Investors Title
INNOVATIVE BY INSTINCT

GENERAL UNDERWRITING PRINCIPLES MANUAL

I. Introduction to Title Insurance Underwriting

A. How to Use This Manual

1. Introduction

The ***General Underwriting Principles Manual*** is intended to provide the underwriter with an understanding of the legal issues involved in real estate titles, as well as the skills necessary to issue a title policy. The legal discussion is included to enable the underwriter to discuss real estate-related issues with confidence and to ask questions about the title to obtain information pertinent to underwriting.

Hopefully, with such understanding comes the ability to underwrite routine matters without needing to confirm the underwriting decision with the Home Office. Certainly, there will be fact situations that go beyond the materials presented here. In order to deal with those situations appropriately, the Home Office should be contacted, and it will be expected that the underwriter will have already reviewed the relevant sections in both the ***General Underwriting Principles Manual*** and the applicable ***State Supplement***. This will ensure that all pertinent facts can be presented during the conversation, and that the underwriter will have a preliminary understanding of the issues.

Every underwriter in each branch and agency office of the Company will have a ***General Underwriting Principles Manual***, as will every manager and each of the Staff Attorneys.

The ***General Underwriting Principles Manual*** has been designed to provide the most general information about the legal issues and company policies associated with the various underwriting topics discussed herein. State specific information is located in the applicable ***State Supplement***. The underwriter should advise the Home Office of any knowledge the underwriter has regarding state law distinctions on any of these topics. All of the manuals are under constant revision in order to supply the underwriters with the most accurate and timely information available.

2. How to Use The General Underwriting Principles Manual

When an underwriter has a question about a title matter arising from an application, or posed by telephone from an examiner, attorney or paralegal, the underwriter should first consult the pages of the ***General Underwriting Principles Manual*** to determine if the question is addressed herein. The underwriter should then consult the appropriate ***State Supplement*** for any state-specific information on the question. Only after reviewing the pertinent sections of both manuals and finding the information contained therein insufficient, should the underwriter contact the Home Office for assistance.

The exceptions and requirements have been presented as they should appear in the computer. This includes the symbol that looks like a caret (^), which is used to indicate a blank space to be filled in by the underwriter. Usually, this symbol will be followed by instructions enclosed by brackets telling the underwriter what information should be inserted in the place of the symbol. These instructions will be in italics. (*i.e*., The underwriter will see "([*Insert Map, Plat, etc.*].")

There are other instances where the underwriter will see information enclosed within brackets, but which is not italicized. This is where the underwriter must make a choice between the different items in brackets (*i.e.*, Where the underwriter sees, "[deed of trust] [mortgage]" the underwriter should choose one of these, depending on what is appropriate and correct).

[italics] = follow instructions
[no italics] = make a choice

The section entitled "Glossary of Exceptions & Requirements" is a comprehensive listing of all the codes currently in use. This section is organized by underwriting topic. Please refer to this applicable topic for specific wording of the exception or requirement appropriate to your needs.

DO NOT CREATE NEW CODES.
If a new code becomes necessary, please contact Corporate Legal and Underwriting Services for approval.

B. What is Title Insurance?

A title gives one the right to enter upon the land and to possess, occupy, use, control, enjoy, and dispose of the land.

A title to real estate is basically the right of ownership recognized and protected by the law. The word "entitle" is derived from "title." A person is thus entitled to own, possess, occupy, use, control, enjoy and dispose of real estate, SUBJECT, HOWEVER, to any rights of others, liens, encumbrances, etc.

1. Benefits of Title Insurance

A title insurance policy affords lenders and owners protection against loss or damage:

1. Up to the face amount of the policy,
2. Together with costs, attorney's fees and expenses,
3. Arising out of all liens upon and all defects in the title except those specifically excluded or excepted.

Title insurance is a means by which real estate deals can be closed quickly.

Reliable standardization of forms has been a boon to national mortgage lending institutions.

Coverage is not limited to matters relating to and shown on the public records: title insurance covers hidden defects, which are not disclosed by public records.

Title insurance covers loss resulting from errors, omissions and mistakes of judgment made by title examiners (whether occasioned by negligence, lack of professional skill or otherwise.)

Unless specifically excepted, title insurance covers loss arising out of erroneous and inadequate surveys, and unrecorded and undiscovered rights of parties in possession.

No statutes of limitations run against liability under a title insurance policy until after the discovery of loss.

A title policy does not expire or die as an individual's (examiner or abstractor) death may affect liability. Liability is interminable unless after discovery of loss a statute of limitations has run.

Title insurers are regulated and supervised by state insurance departments. Sometimes the state insurance departments also regulate an insurer's financial structure and solvency, and may further require establishment and maintenance of loss reserves.

The coverage afforded by a title policy remains in effect as long as the insured has an interest in the property.

Title insurance companies assume liability for certain known risks under reasonable circumstances.

Title insurance is offered for a one-time premium.

Title policies insure against unmarketability of title.

2. For The Lender

A mortgage (Loan) policy insures a lender whose debt is secured by a deed of trust or mortgage encumbering real estate.

The title insurance guarantees that the lender has a valid and enforceable lien.

The insurance is for the face amount of the policy, and declines as the principal loan balance declines.

A mortgage (Loan) policy affords coverage to the named (insured) lender and all subsequent holders of the note through assignments.

A mortgage (Loan) policy affords owner's coverage to a mortgagee or its corporate subsidiary in the event the lender acquires title pursuant to foreclosure or a deed in lieu of foreclosure.

3. For The Owner

An owner is not protected by a mortgage (Loan) policy: an owner must obtain his own title insurance policy for protection.

The coverage is the face amount of the policy and MAY increase if inflation protection is also provided.

The coverage never lapses; it continues to protect the insured from liability which he may have under "warranties" (as with a Warranty Deed) after he has sold the property. It protects the heirs of an insured who inherit the property.

C. General Discussion

1. Real Estate Transaction

The typical residential real estate transaction begins when a seller enters into a brokerage contract with a real estate agent. Pursuant to such brokerage or listing contract, the broker then seeks a buyer for the property. In most cases, the broker will solicit an offer from a potential purchaser, which will be presented to the seller for his acceptance or rejection. If accepted, there is a binding contract at this point, subject to whatever terms may be written into the offer, such as the ability to obtain satisfactory financing or sale of the buyer's present home.

The attempt to obtain sufficient financing for the purchase of the dwelling is usually the next step in the transaction. Often with the assistance of the broker, the purchaser will contact a lending institution and apply for a loan. Once the loan commitment has been obtained, the lender may advise the purchaser that a settlement agent (possibly an attorney, title examiner, or other mode of loan closing) will be required, typical to each state.

The title examiner will "search" or examine the title and make a report to the lender to assure title to the lender's security, that is, the real estate involved. The examiner might also assist in the preparation of and review of the loan documents. A "search" includes examining the Clerk's records, Register of Deeds records, tax records, marriage and divorce records, for any and all matters pertaining to all parties who now have or have had an interest in the property. The examiner determines that all conveyances were proper, properly conveying the subject property, and determines all encumbrances against the property, either paid in full and satisfied, or still existing and of record. All such matters and irregularities are noted to the title company on the examiner's opinion to the title company.

The settlement agent, after all of the paperwork has been completed and the loan processed, will preside over the closing, at which time he will explain the documents to the purchaser, obtain the necessary signatures, and so forth. The settlement agent will normally receive the funds from the lender, plus whatever cash the purchaser has agreed to pay, and will make all necessary disbursements subsequent to the closing. These may include cancellation of applicable prior deeds of trust, payment of surveyor's fees, attorney's fees, etc., with the balance forwarded to the seller.

The settlement agent will then take the deed of trust, properly executed and notarized, to the Register of Deeds for recordation in the county in which the property is located.

The settlement agent may secure a title insurance commitment (binder) that is reviewed by the lender prior to loan closing, or he may secure a final title insurance policy after the transaction is closed.

After an examination (search) of title, the examiner submits to a title company an "opinion of title" or title insurance application listing items discovered during his search. The opinion may take any form approved by the title company. The title company then "underwrites" the opinion, noting all items to be shown on Schedule A of the title policy: the insuring section; and all items to be shown in Schedule B: the exceptions to title, or matters not insured or covered by the title policy.

2. *A/B Policies*

Underwriters are sometimes asked to issue an A/B commitment and policy. This occurs when a lender is making a first and a second deed of trust/mortgage on real property **simultaneously**. **This can be issued under one (1) policy number within the policy processing system**.

Click here for sample A/B invoice, A/B Commitment, A/B Loan Policy and A/B Owner's Policy.

Please also refer to the ***Subordination Agreements*** section herein for guidance on reflecting subordinate matters on a Lender Short Form Policy.

3. *General Considerations*

Claims paid and attorney's fees paid to defend unwarranted claims against the Company are costs of doing business for a title insurance company.

A review of the Company's claims experience provides important information. Claims paid and defenses of claims occur for the reasons shown on the Loss Category Summary.

It is obvious that none of these claims arose because an underwriter neglected to set out any important exception to coverage reported in a title insurance application. It is also evident that the particular wording of an exception did not create any claim.

The implication of this data is to continue to:

1. Use due diligence in examining facts reported in the title insurance application or opinion of title;
2. Use standard wording for routine requirements and exceptions;
3. Not be overly-concerned about the wording of non-routine exceptions; and
4. Use prudent judgment in insuring over reasonable risks reported in the title insurance application in order to provide acceptable coverage to lenders and/or owners.

It is important to have an understanding of "prudent judgment" and "reasonable risk," and both must be considered together. Making a prudent judgment about a reasonable risk involves an assessment of:

1. The reporting characteristics of the examiner;
2. The applicable laws involved;
3. The likelihood of a claim;
4. The amount of potential loss from such a claim; and
5. The business relationship with the examiner as well as the lender and/or owner.

In furtherance of these objectives, the Company endeavors to reduce the number of extra documents, agreements, affidavits, etc., that examiners have to obtain and to require only those that are absolutely necessary. In general, the Company tends to insure lenders to a greater extent than owners with regard to exceptions to title. The obvious reason is twofold: first, the risk of loss on the lender's policy is generally less than the risk of loss on an owner's policy; and second, lenders cannot sell their loans on the secondary market with certain exceptions appearing in title policies. Keep these two considerations in mind when deciding whether to insure a lender over a minor violation or a minor title problem. Remember, keep the customer happy. If an examiner specifically requests affirmative coverage for an owner over an exception that the Company would normally make, try to make every effort to give the affirmative coverage.

D. Search Standards

Unless specified in your specific *State Supplement*, or unless local custom dictates a search in excess of the periods provided for in these guidelines, the Company has established the following MINIMUM search standards.

1. Residential property

a) Refinance/Equity Line

Search back to the first arms-length transaction for vesting deed and liens. (An arm's length transaction is a vesting deed with simultaneous mortgage from institutional lender. *i.e.* a purchase money transaction.)

See 'Limited Title Searches' for the applicable exceptions based on the policy to be issued.

b) Purchase

Search back to the first arms-length transaction for vesting deed and liens. (An arm's length transaction is a vesting deed with simultaneous mortgage from institutional lender. *i.e.* a purchase money transaction.)

For platted properties – search back to the filing date of the plat for easements and restrictions (not to exceed the required Period of Search).

For unplatted properties – search back for the Period of Search specified in the applicable ***State Supplement*** for easements and restrictions.

2. Expanded Coverage Loan and Homeowners Policies

Full examination back to the first vesting deed prior to the period of time specified in the Period of Search section of the applicable ***State Supplement*** is required on all expanded coverage policies. In lieu of the full search, an Expanded Loan Policy may be updated from a prior Loan Policy (ALTA 2006 Loan Policy, ALTA 2021 Loan Policy, etc.). A Short Form policy cannot be used when updating title to issue an Expanded Loan Policy. Only a prior owner's title insurance policy may be used as the basis for the title search when an ALTA Homeowner's Policy will be issued in the new transaction.

3. Foreclosure commitments and policies

Full examination back to the first vesting deed prior to the period of time specific in the "Period of Search" of the applicable ***State Supplement*** must be performed.

4. Commercial

This includes residential developments and construction of subdivisions.

Full examination back to the first vesting deed prior to the period of time specified in the Period of Search section of the applicable ***State Supplement*** must be performed.

Note: The period of search limitation is not applicable to where the Company is requested to insure property which contains or contained a railroad right-of-way, or where the Company is requested to insure mineral interests. Transactions involving these interests normally require a search back to the originating document and may be well beyond the Period of Search for a full examination.

5. *Tacking*

a) Prior policy

Tacking to a prior policy, owner's or loan, is permissible for all residential and commercial transactions.

If tacking to a short from policy, easements and restrictions must be searched according to the above specified search guidelines based on the type of transaction being insured. Carry forward all exceptions from prior policy.

b) Commitment

Tacking to a commitment is permissible under the following conditions:

- The searcher must determine that the transaction specified in the commitment actually closed. This may be indicated by the recordation of a mortgage for a consistent amount, showing the proposed insured as the lender, and recorded within 60 days of the effective date of the commitment.
- The current transaction to be insured cannot exceed $250,000.
- Search back to the first arms-length transaction for vesting deed and liens.
- Carry forward all exceptions from commitment.

6. *Title Searching Standards by David Mizelle*

E. Assuming Risk

1. Assuming Risk

The general underwriting principles discussed here should be taken into consideration relative to every underwriting question which is presented by an examiner or which appears on an opinion of title. Often these principles will prevent the need to consider the question being raised in more detail.

1. Is there an insured closing service agreement that would support a claim by the lender if we refuse to insure that lender for a given risk?
2. Has Investors Title Insurance Company, or any other title company, already insured the identified risk?
   a. If the Company has already insured over the risk, then insure again, **generally**.
   b. If another title company has already insured the risk, then take exception on the owner's policy and insure the lender.
3. Is the defect sufficiently nominal so that, considering the loan to equity ratio of the property, the Company could insure the lender only?
4. Marketability and defense costs will often preclude underwriting a risk. The title insurance policy insures that the property is "marketable;" that is, free from reasonable doubt in law or fact as to its validity, and the insurer undertakes to defend the title. This does not mean that title insurance guarantees that property can be resold or refinanced in the future, or that a particular transaction will be completed. It means instead that the policy insures that a finding of unmarketability will not be made based on a defect existing before the policy date. What is "marketable title" in a particular context is determined by the intent and bargain of the parties to a transaction. If a party is willing to pay another for whatever is the extent of title the latter has, then whatever title passes is marketable as between the parties. Often when confronted with a title defect or risk, the Company may be willing to insure against the risk, but not against the risk's effect on the marketability of the title. Where exception to marketability should be made, language is provided in other sections of this Underwriting Manual. For instance, under the topic **BUILDING SETBACK LINES**, there is an exception called **BSL-Market** which provides such coverage.
5. Where an indemnity agreement is being used to procure insurance, be sure the use of an indemnity was agreed to and approved by the Home Office. If the indemnity is not the Company's standard form, submit it for review to the Home Office.
6. Where an escrow agreement is being used to procure insurance, be sure the agreement is drafted to give the Company authority to compel payment or action by escrow agent.

F. Extraordinary Requirements and/or Exceptions

1. Extraordinary Requirements and/or Exceptions

When any unusual or extraordinary requirements or exceptions will appear in the Commitment, the Company recommends that underwriters call the settlement agent to provide notice of said requirement or exception prior to loan closing.

Examples of *extraordinary* requirements may include:

1. Execution of an escrow agreement;
2. Execution of a Long Lien Waiver form, when it is customary to obtain a regular Lien Waiver; or
3. Execution of an indemnity agreement.

G. Unusual or Extra Hazardous Risk and Reinsurance Alert

Throughout this manual the caption **Unusual or Extra Hazardous Risk and Reinsurance Alert** appears within topics identified by the Company's reinsurer as potential unusual or extra hazardous risk. In cases where a policy is insuring over an unusual risk and will involve reinsurance, the underwriter **must** advise the Home Office before issuing a commitment or policy.

This Company's reinsurance treaty requires us to specifically disclose to the reinsurer any liability the Company is assuming in policies in excess of ~~$7.5~~ $12.5 million in connection with the following:

1. ~~Timber, oil, gas or other minerals, title to which has been severed from the surface title.~~
2. ~~Airspace rights or Air Rights.~~
3. ~~Tide or submerged lands or lands which abut a navigable waterway.~~
4. ~~Native American (Tribal) lands.~~
5. ~~Railroad property or property abutting a railroad right of way.~~
6. ~~Mechanic's Lien Coverage-where insuring a transaction involving construction or recently completed construction.~~
7. ~~Removal of any exclusions from coverage from the standard form of the ALTA Policy to be issued.~~
8. ~~Any matter requiring execution of an indemnity agreement regarding matters affecting title to the estate or interest being insured.~~
9. ~~Title based on judicial procedures (tax sale, condemnation procedure, bankruptcy).~~
10. ~~Title based on foreclosure or a deed in lieu of foreclosure.~~
11. ~~Water Rights.~~
12. ~~Sheriff's Sale.~~

1. Creditors' Rights risk***
2. Title to Land under or formerly under navigable waters.
3. Title to land which derived from a Swamp and Overflow Patent.
4. Insurance of Options to Purchase.
5. Title to lands, whether current or prior, 1) held in trust for individual Indians or tribes; 2) located within reservation boundaries owned by tribe or non-tribe members or; 3) located outside reservation property boundaries owned by tribe or tribe entity.
6. Transactions in Washington D.C. involving the Tenants Opportunity to Purchase Act ("TOPA") or The District Opportunity to Purchase Act ("DOPA").

7. Transactions involving EB-5 loans and/or crowdfunded loans.
8. Transactions involving a marijuana and/or a hemp related facility or business.
9. Transactions involving Swap coverage for unique Swap structures or Swaps that do not utilize the ISDA forms.
10. Transactions involving endorsements that are of a unique nature or not customarily issued.
11. Transactions requiring outgoing international wires.
12. Transactions involving a cross-border remote online notary.
13. Insuring transactions subsequent to the foreclosure of a mezzanine loan.
14. Title derived through railroads.
15. Title to severed mineral or oil and gas interests.
16. Providing affirmative coverage over mineral interests in areas with known mineral rights or development.
17. Insuring Easements in Gross, Negative Easements, or Conservation Easements.
18. Title subject to present or threatened civil or criminal litigation.
19. Mechanic lien risk where priority cannot be established or maintained or the issuance of an endorsement from the ALTA32 series is required.
20. Any transaction with a potential fraudulent conveyance or preferential transfer risk in the back chain of title.
21. Title to improvements to real estate severed from title to the surface estate.
22. Title to air or subterranean space.
23. Title by adverse possession or title to easement by prescription unless there is a final, non-appealable order establishing title.
24. Transactions which have been refused by other underwriters.
25. Title subject to cemeteries, burial grounds and archeological sites.
26. Transactions involving a sale-leaseback or a synthetic lease
27. Title subject to federal or state inheritance tax liens if a policy is to be issued without an exception.
28. Title derived from a mineral patent.
29. Insuring transferable development rights.
30. Insuring over any matter based upon an unsecured Indemnity.
31. Transactions involving Swap coverage.
32. Transactions involving the issuance of either the ALTA 7-06, 16-06, 40-06, and 46-06 endorsements
or the issuance of an endorsement from the ALTA 15, 2 9, or 32 series.
33. Title emanating from a federal civil or criminal governmental forfeiture proceedings, IRS sales, Receiverships, or federal condemnation proceedings.
34. Bankruptcy orders modifying or eliminating any title matters or authorizing a title interest transfer.

*** Creditors' Rights endorsements or policies which provide creditors' rights coverage are no longer issuable. Existing policies in which creditors' rights coverage was previously provided may not be modified or amended to extend the Date of Policy.

II. Underwriting Topics

A. Access

1. Access

It should be readily apparent that the value of real property is affected by the existence or lack of access thereto. Persons who may be considering the purchase of, or lenders who have been asked to make a mortgage loan secured by real property, will give great weight to the quality of access that serves the real property under consideration. Careful examination of access should be routine for every real property transaction, and the following analysis should serve to properly focus such examination.

Both the Owner's and Mortgagee's policies insure against loss or damage resulting from the lack of a right of access (often referred to as a right of ingress, egress and regress) to and from the insured property. Two "types" of access must be considered: legal and actual. Legal access, which we have defined as the right of access, is insurable; actual access is insurable only if it is also legal. While the title insurer will not typically be concerned with the quality of access (*i.e.*, its width or construction, or how it is maintained), again, the requirements of many lenders concerning access have become more demanding as a result of the requirements of their investors on the secondary market. This has impacted on the sale-ability of loans, the marketability of property and hence, the underwriting practices for title insurers. It is only the legal right to access with which the Company is concerned, not the quality or practicality of such access. Accordingly, as long as a legal right of access exists, the Company will make no exception for access, even where the ability to reach the property would be difficult or impossible.

If there is not a legal right of access, any of the following exceptions should be used:

E18 Right of access to and from the Land.

E17 Attention is directed to the fact that the Land does not appear to abut a public road or highway nor to be served by any right of way or easement over adjoining or adjacent property to any such public road or highway.

X30b Attention is directed to the fact that the Land does not appear to abut a public road or highway. This policy does not insure title to any right of way or easement over adjoining or adjacent property to any such public road or highway.

2. Subdivision Roads

The recording of a subdivision plat which depicts roads without a reservation or designation that these roads are "private roads" coupled with any "out" sales by the developer which would imply use of the road by a lot owner results in an offer of dedication by the developer to the public. Such a recorded plat and resulting offer of dedication enable the Company to insure access for the lot owners. Any exceptions for the road will be made in accordance with the underwriting rules as set out in subsequent parts of this section.

The recording of a plat with a reservation or designation that the road is a "private road" coupled with "out" sales by the developer of lots within a subdivision creates a presumptive easement in all the lot owners for access. Again, the Company can insure matters of access for the lot owners. Any exceptions will be made in accordance with the underwriting rules as set out in subsequent parts of this section.

When insuring access on the basis of a private road, be sure such private road lays entirely within the boundaries of the subdivision shown on plat and that the insured lot description references the plat.

3. Access through Contiguous Property

In circumstances where the insured owns two (2) parcels and the Company is asked to insure only one (1), and access to the parcel insured is over adjoining property owned by the same party, exception must be made for the possibility that the adjoining property may someday be owned by a different party and that access may fail at that time. Use this exception:

X30a This policy does not insure title to any right of way or easement over adjoining or adjacent property to any such public road or highway.

NOTE: for information purposes, attention is directed to the fact that the Land does not appear to abut a public road or highway nor to be served by any right of way or easement over adjoining or adjacent property to any such public road or highway.

OR

X30b Attention is directed to the fact that the Land does not appear to abut a public road or highway. This policy does not insure title to any right of way or easement over adjoining or adjacent property to any such public road or highway.

Or, where the owner has access, but the deed of trust is only for a PART of Owner's entire tract, and that PART viewed alone would not have access, the following exception should be made:

X30a This policy does not insure title to any right of way or easement over adjoining or adjacent property to any such public road or highway.

NOTE: for information purposes, attention is directed to the fact that the Land does not appear to abut a public road or highway nor to be served by any right of way or easement over adjoining or adjacent property to any such public road or highway.

Conversely, when the PART alone does not have access, but the Owner in the deed of trust (mortgage) grants an access easement over that portion of his property that does have access, then no exception is required.

4. Access Through Recorded Easement

Clearly the most common method of access where property is landlocked is by and through an easement. *Black's Law Dictionary* defines an easement as "[a] right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner." *Black's Law Dictionary* further lists approximately twenty (20) types of easements, including one for access, which is described as "the right which an abutting owner has of ingress to and egress from his premises, in addition to the public easement in the street."

There are many ways in which an easement can be created over another's property. Of these, only a few are express, and must meet the requirements of the Statute of Frauds and the essential elements of a deed. Several of the remaining methods involve circumstances in which the laws imply an easement where there is no express grant.

5. Express Easements

Creating an easement by express grant or express reservation requires that there be a written instrument which describes with reasonable certainty the easement granted or reserved, and also describes the dominant estate (the tract that benefits by the easement, and oftentimes noted by the phrase "together with") and the servient estate (the tract that is burdened by the easement and oftentimes noted by the phrase "subject to").

Grants of easement can be in gross, which means the easement is for the benefit of one individual or entity irrespective of the ownership of any estate in other land. Easements in gross are limited in time and do not support a marketable fee simple title. Appurtenant easements are created for the purpose of benefiting specific property, and are so attached to that property that the easement rights pass with the title thereof and are owned in connection with the property as incident of such ownership. This characteristic of having the easement be appurtenant to the property intended to be benefited has traditionally been referred to as "running with the land." If steps are taken to record a deed of easement to cure otherwise questionable access, it is important that the easement be appurtenant to the dominant estate.

Where access to the insured property is by means of an express, recorded easement, the examiner must search the title to the easement. If any liens or deeds of trust appear of record as to the easement tract prior to the easement being vested, they must be excepted to in the policy. Any liens or deeds of trust on the easement tract, after the easement vested, do not affect the easement and do not need to be excepted to. If the examiner does not certify that the easement has been searched, the following exception should be made:

X32a This policy does not insure against loss or damage arising from adverse interests or claims to the easement or to the property over which the access easement lies.

6. Implied Easements and the "Old Farm Road"

Several methods of imposing or creating an easement depend upon establishing facts, which, under various legal doctrines, would lead to a court decision that an easement has resulted. These include prescriptive easements, easements by necessity and easements by estoppel. While these easements arise by operation of law, they are only enforceable if they have been established by a special proceeding in which the party claiming the right to use the easement has the burden of proving that his use meets all of the essential elements.

The classic situation that presents itself repeatedly to real property attorneys, particularly those practicing in rural communities, is where the property has been served for as long as anyone can remember by the "old farm road." The property owners confidently assert that they have used that road for 20, 30, or 50 years, as had the prior owners before them, and that no dispute about its use has ever arisen. While such use, supported by affidavits as to its nature and duration, may be sufficient to give rise to prescriptive easement rights, if such rights were challenged, resolution of the dispute must be had through the courts.

Since the examiner cannot be certain, even on the strongest apparent facts, of the result of a trial involving prescriptive rights to an easement or an easement by implication, it is dangerous to rely on these facts alone as creating a right of legal access to a public road or right of way, or fail to disclose that access is premised on such implied rights.

The better practice is to research the availability of an express easement or to pass the decision to the title insurer. Keep in mind that the title insurer must consider both the questions of access and of marketability. Heightened restrictions imposed by secondary market investors regarding the quality of access have impacted on the willingness of lenders to make loans on property where access is by other than express easements. Inquiry by the lender or its investor into such matters as the existence of maintenance agreements, the requirements for paved or "all weather" roads, and whether the easement width conforms to local ordinances designed to accommodate use by emergency vehicles is becoming more common. Accordingly, while the examiner and the title insurer may get comfortable on the issue of access, the further consideration of marketability may nonetheless preclude the issuance of a title policy that insures both access and marketability.

7. Underwriting Prescriptive Easements

Where access has been over an "old farm road" for many years but there is no recorded easement, a right of access may have "ripened" over time through the doctrine of prescriptive easements. To be enforceable, however, a prescriptive easement must be proven in court. It is, therefore, not advisable to insure that property has access on the basis of a prescriptive easement. The policy should make exception for access.

X30a This policy does not insure title to any right of way or easement over adjoining or adjacent property to any such public road or highway.

NOTE: for information purposes, attention is directed to the fact that the Land does not appear to abut a public road or highway nor to be served by any right of way or easement over adjoining or adjacent property to any such public road or highway.

OR

X30b Attention is directed to the fact that the Land does not appear to abut a public road or highway. This policy does not insure title to any right of way or easement over adjoining or adjacent property to any such public road or highway.

However, in certain situations, the Home Office may give affirmative coverage in a limited fashion as follows:

AccessAff This policy insures against loss or damage arising from a decree of a court of competent jurisdiction that the Land does not have a legal means of access.

8. Use of an Easement/Subdivision Roads to Access Adjoining Landlocked Property

The grantee of an easement appurtenant to a specific dominant estate cannot use the easement to serve additional property, even if the new parcel adjoins the original dominant estate. Nor may he impose an additional burden on the servient tract by subdividing the dominant tract and conveying parcels to additional owners. One of the most frequently asked questions' regarding access concerns the situation where a parcel of land which does not have access to a public road abuts a subdivision lot which, by reason of the subdivision streets and easements, does have access to public roads. The owner of the landlocked tract purchases a lot in the subdivision over which he constructs a driveway from the subdivision street to the parcel. If the subdivision is subject to restrictive covenants which restrict the lots to residential use only, the driveway that was built for the purpose of serving the adjacent non-subdivision parcel may violate the restrictive covenants. The owners of the other subdivision lots may successfully bring an action to enforce the restrictive covenants and may be awarded injunctive relief. The owners of the other subdivision lots may successfully bring an action to enforce the restrictive covenants and may be awarded injunctive relief. A careful reading of case law on this subject is required. Call the Home Office for assistance.

B. Adoption

State law regarding adoption is relevant to real property title usually in the context of inheritance of real estate pursuant to the laws of intestate succession, where property is owned by a decedent who died without a will. The question to be answered is, typically, whether an adopted person does or does not inherit from his adoptive parents or his natural parents or both. Unless otherwise noted in the ***State Supplement***, adopted children usually only inherit from the adoptive parents.

C. Adverse Possession

Adverse possession is a doctrine of law which allows a non-record owner to acquire title by reason of prolonged use, for a period prescribed by statute or case law, which prolonged use is hostile to the real owner, open for the world to see, uninterrupted and exclusive as against other persons.

Upon evidence of such use, the law allows ownership rights to "ripen" in a non-record owner from his continued, uninterrupted, open, notorious, hostile use of the property. The use may be of only a portion of property (*i.e.*, where an adjoining landowner uses a strip of his neighbor's land), or as to entire parcels. The use must continue for the statutory period in order to "vest" title in the non-owner. Since adverse possession requires use of the property, it is far easier to establish such use for residential or commercial property than undeveloped, vacant land.

Title based upon adverse possession is usually not insurable unless and until the title so acquired is established by a decree or judgment of a court of competent jurisdiction, in an appropriate action to which all necessary and proper persons are made parties and for which the appeal period has expired. Adverse possession is, however, a legal argument which the Company can rely on to get comfortable with insuring a defect that occurred back in the chain of title, or to establish title which the Company has already insured. Questions about the insurability of title to adversely possessed property should be referred to the Home Office.

D. Assessments

1. Special Assessments

Special assessments are levied by the taxing authorities to pay for improvements constructed by the town/city/county which benefit a certain parcel or parcels of land. The type of improvements may vary; examples would be road paving, curbing, guttering, sewer or water service and street repair. Special assessments are "special" because they are levied separately from "regular" ad valorem taxes, and because the lien may be payable over a period of years. Assessments become a lien on real property when the assessment role is confirmed by the taxing authority; until then, it is a pending assessment only. Because state law with respect to the priority and collection of liens for assessments may vary, please see ***State Supplement*** for specific underwriting guidelines.

Any and all improvement liens, special levies or assessments, whether now due and payable, or becoming due and payable in future installments, must be excepted to in the policy.

If the examiner reports an assessment lien, a commitment should require payment of the assessment or it should appear as an exception on the policy. If assessments are to be paid at closing, in addition to considering the terms of the sales contract, the settlement agent will want to consider <u>when</u> the work was done and whether the seller or buyer benefit by the improvement, in order to pro-rate the assessment.

Some localities specifically designate assessments as to paving or sewer, etc. Others call them by the name of the district in which the assessment is levied. Exceptions to special assessments should be as definite as possible as to the purpose of the assessment or the districts in which the assessment is levied.

A28 Installments of special assessment(s) for ^ [*type of assessment*] for the years ^ in the amount of $^ each, plus penalties and interest.

Occasions arise when certain assessments or portions of assessments have matured and have not been paid and others are unmatured. In this case, an exception worded as follows is used:

A30 Matured and unmatured installments of special assessments for ^ [*type of assessment*].

2. Homeowner's Association Dues and Maintenance Charges

Restrictive covenants often contain provisions for the payment of maintenance charges or homeowner's association dues for the upkeep of streets, alleys, parkways, recreational areas or common areas in the subdivision of which the property to be insured is a part. These charges may or may not be made a specific lien on the real estate, and if they are considered a lien, are often subordinated to the interest of any mortgagee. Nonetheless, maintenance charges or homeowner's association dues must be treated as liens for the purpose of title insurance, and exception made accordingly.

If a special assessment will come due within the effective period of the commitment, the following requirement would be made:

A71 Payment of ^ installment of special assessment for ^, plus all penalties and interest.

If the title search indicates that the future installments of a special assessment are to be paid before the loan is closed, the following requirement is used:

A74 Payment of all installments of special assessment for ^, whether now due or payable in future installments, plus all penalties and interest.

If it is unknown as to whether homeowner's association dues are current or due, use the following requirement:

HO Payment of any homeowner's association dues, if any are now due and payable.

Where the lender requires assurances as to the priority of their deed of trust, and where the examiner certifies the same or the underwriter can determine the same from the restrictive covenants, affirmative coverage can be given as follows:

AssessSu This policy insures the superiority of the lien of the insured over any lien created by non-payment of assessment or dues.

3. Unusual or Extra Hazardous Risk and Reinsurance Alert

In cases where a policy is insuring over an unusual risk (*i.e.*, known liens) and coverage is in excess of $5 million, the underwriter **must** advise the Home Office before issuing a commitment or policy.

E. American Indian Claims

1. American Indian Claims Generally

The allegations of aboriginal Indian land claims are, first, that the affected tribe occupied the land being claimed at the time of the founding of the nation. Second, that tribal lands were conveyed to third parties or to state governments without the specific congressional approval that was required by the Indian Nonintercourse Act of 1790. (endnote 1). That Act, which was passed by the first Congress to protect the American Indians from land grabbers, and which has been amended by subsequent Congresses but is preserved to the present time, provided that a transfer of tribal lands was invalid unless the transfer was approved by Congress. Without such Congressional approval, the American Indians argue, the conveyances are rendered invalid, and the affected tribes are now entitled, despite the passage of time, to the return of the land and to damages for trespasses committed by past and present landowners.

The Indian Nonintercourse Act created a federal form of ownership specific to aboriginal Indian tribes known as "Indian title." Indian title is the title established in Indians to land occupied by them when the United States gained its independence from Great Britain and became the sovereign. The distinguishing characteristic of Indian title is a right of possession superior to that incident to fee simple title. Where Indian title and fee simple title coexist, the fee simple interest operates merely as a reversionary right to possession which can take effect only when Congress extinguishes the Indian title. Indian title enables the possessor of real property to exclude all others, including holders of fee simple title, through state law possessory actions such as ejectment and trespass. But Indian title cannot be alienated, even by the tribe itself, except by an Act of Congress.

Adjudication of these claims involves unique and complex questions of fact and law:

1. Whether the claimants constituted in the past and still constitute today a "tribe" within the meaning of the Act;
2. What lands the tribe occupied and historically hunted, fished or cultivated;
3. Whether the Nonintercourse Act was intended to apply to tribes in the original thirteen (13) colonies;
4. Whether the federal government has ever consented to the conveyances; and,
5. Whether the defenses that would otherwise be available to a landowner against ancient defects in title (*e.g*., laches, adverse possession and statutes of limitation and repose) are available against the tribal claims.

2. American Indian Claims Around the Country

During the l970's North American Indians assumed a far more aggressive approach in asserting land and civil rights against the state and federal governments that, for decades past, had treated them as wards upon whom restrictions must be imposed and aid granted. Although the Nonintercourse Act prohibited the sale of Indian lands without prior federal approval, vast sections of the Eastern United States passed from Indian control after that time. Since 1977, Indian land claims have been instituted or announced which would affect townships, counties or individual landowners in Connecticut, Louisiana, Maine, Massachusetts, New York, Rhode Island and South Carolina. Further claims may also exist in other states, such as Tennessee, New Hampshire, New Jersey and Virginia.

A brief synopsis of the most prominent of these claims will demonstrate the tremendous areas of land which are affected, the arduousness of prosecuting these claims, and the success with which the claims are ultimately being met.

* The Sioux tribe, consisting of 60,000 members, lay valid claim to seven million (7,000,000) acres in the Black Hills of South Dakota, and, in 1980, was awarded $122.5 million by the U.S. Supreme Court. The award was recompense to the tribe for violation of the 1868 Treaty of Fort Laramie, which had been violated when the U.S. Congress took the land in 1877 without fair compensation.

* In 1984, the federal government instituted suit on behalf of the Pueblo of Santo Domingo, a federally-recognized Indian tribe, to quiet title to approximately twenty-four thousand (24,000) acres of land in New Mexico. The Pueblo's title emanates from an early land grant from Spain, and the suit sought to establish title in the Pueblo as against subsequent land grants from Spain to non-Indians on the basis that the Pueblo's grant was first in time. The merits of the case have not yet been addressed because the lower courts found the claim to be barred by the statute of limitations created in the Pueblo Lands Act of 1924.

The 1924 Act was passed to address the uncertainty of whether the Pueblos were Indian tribes within the meaning of the Indian Nonintercourse Act. For if the Pueblos were Indian tribes within the meaning of the Nonintercourse Act, then during the period that title was held by the United States, the Pueblos lacked the capacity to convey good title, and any deeds purporting to convey portions of their land were void. Non-Indians would establish superior title to lands if the non-Indians could show continuous, open and notorious adverse possession and the payment of taxes from 1889 to 1924. But the Pueblo Lands Act did not have authority to resolve non-Indian claims based on grants from Spain or Mexico, so title to the land at issue in this case was not determined under the provisions of the 1924 Act. Nonetheless, the lower court did hold the 1924 Act statute of limitations applicable to bar any suit to quiet title to the lands. The plaintiffs filed a writ of certiorari to the Tenth Circuit Court of Appeals.

* The Passamaquoddy and Penobscot Indians of Maine successfully laid claim to twelve and a half million (12,500,000) acres of land, fully two-thirds (2/3) the land area of that State, and were awarded $81.5 million with which they have already purchased two hundred twenty-five thousand (225,000) acres out of a prospective three hundred thousand (300,000) acres designated to be returned to them. That suit, which remained pending eight (8) years before being settled in 1980, was founded upon a 1794 treaty between the Commonwealth of Massachusetts (which, at the time, included portions of modern-day Maine) and the Passamaquoddy Tribe. The treaty document, which itself had been saved by a female member of the tribe in an old shoebox, granted the Indians "title in perpetuity" to twenty-three thousand (23,000) acres in Indian Township, fifteen (15) islands in the St. Croix River and two (2) islands in Big Lake.

The ultimate settlement of the suit required concessions on the parts of both the State of Maine and the tribes. Those made by the state government - that the organization and function of the tribal government is not subject to state regulation, that the tribes have the constitutional right to exclude non-Indians from participation in tribal decision-making, that the tribe has the right to regulate their own fishing, hunting, and trapping, as well as the right to set up tribal courts to deal with misdemeanors and minor infractions committed by Indians against other Indians - are noteworthy in that they effectively create an Indian nation within the boundaries of the modern State of Maine.

* By the Treaty of Pine Hill (1760) and the Treaty of maya (1763), the Catawba Indians agreed to relinquish its aboriginal territory in exchange for a permanent and fixed settlement in South Carolina on a 225 square-mile tract in and around present day York County. Under the subsequent Treaty of Nation Ford (1840), the tribe transferred its interest in the lands to the State of South Carolina as established by the prior treaties.

In 1959, Congress passed the Catawba Act (endnote 2) which resulted in the revocation of the tribe's constitution on July l, 1962, and rendered the tribe's claim to the land it relinquished in 1840 subject to South Carolina statutes of limitations. The Catawba instituted suit in 1980 to recover the land and damages under the theory now familiar in these cases, that the United States did not participate in or consent to the alienation of the tribe's reservation as required by the Nonintercourse Act. The suit named as defendants the State of South Carolina, various county and municipal bodies, and various individual and corporate landholders as representatives in order to allege a cause of action which potentially involves each and every landowner within the claims area.

While the above-described claims all involve land tenure, land claims are not the only rights currently at issue. Other rights, some only remotely incident to land ownership, are being asserted successfully. For example, in the Pacific Northwest, Indians have been awarded recognized fishing rights in the salmon-abundant waters there. And, in the dry and arid southwestern United States, the Apache, Paiute and Pima tribes have defended valuable water rights.

In McGirt v. Oklahoma 140 S.Ct. 2452 the U.S. Supreme Court decided that Congress never disestablished the Muscogee (Creek) Nation’s reservation. Although McGirt was specific to the Muscogee (Creek) Nation, the Oklahoma Court of Criminal Appeals has now applied the ruling to recognize that Congress likewise never disestablished the Cherokee, Chickasaw, Choctaw and Seminole reservations. Under federal law, these reservations—encompassing the majority of Eastern Oklahoma—are “Indian Country.” Even though most of this land is privately owned by non-Indians, this designation carries a host of implications.

For more information regarding the implications of the McGirt Decision, see the Impact Statement written by the Oklahoma Land Title Association.

3. The Impact of American Indian Claims

The social and economic impact of tribal claims can be severe, particularly if suits against individual landowners are brought and litigated. In those instances, land transactions and development are greatly impeded because of the cloud on title which exists as to all land within the claim area. Mortgage loans become difficult, if not impossible to obtain without title insurance to insure the valid first lien position on the property in favor of the lending institution. The alienability of real property is destroyed, so that what has traditionally been the single largest asset of a family must be sold substantially reduced from market value, if it can be sold at all.

The cost of defending against claims by Indian tribes is tremendously expensive, and as evidenced by the claims described above, the adjudication of the claim is typically a lengthy and arduous process. Defending such a claim is an immense hardship if borne by individual landowners and townships, and no less problematic for a title insurance company in those circumstances where affected property owners are so insured. The hardships are suffered as well by the general public in the claim areas as the local governments must adjust their planning and administration in reaction to shrinking tax bases and an inability to borrow money.

Ultimately, all of the political and economic fall-out from the Indian claim creates an emotionally charged climate of apprehension and mistrust between the landowners and the American Indians; a climate which not infrequently results in violence and greater social disruption.

4. Underwriting

Because of the geographic extent and significant economic impact which characterizes a tribal claim, the underwriter should not proceed to issue title insurance in such circumstances without clear instruction from the Home Office.

5. Unusual or Extra Hazardous Risk and Reinsurance Alert

In cases where a policy is insuring over an unusual risk (*i.e.*, known American Indian claims; insuring title to land within an Indian reservation) and coverage is in excess of $5 million, the underwriter **must** advise the Home Office before issuing a commitment or policy.

6. Endnotes

1 The Indian Nonintercourse Act, 4 Stat. 730 (1790) [current version at 25 U.S.C. 177 (1976)].
2 The Catawba Act, 73 Stat. 592 (1959) [current version at 25 U.S.C. 931 (1976)].

7. Bibliography

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F. Assignment of Rents, Leases and Profits

An assignment of rents and leases is exactly what the name implies: the transfer of an owner's rights to receive rents due and otherwise enjoy the benefits of having leased one's properties.

In a typical real estate transaction, the lender loans money to the borrower for the purchase/refinance/improvement of the property. In return, the borrower signs a promissory note, evidencing his promise to repay the money, and a deed of trust or mortgage or deed to secure debt that encumbers the property. The deed of trust is then recorded in the public records as notice that until the lender is paid in full, the lender has an interest in and a lien against the property, too. The lender relies upon the value of the real estate owned by the borrower rather than the borrower's promise to repay, as collateral for the repayment of the monies loaned. In the event the borrower does not repay the loan as agreed, the deed of trust allows the lender to foreclose the borrower's interest or, in other words, sell the property in order to pay off the loan.

Of course, the ultimate goal of the lender is not to own the property. In the residential context, the lender has comfort in the fact that many people are interested in buying homes and expects in a foreclosure setting that another owner will. In contrast, there are not many prospective buyers for shopping centers, apartment buildings, office buildings, or other income-producing properties. Consequently, the lender wants more than a deed of trust on commercial or income producing real estate. It really wants to secure the loan with the right to collect the rents a tenant will pay for space in that shopping center, for an apartment in the apartment building, or office space in the office building. Thus, the lender will require the borrower to grant an assignment of his rights to rents, leases and profits relative to the real estate being used as collateral for the loan.

Depending upon state law, an assignment of rents, leases and profits will be deemed to be a security interest in real estate, personal property, or both. In states where an assignment of rents, leases and profits is deemed to be a security interest in real property rights, or in both real property and personal property rights, it is appropriate to list an assignment of rents, leases and profits as an additional instrument insured under Schedule A on a Loan Policy. Please note, however, that title must be searched and certified through the date and time of recording of the assignment of rents, leases and profits in order for it to be shown as an additional insured instrument under Schedule A in the Loan Policy.

In states where an assignment of rents, leases and profits is deemed to be purely a personal property interest, this additional collateral instrument should be shown as a "note" after Schedule B, Part II of the Loan Policy.

Of course, the Company may show an assignment of rents, leases, and profits as an exception on a Loan Policy, and if requested, the underwriter may do so without further approval. Unless otherwise noted in the ***State Supplement***, an assignment of rents, leases and profits should be shown as an additional instrument to be insured under Schedule A on the Loan Policy.

If the assignment of rents, leases and profits is recorded on or before the effective date of any owner's policy, it must be shown as an exception.

G. Availability of Reduced Premium

The Company intends, in every transaction, to offer the rate most beneficial to the insured. To ensure the responsible parties to each transaction are aware of all qualifications for a reduced rate, please see the applicable ***State Supplement***.

H. Bankruptcy

1. Generally

Bankruptcy is a legal proceeding under federal law that affords protection and relief to a debtor against his debts. Bankruptcy proceedings are conducted under Title 11 of the U.S. Code (informally called the "Bankruptcy Code") in federal bankruptcy court. The exact filing requirements in each jurisdiction are specified in local rules of court, which can be obtained from the clerk's office.

The bankruptcy code defines the conditions, procedure and effect of the following bankruptcy proceedings, which are referred to by chapter number as:

Chapter 7: Liquidation or "straight bankruptcy" where the debtor's nonexempt property is sold and proceeds distributed to creditors.

Chapter 11: A reorganization bankruptcy, usually involving a corporation or partnership, but also available to individuals or persons in business, in which the debtor proposes a plan of reorganization to keep its business going and pay creditors over time.

Chapter 12: Adjustment of debts of a family farmer with regular income.

Chapter 13: Adjustment of debts of an individual with regular income, usually allowing debtor to pay debts over time, usually three (3) to five (5) years.

All four chapters referenced may be used by individuals; Chapters 7 and 11 may also be used by businesses. Bankruptcy can be either voluntary, that is, commenced by the filing of a petition by the debtor himself, or involuntary, under Chapters 7 and 11, where the petition is filed against a debtor by his creditors.

The commencement of a case under the bankruptcy code by the filing of a petition creates an estate, which is comprised of all the property owned by the debtor at the time of the bankruptcy filing that the bankruptcy trustee and court will administer for the benefit of the creditors of the debtor. Not all property of the estate will be available for distribution to creditors. Certain property may be subject to exemption and kept by the debtor for his use and benefit. Some property may be abandoned during the course of the case by the bankruptcy trustee, or may be surrendered to secured creditors, such as holders of deeds of trust to satisfy their secured debt.

When a bankruptcy case is commenced, an automatic stay is imposed, which operates as an injunction to prohibit creditors from initiating or continuing all collection efforts. Lawsuits, foreclosure actions, wage garnishment actions and even telephone calls to demand payment must be held in abeyance by the creditor. The automatic stay also prohibits the conveyance of any real property by the debtor, including refinances. In order for a lender to begin or continue its foreclosure or for the debtor to convey or refinance real property, a relief from stay must be obtained from the bankruptcy court judge.

A person is appointed as trustee in the bankruptcy case to represent the interests of the bankruptcy estate and the unsecured creditors. The trustee reviews the debtor's petition, liquidates the property of the estate and makes distributions to creditors. If the bankruptcy involves a plan, the trustee is responsible for supervising its administration, receiving payments from the debtor and making distributions to the creditors.

If, at the conclusion of the bankruptcy case, an order of discharge is entered, the discharge releases the debtor from personal liability for discharged debts and precludes the creditors from taking any further action against the debtor personally or against his property, both real and personal acquired after the discharge to collect the debts. Note, however, that as to judgments or deeds of trust filed against real property before the bankruptcy is filed, the real property encumbered thereby is not automatically released from these liens by virtue of a discharge. Certain types of debts, defined in § 523 of the Bankruptcy Code, are not dischargeable. These include alimony and child maintenance and support obligations, certain taxes, debts for certain educational loans, debts for willful and malicious injury by the debtor to another or the property of another, debts for death or personal injury caused by the debtor's use of a motor vehicle while intoxicated, and debts for criminal restitution. To the extent that these debts are not fully paid, the debtor is still responsible for them after the bankruptcy case has concluded.

If, at the conclusion of the bankruptcy case, the debtor's plan of reorganization is confirmed, such confirmation will discharge the debtor from most debts that arose before the date of confirmation, and a discharge order may not be issued as part of the case. When a plan of reorganization is confirmed, the debtor is required to make plan payments and is bound by the provisions of the plan of reorganization. Confirmation does not, however, discharge an individual debtor from any debt made nondischargeable by § 523 of the Bankruptcy Code.

Dismissal of a bankruptcy case does not effect a discharge of any debt, nor does conversion of a bankruptcy case from one chapter of the Bankruptcy Code to another.

2. Automatic Stay

If the examiner reports a current or recent bankruptcy, the underwriter should be alert to conveyances which would violate the automatic stay - either voluntary conveyances by the debtor, such as sales or refinances, or involuntary conveyances in the form of foreclosure proceedings instituted by the lender. If the property is sold at foreclosure during a bankruptcy, the underwriter should require:

BankrStay Receipt of a copy of any order entered by the bankruptcy court abandoning the Land to the holder of the Mortgage, allowing it to be sold, and/or releasing the property from the automatic stay.

3. The Avoiding Powers of the Bankruptcy Trustee

The trustee is possessed of "avoiding powers" which allows the estate to recapture certain property that has been transferred by the debtor to third parties immediately prior to or during the bankruptcy case, if such transfer is done without appropriate authority. Specifically, the trustee has the power to review any transfer of property occurring within ninety (90) days prior to the filing of the bankruptcy petition, and if he determines that the transfer is made to a creditor of the debtor to satisfy an existing debt or obligation, then the trustee can set aside that transfer and bring the property back into the bankruptcy estate on the basis that the transfer is a "preference" of one creditor over the others. Where the parties to the earlier transaction can be considered "insiders," then the trustee can avoid a transfer occurring within one (1) year prior to the filing of the petition.

The trustee has two (2) years from his appointment to set aside or avoid transfers as preferential.

4. Conveyances and Encumbrances by the Debtor in Possession or Bankruptcy Trustee

Under Chapter 11 reorganizations, the debtor assumes the role of "debtor in possession" together with certain related duties, as a fiduciary with the rights and powers of a Chapter 11 trustee which include accounting for property, examining claims, filing reports, employing attorneys, accountants, appraisers, and filing tax returns. Where an order authorizing operation of the business is entered by the court, the debtor keeps possession and control of its assets, and continues to operate the business which may include the sale of real property. Where real property is to be conveyed by a debtor in possession or a bankruptcy trustee, it is necessary that an order be entered by the bankruptcy court which authorizes the sale, transfers the lien of creditors to the proceeds of sale and allows the property to be sold free and clear of liens. The underwriter should require:

BankrSale Receipt of Order of Sale, or in the alternative, receipt of Order of Abandonment, indicating that the Land has been abandoned by the trustee, which Order of Sale or Order of Abandonment expressly states that the sale is authorized and transfers the lien of creditors to the proceeds of sale and allows the Land to be sold free and clear of liens. In the alternative, if the Order does not expressly transfer the lien of creditors to the proceeds of sale and allow the Land to be sold free and clear of liens, the Company must be provided evidence that said liens are paid in full and the Land is released from same OR said liens will appear as EXCEPTIONS IN SCHEDULE B OF THE POLICY.

Where property is being refinanced during a pending bankruptcy the underwriter should require:

BankrRefi Receipt of satisfactory final non-appealable order, plans, or documents in the bankruptcy proceedings authorizing the contemplated transaction.

NOTE: Upon receipt of said documents additional exceptions or requirement may be made.

5. The "Small Business" Debtor and the "Single Asset Real Estate" Debtor

A "small business" debtor is defined in the Bankruptcy Code as a person engaged in commercial or business activities that has aggregate debts not exceeding $2 million. If a debtor qualifies and elects to be considered a small business debtor, the case is treated differently than a regular Chapter 11 and moves along on a faster track.

Similarly, a "single asset real estate" debtor has special provisions in the Bankruptcy Code which define the phrase to mean a single property or project, other than residential real property with fewer than four residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor other than operating the real property.

Creditors of a single asset real estate debtor may request and, within ninety (90) days from such request, obtain relief from the automatic stay unless the debtor files a feasible plan of reorganization or begins making payments to the creditor.

6. Treatment of Liens on Real Property

As previously stated, a bankruptcy case does not automatically discharge liens, such as judgment liens, which have previously attached to the real property of the debtor. In order for a record lien to be released from the property, the bankruptcy court must enter an order releasing the property from specific liens and transferring such liens to the proceeds of sale.

Where property is being conveyed by a bankruptcy debtor in possession or bankruptcy trustee, the underwriter should require:

BankrRelease Receipt of copy of Order of Bankruptcy Court releasing insured premises from any liens and transferring the liens to proceeds of sale.

7. Deeds of Trust

A deed of trust or mortgage secured by property held in the bankruptcy estate survives the bankruptcy and remains a lien on the property. The underwriter should not remove an exception for deeds of trust on the basis that the bankruptcy has discharged the deeds of trust. Instead, the underwriter should require an order (**BankrRelease**) which avoids the lien of the deed of trust or mortgage or which transfers the lien to the proceeds of sale.

8. Exemptions

For the protection of the debtor, certain property is exempt under state law from the claims of creditors. *See* **JUDGMENTS** herein. For title insurance purposes, the exemption that is most commonly at issue is the right of the debtor to exempt his personal residence.

An issue which must be resolved in each state is whether an order by the bankruptcy court avoiding liens to the extent of the debtor's exemption avoids the lien permanently, or whether the exemption ceases if use of the property as a personal residence ceases or if the property is sold, so that the judgment creditor can enforce his judgment lien. This issue is resolved differently by the federal Courts of Appeal in different circuits, and must be researched for each jurisdiction. *See* the **Homesteads** section of the ***State Supplement***, if applicable.

9. Effect of Divorce

Any property received by the bankruptcy debtor within 180 days of the filing of the bankruptcy petition becomes the property of the bankruptcy estate. This would include property which vests in the debtor by reason of the divorce of the debtor and his/her spouse.

10. Bankruptcy Terminology

See “Glossary of Underwriting Terms”

11. AN INDIVIDUAL SELLER IN BANKRUPTCY

By Denise Bryant
Appeared in *North Carolina Lawyers Weekly* January 25, 1999

12. Bankruptcy and Judgment Liens: Traps for the Unwary

By Steve Brown

I. Bonds

The financing of commercial transactions through the issuance of bonds is an important title insurance underwriting concern. Contact Corporate Legal and Underwriting Services for underwriting assistance if bond financing is present in the transaction to be insured.

After **express** authorization from Corporate Legal and Underwriting Services or a staff attorney, the following requirement may be used:

Bond Receipt of satisfactory opinion letter from bond counsel confirming the issuance of the bonds has been duly authorized and that the bonds are valid and enforceable.

A Company staff attorney **must** review the opinion letter from bond counsel in order to determine if the **Bond** requirement is satisfied.

J. Building Setback Lines

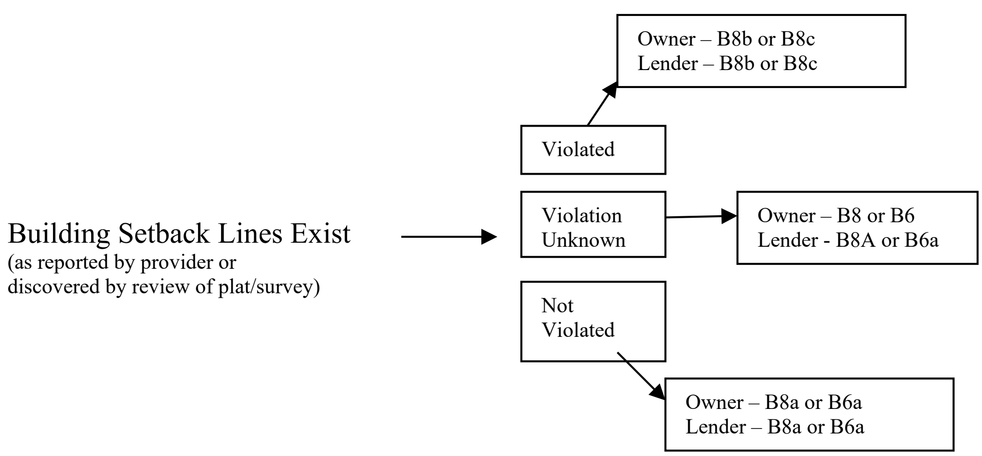
Building setback lines mark those areas on a designated property in which no building or integral part thereof may be erected. They are created to maintain property values by establishing uniform development within a neighborhood. They are considered to be and treated as restrictive covenants and are designated on a plat of subdivision in several ways, generally either by lines marked on the plat as building setback lines or by a statement on the plat that building setback lines shall be of a designated depth.

In construing building setback line provisions, bay windows, chimneys, enclosed porches and other permanent appendages shall be considered as an integral part of the building and not entitled to tolerance unless the building restriction line provisions definitely show a contrary intent. Open porches, stoops and terraces shall not be considered a violation of a setback line unless the building restrictions so indicate. Any reasonable violation of the setback line by eaves and cornices shall be considered *de minimis* and disregarded. However, if eaves and cornices violate the setback line to such extent as to materially obstruct light, view, or air, of or to the adjoining premises, such violation should be excepted in accordance with the requirements applicable to any integral part of the building.

1. Underwriting

When building setback lines have been reported/discovered in relation to restrictive covenants and excepted to under an appropriate restrictive covenants exception, no additional exceptions are necessary (See Restrictive Covenants herein).

When building setback lines are reported by the provider or are discovered by review of the plat or survey and have not already been excepted to under Restrictive Covenant underwriting guidelines, certain exceptions must be made depending on the circumstances involved. The underwriter/examiner must review any plats and/or surveys, if provided, to ascertain the existence of a violation and proceed accordingly. Below are general guidelines to follow:



Exceptions for building setback lines found on a plat (see guidelines above):

B8a Building setback line of ^ feet from ^ [*location*], as shown on the recorded plat of subdivision, which setback has not been violated.

B8 Building setback line of ^ feet from ^ as shown on the recorded plat of subdivision.

B8b Building setback line of ^ feet from ^ [*location*], as shown on the recorded plat of subdivision, which setback has been violated.

Exceptions for building setback lines found on a survey (see guidelines above):

B6a Building setback line as shown on plat of survey by ^ [*name of surveyor*], [RLS][PLS], dated ^ which setback has not been violated.

B6 Building setback line of ^ feet from ^ as shown on plat of survey by ^ [*name of surveyor*], [RLS][PLS], dated ^.

B8c Building setback line of ^ feet from ^ [*location*] as shown on the recorded plat of subdivision, which setback has been violated to the extent shown on plat of survey by ^ [*name of surveyor*], [RLS][PLS], dated ^.

2. Violations

De minimis violations are violations that are minimal, small or negligible. If a plat shows a violation of two percent (2%) or less, the loan and owner policy may be issued insuring that the building restriction line has not been violated.

To determine the insurability of violated building setback lines, consider the following factors:

1. Violations by other lot owners to show "unclean hands;"
2. Whether the violating structure is newly constructed or the number of years the structure has been constructed;
3. The degree of violation. If the violation is less than ten percent (10%), the loan policy may be issued giving affirmative coverage; the owner policy must take exception to the violation unless the Home Office grants approval. If the violation is greater than ten percent (10%), call the Home Office for approval to grant affirmative coverage.

Where the Company cannot insure the violation, curative actions may be taken to correct the violation (and always obtain Home Office approval):

1. Waivers can be signed by adjoining lot owners which run to heirs and assigns and are recorded;
2. Variances can be signed by the developer, if developer reserved the right to make such variances;
3. An indemnity agreement can be obtained from the current owner or builder;
4. An amendment to the plat can change the setback requirement.

Where an owner demands coverage to patio, deck, or garage encroachments into setback lines, the Company may agree, in the case of minor violations or violations which have existed for long periods of time to insure against forced removal of the encroaching structure or other loss, but <u>not</u> against loss arising from the unmarketability of title. In these cases, either of the following affirmative assurances can be included in the owner's policy:

BSLMark Building setback line(s) as shown on recorded plat. This policy insures that said building setback lines have not been violated except as to the ^ setback provision and that said violation or a future violation of said building setback line will not cause a forfeiture or reversion of Title. This policy insures against loss or damage which the insured may sustain by reason of said defect provided, however, that with respect to said defect the offer of any [*name of state*] licensed title insurance company to insure the Land at its regular rates in the manner set forth above shall be conclusive evidence of the marketability of the Title hereby insured. The Company agrees that upon request of any mortgagee or vendee of the insured (or the mortgagee of such vendee) it will issue its policy containing the same affirmative coverage set forth above, but subject to the same condition.

B13 As to such violation, this policy insures against loss or damage by reason thereof except such as may be occasioned by the refusal of a contract purchaser to take Title.

3. Health Department Setback Lines

Setback lines established by the county health department are excluded from coverage under the pre-printed exclusion for governmental ordinances and regulations. Therefore, health department setbacks do not need to be noted on the policy.

Where a health department setback is violated as shown on plat of survey, ordinarily, there should still be no exception taken because of the pre-printed exclusions from coverage on the loan and owner policy. If, however, a lender requires affirmative coverage and it is appropriate to give such coverage to be competitive, the underwriter must first determine insurability to use the following exception (with Home Office approval):

HealthSBVio Health Department setback line of ^ feet from ^ [*location*] as shown on plat of survey by ^ [*name of surveyor*], [RLS][PLS], dated ^, which setback has been violated. However, this policy insured against loss or damage which the insured may sustain on account of said violation.

K. Cemetery

1. Generally

Cemetery property law is governed by statutes and common law in each state.

Generally, land used for a cemetery purpose continues indefinitely unless specific statutory guidelines are met. If state specific information exists, *see* ***State Supplement***.

2. Purchase of Cemetery

In some instances, Investors Title may be asked to insure a purchase of a cemetery. If so, the following exceptions will apply:

C4 Any and all right, title, and interest resulting from (a) the interment of human remains or (b) certificates of ownership, options to purchase, deeds, contracts for the sale of or other agreements relating to the past or future burial of human remains in, on or in anywise located within the boundaries of the Land, whether of record or not, and the rights of interested parties in the existing and future interment of human remains, including but not limited to rights of ingress, egress and regress over and across the Land for all lawful purposes, including, but not limited to, the visitation, maintenance and/or decoration of such burial sites.

C5 All rules, regulations and laws governing the operation of ^ [*name of cemetery*] and the Land including those laws of the State of ^ [*name of state*] governing the operation of cemeteries and cemetery companies including, but not limited to ^ [*code section of applicable state law*] and any failure to comply with said rules, regulations and laws.

3. Underwriting

Where a cemetery is reported by the examiner or shown on the plat of survey, the policy must take exception to the cemetery, together with rights of access to the cemetery:

X10 Title to that portion of the Land within the bounds of burial grounds, together with right of ingress and egress thereto.

OR

X11 Right of ingress and egress to burial grounds.

If the cemetery has been reserved or excepted to in an instrument in the chain of title:

C1 Title to that portion of the Land within the bounds of the cemetery reserved in instrument recorded in Book ^ at Page ^, together with the rights of ingress and egress thereto.

If the existence of a cemetery is revealed by a plat of survey, but no reference thereto appears in the chain of title:

C2 Title to that portion of the Land within the bounds of any cemetery(ies) shown on plat of survey by ^ [*name of surveyor*], [RLS][PLS], dated ^, together with rights of ingress and egress thereto.

If a cemetery exists on property in the vicinity of the land to be insured and it appears that said land is burdened by a right of access to the cemetery:

C3 Right of ingress and egress to the cemetery situate on property adjoining the Land on the ^ [*location*].

In order to delete an exception for a cemetery, the cemetery itself will have to be relocated. This will rarely occur; instead, the developers usually fence around the cemetery and the legal description excludes that fenced area. If the legal description does not exclude that area, then the policy must except to the cemetery (using one of the above exceptions).

Moving a cemetery is a very expensive, very political and very complicated procedure. An examiner must certify title back to the origin of the cemetery, where:

1. Deeds for plots have been conveyed to owner's subject to rules and regulations for maintenance of the cemetery, and to the rights of others; or
2. An entity owns every plot in the cemetery and merely "leases" a plot in perpetuity (forever) to the occupant.

Once the ownership interests and other interested parties have been determined, then a developer who has decided to relocate a cemetery would follow disinterment proceedings, if any, prescribed by statute.

L. Civil Actions

A pending civil action is not a lien against the real property owned by the defendant therein, unless a notice of *lis pendens* is filed. *Lis pendens* is a Latin term, meaning "pending litigation" and is notice to the world that the property it describes is the subject of litigation which is not yet concluded. When the lawsuit is concluded, and if a judgment is entered against the defendant, the judgment attaches to the real property and its attachment relates back to the date of the filing of the notice of *lis pendens*.

If there is a notice of *lis pendens* on record, make the following requirement:

LisPend1 Release of record of lis pendens ^. [*In blank, identify case number or other identifying factor.*]

If the *lis pendens* remains of record, make the following exception:

LisPend2 Subject to lis pendens ^. [*In blank, identify case number or other identifying factor.*]

M. Co-Insurance

1. Between Two Title Companies

Where an examiner or client requests policies of co-insurance, one policy from Investors Title and the second from another company, these can be structured in two ways:

1. Where both policies are to insure all risks, each policy is issued in an amount equal to one-half (1/2) of the policy limits, either the property value or the amount of the mortgage or deed of trust. Any claims paid out under these policies would be shared pro-rata by the title companies.
2. Where one policy makes exception for a risk or risks that the other insures in full, then each policy must be issued for the full amount of the policy limits because as to that one risk or risks, one company will be fully and solely liable for any claims arising therefrom.

The policies must contain mirror language that reads substantially as follows:

Coins1 All title risks which are otherwise covered by this policy shall be compensable pro-rata with ^ Title Insurance Company under their policy no. ^, except for that title risk shown as exception no. ^ in Schedule B, Part I of policy no. ^ of ^ Title Insurance Company, for which ^ Title Insurance Company shall have sole liability.

It is recommended that commitments for both policies from both title insurance companies be issued, so that each company can have the opportunity to review the other's policies.

An indication that the transaction will involve policies of co-insurance, one policy from Investors Title and the second from another company, will be the request for ALTA 23-06 Endorsement or its equivalent in your market area *(see **Endorsements Manual** and/or **State Supplement** for further guidance)*. Call the Home Office for assistance.

N. Condemnation Proceeding

1. Generally

Eminent domain is defined as the power vested in the government or other sovereign to take the private property of an individual without their consent, but with payment to them of fair compensation in order to put the property to use for a public purpose. It is a power which state, local and federal governments may exercise, subject only that a just compensation must be paid to the owner and that due process be complied with.

Condemnation proceedings are the statutory mechanisms employed by the government to acquire the property of an individual. The provisions of condemnation statutes will vary between jurisdictions, and may vary within a jurisdiction between different kinds of property.

Several questions of fact and law are raised in the context of condemnation proceedings and, over the years, each of these issues has been the subject of extensive litigation. These include the questions of:

1. What constitutes fair compensation;
2. Whether the use to be made of the property constitutes a "public use;" and
3. Whether the entire fee title or merely an easement is to be appropriated.

2. Fair Compensation

The present market value of the property at the time that the condemnation proceeding is instituted or the property is taken is generally the measure of compensation for the taking of land or any interest in land. Fair market value is hypothetically the sum which a willing seller and purchaser would agree to as a purchase price for the property.

3. Public Use

To be a "public use" and justify the taking of private property, the use must be by or for the government or for the benefit of the general public, or a portion of the general public, and not for use by particular individuals.

4. Fee Title or Easement

The question of whether the entire fee simple estate or only an easement is necessary for the public use and is thereby appropriated through the condemnation proceeding is a particularly significant one upon a change or abandonment of the public use. Where the public use is changed or abandoned, and the government had acquired the fee estate, the government can then dispose of the property without concern about any rights of the former owner. If, however, only an easement was condemned, the title to the underlying fee remains in the landowner or his successor in interest, and when the public use is changed or abandoned, the landowner or his successor may have rights to re-acquire the easement.

5. Inverse Condemnation

Inverse condemnation is a doctrine available in some jurisdictions that allows a landowner to bring an action claiming compensation for property which they allege has been "taken" by a government entity, although no condemnation proceeding has been instituted by the government. The landowner must prove an actual interference with or disturbance of their property rights, and show that the government has entered upon their private property for a period of time, and by its authority has devoted the property to a public use, or otherwise appropriated or affected it in such a way as to deprive them of all beneficial enjoyment thereof.

6. Underwriting

When asked to insure the government entity performing the condemnation, use the following requirement:

Condemn1 As to the condemnation proceedings, the Company must receive:

(a) Receipt of certification that the condemnation proceeding was appropriately completed;
(b) Certification that all parties with an interest in the Land were properly served with notice of the action;
(c) Certification that compensation has in fact been paid to the condemned Land owner; and
(d) If thirty (30) days has not elapsed from the issuance of the Order for Judgment, certification that the thirty (30) day period has run and no appeal has been filed as of the expiration of the statutory appeal period.

For the final policy, verify that the appeal period has run from the issuance of the order for judgment; make no exception if all requirements are met. If said appeal period has NOT elapsed, make the following exception:

Condemn2 All right, title and interest of any person appealing for the Order for Judgment entered the ^ day of ^, ^, and filed for record in Book ^ at Page ^.

NOTE: This exception will be removed upon certification that there has been no appeal filed within the statutory appeal period.

If a recorded notice of a taking or other governmental action is reported in the chain of title, the notice and applicable recording information must appear as an exception under Schedule B of the commitment and policy.

Examples of a typical exception include:

- Condemnation proceeding filed in ^. *[In blank, insert recording information, identifying case number or other identifying factors.]*
- Rights of the applicable governmental authority arising out of that condemnation proceeding filed in ^. *[In blank, insert identifying case number or other identifying factors.]*

7. Unusual or Extra Hazardous Risk and Reinsurance Alert

In cases where a policy is insuring over an unusual risk (*i.e.*, "Title being dependent upon a present or past governmental legislation or condemnation, other than a federal or state patent, purporting to alienate or vest interest to be insured") and coverage is in excess of $7.5 million, the underwriter **must** advise the Home Office before issuing a commitment or policy.

O. Condominiums, Townhouses, PUDS, Cooperatives, and Timeshares

1. Condominiums

The concept of property ownership inherent in the condominium, that is, the right to own and convey individual units within a building, is created and defined by state statute. The statutes govern and prescribe the method by which condominiums are to be established and the respective rights of unit owners in the condominium. Condominiums must be part of a planned condominium development so that the spatial rights of the units of the buildings can be established.

Usually, the statute sets forth guidelines and requirements governing the recordation and contents of the condominium development declaration, the bylaws and the building plans that describe the condominium development. The title examiner must determine that the statutory requirements are met. If they are not, and if any of the formative documents of a condominium are defective, the ownership rights of the unit owners may be impaired or defeated.

Briefly, the declaration must include a description of the property containing the buildings and improvements; a description of the building setting forth the number of units, stories and principal construction materials; a description of the general common areas and facilities and the proportionate interests of each unit owner in them; and a description of any limited common areas, along with a statement as to which units will share them and in what proportion. Restrictions as to use of the building and units may be included, as well as provisions for amendment to the declaration. Therefore, an accompanying survey is not required with the title application to provide survey coverage.

Generally, the by-laws must contain the form of administration and governance; provisions for maintenance and replacement of common areas and facilities; and the method of collection of unit ownership shares of common expenses. The building plan, which is recorded, must be a full and exact copy of the plan of the building, showing the layout, location, ceiling and floor elevations; the unit numbers and dimensions; the area and location of the common areas; and the name of the building. The plan must bear the verified statement of a registered architect or professional engineer (P.E.) and must meet specific size and detail requirements to be recorded.

In a condominium, the owner buys only the interior space in the unit and rights in the common areas, but they do not own the entire building in which their unit is located, and the owner does not own individually any of the land on which the condominium building sits.

2. Townhouses

A townhouse is not a special form of ownership, as is a condominium. The term "townhouse" is merely an architectural term which indicates a type of dwelling structure usually characterized by party walls between units. In a townhouse, the owner buys a traditional fee simple interest in the entire dwelling and the land on which their townhouse sits.

While a condominium must, by definition, be part of a planned development, townhouses need not be. Townhouses are not governed by specific statutory requirements in the same manner that condominiums are; however, they are typically set up in similar fashion. A declaration is usually recorded for townhouse developments although none is required. The townhouse declaration will describe the property within the development, the townhouse units, establish the respective rights among the unit owners in the common areas, state the owner's respective duties for payment of assessments, and set out the restrictive covenants on uses of the units. In addition, matters of governance of the development, including establishment of an owners' association, collection of common expenses, and general maintenance may be contained in the declaration. A recorded plat establishes the units, roads, and rights of way for the development.

Often, the restrictive covenants of a townhouse development create a "blanket" easement for patios, driveways, or other encroachments from one townhouse lot to another, or the restrictive covenants define such encroachments as "limited" common areas and award exclusive possessory rights to the owner of the encroaching structure. Where such an easement or limited common area is established for encroachments, no exception would be taken for the encroachment in a policy, because the policy already takes exception for the restrictive covenants where the easement or limited common area is defined.

3. Planned Unit Developments or PUDs

The term "planned unit development" ("PUD") is a regulatory term, one used by government enterprises, such as FNMA, to describe a property that possesses certain characteristics, including, but not limited to:

1. Areas of common ownership, particularly amenities such as swimming pools, tennis courts, clubhouses, etc.;
2. A homeowners' or property owners' association endowed with authority to govern the development as well as the right to levy assessments;
3. Restrictive covenants defining the use to be made of the property in the development; and
4. Easements and cross-easements for the benefit of all lot owners.

As discussed above, a condominium must be part of a planned development in order to comply with the statutes governing its creation. A townhouse need not be built as part of a planned development, but they typically are.

If a development has some, but not all of the characteristics of a PUD, it may sometimes be referred to as a "*de minimis*" PUD.

4. Cooperatives

Cooperatives, more commonly known as "co-ops," are more commonly found in the northeastern part of the country. The concept of ownership is statutorily defined, as in a condominium, and very complex. Basically, a cooperative is established when a corporation purchases and owns an apartment building, and shares of the corporation are issued based on the number of apartments in the building. Each apartment owner receives his pro-rata number of shares and a proprietary lease for the apartment.

An owner's policy is issued insuring the leasehold interest of the apartment "owner" and a loan policy is issued if there is a mortgage in place. Mortgages against co-op units are unusual in that they are secured not by the unit itself, but by the shares of stock which have been issued to the apartment "owner."

Click here for sample Loan Policy and Owner's Policy.

P. Corporations

1. Corporate Deeds

A proper corporate deed is signed by a president or vice president, attested (or witnessed) by a secretary or assistant secretary, and affixed with a corporate seal as follows:

	ABC Corporation, Inc.
[CORPORATE SEAL]	By: __________________ John Jones, President
Attested by: ______________________ Sue Smith, Secretary	

If state law requires that a corporate deed be attested (*see* ***State Supplement***) then the above example should be followed.

If a foreign corporation is doing business in a state that requires seals and the corporation's home state does not require seals, check with the Home Office or *see* ***State Supplement***.

If state law requires a corporate seal for corporate deeds (*see* ***State Supplement***), the following requirement may be used in the title commitment, as applicable:

CorpSeaR Execution of the corporate deed must be under corporate seal.

If **CorpSeaR** is not met, the following exception may be used in order to issue the Loan or Owner's Policy:

CorpSealE This policy does not insure against loss or damage due to the lack of a corporate seal on the deed.

2. Authority of Individual to Execute Documents on Behalf of a Corporation

Officers of a corporation have no authority to convey or encumber property of the corporation merely by virtue of their office. The officer must be authorized by the corporate charter or bylaws to convey or encumber corporate real property or be directed to do so by a board of directors' resolution. A corporate resolution is a brief statement of authority signed by a corporation's board of directors empowering the corporation's officers to act. Typically, a corporate resolution is not required where the transaction is in the ordinary course of business however, the individual executing a deed or security instrument on behalf of the corporation must still have the authority to bind the corporation. If a corporation is selling all or substantially all of its assets, other than in the ordinary course of business, then it may be necessary to obtain shareholder approval of the transaction.

3. Corporate Standing

A corporation is a legal entity created by or under state law. The law treats a corporation as an artificial person with an unlimited life that can sue and be sued. The corporation comes into existence by filing articles of incorporation and by adopting bylaws which govern the operation of the corporation. As a creature of statute, a corporation may cease to exist if it fails to follow the statutes under which it is created. In most states, a corporation is required to pay an annual fee and to file annual reports with the state. Failure to pay or file may result in an administrative dissolution. Additionally, the shareholders of a corporation may choose to voluntarily dissolve a corporation and wind up its affairs. Either type of dissolution effectively terminates the life of the corporation. In order to continue to do business, a dissolved corporation must be reinstated in the state in which it is domiciled. If a dissolved corporation is selling property in order to wind up its affairs, and the corporation does not wish to do business as a functional corporation, please contact the home office for further direction.

It is also important to verify that a corporation was in existence at the time it took title to property. This is accomplished by comparing the date of the deed to the date of incorporation. A deed into a nonexistent corporation may be held void. If the deed date is prior to the date of incorporation, please contact the home office for further guidance.

4. Foreign Corporations

A foreign corporation is a corporation established under the laws of a state other than the state in which it wishes to do business. As such, a foreign corporation must qualify to do business in states other than its domicile state. This is typically accomplished by registering as a foreign corporation with the state's Secretary of State or the state corporation commission. For federal law, a foreign corporation is one which is not organized under the laws of one of the states or territories of the United States.

5. Incorrect Notary Acknowledgment

Where the execution of a corporate deed is proper, but the acknowledgment of that execution is defective, recordation of such a deed is not valid and does not constitute public notice. The risk is not as between the corporate grantor and grantee because the deed is still effective as a contract. The risk is that the corporate grantor will re-convey the property and start another chain of title. Wherever possible, the acknowledgment and corporate deed should be corrected. If correction is not possible, evidence of possession, use and consideration paid will all be reviewed to determine insurability.

6. Merger, Consolidation or Name Change

Often, corporations have changed their name, or merged or consolidated with other corporations, and no record of these transactions appear. Where such internal transactions of a corporation affect record title, inquire as to whether a memorandum of these transactions can be put on record.

7. Corporate Power of Attorney

A corporation can act through an attorney-in-fact (AIF). When a conveyance of real property owned by a corporation is executed by an AIF, the following guidelines are recommended:

1. The power of attorney must be examined to ascertain the authority of the AIF to bind the corporation and to determine if the board of directors has the capacity to delegate the duties to the AIF.

2. The power of attorney should give the AIF specific authority to enter into and execute contracts, deeds or other documents necessary to effectuate a sale and conveyance of real property and to accept closing proceeds.
3. The power of attorney must be executed in proper corporate form and recorded in the county where the real property is located.
4. A certified copy of the corporate resolution should be attached to and recorded with the power of attorney.
5. The notary acknowledgment which follows the deed being executed by the corporate AIF:

State of ^
County of ^

I, I, ^, a Notary Public of the State and County aforesaid, do hereby certify that ^, attorney-in-fact for ^, a ^ corporation, personally appeared before me this day, and being by me duly sworn, says that he executed the foregoing and annexed instrument for and in behalf of and as the act of ^, a ^ corporation, and that his authority to execute and acknowledge said instrument is contained in an instrument duly executed, acknowledged, and recorded in the office of the Register of Deeds [*Clerk of Courts, or other*] of ^ County, [*state*], on the ^ day of ^, ^ [*year*], in Book ^, Page ^, and that this instrument was executed under and by virtue of the authority given by said instrument granting him power of attorney; that the said ^ acknowledged the due execution of the foregoing and annexed instrument for the purposes therein expressed, for and in behalf of and as the act of the said ^, a ^ corporation.

WITNESS my hand and official stamp or seal, this ^ day of ^, ^ [*year*].

____
Notary Public
My commission expires: ______________________

8. Underwriting

When insuring transactions involving a corporation, you must verify that the corporation is in good standing in its domicile state, that if applicable it is a validly registered foreign corporation and that the party executing the documents has the authority to bind the corporation. If an attorney is certifying title to the property and acting as the settlement agent, no requirement is needed. However, if an attorney is certifying title to the property but another party is acting as the settlement agent or a title exam, not a title opinion is being relied upon when underwriting, make the following requirement:

CORP1 We must be furnished with satisfactory evidence that ^ is a corporation in good standing in the (State/Commonwealth of ^); a copy of the articles of incorporation and bylaws, or a resolution of the Board of Directors authorizing the proposed transaction and identifying the individual authorized to execute the applicable documents; and a Shareholder resolution authorizing the transaction where the property constitutes all or substantially all of the corporation's assets.

NOTE: Upon receipt and review of the above items, the Company may make additional requirements or exceptions.

If the transaction is in the ordinary course of business for the corporations, make the following requirement:

CORP2 We must be furnished with satisfactory evidence that ^ is a corporation in good standing in the (State/Commonwealth of ^); and a Shareholder resolution authorizing the transaction where the property constitutes all or substantially all of the corporation's assets.

NOTE: Upon receipt and review of the above items, the Company may make additional requirements or exceptions.

If a corporation involved in the transaction is not incorporated in the state in which the property is located, make the following requirement:

FORCORP We must be furnished with satisfactory evidence that ^ is a foreign corporation authorized to do business in the (State/Commonwealth of ^.)

If it is determined that the corporation is not in good standing, make the following requirement:

RECORP The corporate charter of ^ has been forfeited or administratively dissolved. We must be furnished satisfactory evidence that the charter has been reinstated and that ^ is in good standing.

NOTE: Upon receipt and review of the above items, the Company may make additional requirements or exceptions.

If a dissolved corporation is selling property in order to wind up its affairs, and the corporation does not wish to do business as a functional corporation (reinstate its corporate charter), please contact the home office for further direction.

If the corporate resolution or articles of incorporation and bylaws are not furnished, the following exception shall be made in order to be able to issue the final mortgagee and/or owner's policy:

CorpAffC This Policy does not insure against loss or damage the insured would sustain due to the corporation not being validly incorporated under state law or the lack of authority of the signatories purporting to pledge or encumber the Land described in Schedule A.

Q. Corporate Review of Large Dollar Transactions

For certain large dollar transactions, additional review is required by the applicable Corporate Legal Division prior to the issuance of the commitment and/or policies. These transactions include:

1. Over-the-Limit authorizations;
2. Construction transactions in excess of $3 million;
3. Reinsurance.

For each of these categories, specific forms must be submitted to make the appropriate risk assessment. Please refer to the specific sections below to determine which form(s) will be required for approval of the transaction by the Company. All forms referred to in this section can be found in the ***Forms Manual***.

1. Over-the-Limit Authorization Form

When a transaction exceeds the underwriting authorization amount as established by the Company, the Over-the-Limit Underwriting Authorization Form must be submitted to the applicable Corporate Legal Division assigned to the State where the property is located.

The Issuing Office must include all of the following items when submitting the Over-the-Limit Authorization Form to prevent a delay in the review of the transaction:

1. Completed Over-the-Limit Underwriting Authorization Form accurately reflecting the type of transaction and current use/possession of the property.
2. Proposed Commitment of Title Insurance;
3. Copies of any applicable Endorsements; and
4. Copies of the Title Work (title exam or title opinion) utilized when underwriting the transaction.

After a review of the submitted information, the Issuing Office will receive a signed Over-the-Limit Underwriting Authorization Form. The form will either instruct the Issuing Office to issue the Commitment as is, or provide instructions on what needs to be altered prior to issuing the Commitment.

After an initial review and approval, a revised commitment does not need to be resubmitted for further review and re-approval UNLESS any of the following types of modifications are made to the Commitment following initial approval, the revised Commitment:

1. A proposed policy amount increases by more than $500,000; OR the increase results in a proposed policy amount exceeding any of the following:
   (a) $3,000,000 (requires second review and approval)
   (b) $5,000,000 (“No New Survey Coverage” no longer available for lenders)
   (c) $12,500,000 (Reinsurance Notification required)
   (d) $25,000,000 (reinsurance review and approval needed)
2. Change in the Seller, Buyer and/or Borrower for any reason other than an assignment of a purchase contract; and/or change in type of entity for the Seller, Buyer and/or Borrower (i.e. the Buyer was originally an individual but his LLC will be taking title pursuant to an Assignment);
3. Addition of property to be insured;

4. Any changes in the nature of the transaction (i.e. the loan is now a construction loan);
5. Deletion of exceptions or request for affirmative coverage; and
6. Addition of, or modification to, endorsements.

If the transaction changes and the underwriter is not sure if the change falls into one of the above categories and requires further review and re-approval, contact the applicable Corporate Legal Division for assistance.

2. *Mechanics Lien Risk Assessment*

The Mechanics Lien Risk Assessment Form must be submitted to the applicable Corporate Legal Division assigned to the State where the property is located on all construction transactions that are in excess of $3 million.

The Issuing Office must include all of the following items when utilizing the Mechanics Lien Risk Assessment Form to prevent a delay in the review of the transaction:

1. Completed Over-the-Limit Underwriting Authorization Form;
2. Completed Mechanics Lien Risk Assessment Form (the form can be found here);
3. Proposed Commitment of Title Insurance;
4. Copies of any applicable Endorsements; and
5. Copies of the title work (title exam or title opinion) that was used when underwriting the transaction.

After a review of the submitted information, the Issuing Office will receive a signed Over-the-Limit Underwriting Authorization Form. The Form will either instruct the Issuing Office to issue the Commitment as is, or provide instructions on what needs to be altered prior to issuing the Commitment.

After an initial review and approval, a revised commitment does not need to be resubmitted for further review and re-approval UNLESS any of the following types of modifications are made to the Commitment following initial approval, the revised Commitment:

1. A proposed policy amount increases by more than $500,000; OR the increase results in a proposed policy amount exceeding any of the following:
   (e) $3,000,000 (requires second review and approval)
   (f) $5,000,000 (“No New Survey Coverage” no longer available for lenders)
   (g) $12,500,000 (Reinsurance Notification required)
   (h) $25,000,000 (reinsurance review and approval needed)
2. Change in the Seller, Buyer and/or Borrower for any reason other than an assignment of a purchase contract; and/or change in type of entity for the Seller, Buyer and/or Borrower (i.e. the Buyer was originally an individual but his LLC will be taking title pursuant to an Assignment);
3. Addition of property to be insured;
4. Any changes in the nature of the transaction (i.e. the loan is now a construction loan);
5. Deletion of exceptions or request for; and
6. Addition of, or modification to, endorsements.

The use of the Risk Assessment for Construction Loan worksheet is in addition to the existing underwriting guidelines that are currently in place. The Risk Assessment for Construction Loan worksheet must be completed by the submitting underwriter. The worksheet is not to be completed by any other party to the transaction. Oftentimes, the receipt of a "loan approval summary" from the lender could provide the submitting underwriter with useful information when completing the Risk Assessment for Construction Loan worksheet.

The following applies to NC Issuing Offices only: The NC Issuing Office will not be obtaining or submitting the Mechanics Lien Risk Assessment Form. The reviewer of the Over-the-Limit transaction will be obtaining this information.

3. Reinsurance

Investors Title Company has set its reinsurance limits so that we can issue our policies in an amount up to $25 million and have that amount reinsured automatically, provided there is no extra-hazardous risk involved. All transactions in excess of $25 million require the Company to obtain written confirmation from the Reinsurer approving the transaction.

Because the approval process for a transaction requiring reinsurance may take longer than the typical Over-the-Limit review, it is the issuing office's responsibility to provide prompt notification about projects which will require reinsurance.

The Issuing Office must include all of the following items for any transaction that involves reinsurance to prevent a delay in the review of the transaction by the applicable Corporate Legal Division assigned to the State where the property is located:

1. Completed Over-the-Limit Underwriting Authorization Form;
2. Proposed Commitment of Title Insurance and/or Pro-Form Policies;
3. Copies of any applicable Endorsements; and
4. Copies of the title work (title exam or title opinion) that were utilized when underwriting the transaction.

The Commitment and corresponding Endorsements may not be released to the proposed insured until the issuing office has received written authorization from the applicable Corporate Legal Division assigned to the State where the property is located.

If any of the following types of modifications are made to the Commitment following initial approval, the revised Commitment must be re-submitted for review and approval and possible resubmission to the Reinsurance Company for review and approval:

1. Increases in coverage amount;
2. Changes in the amount of premium being charged;
3. Addition of or change to the insured parties and/or the collateral being secured by the loan;
4. Deletion of exceptions or providing affirmative coverage for any unusual or extra hazardous risk; and
5. Addition of or modification to endorsements.

Investors Title Reinsurance Counsel will utilize the information provided by the issuing office and provide it to the reinsurance participants. Investors Title Finance Department will use the same information to provide reinsurance participants with copies of commitments, final policies and endorsements.

A copy of the completed Over-the-Limit Underwriting Authorization Form and/or Reinsurance approval must be kept in the issuing office’s file.

R. Correction Instruments

Any instrument, deed or deed of trust, can be designated as a "correction" instrument, for a variety of reasons, and signed by the original parties. Depending upon the nature of the corrections, the priority of such correction instruments may either be the same as the date/time of the recording of the original instrument, or may only be effective as of the date/time of the correction instrument. For example, if the correction relates to an insignificant term or provision of the instrument (*i.e.*, middle initial, zip code, maturity date) then the original filing of the instrument will control. If, however, the correction is relative to the legal description, signature, acknowledgment, or other essential element to the validity of the instrument, then the original filing was likely so defective as to be invalid, and the corrected filing will be the effective date and time.

S. Crop Allotment

Crop allotments "run with the land" in the sense that the buyer and seller must agree in writing to not sell the allotment and must comply with the requirements of the state agricultural office in order to <u>not</u> convey the crop allotment. Without this affirmative action on the part of the buyer and seller, crop allotments are conveyed with property.

Accordingly, where a deed recites or an examiner reports that a crop allotment is withheld or is not conveyed, there must be an exception in the policy for the crop allotments that are withheld by the seller:

CropWith Crop allotments withheld by grantor in Book ^ at Page ^.

T. Curative Statutes

Curative statutes are enacted by state legislatures to validate certain matters regarding probate and recordation, which would otherwise be incorrect, such as the omission of a notary seal or a corporate seal and, therefore, render the deed ineffective as a transfer or conveyance of land. Typically, the curative statute is effective only as to instruments recorded on or before a certain date. *See* ***State Supplement***.

U. Deeds

Typically, in order for a conveyance of real property to be valid, it must be evidenced by an instrument in writing, signed by the grantor or his authorized agent, sealed and delivered. The great majority of conveyances in a chain of title are usually by deed.

Under common law, the essential elements of a valid deed are:

1. A competent grantor
   Beyond properly identifying the grantor and his or her marital status, the examiner must be concerned about the competence and capacity of the grantor; that is, whether he is a minor or mentally incompetent, or if a corporate grantor, partnership, personal representative or trustee, whether such party has authority to convey. The names of the parties need not be complete as long as they are clearly identified;
2. A grantee capable of holding title to land
   A validly chartered corporation, a legally-recognized partnership or trust, individuals whether minors or incompetents. The names of the parties need not be complete as long as they are clearly identified;
3. A legally sufficient description of the property
   Either by reference to recorded plat or by metes and bounds;
4. Operative words of conveyance
   Language which evidences the intent of the grantor to convey, such as "grant, bargain, sell and convey;"
5. Proper execution by the grantor
   Signed by each grantor and a seal beside each signature, if required by law;
6. Proper delivery by the grantor
   A deed passes no title unless the legal delivery of the deed, in its completed state, is perfected in the grantor's lifetime. The grantor must intend to pass title presently and part with possession of the instrument and relinquish legal control of the instrument to the grantee or to someone on the grantee's behalf; and
7. Acceptance by the grantee.

1. Requirement of Acknowledgment and Recording

A deed need not be notarized or acknowledged to be effective between the immediate grantor and grantee. But without an acknowledgment, the deed may not be validly recorded, and its attempted recordation may be ineffective against subsequent purchasers or lien creditors. *See **State Supplement***.

2. Dates and Consideration

Though the date of execution is not required to be on a deed, and its absence does not create a problem, most deeds include a date of execution. When the date appears, it creates a presumption that execution, including delivery, took place on that date. Since a deed is usually delivered after it is signed and acknowledged, it does not matter that the deed has a date after the date of the acknowledgment. Nor should it matter if a deed is dated before the dates of any of the acknowledgments, since execution of a deed may precede acknowledgment by a grantor. A question could arise as to proper delivery, if a deed were dated after the date of recordation, but such a problem will probably not be fatal. The date of recordation is the date indicated as such by the register of deeds in the recordation notation, normally imprinted on the deed by a clocking device.

The dates of execution and recordation are important with respect to gift deeds because some states require gift deeds to be recorded within a prescribed period from the date of execution in order to be valid and to effect a transfer of title. Consequently, any deed that either recites no consideration or "love and affection" as consideration, or in some other manner indicates that it was a gift deed, should be examined to determine if its recordation date is within the prescribed period of its execution date. If not, and the deed constitutes a necessary link in a chain of title, the title will fail. *See* **GIFT DEEDS** herein.

3. The Requirement of a Seal

In certain states, deeds must have a seal in order to be valid. If the deed actually has a seal attached to it, the fact that there is no recital in the deed that it bears a seal will not impair its validity. Conversely, the recital of the seal in the instrument raises a presumption that a seal was affixed to the original deed even though such does not appear on the face of the registered deed.

If a seal that purports to be the seal of the grantor is referred to in the body of the deed, it can be the seal of the grantor even though it is not on the line with the signature. A corporate seal may be a necessary prerequisite to a valid conveyance of real estate by a corporation. *See also* **CORPORATIONS** herein and *see* ***State Supplement***.

4. Gift Deeds

A gift deed is a conveyance of real property without the payment of a purchase price. Gift deeds are very common between family members. Often, the instrument will recite on its face that it is a "gift deed." But the absence of the words "gift deed" does not control; instead it is the absence of revenue stamps (or excise tax stamps) which indicates that the deed is one of gift.

The concern about a gift deed is whether the deed is presumed to be void if it fails to meet the recording requirements of a given state. For example, certain states require gift deeds to be recorded within a prescribed number of years, or the gift deed is void and does not transfer title. *See* ***State Supplement***. Consequently, a deed which is marked as a "gift deed," or recites "love and affection" as consideration paid for the transfer of title, or otherwise indicates that the conveyance is a gift, should be examined to determine if its recordation date falls within the prescribed period of its execution date.

If void, then the grantor in the gift deed still retains the property or where the grantor is dead, the heirs of the grantor in the gift deed would have inherited his interest. In order to remove the question of the heir's outstanding interest, all heirs of the grantor must quitclaim their interest to the original grantee. Then it would be necessary to address whether estate or inheritance taxes have been paid now that the property is being treated as if it had been in the estate.

As a practical matter, the failure to record a deed that has no stamps or taxes to indicate that value was paid, but which does not recite "gift deed," only raises the issue of avoidance. To determine insurability, the Company must establish:

1. If there is recited consideration in the deed beyond "mere love and affection;"
2. If there are persons who could give an affidavit that the transaction at issue was arms' length and that real consideration was exchanged;
3. Whether the title has been "quiet" since the date of the questioned deed; and

4. The length of time which has elapsed.

5. Quitclaims and Special Warranty Deeds

Under a general warranty deed, the grantor makes several "warranties" or "promises" to the grantee. These are:

1. That he is seized of the property;
2. In fee simple;
3. That he has the right to convey;
4. That there are no encumbrances on the title; and
5. That he will defend any adverse claims against the title.

In a quitclaim deed, no warranties are made. In a special warranty deed, the grantor warrants only that he has, during <u>his</u> ownership of the property, not taken any adverse action that would affect the title.

Generally, the Company prefers not to insure title from quitclaim deeds because without the warranties, the owner and therefore this Company may be prevented from suing prior owners who had conveyed poor title. The Company does occasionally insure title conveyed by a quitclaim where the quitclaim deed is used to cure some defect in the title. If an owner insists on insurance for his title that is based on a quitclaim deed, the Company may not insure marketability as to the owner.

There are certain grantors that convey real property <u>only</u> through the use of special warranty deeds. These are:

1. Relocation companies
2. Timber companies
3. Government agencies

Where the current owners/sellers of property want to use quitclaim, find out why - is there a problem in title? Advise the settlement agent or closing attorney that a warranty deed is always preferable.

6. Underwriting

If the transaction is for the purchase (new owner) of the real property, make the following requirement:

I6 Duly authorized and executed deed from ^, vesting fee simple title in ^.

If, upon receipt of the final documentation, there is a discrepancy discovered between the name of the proposed insured and the party shown as the grantee in the vesting instrument, the underwriter/examiner should immediately contact the party responsible for the closing to inform them of this discrepancy. The party closing the transaction must provide an explanation for the discrepancy or must correct the discrepancy within 60 days.

If after 60 days, the discrepancy is not resolved or corrected the following exception must be added to the policy(ies):

DeedNoCov This policy does not insure against loss or damage arising from a failure of the vesting instrument to vest Title in the Insured.

Schedule A, #3 should list the exact name in which title was vested.

When the incorrect party has executed a vesting deed the underwriter/examiner must, in addition to the exception shown above, also except to the interest of the party that has not executed the instrument. For example:

When a husband and wife are listed as the fee titleholder of the insured premises (only where title is held as tenants in common or joint tenants, not where title is held as tenants by the entirety) and one spouse executes a deed without the spouse, the underwriter/examiner must except to the interest of the spouse that did not sign the instrument with the following exception:

FeeSimpl Subject to the fee simple interest of ^.

When an LLC is the fee titleholder of the insured premises and the deed has been executed by an individual, the underwriter/examiner must utilize the appropriate exception for the situation. See the appropriate section of the '***General Underwriting Principles Manual*** (i.e., *Corporations, Partnership*s, *Limited Liability Company,* etc.) for the applicable exception.

If the transaction involves the use of a *Quitclaim Deed*, use the following exception after checking with the Home Office:

QClaim This policy does not insure against loss or damage arising from any claim of Unmarketable Title.

V. Deeds of Trust and Mortgages

1. Generally

Deeds of trust and mortgages perform the same function; that of securing the repayment of a loan with real property owned by the borrower, so that in the event the borrower does not repay the loan, or otherwise defaults, the real property can be sold to satisfy the outstanding debt. A deed of trust is a three-party instrument. The mortgagor signs the deed of trust, giving legal title to the trustee for the benefit of the mortgagee (also called the beneficiary), usually a bank, savings and loan, or mortgage company. A mortgage is a two-party instrument. In a mortgage, the mortgagor retains an equitable interest and conveys to the mortgagee directly and without a trustee.

Usually, custom in each state dictates the use of either deeds of trust or mortgages (or any other named instrument; *see* ***State Supplement***).

2. Assignments

In certain states, assignments of deeds of trust do not have to be recorded. Because the legal title rests in the trustee, the beneficial interest of the deed of trust can be transferred by giving over the actual instrument. Since no legal title is changing hands, there is no requirement that the assignment be recorded. The trustee holds legal title and is charged with knowing who holds the equitable interest. *See* ***State Supplement***.

3. Statutes of Limitation

Foreclosures under deeds of trust and mortgages are often barred after the passage of a prescribed period of time as established by statute. These vary by state (*See* ***State Supplement***). Where the deed of trust is unenforceable because of a statute of limitations, the underwriter may suggest that the fee owner execute an affidavit stating that he is the fee owner, that the deed of trust is/has been satisfied or is unenforceable because of the statute of limitations and then appoint a substitute trustee to effect cancellation.

4. Uncancelled Deed of Trust of Record

Where no statute of limitation applies for remedies for uncancelled deeds of trust, the underwriter may pursue the following curative actions:

1. Obtain canceled checks to show payment of the debt;
2. Obtain an indemnity agreement from the owner for the mortgagee's policy; or
3. Attempt to get a cancellation through substitution of trustee and trustee's cancellation for mortgagee's and owner's policy.

Call the Home Office for approval of any of these methods.

5. Request for Notice of Sale

A Request for Notice of Sale is a legal document put on record by the holder of a junior deed of trust requesting that he receive notice in the event the first or "senior" deed of trust begins foreclosure proceedings. The junior holder can then appear at the foreclosure sale and protect his interest. Without recording a Request for Notice, the junior holder would not receive notice of the foreclosure under normal proceedings of the foreclosure statute. The Request for Notice is not a part of the deed of trust and does not need to be included in

Schedule A, Item 4, or excepted to in the policy, or required as part of a cancellation or release.

6. *Assumption*

Where a purchaser of property is going to "take over" or assume the payments of an existing deed of trust, the holder of the deed of trust (the bank or mortgage company) usually releases the prior owner from liability for repayment of the debt. At closing of an assumed loan, there is no new deed of trust signed; an assumption package or agreement is executed where the purchaser agrees to "assume" the obligation of repaying the loan originally taken out by the prior owners (now the sellers). Most often this "assumption" language appears on the new deed. The lender will usually require only an endorsement to its existing loan policy to show the conveyance to the new owners. If the new owners desire title insurance, however, a new title policy will have to be issued, which of course will except to the deed of trust as well as other matters of record.

After an assumption, where the new owner has defaulted and foreclosure proceedings have been instituted, a notice of foreclosure may be served on the original mortgagor in those cases where the lender intends to seek a deficiency judgment from the original mortgagor.

7. *Adjustable Rate Mortgage - Schedule A Coverage*

Convertible ARMS are loans that begin as Adjustable Rate Mortgage loans that can be converted to Fixed Rate loans at some time predetermined by lender and borrower.

If an option to convert exists on the originally recorded deed of trust (mortgage), or by a RIDER attached thereto, and the lender DOES NOT intend to require recordation of an amendment or modification of the deed of trust when such option to convert is exercised, add the following wording to the lender's policy as a "Notation" to Schedule A, Item 3:

> NOTE: Notwithstanding the exercise of the fixed rate option, which option is exercised in accordance with the procedure set out in the insured Deed of Trust (Mortgage), this Policy continues to insure the validity and priority of said Deed of Trust (Mortgage).

If an option to convert exists on the originally recorded deed of trust (mortgage), or by a RIDER attached thereto, and the lender DOES intend to require recordation of an amendment or modification of the deed of trust when such option to convert is exercised, add the following wording to the lender's policy as a "Notation" to Schedule A, Item 3:

> NOTE: Notwithstanding the exercise of the fixed rate option, which option is exercised in accordance with the procedure set out in the insured Deed of Trust (Mortgage), this Policy continues to insure the validity and priority of said Deed of Trust (Mortgage), provided that title is brought up to date at the time of recording any modification agreement or amendment, and there are no intervening liens, defects, or objections to title of record.

Use of this language is approved when requested.

8. *Equity Line Deeds of Trust*

An equity line deed of trust secures a debt which can be accessed much the same as a checking account, so that the debt can be drawn down, then repaid partially or in full, then drawn down again, repaid again, and so on. The borrower is in control of how much of the loan amount is outstanding through account "checks" which he writes without any bank involvement.

Because the borrower holds these checks, equity lines of credit are sometimes incorrectly or wrongfully accessed <u>after</u> the intended payoff is made to the equity line lender from the closing agent and after the property which served as collateral for the debt has been conveyed. The reactivated credit line is sometimes asserted as prior to the new deed of trust of record.

The following steps are required in order to obtain timely cancellation of prior equity line deeds of trust.

1. Send a written statement on behalf of the mortgagor to the equity line lender along with the payoff check instructing the lender to mark the note and deed of trust paid and satisfied and to return both documents for cancellation of record.
2. Particular attention should be given to the necessity of timely follow up with the equity line lender, if the satisfied note and deed of trust are not received in a reasonable period of time. In all of the Company's related claims, none of the prior equity line accounts were accessed shortly after the closing and in each case the loss could have been prevented had there been a timely follow up by the examiner.

The sample "written statements" shown below may be provided upon request:

Sample #1 Letter from Seller to Closing Attorney and Lender

Re: Account No.
Deed of Trust recorded in Book ____, page _____, _____________County Registry
Property Address

I (We), the Seller of the above-described property do hereby direct, authorize and request [name of bank], my equity line lender, to close out my equity line account effective immediately. I do further agree that I have not written any checks/drafts from my equity line account since [date] and will not write any more against my equity line account. I do further agree to indemnify and hold harmless [name of law firm], the new lender, the buyer and the title insurance company for any loss as a result of my equity line being used subsequent to the date of this agreement or for checks/drafts being honored by my equity line lender despite my canceling of my equity line.

This the _____ day of _______________, _____.

_______________________________(SEAL)

Sworn to and subscribed before me this
the ____ day of ________, _____.

____
Notary Public

Sample #2 Letter from Closing Attorney to Lender

Re: Account No.
Deed of Trust recorded in Book ____, page _____, _____________County Registry
Property Address

Enclosed you will find our trust account check in the amount of $____________, representing payment in full for the above-referenced loan. Note: If this loan is an equity line, the account is to be closed and no more checks or drafts shall be accepted by you since the payoff was quoted to this firm or after receipt of this check. This is not to be construed as a payment or paydown of this account.

Please forward to our office the original Note and Deed of Trust marked "Paid in Full and Fully Satisfied," dated and signed, so that we may have the lien removed from public record.

9. *Re-Recording of Loan Documents*

Once the deed of trust is recorded and the closing package is returned to the lender, post-closing and shipping personnel of the lender scrutinize the package for compliance with instructions and may determine that the instrument must be re-recorded to correct any number of possible errors. Anytime a deed of trust is re-recorded, the priority of the deed of trust could possibly be impaired.

If the error or omission which gives rise to the request for re-recording is one which goes to the essential elements of or the validity of the deed of trust as a security interest, then the lien of the deed of trust is only effective as of the date/time of re-recording. For example, a substantial error in or omission of the legal description, the notary acknowledgment or the names of the granting parties would invalidate the deed of trust entirely and the corrected instrument would only enjoy priority from the date/time of the re-recording.

On the other hand, where the error or omission does not affect the essential elements of the instrument, such as an incorrect zip code, maturity date, or middle initial, the priority of the re-recorded instrument will usually relate back to the date/time of the original recording.

The Company will generally not insure over:

1. Legal description not attached or incorrect;
2. Missing signature of grantor;
3. Missing notary acknowledgment and/or incorrect notary acknowledgment;
4. ARM Rider missing (for residential deeds of trust with value of $500,000 or more and for all commercial transactions).
5. Missing date of instrument or note.

The Company will generally insure over, (rather than re-record) as to:

1. Trustee fee missing (but if insurance is for a commercial property, check with Home Office.);
2. Middle initial(s) missing;

3. Street address (property) incorrect, missing zip code;
4. Maturity date missing;
5. Missing or incomplete adjustable rate mortgage (ARM) riders on residential transactions where the insured value is less than $500,000.

Check the ***State Supplement*** for any exceptions to the above.

Generally, even in those circumstances where the change does not appear to affect any material term of the instrument, intervening lien creditors can be expected to aggressively assert their priority over the re-recorded deed of trust, in the event of a subsequent default by the borrower. Accordingly, it is necessary for the examiner to update the title prior to re-recording a deed of trust and report any intervening matters to the lender and the title insurer. *See* ***State Supplement***.

Generally, where an error or omission in the original deed of trust causes a lender to request re-recording, an attempt should be made to determine if the error/omission is minor and can be affirmatively insured by endorsement to the Lender's policy. If re-recording is determined to be necessary, the examiner must research the title to determine the existence of intervening liens. If no intervening liens appear of record, the examiner should proceed to re-record the deed of trust and re-certify the title. If intervening liens or other title matters appear of record, these should be reviewed to determine if subordination to the first deed of trust is necessary. *See* ***State Supplement***.

Title companies are in a position to offer an even better resolution to the re-recording conundrum. When a lender requests a deed of trust to be re-recorded, the insurer should be contacted immediately with a request to "insure over" the error or omission noted by the lender. In situations where the error or omission is innocuous, the title company will often agree to endorse the existing policy to give affirmative coverage against loss or damage arising from the error or omission rather than have the examiner re-record the instrument and open the deed of trust to attack on its priority. This will save your office time and money (especially since fees for re-recording are often not forthcoming from the lender). Further, if the title company cannot see its way clear to provide coverage for the error or omission, it can assist in resolving any priority questions that may be uncovered by an examination of title, and can identify the proper procedure to use for re-certification of the deed of trust.

10. Deeds of Trust to "Bearer" as the Beneficiary

Never issue a commitment of policy where the Insured lender is designated as "Bearer."

This Deed of Trust may read:

"This Deed of Trust made this 20th day of May, 1998 by and between John Doe and wife, Mary Doe, Grantors, and Tim Smith, Trustee, and BEARER, hereinafter designated as Beneficiary..."

If the underwriter receives any application or instrument that indicates "bearer," do not issue the commitment or policy; call the Claims Department or a Staff Attorney immediately.

11. Non-Institutional Lenders as the Insured Party

If the Company is asked to issue a Loan Policy of Title Insurance to a non-institutional lender (individual or other entity), additional risk factors must be considered when determining the type of coverage the Company is willing to extend. Please contact Corporate Legal and Underwriting Services for further directions.

12. Loan Modifications

Modification of an existing deed of trust may affect the priority of the deed of trust. Two issues must be considered before a loan modification is recommended as the vehicle to change terms of a loan. First, the modification must be characterized as either a "continuation" of the loan or a "novation." Second, the impact of the modification on the security of junior lienholders must be evaluated.

When loan terms are modified, but the original debt is continued, the original lien priority is also continued. If the original debt is discharged or extinguished and replaced with a new debt, then a "novation" has occurred. In a novation, the original lien priority is lost for the entire indebtedness. Priority for the new debt will date from the date/time of recording of the instrument of novation.

The intent of the parties is important to answer the continuation/novation question, and generally it will be assumed that the parties intend to continue the debt, unless the contrary intent -- to extinguish the old debt for a new debt - is clear on the face of the instrument. But while the priority of the original lien will continue as long as the original debt is not extinguished, the same priority will not necessarily apply to the new terms that are agreed to in the modification.

As a general rule, new loan terms that do not impair the security of intervening lien creditors will be accorded priority from the date of the original deed of trust. If the new terms do impair the security of intervening creditors, they will be accorded priority only from the date/time the notice of modification is filed. The original debt will continue to enjoy its original priority.

For example, agreements to extend the time for payment, renew a debt for additional terms, or reduce the interest rate are generally viewed as <u>not</u> increasing the burden on the debtor. Therefore, original lien priority continues despite modifications of this sort. Where the agreement is to increase the amount of the debt (other than future advance deeds of trust) or the interest rate, the financial burden on the debtor is also increased, and the priority of the additional principal or interest amounts will be as of the date/time of recording of the notice of modification. Changes to other loan terms cannot be easily categorized and are best reviewed on a case-by-case basis in light of the burden placed on the debtor and the effect on intervening lien creditors.

When dealing with loan modifications, the examiner or settlement agent should:

1. Always examine the records before recording a modification;
2. If the record discloses the presence of intervening lien creditors, disclose the same to both the lender and the title company before recording the documents in hand; and

3. Be prepared to assist the lender or title company in addressing and resolving issues of priority, which may include obtaining release or subordination agreements for intervening matter on record.

When a request to insure a loan modification to an existing policy is received, the Company prefers the coverage be provided to the insured via the issuance of the ALTA 11 Series Modification Endorsements in lieu of a "general" endorsement to the existing policy.

Because the modification affects the original policy, a commitment will not be issued when insuring a modification. In light of this, the underwriter must communicate with the Lender as to what is required before the issuance of the Endorsement (this can generally be done through email correspondence). In the event that the lender requests a copy of the proposed final endorsement, the underwriter can issue a "proforma" or specimen endorsement.

If the modification is increasing the amount of coverage and the prior or newly proposed coverage amount is now or was over the agency limit, approval from Corporate Legal and Underwriting services must be obtained before issuance of the endorsement.

Please refer to the "Modifications" section of the Endorsement Manual for a detailed description of the modification endorsements and their requirements. If the Underwriter is being asked to add additional collateral to the Policy through the modification, please contact Corporate Legal and Underwriting Services.

13. Subordination Agreements

Most title examiners are familiar with the import and use of subordination agreements - agreements where a party in interest or a prior lien holder expresses their willingness to alter the normal rules of recordation and step behind the new lender's deed of trust. However, many examiners do not recognize that where a subordination agreement is used, certification through the date of its recording is necessary, even where it is recorded after the deed of trust to be insured. While subordination agreements are effective even when recorded after the security instruments in question, it is important that the party giving the subordination is the proper party and that no other conflicting interests have arisen which would damage or destroy the effectiveness of the subordination. The examiner or settlement agent should be sure that title is vested properly in those parties who are granting the subordination, and that no other interest holders or junior lien creditors have been put on record whose joinder would be necessary to effectuate a complete subordination.

For further discussion and instructions as to underwriting, *see* **SUBORDINATION AGREEMENTS** herein.

14. Hypothecated or Collateral Security

Hypothecated or collateral security is an encumbrance where the record owner of the real property must execute the deed of trust/mortgage even though the record owner is not the borrower. How does a lender properly encumber property owned by one party which is serving as collateral for the obligation of another? What are the title insurance considerations?

The hypothecation affidavit states that the owner of the property acknowledges the mortgage secures the debt of another, and that the benefit from the loan is sufficient consideration for execution of the mortgage. The affidavit further states that in the event of a default by the borrower, the beneficiary will have the same remedies for default as if the owner had signed on the note. These statements can be made by having the record owner sign the hypothecation affidavit, or by incorporating similar language into the mortgage.

To define such security, consider the following scenarios:

Scenario #1:
A nineteen-year-old college student wishes to obtain a loan from Lender. She executes a promissory note in favor of Lender. Since the student has no real property to put up as collateral for the loan, Lender requires that she and her parents execute a deed of trust encumbering a parcel of real property owned by her parents. The parents do not sign the promissory note and the loan proceeds are distributed directly to the student.

Scenario #2:
Mr. and Mrs. Smith open a business and desire to obtain a loan from Lender for start-up costs. Lender and the Smiths agree that the loan will be made to the new corporation of which the Smiths are the only officers, directors and shareholders. The newly formed corporation owns no property to serve as collateral for the loan. Although the Smiths sign a promissory note in their capacities as officers of the new corporation, the Lender requires them to execute a deed of trust encumbering the residence they own as tenants by the entireties.

The Hypothecation Affidavit can be found here or online in the *Forms Manual*.

For a full article on Hypothecated Security/Collateral, please click here.

15. *Reverse Mortgages*

A reverse mortgage is a loan used increasingly in some areas as a means for retired persons who have high equity in their home to obtain monthly payments of funds for living or other expenses. Generally, the mortgagee (lender) makes a payment to the mortgagor each month and that payment becomes part of the principal of the mortgage loan that increases. The mortgage may then be paid off upon sale of the home or otherwise at the end of its stated term or the mortgagor's demise. The coverage given is similar to that of variable rate mortgage endorsements in-so-far as it provides for insurance against loss or damage sustained by reason of the invalidity or unenforceability of the lien of the mortgage resulting from changes in interest rate provided for or interest on interest or addition of unpaid interest from the principal balance.

Click here for a sample **commitment**, **loan policy** and **owner's policy** for such reverse mortgages. An indication that the loan is a reverse mortgage will be the request for ALTA 14.3 or its equivalent in your market area *(see **Endorsements Manual** and/or **State Supplement** for further guidance)*. Call the Home Office for assistance.

16. *Unusual or Extra Hazardous Risk and Reinsurance Alert*

In cases where a policy is insuring over an unusual risk (*i.e.*, known liens) and coverage is in excess of $5 million, the underwriter **must** advise the Home Office before issuing a commitment or policy.

17. Underwriting

a) Executed Deed of Trust/Mortgage

If the transaction is to obtain a deed of trust/mortgage or other encumbrance on the real property, make the following requirement:

I50 Duly authorized and executed Mortgage by ^ in favor of ^ in the amount of $^.

If, upon receipt of the final documentation, there is a discrepancy discovered between the grantor on the deed of trust/mortgage and the party shown as the grantee on the vesting instrument or the party shown as the vested fee titleholder, the underwriter should immediately contact the party responsible for the closing to inform them of this discrepancy. The party closing the transaction must provide an explanation for the discrepancy or must correct the discrepancy within 60 days.

If after 60 days, the discrepancy is not resolved or corrected, the following exception must be added to the policy(ies):

DOT/MTG NoCov This policy does not insure against loss or damage arising from a failure of the Insured Mortgage to encumber the Land as a result of the incorrect party executing the Insured Instrument.

When the incorrect party has executed a deed of trust/mortgage the underwriter/examiner must, in addition to the exception shown above, also except to the interest of the party that has not executed the instrument. For example:

> When a husband and wife are listed as the fee titleholder of the insured premises (only where title is held as tenants in common or joint tenants, not where title is held as tenants by the entirety) and one spouse executed the deed of trust/mortgage without the other spouse, the underwriter/examiner must except to the interest of the spouse that did not sign the instrument with the following exception:
>
> **FeeSimpl** Subject to the fee simple interest of ^.

When an LLC is the fee titleholder of the insured premises and the deed of trust/mortgage has been executed by an individual, the underwriter/examiner must utilize the appropriate exceptions for the situation. See the appropriate section of the ***General Underwriting Principles Manual*** (i.e., *Corporations*, *Partnerships*, *Limited Liability Company*, etc.) for the applicable exception.

b) Cancellation of deeds of trust and mortgages

Cancellation of deeds of trust or mortgages on the public records must be accomplished in order to release its lien against the real property. State law usually prescribes the methods of cancellation for deeds of trust and mortgages. *See* ***State Supplement***.

Where a deed of trust or mortgage is a lien on title to real property for which a commitment is to be issued, a requirement should be made under Schedule B for the cancellation and release of record of any deeds of trust (mortgages) reported by the title examiner.

L30 Cancellation and release of record of the Land described herein from the lien of:

Mortgage from ^ for the benefit of ^ recorded in ^, at ^, securing a note in the original principal sum of $^, and any other obligations secured thereby and/or described therein.

In the event any lien to be paid and satisfied and cancelled of record is an Equity Line lien, it is required that the ^ [Certifying Attorney] [Settlement Agent] send a written statement on behalf of the mortgagor to the Equity Line lender along with the payoff check instructing the lender to mark the note and Mortgage paid and satisfied and to return both documents for cancellation of record AND instruct the Equity Line lender to close said account and issue no more checks or drafts since the payoff was quoted. (Sample "written statements" are available from this Company upon request.)

c) Payoffs

If one party closes the loan and records the documents (a/k/a "settlement agent") but another party (*i.e.,* lender) disburses the funds, use the following requirement:

PayOff1 We must receive from the disbursing party a copy of the HUD-1/Closing Disclosure, a copy of the payoff letter/request, and a copy of the payoff check regarding the Mortgage from ^ for the benefit of ^ recorded in ^, at ^, securing a note in the original principal sum of $^, and any other obligations secured thereby and/or described therein.

Also, use the appropriate requirement to require cancellation of outstanding liens (*i.e.,* **L30**).

Receipt of the copies requested in the **PayOff1** requirement alert the title company to request final title evidence from the settlement agent in order to issue the final policy(ies).

d) Deeds of Trust/Mortgage – Owner's Policy

Unlike the Mortgagee Policy, the Owner's Policy does not have a section in Schedule A to show the insured the Deeds of Trust/Mortgage that affects the property and is part of the insured transaction. Because of this, the underwriters must use the following under Schedule B, Pt. II exception in the Owner's Portion of the Commitment and Schedule B of the Owner's Policy on all Simultaneous Issue and Owner's only transactions:

DOTInTem Mortgage from ^ for the benefit of ^ recorded in ^, securing a note in the original principal sum of $^, and any other obligations secured thereby and/or described therein.

Sections of this exception will appear incomplete when it is shown on the Commitment of Title Insurance. The appropriate recording information will populate for users of Investors Title production system when added to the appropriate fields. Users of other production systems will have to be sure the recording information is complete prior to policy issuance.

e) Deeds of Trust/Mortgage not released

Prior to the issuance of the policy of title insurance, the Company requires confirmation that prior liens, including but not limited to a Mortgage, required for release on the Commitment have been paid. This determination may be established by:

a) an attorney's certification as to the payment of prior liens; this can include the term, "paid, but not cancelled of record", or
b) an attorney's certification identifying the loan related to current transaction as being in "first lien position"; or
c) through verification of funds having been directed to the prior lien holders on closing documents, i.e., a HUD1/Closing Disclosure statement, payoff checks, payoff letters, etc.

If prior liens remain unpaid and/or unsatisfied the following exception must be used:

MTG Mortgage from ^ for the benefit of ^ recorded in ^, at ^, securing a note in the original principal sum of $^, and any other obligations secured thereby and/or described therein.

If the provider reports a lien will remain of record, but said lien has been subordinated to the instrument insured in Schedule A, make the following exception in Schedule B, Part II of the loan policy that refers to the Lien and the Subordination Agreement:

Subord=M Mortgage from ^ for the benefit of ^ recorded in ^, at ^, securing a note in the original principal sum of $^, and any other obligations secured thereby and/or described therein; by Subordination Agreement dated ^ and recorded ^ in Book ^ at Page ^ of the aforesaid Registry.

It is necessary for the provider to report the recording information of the Subordination Agreement to complete this exception.

f) MERS Releases

Advances in technology and use of those advances seem to inevitably lead to new sorts of fraud. This is exemplified by recent reports of fraudsters scanning MERS cancellations and cutting and pasting the officers' signatures onto forged cancellations of deeds of trust and mortgages that have not been paid in full. This enables the fraudster to refinance the property multiple times without paying off prior liens. Since MERS cancellations appear to be particularly well suited for this type of fraud, it is in the best interests of the Company to verify recent MERS cancellations. MERS has a website that may be accessed for this purpose: www.mers-servicerid.org

The search is done by MIN (mortgage identification number). If the loan has been paid off or foreclosed, it will show as "inactive."

g) Hypothecation/Collateral Security Transaction

If there is an indication of hypothecated or collateral security, make the following requirement:

Hypoth Receipt and review of satisfactorily executed hypothecation affidavit, if the record owner of Land is not executing the promissory note. The vested owner must sign the Insured Mortgage.

NOTE: This requirement will be deemed satisfied if the insured instrument contains a hypothecation provision substantially similar to the attached affidavit.

h) Error or Omission – Affirmative Coverage

If the Company agrees to insure over an error or omission, the following exception may be used in the Loan Policy and as requested by the Lender:

DOTAffCo This policy insures against loss or damage which the Lender may sustain due to the following errors/omissions on the Insured Mortgage: ^.

i) Investors Title Insurance Company as the trustee

The Company has no specific objections if Investors Title Insurance Company is the trustee in a deed of trust. It is recommended, however, that a different choice be made prior to loan closing (*i.e*. the closing attorney).

j) Mortgagee/lender is the same as the trustee

If the lender and trustee are identical, the instrument is then a two-party transaction, or a *mortgage*, and thus the lender cannot pursue power of sale provisions under a *deed of trust*. If the underwriter is aware of this situation prior to loan closing, call the closing attorney and request that a third party (not the lender) is named as trustee. If the underwriter is made aware of this situation after loan closing and recording, either (a) request the closing attorney to record a Substitution of Trustee and provide a copy (the attorney does not have to update or re-certify through that recording); or (b) make the following exception in Loan and Owner Policy:

DOT=Mtg Notwithstanding the insured instrument title "Deed of Trust," the insured instrument is a Mortgage and this policy does not insure against loss or damage resulting from the inability to exercise the power of sale contained therein or the inability of the mortgagee to purchase the Land shown in Schedule A in a foreclosure sale.

Once the Substitution of Trustee is received, the exception can be eliminated.

k) No trustee recited on the Deed of Trust

If there is no trustee recited, the instrument is then a two-party transaction, or a *mortgage*, and thus the lender cannot pursue power of sale provisions under a *deed of trust*. If the underwriter is aware of this situation prior to loan closing, call the closing attorney and request that a third party (not the lender) is named as trustee. If the underwriter is made aware of this situation after loan closing and recording, either (a) request the closing attorney to **re-record** the instrument with a trustee name and further request the closing attorney to **re-certify** through the re-recording; or (b) make the following exception in Loan and Owner Policy:

DOT=Mtg Notwithstanding the insured instrument title "Deed of Trust," the insured instrument is a Mortgage and this policy does not insure against loss or damage resulting from the inability to exercise the power of sale contained therein or the inability of the mortgagee to purchase the Land shown in Schedule A in a foreclosure sale.

Once the re-recording and re-certification are received, then the exception can be eliminated.

18. The Doctrine of Merger: Stop, Yield or Go?

By Holly H. Alderman, Title Attorney

19. Effects of Modifications on Loan Policies

By Michael W. Aiken, Title Attorney

20. Effects of Modifications on Loan Policies Continued

By Michael W. Aiken, Title Attorney

W. Divorce, Alimony and Child Support

1. Divorce

Absolute divorce terminates the marital interests of each spouse in and to property owned by the other. Divorce also terminates any tenancy by the entirety of the couple in real property and renders them co-owners as tenants in common. A divorce from bed and board, if available under state law, has a similar effect to that of a property settlement agreement or separation agreement. *See **State Supplement***.

For states in which receipt of a divorce decree is required (*see **State Supplement***), and the divorce decree is not furnished and the customer has been contacted at least three (3) times by fax and telephone to furnish the divorce decree, the following exception shall be made in order to be able to issue the final mortgagee and/or owner's policy:

Div/Aff Terms, conditions, and liens, if any, contained in Divorce case file #^.

2. Alimony and Child Support

Judgments against a spouse for alimony or child support may or may not create a lien on any real property owned by that spouse, depending on state law. *See **State Supplement***.

X. Easements

1. Generally

An easement creates a right in one person to use, for a specified purpose, the land of another person. So while one person may own the fee interest in land, another may have the right to use the property for a specific purpose. Easements may be express where they are granted or reserved by definite statement in a written instrument; or implied, where:

1. They arise by prescription which, like adverse possession, results from long use; or
2. may arise or be implied by operation of law.

Easements are further classified as either appurtenant easements or easements in gross. An easement in gross is purely personal to one individual or entity and ends with the death of the grantee. It cannot be conveyed, assigned or inherited. An appurtenant easement, on the other hand, is an easement created for the purpose of benefiting particular land, and is considered to be "attached to" and passing with the benefited land. There must be two (2) tracts to create an appurtenant easement. The dominant tract is the one benefited by the easement. The servient tract is the one burdened by the easement. After its creation, an appurtenant easement becomes an incident of ownership of the dominant tract and is deemed to "run with the land" so that a conveyance of the dominant tract affects a conveyance of the appurtenant easement.

2. Underwriting Easements

Title underwriters must determine the proper exception to an easement in light of the requirements of the insured, the nature of the property, whether farm, residential, or business, and the information made available by the title opinion, surveyor's certificate and plat of survey. The easement exception should be definite enough for the insured to know what portions of the property are affected, taking into consideration the possible future uses of the property. If the title opinion does not give full details as to the easement and the portions of the property affected, the policy must not be issued until such information is secured.

If there is any doubt as to what is granted by the easement, or the easement cannot be summarized clearly, the pertinent portions of the easement should be set out verbatim in the policy.

To the extent that a general exception may be acceptable to and adequate for purposes of the insured, a general exception is preferable from the Company's standpoint and should be used. In all cases where by reason of the requirement of the insured or by the nature of the easement, one of the general exceptions cannot be used, then the exception should be as definite as possible and should, if practical, incorporate the language of the easement.

In some instances, there will be reservation of easements set out in the restrictive covenants and, additionally, there will be a recorded easement over the same portion of the property. In these cases, exception should be made both to the reservation and to the grant because the reservation may be broad enough to permit future grants to other utility companies and the recorded instrument is definite notice of a right which has been granted.

3. Easements Affecting Insured Premises

Exception should always be made in a title policy to any easement reported by the examiner or disclosed on the plat or survey, otherwise the policy will be deemed to have insured against such easement rights.

S44 Rights of others for ingress and egress purposes in and to the use of ^ located on the Land [*Optional*: and as shown on plat of survey by ^, [R.L.S.][P.L.S.], dated ^].

Exceptions should be made in the title policy whether the easement is granted or reserved or when there is a possibility that an easement has been or may be acquired by prescription or by operation of law.

4. Easements Appurtenant to Insured Premises

Easement rights appurtenant <u>to</u> the insured premises creating rights in or over <u>adjoining</u> premises, are not generally insured under the policy by definition of the word "Land" in the Conditions portion of the policy, which limits coverage under the policy to the property described by the legal description referred to in the commitment /policy.

In those instances where the existence of an easement is essential to the use and enjoyment of the insured premises (*i.e*., an easement for access), the Company may be called upon to insure the rights thereto. In such cases, the examiner must examine title to the property over which the easement passes, identify the record owner, as well as any liens, encumbrances or defects affecting said easement, and certify that title to the easement is vested in the insured owner. In order that an easement be insured, said easement must exist by grant or by reservation in an instrument duly recorded; it must be said to "run with the land" or "be appurtenant thereto;" and it should be conveyed "together with" the premises to be insured.

5. Utility Easements

Utility easements are often drafted with wording such that the utility company may exercise rights in the future to change the location of lines or add additional lines. Therefore, grants of general easements over large land areas (*i.e*., subdivisions) should appear as exceptions in the title policy even though the easement may not at the present time be in use over the property insured or has already been exercised over other property. If there is a recorded easement, exception may be made to it as follows:

E2 Easement(s) to ^ [*name of utility company, etc.*] recorded in Book ^ at Page ^.

The title exam/title opinion may report the restrictions, easements and/or rights of way affecting the insured premises. If there is specific information reported, make the appropriate exception and list the book/page numbers of the matter affecting the property. If there is no specific information provided and the title exam/title opinion state something to the effect "…any and all rights of way, easements or restrictions of record." Use the following exception:

GenRe Restrictions, easements and rights of way of record.

When requested by an insured to delete an exception for a utility easement, the following affirmative coverage may satisfy their request, if the fact stated in the exception is established:

EsmtAff/3 This policy insures that exercise of rights under the easement does not and will not interfere with the use of any existing improvements on the Land and that the easement does not extend under any existing buildings or improvements on the Land.

OR

EsmtAff/1 The exercise of the rights thereof does not interfere with the use of any of the existing buildings or improvements located on the Land.

OR

EsmtAff/2 But this policy insures against loss or damage which the Insured may sustain due to the exercise, maintenance, or attempted enforcement of said rights-of-way or easements.

In the absence of recorded agreement, no exception is necessary to power lines, telephone lines, etc., extending from outside of the insured premises to the improvements on the premises and serving only these improvements. These lines are located by permission of the owner of the property, and because of this permission no easement may ever be acquired by prescription or by operation of law.

6. Easements on Subdivision Plats

In some cases the subdivision plat will show easements along certain designated areas, but no reference is made to the easement in the restrictive covenants or in any instrument in the chain of title. In such cases, an exception as follows is suggested:

E8 Easement ^ feet wide along the ^ [*location*] property line as shown on the recorded plat of subdivision.

OR

PlatShow Matters shown on recorded ^ [*identify: Map, Plat, etc.*] Book ^ at Page ^ including ^ located on the Land.

7. Easements Created by Prescription as Result of Long Use

Easements may be created by prescription as a result of long use in the absence of any recorded grant of reservation in the chain of title. (Where the prescriptive easement is one for access, *see* **ACCESS** herein.) If the plat of survey shows telephone, electric, or other utility lines crossing the property, the Company is put on notice that certain rights may have been acquired as a result of the use of the portions of the property crossed by said lines. In such cases, an exception should be made to this possibility:

E11 Plat of survey by ^ [*name of surveyor*], [R.L.S.][P.L.S.], dated ^, shows ^ [*identify*] located on the Land.

An easement existing or supposed to exist by prescription or by operation of law is not insurable as appurtenant to the property and must always be the subject of appropriate exception when the property being insured is the servient tenement.

8. Encroachments into Easement Area

Any encroachment by structures on the insured premises into an easement area must be made the subject of an exception. The underwriter should carefully check the plat of survey to ascertain whether or not there are encroachments into the easements. If the plat shows an encroachment, the following exception should be used:

E13 Attention is directed to the fact that ^ encroaches in said easement.

Affirmative coverage may be available where the encroachment is minimal or where it has existed for a long time. Such affirmative coverage should not be provided without approval by the Home Office.

EsmtAff/4 Encroachment does not and will not interfere with the use of the easement or the exercise of rights in connection with the easement.

9. Conservation Easements

A conservation easement is a written legal agreement to preserve some aspect of a landowner's land. These easements are often used to protect open spaces, natural areas and to preserve farmland. Typically, the landowner will convey certain rights in the property to a government entity or a land trust. The landowner may retain certain rights in the land that could be exercised along with the conservation easement.

When a conservation easement is discovered in the chain of title, exception should be taken to the easement in the same manner as any other easement. Increasingly, Corporate Legal and Underwriting Services is being asked to insure the conservation easements themselves.

Insuring the conservation easement is possible. In Schedule A, describe the property to be encumbered by the conservation easement. In Schedule B, Part I of the Commitment, a requirement for the recording information for the instrument creating the conservation easement must be made.

Additionally, the following exceptions must appear on the Commitment and Final Title Policy:

Exception must be made to the conservation easement:

E2ConEase Terms of the Conservation Easement from ^ (owner) to ^ (government entity or land trust), recorded in Book ^ at Page ^.

AND

Exception must be made to the rights of the fee simple owner:

FeeConEase Fee simple interest of ^ (owner) and rights of underlying fee simple owner to use the Land in any way not inconsistent with the terms of the Conservation Easement.

If there are any questions about how to proceed, or what must be contained in the Commitment and Final Title Policy, please contact Corporate Legal and Underwriting Services for assistance

Y. Encroachments

1. Generally

Any encroachment by structures on the insured premises upon adjoining property or by structures on adjoining property onto the insured premises must be the subject of an exception because superior title is difficult to prove and because the encroachment impairs marketability.

Accordingly, if a plat of survey, surveyor's report, or other papers in the file indicates that a building, wall, or other structure appurtenant to insured premises encroaches upon adjoining property, the following exception should be used:

S65a Encroachment upon land adjoining on the ^ by the ^ appurtenant to the Land, as shown on plat of survey by ^ [*name of surveyor*], [RLS][PLS], dated ^.

If affirmative coverage is requested for a lender, the following are factors to consider:

1. The degree of encroachment;
2. How long the encroachment has existed;
3. The nature of encroachment; and
4. Whether the encroachment completely or partially prevents concurrent use.

If, based on the above criteria, the Company is unwilling to provide affirmative coverage, a description on the deed of trust can be drafted so that the legal area of the encroachment is not included, and therefore not encumbered by the deed of trust. Then, the lender's policy can be issued without exception to the encroachment.

Other methods available to address and "cure" encroachments:

1. A boundary line agreement to re-establish the boundary lines.
2. An easement for encroachment to "cure" the encroachment. (A sample of such easement for encroachment is available from the Home Office.)
3. An indemnity agreement from the insured owner to provide lender's coverage.
4. The neighbor's written waiver acknowledging that the use is permissive. Such waiver must be recordable and must run to his "heirs and assigns."

It is better practice to show the encroachment on the lender's policy and give affirmative coverage where the Company insures encroachments so that the face of the policy gives notice of the encroachment. This will prevent the encroachment from being inadvertently insured on an owner's policy in the case of a tack-on.

Where the Company feels comfortable giving affirmative coverage, the following language is acceptable:

EncrAff4 This policy insures against loss or damage which the Insured may sustain due to the enforced removal of said ^.

Where affirmative coverage will be given <u>only</u> as to forced removal of the encroachment, the following language applies:

EncrAff1 This policy insures against loss or damage to the Insured resulting from the forced removal of the encroachment, but does not insure the unmarketability of the Land resulting from the said encroachment.

Where an improvement belonging to the insured property encroaches entirely onto adjoining property, the following exception should be used:

S69 This policy insures only that Land described in Schedule A of this policy and not the title to any property beyond those boundaries, including the ^ [*identify improvement*] as shown on plat of survey by ^ [*name of surveyor*], [RLS][PLS], dated ^.

If the encroachment is upon the insured premises, by a structure from adjoining property, the following exception should be used.

S66a Encroachment upon the Land by the ^ appurtenant to the property adjoining on the ^, as shown on plat of survey by ^ [*name of surveyor*], [RLS][PLS], dated ^.

2. Townhouses and PUDs

Where encroachments of patios, walkways, drives, or privacy walls are found in townhouses or PUDS, the restrictive covenants often "cure" these encroachments through the grant or reservation of "limited common area" rights for the owners of such encroaching improvements. In such cases, there is no encroachment and no exception need be taken, because exception is taken to the restrictive covenants.

3. Easements for Encroachments

In some cases in which there is an encroachment upon adjoining property, there will be a recorded easement from the owner of said adjoining property permitting the encroachment. If this easement is specifically conveyed by the instrument to be insured and the title examiner certifies that he has examined the title to such adjoining property and that unencumbered title to said easement is vested in the grantor or mortgagor, then the following statement should be added at the end of the appropriate encroachment exception:

S68 This policy insures that by agreement between ^ and ^ dated ^ and recorded in Book ^ at Page ^, this encroachment is permitted to remain as presently located.

If the agreement permitting the continued existence of the encroachment contains any limitations, consideration should be given to such, quoting these limitations verbatim in the exception.

Z. Environmental Liens

1. ALTA Endorsement 8.1 (Environmental Protection Lien)

This endorsement is only applicable to residential properties and addresses only the priority of the lien of a lender's deed of trust relative to liens in favor of the Environmental Protection Agency. This endorsement does not provide coverage against liability for environmental cleanup. Please refer to the ***Endorsements Manual*** for a sample of this endorsement.

No requirements are necessary for the issuance of this endorsement on residential property, however, if the search reveals any environmental liens of record; make one of the following exceptions:

For a Government Lien:

GovLien Notice and lien concerning violation of laws, ordinances, or governmental regulations relating to environmental protection recorded ^.

For an Environmental Agreement:

EnvAgmt Terms and provisions of agreement relating to environmental remediation, removal, action or use recorded ^.

For a Notice of Hazardous Substance:

NoticeHazSub Hazardous materials, if any, as disclosed by document recorded ^.

The ALTA 8.1-06 Endorsement is not available for Owner's Policies.

2. Non-Residential Environmental Protection Lien Endorsement

Lenders may obtain coverage similar to the ALTA 8.1 endorsement for non-residential property by requesting the Environmental Protection Lien Endorsement. This endorsement is available for a Lender's Policy only.

In order to issue this endorsement, the underwriter must first determine if the property is located in a state which has adopted the Uniform Federal Lien Registration Act. The following states have adopted the act:

> Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Virginia, Washington, West Virginia, Wisconsin, Wyoming

Pursuant to the Act, any federal lien or federal judgment must be recorded in the local real estate records in order to constitute a lien on real property. If the property is located in one of the above-listed states, no requirements are necessary in order to issue this endorsement.

The State of New York has not adopted the Uniform Federal Lien Registration Act, but does have a state law with similar effect. Pursuant to N.Y. Lien Law Section 204 notices of liens upon real property created by federal law in favor of the United States of America or one or more of its instrumentalities, shall be filed in the office of the clerk of the county in which the real property is situated, except that if real property is situated in the county of Kings, the county of Queens, the county of New York or the county of Bronx. Liens in these counties shall be filed in the office of the city register of the city of New York in such county. If property is situated in two or more counties, such notice or certificate shall be filed in the office of the clerk or the city register, as the case may be, in each of such counties. As a result of N.Y. Lien Law Section 204 no requirements are necessary in order to issue this endorsement in New York.

The State of South Carolina has not adopted the Uniform Federal Lien Registration Act but does have state law with similar effect. No requirements are necessary in order to issue this endorsement in South Carolina.

The State of Tennessee has not adopted the Uniform Federal Registration Act. However, Tennessee law requires "liens for taxes or other obligations payable to the United States" to be recorded in the office of the register of deeds of the county within which the property subject to the lien is situated. No requirements are necessary in order to issue this endorsement in Tennessee.

If the property is located in a state that has **not** adopted the Uniform Federal Lien Registration Act or does not have state law with a similar effect (see above), make the following requirement:

NonRes–8.1 An Environmental Protection Lien Endorsement will be attached to the final policy upon receipt of evidence satisfactory to the Company that a search of the United States District Court, for the district in which the Land is located, has been conducted and no environmental liens have been discovered.

The endorsement may then be issued ONLY with Company approval.

Regardless of whether or not an Environmental Protection Lien Endorsement will be issued, if the search reveals any environmental liens of record, make one of the following exceptions:

For a Government Lien:

GovLien Notice and lien concerning violation of laws, ordinances, or governmental regulations relating to environmental protection recorded ^.

For an Environmental Agreement:

EnvAgmt Terms and provisions of agreement relating to environmental remediation, removal, action or use recorded ^.

For a Notice of Hazardous Substance:

NoticeHazSub Hazardous materials, if any, as disclosed by document recorded ^.

3. Unusual or Extra Hazardous Risk and Reinsurance Alert

In cases where a policy is insuring over an unusual risk (*i.e.*, Environment impairment liabilities; pollution; Nuclear incidents) and coverage is in excess of $5 million, the underwriter **must** advise the Home Office before issuing a commitment or policy.

AA. Escrow Agreements

Occasionally, in instances where a judgment on other lien clouds title to real property the Company is being asked to insure, the owner or the certifying attorney may prefer to not pay the judgment or lien and cause its release, and instead will ask to "escrow" the judgment or lien amount and have the title policy insure without exception. Generally, the Company is willing to allow escrows over outstanding judgments or liens. The underwriter should be aware of the following:

1. Usually, the certifying attorney agrees to serve as escrow agent and hold the funds, but the Company can do so as well.
2. Escrows for long periods of time (exceeding one (1) year) should be evaluated more carefully.
3. Generally, the escrow amount should equal 125% of the judgment or lien amount.
4. There must be a written escrow agreement outlining the terms of the escrow.
5. Where the Company is to serve as escrow agent, the escrow agreement should release the escrow agent from any liability for wrongful disbursement. Where the Company does not serve as escrow agent, there must be provisions in the escrow agreement allowing the Company the discretion to direct payment of the escrow funds to the judgment or lien creditor.

All authority to use an escrow agreement resides with the Home Office.

BB. Estates, Wills and Administration

1. Introduction

A will is a statement, usually in writing, which directs how property is to be distributed at death.

Ordinarily, a will speaks to three basic points:

1. It appoints some person or bank to be executor and to carry out the provisions of the will.
2. It defines the powers that the executor will have in dealing with property.
3. It tells the executor how to distribute property after all of the debts, funeral expenses, taxes and costs of administering the estate have been paid.

The only property controlled by the terms of a will is property that is vested or titled in the name of the testator or decedent. Property in joint names or subject to some sort of contract, like annuities or life insurance proceeds, passes in other ways.

A will is effective only upon the death of the person making it (the testator), and then only after it has been proven to be his will (probated) before the appropriate authorities, usually the clerk of court, for the county in which he lived. Until the testator's death, it can be revoked or revised at any time.

a) Kinds of Wills

Most states recognize the attested written will and some recognize the holographic will for purposes of transferring title to real property.

Attested Written Will: An attested written will is a will in writing, signed by the party making it (called the testator), and witnessed by at least two competent witnesses. The testator must sign the will in the presence of the witnesses or acknowledge to them that he previously signed the instrument. The witnesses must sign in the presence of the testator, but do not have to sign in the presence of each other.

To be a competent witness, an individual must have the ability to comprehend and understand his action; there is no minimum age requirement. If a witness or his spouse is a beneficiary under the will and there are not at least two other witnesses who are not beneficiaries, the interested witness or his spouse takes nothing under the will. The remainder of the will is valid, however.

Holographic Will: There may be other requirements for a valid holographic will under state law (*see* ***State Supplement***), but one requirement is universal:

It must be entirely in the handwriting of the testator, whose name, in his handwriting, must appear somewhere in the will or at the end of it, and some jurisdictions require the will to be found after the testator's death among his valuable papers or effects or in a safe deposit box or other safe place, or in the possession of some person with whom it was deposited by the testator for safekeeping.

No witnesses need to sign the holographic will. Its validity is proven by the fact it is in the testator's handwriting and by the circumstances of its location.

b) Right of Dissent

Generally, the maker of a will can dispose of his property in any way he chooses. Usually state law (*see **State Supplement***) does protect a surviving spouse, however, by guaranteeing that a minimum share of the decedent's property will pass to him or her. This is often accomplished by giving the surviving spouse the right to dissent from the decedent's will unless this minimum share of the property is received under the terms of the will or by survivorship.

The surviving spouse must exercise the right of dissent within a stipulated time period after the will is probated. After dissenting, the surviving spouse generally receives his or her intestate share. The dissent revokes any provision in the will for the dissenting spouse. All other provisions remain in effect and are carried out, reduced pro-rata for the amount passing to the surviving spouse.

c) Probating a Will

Where an individual dies leaving a will, the first action which must be taken is to "probate" or "prove" the will. In this procedure, evidence is presented to the Court that the instrument in question was executed as required by law and is in fact the will of the deceased person.

Probate of a will is accomplished by taking the instrument to the office of the appropriate authorities, such as the clerk of court for the county where the decedent lived or had his principal residence, and having the required witnesses come to that office to testify. Until the will is duly probated, it does not pass title to real property.

d) Appointing a Personal Representative

The first step in the administration of a decedent's estate is the appointment of a personal representative who represents the decedent in dealing with his property and with the persons who receive it. If the decedent had a will, the personal representative named in it is called an "executor." If there is no will, however, the personal representative is called an "administrator." (In older usage, a female executor was called an "executrix" and a female administrator, an "administratrix.")

To qualify, the person to be the personal representative goes to the government office of the clerk of court for the county in which the decedent died. There he takes the oath of office administered by the clerk or his deputy.

The first task of the personal representative is to assemble under his control all property that is in the estate of the decedent. He must determine what assets are in the estate, place them under his control, and see that they are adequately protected and insured during the period of administration.

e) Claims Against the Estate

At the same time he is assembling the decedent's assets, the personal representative must determine what claims there are against the estate, which of them are valid and what amounts must be paid. The first step is to publish a creditors' notice in the county where the decedent resided. This notice is to be published for a prescribed period and must set a deadline for filing claims.

Until the period for filing claims has passed, the estate cannot be closed. Also during this period, the executor or administrator must be cautious about paying any claims unless he is positive there will be enough assets to pay all claims. If there is not enough to completely pay all claims, that which is available must be spread pro rata over all claims. If any creditor is paid too much, the personal representative is personally liable to other creditors for that excess.

Another duty dealing with payments is to prepare and file death tax returns with state and federal taxing authorities. These returns are due nine (9) months after death, and the tax must generally be paid when the returns are filed.

f) Distributing the Estate

When all claims have been satisfied and all taxes paid, the personal representative is to distribute the remaining property, either under the terms of the will, if there is one, or under the laws of intestate succession if there is no will.

2. Open Estates

There are three main questions to consider when underwriting a policy where an estate is still "open."

1. Which parties are necessary to convey title?
2. Are all debts paid or will they be paid?
3. Are inheritance taxes or estate taxes due, and have they been paid?

a) Title

Some jurisdictions (*see **State Supplement***) allow an executor to convey title to property of the estate without the need for a special proceeding where:

1. The real property is devised to the personal representative for the benefit of the estate; or
2. Where the personal representative is given the power to sell real property by the terms of the will.

An express power of sale under the terms of the will allows the sale of real property by the personal representative for any purpose expressly authorized by the will or to raise funds for the payment of claims against the estate.

Accordingly, the non-judicial sale of property by personal representative is allowed where the real property is devised to the personal representative for the benefit of the estate or where the personal representative is given the power to sell real property by the terms of the will. An express power of sale under the terms of the will allows the sale of real property by the personal representative for any purpose expressly authorized by the will or to raise funds for the payment of claims against the estate.

b) Debts

If the period for advertising to creditors is not complete, the attorney administering the estate must give his or her opinion on the sufficiency of assets to cover debts and taxes or affirm that debts have been paid, otherwise title is insured with an exception which reads:

EstateOp Open estate of ^ [*name of deceased*].

If there is no attorney handling the estate and the executor is signing an affidavit to the Company about the sufficiency of assets, then indemnity agreements may be recommended by the Home Office where the examiner gives adequate information regarding the executor, his stability and his domicile.

c) Taxes

An inheritance tax or estate tax may be imposed by the state department of revenue or taxation upon the transfer of any property, real or personal, to persons or corporations when transferred from a person who is a resident of the State and the transfer is made by will or intestacy.

Most relatively simple estates (cash, publicly traded securities, small amounts of other easily valued assets, and no special deductions or elections, or jointly held property) do not require the filing of an estate tax return.

A filing is required for estates with combined gross assets and prior taxable gifts exceeding:

- $1,500,000 in 2004 - 2005;
- $2,000,000 in 2006 - 2008;
- $3,500,000 for decedents dying in 2009; and
- $5,000,000 or more for decedent's dying in 2010 and 2011 (note: there are special rules for decedents dying in 2010);
- $5,120,000 in 2012;
- $5,250,000 in 2013;
- $5,340,000 in 2014;
- $5,430,000 in 2015;
- $5,450,000 in 2016;
- $5,490,000 in 2017;
- $11,180,000 in 2018;
- $11,400,000 in 2019;
- $11,580,000 in 2020;
- $12,060,000 in 2021;
- $12,060,000 in 2022;
- $12,920,000 in 2023

Under both state and federal law, there are several classes of exempt property, the most frequently encountered exception being property passing to the surviving spouse of a decedent.

d) Underwriting

*See **State Supplement*** for underwriting procedures.

3. Small Estates

Most states have scaled down procedures to probate "small estates" as defined by statute. These are valid for purposes of transferring title to real property and can provide the basis for a title policy.

4. Miscellaneous

a) Foreign Wills

Foreign probate proceedings must be certified to the county in which real property is located to effect record title.

b) Rules of Class Beneficiaries

When a class of beneficiaries under a will is "subject to open," meaning that the beneficiaries under the will cannot be determined at the time of the transaction being insured, then there must either be a special proceeding to protect the interests of the unborn beneficiaries, or an indemnity agreement must be obtained from the person who has the ability to expand the class and all the other members of the class.

c) Interpretation of Wills

The word "lend" used in a will means "give," "devise" or "bequeath" (*e.g.*, "I lend Hattie Hardy my property at Five Oaks"). *Black's Law Dictionary*.

Where a will purports to place restrictions upon or conditions on ownership of property (*e.g.*, "property can only be encumbered for purposes of maintaining or improving premises"), these restrictions can only be waived by agreement of record between all possible interested parties.

d) Judgments Against Heirs

Judgments against the heirs of an estate attach immediately to the property the heirs have acquired by will or intestacy subject to divestiture by the administration of the estate. If the executor/administrator needs to sell the property to pay debts, the judgments then attach to proceeds remaining after the payment of debts.

CC. Excise Stamp Tax

Some states impose a tax on the conveyance of real property based on the value of the property or the consideration paid by the purchaser. These taxes can be known as "revenue stamps," "excise stamps," "excise taxes," "transfer taxes," "conveyance taxes," or "real property taxes." Refer to the ***State Supplement*** for more information on this topic.

DD. Fee Simple Absolute

The fee simple estate is the most commonly encountered interest in real property. It is also the most extensive in duration of all interests. The fee simple owner has the unconditional right to own and possess that land as long as he desires and he can convey it to whom he wishes, whenever he wishes. If he does not convey it during his lifetime, then at his death, the land will descend to his heirs or devise by will.

In most states a deed, will or other conveyance is deemed to be in fee simple, unless a lesser estate in the property is otherwise noted.

EE. Fences

Since there are so many different factual situations with respect to fences, the Company has chosen to create one exception that should cover all such situations:

S104 Attention is directed to the fact that the plat of survey by ^ [*name of surveyor*], [RLS][PLS], dated ^, shows that the fence(s) do not coincide with the property line(s) and may be an encroachment.

If the underwriter can clearly identify the fence as an encroachment onto adjoining property, the following exception may be used to be more specific:

S101 Encroachment upon property adjoining on the ^ by the fence appurtenant to the Land, as shown on plat of survey by ^ [*name of surveyor*], [RLS][PLS], dated ^.

If the underwriter can clearly identify the fence as an encroachment onto subject property, the following exception may be used to be more specific:

S103 Encroachment upon the Land by the fence appurtenant to the property adjoining on the ^, as shown on plat of survey by ^ [*name of surveyor*], [RLS][PLS], dated ^.

FF. FIRPTA

1. Foreign Investment in Real Property Tax Act

The Foreign Investment in Real Property Tax Act ("FIRPTA") imposes a tax on gain realized upon the transfer of a United States real property interest by a foreign person (the "transferor"). For the purposes of FIRPTA, a "foreign person" is a non-resident alien, foreign individual or foreign entity, including corporations, partnerships, trusts and estates owned entirely or in part by a foreign individual or entity.

FIRPTA generally requires that if a foreign person disposes of a United States real property interest, then the person acquiring such interest (the "transferee") must withhold a tax equal to the lesser of (i) fifteen percent (15%) of the amount realized by the transferor or (ii) the transferor's maximum tax liability as determined by the IRS. The transferee must pay the amount withheld to the IRS no more than twenty (20) days after the transfer. If the transferee does not collect and pay this tax to the IRS, then any agent involved in the transaction also becomes liable for the tax.

2. U.S. Real Property Interest and U.S. Real Property Holding Corporation

A "United States real property interest" ("USRPI") is an interest in real property located in the United States or the Virgin Islands, such as a fee ownership, leasehold or option to acquire a fee or leasehold, and related personal property. A USRPI also includes an interest in a United States real property holding corporation (defined below), other than an interest solely as a creditor, unless the transferor demonstrates that (i) the corporation did not hold any USRPIs during the shorter of the period after June 18, 1980 during which the transferor held the stock or the preceding five (5) year period and (ii) all of the USRPIs held by such corporation either were disposed of in transactions in which the full amount of the gain was recognized or ceased to be USRPIs by reason of the application of this provision to one or more other corporations. In addition, if the corporation did not hold any USRPIs on the date the transferor disposed of his interest in the corporation, then the transferor's interest in the corporation is not a USRPI.

A corporation is a United States real property holding corporation ("USRPHC") if the fair market value of its USRPIs are at least fifty percent (50%) of the total fair market value of (i) its United States real property interests, (ii) its interests in real property located outside the United States and (iii) any other of its assets which are used or held for use in a trade or business. As a result of applying certain look-through provisions, the IRS may treat the parent corporation as being held proportionately by its shareholders. The IRS also applies special provisions to determine whether a partnership, trust or estate is a USRPHC.

3. Exceptions and Special Rules

No person shall be required to withhold tax with respect to a disposition of a USRPI if one of the following exceptions applies to the transaction:

1. The transferor furnishes a Certificate of Non-Foreign Status.
2. In the case of a disposition of any interest in a domestic corporation, the corporation furnishes an affidavit dated no more than thirty (30) days prior to the date of the transfer which states that the corporation is not a USRPHC or, as of the date of the disposition, interests in such corporation are not USRPIs.

3. The transferee receives a qualifying statement from the IRS that the transferor is exempt from any withholding imposed by FIRPTA.
4. However, if the amount realized exceeds $300,000 but does not exceed $1 million, and the property will be used by the buyer as a primary residence, the withholding rate is 10% on the full amount realized.
5. The disposition is of stock that is regularly traded on an established securities market and the taxpayer did not hold more than five percent (5%) of that class of stock at any time during the shorter of the period after June 18, 1980, during which the transferor held the stock or the five (5) year period preceding the disposition of the stock.
6. The transferor provides written notice that recognition of gain or loss is not required.
7. The property is acquired by the United States, a state or possession, a political subdivision or the District of Columbia.
8. The disposition is of an interest in a publicly traded partnership or trust.
9. The transferor realizes a gain on the initial grant or the lapse of an option to acquire a USRPI.

The first two exceptions do not apply if (i) the transferor knows that the certification is false, (ii) the transferee receives notice that the certification is false, or (iii) the transferee is required to furnish a copy of the certification to the IRS and the transferee fails to do so at such time and in such manner as required by the IRS regulations.

In the case of a disposition of a USRPI by a domestic partnership, trust or estate, the partnership, trustee or executor must withhold a tax equal to thirty-five percent (35%) of the gain realized to the extent that such gain is allocable to a foreign person who is a partner or beneficiary of such partnership, trust or estate, or is allocable to a portion of the trust treated as owned by a foreign person. In some cases, this tax is twenty percent (20%). Furthermore, a foreign corporation that distributes a USRPI to its shareholders must withhold thirty-five percent (35%) of the gain recognized on the distribution, unless the corporation has elected to be treated as a domestic corporation. Finally, special rules apply in the event of a foreclosure on a USRPI.

4. Duties and Liability of Agents

An agent is any person or entity that is involved in the transaction and represents the transferor or transferee in connection with the transfer of a USRPI. A person is not considered an agent merely because he receives and disburses any portion of the consideration for the transaction, records any document in connection with the transaction, or obtains title insurance reports and reports concerning the condition of the real property that is the subject of the transaction. A title insurance agent or settlement agent may be considered an "agent" depending on the role they play in the transaction.

Generally, the transferee is responsible for withholding and paying to the IRS any tax required to be withheld pursuant to FIRPTA. If the transferee does not collect and pay this tax, however, then any and all agents are also liable for the tax not collected.

An agent has a duty to notify a transferee in writing if the agent is aware that a transferor has provided a false certificate of non-foreign status or that a domestic corporation has furnished a false certificate stating that the corporation is not a USRPHC or that interests in such corporation are not USRPIs. The agent must provide this notice as soon as possible after learning of that false certification, but in no event later than the transferee's payment of consideration on the date of the transfer. A copy of the notice must be provided to the IRS at the same time, along with a cover letter explaining that the notice is being provided in compliance with Section 1.1445-4(c)(2) of the Internal Revenue Code Regulations. Generally, if any agent fails to furnish this notice at such time and in such manner as required, then the agent has the same duty to withhold that the transferee would have had if the agent had complied with the notice requirements.

An agent's liability to the IRS is limited to the amount of compensation the agent derives from the transaction. The agent's liability to the transferee and/or transferor is not limited by statute, however, and is governed by the relationship between the parties. In addition to the liability described above, civil and criminal penalties may be imposed upon the agent for failure to provide a notice or collect tax under FIRPTA.

In order to remain in compliance with FIRPTA and avoid the penalties described above, we suggest that persons closing real estate transactions:

1. Require the transferor to execute a Certificate of Non-Foreign Status Individual Transferor or Certificate of Non-Foreign Status Entity Transferor;
2. Provide a notice to the transferee summarizing the transferee's potential obligation to withhold pursuant to FIRPTA;
3. If needed, immediately provide a Notice of False Certification to the transferee and the IRS; and
4. Retain the Certificate and any such notices for five (5) tax years after the tax year in which the transaction occurs.

5. Underwriting Guidelines

If you become aware that the transferor is a foreign person, provide the transferee with the attached Notice to Purchaser(s) Regarding Transfer of United States Real Property Interest by Foreign Persons.

Contact Corporate Legal and Underwriting Services if you need any additional information or guidance concerning FIRPTA.

GG. Foreclosure

1. Generally

Foreclosure is the right of a lender under a deed of trust or mortgage to sell or acquire real property which was put up as collateral for the repayment of a loan in satisfaction of that loan. Generally, the statutes or code in effect in a state will outline the procedures necessary to properly foreclose on an instrument. When foreclosed, the deed of trust or mortgage is canceled, and the purchaser at the foreclosure sale acquires such title to the property as existed when the deed of trust or mortgage was recorded.

<u>**NOTE:** If a deed of trust or mortgage to be satisfied is in the midst of foreclosure, the Company requires that the payoff statement be obtained from the attorney who represents the lender at the foreclosure.</u>

2. Power of Sale vs. Judicial Sale

Some states (*see **State Supplement***) use a deed of trust which allows for sale under power of sale, instead of by lawsuit. Under a power of sale, only the record owner must be served with notice of foreclosure. A junior lienholder who wants to receive notice of foreclosure by senior lienholders must file a request for notice of sale in order to receive notice when a prior deed of trust is being foreclosed.

Other states use a mortgage so that foreclosure is conducted by the institution of a lawsuit, in which the mortgagee serves all parties having any interest in the property. If a junior lienholder is not served, the foreclosure is invalid as against him.

3. Effect on Junior Lienholders

The general rule is that the purchaser at a foreclosure sale acquires the title to the property as existed when the deed of trust or mortgage was recorded. In other words, foreclosure of a deed of trust or mortgage cuts off subsequently filed liens, judgments and other encumbrances, except for ad valorem taxes.

Foreclosure does <u>not</u> terminate:

1. Judgments docketed before the deed of trust or mortgage went of record;
2. Judgments arising from liens on the property asserting priority before deed of trust or mortgage as in the case of a mechanic's lien which may be recorded after a deed of trust but which asserts a lien priority dating back to before the deed of trust;
3. Judgments docketed after foreclosure of the deed of trust or mortgage is completed. For example, if the property is redeemed by the mortgagor judgments filed after foreclosure are not wiped out;
4. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under the internal revenue laws the period shall be 120 days or the period allowable for redemption under State law, whichever is longer. 28 U.S.C.A. § 2410.

4. Under the UCC (Uniform Commercial Code)

A foreclosure of a deed of trust or mortgage does not extinguish a purchase money security interest in fixtures under the UCC. If a fixture filing (UCC filing) is a purchase money security interest and is filed before the goods become fixtures or within ten (10) days thereafter, then that fixture filing would take priority over a prior deed of trust or mortgage as to the fixture.

5. Notice

Notice is a core issue to the validity of a foreclosure for two reasons. First, the Company must be sure the owner received sufficient notice to avoid a constitutional attack. Notice is best achieved by personal service on the party by the sheriff. Service by certified mail-return receipt requested is acceptable. Where notice is other than personal (*i.e.*, by posting or publication) try to identify facts that would show "reasonable and diligent effort" of service.

Second, there must be sufficient notice to insure that the sale is well attended. Otherwise, junior creditors or the owner can argue that because of defective notice, not enough bidders attended the sale to get the price closer to fair market value. If there were more bidders and greater sales price, then junior creditors or owners might get more money on their secured or unsecured debts or as equity.

Where notice is defective, evaluate:

1. How well attended was the sale?
2. What is the difference between fair market value of the property and the sales price?
3. How many junior creditors exist and what are their lien amounts?

6. Foreclosure Vis a Vis Bankruptcy

Foreclosure sales may be subject to avoidance by a subsequently-named bankruptcy trustee if the trustee proves the foreclosure to result in preferential treatment of one creditor over another. Federal case law in the appropriate jurisdiction will prescribe the period of time and circumstances allowing a trustee in bankruptcy to void a foreclosure.

7. Federal Tax Liens Relative to Foreclosures of Deeds of Trust

If property is foreclosed pursuant to a power of sale in a deed of trust thirty (30) days after a federal tax lien is placed on the property, the IRS must receive twenty-five (25) days' notice of the foreclosure sale. Upon proper notice, the IRS has a redemption period of 120 days after the date of sale to redeem the property to satisfy its lien or lose its lien. Failure to give the IRS notice leaves the federal tax lien in force.

The examiner can obtain a waiver of redemption from the IRS, or delay closing beyond the 120-day period or the Company must make an exception on both the owner's and lender's policy for IRS redemption rights. After expiration of the 120 days, the policy can be endorsed to remove the exception. <u>EXCEPTION</u>: When the foreclosure is of a VA or FHA loan and the government is the successful bidder, and there is no indication of equity in the property, policy can be issued without exception for the redemptive rights.

8. Foreclosure Commitment/Endorsement

The Company offers a Foreclosure Commitment and Endorsement designed for use where the Company is asked to insure a Lender foreclosing on its deed of trust or mortgage. This Endorsement is issued in conjunction with the 2006 Loan Policy. *See* ***State Supplement***.

9. Deed in Lieu of Foreclosure

Often, an owner of property is willing to deed the title to the lender or holder of the deed of trust or mortgage to avoid the publicity and hassle of foreclosure. Such deeds in lieu of foreclosure are insurable if certain requirements are met. Where the deed in lieu of foreclosure has been on record for more than one (1) year, then the only requirement is the cancellation of the deed of trust, if no bankruptcy is reported. Where the deed in lieu is on record twelve (12) months or less, then very explicit requirements must be made.

In the pages following this section, the Company has identified the proper inquiry for insuring deeds in lieu of foreclosure. These pages can be forwarded in their entirety to an examiner's office.

10. Underwriting

If insuring a property out of foreclosure, always make the following exception:

X13 Rights or claims of parties in possession not shown by the public records.

Use the following requirement when insuring a transaction where the transfer will be accomplished by a Deed in Lieu of Foreclosure:

DeedinLieu As to the Deed in Lieu of Foreclosure, the Company must receive:

(a) The deed must contain a recital stating it is an absolute conveyance of the Land to the grantor, the Land was sold for fair and adequate consideration, said consideration is a full satisfaction of all obligation secured by the Mortgage and a sufficient description of the Mortgage being satisfied (sample language is available upon request). OR
(b) The deed must include an affidavit and estoppel certificate containing a sufficient description of the Mortgage being satisfied, language stating the deed is for the absolute conveyance of the Land only and the conveyance is not a preferential conveyance for one creditor over another. The affidavit and estoppel certificate must be executed and acknowledged in recordable form by the individual or corporate grantor in the deed (sample language is available upon request).
(c) The note secured by the Mortgage must be canceled and surrendered to the grantor in the deed, and the Mortgage must be properly released of record. Satisfactory evidence of the fair market value of the Land and a current payoff statement from the lender receiving the deed in lieu must be provided.

NOTE: Satisfactory evidence of the fair market value may include, but is not limited to, prior appraisals, tax valuations, or recent contracts for purchase. If the property is worth considerably more than amount secured by and under the terms of the Mortgage, additional requirements or exceptions may be made.

Click here for sample language for #1 shown above. Click here for sample language from an individual and here for sample language for a corporation for #2 shown above.

Use the following requirement when insuring a transaction where a Deed in Lieu of Foreclosure appears in the chain of title in the last 12 months.

DeedinLieu2 As to the Deed in Lieu of Foreclosure, the Company must receive:

(a) Deed in Lieu of Foreclosure must be submitted to the agency for review.
(b) The note secured by the Mortgage must be canceled and surrendered to the grantor in the deed, and the Mortgage must be properly released of record.
(c) Satisfactory evidence of the fair market value of the Land and evidence of the outstanding indebtedness, at the time of conveyance, must be provided.

NOTE: Satisfactory evidence of the fair market value may include, but is not limited to, prior appraisals, tax valuations, or recent contracts for purchase. If the Land was worth considerably more than amount secured by and under the terms of the Mortgage, additional requirements or exceptions may be made.

In order to reduce the possibility of unintentionally providing creditors rights coverage for a Deed in Lieu of Foreclosure transactions, the Company has decided to limit its exposure to said risk by adding the following exception to the commitment and loan policy if a Deed in Lieu of Foreclosure appears in the chain of title within the last 12 months:

DCR Paragraph 13(a) of the Covered Risks is hereby deleted.

In the event the deed of trust or mortgage has not been properly released of record and/or will not be released of record, add the following exception to the policy:

MTG Mortgage from ^ for the benefit of ^ recorded in ^, at ^, securing a note in the original principal sum of $^, and any other obligations secured thereby and/or described therein.

HH. Forfeitures of Real Property Under Federal Drug and RICO Laws

The Company receives applications for title insurance for property which is being conveyed by the U.S. Marshall's office and which was acquired by that office through federal forfeiture proceedings.

The procedures employed by the government in these cases raise several issues regarding the title to the properties, for which uniform underwriting guidelines should be established. These are as follows (ALL such applications require Home Office guidance):

1. The U.S. Marshall typically gives only a special warranty deed in the name of the United States of America. There is no requirement for a general warranty deed, and the Company will accept the special warranty deed.
2. Since the deed is in the name of the United States, while the record title shows "John Doe" as the owner, there is a break in the chain of title. Require some language to be added on the deed to explain the event of forfeiture, or require that the Order of Forfeiture be recorded as an exhibit to the deed.
3. The Company's main concern is whether the record owner/criminal received notice of the forfeiture proceeding. That information can only be gleaned through conversation with the U.S. Attorney's office; however, this office is usually willing to discuss their process with the title examiner.
4. Notice to lienholders - The federal government takes the position that title to the property vests in the government at the time of the criminal act. The seizure of the property and subsequent forfeiture proceedings simply confirm the title forfeiture that has already taken place. Hence, the U.S. Attorney's office asserts, no third party can acquire a legally recognizable interest in the property after the illegal use. The date of the illegal activity is often, but not always, stipulated in the Order of Forfeiture.

The significance of this position becomes apparent when the examiner reports judgments, deeds of trust or tax liens against the forfeited property.

Often the Order of Forfeiture of a Stipulation of Compromise will identify mortgagees and record creditors, and recite the government's plan to satisfy those liens. Other times, the Order is silent as to such lienholders.

The Company has been informed by the U.S. Attorney's office that the government deals with lienholders as follows:

1. Holders of judgments docketed after the illegal act are automatically cut off without notice.
2. Holders of judgments docketed prior to the illegal act are given notice, upon receipt of which they must appear in court to protect their interest.
3. Secured parties and mortgagees are protected; hence, they receive notice whether their interests appear on record before or after the illegal act.

Where the Order of Forfeiture does not address every mortgagee or lienholder which is reported by the examiner, the Company must require the examiner to contact the U.S. Attorney's office to confirm that notice was given to all lienholders. If notice is not given to a junior lienholder on the basis that its interest appeared on record after the illegal act, the Company should not insure without exception for such outstanding lienholders.

In conclusion, it is safe to say that titles coming through U.S. forfeiture proceedings must be carefully scrutinized. Always enlist the assistance of the Home Office.

1. Unusual or Extra Hazardous Risk and Reinsurance Alert

In cases where a policy is insuring over an unusual risk (*i.e.*, RICO) and coverage is in excess of $5 million, the underwriter **must** advise the Home Office before issuing a commitment or policy.

II. Homestead

1. Generally

"Homestead" is defined as the home where the head of the family dwells, comprised of the house, the adjoining buildings and the surrounding land.

The homestead has been created by law in some states as an artificial estate in land which is recognized to protect the possession and enjoyment of the owner against the claims of his creditors, by withdrawing the property from execution and forced sale, so long as the land is occupied as a home. In these states, the householder or head of a family can designate a house and land as his homestead, and exempt the same homestead from execution for his general debts.

State laws vary as to whether a homestead right can be claimed, and where homestead rights are available, the householder may be limited as to the acreage or total value he can claim as exempt from his creditors. *See* ***State Supplement***.

JJ. Hospital and Institutional Liens

Some states provide unique lien rights in favor of hospitals or other care institutions which give care that remains unpaid. Refer to the ***State Supplement*** for more information on this topic.

1. "Hill-Burton" Act

The "Hill-Burton" Act (42 U.S.C.A. 291 et seq.) enables hospitals and other medical care institutions to obtain financial aid from the federal government when improving their facilities. Funds are directly provided to the state who, in turn, disburses the money to the hospital or institution.

Funds granted by the "Hill-Burton" Act may be recovered from the owner or transferee of the facility for twenty (20) years after the completion of the improvements. The Act also contains restrictions for usage of the property for purposes other than its original use.

Therefore, if a public or non-profit community hospital or other medical care institution is presently in title or was previously in title since the "Hill-Burton" Act passed (may 1946), then the following exception should be used:

HillBurton Rights of the United States to recover funds advanced to ^ [*name of hospital/institution*] pursuant to the "Hill-Burton" Act (42 U.S.C.A. 291 et seq.) or similar laws relating to health care.

The above exception may be deleted upon receipt of satisfactory evidence from the Department of Health and Human Services (800/638-0742) that no "Hill-Burton" Act funds were advanced to the hospital/institution or the obligation to repay such funds has been satisfied.

2. Unusual or Extra Hazardous Risk and Reinsurance Alert

In cases where a policy is insuring over an unusual risk (*i.e.*, known liens) and coverage is in excess of $5 million, the underwriter **must** advise the Home Office before issuing a commitment or policy.

KK. Indemnification

Indemnification is the act of one party agreeing to a second party that they will guarantee against, or compensate for, losses that the second party has incurred or will incur because of a specified incident.

Frequently used with indemnification language is a “hold harmless” clause, which is a promise by a party to another party to pay any costs or claims which may result from an identified situation for which the other party is concerned that there might be unknown lawsuits or claims, so the promising party agrees to cover these costs or claims.

Indemnification is an option that can be helpful in underwriting – having an indemnity agreement does not cure clouds on title, but it allows the underwriter to insure without exception to a problem issue because the indemnification transfers the risk from the underwriter to the indemnifying party, who by indemnifying agrees to pay for any loss or damage that may arise as a result of the problem.

Indemnification can be obtained for title matters by using one (1) of three (3) methods – an Indemnification by Approved Form, a Letter of Indemnity from a Prior Insurer, or a Mutual Indemnification Agreement

1. Indemnification by Approved Form

Investors forms that are signed by a seller/borrower, or other applicable affiant, in order to insure without exception to a title issue, such as the Seller/Borrower Affidavit, Estate Affidavit, Manufactured Homes Affidavit, “Not-Me” Judgment Affidavit, and Form 117 Indemnity Agreement, all include indemnification and hold harmless language. By signing the Affidavit, the seller/borrower, or other applicable affiant, agrees to pay for any loss or damage if a claim is filed regarding the issue(s) set forth in the Affidavit – a judgment, uncancelled deed of trust/mortgage, claim against an Estate, etc.

Use of the Form 117 Indemnity Agreement MUST BE APPROVED by the ***applicable Corporate Legal Division*** in each and every case.

The underwriting preference is to insure without exception to various title matters by relying on duly executed Investors forms. However, non-Investors forms will frequently be executed at closing and provided with the final update and other supporting documents. If a non-Investors form is submitted, it may be accepted in lieu of the required Investors form if (i) the content includes sufficient transaction information and description of the title issue being addressed; (ii) the form references, is addressed to, or otherwise identifies Investors Title Insurance Company; and (iii) the form includes indemnification language.

If there are questions or concerns about relying on a specific non-Investors form for your transaction, please contact Corporate Legal and Underwriting Services for assistance.

2. Letter of Indemnity from a Prior Insurer

Sellers, borrowers and lenders will frequently provide a copy of a prior policy that insures without exception to an unresolved title issue that has been reported for the current transaction, the argument being that the prior insurer probably addressed the matter to their satisfaction and determined they were comfortable insuring over the issue. While this argument sounds good in theory, if the prior insurer was not Investors, we likely have no knowledge of the due diligence of the prior insurer, or evidence that they were even aware of the issue. Rather than relying solely on a prior policy from another insurer, it is better to ask the prior insurer for a specific Letter of Indemnity. By providing such a letter, the prior insurer is agreeing to pay for any loss or damage incurred by Investors if a claim is filed regarding the specified issue.

If an agent choses to contact a prior underwriter or issuing agent and request a Letter of Indemnity for a transaction, the following should be provided to the prior underwriter or issuing agent:

(a) The agent’s current commitment identifying the issue(s) for which the LOI is being requested;
(b) The prior policy insuring without exception to the issue(s);
(c) Any supporting documents for those issues (i.e., mortgage, deed of trust, judgment, etc.); and
(d) The date of the agent’s closing (if known).

Specific Letters of Indemnity are limited to the amount of the policy issued by the prior insurer. Therefore, depending on the issue and the potential risk, if the prior policy was for an amount considerably less than the current transaction amount, a Letter of Indemnification may not be sufficient and the issue will need to be further addressed in order to insure the current transaction without exception.

See ***State Supplement*** for specific underwriting guidelines on the use of Letters of Indemnity.

3. Requests for Specific Letters of Indemnity from Investors

Just as Investors’ underwriters may at times reply on a Letter of Indemnity from a prior insurer, other underwriters or agents may also request Letters of Indemnity from Investors. Any such requests are treated as claims by Investors and are handled by our Claims Department, who will review and determine whether the issuance of a Letter of Indemnity is appropriate. If an agent is contacted by another underwriter or agent requesting a specific Letter of Indemnity, the underwriter should be instructed to submit a request to our Claims Departments following the below instructions:

1. E-mail the request to newclaims@invtitle.com.
2. The body of the e-mail should identify:
   a. The issue(s) for which the LOI is being requested, and
   b. The date of closing (if known).
3. If the closing date is rapidly approaching (tomorrow, day after, etc.), this should be stated as well so that the administrator who is assigned the claim can be aware of any deadlines.
4. Include copies of:
   a. The current owner’s policy;
   b. The current commitment identifying the issue(s) for which the LOI is being requested; and
   c. Any supporting documents for those issues (i.e., mortgage, deed of trust, judgment, etc.).

> The agent also has the option of submitting the request. If so, follow the procedures set forth above to e-mail the request to newclaims@invtitle.com with a copy to the new underwriter or new agency requesting the Letter.

Typically, further communications and issuance of the Letter of Indemnity will go directly from the Claims Administrator to the new underwriter or new agent who has submitted the request.

Due to every transaction being unique with different variables, there is not a typical turnaround time for issuing a Letter of Indemnity. However, for every request, the Claims Department makes every reasonable effort to respond in a timely manner in order to avoid causing any delay.

MM. Intestate Succession

1. Rules of Intestate Succession

Most states provide rules for the distribution of a decedent's property in the event there is no will. These rules are called the laws of intestate succession and they apply to all property whose title is in the name of the decedent and to any property which comes into the estate by other ways, such as insurance payable to the decedent's estate. The persons who receive a decedent's property under these rules are called "heirs." The rules of intestate succession apply without regard to the wishes of the decedent, and without regard to the prior conduct of the heirs toward the decedent.

These rules do not apply to property held in joint names which will pass to the surviving joint tenant or to property such as life insurance which is subject to a contract and which will pass to the person named as beneficiary by that contract.

Most people are survived by a spouse, children or grandchildren. If the decedent is not survived by a spouse, children, grandchildren or parents, more distant relatives become the heirs to the decedent's property. If there are no heirs within any available classes, the estate "escheats," or goes to the state. The pattern of distribution of assets is set forth in the rules of intestate succession for those family members and parents, grandparents, aunts, uncles, mothers and sisters.

2. Spouse's Elective Life Share

Often, in lieu of the common law concepts of dower and curtesy, surviving spouses are given an election to share in the deceased spouse's estate upon his death.

3. Treatment of Special Relationships

Adopted children, stepchildren, in-laws, half-blood relations, and illegitimate children are often specially treated under the state laws for purposes of the distribution of an estate.

See ***State Supplement*** for particulars.

NN. Joint Driveways and Walkways

Plats of survey or the public record may disclose driveways or walks used in common by the owners of the premises under consideration with adjoining property owners.

Such may be located partly on the insured premises and partly on the adjoining property, or they may be located wholly on insured premises or wholly on adjoining property. Unless the rights of the various parties using the driveway or walk are established of record, the Company cannot insure, as an appurtenance to insured premises, the rights of the owner of insured premises to use such portion of the driveway or walk as is located on adjoining premises. Also, the Company cannot insure against the rights of those making use of that part of the driveway or walk located on the property under consideration.

1. In the Absence of an Agreement

If the rights of the parties are not established of record, no insurance can be afforded in connection with the driveway or walk. The following exceptions should be used:

S75a Joint ^, used in common, situated partly on the Land and partly on property adjoining on the ^, as shown on plat of survey by ^ [*name of surveyor*], [RLS][PLS], dated ^.

2. Under Agreement

In some cases the joint use of a driveway or walk may have been established by agreement of record between the property owners. The following exceptions are suggested:

S76 Joint ^ situated partly on the Land and partly on the property adjoining on the ^ as established by agreement between ^ and ^ dated ^ and recorded in Book ^ at Page ^.

OR

S77 Rights of adjoining owner on the ^ in and to the use of the joint ^ situated partly on the Land and partly on the property adjoining on the ^.

OO. Judgment Liens

1. Generally

When a civil action or criminal proceeding is concluded and a judgment is entered or docketed against one of the parties, that judgment becomes a lien on all real property owned by that party in the county where the judgment is entered. Judgments can be transcribed from one county to another to become a lien on property located there.

The lien that arises from a docketed judgment is often limited in duration by state statute or case law. Often, state law provides that the lien of a judgment may be continued or extended by the judgment creditor if he brings an independent action on the judgment or makes additional filings as prescribed by statute.

2. Exemptions

An individual resident is usually entitled to retain certain property free from the enforcement of the claims of his creditors. It is important to note however, that property that is exempt from judgment loses this protection when it is later conveyed. The property then becomes subject to judgment liens previously docketed. The statute of limitations on judgments is usually also suspended for the period of exemption, as to the property which is exempt.

This property is known as "exempt" property and the exemption usually only speaks to a certain dollar amount for each class of property. For example, a debtor's principal residence might be exempt up to $10,000; one motor vehicle is exempt up to $1500; $3500 for household furnishings.

3. Tenancy by the Entireties

Judgments docketed against either a husband or wife alone do not attach to real property which they hold as tenants by the entirety. If the husband and wife divorce, thereby terminating the entireties and rendering their ownership of the property a tenancy in common prior to selling the property to a third party or one conveying his/her interest to the other, the judgment will attach to the tax debtor's one-half (1/2) undivided interest.

4. Judgments Against Buyers

The theory being relied upon to preserve the priority of the purchase money deed of trust is the Doctrine of Instantaneous Seizin. The requirements to insure over a judgment which is docketed against the buyer of real property are:

1. The buyer must borrow money for the purpose of or acquiring title in and to the real property;
2. Buyer must give a purchase money security interest to the lender or seller;
3. The deed to the buyer and the purchase money deed of trust must be recorded simultaneously, or if not simultaneously, clearly as part of the same transaction.

5. Judgments Against Same Name

Occasionally, a title search will uncover a judgment docketed against a person with the same name as the seller or buyer, but the seller/buyer asserts that it is not against them. The certifying attorney should be asked to verify that the judgment is not against the seller/buyer by comparing social security numbers, street addresses, or other pertinent information of the seller/buyer to the judgment lien file. If no verification can be accomplished in this manner, the Company can consider accepting the "Not Me Affidavit" from the seller/buyer to substantiate his claim that the judgment is not against him, depending upon:

1. The amount of the judgment;
2. Which party is being insured and in what amount;
3. Who will provide the Affidavit; or
4. Other circumstances.

If use of the "Not Me Affidavit" is appropriate the following requirement shall be made in the title commitment when a reported judgment lien is not being satisfied at closing because the reported judgment lien is not against the property owner or seller:

NotMe Receipt and satisfactory execution of the attached Affidavit regarding the following judgment lien: ^ [*insert judgment lien information*].

The Not Me Affidavit may be found in the ***Forms Manual.***

6. Underwriting

If the title opinion shows a recorded judgment, the release of said lien should be required in the following manner:

L50 Cancellation and release of record of judgment in favor of ^ recorded in Book ^ at Page ^, in the amount of $^, plus interest and cost.

If any judgment(s) remain outstanding, and are not canceled and/or released of record, they must be excepted to in the final policy:

L52 Judgment in favor of ^ recorded in Book ^ at Page ^, in the amount of $^, plus interest and cost.

7. Federal Liens, Generally

Many states have enacted the Uniform Federal Lien Registration Act, which provides where federal liens are required to be filed.

The Federal Debt Collection Procedures Act of 1990 (28 U.S.C. A §3201) provides that upon filing, a judgment in favor of the United States now has priority over any subsequent liens and encumbrances for a period of twenty (20) years, which period can be extended for an additional period of twenty (20) years. Note that any judgment in favor of the United States which had not expired before May 29, 1991, was automatically extended to expire twenty (20) years from its date.

8. Unusual or Extra Hazardous Risk and Reinsurance Alert

In cases where a policy is insuring over an unusual risk (*i.e.*, known liens) and coverage is in excess of $5 million, the underwriter **must** advise the Home Office before issuing a commitment or policy.

PP. Land Patents

A land patent is an instrument by which a government entity grants public lands to an individual and serves as muniment of title issued by a government entity for the conveyance of some portion of the public domain. The use of land patents and the law related thereto varies between jurisdictions.

QQ. Land Sales Contract/Installment Sales Contract

An alternative financing method to the traditional mortgage is a Land Sales Contract (a/k/a Contract for Deed or Installment Contract). This contract may look, on the surface, to be a purchase agreement, but in effect, it acts as a mortgage.

With a Land Sales Contract, the seller (the "vendor") holds title to the property. The terms of the contract will provide for a purchase price and monthly payments. The terms provide that if the buyer (the "vendee") completes the specified payments, the vendor will then deed title to the property to the vendee. During the period of the contract, the vendee is entitled to possession and equitable title to the property. The vendor holds legal title and continues to be liable for payment of any pre-existing mortgage or loans.

Contracts for deed are often used for short-term financing (of a few years or less), and may contain a "balloon payment" clause, meaning that on a specified date, the entire outstanding balance of the purchase price will be due and payable.

The vendee may mortgage, assign or convey his/her interest as long as the vendor's position is not impaired. In the event of such mortgage, assignment or conveyance, the vendee's obligations under the contract remain and can only be released if the vendor specifically releases the vendee's obligations in writing.

Likewise, the vendor may mortgage, assign or convey his/her interest as long as the vendee's position is not impaired. In the event of such mortgage, assignment or conveyance, the vendor's obligations under the contract remain and can only be released if the vendee specifically releases the vendor's obligations in writing.

1. Satisfaction

Satisfaction of a Land Sales Contract occurs when the vendee completes the specified payments and the vendor deeds title to the property to the vendee.

2. Termination

If the vendee fails to make the required payments, including any balloon payment, the vendor can cancel the contract, usually by serving notice on the vendee. If the vendee fails to cure the default, he/she she can lose the property and any money paid to date. In most states, the termination provisions are set forth in the contract.

3. Underwriting if requested to insure the fee simple owner

If the search reveals an outstanding Land Sales Contract, make the following requirement:

ContrCancel	Receipt of evidence that the Land Sales Contract/Installment Sales Contract has been cancelled OR recitation in the Deed that the deed is being executed to satisfy that Land Sales Contract/Installment Sales Contract by and between ^.

If the Land Sales Contract remains of record, make the following exception:

Contract	Subject to that Land Sales Contract/Installment Sales Contract by and between ^, [recorded in Book ^ at Page ^]."

4. Underwriting if insuring the vendee's interest under a Land Sales Contract

Commitment: Schedule A, Item 2(a) should read: "Contract Purchaser [names of vendees]"

Make the following requirement:

Contr/Record Receipt of recording information for the Land Sales/Installment Sales Contract.

Include the following in Schedule B-II:

Contr/Es The estate or interest in the Land is that right as contract purchaser under that Land Sales Contract/Installment Sales Contract by and between ^ and ^, recorded in Book ^ at Page ^, ^ County Registry.

AND

Contr/No This policy does not insure performance of the terms and conditions of the Land Sales Contract / Installment Sales Contract by and between ^ and ^, recorded in Book ^ at Page ^.

Final Owner's Policy

Schedule A, Item 1 (Name of Insured) should read: "[names of vendees]"

Schedule A, Item 2 should read: "Vendee's Interest"

Schedule A, Item 3 should read: "Land Sales Contract by and between ^ and ^, dated ^ and recorded ^ in Book ^ at Page ^.

Include the following in Schedule B:

Contr/Es The estate or interest in the Land is that right as contract purchaser under that Land Sales Contract/Installment Sales Contract by and between ^ and ^, recorded in Book ^ at Page ^, ^ County Registry.

AND

Contr/No This policy does not insure performance of the terms and conditions of the Land Sales Contract / Installment Sales Contract by and between ^ and ^, recorded in Book ^ at Page ^.

Click here for sample Commitment and Owner's Policy.

RR. Leases and Leasehold Titles

A lease is a contract whereby one person (called the lessor or landlord) grants to another person (the lessee or tenant) the right to use a parcel of land for a specified period of time or term, in exchange for rent payments.

A leasehold interest is insurable and a leasehold policy is issued to insure the interest of a lessee/tenant in and to real property, including, by necessity, the validity of the lease under which he holds title. Because a lease serves both to convey an interest in the real estate for a period of time and to impose conditions and restrictions concerning the use of the land, an exception must be taken for failure to comply with terms and provisions of the lease.

Premiums for title insurance on leasehold interests are collected either based on fair market value of the property or the amortized value of lease. The following formula is used to calculate the value of the lease or to amortize lease payments:

$ν [*Rental payments*] x total number of payments = $ν [Amount of Policy]

1. *Leasehold Commitment*

A Commitment to insure a leasehold transaction is issued on a standard ALTA Commitment for Title Insurance.

Since there are additional parties to the transaction it is important that the information shown in Schedule A of the Commitment appears as follows:

Schedule A, #2(a) – the Proposed Insured is the name of the ***lessee***
Schedule A, #3 – the estate or interest in the Land described in the Commitment relates to the current ownership interest.
Schedule A, #4 – the titleholder is listed if the transaction being insured is a new lease; if there is an existing lease, the fee owner does not need to be listed.

2. *Leasehold Interest – Owner's Policy*

Leasehold owner's policies are issued on standard ALTA Owner's Policy with the ALTA Endorsement 13-06 Leasehold – Owner's attached to it.

3. *Leasehold Interest – Loan Policy*

Leasehold loan policies are issued on standard ALTA Loan Policy with the ALTA Endorsement 13.1-06 Leasehold – Loan attached to it.

Click here for sample Commitment, Loan Policy, and Owner's Policy.

4. *Underwriting*

If the transaction is to insure a leasehold interest in the real property, make the following requirement in the Commitment:

Lease/Record	Receipt of recording information for the Lease creating the Leasehold Estate.

A common exception when a lease affects the insured premises is:

Lease Lease from ^ to ^, recorded in Book ^ at Page ^.

a) When 2006 Owner's Policy is requested

Because the Company cannot guarantee against losses arising from failure on the part of the insured to comply with the terms of the lease, exception is made in all leasehold owner's policies as follows:

P25a Loss or damage resulting from failure to comply with the terms and provisions of Lease set forth under Schedule A hereof, creating the Leasehold Estate insured.

And except to the fee simple owner:

FeeSimpl Fee simple interest of ^.

b) When 2006 Loan Policy is requested

In the leasehold loan policy, when the lease has commenced to run, the following exception is used:

P27 The effect of any failure to comply with the terms and provisions of Lease from ^ to ^, dated ^ and filed for record on ^ in Book ^ at Page ^, creating the Leasehold Estate conveyed by the [deed of trust] [mortgage] set forth under Schedule A hereof.

And except to the fee simple owner:

FeeSimpl Fee simple interest of ^.

5. Unusual or Extra Hazardous Risk and Reinsurance Alert

In cases where a policy is insuring over an unusual risk (*i.e.*, Mineral Leasehold Policies) and coverage is in excess of $5 million, the underwriter **must** advise the Home Office before issuing a commitment or policy.

SS. Legal Description

Generally, a legal description of real property must describe the property with sufficient certainty that it can be located on the ground. A legal description can either be by metes and bounds or by reference to a lot and block on a recorded plat. Without a valid legal description, a deed will fail and there will be no conveyance of title to the real property.

A vague or ambiguous description may affect the marketability of the title. While not every deficiency or inaccuracy will necessarily invalidate a deed, less than adequate descriptions can cloud titles and raise disputes.

In order to be valid, a deed or other conveyance must describe or somehow identify the land to be conveyed. The Statute of Frauds requires that the identification be in writing. A deed does not need to contain a complete description on its face - reasonable certainty is all that is required. The deed's subject matter must either be clearly definable as it is written or must be capable of being identified by reference to extrinsic evidence, including the intent of the parties as can be determined from the four corners of the document. In other words, the description in a deed or contract must be sufficient to enable a competent surveyor to locate the property's boundaries on the ground. The following methods are most commonly used to describe property:

- Metes and Bounds description
- The Rectangular System
- Reference to a recorded Map or Plat
- Reference to property by its Street Address
- Reference to a Prior Conveyance

Just as a legal description is an essential part of a deed, it is an essential part of the title commitment and policy. Without a legal description, there is no way to determine which property the search relates to and thus the commitment and policy are meaningless. Therefore, it is imperative that the title company be provided a proper legal description when asked to prepare a title commitment.

When reviewing legal descriptions, look for a preponderance of the evidence to identify the property and where there is an ambiguity, inconsistency or conflict in a description, gather the intention of the parties from the four corners of the instrument.

1. Metes and Bounds Description

The basic elements of a metes and bounds description include (1) monuments set or called for; (2) courses; (3) adjoining landowners and (4) area. A metes and bounds description is quite useful when describing rural and irregularly shaped tracts of land. The description should begin with some geographic "point of beginning." If the point of beginning is not ascertainable or cannot be located, the rest of the legal description will fail because it has no basis or foundation. The beginning point may be (a) directly identifiable, (b) located by reference (or tie) to another known point, or (c) determined by reversing calls from an established monument in the description back to the point constituting the beginning. An example of each type of beginning point follows:

a. BEGINNING at a concrete right of way monument marking the intersection of the southern margin of the right of way of Deacon Lane with the western margin of the right of way of Smithfield Drive; and runs thence from said established Beginning Point . . .;

b. BEGINNING on an iron pin in the eastern margin of the right of way of Adam Street, which iron pin is located South 26 deg. 5 min. 30 sec. West 250.96 feet from a concrete right of way monument marking the intersection of the southern margin of the right of way of Deacon Lane with the western margin of the right of way of Smithfield Drive; and runs thence from said established Beginning Point . . .;

c. BEGINNING on an iron pin in the western boundary line of the Dean Smith property; runs thence North 05 deg. 15 min. 45 sec. West 149.05 feet to an iron pin marking the northwest corner of the Dean Smith property; then South 89 deg. 25 min. 15 sec. West 152.80 feet to an iron pin in the eastern margin of the right of way of Adam Street, which iron pin is located South 26 deg. 05 min. 10 sec. West 250.95 feet from a concrete right of way monument marking the intersection of the southern margin of the right of way of Deacon Lane with the western margin of the right of way of Smithfield Drive; thence .. .;

Once the beginning point is established, the description continues with a “call” which includes a course (usually expressed as degrees, minutes and seconds) and distance from one point to the next. For example, a call may be stated as follows:

“North 05 deg. 15 min. 45 sec. West 149.05 feet to an iron pin”.

Each call represents a boundary line of the tract and the calls continue until the last line returns to the place of beginning. Although most modern deeds are stated in terms of the number of feet, distance can also be expressed in yards, rods, poles, chains, links or other units of measurement.

Early deed descriptions relied heavily on natural objects or “monuments,” such as streams, rivers, trees and stumps to mark the boundaries of land. However, the major problem with such monuments is their lack of permanence. Over time, streams and rivers can change course and trees or stumps may be removed. As a result, many descriptions today use artificial monuments such as iron pins or pipes that are driven into the ground at each boundary corner. Additionally, roads and bridges can be used for reference to help identify or retrace the description in the event the iron markers are ever removed. Although it is not error-free, a metes and bounds description can be a useful and accurate means of identifying property.

2. Rectangular System

Beginning in the late 1700’s, the United States Continental Congress determined that it was necessary to inventory all of the public lands belonging to the United States. In order to get accurate information, the Continental Congress passed legislation requiring all land, other than that contained in the original thirteen colonies plus Texas, Kentucky, Tennessee and West Virginia, to be surveyed using a rectangular tract system. The surveys of the public lands would also allow the government to grant parcels of property that were specifically identifiable. This would avoid many of the hap hazard survey problems existing in the original colonies. For example, in 24 counties in Georgia, containing 8,718,000 acres, 29,090,000 acres of land were granted. Not to be out done, North Carolina, with a land area of approximately 55,000 square miles, granted over 100,000 square miles of property.

The rectangular system is fairly easy to understand once you get the hang of it. A large tract of land is initially divided by a Base Line running East and West and parallel to lines of latitude. The land is then divided by a Principal Meridian line that runs true North. Once these lines are established, standard parallel lines are run north and south of the base line and guide meridians are run parallel to the principal meridian line. The standard parallel lines and the guide meridian lines are established on 24-mile intervals thus creating quadrangles. Townships are designated sequentially north or south of the base line and ranges are designated sequentially east and west of the principal meridian.

Once the quadrangles are established, they are further subdivided into townships that are 6 miles by 6 miles square. The individual townships are established by laying range lines running north and south and parallel to meridian lines and by running township lines east and west on 6 mile intervals from the standard parallel lines. Once the township is established, it is divided into 36 sections. The division of townships is done by setting section corners at one-mile intervals along the range and township lines. Sections 1 through 6 run across the top of the township from right to left. Section 7 is immediately below sections 6. Sections 7 through 12 then run from left to right. This numbering system continues until you reach section 36 in the southwest corner of the township. Each township contains approximately 36 square mile or 23,040 acres of property. Each section contains approximately 640 acres.

Section 1 is the Northeast corner and proceeds west to section 6; then the next tier numbering east from section 7 to section 12; this goes back and forth until section 36 is reached in the southeast corner.

Sections are then broken down further into quarter sections and quarter-quarter sections. Each quarter section contains 160 acres and each quarter-quarter section contains 40 acres. Each quarter-quarter can be broken down until you reach tracts as small as one acre.

For an example of the information above, click here (as seen in Land Title Institute, Course 1).

3. Reference to a recorded Map or Plat

A plat is a map that has been recorded in the Register of Deeds or Land Records Division in the county where the property is located. The most common use of a plat is the subdivision and development of property. Generally, the "subdivider" of land prepares the map (or has it prepared) which shows the streets that will be laid out and the lots and blocks of property to be sold. The plat showing all the blocks in a particular tract are delivered to the Register of Deeds Office where it is recorded in the map books along with all the other subdivision plats in the county. Each plat is assigned a book and a page number and, from then on, is available for public inspection and copying. When describing a particular lot on a plat, the legal description need only reference the number of the lot, block number (if any) and the plat recording information. In order to be accepted for recordation, the plat must generally meet certain requirements or standards for format and accuracy, as well as any applicable county or local ordinances.

4. Reference to property by its Street Address

Courts have upheld legal descriptions that are based on a reference to a street address or other local reference. However, one problem with using this method to describe a parcel of land is that it does not indicate where the boundaries of the parcel lie. Additionally, street names and numbers can change over time or repeat themselves. While we do not recommend relying on this method as a sole source for a legal description, it can be used as additional information to bolster an otherwise ambiguous description.

5. Reference to a Prior Conveyance

Another common method of describing property is to refer to a prior deed conveying the same land and incorporate such reference into a current deed. If the description contained in the prior deed is clear and unambiguous, the current deed will sufficiently identify the property. If a court were to examine the adequacy of such a legal description, it would consider the description in the prior deed as if it were written out in its entirety in the current deed.

6. Other Description Techniques

Certain descriptive techniques almost certainly result in ambiguous descriptions and should be avoided. Among them are references to a quantity of land. Typically, this descriptive technique might read as follows: “the west 50 feet of Lot 10”. Only if Lot 10 is precisely rectangular and its boundaries run exactly north-south and east-west would this be a satisfactory descriptive technique. In all other cases the description would likely be ambiguous. If the northerly boundary and the southerly boundary are not parallel to each other the description is unclear as to along which boundary the 50 feet is to be measured. Moreover, where the westerly and easterly boundaries are not parallel, the description is also unclear as to whether the 50 feet is to be measured at right angles to the westerly boundary or if it is to be measured due east from the westernmost point of the lot. The same problem arises where the description purports to convey a fractional part of a larger parcel, such as “the west half of Lot 10”. Similarly, if a conveyance uses another form of fractional description such as one-half of a described tract, but fails to describe adequately the particular part conveyed, some state courts may construe the instrument as conveying an undivided tenancy in common.

7. Ambiguous Legal Descriptions

An ambiguity exists when language is capable of being understood in more than one way or refers to two or more things at the same time. Generally, two types of ambiguity are found in deed descriptions, patent and latent.

Using language contain in a will as an example, a patent ambiguity, which is an ambiguity that is readily apparent by examining the documents on its face, it might read as:

> Testator leaves a will containing the following provision: “I give Blackacre to John and all my real estate to Bob.”

This ambiguity is readily apparent by examining the document on its face. Who gets Blackacre? This is a patent ambiguity because Blackacre is real estate. Just by looking at the face of the instrument, you can see that it is ambiguous and unclear who Testator intended to receive Blackacre.

Again using language in a will, a latent ambiguity, which is discovered upon further investigation, it might read as:

I give MY HOMESTEAD to Shirley.

Unfortunately, upon Testator's death, it is discovered that he owns a ranch called "Homestead" in addition to his primary residence. Therefore, this creates a latent ambiguity because we are uncertain as to whether Testator intended to convey the ranch or his home.

In most cases the parties involved will work out these types of issues amongst themselves. If they cannot come to a satisfactory resolution, they may end up in court. Title Insurers hope to avoid situations like this. When determining what was or should have been conveyed, the court is looking to ascertain the intention of the parties. With this objective in mind, courts have generally taken the position that when a deed or conveyance is clear on its face the document will control and outside or parol evidence may not be used to contradict or vary the description. For example, if a deed from A to B contains a description that reads "Lot 1, Block 1, Boom Town Subdivision, as shown on that certain plat recorded in Plat Book 1, Page 1, George County Virginia." It is clear based on the legal description that A was intending to convey lot 1. If B subsequently challenges the conveyance, contending that he/she should have received lots 1 and 2, the court will not allow outside evidence to be admitted because the deed is clear on its face. If the intention of the parties is clear and can be determined by the words used in the deed, courts must conclude that the parties intended what they said (The "Plain Meaning Rule" or "objective theory" of contract interpretation).

Likewise, when the deed description is incomplete or ambiguous and it is apparent from the document that it does not constitute the entire agreement between the parties, extrinsic evidence of the surrounding circumstances and probably motives of the parties is admissible to establish the true intention of the parties. Using the example above where the will leaves "my homestead" to Shirley, Shirley would be allowed to introduce evidence to show which homestead the testator was referring to.

8. Rules of Construction

There are times when the intentions of the parties to the transaction are clear, but the legal description used in the transaction might not be. When trying to locate the boundaries of a parcel of property, the usual procedure is to follow the calls in the order given in the description and to establish each boundary line and corner in turn. If this method fails to establish a particular boundary or corner, it is possible to skip to a later corner or boundary that is known and reverse the direction to establish the location of the unknown corner. For example, assume that you have received the following legal description:

Beginning at a point located at the Southeast intersection of North Street and West Street; thence along the right of way of West Street North 90 degrees 00 minutes 00 seconds east, a distance of 300 feet to a found iron pin in the southern right of way of West Street; thence South 00 degrees 00 minutes 00 seconds West, a distance of 300 feet to a found iron pin in the Northern right of way of Second Street; thence along the north right of way of Second Street, North 90 degrees 00 minutes 00 seconds West, a distance of 300 feet to a found iron pin located in the Eastern right of way of North Street; thence 300 feet to the true point of beginning.

As you can see from this legal description, there is no course to complete the legal description. However, with the information provided, it is possible to determine what the last course should be. This legal description would be insurable. If there are inconsistencies in the description such that a boundary cannot be located, courts have developed the following general hierarchy for ranking the inconsistencies (1 =best, 6=worst):

1. Natural monuments or landmarks (stones, cliffs, trees, stumps, roads, etc.);
2. Artificial monuments (set iron pins, houses, sheds, etc.) and established lines, marked or surveyed;
3. Adjacent boundaries or lines of adjoining tracts;
4. Calls for courses and directions
5. Distances (feet, rods, chains, steps, etc.);
6. Designations of quantity or area of land.

When courts are called upon to interpret ambiguous, inconsistent and conflicting legal descriptions, the above rules of construction are used to help interpret and to decide as a matter of law where the boundaries of property lie. However, the above-mentioned rules are to be used as guidelines and are not inflexible. Therefore, these rules need not be used if to do so would frustrate the intent of the parties.

It is incumbent on the certifying attorney, title abstractor or underwriter to insure that the legal description in the policy does not contain ambiguities. If ambiguities are present, then additional information will be necessary to determine if the legal description is insurable. Additional information could include such things as prior conveyances, surveys, corrective deeds and affidavits depending on the situation. It should be noted however that a survey, no matter how good it is, cannot correct an invalid legal description. A survey can only show what the legal description should be. In some cases, the legal description may be so vague that the party will have to go to court to have the deed construed.

9. Variances Between the Legal Description and the Survey

Surveying generally involves the following components: (i) determining the location of property lines; (ii) showing the improvements which are located on the property; and (iii) stating the size or quantity of property.

Generally, the description in the deed of trust must be in conformance with the survey in order to provide mortgagee coverage for matters of survey, while the description in the deed must be in conformance with the survey in order to provide coverage to the owner. The survey must also be examined in order to ascertain the presence of easements, encroachments onto the insured premises, or encroachments onto adjoining lands appurtenant to the insured premises. If the property to be insured is subject to restrictions such as building setback lines, the survey must be checked for existing violations.

10. Boundary Line Agreements

Where the boundary line(s) of adjoining landowners are not definitely known or their location is in dispute, such owners may establish the line(s) either by a written agreement, conveyance, or parol agreement. A parol agreement is an oral agreement that is established by outside facts such as the use and possession of the property. The parties' mutual recognition of, and acquiescence to, may also establish certain lines as the true boundary lines.

The owners of adjoining lands are the only persons who are competent to agree and thus establish a boundary line between their properties where such line is uncertain and in dispute. Moreover, where there is a bona fide dispute as to the true location of a line, or its location is not definitely known, a sufficient consideration exists for the making of an agreed line, and a written boundary agreement is binding on the parties and their heirs, successors and assigns.

There are generally two types of boundary line disputes. In the first type, the boundary line is uncertain between two points. In the second, the adjoining landowners' legal descriptions actually overlap or cross. The first type is typically corrected by a written agreement where the adjoining landowners agree to establish a line separating the property but do not include cross conveyances. The second type of dispute is resolved by a written agreement in which a boundary is agreed to and each landowner conveys any right, title and interest that he may have to the adjoining landowner. This second type of agreement is preferred. Regardless of the type of agreement used, the searcher should examine the adjoining property to verify that the party entering the agreement has the authority to do so.

Where a boundary line agreement is entered, the legal description should incorporate the cross conveyances or the legal description should indicate that it is subject to the recorded boundary line agreement. The latter occurs where the cross conveyances have not been incorporated into a new legal description.

11. Underwriting for Additional Easements or Rights in Legal Descriptions

A legal description that describes easements, water rights, dock privileges, etc. which, if included in the description on Schedule A of the policy, can give rise to the argument that the Company has deemed such interest as "Land" and that the Company has thus insured these rights or easements. Most searches or opinions of title do not include examination of such rights, nor are they included in the search or opinion with the intent of obtaining title insurance for such rights.

Such rights or easements should not be included in Schedule A of the commitment/policy. Only rights that are being insured should be included in Schedule A.

Any wording which includes statements such as, "*Subject to…, Restrictions…, or Easements…", "Being the same…" or "Further Deed References*…," should be omitted. Such statements should be excepted to under Schedule B as is appropriate.

a) Access Easements

One type of language which should be included in Schedule A of the Commitment and the Policy when shown in the legal description is that which describes the right of access appurtenant to the Land being insured. This language will be included, along with the description of the actual parcel of land to be insured, if said land describing the access has been searched and/or certified as valid.

Typically, this access easement can be identified by the descriptive paragraph(s) of the same beginning *"Together with…"* followed by other wording that may help identify the appurtenant access easement as such, for example: *an easement (or "a right of way") for the purpose of ingress, egress and regress" or simply "an easement for access."*

b) <u>"Out Conveyances"</u>

An out conveyance of land should also be included in the legal description in Schedule A of the commitment and policy. An out conveyance is defined as land that is divided or cut out from the original parcel and conveyed to another party. An out conveyance may be identified by wording such as, "Save and except the following." It is necessary to include the out conveyance language because it is the remaining portion only of the original parcel that is to be insured. Out conveyances may be described with a conventional legal description, book and page reference, or both.

These guidelines are only applicable to formatting of legal descriptions to be included in Commitments and Policies. Do not require Attorneys or Settlement Agents to use the changes.

12. Legal Descriptions Containing Acreage

Due to claims history and case law, Investors Title decided to amend its procedures regarding the insurance of acreage in legal descriptions. *Walker Rogge, Inc. v. Chelsea Title & Guaranty Company*, 116 N.J. 517, 562 A.2d 208 (1989). See "Underwriting" later in this section for complete information.

13. Deeded Legal versus Tax Legal

There are times where the deeded legal description does not match the taxing authority's legal description. Typically, the Company has always been reluctant to utilize a tax legal in Schedule A of either a commitment or policy. The Company has also been reluctant to provide the tax legal for use in a mortgage, deed, or any other vesting instrument. It is our experience that tax legal descriptions are notoriously inaccurate.

For the most part, the Company is not concerned where the discrepancies are minor. For example, if the courses/directions or distances in the deeded legal description differ from the tax legal by a minimal amount, no additional action is necessary. There is no way for us to accurately define "minimal." As an underwriter, you must apply your best judgment in making this determination. If you are not comfortable with the discrepancies, please contact Corporate Legal and Underwriting Services for assistance. In those cases, where a significant difference exists between the deeded legal and the tax legal, additional investigation should be made as a number of potential problems may arise.

For explanation purposes, assume that upon comparison, it is determined that the tax legal includes a 20-foot wide strip of property that is not included in the deed's legal description. The first and probably most important question that arises is one of access. Is the property owner using this 20-foot strip for access to the property to be insured? Even if the property has a legal means of access other than the 20-foot strip, it may be necessary for the lender or purchaser to acquire an interest in the strip for convenience purposes. Failure to recognize this issue may not result in a loss under the terms of the policy, but it does a tremendous disservice to the lender or purchaser if we fail to advise them of this.

Second, it is possible that the failure of the lender or purchaser to acquire an interest in this strip may render the remaining portion of the property worthless. This problem may arise in those states that have subdivision control acts regulating the owner's ability to split or subdivide the property. There have been a number of cases where a purchaser acquired a parcel of land sold in violation of the state's subdivision control act. As a result, the purchaser was unable to obtain a building permit rendering the property worthless for all practical purposes. Although the property may be significantly diminished in value, it does not render the title unmarketable. The owner may still sell the property but it will be at a substantially lower price.

It is also possible that a lender may acquire the property in foreclosure and subsequently be unable to sell the property due to the violation. From a technical underwriting perspective, this does not pose much of a risk for the Company since the standard ALTA Owner's and Lender's policy excludes from coverage any law, ordinance or governmental regulation restricting, regulating, prohibiting or relating to the occupancy, use or enjoyment of the land or 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. The ALTA Homeowner's and Expanded Coverage Residential Loan Policies create a potential risk for the Company if this type of violation exists.

There are also a number of courts that have found title companies liable for failure to disclose known defects. These findings are not based on the insuring provision in the policy but rather arise under an implied duty when conducting title searches. As an underwriter, we strive to avoid these types of claims as the litigation costs often exceed the Company's liability under the policy itself.

In a purchase transaction, it is also possible that these discrepancies may result in recording delays or even an outright refusal to record a vesting deed. In a number of states, a deed must be submitted to the taxing authority for verification or determination of transfer tax. In some instances, the taxing authorities have either marked the deed as a split lot pursuant to the state's subdivision control act or refused to certify the deed due to the exclusion of the additional parcel. Rectifying this type of problem can be very time consuming and may jeopardize lien priority where the lender has already disbursed.

This situation causes significant liability if the lender is requesting the issuance of the subdivision or zoning endorsements. In order to issue either endorsement, this situation must be rectified with the appropriate taxing authority and the necessary zoning letters must be obtained.

14. Underwriting

a) Boundary Line Agreement

When a review of the legal description with the title exam and/or title opinion reveals a boundary line agreement, it is important to adhere to the following guidelines:

If the boundary line agreement is incorporated into the legal description, no exception is necessary. This can be applied whether or not boundary line agreement is written with or without a cross conveyance.

If the boundary line agreement is not incorporated into the legal description, make the following exception:

BlineNote The Land is subject to a Boundary Line Agreement recorded in Book ^ at Page ^.

If the boundary line agreement is not identical or somewhat consistent with the legal description or is not incorporated into the legal description, make the following exception:

BLineNoCov This policy specifically excepts and does not insure that portion of the Land detailed in the Boundary Line Agreement [*choose either: Recorded in Book ^ at Page ^. Or, if unrecorded: by and between* ^]

This exception should be used whether or not the boundary line agreement is identical or very consistent with the legal description. An exception is needed because the boundary line agreement hasn't been incorporated into the legal description.

b) Discrepancies between the legal description and the survey

Where there are differences between the survey and the recorded legal description in our chain of title the survey should be reviewed to determine what physical evidence the surveyor relied on to establish boundaries; *i.e*., road, existing pins, concrete monuments, natural monuments. If the variations are minor, then the differences between the survey and the legal description in prior deeds are not a concern. The greater risk is that there are conflicts as to the boundary lines between current adjoining owners. The title examiner/certifying attorney should review the deeds to the current owners of adjoining lots to determine where the boundaries of the insured premises are and are they in conflict with adjoining owners?

If the boundaries are not in conflict, use the description based off of the survey and insure without an exception.

If the discrepancy is discovered prior to the issuance of the Commitment of Title Insurance, the following requirement should be used:

Z1 Attention is called to the correction(s) made in the description under Schedule A. Commitment description must be used in the proposed [Mortgage] [deed].

If there are conflicts between the survey and the legal description in the vesting deed to the current owner, the following exception should be used:

X23 The description in the [Mortgage] [deed] set out under Schedule A hereof calls for a distance of ^ along the property line, whereas plat of survey by ^ [*name of surveyor*], [RLS][PLS], dated ^, shows the line to be ^. This policy does not insure a greater distance along said line than ^.

If the legal description is deficient because the beginning point or end point isn't "tied down" by a geodetic station, by metes and bounds from roadway intersection, by deed book or plat book reference for the subdivision, or for adjoining property owners,

OR

If the legal description is less than adequate because it is vague, ambiguous, incomplete, does not close, has missing or extra calls, or is otherwise insufficient to adequately describe the property, the following exceptions must be used:

S11 The effect of the Title of an encroachment, encumbrance, violation, variation, ~~or~~ adverse circumstance, boundary line overlap, or encroachment (including an encroachment of an improvement across the boundary lines of the Land), but only if the encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment would have been disclosed by an accurate and complete land survey of the Land. Paragraph 2 (c) of the Covered Risks is hereby deleted.

X26 This policy does not insure against loss or damage arising from the inadequacy of the legal description.

If the discrepancies between the survey of the insured property and the legal description in the deed of trust/mortgage which appears under Schedule A are not corrected prior to the issuance of the policy, the following exceptions must be used:

X27 The description in the [Mortgage] [deed] set out in Schedule A hereof and the plat of survey by ^ [*name of surveyor*], [R.L.S.][P.L.S.], dated ^, contains numerous variations and discrepancies. This policy does not insure against loss or damage to the extent that such loss arises from said discrepancies.

c) Legal description containing specific acreage amount

When issuing an 2006 ALTA Owner's Policy and the legal description contains a specific acreage amount (*i.e*. "Containing 12 acres"), the following ALTA standard exception should be added to the commitment and final policy:

LegAcre Any inaccuracy in the area, square footage, or acreage of Land described in Schedule A or attached plat, if any. The Company does not insure the area, square footage, or acreage of the Land.

If the acreage is described as "more or less," then the **LegAcre** exception is not required.

If the owner has a current survey which specifically states the amount of acreage on the face of the survey and the amount listed on the survey equals the amount of acreage stated in the legal description, the **LegAcre** exception is not required.

d) Discrepancy in the deeded legal and the tax legal

If, during the title search or review it is determined that a significant difference exists between the deeded legal description and the tax legal, the searcher or underwriter must determine the cause of the difference. If you are being asked to insure an additional parcel of property shown in the tax legal, a valid chain of title must be established or the appropriate exception must be placed on the commitment and final policy.

If you are not being asked to insure the additional property, the following exception must be used:

LegalTax Loss or damage sustained as a result of the tax description covering more land than the legal description contained in Schedule A.

TT. Life Estates

A life estate is an estate conveyed to a person for the duration of the life of that person or some other person, and upon the death of the person on whose life the estate is measured, the title vests in one or more persons or reverts to the grantor. The person owning the life estate is called a life tenant, and the person who receives the property upon the death is normally called the remainderman.

A life tenant can convey his estate, but the estate will terminate at the death of the person by whose life the estate is measured, regardless of who owns the life estate at the time of the death.

The typical life estate involves a conveyance to a person for his life with the remainder in fee simple to a third person. The language generally used in such a conveyance is "to [*named person*], then to [*named person*] and his heirs." Different language could create the life estate if the intent to create such an estate were evidenced by the language of the conveyancing instrument as a whole.

The life estate will most often be encountered in wills, but sometimes one is created in a deed.

The fact that a life estate has been created in the chain of title should concern the title examiner if the life tenant is a grantor in the chain or is the prospective grantor. However, a life estate in the chain does not necessarily defeat a title. If a life estate has been created and terminated, and then a conveyance by the remaindermen owning a fee simple estate has taken place in the chain of title, no title problem exists. Similarly, if a conveyance by a life tenant and all prospective fee simple remaindermen has taken place in the chain, no problem exists, since all existing and prospective interests would have been conveyed. Also, when a life tenant's interest has merged with the remainder estate to form a fee simple estate, a conveyance by the life tenant is not a problem. On the other hand, if a life tenant has actually conveyed only a life estate in the chain of title, so that the present grantor does not own a fee simple estate, a title problem does exist, and the only safe solution is to obtain from all the remaindermen deeds in which they convey their interests to the prospective grantor or grantee. If the problem cannot be solved, the underwriter will have to expressly note that the interest being insured is only a life estate (in Schedule A) and in Schedule B make exception to the interest of the remaindermen:

RemaindEst The remaindermen interest of ^.

Conversely, if the remaindermen attempt to convey fee simple without the joinder of the life tenant then the grantor hereof does not own a fee simple estate and a title problem exists; the only safe solution is to obtain from the life estate holder a deed in which he or she conveys his interest to the prospective grantor or grantee. If the life tenant does not convey their life estate interest, make the following exception:

LifeEstate The life estate of ^.

UU. Limited Liability Company (LLC) and Limited Liability Partnerships (LLP)

1. Generally

Limited liability companies (and limited liability partnerships used by professionals who usually practice in a partnership format, such as doctors, lawyers, and CPA's) are a recent innovation in the law, being first introduced in the late 1980's. They comprise elements of both partnerships and corporations. Their appeal lies in two facts: They afford limitations on the liability of the individuals who are the owners ("members") and they can be taxed as a partnership.

LLC's resemble partnerships in that membership is not freely transferable and the organization may terminate if a member dies, withdraws or becomes insolvent. LLC's resemble corporations in that it offers limited liability to its members and is an entity separate from its members.

Governance of the LLC is typically set forth in the articles of organization or in the operating agreement or both. The members of the LLC may retain management of the day to day operations (member managed LLC) or they may choose to delegate the management responsibility to a manager (manager managed LLC.)

LLC statutes vary between jurisdictions, and title practices related to LLC property are still evolving. The underwriter must consider the relevant state LLC statute, the LLC's articles of organization and the LLC operating agreement when evaluating title to real property.

2. The LLC and Real Property

When accepting a deed, mortgage or other conveyance from an LLC, the title examiner is prudent to verify:

1. The existence of the LLC;
2. The authority of the LLC to own and convey the property; and
3. The authority of the individual executing and delivering the conveyance for the LLC.

The LLC's existence and good standing can be verified by the appropriate governmental office in the state where the LLC is organized. The examiner should receive a certificate of good standing or a certificate of existence. The examiner must confirm that no articles of dissolution have been filed. If articles of dissolution have been filed, the LLC may have authority to wind up its affairs. The examiner should verify the authority of the person conducting the post-dissolution business of the LLC. If the LLC is conveying property in order to wind up its affairs, please contact the Home Office for further direction.

The state LLC statute and the LLC's articles of organization or operating agreement will control who must sign a deed or mortgage. Where the LLC is managed by its members, every member is an agent of the LLC and the act of any member can bind the LLC if it is for the apparent purpose of carrying the usual business of the LLC and the person dealing with the member had no actual knowledge of the member’s lack of authority.

Where there are multiple managers, the apparent authority of a single manager may not be enough. The law may require a majority or super-majority vote of the managers to authorize the conveyance or encumbrance.

Where the conveyance is not in the ordinary course of business, or the conveyance will dispose of all or substantially all of the LLC's property, the examiner must require proof that all members have consented to the transaction.

If no operating agreement exists but the Articles of Organization have been provided, the appropriate party(ies) to execute the documents are all of the members of a member-managed LLC or the manager of a manager-managed LLC where the LLC has adopted a resolution authorizing the manager to enter the transaction on behalf of the LLC. This resolution must be signed by all members of the LLC.

In lieu of receiving and reviewing a copy of the LLC Articles of Organization and Operating Agreement, the Company may accept a resolution from the LLC. In order to be acceptable, the resolution must contain the following provisions:

- The LLC is permitted to enter into the proposed transaction, pursuant to its Articles of Organization and the Operating Agreement;
- Identification of the individual that is authorized to execute documents (including notes and deeds of trust/mortgages);
- That the undersigned are all members of the LLC; and
- All members of the LLC must execute the resolution.

If the resolution does not satisfy the above requirements, the resolution must be approved by Corporate Legal and Underwriting Services prior to acceptance for underwriting purposes. For subsequent transactions with the same LLC, a previously provided resolution may be utilized as long as the LLC provides a letter that states that the resolution is still in full force and effect as of the transaction date.

3. *Foreign LLC's*

Some states (*see **State Supplement***) require foreign LLC's to register or otherwise qualify to do business in the state, similar to corporations. Failure to do so may affect the validity of a conveyance of real property from the LLC. The examiner should confirm compliance with foreign LLC laws of the state where the property is located, as well as verify the authority and execution of the conveyance under the laws of the LLC's organizational jurisdiction.

If a foreign LLC owns property in a state that has no LLC statute, the LLC may be considered a partnership, and title requirements related to partnerships should govern the issuance of a policy.

4. *Dissolution of LLC or Change in Membership*

Some jurisdictions require an LLC to dissolve where only one member remains. Other states provide that the LLC must dissolve upon the death, withdrawal, bankruptcy, insolvency or incompetence of one of its members, unless the remaining members avoid dissolution by unanimously agreeing to continue the business. Still other states allow the LLC to automatically continue in existence. (*See **State Supplement***)

In those instances where the LLC continues, the resulting LLC is deemed a "new" and different entity from the original LLC. Hence, a title policy issued to the original LLC will not be transferable to the "new" LLC. This is the same issue and result as with changes to the number and identity of partners in a partnership. As with partnerships, the title policy can be made "transferable" to the new LLC by the inclusion of a fairway endorsement, which protects against a lapse of coverage resulting from a change in membership.

5. Underwriting

If an attorney is certifying title to the property and acting as the settlement agent, no requirement is needed. However, if an attorney is certifying title to the property but another party is acting as the settlement agent or a title exam, not a title opinion, is being relied upon when underwriting, make the following requirement:

LLCArtOrg Receipt of a complete copy of the filed Articles of Organization of ^ [*Name of Limited Liability Company*] and all amendments thereto. Note: Upon receipt and review of said document, the Company may make additional requirements and/or exceptions.

LLCOperAgr Receipt and satisfactory review of the Operating Agreement together with all amendments thereto of ^ [*Name of Limited Liability Company*] confirming the parties signing the instrument(s) required herein have full and complete authority to bind ^ [*Name of Limited Liability Company*]. Note: Upon receipt and review of said document, the Company may make additional requirements and/or exceptions.

LLCCert Receipt and satisfactory review of a certificate of good standing or certificate of existence from the state in which ^ [*Name of Limited Liability Company*] is organized. Note: Upon receipt and review of said document, the Company may make additional requirements and/or exceptions.

If the Articles of Organization, Operating Agreement, or certificate of good standing/certificate of existence are not provided and cannot be obtained, or the attorney certifying title excepts to the authority of the signatories or the existence of the LLC, make the following exception:

LLCAffCov This Policy does not insure against loss or damage the insured would sustain due to a failure of ^ [*Name of Limited Liability Company*] to be formed and in existence under state law or due to the lack of authority of the signatories purporting to pledge or encumber the Land described in Schedule A.

VV. Limited Title Searches

1. Limited Title Search – Search Standards not met

If a limited search is performed and the Company cannot, under one of the Search Standards, accept a limited search, the following exception is made:

Limited Any defect in or lien or encumbrance on the Title or other matter included in the Covered Risks that has been created or attached or has been filed or recorded in the Public Records prior to ^ [*enter the beginning date of the search*].

2. Limited Title Search – Search Standards met

If the limited title search meets the requirements identified in the Search Standards for Residential Purchases, Commercial Property or Tacking, all recording information as to restrictions and easements should have been supplied: follow the underwriting procedures as usual.

3. Limited Title Search – Search Standards met, no recording information for matters affecting the property provided – Loan Policy

If the limited title search meets the requirements identified in Residential Property Refinance Search Standards and the underwriter is issuing a ALTA Loan Policy on 1 to 4 family residential property, the underwriter should use the following exception in the commitment and final policy if the recording information for easements, restrictions, etc. is not supplied:

StandL This policy does not insure against loss or damage by reason of the following:

(a) Covenants, conditions, or restrictions, if any, appearing in the Public Records; however, this policy insures against loss or damage arising from:

i. the violation of those covenants, conditions, or restrictions on or prior to Date of Policy;
ii. a forfeiture or reversion of Title from a future violation of those covenants, conditions, or restrictions, including those relating to environmental protection; and
iii. provisions in those covenants, conditions, or restrictions, including those relating to environmental protection, under which the lien of the Insured Mortgage can be extinguished, subordinated, or impaired.

As used in paragraph (a), the words “covenants, conditions, or restrictions” do not refer to or include any covenant, condition, or restriction (a) relating to obligations of any type to perform maintenance, repair or remediation on the Land, or (b) pertaining to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances, except to the extent that a notice of a violation or alleged violation affecting the Land has been recorded or filed in the Public Records at Date of Policy and is not shown in Schedule B.

(b) Any easements or servitudes appearing in the Public Records; however, this policy insures against loss or damage arising from (a) the encroachment, at Date of Policy, of the improvements on any easement, and (b) any interference with or damage to existing improvements, including lawns, shrubbery, and trees, resulting from the use of the easements for the purposes granted or reserved.

(c) Any lease, grant, exception, or reservation of minerals or mineral rights or other subsurface substances appearing in the Public Records; however, this policy insures against loss or damage arising from (a) any effect on or impairment of the use of the Land for residential one-to-four family dwelling purposes by reason of such lease, grant, exception or reservation of minerals or mineral rights or other subsurface substances, and (b) any damage to existing improvements, including lawns, shrubbery, and trees, resulting from the future exercise of any right to use the surface of the Land for the extraction or development of the minerals or mineral rights or other subsurface substances so leased, granted, excepted, or reserved. Nothing herein shall insure against loss or damage resulting from contamination, explosion, fire, fracturing, vibration, earthquake or subsidence.

If information is provided as to any of the above exceptions (*i.e*., taxes) then delete the appropriate item above and substitute the appropriate exception according to this manual and/or ***State Supplement***.

4. Limited Title Search – Search Standards met, no recording information for matters affecting the property provided – Owner's Policy

If the limited title search meets the requirements identified in Residential Property Refinance or Foreclosure Search Standards and the agency is issuing an ALTA Owner's Policy, the agent must use the following exception in the commitment and final policy if the recording information for easements, restrictions, etc. is not supplied:

GenRe Restrictions, easements and rights of way of record.

AND

StandO This policy does not insure against loss or damage by reason of the following:

(a) Roads, ways or easements or claims of easements not shown by the Public Records.
(b) Any lien, or right to a lien for services, labor or materials heretofore or hereafter furnished, imposed by law and not shown by the Public Records.
(c) Title to all oil, gas and minerals within and underlying the Land, together with all mining and drilling rights and other rights, privileges and immunities relating thereto.
(d) Pending assessments by any taxing authority not yet filed in the Public Records.

If information is provided as to any of the above exceptions (*i.e*., Restrictions) then delete the appropriate item above and substitute the appropriate exception according to this manual and/or ***State Supplement***. All other standard underwriting guidelines apply (*i.e*. Taxes, Survey, Assessments, etc.)

WW. Marital Interests

1. Common Law Dower and Curtesy

"Dower" was the common law life estate to which every married woman was entitled on the death of her husband in the lands of which her husband was seized in fee at any time during the marriage. Dower was a provision made under the law for a widow for her support and the nurture of her children. "Curtesy" is a similar estate for the husband on the death of his wife in lands of which she was seized during the marriage, provided they had lawful issue (children) which are capable of inheriting.

Most states have abolished the common law estates of dower and curtesy to replace them with either a statutory marital interest or community property rights.

2. Statutory Marital Interests

By statute in many states, husbands and wives are vested with certain rights relative to the property of their spouse, commonly referred to as a "marital interest." These rights are inchoate, or unripe, during the life of the spouse. But upon the death of the spouse, these rights become choate, that is, they ripen and become fully operational in the surviving husband or wife.

In states that provide for such marital interests, the spouse must join the record owner of real property when (s)he conveys or encumbers it. Without such joinder, by the non-owning spouse, the marital interest remains outstanding. The risk is that upon the death of the record owner spouse, the surviving spouse would assert a claim for his or her marital interest in property that had previously been conveyed. Because risk appears at death of spouse, indemnity agreements are not usually a satisfactory resolution.

The requirement that both husband and wife must sign a deed or deed of trust/mortgage to convey or encumber their marital interest in property can be eliminated by a valid separation agreement, in which each relinquishes his or her marital rights in the other spouse's property. The separation agreement or a memorandum thereof must be recorded and then a conveyance of the property will be free of the marital interest. The death of the non-owning spouse will terminate the marital interest, as will divorce between the parties. In states that recognize as valid pre-nuptial or ante-nuptial agreements, such agreements can serve to eliminate the marital interest between the parties. A general warranty deed is required to convey a spouse's legal interest in property to the other spouse, such as in cases where husband and wife own property as tenants by the entirety, and either the husband or the wife plan to hold all title to the property, or seek to convey it to a purchaser.

XX. Marketable Title Act

Some states have passed legislation that serves to extinguish "ancient" claims to or against property with the intention to render the property more "marketable." Such legislation usually prescribes a specific period of time during which the chain of title remains uninterrupted or does not mention or reference the ancient interest. Often, marketable title legislation provides the basis for the search period customarily required by title companies.

Refer to the ***State Supplement*** for further discussion on this topic.

YY. Mechanics' and Materialmen's Liens

Almost all jurisdictions allow a lien to persons who provide materials or labor for the construction of improvements on real property in order to secure the payment for such improvements. The statutes or code prescribe the requirements for claiming and enforcing such lien rights; whether filings must be made and where; whether notice must be served and to whom; and applicable time periods.

Often, construction liens are afforded priority or "super-priority" different than otherwise would normally result under the state recording acts relative to judgment creditors, mortgage holders or other persons having an interest in real property. This is an area of great risk to the title industry. Law and custom dictate procedures for underwriting construction liens and what, if any, affidavits and indemnity agreements are necessary.

1. Pending Disbursements

a) Loan Policy

Occasionally, the Company is called upon to issue a Loan Policy in the full amount secured by the deed of trust or mortgage prior to full disbursement of the proceeds of the loan. In such cases, a pending disbursement clause is listed under Sch. B, Pt. I of the Loan Policy, limiting the liability of the Company to the amount actually disbursed, but providing for an increase of liability as the disbursements are made.

Under the laws of certain states (*see* ***State Supplement***), a properly drafted future advances deed of trust or mortgage will not be affected by liens, encumbrances or objections intervening or attaching between the time of the issuance of the policy and the making of the disbursements. The necessity of the title being continued down to the time of each disbursement is thereby eliminated.

b) Owner's Policy

It may be that the Company will be called upon to issue an Owner's Policy in the amount paid for the land plus the cost of contemplated improvements, and the policy is desired before the improvements are commenced. In the event the improvements are immediately contemplated and the approximate cost of them is known, it is permissible to issue the policy in an amount equal to the consideration paid for the land plus the estimated cost of the contemplated improvements; but under these circumstances the policy should contain a proper pending disbursement clause under Sch. B. The pending disbursement clause on an Owner's policy typically limits the Company's liability to the improvements made to the insured premises.

2. Mechanics Lien Coverage

The standard 2021 ALTA Loan Policy provides mechanics lien coverage under Covered Risk 11(a) which provides:

11. The lack of priority of the lien of the Insured Mortgage upon the title
    (a) as security for each advance of proceeds of the loan secured by the Insured Mortgage over any statutory lien for services, labor, material or equipment arising from construction of improvements or work related to the Land when the improvement or work
        (i) contracted for or commenced on or before the Date of Policy; or

(ii) contracted for, or commenced, or continued after the Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on the Date of Policy to advance.

Typically, mechanics lien coverage is provided in one of four ways, depending on the custom and practice in a particular market, including;

1. deleting the mechanics lien exception from the standard exceptions placed on the policy,
2. deleting an exception for a recorded lien or notice of commencement,
3. adding a mechanics lien endorsement to the policy providing affirmative coverage, or
4. including a pending disbursement clause in Schedule B of the policy.

3. Mechanics Lien Risk

Mechanic's liens arise most commonly in one or more of the following scenarios:

a) Broken Priority

Broken priority is a situation where the mortgage being insured is recorded after the commencement of construction on a project. What constitutes commencement varies from state to state but generally involves the "turning of dirt" on the job site. Once construction has commenced, the insured mortgage and the disbursements made will be subordinate to subsequently filed mechanics liens. In some situations, this will apply only to lien claimants that did work prior to recording the mortgage and in other situations, the first person doing work will establish priority for all persons doing work on the job site.

b) Credit Risk

Credit Risk relates to projects where one party entrusted with construction funds fails to pay the funds to the parties entitled to them. In many construction transactions, draw requests are made by the owner or general contractor who is then paid with the disbursement and is obligated to pay funds to subcontractors and suppliers that have done work on the project. The failure to pay the appropriate parties often results in the filing of a mechanic's lien. In some instances, there may be a legitimate reason that the funds were not being paid, such as a dispute over the amount owed or the quality of the work performed. In other instances, the funds may be used to make payments on other projects or diverted for personal use. Regardless of the reason for the failure to pay the funds over, the filing of a mechanic's lien inevitably results in a claim on a title insurance policy.

c) Financial Solvency and Project Viability

These two issues are typically interrelated but that is not always the case. Financial solvency relates to the availability of funds to the parties involved in the transaction. Most if not all construction projects require the infusion of significant funds from the owner in addition to the construction loan funds. The owner's funds should normally be used or available at the front end of the transaction and the lender's funds should not be drawn on until most, if not all, of the owner's funds are paid into the project. Situations often arise where cost overruns lead to a shortage of funds and require the owner to inject additional capital. If the owner does not have the required funds to complete the project, parties doing work on the project are not paid resulting in the filing of a mechanic's lien. The financial solvency of the contractors is also of major importance. As they are typically entrusted with significant funds, financial shortcomings of the contractor may result in funds being diverted to other projects or used in a manner other than that for which they were entrusted.

Project viability deals with the need for the project in the market in which the project is being contemplated. An example of this might be the construction of a new apartment project. The viability of this type of project is fairly high in a location where there is currently a low inventory of available housing but as the available inventory increases, the viability of the apartment project decreases. As the viability of the project decreases, the risk of the project not coming to its conclusion increases, again resulting in parties not being paid and mechanic's liens being filed.

4. Mechanics Lien Risk Assessment

The most effective way to avoid the potential of mechanic's lien claims is to make sure the project is successfully completed and all of the parties that have done work on the project are paid in full. While this should be the goal on all transactions, the practical aspects are often difficult if not impossible to achieve, therefore we need to make a sound risk assessment prior to extending coverage. In order to make a sound underwriting decision prior to extending mechanics' lien coverage, it becomes necessary to analyze all of the factors applicable to a specific project including priority, credit risk and financial solvency/project viability. No one factor provides conclusive evidence that the transaction will have negligible mechanics' lien risk but the totality of information allows for a more informed decision. The sources of information to make this evaluation vary from transaction to transaction but typically include the lender, the owner, guarantors and the general contractor on the project.

In order to assist with the analysis of pertinent information, the Company has developed a Risk Assessment for Construction Loan worksheet, which is located in the ***Forms Manual***. This worksheet is designed to elicit information that will allow the underwriter and Company to make an educated assessment of the risk associated with a specific transaction. The form is broken into several constituent components including specific information pertaining to the project and funding, owner information, contractor information and lender information.

It is important to understand that the Risk Assessment for Construction Loan worksheet is a general guide to analyzing risk associated with a transaction. Some of the areas within the worksheet may not be applicable to a particular transaction we are asked to insure and the Company is not requiring responses to all the specific factors. The Company is only asking that each area be considered as relevant to the transaction, and if relevant, it is necessary to obtain the pertinent information.

Some of the most telling documents that will provide information in a number of pertinent areas include the lenders commitment letter, construction budget, and the construction loan agreement. The lender commitment letter normally outlines all of the requirements imposed by the lender as conditions for making the loan. The construction budget provides an itemized breakdown of the construction costs and should confirm the adequacy of funds to complete the project. The construction loan budget will include the information from the construction budget as well as soft costs in the construction. Reconciliation of the two budgets is important. If there is a shortfall between what is needed for the project verses the loan amount, an explanation of the source for additional funds should be provided.

The construction loan agreement should also disclose the disbursement controls and pre-releasing requirements the lender is requiring in order to fund the applicable draw.

For any transaction in excess of $3 million requires underwriting approval prior to the issuance of a commitment where mechanics lien coverage is being provided. The Risk Assessment for Construction Loan worksheet and supporting documentation, along with the draft of the title commitment should be submitted with the request for approval. The use of the worksheet is in addition to the existing underwriting guidelines that are currently in place. The Risk Assessment for Construction Loan worksheet must be completed by the submitting underwriter. The worksheet is not to be completed by any other party to the transaction.

5. Underwriting

Each state has different mechanics' and materialmen's liens procedures as well as varying pending disbursement clauses. See the ***State Supplement*** for more specific information.

6. Unusual or Extra Hazardous Risk and Reinsurance Alert

In cases where a policy is insuring over an unusual risk (i.e., Construction completion guarantees; Insurance of priority over recorded or filed mechanics' liens where such priority does not in fact exist) and coverage is in excess of $5 million, the underwriter must advise the Home Office before issuing a commitment or policy.

7. Non-Approved Builders List (aka Disapproved or Unapproved Builders)

Refer to the section of this manual titled "Non-Approved Builders (aka Disapproved or Unapproved Builders)" for a complete discussion on the procedures involving builders and contractors who pose a significant risk to the Company.

ZZ. Mineral Rights and Timber Deeds

1. Generally

In any state where independent searchers (and not certifying attorneys) are providing title evidence, the agent should call Corporate Legal and Underwriting Services before requesting the title search; Corporate Legal and Underwriting Services will help ascertain the searcher's ability to perform this search.

The right to extract minerals and oil, or cut timber can be vested in someone other than the owner of the fee simple title to the property, through reservation, conveyance or lease of the minerals, oil, or timber. Any reported leases, deeds or easements which purport to convey, reserve, rent or otherwise "sever" the mineral/timber rights from the fee simple estate must appear as an exception on the policy.

If all minerals or a particular mineral should be excepted, the following exception should be used:

E40a Title to all ^ [*identify*] within and underlying the Land, together with all mining rights and other rights, privileges and immunities relating thereto.

OR

E40b Title to all ^ [*identify*] within and underlying the Land, together with all mining and drilling rights and other rights, privileges and immunities relating thereto.

In some cases, it is possible that, even though the minerals have been reserved or granted, the mineral rights deed or lease contains language that assures that the exercise of such mineral rights will not affect or damage the surface of the insured premises. Affirmative coverage can be given by adding the following statement at the end of the appropriate exception. These affirmative insurances, however, are not to be granted without prior Home Office approval.

E40c This policy insures against loss or damage due to future operations on the surface of Land in connection with such ^ [*identify*].

OR

MinAff2 Reservation of mineral rights, as recorded in Book ^, Page ^; the Public Records do not disclose exercise, or impending exercise, of such outstanding rights in the Land or impair its value or usefulness for its intended purposes, and generally that such outstanding rights are similar to those customarily acceptable to prudent lending institutions, informed buyers, and lending attorneys in the community.

MinAff1 Reservation of the [oil] [gas] within and underlying the Land, together with mining rights, privileges and immunities thereto belonging as set out in deed in Book ^, Page ^. By virtue of the wording of the reservation set forth above, all drilling and removal of [oil] [gas] will be from a location off the Land and will not adversely affect the use of the property for residential purposes.

In some cases, instead of mining rights and privileges being reserved, the reservation is of certain drilling rights, as, for example, in reservations of oil and gas. In these cases, the following exception is used:

E41 Title to all oil and gas within and underlying the Land, together with the drilling rights and privileges thereto belonging.

In the case of an oil or gas lease, the following exception should be used:

E46 Oil and gas lease from ^ to ^, dated ^ and recorded in Book ^ at Page ^.

Occasionally, coal and other minerals may be leased rather than conveyed or reserved. In such instances, the exception to the recorded lease should read as follows:

E47 ^ lease from ^ to ^, dated ^, and recorded in Book ^ at Page ^.

2. Timber Deed or Mineral Rights Deed Policy

Where the Company is being asked to insure the rights under a timber deed or mineral rights deed:

1. Item 2 under Schedule A would be modified to show the estate or interest in land as only a "timber deed interest" or "mineral rights interest."
2. Schedule B of the Loan and Owner's policies would contain an exception:

Timber/Miner Terms, conditions and provisions of the [timber] [mineral] rights deed recorded in Book ^ at Page ^.

And

FeeSimpl Fee simple interest of ^.

Click here for sample Commitment, Loan Policy, and Owner's Policy.

3. Unusual of Extra Hazardous Risk and Reinsurance Alert

In cases where a policy is insuring over an unusual risk (*i.e.*, Mineral Leasehold Policies) and coverage is in excess of $5 million, the underwriter **must** advise the Home Office before issuing a commitment or policy.

AAA. Minors and Incompetents

1. Minors

At common law, minors were incapable of entering a binding contract regarding real property. In more modern times, state legislatures have expanded a minor's capacity to contract. Often minors are allowed to revoke or avoid contracts when they reach the age of majority. Hence, insuring title to real property conveyed by a minor is risky business: The Company policy is to NOT insure this conveyance - always call the Home Office.

2. Incompetents

Similarly, someone who is mentally incompetent cannot typically convey title and a special proceeding may be required. Always call the Home Office.

Where the public records indicate that a person was involuntarily committed at some time in the past, the underwriter should inquire of the examiner if and when the person was released. If commitment was short-term, and the person was released at the time they signed the instrument or deed in question, there should be no exception to the competence or interest of that grantor. If instead, the commitment is ongoing, such that the person could not be considered capable of handling their own affairs, a special proceeding is necessary to convey the incompetent's interest.

The following requirement would be used only where the underwriter has been informed or alerted to a possible question with the capacity of the grantor in deed or deed of trust.

Z38 It must be definitely determined that all of the grantors in the above required deed(s) and Mortgage were at least, ^ [*age of majority*] years of age and mentally competent at the time of delivery thereof.

BBB. Missing Heirs

Where property was transferred through an estate, and it appears that certain heirs did not join in the conveyance of the property to the next owner, the following information should be assembled:

1. The total number of heirs who held an interest in the property;
2. The number of heirs who joined in the conveyance; and
3. The value of the property to be insured.

Items (1) through (3) will allow the Company to determine the "size" of the outstanding interest.

4. The length of time since the death of the original property owner;
5. The length of time since the conveyance in question.

Items (4) and (5) will allow the Company to determine if title has "ripened" in the subsequent owner as against the missing heirs by adverse possession.

It may be necessary to request affidavits from community members who knew the family in order to identify all the heirs. An indemnity agreement from the seller/owner may also be advisable. Ask the Home Office for assistance.

If the outstanding interest is too large or too recent to insure, the policy should contain an exception as follows:

HeirNoCo This policy does not insure against the rights of any outstanding heirs of ^, deceased.

CCC. Mobile and Manufactured Homes

Underwriting issues as to Mobile and Manufactured Homes is state-sensitive; *see* ***State Supplement***.

DDD. Mortgage Electronic Registrations Systems, Inc. (MERS)

MERS is a wholly owned subsidiary of MERSCORP, Inc., a Delaware Corporation owned by various organizations in the mortgage industry, which legally operates in all fifty states.

The primary functions of MERS are to (1) Track the changes in servicing rights and beneficial ownership, and (2) Act as the mortgagee of record on all mortgages registered with MERS.

In order to show MERS as mortgagee of record, one of two scenarios must occur:

A) A member lender appoints or nominates MERS as the mortgagee of record (**M**ERS as **O**riginal **M**ortgagee) on the security instrument (sample Deed of Trust and Mortgage); or
B) A member lender appoints MERS as mortgagee of record by executing an Assignment, (sample Assignment) which may or may not be recorded depending on state statutes, to same.

In either scenario, a mortgage identification number is assigned to the loan. This number is an eighteen (18) digit number that contains the member's identification number (seven digits), a sequential account number (ten digits) and a check digit (one digit). This number will remain constant for the term of the loan (regardless of whether the loan is sold or the servicing rights transferred) and will never be reused.

There are many benefits realized by the mortgage industry as a result of the implementation of the MERS system. Some of those benefits include:

1. Simplified Loan Tracking
   It is very common for a mortgage loan to be sold (ownership and/or servicing rights) four to five (and sometimes more) times during the term of the loan. Typically, when a loan changes Servicers, the new Servicer will assign a new loan number. If the loan changes hands several times over the years, and assignments are not properly executed and/or recorded, it becomes a nightmare for anyone in the real estate industry to track down the loan. If, however, all ownership and servicing transfers are handled through companies participating in the MERS program, all subsequent transfers will be maintained electronically on the MERS system. If the loan is transferred to a non-member lender, the mortgage identification number will become inactive. If the loan is sold back to a MERS member the previous identification number will be used.

2. Cost Savings
   By appointing MERS as mortgagee of record, it eliminates the need for future assignments which can save a lender (on average) between $5.00 and $25.00. The difference depends on whether the Assignment needs to be recorded. In addition, a portfolio fully contained on the MERS system becomes a more liquid investment as it streamlines the due diligence process and custodial certification process. It may also reduce the cost of releasing the lien by reducing the research time involved and re-recording fees to correct assignment problems.

3. Fraud Reduction
   Because MERS serves as a centralized location to house the mortgage identification number and other information regarding a mortgage loan, it provides an easy means of cross-referencing for those in the mortgage industry. It is believed that this may help to

reduce the possibility of multiple loan fundings. Additionally, the MERS system is a multi-layered system and a member must pass through several validation levels in order to facilitate changes on the mortgage loan.

As far as the title insurance industry is concerned, there should be little or no effect upon existing underwriting procedures from MERS being named mortgagee of record. For new loans, it is possible that a lender's instructions may request that MERS be named as an additional insured. This is remedied by showing the following under proposed insured on the lender's policy:

"MERS, acting on behalf of ABC Mortgage Company, its Successor's...."

When MERS is the original mortgagee, four (4) options exist for MERS members to use when issuing title policies:

- Naming the lender, its successors and assigns as the insured;
- Naming the lender, its successors and assigns appearing of record as Mortgage Electronic Registration Systems, Inc. as the insured;
- Naming Mortgage Electronic Registration Systems, Inc. as the beneficiary and the lender as the beneficial owner as the insured; or
- Lender and/or Mortgage Electronic Registration Systems, Inc., solely as nominee for the lender, its successors and assigns, as their interests may appear

One very positive impact on the title industry is the ease with which the current Servicer may be located. This will greatly benefit those agencies who handle closings as it will save them time when tracking down payoff information. To contact MERS, the settlement agent should call (888) 679-MERS. This number will connect them to a voice response unit that will allow them to access the name of the current loan Servicer. There is no fee for obtaining this information.

For additional information, please visit the MERS web-site at www.mersinc.org.

Click here for sample Deed of Trust, Mortgage and Assignment of Mortgage.

See the section MERS Releases under the Deeds of Trust or Mortgages section herein also.

EEE. Multiple Owners

The common law recognizes three (3) ways by which title to real property can be held in two (2) or more names. These are:

1. Tenancy in common
2. Joint tenancy with right of survivorship
3. Tenancy by the entirety

1. Tenancy In Common

If property is held by "A and B" and nothing else is said, A and B own it as tenants in common, also referred to as "co-tenants." As tenants in common, each one of them holds an undivided and unallocated one-half (1/2) interest in the whole property. Neither can point to any particular part of the property and say, "this is mine." However, each has individual and equal rights to possess the property, and all own the entire tract together.

A tenant in common may separately convey his fractional interest or mortgage it. Upon the death of a tenant in common, his interest passes through his estate. The person(s) who inherit the interest become tenants in common with the surviving owner. There is no restriction on the number of people who can be tenants in common at any one time.

Any tenant is entitled to ask that the property be "partitioned" or divided between them. If the tenants cannot agree on a fair partition, the court will be asked to divide the property with the help of disinterested appraisers. If the asset cannot be fairly divided physically or if division would significantly diminish the value of both portions, the court can require a sale of the property and then order division of the sales proceeds.

Judgments or tax liens against only one co-tenant <u>do</u> attach to his undivided interest in the property. Accordingly, exception to judgments or tax liens docketed against a co-tenant would appear on the title insurance policy.

2. Joint Tenancy With Right of Survivorship

This form of ownership is just like tenancy in common until one tenant dies. Then the decedent's interest passes by law to the surviving tenant, rather than passing through his estate. The deceased owner has no control over what happens to the property.

When the notion of joint tenancy with the right of survivorship initially developed, the law viewed the joint tenants as one person. In order to create this type of relationship, the law required that the interest of each individual be equal in all respects. In particular, four "unities" were essential to a joint tenancy - time, title, interest and possession. The meaning of each is as follows:

1. Time – The interest of each joint tenant must be acquired or vest at the same time.
2. Title – All joint tenants must acquire title by the same instrument or by a joint adverse possession. A joint tenancy can never arise by intestate succession or other act of law.
3. Interest – All must have equal undivided shares and identical interests measured by duration.
4. Possession – Each must have a right to possession of the whole. After a joint tenancy is created, however, one joint tenant can voluntarily give exclusive possession to the other joint tenant.

At common law and in many states today, if one of the four unities is not present, then a tenancy in common is created. Statutes in some states have done away with the requirement that the four unities are met and provide that a joint tenancy is created simply by indicating such.

If one of the four unities is broken (severed), the joint tenancy turns into a tenancy in common. Joint tenants can change their interests into a tenancy in common by a mutual agreement destroying one of the four unities. In practice, a severance occurs and a tenancy in common is created when one of the joint tenants conveys his interest to a third party. This severs the joint tenancy as between the third party and the remaining joint tenants.

<u>FOR EXAMPLE</u>:
A, B and C own a tract of land as joint tenants with right of survivorship. A conveys his interest to D. This would create a tenancy in common between D and B as well as between D and C. However, this would not sever the joint tenancy as between B and C.

In many states, rights of survivorship have been abolished and people can own property as joint tenants with right of survivorship only by means of a contract between them. Generally, the contract must be in writing and signed by all joint tenants. Other states allow survivorship only if the deed expressly so provides.

So long as all tenants are alive, either tenant can ask for partition of the property as discussed above in the case of tenancy in common.

3. Tenancy By the Entireties

Tenancy by the entireties is a special form of joint ownership that exists only between husband and wife and only as to real property. As to married persons, it is the form of ownership favored by law.

If husband and wife acquire real property in joint names, it will be presumed that they intend to hold title as tenants by the entirety, unless the deed or will by which they get the property clearly provides to the contrary.

The results of owning real property as tenants by the entireties are well settled. The most important characteristics of this form of ownership are:

1. Upon the death of either tenant, the land automatically becomes the sole property of the other. It does <u>not</u> pass through the estate of the deceased spouse; it is not subject to debts or taxes of the estate.
2. During their joint lives, neither party can dispose of the property or his interest in the property without the joinder of his spouse.
3. There is no right to partition the property.
4. The property is not subject to the individual debts of either spouse; only joint creditors can reach it. Accordingly, judgments against one spouse do not attach to entireties property nor do tax liens in favor of the state departments of revenue or taxation. However, tax liens in favor of the U.S. Department of Treasury or Internal Revenue Service against only one (1) spouse on property owned as tenancy by the entirety must be satisfied or released. See ***TAX LIENS*** herein for additional information.

5. The husband and wife share equally all income received from the property during their joint lives and also share control of the use and enjoyment of the property during that period.
6. Upon divorce, the ex-spouses continue to own the property and the tenancy changes to tenancy in common. Consequently, any judgment against one spouse would attach upon divorce as to their one-half (½) interest.

FFF. Multi-State Transactions

When working on a transaction that involves property located in multiple states, it is important to be aware of specific requirements for the following underwriting issues that differ from state to state:

1. Endorsements

It is necessary that the "*Endorsements Manual*" is reviewed to ensure that an endorsement that is requested is approved for use in a particular state/commonwealth. It is equally important that if there is a state specific version of an endorsement it is being used. It is also important to note that some ALTA 8.1 endorsements do have state specific statutory references included with the text. See "*ITIC Endorsements Manual, Second Edition*" for complete information.

2. Forms

Generally, most of the forms available in the *Forms Manual* are applicable in most states/commonwealths. However, some transactions require that a state specific form is used, i.e. Construction Loans. See *Forms Manual* for complete information.

3. Licensing

A settlement agent who is closing a transaction involving property in multiple states/commonwealths must be approved as a settlement provider with ITIC/NITIC in each state/commonwealth in which the property is located. The searcher must be approved as a searcher with ITIC in every state/commonwealth in which the property being searched is located. See "Approved Settlement Provider by State" and "Approved Searcher by State" lists on the ITC website (www.invtitle.com) for a complete list of ITIC/NITIC approved providers.

4. Rates

The following procedures should be used to calculate a premium if the transaction involves multiple tracts of land located in multiple states or multiple rate areas/zones with a certain state. Note: these are the same calculation procedures used for the *Aggregate/Tie-in (a/k/a Cluster) Endorsement*.

A = Total Coverage Amount (Client must provide)
B = Each Site's Value (Client must provide)
C = Total Value of All Sites (see #3 below)
D = Loan-to-Value Percentage (See #3 below)
E = Each Site's Coverage Amount (See #4 below)
F = Individual Site's Premium Percentage (See #6 below)
G = Individual Site Premium Amount (Se #5 or #7 below)
H = Total Premium Amount (see #5 below)

1. Need total coverage amount desired for all sites (A), which is typically the total loan amount.
2. Need each site's value (appraisal values (B).
3. Add each site's value (B) and get a total value (C). Divide A by C to get Loan to Value Percentage (D).
4. Multiply B x D to get each site's coverage amount (E).

5. Use each site's coverage amount to calculate that site's applicable premium (G), or if all sites are in the same state or applicable rate area, calculate the total premium based on the total coverage amount (A).
6. The sum of all E's should = A. The sum of all G's should = H.
7. If the premium is calculated based on A rather than by each E, divide E by A to get the Individual site's premium percentage (F).
8. Multiply H x F to get the allocation for the individual site's premium amount (G).

5. Underwriting

Underwriting guidelines vary from state to state. It is the underwriters' responsibility to be aware of these differences and utilize the appropriate requirements/exceptions. Examples of topics that have different underwriting guidelines include, but are not limited to, estate matters, foreclosures, mechanics' and materialmen's liens, mobile homes, survey coverage and trusts. See the "*General Underwriting Principles Manual*" and the respective ***State Supplement*** for full details.

GGG. Non-Approved Builders (aka Disapproved or Unapproved Builders)

As part of an ongoing claims reduction program, the Company has determined that some builders and contractors pose a significant risk to the Company, and as such, transactions involving these builders should be avoided. In order to maximize the effectiveness of the program the Company is requesting the assistance of all issuing agents and branch offices by adhering to the following procedures.

The Company will publish a list of non-approved builders in the Company's on-line library. This list of builders will be updated on a regular basis to add or remove builders as necessary. When a builder is added or removed, the Company will send out a Builder Alert Notification Form. If a builder appears on the Non-Approved Builder List, the issuing agents and branch offices may not underwrite any transaction involving that builder without Home Office approval.

If the issuing agents and branch offices becomes aware of a builder that poses a risk the issuing agents and branch offices should submit a Non-Approved Builder Request Form (Form 569) to the Legal and Marketing Support Department at the Home Office. Upon receipt of the form and any supplemental information, the form will be sent to a designated Company attorney for review and determination. If the situation warrants, the builder will be added to the Non-Approved Builder List and the issuing agents and branch offices will receive a builder alert notification.

In determining if a builder poses a risk, the issuing agents and branch offices should consider the following factors:

- Does the builder have a reputation in the community for not paying subcontractors or suppliers in a timely manner;
- Does the builder have mechanics' liens or claims of liens filed on any project;
- Has the builder recently filed for bankruptcy or gone into receivership;
- Has the builder generated any title insurance claims that you are aware of;
- Are other title underwriters unwilling to insure transactions involving this builder; or
- Any other factors which would lead you to conclude that the builder poses a risk.

The Company, at its discretion, may add builders to the Non-Approved Builder List based on information obtained through claims administration, correspondence with other underwriters, or in day to day underwriting operations.

Once it has been determined that the builder no longer poses a risk to the Company, the builder will be removed from the list and a Builder Alert Notification Form will be sent to all issuing agents and branch offices. Builders may also be removed from the list at the request of the issuing agents and branch offices. In order to have a builder removed, the issuing agents and branch offices must obtain a Builder Approval Application (Form 561), complete a Confidential Builder Rating Worksheet (Form 561b), and contact the references listed on the application. Additionally, it will be necessary to obtain a judgment search / clerk's office search on the builder. Upon completion of these steps, a Non-Approved Builder Request Form and all supporting documentation should be submitted to the Legal and Marketing Support Department at the Home Office for processing.

For all construction transactions, including but not limited to conversions from temporary construction to permanent financing, the issuing agents and branch offices must check the Non-Approved Builder List to verify that the builder is not listed prior to the issuance of any commitment.

HHH. Non-Approved Lenders (aka Disapproved or Unapproved Lenders)

As part of an ongoing claims reduction program, the Company has determined that some mortgage brokers and lenders pose a significant risk to the Company, and as such, transactions involving these mortgage brokers and lenders should be avoided. In order to maximize the effectiveness of the program the Company is requesting the assistance of all issuing agents and branch offices through adherence to the following procedures.

The Company will publish a list of non-approved mortgage brokers and lenders in the Company's on-line library. This list of mortgage brokers and lenders will be updated on a regular basis to add or remove mortgage brokers and lenders as necessary. When a mortgage broker and lender is added or removed, the Company will send out a Lender Alert Notification Form. If a mortgage broker or lender appears on the Non-Approved Lender List, issuing agents and branch offices may not underwrite any transaction involving that mortgage broker or lender without Home Office approval. There is no affirmative obligation to determine if a mortgage broker is involved in any given transaction. If you are not advised that a broker is participating in the transaction, then you do not need to inquire.

If the issuing agents or branch office becomes aware of a mortgage broker or lender that poses a risk a Notification Form (Form 568) should be submitted to the Claims Department at the Home Office, Attention: Risk Specialist. Upon receipt of the form and any supplemental information, the information will be reviewed by the Company and a determination made. If the situation warrants, the mortgage broker or lender will be added to the Non-Approved Lender List and issuing agents and branch offices will receive a Lender Alert Notification Form.

In determining if a mortgage broker or lender poses a risk, issuing agents and branch offices should be vigilant in monitoring local and regional media sources and reporting any articles or stories which may raise suspicion of a broker's or lender's bad acts.

The Company, at its discretion, may add mortgage brokers or lenders to the Non-Approved Lender List based on information obtained through claims administration, correspondence with other underwriters, or in day to day underwriting operations.

Once it has been determined that the mortgage broker or lender no longer poses a risk to the Company, the mortgage broker or lender will be removed from the list and a Lender Alert Notification Form will be sent to all issuing agents and branch offices.

III. Notary Acknowledgments

Most states require deeds and other instruments to be acknowledged or authenticated before they can be recorded. Defects in or the omission of such acknowledgments will cause the instrument to be invalid against subsequent purchasers or creditors. However, defects in acknowledgment are often put to the title insurer with requests to "insure over" their nonconformity. The following are examples of underwriting concerns:

1. Dates

The Company has no objection for the acknowledgment date to precede the date of instrument. This often occurs when there are multiple grantors and the deed has to be mailed around the state or county for all signatures.

2. Expired Commission

Where it appears that notary's license expired before the date of his signature, have the examiner investigate whether the notary was re-licensed and simply forgot to use new date of expiration. If the notary was actually licensed on the day of the acknowledgment, the Company will insure without exception.

3. Jurisdiction

Often, a notary may act outside his home county and may take the acknowledgment of any instrument regardless of the county where the subject matter of the transaction is located or where the residence of the parties exists.

4. Incorrect Corporate Notary Acknowledgment

Where the execution of a corporate deed is proper, but the acknowledgment of that execution is defective, recordation of such a deed is not valid and does not constitute public notice. The risk is not as between the corporate grantor and grantee because the deed is still effective as a contract. The risk is that the corporate grantor will re-convey the property and start another chain of title. Wherever possible, the acknowledgment and corporate deed should be corrected. If correction is not possible, evidence of possession, use and consideration paid will all be reviewed to determine insurability.

5. Electronic Notary Acknowledgment

An electronic notary acknowledgement is the electronic notarization of an electronic document. The Uniform Electronic Transactions Act (UETA) permits a notary to act electronically, not remotely. The notary must still satisfy all other requirements of applicable state notarial law, including that the notary be in the physical presence of the signer at the time of execution. For an electronic notarization, the notary electronically signs and seals an electronic document. The notary's electronic signature must comply with the definition of an electronic signature, and the electronic notary seal must contain the same information as the physical notary seal.

The Company will insure transactions that are the subject of electronic notarization (and correspondingly being electronically recorded) provided that:

1. It is lawful in the state where the document is being signed and the electronic notarization is taking place.
2. The notary public has been properly commissioned/authorized to perform electronic notarizations by the applicable state authority.

3. The form and substance of the document is otherwise acceptable if it were executed with a "wet" signature and notarized using a traditional notarization process
4. The applicable government recording office has the requisite technology to accept electronic documents and is accepting them in digital or digitized format or there is statutory authority that allows for the electronically signed and notarized document to be "papered out" and recorded as a paper document.

NOTE: After a document has been signed and notarized with an electronic notary, it cannot be changed. The electronic notary must attach their electronic signature and seal to the electronic notarial certificate in a manner that renders any subsequent modification of the electronic document evident. It is imperative that all exhibits, addenda, and riders must be attached and completed before the document is electronically signed and the electrically notarized.

Please contact Corporate Legal and Underwriting Services with any questions.

6. Remote Online Electronic Notarization (RON)

Remote online notarization (RON) occurs when the signer is not in the physical presence of the notary utilizing audio-video teleconference technology that meets the requirements outlined by the state. In states that allow for RON, the Company will insure transactions involving a RON provider provided that:

1. The notary public has been properly commissioned/authorized to perform remote/electronic notarizations by the applicable state authority.
2. The notary public is physically present in the state where the property is located at the time the document is executed/notarized. The signer does not need to be located in the state.
3. The property is located in the same state in which the notary public is so commissioned/authorized.
4. The notary public has complied with all applicable state statutes, regulations, and guidelines, including without limitation pertaining to identity proofing, acknowledgment requirements, and use of RON providers.
5. The form and substance of the document is otherwise acceptable if it were executed with a "wet" signature and notarized using a traditional notarization process.
6. NOTE: After a document has been signed and notarized with an electronic notary, it cannot be changed. The electronic notary must attach their electronic signature and seal to the electronic notarial certificate in a manner that renders any subsequent modification of the electronic document evident. It is imperative that all exhibits, addenda, and riders must be attached and completed before the document is electronically signed and the RON is performed (this is the rule for all documents, regardless of how they are signed and notarized, but it will be particularly evident if someone attempts to alter a document with a remote online notarization).

Please note the following:

- Agents should work closely with each lender to understand their willingness to participate in a digital closing. In the event your lenders decline to utilize RON to execute the lender documents, RON may still be a viable alternative to utilize in completing seller-side documents or for cash deals where there is no lender involved, eliminating the need for those parties to come into your offices.

- Agents should check with the county clerk or recorder to confirm, prior to closing, that electronic documents electronically notarized will be accepted for recording.
- At this time, the Company does not require Agents to store RON audio/visual sessions, unless required by state law (as one example, if the Agent is the notary and state law requires that the notary store the session).

Please contact Corporate Legal and Underwriting Services with any questions.

JJJ. Parks

When shown on a subdivision plat, parks are considered dedicated to public use and where such property has been deeded to a private individual and title policy issued, the following exception would be made:

Parks Rights of others in and to the use of that portion of the Land designated as a "park" and as shown on plat recorded in Book ^ at Page ^.

In order for a subsequent owner to build on such property or change its use, a declaratory judgment would be required from a court of competent jurisdiction terminating the rights of other lot owners to the park, or an amended plat would have to be prepared showing the park as private property, consented to by the other property owners in the subdivision and recorded.

KKK. Partnerships

A partnership is an association of two or more persons to carry on a business for profit as co-owners. A partnership is created by an agreement, either express or implied, to jointly carry on the business and share profits and liabilities. The contract or agreement of partnership need not be in writing but may be implied from the acts and conduct of the partners. The contract or agreement need not be in writing even though the sole purpose of the partnership is to deal in real estate.

In certain jurisdictions, a certificate of assumed name or a recorded partnership agreement or other filing may need to occur to establish the partnership, and give authority to do business as a partnership. It is preferable for all partners in a partnership to sign a deed or deed of trust, but where title to the property is in the partnership name, any partner may convey title by a deed executed in the partnership name. If the partnership agreement authorizes more than one partner to convey real property, the partnership agreement will control.

1. Title in Partnership Name

When title is acquired or vested in the firm name as shown in the recorded statement or certificate of partnership and the firm is described as a partnership and identity has been established, title may be treated and insured in the firm name as a partnership property. This rule applies when the firm name is first shown and whether or not the individual names of the partners are shown following the firm name.

<u>EXAMPLES:</u>

1. Reliable Realty Company, a partnership composed of John Smith and Richard Jones.
2. Reliable Realty Company, composed of John Smith and Richard Jones, partners.
3. Reliable Realty Company, a partnership.

All general partners should join in the execution of instruments affecting the partnership property unless the recorded statement or certificate of partnership delegates the authority to sign deeds to less than all or certain of the general partners. The delegation of authority for less than all general partners to act could also be made by agreement or some other document signed by all partners, both general and limited. Such delegation should be reflected in the public records.

2. Title in Individual Names of Partners

When title is acquired or vested in the individual names of the members of a partnership, usually evidenced by showing the individual names first followed by the firm name which may or may not be designated as a partnership, and even though a statement or certificate of partnership is recorded, the title may not be vested in the firm name.

<u>EXAMPLES:</u>

1. John Smith and Richard Jones, doing business as Reliable Realty Company, a partnership.
2. John Smith and Richard Jones, partners doing business as Reliable Realty Company.
3. John Smith and Richard Jones, doing business as Reliable Realty Company.

Conveyances of title so acquired or vested may be captioned on the policy as title is held. Individual signatures of the partners including spouses of any married partners (if the applicable state grants marital interest, *see* ***State Supplement***) and acknowledgment are required to convey title to real property.

3. General Index Matters

The manner in which title is held is important when general index matters such as abstracts of judgment, federal tax liens, etc., against either the partnership firm name or the individual names of the general partners, are being considered. All such matters will ordinarily be included in the chain of title and to determine which of them should or should not be reported and cleared is the responsibility of the examiner and title insurer.

<u>When title is held in the firm name</u> as shown in the recorded statement or certificate of partnership, and whether or not the individual names of the partners are shown following the firm name, state certificates of tax and abstracts of judgment, including those in favor of the United States of America, (but not federal tax liens), against the individual names of the partners can be ignored. If however, the firm name is shown or mentioned as a debtor in addition to or in connection with the individual, the matter must be reported and cleared.

<u>When title is held in the individual names</u> of the partners of the partnership, even if their names are followed by the partnership name and even though a certificate of partnership is recorded, it is our position that title to the real property did not vest in the partnership but rather vested in the individual partners. Accordingly, liens to the local or state taxing authorities and judgments against the individuals will be considered liens against the property and will have to be satisfied or released. Also, in order to effect a complete conveyance of the property, the spouses of the partners will have to join in the execution of deeds and deeds of trusts (if the applicable state grants marital interests: *see* ***State Supplement***.)

4. Federal Tax Liens

A federal tax lien, unlike state certificates of tax and abstracts of judgment, when found against the partnership firm name or against the general partners individually or as partners should be brought to the attention of the Home Office for a determination of whether it is to be considered a lien on the property being insured. The attorney and Home Office should review (and underwriters may ask the attorney):

1. How title to the property is vested;
2. The nature of the transaction (*i.e.*, refinance, sale, acquisition);
3. The party against whom the tax lien is docketed, his interest in the partnership, and his interest in the property;
4. The amount of the tax lien; and
5. The value of the property.

5. Partner's Right in Specific Partnership Property

At common law, a partner is a co-owner with his partners of specific partnership property holding as a tenant in partnership. A partner cannot assign his interest in specific property except in connection with the assignment of rights of all the partners in the same property. A partner's right in specific partnership property is not subject to attachment or execution of his individual creditors. *See* ***State Supplement***.

6. Changes in Partnership

Under common law, a new partnership is deemed to be created with every change in the number or identity of the partners. Thus, if a partner dies or resigns, or if a new partner or partners are added, a new partnership has been formed. This poses a problem for real property examiners, lawyers and insurers alike. The examiner and closing attorney need to confirm the identity of the partnership and who has authority to execute instruments relating to the real property.

Situations will be encountered where amended statements or certificates of partnership indicate a change in partners and thus a question of identity is raised. Sometimes the existence of such facts is disclosed by instruments of record or to be recorded. Often the change in partners is the result of dissolution of the old partnership and the formation of a new partnership. Usually off-record inquiry must be made before the facts can be properly evaluated and title requirements be made. No general rule can be stated nor can any standard procedure be outlined to take care of such situations. If the slightest doubt exists as to the inquiry to be made or procedures to be taken, consultation with the Home Office is indicated.

7. Underwriting

If an attorney is certifying title to the property and acting as the settlement agent, no requirement is needed. However, if an attorney is certifying title to the property but another party is acting as the settlement agent or a title exam, not a title opinion, is being relied upon when underwriting, and the party in title or the buyer is a *general* partnership, make the following requirement:

GenPart Execution of the ^ [Deed and/or Mortgage] by all of the general partners or receipt of a resolution by all of the general partners authorizing execution of the ^ [Deed and/or Mortgage] by less than all of the partners.

If an attorney is certifying title to the property and acting as the settlement agent, no requirement is needed. However, if an attorney is certifying title to the property but another party is acting as the settlement agent or a title exam, not a title opinion, is being relied upon when underwriting, and the party in title or the buyer is a *limited* partnership, make the following requirement:

LimPart Execution of the ^ [Deed and/or Mortgage/Deed of Trust] by (i) all of the general and (ii) any of the limited partners the partnership agreement requires.

LLL. Party Walls

A party wall is a common wall, usually situated on or near the boundary line between two (2) adjacent properties, and used jointly by both properties. Since the adjoining owner would have rights in the party wall, those rights must be the subject of an exception as follows:

PartyWal Rights of adjoining lot owners to the lateral support and encroachment of the party walls situate on side lot lines.

No exception is taken for party walls in townhouses and condominiums because exception to the restrictive covenants is made and such party walls are usually defined therein.

<u>Do</u> make the party wall exception for nonrestricted residential (*i.e.*, duplexes) and commercial property, unless requested to issue the ALTA 4 – Condominium Endorsement.

MMM. Plat/Recorded Plat of Subdivision

Subdivision or property maps may be referred to as:

1. "Recorded plat," or
2. "Recorded map," or
3. "Recorded subdivision plat [or map]," or
4. "Recorded condominium plat [or map]."

The principal purpose of a recorded plat of subdivision (however named) is to provide for regulation and control of design and improvements of the site or subdivision with proper consideration of its relation to adjoining areas. The street layout will appear and may thus offer street dedication. Building setback lines may be shown and must be excepted to. Local ordinances may require the sewers, drains and/or utility placement, and these may result in "easements" and must be excepted to:

PlatSub Matters shown on recorded ^ [*identify: Map, Plat, etc*.] Book ^ at Page ^.

OR

PlatShow Matters shown on recorded ^ [*identify: Map, Plat, etc.*] Book ^ at Page ^ including ^ located on the Land.

NNN. Policy Exceptions for Missing Requirements

This list is intended to assist the agent or branch to issue Final Policies when requirements are not met. <u>These exceptions should only be used after you have contacted the customer at least three times both by fax and by telephone</u>.

1. Corporate Resolution (Owners/Loan Policies)

If the corporate resolution exists, but were not provided, use the following exception:

CorpAffC This policy does not insure against loss or damage and the Company will not pay costs, attorneys' fees, or expenses resulting from the lack of authority of the signatories purporting to pledge or encumber the Land described in Schedule A.

<u>**Please be advised that this is a very broad exception and has the effect of eviscerating a good portion of the coverage offered by the policy.**</u>

2. Certificate of Good Standing

Call the appropriate state agency and verify that the organization is in good standing. Place a note in the file indicating the date of the call, the name of the individual that you spoke to, and the information that agency relays to the underwriter.

CorpGood This policy does not insure against loss or damage and the Company will not pay costs, attorneys' fees, or expenses resulting from the organization purporting to convey or encumber the Land described in Schedule A not being in good standing with the Secretary of State.

NOTE: Upon receipt and review of Certificate of Good Standing, this exception may be altered or removed.

3. Operating Agreement

If an operating agreement exists, but was not provided, use the following:

CorpAffC This policy does not insure against loss or damage and the Company will not pay costs, attorneys' fees, or expenses resulting from the lack of authority of the signatories purporting to pledge or encumber the Land described in Schedule A.

If no operating agreement exists, but the LLC Articles of Organization have been provided, the appropriate party(ies) to execute the documents are all of the members of a member managed LLC or the manager of a manager managed LLC.

4. Articles of Organization

If no Articles of Organization or a satisfactory resolution are provided, a final policy cannot be issued, as there is not a valid legal entity capable of holding, conveying, or encumbering property.

5. Missing Seller/Borrower Affidavit (Owners/Loan Policies)

When a Seller/Borrower or Estoppel Affidavit is required but not received, use the following:

Affid/Aff Loss or damage arising from any matter that would have been disclosed by a properly executed [*name of Affidavit*].

In addition, the Owners policy should contain the standard exceptions. (*See* ***State Supplement*** or the Glossary of Exceptions and Requirements contained herein.)

6. Certificate of Trust (Loan Policies Only)

CorpAffC This policy does not insure against loss or damage and the Company will not pay costs, attorneys' fees, or expenses resulting from the lack of authority of the signatories purporting to pledge or encumber the Land described in Schedule A.

7. Unrecorded Easements that Grant Access

Please refer to the Easements section contained herein for the specific exception to be used in this circumstance.

8. Undischarged Mortgages or Deeds of Trust

Use the appropriate **MTG** or **DOT** exception. *See* ***State Supplement.***

You can add a note that indicates that this exception will be removed upon receipt of satisfactory evidence that the mortgage or deed of trust has been satisfied or discharged.

9. Re-recorded Documents for Errors in Legal Description

It is not possible to come up with a standard exception for this problem. Each case should be dealt with individually and it is best for the underwriter to contact Corporate Legal and Underwriting Services for specific guidance.

10. Copy of Divorce

Div/Aff Subject to the terms, conditions, and liens, if any, contained in Divorce case file #^.

11. Letters of Authority

EstateOp Open estate of ^.

12. Death Certificates

Except to the outstanding interest of ^ (*Name of decedent*).

13. Deeds (Owners/Loan Policy)

Cannot issue policy until documents transferring interest are recorded.

14. Power of Attorney

Cannot issue policy until the Power of Attorney has been recorded and any documents executed by the Attorney in Fact have been re-recorded in the correct sequence.

15. Lack of Fee Simple Owner Signing Mortgage or Deed of Trust (Loan Policy)

Cannot issue policy. Contact Corporate Legal and Underwriting Services for guidance.

16. Mortgage or Deed of Trust Covers More Land than Policy Description

It is not possible to come up with a standard exception for this problem. Each case should be dealt with individually and it is best for the underwriter to contact Corporate Legal and Underwriting Services for specific guidance.

17. Unable to Obtain the Attorney's Final Opinion

If you are unable to obtain the attorney's final opinion, you may use the following exception

1) **IF** you have documented at least three (3) attempts on your part to obtain the final opinion, AND
2) **ONLY IF** you have all of the recording information and evidence that all of the requirements have been met except the final opinion, AND
3) You receive **approval from the Home Office**:

NoFinal Exception is hereby taken as to any intervening liens and other matters occurring after the date of commitment.

NOTE: This exception may be removed upon receipt of the attorney's final opinion or the final title bringdown.

OOO. Powers of Attorney

1. Generally

By written instrument, a person may designate and appoint another to act as his attorney-in-fact with authority to execute deeds and deeds of trust, or to do any act that the person could do himself if he were present.

When a power of attorney is used to convey real property or to subject real property to a deed of trust, the following items must be reviewed:

1. Is there language clearly designating an authority to act?
   Read the power of attorney to determine that the grantor gave his attorney-in-fact appropriate and sufficient authority, to buy (or sell), to sign deeds of trust (or deeds) and other closing documents.

2. Is the power of attorney specific as to a particular tract, or general?
   If the power of attorney is general it can be used relative to any property. If the power of attorney is specific as to one particular tract, (lot 12, for instance) it cannot be used for another tract (lot 13, for instance).

3. Is the power of attorney durable; if not, does it address competency?
   Powers of attorney can survive mental incompetence and be "durable" if the laws of the state allow and if it expressly states its durability. In such cases, the examiner does not need to confirm the grantor's competence prior to using the power of attorney. If no language appears which can be interpreted to make the power durable, then it will fail on the mental incompetence of the grantor. In those cases, the examiner must confirm the mental competence of the grantor prior to using the power of attorney.

4. Is the grantor of the power alive?
   All powers of attorney are terminated on the death of the grantor. Therefore, in all cases, the examiner must confirm that the grantor is still living at the time the power is to be used.

5. Is the power of attorney signed under seal?
   If state law requires the documents that will be signed by the attorney in fact to be under seal (*i.e.*, deed and deeds of trust), the power of attorney must also be signed under seal. *See* ***State Supplement***.

6. Has the power of attorney been recorded?
   The power of attorney should be recorded prior to recording of the document signed by the attorney in fact and is required to be recorded in certain states. *See* ***State Supplement***.

2. Execution in Name of Either Principal or Attorney-In-Fact

Occasionally, there will be a statute which establishes that an instrument is good and valid whether signed in the name of the principal by the attorney-in-fact, or by the attorney-in-fact for the principal, or by the attorney-in-fact without naming the principal if it will appear that it was the purpose of the attorney-in-fact to be acting for and on behalf of the principal.

3. Military Powers of Attorney

Often a power of attorney is used to convey or encumber real property owned by a serviceperson. In such cases, the military power of attorney must be given legal effect without regard to state law requirements. 10 U.S.C. 1044b.

4. Corporate Power of Attorney

A corporation can act through an attorney-in-fact (AIF). When a conveyance of real property owned by a corporation is executed by an AIF, the following guidelines are recommended:

1. The power of attorney must be examined to ascertain the authority of the AIF to bind the corporation and to determine if the board of directors has the capacity to delegate the duties to the AIF.

2. The power of attorney should give the AIF specific authority to enter into and execute contracts, deeds or other documents necessary to effectuate a sale and conveyance of real property and to accept closing proceeds.

3. The power of attorney must be executed in proper corporate form and recorded in the county where the real property is located.

4. A certified copy of the corporate resolution should be attached to and recorded with the power of attorney.

5. The notary acknowledgment which follows the deed being executed by the corporate AIF:

State of ^
County of ^

I, I, ^, a Notary Public of the State and County aforesaid, do hereby certify that ^, attorney-in-fact for ^, a ^ corporation, personally appeared before me this day, and being by me duly sworn, says that he executed the foregoing and annexed instrument for and in behalf of and as the act of ^, a ^ corporation, and that his authority to execute and acknowledge said instrument is contained in an instrument duly executed, acknowledged, and recorded in the office of the Register of Deeds [*Clerk of Courts, or other*] of ^ County, [*state*], on the ^ day of ^, ^ [*year*], in Book ^, Page ^, and that this instrument was executed under and by virtue of the authority given by said instrument granting him power of attorney; that the said ^ acknowledged the due execution of the foregoing and annexed instrument for the purposes therein expressed, for and in behalf of and as the act of the said ^, a ^ corporation.

WITNESS my hand and official stamp or seal, this ^ day of ^, ^ [*year*].

____
Notary Public
My commission expires: ____________________

5. Underwriting

When insuring transactions involving documents signed by an Attorney in Fact, the Company requires verification that the Attorney in Fact has been duly appointed and has the authority to act on behalf of the Principal.

The following requirement applies to all transactions in which any or all of the documents creating the interest(s) to be insured are to be executed by an Attorney in Fact:

POAAffid Receipt of satisfactory, notarized Affidavit of Attorney-in-Fact (copy attached).

If the above mentioned Affidavit of Attorney-in-Fact is not received and/or a similar type of form is submitted for review that does not state it is for the benefit of a title insurance company or on a form that does not specifically identify the Company, the following must be verified:

1. The Attorney in Fact has been duly appointed;
2. The Attorney in Fact has no knowledge of any amendment or modification;
3. Said Power of Attorney has not been revoked and remains in full force and effect;
4. Said Power of Attorney grants the Attorney in Fact appropriate and sufficient authority to sell or encumber real property, and to execute deeds, deeds of trust/mortgages and other closing documents;
5. The Attorney in Fact has no knowledge of the Principal being deceased;

The following applies when the Power of Attorney is not durable:

1. The Attorney in Fact has no knowledge of the Principal being incapacitated or incompetent; and
2. The Attorney in Fact has no knowledge of the initiation of any proceedings to determine incapacity of the Principal, or to appoint a guardian or legal advocate for the Principal.

If the Power of Attorney has not been recorded in the county where the property to be insured is located, add the following requirement:

POARecor Satisfactory evidence that the Power of Attorney was recorded in the county where the Land to be insured is located prior to the recordation of the deed and Mortgage executed by the Attorney in Fact.

See ***State Supplement*** for state specific information.

PPP. Privacy Disclosure

For more information about the Financial Privacy Rule requirements, please see the FTC's Small Business Guide.

1. *In Brief: The Financial Privacy Requirements of the Gramm-Leach-Bliley Act*

Protecting the privacy of consumer information held by "financial institutions" is at the heart of the financial privacy provisions of the Gramm-Leach-Bliley Financial Modernization Act of 1999. The GLB Act requires companies to give consumers privacy notices that explain the institutions' information-sharing practices. In turn, consumers have the right to limit some – but not all - sharing of their information.

Here's a brief look at the basic financial privacy requirements of the law.

a) Financial Institutions

The GLB Act applies to "financial institutions" - companies that offer financial products or services to individuals, like loans, financial or investment advice, or insurance. The Federal Trade Commission has authority to enforce the law with respect to "financial institutions" that are not covered by the federal banking agencies, the Securities and Exchange Commission, the Commodity Futures Trading Commission, and state insurance authorities. Among the institutions that fall under FTC jurisdiction for purposes of the GLB Act are non-bank mortgage lenders, loan brokers, some financial or investment advisers, tax preparers, providers of real estate settlement services, and debt collectors. At the same time, the FTC's regulation applies only to companies that are "significantly engaged" in such financial activities.

The law requires that financial institutions protect information collected about individuals; it does not apply to information collected in business or commercial activities.

b) Consumers and Customers

A company's obligations under the GLB Act depend on whether the company has consumers or customers who obtain its services. A *consumer* is an individual who obtains or has obtained a financial product or service from a financial institution for personal, family or household reasons. A *customer* is a consumer with a continuing relationship with a financial institution. Generally, if the relationship between the financial institution and the individual is significant and/or long-term, the individual is a customer of the institution. For example, a person who gets a mortgage from a lender or hires a broker to get a personal loan is considered a customer of the lender or the broker, while a person who uses a check-cashing service is a consumer of that service.

Why is the difference between consumers and customers so important? Because only customers are entitled to receive a financial institution's privacy notice automatically. Consumers are entitled to receive a privacy notice from a financial institution only if the company shares the consumers' information with companies not affiliated with it, with some exceptions. Customers must receive a notice every year for as long as the customer relationship lasts.

The privacy notice must be given to individual customers or consumers by mail or in-person delivery; it may not, say, be posted on a wall. Reasonable ways to deliver a notice may depend on the type of business the institution is in: for example, an online lender may post its notice on its website and require online consumers to acknowledge receipt as a necessary part of a loan application.

c) The Privacy Notice

The privacy notice must be a clear, conspicuous, and accurate statement of the company's privacy practices; it should include what information the company collects about its consumers and customers, with whom it shares the information, and how it protects or safeguards the information. The notice applies to the "nonpublic personal information" the company gathers and discloses about its consumers and customers; in practice, that may be most - or all - of the information a company has about them. For example, nonpublic personal information could be information that a consumer or customer puts on an application; information about the individual from another source, such as a credit bureau; or information about transactions between the individual and the company, such as an account balance. Indeed, even the fact that an individual is a consumer or customer of a particular financial institution is nonpublic person information. But information that the company has reason to believe is lawfully public - such as mortgage loan information in a jurisdiction where that information is publicly recorded - is not restricted by the GLB Act.

d) Opt-Out Rights

Consumers and customers have the right to opt out of - or say no to - having their information shared with certain third parties. The privacy notice must explain how - and offer a reasonable way - they can do that. For example, providing a toll-free telephone number or a detachable form with a pre-printed address is a reasonable way for consumers or customers to opt out; requiring someone to write a letter as the only way to opt out is not.

The privacy notice also must explain that consumers have a right to say no to the sharing of certain information - credit report or application information - with the financial institution's affiliates. An affiliate is an entity that controls another company, is controlled by the company, or is under common control with the company. Consumers have this right under a different law, the Fair Credit Reporting Act. The GLB Act does not give consumers the right to opt out when the financial institution shares other information with its affiliates.

The GLB Act provides no opt-out right in several other situations: For example, an individual cannot opt out if:

- a financial institution shares information with outside companies that provide essential services like data processing or servicing accounts;
- the disclosure is legally required;
- a financial institution shares customer data with outside service providers that market the financial company's products or services.

e) Receiving Nonpublic Personal Information

The GLB Act puts some limits on how anyone that receives nonpublic personal information from a financial institution can use or re-disclose the information. Take the case of a lender that discloses customer information to a service provider responsible for mailing account statements, where the consumer has no right to opt out: The service provider may use the information for limited purposes - that is, for mailing account statements. It may not sell the information to other organizations or use it for marketing.

However, it's a different scenario when a company receives nonpublic personal information from a financial institution that provided an opt-out notice -- and the consumer didn't opt out. In this case, the recipient steps into the shoes of the disclosing financial institution, and may use the information for its own purposes or re-disclose it to a third party, consistent with the financial institution's privacy notice. That is, if the privacy notice of the financial institution allows for disclosure to other unaffiliated financial institutions - like insurance providers – the recipient may re-disclose the information to an unaffiliated insurance provider.

f) Other Provisions

Other important provisions of the GLB Act also impact how a company conducts business. For example, financial institutions are prohibited from disclosing their customers' account numbers to non-affiliated companies when it comes to telemarketing, direct mail marketing or other marketing through e-mail, even if the individuals have not opted out of sharing the information for marketing purposes.

Another provision prohibits "pretexting" - the practice of obtaining customer information from financial institutions under false pretenses. The FTC has brought several cases against information brokers who engage in pretexting.

g) For More Information

The FTC is one of eight federal regulatory agencies that have the authority to enforce the financial privacy law, along with the state insurance authorities. The federal banking agencies, the Securities and Exchange Commission and the Commodity Futures Trading Commission have jurisdiction over banks, thrifts, credit unions, brokerage firms and commodity traders.

The FTC has additional details on the GLB Act, the Commission's Privacy Rule and a compliance guide for small business owners at www.ftc.gov/privacy.

2. Underwriting

On all residential transactions, the following requirement must be made:

Privacy Provide the attached ITC Privacy Statement to the buyer/borrower at the time of closing.

On those residential transactions for which a commitment is not issued, the privacy statement must be provided to the buyer/owner.

QQQ. Probate and Recordation

1. Recording Statutes Used in Various States

Acts providing for the recording of deeds and other instruments are found in every state. These acts do not affect the validity of the instrument but may have an effect on the priority of the instrument. Prior to the enactment of these statutes, the common law determined priority based on an ancient Maxim of Roman Law. *Qui prior est tempore potior est jure*. (Who is first in point of time is stronger in right, more commonly known as first in time, first in right.) The modern recording statutes are classified into three groups commonly referred to as "race," "notice," and "race-notice." The first type deals purely with the question of the race to the records; the first person to record wins. In the second type, the subsequent purchaser wins if he purchases without notice of the prior deed and purchases before the prior deed is recorded. In the third type, the subsequent purchaser wins if he purchases without notice of the prior deed and also records his deed before the prior deed is recorded.

Most of the recording acts are phrased in terms of declaring the priority between two inconsistent conveyances of the same property. For example, A, the owner of Blackacre in fee simple conveys Blackacre to B and subsequently conveys Blackacre to C. The statutes declare when C's conveyance takes priority over B's conveyance. At common law, and in the absence of a recording act, if A had legal title, then B would always win over C, since B's conveyance was first. The recording acts, however gives C a priority when B fails to record, if, in a notice state, C pays value and has no notice of the deed to B. A notice statute protects a subsequent purchaser against prior unrecorded instruments even though the subsequent purchaser fails to record. In a race-notice state, C has priority if C pays value without notice of B's deed, and thereafter records before B records. Thus in a notice state, C must record only to protect himself against subsequent conveyances, but not against the conveyance to B. In a race-notice state, C must record to protect himself both against B and against subsequent conveyances. In a race state, C must record first to defeat the priority of B and to protect against subsequent conveyances.

<u>EXAMPLES</u>

Race Statute
O, owner of Blackacre, conveys Blackacre to A, who does not record the deed. O subsequently conveys Blackacre to B for a valuable consideration. B actually knows of the deed to A. B records the deed from O to B. Under a race statute, B prevails over A, and B owns Blackacre. (If a notice statute is applicable, B would not prevail over A because B has notice of A's prior deed.)

Notice Statute
O, owner of Blackacre, conveys Blackacre to A, who does not record the deed. O subsequently conveys Blackacre to B for a valuable consideration. B has no knowledge of A's deed. Under a notice statute, B prevails over A even though B does not record the deed from O to B.

Race-Notice Statute
O, owner of Blackacre, conveys Blackacre to A, who does not record the deed. O subsequently conveys Blackacre to B, who does not know of A's deed. Then A records. Then B records. A prevails over B because, even though B had no notice of A's deed, B

did not record before A did. If on the other hand, B recorded his deed prior to A, then B would prevail.

With regard to "gap coverage" it is recommended that an affidavit from the mortgagor be obtained in any state operating under a notice or race-notice statute if there is a delay between the recording of an instrument and its availability for review by an examiner searching title. Owner's coverage should not be provided until the "gap" can be searched to verify that no intervening instruments have been recorded.

PURE RACE	***PURE NOTICE***	***RACE-NOTICE***
Arkansas (Mortgages)	Alabama	Alaska
Louisiana	Arizona	California
North Carolina	Arkansas (except Mortgages)	District of Columbia
Ohio (Mortgages and Oil and Gas Leases)	Colorado	Georgia
Pennsylvania (Mortgages except for Purchase Money)	Connecticut	Hawaii
	Delaware	Idaho
	Florida	Indiana
	Illinois	Maryland
	Oklahoma	Michigan
	Iowa	Minnesota
	Kansas	Mississippi
	Kentucky	Montana
	Maine	Nebraska
	Massachusetts	Nevada
	Missouri	New Jersey
	New Hampshire	New York
	New Mexico	North Dakota
	Ohio (Except Mortgages and Oil and Gas Leases)	Oregon
	Rhode Island	Pennsylvania (except most types of Mortgages)
	Tennessee	South Carolina
	Texas	South Dakota
	Vermont	Utah
	Virginia	Washington
		West Virginia
		Wisconsin
		Wyoming

2. Estoppel by Deed

The Company is frequently asked to insure title on the basis of a doctrine known as estoppel by deed, commonly referred to by examiners as "feeding the estoppel." The typical fact situation that raises this doctrine is as follows.

A conveys title to B, but before the deed from A to B is recorded, B conveys title to C, and the Company is asked to insure C.

OR

A's deed to B, and B's deed to C are recorded in the wrong order, so that the deed from B to C is first, then the deed from A to B, and the Company is asked to insure C.

The examiner argues that in either scenario, when the deed from A to B finally gets on record, it "feeds" the title which B conveyed to C, and B would be "estopped" from claiming superior title to the property. The deed from A to B "feeds the estoppel" for title from B to C.

The problem with the doctrine of estoppel by deed is that even though B is estopped from asserting superior title to the property as against C, the deed from B to C is outside the chain of title, that is, it is outside the chain from A to B because it comes before the deed which vests title in B.

A deed, although recorded at the time of its execution, does <u>not</u> constitute constructive notice and is not within the chain of title of a particular grantor/grantee if it is recorded prior to such person's acquisition of title. Hence, if a deed purports to pass title to land and such deed is executed prior to the grantor's acquisition of title, its recordation prior to the date of acquisition of the title gives no notice to purchasers for value and lien creditors of the grantor because only grants out of the grantor subsequent to his acquisition of title must be searched.

While the doctrine of title by estoppel is applicable in many states, that when one purports to convey title to land which he does not own, the title inures to his grantee when the grantor subsequently acquires title to that land, the doctrine of estoppel <u>does not</u> prevail as against the provisions of the recording statute. That means that subsequent purchasers or creditors may have superior title to that being insured. In the event an examiner reports that the title relies on the doctrine of estoppel, the underwriter should call the Home Office for assistance.

3. Simultaneously Recorded Instruments

Where two (2) deeds of trust are recorded at the same time but are being asserted by the settlement agent as a "first" and a "second," based upon the **<u>page number</u>** of their indexing in the records, there is no hard and fast rule. Both because such a rule would render the Company less responsive to the individual circumstances of each case and because this question will likely be asked only by an settlement agent who has already recorded instruments simultaneously and run afoul of the law, our unwillingness to address the particularities of his situation leaves him in the uncomfortable place of having only himself to look to for the mistake that has been made.

If, under the recording act, the **time** of registration is controlling in determining the priority of competing interests or instruments, then the book/page of indexing will not control the priority of instruments.

Accordingly, when an settlement agent records, in the same minute, two (2) deeds of trust which are secured by the same property, the settlement agent arguably has created a situation where neither of the two deeds of trust are a first lien. (Assuming the absence of evidence which indicates priority, see below.) The further extrapolation of that result, is that when either deed of trust is foreclosed, the other deed of trust will not be eliminated, as are all other junior liens, but will remain a lien on the property as of the date/time of its recording. If, at the time of such foreclosure, a title policy were applied for in the name of the foreclosing lender, an exception would appear for the "unforeclosed" deed of trust.

By reason of the same analysis, when application is made for a Loan Policy in the situation where two deeds of trust are recorded at the same date/time, exception should be made for the deed of trust which does not appear in Schedule A as the insured instrument. Do not underwrite the other deed of trust as a subordinated item in Schedule B, Part II based solely on the book/page of the instruments.

Having just given what would appear to be underwriting instructions, the position of the Company should be further defined. There can be circumstances which would make the Company comfortable in issuing a title policy to a lender for its deed of trust despite a simultaneously recorded competing instrument. For example, the instruments may, on their face, indicate that one is to be a first lien and one is to be second. Or there may exist other evidence which would support a conclusion that one deed of trust is intended to have priority over the other.

In the absence of evidence to clearly indicate which lien is to enjoy priority over the other, and where the settlement agent argues that the book/page controls, request the Home Office contact the settlement agent and continue the discussion.

Where the settlement agent understands and agrees with the conclusion that the simultaneously recorded instruments are competing liens and will appear as an exception on the title policy, he might ask for guidance as to how he can correct the situation. One means by which a settlement agent can rectify and confirm the priority of these two instruments is through the use of a subordination agreement in which one deed of trust is subordinated to the lien of the other. This should be recommended to any settlement agent who asks how to cure the simultaneous recording problem.

A different result is not reached in this analysis simply because both deeds of trust are in favor of the same lender. Remember that loans are sold on the secondary market and the two loans may not both be held by the same lender throughout their duration. It is helpful to have both deeds of trust in favor of the same lender only from the perspective of obtaining the lender's cooperation in subordinating one deed of trust to another.

The best approach to take when questioned regarding simultaneously recorded instruments is to explain the implication such recording has on priority, and to suggest that there is a need to subordinate one deed of trust to the other. If the settlement agent is unwilling to take steps to subordinate, or if the underwriter is unable to either clearly communicate the risks to him or add the deed of trust not insured under Schedule A as an exception under Schedule B, simply ask if the Home Office can call him for further discussion.

4. Gap Coverage

The "gap" is the period of time between the completion of the title search (i.e. effective date of the Commitment) and the date of recording of the documents creating the interest in real estate to be insured. In some states, this period is expanded due to delays in the indexing of documents by the recorder's office. The recording delay varies from county to county and may be minimal or as long as one year. The larger the gap, the more risk the Company assumes.

The 2021 ALTA Owner's Policy contains the following covered risk:

> Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 9 that has been created or attached or has been filed or recorded in the Public Records subsequent to the Date of Policy and prior to the recording of the deed or other instrument vesting the Title in the Public Records.

The 2021ALTA Loan Policy contains the following covered risk:

> Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 13 that has been created or attached or has been filed or recorded in the Public Records subsequent to the Date of Policy and prior to the recording of the Mortgage in the Public Records.

The gap between the effective date of the Commitment and the date of closing or recording is normally reduced or eliminated depending on the specific procedures used in a particular state. For example, if the customary practice is to update title just prior to recording the documents, the gap is shortened as much as possible. In other states, the gap is kept in check by updating title prior to closing when a Commitment has aged more than thirty days from the effective date of the Commitment. The various procedures cannot eliminate the gap caused by the delay in indexing documents by the recorder's office but can reduce the Company's exposure.

The Company typically insures the gap created by the delay in indexing, for the lender only, provided (1) the gap is as reasonably short as possible in light of the limitations caused by the delay in indexing documents AND (2) satisfactory affidavits and indemnities are obtained from the seller and/or borrower. The reasonableness of the gap is determined by the custom in a particular geographic region. The affidavits and indemnities that are required to insure the gap are obtained when the seller/borrower executes a Seller/Borrower Affidavit. Please note these are not the same indemnity agreements that are required for the issuance of the "Gap Endorsement."

Before issuing an owner's policy, a final update on title must be performed. In most cases, the agent must obtain a final update on title prior to the issuance of a lender's policy as well. Performing the update allows for the resolution of intervening matters prior to the issuance of the final policy.

PLEASE REFER TO YOUR *STATE SUPPLEMENT* FOR SPECIFIC STATE PROCEDURES.

5. GAP Underwriting and Update Steps

The timing and practices for updating title vary from jurisdiction to jurisdiction and often depend on the type of transaction and the parties involved. In states where an attorney is providing a title opinion and closing the loan, the attorney will update the title immediately prior to recording the documents. This may also be the practice where a settlement company is conducting the closing and providing the title search. Where the party providing the search or opinion is not also closing the transaction, the agent will be responsible for obtaining the necessary updates or final search/opinion. In order to determine the appropriate requirements to be made on the commitment, the agent must determine which party is responsible for each function in the transaction.

For transactions with a coverage amount of less than $500,000 the following procedures shall apply:

1. If a closing attorney or Settlement Company is updating the title prior to the recordation of the instruments to be insured, no requirement as to update is necessary.
2. If an attorney or search company is not updating the title at the time of recordation of the instruments to be insured, make the following requirement:

   Gap1 In order to insure the accuracy of this commitment, an update on title must be performed prior to closing if more than thirty (30) days elapse between the Commitment Date shown in Schedule A and the date of closing. Please advise as to the scheduled closing date as soon as possible to insure that all necessary updates are obtained in a timely manner.

3. On all commitments, make one of the following requirements, as applicable:

   Opinion Receipt of Attorney's Final Certificate, along with all additional required documents, in order to issue a final policy or policies.

   Or

   Final In order to issue final policy(ies); (a) Agency must obtain final title update; and (b) settlement agent must provide all required documentation as noted in Commitment.

For transaction with a coverage amount in excess of $500,000 the following procedures shall apply:

1. If a closing attorney or Settlement Company is updating the title prior to the recordation of the instruments to be insured, no requirement as to update requirement is necessary.
2. If an attorney or search company is not updating the title at the time of recordation of the instruments to be insured, make the following requirement:

   Gap2 In order to insure the accuracy of this commitment, an update on title must be performed within five (5) days prior to closing. Please advise as to the scheduled closing date as soon as possible to insure that all necessary updates are obtained in a timely manner.

3. On all commitments, make one of the following requirements, as applicable:

Opinion Receipt of Attorney's Final Certificate, along with all additional required documents, in order to issue a final policy or policies.

Or

Final In order to issue final policy(ies); (a) Agency must obtain final title update; and (b) settlement agent must provide all required documentation as noted in Commitment.

Once the transaction has closed, the final policy may be issued upon receipt of the following:

1. The final title opinion and premium; or
2. The final title update and evidence that all requirements under Schedule B 1 have been satisfied, or
3. Receipt of the following documents:
    a. Recording information for the insured mortgage (if applicable);
    b. Copy of the deed vesting title in the insured or applicable recording information (if applicable);
    c. Completed and executed HUD-1 Settlement Statement/Closing Disclosure;
    d. Seller/Borrower Affidavit;
    e. Satisfactory evidence that all other requirements contained in the commitment have been satisfied; and
    f. The premium.

Notwithstanding the issuance of the policy upon receipt of the items listed in number 2 above, the final update or final opinion should be reviewed upon receipt to determine if any intervening matters have arisen. If an intervening matter is discovered, please contact the Claims Department at the Home Office immediately.

FOR LENDER’S SHORT FORM LOAN POLICY ISSUANCE ONLY:

In the event a title update is obtained no more than five (5) business days prior to the settlement/closing of the mortgage to be insured, a post-closing/recording update is not necessary.

6. Policy Date and Time

For most policies the agency should use the earlier of either the examiner’s certification date or recording date and time of the insured instrument as the date and time of the applicable policy. If the subject property includes several tracts, with multiple searches and different certification dates, the Commitment Date in Schedule A.1. should be edited to reflect the specific date and time of certification for each tract. The earliest of certification dates should be shown as the Date of Policy in Schedule A of the final policy. At the request of the proposed insured, the certification dates for all of the other tracts can be itemized in the Date of Policy field of Schedule A.

In some instances the agency will receive a final title update, final title opinion or recording information that fails to provide the recording time of the instrument to be insured. For example, the update may show the instrument as having been recorded in Book 100 Page 200 on May 1, 2006 but omits the time of recording. If the agent is not provided with the exact recording time, then Schedule A should reflect a recording time of 8:00 A.M.

For the policies adopted in 2021, the general rule still applies, however, if you are issuing 2021 ALTA Owner's Policy, Loan Policy or Short Form Policy prior to receipt of the final update, final opinion and/or recording information you should use the date that the transaction closed for the effective date of the policy. The applicable time would be 8:00 A.M. If the insured objects to the potential lack of coverage for the "Gap" period, you should refer them to Covered Risk #14 in the Loan Policy or Covered Risk #10 in the Owner's Policy.

7. Purchase Money Deeds of Trust

A purchase money deed of trust (PMDT) is a deed of trust which secures the debt of the buyer to the seller of real property who financed the purchase. This is contrasted to a deed of trust to secure a loan where the money is used for other purposes and the property given as collateral is already owned by the mortgagor. The traditional view is that purchase money deeds of trust can only exist in favor of a seller of real estate and would not exist where money which was loaned for the purchase of real property was loaned by a bank or mortgage company.

Often, there are noteworthy consequences of a purchase money deed of trust under state law, such as a limitation on the ability of the mortgagee to seek a judgment against the owner for any deficiency after sale, or whether a spouse must join in the execution of the purchase money deed of trust for it to be enforceable against the spouse's interest.

In some states (*see* ***State Supplement***), the lien of a purchase money deed of trust will enjoy priority over earlier-docketed judgments or liens against the purchaser on the equitable theory that judgment creditors and lien creditors should not defeat the interest of the mortgagee who made possible the purchase of the property. Such judgments or liens will attach to the property only to the extent that the value of the property exceeds the amount of the purchase money mortgage. The IRS acknowledges this theory and considers that a purchase money interest is protected even though it may arise after the filing of a notice of federal tax lien. Therefore, the Company can (state law prevailing) issue a title policy to a purchase moneylender showing earlier-docketed judgments or liens as subordinated items in Schedule B, Part II. An owner's policy would show the judgments and liens as exceptions under Schedule B, Part I. State law defines what constitutes a "purchase money deed of trust/mortgage."

The question most often asked relative to this priority issue is whether the PMDT must be recorded <u>simultaneously</u> with the recording of the deed vesting title in the borrower. The question is asked because the equitable theory being relied on to preserve the priority in the PMDT is known as the doctrine of "instantaneous seizin," which promotes that the lien of the PMDT instantaneously arises in the lender when the borrower acquires title. Many examiners take the position that to create the instantaneous lien, the deed and the PMDT should be recorded the same minute. This Company is of the opinion that as long as the deed and PMDT are recorded in such fashion that it is clear that they are part of <u>one</u>

transaction, the passage of time (*i.e.*, a minute or two) will not destroy the effect of the doctrine.

Please see the sample Purchase Money Deed of Trust/Mortgage Affidavit .

8. Electronic Recording

a) Background and Legislation

There are three primary legislative acts that govern Electronic Recordings: UETA, E-SIGN and URPERA.

(1) Uniform Electronic Transactions Act (UETA)

The main purpose of UETA is to promote interstate electronic commerce by establishing uniform legitimacy for electronic contracts and digital signatures. UETA's main provisions are:

1. If a law requires a record to be in writing, an electronic record satisfies the law.
2. If a law requires a signature, an electronic signature satisfies the law.
3. A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
4. A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
5. If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

There are a number of exceptions, where electronic documents are not allowed to replace paper documents. Some of these exceptions include wills, codicils, testamentary trusts, legal notices, and all but a few documents covered under the Uniform Commercial Code.

(2) Electronic Signatures in Global and National Commerce Act (E-Sign)

The main purpose of E-Sign is to give correctly prepared electronic contracts, records, and signatures the same validity and legal weight as those created on paper. Like UETA, E-SIGN validates the use of electronic documents but does not require them.

E-SIGN is more specific than UETA to the degree that it protects individual consumers from manipulation and exploitation of the e-document medium.

For Example: **E-SIGN requires that consumers explicitly consent to using electronic documents for notices that are required by law to be in writing. UETA requires agreement between the parties, but doesn't set any standard for proving that an agreement occurred.**

1. E-SIGN prevents the use of recorded oral agreements as a substitute for written notices. UETA allows a taped or computerized voice recording to serve as an "electronic record," which can replace a written agreement.
2. UETA allows consumers to sign a paper agreement to receive future written notices in electronic form, and does not stipulate that electronic notices must be readable by the consumer. These loopholes would allow a person or company to send notices to a dormant e-mail account, or to send notices in proprietary or foreign file formats. E-SIGN prevents this from happening.
3. E-SIGN prevents critical consumer-related documents (such as eviction or health insurance termination notices) from being sent electronically. UETA has no such protection.

(3) Uniform Real Property Electronic Recording Act (URPERA)

The main purpose of URPERA is to create consistent conditions across the United States for land records officials to accept records in electronic form, storing electronic records, and setting up systems for processing, searching, and retrieving these land records. URPERA is a follow up act to UETA to establish a method for adopting standards on a state-wide basis that has the potential for implementing uniform standards nationally.

(4) Other national standards that drive eRecording

PRIA eRecording; PRIA Notary; MISMO Closing, Servicing, Origination, Request and Response envelopes, eMortgage SMART Document, eMortgage eRegistry, eMortgage ePackage, PDF, TIFF, XML; W3C Digital Signatures; FIPS; SAML, Internet protocols (http, https, ftp, tcp/ip, html, SOAP)

b) Models

Three primary models are utilized for eRecordings.

A. In the Level 1model the originators prepare, print, sign, and notarize the paper document as in their current paper process, but instead of carrying the paper to the recording office, they scan the document, converting the paper back into electronic form. The digitized image is then sent to the recording office via secure network or Internet connection. This model does not eliminate any of the manual data entry performed at the recording office

B. In the Level 2 model, the originator transmits a document image, but also includes a separate file with the transaction data. This intermediate level of electronic recording is a combination of the digital and paper world. The document is created electronically, often using a word processing format or Adobe's Portable Document Format (PDF). However, the transaction data is stored in a separate computer-readable file (generally --XML). The electronic document file and separate data file are bundled together and transmitted electronically to the county office for recording. The recorder does not have to manually key or index any data but still needs to visually compare the elements to make sure everything matches. Level 2 still requires human intervention to record a document and the separation of the transaction and the data has the potential to introduce errors.

C. In the Level 3 model uses self-contained "smart" documents, containing both data and visual description, finally achieving the full automation potential of e-recording.

Level 3 is the most technically advanced option, featuring all-digital, fully automated electronic recording. Instead of generating a physical paper document to receive the signatures and notarizations, the originators create XHTML-based "smart" documents using pre-approved templates for the specified recording office and document type. When the digital document is prepared, a digital signature and digital notarization are embedded directly into the electronic file. All of the required information is contained in a single, integrated electronic document. When the recording office receives the electronic file, the recording server validates the transaction data, determining completeness and recordability.

c) Definitions

Electronic Recording
Electronic recording (e-recording) is the process of digitally creating, submitting, and recording legally binding land ownership records. The process encompasses the use of several technologies that allow those involved to create, sign, transmit, record, index, archive, and return the original document-all without ever touching a piece of paper.

Electronic Signature
An Electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record.

Digital Signature
A digital signature is a series of numbers generated by complex algorithms, and involves encryption technology rather than penmanship.

Digital Acknowledgment
For all practical purposes, a digital acknowledgment is identical to a digital signature, but a digital acknowledgment can only be created by a notary public who has been given special credentials to do so. Instead of an embossed stamp, the notary uses a special digital certificate. Though the documents and signatures are digital, many states still require that a notary public be physically present for the document's signing, to fulfill the "personal appearance" required by law.

Digital Certificate
A digital certificate is an electronic identity card that empowers its holder to create digital signatures that can be reliably trusted by others. A digital certificate is accompanied by special encryption keys that help create and validate digital signatures. The certificate and its corresponding keys are sometimes referred to as a digital ID.

RRR. Railroads

Most railroad rights of way in the country were granted by deed during the 1860's through the turn of the century. Very clearly, examiners do not search titles back to that date. Exceptions for the railroad <u>right of way</u> located on the premises or when the survey shows the railroad thereon, must be made.

This practice is problematic from a claims perspective because the railroad companies often received deeds from property owners for <u>fee simple</u> title to the right of way rather than just easement rights. That would result in the railroad <u>owning</u> the property under the right of way instead of simply enjoying the right to use the property. Accordingly, when the examiner's certification reports the existence of a railroad right of way, or when the survey depicts a railroad right of way, the following exception should appear on the title policy:

X12a Title to that portion of the Land lying within the bounds of the railroad right of way of ^ Railroad, as shown on plat of survey by ^ [*name of surveyor*], [RLS][PLS], dated ^.

1. Abandonment

Certain state laws presume the re-vesting of title to abandoned railroad rights of way in the owner of the underlying fee simple title or the vesting of the right of way in the state department of transportation. Statutes must be reviewed for the result of a railroad company's abandonment of its right of way. *See **State Supplement***.

SSS. Religious Societies

Often, state law will prescribe when and how religious societies can hold and convey title to real property. These state laws may set dollar amount limits on the value of real property which a religious society can hold; or limit which persons, such as trustees, deacons, ministers, who can sign deeds or mortgages, or differentiate between incorporated and unincorporated religious organizations; or limit the use of such real property for certain uses, *i.e*. burial grounds or church buildings.

See the ***State Supplement*** for more specific information on this topic.

UUU. Restrictive Covenants

Restrictive covenants and conditions are limitations on the use of real estate. They are the promise of an owner not to use real estate in a certain manner. Breach of the promise may subject the owner to liability for damages, or he may be required to remedy the breach. A restrictive condition can also result in termination of ownership through automatic reversion back to the grantor who established the condition.

Restrictive covenants may be included in a deed, but quite often, they are set out in a separately recorded document that is referred to in a deed known as a "Declaration." Real estate developers typically establish restrictive covenants on all of the lots in a subdivision through a separately recorded document. The purpose of such restrictive covenants is usually to maintain a particular type of residential neighborhood and to maintain a consistent residential appearance within the subdivision. Restrictive covenants sometimes include a termination period after which the restrictions can no longer be enforced, but more often no termination period is included. When no termination period is specified, the covenant usually runs indefinitely with the land and binds subsequent grantees, even if their deeds do not mention the existence of the covenant included in or recorded along with and referred to in a prior deed in their chain of title. Persons intended to be benefited by a covenant, such as other residents in the development, may often enforce the covenant as well as grantors in the chain of title.

In some states, there is authority that violations of restrictive covenants cannot be enforced after a specified period (*see* ***State Supplement***). This purported "statute of limitations" arises from case law dealing with "incorporeal hereditaments" or the inheritable rights pertaining to land. While the underwriter should be aware of this argument that a violation older than the requisite number of years is not enforceable, and should certainly bring the age of the violation into consideration when determining how to underwrite, it is this Company's position that the law regarding incorporeal hereditaments does not establish a statute of limitations against enforcing a violated restrictive covenant.

The provider must disclose restrictive covenants and any violation thereof appearing of record or disclosed by survey, or otherwise known to the provider. However, the underwriter/examiner shares that responsibility to the extent they must review any plat of survey and restrictive covenants submitted, to identify any violations that might appear thereon. (See Underwriting below)

1. Restrictive Covenants Based on Race, Religion, Color, Sex, or National Origin

Restrictive covenants based on race, religion, color, sex, or national origin are considered unenforceable and void and must not be referred to in a title commitment or title policy. The 2021 ALTA commitment and policies contain a preprinted disclosure in Schedule B, Part II exceptions which provides “Some historical land records contain Discriminatory Covenants that are illegal and unenforceable by law. This policy treats any Discriminatory Covenant in a document referenced in Schedule B as if each Discriminatory Covenant is redacted, repudiated, removed, and not republished or recirculated. Only the remaining provisions of the document are excepted from coverage.” The ALTA commitment and polices also contain the defined term “Discriminatory Covenants” which provides “Discriminatory Covenant”: Any covenant, condition, restriction, or limitation that is unenforceable under applicable law because it illegally discriminates against a class of individuals based on personal characteristics such as race, color, religion, sex, sexual orientation, gender identity, familial status, disability, national origin, or other legally protected class.

As a result of these preprinted exclusions, no specific exceptions are required when issuing the 2021 ALTA commitment or policies.

For the 2006 policies and 2016 commitment, if such an unenforceable covenant is located in an instrument containing other restrictive covenants that are enforceable, the following note must be used after the applicable restrictive covenant exception (see Underwriting below):

Restr/Race Deleting therefrom any restriction indicating any preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, or national origin.

2. *Conflicting Setback Lines*

Where the restrictive covenants establish a setback and the recorded plat shows a different setback, the improvements must comply with the more restrictive of the two setbacks.

3. *For Residential Use Only*

Most restrictive covenants contain a provision that the use of the property be "residential" or only for "single-family dwellings." Where the future use intended is to be a commercial use, the Company can insure the current state of title as not violated, but cannot insure future use and compliance.

4. *Forfeiture or Reversionary Clause*

A forfeiture or reversionary clause in restrictive covenants allows the person or corporation who originally restricted the property to "take it back" if the restrictions are violated. The Company insures over the existence of forfeiture or reversionary clauses.

5. *Amended Restrictive Covenants*

Where property is platted prior to the recordation of restrictive covenants, and replated after the recordation of those restrictive covenants, the property will still be subject to the restrictive covenants. If there are some restrictions that cannot be complied with due to the replating, an amendment may be necessary to the restrictions to speak to such violations or non-compliance.

Where only one phase or section is restricted, subsequent phases or sections must be included by amendment.

6. *Underwriting*

The following exception should be used when the examiner reports a violation or a violation is discovered through review of the survey, restrictions and any other related information in the file:

R36 Restrictions appearing of record in Book ^ at Page ^, which restrictions have been violated as to the ^ [*recite violation*], and that said violation or a future violation thereof will not cause a forfeiture or reversion of Title.

The following exception applies to lender's policies unless a violation is reported by the examiner or discovered through review of the survey, restrictions and any other related information in the file:

R31 Restrictions appearing of record in Book ^ at Page ^, but this policy insures that said restrictions have not been violated and that a future violation thereof will not cause a forfeiture or reversion of Title.

The following exception applies to owner's policies where the provider does not affirmatively state whether or not the restrictions have been violated or a review of the survey and restrictive covenants cannot be performed:

R30 Restrictions appearing of record in Book ^, Page ^, but this policy insures that a violation thereof will not cause a forfeiture or reversion of Title.

If the provider affirmatively states no violation exists or review of the survey and restrictive covenants can be performed to determine no violation exists, replace the R30 with the R31 on the owner's policy.

The title exam/title opinion may report the restrictions, easements and/or rights of way affecting the insured premises. If there is specific information reported, make the appropriate exception and list the book/page numbers of the matter affecting the property. If there is no specific information provided and the title exam/title opinion state something to the effect "…any and all rights of way, easements or restrictions of record." Use the following exception:

GenRe Restrictions, easements and rights of way of record.

NOTE: Please review the ***Policies Manual*** for additional information on restrictive covenant underwriting when issuing a product providing enhanced/expanded coverage.

7. Affirmative Assurances

Generally, affirmative coverage is provided as follows:

Restr/ld3 This policy insures against actual loss or damage by reason of said violation(s).

OR

Restr/ld1 This policy insures against loss or damage which the Insured may sustain due to the enforced removal of said ^.

Under certain circumstances, and with approval from the Home Office, affirmative coverage can be provided for violated restrictive covenants. The following are samples of such affirmative coverage.

Restr/ld4 This policy insures against loss or damage by reason of said violation(s) except such as may be occasioned by the refusal of a contract purchaser (or FHA or the VA) to take Title.

Restr/Aff2 This policy insures that the Title (other than the possible questions of marketability arising therefrom) and the use of the Land will not be affected by said violation(s).

Restr/ld5 This policy insures against loss or damage occasioned by the entry of a decree of a court of competent jurisdiction requiring the removal of the building on the Land to conform to said restrictions.

Restr/ld6 This policy insures against loss or damage occasioned by the entry of a decree of a court of competent jurisdiction requiring the building on the Land to be brought into conformity with said restrictions. This policy further insures that any monetary judgment against the owner of the Land for said violation of said restrictions while the Mortgage set forth in Schedule A hereof is a lien of such Mortgage.

Restr/ld2 This policy insures against loss or damage which the Insured may sustain by reason of the enforcement or attempted enforcement of said restrictions on account of said violation.

In some cases, the Insured may insist upon protection against loss or damage on account of the refusal of a contract purchaser to take title because of the violation. When it is a case in which the Company would be willing to insure against loss or damage resulting from the violation including marketability, it will be permissible to add the following:

Restr/Mkt Restrictions appearing of record in Book ^, Page ^, but this policy insures that said restrictions have not been violated except as to the ^ setback provision and that said violation or a future violation of said restrictions will not cause a forfeiture or reversion of Title. This policy insures against loss or damage which the insured may sustain by reason of said defect, provided however, that with respect to said defect the offer of any ^ [*name of state*] licensed title insurance company to insure the Land at its regular rates in the manner set forth above shall be conclusive evidence of the marketability of the Title hereby insured. The Company agrees that upon request of any mortgagee or vendee of the insured (or the mortgagee of such vendee) it will issue its policy containing the same affirmative coverage set forth, but subject to the same condition.

OR

Restr/Aff1 Terms and conditions of this policy, this policy insures against loss or damage including unmarketability of title, caused by the foregoing violation(s), provided that in any terms of sale, or in any contract of sale affecting the Land insured, the sale is made subject thereto.

8. Building Setback Lines

The most frequently encountered violation of restrictive covenants is a violation of the building setback line. This is also the violation for which affirmative coverage is most frequently sought. (*See also* **BUILDING SETBACK LINES** herein.) Where setbacks are violated and the lender is requiring affirmative coverage, consider the following factors:

i. The extent of the violation – If the violation is two percent (2%) or less, the loan and owner policy may be issued insuring that the restriction has not been violated; if the violation is less than ten percent (10%), the loan policy may be issued giving affirmative coverage; the owner policy must take exception to the violation unless the Home Office grants approval. If the violation is greater than ten percent (10%), call the Home Office for approval to grant affirmative coverage;
ii. The length of time the violation has existed; and
iii. What part of what structure violates the setback.

To insure over such a violation, it would be necessary to obtain approval from the Home Office, who may request:

1. An indemnity agreement from the owner; or
2. A uniform development scheme among all lots that they do not comply with setback.

To accept a variance from a developer for a violation of restrictive covenants, the declarant must have reserved the unilateral right to issue such variances.

9. Fannie Mae Deed Restrictions

In order to prevent flipping transactions, Fannie Mae is including the following restrictions in their Special Warranty Deeds:

"Grantee herein shall be prohibited from conveying captioned property to a bona fide purchaser for value for a sales price greater than $_____ for a period of six months from the date of this deed. Grantee shall also be prohibited from encumbering subject property with a security interest in the principal amount greater than $____ for a period of six months from the date of this deed. These restrictions shall run with the land and are not personal to Grantee."

The following exception should be used if a restriction similar to this is reported by the examiner or included in a Deed provided for review, if the transaction falls within the time frame designated in the restrictions:

R7 Restrictions appearing of record in Book ^ at Page ^.

If you are asked to insure a transaction that violates the restrictions within the time period stated in the deed, require a release of the restriction in the commitment. If a release is not obtained, make the appropriate exception (R-7) in the policy.

10. Private Transfer Fee Covenants

A private transfer fee covenant is a type of restriction that requires payment of a fee each time the encumbered property is conveyed to a different owner. If the fee is not paid a lien may be placed on the property. These covenants are typically established by a subdivision developer, and are usually equal to approximately 1% of the purchase price. They are frequently found in the restrictions, declarations or by-laws for a subdivision. Private transfer fee covenants are different than homeowner association dues because private transfer fees are not used for the maintenance, operation or benefit of the community. Some states have declared private transfer fee covenants as contrary to public policy and thus unenforceable.

If a private transfer fee is disclosed by the certifying attorney or searcher, or otherwise discovered by an examination of the public records, the following exception must be used in the commitment and policy:

TransferFee Restrictions appearing of record in Book ^ at Page ^. Said restrictions impose a transfer fee for all future conveyances of the Land.

VVV. Rights of First Refusal and Outstanding Options

Outstanding options and rights of first refusal, which are in writing and duly recorded, are objections to title. Often these are contained in leases and other contracts for real property.

1. Insuring Rights of First Refusal and Outstanding Options

Similar to easements, a right of first refusal or option may be an insured interest in real estate. *See* ***State Supplement***. When insuring a right of first refusal or option interest in real estate, the underwriter should clearly indicate that a fee simple interest is NOT being insured. Also, the Option Endorsement must be included in both the commitment and the policy. If you have any questions regarding insurance of a right of first refusal or option, contact a Staff Attorney at the Home Office.

2. Underwriting

When an option or right of first refusal is reported by the examining attorney, the underwriter should take exception as follows:

Right/Refusal	Exception is taken to the rights of ^ as disclosed in that certain Option/Right of First Refusal, dated ^, recorded at Book ^ Page ^.

WWW. Roads, Streets, Alleys and Sidewalks

1. Abandoned Roads

State law may provide for the closing of abandoned roads or streets and re-vesting of title in and to the adjoining fee simple property owner. *See* the ***State Supplement*** for more information on this topic.

2. Roads and Streets

Generally, title to that portion of the property within the bounds of roads or streets should be excepted to in the title policy. As there are a number of different exceptions that may be used depending upon the facts applicable to the case under consideration, no general explanation can be made, but each exception is explained in detail.

If the description of the property states or if the plat of survey shows that the outside boundaries of the property extend into the road or that certain roads cross the property, the policy should contain exception to roads in the following manner:

X12 Title to that portion of the Land within the right-of-way of ^.

In cases of ambivalent language, the underwriter should be conservative in the use of the above exceptions, e.g. – The legal description states that the property line runs "to a point on the road." The subsequent call runs "along the road." In this instance, "along" may be viewed as inferring "along the edge." The recommended underwriting practice in this instance would omit a roadway exception.

Perhaps the most common error associated with the roadway exception is excepting to a road that is used as a reference point in finding the beginning point of the subject land. A case in point would read as such:

> "Beginning at the center of the intersection of A Street and B Street, thence along the center-line of B Street 500 feet to the true point of beginning."

Such wording will often give the underwriter the impression that A Street should be the subject of an X12 exception. This type of awkward wording is quite common and quite misleading. Upon further analysis, it is clear that the intersection of A Street and B Street is merely a reference point used to help find the true beginning point of the parcel, and is actually 500 feet away from said parcel. Therefore, there is no need to except to A Street. B Street, however, will be included in an X12 exception, as the true point of beginning lies in the center of the same.

<u>NOTE:</u> In instances where further guidance is needed, please contact the Home Office.

If the title opinion definitely states that the owner has fee simple title to the bed of the street, road, or alley, exception should not be made as to the title to the strip in question, but on the other hand, the rights of other parties to use said strip should be excepted to in the following manner:

S44a Rights of the public and others entitled thereto in and to the use of that portion of the Land within the bounds of ^

3. Sidewalks

In many subdivisions, strips across the front of the property may be reserved for sidewalk purposes or the property owner may have permitted the sidewalk to be constructed across the property. If the Company does not receive certification that fee simple title to the sidewalk area is vested in the property owner, and therefore cannot insure fee simple title to the sidewalk strip in question, one of the following exceptions should be used:

S46 Title to that portion of the Land within the bounds of the sidewalk as shown on plat of survey by ^ [*name of surveyor*], dated ^.

OR

S47 Title to ^ feet of the Land which is within the bounds of the sidewalk.

Where the property owner clearly has fee simple title to the strip, it is only necessary to except to rights of the public and others to the use of the strip. The following exception is used:

S49 Rights of the public and others entitled thereto in and to the use of that portion of the Land within the bounds of the sidewalk as shown on plat of survey by ^ [*name of surveyor*], [RLS][PLS], dated ^.

XXX. Rule in Shelley's Case

At common law, the conveyance of real property "to A for life, then to A's heirs," resulted in "A" acquiring fee simple title.

Many states have abolished the Rule in Shelley's case, such that now, a conveyance "to A for life, then to A's heirs" would result in "A" owning only life estate and "A's" heirs being vested with the fee simple remainder. The certifying attorney or examiner or underwriter must review all deeds and wills in the chain of title which recite "to A for life, the to A's heirs" to determine the ownership of the property as either A alone in fee simple or A for life and A's heirs.

YYY. Seller/Borrower Affidavit

The Company has developed a generic Seller/Borrower Affidavit Form SB-1 that may be used in most states. *See* ***State Supplement***.

ZZZ. Soldiers and Sailors Civil Relief Act of 1940

The very nature of military service often compromises the ability of those in service to fulfill their financial and other obligations or to assert many of their legal rights. The Soldiers and Sailors Civil Relief Act of 1940 is protective legislation which temporarily suspends, in certain cases, enforcement of civil liabilities against those persons in active military service.

Operation of the Act most frequently arises in the real estate context in the case of foreclosures of deeds of trust and mortgages on property owned by persons in active military service. It is the Company's position that a mortgage foreclosure cannot be validly conducted against a borrower who is currently on active military duty, unless:

1. The loan for which foreclosure has been undertaken was made after the borrower entered military service;
2. The borrower entered into a written agreement after he entered military service wherein he agrees to waive the protection of the act; or
3. There is a court order entered in the foreclosure action allowing the foreclosure.

If the examiner can certify that either of the conditions in (1), (2), or (3) above exist, then the underwriter can issue a policy to insure the title out of a foreclosure against a borrower who is a military serviceperson. If none of the conditions above can be met, then exception should be taken for the outstanding interest of the borrower

MilitaryInt Outstanding interest of ^, who is a military serviceperson.

The Act further operates to:

1. Prohibit lenders from charging interest in excess of six percent (6%) on personal debt, including home mortgages, incurred by military personnel prior to their entry into the military for the duration of their active military duty;
2. Require a creditor to first obtain a court order permitting the sale, foreclosure or seizure of a serviceman's property for nonpayment of an obligation arising prior to the serviceperson's entrance into military service; and
3. Suspend the enforcement of any civil obligation against a serviceperson that arose prior to entrance into the military.

1. *“Real Estate Transactions Involving the Military”*

by Tonya Mason

AAAA. Standard Exceptions

Investors Title amended its underwriting practices to include Standard Exceptions on Owner's Policies after reviewing the claims history of the Company. It is a common practice for Standard Exceptions to be used by other title insurance companies.

For **ALL** Owner's Policies covering Residential Property, a standard exception must be used (unless the appropriate ***State Supplement*** states otherwise) NOTE Residential property is defined as real property improved by a structure used for residential living, containing not more than four dwelling units. Residential property may also include unimproved property that is intended to be used for residential living and not containing more than four dwelling units. Residential property may also be land designated by zoning ordinances as "residential" and may be improved or unimproved:

Standard This policy does not insure against loss or damage and the Company will not pay costs, attorneys' fees, or expenses resulting from:

(a) Roads, ways or easements or claims of easements not shown by the Public Records.
(b) Any lien, or right to a lien, for services, labor, materials, or equipment heretofore or hereafter furnished, imposed by law and not shown by the Public Records.
(c) Pending assessments by any taxing authority not yet filed in the Public Records.

Under the following circumstances, one or more of the Standard Exceptions may be eliminated:

(a) Standard Exception (a) may be removed upon receipt of both the Seller/Borrower Affidavit and a satisfactory survey pursuant to the guidelines listed in the **SURVEY** section of the ***General Underwriting Principles Manual***. Remember to continue to make exceptions for other survey matters as customary. Both the Affidavit and survey are required in this situation as the survey may not show easements not of record, so the accompanying Seller/Borrower testimony is required.

Standard Exception (a) is also addressed by Item 7 on the Seller/Borrower Affidavit which reads, "That unless otherwise indicated, the Land is occupied by deponent(s), and there are no unrecorded liens, leases or options to purchase, or other unrecorded provisions, easements, rights of way, or agreements which encumber the Land.

(b) Standard Exception (b) may be removed either (1) after receipt of a satisfactory lien waiver if the lien period has not expired, or (2) after receipt of the Seller/Borrower Affidavit if the lien period has expired. When the lien period has expired, Standard Exception (b) is answered by Item 6 on the Seller/Borrower Affidavit which reads, "That there are no unpaid bills or claims for labor, services, or material, or equipment furnished for alteration, repair or construction of any improvement on the Land, and no such alteration, repair or construction has occurred within the last six (6) months. NOTE: If alterations, repairs or construction has occurred within this time frame, an Affidavit Regarding Liens must be completed. Please contact the agent listed above for the appropriate form."

In no event may this Standard Exception be removed if the property is under construction or insurance is for a “construction loan.” [Refer to **MECHANICS' AND MATERIALMEN'S LIENS** for the appropriate state.]

Also, because Standard Exception (b) fulfills the same purpose as the **L1** exception, the **L1** exception does not have to be used on the owner's policy if Standard Exception (b) remains on the policy.

(c) Standard Exception (c) is addressed by Item 5 on the Seller/Borrower Affidavit which reads, “That there are no delinquent real estate taxes or unpaid current real estate taxes, special assessments or pending assessments, or unpaid utility bills. Or, if the attorney/examiner certifies that he has checked with the proper municipal authorities about the placement of assessments upon the property and none exist, Standard Exception (c) may be removed upon request.

BBBB. Subordination Agreements

A subordination agreement is an agreement between two parties with competing interests in real property who agree to change the priority of their interests as to the other. Through the use of a subordination agreement, the priority of recorded liens, judgments, deeds of trust, deeds, leases, etc., can be altered to reach a different result than the recording statute would indicate.

For example, assume the examiner or agent recorded two deeds of trust - one securing a conventional loan from lender A, the other an equity line deed of trust with lender B - in the wrong order. The conventional loan deed of trust, which should have been in the first lien position, is recorded after and junior to the equity line. If lender A and lender B execute a subordination agreement, stating that the equity line deed of trust is "subordinated" to or made junior to the conventional loan deed of trust, the problem is resolved and the parties enjoy the priority they were intended to have relative to the other.

Subordination agreements are most often used as curative measures to "fix" the priority of record interests. The most recurring issue the underwriter encounters with subordination agreements is whether the examiner must search through the recording of the subordination agreement.

It is the Company's opinion that a search through the date of recording for the subordination agreement is the prudent course of action, and that such search is the only way to determine with certainty that the party giving the subordination is the proper party and that no other conflicting interests have arisen which would damage or destroy the effectiveness of the subordination, nonetheless. However, local custom and market competition may dictate whether examiners who report that a prior deed of trust has been subordinated by agreement, but who only search through the date and time of recording of the insured and prior deed of trust, will be instructed to extend their search period to include the subordination.

1. Underwriting

If the title examination indicates that there is a lien of record and the lien will remain of record, but be subordinated to the newly recorded lien, make the following requirement in Schedule B, Part I of the Commitment:

SubordRecord Receipt of Subordination Agreement as to the Mortgage from ^ for the benefit of ^ recorded in ^, at ^, securing a note in the original principal sum of $^, and any other obligations secured thereby and/or described therein.

Because Subordination Agreements may include provisions stating that the party who will be placed in first lien position must satisfy certain requirements before that party can enjoy this first lien position, it is the Company's opinion that it is prudent to take exception to the Subordination Agreement.

The following applies to the Loan Policy only: for competitive reasons, it is not necessary to take exception to the terms and conditions of the Subordination Agreement on a residential transaction.

However, on a commercial transaction the following exception must appear under Schedule B, Part I of the Loan Policy:

Subord/Agree Loss or damage resulting from the failure to comply with any terms, provisions, or conditions of that certain Subordination Agreement dated ^ and recorded in Book ^ at Page ^, of the aforesaid Registry.

The exception shown above may be removed upon receipt and review of either the recorded Subordination Agreement or the Subordination Agreement being recorded and Home Office approval.

<u>The following applies to a residential and commercial transaction:</u>

Show the subordinated interest (deed of trust/mortgage, or tenants rights or lease, etc.) under Schedule B, Part II of the Loan Policy with the following exception:

Subord=M Mortgage from ^ for the benefit of ^ recorded in ^, at ^, securing a note in the original principal sum of $^, and any other obligations secured thereby and/or described therein; by Subordination Agreement dated ^ and recorded in Book ^ at Page ^, of the aforesaid Registry.

<u>As to Short Form Lenders' Policies:</u> Because a Lender's Short Form Policy does not include a Schedule B Part II in which subordinate matters are reflected, any matters considered subordinate to the insured lien must be added on an Addendum to the Short Form through use of the affirmative language provided below.

The following affirmative language may be used only after the item's subordinate status has been confirmed through all other underwriting/examining considerations. In other words, do not insure a matter as being subordinate if the criteria for doing so have not been met (i.e. item is recorded in proper sequence, subordination agreement is valid/sufficient, and search is adequate). Refer to the ***A/B Policies*** and the ***Probate and Recordation*** sections herein as well as the applicable ***State Supplement***.

Subord=S Notwithstanding the above paragraph, this Policy insures against loss or damage sustained in the event the following matters are not subordinate to the lien of the Insured Mortgage:

Mortgage from ^ for the benefit of ^ recorded in ^, at ^, securing a note in the original principal sum of $^, and any other obligations secured thereby and/or described therein; Subordinated by subordination agreement dated ^ and recorded ^ in Book ^ at Page ^ of the aforesaid Registry.]

<u>As to the Owners Policy</u>: Because Subordination Agreements rarely affect the rights of owners, taking exception to the lien remaining of record, tenants' rights or leases under Schedule B is sufficient.

CCCC. Subordination, Nondisturbance & Attornment Agreements (SNDA)

SNDA consists of three primary elements: Subordination, Nondisturbance and Attornement.

- The *Subordination* provision allows the parties to adjust their relative priorities with respect to the real property.
- The *Nondisturbance* provision is an agreement between the mortgagee and any tenants that provides the tenant assurances that their possession of the property will not be disturbed by the mortgagee or purchaser at foreclosure.
- The *Attornment* provision is an agreement between the tenant and the mortgagee whereby the tenant agrees to pay his rent over to the new landlord if the existing landlord defaults or the mortgagee forecloses.

SNDA agreements are typical in shopping center transactions. A lender will often require a landlord, who is usually the borrower, to deliver an SNDA from each tenant. The lender wants to protect its interest and be assured that the tenant will pay the rent which in turn is cash flow for the loan. An SNDA has no impact on lenders ability to foreclose, but does affect what lender gets after foreclosure. Typically, the lender takes the property subject to existing leases which may or may not be recorded.

Both the lease(s) and the real estate serve as the lender's collateral. A lease should provide that the tenant's interest is subordinate to current and future deeds of trust or mortgages. The tenant needs to agree to subordinate upon request and to attorn to the lender as the new landlord in the event of foreclosure. The tenant should in turn demand the lender to agree to nondisturbance language that the tenant's occupation of the leased premises will not be disturbed following a foreclosure of a landlord's loan as long as tenant complies with the lease.

Landlords typically include language in the lease that require the tenant to satisfy the lender's demands for approval of all lease modifications so as not to delay or prevent the landlord from obtaining mortgage financing in the future.

1. Underwriting

When insuring commercial rental property, we except to parties in possession under unrecorded leases (X13) and take specific exceptions for recorded leases (Leases). Most commercial lenders do not want these exceptions. ***If the underwriter is provided with an SNDA agreement, the general exception for parties in possession is no longer necessary.*** Instead, all tenants with recorded leases who have executed the SNDA should then be shown as ***subordinate matters under Schedule B Part II of the final policy***.

In addition, the following exception should be made in Schedule B, Part I:

SNDA Terms and provisions of a Subordination, Non-disturbance and Attornment agreement, executed by ^ [name of parties to the agreement].

DDDD. Survey Coverage

A survey is a map or plat of property that is drawn by a surveyor that represents the property being insured and usually shows matters of insurance that are not generally discovered with a title search. These matters include, but are not limited to buried, hidden sewers, drains, or conduits, encroachments both onto the insured property and from the insured property onto adjoining land, boundary line issues, etc.

The 2021 Loan Policy of Title Insurance and the 2021 Owner's Policy of Title Insurance, included a paragraph under Covered Risk 2 that reads as follows:

> "(c) the effect on the Title of an encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment (including an encroachment of an improvement across the boundary lines of the Land), but only if the encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment would have been disclosed by an accurate and complete land title survey of the Land.

The 2021 Owner's Policy limits the scope of coverage through the addition of Exclusion from Coverage 7 which provides:

> "Any discrepancy in the quantity of the area, square footage, or acreage of the Land or of any improvement to the Land."

Essentially this paragraph provides the insured shown under Schedule A in the respective policy, with survey coverage. The Company has several ways of dealing with survey coverage related to title insurance. The two most common ways of providing full survey coverage to the insured are:

1. Receipt of a Satisfactory and Current survey or
2. Survey Coverage without a new survey alternative.

1. Satisfactory Survey

The Company defines "Satisfactory Survey" as a survey which contains a Registered (or Licensed) Surveyor's signature and seal and meets the following minimum standards:

(a) Is a field survey, not a drive-by inspection;
(b) Is a "transit" survey, not a "compass" survey;
(c) Includes an arrow pointing "North" along with the date(s) of the survey and any revisions;
(d) References a recorded deed or plat for the property, if applicable;
(e) Shows the following:
  i. A defined point of beginning, corners, stakes and boundary lines of the property, along with any physical characteristics (fence, creek, highway, etc.), and described by courses and distances;
  ii. The location of all buildings and other improvements, including fences, on the property with buildings having dimensions and distances from property lines;
  iii. All water courses, drains, sewers, utility easements or power lines, joint driveways, roads and streets by names, paths or trails crossing the property, and any existing cemetery or burial grounds;
  iv. The location and width of all walls on or near boundary lines;
  v. Names of the adjoining property owners;

  vi. Lot number and acreage of subject property along with lot numbers of adjoining properties; and
  vii. Encroachments of buildings and other improvements, including fences, by or onto adjoining property, abutting streets or easements;

(f) Includes the City or Town and State where the property is located; and
(g) If the survey comprises several contiguous parcels and it is the intention of the survey to combine said parcels, the survey should include a consolidated legal description.

An accompanying "inspection report" can be waived if the underwriter believes that all facts are shown or noted on the survey.

2. Current Survey

The Company defines "Current Survey" as a survey which is drawn and prepared (dated) within the last twelve (12) months unless there are indications that the facts shown on said survey have changed enough to warrant an exception. For example, if the underwriter becomes aware of construction that has taken place on the property after the date of the survey and before the date of the policy, then the survey cannot be used to give full survey coverage.

The proper use of Requirements and Exceptions are explained in the topic of this section titled, “Underwriting.”

If a survey is provided but there are concerns as to whether or not it meets the standards for a “Satisfactory Survey” for the insured transaction, please contact the applicable Corporate Legal Division for assistance.

Refer to your ***State Supplement*** for more specific information.

3. Survey Coverage Without A New Survey Alternative

The following applies to a lender’s policy where coverage is being extended to an institutional lender only, with a coverage amount of less than Five Million Dollars ($5,000,000):

If a Satisfactory and Current survey is not furnished a loan policy can be issued without a survey exception if, at any time in the chain of title, the property has been surveyed by a registered land surveyor and is described consistently with such survey. This coverage can be afforded to an institutional lender on all transactions when the coverage amount is less than $5,000,000.00. This coverage is often referred to as “No New Survey” coverage.

Survey Coverage without a New Survey does not mean if a survey is received it should not be reviewed. All surveys received must be reviewed. The underwriter must make sure to show the appropriate exceptions to restrictions, building setback lines, easements, recorded plat items, and all other matters under Schedule B of the commitment/policy. If a review of the title examination/title opinion reveals a problem with the legal description, a conflict in boundary lines, or an encroachment, these problems should be addressed by the examiner and underwritten on a case-by-case basis.

4. Survey Coverage-Owners Policy

Full survey coverage can be extended to the Owner only when the underwriter is in receipt of a Satisfactory and Current survey. Refer to the beginning of this section for the Company's definition of a Satisfactory and Current survey.

However, there are alternatives to a Satisfactory and Current Survey that are acceptable in order to extend full survey coverage to an Owner.

A survey, which is older than twelve (12) months and accompanied by an Owner's Affidavit Regarding Survey (Form #121) may be considered "current" in certain situations:

1. In a refinance transaction where the survey is less than five (5) years old. Older surveys that are accompanied by an Owner's Affidavit Regarding Survey (Form #121) should be reviewed by the Home Office.
2. In a purchase transaction where the Owner's Affidavit Regarding Survey (Form #121) is executed by the current owner/seller and upon a review by the Home Office.

Typically this type of full survey coverage is only used on residential transactions, but upon approval from the Home Office, may be given on a Commercial transaction.

5. Survey's not showing Improvements

While the Company prefers to get a Satisfactory and Current survey that shows all of the improvements on the land and all other matters that may affect the insurability of the property, that is not always the case. There are different types of surveys that the underwriter/examiner might receive and will need to be reviewed in order to extend survey coverage.

a) Boundary Survey

A Boundary Survey typically shows just the boundary lines of the property being insured but not the improvements on the land. These types of surveys are acceptable and can be used to extend limited survey coverage on an owner's policy.

b) Vacant Lot Survey

A Vacant Lot Survey is usually a lot where there is not a permanent building located on the premises. This could be a parking lot, a park or an undeveloped parcel of land. When the transaction being insured involves a vacant lot, the Company prefers using the 2021 ALTA Owner's Policy, even if the vacant lot will be used for "residential" purposes. The same can be said when the transaction being insured involves multiple properties where some are improved, residential properties and some are vacant properties.

6. Receipt/Review/Examination of a Survey

If the Company is furnished a Satisfactory and Current survey which meets all of the requirements concerning a survey, exceptions may be made as to the facts shown on that survey.

With respect to the survey exception, pick up all setbacks, easements and encroachments, but do not itemize every single improvement shown on the survey. Instead, pick up only the improvements that are encroaching. The improvements that are appurtenant to an easement, such as a manhole appurtenant to a sewer easement, are not encroachments if they are located within the boundaries of the easement. If the underwriter is unable to determine whether the improvement is appurtenant to the easement, call the surveyor.

Exceptions that already appear under Sch. B may list the exact items that appear on the survey. For example, there may already be an exception for an easement to a local utility company, but the survey may show the same easement and reference the same book/page number of the easement that was reported on the title search/title opinion. It is not necessary to list the same easement twice. If it can be determined that the easements are the same, leave the easement exception under Schedule B and continue to review the survey for other matters. If it cannot be determined that the easements are the same, the recommended practice is to leave the easement exception under Sch. B and show the easement with the rest of the items found on the survey. If no easements are shown of record and/or in separate exceptions previously made, then all easements and any improvements not serving just the insured premises and are disclosed by the survey would need to be identified as exceptions. While it is difficult to list every situation where it is best to use a specific exception rather than a generic survey exception, here are some examples where it is recommended that a specific exception be used in lieu of a generic survey exception:

- Access issues, especially a lack of access
- Building Setback lines
- Cemetery
- Easements
- Encroachments
- Fences
- Joint Driveways and Walkways
- Legal Description
- Mineral Rights and Timber Deeds
- Railroads
- Roads, Streets, Alleys and Sidewalks
- Water Rights and Well Rights

When reviewing a survey on a commercial transaction, it is necessary to be more aware of the matters disclosed on the survey and perhaps address those matters differently than a residential transaction. As mentioned earlier in this section, matters that are found of record may seem redundant to the lender when picked up as an exception and then again cited as a survey exception. Thus, some attorneys/lenders will ask that the recorded easement excepted to previously not be shown as a survey exception. Others prefer to see it. To satisfy both, the best thing to do is make the exception under the survey matters but provide sufficient information i.e. "Easement to Duke Power recorded in Book - at Page -," to make it clear that this Duke Power easement on the survey is the same easement already mentioned, and not two separate matters.

If the title exam/title opinion does not report easements of record, therefore there are no exceptions for an easement under Schedule B, then all easements shown on the survey must be listed as exceptions on title under Schedule B.

It is also recommended that all items that appear under the survey exception be shown as a list:

EXAMPLE:

1. Twenty (20) foot private water line easement;
2. Twenty (20) foot drainage easements;
3. Private thirty (30) foot cross-access easement;
4. Thirty (30) foot storm drain and City of Raleigh sewer easement;
5. Thirty (30) foot variable width City of Raleigh sewer and private drainage easement;
6. Variable width utility easements;
7. Fifteen (15) foot slope and landscape easement located on insured premises.

Showing the items as a list is not limited to a commercial transaction. This practice can be applied to residential transactions also.

The SURVEY CHECKLIST may be copied as necessary.

Click here for Common Survey Abbreviations and Common Map Symbols.

Click here for the latest American Land Title Association (ALTA) and National Society of Professional Surveyors (NSPS) Minimum Standard Detail Requirements for ALTA/NSPS Title Surveys.

7. Underwriting

For transactions not qualifying for Survey Coverage without a New Survey Alternative and/or transactions with coverage in excess of $5,000,000, the following requirement must be used:

S9 Receipt of a satisfactory up-to-date survey of the Land showing all improvements, easements, and setback lines.

If a Satisfactory and Current survey is not furnished and/or the transaction does not qualify for Survey Coverage without a New Survey Alternative, the loan and owner's policies must contain the exception:

S11 The effect of the Title of an encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment (including an encroachment of an improvement across the boundary lines of the Land), but only if the encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment would have been disclosed by an accurate and complete land survey of the Land. Paragraph 2 (c) of the Covered Risks is hereby deleted.

If the Company is furnished a survey that meets all of the survey guidelines except that it does not meet the Company's definition of a Current survey, the following exception should be used to provide limited survey coverage on an Owner's policy:

S7 Such state of facts occurring subsequent to ^, date of survey by ^ [*name of surveyor*], [R.L.S.][P.L.S.], as would be disclosed by an accurate survey and inspection of the Land.

If a Boundary Survey is received, use the following exception on the Owner's Policy:

S16 Attention is directed to the fact that the plat of survey by ^ [*name of surveyor*], [R.L.S.][P.L.S.], dated ^, is a "Boundary Survey" and this policy does not insure other matters that a complete survey showing any and all improvements would disclose.

Once it is determined that the survey meets all of the established guidelines for a Satisfactory and Current survey, the following exception should be used to show all of the matters that appear on said survey:

E11 Plat of survey by ^ [*name of surveyor*], [R.L.S.][P.L.S.], dated ^, shows ^ [*identify*] located on the Land.

Additionally, the following general exception should be made on all commitments/policies insuring Commercial transactions where there are any improvements shown on the survey that appear to be for utilities, but which are not clearly located within the boundaries of a designated, recorded easement, regardless of whether they serve only the property to be insured or other property. Examples of such improvements are manhole covers, telephone pedestals, catch basins, storm drains, sanitary sewers and utility lines.

GenComm Rights, if any, of third party utility providers in and to the utility improvements located on the Land.

EEEE. Tax Liens

1. State Tax Liens

See ***State Supplement*** for information on this topic.

2. Federal Tax Liens

Pursuant to § 6321 of the Internal Revenue Code, unpaid federal taxes shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to the tax debtor. Further, pursuant to § 6322 of the Internal Revenue Code, this federal tax lien attaches at the same time an assessment for the tax is made, not when notice is filed. Any Notice of Federal Tax Lien will show the assessment date(s) and it is the IRS' position that the tax lien is valid against the taxpayer and all other interests from the assessment date(s). However, § 6323(a) of the Internal Revenue Code sets forth that the lien imposed by § 6321 shall not be valid as against any purchaser or holder of a security interest until notice thereof which meets the requirements of subsection (f) has been filed. Therefore, while the lien attaches as of the assessment date(s), the priority of the lien is established by date of the recorded notice.

Because § 6323(f)(1)(A)(i) allows the notice referred to in subsection (a) to be filed in an office designated by the law of the state in which the property subject to the lien is located, property located in those states that have adopted the Uniform Federal Lien Registration Act will not require a search of the federal records in order to locate a federal tax lien. The following states have adopted the act:

> Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

The States of New York, South Carolina and Tennessee have not adopted the Uniform Federal Lien Registration Act, but do have state laws with similar effect. As such, property located in these state do not require a separate search of the federal records for a federal tax lien.

a) Lien Attachment

When underwriting a transaction with an outstanding federal tax lien in the chain of title, the lien attached to the property as of the date of the recording of the Notice and does not date back to the assessment date(s).

If the tax lien involves property held as tenants by the entireties, or the tax debtor is now deceased, please contact Corporate Legal and Underwriting Services.

b) Statute of Limitations

Per the Omnibus Budget Reconciliation Act of 1990 enacted on May 6, 1990 and amending § 6502 of the Internal Revenue Code, there is a ten (10) year time limitation on the enforcement of federal tax liens.

c) As to Entireties Property

Although state tax liens and judgments against only one spouse do not attach to entireties property, federal tax liens against only one spouse are considered a lien against property owned by the taxpayer as tenants by the entirety with his or her spouse. *United States v. Craft,* 2002 U.S. LEXIS 2790 (2002). The government can foreclose a tax lien against one (1) spouse who holds an interest in entireties property. *United States v. Barr*, 2010 WL 3023985 (2010.)

Underwriting federal tax liens against entireties property should be as follows: All federal tax liens against only one (1) spouse on property owned as tenancy by the entirety must be satisfied or released, and an appropriate requirement made on the title insurance commitment.

d) Federal Tax Liens Relative to Foreclosures of Deeds of Trust

If property is foreclosed thirty (30) days after a federal tax lien is placed on the property, the IRS must receive twenty-five (25) days' notice of the foreclosure sale. Failure to give proper notice leaves the IRS lien in force. Upon proper notice, the IRS has a redemption period of 120 days after the date of sale to redeem the property to satisfy its lien.

The examiner must obtain a waiver of redemption from the IRS, or delay closing beyond the 120-day period or the Company must make an exception on both the owner's and lender's policy for IRS redemption rights. EXCEPTION: When the foreclosure is of a VA or FHA loan and the government is the successful bidder, and there is no indication of equity in the property, policy can be issued without exception for the redemptive rights.

3. Ad Valorem Taxes

Ad valorem or property taxes usually become liens before they are due and payable, and in some localities, they are liens for weeks or months before the amounts thereof can be either ascertained or obtained. Since the title policy protects against all taxes that are liens at the date of the policy not excepted therein, it is very important that correct tax exception be made in the policy.

As a general rule, exception is made in the commitment or title policy to all taxes for years subsequent to those through which the taxes have been paid.

In all cases, commitments should require payment of all taxes which are due and payable or which may become due and payable within the effective period of the commitment. If the title examination shows the year through which taxes are paid, and the year so set out does not cover all taxes which may be due or which may become due as stated above, the following requirement is used, setting out in the blank the year or years for which payment must be made:

T45 Payment of taxes for the year(s) ^, plus any penalties and interest which may accrue.

If the examination indicates that taxes for the prior years have been paid and at the same time shows that taxes for the current year are a lien, the following requirement should be made to avoid any possibility that the taxes will become due and payable prior to the recording of the proposed insured [Mortgage][deed].

T45a Payment of taxes for the year(s) ^, plus any penalties and interest which may accrue, if said taxes become due and payable prior to the recording of the proposed insured [Mortgage] [deed].

If all taxes prior to those for the year in which the policy is effective are paid and those for the effective year of the policy are not yet a lien, the following exception is used:

T1a Taxes for the year ^, and subsequent years, not yet due and payable.

If all taxes prior to those for the year in which the policy is effective are paid and those for the effective year of the policy are a lien but not paid, the following exception is used:

T1 Taxes for the year ^, and subsequent years.

If all taxes prior to those for the year in which the policy is effective are not paid, the following exception is used:

T1 Taxes for the year ^, and subsequent years.

For lenders who require an affirmative statement when the current taxes are due, but not paid, and further, not delinquent, make the following exception in lender's policy only:

T16 Taxes for the year ^, a lien, now due and payable, but not yet delinquent.

But as to the owner:

T1 Taxes for the year ^, and subsequent years.

If the title examination states the property may be subject to a recapture of taxes due to a change in land use designation, the following exception must be added to both the Loan and Owner's Policy:

TaxRecap The recapture of ^ County taxes in the event subject Land ceases to qualify for special land use value.

Refer to the ***State Supplement*** for more specific information on this topic (i.e. Greenbelt designations).

4. Unusual or Extra Hazardous Risk and Reinsurance Alert

In cases where a policy is insuring over an unusual risk (*i.e.*, known liens) and coverage is in excess of $5 million, the underwriter **must** advise the Home Office before issuing a commitment or policy.

5. United States v. Craft

Marriage is No Longer a Safe Haven By Gary M. Whaley

FFFF. Tax Sales and Tax Deeds

Under the United States Constitution, citizens are entitled to due process of law before being deprived of their property. Therefore, when a tax sale occurs in which the taxing authority sells real estate to pay delinquent taxes and gives a tax deed to the purchaser, the key concern is that the fee simple owner whose interest has been extinguished received actual notice of the sale, sufficient to withstand constitutional attack.

1. Recent Sales

Generally, the Company is more reluctant to insure title coming from recent (less than ten (10) years) tax sales. However, if the owners received personal service of notice of the sale, and after considering the amount of the tax bill which prompted the sale versus the value of the property, the Company may insure the tax sale purchaser, or a subsequent purchaser from the tax sale purchaser.

Where fee owners are not personally served in recent tax sales, inquire:

1. If this is an isolated sale or one of many in a group of foreclosures, *i.e.*, subdivision?
2. Whether notice was given by publication or posting?
3. What efforts were made to locate and serve the fee owners?

Note that under constitutional provisions, service by publication or posting is only sufficient where reasonable and diligent efforts are made to personally serve the fee owners. It is not sufficient to merely send a letter to the last known address or for the sheriff to go to the last known address and report the fee owners absent. There must be an attempt to locate the owners by talking to neighbors, relatives, checking phone books in the city and directories, etc. Only if there is a real attempt will the Company consider insuring when service is by publication and recent. If service was by publication and there was not sufficient attempt to locate, the parties would have the right to have the foreclosure set aside.

2. Older Sales

Where the tax sale was conducted a sufficient number of years ago and the tax deed is old enough to allow the Company to argue adverse possession under color of title or the passing of the statute of limitation, the Company is willing to insure. Similarly, where the tax sale is fifteen (15) to twenty (20) years old and there have been intervening warranty deeds in the chain of title, then lack of personal service on the fee owner is not a problem.

Certain states have laws which bar an action by the fee owner claiming a defect in tax sale or otherwise contesting its validity after a prescribed period from the date on which the deed is recorded. This does not eliminate the risk of attack on the tax sale under the 14th Amendment due process guarantees of the U.S. Constitution or similar provisions under state constitutions.

Where the fee owners were not served personally, the following factors must be considered:

1. Number of years of possession;
2. Evidence of use under color of title;
3. Availability of a quitclaim deed from the foreclosed owners;

4. Further facts relevant to the service on the owners;
5. Their efforts made to locate the owners; and
6. The price paid at the tax sale.

GGGG. Tenants

Under the Statute of Frauds, leases and contracts for leasing lands may be void unless in writing and signed by the party to be charged.

Under all state recording statutes, leases of land are valid to pass any property interest as against lien creditors or purchasers for value, but from the time the lease is recorded.

Since a written and recorded lease would be disclosed by the title examiner, together with its recording information, the title policy would except to the lease as recorded.

Lease Lease from ^ to ^ recorded in Book ^ at Page ^.

However, if, under state law (*see **State Supplement***), a lease does not have to be recorded and the underwriter is advised that someone other than the owner occupies the property or the occupancy of the property is not known, exception must be taken for the rights of those parties who are in possession as follows:

X13 Rights or claims of parties in possession not shown by the public records.

X13a Rights of tenants in possession under unrecorded lease of less than one (1) year's duration.

These two exceptions, **X13** and **X13a**, are acceptable to FNMA and as such are the most commonly used exceptions when a tenant is shown to be occupying the property. Upon receipt of a properly executed Seller/Borrower Affidavit or Estoppel Certificate the X13/X13a exception(s) may be removed prior to the issuance of the Final Policy.

If the examiner reports that there is a tenant under an unrecorded lease of a specified duration longer than one (1) year (*i.e.*, two (2) years), then the following exception should be used:

X13b Rights of tenants in possession under unrecorded lease of less than ^ year's duration.

When a tenant is occupying the property and the lender wants affirmative coverage that the lien of their deed of trust is in a first lien position,

1. The tenant must fully subordinate their rights under the recorded or unrecorded lease to the deed of trust; or,
2. The written lease must be reviewed to determine if the deed of trust is afforded priority as against the lease; or,
3. If the lease has not yet been recorded, it should be recorded after the deed of trust.

1. Commercial Transactions

If the project is a shopping center, multi-family apartment complex, office building (with tenants, not just owner occupied) or is otherwise a project known to be occupied by an entity other than the insured owner **ALWAYS** make an exception on both the Owner's and Lender's policies:

X13 Rights or claims of parties in possession not shown by the public records.

Further, it is permissible to limit this exception on the Lender's policy to:

X13d/Comm Rights of tenants in possession, as tenants only, under unrecorded leases with a term of ^. [Refer to the **State Supplement** for the appropriate length of the term. In many states, tenants' rights under short term leases do not need to be recorded to enjoy priority over recorded interests.]

Upon receipt of a satisfactory affidavit confirming the identity of unrecorded leases and parties in possession, this exception can be further limited on the Lender's policy to:

X13a/Comm Rights of tenants and others in possession, as tenants only, as identified ^. [List the leases, identify the date of the lease agreement, provide identity of the parties to the lease and the terms of the lease and identify all other parties in possession, not of record.]

In the event a valid subordination agreement in favor of the insured lender is recorded and signed by the tenant(s) in possession under (a) an unrecorded lease(s) with an appropriate term (refer to the ***State Supplement*** for the appropriate length of the term. In many states, tenants' rights under short term leases do not need to be recorded to enjoy priority over recorded interest); or (b) a lease(s) evidenced of record, show that lease(s) as a Schedule B, Part II subordinate matter on the Lender's policy only. However, take exception to the recorded subordination agreement on the Lender's policy. With prior approval from the Home Office, said subordination agreement(s) may be deleted as a Schedule B, Part I exception on the Lender's policy. *See* **SUBORDINATION AGREEMENTS** and **SUBORDINATION, NONDISTURBANCE AND ATTORNMENT AGREEMENTS (SNDA)** herein.

Additionally, with prior approval from the Home Office, the exception may be modified to read:

X13e/Comm Rights of tenants, as tenants only, without any rights of first refusal or option to purchase.

HHHH. Title Search

In all cases where an attorney is certifying title and/or providing an "opinion" of title, make the following requirement in the Commitment:

Opinion Receipt of Attorney's Final Certificate, along with all additional required documents, in order to issue a final policy or policies.

<u>All "opinions" of title should be certified either to the Company or to the Company **and** its named agent.</u>

In all cases where a non-attorney is providing the title search or abstract of title, make the following requirement in the Commitment:

FinalTitle Receipt of Final Title Examination or Update, along with all additional required documents, in order to issue a final policy or policies.

IIII. Torrens System

1. Torrens System

The system of registering title to real property is commonly referred to as the Torrens system. Under a Torrens system, title is registered as follows:

1. Title of the real property is determined through an adjudication by the court. All other claims to the property are wiped out. A Torrens certificate is then issued by the court stating the registered status of the title.
2. When the registered property is transferred, the registrar must issue a new Torrens certificate after a satisfactory title search is completed back to the original date of the last Torrens certificate issued.

Although 19 states previously recognized the Torrens system, registered title to property is primarily found in Hawaii, Illinois (Cook County), Massachusetts, Minnesota (Hennepin and Ramsey Counties), and Ohio (Hamilton County).

JJJJ. Trusts

1. Generally

A trust, if properly established, can hold title to real property with the same rights of possession and alienation as an individual or corporation. While there are various **implied** trusts, *i.e.*, constructive trusts and resulting trusts, it is usually an **express** trust, which is designed and created to own and convey real property. Express trusts are created by written instrument, either a deed or declaration of trust in the case of a "living" or inter vivos trust, or through the provisions of a will, in the case of a testamentary trust.

Where the trust is created by deed or declaration, it does not become effective until there is a conveyance of the land or assets which are meant to be the trust res. If the trust is revocable, that is, if the grantor or settlor of the trust has retained the power of modification, property can be delivered to or removed from the trust at the whim of the grantor. In the case of an irrevocable trust, once the property has been conveyed to the trust, it remains trust property, unless in the trustee's judgment, it is in the best interest of the trust to do otherwise.

There is no special language or particular grouping of words necessary to create a trust. It is sufficient if the language manifests the intention to create a trust, clearly designates the beneficiary and the property, and specifies the purpose for which the trust is created.

2. Explicit Authority

The trustee holds the legal title to the property for the benefit of the beneficiary, who holds equitable title. As a result, any conveyance of the title of real property held in trust must be done by the trustee.

For the real estate lawyer, and hence, for the title insurer, the issue is very simple. When a conveyance of real property is made from a trust, there must be clear authority in the trustee to convey the property, which authority must be explicit in the trust document. It is advisable that the trust document be recorded to provide evidence to later title searchers that such authority existed.

In the case of a testamentary trust, the empowering provisions are a matter of record because the estate file in the office of the clerk of court contains the original will. If the will was probated in another county, an exemplified copy of the will should be recorded in the county where the land lies. Where the estate of the decedent was administered in another state, the question of whether to conduct an ancillary administration should be considered.

In the case of a living trust, the declaration of trust must be of record, or a memorandum of the declaration should be recorded to afford title examiners the opportunity to ascertain the rights and powers of the trustee relative to real property held by the trust.

If the trust instrument empowers the trustee to sell or encumber the real property, a deed or deed of trust signed by the trustee will be sufficient to insure the title so conveyed.

3. Early Termination

Where property is held in trust, which by its terms has not yet expired, the real property lawyer will occasionally be asked to allow the trust property to be distributed, prematurely, to the beneficiaries in kind. The trust can be terminated and the property distributed upon agreement among all interested parties, which agreement recites that the purposes of the trust have been accomplished and that the trust is no longer necessary.

The key is to properly identify all interested parties to the trust, including any remaindermen, which will have to join in the agreement. If any trust beneficiaries are minors or incompetents, this approach will not work, since a special proceeding would be necessary to sell their interest. The title insurer should be consulted before these steps are taken to determine if title can be insured in the beneficiaries or only insured if conveyed to third party purchasers.

4. Where No Trust Document Exists

Occasionally, deeds or other conveyances of real property indicate a person's capacity as trustee, but there is not public record evidence of a trust document on those cases, the trustee's powers relative to real property are uncertain because there is no trust document outlining his authority to buy, sell, hold, lease, mortgage or encumber. Occasionally, state law will input to a person named as trustee certain powers as listed in the statutes or code. *See* ***State Supplement*** for more information on this topic.

5. Family Trusts

It has become somewhat popular, particularly with retired persons, to set up a "family trust" in an attempt to avoid the perceived delays and expenses incurred when property passes through an estate. These family trusts are often set up through "trust kits" without the benefit of advice or instruction from an attorney or accountant, and the settlor conveys all his or her assets to the family trust. Often, the settlor forgets that the trust has been created and executes a deed for the property individually or with a spouse, which proves insufficient when record title is found to be in the family trust. Then another replacement or corrective deed must be prepared and executed.

Further, the settlement agent is responsible for recording a document that evidences the authority of the trustee. This may be problematic when the settlor cannot produce the trust document or is unavailable to provide the same. Without the benefit of the trust document, the attorney and the title insurer must be concerned about the marketability of the title conveyed.

6. Land Trust

A land trust is a variation of an express trust. It is created in much the same way and has a settlor (creator), trustee, res (property), beneficiary and a written trust agreement. The settlor conveys property to the trustee by deed, to be held pursuant to the terms of the land trust agreement. A land trust however, is only established to hold title to real property and does not contain any personal property. Under a land trust, the trustee holds both legal and equitable title to the property, unlike an express trust, where the trustee holds legal title to property, but the beneficiary hold equitable title. A beneficiary under a land trust has the rights of possession, management, control, and operation, and the right to receive rents, issues, profits, and proceeds of a sale. The beneficiary’s interest is only a personal property interest.

Unlike the typical express trust, a trustee under a land trust serves in the very limited capacity for the execution of documents that affect the title to the property such as deeds, deeds of trust, and mortgages and to liquidate the trust when it terminates. The trust agreement typically states that the land trustee will hold title or some other interest in real property and will act in regard to that property interest only when authorized and directed to do so in writing by the beneficiary or by a beneficiary's designee.

Typically the deed into the trust takes the form of a "full power deed," which sets forth the authority of the land trustee to convey the property. The deed will normally contain provisions which indicate that third parties dealing with the trust need not resort to an analysis of the trust agreement to confirm the trustee's authority. This is designed to allow the beneficiary to remain anonymous. It is important to receive and review a copy of the deed transferring property in to the trust, to insure that the trustee has the authority to enter into the insured transaction.

As with most trusts, the trust property is typically insulated from judgments against the beneficiaries. There are however some exceptions to this rule. One exception to this rule is federal tax liens. In United States v. Stamps, the United States District Court for the Southern District of Illinois held that the federal government could foreclose against real property held in a land trust when the tax lien was recorded against the beneficiary. The second exception to this rule is mechanics liens. For the purposes of the Mechanics Lien Act, the beneficiary of a land trust is an owner whose act can result in a lien on title to the land trust property. Despite the beneficiary's desire to remain anonymous, it is vital that the underwriter ascertain the beneficiaries under a land trust so that they appropriate judgment searches may be conducted.

7. Conveyances and Encumbrances of Land Trust Interests

The trustee may deed by trustees deed after receiving a written direction to convey from the beneficiaries pursuant to the trust agreement. Typically this is accomplished with a quitclaim deed as the trustee does not want to risk incurring any personal liability or liability to the trust. A land trustee can also mortgage the property, but only upon written direction from the beneficiaries. The land trustee does not have personal liability for the underlying debt; consequently, most lenders will require a personal guarantee of the debt from the beneficiaries of the land trust.

A beneficiary may convey his or her beneficial interest in the land trust by way of an assignment of beneficial interest. This assignment may convey full title or may be for the purpose of conveying a security interest in the beneficial interest, known as a "collateral assignment." A beneficiary of a land trust can also pledge his or her beneficial interest as security for a debt to obtain financing. The pledge is accomplished with a collateral assignment as well, however the beneficiary retains his or her status as a beneficiary and the lender becomes a secured creditor. The beneficiary still has the right of possession, to collect rents and to manage the property. Because of the beneficiary's ability to assign or pledge their personal property interest a search of the beneficiary's name in the recorder's office to identify creditors and also a search of the Secretary or State's office to identify financing statements is required.

If you are asked to insure a transaction involving a Land Trust, it is imperative that you obtain a copy of the deed vesting title in the trustee. This is typically the document which will give the trustee the authority to execute the necessary documents.

It is important to remember that a judgment search and a search of the Secretary of State office for UCC will be required when insuring a land trust. The difficulty arises in that until the commitment is generated and the beneficiaries are disclosed, you cannot order the necessary searches. The underwriter is advised to alert the searcher to the need to obtain additional searches once the additional information is obtained.

8. IRA Custodians

Real estate can be used as an investment vehicle in an Individual Retirement Account (IRA) in the same manner that one may use a mutual fund in an IRA as an investment vehicle. Real estate may be attractive to some IRA account owners due to its relative safety as a long-term investment. A custodian of an IRA can invest in real estate for the benefit of the account owner. The account owner cannot place property which either him, his spouse, parents or children already own into this type of ownership. The property cannot be used by the account owner as a primary residence, vacation home or for business. These transactions may be insured under the following conditions:

1. The purchaser on the sales contract is an institutional IRA custodian for the benefit of an account owner. "Institutional" means a recognized business entity that handles custodial accounts in the ordinary course of its business. If the purchaser is an individual account owner, they must assign their rights to the IRA custodian f/b/o (for the benefit of) the account owner by assignment or addendum to the contract.
2. Receipt of a written statement confirming the account number and account owner.
3. The vesting deed must convey fee simple title to: [IRA custodian] f/b/o [account owner], [account number]
4. The account owner must sign the HUD-1 Settlement Statement/Closing Disclosure.
5. The policy insures the grantee exactly as named in the vesting deed.
6. When there is a conveyance out of a property held by an IRA custodian both the custodian and the account owner must execute the deed with a proper release of marital interest by the account owner's spouse, if applicable.
7. The IRA Agreement must allow for the holding of real estate by the IRA.

If the transaction being insured is to have Title vested as it is described in the text above, contact Corporate Legal and Underwriting Services for assistance.

9. Underwriting

Where title is reported to be held in trust by a certifying attorney, a requirement should appear in the commitment as follows:

TrustAut Receipt of certification by the attorney as to the existence of the trust, identity of the trustee and trustee's authority to enter the transaction contemplated and execute all related documents, including deeds, or mortgages.

Where title is reported to be held in trust by a title examiner, a requirement should appear in the commitment as follows:

TrustAgmt Provide to the Company a copy of the trust agreement and all amendments or modifications to said trust for which ^ is trustee. The Company reserves the right to make such additional requirements as it may deem necessary upon review of said trust agreement and amendments or modifications and proof of status of said trust.

Where the trust or a memorandum of trust needs to be recorded:

TrustRec Recordation of trust or memorandum of trust outlining real property provisions and authority of trustee.

If the above requirements are not met, the following exception should appear on policy:

TrustNoCov This policy does not insure against loss or damage resulting from the unmarketability of the Title due to questions about the trust or the trustee's authority.

In order to insure a sale or encumbrance by a Land Trust Trustee, make the following requirements:

LandTrust As to the Land Trust:

(a) The trustee of the Land Trust must provide a written disclosure of all beneficial owners prior to closing. The Company reserves the right to make such additional requirements as it may deem necessary upon review of said disclosure.

(b) Signed notarized directive from all the beneficial owners of the trust directing the trustee to execute all necessary documents. The Company reserves the right to make such additional requirements as it may deem necessary upon review of said directive.

KKKK. Uniform Commercial Code

The Uniform Commercial Code (UCC) deals with, among other things, security interests in personal property. While title insurance policies insure real property and do not, by definition, insure title to personal property, there are circumstances where personal property can become so attached, or affixed, to real property that it becomes real property. These types of personal-to-real property items are called fixtures. Some examples of fixtures are heating and air conditioning units, satellite dishes, and certain business machinery. All of these items, when purchased from a dealer or retailer, are personal property. Once they are delivered to a house or business and installed or "affixed" to the property then they become real property.

1. Fixture Filings

Under the UCC, a retailer of personal property can have a lien on that item for any unpaid part of the purchase price. The retailer would create that lien by filing a security instrument with the Secretary of State. These are commonly referred to as "UCC Security Interests" or "UCC Financing Statements." If the item of personal property is going to become a fixture, then the retailer would also file his UCC in the register of deeds or other local office for the county where the land on which the fixture is located lies. This is commonly referred to as a "UCC fixture filing" and it is a lien on both the item that the retailer sold and the real property. When a UCC fixture filing is filed at the register of deeds office, it constitutes a lien on the real property and will appear as an exception on a title policy or must be paid and satisfied.

2. Purchase Money Security Interests in Fixtures

Often, the UCC provides that the lien in favor of the retailer of fixtures for the purchase price of the fixture has priority over other competing liens or mortgages.

3. Commercial Transactions

Show UCC financing statements that are serving as collateral in addition to the insured deed of trust/mortgage under a "NOTE" after Schedule B, Part II of the Loan Policy. **These are not subordinate matters, but should be shown in a "note."**

If the examiner notes that there is a UCC-1 financing statement against a tenant who is in possession of the property, even if it is for fixtures, list it as an exception but insure affirmatively against loss or damage resulting therefrom. Do this for both an Owner's and Lender's policy; **but not if they are leasehold policies for said tenants interest.** Call Corporate Legal and Underwriting Services for guidance.

4. Underwriting

Use the following requirement:

UCCFinP Termination, payment, satisfaction and cancellation of the [UCC][Financing Statement] ^ [*insert # or description*] in favor of ^ in the amount of $^ recorded in ^.

Use the following exception:

UCCFin [UCC][Financing Statement] ^ [*insert # or description*] in favor of ^ in the amount of $^ recorded in ^.

5. *Unusual or Extra Hazardous Risk and Reinsurance Alert*

In cases where a policy is insuring over an unusual risk (*i.e.,* known liens) and coverage is in excess of $5 million, the underwriter **must** advise the Home Office before issuing a commitment or policy.

6. *Revised Article 9 - Modern and Uncluttered*

By Tonya A. Mason

LLLL. USA Patriot Act

In 2001, anti-terrorism legislation, known as the USA Patriot Act, was enacted. In order to comply with the directives presented in the USA Patriot Act, all agents and branches must review the Department of Treasury's Sanctions List before issuing title commitments or policies. The Company has placed a link to the Department of Treasury's Sanctions List on its website (http://www.invtitle.com/resource-center) under the "Tools" category.

Effective July 1, 2010, the Company added a function to its website called "OFAC Validation."

For additional information see the memorandum by David Florio. Please refer to the SDN Validation Tool Manual for complete instructions on how to use the OFAC Validation. If a title application is received with a name on the Department of Treasury's list, contact a staff attorney or Corporate Legal and Underwriting Services for further instructions.

See memorandum by Michael Aiken for additional information.

MMMM. Water Rights and Well Rights

1. Water Rights

a) Navigable Waters

That portion of any property lying below the mean high water mark of oceans and navigable rivers and streams is subject to certain rights of the federal and state governments and of the public. The federal government by reason of its jurisdiction with respect to navigation and commerce exercises certain controls over all navigable bodies of water, and this applies to bodies of water which are deemed navigable in law as well as those which are navigable in fact. Therefore, in addition to waters which are known to be navigable, any body of water which is designated as a river should be so treated.

X18 Title to that portion of the Land lying below the mean high water mark of ^.

This exception may not be deleted under any circumstances without approval from the Home Office.

b) Filled-in Lands and Swamps

As previously discussed, the federal government controls all navigable bodies of water. Consequently, when there has been an artificial filling-in of a body of water deemed navigable in law, the title to the land constituted as a result of such filling-in is subject to the control of the federal government by reason of its jurisdiction over navigation and commerce. Not only is this true, but if the filling-in was done pursuant to a permit issued by the Secretary of the Army, the title to the land constituted as a result of such filling-in is also subject to the terms of the permit under which the filling-in was done. All such permits are revocable and subject to the right of the government to require removal of the fill and/or other improvements without compensation.

In the case of the title to lands artificially filled-in, consideration also must be given to the rights of the federal government in and to such lands by reason of its control over navigation and commerce.

If a portion of the property to be insured is or may be filled-in land and the title to such portion below the prior high water mark of the body of water cannot be insured, one of the following exceptions should be used:

Swamp Rights of others which may exist in and to that portion of the Land designated as swamp/marsh land. [*as shown on plat of survey by^, [RLS][PLS], dated* ^.]

OR

W6 Title to that portion of the Land which is or may be filled-in land, or which is or has been under water, or which lies below the mean high water mark of ^.

c) Streams

In all cases in which a stream, branch, or other natural watercourse (short of a river) extends through property, exception should be made to the rights of others entitled thereto in and to the waters of the stream or branch and the natural flow thereof:

X22 Rights of others thereto entitled in and to the continued uninterrupted flow of ^, located on the Land.

d) Ponds

If there is a pond on the property to be insured which is entirely surrounded by such property, no exception thereto is necessary. However, if the pond is not entirely surrounded by insured premises, then other abutting owners will have rights in such pond, which should be excepted to in the following manner:

X19 Riparian rights incident to the Land.

e) Riparian Rights

In those cases in which riparian rights are conveyed by the instrument to be insured, such rights are not to be insured unless it is definitely determined that such rights are appurtenant to the property. The basic features of the riparian water rights system are:

1. The system applies only to flowing surface waters. This includes rivers, lakes, some ponds;
2. The right to water depends on land ownership. It makes no difference how much land fronts the waterway to which the land is riparian. Nonuse of the right does not result in loss of it; loss occurs upon land transfer. If a stream shifts out of its channel, land once riparian may become nonriparian, and the water right may be lost;
3. Water must be used (in most jurisdictions) on the riparian land itself, or not at all. Additionally, water must be used within the watershed of the stream of origin;
4. There are no gallonage limitations on the right. Rather, water must be dedicated to a "reasonable use." If the use is reasonable, all the water necessary for that use may be taken as a matter of right;
5. In times of shortage, riparians must share the burden of reducing water use. In this way, riparian rights are "correlative."

The exception when no rights are to be insured is as follows:

X19 Riparian rights incident to the Land.

Affirmative assurance can be provided as follows:

Ripar/Cust2 The Riparian Rights mentioned in Schedule B, Item #^, of the Title Policy covering the above captioned Land are common and customary in the area and acceptable to leading attorneys and prudent lending investors in the community.

f) Prior Appropriation

The western states of the United States use a system for the allocation of water rights known as prior appropriation whereas the eastern states use a system known as riparianism. The 100^{th} longitudinal meridian is considered to be the divider. The operative features of the prior appropriation system are based on first in time, first in right. Under a riparian system, the right to water is directly connected to the ownership of property that fronts the waterway. Under prior appropriation, the right to the water ripens when the water is taken and applied to a beneficial use. Land ownership is irrelevant to acquiring this right. In a riparian system, the water may only be used on the land that fronts the waterway and the right to such water may not be separated from the ownership of the land. Riparian rights may be lost if the ownership of the land is severed. Rights under prior appropriation are superior or inferior to another's right based on the time at which the right is secured and may be sold as a separate property right. Prior appropriation rights are usually quantified in the amount taken and in times of shortage, inferior users must yield to seniors. The prior appropriation system is regulated by the individual state by statute and agency regulation where riparian rights are largely governed by common law. *See **State Supplement***.

g) Drainage Ditches

In all cases in which the plat of survey or other information furnished the Company indicates that a drainage ditch crosses the property to be insured, the following exception should be used:

X37 Rights of others thereto entitled in and to the [ditch(es)] [canal] along the ^ boundary line(s) of the Land.

OR

X37a Rights of others entitled thereto in and to the ditch(es) crossing the Land.

h) Community Water (Private)

If the documents on record which establish community water rights do, in fact, contain such language, or the examiner will certify to that effect, the following coverage can be provided:

PrivUt/Sup With respect to the private utility system documents of Public Record, there are no provisions which could result in a superior lien on the Land ahead of the Insured Mortgage, or which could create a lien which would take priority over the interest of the mortgagee acquired through a deed in lieu or through foreclosure.

i) Boatslips and the Associated Water Rights

When dealing with boatslips and water rights, there are several underlying principles that must be kept in mind:

1. The Public Trust Doctrine;
2. Navigational Servitude;
3. Riparian Rights; and
4. Littoral Rights.

The Public Trust Doctrine is a restraint on government power. It holds that title in lands under navigable waters belong to the public at large. It further provides that the state may not convey such property to private individuals. Any conveyance must be for the benefit of the public at large and cannot restrain public use and access of the lands and, more importantly, the overlying waters. Any such transfer to an individual is invalid, or at least revocable by the granting agency.

Navigational Servitude arises out of Article I, Section 8, Clause 3 of the United States Constitution which provides that Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes. Based on this grant of power, Congress enacted what is known as the Rivers and Harbors Appropriations Act in the late 1800's. This act basically prohibits the construction of any structure on any navigable stream or navigable body of water without first obtaining authorization from the Corps of Engineers.

Both of these principals come into play when dealing with "navigable waters." The definition of "navigable waters" is very elusive. In the past the United States Supreme Court held that waters were navigable in law when navigable in fact, and that they are navigable in fact when they are used, or are susceptible to being used, in their ordinary condition by themselves, or by uniting with other waters, as highways for commerce under which trade and travel are or may be conducted. This holding has been interpreted very broadly, and taken to the extreme, has been said to mean that if a stick can float with a toothpick sail, then the waters are navigable. It is safe to assume that this definition now includes the use of water for recreational purposes. There is also case law that holds that man-made canals on private property become navigable waters of the United States and are thus subject to the Rivers and Harbors Appropriations Act when these waters are connected to tidal waters (that is, water that rises and falls with the tide). Once water becomes "navigable" it remains so regardless of subsequent changes. The states have also developed their own definition of what is "navigable." *See* ***State Supplement***.

Riparian owners are owners of land that abuts a river and a littoral owner is one whose land abuts a lake or sea. The term riparian owner is often used interchangeably with that of littoral owners. Riparian and littoral rights arise from the ownership of land abutting water rather than out of the ownership of the bed of the stream or body of water. Broadly speaking, such rights include the landowner's right of access to the water, the landowner's right to take and use the water, the landowner's right to have the stream flow in its natural course and volume, and the landowner's right to additions to his land by accretions or relictions. Accretions are the gradual deposits of land from natural causes and relictions are increases in land due to the withdrawal of a body of water. Additionally, some states provide these landowners with the right to an unobstructed view of or over the water. Generally, the right of access to the water also includes the right to construct docks and other structures related to access, but the extent of these rights are controlled by the individual states. All of these rights however are inferior to the overriding rights of the state and federal government and the public at large found in The Public Trust Doctrine and in the Navigable Servitude Doctrine.

Boat slips and docks pose some additional concerns that must be addressed by an underwriter. A boat slip generally refers to a space at a dock or pier, used by boats for mooring purposes. This is analogous to parking space for automobiles. A dock is typically a platform set between pilings used for loading or unloading people and materials from a boat or ship. The concern for underwriters is what is being conveyed. Depending on the language used in the conveyance, either the boat slip or dock itself is being conveyed

1. In fee; or
2. A lease is being given; or
3. Only an exclusive right to use the boat slip is conveyed.

A fee simple interest can be insured provided that the appropriate exception is placed on the policy (**X21**). A leasehold interest may be insured, provided the appropriate exception is placed on the policy (**X21**). An exclusive right to use the boat slip or dock **cannot** be insured. An exclusive right to use a parcel of property is considered personal property and is not insurable under a title policy.

Thus, when requested to insure property abutting a body of water, or requested to insure a boatslip or dock, exception must be made for the rights and interests of the state and federal government as well as the rights of the public to the water. Both the state and federal government retain the power to retake any land that would fall under either The Public Trust Doctrine or the Navigable Servitude Doctrine.

X21 Rights of the public and the State of ^, if any, to (1) lands lying below the ^ [*mean high; mean low; high; low - See **State Supplement***] water mark, (2) lands that have been created by artificial means, (3) riparian rights; and subject also to the rights of the federal government's control over navigable waters, and public rights of access to any navigable waters.

j) Unusual or Extra Hazardous Risk and Reinsurance Alert

In cases where a policy is insuring over an unusual risk (*i.e.*, Tidal line changes; insuring title to water, water rights, wetlands, or water related to dependent land such as tidelands or submerged land) and coverage is in excess of $5 million, the underwriter **must** advise the Home Office before issuing a commitment or policy.

2. Well Rights

Where the well is located outside insured of the insured premises and there is a recorded easement to the well that has been searched, show the easement as part of insured premises by including it in the legal description and make the following exception for rights of others in and to the easement area:

WellEsmt Rights of others entitled thereto in and to the use of the easement for the well located on lands lying to the [North] [South] [East] [West].

Where the well is located outside of the insured premises and there is no recorded easement, omit the easement from the legal description and choose one of the following options based on the preference of the customer:

1. Require recordation of an easement; or
2. Make exception for rights of the insured owner in and to that well located on property adjoining to N-S-E-W as follows:

Well Rights of ^, owner of the Land, to share in the well located on lands lying to the [North] [South] [East] [West].

Where the well is located within the insured premises, but owners of adjoining properties have rights to the well, exception must be made for the rights of others in and to the use of the insured premises:

WellOthers Rights of others in and to the use of the well located on the Land.

NNNN. Zoning

1. 2021 ALTA Owner's & Loan Policies

Under the 2021 ALTA Owner's & Loan Policies, the violation of a zoning ordinance is a covered risk only if the violation or enforcement described by the enforcing governmental authority in an Enforcement Notice (*See* **Policy Jackets**, Covered Risk #5). If no Enforcement Notice is recorded then the Company is unconcerned about violations of zoning setbacks or other ordinances.

Under the 2021 ALTA Owner's & Loan Policy now includes a new defined term, Enforcement Notice which provides;

"Enforcement Notice": A document recorded in the Public Records that describes any part of the Land and:

i. is issued by a governmental agency that identifies a violation or enforcement of a law, ordinance, permit, or governmental regulation;
ii. is issued by a holder of the power of eminent domain or a governmental agency that identifies the exercise of a governmental power; or
iii. asserts a right to enforce a PACA PSA Trust.

If the Company is required to provide a lender with assurances relative to a zoning violation, the following language may be used, **only with approval by the Home Office:**

Zoning/Aff This policy insures against loss or damage which the insured may sustain as a result of a decree of a court of competent jurisdiction ordering forced removal of the structure of the improvements appurtenant to the Land.

III. Glossary of Exceptions and Requirements

IV. Glossary of Underwriting Terms

