



*Title Insurance  
Seminar  
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# **UNDERWRITING FROM A NATIONAL PERSPECTIVE**

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**COMMON UNDERWRITING ISSUES FROM A NATIONAL  
PERSPECTIVE**

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## Underwriting Mechanic's Lien Issues

Insuring a mortgage where there is no priority or before the intended improvements have been completed is extremely risky and should not be undertaken lightly. Mechanic's liens are a significant source of claims and mechanic's lien coverage is among the most hazardous coverage provided. The primary reason mechanic's liens continue to present such a challenge is that, unlike a typical lien scenario, priority does not necessarily depend on what notice or instrument is recorded first. The statutes of many states provide special priority protection for those providing labor or materials for the improvement of property such that their liens relate back to the start date of the project. In some states this risk is magnified by allowing the priority of all potential claimants to relate back to the commencement of work by any one on the project. Thus, a lien filed by a landscaper 18 months after the excavator started work would relate back and have its priority date run from the date the excavator began work.

Mechanic's lien claims predominantly arise from the following two sources:

1. Early start and split priority; and
2. Insufficient indemnifications.

### **Early Start and Split Priority**

Early-start or pre-start refers to construction work undertaken prior to the recording of the construction financing. These present an obvious risk as lien claims often relate back to the first improvement made or materials supplied to the project and therefore gain priority over the insured mortgage. Accordingly, a thorough inspection of the subject property may be necessary before extending mechanic's lien coverage to ensure that no work has begun. At a minimum, a sworn statement, affidavit and/or indemnification should be obtained from the borrower and contractor, either stating that no work has been initiated, or that ORT will be indemnified for any losses relating to work commenced prior to the recording of the insured mortgage. It is also highly recommended that pictures be taken of the property commensurate with the recording of the mortgage as proof of the priority of the insured mortgage.

Claims may also arise as a result of split priority issues. These issues come about in two primary ways. First, if the loan documents do not clearly obligate the lender to make the construction advances but instead allow for lender discretion on whether or not to make an advance, then such discretionary or optional advances made after the start of construction could be considered junior to a claimant's mechanic's lien interest. To avoid this, a thorough review of the construction loan documents is required to ensure that the lender has not gotten careless and neglected to include mandatory construction loan language.

Second, if the underlying debt of the insured mortgage is modified, you need to determine if such a modification creates a novation that eliminates the initial priority of the mortgage. Additionally, even if it's determined that priority has not been jeopardized by the modification any increase in the loan amount may put the "new money" behind a contractor's lien rights

## Indemnifications

Obtaining an indemnification from borrowers and general contractors is a common solution used to mitigate the risk of loss in mechanic's lien situations. However, it is important to remember that an indemnity without financial viability does little to mitigate a claim. Current financial statements should be obtained from the proposed indemnitor which show all relevant financial information and which disclose that the indemnitor has sufficient liquid assets to finish the project if currently identified sources of funds prove inadequate. Financial statements should be certified through a reasonably current date. Audited financial statements are preferred, as they are generally more reliable than unaudited statements. An indemnification and review of financial statements should not be a substitute for obtaining statutory priority when and where possible, nor should receipt of an indemnity be a substitute for requiring that adequate funds to complete construction be committed to and available for disbursement when we agree to delete the exception for mechanic's liens.

Alternatively, if a viable indemnification is not possible other sources of loss mitigation should be considered such as payment and performance bonds, escrowed funds, unconditional lien waivers or executed releases.

The surest way to guard against mechanic lien claims is to strive for statutory lien priority. Where this is not possible, know the risks, obtain adequate assurance that any intervening interests will be resolved, and exercise caution in underwriting. Identified funds committed to construction should exceed the costs of construction and the construction budget should contain an adequate "cushion" or "contingency" category to meet unexpected costs and overruns. If costs to complete the project exceed currently identified funds irrevocably committed to the project, the risk should not be accepted and coverage should be declined.

At a minimum the following items should be considered, reviewed and analyzed before agreeing to delete the mechanic's lien exception:

1. The Construction Contract – Determine if it's a guaranteed maximum price or a cost plus contract;
2. Construction Budget detailing the sources and uses of all funds;
  - a. How much of a contingency is built in
    - i. We look for a minimum of 5%
  - b. Know the difference between the loan amount and the cost of construction.
    - i. Is this shortfall being paid from owner's equity or from the profit derived from future sales?
    - ii. It is generally required that the additional equity funds be advanced prior to the disbursement of any loan funds.
3. Audited financial statements for any individual or entity from whom an indemnity will be taken.
  - a. Look for liquid assets
  - b. Discount value of "Goodwill"
  - c. Look for any obvious red flag warnings

- d. They are also required to be reviewed by Old Republic's Underwriting and Treasury groups.
- 4. Statement as to what's been disbursed so far, if anything, and an audit of unconditional full and final lien waivers for all payments made.
- 5. Consider the amount of equity the owner has in the property.
- 6. Who will disburse the loan funds and how will the project be monitored to ensure the construction costs and funds stays in balance?
- 7. Consider inserting a mechanic's lien exception similar to the following:

This Policy specifically excepts from coverage any mechanic's liens arising as a result of the insufficiency of loan funds, owner's equity, or any and all other sources of funds in an amount sufficient to pay the full amount of the construction costs associated with the improvements being made to the insured property pursuant to a construction contract dated \_\_\_\_\_, 2013 with \_\_\_\_\_.

In addition, this Policy specifically excepts from coverage any mechanic's liens arising as a result of the lender's failure or refusal, for whatever reason, to fully disburse the loan proceeds.

### **Mechanic's Lien Endorsements**

The ALTA 32 series endorsements are specifically designed for use in situations where the priority of the lien of an insured mortgage or deed of trust does not have absolute priority over potential mechanic's liens and where you will be reviewing draw requests and disbursement records whether or not you are acting as the disbursing agent. The coverage afforded by the ALTA 32 series is significantly more limiting in the lien coverage provided than any other previously issued ALTA product. The endorsements are intended to avoid the potential of having a Loan Policy operate as a payment bond.

Additionally, a separate endorsement, ALTA 33, has been specifically designed as a date down endorsement for use in the disbursing process. Its use however, is strictly limited to situations where one of the ALTA 32 endorsements is also being utilized.

#### **A. ALTA 32 Series**

There are currently three versions of the ALTA 32 which are available. If you are not acting as the disbursing agent or are not otherwise reviewing draw requests and disbursement records then none of the ALTA 32 series endorsements should be used.

##### **1. ALTA 32.06 (Loss of Priority Construction Loans)**

The ALTA 32-06 endorsement provides coverage for an advance **only** to the extent that the charges for the services and/or materials rendered were designated for payment in the documents supporting a Construction Loan Advance and are disbursed by or on behalf of the Insured on or before the Date of Coverage.

This endorsement does not require the Company to disburse the construction funds.

**Note:** When applicable, this is the form of construction loan endorsement required by Section 3.2.C of the Department of Housing and Urban Development Federal Housing Administration Multifamily Program Closing Guide dated September 1, 2011.

2. ALTA 32.1-06 (Construction Loan – Loss of Priority – Direct Payment)

The ALTA 32.1-06 endorsement provides coverage **only** to the extent that direct payments to the labor and material suppliers have been made by the Company or by the Insured with the Company's written approval. It also limits the coverage to liens filed for labor or materials for which payment has been made by the Company.

This endorsement requires that construction disbursements be made by the Company either making direct payments to labor and material suppliers or by specifically authorizing, in writing, that such a payment be made.

3. ALTA 32.2-06 (Construction Loan – Loss of Priority – Insured's Direct Payment)

The ALTA 32.2-06 endorsement provides coverage **only** to the extent that direct payments to the labor and material suppliers has been made by the Insured or on the Insured's behalf on or before the Date of Coverage. It also limits the coverage to liens filed for labor or materials for which payment has been made by or on behalf of the Company or the Insured.

It does not require the Company to disburse the construction funds.

B. ALTA 33 – Disbursement Endorsement

This endorsement, which acts as a date down endorsement for construction disbursements and draws, is to be used solely in connection with the ALTA 32 series. The endorsement provides for a change to the Date of Coverage as defined in the ALTA 32 series, but does not change the Date of Policy or any other endorsements issued in connection with the policy. It also requires the insertion of any additional exceptions resulting from the title search done in connection with the issuance of the endorsement.



**ENDORSEMENT**

**Attached to Policy No. \_\_\_\_\_**

**Issued by**

**BLANK TITLE INSURANCE COMPANY**

1. Covered Risk 11(a) of this policy is deleted.
2. The insurance [for Construction Loan Advances] added by Section 3 of this endorsement is subject to the exclusions in Section 4 of this endorsement and the Exclusions from Coverage in the Policy, the provisions of the Conditions, and the exceptions contained in Schedule B. For the purposes of this endorsement and each subsequent Disbursement Endorsement:
  - a. "Date of Coverage", is [ \_\_\_\_\_ ] unless the Company sets a different Date of Coverage by an ALTA 33-06 Disbursement Endorsement issued at the discretion of the Company.
  - b. "Construction Loan Advance," shall mean an advance that constitutes Indebtedness made on or before Date of Coverage for the purpose of financing in whole or in part the construction of improvements on the Land.
  - c. "Mechanic's Lien," shall mean any statutory lien or claim of lien, affecting the Title, that arises from services provided, labor performed, or materials or equipment furnished.
3. The Company insures against loss or damage sustained by the Insured by reason of:
  - a. The invalidity or unenforceability of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage;
  - b. The lack of priority of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage, over any lien or encumbrance on the Title recorded in the Public Records and not shown in Schedule B; and
  - c. The lack of priority of the lien of the Insured Mortgage, as security for each Construction Loan Advance made on or before the Date of Coverage over any Mechanic's Lien, if notice of the Mechanic's Lien is not filed or recorded in the Public Records, but only to the extent that the charges for the services, labor, materials or equipment for which the Mechanic's Lien is claimed were designated for payment in the documents supporting a Construction Loan Advance disbursed by or on behalf of the Insured on or before Date of Coverage.
4. This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) by reason of any Mechanic's Lien arising from services, labor, material or equipment:
  - a. furnished after Date of Coverage; or
  - b. not designated for payment in the documents supporting a Construction Loan Advance disbursed by or on behalf of the Insured on or before Date of Coverage.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

**BLANK TITLE INSURANCE COMPANY**

By: \_\_\_\_\_  
Authorized Signatory

**ENDORSEMENT**

Attached to Policy No. \_\_\_\_\_

Issued by

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2. The insurance [for Construction Loan Advances] added by Section 3 of this endorsement is subject to the exclusions in Section 4 of this endorsement and the Exclusions from Coverage in the Policy, the provisions of the Conditions, and the exceptions contained in Schedule B. For the purposes of this endorsement and each subsequent Disbursement Endorsement:
  - a. "Date of Coverage", is [ \_\_\_\_\_ ] unless the Company sets a different Date of Coverage by an ALTA 33-06 Disbursement Endorsement issued at the discretion of the Company.
  - b. "Construction Loan Advance," shall mean an advance that constitutes Indebtedness made on or before Date of Coverage for the purpose of financing in whole or in part the construction of improvements on the Land.
  - c. "Mechanic's Lien," shall mean any statutory lien or claim of lien, affecting the Title, that arises from services provided, labor performed, or materials or equipment furnished.
3. The Company insures against loss or damage sustained by the Insured by reason of:
  - d. The invalidity or unenforceability of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage;
  - e. The lack of priority of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage, over any lien or encumbrance on the Title recorded in the Public Records and not shown in Schedule B; and
  - f. The lack of priority of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage over any Mechanic's Lien if notice of the Mechanic's Lien is not filed or recorded in the Public Records, but only to the extent that direct payment to the Mechanic's Lien claimant for the charges for the services, labor, materials or equipment for which the Mechanic's Lien is claimed has been made by the Company or by the Insured with the Company's written approval.
4. This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) by reason of any Mechanic's Lien arising from services, labor, material or equipment:
  - a. furnished after Date of Coverage; or
  - b. to the extent that the Mechanic's Lien claimant was not directly paid by the Company or by the Insured with the Company's written approval.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

**BLANK TITLE INSURANCE COMPANY**

By: \_\_\_\_\_  
Authorized Signatory

**ENDORSEMENT**

**Attached to Policy No. \_\_\_\_\_**

**Issued by**

**BLANK TITLE INSURANCE COMPANY**

1. Covered Risk 11(a) of this policy is deleted.
2. The insurance [for Construction Loan Advances] added by Section 3 of this endorsement is subject to the exclusions in Section 4 of this endorsement and the Exclusions from Coverage in the Policy, the provisions of the Conditions, and the exceptions contained in Schedule B. For the purposes of this endorsement and each subsequent Disbursement Endorsement:
  - a. "Date of Coverage," is [\_\_\_\_\_] unless the Company sets a different Date of Coverage by an ALTA 33-06 Disbursement Endorsement issued at the discretion of the Company.
  - b. "Construction Loan Advance," shall mean an advance that constitutes Indebtedness made on or before Date of Coverage for the purpose of financing in whole or in part the construction of improvements on the Land.
  - c. "Mechanic's Lien," shall mean any statutory lien or claim of lien, affecting the Title, that arises from services provided, labor performed, or materials or equipment furnished.
3. The Company insures against loss or damage sustained by the Insured by reason of:
  - a. The invalidity or unenforceability of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage;
  - b. The lack of priority of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage, over any lien or encumbrance on the Title recorded in the Public Records and not shown in Schedule B; and
  - c. The lack of priority of the lien of the Insured Mortgage, as security for each Construction Loan Advance made on or before the Date of Coverage over any Mechanic's Lien, if notice of the Mechanic's Lien is not filed or recorded in the Public Records, but only to the extent that direct payment to the Mechanic's Lien claimant for the charges for the services, labor, materials or equipment for which the Mechanic's Lien is claimed has been made by the Insured or on the Insured's behalf on or before Date of Coverage.
4. This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) by reason of any Mechanic's Lien arising from services, labor, materials or equipment:
  - a. Furnished after Date of Coverage; or
  - b. To the extent that the Mechanic's Lien claimant was not directly paid by the Insured or on the Insured's behalf.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

**BLANK TITLE INSURANCE COMPANY**

By: \_\_\_\_\_  
Authorized Signatory

**ENDORSEMENT**

Attached to Policy No. \_\_\_\_\_

Issued by

**BLANK TITLE INSURANCE COMPANY**

1. The Date of Coverage is amended to \_\_\_\_\_.

[a. The current disbursement is: \$ \_\_\_\_\_ ]

[b. The aggregate amount, including the current disbursement, recognized by the Company as  
disbursed by the Insured is: \$ \_\_\_\_\_ ]

2. Schedule A is amended as follows:

3. Schedule B is amended as follows:

[Part I]

[Part II]

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

**BLANK TITLE INSURANCE COMPANY**

By: \_\_\_\_\_

## CFPB'S Loss Mitigation Rules

The CFPB has issued new mortgage servicing rules which will impose specific loss mitigation requirements on federally related mortgage lenders prior to the lender or its servicer initiating or completing a foreclosure action. These new procedures are specifically designed for the benefit of residential homeowners who are facing foreclosure and go into effect on January 10, 2014. The new rules amend Regulation X of RESPA and read in pertinent part as follows:

- A. A servicer **shall not** make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless a borrower's mortgage loan obligation is more than 120 days delinquent. See, 12 CFR §1024.41(f) (emphasis added) and
  
- B. If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process but more than 37 days before a foreclosure sale, a servicer **shall not** move for foreclosure judgment or order of sale, or conduct a foreclosure sale, unless:
  - (1) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;
  - (2) The borrower rejects all loss mitigation options offered by the servicer; or
  - (3) The borrower fails to perform under an agreement on a loss mitigation option.

See, §1024.41(g) (emphasis added).

The prohibitions contained in the new rules are each governed by the mandatory phrase “shall not”. Due to the absolute nature of this phrase, it may be argued that commencing or continuing with a foreclosure in violation of the regulations makes the foreclosure itself void. Unfortunately, there is nothing in the rule which definitively states that to be the case. In this regard, it is worth noting that, unlike other statutes or regulations containing specific pre-foreclosure requirements such as the Servicemembers Civil Relief Act, **there is no time frame within which the borrower must bring an action to invalidate the foreclosure and there is no BFP exemption.** Nevertheless, until such time as the rule is amended or has been judicially analyzed, whether a non-compliant foreclosure is void or voidable is an open question.

In addition to the foreclosure being void or voidable, §1024.41(a) also provides a borrower with a private cause of action should a lender violate the loss mitigation requirements. In pertinent part, this subdivision states: “A borrower **may** enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. 2605(f))”. (Emphasis added).



Under 12 U.S.C. 2605(f), the borrower is entitled to recover any actual damages sustained plus the fees and costs incurred in bringing the action. If it is determined that the lender has engaged in a “pattern and practice of noncompliance”, the court is given the discretion to award whatever additional damages it decides are appropriate in an amount not to exceed \$2000.00. The statute of limitations for bringing an action under 12 U.S.C. 2605(f) is three (3) years from the date of the violation. See, 12 U.S.C. 2614.\

Finally, the new rule also leaves open the question of whether or not junior creditors have standing to contest the foreclosure process. Again, the rule is silent on this point and the issue may be argued both ways. Consequently, the ultimate conclusion on this issue will most likely be left to the courts.

### **Impact**

Since a foreclosure by a lender who has failed to comply with the loss mitigation procedures may be considered void as opposed to voidable, and there is no BFP exemption, coverage afforded under any post foreclosure policy will be at risk unless:

- a. The policy contains an appropriate exception;
  - b. The agent has performed the appropriate due diligence regarding the foreclosure process;
  - c. In a judicial foreclosure state, the applicable appeal period has run;
  - d. In non-judicial states, an appropriate affidavit is recorded with the foreclosure sale documents; or
  - d. The agent obtains a clear and unambiguous affidavit from the foreclosing lender attesting to its compliance.

The biggest risk will occur in non-judicial foreclosure states as in judicial foreclosure states courts are likely to require specific affidavits attesting to the lenders compliance. Although it is also suspected that courts will eventually carve out protections for BFPs, as well as determine what rights, if any, junior creditors may have to contest the foreclosure, the litigation costs of having to get to that point could be substantial

## TEXT OF LOSS MITIGATION RULES

### § 1024.41 Loss mitigation procedures.

(a) *Enforcement and limitations.* A borrower may enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. 2605(f)). Nothing in section 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option. Nothing in section 1024.41 should be construed to create a right for a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or offer of, any loss mitigation option or to eliminate any such right that may exist pursuant to applicable law.

(b) *Receipt of a loss mitigation application. (1) Complete loss mitigation application.* A complete loss mitigation application means an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower. A servicer shall exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application.

(2) *Review of loss mitigation application submission. (i) Requirements.* If a servicer receives a loss mitigation application 45 days or more before a foreclosure sale, a servicer shall:

(A) Promptly upon receipt of a loss mitigation application, review the loss mitigation application to determine if the loss mitigation application is complete; and

(B) Notify the borrower in writing within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving the loss mitigation application that the servicer acknowledges receipt of the loss mitigation application and that the servicer has determined that the loss mitigation application is either complete or incomplete. If a loss mitigation application is incomplete, the notice shall state the additional documents and information the borrower must submit to make the loss mitigation application complete and the applicable date pursuant to paragraph (2)(ii) of this section.

The notice to the borrower shall include a statement that the borrower should consider contacting servicers of any other mortgage loans secured by the same property to discuss available loss mitigation options.

(ii) *Time period disclosure.* The notice required pursuant to paragraph (b)(2)(i)(B) of this section must state that the borrower should submit the documents and information necessary to make the loss mitigation application complete by the earliest remaining date of:

(A) The date by which any document or information submitted by a borrower will be considered stale or invalid pursuant to any requirements applicable to any loss mitigation option available to the borrower;

(B) The date that is the 120th day of the borrower's delinquency;

(C) The date that is 90 days before a foreclosure sale; or

(D) The date that is 38 days before a foreclosure sale.

(c) *Evaluation of loss mitigation applications.* (1) *Complete loss mitigation application.*

If a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, then, within 30 days of receiving a borrower's complete loss mitigation application, a servicer shall:

(i) Evaluate the borrower for all loss mitigation options available to the borrower; and

(ii) Provide the borrower with a notice in writing stating the servicer's determination of which loss mitigation options, if any, it will offer to the borrower on behalf of the owner or assignee of the mortgage loan.

(2) *Incomplete loss mitigation application evaluation.* (i) *In general.* Except as set forth in paragraph (c)(2)(ii) of this section, a servicer shall not evade the requirement to evaluate a complete loss mitigation option for all loss mitigation options available to the borrower by offering a loss

mitigation option based upon an evaluation of any information provided by a borrower in connection with an incomplete loss mitigation application.

(ii) *Reasonable time.* Notwithstanding paragraph (c)(2)(i) of this section, if a servicer has exercised reasonable diligence in obtaining documents and information to complete a loss mitigation application, but a loss mitigation application remains incomplete for a significant period of time under the circumstances without further progress by a borrower to make the loss mitigation application complete, a servicer may, in its discretion, evaluate an incomplete loss mitigation application and offer a borrower a loss mitigation option. Any such evaluation and offer is not subject to the requirements of this section and shall not constitute an evaluation of a single complete loss mitigation application for purposes of paragraph (i) of this section.

(d) *Denial of loan modification options.* If a borrower's complete loss mitigation application is denied for any trial or permanent loan modification option available to the borrower pursuant to paragraph (c) of this section, a servicer shall state in the notice sent to the borrower pursuant to paragraph (c)(1)(ii) of this section:

(1) The specific reasons for the servicer's determination for each such trial or permanent loan modification option; and

(2) If applicable pursuant to paragraph (h) of this section, that the borrower may appeal the servicer's determination for any such trial or permanent loan modification option, the deadline for the borrower to make an appeal, and any requirements for making an appeal.

(e) *Borrower response. (1) In general.* Subject to paragraphs (e)(2)(ii) and (e)(2)(iii) of this section, if a complete loss mitigation application is received 90 days or more before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than 14 days after the servicer provides the offer of a loss mitigation option to the borrower. If a complete loss mitigation application is received less than 90 days before a foreclosure sale, but

more than 37 days before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than 7 days after the servicer provides the offer of a loss mitigation option to the borrower.

(2) *Rejection.* (i) *In general.* Except as set forth in paragraphs (e)(2)(ii) and (e)(2)(iii) of this section, a servicer may deem a borrower that has not accepted an offer of a loss mitigation option within the deadline established pursuant to paragraph (e)(1) of this section to have rejected the offer of a loss mitigation option.

(ii) *Trial Loan Modification Plan.* A borrower who does not satisfy the servicer's requirements for accepting a trial loan modification plan, but submits the payments that would be owed pursuant to any such plan within the deadline established pursuant to paragraph (e)(1) of this section, shall be provided a reasonable period of time to fulfill any remaining requirements of the servicer for acceptance of the trial loan modification plan beyond the deadline established pursuant to paragraph (e)(1) of this section.

(iii) *Interaction with appeal process.* If a borrower makes an appeal pursuant to paragraph (h) of this section, the borrower's deadline for accepting a loss mitigation option offered pursuant to paragraph (c)(1)(ii) of this section shall be extended until 14 days after the servicer provides the notice required pursuant to paragraph (h)(4) of this section.

(f) *Prohibition on foreclosure referral.* (1) *Pre foreclosure review period.* A servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless a borrower's mortgage loan obligation is more than 120 days delinquent.

(2) *Application received before foreclosure referral.* If a borrower submits a complete loss mitigation application during the pre-foreclosure review period set forth in paragraph (f)(1) of this section or before a servicer has made the first notice or filing required by applicable law for any judicial

or non-judicial foreclosure process, a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless:

(i) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;

(ii) The borrower rejects all loss mitigation options offered by the servicer; or

(iii) The borrower fails to perform under an agreement on a loss mitigation option.

(g) *Prohibition on foreclosure sale.* If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, unless:

(1) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;

(2) The borrower rejects all loss mitigation options offered by the servicer; or

(3) The borrower fails to perform under an agreement on a loss mitigation option.

(h) *Appeal process. (1) Appeal process required for loan modification denials.* If a servicer receives a complete loss mitigation application 90 days or more before a foreclosure sale or during the period set forth in paragraph (f) of this section, a servicer shall permit a borrower to appeal the servicer's determination to deny a borrower's loss mitigation application for any trial or permanent loan modification program available to the borrower.

(2) *Deadlines.* A servicer shall permit a borrower to make an appeal within 14 days after the servicer provides the offer of a loss mitigation option to the borrower pursuant to paragraph (c)(1)(ii) of this section.

(3) *Independent evaluation.* An appeal shall be reviewed by different personnel than those responsible for evaluating the borrower's complete loss mitigation application.

(4) *Appeal determination.* Within 30 days of a borrower making an appeal, the servicer shall provide a notice to the borrower stating the servicer's determination of whether the servicer will offer the borrower a loss mitigation option based upon the appeal. A servicer may require that a borrower accept or reject an offer of a loss mitigation option after an appeal no earlier than 14 days after the servicer provides the notice to a borrower. A servicer's determination under this paragraph is not subject to any further appeal.

(i) *Duplicative requests.* A servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower's mortgage loan account.

(j) *Small servicer requirements.* A small servicer shall not make the first notice or filing required by applicable law for any judicial or non judicial foreclosure process unless a borrower's mortgage loan obligation is more than 120 days delinquent. A small servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process and shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of an agreement on a loss mitigation option.

## **FIRPTA AND SHORT SALES**

Foreign persons are not immune to the housing bust that began in the late 2000's and FIRPTA issues can certainly arise in short sale situations, where they can derail even the most well-planned short sale. Since FIRPTA is not usually on the minds of the parties to a short sale or even their realtors, it often falls on the closing agent to bring up the issue.

### **I. INTRODUCTION TO FIRPTA**

The Foreign Investment in Real Property Tax Act ("FIRPTA"), codified at 26 USC § 1445 (see also Treasury Regulation 26 C.F.R. § 1.1445-1), was first enacted back in 1980. The main provision of FIRPTA, which affects title agents, requires the withholding and subsequent remittance to the IRS of 10% of the "amount realized" by a foreign seller of a US real property interest unless one or more exemptions apply to the seller or the transaction.

FIRPTA does not actually impose requirements to withhold and remit funds to the IRS directly on the title agent. These requirements are imposed on the Buyer, although the title agent usually ends up with the responsibility of making sure that either FIRPTA does not apply to the transaction or that, if it does, the correct forms are filled out and submitted to the IRS along with the correct amount of withholding. Since the agent oversees this whole process during closing, a thorough understanding of when FIRPTA applies, what exemptions are available and how to complete the forms and remit to the IRS is necessary. Non-attorney settlement agents need to exercise caution in dealing with the parties in FIRPTA situations because, should the IRS determine that FIRPTA's provisions were not properly followed, the buyer or the seller may try to place the blame on the settlement agent.

Documentation and disclaimers regarding the scope of the settlement agent's duties are key. In certain situations, a hold harmless may be advised to protect the agent.

### **II. BASIC STATUTORY REQUIREMENTS FOR WITHHOLDING**

The basic rule of FIRPTA is that, unless a special exemption applies, whenever a foreign person disposes of a United States real property interest, the Buyer is required to deduct and withhold 10% of the amount realized from the consideration paid over to the foreign Seller. This rule contains four main concepts that are defined terms under the Internal Revenue Code and accompanying Treasury Regulations and whose definitions are key to proper application of FIRPTA in a variety of circumstances, particularly short sales. These terms are: "Foreign Person," "Real Property Interest," "Buyer" and "Amount Realized."

#### **A. Understanding the Terminology**

##### **1. Foreign Person**

A "foreign person" is (1) an individual that is not a US citizen or a resident alien, (2) a foreign corporation that has not elected to be treated as a domestic corporation or (3) a foreign partnership, trust or estate. Whether the Seller of a real property interest is a foreign person under FIRPTA is a matter of law and not one to be determined by someone who is not a tax



professional. Therefore, any settlement agent that is not a tax professional should not be deciding whether a given Seller is a “foreign person” or not under FIRPTA. For FIRPTA purposes, any entity that is considered to be a “disregarded entity” for tax purposes, such as a single-member LLC, is not considered to be the Seller for purposes of determining whether the Seller is a foreign person or not. It is the principal of that entity that is considered the Seller. So, a single-member LLC formed under the laws of a given state whose sole member is a non-resident alien could be considered to be a foreign person under FIRPTA.

## **2. United States Real Property Interest**

While determining whether a Seller is a “foreign person” under FIRPTA can be difficult, it is generally a given that the title agent is dealing with a “real property interest” or else title insurance would not be involved. Section 897 of the Internal Revenue Code (26 USC § 897) defines “US real property interest” to include, among other things, any interest in real property that is located anywhere in the United States including the US Virgin Islands. This would include any fee simple, leasehold, life estate, remainder or easement interest in real property.

## **3. Buyer**

FIRPTA defines the term “Buyer” as any person that “acquires a US real property interest by purchase, exchange, gift or any other transfer.” It does not matter whether the Buyer is a foreign person or a US person. FIRPTA withholding requirements apply only when the Seller is a foreign person.

## **4. Amount Realized**

The “amount realized” is defined as the total of the amount of cash paid by the Buyer plus the fair market value of all other property given to the Seller by the Buyer in exchange for the US real property interest at issue, **plus** “the outstanding amount of any liability assumed by the Buyer or to which the US real property interest is subject immediately before and after the transfer.” In other words, Cash to be paid + FMV of other property to be transferred + the amount of any lien which the Buyer is assuming. In plain English, this means that the “amount realized” generally equals the amount the buyer is paying for the property (in cash and other property) plus the outstanding amount of any mortgage or other lien that the buyer might be taking the property subject to. For example, if the buyer was paying the seller \$50,000 in cash, assuming the seller’s mortgage which had an outstanding balance of \$50,000 and also giving the seller a boat worth \$25,000, the amount realized by the seller would be the total of these three things, or \$125,000.

It is important not to confuse “amount realized” with “gain.” FIRPTA withholding is based on the “amount realized” as defined above and not whether the seller is losing money on the sale or whether the property is worth more or less than the liens that encumber it. This is important because some people mistakenly think that the “amount realized” for FIRPTA purposes on a short sale is zero. THIS IS NOT TRUE. In fact, there was a private letter ruling that specifically addresses this common misunderstanding.

## **III. Figuring the Withholding**

In the absence of an exemption situation (discussed below), the amount of tax to be withheld is usually equal to 10% of the amount realized which, as was discussed above, is generally the contract price. So, for a contract price of \$150,000, the withholding amount is \$15,000. This would leave \$135,000 for any loan or other encumbrance payoffs, commissions and all closing costs. When there are joint Sellers and not all are foreign persons, withholding is required on that portion of the contract price that bears the same ratio to the whole price as the foreign person's ownership interest bears to 100%. Husband and wife considered to each own a ½ interest in real property. So, if real property which is being sold for \$300,000 is owned by a husband and wife and only the husband is a foreign person, then FIRPTA withholding would only be due on ½ of the sale price. When there are multiple foreign Sellers, the agent may allocate the withholding among the foreign Sellers as they agree.

The agent is well-advised to ask about the applicability of FIRPTA as soon as the contract arrives at their office. It is entirely possible, particularly in a short sale situation, that failure to consider FIRPTA early on could result in the seller (or someone else) having to bring money to the closing table to pay the withholding in order for the sale to go through.

#### **IV. EXEMPTIONS TO FIRPTA WITHHOLDING**

FIRPTA provides several exemptions to the requirement to withhold 10% of the amount realized when a foreign person disposes of a US real property interest. These exemptions are introduced in the FIRPTA statute (26 USC § 1445) and are described in greater detail in several Treasury Regulations. For purposes of this seminar, only exemptions described in 26 C.F.R. § 1.1445-2 and 26 U.S.C. § 1.1445-3 will be discussed as the others will generally only be encountered in more complex commercial transactions involving entities such as corporations and partnerships.

##### **A. Furnishing of a Non-Foreign Affidavit**

This first exemption basically states that if a Seller provides to the Buyer or a qualified substitute a non-foreign affidavit that contains, under penalties of perjury, the Seller's United States taxpayer identification number and an assertion that the Seller is not considered to be a "foreign person" then the Buyer is not obligated to withhold any portion of the sales price. When this exemption is relied upon, the Buyer is required to retain the affidavit for at least five years following the tax year in which the sale took place.

The Buyer is not permitted to rely on any certification of the Seller stating that he or she is not a foreign person under FIRPTA if the Buyer either has knowledge that the certification is false or receives notice from either the Seller's agent or qualified substitute or the Buyer's agent or that the certification is false. Title agents might pause at this point and ask whether they might be considered agents or qualified substitutes of either the Seller or the Buyer. 26 USC § 1445(3) and (4) and 26 C.F.R. § 1.1445-4 define Seller's agent and Buyer's agent, respectively, as a person who represents the Seller or Buyer in any negotiation with the opposite party regarding the transaction or in settling the transaction. However, 26 USC § 1445(5) goes on to state that for FIRPTA purposes one will not be considered to be an agent of the Seller or Buyer simply because he or she "performs one or more of the following acts:

- a. The receipt and disbursement of any portion of the consideration for the transaction; or
- b. The recording of any document in connection with the transaction.”

The term “qualified substitute,” which was added as part of the American Housing Rescue and Foreclosure Prevention Act of 2008, is defined as either “(A) the person (including any attorney or title company) responsible for closing the transaction other than the Seller’s agent, and (B) the Buyer’s agent.” Therefore, the title/settlement agent should be extra cautious when dealing with non-foreign affidavits and may want to make an appropriate disclosure if he or she has knowledge that the affidavits contain false statements. The penalties to the Buyer that knowingly relies on a false affidavit can be severe and the Buyer may try to shift the liability to the agent.

### **B. Purchase of a Residence for \$300,000 or Less**

One of the most common FIRPTA exemptions applies when the property being sold is a personal residence, the Buyer is an individual and the sale price is \$300,000 or less. If the Buyer, the Buyer’s spouse, sibling or any of the Buyer’s ancestors (parents, grandparents, great-grandparents) or lineal descendants is going to reside on the property for at least one-half the time the property is going to be used as a residence during the first two years following the transfer, then the transfer is exempt from FIRPTA withholding requirements.

Any time that the property will not be occupied by anyone during the first two years is not considered when determining whether the exemption applies. For example, if the Buyer purchases a vacation home for \$250,000 and plans to reside in it himself for one month out of the year, allow his sister and her family to stay there one month out of the year and his best friend to live there one month out of the year for the first two years, then the exemption will apply because the property will be vacant for nine months and occupied by the Buyer and the Buyer’s sibling for 2/3 of the time it is being occupied during the first two years. A Buyer’s affidavit can be used to create a paper trail for the agent’s file to show that no moneys were withheld in reliance on this exemption.

### **C. Issuance of a Withholding Certificate by the IRS**

The third exemption available to reduce or eliminate the need to withhold under FIRPTA is the withholding certificate, which is discussed extensively in Treasury Regulation 26 C.F.R. § 1.1445-3. This waiver is accomplished by completing IRS Form 8288-B in advance of the sale and having the seller present the form with the IRS’s approval to the agent at or before the closing. If the agent is presented with a pre-approved withholding certificate, all the agent needs do is abide by the determination in the certificate, which might be to withhold the entire 10%, withhold some amount less than 10% or withhold nothing. If full or partial withholding is required, Form 8288 must be submitted to the IRS with payment as usual, but a copy of the withholding certificate must also be attached. The withholding certificate may also be conditioned upon the Seller signing an agreement for the payment of the tax due on the transfer,

which will also require the posting of security for the payment of that tax in the form of a bond or a letter of credit by the taxpayer.

It usually takes several months for the IRS to issue a withholding certificate. The mere filing of an application for a withholding certificate does not eliminate the need to withhold the 10%. However, if the closing agent is provided with proof that an application for a withholding certificate was filed with the IRS, then the actual payment of withheld funds can be delayed until 20 days after the IRS mails out either a withholding certificate or a notice of denial.

#### **D. Seller's Non-Recognition of Gain or Loss**

A foreign Seller may be able to determine in advance that he or she will not have to recognize any gain or loss from a transaction. In such a case, he, she or it (in the case of an entity) may wish to take advantage of the exemption available under 26 C.F.R. § 1.1445-2(d)(2) which allows a Seller to provide a Buyer with a signed statement verified as true under penalty of perjury that the Seller is not required to recognize any gain or loss with respect to the particular transaction. According to the governing regulation, the Seller has until the 20th day following the transaction to supply the Buyer with the notice and a cover letter to be sent to the IRS. This exception does not apply for simultaneous 1031 like-kind exchanges or other transactions that do not have complete nonrecognition of gain or loss.

The statement does not need to be on any particular form, but it does need to contain the following elements: (1) a statement that the writing constitutes a notice of a transaction that qualifies for nonrecognition or is governed by a treaty provision pursuant to the requirements of 26 C.F.R. § 1.1445(d)(2); (2) name, address and taxpayer ID number of the Seller; (3) a statement that the Seller does not have to recognize gain or loss in the transaction; (4) a short description of the transaction itself and (5) a short discussion of the facts and law that justify the conclusion that the transaction qualifies for nonrecognition of gain or loss. The Buyer may not rely on any such statement if the Buyer knows or has reason to know that the transaction does not qualify for nonrecognition in its entirety.

This exemption is not one that is used very often. However, it is available to the foreign taxpayer, so the agent should be aware of it. It is up to the Seller and the Buyer to come to an agreement regarding this exception and whether both parties are comfortable relying on it. The prudent agent will keep a copy of the statement and some evidence that the Buyer agreed to not withhold based on this exemption to avoid any problems for the agent later on should the IRS determine that the transaction did not qualify for nonrecognition.

#### **V. SHORT SALES**

As mentioned above, much of the trouble between FIRPTA and short sales comes from a misunderstanding of the term "amount realized". There are no regulations that specifically address FIRPTA and short sales and also no binding determination of how to calculate the amount realized in a short sale situation. One might be tempted to say that the amount realized is zero because the seller is not getting any proceeds. Although seemingly logical, this would be incorrect. A foreign person who purchases a home in the US for \$300,000, takes out a \$400,000

mortgage loan when the value increases to \$500,000 and then has to sell short for \$350,000 when the real estate market crumbles walks away with no proceeds. Nevertheless, this would trigger FIRPTA withholding of at least \$35,000, i.e. 10% of the purchase price. However, the amount realized would also include the amount of any indebtedness which the Buyer takes subject to or to which the property was subject immediately before and after the transfer. In this situation such as this, there is forgiveness of debt and the 10% should be calculated on the sum of the contract price plus the amount of debt forgiven. Using this method of calculation in our example above, the withholding amount jumps from \$35,000 to \$40,000 assuming the lender gets all the proceeds from the sale (which, of course, is never the case) and the amount due on the loan is still \$400,000 at the time of the sale.

Even assuming that the "amount realized" could be accurately determined, it still has to be listed as a line item on the preliminary HUD that is submitted to the short lender to avoid having a last-minute disaster derail the short sale. The short sale lender might refuse to approve a short sale if the transaction is subject to FIRPTA withholding or may require that the funds necessary to meet the withholding requirement be brought to the closing table by the seller, the buyer or some third party. While a withholding certificate would give an exact determination as to whether withholding was necessary and, if so, how much, the application would have to be filed many months in advance of the request for short sale approval in order to have the withholding certificate issued by the time the preliminary HUD is sent to the short sale lender.

## **VI. CONCLUSION**

While all the nuances of the FIRPTA statute and accompanying regulations may seem overwhelming, they illustrate why it is best to start to address any possible FIRPTA issues as soon as possible (ideally when the realtor takes the listing) in order to avoid any unpleasant surprises and minimize the chance of closing disasters. Although the non-attorney agent can offer little help in answering FIRPTA questions, simply raising the issue and being familiar with the process, the exemptions and the forms can go a long way toward helping the transaction close as smoothly as possible. Also, by being familiar with the potential pitfalls, the agent can hopefully take the necessary steps to protect himself or herself by obtaining copies of the appropriate documents, advising the parties to seek the assistance of qualified tax professionals and, if desired, obtaining disclaimers and hold harmless agreements. As always, whenever an agent has a FIRPTA question, he or she should feel free to contact the Old Republic Underwriting Department for assistance.

## **Back Chain Creditors' Rights Issues**

Although the 2006 Owner's and Loan Policies exclude creditors' rights issues from coverage, they only do so relative to the specific transaction covered by the policy being issued. Unfortunately, unless an appropriate exception is raised in the policy, we continue to be liable for any creditors' rights issues that may be lurking in the chain of title leading up the current transaction.

Transfers that may be characterized as either preferential in nature or as a fraudulent conveyance create the most concern but are often overlooked. These issues arise when the underlying transaction leaves the debtor either undercapitalized or insolvent such as when there is an increase in a borrower's debt obligation or a decrease in assets without adequate or full consideration.

### **Preferences**

§547 of the Bankruptcy Code (11 U.S.C. §547) gives the bankruptcy trustee the power to avoid the transfer of any interest in property occurring within 90 days prior to the filing of the bankruptcy petition or 1 year if the transfer is made to an insider. The specific elements of what constitutes a preference are set out in §547(b) and are as follows:

A transfer of an interest of the debtor in property (1) to or for the benefit of the creditor; (2) for or on account of an antecedent debt; (3) made while the debtor was insolvent; (4) made on or within 90 days before the date of the filing of the petition, and (5) one that enables the creditor to receive more than such creditor would receive in a Chapter 7 liquidation of the estate.

It is not necessary for the trustee in a §547 action to prove that the debtor is in fact insolvent, insolvency is simply presumed to be the case relative to any transfer made within the 90 day period. There is also no requirement for the trustee to prove that the benefitted creditor knew or should have known that the debtor was insolvent at the time of the transfer. Simply put, all transfers that occur within the 90 day period prior to the filing of the petition are at risk of being challenged.

In order to determine if the transfer occurred within the 90 day period, you must look at not only the date that the interest was created as stated in the instrument, but also when that instrument was recorded in the real estate records. A refinance or purchase money mortgage closed before the 90 day period and recorded within 30 days, even when recorded within the 90 day preference period, is deemed to have occurred prior to the 90 day period. Transactions recorded outside of this window, however, are at risk.

### **Fraudulent Transfers**

§548 of the Bankruptcy Code (11 U.S.C. §548) governs fraudulent conveyances. This section allows the trustee or a creditor to avoid a transfer by the debtor that was made "with actual intent

to hinder, delay, or defraud an entity to which the debtor was or became... indebted." §548(a)(1)(B) also allows an avoidance action for transfers for which the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation," and where the debtor "was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation," or as a result of the transfer or obligation, the debtor became undercapitalized. Unlike the shorter limitations provided in §547, the look back period for §548 actions is two years, and this period may be further extended by state law.

The primary concern and focus is whether the debtor received sufficient value (i.e., value for value), and whether the transaction rendered the debtor insolvent or undercapitalized. A common example of a §548 violation is when a debtor pledges its property as security for a loan, but the loan proceeds are disbursed in favor of a related, but different, entity. In this situation, the debtor has taken on a new obligation while receiving no benefit. Another example arises in the situation where an unsecured creditor attempts to strengthen its position by demanding the debtor pledge property as security for the loan. In this instance, one of the debtor's assets is encumbered, with the debtor receiving no additional value in return. In both examples, the debtor's equity in its assets declines, while its debt obligations increase.

§548 is particularly perilous when you see a transfer in the back chain of title as the lookback period applicable to fraudulent conveyances can extend well beyond the two years provided for in the Bankruptcy Code if the bankruptcy trustee chooses instead to use state law to attack the transaction. State law often provides an advantage to the trustee as state statutes frequently provide a longer statute of limitations than that afforded by §548. In some cases, states statutes allow for as long as a six (6) year lookback period. Accordingly, care should be taken whenever a questionable transaction is noted in the back chain.

## **Scenarios**

### **1. Deed in Lieu Transactions**

When the value of the property transferred by a deed in lieu is greater than the outstanding balance owed on the loan that transfer may be challenged either as a preference under §547 or a fraudulent conveyance under §548. A trustee may still challenge the transaction even when the value of the property appears to be less than the loan amount if the trustee feels that property was not properly appraised.

### **2. No consideration transfers to a related party or an SPE**

Since these transactions do not involve an exchange of "reasonably equivalent value", they are easily challenged as either actual or constructive fraud. Transactions in which there is an agreement not to record something; the transfer price is far below the market value; are done in the middle of litigation; or are done when the debtor was insolvent or when the debtor was made insolvent by the transfer, are all signs of a possible fraudulent transfer.

3. Up-Stream, Side Stream, and Leveraged Buy-Out Transactions

Up-stream transactions describe transactions between a parent and subsidiary while side-stream transactions are between sister companies. They can be identified when the loan proceeds do not go to the same party that has put the property up for collateral. In these situations, an interest in the real estate has been transferred by the fee owner without that same owner also receiving the proceeds of the loan.

Leveraged buy-outs are generally associated with the acquisition of a business. In these transactions, the property being mortgaged is not owned by the business but by the owner of the business. Neither the excess cash nor the loan proceeds are set aside either for the operation of the business or for the creditors.

4. Mortgage Foreclosures

If the foreclosure bid amount is less than the reasonably equivalent value of the property, the foreclosure sale may be challenged if the former fee owner files for bankruptcy. The theory here is that the loss of equity in the real estate has deprived creditors of potential assets and consequently the sale is invalid.

It should be noted that the U.S. Supreme Court in BFP v. Resolution Trust Corporation held that a foreclosure sale is valid for §548 purposes, regardless of the bid price, so long as the foreclosure sale was pursuant to a noncollusive, regularly conducted nonjudicial sale. This decision, however, is limited to §548 challenges and such sales are still in danger of being found invalid as a preferential transfer under §547. (See, In Re Villarreal; and In Re Whittle).

**Exception**

If a back chain issue is noted, the following exception must be taken in Schedule B regarding the transfer:

Any claim which arises out of the transfer from \_\_\_\_\_ to \_\_\_\_\_, dated \_\_\_\_\_ and recorded on \_\_\_\_\_ in Book \_\_\_\_\_, page \_\_\_\_\_, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws.



## Deeds in Lieu Transactions

Deeds in lieu of foreclosure transactions present a number of potential title issues which must be carefully analyzed before agreeing to insure either the lender's ownership interest or any subsequent conveyance. These types of transactions are generally entered into between borrowers and lenders in order to avoid foreclosure proceedings and are recognized by most courts as a legitimate and efficient alternative to a foreclosure proceeding.

When a deed in lieu is taken by the lender, one of the primary questions that must be addressed is whether the lender's new fee interest has merged with its mortgage interest thus terminating or extinguishing the mortgage. In order to avoid this possibility, some jurisdictions require that specific anti-merger language be inserted into the deed. The existing mortgage should nevertheless continue to be shown as a title exception until it is formally released. Additionally, unlike a normal foreclosure, a deed in lieu transaction does not extinguish any other liens or encumbrances that may exist on the property. Therefore these junior interests must also continue to be shown as exceptions to title unless they have been released by the proper party.

In addition to the "merger" and "junior interest" concerns, the following issues may also be grounds to attack the transfer:

1. The deed is in reality an equitable mortgage. In other words, from the structure of the transaction it is evident that the parties did not intend that the deed be an absolute conveyance but intended it to act as security for the debt. Any scenario in which the debtor has the right to remain in possession of the property after the conveyance or has been granted any type of repurchase option could be construed as an equitable mortgage as the rent payments may in reality be payments on the loan obligation. It is imperative that an inspection of the property be made to determine the debtor's possession status prior to committing to insure the transaction.

An estoppel certificate, executed by the party who is providing the deed in lieu, should be obtained as part of every transaction. This certificate is an affidavit that should clearly state that the deed is not being given as additional security and it is the grantor's express intent that the conveyance is intended as an absolute conveyance in which the grantor understands and intends to divest itself of all right, title and interest in and to the property.

2. A deed in lieu transaction is often nothing more than a clog on the debtor's right of redemption. Clogging refers to the cutting off of either the debtors or junior creditors rights to redeem the property from foreclosure. For example, if a debtor agrees to give a deed in lieu of foreclosure if certain future events occur, the right of redemption is forfeited upon the occurrence of the triggering event. Another example is in the case where the lender has been granted an option to purchase the mortgaged property at some future time. Such an option should not become automatically effective upon the debtor's default and should be set a fair market value. If the option purchase price is set for an

amount that is less than the amount owed on the note or for a fixed price and was granted simultaneously as part of the original loan transaction, it will be considered a clog.

3. The transaction may be set aside pursuant to a bankruptcy filing as either a preferential transfer or fraudulent transaction or attacked under a state's fraudulent transfer statutes.
4. Lack of or unfairness of the consideration given for the transaction or the transaction is the product of fraud duress or undue influence.

A lender's ALTA loan policy, by its terms, remains in force if fee title is obtained either by foreclosure or a deed in lieu of foreclosure. If the lender wants coverage through the date of acquisition of the fee title, rather than simply update the existing loan policy, an owner's policy in an amount equal to the outstanding principal indebtedness owed, plus any additional interest, taxes and expenses which may be due or for the current fair market value of the property should be issued at the appropriate filed rate.

Finally, if the search discloses a deed in lieu of foreclosure recorded in the chain of title within 90 days prior to the current transaction, additional requirements and exceptions may be needed. For example, it may be necessary to confirm that the grantor of the deed in lieu has not filed bankruptcy. In addition, you may be required to obtain verification of the outstanding balance of the recently released debt in order to compare it to the current sale price. Otherwise, it may be necessary to insert a creditor's rights exception into the new policy.

## **ALTA Limited Pre-Foreclosure Policy and Date-Down Endorsement**

Numerous products exist in the marketplace and are issued to lenders which want to determine the status of title and the identity of parties to be joined as parties in a foreclosure proceeding. The Limited Pre-Foreclosure Policy was developed in an attempt to standardize the coverage available to a lender in a manner which does not expose the title industry to undue risk. This product is a limited search product (as described in more detail below) which gives limited coverage to a lender beginning to conduct a foreclosure sale or considering acquiring title through a deed in lieu of foreclosure.

The policy indemnifies a lender against several items regularly found in a search of the Public Records **unless specifically excepted in Schedule B of the Policy**. Those matters include conveyances, Notices of Judicial Proceedings (as defined in the Policy), Notices of Bankruptcy (as defined in the Policy) and mortgages recorded in the Public Records subsequent to the Insured's Mortgage. In addition, coverage is provided as to Judgment Liens (as defined in the Policy) and federal tax liens against the mortgagor(s) recorded before or after recording of the Insured's mortgage provided, again, that there is recorded notice in the Public Records. Lastly, coverage is given as to ad valorem real estate taxes and special assessments imposed by a governmental authority and **due and payable at Date of Policy**.

It is important to note that, except for taxes and assessments, coverage for all other matters in the policy is expressly limited to matters appearing in the Public Records. The Limited Pre-Foreclosure Date Down Endorsement is intended and is available to extend the Policy if an Insured encounters delays in the foreclosure process.

Issuance of the policy requires examination of the Public Records from the date the mortgage or deed of trust was recorded forward. A full search, as appropriate for the state in which the property is located, must be conducted for judgment liens and federal tax liens filed against the mortgagor(s). It is not necessary to issue a Commitment prior to issuing this Policy and no express insurance should be given as to any exceptions. Finally, the Date of Policy is the date through which the title was examined.

This product provides an insured title search covering limited matters spanning a limited time frame. Feel free to direct any inquiries you have with respect to this new policy to the Old Republic Underwriting Department for assistance.

**LIMITED PRE-FORECLOSURE POLICY  
ONE-TO-FOUR FAMILY  
Issued By  
BLANK TITLE INSURANCE COMPANY**

**Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at the address shown in Section 15 of the Conditions.**

**This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured and is not an abstract of title or a report of a condition of title.**

**[This policy is effective only if the Land is improved by a one-to-four family residence and related structures.]**

**COVERED RISKS**

SUBJECT TO THE EXCLUSIONS FROM COVERAGE AND THE CONDITIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation (the "Company"), insures as of Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of any of the following matters, if not identified in Schedule B:

1. An instrument purporting to change or evidencing a change in the ownership of the Title and recorded in the Public Records subsequent to the recording of the Insured's Mortgage.
2. An instrument purporting to create a right or interest affecting the Title and recorded in the Public Records subsequent to the recording of the Insured's Mortgage.
3. A Mortgage, notice of Mechanic's Lien, Judgment Lien, federal tax lien, or other lien affecting the Title and recorded in the Public Records subsequent to the recording of the Insured's Mortgage.
4. A Judgment Lien or federal tax lien affecting the Title and recorded in the Public Records against the names of the mortgagors of the Insured's Mortgage prior to the recording of the Insured's Mortgage.
5. A Notice of a Judicial Proceeding affecting the Title and recorded in the Public Records subsequent to the recording of the Insured's Mortgage.
6. A Notice of Bankruptcy specified in 11 U.S.C. Section 549 (c), affecting the Title and recorded in the Public Records subsequent to the recording of the Insured's Mortgage.
7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records subsequent to the recording of the Insured's Mortgage.
8. Ad valorem real estate taxes and assessments imposed by a governmental authority due and payable at Date of Policy.

**BLANK TITLE INSURANCE COMPANY**

By: \_\_\_\_\_  
Authorized Signatory

## EXCLUSIONS FROM COVERAGE

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

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to:
  - (i) the occupancy, use, or enjoyment of the Land;
  - (ii) the character, dimensions, or location of any improvement erected on the Land;
  - (iii) the subdivision of land; or
  - (iv) environmental protection;or the effect of any violation of these laws, ordinances, or governmental regulations.
- (b) Any governmental police power.
2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7.
3. Defects, liens, encumbrances, adverse claims, transfers of the Title, or other matters:
  - (a) created, suffered, assumed, or agreed to by the Insured;
  - (b) Known to the Insured whether or not disclosed in the Public Records;
  - (c) resulting in no loss or damage to the Insured;
  - (d) attaching or created subsequent to Date of Policy;
  - (e) not recorded in the Public Records at Date of Policy; or
  - (f) resulting in loss or damage that would not have been sustained if the Insured had paid value for the Insured's Mortgage.
4. Invalidity, unenforceability, or lack of priority of the Insured's Mortgage, or any assignment of it.
5. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws. This Exclusion does not modify or limit the coverage provided under Covered Risk 6.
6. Any claim that Title to the Land is an Unmarketable Title.

## CONDITIONS

### 1. DEFINITION OF TERMS

The following terms when used in this policy mean:

- (a) "Amount of Insurance": The amount stated in Schedule A as it may be decreased by Section 9 of these Conditions.
- (b) "Curative Action": An act, payment or proceeding to eliminate a matter included within the Covered Risks but not excluded by the Exclusions from Coverage or identified in Schedule B.
- (c) "Date of Policy": The date designated as "Date of Policy" in Schedule A.
- (d) "Indebtedness": The obligation secured by the Insured's Mortgage including one evidenced by electronic means authorized by law and, if that obligation is the payment of a debt, the Indebtedness is the sum of:
  - (i) the amount of the principal disbursed as of Date of Policy;
  - (ii) interest on the loan;
  - (iii) the expenses of foreclosure and any other costs of enforcement;
  - (iv) the amounts to pay taxes and insurance; and
  - (v) the reasonable amounts expended to prevent deterioration of improvements;but the Indebtedness is reduced by the total of all payments and by any amount forgiven by an Insured.
- (e) "Insured's Mortgage": The Mortgage described in paragraph 3 of Schedule A.
- (f) "Insured": The Insured named in Schedule A.
- (g) "Judgment Lien": A judgment, abstract of judgment, tax lien (other than a lien for ad valorem real estate taxes or assessments), or support lien recorded in the Public Records, and having the effect of a judgment for the payment of money.
- (h) "Knowledge" or "Known": Actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title.
- (i) "Land": The land described in Schedule A, and affixed improvements that by law constitute real property. The term "Land" does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways.
- (j) "Mechanic's Lien": A private, statutory lien or claim of lien, affecting the Title that arises from services provided, labor performed, or materials or equipment furnished for the construction of an improvement or work on the Land.
- (k) "Mortgage": Mortgage, deed of trust, trust deed, or other security instrument, including one evidenced by electronic means authorized by law.
- (l) "Notice of Bankruptcy": A document specified in 11 U.S.C. Section 549 (c) setting forth the nature and venue of and debtor in a bankruptcy proceeding.
- (m) "Notice of a Judicial Proceeding": A notice of *lis pendens* or other document required or permitted under state statutes to provide constructive notice of a judicial proceeding affecting the Title and setting forth the nature and venue of and parties to the proceeding and describing any part of the Land.
- (n) "Public Records": Records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge.

- (o) "Title": The estate or interest described in Schedule A.
- (p) "Unmarketable Title": Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title or a prospective purchaser of the Insured's Mortgage to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

## **2. NOTICE OF CLAIM TO BE GIVEN BY INSURED**

The Insured shall notify the Company promptly in writing in case Knowledge shall come to the Insured of a matter that might cause loss or damage for which the Company may be liable by virtue of this policy. If the Company is prejudiced by the failure of the Insured to provide prompt notice, the Company's liability to the Insured under the policy shall be reduced to the extent of the prejudice.

## **3. NO DUTY TO DEFEND OR PROSECUTE**

The Company shall have no duty to defend or prosecute any action or proceeding to which the Insured is a party, notwithstanding the nature of any allegation in such action or proceeding. However, the Company has the rights listed in Section 4 of these Conditions.

## **4. COMPANY'S OPTION TO DEFEND OR PROSECUTE ACTIONS; DUTY OF INSURED TO COOPERATE**

- (a) In addition to the options contained in Section 6 of these Conditions and whether or not the Company shall be liable to the Insured, the Company shall have the right, but not the obligation, at its own cost, to undertake any Curative Action that in its opinion may prevent or reduce loss or damage to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.
- (b) If the Company brings an action or asserts a defense permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order.
- (c) In all cases where this policy permits the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at the Company's option, the name of the Insured for this purpose.
- (d) If requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that, in the opinion of the Company, may be necessary or desirable to avoid or mitigate a loss under this policy. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, with regard to the matter or matters requiring such cooperation.

## **5. PROOF OF LOSS OR DAMAGE**

- (a) In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured furnish a signed proof of loss. The proof of loss must describe the matter insured against by this policy that constitutes the



basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

- (b) The Company may reasonably require the Insured to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos, whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all of these records in the custody or control of a third party that reasonably pertain to the loss or damage. All information designated as confidential by the Insured provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

## **6. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS: TERMINATION OF LIABILITY**

In case of a claim under this policy, the Company shall have the following additional options:

- (a) To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.
- (i) To pay or tender payment of the Amount of Insurance under this policy. In addition, if the Company exercises its rights under Section 4 of these Conditions it will pay any costs, attorneys' fees, and expenses authorized by the Company and incurred by the Insured; or
  - (ii) To purchase the Indebtedness for the amount of the Indebtedness on the date of purchase. When the Company purchases the Indebtedness, the Insured shall transfer, assign, and convey to the Company the Indebtedness and the Insured's Mortgage, together with any collateral security.

Upon the exercise by the Company of either of the options provided for in subsections (a)(i) or (ii), all liability and obligations of the Company to the Insured under this policy for the claimed loss or damage, other than to make the payments required in those subsections, shall terminate.

- (b) To Pay or Otherwise Settle With Parties Other Than the Insured or With the Insured.
- (i) To pay or otherwise settle with other parties for or in the name of an Insured any claim insured against under this policy. In addition, if the Company exercises its rights under Section 4 of these Conditions it will pay any costs, attorneys' fees, and expenses authorized by the Company and incurred by the Insured; or
  - (ii) To pay or otherwise settle with the Insured the loss or damage provided for under this policy. In addition, if the Company exercises its rights under Section 4 of these Conditions it will pay any costs, attorneys' fees, and expenses authorized by the Company and incurred by the Insured.

Upon the exercise by the Company of either of the options provided for in subsections (b)(i) or (ii), all liability and obligations of the Company to the Insured under this policy for the claimed loss or damage, other than the payments required in those subsections, shall terminate.

## **7. DETERMINATION AND EXTENT OF LIABILITY**

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured who has suffered loss or damage by reason of matters insured against by this policy.

The extent of liability of the Company for loss or damage under this policy shall not exceed the least of:

- (a) the Amount of Insurance;
- (b) the Indebtedness;
- (c) costs, attorneys' fees, and expenses incurred or authorized in writing by the Company in completing any Curative Action; or
- (d) the difference between the value of the Title without the matter insured against and the value of the Title subject to the matter insured against by this policy.

## **8. LIMITATION OF LIABILITY**

- (a) If the Company cures any matter insured against by this policy in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.
- (b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals.
- (c) The Company shall have no liability for loss or damage to the Insured, resulting from any delay in the enforcement of the Insured Mortgage, including lost interest, reduction in the value of the security or collateral, taxes, assessments, insurance or maintenance.
- (d) The Company shall not be liable for loss or damage to, or attorneys' fees, expenses or liability incurred by, the Insured in conducting a Curative Action or settling any claim or suit without the prior written consent of the Company.

## **9. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY**

- (a) All payments under this policy, except payments made for costs, attorneys' fees, and expenses under Section 4 of these Conditions, shall reduce the Amount of Insurance by the amount of the payments.
- (b) The voluntary satisfaction or release of the Insured's Mortgage, other than foreclosure of the Insured's Mortgage or the acceptance of delivery of a deed of lieu of foreclosure of the Insured's Mortgage, shall terminate all liability of the Company.

## **10. PAYMENT OF LOSS**

When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days.

## **11. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT**

(a) The Company's Right to Recover.

Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured in the Title or Insured's Mortgage and to all other rights and remedies in respect to the claim that the Insured has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees, and expenses paid by the Company. If requested by the Company, the Insured shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured shall permit the Company to sue, compromise, or settle in the name of the Insured and to use the name of the Insured in any transaction or litigation involving these rights and remedies.

If a payment on account of a claim does not fully cover the loss of the Insured, the Company shall defer the exercise of its right to recover until after the Insured shall have recovered its loss.

(b) The Company's Rights Against Noninsured Obligors.

The Company's right of subrogation includes the Insured's rights against non-insured obligors including the rights of the Insured to indemnities, guaranties, other policies of insurance, or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights.

The Company's right of subrogation shall not be avoided by acquisition of the Insured's Mortgage by an obligor who acquires the Insured's Mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond, and the obligor will not be an Insured under this policy.

## **12. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT**

- (a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.
- (b) Any claim of loss or damage that arises out of a matter insured against by this policy or by any action asserting such matter shall be restricted to this policy.
- (c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person.
- (d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it shall not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance.

## **13. SEVERABILITY**

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision or such part held to be invalid, but all other provisions shall remain in full force and effect.

## **14. CHOICE OF LAW; FORUM**

- (a) Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the jurisdiction where the Land is located.

The law of the jurisdiction where the Land is located shall apply to determine the validity of matters insured against under this policy and to interpret and enforce the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law.

- (b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

#### **15. NOTICES, WHERE SENT**

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at [fill in].

#### **[16.ARBITRATION**

Either the Company or the Insured may demand that the claim or controversy shall be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association ("Rules"). Except as provided in the Rules, there shall be no joinder or consolidation with claims or controversies of other persons. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy. All arbitrable matters, when the Amount of Insurance is \$ \_\_\_\_\_ or less, shall be arbitrated at the option of either the Company or the Insured. All arbitrable matters, when the Amount of Insurance is in excess of \$ \_\_\_\_\_, shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules shall be binding upon the parties. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.]

NOTE: Bracketed [ ] material optional

Schedule A

Name and Address of Title Insurance Company:

[File No.:     ]     Policy No.:

[Address Reference:                     ]

Amount of Insurance: \$ [Premium: \$     ]

Date of Policy:             [at a.m./p.m.]

1. Name of Insured:

2. The estate or interest in the Land that is the subject of coverage in this policy is:

3. The Insured's Mortgage is described as follows:

4. The Land referred to in this policy is described as follows:

Schedule B

This policy does not insure against loss or damage by reason of:

(List matters identified in accordance with the Covered Risks.)

**ENDORSEMENT**

Attached to Policy No. \_\_\_\_\_

Issued by

**BLANK TITLE INSURANCE COMPANY**

1. The Date of Policy is changed to: \_\_\_\_\_

2. Schedule A is also amended as follows:

3. Schedule B is amended to add the following matters:

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

**BLANK TITLE INSURANCE COMPANY**

By: \_\_\_\_\_

Authorized Signatory

## **PATRIOT ACT SEARCHES**

### **What do you do if you have a Patriot Act Match?**

If you have checked a name manually or by using software and find a match, please take the following steps to determine if the match is a valid Office of Foreign Assets Control (“OFAC”) match. Unless a transaction involves an exact match, it is recommended that you contact OFAC Compliance before actually blocking assets.

#### **Step 1**

Is the name a match against OFAC’s Specially Designated Nationals (“SDN”) list or targeted countries, or is it “hitting” for some other reason (i.e., “Control List” or “PEP - Politically Exposed Persons List”, “CIA,” “Non-Cooperative Countries and Territories,” “Canadian Consolidated List (OSFI),” “World Bank Debarred Parties,” “Blocked Officials File,” or “government official of a designated country”), or can you not tell what the “hit” is?

- If it’s hitting against OFAC’s SDN list or targeted countries, continue to 2 below.
- If it’s hitting for some other reason, you should contact the “keeper” of whichever other list the match is hitting against. For questions about:
  - The Denied Persons List and the Entities List, please contact the Bureau of Industry and Security at the U.S. Department of Commerce at 202-482-4811.
  - The FBI’s Most Wanted List or any other FBI-issued watch list, please contact the Federal Bureau of Investigation (<http://www.fbi.gov/contact/fo/fo.htm>).
  - The Debarred Parties list, please contact the Office of Defense Trade Controls at the U.S. Department of State, 202-663-2700.
  - The Bank Secrecy Act and the USA PATRIOT Act, please contact the Financial Crimes Enforcement Network (FinCEN), 1-800-949-2732.
  - If you are unsure whom to contact, please contact your interdict software provider which told you there was a “hit.”
  - If you can’t tell what the “hit” is, you should contact your interdict software provider which told you there was a “hit.”

#### **Step 2**

Now that you’ve established that the hit is against OFAC’s SDN list or targeted countries, you must evaluate the quality of the hit. Compare the name in your transactions with the name on the SDN list. Is the name in your transaction an individual while the name on the SDN list is a vessel, organization or company (or vice-versa)?

- If yes, you do not have a valid match.
- If no, please continue to 3 below.

#### **Step 3**



How much of the SDN's name is matching against the name in your transaction? Is just one of two or more names matching (i.e., just the last name)?

- If yes, you do not have a valid match.
- If no, please continue to 4 below.

#### **Step 4**

Compare the complete SDN entry with all of the information you have on the matching name in your transaction. An SDN entry often will have, for example, a full name, address, nationality, passport, tax ID or cedula number, place of birth, date of birth, former names and aliases. Are you missing a lot of this information for the name in your transaction?

- If yes, go back and get more information and then compare your complete information against the SDN entry.
- If no, please continue to 5 below.

#### **Step 5**

Are there a number of similarities or exact matches?

- If yes, please call the hotline at 1-800-540-6322.
- If no, you do not have a valid match

# **UNDERWRITING FROM AN ALABAMA PERSPECTIVE**

Foreclosure and Deed In Lieu Issues  
Selected Endorsements  
Recently Enacted Legislation

Presented by:

Gina K. Matthews  
Vice President and Alabama State Counsel  
Mississippi Valley Title Insurance Company  
Birmingham, AL

# **FORECLOSURE AND DEED IN LIEU ISSUES**

# **DEEDS IN LIEU OF FORECLOSURE UPDATE**

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## **I. GENERALLY**

Deeds from mortgagors to mortgagees affect only the rights and obligations of the parties to the deed. Because the instrument is a private transaction between the mortgagor and the mortgagee, there is no foreclosure of the security interest and no statutory right of redemption arises. The rights of junior lienholders are not adversely affected. See §§35-10-50 and 35-10-51, Ala. Code (1975).

## **II. RIGHTS OF REDEMPTION**

An owner's or loan policy may be issued to the mortgagee (who took the deed in lieu) or its purchaser or purchaser's lender without an exception for rights of redemption.

## **III. MERGER**

A deed in lieu does not merge title in the lender or effect a foreclosure of the mortgage at hand between the parties. Therefore, **a Scheduled B exception for the mortgage must be included in any policy to be issued if the mortgage is not properly released of record.** §35-10-51(2) & (4), Ala. Code (1975).

If, however, you are requested to insure a subsequent foreclosure of the mortgage giving rise to the deed in lieu, carefully review the deed in lieu to determine there is no merger of title or full extinguishment of mortgage language. Any available release or settlement agreement between the grantor(s) and the grantee of the deed in lieu should also be reviewed. Contact Underwriting Counsel for guidance if merger of title or full extinguishment of mortgage language appears in the documents.

## **IV. JUNIOR LIENHOLDERS**

When there are junior lienholders of record, and you are asked to insure a deed in lieu or behind a deed in lieu, show the liens as exceptions or require that they be released of record by the proper party.

## **V. CREDITORS' RIGHTS EXCEPTION**

### **A. Introduction**

When the value of the property transferred by a deed in lieu is greater than the outstanding balance on the loan, the deed in lieu transfer may be challenged as a preference under Section 547 of the Bankruptcy Code (11 U.S.C. § 547) or a fraudulent conveyance under Section 548. Under Section 547, Bankruptcy Trustees have the power to avoid the transfer of any interest in property occurring within 90 days prior to the filing of the bankruptcy

petition or 1 year if the transfer is made to an insider. The look back period for Section 548 actions is 2 years, and this period may be further extended by state law if the trustee chooses to use state law to attack the transfer as fraudulent. Refer to Alabama Code 1975, Sections 8-9A-1 through 12 for the Alabama Fraudulent Transfer Act.

**B. Owner's Policy - Insuring Lender's Ownership Interest**

Exclusion 4 of the 2006 Owner's Policy excludes from coverage claims that the **insured transaction** is a fraudulent transfer or conveyance under Section 548 or a preferential transfer under Section 547. It should, therefore, not be necessary to include a creditors' rights exception when insuring a lender's ownership interest under a deed in lieu of foreclosure. If, however, you have knowledge that the mortgagor has filed a bankruptcy petition at the time of a proposed deed in lieu conveyance or that the mortgagor was in bankruptcy at the time of execution of a deed in lieu, contact Underwriting Counsel for guidance. Additional requirements and exceptions may be necessary after review of bankruptcy documents to address issues such as relief from automatic stay, and whether the real property is/was still part of the bankruptcy estate.

**C. Subsequent Conveyances**

Exclusion 6 of the Lender's Policy and Exclusion 4 of the Owner's Policy exclude coverage for creditors' rights issues only with regard to the insured transaction, **not prior conveyances**. You should, therefore, make the following exception for creditors' rights if the deed to be insured is a reconveyance of the property from the lender who holds title under a deed in lieu to a third party and the mortgagor who gave the deed in lieu to the lender is in bankruptcy at the time this second transfer is made, to-wit:

Any claim which arises out of the transfer from (the grantor(s) of a deed in lieu) to (the grantee of a deed in lieu), dated \_\_\_\_\_, and recorded on \_\_\_\_\_, in \_\_\_\_\_, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws.

If you are requested to remove this exception, contact Underwriting Counsel for approval and be prepared to discuss the status of the bankruptcy case.

Also, if the search discloses a deed in lieu of foreclosure recorded in the chain of title within 90 days prior to the current transaction, insert the above referenced creditors' rights exception into the new Owner's and/or Loan policies. If you are requested to remove this exception, contact Underwriting Counsel for guidance and approval. Additional requirements and exceptions may be necessary such as verification that the grantor of the deed in lieu has not filed bankruptcy. In addition, among other requirements, you may be required to obtain verification of the outstanding balance of the recently released debt in order to compare it to the current sale price.

## D. Appraisal

In most conveyances by a deed in lieu of foreclosure, the value of the property is less than the outstanding debt. Many lenders will not accept a deed in lieu unless a current appraisal on the property reveals that there is no equity in the property.

By establishing the value of the property, and by establishing that there is no equity in the property being conveyed via the deed in lieu, the current appraisal can address in part the above referenced bankruptcy concerns:

Fraudulent transfer.

The appraisal shows that the property is being exchanged at least for reasonably equivalent value.

Preferential transfer.

The appraisal shows that the lender is receiving no more than he would in the event of a distribution in bankruptcy. Assuming the loan documents are proper, and the debt is properly secured by the transferred property, the issue becomes making certain that the debtor had no equity in the property at the time of the transfer.

Contact Underwriting Counsel for guidance on these creditors' rights issues. Keep in mind that a trustee may still challenge the transaction even when the value of the real property appears to be less than the loan amount if the trustee believes that the property was not properly appraised. For the foregoing reasons, a current and reliable appraisal is advisable.

## VI. RECHARACTERIZATION

**The person giving the deed in lieu should not be in or remain in possession of the premises after the grant of the deed in lieu.** The issue of recharacterization of the deed could arise if the grantor retains all or part of the property under a lease or occupancy agreement because a court could subsequently find that the deed in lieu was really an equitable mortgage and rent payments were in effect payments on a loan obligation. This is sometimes also referred to as a disguised mortgage. Before committing to insure a deed in lieu, you should determine that the deed in lieu conveyance is absolute (not a mortgage or additional security), with no rights (such as an option to repurchase the property or a right of first refusal) or possession retained by the grantor. **The possession status of the grantor must be determined by inspection or otherwise.** In all cases, **an Estoppel Certificate should be obtained.** This is an affidavit executed by the party who gave the deed in lieu in which it is recited that the deed in lieu is not given as additional security, the intent of the grantor is to part with all title to and interests in the property and the deed is an absolute conveyance given freely and under no duress or coercion (see attached sample Estoppel Certificate). A copy of any release or settlement agreement should also be required and reviewed, if available, along with satisfactory evidence that there are no other agreements between the grantor(s) and the grantee. Review of these

documents may disclose the need for additional requirements or exceptions.

The following exceptions should be contained as Schedule B Exceptions in any owner's title commitment or policy to the grantee of a deed in lieu if the requirements set forth above have not been met:

Subject to any claims that the deed from \_\_\_\_\_ to \_\_\_\_\_, dated \_\_\_\_\_, and recorded in \_\_\_\_\_, impairs any legal or equitable remedies available to the debtor under the laws of the State of Alabama.

Subject to any recharacterization or claims of recharacterization of the deed from \_\_\_\_\_ to \_\_\_\_\_, dated \_\_\_\_\_, and recorded in \_\_\_\_\_, as a mortgage lien, security device or other interest in the land insured hereunder.

The following exception should be included in all owner's policies issued to the grantee of a deed in lieu:

Subject to any claims of violation of any consumer protection law imposing mediation, credit counseling or other conditions precedent to foreclosure.

Contact Underwriting Counsel for approval if you are requested to delete this exception.

# SAMPLE

After Recording Return To:

This Document Prepared By:

Loan No.: SampleDIL-A  
Investor No.: SampleDIL-A

## ESTOPPEL AFFIDAVIT

State of Alabama §  
County of Butler §

THE UNDERSIGNED, John Doe and Jane Doe, husband and wife

after having been first duly sworn, upon oath, state and affirm the following to-wit:

, ("Borrower")

1. That on January 1st, 2000, for good and valuable consideration, Borrower duly executed and delivered a certain Promissory Note ("Note"), made payable to the order of ABC Mortgage, Inc.

, ("Lender"), in the original principal amount of \$100,000.00, together with interest thereon at the rate set forth in said instrument. The Note was duly secured by a Mortgage, Deed of Trust or Deed to Secure Debt (the "Security Instrument") of even date therewith being recorded on January 10th, 2000, as Instrument No. 654321, Book N/A, Page N/A which was further transferred and assigned to ABC Mortgage, Inc. in Book \_\_\_\_\_, Page \_\_\_\_\_, Instrument No. \_\_\_\_\_ in the real estate records, in the Probate Office of Butler County, Alabama.



Loan No.: SampleDIL-A  
Investor No.: SampleDIL-A

Property more particularly described as:  
SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.

COMMONLY KNOWN AS: 123 Test Street, Test City, Alabama 45678

TAX ID: 456-789-10

The Borrower is currently in default in the making of payments due on the Note and does not currently have the financial capability of curing such default.

2. That pursuant to an agreement with the Lender, Borrower has made, executed and delivered that certain Warranty Deed ("Deed") of even date herewith, which conveyed the Property and improvements thereon to the Lender or its designee.
3. That the undersigned hereby acknowledges, agrees and certifies that the Deed is an absolute conveyance of Borrower's right, title and interest in and to said Property and improvements, together with all buildings thereon and appurtenances thereunto belonging and appertaining, including the exceptions as specified in the title commitment/report from Test Title Company, effective date of March 1st, 2011 with release of all homestead and other exemption rights in and to the Property; and also conveyed, transferred and assigned Borrower's rights of possession, rentals, deposits and equity of redemption in and to the Property and improvements thereon, all personal property existing on or used in conjunction with the Property, and all other rights and interest of Borrower in and to the Property.
4. That the value of the Property and improvements thereon is not in excess of the amount of the total indebtedness outstanding on the Note, and in consideration of the premises hereof, and in consideration of such conveyance, Borrower has received from the Lender an agreement that, subject to certain conditions, Lender covenants to completely release Borrower from personal liability to pay principal and interest under the Promissory Note and Security Instrument, and from all security agreements, financing statements, and claims and demands with respect to the Property.
5. That the Deed was given voluntarily by Borrower, in good faith on the part of the Lender, without any fraud, misrepresentation, duress or undue influence whatsoever, or any misunderstanding on the part of the Lender or Borrower, and was not given as a preference against any other creditors of Borrower.
6. That the Deed shall not restrict the right of the Lender to commence foreclosure proceedings if it should so desire; but the conveyance by said Deed shall be and is hereby intended and understood to be an absolute conveyance and an unconditional sale, with full extinguishment of Borrower's equity of redemption, and with full release of all of Borrower's right, title and interest of every character and nature in and to the Property and improvements thereon.
7. That Borrower has not taken any action, or failed to take any action, which would result in any lien, encumbrance, claim or charge from being recorded against the Property.



**RECENT ALABAMA CASE LAW  
REGARDING  
FORECLOSURES, EJECTMENTS, AND CHAIN OF ASSIGNMENTS**

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**I. INTRODUCTION**

Over the past year, the Alabama Court of Civil Appeals has issued a line of cases addressing foreclosure and ejectment actions. Generally, these cases provide that a foreclosing entity must have a valid interest in the mortgage indebtedness prior to initiating a foreclosure action. If your legal practice includes conducting foreclosures or if you are asked to insure a transaction post-foreclosure, then you should review this summary and the case law carefully.

**II. CASE ANALYSIS**

**Sturdivant v. BAC Home Loans Servicing, LP.**, [Ms. 2100245, December 16, 2011] \_\_ So.3d \_\_ (Ala.Civ.App.2011). The borrower, Bessie Sturdivant, defaulted on her loan. BAC Home Loans Servicing notified Sturdivant that if she did not cure the default, they would accelerate her loan. When Sturdivant failed to cure the default, BAC retained counsel to commence foreclosure. BAC's attorney sent two (2) letters to Sturdivant, one letter identified BAC as the servicer of the loan while the second letter identified BAC as the holder of the note. Post-foreclosure, BAC filed an ejectment action. In support of its motion for summary judgment, BAC submitted an affidavit from an assistant vice president regarding Sturdivant's default. The affidavit did not reference an assignment of the mortgage to BAC. The trial court granted BAC's motion for summary judgment.

The Court of Civil Appeals vacated the trial court's judgment, holding that BAC lacked standing to bring the post-foreclosure ejectment action. BAC did not get an assignment of the loan until the same day as the foreclosure. Therefore, the Court found that at the time the foreclosure action was initiated, BAC had no interest in the note or mortgage. Accordingly, BAC did not have the power or authority to foreclose. Prior to the initiation of a foreclosure action, the foreclosing entity must have the legal right to receive payment under the note and mortgage. See §6-6-280(b), Ala. Code (1975). The Court stated that a party initiates the foreclosure process when it accelerates the maturity date of the debt and publishes the notice of a foreclosure sale. The foreclosing entity should hold the mortgage at the time of the initial demand for payment, at the initiation of foreclosure proceedings, and at the time of publication of foreclosure. Any deed obtained via a foreclosure by a lender who lacked the authority to foreclose will be deemed invalid. The Court stated that the timing of the assignment was a distinguishing and determinative factor because the foreclosing entity did not acquire the note and mortgage **prior** to the **initiation** of the foreclosure proceedings.

**Perry v. Federal National Mortgage Association**,<sup>1</sup> [Ms. 2100235, June 29, 2012] \_\_ So. 3d \_\_ (Ala.Civ.App. 2012). James Perry executed a promissory note to RBMG and a mortgage to Mortgage Electronic Registrations Systems, Inc. (“MERS”), as nominee for RBMG. The note and mortgage were to secure the same indebtedness. At different times, the note and mortgage were transferred to EverHome Mortgage Company. After Perry defaulted, an attorney for EverHome notified Perry that it was accelerating the loan and commencing foreclosure proceedings. Prior to the publication of the foreclosure sale, EverHome deeded the property to Federal National Mortgage Association (“Fannie Mae”). That deed, however, was not recorded until after the foreclosure. During the three (3) weeks in which the foreclosure sale notices were published, MERS assigned the mortgage to EverHome. EverHome was the successful bidder at the foreclosure sale. The assignment of the mortgage and the deed from EverHome to Fannie Mae were recorded as consecutively numbered instruments in the Probate Office. Fannie Mae filed an ejectment action. In support of its motion for summary judgment, Fannie Mae submitted the note, mortgage, foreclosure deed, the deed from EverHome to Fannie Mae, and an affidavit from an EverHome employee regarding the status of Perry’s loan. The affidavit addressed certain documents, including the note which contained the following indorsement: “Pay to The Order of \_\_\_\_\_ Without Recourse [illegible signature] Senior Vice President RBMG, Inc.” The trial court granted EverHome’s motion for summary judgment.

The Court of Civil Appeals affirmed. The Court, citing Sturdivant, stated that a party initiates foreclosure proceedings when it accelerates the indebtedness and publishes notice of a foreclosure sale. The Court, however, distinguished Sturdivant by stating that the timing of the assignment of the mortgage is not determinative in this particular case. The Court also recognized the note as a negotiable instrument, and, as such, the holder of the note is entitled to enforce its terms. See § 7-3-301, Ala. Code (1975). The Court noted that a blank indorsement allows a party to transfer a note by possession. See § 7-3-205(b), Ala. Code (1975) (an instrument with a blank indorsement becomes payable to bearer). If the foreclosing entity is the holder of the note before the initiation of the foreclosure proceeding, the entity is authorized to exercise the power of sale as contained in the mortgage. The Court of Civil Appeal acknowledged that the dispute focused on when EverHome became a holder of the note. EverHome relied on the affidavit of its employee regarding the timing of the acquisition of the note wherein the employee stated that EverHome acquired the note on July 2, 2007, two years before the initiation of the foreclosure proceedings. Perry argued that the affidavit was inadmissible under Rule 56(e), Ala. R. Civ. P. In affirming the trial court, the Court of Civil Appeals noted that Perry did not move to strike the EverHome affidavit. Although Perry objected to the admissibility

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<sup>1</sup>The Court of Civil Appeals originally issued its opinion in this matter on December 30, 2011. Subsequently, the Court granted the Application for Rehearing, withdrew its December 30, 2011 opinion, and substituted its March 9, 2012 opinion. On June 29, 2012, the Court of Civil Appeals withdrew the March 9, 2012 opinion and substituted another one. See Perry v. Federal Nat’l Mortg. Ass’n, [Ms. 2100235, June 29, 2012] 100 So.3d 1090 (Ala.Civ.App.2012).

of the affidavit, Perry did not move to strike the affidavit. Accordingly, the Court found that the trial court properly considered the evidence as to when EverHome acquired the note.

The Court dismissed Perry's argument regarding contradictory evidence as to when EverHome became entitled to exercise the power of sale under the mortgage. The Court, concluding there was no conflict in the evidence, cited Coleman and distinguished Byrd.

**Patterson v. GMAC Mortgage, LLC**, [Ms. 2100490, January 20, 2012] \_\_ So. 3d \_\_ (Ala.Civ.App. 2012). Reginald and Diana Patterson executed a note and mortgage to Option One Mortgage Corporation. After default, GMAC Mortgage, LLC accelerated the debt and initiated foreclosure proceedings. Post-foreclosure, GMAC brought an ejectment action. In support of its motion for summary judgment, GMAC presented the foreclosure deed and an assignment from Option One which was dated the day before the foreclosure sale. The trial court granted GMAC's motion for summary judgment.

The Court of Civil Appeals vacated the judgment of the trial court. The Court reiterated its holding in Sturdivant stating that the foreclosing entity "lacked authority to foreclose the mortgage when it initiated the foreclosing proceedings, and therefore, the foreclosure and the foreclosure deed upon which [the foreclosing entity] based its ejectment claim are invalid." Patterson, at \*2.

**Coleman v. BAC Servicing, agent for the Secretary of Veterans Affairs, an officer of the United States of America**, [Ms. 2100453, June 22, 2012] \_\_ So. 3d \_\_ (Ala.Civ.App. 2012).<sup>2</sup> Evelyn Coleman and her husband obtained a loan from Johnson & Associates Mortgage Company ("Johnson") based on the execution of a promissory note and mortgage. Johnson assigned its interest in the mortgage to Trans Financial Mortgage Company ("Trans Financial"). Firststar Bank, purporting to be the successor in interest to Trans Financial assigned the mortgage to MERS as nominee for Lehman Brothers Holdings, Inc. After Mr. Coleman's death, Mrs. Coleman defaulted on her loan. Midland Mortgage Company, a subsidiary of MidFirst Bank, sent Mrs. Coleman a notice of default and a notice of acceleration. During the three (3) weeks in which the foreclosure sale was noticed, MidFirst executed a special warranty deed to the Secretary of Veterans Affairs. Prior to the foreclosure sale, MERS assigned the mortgage to MidFirst. At foreclosure, MidFirst was the successful bidder. Post-foreclosure, BAC Servicing, as agent for the Secretary of Veterans Affairs, filed an ejectment action. In support of its motion for summary judgment, BAC submitted, among other documents, the note, the mortgage, and certified copies of the assignments from Johnson to Trans Financial; from Firststar to MERS; from MERS to MidFirst. BAC also produced evidence regarding the transfer of the note which contained two (2) indorsements: one from Johnson to Trans Financial and a blank

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<sup>2</sup>The Court of Civil Appeals granted the Application for Rehearing, withdrew its February 3, 2012 opinion, and substituted its June 22, 2012 opinion.

indorsement from Trans Financial. BAC's evidence indicated that MidFirst acquired possession of the note in 2005, well before the initiation of foreclosure proceedings. The trial court granted BAC's motion for summary judgment.

The Court of Civil Appeals affirmed the trial court's decision. The Court referenced its decision in Perry, stating, "this court noted that the timing of a mortgage assignment is not determinative when the foreclosing entity acquires possession of the note before it initiates the foreclosure proceedings." Coleman, at \*200. The Court quoted § 35-10-12, Ala. Code (1975), "[w]here a power to sell lands is given in any mortgage, the power is part of the security and may be executed by any person ... who, by assignment or otherwise, becomes entitled to the money thus secured." Id., at \*200-201. The Court held that there was no conflicting evidence as to when MidFirst became entitled to enforce the note. Id., at \*204. The Court stated that a promissory note evidencing a debt was a bearer instrument which could be transferred by delivery of possession or written assignment. See § 8-5-24, Ala. Code (1975). MidFirst obtained physical possession of the note on September 17, 2005, well before the default. The Court distinguished its holding in Byrd.

The Court went on to state that Alabama recognizes that a note and mortgage can be separated. However, "[t]he mortgage becomes useless in the hands of one who does not also hold the obligation because only the holder of the obligation can foreclose." Id., at \*205, quoting Restatement (Third) of Property: Mortgages § 5.4 (Reporter's Note - Introduction, Comment a) at 386 (1997). The Restatement goes on to explain, "The note is the cow and the mortgage the tail. The cow can survive without the tail, but the tail cannot survive without the cow." Id. At all pertinent times, MidFirst held the note.

**Byrd v. MorEquity, Inc.**, 94 So.3d 378 (Ala.Civ.App. 2012). On July 19, 2007, Stephen and Cynthia Byrd executed a promissory note and mortgage in favor of Wilmington Finance, Inc. When the Byrds defaulted, the debt was accelerated in December 2009 and the loan was foreclosed. In April 2010, MorEquity filed a post-foreclosure ejectment action. The Byrds alleged that the foreclosure was invalid because, they claim, MorEquity did not have an ownership interest in the property at the time of the foreclosure. The trial court entered summary judgment in favor of MorEquity.

On appeal, the Court of Civil Appeals stated that the "threshold and dispositive issue ... is whether MorEquity had standing to prosecute the ejectment action." \*1. In support of its position, MorEquity presented two affidavits regarding the assignment of the note and mortgage. The first affidavit stated that the debt was assigned on April 20, 2009, well before the initiation of the foreclosure proceedings. The second affidavit, however, stated that the debt was assigned on December 30, 2009, after the initiation of the foreclosure proceedings. The Court reversed and remanded, holding that MorEquity did not present a prima facie case of standing to foreclose because it presented conflicting evidence as to whether it had the power of foreclosure at the time the foreclosure proceedings were initiated.

**Nelson v. Federal National Mortgage Association**, 97 So.3d 770 (Ala.Civ.App. 2012). In 2007 Andinaria Nelson executed a promissory note to Global Lending Group, Inc., (“Global”). The note was secured by a mortgage to MERS as nominee for Global. Simultaneously, Nelson was notified that the servicing of her mortgage has been assigned to Flagstar Bank. After several defaults and forbearance agreements, Flagstar provided notice of acceleration of the debt and published the foreclosure notice. On January 25, 2010, MERS, as nominee for Flagstar, conducted the foreclosure sale. MERS purchased the property and conveyed to FNMA. FNMA then filed an ejectment action. Nelson answered, alleging that the foreclosure was wrongful and that the foreclosure deed was void. FNMA moved for summary judgment and submitted copies of the note, the mortgage, the foreclosure deed to MERS, the deed from MERS to FNMA, and the affidavit of a Flagstar assistant vice president. FNMA did not submit any documents evidencing the assignment of the mortgage. The trial court granted FNMA’s motion and entered summary judgment. On appeal, Nelson argued that the power-of-sale provision in the mortgage was unenforceable because the note and mortgage had been separated and that the mortgage was never assigned to Flagstar. The Court of Civil Appeals rejected Nelson’s argument regarding the separation of the note and mortgage citing Coleman v. BAC Servicing, [Ms. 2100453, February 3, 2012], stating this theory “does not comport with Alabama law.” 97 So.3d at 775. Nelson also argued that MERS, as nominee for Flagstar, did not have the authority to exercise the power of sale in the mortgage because the mortgage was never assigned to Flagstar. The Court notes that, at some point, Flagstar became the holder of the note. However, the parties failed to identify the “crucial issue” of whether Flagstar was the holder of the note before MERS, as nominee for Flagstar, initiated the foreclosure proceedings. Id., at 779. In vacating the judgment, the Court held that given the absence of evidence as to which entity owned the debt at the time of invocation of the power of sale provision FNMA lacked standing to bring the ejectment action.<sup>3</sup> MERS could not have conveyed title to itself by virtue of the foreclosure deed because MERS had no authority to initiate foreclosure. The deed from MERS to FNMA was, therefore, void.

### III. UNDERWRITING IMPLICATIONS

If you are asked to insure a transaction immediately following foreclosure, you should verify that the foreclosing entity had the authority to foreclose at the time the foreclosure was initiated. Typically, the chain of title will provide the verification you need in the form of recorded assignments. Be wary of assignments recorded concurrently with foreclosure deeds or assignments recorded shortly before foreclosure deeds.

If the chain of title indicates that there are missing or unrecorded assignments, proceed with caution. In addition to recordation of an assignment, other documentation or curative measures, such as recommencement of foreclosure proceedings, may be necessary.

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<sup>3</sup>The Court made a distinction between the absence of evidence in the present case and the conflicting evidence as presented in Byrd v. MorEquity, Inc., 94 So.3d 378 (Ala.Civ.App. 2012).

#### **IV. CONCLUSION**

Under current Alabama case law, a foreclosing entity must be the holder of the note evidencing a mortgage debt prior to initiating foreclosing proceedings. Therefore, before any notice of default, before any acceleration of the debt, and before any publication of the foreclosure sale, the foreclosing entity must have a valid interest in the mortgage debt and must be legally entitled to foreclose. The acquisition of the note may be evidenced by a recorded assignment or other admissible evidence.

If you have any questions regarding insuring after a foreclosure or ejectment action, please call the Birmingham Office at 800-843-1688.



**SELECTED  
ENDORSEMENTS**

## **SELECTED ENDORSEMENTS**

- I. ALTA 3 Series - Zoning
  - A. Introduction
  - B. ALTA 3-06: Zoning - Unimproved Land
  - C. ALTA 3.01-06: Zoning - Completed Structure
  - D. ALTA 3.2-06: Zoning - Land Under Development
  
- II. ALTA 8 Series - Environmental Protection Lien
  - A. Overview and Introduction
  - B. ALTA 8.1-06: Environmental Protection Lien
  - C. ALTA 8.2-06: Commercial Environmental Protection Lien
  
- III. ALTA 9 Series - Restrictions, Encroachments, and Minerals/Covenants, Conditions and Restrictions Endorsements
  - A. Overview and Introduction
  - B. Endorsements to Loan Policies
  - C. Endorsements to Owners Policies
  - D. ALTA 9-06: Restrictions, Encroachments, Minerals - Loan Policy
  - E. ALTA 9.1-06: Covenants, Conditions and Restrictions - Unimproved Land - Owner's Policy
  - F. ALTA 9.2-06: Covenants, Conditions and Restrictions - Improved Land - Owner's Policy
  - G. ALTA 9.3-06: Covenants, Conditions and Restrictions - Loan Policy
  - H. ALTA 9.6-06: Private Rights - Loan Policy
  - I. ALTA 9.7-06: Restrictions, Encroachments, Minerals - Land Under Development - Loan Policy
  - J. ALTA 9.8-06: Covenants, Conditions and Restrictions - Land Under Development - Owner's Policy
  
- IV. ALTA 11 Series - Mortgage Modification Endorsements
  - A. Overview and Introduction
  - B. ALTA 11-06: Mortgage Modification
  - C. ALTA 11.1-06: Mortgage Modification with Subordination
  
- V. ALTA 21-06: Creditors' Rights Endorsement
  
- VI. ALTA 28 Series - Easement Endorsement/Encroachments and Easements Endorsement
  - A. ALTA 28-06: Easement - Damage or Enforced Removal
  - B. ALTA 28.1-06: Encroachments - Boundaries and Easements
  
- VII. ALTA Series 35 - Minerals and Other Subsurface Substance
  
- VIII. Deletion of Arbitration Endorsement
  
- IX. Endorsements Which Move the Policy Date Forward

## **I. ALTA Series 3 - ZONING ENDORSEMENTS**

### **A. Introduction.**

1. Exclusion 1 of the Owner's Policy and Loan Policy excludes zoning matters from coverage.
2. The ALTA 3 Series provides coverage for certain zoning matters that would otherwise be excluded by Exclusion 1.
3. The ALTA 3-06 may be issued where the property is either improved or unimproved.
4. The ALTA 3.1-06 provides the same coverage as the ALTA 3-06, but adds additional coverages related to the improvements. It may be issued on improved property only, and it may NOT be issued on unimproved property.
5. The ALTA 3.2-06 provides the same coverage as the ALTA 3.1-06, but includes coverage for certain future improvements.

### **B. ALTA 3-06: Zoning - Unimproved Land.**

#### **1. Availability.**

- May be issued with a Lender's Policy or an Owner's Policy.
- May be issued where the property is either improved or unimproved.

#### **2. Coverage. Insures a Lender or Owner against loss if:**

- The Land is not classified as stated (Item 1.a.)
- The uses listed in the Endorsement are not allowed under that classification (Item 1.b.)

#### **3. Underwriting Guidelines.**

- Obtain and review a copy of the applicable zoning ordinances.
- Obtain and review a written certification from the applicable zoning department or agency. The certification should state the zoning classification and authorized use of the property.
- Complete the Endorsement as described on the attached sample.

ENDORSEMENT  
ALTA 3 - 06

ZONING - UNIMPROVED LAND

To be attached to and become a part of Policy No. \_\_\_\_\_ ***[Insert Policy Number]*** of Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

1. The Company insures against loss or damage sustained by the Insured in the event that, at Date of Policy,
  - a. According to applicable zoning ordinances and amendments, the Land is not classified Zone: \_\_\_\_\_ ***[Insert Zoning Classification of the Subject Property]***
  - b. The following use or uses are not allowed under that classification: \_\_\_\_\_ ***[Insert Uses allowed by that Zoning Classification. Either quote from the applicable ordinance, or state "See Exhibit A" and attach a copy of the applicable zoning ordinance as Exhibit A]***
  
2. There shall be no liability under this endorsement based on:
  - a. Lack of compliance with any conditions, restrictions, or requirements contained in the zoning ordinances and amendments, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses. This paragraph 2.a. does not modify or limit the coverage provided in Covered Risk 5.
  - b. The invalidity of the zoning ordinances and amendments until after a final decree of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit the use or uses.
  - c. The refusal of any person to purchase, lease or lend money on the Title covered by this Policy.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ ***[Insert Date of Endorsement]***

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent

C. ALTA 3.1-06: Zoning - Completed Structure.

1. Availability.

- May be issued with a Lender's Policy or an Owner's Policy.
- May only be issued where the property is improved.

2. Coverage. Insures a Lender or Owner against loss if:

- The Land is not classified as stated (Item 1.a.)
- The uses listed in the Endorsement are not allowed under that classification (Item 1.b.)
- A court orders removal or alteration of an existing structure due to a violation of the zoning ordinances related to:
  - area, width or depth of the land as a building site,
  - floor area space of the structure,
  - setback of the structure,
  - height of the structure, and
  - number of parking spaces. (Item 2).

3. Underwriting Guidelines.

- Obtain and review a copy of the applicable zoning ordinance.
- Obtain and review a written certification from the applicable zoning department or agency.
  - The certification should state the zoning classification and authorized use of the property.
  - In addition, it should also state that the existing improvements comply with (a) area, width or depth of the land as a building site, (b) floor area space of the structure, (c) setback of the structure, (d) height of the structure, and (e) number of parking spaces.
- Obtain and review a survey of the property to determine that the existing improvements comply with (a) area, width or depth of the land as a building site, (b) floor area space of the structure, (c) setback of the structure, (d) height of the structure, and (e) number of parking spaces.
  - It is preferable for the survey to state on its face the zoning classification, the number of parking spaces on the

property, and that the improvement complies with the various matters listed in Item 2 of the Endorsement.

- Complete the Endorsement as described on the attached sample.

ENDORSEMENT  
ALTA 3.1 - 06

ZONING - COMPLETED STRUCTURE

To be attached to and become a part of Policy No. \_\_\_\_\_ **[Insert Policy Number]** of Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

1. The Company insures against loss or damage sustained by the Insured in the event that, at Date of Policy,
  - a. according to applicable zoning ordinances and amendments, the Land is not classified Zone \_\_\_\_\_ **[Insert Zoning Classification of the Subject Property]**;
  - b. the following use or uses are not allowed under that classification: \_\_\_\_\_ **[Insert Uses allowed by that Zoning Classification. Either quote from the applicable ordinance, or state "See Exhibit A" and attach a copy of the applicable zoning ordinance as Exhibit A]**
  - c. There shall be no liability under paragraph 1.b. if the use or uses are not allowed as the result of any lack of compliance with any conditions, restrictions, or requirements contained in the zoning ordinances and amendments, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses. This paragraph 1.c. does not modify or limit the coverage provided in Covered Risk 5.
2. The Company further insures against loss or damage sustained by the Insured by reason of a final decree of a court of competent jurisdiction either prohibiting the use of the Land, with any existing structure, as specified in paragraph 1.b. or requiring the removal or alteration of the structure, because, at Date of Policy, the zoning ordinances and amendments have been violated with respect to any of the following matters:
  - a. Area, width, or depth of the Land as a building site for the structure
  - b. Floor space area of the structure
  - c. Setback of the structure from the property lines of the Land
  - d. Height of the structure, or
  - e. Number of parking spaces.
3. There shall be no liability under this endorsement based on:
  - a. the invalidity of the zoning ordinances and amendments until after a final decree of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit the use or uses;
  - b. the refusal of any person to purchase, lease or lend money on the Title covered by this policy.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ *[Insert Date of Endorsement]*

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent



D. ALTA 3.2-06: Zoning - Land Under Development.

1. Availability.

- May be issued with a Lender's Policy or an Owner's Policy.
- May only be issued when the construction of an improvement is imminent and detailed plans and specifications for the improvement have been prepared.
- Contact Underwriting Counsel if you receive a request to issue this Endorsement.

2. Coverage.

- Provides the same coverage as the ALTA 3.1-06, but includes within the definition of "Improvements" future buildings built according to the specified plans.

3. Underwriting Guidelines.

- Follow the same underwriting guidelines as for the ALTA 3.1-06.
- Obtain and review the Plans and confirm that the planned future improvements comply with zoning regarding (a) area, width or depth of the land as a building site, (b) floor area space of the structure, (c) setback of the structure, (d) height of the structure, and (e) number of parking spaces.
  - The Plans must be sufficiently detailed so that the determinations can be made.
- Complete the Endorsement as described on the attached sample.

ENDORSEMENT  
ALTA 3.2-06

ZONING - LAND UNDER DEVELOPMENT

To be attached to and become a part of Policy No. \_\_\_\_\_ **[Insert Policy Number]** of Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

1. For purposes of this endorsement:
  - a. "Improvement" means a building, structure, road, walkway, driveway, curb, subsurface utility or water well existing at Date of Policy or to be built or constructed according to the Plans that is or will be located on the Land, but excluding crops, landscaping, lawns, shrubbery, or trees.
  - b. "Plans" means those site and elevation plans made by \_\_\_\_\_ **[Insert name of architect or engineer]** dated \_\_\_\_\_ **[Insert Date of Plans]**, last revised \_\_\_\_\_ **[Insert Date of Latest Revision]**, designated as \_\_\_\_\_ **[Insert name of project]** consisting of sheets.
  
2. The Company insures against loss or damage sustained by the Insured in the event that, at Date of Policy
  - a. according to applicable zoning ordinances and amendments, the Land is not classified Zone \_\_\_\_\_ **[Insert Zoning Classification of the Subject Property]**;
  - b. the following use or uses are not allowed under that classification: \_\_\_\_\_ **[Insert Uses allowed by that Zoning Classification. Either quote from the applicable ordinance, or state "See Exhibit A" and attach a copy of the applicable zoning ordinance as Exhibit A]**
  - c. There shall be no liability under paragraph 2.b. if the use or uses are not allowed as the result of any lack of compliance with any condition, restriction, or requirement contained in the zoning ordinances and amendments, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses. This paragraph 2.c. does not modify or limit the coverage provided in Covered Risk 5.
  
3. The Company further insures against loss or damage sustained by the Insured by reason of a final decree of a court of competent jurisdiction either prohibiting the use of the Land, with any existing Improvement, as specified in paragraph 2.b. or requiring the removal or alteration of the Improvement, because, at Date of Policy, the zoning ordinances and amendments have been violated with respect to any of the following matters:
  - a. Area, width, or depth of the Land as a building site for the Improvement
  - b. Floor space area of the Improvement
  - c. Setback of the Improvement from the property lines of the Land
  - d. Height of the Improvement, or
  - e. Number of parking spaces.

4. There shall be no liability under this endorsement based on:
- a. the invalidity of the zoning ordinances and amendments until after a final decree of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit the use or uses;
  - b. the refusal of any person to purchase, lease or lend money on the Title covered by this policy.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ ***[Insert Date of Endorsement]***

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent

## **II. ALTA 8 Series - ENVIRONMENTAL PROTECTION LIEN ENDORSEMENTS**

### **A. Overview and Introduction.**

1. Exclusion 1 of the Loan Policy and Owner's Policy excludes the effect on title of any laws, ordinances, or regulations relating to environmental protection.
  - Covered Risk 5(d) does provide coverage against loss if a notice of the violation of those environmental protection laws is recorded in the Public Records.
    - Condition 1 defines "Public Records" for Covered Risk 5(d) to include environmental protection liens filed with the clerk of the US District Court. Some of the federal environmental protection laws provide for a lien to be filed in the United States district court unless the State has provided otherwise. Alabama has adopted the Uniform Federal Lien Registration Act, so these liens must be filed with the Probate Court to give constructive notice. Therefore, it is not necessary to check the District Court records.
2. Much of the coverage which is provided in the ALTA 8 Series is already provided by the 2006 version of the ALTA policies.
  - The ALTA 8.1-06 is used for Lender's Policies which are insuring mortgages secured by residential property.
  - The ALTA 8.2-06 is used for Lender's or Owner's Policies and is not limited to residential property.

### **B. ALTA 8.1-06: Environmental Protection Lien.**

1. Availability.
  - May be issued with a Lender's Policy only.
  - May only be issued when the insured Mortgage secures residential property.
2. Coverage. Insures a Lender against loss of priority of the insured Mortgage resulting from:
  - An environmental protection lien which is not excepted in

Schedule B-I.

- This is essentially the same protection provided by Covered Risk 5(d).
  - An environmental protection lien provided by state statute, except for those statutes specifically listed in the endorsement.
    - There are no statutes in Alabama which give an environmental lien priority over a previously filed mortgage.
3. Underwriting Guidelines.
- If the title search discloses a recorded environmental protection lien or notice of a violation of any environmental protection laws, ordinances, or regulations, insert it as an exception in Schedule B-I.

ENDORSEMENT  
ALTA 8.1 - 06

ENVIRONMENTAL PROTECTION LIEN

To be attached to and become a part of Policy No. \_\_\_\_\_ **[Insert Policy Number]** of Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

The insurance afforded by this endorsement is only effective if the Land is used or is to be used primarily for residential purposes.

The Company insures against loss or damage sustained by the Insured by reason of lack of priority of the lien of the Insured Mortgage over:

- (a) any environmental protection lien that, at Date of Policy, is recorded in those records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge, or is filed in the records of the clerk of the United States district court for the district in which the Land is located, except as set forth in Schedule B; or
- (b) any environmental protection lien provided by any state statute in effect at Date of Policy, except environmental protection liens provided by the following state statutes:

NONE

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ **[Insert Date of Endorsement]**

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent

C. ALTA 8.2-06: Commercial Environmental Protection Lien.

1. Availability.

- May be issued with a Lender's Policy or Owner's Policy.
- May be issued on any type of property (residential or non-residential).

2. Coverage.

- Provides the same coverage as the ALTA 8.1-06 regarding recorded liens or notices.
- Does not insure against the existence of statutes providing for environmental protection liens.

3. Underwriting Guidelines.

- Follow the same underwriting guidelines as the ALTA 8.1-06.

ENDORSEMENT  
ALTA 8.2 - 06

COMMERCIAL ENVIRONMENTAL PROTECTION LIEN

To be attached to and become a part of Policy No. \_\_\_\_\_ **[Insert Policy Number]** of Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

The Company insures against loss or damage sustained by the Insured by reason of an environmental protection lien that, at Date of Policy, is recorded in the Public Records or filed in the records of the clerk of the United States district court for the district in which the Land is located, unless the environmental protection lien is set forth as an exception in Schedule B.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ **[Insert Date of Endorsement]**

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent



### **III. ALTA Series 9 - RESTRICTIONS, ENCROACHMENTS, AND MINERALS / COVENANTS, CONDITIONS AND RESTRICTIONS ENDORSEMENTS**

#### **A. Overview and Introduction.**

1. The ALTA 9 Series endorsements were completely reworked by ALTA in 2011 and 2012 as a result of the Nationwide case.
2. The previous ALTA 9 Series endorsements provide coverage on 3 topics: (1) Covenants, Conditions, and Restrictions, (2) Encroachments, and (3) Minerals.

- The ALTA 9-06 and 9.7-06 continue to provide Lender's with combined coverage for (1) Covenants, Conditions, and Restrictions, (2) Encroachments, and (3) Minerals.
- However, the other ALTA 9 Series endorsements are limited to providing coverage for Covenants, Conditions and Restrictions.

- Coverage for Encroachments and for Minerals was made available by ALTA through other Endorsement forms:

- The ALTA 28.1-06 provides coverage for Encroachments.
- The ALTA 35 Series provides coverage for Minerals.

#### **B. Endorsements to Loan Policies.**

1. ALTA 9-06: Restrictions, Encroachments, Minerals - Loan Policy
  - The basic endorsement requested by Lenders. It provides the broadest coverage.
2. ALTA 9.7-06: Restrictions, Encroachments, Minerals - Land Under Development - Loan Policy
  - Provides the same coverage as the ALTA 9-06, but extends coverage to include certain future improvements.
3. ALTA 9.6-06: Private Rights - Loan Policy
  - Provides coverage which is not included in any of the other ALTA 9 Series endorsements. It provides coverage against charges or assessment; options to purchase; rights of first refusal; or rights of prior approval of a future purchaser or occupant.

4. ALTA 9.3-06: Covenants, Conditions and Restrictions - Loan Policy
  - Provides the same coverage as the ALTA 9-06 for covenants, conditions, and restrictions only. It does not provide the coverage of the ALTA 9-06 with respect to encroachments or minerals.

C. Endorsements to Owner's Policies.

1. ALTA 9.1-06: Covenants, Conditions and Restrictions - Unimproved Land - Owner's Policy
  - Provides coverage for covenants, conditions, and restrictions.
2. ALTA 9.2-06: Covenants, Conditions and Restrictions - Improved Land - Owner's Policy
  - Provides the same coverage as the ALTA 9.1-06, but extends coverage for matters relating to an existing improvement.
3. ALTA 9.8-06: Covenants, Conditions and Restrictions - Land Under Development - Owner's Policy
  - Provides the same coverage as the ALTA 9.2-06, but includes both existing and certain future improvements.

D. ALTA 9-06: Restrictions, Encroachments, Minerals - Loan Policy.

1. Availability.

- May be issued with a Lender's Policy only.

2. Coverage. Insures a Lender against loss resulting from:

■ Covenants, Conditions and Restrictions.

- A violation of a Covenant that divests, extinguishes or subordinates the lien of the insured Mortgage, renders the lien of an insured Mortgage unenforceable, or causes a loss of an insured lender's title after foreclosure (Item 3.a.).
- **A violation of a Covenant, unless the violation is specifically excepted in Schedule B (Item 3.b.).**
- Forced removal of an "Improvement" as a result of a violation of a building setback line shown on a recorded plat, unless the violation is specifically excepted in Schedule B (Item 3.c.).
- A notice of violation of a Covenant relating to environmental protection, but only if notice of the violation is recorded in the public records and the notice is not specifically excepted in Schedule B (Item 3.d.).

■ Encroachments.

- An encroachment of an existing "Improvement" on the insured property onto either (a) adjoining property or (b) an easement crossing the insured property; unless the encroachment is specifically identified in Schedule B (Item 4.a.i.).
- An encroachment by an existing "Improvement" on adjoining land that encroaches onto the insured property; unless the encroachment is specifically identified in Schedule B (Item 4.a.ii.).
- Forced removal from the adjoining land of an encroachment identified in Schedule B (Item 4.b.).
- **NOTE:** Even if an exception for an encroachment onto a neighbors property is included in Schedule B-I, this Endorsement provides coverage if a court orders removal of that encroachment.

- Damage to an existing "Improvement" which is located on, or encroaches onto, an easement where the damage is due to maintenance of the easement (Item 4.c.i.).

- Minerals.

- Damage to an existing "Improvement" resulting from the use of the surface for development or extraction of minerals or other subsurface substances excepted in Schedule B (Item 4.c.ii.).

- **NOTE:** Even if an exception for mineral interests is included in Schedule B-I, this Endorsement provides coverage for damage to a building resulting from the mineral owner's development of the minerals.

### 3. Underwriting Guidelines.

- Covenants, Conditions and Restrictions.

- Confirm that the Covenants do not contain any provisions that would extinguish or subordinate the insured Mortgage upon a violation of the Covenants.
- Confirm that there are no violations of the covenants.
  
- In order to give this coverage, it is necessary to know what the covenants provide, the details of the transaction, and how the property is being used.
- Examples of Covenant violations:
  - The covenants provide that only one house may be built on each lot; however, a lot has been subdivided and two houses built.
  - The covenants in a commercial development prohibit use as a pharmacy; however, the property being insured is used as a drug store.
  
- Confirm that no improvements violate building set back lines.
- Confirm that there are no recorded notices of any violation of covenant relating to environmental protection.

■ Encroachments.

- Confirm that no building on the subject property encroaches onto a neighbors property or onto an easement that crosses the subject property.
  - For non-residential property, a survey is usually required.
  - Remember: Even if an exception for an encroachment onto a neighbors property is included in Schedule B-I, the Endorsement provides coverage if a court orders removal of that encroachment.
- Confirm that no building on a neighboring property encroaches onto the subject property.
  - For non-residential property, a survey is usually required.

■ Minerals.

- Confirm that there are governmental restrictions that would limit or prevent mineral or other subsurface development.
- Confirm that there is no ongoing or anticipated mineral or other subsurface development in the area.

ENDORSEMENT  
ALTA 9-06

RESTRICTIONS, ENCROACHMENTS, MINERALS - LOAN POLICY

To be attached to and become a part of Policy No. \_\_\_\_\_ **[Insert Policy Number]** of Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

1. The insurance provided by this endorsement is subject to the exclusions in Section 5 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For the purposes of this endorsement only:
  - a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.
  - b. "Improvement" means an improvement, including any lawn, shrubbery, or trees, affixed to either the Land or adjoining land at Date of Policy that by law constitutes real property.
3. The Company insures against loss or damage sustained by the Insured by reason of:
  - a. A violation of a Covenant that:
    - i. divests, subordinates, or extinguishes the lien of the Insured Mortgage,
    - ii. results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or
    - iii. causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness;
  - b. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;
  - c. Enforced removal of an Improvement located on the Land as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision recorded or filed in the Public Records, unless an exception in Schedule B of the policy identifies the violation; or
  - d. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.
4. The Company insures against loss or damage sustained by reason of:
  - a. An encroachment of:
    - i. an Improvement located on the Land, at Date of Policy, onto adjoining land or onto that portion of the Land subject to an easement; or
    - ii. an Improvement located on adjoining land onto the Land at Date of Policy unless an exception in Schedule B of the policy identifies the encroachment otherwise insured against in Sections 4.a.i. or 4.a.ii.;
  - b. A final court order or judgment requiring the removal from any land adjoining the Land of an encroachment identified in Schedule B; or
  - c. Damage to an Improvement located on the Land, at Date of Policy:
    - i. that is located on or encroaches onto that portion of the Land subject to an easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or
    - ii. resulting from the future exercise of a right to use the surface of the Land for the extraction or development of minerals or any other subsurface substances

excepted from the description of the Land or excepted in Schedule B.

5. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:
- a. any Covenant contained in an instrument creating a lease;
  - b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land;
  - c. except as provided in Section 3.d, any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances;
  - d. contamination, explosion, fire, fracturing, vibration, earthquake or subsidence; or
  - e. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ ***[Insert Date of Endorsement]***

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent

**E. ALTA 9.1-06: Covenants, Conditions and Restrictions - Unimproved Land - Owner's Policy.**

**1. Availability.**

- May be issued with an Owner's Policy only.
- May be issued where the property to be insured is improved or unimproved.

**2. Coverage. The ALTA 9.1-06 indemnifies an Owner against loss resulting from:**

- A violation of a Covenant, unless the violation is specifically excepted in Schedule B (Item 3.a.).
- A notice of violation of a Covenant relating to environmental protection, but only if notice of the violation is recorded in the public records and the notice is not specifically excepted in Schedule B (Item 3.b.)

**3. Underwriting Guidelines.**

- Confirm that there are no violations of the covenants.
- Confirm that there are no recorded notices of any violation of covenant relating to environmental protection.



ENDORSEMENT  
ALTA 9.1-06

COVENANTS, CONDITIONS AND RESTRICTIONS -  
OWNER'S POLICY - UNIMPROVED LAND

To be attached to and become a part of Policy No. \_\_\_\_\_ **[Insert Policy Number]** of Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For the purposes of this endorsement only, "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.
3. The Company insures against loss or damage sustained by the Insured by reason of:
  - a. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation; or
  - b. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.
4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:
  - a. any Covenant contained in an instrument creating a lease;
  - b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land; or
  - c. except as provided in Section 3.b, any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ **[Insert Date of Endorsement]**

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent

**F. ALTA 9.2-06: Covenants, Conditions and Restrictions - Improved Land - Owner's Policy.**

**1. Availability.**

- May be issued with an Owner's Policy only.
- May only be issued where the property to be insured is improved.

**2. Coverage.**

- Provides the same coverage as the ALTA 9.1-06.
- Adds indemnification against loss resulting from forced removal of an "Improvement" as a result of a violation of a building setback line shown on a recorded plat, unless the violation is specifically excepted in Schedule B.

**3. Underwriting Guidelines.**

- Follow the same underwriting guidelines as the ALTA 9.1-06.
- Confirm that no improvements violate building set back lines.
  - For non-residential property, a survey is usually required.

ENDORSEMENT  
ALTA 9.2-06

COVENANTS, CONDITIONS AND RESTRICTIONS -  
OWNER'S POLICY - IMPROVED LAND

To be attached to and become a part of Policy No. \_\_\_\_\_ *[Insert Policy Number]* of Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For the purposes of this endorsement only,
  - a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.
  - b. "Improvement" means a building, structure located on the surface of the Land, road, walkway, driveway, or curb, affixed to the Land at Date of Policy and that by law constitutes real property, but excluding any crops, landscaping, lawn, shrubbery, or trees.
3. The Company insures against loss or damage sustained by the Insured by reason of:
  - a. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;
  - b. Enforced removal of an Improvement as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision recorded or filed in the Public Records, unless an exception in Schedule B of the policy identifies the violation; or
  - c. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.
4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:
  - a. any Covenant contained in an instrument creating a lease;
  - b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land; or
  - c. except as provided in Section 3.c., any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ *[Insert Date of Endorsement]*

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent

G. ALTA 9.3-06: Covenants, Conditions and Restrictions - Loan Policy.

1. Availability.

- May be issued with a Lender's Policy only.

2. Coverage.

- Provides identical coverage regarding Covenants, Conditions, and Restrictions as the ALTA 9-06.
- However, the ALTA 9.3-06 does not include the coverage for Encroachments and Minerals provided by the ALTA 9-06.

3. Underwriting Guidelines.

- Follow the same underwriting guidelines as for the Covenants, Conditions, and Restrictions coverages of the ALTA 9-06.
- **NOTE:** The ALTA 9.3-06 is useful where the Encroachments and/or Minerals coverage provided by the ALTA 9-06 can not be issued, but the Covenants, Conditions, and Restrictions coverage can.

ENDORSEMENT  
ALTA 9.3-06

COVENANTS, CONDITIONS AND RESTRICTIONS - LOAN POLICY

To be attached to and become a part of Policy No. \_\_\_\_\_ **[Insert Policy Number]** of Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For the purposes of this endorsement only:
  - a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.
  - b. "Improvement" means an improvement, including any lawn, shrubbery, or trees, affixed to the Land at Date of Policy that by law constitutes real property.
3. The Company insures against loss or damage sustained by the Insured by reason of:
  - a. A violation of a Covenant that:
    - i. divests, subordinates, or extinguishes the lien of the Insured Mortgage,
    - ii. results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or
    - iii. causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness;
  - b. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;
  - c. Enforced removal of an Improvement as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision recorded or filed in the Public Records, unless an exception in Schedule B of the policy identifies the violation; or
  - d. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.
4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:
  - a. any Covenant contained in an instrument creating a lease;
  - b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land; or
  - c. except as provided in Section 3.d, any Covenant pertaining to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ *[Insert Date of Endorsement]*

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent

H. ALTA 9.6-06: Private Rights - Loan Policy.

1. Availability.

- May be issued with a Lender's Policy only.
- Contact Underwriting Counsel if requested to issue this endorsement.

2. Coverage.

- Insures a Lender against loss resulting from enforcement of a "Private Right" in a covenant that:
  - Results in invalidity, unenforceability, or lack of priority of the insured Mortgage (Item 3.a.).
  - Causes a loss of an insured lender's title after foreclosure (Item 3.b.).
- "Private Right" is defined as:
  - A private charge or assessment (such as home owners or other association fees or dues or private transfer fees, for example);
  - An option to purchase;
  - A right of first refusal; or
  - A right of prior approval of a future purchaser or occupant (often found in retail developments).
- **NOTE:** The coverage provided by this endorsement is not included in the other ALTA 9 Series endorsements. As a result, a lender may request both the ALTA 9.6-06 and one of the other ALTA 9 Series endorsements.

3. Underwriting Guidelines.

If there are recorded instruments that contain covenants, conditions or restrictions:

- **Read the covenants** and determine if a "Private Right" exists.
  - If so, do not issue or commit to issue this endorsement.
  - Do not rely on the classification of the document in the commitment failing to identify private rights. All

documents should be examined for private rights before this coverage may be given.

- If a private right exists and termination of the private right is proposed for issuance of this endorsement, contact Underwriting Counsel for guidance.



ENDORSEMENT  
ALTA 9.6-06

PRIVATE RIGHTS - LOAN POLICY

To be attached to and become a part of Policy No. \_\_\_\_\_ **[Insert Policy Number]** of Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For purposes of this endorsement only:
  - a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.
  - b. "Private Right" means (i) a private charge or assessment; (ii) an option to purchase; (iii) a right of first refusal; or (iv) a right of prior approval of a future purchaser or occupant.
3. The Company insures against loss or damage sustained by the Insured under this Loan Policy if enforcement of a Private Right in a Covenant affecting the Title at Date of Policy (a) results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or (b) causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness.
4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from any covenant, condition, limitation or restriction:
  - a. contained in an instrument creating a lease;
  - b. relating to obligations of any type to perform maintenance, repair, or remediation on the Land; or
  - c. relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ **[Insert Date of Endorsement]**

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent

I. ALTA 9.7-06: Restrictions, Encroachments, Minerals - Land Under Development  
- Loan Policy.

1. Availability.

- May be issued with a Lender's Policy only.
- May only be issued when the construction of an improvement is imminent and detailed plans and specifications for the improvement have been prepared.
- Contact Underwriting Counsel if you are asked to issue this Endorsement.

2. Coverage.

- Provides a Lender the same coverage as the ALTA 9-06, but adds coverage for certain "Future Improvements".
  - "Future Improvement" means a building, structure, road, walkway, driveway, curb, lawn, shrubbery or trees to be constructed on or affixed to the Land in the locations according to the "Plans" and that by law will constitute real property.
  - "Plans" means the survey, site and elevation plans or other depictions or drawings which are identified in the Endorsement.

3. Underwriting Guidelines.

- Follow the same underwriting guidelines as the ALTA 9-06.
- Obtain and review the Plans for the improvement.
  - The Plans must be sufficiently detailed so that the coverages provided by the Endorsement can be safely given.
- Complete the Endorsement as described on the attached sample.

ENDORSEMENT  
ALTA 9.7-06

RESTRICTIONS, ENCROACHMENTS, MINERALS -  
LAND UNDER DEVELOPMENT - LOAN POLICY

To be attached to and become a part of Policy No. \_\_\_\_\_ **[Insert Policy Number]** of Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

1. The insurance provided by this endorsement is subject to the exclusions in Section 5 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For purposes of this endorsement only:
  - a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.
  - b. "Future Improvement" means a building, structure, road, walkway, driveway, curb, lawn, shrubbery or trees to be constructed on or affixed to the Land in the locations according to the Plans and that by law will constitute real property.
  - c. "Improvement" means an improvement, including any lawn, shrubbery, or trees, affixed to either the Land or adjoining land at Date of Policy that by law constitutes real property.
  - d. "Plans" means the survey, site and elevation plans or other depictions or drawings prepared by \_\_\_\_\_ **[Insert name of architect or engineer]** dated \_\_\_\_\_ **[Insert Date of Plans]**, last revised \_\_\_\_\_ **[Insert Date of Latest Revision]**, designated as \_\_\_\_\_ **[Insert name of project]** consisting of \_\_\_\_\_ **[Insert number of pages]** sheets.
3. The Company insures against loss or damage sustained by the Insured by reason of:
  - a. A violation of a Covenant that:
    - i. divests, subordinates, or extinguishes the lien of the Insured Mortgage,
    - ii. results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or
    - iii. causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness;
  - b. A violation of an enforceable Covenant by an Improvement on the Land at Date of Policy or by a Future Improvement, unless an exception in Schedule B of the policy identifies the violation;
  - c. Enforced removal of an Improvement located on the Land or of a Future Improvement as a result of a violation of a building setback line shown on a plat of subdivision recorded or filed in the Public Records at Date of Policy, unless an exception in Schedule B of the policy identifies the violation; or
  - d. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.

4. The Company insures against loss or damage sustained by reason of:
  - a. An encroachment of:
    - i. an Improvement located on the Land at Date of Policy or a Future Improvement, onto adjoining land or onto that portion of the Land subject to an easement; or
    - ii. an Improvement located on adjoining land onto the Land at Date of Policy, unless an exception in Schedule B of the policy identifies the encroachment otherwise insured against in Sections 4.a.i. or 4.a.ii.;
  - b. Damage to an Improvement located on the Land at Date of Policy or a Future Improvement:
    - i. that encroaches onto that portion of the Land subject to an easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or
    - ii. resulting from the future exercise of a right to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.
  
5. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:
  - a. any Covenant contained in an instrument creating a lease;
  - b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land;
  - c. except as provided in Section 3.d, any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances;
  - d. contamination, explosion, fire, vibration, fracturing, earthquake or subsidence; or
  - e. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ ***[Insert Date of Endorsement]***

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
 Mark B. Higdon President  
 W. Parrish Fortenberry Secretary  
 OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
 Mark A. Bilbrey President  
 Daniel M. Wold Secretary

\_\_\_\_\_  
 Authorized Officer or Agent

J. ALTA 9.8-06: Covenants, Conditions and Restrictions - Land Under Development - Owner's Policy.

1. Availability.

- May be issued with an Owner's Policy only.
- May only be issued when the construction of an improvement is imminent and detailed plans and specifications for the improvement have been prepared.
- Contact Underwriting Counsel if you are asked to issue this Endorsement.

2. Coverage.

- Provides the same coverage as the ALTA 9.2-06.
- Adds coverage for certain "Future Improvements".

3. Underwriting Guidelines.

- Follow the same underwriting guidelines as for the ALTA 9.2-06.
- Obtain and review the Plans for the improvement and determine that the coverages can be safely given.
  - The Plans must be sufficiently detailed so that the determinations can be made.
- Complete the Endorsement as described on the attached sample.

ENDORSEMENT  
ALTA 9.8-06

COVENANTS, CONDITIONS AND RESTRICTIONS -  
LAND UNDER DEVELOPMENT - OWNER'S POLICY

To be attached to and become a part of Policy No. \_\_\_\_\_ **[Insert Policy Number]** of Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For purposes of this endorsement only:
  - a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.
  - b. "Future Improvement" means a building, structure, road, walkway, driveway, curb to be constructed on or affixed to the Land in the locations according to the Plans and that by law will constitute real property, but excluding any crops, landscaping, lawn, shrubbery, or trees.
  - c. "Improvement" means a building, structure located on the surface of the Land, road, walkway, driveway, or curb, affixed to the Land at Date of Policy and that by law constitutes real property, but excluding any crops, landscaping, lawn, shrubbery, or trees.
  - d. "Plans" means the survey, site and elevation plans or other depictions or drawings prepared by \_\_\_\_\_ **[Insert name of architect or engineer]** dated \_\_\_\_\_ **[Insert Date of Plans]**, last revised \_\_\_\_\_ **[Insert Date of Latest Revision]**, designated as \_\_\_\_\_ **[Insert name of project]** consisting of \_\_\_\_\_ **[Insert number of pages]** sheets.
3. The Company insures against loss or damage sustained by the Insured by reason of:
  - a. A violation of an enforceable Covenant by an Improvement on the Land at Date of Policy or by a Future Improvement, unless an exception in Schedule B of the policy identifies the violation;
  - b. Enforced removal of an Improvement located on the Land or of a Future Improvement as a result of a violation of a building setback line shown on a plat of subdivision recorded or filed in the Public Records at Date of Policy, unless an exception in Schedule B of the policy identifies the violation; or
  - c. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.
4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:
  - a. any Covenant contained in an instrument creating a lease;

- b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land;
- c. except as provided in Section 3.c, any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances; or
- d. contamination, explosion, fire, vibration, fracturing, earthquake or subsidence.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ *[Insert Date of Endorsement]*

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent

#### **IV. ALTA 11 Series - MORTGAGE MODIFICATION ENDORSEMENTS**

##### **A. Introduction.**

1. A Loan Policy insures through the Date of Policy, which is stated in Schedule A.
  - Under the terms of the Policy, a subsequent Modification of the insured Mortgage is not insured and the Lender would have no claim for matters occurring after the Policy Date.
    - For example: If the Modification was ineffective and the statute of limitations on the original Mortgage ran, or the Modification resulted in a loss of priority to an intervening lien, the Lender would have no claim under the Policy.
2. Some lenders request an Endorsement to insure the Modification in order to limit or eliminate this risk.
  - Modifications can be insured to the extent provided by an ALTA 11-06 or 11.1-06 Endorsement.
  - The ALTA 11.1-06 provides the same coverage as the ALTA 11-06, but is used where an intervening lien exists and was subordinated to the modification.
    - The current appropriate charge for the ALTA 11 Series is \$.10 per thousand.
  - Modifications may also be insured by use of a blank endorsement with the proper wording if a lender wishes to extend coverage through the recording of the modification agreement and to have said modification agreement added as an insured item under Schedule A of the loan policy.
    - For underwriting guidelines and the appropriate charge, refer to the Modifications of Mortgage Loans Section on Page 96-9 of the Alabama Agents Manual.

##### **B. ALTA 11-06: Mortgage Modification.**

1. Availability.
  - May be issued with a Lender's Policy.



2. Coverage.

- Insures a Lender against loss due to invalidity or unenforceability of the Mortgage as a result of the terms of the modification agreement.
- Insures that priority of the Mortgage, as modified, continues over any defects, liens and encumbrances on the title, other than those listed as exceptions in either the Policy or the Endorsement.

3. Underwriting Guidelines.

- Determine if any intervening matters have been recorded between the Policy Date and the date of the Modification.
  - All intervening matters must be listed as exceptions unless subordinated or released.
- Complete the Endorsement as described on the attached sample.

ENDORSEMENT  
ALTA 11-06

MORTGAGE MODIFICATIONS

To be attached to and become a part of Policy No. \_\_\_\_\_ **[Insert Policy Number]** of Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

The Company insures against loss or damage sustained by the Insured by reason of:

1. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title at Date of Endorsement as a result of the agreement dated \_\_\_\_\_ **[Insert date of Modification Agreement]**, recorded \_\_\_\_\_ **[Insert the recording information of the Modification Agreement]** ("Modification"); and
2. The lack of priority of the lien of the Insured Mortgage, at Date of Endorsement, over defects in or liens or encumbrances on the Title, except for those shown in the policy or any prior endorsement and except: \_\_\_\_\_ **[Insert any intervening matters between the Date of Policy and Date of the Endorsement. If none, insert "NONE"]**.

This endorsement does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses, by reason of any claim that arises out of the transaction creating the Modification by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws that is based on:

1. the Modification being deemed a fraudulent conveyance or fraudulent transfer; or
2. the Modification being deemed a preferential transfer except where the preferential transfer results from the failure:
  - a. to timely record the instrument of transfer; or
  - b. of such recordation to impart notice to a purchaser for value or to a judgment or lien creditor.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ **[Insert Date of Endorsement]**

Countersigned: \_\_\_\_\_

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent

C. ALTA 11.1-06: Mortgage Modification with Subordination.

1. Availability.

- May be issued with a Lender's Policy.

2. Coverage.

- The ALTA 11.1-06 provides the same coverage as the ALTA 11-06, but is used where an intervening lien exists and was subordinated to the modification.

3. Underwriting Guidelines.

- Follow the same underwriting guidelines as for the ALTA 11-06.
- Complete the Endorsement as described on the attached sample.
  - All subordinated intervening matters must be listed in the Endorsement.

ENDORSEMENT  
ALTA 11.1-06

MORTGAGE MODIFICATION WITH SUBORDINATION

To be attached to and become a part of Policy No. \_\_\_\_\_ **[Insert Policy Number]** of Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

The Company insures against loss or damage sustained by the Insured by reason of:

1. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title at Date of Endorsement as a result of the agreement dated \_\_\_\_\_ **[Insert date of Modification Agreement]**, recorded \_\_\_\_\_ **[Insert the recording information of the Modification Agreement]** ("Modification"); and
2. The lack of priority of the lien of the Insured Mortgage, at Date of Endorsement, over defects in or liens or encumbrances on the Title, except for those shown in the policy or any prior endorsement and except: \_\_\_\_\_ **[Insert any intervening matters between the Date of Policy and Date of the Endorsement. If none, insert "NONE"]**;
3. The following matters not being subordinate to the lien of the Insured Mortgage: \_\_\_\_\_ **[Insert any intervening matters which are subordinate to the Insured Mortgage as modified by the Insured Modification]**;

This endorsement does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses, by reason of any claim that arises out of the transaction creating the Modification by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws that is based on:

1. the Modification being deemed a fraudulent conveyance or fraudulent transfer; or
2. the Modification being deemed a preferential transfer except where the preferential transfer results from the failure
  - a. to timely record the instrument of transfer; or
  - b. of such recordation to impart notice to a purchaser for value or to a judgment or lien creditor.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ **[Insert Date of Endorsement]**

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent

**V. CREDITORS' RIGHTS ENDORSEMENT (ALTA 21-06)**

A. Exclusion 6 of the Lender's Policy and Exclusion 4 of the Owner's Policy exclude from Coverage claims that the insured transaction is:

1. A fraudulent transfer or conveyance under (1) §548 of the Bankruptcy Code; or (2) state fraudulent conveyance law.
2. A Preferential Transfer under §547 of the Bankruptcy Code.

■ However, the Creditors' Rights Exclusion does not exclude coverage for a Preferential Transfer if the basis of the preference is either:

- the failure to timely record the transfer instrument, or
- the recording fails to impart constructive notice of its contents to a purchaser for value or a judgment or lien creditor.

B. Formerly, the ALTA 21-06 Endorsement provided coverage for creditors' rights matters which would have otherwise been excluded by the Exclusions.

■ **The ALTA 21-06 has been withdrawn and is no longer available.**

- See Underwriting Bulletin "Creditors' Rights Coverage Eliminated" dated September 27, 2011.

C. For New Policies:

- The ALTA 21-06 Endorsement may **NOT** be issued.
- No Endorsement deleting Exclusion 6 of the Lender's Policy or Exclusion 4 of the Owner's Policy may be issued.

D. For Existing Policies which include an ALTA 21-06 or otherwise provided Creditors' Rights Coverage:

■ If asked to insure an Assignment or Modification:

- If insuring the Assignment using the ALTA 10-06 or 10.1-06 or insuring the Modification using the ALTA 11-06 or ALTA 11.1-06, these endorsements contain appropriate wording and no additional exception is necessary.

- For any other form of Endorsement to insure the Assignment or Modification it **MUST** include the following exception:

*This endorsement does not insure against and the Company will not pay any loss, cost, expenses or attorneys' fees by reason of any claim that the \_\_\_\_\_ [Assignment/Modification] constitutes a preferential transfer or fraudulent conveyance under federal bankruptcy, state insolvency or similar creditors' rights laws. This exception shall not apply if the claim of preferential transfer results from the failure of the recording of the Assignment: (a) to be timely; or (b) to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.*

- If asked to issue any other Endorsement which Down Dates the Policy, the Endorsement **MUST** include the following exception:

*This endorsement does not insure against and the Company will not pay any loss, cost, expenses or attorneys' fees by reason of any claim seeking the avoidance, in whole or in part, of the interest insured in Schedule A, because of the occurrence, after Date of Policy as stated in the Policy prior to issuance of this endorsement and prior to Date of Policy as stated in this endorsement, of a preferential transfer or fraudulent conveyance under federal bankruptcy, state insolvency or similar creditors' rights laws.*

**VI. ALTA 28 Series - EASEMENT ENDORSEMENT/ENCROACHMENTS -  
BOUNDARIES AND EASEMENTS ENDORSEMENT**

**A. ALTA 28-06: Easement - Damage or Enforced Removal.**

- The ALTA 28-06 insures a Lender or Owner against loss due to (1) damage to an existing building, or (2) forced removal or alteration of an existing building, which is a result of the exercise of the right to use or maintain an easement (even though that easement is excepted in Schedule B).
  
- Insert only the Item Number(s) from Schedule B that describe the Easement(s) for which it is appropriate to extend the coverage provided by this Endorsement.

ENDORSEMENT  
ALTA 28-06

EASEMENT - DAMAGE OR ENFORCED REMOVAL

To be attached to and become a part of Policy No. \_\_\_\_\_ **[Insert Policy Number]** of Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

The Company insures against loss or damage sustained by the Insured if the exercise of the granted or reserved rights to use or maintain the easement(s) referred to in Exception(s) \_\_\_\_\_ **[Insert the Item Number from Schedule B that describe the Easement(s) insured against]** of Schedule B results in:

- (1) damage to an existing building located on the Land, or
- (2) enforced removal or alteration of an existing building located on the Land.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (I) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ **[Insert Date of Endorsement]**

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent  
MVT 08-9 (Revised 2/03/10)



**B. ALTA 28.1-06: Encroachments - Boundaries and Easements.**

- The ALTA 28.1-06 insures a Lender or Owner against loss due to:
  - encroachment by an existing building on the insured property onto either (a) adjoining property or (b) an easement crossing the insured property;
  - encroachment by an existing building on adjoining land that encroaches onto the insured property;
  - enforced removal of an existing building on the insured property that encroaches onto an easement crossing the insured property; and
  - enforced removal of an existing building on the insured property that encroaches onto adjoining land.
  
- Any encroachments which are not to be insured must be listed as exceptions in Schedule B of the Policy and the corresponding Item Number(s) inserted into Section 4 of the Endorsement.

ENDORSEMENT  
ALTA 28.1-06  
ENCROACHMENTS - BOUNDARIES AND EASEMENTS

To be attached to and become a part of Policy No. \_\_\_\_\_ *[Insert Policy Number]* of Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For purposes of this endorsement only, "Improvement" means an existing building, located on either the Land or adjoining land at Date of Policy and that by law constitutes real property.
3. The Company insures against loss or damage sustained by the Insured by reason of:
  - a. An encroachment of any Improvement located on the Land onto adjoining land or onto that portion of the Land subject to an easement, unless an exception in Schedule B of the policy identifies the encroachment;
  - b. An encroachment of any Improvement located on adjoining land onto the Land at Date of Policy, unless an exception in Schedule B of the policy identifies the encroachment;
  - c. Enforced removal of any Improvement located on the Land as a result of an encroachment by the Improvement onto any portion of the Land subject to any easement, in the event that the owners of the easement shall, for the purpose of exercising the right of use or maintenance of the easement, compel removal or relocation of the encroaching Improvement; or
  - d. Enforced removal of any Improvement located on the Land that encroaches onto adjoining land.
4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from the encroachments listed as Exceptions \_\_\_\_\_ *[Insert the Item Number(s) from Schedule B that describe the Encroachments(s) which are NOT insured against by this Endorsement]* of Schedule B.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (I) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ *[Insert Date of Endorsement]*

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent  
MVT 12-06 (4/02/12)

## **VII. ALTA Series 35 - MINERALS AND OTHER SUBSURFACE SUBSTANCES**

### **A. Coverage.**

- The ALTA 35 series endorsements provide limited coverage for damage or interference with "Improvements" (as defined by each endorsement) because of the development or extraction of minerals or other subsurface substances excepted in Schedule B.
- The coverage in the ALTA 35 series is identical except for the definition of "Improvements".
  - ALTA 35-06 defines "Improvements" to include buildings.
  - ALTA 35.1-06 defines "Improvements" to include buildings and structures, plus paved roads, walkways, parking areas, driveways, or curbs. It excludes crops, landscaping, lawn, shrubbery, or trees.
  - ALTA 35.2-06 contains a blank so the specific improvements covered can be itemized.
  - ALTA 35.3-06 gives the coverage of ALTA 35.1-06 but includes improvements to be built as set out on the designated plans.

### **B. Underwriting Guidelines.**

- To issue the ALTA 35 series, the Agent must be sufficiently familiar with the area to know that mineral development is not active in the area, or if other restrictions (covenants, zoning, etc) prohibit mineral development.

ENDORSEMENT  
ALTA 35-06

MINERALS AND OTHER SUBSURFACE SUBSTANCES - BUILDINGS

To be attached to and become a part of Policy No. \_\_\_\_\_ *[Insert Policy Number]* of Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

1. The insurance provided by this endorsement is subject to the exclusion in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For purposes of this endorsement only, "Improvement" means a building on the Land at Date of Policy.
3. The Company insures against loss or damage sustained by the Insured by reason of the enforced removal or alteration of any Improvement resulting from the future exercise of any right existing at Date of Policy to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.
4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:
  - a. contamination, explosion, fire, vibration, fracturing, earthquake or subsidence; or
  - b. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances; or
  - c. the exercise of the rights described in \_\_\_\_\_.  
*[Identify any interest excepted from the description of the Land in Schedule A or excepted in Schedule B that you intend to exclude from this coverage.]*

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ *[Insert Date of Endorsement]*

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent  
MVT 12-17 (4/02/12)

ENDORSEMENT  
ALTA 35.1-06

MINERALS AND OTHER SUBSURFACE  
SUBSTANCES - IMPROVEMENTS

To be attached to and become a part of Policy No. \_\_\_\_\_ *[Insert Policy Number]* of  
Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

1. The insurance provided by this endorsement is subject to the exclusion in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For purposes of this endorsement only, "Improvement" means a building, structure located on the surface of the Land, and any paved road, walkway, parking area, driveway, or curb, affixed to the Land at Date of Policy and that by law constitutes real property, but excluding any crops, landscaping, lawn, shrubbery, or trees.
3. The Company insures against loss or damage sustained by the Insured by reason of the enforced removal or alteration of any Improvement, resulting from the future exercise of any right existing at Date of Policy to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.
4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:
  - a. contamination, explosion, fire, vibration, fracturing, earthquake or subsidence; or
  - b. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances; or
  - c. the exercise of the rights described in \_\_\_\_\_.]  
*[Identify any interest excepted from the description of the Land in Schedule A or excepted in Schedule B that you intend to exclude from this coverage.]*

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ *[Insert Date of Endorsement]*

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent  
MVT12-18 (4/02/12)

ENDORSEMENT  
ALTA 35.2-06

MINERALS AND OTHER SUBSURFACE SUBSTANCES -  
DESCRIBED IMPROVEMENTS

To be attached to and become a part of Policy No. \_\_\_\_\_ *[Insert Policy Number]* of  
Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

1. The insurance provided by this endorsement is subject to the exclusion in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For purposes of this endorsement only, "Improvement" means each improvement on the Land at Date of Policy itemized [on the exhibit attached to this endorsement] [below:]
3. The Company insures against loss or damage sustained by the Insured by reason of the enforced removal or alteration of any Improvement resulting from the future exercise of any right existing at Date of Policy to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.
4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:
  - a. contamination, explosion, fire, vibration, fracturing, earthquake or subsidence; or
  - b. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances; or
  - c. the exercise of the rights described in \_\_\_\_\_.  
*[Identify any interest excepted from the description of the Land in Schedule A or excepted in Schedule B that you intend to exclude from this coverage.]*

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ *[Insert Date of Endorsement]*

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent  
MVT 12-19 (4/02/12)

ENDORSEMENT  
ALTA 35.3-06

MINERALS AND OTHER SUBSURFACE SUBSTANCES -  
LAND UNDER DEVELOPMENT

To be attached to and become a part of Policy No. \_\_\_\_\_ *[Insert Policy Number]* of  
Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

1. The insurance provided by this endorsement is subject to the exclusion in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For purposes of this endorsement only:
  - a. "Improvement" means a building, structure located on the surface of the Land, and any paved road, walkway, parking area, driveway, or curb, affixed to the Land at Date of Policy and that by law constitutes real property, but excluding any crops, landscaping, lawn, shrubbery, or trees.
  - b. "Future Improvement" means a building, structure, and any paved road, walkway, parking area, driveway, or curb to be constructed on or affixed to the Land in the locations according to the Plans and that by law will constitute real property, but excluding any crops, landscaping, lawn, shrubbery, or trees.
  - c. "Plans" means the survey, site and elevation plans or other depictions or drawings prepared by \_\_\_\_\_ *[Insert name of architect or engineer]* dated \_\_\_\_\_ *[Insert date of the Plans]*, last revised \_\_\_\_\_ *[Insert date of last revision of the Plans]*, designated as \_\_\_\_\_ *[Insert name of project or project number]* consisting of \_\_\_\_\_ *[Insert number of Pages of the Plans]* sheets.
3. The Company insures against loss or damage sustained by the Insured by reason of the enforced removal or alteration of an Improvement or a Future Improvement, resulting from the future exercise of any right existing at Date of Policy to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.
4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:
  - a. contamination, explosion, fire, vibration, fracturing, earthquake or subsidence; or
  - b. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances; or
  - c. the exercise of the rights described in \_\_\_\_\_  
*[Identify any interest excepted from the description of the Land in Schedule A or excepted in Schedule B that you intend to exclude from this coverage.]*

This endorsement is issued as part of the policy. Except as it expressly states, it does not (I) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ *[Insert Date of Endorsement]*

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent  
MVT 12-20 (4/02/12)



## VIII. DELETION OF ARBITRATION ENDORSEMENT

### A. Introduction.

- Section 13 of the Loan Policy provides for Arbitration:
  - Policy Amount of \$2 million or less: arbitration may be unilaterally invoked by either Insured or Underwriter.
  - Policy Amount of over \$2 million: both parties must agree to arbitration.
- Lenders on Commercial Transactions occasionally request the Arbitration provision of the Loan Policy to be deleted.
- This is not an ALTA Endorsement. It is simply the appropriate wording inserted into a blank Endorsement. A sample is attached.

### B. Availability.

- If the Policy Amount of the Policy to be issued is \$2 million or less: contact Underwriting Counsel.
- If the Policy Amount of the Policy to be issued is more than \$2 million or more: it may be issued if requested by the lender.

ENDORSEMENT

DELETION OF ARBITRATION PROVISION FROM LENDER'S POLICY

To be attached to and become a part of Policy No. \_\_\_\_\_ *[Insert Policy Number]* of Mississippi Valley Title Insurance Company/Old Republic National Title Insurance Company.

**Section 13 of the Conditions, relating to arbitration, is hereby deleted in its entirety.**

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: \_\_\_\_\_ *[Insert Date of Endorsement]*

Countersigned:

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY  
Mark B. Higdon President  
W. Parrish Fortenberry Secretary  
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY  
Mark A. Bilbrey President  
Daniel M. Wold Secretary

\_\_\_\_\_  
Authorized Officer or Agent

## **IX. ENDORSEMENTS WHICH MOVE THE POLICY DATE FORWARD**

- A. An Endorsement to an existing Policy which advances the Policy Date may be used in connection with construction disbursements, assignments, modifications of mortgages or any other appropriate request for a Policy Update.**
  
- B. Changing the Date of Policy by Endorsement also updates the coverages provided by all Endorsements to that Policy.**
  - Each Endorsement must be re-underwritten to determine that it is safe to advance the Date of Policy. If not, appropriate exceptions must be made.**
  
  - Be very careful if the original Policy contains:**
    - Survey Coverage or a survey related endorsement**
    - ALTA 3 Series (Zoning)**
    - ALTA 9 Series (Restrictions, Encroachments, and Minerals/Covenants, Conditions and Restrictions Endorsements)**
    - ALTA 21-06 (Creditors' Rights Coverage)**

# **RECENTLY ENACTED ALABAMA STATUTES**

- I. ALABAMA UNIFORM POWER OF ATTORNEY ACT**
- II. ALABAMA RESIDENTIAL MORTGAGE SATISFACTION  
ACT**
- III. PRIVATE TRANSFER FEES**

- I. Alabama Uniform Power of Attorney - Sections 26-1A-101, *et seq.***
  - A. Effective Date and Application**
    - 1. Affects only POA's executed on or after January 1, 2012
    - 2. POA's executed prior to January 1, 2012 governed by prior applicable law
  - B. Select Default Provisions Under Article 1 (May be Altered by POA)**
    - 1. Durability - Section 104
    - 2. Effective Date of POA - Section 109
    - 3. Revocation of Spouse - Agent's Authority - Section 110(b)(3)
    - 4. Age of POA - Section 110(c)
    - 5. Authority of Co-Agent to Act Alone - Section 111(a)
    - 6. Authority of Successor Agents - Section 111(b)
    - 7. Notice of Resignation of Agent - Section 118
  - C. Execution Requirements**
    - 1. Signature of Principal or Signature of Principal by Another Individual - Section 105
    - 2. Acknowledged Signatures Presumed Genuine - Section 105
  - D. Incapacity**
    - 1. Definition Includes Principals Who Are "Unavailable" - Missing, Detained or Unable to Return to United States - Section 102(5)
    - 2. Default Persons Designated in Section 109(c) to Provide Written Determination of Incapacity
      - a. Licensed Physician or Psychologist ("impairment")
      - b. Attorney, Judge or Governmental Official ("unavailable")
  - E. Termination**
    - 1. Events of Termination - Section 110
    - 2. Protection to Agents Acting in Good Faith and Without Actual Knowledge of Termination - Section 110
  - F. Acknowledged POA's**
    - 1. Parameters for "Acceptance" of POA - Section 119
    - 2. Parameters for "Refusal" of POA - Section 120(b)
    - 3. Sole Liability for "Arbitrary Refusal" of POA - Section 120(c)
    - 4. Right to Request Agent Certification, Translation or Opinion of Counsel - Sections 119(d) and 120(a)
  - G. Effect of Grants of General Authority (unless otherwise provided in the POA or Act)**
    - 1. Broad and Sweeping Powers
    - 2. Inclusion of Subject Matters and Authority in Sections 204-217 and incidental authority of Section 203 - Sections 201(c) and 202
      - a. Real Property - Section 204
      - b. Business Entities (Principal's Ownership Interest) - Section 209

- H. **Express Grants of Authority**
  - 1. **Certain Acts are Authorized Only If Expressly Granted in the POA - Section 201(a) - Noteworthy Acts for Title Insurers are:**
    - a. **Create, Amend, Revoke or Terminate an Inter Vivos Trust - Section 201(a)(1)**
    - b. **Create or Change Rights of Survivorship - Section 201(a)(3)**
    - c. **Delegate Authority Granted under the POA - Section 201(a)(5)**
    - d. **Exercise fiduciary powers that the principal has authority to delegate - Section 201(a)(7)**
  - 2. **Review of Other Applicable Instruments or Laws**
- I. **“Self-Dealing”**
  - 1. **Appears to be Allowed to Some Extent by the Act**
    - a. **Parameters for Gift-Making Authority - Section 201(d) in Conjunction with Section 271. See Also Section 201(b) - Parameters for Conveyance of Principal’s Land to an Agent by Gift or Otherwise**
      - (1) **Agents Related to Principal**
      - (2) **Unrelated Agents**
    - b. **Authority to Provide Living Quarters for Certain Family Members or Other Individuals - Section 213(a)(3)**
  - 2. **Subject to Limitations, Modifications or Prohibitions in the POA**
  - 3. **Agent bound by the Mandatory and Unmodified Default Fiduciary Duties Set Forth in Section 114**
    - a. **Agent Acting in Good Faith not Liable for Failure to Preserve the Estate Plan of Principal - Section 114(c)**
    - b. **Agent Acting Properly for Best Interest of the Principal Not Liable Solely Because the Agent also Benefits from the Act**
- J. **Forms**
  - 1. **Optional Statutory Alabama POA Form - Section 301 - See attached**
  - 2. **Sample Agent Certification Form - Section 302**

See Attached Underwriting Bulletin dated February 14, 2012 entitled “Alabama Uniform Power of Attorney Act”.

**ALABAMA POWER OF ATTORNEY FORM**

**Important Information**

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the Alabama Uniform Power of Attorney Act, Chapter 1A, Title 26, Code of Alabama 1975.

This power of attorney does not authorize the agent to make health care decisions for you. Such powers are governed by other applicable law.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you.

Your agent is entitled to reimbursement of reasonable expenses and reasonable compensation unless you state otherwise in the Special Instructions.

This form provides for designation of one agent. If you wish to name more than one agent you may name a co-agent in the Special Instructions. Co-agents are not required to act together unless you include that requirement in the Special Instructions.

In your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney becomes effective immediately unless you state otherwise in the Special Instructions.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

**Designation of Agent**

I \_\_\_\_\_ (Name of Principal) name the following person as my agent:

Name of Agent: \_\_\_\_\_  
Agent's Address: \_\_\_\_\_  
Agent's Telephone Number: \_\_\_\_\_

**Designation of Successor Agent(s)**  
**(Optional)**

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of Successor Agent: \_\_\_\_\_  
Successor Agent's Address: \_\_\_\_\_  
Successor Agent's Telephone Number: \_\_\_\_\_

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

Name of Second Successor Agent: \_\_\_\_\_  
Second Successor Agent's Address: \_\_\_\_\_  
Second Successor Agent's Telephone Number: \_\_\_\_\_

**Grant of General Authority**

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the Alabama Uniform Power of Attorney Act, Chapter 1A, Title 26, Code of Alabama 1975:

If you wish to grant **general authority** over all of the subjects enumerated in this section you may SIGN here:

\_\_\_\_\_   
 (Signature of Principal)

**OR**

If you wish to grant **specific authority** over less than all subjects enumerated in this section you must INITIAL by each subject you want to include in the agent's authority:

- \_\_\_\_\_ Real Property as defined in Section 26-1A-204
- \_\_\_\_\_ Tangible Personal Property as defined in Section 26-1A-205
- \_\_\_\_\_ Stocks and Bonds as defined in Section 26-1A-206
- \_\_\_\_\_ Commodities and Options as defined in Section 26-1A-207
- \_\_\_\_\_ Banks and Other Financial Institutions as defined in Section 26-1A-208
- \_\_\_\_\_ Operation of Entity or Business as defined in Section 26-1A-209
- \_\_\_\_\_ Insurance and Annuities as defined in Section 26-1A-210
- \_\_\_\_\_ Estates, Trusts, and Other Beneficial Interests as defined in Section 26-1A-211
- \_\_\_\_\_ Claims and Litigation as defined in Section 26-1A-212
- \_\_\_\_\_ Personal and Family Maintenance as defined in Section 26-1A-213
- \_\_\_\_\_ Benefits from Governmental Programs or Civil or Military Service as defined in Section 26-1A-214
- \_\_\_\_\_ Retirement Plans as defined in Section 26-1A-215
- \_\_\_\_\_ Taxes as defined in Section 26-1A-216
- \_\_\_\_\_ Gifts as defined in Section 26-1A-217

**Grant of Specific Authority**  
**(Optional)**

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

**(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL the specific authority you WANT to give your agent.)**

- \_\_\_\_\_ Create, amend, revoke, or terminate an inter vivos trust, by trust or applicable law
- \_\_\_\_\_ Make a gift which exceeds the monetary limitations of Section 26-1A-217 of the Alabama Uniform Power of Attorney Act, but subject to any special instructions in this power of attorney
- \_\_\_\_\_ Create or change rights of survivorship



- \_\_\_ Create or change a beneficiary designation
- \_\_\_ Authorize another person to exercise the authority granted under this power of attorney
- \_\_\_ Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
- \_\_\_ Exercise fiduciary powers that the principal has authority to delegate

**Limitations on Agent's Authority**

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions.

Limitation of Power. Except for any special instructions given herein to the agent to make gifts, the following shall apply:

(a) Any power or authority granted to my Agent herein shall be limited so as to prevent this Power of Attorney from causing any Agent to be taxed on my income or from causing my assets to be subject to a "general power of appointment" by my Agent as defined in 26 U.S.C. § 2041 and 26 U.S.C. § 2514 of the Internal Revenue Code of 1986, as amended.

(b) My Agent shall have no power or authority whatsoever with respect to any policy of insurance owned by me on the life of my Agent, or any trust created by my Agent as to which I am a trustee.

**Special Instructions**  
**(Optional)**

You may give special instructions on the following lines. For your protection, if there are no special instructions write **NONE** in this section.

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**Effective Date**

This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions.

**Nomination of [Conservator or Guardian]**  
**(OPTIONAL)**

If it becomes necessary for a court to appoint a [conservator or guardian] of my estate or [guardian] of my person, I nominate the following person(s) for appointment:

Name of Nominee for [conservator or guardian] of my estate: \_\_\_\_\_

Nominee's Address: \_\_\_\_\_

Nominee's Telephone Number: \_\_\_\_\_

Name of Nominee for [guardian] of my person: \_\_\_\_\_

Nominee's Address: \_\_\_\_\_

Nominee's Telephone Number: \_\_\_\_\_

**Reliance on this Power of Attorney**

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.

**Signature and Acknowledgment**

\_\_\_\_\_  
(Signature of Principal)

Your Signature Date: \_\_\_\_\_

Your Name Printed: \_\_\_\_\_

Your Address: \_\_\_\_\_

Your Telephone Number: \_\_\_\_\_

State of \_\_\_\_\_

County of \_\_\_\_\_

I, \_\_\_\_\_, a Notary Public, in and for the County in this State, hereby certify that \_\_\_\_\_, whose name is signed to the foregoing document, and who is known to me, acknowledged before me on this day that, being informed of the contents of the document, he or she executed the same voluntarily on the day the same bears date.

Given under my hand this the \_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_. (Seal, if any)

\_\_\_\_\_  
Signature of Notary

My commission expires: \_\_\_\_\_

This document prepared by:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

## **Important Information for Agent**

### **Agent's Duties**

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

- (1) do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;
- (2) act in good faith;
- (3) do nothing beyond the authority granted in this power of attorney; and
- (4) disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:  
**(Principal's Name) by (Your Signature) as Agent**

Unless the Special Instructions in this power of attorney state otherwise, you must also:

- (1) act loyally for the principal's benefit;
- (2) avoid conflicts that would impair your ability to act in the principal's best interest;
- (3) act with care, competence, and diligence;
- (4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
- (5) cooperate with any person that has authority to make health care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest; and
- (6) attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest.

### **Termination of Agent's Authority**

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

- (1) death of the principal;
- (2) the principal's revocation of the power of attorney or your authority;
- (3) the occurrence of a termination event stated in the power of attorney;
- (4) the purpose of the power of attorney is fully accomplished; or
- (5) if you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the Special Instructions in this power of attorney state that such an action will not terminate your authority.

### **Liability of Agent**

The meaning of the authority granted to you is defined in the Alabama Uniform Power of Attorney Act, Chapter 1A, Title 26, Code of Alabama 1975. If you violate the Alabama Uniform Power of Attorney Act, Chapter 1A, Title 26, Code of Alabama 1975, or act outside the authority granted, you may be liable for any damages caused by your violation.

If there is anything about this document or your duties that you do not understand, you should seek legal advice.

1905 Indian Lake Drive, Suite A  
Birmingham, Alabama 35244  
(205) 682-2770  
(205) 682-2775 Fax

## UNDERWRITING BULLETIN

**Date:** February 14, 2012

**To:** Alabama Agents

**Re:** Alabama Uniform Power of Attorney Act

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The Alabama Legislature passed Act 2011-683, codified in Section 26-1A-101, *et seq.*, known as the Alabama Uniform Power of Attorney Act (the "Act"). This Act became effective on January 1, 2012. Powers of Attorney executed before January 1, 2012 are governed by the laws in effect at the time of execution.

This underwriting bulletin is designed to address those provisions of the Act affecting your real estate and title insurance practice and to amend current underwriting guidelines where applicable. This bulletin is not an exhaustive analysis of the Act. We recommend that you review the Act in its entirety to familiarize yourself with the new provisions and determine their impact on all areas of your practice.

### GENERAL PROVISIONS

Article 1 of the new Act consists of the general provisions of the Act that govern creation and use of a Power of Attorney. Most of these provisions are default rules that can be altered by the Power of Attorney. Below are some of the changes in the Act regarding creation and use of a Power of Attorney that affect real estate transactions.

**Durability.** One of the most significant changes is that the Power of Attorney (POA or POA's) is now **presumed durable** (not terminated by the principal's subsequent incapacity). A POA under the new Act is durable, **unless it expressly provides that it is terminated by the incapacity of the principal.** Section 26-1A-104. This default provision is a complete change from prior law which requires a statement of durability in the POA. **Keep in mind that POA's created prior to January 1, 2012 are not presumed durable.**

**Agent.** The term “Agent” has replaced use of the term “Attorney-in-Fact” to designate the person authorized to act for the principal. Section 26-1A-102(1).

**Power of Attorney.** The definition of “Power of Attorney” clarifies that the instrument that authorizes the agent to act in the place of the principal does not have to use the term “power of attorney” to qualify as one. Section 26-11-102(7).

**Execution.** A POA must be signed by the principal or by another individual who the principal has directed to sign the principal’s name, which signing must occur in the principal’s “conscious presence”. Section 26-1A-105. This section also accords “acknowledged” signatures a statutory presumption of genuineness. **Because the signature on the POA is presumed genuine only if acknowledged, continue to require that POA’s for real estate conveyances be properly acknowledged. A careful examination of the signatures and notary acknowledgments for due execution is still required. If you have information or belief, for example, that the POA may be forged or executed by an incompetent principal, do not insure the transaction until satisfactory evidence to the contrary is obtained.**

**Validity.** To promote portability and use of POA’s, Section 26-1A-106 recognizes the validity of POA’S created under other laws, including foreign military POA’s meeting the requirements of 10 U.S.C. Section 1044b, as amended. **This facilitates continuation of our current practice of liberally construing, within reason, military POA’s for real estate transactions.**

While Section 106(d) provides that a photocopy of an original POA has the same effect as the original, **you should continue to require recordation of the original POA in the proper Probate Office in order to rely on the POA as authority for the agent to convey the principal’s interest in real property. If the original POA has already been recorded in another county, a certified copy of the recorded original POA may be recorded in the county where the real property to be insured is located.**

**Incapacity.** “Incapacity” is defined to include not only individuals incapable of managing their property or business affairs due to “impairment”, but also individuals who are unable to do so because they are “unavailable”- missing, detained (including incarcerated in a penal system) or unable to return to the United States. Section 26-1A-102(5). If the POA states that it terminates upon the incapacity of the principal, or that it becomes effective only upon the incapacity of the principal, this definition is of critical importance. It is also helpful to determine if an Agent’s authority is terminated due to incapacity of the Agent.

**Effective Date.** A POA is effective when executed, unless otherwise stated in the POA. Section 26-1A-109(a). If the POA states that it becomes effective upon the occurrence of a future event or contingency, the principal in the POA may authorize the agent or someone else to determine and provide written verification that the event or contingency has occurred. Section 109(b). If a POA becomes effective only upon the principal’s incapacity, and the POA does not authorize a person(s) to make this determination, Section 109(c) provides that the written determination of

incapacity may be made by a physician or licensed psychologist (if incapacitated due to impairment), or by an attorney, judge or “appropriate” governmental official (if incapacitated because the principal is missing, detained or unable to return to the United States). Section 109(c).

**Please consult with the Alabama Office prior to relying on a written determination of incapacity under this Section for title insurance purposes.**

**Co-Agents and Successor Agents.** Section 26-1A-111 provides default rules for the rights and authority of co-agents and successor agents. If the principal designates two or more persons to act as co-agents, unless the POA otherwise provides, each agent may exercise its authority alone. Section 111(a). Under Section 111(b), a principal may authorize an agent or other person to designate one or more successor agents to act for the principal. Section 111(b) also provides that, unless the POA otherwise provides, a successor agent has the same authority as that granted to the original agent, and may not act until all predecessor agents are no longer serving as agents.

**Termination.** Section 26-1A-110 sets out the events under which a POA, or an agent’s authority, is terminated. Please familiarize yourself with all events of termination, most of which are consistent with prior Alabama law. **With regard to revocation of an agent’s authority, particularly noteworthy and new is Section 110(b)(3) which provides that a spouse-agent’s authority is revoked when an action is filed for divorce or annulment of the agent’s marriage to the principal or their legal separation, unless the POA otherwise provides.** Section 110(a)(5) provides that a POA is terminated when the purpose of the POA is accomplished. Be mindful of this event of termination when drafting and/or relying on a specific POA for a particular real estate transaction.

Sections 110(d) and 110(e) provide protection to an agent who performs an act for the principal in good faith and without actual knowledge that the POA or the agent’s authority under the POA has been revoked or terminated. These sections provide that such an act, unless otherwise invalid or unenforceable, still binds the principal and the principal’s successors in interest. **When insuring a real estate conveyance from an agent, please continue to require an Affidavit of Non-Revocation from the agent stating that the agent has no knowledge of the death of the principal, or of the revocation or termination of the POA or the agent’s authority under the POA. You may use the Agent’s Certification form set out in Section 302, or a substantially similar form.**

**Acknowledged POA’s (Reliance on and Refusal to Accept).** Sections 26-1A-119 and 120 are intended to encourage acceptance of acknowledged POA’s and to discourage arbitrary refusal of acknowledged POA’s. These sections provide parameters for statutorily protected reliance on and refusal of acknowledged POA’s, and impose liability for refusal to accept a POA for reasons outside these allowed parameters. **Because neither section applies to unacknowledged POA’s, we will continue our practice of requiring acknowledged POA’s.**

Section 119 fully exonerates a person from liability for “accepting” an acknowledged POA unless the person has “actual knowledge” of one or more of the facts specified in Subsection 119(c). The protection of Section 119(c) applies only if the transacting party relies on the acknowledged POA to effect the transaction without actual knowledge that the POA or the agent’s authority is void, invalid or terminated, or that the agent is exceeding or improperly exercising the agent’s authority.

Section 120 provides protection to a person who refuses to rely on an acknowledged POA to effect a transaction for one or more of the valid reasons set out in Subsection (b), and imposes liability on a person who refuses to accept the POA for reasons not provided for under Section 120(b). The sole liability imposed under Section 120(c) for improper refusal of an acknowledged POA is that the refusing party may be subject to a court order mandating acceptance of the POA, and liability for the legal fees and court costs of any such proceeding that mandates acceptance of or confirms the validity of the POA.

Unless refusal of the POA is allowed under Section 120(b), Section 120(a) requires reliance on the acknowledged POA for the transaction, or exercise of the right under Section 26-1A-119(d) to request an agent’s certification, an English translation or an opinion of counsel. This request must be made within a reasonable time after presentation of the POA, and acceptance of the POA is not required if a request for certification, translation or opinion is denied. Section 120(b)(4). Under Subsections (b)(3) and (b)(5) of Section 120, a party may refuse to accept an acknowledged POA if the party has “actual knowledge” or in “good faith” believes that the POA is not valid or that the agent does not have the authority to perform the action in question. You should familiarize yourself with all of the Section 120(b) parameters for refusal of an acknowledged POA.

**The broad protection afforded to agents under Section 110 and to those who rely on the agent’s authority under Sections 119 and 120 is new in Alabama and favorable toward use of POA’s in real estate transactions. It does not, however, obviate the need for sound underwriting. Please continue to review POA’s for authority and limitations, inquire into the circumstances of use of the POA, particularly with regard to the status of the principal both at the time of execution of the POA and at the time of exercise of the POA, scrutinize the signatures and notary acknowledgments for due execution, require and record an Affidavit of Non-Revocation from the agent (see Agent Certification Form under Section 302), and require the original POA to be acknowledged and recorded.**

## AUTHORITY

Article 2 provides the default statutory construction for authority granted in a POA, under which a grant of “general authority” is considered to be comprehensive, unless otherwise limited by the Act or the POA. Below are some of the default rules and provisions under Article 2 that will affect real estate transactions and title insurance practices.

**General Authority.** Section 26-1A-201(a) enumerates the acts that may be authorized only by express grants of authority in the POA. Sections 204 through 217 describe the authority of an

agent under a grant of general authority with respect to various subject matters, including real property. Section 201(c) authorizes a POA to contain a grant of “authority to do all acts that a principal could do”. This broad grant of general authority appears to be interpreted under the Act as including, but not being limited to, all of the subject matters and authority described in Sections 204 through 217. Section 202 also authorizes a POA to incorporate by reference the subject matter of one or more of Sections 204 through 217. The principal may in the POA limit the effect of a grant of general authority or modify any authority incorporated by reference. Section 203 enumerates incidental types of authority that, unless otherwise provided in the POA, accompany all authority granted to an agent under each of Sections 204 through 217 for implementation purposes. Section 204 enumerates the powers with respect to real property, including the authority to sell and mortgage real property, that will be authorized by a grant of general authority to an agent, unless otherwise provided in the POA. Section 209 enumerates the powers an agent will have under a grant of general authority with respect to operation of a business entity in which a principal has an ownership interest, unless otherwise provided in the POA. This authority is also subject to the terms of all documents or agreements that govern the entity or an entity ownership interest. **You should not insure a transaction from an agent acting for a principal in the principal’s capacity as an owner, officer, shareholder, partner or member of an entity, without a careful review of the POA and all governing documents of the entity. Any other applicable laws should also be taken into account.** Please do not hesitate to contact the Alabama Office for assistance with this type of transaction. Section 211(b)(7) authorizes an agent under a grant of general authority to transfer an interest of the principal in real property to the trustee of a revocable trust created by the principal as settlor, unless otherwise provided in the POA.

**Express Grants of Authority Required.** Section 201(a) identifies the acts that may be authorized only by an express grant of authority to the agent in the POA. Express authorization is required because of the risk those acts pose to the principal’s property and estate plan. The most noteworthy of these acts for title insurers are Subsections (a)(1) create, amend, revoke, or terminate an inter vivos trust, (a)(3) create or change rights of survivorship, (a)(5) delegate authority granted under the POA and (a)(7) exercise fiduciary powers that the principal has authority to delegate. Steps should be taken to determine that exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject. Any other applicable laws should also be taken into account. The power enumerated in Section 201(a)(1) with regard to trusts, for example, is subject to Alabama Code Section 19-3B-692(e), which provides that the power of a settlor with respect to revocation, annulment, or distribution of trust property may be exercised by an agent under a POA only to the extent expressly authorized by the terms of the trust. Delegation of a power held in a fiduciary capacity provided by Section 201(a)(7) is possible only if the principal has authority to delegate the power, and the agent’s authority is necessarily limited by whatever terms govern the principal’s ability to exercise the power. Again, examination of all pertinent documents and applicable law is necessary.

**Self Dealing.** Most agents under POA’s are family members who have inherent conflicts of interest with the principal arising from joint property ownership or inheritance expectations. The Act recognizes that these conflicts alone may not prevent an agent from acting in the best interest of a principal. Section 26-1A-114(d) provides that an agent acting with care, competence and diligence



for the best interest of the principal is not liable solely because the agent also benefits from the Act or has a conflict of interest. There are also several sections in the Act that allow potentially self-dealing types of transactions by agents under statutorily prescribed default rules.

For example, Section 26-1A-201(c), in conjunction with Section 114 (Agent's Duties), permits agents to make gifts that are beneficial to the principal, the principal's estate, or the principal's tax plan, without an express authorization in the POA, in the circumstances specified in the statute. The default standard for such gifts is Section 217. Section 201(d) provides that, unless the POA otherwise "expressly" provides, a grant of authority to make a gift is subject to Section 217. This means that the scope of authority to make a gift is defined by the default provisions of Section 217, unless the principal expands or narrows that authority with express language in the POA. Section 217(b)(1), unless the POA otherwise "expressly" provides, authorizes an agent to make gifts of any of the principal's property to certain individuals, including the agent, provided that such gifts do not exceed the annual dollar limits of the federal gift tax exclusion. The word "expressly" is used to clarify that gifts in excess of the allowed amounts will not be inferred. Subsection (c) of Section 217 emphasizes that exercise of authority to make a gift, as with exercise of all authority under a POA, must be consistent with the principal's objectives. If these objectives are not known, then gifts must be consistent with the principal's best interest based on all relevant factors. Subsection (c) provides examples of factors relevant to the principal's best interest.

Furthermore, the default rule in Section 201(b) allows an agent, if that agent is an "ancestor, spouse or descendant" of the principal, to convey an interest in the principal's property to the agent, or to an individual the agent is legally obligated to support, under general gift-making authority or a specific grant of authority to do an act in Subsection (a) of Section 201. However, a non-relative agent with the same type authority may not convey to the agent or a dependant of the agent by gift, right of survivorship, beneficiary designation, disclaimer or otherwise without the principal's "express" authority to do so in the POA.

Another example is Section 26-1A-213(a), which authorizes an agent to provide living quarters for certain family members and other individuals by purchase, lease or contract, unless otherwise provided in the POA.

**If you are requested to provide title insurance in connection with a potentially "self-dealing" type of transaction, whether statutorily prescribed or not, please consult with the Alabama Office before you commit to insure the transaction.**

**With respect to POA's executed prior to January 1, 2012, continue to decline to insure conveyances of the principal's real property from an agent to the agent or a dependant of the agent, unless there is a specific grant of power from the principal in the POA authorizing the agent to do so. This practice is consistent with current Alabama case law decided under Section 26-1-2.1 (See Lamb v. Scott, 643 So.2d 972).**

## FORMS

Section 26-1A-301 provides an optional POA form. This form, or a form that is in substantial compliance with this statutory form, may be used to create a POA that has the meaning and effect of the Act. The POA does not, however, have to be in the statutorily suggested form in order for the Act to apply so long as the POA is executed on or after January 1, 2012. (See also Section 26-1A-120(a)(3) regarding acknowledged POA's.) The POA form concludes with an "Important Information for Agent" section. One of the noteworthy duties of an agent set forth in this section is to "disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner: **(Principal's Name) by (Your Signature) as Agent**".

Section 302 provides an optional Agent Certification of Non-Revocation form. This form contains typically requested statements of facts concerning a POA. Other factual statements may be added to the form as needed and for the purpose of providing an agent certification pursuant to 26-1A-119 (b)(1).

## CONCLUSION

The Alabama Uniform Power of Attorney Act applies only to POA's executed on or after January 1, 2012. A transaction under a POA executed prior to January 1, 2012 should be insured using the underwriting procedures in place prior to this Bulletin. A POA transaction under this Act should be insured using the underwriting procedures set forth in this Bulletin.

If you would like to use the "Alabama Power of Attorney Form" and "Agent's Certification as to the Validity of Power of Attorney and Agent's Authority Form", MVT has these available in a fill-in-the-blank .pdf version under Miscellaneous Forms.

## COMMENTS OR QUESTIONS

For comments or questions, please feel free to contact Gina Matthews or Tom Marvin at 800-843-1688 in our Alabama Office.

- II. Alabama Residential Mortgage Satisfaction Act- Sections 35-10-90, et. seq.**
- A. Effective Date and Application - Section 35-10-90
1. Effective March 1, 2013
  2. Applies only to mortgages securing improved Alabama residential real property
- B. Procurement of Pay-Off Statement Pursuant to Proper Notification - Section 35-10-91
1. Lender required to provide a pay-off statement within 14 days after receiving proper notice (notification that complies with Subsection (b)) from the borrower(s) or a person authorized by the borrower(s)
  2. Lender allowed time to take reasonable measures to verify the identity of any person acting for the borrower(s) and to obtain the borrower's authorization to release information to that person before 14-day time period begins
  3. Pay-off statement must contain the elements required by Subsection (c)
  4. Lender may send pay-off statement by first-class mail, facsimile or E-mail
- C. Recordation of a Mortgage Satisfaction from Lender Required - Section 35-10-92.
1. Lender required to submit for recording a satisfaction of mortgage within 30 days after receiving full payment
  2. Lender liable to borrower(s) in the amount of \$500.00 if lender is required to satisfy a mortgage of record, fails to record a satisfaction within the requisite 30-day time period, and following expiration of the 30 days, receives a written request from borrower(s) for satisfaction and fails to record the mortgage satisfaction within 21 days after receipt of the written request
  3. Written request for satisfaction of mortgage from borrower(s) must be sent by a method that provides proof of receipt by the lender
- D. Self-help Satisfaction Remedy Pursuant to an Affidavit of Satisfaction and a "Satisfaction Agent" - Sections 35-10-93 through 98 (**Very Limited in Application**)
1. Only a title insurance company or an attorney licensed in Alabama acting as the agent of and for a title insurance company pursuant to a title agent license may serve as a Satisfaction Agent
  2. A Satisfaction Agent must have authority from the mortgagors named in the mortgage for which a recorded satisfaction is being sought to act to:
    - a. Notify a non-compliant lender that the Satisfaction Agent intends to record an Affidavit of Satisfaction of the mortgage
- (1) Notification to lender must contain all elements

- prescribed by Section 25-10-94 and be sent by a method that provides proof of receipt by the lender
- (2) Lender has 30 days from receipt of the notification to record the satisfaction of mortgage
- b. Sign and submit for recordation an Affidavit of Satisfaction containing the elements prescribed by Section 25-10-96 provided:
    - (1) A satisfaction is not filed by the lender within 30 days after receipt of notification, and
    - (2) The Satisfaction Agent does not receive notification from the Lender that the secured loan obligation remains unsatisfied or has been assigned
3. **Liability of Satisfaction Agents**
    - a. Section 35-10-98(a) limits the liability of a Satisfaction Agent to the lender to any actual economic damages caused by the recording of an Affidavit of Satisfaction erroneously or as a result of negligence or non-compliance with the Act
    - b. Section 35-10-98(b) does not limit the liability of or the damages against a Satisfaction Agent who executes an Affidavit of Satisfaction as a result of wantonness, recklessness, or deliberate misconduct, which implies that punitive damages may be awarded (states that the Article does not apply to such liability of a Satisfaction Agent)

**Contact Underwriting Counsel if requested to serve as a “Satisfaction Agent” or to insure without exception for a mortgage satisfied by an “Affidavit of Satisfaction” pursuant to this Section of the Act.**



**C**

Code of Alabama Currentness

Title 35. Property.

▣ Chapter 10. Mortgages. (Refs & Annos)

▣ Article 5. Alabama Residential Mortgage Satisfaction Act. (Refs & Annos)

→ → § 35-10-90. (Effective March 1, 2013) Short title; application; definitions.

(a) This article shall be known as the Alabama Residential Mortgage Satisfaction Act. This article applies only to mortgages securing residential real property located in this state which is used primarily for personal, family, or household purposes and is improved by one to four dwelling units. Without limitation, this article does not apply to mortgages on commercial or other types of property. This article also does not apply to a security interest exclusively in one or more fixtures as defined in Title 7, Article 9A.

(b) For purposes of this article, the following terms shall have the following meanings:

(1) **ENTITLED PERSON.** The person or persons liable for payment or performance of the obligation secured by the real property described in a security instrument.

(2) **EQUITY LINE SECURITY INSTRUMENT.** A security instrument securing, in whole or in part, indebtedness created under a line of credit, a revolving or open-end credit agreement, or a credit agreement that provides for future advances. The credit agreement may be referred to in this article as an "equity line" or an "equity line of credit."

(3) **RESIDENTIAL REAL PROPERTY or REAL PROPERTY.** Real property located in this state which is used primarily for personal, family, or household purposes and is improved by one to four dwelling units.

(4) **SECURED CREDITOR.** At any particular time, the person that currently holds or is the beneficiary of a security interest or that is authorized both to receive payments on behalf of a person that currently holds a security interest and to record a satisfaction of the security instrument upon receiving full performance of the secured obligation. The term does not include a trustee under a security instrument.

(5) **SECURITY INSTRUMENT.** A mortgage or other agreement that creates or provides for an interest in residential real property to secure payment or performance of an obligation.

(6) **SECURITY INTEREST.** An interest in residential real property created by a security instrument. For purposes of this article, a security interest exclusively in one or more fixtures, as defined in Title 7, Article 9A, does not constitute an interest in residential real property.

(7) **SUBMIT FOR RECORDING.** To deliver, with required fees and taxes, a document, sufficient to be recorded, to the judge of probate of the county in which the property is located. For purposes of this article, without limitation, mailing, delivering, or sending by overnight or other delivery service a satisfaction of mortgage or other document to be submitted for recording to the address of the office for recording satisfactions of mortgages or other documents, as applicable, is sufficient to constitute submission for recording.

(8) **TITLE INSURANCE COMPANY.** An organization authorized to conduct the business of insuring titles to real property in this state and licensed by the Department of Insurance as defined in subdivision (9) of Section 27-25-3.

**CREDIT(S)**

(Act 2012-278, § 1.)

**HISTORY**

Effective date:

The act which added this section is effective March 1, 2013.

Ala. Code 1975 § 35-10-90, AL ST § 35-10-90

Current through Act 2013-25 of the 2013 Regular Session.

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**C**

Code of Alabama Currentness

Title 35. Property.

▣ Chapter 10. Mortgages. (Refs &amp; Annos)

▣ Article 5. Alabama Residential Mortgage Satisfaction Act. (Refs &amp; Annos)

→ → § 35-10-91. (Effective March 1, 2013) Payoff statement; notice.

(a) A person liable for payment or performance of the obligation secured by the real property described in a security instrument who makes proper notice pursuant to this section shall be entitled to receive a payoff statement.

(b) Proper notice must contain all of the following:

(1) The entitled person's name.

(2) If given by a person other than an entitled person, the name of the person giving the notification and a statement, if required by the secured party evidence, that the person is an authorized agent of the entitled person.

(3) The address to which the creditor must send the statement.

(4) The account number assigned by the secured creditor or other sufficient information to enable the creditor to identify the secured obligation and the real property encumbered by the security interest.

(5) If the secured obligation is an equity line, a statement that the entitled person requests the secured creditor to close the equity line upon receipt of full payment of the equity line on the payoff date specified in the notification and authorizes the secured creditor, at the secured creditor's sole discretion and upon notification to the entitled person or to the entitled person's authorized agent, to suspend the extension of any additional amounts under the equity line for a period of time prior to the payoff date as designated by the secured creditor. Any payoff statement on an equity line may qualify the payoff amount as being subject to change.

(c) Within 14 days after the receipt of a notification that complies with subsection (b), the secured creditor shall issue a payoff statement. A secured creditor may take reasonable measures to verify the identity of any person acting on behalf of the entitled person and to obtain the entitled person's authorization to release information to that person before the 14-day time period begins. If a secured obligation cannot be prepaid, a statement of that fact is sufficient; otherwise, a payoff statement must contain, in substance and with no particular phrasing required, the following:

(1) The date on which it was prepared and the payoff amount as of that date, including the amount of unpaid principal, interest and fees, or other charges included within the payoff amount.

(2) The information reasonably necessary to calculate the payoff amount as of the requested payoff date, including the per diem interest amount. This subdivision does not apply to equity line security instruments.

(3) The payment cutoff time, if any, the address or place where payment must be made, and any limitation as to the authorized method of payment.

(d) A secured creditor may qualify a payoff amount or state that it is subject to change before the payoff date and provide in the payoff statement information sufficient to permit the entitled person or the person's authorized agent to request an updated payoff amount and to obtain that updated payoff amount during the secured creditor's normal business hours on the stated payoff date or the immediately preceding business day.

(e) A secured creditor is not required to send a payoff statement by means other than first class mail, facsimile, or electronic mail.

(f) If a secured creditor determines that the payoff statement it provided was erroneous, the creditor may send a corrected payoff statement. If the entitled person or the person's authorized agent receives and has a reasonable opportunity to act upon a corrected payoff statement before making payment, the corrected statement supersedes an earlier statement. This article does not affect the right of a secured creditor to recover any sum that it did not include in a payoff amount from any person liable for payment of the secured obligation, including, without limitation, the entitled person who requested the payoff statement.

(g) This section does not preclude, nor does it apply to, other methods of obtaining payoff information such as telephone calls, electronically, or other methods.

#### CREDIT(S)

(Act 2012-278, § 2.)

#### HISTORY

Effective date:

The act which added this section is effective March 1, 2013.

Ala. Code 1975 § 35-10-91, AL ST § 35-10-91

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Ala.Code 1975 § 35-10-91

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**C**

Code of Alabama Currentness

Title 35. Property.

▣ Chapter 10. Mortgages. (Refs &amp; Annos)

▣ Article 5. Alabama Residential Mortgage Satisfaction Act. (Refs &amp; Annos)

→ → § 35-10-92. (Effective March 1, 2013) Submission of a satisfaction of a security instrument for recording.

(a) A secured creditor shall submit for recording a satisfaction of a security instrument within 30 days after the creditor receives full payment and performance of the secured obligation, and the secured creditor has no obligation to make advances, incur obligations, or otherwise give value under any agreement. Equity line security instruments are fully paid and performed only if, in addition to full payment and performance, the equity line previously has been closed pursuant to the request of the entitled person or the entitled person's authorized agent or otherwise closed as provided by law and all secured obligations have been paid in full.

(b) Notwithstanding anything to the contrary in this article, any notification demanding satisfaction of the security instrument must be sent to the secured creditor's address by a method that also provides proof of receipt by the secured creditor.

(c) A secured creditor that is required to submit a satisfaction of a security instrument for recording and does not do so by the end of the period specified in subsection (a) is liable to the mortgagors for five hundred dollars (\$500) if following the expiration of the time period in subsection (a) the mortgagors make a written request to the secured creditor to record a satisfaction and the secured creditor fails to do so within 21 days after receipt of the written request. The written request must be signed by the mortgagors and by all other persons who have a right to require the mortgage to extend value or signed by an authorized agent of these persons.

(d) A secured creditor that is required to submit a satisfaction of a security instrument for recording and does not do so by the end of the period specified in subsection (c) is not liable to the mortgagors other than for the penalty set forth in subsection (c) and any actual economic damages directly caused by the failure to comply with this section.

(e) A secured creditor is not liable under this article if it does the following:

- (1) Establishes a reasonable procedure to achieve compliance with its obligations under this article.
- (2) Complies with that procedure in good faith as defined in Section 7-9A-102(43).

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(3) Fails to comply with its obligations either because of circumstances beyond its reasonable control or as a result of a bona fide error, notwithstanding maintenance of reasonable procedures of compliance.

(f) Subsections (a), (b), (c), and (d) do not apply if the secured creditor receives full payment or performance of the secured obligation before March 1, 2013.

CREDIT(S)

(Act 2012-278, § 3.)

HISTORY

Effective date:

The act which added this section is effective March 1, 2013.

Ala. Code 1975 § 35-10-92, AL ST § 35-10-92

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Code of Alabama Currentness

Title 35. Property.

▣ Chapter 10. Mortgages. (Refs & Annos)

▣ Article 5. Alabama Residential Mortgage Satisfaction Act. (Refs & Annos)

→ → § 35-10-93. (Effective March 1, 2013) Service as satisfaction agent.

(a) Only a title insurance company or an attorney licensed in this state acting as the agent of and for a title insurance company pursuant to a certificate of authority and within the scope of his or her agency agreement with a title insurance company may serve as a satisfaction agent pursuant to this article.

(b) This article does not require a title insurance company to agree to serve as a satisfaction agent or any attorney or other agent to act on behalf of a title insurance company.

CREDIT(S)

(Act 2012-278, § 4.)

HISTORY

Effective date:

The act which added this section is effective March 1, 2013.

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## Code of Alabama Currentness

## Title 35. Property.

## Chapter 10. Mortgages. (Refs &amp; Annos)

## Article 5. Alabama Residential Mortgage Satisfaction Act. (Refs &amp; Annos)

## → → § 35-10-94. (Effective March 1, 2013) Notification by satisfaction agent to secured creditor.

(a) If a secured creditor has not submitted for recording a satisfaction of a security instrument within the time set forth in Section 35-10-92 after full and complete payment of all indebtedness secured by the security instrument, a satisfaction agent acting for and with authority from the mortgagors may give the secured creditor a notification that the satisfaction agent intends to submit for recording an affidavit of satisfaction of the security instrument. The notification must include all of the following:

- (1) The identity and mailing address of the satisfaction agent.
- (2) Identification of the security instrument for which a recorded satisfaction is sought, including the names of the original parties to, and the recording data for, the security instrument.
- (3) A statement that the satisfaction agent has determined all of the following:
  - a. That the real property described in the security instrument is residential real property or, at the time the security interest was made, was residential real property.
  - b. That the person to which the notification is being given is the secured creditor.
  - c. That the secured creditor has received full payment and performance of the secured obligation.
- (4) A statement that a satisfaction of the security instrument does not appear of record in the chain of title.
- (5) A statement that the satisfaction agent, acting with the authorization of the mortgagors of the real property described in the security instrument, intends to sign and submit for recording an affidavit of satisfaction of the security instrument unless, within 30 days after receipt of the notification by the secured creditor, any of the following occurs:
  - a. The secured creditor submits a satisfaction of the security instrument for recording.

b. The satisfaction agent receives from the secured creditor a notification stating that the secured obligation remains unsatisfied.

c. The satisfaction agent receives from the secured creditor a notification stating that the secured creditor has assigned the security instrument or otherwise does not claim an interest in the security instrument. In this event, the satisfaction agent will use all reasonable efforts to determine the name and address of, and notify, the secured creditor then owning the securing instrument.

(b) A notification to the secured creditor under subsection (a) must be sent by a method that provides proof of receipt by the secured creditor for giving a notification for the purpose of requesting a payoff statement or, if the satisfaction agent cannot ascertain that address, to the secured creditor's address for notification for any other purpose.

**CREDIT(S)**

(Act 2012-278, § 5.)

**HISTORY**

Effective date:

The act which added this section is effective March 1, 2013.

Ala. Code 1975 § 35-10-94, AL ST § 35-10-94

Current through Act 2013-25 of the 2013 Regular Session.

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Ala.Code 1975 § 35-10-95

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## Code of Alabama Currentness

## Title 35. Property.

## Chapter 10. Mortgages. (Refs &amp; Annos)

## Article 5. Alabama Residential Mortgage Satisfaction Act. (Refs &amp; Annos)

→ → § 35-10-95. (Effective March 1, 2013) Conditions for satisfaction agent to sign and submit affidavit for recording.

(a) Subject to subsections (b) and (c), a satisfaction agent may sign and submit for recording an affidavit of satisfaction of a security instrument complying with this article if either of the following occurs:

(1) There does not appear of record a satisfaction of a security instrument within 30 days after the receipt by the secured creditor of the notification.

(2) The secured creditor authorizes the satisfaction agent to do so.

(b) A satisfaction agent may not sign and submit for recording an affidavit of satisfaction of a security instrument if it has received a notification stating that the secured obligation remains unsatisfied or information that the security instrument has been assigned.

(c) If a satisfaction agent receives information that the security instrument has been assigned, the satisfaction agent may not submit for recording an affidavit of satisfaction of the security instrument without giving a notification of intent to submit for recording an affidavit of satisfaction to the assignee.

## CREDIT(S)

(Act 2012-278, § 6.)

## HISTORY

Effective date:

The act which added this section is effective March 1, 2013.

Ala. Code 1975 § 35-10-95, AL ST § 35-10-95

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Ala.Code 1975 § 35-10-95

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## Code of Alabama Currentness

## Title 35. Property.

- ▣ Chapter 10. Mortgages. (Refs & Annos)

- ▣ Article 5. Alabama Residential Mortgage Satisfaction Act. (Refs & Annos)

- § 35-10-96. (Effective March 1, 2013) Affidavit of satisfaction requirements.

An affidavit of satisfaction of a security instrument must do all of the following:

- (1) Identify the original parties to the security instrument, the secured creditor, and the recording data for the security instrument.
- (2) State the basis upon which the person signing the affidavit is a satisfaction agent including, without limitation, that the person signing the affidavit is authorized to sign on behalf of, and to bind, the insurance company acting as satisfaction agent.
- (3) State that the person signing the affidavit has determined that the real property described in the security instrument is residential real property or was residential real property at the time the security instrument was made.
- (4) State that the person signing the affidavit determined that the secured creditor has received full payment or performance of the secured obligation and, if the security instrument is an equity line security instrument, that the equity line has been closed.
- (5) State that the person signing the affidavit, acting with the authority of the owner of the real property described in the security instrument, gave notification to the secured creditor of its intention to sign and submit for recording an affidavit of satisfaction.
- (6) Describe the method by which the person signing the affidavit gave notification in compliance with this article.
- (7) State either of the following:
  - a. That more than 30 days have elapsed since the receipt of notification by the secured party, no satisfaction has been recorded, and the satisfaction agent has not received a notification that the secured obligation remains unsatisfied or received information that the secured obligation has been assigned.

b. That the secured creditor authorized the person signing the affidavit to sign and record an affidavit of satisfaction.

(8) Be sworn or affirmed, signed, and acknowledged as required by law for a conveyance of an interest in real property.

CREDIT(S)

(Act 2012-278, § 7.)

HISTORY

Effective date:

The act which added this section is effective March 1, 2013.

Ala. Code 1975 § 35-10-96, AL ST § 35-10-96

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Ala.Code 1975 § 35-10-97

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Code of Alabama Currentness

Title 35. Property.

▣ Chapter 10. Mortgages. (Refs & Annos)

▣ Article 5. Alabama Residential Mortgage Satisfaction Act. (Refs & Annos)

→ → § 35-10-97. (Effective March 1, 2013) Effect of recording affidavit.

(a) Upon recording, an affidavit complying with the requirements of this article constitutes a termination of the security interest described in the affidavit.

(b) The recording of an affidavit of satisfaction of a security instrument does not extinguish, offset, or otherwise affect any responsibility or liability of a person for payment or performance of the debt or other obligation secured by the security instrument.

CREDIT(S)

(Act 2012-278, § 8.)

HISTORY

Effective date:

The act which added this section is effective March 1, 2013.

Ala. Code 1975 § 35-10-97, AL ST § 35-10-97

Current through Act 2013-25 of the 2013 Regular Session.

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Code of Alabama Currentness

Title 35. Property.

Chapter 10. Mortgages. (Refs & Annos)

Article 5. Alabama Residential Mortgage Satisfaction Act. (Refs & Annos)

→→ § 35-10-98. (Effective March 1, 2013) Liability.

(a) Except as otherwise provided in subsection (b), a satisfaction agent or any other person who executes an affidavit of satisfaction of a security instrument erroneously or as a result of negligence or non-compliance with this article is liable to the secured creditor for any actual economic damages caused by the recording of the satisfaction.

(b) This article does not apply to the liability of a satisfaction agent who executes an affidavit of satisfaction of a security instrument erroneously as a result of wantonness, recklessness, or deliberate misconduct, nor does this article apply to the liability of a person other than a satisfaction agent who erroneously executes an affidavit of satisfaction.

CREDIT(S)

(Act 2012-278, § 9.)

HISTORY

Effective date:

The act which added this section is effective March 1, 2013.

Ala. Code 1975 § 35-10-98, AL ST § 35-10-98

Current through Act 2013-25 of the 2013 Regular Session.

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### III. Private Transfer Fees - Section 35-4-430, *et. seq.*

#### A. Effective Date and Application

1. Effective May 25, 2011
2. Applies to Private Transfer Fee Obligations recorded before and after the Act

#### B. Definitions

##### 1. **“Private Transfer Fee” defined very broadly as:**

“A fee or charge payable upon the transfer of an interest in real property, or payable for the right to make or accept such transfer, regardless of whether the fee or charge is a fixed amount or is determined as a percentage of the value of the property, the purchase price, or other consideration given for the transfer.”

However, fees or charges that are not to be considered a “Transfer Fee” under the Act are as follows:

- a. Consideration payable by the grantor to the grantee for the real estate interest being conveyed
- b. Commission payable to a licensed real estate agent
- c. Interest, charges or fees payable by a borrower to a lender pursuant to a loan secured by a real property mortgage
- d. Amounts payable by a lessee to a lessor under a lease
- e. Consideration paid to procure a waiver, release or the non-exercise of an option to purchase real estate or a right of first refusal or first offer to purchase an interest in real property
- f. Taxes and other fees, charges, assessments or fines assessed or imposed by a governmental authority
- g. Amounts payable to property owner’s associations
- h. Amounts imposed by a declaration or covenant encumbering real property payable solely to a non-profit or charitable organization to support cultural, educational, recreational, environmental, conservation or other similar activities that actually benefit the encumbered real property or the community in which such real property is located
- I. Amounts paid in connection with the purchase or transfer of a club membership relating to real property owned by the member  
Section 35-4-431(a)(3)

2. **“Private Transfer Fee Obligation” is defined as:**

“An obligation arising under a declaration or covenants recorded against the title to real property, or under any other contractual agreement or promise, whether or not recorded, that requires or purports to require the payment of a private transfer fee upon a subsequent transfer of an interest in the real property.”

C. Private Transfer Fee Obligations After the Act

1. **Prohibited.** Void and unenforceable if recorded or entered into on or after May 25, 2011. Section 35-4-432
2. **Liability for Violations.** Section 35-4-433 imposes liability on any person who records or enters into an agreement imposing a private transfer fee obligation in his or her favor after May 25, 2011.
  - a. Damages
  - b. Attorney fees, expenses and costs

D. Private Transfer Fee Obligations in Existence Prior to the Act

1. **Recording of Notice Required.** A payee of a private transfer fee obligation recorded or entered into prior to May 25, 2011 must record a separate Notice of the Obligation in the Probate Office of each county in which encumbered real property is located.
  - a. Prescribed notice document must be recorded prior to December 31, 2011. Section 35-4-435(a)
  - b. Notice document must have the title of “Notice of Private Transfer Fee Obligation” in at least 14-point boldface type. Section 35-4-435(a)(1)
  - c. Notice document must contain certain elements set forth in Section 35-4-435(a)(2)-(9).
  - d. Failure of the payee to file the prescribed notice by December 31, 2011, and/or to provide a written statement of the private transfer fee payable within 30 days of the date of a written request in accordance with Section 35-4-435(e) may ultimately relieve the real property from the burden of the private transfer fee obligation. Sections 35-4-435(c)(e)

***Do not rely solely on these provisions for underwriting purposes. If the title search and examination discloses a declaration or covenants containing a private transfer fee obligation recorded prior to May 25, 2011, but does not reveal the recorded payee’s notice as required by this Section, require the payee to execute and record a release of the land to be insured from the declaration or covenants containing the private transfer fee obligation. Contact Underwriting Counsel for guidance if you are unable to procure the release.***

2. **Disclosure in Real Estate Contract Requirements.** Section 35-4-434(a) requires a contract for the sale of real property that is subject to a private transfer fee obligation to “include a provision disclosing the existence of that obligation, a description of the obligation, and a statement that private transfer fee obligations are subject to certain prohibitions under this article”.
  - a. Contract Unenforceable. If the required disclosures are not made in the contract and the property is in fact subject to a private transfer fee obligation, the contract is unenforceable, the buyer will not be liable to the seller for damages and the buyer will be entitled to a return of the earnest money.
  - b. Recovery of Damages and Attorney Fees. If a private transfer fee obligation is not disclosed in the real estate contract and the sale takes place, a buyer who subsequently discovers the existence of the obligation has the right to recover damages as set forth in Section 35-4-434(b)(1) and all attorney fees, expenses and costs incurred.
  - c. Real Estate Agents have no duty to discover the existence of any private transfer fee obligations. Section 35-4-434(d).

When the title search and examination discloses an enforceable private transfer fee obligation, it would be advisable to review the real estate sales contract to determine if it meets the statutory disclosure requirements. If not, the contract should be properly amended prior to closing to include the statutory disclosures.

E. **Underwriting Implications**

1. Carefully review all recorded declarations, covenants, restrictions, subdivision development documents and amendments thereto, etc., to determine if they contain a private transfer fee obligation and if so, whether such transfer fee is enforceable.
2. Make sure any lawful private transfer fees are collected at closing and forwarded to the correct payee.
3. Make the necessary B-I requirements and B-II Exceptions in the title commitment, and Schedule B exceptions in the subsequent policy for the private transfer fee obligation.

The exception for private transfer fee obligations should be specific in nature.

**Examples of Exceptions:**

Item \_\_\_\_\_. Transfer Free Covenants set forth in instrument dated \_\_\_\_\_, and recorded in \_\_\_\_\_. This instrument includes provisions that create or purport to create a lien on the land payable upon each transfer of the Land.

Item \_\_\_\_\_. Transfer Fee Covenants contained in Section \_\_\_\_\_ of the Declaration of Covenants, Conditions and Restrictions dated \_\_\_\_\_, and recorded in \_\_\_\_\_. These provisions create or purport to create a lien on the Land payable upon each transfer of the Land.

4. It is also advisable to verify compliance with the Notice provisions of this Act, and to have purchasers acknowledge in writing their awareness of future private transfer fee obligations.
5. Do not commit to insure or otherwise insure Transfer Free Covenants or other private transfer fee obligations by including them in Schedule A as part of the interest being insured.

***Use extreme caution when you encounter recorded documents establishing or purporting to establish transfer fee obligations in residential and commercial developments. Contact Underwriting Counsel for guidance in determining when recorded transfer fee covenants are enforceable by statute, to create appropriate requirements and exceptions and to resolve any other issues that may arise.***