

ALTA's 2021 Forms Adapt to Evolving Title Insurance Needs

~ Practical Skills Session ~



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ALTA's 2021 Policy Forms: Adapting to Changing Needs

Why revise the forms now?

Changes to the legal and regulatory environment: new and updated laws and regulations, and court decisions as well. Examples:

- Consumer Financial Protection Bureau
- Remote Online Notarization has become available in many jurisdictions
- *McGirt v. Oklahoma*, 140 S. Ct. 2452 (U.S. Sup. Ct., July 9, 2020)
 - In the McGirt case, the Court held that the state of Oklahoma could not prosecute a Native American who allegedly committed a serious crime covered by a federal statute, finding that the statute gave only the federal government and the tribe concurrent jurisdiction within the boundaries of the tribal reservation
 - The 2021 Policies include language clarifying the operative law to apply when interpreting policy provisions and determining rights and liabilities
- Legislative-Regulatory-Judicial Focus on Discriminatory Covenants
 - (e.g., Indiana HB 1314; 2020 Florida Legislation; 2020 Orange County, CA – ALTA TitleNews Online, February 9, 2021; Washington HB 1335; *May v. Spokane*, (WA Ct. App.-Div. Three, Feb. 23, 2021)

Other changes influenced by comments and requests by Government Sponsored Entities (GSEs), professional organizations, lenders, attorneys and title agents.

What's Revised? – Every Section of the Standard Policy Forms

Covered Risks (the “Jacket”)

Exclusions From Coverage

Schedule A & B

Conditions

- New & Revised Definitions

NEW POLICY JACKETS

Introductory Language

Both the new Owner Policy (“OP”) and new Loan Policy (“LP”) begin by effectively incorporating coverage provided by the Policy Authentication Endorsement (ALTA 39)

- As long as the Insurer issues the policy with a Policy Number and Date of Policy, the policy is valid even if issued electronically or without any signatures

Covered Risk 2 (Owner and Loan)

The Owner and Loan Policies update Covered Risk 2 by adding these new examples of title defects that can cause a covered loss:

- a document affecting the Title not being properly authorized, created, executed, witnessed, sealed, acknowledged, notarized, (*including by remote online notarization*), or delivered; and
- the repudiation of an electronic signature by a person who signed the document because the electronic signature was not valid under applicable electronic transactions law.

The survey coverage provided by Covered Risk 2(c.) is also enhanced to add a boundary line overlap as one of the matters covered if it would have shown up on a survey.

Covered Risk 9 (Loan Policy)

The 2021 Loan Policy updates Covered Risk 9 by adding these new examples of matters that can impair the Insured Mortgage and cause a covered loss:

- the Insured Mortgage not being properly authorized, created, executed, witnessed, sealed, acknowledged, notarized (including by remote online notarization), or delivered; as well as
- the invalidity or unenforceability of Insured Mortgage resulting from the repudiation of an electronic signature by a person who signed the mortgage because the signature was not valid under applicable electronic transactions law.

Covered Risks 5, 6 and 7

Both the Owner and Loan Policies also revise Covered Risks 5, 6 and 7 for loss resulting from a violation or enforcement of governmental regulations, enforcement of other governmental powers, or the exercise of the power of eminent domain.

- The updated language covers loss to the extent of the violation, enforcement or exercise described in an Enforcement Notice
- Enforcement Notice is a new defined term, and together with a refinement of the definition for Public Records, represents a significant clarification regarding the type of notice that triggers coverage and where that notice needs to be recorded.

New Covered Risk 8

Both Policies add a new Covered Risk 8 that insures against an enforcement of a PACA-PSA Trust to the extent of the enforcement described in an Enforcement Notice

- PACA-PSA Trust is also a new defined term
- The Perishable Agricultural Commodities Act (7 U.S.C. §§ 499a, et seq.) imposes a trust in favor of unpaid suppliers and sellers of fresh fruits and fresh vegetables against assets of buyers or dealers. The Packers and Stockyards Act (7 U.S.C. §§ 181, et seq.) establishes a similar trust to protect livestock producers. Both trusts can exist in unrecorded form

Covered Risk 10 (Loan)

Covered Risk 10 now explicitly insures the priority of the Insured Mortgage as to specific components of the Indebtedness, including:

- The amount of the principal disbursed as of the Date of Policy;
- the interest on the obligation secured by the Insured Mortgage;
- the reasonable expenses of foreclosure;
- amounts advanced for insurance premiums by the Insured before the acquisition of the estate or interest in the Title; and
- the following amounts advanced by the Insured before the acquisition of the Title to protect the priority of the lien of the Insured Mortgage:
 - i. real estate taxes and assessments imposed by a governmental taxing authority; and
 - ii. regular, periodic assessments by a property owners' association

Covered Risk 9 (Owner) and Covered Risk 13 (Loan)

There is new creditors' rights coverage in Covered Risk 9 of the Owner Policy, and similar coverage in Covered Risk 13 of the Loan Policy

- The protection against loss resulting from a court order providing an alternative remedy now applies to both subsections of the Covered Risk. Section 550(a) of the Bankruptcy Code authorizes an alternative remedy in allowing the bankruptcy trustee to "...recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property"
- In addition, the provision also updates coverage by insuring against loss resulting from the prior transfer being voidable under the Uniform Voidable Transactions Act. The National Conference of Commissioners changed the Uniform Fraudulent Transfer Act to the Uniform Voidable Transactions Act in 2014

EXCLUSIONS

Both the Owner and Loan Policies have two new Exclusions. The remaining changes to the Exclusions consist of updating and making them consistent with the revised language in the corresponding Covered Risks and the Conditions

- For example, in addition to excluding loss resulting from municipal regulations, **Exclusion 1** revises subsection b. to exclude loss or damage resulting from "any governmental forfeiture, police, regulatory, or national security power"
- **Exclusion 3** updates language to exclude loss or damage that would not have been sustained had the insured paid consideration sufficient to qualify as a bona fide purchaser or encumbrancer under applicable recording laws, but clarifies coverage by not excluding loss based on the insured's failure to pay fair market value

Exclusion 4 (Owner) and Exclusion 6 (Loan)

The creditors' rights exclusion in each new policy contains a clarification that loss resulting from a voidable preference is excluded if not given as a contemporaneous exchange for new value

- Also contains an express exclusion for loss resulting from the transaction vesting the Title or creating the Insured Mortgage being a voidable transfer under the Uniform Voidable Transactions Act
- This reference to the Uniform Voidable Transactions Act is intended to modernize the 2021 Policy forms

Exclusion 5 (Owner) and Exclusion 7 (Loan)

Both policies include a new exclusion for loss arising from any claim of a PACA-PSA Trust, while stating that the exclusion does not modify or limit the coverage provided by the new Covered Risk 8.

- Covered Risk 8 in both policy forms insures against loss resulting from the enforcement of a PACA-PSA Trust, but only to the extent of the enforcement described in an Enforcement Notice.

Exclusion 7 (Owner) and Exclusion 9 (Loan)

- Another new Exclusion in both policies excludes loss caused by “any discrepancy in the quantity of the area, square footage, or acreage of the Land or of any improvement to the Land.”

SCHEDULES

Schedule A

An optional Transaction Identification Data header has been added to Schedule A to provide clarity and make post-closing smoother and general inquiries easier to initiate

- This information is intentionally set apart from the insured information in Schedule A so it’s not an insured matter but serves as reference information to improve communication

Another optional provision enables the Schedule A to incorporate specific ALTA endorsements by reference. Reference can also be made to other available endorsements (for example: those that are state specific or proprietary)

Schedule B

Schedule B begins with the following sentences:

- *Some historical land records contain Discriminatory Covenants that are illegal and unenforceable by law. This policy treats any Discriminatory Covenant in a document referenced in Schedule B as if each Discriminatory Covenant is redacted, repudiated, removed, and not republished or recirculated. Only the remaining provisions of the document are excepted from coverage.*

This language makes it clear that when a policy includes an exception for restrictions, it does not republish any unenforceable discriminatory provisions contained within those restrictions nor does it except any Discriminatory Covenant from coverage.

Exception Language

The new Policies also revise the lead-in sentences immediately preceding the list of the exceptions in Schedule B:

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

This addition obviates the need to include a specific exception in Schedule B for the terms and conditions of any leases or easements that comprise all or a part of the insured property.

CONDITIONS

New Definitions in Condition 1

The terms *Affiliate*, *Discriminatory Covenant*, *Enforcement Notice*, *PACA-PSA Trust* and *State* are new in both policy forms

Affiliate

In both policies an “*Affiliate*” is an Entity:

- that is wholly owned by the Insured;
- that wholly-owns the Insured; or
- if that Entity and the Insured are both wholly owned by the same person or entity.

An Affiliate will be considered an Insured when the named Insured conveys the Title to the Affiliate by deed or other instrument of transfer

State

The policies include State as a new defined term.

- The term means the state or commonwealth of the United States where the Land is located, and where applicable also includes the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, and Guam

The Loan Policy features a newly defined term for *Consumer Protection Law*, that replaces the terms *consumer credit protection laws* and *truth in lending laws* used in Exclusion 5 of the 2006 ALTA Loan Policy. The Loan Policy also includes newly defined terms for *Government Mortgage Agency or Instrumentality* and *Obligor*.

Revised Definitions

Insured (Owner)

In the new Owner Policy, a deed from the named Insured to one of the following can also result in the grantee being an Insured under the policy:

- an Affiliate;
- a trustee or beneficiary of a trust created by a written instrument established for estate planning purposes by an Insured;
- a spouse who receives the Title because of a dissolution of marriage;
- a transferee by a transfer effective on the death of an Insured as authorized by law; or
- another Insured named in Item 1 of Schedule A.

These last two categories are new, and this provision also differs from the corresponding language in the 2006 policy because there is no requirement that the deed or conveyance be for no consideration.

Insured (Loan)

The new Loan Policy also makes changes to the definition of *Insured*. This additional language in the Loan Policy does not alter coverage but does clarify that the Insured is a person that holds the Title after acquiring the Indebtedness, regardless of the means of acquisition.

In the Loan Policy, a transfer from the named Insured to one of the following can also result in the grantee being an Insured under the policy:

- the grantee of an Insured under a deed or other instrument transferring the Title, if the grantee is an Affiliate (Note that this is no longer conditioned on the transfer being for no consideration);
- an Affiliate that acquires the Title through foreclosure or deed-in-lieu of foreclosure of the Insured Mortgage (regardless of whether the Affiliate owned or held the Indebtedness); or
- any Government Mortgage Agency or Instrumentality.

Public Records

The 2021 ALTA policies modify the definition of *Public Records*

- The clarification distinguishes between those records that are Public Records for purposes of the terminology used in a title policy and other governmental records that are not intended to be, and are generally not construed as, within the scope of Public Records for purposes of triggering coverage in the policies
- “Public Records” means the recording or filing system established under State statutes in effect at the Date of Policy under which a document must be recorded or filed to impart constructive notice of matters relating to the Title to a purchaser for value without Knowledge. *The term “Public Records” does not include any other recording or filing system, including any pertaining to environmental remediation or protection, planning, permitting, zoning, licensing, building, health, public safety, or national security matters.*

Condition 8: Contract of Indemnity; Determination and Extent of Liability

This Condition has been revised in both policies and clarifies the fact that the policy is a contract of indemnity, with an initial statement that the policies are not abstracts of title, reports of the condition of title, legal opinions, opinions of title, or other representations of title

- Among the improvements in coverage are the provisions establishing a procedure for the Insured to select the date for determining value for purposes of calculating loss. The ability to choose an alternate date for the determination of loss is no longer conditioned on the Insurer’s unsuccessful attempt to cure the defect

Owner Policy

In the Owner Policy, while terms regarding the extent of liability remain essentially the same, a revised subsection addressing valuation states that the fair market value of the Title is calculated using the date the Insured discovers the defect or other matter insured against by this policy; however if, at the Date of Policy, the Title to all of the Land is void by reason of a matter covered by the policy, then the Insured Claimant may, by written notice given to the Insurer, elect to use the Date of Policy as the date for calculating the fair market value of the Title.

- If the Insurer does pursue its rights to cure the Title and is unsuccessful:
- the Amount of Insurance will be increased by 15% (an improvement from 10% in the 2006 policy); and
- the Insured Claimant may elect to use either the date the settlement, action, or proceeding is concluded or the date the notice of claim is received by the Insurer as the date for calculating the fair market value of the Title

Loan Policy

The new Loan Policy also provides options to the Insured for determining loss regardless of any actions taken on the part of the Insurer. Fair market value of the Title is calculated using either:

- the date the Insured acquires the Title as a result of a foreclosure or deed in lieu of foreclosure of the Insured Mortgage; or
- the date the lien of the Insured Mortgage or any assignment set forth in Item 4 of Schedule A is extinguished or rendered unenforceable by reason of a matter insured against by the policy.

In addition, a new subsection provides additional alternatives to the Insured Claimant if the Insurer attempts to establish the Title but is unsuccessful:

- the Amount of Insurance will be increased by 15%; and
- the Insured Claimant may elect to use either the date the settlement, action, or proceeding is concluded or the date the notice of claim is received by the Insurer as the date for calculating the fair market value of the Title.

Condition 10: Reduction or Termination of Insurance (Loan)

Condition 10 in the Loan Policy, now entitled *Reduction or Termination of Insurance*, improves the coverage in the Loan Policy by adding a new subsection b. that states:

- *“b. When the Title is acquired by the Insured as a result of foreclosure or deed in lieu of foreclosure, the amount credited against the Indebtedness does not reduce the Amount of Insurance.”*

Condition 16 (Owner) and Condition 15 (Loan): Revised Choice of Law Provisions in Subsection a.

These revised Conditions clearly provide that the State law of the State where the Land is located, or to the extent it controls, federal law, will determine the validity of claims against the Title or enforcement of the policy.

- While the provision is needed because of increased multi-state and cross-border transactions, the new reference to federal law addresses the jurisdictional issue raised in the *McGirt* decision.

Other Forms Revised in 2021

- **COMMITMENT FOR TITLE INSURANCE**, and the Short Form Commitment
- **SHORT FORM RESIDENTIAL LOAN POLICY**
- **HOMEOWNER'S POLICY**
- **EXPANDED COVERAGE RESIDENTIAL LOAN POLICY—CURRENT ASSESSMENTS**, and the Short Form Expanded Coverage Residential Loan Policies

- **ALTA 3** Zoning
- **ALTA 3.1** Zoning—Completed Structures
- **ALTA 3.2** Zoning—Land Under Development
- **ALTA 3.3** Zoning—Completed Improvement—Non-Conforming Use
- **ALTA 3.4** Zoning—No Zoning Classification
- **ALTA 4** Condominium—Assessments Priority
- **ALTA 4.1** Condominium—Current Assessments
- **ALTA 6** Variable Rate Mortgage
- **ALTA 6.2** Variable Rate Mortgage—Negative Amortization
- **ALTA 7.1** Manufactured Housing—Conversion—Loan Policy
- **ALTA 7.2** Manufactured Housing—Conversion—Owner’s Policy
- **ALTA 8.1** Environmental Protection Lien
- **ALTA 10** Assignment
- **ALTA 10.1** Assignment and Date Down
- **ALTA 11** Mortgage Modification
- **ALTA 11.1** Mortgage Modification with Subordination
- **ALTA 11.2** Mortgage Modification with Additional Amount of Insurance
- **ALTA 12** Aggregation—Loan Policy
- **ALTA 12.1** Aggregation—State Limits—Loan Policy
- **ALTA 14** Future Advance—Priority
- **ALTA 14.1** Future Advance—Knowledge
- **ALTA 14.2** Future Advance—Letter of Credit
- **ALTA 14.3** Future Advance—Reverse Mortgage
- **ALTA 26** Subdivision
- **ALTA 27** Usury
- **ALTA 30** Shared Appreciation Mortgage
- **ALTA 30.1** Commercial Participation Interest
- **ALTA 32** Construction Loan
- **ALTA 32.1** Construction Loan—Direct Payment
- **ALTA 32.2** Construction Loan—Insured’s Direct Payment
- **New: ALTA 34.1** Identified Exception & Identified Risk Coverage

To see redlined comparisons of the old and new policy forms, and to download the ALTA Endorsement chart, go to: <http://www.alta.org/policy-forms>