

ALTA'S 2021 Policy Forms: Adapting to Changing Needs



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Important laws, regulations, and some court decisions, too!

- Consumer Financial Protection Bureau
- Remote Online Notarization has become available in many jurisdictions

WHAT WILL CHANGE IN THE POLICIES?

BY SECTION

- Covered Risks (the “Jacket”)
- Exclusions From Coverage
- Schedule A & B
- Conditions
- New & Revised Definitions

LET'S DIVE IN ...

NEW POLICY JACKET 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 (LP) & (OP)

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 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 RISKS 5, 6, & 7 (LP) & (OP)

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.

COVERED RISK 8 (LP) & (OP)

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 defined as “A trust under the federal Perishable Agricultural Commodities Act [PACA] or Packers and Stockyards Act [PSA]”

PCA (7 U.S.C. §§ 499a, et seq.) imposes a trust for unpaid suppliers, sellers and agents of fresh fruits and fresh vegetables; PSA (7 U.S.C. §§ 181, et seq.) establishes a similar trust on assets of packers to protect livestock producers. Both trusts can exist in unrecorded form.

COVERED RISK 9 (LP)

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 RISK 10 (LP)

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 expense of foreclosure;
- amounts advanced for insurance premiums prior to acquiring title;
- amounts advanced for real estate taxes, or regular HOA or condo fees.

COVERED RISKS 13(LP) & 9 (OP)

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"

COVERED RISKS 13(LP) & 9 (OP)

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 FROM COVERAGE

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 (LP & OP)

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 improves coverage by not excluding coverage for matters based on the insured's failure to pay reasonably equivalent or fair market value

EXCLUSION 6 (LP) & 4 (OP)

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

Exclusion 4 in the Owner Policy and Exclusion 6 in the Loan Policy also contain 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, which has been adopted in at least 19 states, is intended to modernize the 2021 Policy forms

EXCLUSION 7 (LP) & 5 (OP)

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 (OP) & 9 (LP)

Another new Exclusion 7 in the Owner Policy and new Exclusion 9 in the Loan Policy exclude 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.”

SCHEDULE A (LP) & (OP)

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

SCHEDULE B (LP) & (OP)

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.

SCHEDULE B (LP) & (OP)

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

- ***“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

There are several noteworthy revisions to the Conditions, beginning with the Definition of Terms in Condition 1

- The terms *Affiliate*, *Discriminatory Covenant*, *Enforcement Notice*, *PACA-PSA Trust* and *State* are new in both policy forms
- Substantial revisions have been made to the terms *Insured* and *Public Records*

CONDITION 1.a. (LP) & (OP)

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

CONDITION 1.c. (LP)

Definition of “*Consumer Protection Law*”

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

CONDITION 1.e. (LP) & 1.d. (OP)

Definition of “*Discriminatory Covenant*”

[1.e.] [1.d] “Discriminatory Covenant”: Any covenant, conditions, restriction, or limitation that is unenforceable under applicable law because it illegally discriminates against a class of individuals based on personal characteristics such as race, color, religion, sex, sexual orientation, gender identity, familial status, disability, national origin, or other legally protected class.

CONDITION 1.j. (LP)

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.

CONDITION 1.j. (LP)

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.

CONDITION 1.g. (OP)

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

- a trustee or beneficiary of a trust established for estate planning purposes by an Insured; or
- 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.

New in the 2021 form: no requirement that the transfer be for no consideration.

CONDITION 1.h. (LP)

The Loan Policy features a new defined term for *Government Mortgage Agency or Instrumentality*, a term that does not impact coverage, but is used in the definition of the “*Insured*” and of the “*Obligor*”

A Government Mortgage Agency or Instrumentality is not an Obligor

CONDITION 1.p. (LP)

- **The Loan Policy features a new defined term for *Obligor*, defined as a person or entity that is or becomes a maker, borrower, or guarantor as to all or part of the Indebtedness or other obligation secured by the Insured Mortgage. (Remember: a Government Mortgage Agency or Instrumentality is not an Obligor)**
- **The term “Obligor” is used primarily in Condition 12 of the Loan Policy, (Rights of Recovery upon Payment or Settlement) but Condition 12 of the 2006 and 2021 ALTA Loan Policy remain substantively the same**

CONDITION 1.r. (LP) & 1.m. (OP)

The 2021 ALTA policies modify the definition of Public Records to distinguish 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

CONDITION 1.r. (LP) & 1.m. (OP)

“Public Records”: 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 1.s. (LP) & 1.n. (OP)

The new policies include *State* as a new defined term. The inclusion makes it clear that term used in the policies 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

CONDITION 8. (OP) & (LP)

Condition 8, now entitled *Contract of Indemnity; Determination and Extent of Liability* contains some significant changes:

- The Condition clarifies that the policy is a contract of indemnity, with an initial statement that the policies are not abstracts of title, reports, 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

CONDITION 8. (LP)

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 this policy.

CONDITION 8. (LP)

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 8. (OP)

In the Owner Policy, while terms regarding the extent of liability remains 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

CONDITION 8. (OP)

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.

CONDITION 8. (OP)

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.

CONDITION 10 (LP)

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 15 (LP) & 16 (OP)

The 2021 policies contain revised Choice of Law provisions.

Condition 15.a. of the Loan Policy and 16a of the Owner Policy 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 *McGirt v. Oklahoma*, 140 S. Ct. 2452 (U.S. Sup. Ct., July 9, 2020)

CONDITION 17 (LP) & 18 (OP)

CLASS ACTION

The 2021 policies contain a new condition, titled “*Class Action*” separate Condition regarding Class Actions

Claims and disputes must be brought in an individual capacity and may not be brought as a class action

CONDITION 18 (LP) & 19 (OP)

ARBITRATION

Although the optional Arbitration Condition has been substantially revised in the 2021 Owner and Loan Policies, the provisions remain similar to those in the 2006 policy forms

Claims and disputes must be brought in an individual capacity and may not be brought as a class action

COMMITMENT FOR TITLE INSURANCE, and the Short Form Commitment

SHORT FORM RESIDENTIAL LOAN POLICY

HOMEOWNER'S POLICY

EXPANDED COVERAGE RESIDENTIAL LOAN POLICY—ASSESSMENTS
PRIORITY

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

ALTA 34.1 Identified Exception & Identified Risk Coverage

