

ALTA 2006 POLICIES AND ENDORSEMENTS

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1. General comments.

Effective November 7, 2006, the North Carolina Land Title Association ("the NCLTA") obtained approval of the North Carolina Department of Insurance ("the NCDI") for certain American Land Title Association ("ALTA") form policies and endorsements becoming effective on or after November 7, 2006. See G.S. 58-3-150(d); NCLTA File No. 2006-10-31; NCDI No. PC098594. The approval is for certain policy forms and endorsement forms, many of which will be discussed in detail below. The standard loan policy and owner's policy have been revised and are designated 2006 forms. The forms are in addition to the 1992 policy forms. The earlier forms have not been withdrawn. The ALTA has set July 17, 2007 as a withdrawal date for the 1992 forms. However, we will have access to the 1992 forms beyond that date.

At some point very soon, we will use the 2006 policy forms unless an insured requires the earlier forms. It should be noted that the lending community had extensive input regarding the formulation of the 2006 loan policy. This should greatly enhance the acceptability of the new loan policy. Contributing customer groups included the Title Insurance Committee of the American College of Real Estate Lawyers, and the Title Insurance Committee of the American College of Mortgage Attorneys, Fannie Mae and Freddie Mac.

Set forth below is our outline of the significant aspects of the new policies and endorsements. A comparison of the 1992 forms and the 2006 forms is set forth on the ALTA website at www.alta.org. The actual provisions are set out as well.

To highlight what is covered in this article below, we include brief mention of the topics covered, preceded by the numbered sections of this article where the discussion is found along with a brief parenthetical remark where helpful: 3. The "Exception to the Exclusion" issue (the policy has been recast to make it clear that exceptions to the exclusions in the 1992 policies are now Covered Risks, eliminating problems with certain out of state cases); 4. More express covered risks added...(many of these are already covered in the 1992 policy); 5. New survey coverage (Covered Risks 2 (c) affirmatively gives encroachment coverage, including for encroachments onto adjoining land, eliminating problems with out of state cases decided under the 1992 policy forms and earlier policy forms, *unless*, and to the extent that, company takes a Schedule B exception); 6. "Gap" coverage (this only has significance if a "New York style" or "Gap type" closing is conducted); 7. Mechanics' and materialmen's lien coverage in Loan Policy (largely unchanged from the 1992 Loan Policy); 8. New or expanded definitions (this includes, but is not limited to, express definition of "indebtedness" in the loan policy for purposes of clarifying and enhancing "aggregate liability" for computation of loss and a greatly expanded definition of "insured" in owner's and loan policies); 9. Proof of loss (eliminates sworn proof of loss); 10. Elimination of coinsurance (in owner's policy); 11. Elimination of appointment (in owner's policy, which provides coverage as if each tract is insured by a separate policy with a "tie-in" endorsement attached); 12. Exercise of insurer's right to cure defects (this increases coverage when the effort to eliminate a covered risk fails); 13. Elimination of "Subsequent Principal Indebtedness" provision from loan policy (eliminates the lack of coverage for this in contrast to 8(d) of the 1992 Loan Policy's Conditions and Stipulations; read in conjunction with 8.c. of this article); 14. Elimination of "last dollar" problem from Loan Policy; 15. Elimination of "Liability Non-cumulative" provision from Loan Policy; 16. Elimination of production of policy as condition to payment of claim; 17. Arbitration (increases unilateral invoking of arbitration from \$1 million to \$2 million); 18. Incorporation of endorsements; 19. Choice of law; choice of forum (new- the jurisdiction where the land is located controls); 20. Cross-reference to "Notices" provision; 21. Schedule A; 22. 2006 ALTA Short Form Residential Loan Policy (One-to-four Family); 23. Manufactured Housing- new endorsements; 24. Restrictions, Encroachments, Minerals- new endorsements (ALTA 9s are discussed); 25. Location- new endorsements; and 26. Endorsements in general-a list (includes a mention of ALTA's numbering system).

2. Basic outline of organization of content of owner's and loan policies.

The 1992 ALTA Owner's Policy and the 1992 ALTA Loan Policy are comprised of (1) insuring clauses not denominated as such (four in the owner's policy and eight in the loan policy); (2) Exclusions From Coverage (four in the owner's policy and seven in the loan policy) to which the insuring clauses are subject; (3) Conditions and Stipulations (seventeen in the owner's policy and sixteen in the loan policy) to which the insuring clauses are subject; (4) Schedule A of the policy (owner's and loan policy) which sets forth the Date of Policy, the name of the insured, the type of title insured, the instrument (whether the transaction deed of trust or, if there is an owner's policy only, a reference to the transaction

deed) and a description of the insured land; and (5) Schedule B in the owner's policy and Schedule B – Part I in the loan policy, which lists the exceptions to which the insuring clauses are subject. Also, the loan policy contains Schedule B – Part II. This sets forth known subordinate matters of record and/or collateral recorded loan documents (in addition to the insured deed of trust set forth in Schedule A).

The 2006 Owner's Policy and the 2006 Loan Policy are formatted similarly: (1) Covered Risks (ten in the owner's policy and fourteen in the loan policy); (2) Exclusions From Coverage (five in the owner's policy and seven in the loan policy) to which the Covered Risks are subject; (3) Conditions (eighteen in the owner's policy and seventeen in the loan policy) to which Covered Risks are subject; (4) Schedule A which identifies the matters which Schedule A of the 1992 policies, summarized in the preceding paragraph, identifies; and (5) Schedule B in the owner's policy and Schedule B – Part I in the loan policy, which sets forth the exceptions to which the Covered Risks are subject. In addition, as is the case with the 1992 Loan Policy, the 2006 Loan Policy contains Schedule B – Part II where subordinate and other matters can be set forth.

3. The "Exception to an Exclusion issue."

In the 1992 Owner's Policy and the 1992 Loan Policy, several of the Exclusions From Coverage exclude liability for a described type of problem, "except to the extent that" something occurs, such as the public records containing a recorded indication of a problem. The situations involve exclusions for (1) zoning and subdivision laws and ordinances (Exclusions From Coverage, Item 1(a)); (2) police power (Exclusions From Coverage, Item 1(b)); (3) eminent domain ((Exclusions From Coverage, Item 2); and preferential transfers (Exclusions From Coverage, Item 4(b) in the 1992 Owner's Policy and Exclusions From Coverage, Item 7(iii) of the 1992 Loan Policy). As to such zoning, police power and eminent domain matters in the 1992 policies, an exclusion applies, except to the extent that a notice of the matter has been recorded in the public records at Date of Policy as described in the exclusion. As to the creditors' rights exclusion, the "exception to the exclusion" involves delays in or defects in recording.

There are out of state title insurance cases holding that, if (1) coverage for a matter is not provided for in the insuring clauses and (2) the matter not insured against by the insuring clauses is excluded in the exclusions and (3) the exclusions contain an exception for (for example) recorded notice of an aspect of a problem otherwise excluded, the exception to the exclusions cannot provide coverage. A recent case is *Elysian Investment Group, LLC v. Stewart Title Guaranty Company*, 105 Cal. App. 4th 315, 129 Cal. Rptr. 2d 372 (2002).

As a result of concern over the "exception to the exclusion issue," the ALTA added Covered Risks 5, Covered Risks 6, Covered Risks 7, Covered Risks 8, and Covered Risks 9(b) (2006 Owner's Policy) and Covered Risks 13(b) (2006 Loan Policy). These additions clarify that the matters included in the exceptions to the exclusions in the 1992 policies are now clearly covered risks.

Covered Risks 5 in the Owner's Policy and the Loan Policy addresses recorded notices of violation or enforcement of various "governmental laws or regulations." Any loss resulting from the mere existence of these laws or regulations and the effect of their violation is otherwise excluded from coverage by Exclusions From Coverage, 1(a).

Covered Risks 6 in the Owner's Policy and the Loan Policy addresses recorded notices of any enforcement action based on the exercise of any other "governmental police power" not addressed by Covered Risks 5. Any loss resulting from the mere existence of governmental police power is excluded from coverage by Exclusions From Coverage, 1(b).

Covered Risks 7 and 8 in the Owner's Policy and the Loan Policy address recorded evidence of the exercise of "rights of eminent domain" (Covered Risks 7) and the completion of eminent domain proceedings that would be binding on the rights of a bona fide purchaser or encumbrancer (Covered Risks 8). Any loss resulting from the mere existence of the right of eminent domain is excluded from coverage by Exclusions From Coverage, 2.

Covered Risks 9(b) (Owner's Policy) and Covered Risks 13(b) (Loan Policy) address "preferences" resulting solely from the failure to timely record the transfer instrument (Owner's Policy) or the security instrument (Loan Policy) or the failure of the recording of the instrument to impart constructive notice to and bind third parties. Any other cause of a preferential transfer challenge arising out of the insured transfer is excluded from coverage by Exclusions From Coverage, 4(b) (Owner's Policy) and Exclusions From Coverage, 6(b) (Loan Policy) (those exclusions being 4(b) and 7(b), respectively, of the 1992 Owner's Policy and the 1992 Loan Policy). On commercial transactions, the creditors' rights exclusions are frequently deleted depending upon circumstances.

4. More express covered risks added for matters which are clearly covered even without express mention.

The 1992 Owner's Policy and the 1992 Loan Policy insuring provisions expressly insure against (1) title being vested other than as stated in Schedule A of the policy; (2) *any* defect in or lien or encumbrance on the title; (3) unmarketability of title; and (4) lack of a right of access to and from the land. Additionally, the 1992 Loan Policy contains insuring provisions 6 and 7 insuring against priority of other liens, including "mechanics' liens" (see insuring provision 7), over the lien of the "insured mortgage," and insuring provision 8 insuring against the invalidity or unenforceability of any assignment of the "insured mortgage" shown in Schedule A. All of these matters covered by the 1992 Owner's Policy and 1992 Loan Policy are covered by the 2006 Owner's Policy and 2006 Loan Policy, respectively. For example, see Covered Risks 1, 2, 3, and 4 in the 2006 Owner's Policy and in the 2006 Loan Policy and Covered Risks 10, 11, and 12 in the 2006 Loan Policy.

However, Covered Risks 2(a) of the 2006 Owner's Policy and the 2006 Loan Policy also contains a non-exclusive, express list of Covered Risks which are clearly covered by the 1992 policies' broad and all inclusive Insuring Provision 2 quoted above, as well as the basic language of Covered Risks 2 of the 2006 policies. These Covered Risks are: forgery; fraud; undue influence; duress; incompetency; incapacity; impersonation; unauthorized transfer; improper execution; faulty acknowledgment or delivery; failure to create a document under electronic transfer laws; power of attorney problems; recording and indexing problems; and defective proceedings. This long and express list is unnecessary, but consistent with the trend to make policies longer. Covered Risks 2(b) of the 2006 policies expressly covers the lien of real estate taxes or assessments which are due and payable but unpaid. While not expressly spelled out in the 1992 policies, there is no question that these matters are expressly covered by Insuring Provision 2 of the 1992 policies discussed above and by the all encompassing lead-in language of Covered Risks 2 of the 2006 policies.

In 3. above, the "exception to the exclusion issue" is discussed. In the 2006 Owner's Policy, Covered Risks 9(a) expressly covers loss or damage caused by a prior transfer in the chain of title constituting a fraudulent or preferential transfer under federal or state law. This expressly and specifically assumed risk is covered by Insuring Provision 1 and Insuring Provision 2 of the 1992 Owner's and Loan policies, as well as the lead in language of Covered Risks of the 2006 policies.

5. New survey coverage.

Covered Risks 2(c) is (1) a new expression of survey coverage that arguably exists in the 1992 policies and (2) arguably new coverage for encroachments upon adjoining land by improvements appurtenant to the insured land. 2(c) provides coverage for:

Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.

Because the definition of "Land" has always been tied to the exterior boundaries of the land described in Schedule A, an issue arose under the 1992 and prior policy forms as to whether, in the absence of a so-called "survey exception" in Schedule B, the base policy (i.e. without an endorsement like the ALTA 9.2 for an Owner's Policy or ALTA 9 for a Loan Policy) included coverage when an improvement mostly located on the insured "Land" encroached onto adjoining property (i.e. outside the "Land" as defined in the policy). A number of out of state cases have addressed this issue. North Carolina has not. Some courts have held that the title insurance policy did not provide coverage against this risk. Examples include *Havstad v. Fidelity Nat'l Title Ins. Co.*, 58 Cal. App. 4th 654 (1997), and *Transamerica Title Ins. Co. v. Northwest Building Corp.*, 54 Wn. App.289, 773 P. 2d 431 (1989). Other courts, relying on various theories, have held that the policy did provide coverage against this risk. A very recent example is *First American Title Insurance Company v. Dahlmann*, 2006 WI 65, 2006 Wisc. LEXIS 358 (June 7, 2006).

The definition of "land" in the 1992 policies is as follows:

"land": the land described or referred to in Schedule A or C, and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule A or C, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

The definition of "land" in the 2006 policies is as follows:

"land": the land described or referred to in Schedule [A][C], and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule [A][C], nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

It is noted that survey coverage can be eliminated or limited under either a 1992 policy or a 2006 policy by a Schedule B survey exception. It is noted that Covered Risks 2(c) is *not* a substitute for competent underwriting rules and is *not* intended to afford survey coverage to an owner in an owner's policy—particularly on a commercial deal—on a hazard basis. This is the view of the experts on the ALTA forms committee as well. If the title insurer receives no survey, the title insurer is likely to insert a Schedule B survey exception into an owner's policy. In regard to a loan policy in a residential transaction, the title insurer will assume the risk due to the fact that the chance of loss under a loan policy is less than the chance of loss under an owner's policy as we discussed in our prior newsletter entitled *ALTA Endorsement – Form 9 (Restrictions, Endorsements, Minerals) – Use of Endorsement For Loan Policies In Commercial Transactions*, appearing at www.attorneytitle.com:

That is because there are distinct differences between liability under a loan policy versus liability under an owner's policy. These differences are discussed in detail in E. Urban, *North Carolina Real Property Mechanics' Liens, Future Advances and Equity Lines - Including Title Insurance*, § 48-12 (Thomson * West, Supp. 2006), citing *CMEI, Inc. v. American Title Ins. Co.*, 447 So. 2d 427 (Fla. 5th D.C. A. 1984); *Goode v. Federal Title Ins. Co.*, 162 So. 2d 269 (Fla. 2d. D.C.A. 1964); *Ring v. Home Title Guar. Co.*, 168 So. 2d 580 (Fla. 3rd D.C.A. 1964); *First Commerce Realty Investors v. Pennin. Title Ins. Co.*, 355 So. 2d 570 (Fla. 1st D.C.A. 1978). Essentially, if a lender upon foreclosure receives all its secured indebtedness, plus foreclosure costs, or if upon foreclosure, the lender acquires title to the land and it is worth an amount equal to or greater than the secured indebtedness and foreclosure costs, there is no compensable loss or damage payable even if the land would have been worth more without the title defect. This is the difference between a loan policy and a owner's policy. The 1992 and 2006 policies are not different in this regard.

In commercial transactions, a lender will usually require a survey for all parties, including the title insurer, to analyze. See our prior article on ALTA 9 cited above for a discussion of factors included in giving coverage for a known encroachment.

6. "Gap" coverage.

This is not expressly addressed in the 1992 policies. The so-called "GAP" coverage is set forth in the 2006 Owner's Policy (Covered Risks 10) and 2006 Loan Policy (Covered Risks 14). These provisions insure against loss or damage caused by any defect in or lien or encumbrance on the title or other matter included in Covered Risks (1 through 9 in the Owner's Policy and 1 through 13 in the Loan Policy) that has been created or has attached or has been filed or recorded in the public records subsequent to Date of Policy and prior to the recording of (the deed or other instrument of transfer in the public records that vests title as shown in Schedule A, for the Owner's Policy) (the insured mortgage in the public records, in the Loan Policy). This gap coverage is included for situations where settlement or funding takes place prior to the recording of the instrument creating the insured interest. This type of closing takes place if and when the title insurer is willing to accept a "GAP indemnity" from a financially substantial party. The better practice—and the traditional practice in North Carolina—is for the approved attorney to update the title from the effective date of the commitment and, if there are no additional items of record appearing in the update period (or "gap") between (1) the effective date of the commitment—which corresponds to the effective date of the preliminary opinion on title or the last update thereof—and (2) the date and time of recording the recordable transaction documents, for the approved attorney to record the recordable transaction documents. Once the transaction is safely "on record" in this manner, the approved attorney calls in or e-mails to the title insurer the date and time of recording and, if available, the book and page numbers of recording and the title insurer faxes or e-mails a marked commitment to the approved attorney and lender's counsel indicating that all requirements have been met and all documents have been recorded and that the exceptions are as set forth in Schedule B-II of the commitment. Thereafter, funding occurs. In such a case, pursuant to such a procedure, the title insurer has had the "gap" searched and has removed the "gap" risk and the boilerplate "gap" exception in the commitment.

7. Mechanics' and materialmen's lien coverage in Loan Policy.

In the 1992 Loan Policy, Insuring Provision 7 provides this coverage. That coverage is now in Covered Risks 11(a) of the 2006 Loan Policy. No change in coverage is intended. Such a covered risk is necessary to insure the priority of future advances. For this subject see E. Urban, *North Carolina Real Property Mechanics' Liens, Future Advances, And Equity Lines—Including Title Insurance*, Chapter 49 (Thomson * West, 2006 Supp.) and E. Urban, G. Whitney & N. Ferguson, *North Carolina Real Estate—With Forms*, §§ 28-12 through 28-15 (Thomson * West, 2006 Supp.). (Hereinafter, these books will be referred to as “The Mechanics' Lien Book” and “The Real Property Book” respectively.

8. New or expanded definitions.

(a). Amount of Insurance.

This appears in Schedule A of the 1992 forms. However, “Amount of Insurance” is not defined in those forms. The term is now defined in 1(a) of The Conditions in the 2006 Owner's Policy and the 2006 Loan Policy. These definitions were added to make it clear that by “Amount of Insurance,” the policy means the amount as originally issued or that goes up pursuant to 8(b) of the Conditions of the 2006 Owner's Policy and the 2006 Loan Policy or goes down pursuant to 11 and 12 of the Conditions of the 2006 Owner's Policy or 10 of the Conditions of the 2006 Loan Policy, or that is changed by endorsement to the loan or owner's policy.

(b). Entity.

Condition 1(c) of the 2006 Owner's and Loan Policies defines “entity” consistent with common use.

(c). Indebtedness.

1(d) of the Conditions of the 2006 Loan Policy defines this term, whereas the 1992 Loan Policy does not. The definition includes post—Date of Policy principal advances. 8(d)(i) of the Conditions and Stipulations of the 1992 Loan Policy excluded liability for such advances unless the advances were made to protect the lien of the insured mortgage and were secured thereby and reasonable amounts to prevent deterioration of improvements.

8(d)(ii) of the Conditions and Stipulations of the 1992 Loan Policy covers construction loan advances as does 1(d)(iii) of the Conditions of the 2006 Loan Policy.

1(d)(v) of the Conditions of the 2006 Loan Policy adds coverage for “prepayment premiums, exit fees and other similar fees or penalties allowed by law.”

It should be mentioned that while aggregate liability coverage in 1(d) of the Conditions of the 2006 Loan Policy means that post-Date of Policy advances are covered by 1(d) to the extent mentioned, priority coverage for post-Date of Policy advances is limited to the priority coverage set forth in 11(a) of the Covered Risks. 11(a) affords coverage only against mechanics' and materialmen's liens to the extent stated.

To aid the reader in understanding “aggregate liability coverage” in 1(d) of the Conditions in the 2006 Loan Policy (in conjunction with 8(a)(ii) of the Conditions citing “the indebtedness” as one of four measures of loss) as versus priority coverage under 11(a) of the Covered Risks, relevant provisions are set forth below:

Covered Risks 11(a):

11. The lack of priority of the lien of the Insured Mortgage upon the Title

(a) as security for each and every advance of the loan secured by the Insured Mortgage over any statutory lien for services, labor, or material arising from construction of an improvement or work related to the Land when the improvement or work is either

(i) contracted for or commenced on or before Date of Policy; or

(ii) contracted for, commenced, or continued after Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on Date of Policy to advance;

Conditions 1(d):

(d) "Indebtedness": The obligation secured by the Insured 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) the amount of the principal disbursed subsequent to Date of Policy;
- (iii) the construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the Land or related to the Land that the Insured was and continued to be obligated to advance at Date of Policy and at the date of the advance;
- (iv) interest on the loan;
- (v) the prepayment premiums, exit fees, and other similar fees or penalties allowed by law;
- (vi) the expenses of foreclosure and any other costs of enforcement;
- (vii) the amounts advanced to assure compliance with laws or to protect the lien or the priority of the lien of the Insured Mortgage before the acquisition of the estate or interest in the Title;
- (viii) the amounts to pay taxes and insurance; and
- (ix) 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.

Future advances and title insurance coverage is discussed in great detail in the *Mechanics' Lien Book*, supra, Chapter 49 and the *Real Property Book*, supra, at §§ 28-12 through 28-15. These books deal with the 1970 and 1992 forms.

In order to expand priority coverage, ALTA Endorsement Form 14, or a similar endorsement, would be needed.

See 13. of this article below.

(d) Insured:

Conditions 1(d) of the Owner's Policy and Conditions 1(e) of the Loan Policy define this term more expansively than the Conditions and Stipulations in the 1992 Owner's Policy and the 1992 Loan Policy.

The following are included:

- (a) The party having "control" of a "transferable record" where the Indebtedness is evidenced by a "transferable record" (as the quoted terms are defined by applicable electronic transactions law). [Loan Policy].
- (b) Successors to the named insured by dissolution, merger, consolidation, distribution or reorganization. [Owner's Policy and Loan Policy].
- (c) Successors to the named insured by conversion to a different form of entity. [Owner's Policy and Loan Policy].
- (d) Certain voluntary conveyances by the named insured "without actual valuable consideration" including:
 - (i) where the equity interests of the grantee are wholly owned by the named insured ("subsidiary transfer") [Owner's Policy and Loan Policy];
 - (ii) where the grantee wholly owns the named insured ("parent transfer") [Owner's Policy and Loan Policy];
 - (iii) where the grantee is wholly owned by an "affiliate" of the named insured and that affiliate and the named insured share a common "parent" ("affiliate transfer") [Owner's Policy and Loan Policy]; and
 - (iv) where the grantee is the trustee or beneficiary of a trust established by the named insured for estate planning purposes [Owner's Policy]. See P. Hammann, *2006 ALTA Policy and Endorsement Forms* (2006, First American Title; phammann@firstam.com).

(e) Title:

Conditions 1(j) of the Owner's Policy and Condition 1(l) of the Loan Policy define this term with reference to Schedule A to mean "the estate or interest described in Schedule A." The estate or interest is "described" in paragraph 2 of Schedule A of each of the Owner's Policy and Loan Policy. This does not result in any substantive

change from the 1992 policies. However, it eliminates multiple uses throughout the policies of phrases like “estate or interest,” “insured estate or interest, and “estate or interest in the land.”

(f) Unmarketable Title:

Conditions 1(k) of the Owner’s Policy and Condition 1(m) of the Loan Policy defines this term. The definition is more expansive than the definition in the 1992 Policies. It expressly includes lessee and lender interests. Also, the phrase “not excluded or excepted from coverage” that appears in the definition of “unmarketability of title” in the 1992 Policies is deleted in the 2006 Policies.

9. Proof of loss.

Conditions 4 of both the Owner’s Policy and Loan Policy eliminates the requirement for a “sworn” proof of loss within 90 days after the Insured determines the facts giving rise to loss that is found in the Conditions and Stipulations 5 of each of the 1992 policies.

10. Elimination of coinsurance.

The coinsurance provision in Conditions and Stipulations 7(b) of the 1992 Owner’s Policy has been eliminated from the 2006 Owner’s Policy. This provision made the insured owner a coinsurer of the risk of partial loss under either one of two circumstances: (1) when the owner purchased insurance in an amount less than 80% of the then value of or full consideration paid for the land; or (2) when the insured constructed improvements post-Date of Policy that increased the value of the land by 20% or more over the amount of insurance purchased. The coinsurance provision is frequently eliminated by endorsement to the 1992 Owner’s Policy.

11. Elimination of apportionment.

Conditions and Stipulations 8 of the 1992 Owner’s Policy is not included in the 2006 Owner’s Policy. This provision of the 1992 Owner’s Policy applies when (1) an owner’s policy includes two or more parcels of land that are not used as a single site, (2) the insurer and the insured have not agreed on any per parcel value and placed that agreement in the policy, and (3) a covered loss occurs that affect one or more but not all of the parcels. Under these circumstances, the apportionment provision limited the insured’s maximum recovery for the loss incurred on the parcel or parcels affected by the adverse matter by prorating the Amount of Insurance based on the value of each parcel as of the Date of Policy. The elimination of this provision enhances the coverage of the 2006 Owner’s Policy in multi-site transactions included in a single owner’s policy. The result will be the same as if the insured obtained a separate owner’s policy for each separate site with a “tie-in” or “aggregation” endorsement, such as the ALTA 12 endorsement. The insured will be able to apply the full Amount of Insurance to any separate parcel on which a Covered Risk loss occurs. The insured can recover actual loss up to the lesser of the Amount of Insurance or the then full value of the particular parcel affected by the Covered Risk.

12. Exercise of insurer’s right to cure defects.

Two new provisions have been added to the 2006 Policies. These will benefit the insured if the insurer elects under Conditions 5, entitled “Defense and Prosecution of Actions” of the 2006 Owner’s Policy and the 2006 Loan Policy, to try to eliminate a Covered Risk and is unsuccessful. These provisions make more compensation available to the insured for the loss caused by a Covered Risk when the insurer is unable to eliminate the adverse claim than would have been available under the 1992 or the 1970 policies.

Conditions 8(b)(i) of the 2006 Owner’s Policy and the 2006 Loan Policy provides under this circumstance an automatic increase in the Amount of Insurance by 10%.

Condition 8(b)(ii) of those policies grants to the insured (ii) the right to elect what point of time to have the loss determined. The choice is between either (1) the date when the insured made the claim, or (2) the date when the claim is settled and paid. This is not expressly addressed in the 1992 policies.

13. Elimination of “Subsequent Principal Indebtedness” provision from Loan Policy.

Conditions and Stipulations 8(d) of the 1992 Loan Policy states that the insurer has no liability under the policy for “any indebtedness created subsequent to Date of Policy” with the exception of certain (1) protective advances and (2)

construction loan advances. A similar provision is also contained in the 1970 Loan Policy in Conditions and Stipulations 8(b). See the new definition of "Indebtedness" discussed in 8(c) above.

14. Elimination of "last dollar" problem from Loan Policy.

Conditions and Stipulations 9(b) of the 1992 Loan Policy states in part as follows: "Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto." This provision has proven problematic to insureds in mixed-collateral, multi-site and partially-secured (or "undersecured") loan transactions. In each of these transactions, the loan amount is likely to be greater than the Amount of Insurance because there is collateral for the loan other than the land described in the loan policy or the loan is undersecured. As a result of this provision, an insured could be without any remaining insurance once the loan principal is reduced by an amount equal to the Amount of Insurance stated in the loan policy. A "last dollar" endorsement was used to eliminate this result. By eliminating the language from Conditions 10 of the 2006 Loan Policy, insureds requiring this form of policy will no longer need the endorsement. In the 2006 Loan Policy, only claim payments for loss or damage reduce the Amount of Insurance. And, in such a case, if the lender has not acquired title to the insured land by foreclosure or deed-in-lieu-of foreclosure, the Amount of Insurance will be reduced only to the extent that the claim payment reduces the amount owed on the loan. Payments for attorneys' fees, costs and expenses of litigation and investigation do not reduce the amount of insurance.

15. Elimination of "Liability Noncumulative" provision from Loan Policy.

Conditions and Stipulations 10 of the 1992 Loan Policy entitled "Liability Noncumulative" has been a problem. This is true in certain loan transactions involving a "senior" insured mortgage and one or more "junior" insured mortgages that are each insured under loan policies issued by the same title insurer. The 1970 Loan Policy, in Conditions and Stipulations 9, contains a similar provision. In these transactions, usually, the loan secured by the "senior" mortgage is greater than the loan secured by the "junior" mortgage. As a result of the noncumulative provision, the insured making the loan secured by the "junior" mortgage could be without any remaining coverage if the title insurer paid a claim under the loan policy it issued to insure the lien of the "senior" mortgage and the amount of the payment was at least equal to the Amount of Insurance under the "junior" lender's loan policy. We have eliminated this provision from the 1992 Loan Policy upon request, by issuing an endorsement.

16. Elimination of production of policy as condition to payment of claim.

Conditions and Stipulations 12(a) of the 1992 Owner's Policy and Conditions and Stipulations 11(a) of the 1992 Loan Policy obligated the insured to produce either the policy or proof satisfactory to the insurer that the policy could not be produced because it had been lost or destroyed. A similar provision is found in the 1970 form Owner's Policy and Loan Policy in Conditions and Stipulations 8 and 8(b), respectively. These have been eliminated.

17. Arbitration.

An arbitration provision is contained in Conditions 14 of the 2006 Owner's Policy and Conditions 13 of the 2006 Loan Policy. The 1992 policies also include an arbitration provision. This provision in the 2006 policies has been revised to (1) increase from \$1 million to \$2 million the Amount of Insurance threshold up to which arbitration can be invoked unilaterally by either the insured or the insurer, (2) provide that the applicable arbitration rules are ALTA rules, those of which are posted on the ALTA website, www.alta.org, and (3) confirm that the arbitration is limited to the parties to the insurance policy. Because arbitration can only be invoked unilaterally when the Amount of Insurance is \$2 million or less, the provision should not be a concern in most commercial transactions. In commercial transactions, the arbitration provisions are frequently eliminated by endorsement.

18. Incorporation of endorsements.

Conditions 15(d) of the 2006 Owner's Policy and Conditions 14(d) of the 2006 Loan Policy is a new provision that is patterned after the language included as the final paragraph of endorsements. It says that every endorsement to the policy, regardless of when issued, is a part of the policy and is subject to the policy's terms and provisions "[e]xcept as the endorsement expressly states."

19. Choice of law; choice of forum.

Condition 17 of the 2006 Owner's Policy and Condition 16 of the 2006 Loan Policy are new. The "Choice of Law" provision states that the law of the jurisdiction where the land is located applies both as to (1) claims against the title to the land or the lien of the insured mortgage, and (2) disputes between the insured and the insurer in which it becomes necessary to interpret and enforce the terms of the policy. The "Choice of Forum" provision states that any proceedings brought by the insured against the insurer must be brought in a state or federal court within the United States or its territories having appropriate jurisdiction.

20. Cross-reference to "Notices" provision.

A provision has been added to the top of the first page of each of the 2006 Owner's Policy and 2006 Loan Policy. This is to guide the insured to the policy provision that stipulates where a notice of claim or other notice is to be given to the insurer. See Conditions 18 of the 2006 Owner's Policy and Conditions 17 of the 2006 Loan Policy.

21. Schedule A.

Among the other changes, the 2006 Loan Policy also adds to Schedule A as optional paragraph 6 a select the box list of the most frequently required ALTA endorsements. For those insurers adopting this method, the following endorsements will be incorporated by reference into the policy by checking the appropriate box: ALTA Endorsement 4-06 (Condominium); ALTA Endorsement 4.1-04; ALTA Endorsement 5-06 (Planned Unit Development); ALTA Endorsement 5.1-06; ALTA Endorsement 6-06 (Variable Rate); ALTA Endorsement 6.2-06 (Variable Rate-Negative Amortization); ALTA Endorsement 8.1-06 (Environmental Protection Lien) – applies only to improved residential land and includes insertion for applicable state "superlien" statute, if any; ALTA Endorsement 9-06 (Restriction, Encroachments, Minerals); ALTA Endorsement 13.1-06 (Leasehold Loan); ALTA Endorsement 14-06 (Future Advance – Priority); ALTA Endorsement 14.1-06 (Future Advance – Knowledge) (This does not apply in North Carolina due to G.S. 45-67, et. seq. and G.S. 45-81, et. seq.); ALTA Endorsement 14.3-06 (Future Advance – Reverse Mortgage); and ALTA Endorsement 22-06 (Location) – specifies the type of improvement and confirms its street address is as shown in Schedule A.

22. 2006 ALTA Short Form Residential Loan Policy (One-to-Four Family).

Since the 2006 ALTA Short Form Residential Loan Policy ("2006 Short Form") incorporates by reference "THE TERMS, EXCLUSIONS AND CONDITIONS SET FORTH IN THE AMERICAN LAND TITLE ASSOCIATION LOAN POLICY (6-17-06)", this form *is* the 2006 ALTA Loan Policy.

(a) Automatically incorporated endorsements.

These are as follows:

ALTA Endorsement 4.1-06 (Condominium); ALTA Endorsement 5.1-06 (Planned Unit Development); ALTA Endorsement 6-06 (Variable Rate); ALTA Endorsement 6.2-06 (Variable Rate-Negative Amortization); ALTA Endorsement 7-06 (Manufactured Housing); ALTA Endorsement 8.1-06 (Environmental Protection Lien), specifying the state statute referred to in subparagraph (b) of this Endorsement, if any; and ALTA Endorsement 9-06 (Restrictions, Encroachments, Minerals). As to the 4.1-06, the 6-06, the 6.2-06 and the 7-06 endorsements, the policy incorporates them automatically only if they are in fact applicable. The ALTA website gives no explanation as to why this is not the case with 5.1-06.

(b) "Check-the-box" incorporated endorsements.

These are as follows:

ALTA Endorsement 4-06 (Condominium); ALTA Endorsement 5-06 (Planned Unit Development); ALTA Endorsement 7.1-06 (Manufactured Housing-Conversion; Loan); ALTA Endorsement 14-06 (Future Advance - Priority); ALTA Endorsement 14.1-06 (Future Advance – Knowledge) (due to North Carolina statutes, this will not be used); ALTA Endorsement 14.3-06 (Future Advance – Reverse Mortgage); and ALTA Endorsement 22-06 (Location), specifying that the type of improvement is a one-to-four family residential structure and confirming that the street address is as set forth in Schedule A. When a box is checked for, for example, an ALTA 4-06 as

noted above, the current form policy on the ALTA website does not specifically state that the automatic selection of 4.1-06 is overridden. This should be clarified.

(c) Changes to Schedule B.

Several changes have been made to Schedule B of the 2006 Short Form, entitled "Exceptions from Coverage and Affirmative Insurances." Each of these changes are the result of changes made to the "long form" 2006 Loan Policy discussed above.

(1) Deletion of Paragraph 1 – Post-Date of Policy Taxes and Special Assessments.

This paragraph in the existing ALTA Short Form Residential Loan Policy (Revised 10/21/00) reads: "Those taxes and special assessments which become due and payable subsequent to Date of Policy." It was determined that for the 2006 form, this exception was unnecessary. Since the long form 2006 Loan Policy expressly includes in Covered Risks 11(b) covering the lack of priority of the insured mortgage lien "over the lien of any assessments for street improvements under construction or completed at Date of Policy" (this is the ALTA Endorsement Form 1 coverage built into the loan policy), the deletion of this exception avoids having to add language in the exception confirming that the exception was not intended to limit the coverage provided in Covered Risks 11(b).

(2) Deletion of Paragraph 5 – Survey Coverage.

The paragraph in the existing short form reads: "This policy insures against loss or damage by reason of any violation, variation, encroachment or adverse circumstance affecting title that would have been disclosed by an accurate survey. The term "encroachment" includes encroachments of existing improvements located on the land onto adjoining land, and encroachments onto the land of existing improvements located on adjoining land." This language is unnecessary in the 2006 version. This is because the long form 2006 Loan Policy expressly includes this coverage in Covered Risks 2(c), as discussed in 5. of this article. By virtue of the incorporation of the long form into the 2006 short form, this coverage is automatically included in the 2006 short form.

23. Manufactured Housing—new endorsements.

There are two new endorsements, as noted below. The insurer must be satisfied that under North Carolina law the unit constitutes "real property" and otherwise satisfies the insurer's underwriting requirements for providing this coverage. This includes compliance with G.S. 47-20.6 or G.S. 47-20.7, as applicable. The insurer must determine that such a unit does not violate restrictive covenants.

(a) ALTA 7.1-06 (Manufactured Housing Unit-Conversion; Loan)

In pertinent part, the endorsement states that:

1. The term "Land" as defined in this policy includes the manufactured housing unit located on the Land at Date of Policy.
2. Unless excepted in Schedule B, the Company insures against loss or damage, sustained by the Insured if, at Date of Policy:
 - (a) A manufactured housing unit is not located on the Land.
 - (b) The manufactured housing unit located on the Land is not real property under the law of the state where the Land is located.
 - (c) The owner of the Land is not the owner of the manufactured housing unit.
 - (d) Any lien is attached to the manufactured housing unit as personal property, including
 - (i) a federal, state or other governmental tax lien,
 - (ii) UCC security interest,
 - (iii) a motor vehicular lien,
 - (iv) other personal property lien.
 - (e) The lien of the Insured Mortgage is not enforceable against the Land in a single foreclosure procedure.

(b) ALTA 7.2-06 (Manufactured Housing Unit-Conversion; Owner's)

The pertinent part of the endorsement states that:

1. The term "Land" as defined in this policy includes the manufactured housing unit located on the Land at Date of Policy.
2. Unless excepted in Schedule B, the Company insures against loss or damage, sustained by the Insured if, at Date of Policy:
 - (a) A manufactured housing unit is not located on the Land.
 - (b) The manufactured housing unit located on the Land is not real property under the law of the state where the Land is located.
 - (c) The Insured is not the owner of the manufactured housing unit.
 - (d) Any lien is attached to the manufactured housing unit as personal property, including
 - (i) a federal, state or other governmental tax lien,
 - (ii) UCC security interest,
 - (iii) a motor vehicular lien, or
 - (iv) other personal property lien.

24. Restrictions, Encroachments, Minerals—new endorsements.

There are three new ALTA Endorsement 9-series endorsements. There is one for the 2006 Loan Policy and there are two for the 2006 Owner's Policy (one for "unimproved land" and one for "improved land"). Each includes an additional insuring provision to afford coverage in appropriate circumstances for damage to "future improvements" resulting from the future exercise of any right of surface entry to extract or develop minerals that have been severed from the underlying title and are excepted from the legal description or from the policy's coverage by an exception in Schedule B. Because each of these endorsements reads in all other respects like the ALTA Endorsement 9 (Loan Policy), 9.1 (Owner's Policy-Unimproved Land) and 9.2 (Owner's Policy-Improved Land), only the added insuring provision will be set forth below. We have discussed the ALTA 9 endorsement for loan policies in our January 2007 newsletter.

(a) ALTA Endorsement 9.3-06 (Restrictions, Encroachments, Minerals-Loan Policy-Future Improvements Re Minerals Extraction).

4. Damage to improvements, including lawns, shrubbery or trees, located on the Land on or after Date of Policy resulting from the future exercise of any right to use the surface of the Land for the extraction or development of minerals excepted from the description of the Land or excepted in Schedule B.

(b) ALTA Endorsement 9.4-06 (Restrictions, Encroachments, Minerals-Owner's Policy-Unimproved Land-Future Improvements Re Minerals Extraction).

2. Damage to improvements (excluding lawn, shrubbery or trees) constructed on the Land after Date of Policy 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 excepted from the description of the Land or excepted in Schedule B.

(c) ALTA Endorsement 9.5-06 (Restrictions, Encroachments, Minerals-Owner's Policy-Improved Land-Future Improvements Re Minerals Extraction).

3. Damage to improvements (excluding lawns, shrubbery or trees), located on the Land on or after Date of Policy 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 excepted from the description of the Land or excepted in Schedule B.

25. Location—new endorsements.

There are two new endorsements. Each one can be used with both the 2006 Owner's Policy and 2006 Loan Policy. They are designed to address the type of improvement that is located on the land and the applicable street address for the improvement. ALTA Endorsement 22.1-06 (Location and Map) adds coverage related to a map that is attached to the policy in those areas of the country or transactions where it is customary for the title insurer to attach a "location map" to the policy. This second type is not used in North Carolina, so we will not set it out below.

ALTA Endorsement 22-06 (Location).

The Company insures against loss or damage sustained by the insured by reason of the failure of a (description of improvement) known as (street address), to be located on the Land at Date of Policy.

26. List of new endorsements.

The forms which consist of two revised Commitment forms and Forty-four endorsement forms bear a "6/17/06" adoption date. The italicized forms are new. All forms will have a counterpart without the "-06" in the number so that it is clear they can be used with the 1992 policy forms.

- ALTA Commitment Form
- ALTA Plain Language Commitment Form
- ALTA Endorsement 1-06 (Street Assessments)
- ALTA Endorsement 2-06 (Truth-in-Lending)
- ALTA Endorsement 3-06 (Zoning – Unimproved Land)
- ALTA Endorsement 3.1-06 (Zoning – Improved Land)
- ALTA Endorsement 4-06 (Condominium)
- ALTA Endorsement 4.1-06 (Condominium)
- ALTA Endorsement 5-06 (Planned Unit Development)
- ALTA Endorsement 5.1-06 (Planned Unit Development)
- ALTA Endorsement 6-06 (Variable Rate)
- ALTA Endorsement 6.2-06 (Variable Rate-Negative Amortization)
- ALTA Endorsement 7-06 (Manufactured Housing Unit)
- *ALTA Endorsement 7.1-06 (Manufactured Housing Unit-Conversion; Loan)*
- *ALTA Endorsement 7.2-06 (Manufactured Housing Unit-Conversion; Owner's)*
- ALTA Endorsement 8.1-06 (Environmental Protection Lien)
- ALTA Endorsement 9-06 (Restrictions, Encroachments, Minerals)
- ALTA Endorsement 9.1-06 (Restrictions, Encroachments, Minerals-Owner's Policy-Unimproved Land)
- ALTA Endorsement 9.2-06 (Restrictions, Encroachments, Minerals-Owner's Policy-Improved Land)
- *ALTA Endorsement 9.3-06 (Restrictions, Encroachments, Minerals-Loan Policy-Future Improvements Re Minerals Extraction)*
- *ALTA Endorsement 9.4-06 (Restrictions, Encroachments, Minerals- Owner's Policy-Unimproved Land-Future Improvement Re Minerals Extraction)*
- *ALTA Endorsement 9.5-06 (Restrictions, Encroachments, Minerals- Owner's Policy-Improved Land-Future Improvements Re MineralsExtraction)*
- ALTA Endorsement 10-06 (Assignment)
- ALTA Endorsement 10.1-06 (Assignment and Date Down)
- ALTA Endorsement 11-06 (Mortgage Modification)
- ALTA Endorsement 12-06 (Aggregation)
- ALTA Endorsement 13-06 (Leasehold-Owner's)

- ALTA Endorsement 13.1-06 (Leasehold-Loan)
- ALTA Endorsement 14-06 (Future Advance-Priority)
- ALTA Endorsement 14.1-06 (Future Advance-Knowledge)
- ALTA Endorsement 14.2-06 (Future Advance-Letter of Credit)
- *ALTA Endorsement 14.3-06 (Future Advance-Reverse Mortgage)*
- ALTA Endorsement 15-06 (Nonimputation-Full Equity Transfer)
- ALTA Endorsement 15.1-06 (Nonimputation-Additional Insured)
- ALTA Endorsement 15.2-06 (Nonimputation-Partial Equity Transfer)
- ALTA Endorsement 16-06 (Mezzanine Financing)
- ALTA Endorsement 17-06 (Access and Entry)
- ALTA Endorsement 17.1-06 (Indirect Access and Entry)
- ALTA Endorsement 18-06 (Single Tax Parcel)
- ALTA Endorsement 18.1-06 (Multiple Tax Parcel)
- ALTA Endorsement 19-06 (Contiguity-Multiple Parcels)
- ALTA Endorsement 19.1-06 (Contiguity-Single Parcel)
- ALTA Endorsement 20-06 (First Loss-Multiple Parcel Transaction)
- ALTA Endorsement 21-06 (Creditors' Rights)
- *ALTA Endorsement 22-06 (Location)*
- *ALTA Endorsement 22.1-06 (Location and Map)*