 N.Y.S.2d 229 (1982).] subdivision laws, health codes, and the like. [See e.g. Dyer & Moody, Inc. v Dynamic Constructors, Inc., 357 So.2d 615 (La. App. 1978) which held this exclusion applicable to a state statute thatrestricted the building of any work that would restrict the natural running or flow of water.]

Recognizing the limiting effect of this exclusion, many insureds will seek a zoning endorsement which generally insures the zoning classification of the property and the uses allowed under that classification. [See ALTA Endorsements 3 and 3.1 which afford zoning coverage.] The ALTA residential policy also gives coverage against the forced removal of an existing structure or the inability to use the land for a single-family residence because of an existing zoning law.

2. Eminent Domain

The policy also excludes coverage for the loss resulting from the exercise of eminent domain rights unless notice of the exercise of such rights appears in the public records at the date of policy. Again, the exclusion recognizes the fact that real estate is by nature subject to the exercise of the right of eminent domain and there is no way to protect against the exercise of that right. However, this exclusion would not apply if a document such as a lis pendens relating to a pending eminent domain proceeding has been filed in the public records at the date of policy.

EXHIBIT 9

ALTA Forms Committee makes revisions; issues new policy forms

Editor's note: The following comprehensive explanation of the new ALTA policy forms will appear in two parts. The first section discusses the insuring provisions, exclusions and Schedules A and B. A discussion on conditions and stipulations, and endorsements concerning environmental matters will appear in the July-August issue.

by Russ Jordan, Senior Vice-President, General Counsel and Secretary, Lawyers Title Insurance Corporation

The ALTA Forms Committee has now completed its work of revising all of the ALTA policy forms—the Owner's Policy, the Loan Policy, the Leasehold Owner's Policy, the Leasehold Loan Policy, and the Construction Loan Policy.

This project has been ongoing since the fall of 1984. Since the forms had not been revised since 1970, it was thought that a general revision and update was needed in order to address new trends in real estate and real estate financing prevalent in the 1980s, and certain case law that has taken place in recent years having to do with courts' finding liability outside of the title insurance contract and with the appropriate records that the title company must search.

In this article, I will be going through the ALTA Loan Policy which was used as a basis for all the revisions and explaining what the policy *did* cover and *still* covers, as well as pointing out those matters that are new or different from the 1970 forms.

All ALTA policies can be divided into five basic parts: the Insurance Provisions, the Exclusions from Coverage, the Conditions and Stipulations, and Schedule A and Schedule B.

Let's look first at the Insurance Provisions. This is where Lawyers Title gives coverage. Later in the article you'll see where the Company excludes coverage in the Exclusions from Coverage.

The Insuring Provisions begin with a preamble which tells the insured what these Insuring Provisions are "subject to."

"Subject to the exclusions from coverage, the exceptions from coverage contained in Schedule B and the Conditions and Stipulations, the Company insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. "Title to the estate or interest described in Schedule A being vested other than as stated therein."

Insuring Provision 1 has not changed at all from the 1970 policies and basically insures that the title to the property is vested in the owner, and properly vested. If we insure title is vested in John Doe and it turns out to be vested in Mary Roe, then we have a problem. If we insure fee simple title and the estate turns out to be only life estate in the owner, then this insurance provision comes into play.

2. "Any defect in or lien or encumbrance on the title."

This Insuring Provision 2 comes directly from the 1970 policies, and in my opinion, is one of the most important Insuring Provisions in the policy. It would pick up almost any outstanding interest in a third party, such as a missing heir, an outstanding mineral interest, a missed mortgage or deed of trust, a federal tax lien, a judgment lien, a special assessment or a mechanic's lien. This is the "catch all" paragraph and covers almost any defect, lien or encumbrance not excepted to in the policy. Remember that this includes recorded as well as *unrecorded* matters.

3. "Unmarketability of the title."

The 1970 policies simply insured against loss or damage by reason of "unmarketability of title" with no definition or meaning of what would constitute an "unmarketable title." This has proven to be a little broad and poses certain uncertainties and ambiguities in settling claims. How far do you have to go in establishing a marketable title? Do you have a reasonable time to cure same? When is the title unmarketable?

For the 1987 policies, the Forms Committee has come up with a definition of what would constitute an unmarketable title and this definition appears as item 1 (g) of the Conditions and Stipulations:

"An alleged or apparent matter affecting title to the land, not excepted or excluded from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or of the insured mortgage to be released from the obligation to purchase by virtue of a con-

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tractual condition requiring the delivery of a marketable title."

So if an owner plans to sell or lease his property, or obtain a mortgage loan on the property (or if a lender sells the land after foreclosure or sells the loan) and is turned down by reason of a matter insured against by the policy, then the Company would have liability by reason of this Insuring Provision. The Company would have to consider bringing a suit for specific performance, possibly purchasing the property or the mortgage loan, or making an owner a loan if the owner could not obtain a loan because of the unmarketable title.

4. "Lack of a right of access to and from the land."

There has been no change in this Insuring Provision. Note that the coverage afforded in Insuring Provision 4 represents "legal" access to and from the property and that it does not insure the nature and extent of access or the type of vehicle that one might or might not be able to use to get to and from the property.

5. "The invalidity or unenforceability of the insured mortgage upon the title."

Insuring Provisions 5 and 7 formerly had exclusionary language contained within these Insuring Provisions. This exclusionary language has now been removed from Insuring Provision 5 and Insuring Provision 7 and placed in the Exclusions from Coverage. Thus there is now no "exclusionary" language contained in any of the eight Insuring Provisions—all are affirmative statements. Except for the removal of the exclusionary language, Insuring Provision 5 remains the same.

6. "The priority of any lien or encumbrance over the lien of the insured mortgage."

There has been no change in Insuring Provision 6 from the 1970 policies.



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7. "Lack of priority to the lien of the insured mortgage over any statutory lien for services, labor or material:

(a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or

(b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance."

Insuring Provision 7 has been completely reworded but it is intended to offer essentially the same coverage as contained in Insuring Provision 7 of the 1970 Loan Policy. The language in the 1970 Loan Policy was always considered a little awkward since it contained an exclusion built into the affirmative language and this new language in the new policy is much clearer.

In my opinion, the 1970 ALTA Loan Policy was actually designed and suited for permanent loans only, not construction loans, but because of the broad language of Insuring Provision 7 it could be, and often was, used for construction loans. The 1987 loan policies can clearly be used for either—permanent or construction loans.

The Forms Committee seriously considered the concept of a fully funded policy, for permanent loans only, whereby endorsements could be added to the policy to convert the policy into a construction loan policy and thereby offer mechanics' lien coverage which would be especially suited for the particular state. The Forms Committee vascillated over this issue but the final consensus was to design an ALTA Loan Policy for both permanent and construction loans, just like the current policy is being used.

8. "The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens."

The 1970 policies referred to the assignment being "shown" in Schedule A and the new language "provided the assignment is shown in Schedule A" is perhaps a little

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ALTA issues new policy forms

(Continued from page 11)

stronger. If an assignment is shown in Schedule A, then such assignment is insured; if not shown in Schedule A, the assignment is not insured.

Note that in insuring an "assignment" of a mortgage, the title company must not only be concerned with liens, defects and encumbrances against the owner of the subject property, but must also be concerned with liens, defects and encumbrances against the assignor of the debt, since it will be insuring that the title to the insured mortgage vests in the assignee free and clear of all liens.

The paragraph appearing at the conclusion of the Insuring Provisions is the "defense obligation" paragraph and stipulates that the Company will pay all costs, attorneys' fees and expenses incurred in the defense of the title or the lien of the insured mortgage, but only to the extent provided for in the Conditions and Stipulations.

This obligation to pay court costs and attorneys' fees was formerly included in the preamble to the Insuring Provisions but now is contained in a separate paragraph following the Insuring Provisions.

Remember that these attorneys' fees are not included in the policy amount and indeed may even exceed the face amount of the policy. For example, you may have a policy in the face amount of $100,000 and have a $50,000 loss under the policy and yet have attorneys' fees of $75,000. Indeed, you could have attorneys' fees in the amount of $110,000 and have no loss at all under the policy, in which case the amount of insurance would never be reduced below the policy's face amount of $100,000. According to recent ALTA figures, approximately 30 to 40 percent of all losses to title insurance companies involve the subject of attorneys' fees, court costs and expenses.

Now let's look at the Exclusions from Coverage. This is where the title insurer sets forth matters that are not covered. Here the insurer is saying to the insured—"These matters are not the subject of title insurance and are expressly excluded from the coverage of this policy."

Before we get into the Exclusions, we must look at the definition of "public records" in Condition and Stipulation 1(f) which has been altered from the 1970 policies.

The definition of "public records" contained in the 1970 policies simply reads:

"those records which by law impart constructive notice of matters relating to said land."

This definition worked well for years because everyone thought that we were talking about "land records" or "title records" until a certain case arose in Alaska in 1976 called the Hahn Case, which held that easements or rights of way which were recorded in the Federal Register constituted a public record and, therefore, a place the title companies must search for purposes of certain exclusions or exceptions contained in the policy.

Simply put, title insurers, their agents, and approved attorneys are not set up or equipped to routinely examine records outside of the traditional land records—such as records in planning departments, zoning departments, safety inspectors' offices, fire marshals' offices, or the Federal Register.

So the definition of "Public Records" was reworded in the 1987 policies to more clearly indicate that what we are talking about are *land records, title records,* or *land title records.*

" 'public records:' records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1(a)(iv) of the Exclusions from Coverage, 'public records' shall also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located."

The definition of "public records" is only used in four places in the Exclusions from Coverage. Note that this definition does not necessarily prescribe or limit all those places where the title company may search for the purpose of insuring the title, and for the purpose of affording the coverage contained in the eight Insuring Provisions. But this definition does limit or prescribe where the title insurance company must search for the purpose of the affirmative assurances given within the Exclusions from Coverage.

Now with that in mind, let's begin with the preamble to the exclusions.

"The following matters are expressly excluded from the coverage of this policy *and the Company will not pay loss or damage, court costs, attorneys' fees or expenses which arise by reason of:* "

In the new language *italicized* above, the Forms Committee is clarifying that not only are all of the matters contained within the Exclusions excluded from coverage, but also that the Company is under no obligation to pay attorneys' fees or court costs in connection therewith. This should have been true in the 1970 policies, but it is spelled out in the new policies.

1.(a) "Any law, ordinance or

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governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy."

Exclusion 1 excludes building and zoning ordinances, subdivision laws, and environmental protection laws, and also excludes the effect of a violation of these matters. But note that any notice of *enforcement* or any notice of a *defect, lien* or *encumbrance* resulting from a violation (recorded in the public records), must be picked up and reported out by the title company. To this extent, the 1987 policies provide more coverage than the 1970 policies and a little more than the 1984 policies.

(b) "Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy."

Governmental "police power" is the broad power of the state to restrict or regulate property for the benefit of public health, safety or welfare. Again, if there is notice of the exercise of governmental police power or notice of a defect, lien or encumbrance resulting from a violation affecting the land (recorded in the public records), then the title company must pick it up and report it in the policy.

2. "Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but *not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.*"

The new language here is needed because of the change in the definition of "public records" and simply indicates that the policy is not excluding a federal condemnation where a "taking" has occurred prior to or at date of policy. In other words, if there has been a federal taking at date of policy, even though same may not be recorded in the public records, as defined in the policy, then the title company is liable for this matter and must pick it up.

3. "Defects, liens, encumbrances, adverse claims or other matters:"

(a) "created, suffered, assumed or agreed to by the insured claimant;"

There has been no change here from the 1970 policies.

(b) "not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;"

The language here has been reworked but is intended to say essentially the same thing as in the 1970 policies. If the insured knows of some defect or problem with the title and doesn't disclose it to the title company, then its always a defense to the Company in accordance with this paragraph. If the insured tells the Company of the problem and the Company insures anyway, then this defense would not be applicable.

(c) "Resulting in no loss or damage to the insured claimant;"

There has been no change here from the 1970 policies. This points out that the title insurance policy is a contract of indemnity and if the insured suffers no loss, then the Company has no liability.

(d) "attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or material); or"

The language in the parenthetical having to do with the exception provided with respect to mechanics' liens has been reworded in order to track the new coverage of Insuring Provision 7.

(e) "resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage."

This exclusion is new in the 1987 policies.

4. "Unenforceability of the lien of the insured mortgage because of the *inability* or failure of the insured at Date of Policy, or the *inability* or failure of any subsequent owner of the indebtedness, to comply with applicable doing business laws of the state in which the land is situated."

The word "inability" as it appears above is new in the 1987 policies.

5. "Invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law."

This exclusion is new in the

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1987 policies but comes directly from the exclusionary language formerly contained within Insuring Provision 5 having to do with usury or truth in lending laws.

6. "Any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance."

Exclusion 6 in the 1987 policies is new and tracks very closely the exclusionary language that was formerly contained in Insuring Provision 7 of the 1970 Loan Policy. This excludes mechanics' liens for an improvement contracted for and commenced after the date of the policy and not financed in whole or in part out of the proceeds of the loan which the lender has advanced or is obligated to advance. The intent here is to avoid liability (or defense obligations) for mechanics' liens that come along months or years after the mortgage is recorded and the policy is issued for work done by the owner either with his own funds or perhaps with funds from a second mortgage—like the addition of a side porch or some other addition.

Now let's look at Schedule A. There has really been very little change in Schedule A from the 1970 policies.

Date of Policy—This is the date through which the title is examined—probably the recording of the deed or the recording of the mortgage. Remember that title insurance insures against loss or damage by reason of matters occurring in the past. No insurance is afforded as to future events, except for the subject of mechanics' liens and there may be an element of future insurance for lenders with respect to special endorsements having to do with variable rate endorsements or shared appreciation mortgage endorsements.

Amount of Insurance—this is normally the amount of the mortgage in the case of the mortgagee policy. Occasionally, a mortgagee may request additional insurance to cover his foreclosure cost.

In an owner's policy, the amount of insurance should be the purchase price paid for the land. Title insurance companies generally insist on insuring for the full value of the land since their premiums are calculated based on insuring at full value, even though there may be only partial loss under the policy.

Schedule A-1 sets forth the name of the insured.

Schedule A-2 sets forth the estate or interest in the land which is encumbered by the mortgage—for example, "fee simple," "leasehold," "remainder."

Schedule A-3 tells where the estate or interest in the land is vested—i.e. ABC Corporation.

Schedule A-4 sets forth a description of the mortgage and any assignments.

Schedule A-5 sets forth the legal description of the land. The 1987 policies provide that the land may be described in either Schedule A-5 or a separate Schedule C which is customary in some areas.

In Schedule B, the only real change from the 1970 policies is contained in the preamble as follows:

This policy does not insure against loss or damage (*and the Company will not pay costs, attorneys' fees or expenses*) which arise by reason of:

Again, the Company is clarifying the fact that not only are the matters contained in Schedule B excepted from coverage, but also that the Company is under no obligation to provide attorneys' fees, costs or expenses on account of such matters.

The 1987 Loan Policy also contains a Schedule B, Part 2, which sets forth matters that affect the title to the estate or interest in the land but are subordinate to the lien of the insured mortgage. LTC



Gabriel A. Ivan has retired as senior vice-president, general counsel, and secretary of Lawyers Title Insurance Corporation. He joined the company's corporate legal staff at National Headquarters, in Richmond, in 1971. He was appointed senior title attorney in 1974, assistant counsel in 1976, associate counsel in 1978, and corporate counsel in 1981. Ivan was named assistant general corporate counsel in 1982, vice-president and general corporate counsel in 1983, and senior vice-president, general counsel, and secretary in 1985. He was graduated from the United States Military Academy in West Point with a B. S. degree, and from Harvard University where he received his LL. B. degree with honors. Ivan is a member of the District of Columbia Bar Association.

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EXHIBIT 10

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REAL ESTATE LAW AND PRACTICE
Course Handbook Series
Number 300

Title Insurance

The New Policy Changes

Oscar H. Beasley
Chairman

INFORMATION RESOURCE CENTER
REINHART, BOERNER, VAN DEUREN,
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2

ALTA FORMS COMMITTEE REVISES TITLE INSURANCE POLICIES

Russell W. Jordan, III

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The ALTA Forms Committee has now completed its work of revising all of the ALTA policy forms—the Owner's Policy, the Loan Policy, the Leasehold Owner's Policy, the Leasehold Loan Policy, and the Construction Loan Policy.

This project has been ongoing since the fall of 1984. Since the forms had not been revised since 1970, it was thought that a general revision and update was needed in order to address new trends in real estate and real estate financing prevalent in the 1980s, and certain case law that has taken place in recent years having to do with courts' finding liability outside of the title insurance contract and with the appropriate records that the title company must search.

In this article, I will be going through the ALTA Loan Policy which was used as a basis for all the revisions and explaining what the policy *did* cover and *still* covers, as well as pointing out those matters that are new or different from the 1970 forms.

All ALTA policies can be divided into five basic parts: the Insuring Provisions, the Exclusions from Coverage, the Conditions and Stipulations, and Schedule A and Schedule B.

Insuring Provisions

Let's look first at the Insuring Provisions. This is where Lawyers Title gives coverage. Later in the article you'll see where the Company excludes coverage in the Exclusions from Coverage.

The Insuring Provisions begin with a preamble which tells the insured what these Insuring Provisions are "subject to."

"Subject to the exclusions from coverage, the exceptions from coverage contained in Schedule B and the Conditions and Stipulations, the Company insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. "Title to the estate or interest described in Schedule A being vested other than as stated therein."

Insuring Provision 1 has not changed at all from the 1970 policies and basically insures that the title to the property is vested in the owner, and properly vested. If we insure title is vested in John Doe and it turns out to be vested in Mary Roe, then we have a problem. If we insure fee simple title and the estate turns out to be a life estate in the owner, then this insurance provision comes into play.

2. "Any defect in or lien or encumbrance on the title."

This Insuring Provision 2 comes directly from the 1970 policies, and in my opinion, is one of the most important Insuring Provisions in the policy. It would pick up almost any outstanding interest in a third party, such as a missing heir, an outstanding mineral interest, a missed mortgage or deed of trust, a federal tax lien, a judgment lien, a special assessment or a mechanic's lien. This is the "catch all" paragraph and covers almost any defect, lien or encumbrance not excepted to in the policy. Remember that this includes recorded as well as *unrecorded* matters.

3. "Unmarketability of the title."

The 1970 policies simply insured against loss or damage by reason of "unmarketability of title" with no definition or meaning of what would constitute an "unmarketable title." This has proven to be a little broad and poses certain uncertainties and ambiguities in settling claims. How far do you have to go in establishing a marketable title? Do you have a reasonable time to cure same? When is the title unmarketable?

Russell W. "Russ" Jordan III is senior vice-president, general counsel, and secretary of Lawyers Title. He assumed the post at National Headquarters on February 1, succeeding Gebe Ivan, who retired January 31, in the position. Jordan began his career with Lawyers Title at National Headquarters in 1969 as a title attorney. In 1971 he was named senior title attorney, and in 1974 he became assistant counsel. In 1978 he was elected associate counsel; he became counsel and manager of the law division in 1979. In 1982 he was named assistant general counsel, and in 1985 he became vice-president and associate general counsel. Jordan was graduated from Wake Forest University in Winston-Salem, North Carolina, with a B.A. degree, and from the University of Richmond's T. C. Williams School of Law, in Richmond, Virginia, with a J.D. degree. He is a member of the Virginia State Bar, the Virginia Bar Association, the American Bar Association, the Richmond Bar Association, the American Land Title Association, and the Virginia Land Title Association. He is currently chairman of the corporate counsel section of the Richmond Bar Association. Jordan is also a member of the policy revision committee of ALTA, and vice-chairman of the condemnation committee of the American Bar Association.

For the 1987 policies, the Forms Committee has come up with a definition of what would constitute an unmarketable title and this definition appears as Item I (g) of the Conditions and Stipulations:

"An alleged or apparent matter affecting title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or of the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of a marketable title."

Thus if an owner plans to sell or lease his property, or obtain a mortgage loan on the property (or if a lender sells the land after foreclosure or sells the loan) and is turned down by reason of a matter insured against by the policy, then the Company would have liability by reason of this Insuring Provision. The Company would have to consider bringing a suit for specific performance, possibly purchasing the property or the mortgage loan, or making an owner a loan if the owner could not obtain a loan because of the unmarketable title.

4. "Lack of a right of access to and from the land."

There has been no change in this Insuring Provision. Note that the coverage afforded in Insuring Provision 4 represents "legal" access to and from the property and that it does not insure the nature and extent of access or the type of vehicle that one might or might not be able to use to get to and from the property.

5. "The invalidity or unenforceability of the insured mortgage upon the title."

Insuring Provisions 5 and 7 formerly had exclusionary language contained within these Insuring Provisions. This exclusionary language has now been removed from Insuring Provision 5 and Insuring Provision 7 and placed in the Exclusions from Coverage. Thus there is now no "exclusionary" language contained in any of the eight Insuring Provisions—all are affirmative statements. Except for the removal of the exclusionary language, Insuring Provision 5 remains the same.

6. "The priority of any lien or encumbrance over the lien of the insured mortgage."

There has been no change in Insuring Provision 6 from the 1970 policies.

7. "Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:

(a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or

(b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance."

Insuring Provision 7 has been completely reworded but it is intended to offer essentially the same coverage as contained in Insuring Provision 7 of the 1970 Loan Policy. The language in the 1970 Loan Policy was always considered a little awkward since it contained an exclusion built into the affirmative language and this new language in the new policy is much clearer.

In my opinion, the 1970 ALTA Loan Policy was actually designed and suited for permanent loans only, not construction loans, but because of the broad language of Insuring Provision 7 it could be, and often was, used for construction loans. The 1987 loan policies can clearly be used for either—permanent or construction loans.

The Forms Committee seriously considered the concept of a fully funded policy, for permanent loans only, whereby endorsements could be added to the policy to convert the policy into a construction loan policy and thereby offer mechanics' lien coverage which would be especially suited for the particular state. The Forms Committee debated over this issue but the final consensus was to design an ALTA Loan Policy for both permanent and construction loans,

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just like the current policy is being used.

8. "The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens."

The 1970 policies referred to the assignment being "shown" in Schedule A and the new language "provided the assignment is shown in Schedule A" is perhaps a little stronger. If an assignment is shown in Schedule A, then such assignment is insured; if not shown in Schedule A, the assignment is not insured.

Note that in insuring an "assignment" of a mortgage, the title company must not only be concerned with liens, defects and encumbrances against the owner of the subject property, but must also be concerned with liens, defects and encumbrances against the assignor of the debt, since it will be insuring that the title to the insured mortgage vests in the assignee free and clear of all liens.

The paragraph appearing at the conclusion of the Insuring Provisions is the "defense obligation" paragraph and stipulates that the Company will pay all costs, attorneys' fees and expenses incurred in the defense of the title or the lien of the insured mortgage, but only to the extent provided for in the Conditions and Stipulations.

This obligation to pay court costs and attorneys' fees was formerly included in the preamble to the Insuring Provisions but now is contained in a separate paragraph following the Insuring Provisions.

Remember that these attorneys' fees are not included in the policy amount and indeed may even exceed the face amount of the policy. For example, you may have a policy in the face amount of $100,000 and have a $50,000 loss under the policy and yet have attorneys' fees of $75,000. Indeed, you could have attorneys' fees in the amount of $110,000 and have no loss at all under the policy, in which case the amount of insurance would never be reduced below the policy's face amount of $100,000. According to recent ALTA figures, approximately 30 to 40 percent of all losses to title insurance companies involve the subject of attorneys' fees, court costs and expenses.

Exclusions

Now let's look at the Exclusions from Coverage. This is where the title insurer sets forth matters that are not covered. Here the insurer is saying to the insured—"These matters are not the subject of title insurance and are expressly excluded from the coverage of this policy."

Before we get into the Exclusions, we must look at the definition of "public records" in Condition and Stipulation 1(f) which has been altered from the 1970 policies.

"According to recent ALTA figures, approximately 30 to 40 percent of all losses to title insurance companies involve the subject of attorneys' fees, court costs and expenses."

The definition of "public records" contained in the 1970 policies simply reads:

> "those records which by law impart constructive notice of matters relating to said land."

This definition worked well for years because everyone thought that we were talking about "land records" or "title records" until a certain case arose in Alaska in 1976 called the Hahn Case, which held that easements or rights of way which were recorded in the Federal Register constituted a public record and, therefore, a place the title companies must search for purposes of certain exclusions or exceptions contained in the policy.

Simply put, title insurers, their agents, and approved attorneys are not set up or equipped to routinely examine records outside of the traditional land records—such as records in planning departments, zoning departments, safety inspectors' offices, fire marshals' offices, or the Federal Register.

Thus the definition of "Public Records" was reworded in the 1987 policies to more clearly indicate that what we are talking about are *land records, title records,* or *land title records.*

> " 'public records:' records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section.1(a)(iv) of the Exclusions from Coverage, 'public records' shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district in which the land is located."

The definition of "public records" is only used in four places in the Exclusions from Coverage. Note that this definition does not necessarily prescribe or limit all those places where the title company may search for the purpose of insuring the title, and for the purpose of affording the coverage contained in the eight Insuring Provisions. But this definition does limit or prescribe where the title insurance company must search for the purpose of the affirmative assurances given within the Exclusions from Coverage.

Now with that in mind, let's look at the Exclusions' preamble.

> "The following matters are expressly excluded from the coverage of this policy *and the Company will not pay loss or damage, court costs, attorneys' fees or expenses which arise by reason of:* "

In the new language italicized above, the Forms Committee is clarifying that not only are all of the matters contained within the Exclusions excluded from coverage, but also that the Company is under no obligation to pay attorneys' fees or court costs in connection therewith. This should have been true in the 1970 policies, but it is spelled out in the new policies.

1.(a) "Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy."

Exclusion 1 excludes building and zoning ordinances, subdivision laws, and environmental protection laws, and also excludes the effect of a violation of these matters. But note that any notice of *enforcement* or any notice of a *defect, lien* or *encumbrance* resulting from a violation (recorded in the public records) must be picked up and reported out by the title company. To this extent, the 1987 policies pro-

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vide more coverage than the 1970 policies and a little more than the 1984 policies.

(b) "Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy."

Governmental "police power" is the broad power of the state to restrict or regulate property for the benefit of public health, safety or welfare. Again, if there is notice of the exercise of governmental police power or notice of a defect, lien or encumbrance resulting from a violation affecting the land (recorded in the public records), then the title company must pick it up and report it in the policy.

2. "Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but *not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.*"

The new language here is needed because of the change in the definition of "public records" and simply indicates that the policy is not excluding a federal condemnation where a "taking" has occurred prior to or at date of policy. In other words, if there has been a federal taking at date of policy, even though same may not be recorded in the public records, as defined in the policy, then the title company is liable for this matter and must pick it up.

3. "Defects, liens, encumbrances, adverse claims or other matters:

(a) "created, suffered, assumed or agreed to by the insured claimant;"

"Simply put, title insurers, their agents, and approved attorneys are not set up or equipped to routinely examine records outside of the traditional land records . . ."

There has been no change here from the 1970 policies.

(b) "not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;"

The language here has been reworked but is intended to say essentially the same thing as in the 1970 policies. If the insured knows of some defect or problem with the title and doesn't disclose it to the title company, then it's always a defense to the Company in accordance with this paragraph. If the insured tells the Company of the problem and the Company insures anyway, then this defense would not be applicable.

(c) "resulting in no loss or damage to the insured claimant;"

There has been no change here from the 1970 policies. This points out that the title insurance policy is a contract of indemnity and if the insured suffers no loss, then the Company has no liability.

(d) "attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or material); or"

The language in the parentheses having to do with the exception provided with respect to mechanics' liens has been reworded in order to track the new coverage of Insuring Provision 7.

"Governmental 'police power' is the broad power of the state to restrict or regulate property for the benefit of public health, safety or welfare . . . if there is notice of the exercise of governmental police power, or notice of a defect, lien or encumbrance (recorded in the public records) . . . then the title company must pick it up and report it in the policy."

(e) "resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage."

This exclusion is new in the 1987 policies.

4. "Unenforceability of the lien of the insured mortgage because of the *inability* or failure of the insured at Date of Policy, or the *inability* or failure of any subsequent owner of the indebtedness, to comply with applicable doing business laws of the state in which the land is situated."

The word "inability" as it appears above is new in the 1987 policies.

5. "Invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law."

This is a new exclusion but comes directly from the exclusionary language formerly included in Insuring Provision 5 having to do with usury or truth in lending laws.

6. "Any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance."

Exclusion 6 in the 1987 policies is new and tracks very closely the exclusionary language that was formerly contained in Insuring Provision 7 of the 1970 Loan Policy. This excludes mechanics' liens for an improvement contracted for and commenced after the date of the policy and not financed in whole or in part out of the proceeds of the loan which the lender has advanced or is obligated to advance. The intent here is to avoid liability (or defense obligations) for mechanics' liens that come along months or years after the mortgage is recorded and the policy is issued for work done by the owner either with his own funds or perhaps with funds from a second mortgage—like additions such as a side porch.

Schedules A and B

Now let's look at Schedule A. There has really been very little change in Schedule A from the 1970 policies.

Date of Policy—This is the date through which the title is examined—probably the recording of the deed or the recording of the mortgage. Remember that title insurance insures against loss or damage by reason of matters occurring in the past. No insurance is afforded as to future events, except for the subject of mechanics' liens and there may be an element of future insurance for lenders with respect to special endorsements having to do with variable rate mortgages or shared appreciation mortgages.

Amount of Insurance—this is normally the amount of the mort-

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gage in the case of the mortgagee policy. Occasionally, a mortgagee may request additional insurance to cover his foreclosure costs.

In an owner's policy, the amount of insurance should be the purchase price paid for the land. Title insurance companies generally insist on insuring for the full value of the land since their premiums are calculated based on insuring at full value, even though there may be only partial loss under the policy.

Schedule A-1 sets forth the name of the insured.

Schedule A-2 sets forth the estate or interest in the land which is encumbered by the mortgage—for example "fee simple," "leasehold," "remainder."

Schedule A-3 tells where the estate or interest in the land is vested—i.e. ABC Corporation.

Schedule A-4 sets forth a description of the mortgage and any assignments.

Schedule A-5 sets forth the legal description of the land. The 1987 policies provide that the land may be described in either Schedule A-5 or a separate Schedule C which is customary in some areas.

In Schedule B, the only real change from the 1970 policies is contained in the preamble as follows:

"This policy does not insure against loss or damage *(and the Company will not pay costs, attorneys' fees or expenses)* which arise by reason of:"

Again, the Company is clarifying the fact that not only are the matters contained in Schedule B excepted from coverage, but also that the Company is under no obligation to provide attorneys' fees, costs or expenses on account of such matters.

The 1987 Loan Policy also contains a Schedule B, Part 2, which sets forth matters that affect the title to the estate or interest in the land but are subordinate to the lien of the insured mortgage.

Conditions and Stipulations

We now begin to talk about the Conditions and Stipulations—the fine print of the policy that no one really likes to read. But these Conditions and Stipulations are very important in that they spell out the contractual rights and obligations of the Company and of the insured and they tend to consolidate and complete the insurance contract between the parties.

Of all of the changes made by the ALTA Forms Committee, this may have been one of the areas of greatest need, and is perhaps the area of greatest accomplishment. Many of the Conditions and Stipulations contained in the old policy consisted of long paragraphs with several thoughts expressed in each one. The Committee tried to break these paragraphs down into sections, with as much logical order and sequence as possible, and tried to keep one thought per phrase or one thought per sentence insofar as possible.

The Conditions and Stipulations begin with a definition of terms used in the policy. Note that the definition of "insured" includes not only the insured named in Schedule A but also the owner of the indebtedness secured by the insured mortgage and each successor in ownership of the indebtedness, except a successor who is an obligor under the provisions of the new Section 12(c); thus the policy insures the owner of the debt. Note, however, that the Company reserves all rights and defenses as to any successor that the Company would have had against his predecessor, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien or encumbrance against the title.

What does all this mean? If the Company insures lender "A," and lender "A" knows of some defect in the real estate, then this will be a defense to the Company. If lender "A" sells the mortgage to lender "B" and lender "B" buys the mortgage as a bonafide purchaser, then lender "B" takes free of "A's" knowledge and free of this defense of the Company.

The term "insured" will also include any governmental agency or governmental instrumentality which is an insurer or guarantor under an insurance contract, or guaranty insuring or guaranteeing the indebtedness and, in addition, all of those parties designated in Section 2(a) of the Conditions and Stipulations.

The definition of "knowledge" or "known" is very important because of Exclusion 3(b) (matters *known* to the insured). "Knowledge" and "known" are defined as "actual knowledge," not constructive knowledge, or notice which may be imputed to an insured by reason of the public records as defined in this policy *or any other records which impart constructive notice of matters affecting the land*. The 1970 policies defined only "knowledge," while the 1987 policies define both terms. The italicized language indicated above is new and was added to clarify that the insured is only being charged with actual knowledge, not knowledge obtained from the public records or imputed through any other records intending to impart constructive notice of matters affecting the land.

The definition of "land" appearing in 1(d) is also significant and includes the land described or referred to in Schedule A or a separate Schedule C. Note that land also includes all improvements that are affixed to the land which by law constitute real property. Land does not include any property beyond the boundaries of the property described in Schedule A, nor does it include any interest or right in any street, road, alley or waterway. But nothing contained within the definition of "land" will in any way diminish the affirmative insurance the insured receives by Insuring Provision 4 with respect to access to and from the land.

"Public Records" appearing in 1(f) and "unmarketability of title" appearing in 1(g) have been discussed earlier in this article.

Section 2 of the Conditions and Stipulations deals with the continuation of insurance and serves as a good example of where the Forms

". . . if there has been a federal taking at date of policy, even though same may not be recorded in the public records, as defined in the policy, then the title company is liable for this matter and must pick it up."

Committee rearranged and reworded for clarity. Item (a) has to do with the continuation of insurance in favor of a lender after acquisition of title. This paragraph provides that the coverage of the policy shall continue in force (as of date of policy) in favor of certain parties as follows:

1. An insured who acquires all or any part of the estate in the land by foreclosure, trustee's sale, deed in lieu of foreclosure, or any other legal manner which discharges the lien of the insured mortgage.

   Thus, when an insured forecloses and acquires title, he is still protected by the policy, but as of the policy's original effective date.
2. A transferee of the estate or interest from an insured corporation, provided that the transferee is the parent or the

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"If the insured knows of some defect or problem with the title and doesn't disclose it to the title company, then it's always a defense to the Company . . ."

wholly owned subsidiary of the insured corporation.

3. Any governmental agency or governmental instrumentality which acquires all or any part of the estate pursuant to a contract of insurance or guaranty.

Item (b) of Section 2 is contained in the lender's policy and in the owner's policy and provides that the coverage of the policy will continue in force as of the date of the policy in favor of an insured as long as the insured retains an estate or interest in the land or holds an indebtedness secured by a purchase money mortgage given by the insured's purchaser. This means if we insure a lessee in an owner's policy (which lessee has been granted an option to purchase the land) and this lessee later exercises his option to purchase and takes title to the land, his old owner's policy insuring him as a lessee will continue in force to protect him against all matters that are covered by that policy; but note that the old policy does not insure his new estate in the land as "owner" and does not carry an effective date past the date of the old policy. Also, if an owner or a lender sells the property and takes back a purchase money mortgage, coverage of his owner's or lender's policy goes on to protect him as long as he holds the purchase money mortgage.

Further, the coverage of the policy always continues to protect an insured on the covenants of warranty that he might give in a deed of transfer to his purchaser. This is valuable insurance in that liabilities on warranties can last a long time and this is why we always tell our insureds to keep their policies even after they have conveyed the title.

Item (c) of Section 2 is for lenders only and has to do with the amount of insurance after the acquisition of title by the lender or after the conveyance of title by the lender. It provides that such amount of insurance shall not exceed the least of the following:

1. The amount of insurance stated in Schedule A.
2. The amount of the unpaid principal indebtedness secured by the insured mortgage at date of policy, plus interest thereon, plus expenses of foreclosure, plus amounts advanced pursuant to the mortgage to assure compliance with laws or to protect the lien of the insured mortgage, and plus *reasonable amounts expended to prevent deterioration of the improvements*, but reduced by the amount of all paybacks to the lender.
3. The amount paid by the governmental agency or instrumentality.

Section 3 of the Conditions and Stipulations in the 1970 policies had to do with two things—the defense and prosecution of actions and the notice of claim to be given by the insured claimant.

In the 1987 policies, the old Section 3 has been rewritten to promote clarity and these matters now appear in the new policies as Conditions and Stipulations 3 (Notice of Claim to be Given) and 4 (Defense and Prosecution of Actions—Duty of Insured to Cooperate).

Section 3 requires the insured to give to the company notice in writing promptly in the following cases:

1. In case of any litigation;
2. In case the insured shall have knowledge of any claim of title or interest which is adverse to the title to the estate or the lien of the insured mortgage; or
3. If the title to the estate or interest or the lien of the insured mortgage is rejected as unmarketable.

As mentioned, Section 4 concerns the defense and prosecution of actions and the duty of the insured to cooperate. Item 4(a) of the Conditions and Stipulations is reworded somewhat from Item 3(a) of the 1970 policies and provides that the Company will defend the insured in all litigation when someone asserts a claim against the subject property, which claim is based upon a matter insured against by the policy, but only as to those defects, liens or encumbrances or other matters which are insured against by the policy. In other words, if the matter is covered we will provide a defense, but if the matter is not covered then we have no obligation to defend.

This section further specifies that the Company shall have the right to select counsel, but the 1987 policies provide that this right is subject to the insured's right to *object* to the Company's choice of counsel for a "reasonable" cause.

Section 4(b) states that the Company shall have the right, at its own option and cost, to initiate and prosecute an action or proceeding which may be necessary or desirable to establish the title or the lien of the insured mortgage or to prevent any loss or damage to the insured. In other words, if we see something that needs to be done in order to clear the title, cure the title, or avoid an adverse claim, then we don't have to sit by and watch matters get worse, but can go ahead and take action to clear the title or prevent further loss to the insured. The 1987 policies provide that if the Company exercises its rights under this paragraph, it shall do so "diligently."

Section 4(c) provides that when the Company shall have brought an action or interposed a defense, then the Company may pursue any litigation to a final determination by a court of competent jurisdiction and reserves the right, in its sole discretion, to appeal.

Section 4(d) has to do with the insured's helping the Company when the Company brings a suit or defends against a suit, and provides that where the policy permits or requires the Company to bring a suit or defend a suit, the insured shall secure for the Company the right to so prosecute or defend and shall permit the Company to use the insured's name for this purpose.

Section 5 of the Conditions and Stipulations involves a proof of loss. In addition to the notice of claim required in Section 3, Section 5 requires the insured to furnish to the Company a proof of loss or damage statement within 90 days after the insured shall ascertain facts that give rise to the loss or damage. Therefore, in pursuing a claim, the insured must do two things—(1) furnish the Company a notice of loss and, (2) furnish a proof of loss statement.

This section in the 1987 policies spells out in more definitive terms what this proof of loss damage shall contain, requires the insured to describe the defect, lien or encumbrance that is the cause of the problem and requires the insured to show, to the extent possible, the basis of his calculations of the loss or damage.

Also new in the 1987 policies is the requirement that the insured claimant submit to an examination under oath by an authorized representative of the Company and the requirement that the insured claimant produce for examination and copying all records, books, ledgers, checks and correspondence which may reasonably pertain to

R.1956

Chicago Title_004419

the loss or damage. The failure of the insured claimant to provide the proof of loss or damage, submit to examination under oath, or produce or grant permission to obtain reasonably necessary information, could result in the termination of the liability of the Company as to that particular claim.

Section 6, (Options to Pay or Otherwise Settle Claims—Termination of Liability) is a very important paragraph and has been rearranged for clarity. In case of a

"Title companies generally insist on insuring for the full value of the land since their premiums are based on insuring at full value, even though there may be only partial loss . . ."

claim under the policy, the Company shall have the following additional options:

1. In Part A the Company may pay or tender payment of the total amount of insurance under the policy or purchase the debt for the amount owing thereon, together with all attorneys' fees, costs and expenses. If the Company exercises either of these options, then all liability to the insured shall terminate, including any further liability to defend or continue litigation.
2. In Part B the Company may pay or otherwise settle with third parties or with the insured claimant, together with all attorneys' fees, costs and expenses. If the Company exercises either of these options, then all liability to the insured for the particular claimed loss or damage shall terminate, including any further obligation to defend.

Title insurers have had a lot of problems in recent years due to claims for damages outside of the title insurance contract. What we're talking about here are consequential damages, damages due to emotional distress, and so on.

In order to counter this and to make it clear that the title insurance contract is (and has always been) a contract of indemnity, an important preamble has been added to Section 7 as follows:

"This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of the matters insured against by this policy and only to the extent herein described."

Section 7 goes on to state that the liability of the Company under the policy shall not exceed the least of:

1. The amount of insurance stated in Schedule A;
2. The amount of the unpaid principal indebtedness secured by the insured mortgage at the time of the loss or damage;
3. The difference between the value of the insured estate as insured and the value of the insured estate subject to the defect, lien or encumbrance insured against by the policy.

Item 3 above is new in the 1987 policies and represents a classic method in which to measure loss or damage under the policy.

Section 8(a) of the 1987 policies is very similar to what was contained in the 1970 policies and provides that if the Company establishes the title, removes the alleged defect, lien or encumbrance, cures the lack of a right of access, or cures the claim of unmarketability (all in a reasonably diligent manner), then it shall have fully performed its obligation with respect to that matter.

Section 8(d) of the 1987 Loan Policy is very important and replaces Section 8(b) of the 1970 Loan Policy. It provides that the Company shall not be liable for:

1. Any indebtedness created subsequent to the date of the policy, except for advances made to protect the lien of the insured mortgage *and reasonable amounts expended to prevent deterioration of improvements or*
2. Construction loan advances made after the date of the policy, except for those advances made after the date of the policy for financing in whole or in part, the construction of improvements on the land which the insured at the date of the policy was, and continued to be, obligated to advance.

The italicized language in Item 1 above is new in the 1987 policy and represents an expansion of coverage. All of Item 2 is new in the 1987 policy.

Section 9 has to do with the reduction of insurance or the reduction or termination of liability.

Section 9(a) is very similar to what was in the 1970 policies while Section 9(b), having to do with payment in part, is new.

Section 10 (Liability—Non-cumulative) is almost identical to the similar section contained in the 1970 policy but also covers a mortgage "assumed" by the lender. This simply means that if the lender acquires title to the property and assumes a mortgage or places a mortgage on the property, then any payment made under such mortgagee policy will reduce the amount of the lender's insurance under *its* mortgagee policy.

In Section 11 (Payment of Loss) there has been no change in the language, although these provisions don't appear in the exact place as they did in the 1970 policies. When a payment is made under the policy, the policy shall be produced for endorsement unless it is lost or destroyed, in which case proof of such loss or destruction shall be furnished to the Company. When liability and the extent of loss has been definitely fixed, the loss shall be payable within 30 days.

"The failure of the insured claimant to provide the proof of loss or damage, submit to examination under oath, or produce or grant permission to obtain reasonably necessary information, could, unless prohibited by law or regulation, terminate the liability of the Company as to that particular claim."

Section 12 (Subrogation) is a pretty complicated paragraph and I'm not going to try and go into all the details concerning the fine points of subrogation. But, basically what this paragraph said and still says is that when the Company shall have settled and paid a claim under the policy, then all rights of subrogation shall vest in the Company. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property in order to perfect such right of subrogation.

Now, notwithstanding that, both the old version and the new version provide that the lender may release or substitute the personal liability of any debtor, he may modify the terms of payment, or he may release a portion of the property or collateral security; provided, however, in so doing, he does not impair the priority of the lien of the insured mortgage.

Now in the subrogation paragraph in the 1987 policies there is a new section (12c) which extends

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the Company's right of subrogation against "non-insured obligors." It provides that the Company's right of subrogation shall exist and shall include the rights of the insured to any indemnities, guarantees, other policies of insurance or bonds—notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy. In other words, if the lender has a mechanic's lien bond, or a guarantee for itself, then the title insurer will be subrogated to this bond or guarantee once it has paid the claim.

Section 13 (Arbitration) is entirely new in the 1987 policies. The Committee had been considering arbitration from the time it began to work on the policies back in 1984. As you perhaps know, there is a great trend toward alternative dispute resolution, such as mediation or arbitration, in order to avoid high court costs, attorneys' fees, and time in resolving disputes.

What we are talking about in an arbitration clause is arbitration between the insured and the Company over the scope of coverage and all matters covered by the insurance contract; we're not talking about arbitration between the Company and third party claimants.

Section 13 of the 1987 Loan Policy (Section 14 in the owner's policy) deals with arbitration and provides that unless prohibited by applicable law and upon demand of either party any controversy or claim between the insured and the Company arising out of the policy or any service provided by the Company in connection with the issuance of a policy in an amount of $1 million or less, shall be settled by binding arbitration in accordance with the "Title Insurance Arbitration Rules of the American Arbitration Association." For policy amounts in excess of $1 million, arbitration, as provided by Section 13, can be instituted only by the agreement of *both* parties.

The Forms Committee has met with the American Arbitration Association and established a set of rules particularly suited for title insurance. These rules go into such matters as how arbitration is initiated, the qualifications of arbitrators and how they are appointed, representation by counsel, the order of the proceedings, the evidence that is admissable, and the award and settlement.

The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Any judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Any award made by the arbitrator shall be binding upon both parties, but note that it is not precedent, like case law. The law of the situs of the land shall apply to the use of arbitration as a means for settling any controversy or claim under the policy. It is hoped that this new arbitration clause will prove beneficial to both insurers and insureds in resolving claims and disputes in a fair and efficient manner.

Section 14 of the Conditions and Stipulations states that the policy is the entire contract between the parties and that any claim must be based on the policy. This represents no change from the 1970 policies.

Section 15 of the Conditions and Stipulations is a "severability" clause, new in the 1987 policies, and provides that if any provision of the policy is invalid, then the policy will be deemed not to include that provision.

Finally, Section 16 tells the insured where to send notice in the event of a claim or any other need to contact the Company.

With respect to the ALTA Owner's Policy 1987, there is one significant change that does not appear in the ALTA Loan Policy. This is the inclusion of a coinsurance provision in Section 7(b) of the Conditions and Stipulations. This section provides that if the amount of insurance at date of policy is less than 80 percent of the value of the land or the full consideration paid, then, in the event of partial loss, the Company shall only pay the loss pro rata in the proportion that the amount of insurance bears to the total value of the land at date of policy. For example, if the property is worth $100,000 at date of policy but the insured only purchases $70,000 worth of insurance, the Company would pay 7/10 of the loss in the event of a partial loss as provided by Section 7(b).

The coinsurance section further provides that if subsequent to date of policy an improvement is placed on the land which increases the value of the land by more than 20 percent, then, in the event of partial loss, the Company will only pay the loss pro rata in the proportion that 120 percent of the amount of insurance bears to the sum of the amount of insurance and the amount expended for the improvement. In other words, if the insured purchases a $100,000 policy (value of land at date of policy) and later erects a $70,000 improvement on the property without purchasing further insurance, then, in the event of partial loss, the Company would pay only 120/170 of such partial loss under the provisions of Section 7(b).

Finally, the ALTA has adopted two new endorsement forms which provide limited coverage with respect to environmental protection liens—ALTA Endorsement 8 and ALTA Endorsement 8.1.

'ALTA Endorsement 8 is designed for use only with the ALTA Loan Policy 1987 (or the 1987 Leasehold Loan Policy) and is effective only if the land is used or is to be used primarily for residential purposes. It insures against loss or damage by reason of the lack of priority of the lien of the insured mortgage over: (1) any environmental protection lien which is recorded at date of policy in the "public records" or which is filed in the appropriate records in the United States District Court for the district where the land is located or; (2) any environmental protection lien provided for by any *state statute* in effect at date of policy, *except* environmental protection liens provided for by the following statutes: (we then list all super lien statutes).

ALTA Endorsement 8.1 (also only for land used primarily for residential purposes) is designed to be used with both the 1970 ALTA Loan Policy and the 1984 revised version, and is supposed to provide similar coverage. The wording is somewhat different because the 1970 Policy and the policy as amended in 1984 do not carry the new definition of "Public Records." Obviously, ALTA Endorsements 8 and 8.1 will require careful underwriting and may not be available in all states.

The new ALTA policy forms and endorsements represent almost three years of work on the part of the committee and 16 to 18 policy drafts. With input and different ideas from committee members, underwriting companies, agents, and representatives of various customer groups, the resulting product is necessarily a "committee product" and thus cannot satisfy entirely all of the wishes and desires of any one group. However, it is felt that these new forms do represent a significant improvement and modernization over the 1970 forms and it is hoped that they will serve the industry and its customers well for years to come.

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EXHIBIT 11

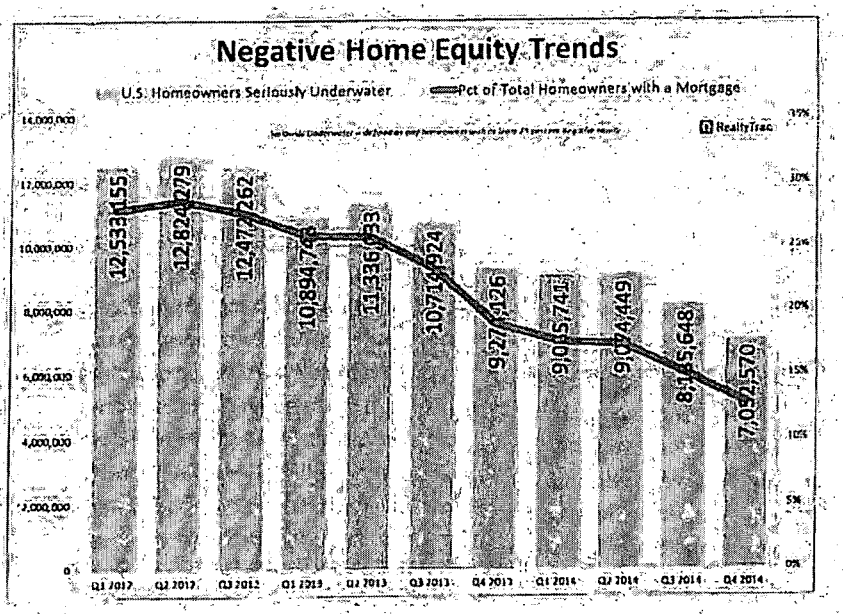
Seriously Underwater Properties Decrease by 2.2 Million in 2014, Down 5.8 Million From Peak Negative Equity in Q2 2012

- Jan 21, 2015
- Daren Blomquist
- Mortgage & Finance, RealtyTrac Reports

7.1 Million U.S. Residential Properties Still Seriously Underwater, 13 Percent; 11.3 Million Equity Rich Homeowners, Up From 9.1 Million a Year Ago

IRVINE, Calif. — Jan. 22, 2015 — RealtyTrac® (www.realtytrac.com), the nation's leading source for comprehensive housing data, today released its U.S. Home Equity & Underwater Report for the fourth quarter of 2014, which shows that at the end of the year there were 7,052,570 U.S. residential properties seriously underwater — where the combined loan amount secured by the property is at least 25 percent higher than the property's estimated market value — representing 13 percent of all properties with a mortgage.

The number and share of seriously underwater homeowners at the end of the fourth quarter of 2014 were both at their lowest levels since RealtyTrac began tracking home equity trends in the first quarter of 2012 and are down from a peak of 12.8 million seriously underwater homeowners representing 29 percent of all homeowners with a mortgage in the second quarter of 2012.



"Median home prices nationwide bottomed out in March 2012 and since then have increased 35 percent, lifting 5.8 million homeowners out of seriously underwater territory," said Daren Blomquist, vice president at RealtyTrac. "While the remaining seriously underwater properties continue to be a millstone around the neck of some local markets, the growing number of equity rich homeowners should help counteract the downward pull of negative equity in many markets, empowering those housing markets — and by extension their local economies — to walk on water in 2015."

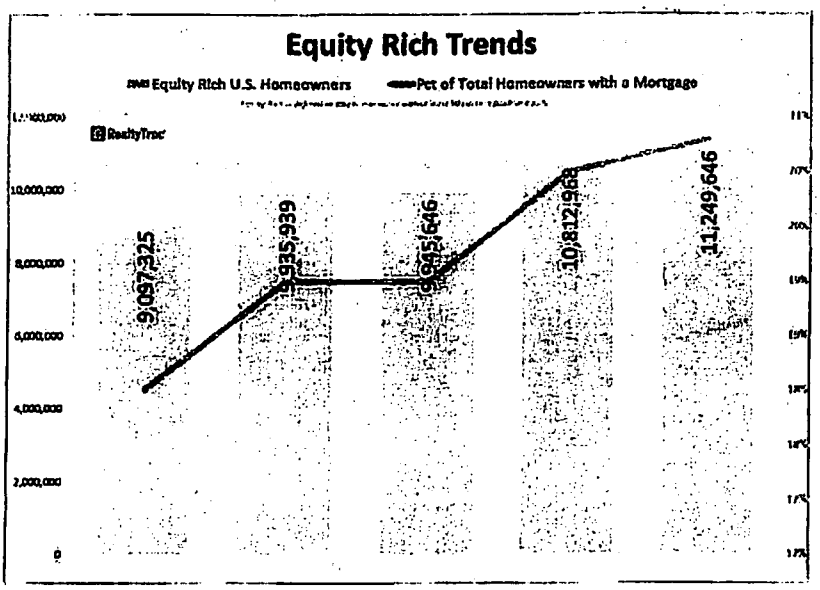
Equity rich properties increase nearly 2.2 million in 2014

There were 11,249,646 equity rich U.S. residential properties with at least 50 percent positive equity at the end of 2014, representing 20 percent of all properties with a mortgage. That was up nearly 2.2 million from 9,097,325 equity rich properties at the end of 2013.

"With price escalation returning home values to near peak levels, homeowners who have positive equity have options before they face foreclosure," said Chris Pollinger, senior vice president of sales at First Team Real Estate, covering the **Southern California** market, where 6 percent of residential properties with a mortgage were seriously underwater in the Los Angeles metro area at the end of 2014 compared to 32 percent that were equity rich.

Other major markets where the share of seriously underwater properties was below 10 percent at the end of 2014 included San Jose, Calif. (2 percent), Denver (4 percent), Portland (5 percent), Minneapolis (5 percent), Boston (5 percent), San Francisco (5 percent), Pittsburgh (6 percent), Houston (8 percent), Dallas (8 percent) and Seattle (9 percent).

"I'm happy to report that the number of homeowners in the Seattle area who are underwater continues to decline and foreclosures are falling," said OB Jacobi, president of Windermere Real Estate, covering the **Seattle** market. "Thanks to Seattle's strong economy and thriving housing market, fourth quarter prices grew by more than 11 percent, enabling many homeowners to recover the equity they lost during the Great Recession."

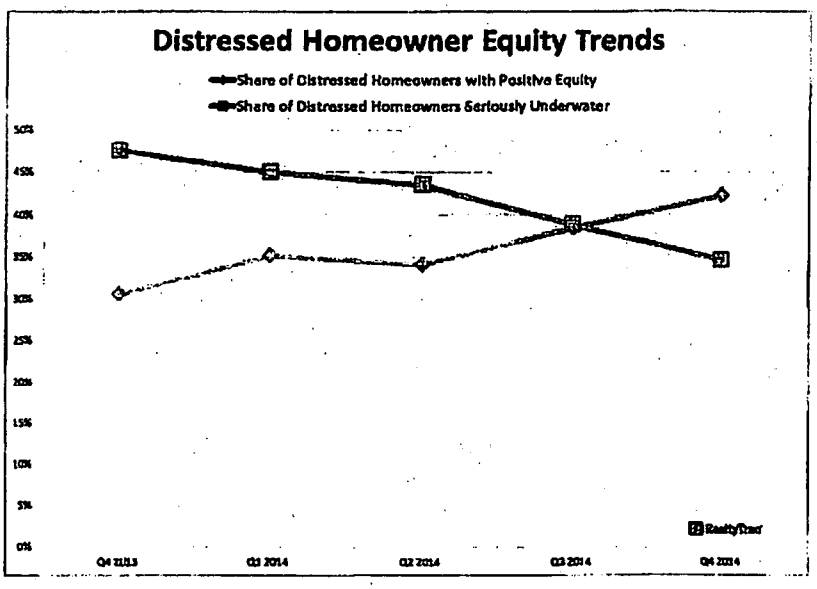


Distressed properties with positive equity exceeds seriously underwater in Q4

The share of distressed properties — those in some stage of foreclosure — with positive equity surpassed the share of distressed properties that were seriously underwater in the fourth quarter for the first time since RealtyTrac began tracking those metrics a year ago. At the end of the fourth quarter, 42 percent of distressed properties had some positive equity compared to 31 percent a year ago. Meanwhile 35 percent of distressed properties were seriously underwater at the end of the fourth quarter, compared to 48 percent a year ago.

"Over the last year and a half I have had more people come to me thinking they need a short sale only to be shocked by the current market value and the positive equity in their home," said Frank Duran, broker at RE/MAX Alliance, covering the Westminster, Colo., market in the Denver metro area, where 81 percent of distressed homeowners had positive equity at the end of 2014 — the highest percentage of any market nationwide — compared to 9 percent of distressed homeowners seriously underwater. "We have certainly seen an upward turn in the market."

Other major markets where the share of distressed properties with positive equity exceeded 60 percent include Pittsburgh (81 percent), Oklahoma City (76 percent), Austin, Texas (73 percent), Nashville (70 percent), San Antonio (63 percent), San Francisco (62 percent), and Raleigh, N.C. (61 percent).



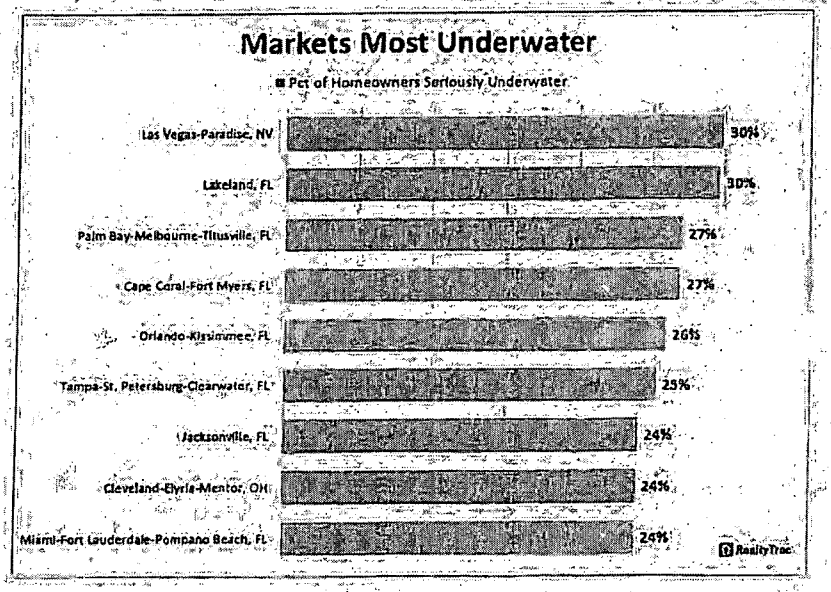
Markets with most seriously underwater properties

Markets with the highest percentage of seriously underwater properties as of the end of 2014 were Las Vegas (30 percent), Orlando (26 percent),

Tampa (25 percent), Jacksonville, Fla. (24 percent), Cleveland (24 percent), Miami (24 percent), Detroit (24 percent), Chicago (22 percent) and Atlanta (19 percent).

Markets where the share of distressed properties that were seriously underwater exceeded 40 percent at the end of 2014 included Las Vegas (60 percent), Tampa (52 percent), Jacksonville, Fla., (50 percent), Orlando (49 percent), Chicago (48 percent), Detroit (47 percent), Miami (46 percent), and Cleveland (45 percent).

"As Ohio housing continues to rebound, increased demand from growing job markets in manufacturing, financial, medical, and education are assisting in driving increases in housing prices, and restoring greater equity to homeowners across the state," said Michael Mahon, executive vice president at HER Realtors, covering the **Cincinnati, Columbus and Dayton, Ohio housing markets.** "As equity is on the rise, this will create further opportunity for those homeowners remaining in risk of default, to take advantage of the improving prices as their solution to avoid foreclosure."



Seriously underwater by loan vintage

The percentage of loans seriously underwater were higher for loans originated during the housing bubble years of 2004 to 2008, with 36 percent of all loans originated in 2006 seriously underwater — the most of any loan vintage, followed by 2007 (32 percent), 2005 (28 percent), 2008 (22 percent), and 2004 (19 percent).

Report methodology

The RealtyTrac U.S. Home Equity & Underwater report provides counts of residential properties based on several categories of equity — or loan to value (LTV) — at the state, metro and county level, along with the percentage of total residential properties with a mortgage that each equity category represents. The equity/LTV calculation is derived from a combination of record-level open loan data and record-level estimated property value data, and is also matched against record-level foreclosure data to determine foreclosure status for each equity/LTV category.

Definitions

Seriously underwater: Loan to value ratio of 125 percent or above, meaning the homeowner owed at least 25 percent more than the estimated market value of the property.

Equity rich: Loan to value ratio of 50 percent or lower, meaning the homeowner had at least 50 percent equity.

Foreclosures w/equity: Properties in some stage of the foreclosure process (default or scheduled for auction, not including bank-owned) where the loan to value ratio was 100 percent or lower.

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About RealtyTrac

RealtyTrac is a leading supplier of U.S. real estate data, with nationwide parcel-level records for more than 130 million U.S. parcels that include property characteristics, tax assessor data, sales and mortgage deed records, Automated Valuation Models (AVMs) and 20 million active and historical default, foreclosure auction and bank-owned properties. RealtyTrac's housing data and foreclosure reports are relied on by the Federal Reserve, U.S. Treasury Department, HUD, numerous state housing and banking departments, investment funds as well as millions of real estate professionals and consumers, to help evaluate housing trends and make informed decisions about real estate.

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- Will FHA Mortgages Become Cheaper In 2016?

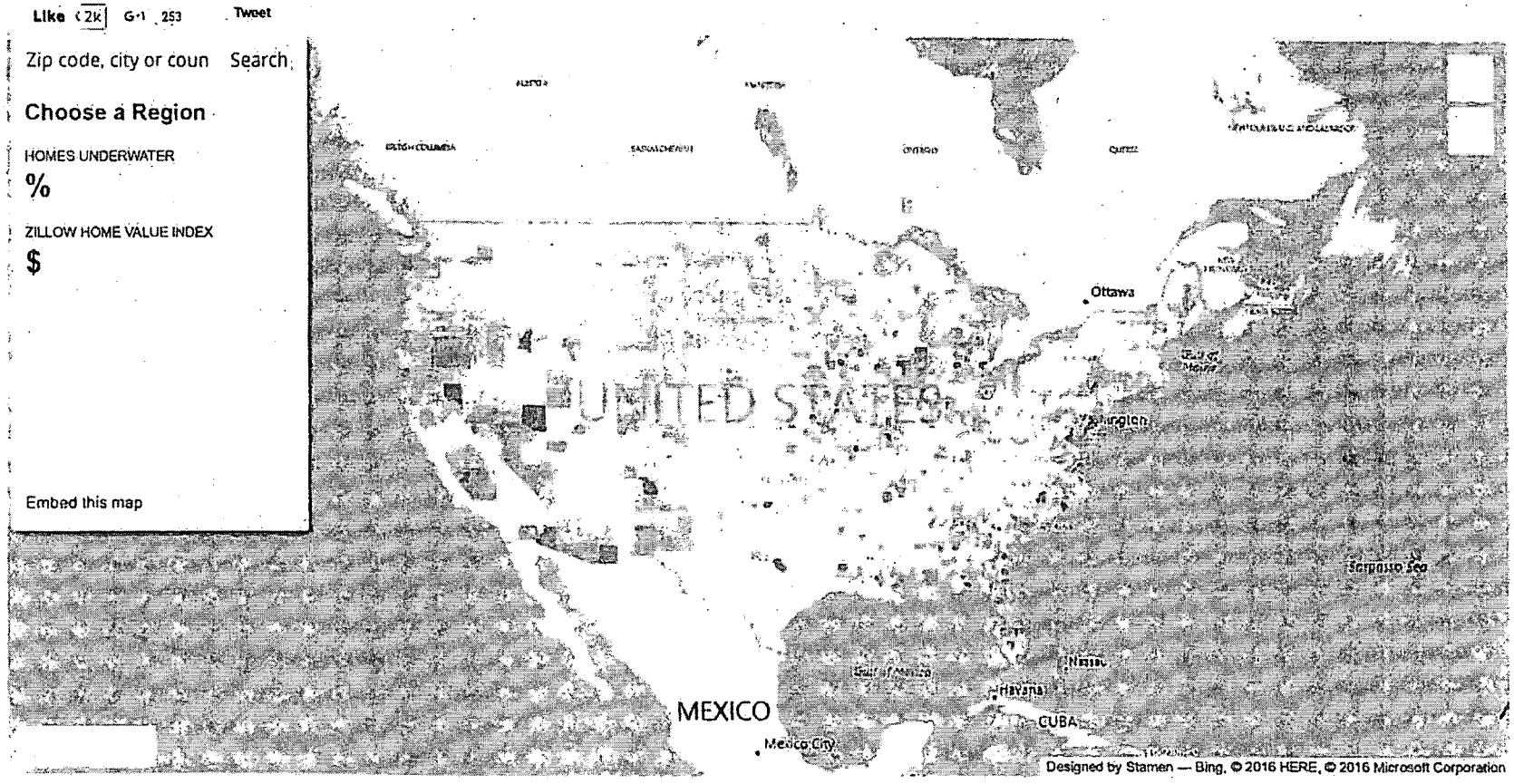
EXHIBIT 12

City, State, or ZIP

Zillow Visuals · Negative Equity

The U.S. Housing Crisis: Where are home loans underwater?

With U.S. home values falling 9.5% since their peak in 2007, many homeowners are now underwater on their mortgages, meaning they owe more than their home is worth. Search our interactive map to discover what percentage of homes in your county or ZIP code are in negative equity, based on Zillow's third quarter 2014 data.



R.1966

Chicago Title_004429

About the map: Negative equity is calculated by matching the estimated value of a home to all outstanding mortgage debt and lines of credit associated with the home, including home equity lines of credit and home equity loans, supplied by TransUnion, a global leader in credit and information management. All personally identifying information ("PII") is removed from the data by TransUnion before delivery to Zillow. The counties and ZIP codes in the highest percentiles (1st, 5th, 10th and 20th percentiles) of negative equity are marked with a badge. Negative equity is calculated for owner-occupied homes with mortgages for more than 870 metros, 2,400 counties, and 23,000 ZIP codes. This map will be updated quarterly. Contact press@zillow.com for additional data points and information including negative equity by state, metro, county, and ZIP code, as well as national data.

About the Zillow Negative Report: The Zillow Negative Equity Report is produced on a quarterly basis and captures the percent of homeowners who owe more on their mortgage than their home is worth from the national level down to the ZIP code level. Negative equity is commonly referred to as being underwater. The report also covers the delinquency rates of underwater mortgagees and the amount of equity among all mortgage holders.

Zillow Q3 2014 Negative Equity Report Summary: According to the latest Zillow Negative Equity Report, the national negative equity rate fell to 16.9 percent in the first quarter. This represents approximately 8.7 million homeowners nationwide. With the pace of home value appreciation slowing, the pace of negative equity improvement will also slow. Zillow currently predicts that the negative equity rate will fall to 15.2 percent by the end of the third quarter of 2015. The "effective" negative equity rate, which includes those homeowners with a mortgage with 20 percent or less equity in their homes, was 35 percent in the third quarter.

Important links:
Q3 2014 Negative Equity Blog Post
Q3 2014 Negative Equity Report – Research Brief
Official Zillow Q3 2014 Press Release

R.1967
Chicago Title_004430

EXHIBIT 13

The Florida Bar Journal
Advertising Rates • Submission Guidelines • Archives • Subscribe • News
December, 2011 Volume 85, No. 10

Now or Then? The Time of Loss in Title Insurance

by Matthew C. Lucas



Title insurance may be the least understood form of insurance in the public market. For most, it probably connotes little more than a vague recollection of a charge on a closing statement when buying or selling a home. Even for those who make it a habit of reviewing their insurance policies' terms, a title policy will likely pose something of a comprehensive challenge. It would seem to function contrary to almost every other means of insuring against risk, and, in fact, that is precisely how it operates, because the risks title insurance covers are those accruing from the past, not in the future.[1] This distinction colors a number of unique aspects of title insurance claims arising from a defect or cloud in title and the measure of benefits a policyholder is entitled to under a title policy. It also raises a particularly interesting question concerning valuation. What happens when an insured owner[2] discovers after the purchase of a home that he or she does not own the front 30 feet of the property because it had been previously conveyed to neighbors? If the loss is covered and his or her title insurer elects to pay damages, what operative date should be used to measure the claim: When he or she purchased the property and the title policy was issued; when the title problem was created; or when he or she first became aware of the defect? Land valuation, as we have all seen in recent years, is subject to wild vacillations.[3] Even a modest span in time could yield a markedly different measurement of benefits for the insured.

Of course, there are a host of variables that necessarily shape a title insurance claim: whether a loss has truly occurred; whether it is covered or excluded; what limits are imposed under the policy, for example, are all subjects of frequent dispute.[4] Assuming, however, these issues are resolved so that the partial loss of title is both real and covered under the policy, there remains the problem of measuring the insured's loss for purposes of a title claim. Pinpointing the extent of an owner's actual loss can prove especially elusive when there are wide swings in property values over time. This article explores the law that exists on that issue and highlights some of the competing interests that may weigh in its consideration.[5] Before proceeding further, it may be helpful to review how title insurance operates and how it came to be a staple component of the vast majority of land transactions in Florida and throughout the United States.

History and Overview of Title Insurance

The 19th century's aggressive expansion of the American frontiers left a bevy of legal work in its wake. While the federal government had undertaken the laudable task of surveying and describing the physical description of our growing nation's lands, legal title to all that property was, in many places, something of

a morass.[6] Mass commoditization of vacant land, wild speculation, squatters, forged deeds, varying and Byzantine distinctions between recognized ownership interests, and fraudulent conveyances on an "epidemic" scale left a mobile population to wonder who really owned the land they were settling[7] — all of which spawned lawsuits, occasionally epic lawsuits, for the states' nascent legal sysems.[8] As one writer observed, "[s]ome of the greatest American trials, in terms of cost, time, and acrimony, have been trials over title to land."[9] Thus, the need for some means of protection and a way of mitigating the risk of becoming ensnared in litigation was readily apparent by the latter half of the 19th century.[10] To that end, title insurance came into the industry of real estate transactions both to provide assurance to those acquiring or selling property and to foster greater stability in the field of property law in general.[11]

Today, title insurance generally indemnifies a policy holder of loss from unknown defects in title, as well as against undisclosed liens or claims appearing in the public record.[12] Its purpose is, as one court colloquially put it, "to protect a purchaser of real estate against title surprises."[13] A prospective buyer obtains a title commitment that describes the results from a title search performed on the property, pays a one-time premium, and, as part of the closing, will be issued a title insurance policy, often one patterned after a form promulgated by the title insurance industry's national trade organization, the American Land Title Association (ALTA), with standardized terms of coverage, exceptions, and exclusions.[14] When a potential title issue arises — for instance, the lost 30-foot frontage scenario described previously — the landowner submits the claim of loss to his or her insurer, which then investigates the claim and issues a coverage decision.[15]

Assuming the defect or cloud is a covered loss that has resulted in damages to the claimant, under most ALTA owner's policies, the title insurer is typically afforded the option of either: 1) tendering the policy's limits to the insured; 2) curing the defect by negotiating with third parties to clear the cloud in title (*i.e.*, buying the strip of land from the neighbor and conveying it back to the insured); 3) instituting litigation on the insured's behalf to remove the defect (*i.e.*, suing the neighbor in the insured's name to recover the frontage); or 4) paying the insured the "actual loss" resulting from the defect (*i.e.*, the loss in value attributable to the lost 30 feet).[16] The standard verbiage of this final option typically runs along the following lines: "The liability of the [c]ompany under this policy shall not exceed...the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy." Measuring the extent of our hypothetical insured's actual loss under this policy option would require some means of comparing what the property was worth with the 30 feet of frontage versus its value without it.

This may seem relatively straight-forward, but it can become complicated in application. Ascribing monetary value to any real estate calls for some measure of prediction, one that requires an amalgam of statistics, economics, and a practiced evaluation of real estate data.[17] Appraising land values is not ad hoc guesswork, nor is it an exact science, but something more akin to a developed art.[18] Apart from this inherent indeterminacy, temporally speaking, an appraisal might determine a current value for a tract of land, or it may look to measure the property's value on a particular date in the past. Which date should control when measuring a title claimant's "actual loss" under a policy? Most title policies are silent on this issue.[19] The standard ALTA policy calls for a comparison of land values, but does not state *when* those values should be made. General appraisal standards do not supply an answer to the question either.[20] Nor, as it turns out, has the law reached a firm consensus as to which date ought to determine the extent of a covered title loss.

The Three Potential Dates of Measurement

Courts throughout the United States have generally identified three points in time to use to measure damages within a title policy's limits in connection with an owner's loss of title: the date of purchase of the property, the date the title defect was created, and the date the defect was first discovered. An overview of each of these approaches and their merits will be considered below.

• *Date of Purchase* — A minority of courts have applied the date of purchase (or, as it is sometimes characterized, the date the policy was issued) to measure an owner's loss under a title policy, although it is somewhat unclear what the underlying rationale for doing so has been.[21]

For example, in *Beaullieu v. Atlanta Title & Trust Co.*, 4 S.E.2d 78 (Ga. Ct. App. 1939), a divided Georgia appellate court held that an insured property buyer whose land was encumbered by an undisclosed easement was entitled to recover from his insurer the diminution in the value of his land measured at the time he purchased the property.[22] In resolving the issue of valuation, the majority in *Beaullieu* provided a fairly extensive review of Georgia law, case law from other jurisdictions, and various commentaries surveying the extent of damages available when a seller breaches its warranties to a buyer in the sale of land before equating that measure to the scope of title insurance coverage:

> [T]he measure of damage for a breach by an insurer under a policy insuring the title against encumbrances or encroachments is the difference between the value of the property when purchased with the encumbrance or encroachment thereon, and the value of the property as it would have been if there had been no such encumbrance or encroachment.[23]

There is scarcely any Florida case authority on this subject; but one of our appellate courts may have applied the same measurement for much the same reason. In *Hillsboro Cove, Inc. v. Archibald*, 322 So. 2d 585 (Fla. 4th DCA 1975), a buyer of a tract of land sued his seller and his title insurer when he discovered, three years after the closing, that a 30-foot strip of the property had been previously conveyed to the purchaser of an adjacent tract. The trial court, rejecting the buyer's cost to cure measure of damages, instead awarded a diminution measurement that represented the proportionate cost of the lost strip as of the date of the conveyance.[24] Affirming the damages judgment, the court in *Hillsboro Cove*, like the court in *Beaullieu*, appears to have premised its analysis on a case interpreting the covenant of seisin (the common law warranty from a seller to a buyer that "the grantor has the very estate in quantity and quality which he purports to convey").[25] The court held:

> We follow the rule in *Burton v. Price*, 105 Fla. 544, 141 So. 728 (1932): "The measure of damages is such fractional part of the whole consideration paid as the value at the time of the purchase of the part to which the title failed bears to the whole block purchased, with interest thereon during the time the (appellant) has been deprived of the use of that part to which he could not acquire possession."[26]

It is unclear, however, whether *Hillsboro Cove* provided a definitive ruling on the date of measuring loss for title claims in Florida. Much of the court's ruling focused on the plaintiff's breach of seisin award against the seller as opposed to the title claim against his insurer. One could also argue that the ruling ought to be confined to the valuation dispute that was squarely addressed between curative and diminution measurements, not competing dates of measurement. To add to the uncertainty, no other reported title insurance decision in Florida has cited the *Hillsboro Cove* opinion, favorably or otherwise.

Assuming a Florida court chooses to apply the date of purchase in valuing an owner's title insurance loss, some further observations would be warranted, beginning with the use of seisin law as a basis for precedent. The covenant of seisin bears a superficial resemblance to the protection title insurance affords its insured customers. In that respect, the projection of a grantor's common law warranties onto title insurance is perhaps understandable and not without a measure of logic. But their distinguishing features in form and in substance — markedly different bargains, relations, privities, and duties between the parties — would deserve some explication, however minimal, before importing a damage measure from the one vein of law into the other. Absent which, the comparison of a seisin warranty to a title insurance claim remains, as one court summarized, an "oblique analogy."[27]

It is still, nonetheless, possible to conceive of justifications for the date of purchase approach. Using the purchase date of valuation imbues a degree of certainty toward resolving what can be, at times, the somewhat ethereal issue of property valuation. It is easily understood and just as easily applied. Moreover, both insured and insurer stand on more or less equal footing with respect to a risk of market fluctuation under this approach. But correspondingly, unless real estate values remain static, one side or the other will also gain or lose something beyond the allocation of costs and risks that title insurance, properly understood, is supposed to cover for an insured's actual loss. This reallocation of risks carries some

consequences, as pointed out by one commentator:

> The problem with using the policy date or date of acquisition to measure the value of the land is that the risk of a decline in the land's market value because of market conditions rightfully belongs to the investor in real estate. A title insurer accepts only the risk of the land's market value being impacted by a title matter. In a case where the value of the land decreased due to market conditions unrelated to the title defect, requiring the title insurer to pay loss based on the value of the land on the policy date would assign to the title insurer the risk the real estate investor assumed. Conversely, utilizing the policy date could unduly benefit the title insurer when the land increased in value either due to a rising real estate market or to the insured's development efforts. In those situations, if the title insurer pays only the value of the land on the policy date, then the title defect essentially deprived the insured of the gain the insured otherwise would have earned.[28]

This may overstate the matter to some extent, since the "risk" of appreciation, such as it is, ordinarily has a very clear and prominent contractual boundary within an owner's title policy. Like other forms of insurance, most owner title policies contain express limits commensurate with the purchase price of the property, capping the extent of the insured's recovery under a covered title claim to what he or she paid for the property. But in circumstances where there is only a partial title failure (such as the lost 30-foot frontage), or where a covered loss falls somewhere below the policy limit, deciding when that loss should be valued is still vitally important in terms of defining an insured's recovery. Given the prevalent silence on this point under most title policies, applying a policy date of valuation could still effectively impose an unbargained cost on either one of the parties to the policy.

• *Date of Defect Creation* — A second approach to measuring actual loss for a title claim has been to utilize the time when the insured defect, cloud, or encumbrance was created as the point of valuation. Because defects in title may come about through a variety of means, however, "date of creation" is a term of measurement with potentially multiple meanings. In some instances, the underlying acquisition of property burdened by an insured encumbrance has been treated as the functional equivalent of the act creating the defect, so that the date the insured purchased the property becomes the effective point of measurement.[29] When applied in this manner, the date of creation reaches the same destination — with the same attendant considerations — as the date of purchase approach, just by a slightly more circuitous route.

More frequently under this approach, the date a title defect is deemed created is the date that a tribunal declares its existence or extent.[30] One such example is the case of *Fohn v. Title Insurance Corp. of St. Louis*, 529 S.W.2d 1 (Mo. 1975), in which out-of-town developers found themselves embroiled in a lawsuit over a vacant parcel of land they had purchased.[31] The developers were in the process of removing commercial signage from the property only to discover that two sign owners held a deed to half an acre of the tract's valuable frontage, a claim the owners were prepared to enforce by suing and then successfully enjoining the developers.[32] After the sign owners prevailed at trial, the developers sued their title insurer, at which point the issue of valuation for the lost frontage came to the forefront. Through investment in the property, or a fortuitous market, or some combination of variables, by the time the disputed title to the frontage had been adjudicated against the developers, the overall tract had appreciated nearly tenfold from the original purchase price, a market increase which presumably increased the value of the insured frontage as well.[33] Faced with this choice of valuation dates — the date of the original purchase or the date of the adjudication — the *Fohn* court affirmed the latter, substantially higher valuation of when the final judgment had been entered against the developers.

Interestingly, the *Fohn* court seemed persuaded not so much from any normative legal justification as it was by the absence of a compelling argument not to use the greater value.[34] As the court observed: "The extent of plaintiffs' bargain becomes obvious but there is no issue in this case which compels us to reject their right to the benefit thereof."[35] And since "the insurance policy [did] not relate any amount recoverable for loss . . . to the purchase price of the property," the court in *Fohn* saw no reason to apply a lower measurement to the detriment of an insured that had been "totally abandoned by his insurer."[36] Perhaps the court's justification leaves something to be desired analytically, but the prior judgment date of measurement used in *Fohn* at least gives a replicable application for measuring title claims when the claim is dependent on first resolving an underlying title dispute (which can be a complicated and time-consuming legal proceeding). Such a measure offers advantages, but also raises some concerns.

Here as well, this date of measurement, like the date of purchase, provides a clear reference for valuation that is readily determinable. Utilizing the findings from prior proceedings, such as the trial court did in *Fohn*, likely promotes judicial and litigation economies as well. The court hearing the title claim and deciding whether or to what extent an insured encumbrance exists will have the benefit of a "concrete demonstration" of the extent of the insured's loss.[37] However, when the dates of purchase and creation are both identical and identically ascertained, the latter measure shares the shortcomings of the former. Market risks that have little to do with the actual contract of insurance could indirectly find their way into the policy's measurement of benefits and become imposed on an unwilling party.

• *Date of Discovery* — The final temporal measurement considered is the one that has come to be the most widely accepted. Frequently, when faced with the question of when to value an owner's covered title insurance loss, courts have adopted the date the insured owner first discovered or became aware of the title defect as the operative time period to measure damages.[38] In most cases, such a discovery will occur when an owner attempts to resell his or her property or obtain some kind of financing; thus, this date often corresponds to the time when a title defect actually impacts an owner's plans to use or dispose of the insured property.[39]

By far, the most comprehensive overview of this approach is found in *Hartman v. Shambaugh*, 630 P.2d 758 (N.M. 1981). In that case, the New Mexico Supreme Court was confronted with an issue of first impression as to when to measure an owner's claim of loss of an acre of insured property.[40] The court began its analysis by first explaining why a comparison in values of the entire property — as opposed to simply determining the proportionate value of the lost acre — was the proper formula for determining loss under a title insurance claim where the property is developed or if the loss would, in any way, disproportionately affect the remaining tract.[41] Turning then to the question of timing, it went on to canvass the case law applying various approaches, beginning with the date of purchase valuation. Here the court was clearly unimpressed. Of the reported decisions using a date of purchase to measure title loss, *Hartman* noted, not one offered any reasoning or persuasive authority for doing so.[42]

On the other hand, the court found that using the date the defect was discovered as a baseline for valuation provided a proper balance between the terms of the owner's policy and the relative expectations of the insurer and insured. Quoting from a California appellate decision, the *Hartman* court held:

> When a purchaser buys property and buys title insurance, he is buying protection against defects in title to the property. He is trying to protect himself then and for the future against loss if the title is defective. The policy necessarily looks to the future. It speaks of the future.... The insured, when he purchases the policy, does not then know that the title is defective. But later, after he has improved the property, he discovers the defect. Obviously, up to the face amount of the policy, he should be reimbursed for the loss he suffered in reliance on the policy, and that includes the diminution in value of the property as it then exists, in this case with improvements. Any other rule would not give the insured the protection for which he bargained and for which he paid.[43]

Hartman also applied an important caveat to this measurement: An insured who sits idly by after discovering a title defect cannot recover any appreciation in the property's value from his insurer after making the discovery.[44] In those instances in which the insured does nothing to resolve the title problem after its discovery and the property value continues to rise, "he should not be allowed to reap any benefit by his inactivity."[45]

Beyond fulfilling the parties' reasonable expectations, commentators have identified other advantages to the date of discovery approach. For example, when applied to property appreciating in value, this measure provides the insured with a full recovery for a loss (subject, of course, to the policy's limits) that include both economic and consequential damages.[46] During periods of depreciation, it encourages vigilance, since an insured owner risks diminishing his or her recovery from a covered loss by not promptly identifying it to the insurer. For the majority of title claims, the span in time between the issuance of the policy and the discovery of an insured loss will be relatively brief, perhaps at most a few years, since "as time passes, there is the increasing likelihood of defects being cured by statutes of limitations, adverse

possession and prescription,"[47] meaning that any variation in values between the date of purchase and the date of discovery will likely be modest in most cases. And perhaps most notably, a predominant number of jurisdictions are adopting the date of discovery as the operative measurement of loss for owners' title claims.[48]

That is not to say there are no drawbacks with this approach, one of which is its indeterminacy. Unlike with the dates of purchase or creation, the actual date a defect was discovered may be far from clear. Fixing the point in time when an owner first discovered a cloud in title brings the same dimension of disputed facts frequently seen in statute of limitations challenges.[49] Valuation of the claim could hinge on such relatively vague reflections as a particular owner's awareness or diligence about his or her insured property. As with the date of purchase and date of creation measurements, then, computing the value of an actual loss under this method poses some challenges.

Conclusion

Title insurance policies have come a long way since the industry's beginnings toward defining and clarifying the title risks inherent in real estate transactions. Yet, market changes in land value, particularly over time, can still play a pivotal role in determining the extent of a title claim for a covered loss. Using one point in time over another when measuring an insured's actual loss raises several issues that remain unresolved today. Each of the approaches reviewed — the dates of purchase, creation, and discovery — account for those issues in different ways. Meanwhile, it will fall to the courts to reach their own conclusions as to when an owner's claim ought to be measured.

[1] *See Livingston v. American Title & Ins. Co.*, 133 So. 2d 483, 486 (Fla. 1st D.C.A. 1961) ("While most insurance is protection against future occurrences such as fire, storm or accident, title insurance as customarily written is protection against future loss because of past events unknown to or misjudged by the insurer and the insured but which may come to light and deprive the insured of the enjoyment of property.").

[2] Title insurance is not limited to protecting property owners (mortgagees, for example, typically procure title insurance in connection with giving a secured loan), however, this article will concentrate on owner policies, recognizing the "significant difference" in what constitutes loss or damage from a title defect under a mortgagee policy versus an owner's policy. *See CMEI, Inc. v. American Title Ins. Co.*, 447 So. 2d 427, 427-28 (Fla. 5th D.C.A. 1984).

[3] Reviewing the S&P/Case-Shiller U.S. National Home Price Index, home prices increased more or less exponentially nationwide from 1996 until 2006 only to fall precipitously for the next two years, briefly regain some ground in 2009, and then resume falling again from 2010 onward. Indeed, in the first quarter of 2011 alone, home values nationwide declined nearly five percent. *See* S&P Indices Press Release, May 31, 2011, *available at* http://www.standardandpoors.com/indices/sp-case-shiller-home-price-indices/en/us/?indexId=spusa-cashpidff--p-us----.

[4] *See generally* Jerel J. Hill & Thomas R. McGrath, *Recent Developments in Title Insurance Law*, 40 Tort Trial & Ins. Prac. L. J. 795 (2005) (collecting reported case decisions of various title insurance disputes).

[5] The focus here, confined as it is to a discrete issue of measuring an insured loss, necessarily assumes that a cloud in title is, in fact, covered and insured and results in actual damages to an insured owner.

[6] Lawrence H. Friedman, A History of American Law 167-77 (3d ed. 2001).

[7] *Id.* at 176.

[8] In Florida alone, just on the discrete issue of resolving land grants of the state's former sovereigns, the U.S. Supreme Court issued no less than 50 opinions between 1832 and 1926. *See* Glenn Boggs, *Florida Land Titles and British, not Just Spanish, Origins*, 81 Fla. B. J. 23, Addendum (July 2007).

[9] Friedman, A History of American Law at 177.

[10] *See* Quintin Johnson, *Title Insurance*, 66 Yale L. J. 492 (1957).

[11] Indeed, one writer posited that a Pennsylvania Supreme Court decision, *Watson v. Muirhead*, 57 Pa. 161 (Pa. 1868) (holding that a non-negligent error in title based on an attorney's opinion precluded award of compensation for the purchaser), was the impetus behind the creation of the title insurance industry in the United States. *See* Barlow Burke, Law of Title Insurance §1.01, at 1-3 (3d ed. supp. 2003). *See also* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 Cornell L. Rev. 531, 552 (2005) (arguing that a property system that promotes stable rights "increases the value of assets to users (now owners) and decreases the costs of obtaining and defending those assets").

[12] *See* Fla. Stat. §627.784 ("A title insurance policy or guarantee of title may not be issued without regard to the possible existence of adverse matters or defects of title."); *Morton v. Attorneys' Title Ins. Fund, Inc.*, 32 So. 3d 68, 71 (Fla. 2d D.C.A. 2009); *Lawyers Title Ins. Co. v. Synergism One Corp.*, 572 So. 2d 517, 518 (Fla. 4th D.C.A. 1990). For a succinct overview of how a typical title policy is created and issued, *see* Amy W. Beatie & Arthur R. Kleven, *The Devil in the Details: Water Rights and Title Insurance*, 7 U. Denv. Water L. Rev. 381, 395-400 (2004).

[13] *Nourachi v. First American Title Ins. Co.*, 44 So. 3d 602, 606 (Fla. 5th D.C.A. 2010) (citing *Commonwealth Land Title Ins. Co. v. Ozark Global, L.C.*, 956 F. Supp. 989 (S.D. Ala. 1997)).

[14] Beatie & Kleven, note 12; Johnson, note 10, at 497.

[15] *Real Estate Inv. Group, LLC v. Attorneys' Title Ins. Fund, Inc.*, 47 So. 3d 868, 871 (Fla. 3d D.C.A. 2010) (Cope, J., concurring).

[16] *See* Joyce Palomar, 1 Title Insurance Law §§10:2, 10:2.1-2.3, and 10:8 (2008). Often, the policy is worded so that the actual delineation of "options" is between payment of "the amount of insurance" (which is then defined separately to be the lesser of the policy limits or the difference in value) or payment or settlement with third parties or the insured.

[17] A cottage industry of professional real estate appraisal has flourished in Florida with over 7,500 certified appraisers licensed through the Department of Business and Professional Regulation evaluating and assessing land values for a variety of real estate transactions. *See* Florida Department of Business & Professional Regulation, Licensee Numbers, http://www.myfloridalicense.com/dbpr/re /FREAB_news.html#News (reporting from Florida Real Estate Appraisal Board on 5,514 certified residential appraisers and 2,344 certified general appraisers as of September 10, 2010).

[18] *See, e.g.*, National Environmental Policy Act (NEPA) Implementation Procedures, 74 Fed. Reg. 63407, 63408 (Dep't of Interior 2009) (noting that land valuations "can be highly subjective and land appraisals are understood to represent an art, not a science"); Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. Envtl. L. & Pol'y 1, 68 (2004) ("An appraisal is an opinion of value, rather than a scientific measuring process."). That said, real estate appraisals are certainly not standardless either; under Fla. Stat. §475.628 and Administrative Code §61J1-9.001, licensed appraisers must comply with a published set of guidelines, the Uniform Standards of Professional Appraisal Practice (USPAP), when rendering an appraisal of property value.

[19] With the exception of situations in which a title insurer chooses to pursue litigation to defend or clear its insured's title, ALTA's promulgated form policies do not fix a date of valuation. Palomar, 1 Title Insurance Law at §10:13.

[20] *See* USPAP Statement on Appraisal Standards No. 3 (2010-11) ("Three categories of effective dates — retrospective, current, or prospective — may be used, according to the intended use of the appraisal assignment.").

[21] *See Citicorp. Sav. of Illinois v. Stewart Title Guar. Co.*, 840 F.2d 526 (7th Cir. 1988); *Security Union Title Ins. Co. v. RC Acres, Inc.*, 604 S.E.2d 547, 551 (Ga. Ct. App. 2004); *Securities Service, Inc. v. Transamerica Title Ins. Co.*, 583 P.2d 1217 (Wash. Ct. App. 1978); *Southern Title Guaranty Co. v. Prendergast*, 478 S.W.2d 806 (Tex. App. 1972); *Glyn v. Title Guarantee & Trust Co.*, 132 A.D. 859 (N.Y. App. Div. 1909).

[22] *Beaullieau*, 4 S.E.2d at 81. Interestingly, the dispute between the formulas proffered by the parties in *Beaullieu* appeared to have had less to do with timing, and more to do with the computation of the value itself: The insured argued for the fair market value ($15,000) of his property at the time of purchase; the insurer contended the appropriate starting measure was the contract sale price ($8,000). *Id.* at 80.

[23] *Id.* at 81. The *Beaullieu* court then reiterated the rule by quoting from the *Glyn* opinion, which had relied on an earlier breach of warranty decision.

[24] *Hillsboro Cove*, 322 So. 2d at 586.

[25] *Allard v. Al-Nayem International, Inc.*, 59 So. 3d 198, 199-200 (Fla. 2d D.C.A. 2011), *quoting Burton v. Price*, 141 So. 728 (Fla. 1932); *Harris v. Sklarew*, 166 So. 2d 164, 165 n.2 (Fla. 3d D.C.A. 1964).

[26] *Id. See also Burton v. Price*, 141 So. 728 (Fla. 1932) (providing measure of damages in breach of covenant of seisin). The *Hillsboro Cove* court also found specific language within the policy — to the effect that the damages could not exceed the lost strip's proportionate value to the value of the entire property — further supported the limited award against the title insurer.

[27] *See Hartman v. Shambaugh*, 630 P.2d 758, 762 (N.M. 1981).

[28] Palomar, 1 Title Insurance Law §10:13 (2008).

[29] *Id.* at §10:13 (citing *In re Gordon*, 176 A. 494 (Pa. 1935)).

[30] *Beaullieu v. Atlanta Title & Trust Co.*, 4 S.E.2d 78 (Ga. Ct. App. 1939); *Fidelity Union Cas. Co. v. Wilkinson*, 94 S.W.2d 763 (Tex. Civ. App. 1936).

[31] *Fohn*, 529 S.W.2d at 2-3.

[32] *Id.* at 2. The developers' title insurer refused to defend them in the original lawsuit with the sign owners, a point the Missouri Supreme Court would later mark with the strongest disapproval. *Id.* at 6 ("[I]t would be difficult to conceive of an insured being more totally abandoned by his insurer than occurred in this case.").

[33] *Id.* at 5.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 5-6.

[37] *In re Gordon*, 176 A. at 497.

[38] *See Allison v. Ticor Title Ins. Co.*, 907 F.2d 645 (7th Cir. 1990); *Hartman v. Shambaugh*, 630 P.2d 758 (N.M. 1981); *Kentucky Title Co. v. Hail*, 292 S.W. 817 (Ky. 1927); *Swanson v. Safeco Title Ins. Co.*, 925 P.2d 1354 (Ari. Ct. App. 1995); *Miller v. Title, U.S.A., Inc. Ins. Corp. of N.Y.*, 1991 WL 24537 (Tenn. Ct. App. 1991) (unpublished); *Jalowitz v. Ticor Title Ins. Co.*, 478 N.W. 2d 67 (Wis. Ct. App. 1991) (Table); *Miebach v. Safeco Title Ins. Co.*, 743 P.2d 845 (Wash. Ct. App. 1987); *Happy Canyon Inv. Co. v. Title Ins. Co. of Minnesota*, 560 P.2d 839 (Colo. Ct. App. 1976); *Overholtzer v. Northern Counties Title Ins. Co.*, 253 P.2d 116 (Cal. Ct. App. 1953); *Narberth Bldg. & Loan Ass'n v. Bryn Mawr Trust Co.*, 190 A. 149 (Pa. Super. Ct. 1937).

[39] *See* Barlow Burke, Law of Title Insurance §7.04 (2010).

[40] *Hartman*, 630 P.2d at 762.

[41] *Id.*

[42] *Id.* at 762-63.

[43] *Id.* at 763 (quoting *Overholtzer*, 253 P.2d at 125).

[44] *Id.* Standard ALTA policies also include an express provision requiring insureds to provide prompt notice of any title defects or risk losing coverage for those claims.

[45] *Id.*

[46] Burke, Law of Title Insurance §7.04 (2010).

[47] Johnson, *Title Insurance*, 66 Yale L. J. at 501.

[48] Burke, Law of Title Insurance §7.04 (2010).

[49] *See, e.g., Thomas v. Lopez*, 982 So. 2d 64, 67 (Fla. 5th D.C.A. 2008) (describing "discovery rule" and actual and constructive means of knowledge that could constitute discovery); *Haskins v. City of Ft. Lauderdale*, 898 So. 2d 1120 (Fla. 4th D.C.A. 2005) (finding that civil claim for invasion of privacy commenced when police officers searched plaintiff's handbag, not when criminal court subsequently ruled the search was illegal); *Snyder v. Wernecke*, 813 So. 2d 213, 217 (Fla. 4th D.C.A. 2002) (collecting cases regarding when statute of limitations for construction claims commences, upon discovery of a physical defect or when the source of the defect could be determined).

***Matthew C. Lucas** is a county court judge in Tampa assigned to the civil division. He is board certified in business litigation law and received his J.D., with honors, from the University of Florida, Levin College of Law.*

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

RECEIVED
APR 05 2016
S.C. SUPREME COURT

Case No. 2012-CP-26-5222
Appellate Case No. 2016-000304

Thomas P. and Desiree J. Lyons,

Respondents.

v.

Fidelity National Title Insurance Company as successor by merger to Lawyers Title Insurance Corporation, Bobby Gene Martin, and The Security Title Guarantee Corporation of Baltimore,

Defendants,

Of Whom The Security Title Guarantee Corporation of Baltimore is the

Appellant.

MOTION TO VACATE OPINION OF THE COURT OF APPEALS

Pursuant to SCRAP Rule 251(d), Petitioner The Security Title Guarantee Corporation of Baltimore and Respondents Thomas P. and Desiree J. Lyons jointly move to vacate Opinion Number 5365 from the South Carolina Court of Appeals.

This is a dispute over whether Petitioner is required to pay over benefits from a title insurance policy to the Lyons. The parties have reached an agreement to settle the underlying dispute contingent on the Court of Appeals' order, Opinion Number 5365, being vacated. The Lyons brought this action against Security Title when a spoilage easement held by the U.S. Army Corp of Engineers was determined to cover their property in Horry County. The parties believe the opinion of the Court of Appeals has had the unintended consequence of expanding the standard of care for all real estate title examiners and closing attorneys by giving a broader definition of "public record" than what is necessary to resolve the specific controversy between the parties. Further, the parties have resolved this matter on grounds other than the contract dispute; hence, the opinion has become advisory in nature.

For the above reasons, the parties move to vacate the opinion of the Court of Appeals and dismiss this action with prejudice.

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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2012-CP-26-5222
Appellate Case No. 2016-000304

Thomas P. and Desiree J. Lyons,

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v.

Fidelity National Title Insurance Company as successor by merger to Lawyers Title Insurance Corporation, Bobby Gene Martin, and The Security Title Guarantee Corporation of Baltimore,

Defendants,

Of Whom The Security Title Guarantee Corporation of Baltimore is the

Appellant.

PROOF OF SERVICE

I certify that I mailed the forging Motion to Vacate Opinion of the Court of Appeals to all counsel of record at the addresses below on April 4, 2016.

David K. Haller

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6th day of April, 2016

Charleston, South Carolina

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Counsel for Amicus Curiae Petitioner

The South Carolina Court of Appeals

Thomas P. and Desiree J. Lyons, Respondents,

v.

Fidelity National Title Insurance company as successor by merger to Lawyers Title Insurance Corporation, Bobby Gene Martin, and The Security Title Guarantee Corporation of Baltimore, Defendants,

Of Whom The Security Title Guarantee Corporation of Baltimore is the Petitioner/Appellant.

Appellate Case No. 2013-002137

ORDER

On December 2, 2015, the court of appeals filed its opinion affirming the circuit court's grant of partial summary judgment in favor of respondents Thomas P. and Desiree J. Lyons. *See Lyons v. Fidelity Nat'l Title Ins. Co.*, 415 S.C. 115, 781 S.E.2d 126 (Ct. App. 2015). While the petition for a writ of certiorari was pending, petitioner, The Security Title Guarantee Corporation of Baltimore, and respondents filed a joint motion indicating they have reached a settlement contingent upon the vacating of the court of appeals' opinion. Thus, the supreme court has remanded this matter for the court of appeals to consider the motion.

The motion is granted. Opinion Number 5365 is hereby withdrawn and vacated. The parties are directed to effectuate the settlement and file proof of such within 60 days of the date of this order.

J.

J.

J.

Columbia, South Carolina

cc:
Ray Coit Yarborough, Jr., Esquire
David K. Haller, Esquire
Amanda A. Bailey, Esquire
Demetri K. Koutrakos, Esquire
Louis H. Lang, Esquire
~~Melanie Huggins-Ward~~
The Honorable Paul M. Burch

FILED
August 26, 2016

84172

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THE STATE OF SOUTH CAROLINA

IN THE SOUTH CAROLINA COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

,Karl A. Folkens, Special Referee
Fifteenth Judicial Circuit

RECEIVED
JUL 31 2017
SC Court of Appeals

COMMON PLEAS CASE NO.: 2015-CP-26-1084; 2013-CP-26-5530 (Combined)

Jericho State Capital Corp. of Florida
Lynx Jericho Partners, LLC .,.....Appellants

vs.

Chicago Title Insurance Company .....Respondent.

NOTICE OF APPEAL

Appellants Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC hereby appeal the order of Special Referee Karl A. Folkens dated July 2, 2017. The Order was filed and received by Appellant on July 10, 2017.

July 26, 2017

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Karl A. Folkens, Special Referee

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MAR 14 2018
SC Court of Appeals

Case Nos: 2015-CP-26-1084 / 2013-CP-26-5530
Appellate Case No.: 2017-001646

Jericho State Capital Corp. of Florida.....Plaintiff,

v.

Chicago Title Insurance Company.....Defendant,

AND

Lynx Jericho Partners, LLC.....Plaintiff,

v.

Chicago Title Insurance Company.....Defendant.

Of whom Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC are the Appellants,

And Chicago Title Insurance Company is the Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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