

**REBA 2022 Annual Conference**

***Marketable vs. Insurable Title and***

***Attorney Certification Statute, MGL c. 93, § 70***

***Lisa J. Delaney, Esq.***

**Carvin & Delaney LLC.**

***Ward P. Graham, Esq.***

**Old Republic National Title Insurance Co.**

# ***Overview of Marketable vs. Insurable Title***

## **Marketable Title**

**Much of the case law discussing marketable title involves enforcement of a purchase and sale agreement where a dispute over whether the seller is able to convey marketable title. For most standard purchase and sale agreements over the last 50 years, the quality of title required to be conveyed is “good clear record and marketable title.” Thus, marketable title actually has two components: “good clear record” title and “marketable” title. (See additional discussion of **Marketable Title in the written materials at pages 144-146.**)**

**As we’ll discuss, the issue of whether a title is marketable or unmarketable can arise in the context of a malpractice claim against an attorney who passed on a title without recognizing or properly dealing with a matter adversely affecting title. See, for example, *Lyon v. Duffy*, 77 Mass.App.Ct. 860 (2010) and *Fall River Savings Bank v. Callahan*, 18 Mass.App.Ct. 76 (1984) referenced in the written materials on Page 144.**

## ***Overview of Marketable vs. Insurable Title***

### **Marketable Title Becoming More and More a Matter of “Insurable Title.”**

**The issue of whether a title is marketable or unmarketable can also arise in the context of a claim under a title insurance policy either when some actual claim of a lien or interest in the insured property adverse to the insured owner (or mortgagee) or, far more often, when a buyer’s or buyer’s lender’s attorney raises a “title issue” after doing reviewing a title examination in preparation for a sale or mortgage refinance transaction. And, almost just as often in the last 30 years, the attorney consults with a title insurance underwriting counsel to not only determine if a title insurance policy can be issued but also to obtain an opinion as to whether title is marketable.**

# *Overview of Marketable vs. Insurable Title*

## **PURCHASE AND SALE AGREEMENT FORMS**

### **Provisions Relating to Title**

#### **REBA FORMS**

**Form 21-Purchase and Sale Agreement For Massachusetts Real Estate**

**– See pages 137-138 in Written Materials**

**Form 66-Sample Rider Provisions to Residential Purchase and Sale Agreement – See pages 138-139 in Written Materials**

# *Overview of Marketable vs. Insurable Title*

## **ATTORNEY'S CERTIFICATION OF TITLE STATUTE**

**M.G.L. Ch. 93, § 70 - See page 133 of Written Materials**

**SAMPLE ATTORNEY CERTIFICATON - See pages 135-136 of Written Materials**



## ***Overview of Marketable vs. Insurable Title***

### **Relationship of REBA Title Standards to Marketable Title and Insurable Title**

#### **Preamble to REBA Title Standards**

The objective of the conveyancer is to determine whether or not the title in question is satisfactory of record. **Objections to the title should be made only when the defect or defects could reasonably be expected to expose the prospective owner, tenant or lienor to the risk of adverse claims or litigation.** The following title standards express the practice considered reasonable by members of the Real Estate Bar Association for Massachusetts. This standard of reasonableness is intended to assist the conveyancer in determining if title is marketable.

#### **Comment**

The foregoing provision should protect sellers by preventing sales from being lost by technical and non-substantive objections to title and should protect buyers by avoiding disputes and assuring them a title that will be marketable in the event of a resale.

# ***Overview of Marketable vs. Insurable Title***

## **REBA Title Standards – Grouped by Topic**

### **Acknowledgments**

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### **Attachments, Executions, Lis Pendens, Court Actions**

[15. Partition by Sale](#)

[20. Levy of Execution by Sale](#)

[29. Dissolution of Lis Pendens](#)

[38. Attachments of Trust Property](#)

[47. Seizure on Execution](#)

[49. Dissolution of Attachments](#)

[67. Orders in Equitable Proceedings](#)

### **Bankruptcy**

[30. Bankruptcy Transfers](#)

[31. Notice of Pendency of Bankruptcy](#)

[32. Unadministered Bankruptcy Interests](#)

[84. Effect of a Bankruptcy on Recorded Liens](#)

## ***Overview of Marketable vs. Insurable Title***

### **REBA Title Standards – Grouped by Topic - continued**

#### **Condominiums**

[69. Certificates Pursuant to M.G.L. c. 183A, § 6\(d\)](#)

[70. Condominiums: First Unit Deed Fails to Include Attached Unit Plan or Includes Defective Unit Plan or Certification](#)

[74. Irregularities in Condominium Unit Deeds, Unit Plans and Floor Plans](#)

#### **Corporations and Other Entities**

[9. Massachusetts Business Trusts and the Rule Against Perpetuities](#)

[11. Corporate Transfers](#)

[12. Foreign Corporations](#)

[17. Corporate Tax Liens](#)

[26. Limited Partnership Transfers](#)

[37. General Partnership Transfers](#)

[44. General Partnership Transfers \(Current Transactions\)](#)

[51. Transfers Involving the Commonwealth](#)

[59. Limited Liability Company Transfers](#)



# ***Overview of Marketable vs. Insurable Title***

## **REBA Title Standards – Grouped by Topic - continued**

### **Corporations and Other Entities - continued**

[60. Limited Liability Partnership Transfers](#)

[66. Transfers by Non-Profit Corporations](#)

[75. Corporate Transfers after Dissolution](#)

[76. Internet-Based Title Information Sources](#)

### **Curative Title Standards**

[21. Scriveners' Errors](#)

[27. Title References and Descriptions](#)

### **Divorce**

[81. Property Transfers Subject to Supplemental Probate Rule 411 - Automatic Restraining Order](#)

# *Overview of Marketable vs. Insurable Title*

## **REBA Title Standards – Grouped by Topic - continued**

### **Estates and Decedents**

[10. Executor's Power of Sale](#)

[14. Missing Probates](#)

[36. Probate Inventories](#)

[39. Exercise of Power of Appointment](#)

[40. Transfers by Devisees](#)

[41. List of Heirs](#)

[46. Delayed Recording](#)

[50. Pretermitted Issue](#)

[71. Evidence of Death of Deceased Joint Owners and Life Tenants](#)

[78. Personal Representative Conveyances Per Power of Sale Under Massachusetts Uniform Probate Code](#)

### **Estate Tax Liens**

[3. Federal Estate Tax Liens](#)

[24. Massachusetts Estate Tax Liens](#)

[61. Massachusetts Estate Tax Liens with Respect to Transfers for Inadequate Consideration](#)

# *Overview of Marketable vs. Insurable Title*

## **REBA Title Standards – Grouped by Topic - continued**

### **Filed Tax Liens**

[28. Release of Right of Redemption after Foreclosure in Respect of a Federal Tax Lien](#)

[54. Federal Tax Liens \(Recorded\)](#)

[55. Massachusetts Tax Liens \(Recorded\)](#)

[83. Massachusetts Child Support Liens](#)

### **Homestead**

[77. Prior Owner Automatic Homestead or Declared Homestead](#)

### **Mechanics Liens**

[62. Mechanic's Lien for Personal Labor Only](#)

[63. Mechanic's Lien for Contractor's Labor or Labor and Materials](#)

[64. Mechanic's Lien for Subcontractor's Labor or Labor and Materials](#)

[73. Effect of Recorded Complaint to Enforce Mechanic's Lien which has been Dissolved](#)

# *Overview of Marketable vs. Insurable Title*

## **REBA Title Standards – Grouped by Topic - continued**

### **Mortgages and Foreclosures**

[6. Junior Lienors as Parties to Proceedings under the Soldiers' and Sailors' Civil Relief Act](#)

[7. Mortgage Foreclosures Not Complying with the Soldiers' and Sailors' Civil Relief Act](#)

[8. A Corporation as a Party to Proceedings under the Soldiers' and Sailors' Civil Relief Act](#)

[25. Mortgage Discharges](#)

[42. Mortgage Transactions: Discharges, Assignments and Partial Releases](#)

[48. Mortgage Foreclosures under Power of Attorney](#)

[56. Mortgage Foreclosures after December 31, 1990](#)

[58. Out of Order Recording of Mortgage Discharges and Assignments](#)

[65. Undischarged Confirmatory Mortgages and Collateral Assignments of Rent/Leases](#)

[72. Mortgage Instruments - Identification of Nominor \(MERS\)](#)

### **POAs**

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# *Overview of Marketable vs. Insurable Title*

## **REBA Title Standards – Grouped by Topic - continued**

### **Restrictions**

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[57. Private Restrictions](#)

[79. Discriminatory Covenants and Restrictions](#)

### **Tax Titles and Municipal Liens**

[2. Old Age Assistance](#)

[4. Tax Titles](#)

[18. Municipal Liens](#)

[19. Municipal Lien Certificates](#)

[22. Municipal Betterments](#)

[80. Petition to Foreclose the Right of Redemption of Tax Deed or Taking](#)

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# *Overview of Marketable vs. Insurable Title*

## **REBA Title Standards – Grouped by Topic - conclusion**

### **Trusts and Trustees**

[23. Self-Dealing by Trustee](#)

[33. Transfers by Trustee](#)

[45. Transfers to Trusts](#)

[53. Indefinite References - Trusts](#)

[68. Trustee's Certificates Under M.G.L. c. 184, § 35](#)

## ***Overview of Marketable vs. Insurable Title***

### **REBA Title Standard No. 3 Federal Estate Tax Liens**

Title to land is not defective by reason of a federal estate tax lien ten years after death in any case and sooner:

(1) When there is an affidavit by the personal representative, executor or administrator, or if no probate then by the decedent's immediate successor in title or person in actual or constructive possession of the property, that the decedent's gross estate as defined in IRC § 2031 is less than the amount set forth in the Table below;

or

(2) When there is proof of payment of the amount shown due by the tax closing letter or the tax closing letter shows no amount due;

or

(3) Where there is proof of payment of the amount shown due, or the amount shown due is zero, on an account transcript issued by the IRS showing transaction code 421 and the explanation "Closed examination of tax return";

or

(4) When the IRS issues pursuant to IRC § 6325 a certificate of its discharge of the land or a certificate of release or non-attachment of the lien;

or

(5) When, in the case of non-probate property, there is a transfer to a "purchaser" or holder of a "security interest" as defined in IRC § 6323(h) if death was after November 2, 1966. In practice any transfer in an arm's length transaction is a transfer to a "purchaser" or holder of a "security interest" as so defined.

## *Overview of Marketable vs. Insurable Title*

### **REBA Title Standard No. 3 Comment No. 5**

### **Discusses IRS Transcripts in Lieu of Estate Tax Closing Letters**

5. An account transcript referenced in Paragraph (3) issues after a Federal Estate Tax Return has been filed and reviewed. It is computer generated, issues for no charge, and has a much shorter turn-around period than requesting an Estate Tax Closing Letter. IRS Notice 2017-12 states that “an account transcript showing a transaction code of “421” serves as the functional equivalent of an estate tax closing letter.”

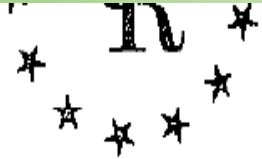
**If you want to find out more information on IRS Transcripts and how to obtain them, easiest way is to do a Google search for**  
**“Transcripts in lieu of estate tax closing letters”**

## *Insurable Title*

### *What do Owner's Title Insurance Policies insure?*

#### **INSURING PROVISIONS UNDER ALTA OWNER'S POLICIES**

#### **ALTA 1992 Standard Form**



SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS,

████████████████████ TITLE INSURANCE COMPANY, a ██████████ corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
4. Lack of a right of access to and from the land.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title, as insured, but only to the extent provided in the Conditions and Stipulations.



## *Insurable Title*

### *What do Owner's Title Insurance Policies insure?*

#### **INSURING PROVISIONS UNDER ALTA OWNER'S POLICIES**

#### **Moving toward more risk assumption – 4 Covered Risks to 10 Covered Risks ALTA 2006 STANDARD FORM**

#### **COVERED RISKS**

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, [REDACTED] NATIONAL TITLE INSURANCE COMPANY, a [REDACTED] corporation (the "Company") insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from:
  - (a) A defect in the Title caused by
    - (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
    - (ii) failure of any person or Entity to have authorized a transfer or conveyance;
    - (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
    - (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
    - (v) a document executed under a falsified, expired, or otherwise invalid power of attorney;
    - (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
    - (vii) a defective judicial or administrative proceeding.
  - (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
  - (c) 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.
3. Unmarketable Title.
4. No right of access to and from the Land.



## *Insurable Title*

### *What do Owner's Title Insurance Policies insure?*

#### **INSURING PROVISIONS UNDER ALTA OWNER'S POLICIES**

#### **Moving toward more risk assumption – 4 Covered Risks to 10 Covered Risks**

#### **ALTA 2006 STANDARD FORM -Continued**

6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.
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.
8. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.
9. Title being vested other than as stated in Schedule A or being defective
  - (a) as a result of the avoidance in whole or in part, or from a court order providing an alternative remedy, of a transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction vesting Title as shown in Schedule A because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws; or
  - (b) because the instrument of transfer vesting Title as shown in Schedule A constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws by reason of the failure of its recording in the Public Records
    - (i) to be timely, or
    - (ii) to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.
10. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 9 that has been created or attached or has been filed or recorded in the Public Records subsequent to 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.

The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

## ***Insurable Title***

### ***What do Owner's Title Insurance Policies insure?***

#### **INSURING PROVISIONS UNDER ALTA OWNER'S POLICIES - Continued**

**Even more risk assumption – Homeowner's Expanded Coverage Policies**

**1998 ALTA Version - 28 or 29 Covered Risks**

**2013 ALTA Version – 32 Covered Risks**

**2021 ALTA Version – 33 Covered Risks**

# *Insurable Title*

## *What do Owner's Title Insurance Policies insure?*

### **INSURING PROVISIONS UNDER ALTA OWNER'S POLICIES - Continued**

#### **ALTA HOMEOWNER'S POLICY 2013**



#### **OWNER'S INFORMATION SHEET**

Your Title Insurance Policy is a legal contract between You and Us.

It applies only to a one-to-four family residence and only if each insured named in Schedule A is a Natural Person. If the Land described in Schedule A of the Policy is not an improved residential lot on which there is located a one-to-four family residence, or if each insured named in Schedule A is not a Natural Person, contact Us immediately.

The Policy insures You against actual loss resulting from certain Covered Risks. These Covered Risks are listed beginning on page 2 of the Policy. The Policy is limited by:

- Provisions of Schedule A
- Exceptions in Schedule B
- Our Duty To Defend Against Legal Actions On Page 4.
- Exclusions on page 5.
- Conditions on pages 5, 6, 7 and 8.

You should keep the Policy even if You transfer Your Title to the Land. It may protect against claims made against You by someone else after You transfer Your Title.

***Insurable Title***  
***What do Owner's Title Insurance Policies insure?***

**INSURING PROVISIONS UNDER ALTA OWNER'S POLICIES - Continued**

**ALTA HOMEOWNER'S POLICY 2013 – Covered Risks**

**COVERED RISKS**

The Covered Risks are:

1. Someone else owns an interest in Your Title.
2. Someone else has rights affecting Your Title because of leases, contracts, or options.
3. Someone else claims to have rights affecting Your Title because of forgery or impersonation.
4. Someone else has an Easement on the Land.
5. Someone else has a right to limit Your use of the Land.
6. Your Title is defective. Some of these defects are:
  - a. Someone else's failure to have authorized a transfer or conveyance of your Title.
  - b. Someone else's failure to create a valid document by electronic means.
  - c. A document upon which Your Title is based is invalid because it was not properly signed, sealed, acknowledged, delivered or recorded.
  - d. A document upon which Your Title is based was signed using a falsified, expired, or otherwise invalid power of attorney.
  - e. A document upon which Your Title is based was not properly filed, recorded, or indexed in the Public Records.
  - f. A defective judicial or administrative proceeding.



# *Insurable Title*

## *What do Owner's Title Insurance Policies insure?*

### **INSURING PROVISIONS UNDER ALTA OWNER'S POLICIES - Continued**

#### **ALTA HOMEOWNER'S POLICY 2013 – Covered Risks continued**

7. Any of Covered Risks 1 through 6 occurring after the Policy Date.
8. Someone else has a lien on Your Title, including a:
  - a. lien of real estate taxes or assessments imposed on Your Title by a governmental authority that are due or payable, but unpaid;
  - b. Mortgage;
  - c. judgment, state or federal tax lien;
  - d. charge by a homeowner's or condominium association; or
  - e. lien, occurring before or after the Policy Date, for labor and material furnished before the Policy Date.
9. Someone else has an encumbrance on Your Title.
10. Someone else claims to have rights affecting Your Title because of fraud, duress, incompetency or incapacity.
11. You do not have actual vehicular and pedestrian access to and from the Land, based upon a legal right.
12. You are forced to correct or remove an existing violation of any covenant, condition or restriction affecting the Land, even if the covenant, condition or restriction is excepted in Schedule B. However, You are not covered for any violation that relates to:
  - a. any obligation to perform maintenance or repair on the Land; or
  - b. environmental protection of any kind, including hazardous or toxic conditions or substancesunless there is a notice recorded in the Public Records, describing any part of the Land, claiming a violation exists. Our liability for this Covered Risk is limited to the extent of the violation stated in that notice.



## *Insurable Title*

### *What do Owner's Title Insurance Policies insure?*

#### **INSURING PROVISIONS UNDER ALTA OWNER'S POLICIES - Continued**

##### **ALTA HOMEOWNER'S POLICY 2013 – Covered Risks continued**

13. Your Title is lost or taken because of a violation of any covenant, condition or restriction, which occurred before You acquired Your Title, even if the covenant, condition or restriction is excepted in Schedule B.
14. The violation or enforcement of those portions of any law or government regulation concerning:
  - a. building;
  - b. zoning;
  - c. land use;
  - d. improvements on the Land;
  - e. land division; or
  - f. environmental protection,if there is a notice recorded in the Public Records, describing any part of the Land, claiming a violation exists or declaring the intention to enforce the law or regulation. Our liability for this Covered Risk is limited to the extent of the violation or enforcement stated in that notice.
15. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 14 if there is a notice recorded in the Public Records, describing any part of the Land, of the enforcement action or intention to bring an enforcement action. Our liability for this Covered Risk is limited to the extent of the enforcement action stated in that notice.

## *Insurable Title*

### *What do Owner's Title Insurance Policies insure?*

#### **INSURING PROVISIONS UNDER ALTA OWNER'S POLICIES - Continued**

##### **ALTA HOMEOWNER'S POLICY 2013 – Covered Risks continued**

16. Because of an existing violation of a subdivision law or regulation affecting the Land:
  - a. You are unable to obtain a building permit;
  - b. You are required to correct or remove the violation; or
  - c. someone else has a legal right to, and does, refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it.The amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
17. You lose Your Title to any part of the Land because of the right to take the Land by condemning it, if:
  - a. there is a notice of the exercise of the right recorded in the Public Records and the notice describes any part of the Land; or
  - b. the taking happened before the Policy Date and is binding on You if You bought the Land without Knowing of the taking.
18. You are forced to remove or remedy Your existing structures, or any part of them - other than boundary walls or fences - because any portion was built without obtaining a building permit from the proper government office. The amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.

***Insurable Title***  
***What do Owner's Title Insurance Policies insure?***

**INSURING PROVISIONS UNDER ALTA OWNER'S POLICIES - Continued**

**ALTA HOMEOWNER'S POLICY 2013 – Covered Risks continued**

19. You are forced to remove or remedy Your existing structures, or any part of them, because they violate an existing zoning law or zoning regulation. If You are required to remedy any portion of Your existing structures, the amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
20. You cannot use the Land because use as a single-family residence violates an existing zoning law or zoning regulation.
21. You are forced to remove Your existing structures because they encroach onto Your neighbor's land. If the encroaching structures are boundary walls or fences, the amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
22. Someone else has a legal right to, and does, refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it because Your neighbor's existing structures encroach onto the Land.
23. You are forced to remove Your existing structures which encroach onto an Easement or over a building set-back line, even if the Easement or building set-back line is excepted in Schedule B.
24. Your existing structures are damaged because of the exercise of a right to maintain or use any Easement affecting the Land, even if the Easement is excepted in Schedule B.
25. Your existing improvements (or a replacement or modification made to them after the Policy Date), including lawns, shrubbery or trees, are damaged because of the future exercise of a right to use the surface of the Land for the extraction or development of minerals, water or any other substance, even if those rights are excepted or reserved from the description of the Land or excepted in Schedule B.



***Insurable Title***  
***What do Owner's Title Insurance Policies insure?***

**INSURING PROVISIONS UNDER ALTA OWNER'S POLICIES - Continued**

**ALTA HOMEOWNER'S POLICY 2013 – Covered Risks continued**

26. Someone else tries to enforce a discriminatory covenant, condition or restriction that they claim affects Your Title which is based upon race, color, religion, sex, handicap, familial status, or national origin.
27. A taxing authority assesses supplemental real estate taxes not previously assessed against the Land for any period before the Policy Date because of construction or a change of ownership or use that occurred before the Policy Date.
28. Your neighbor builds any structures after the Policy Date — other than boundary walls or fences — which encroach onto the Land.
29. Your Title is unmarketable, which allows someone else to refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it.
30. Someone else owns an interest in Your Title because a court order invalidates a prior transfer of the title under federal bankruptcy, state insolvency, or similar creditors' rights laws.
31. The residence with the address shown in Schedule A is not located on the Land at the Policy Date.
32. The map, if any, attached to this Policy does not show the correct location of the Land according to the Public Records.

## ***Insurable Title***

### ***What do Owner's Title Insurance Policies insure?***

**INSURING PROVISIONS UNDER ALTA OWNER'S POLICIES - Continued**

**ALTA HOMEOWNER'S POLICY 2013 – Covered Risks**

**INSURABLE TITLE ALSO CONSERVED WITH DUTY TO DEFEND**

## **OUR DUTY TO DEFEND AGAINST LEGAL ACTIONS**

We will defend Your Title in any legal action, only as to that portion of the legal action for a matter that is based on a Covered Risk and that is not excepted or excluded from coverage in this policy. We will pay the costs, attorneys' fees, and expenses We incur in that defense.

We will not pay for any portion of the legal action for a matter that is not based on a Covered Risk or that is excepted or excluded from coverage in this policy.

We can end Our duty to defend Your Title under Condition 4.



## *Insurable Title*

### *What do Owner's Title Insurance Policies insure?*

#### **INSURING PROVISIONS UNDER ALTA OWNER'S POLICIES - Continued**

#### **ALTA HOMEOWNER'S POLICY 2013 – Covered Risks**

#### **DUTY TO DEFEND - Continued**

#### **4. OUR CHOICES WHEN WE LEARN OF A CLAIM**

- a. After We receive Your notice or otherwise learn of a claim covered by this policy, and after subtracting Your Deductible Amount, if it applies, Our choices include one or more of the following:
  - i. pay the claim;
  - ii. negotiate a settlement;
  - iii. bring or defend a legal action related to the claim;
  - iv. pay You the amount required by this policy;
  - v. end the coverage of this policy for the claim by paying You Your loss determined in Condition 6.a., as applicable, resulting from the Covered Risk;
  - vi. end the coverage described in Covered Risk 16, 18, 19, or 21 by paying You Our Maximum Dollar Limit of Liability then in force for the particular Covered Risk;
  - vii. end all coverage of this policy by paying You the Amount of Insurance then in force; or
  - viii. take other appropriate action, including to cure or otherwise resolve the covered matter giving rise to the claim.

## ***Insurable Title***

### ***What do Owner's Title Insurance Policies insure?***

#### **INSURING PROVISIONS UNDER ALTA OWNER'S POLICIES - Continued**

##### **ALTA HOMEOWNER'S POLICY 2013 – Covered Risks**

##### **DUTY TO DEFEND - Continued**

- b. When We choose the options in Condition 4.a.v., 4.a.vi., or 4.a.vii., all Our liability and obligations to You under this policy terminate, including Our obligation to defend or continue any legal action. In addition, We will pay any costs, attorneys' fees, and expenses that were authorized by Us up to that time and that We are obligated to pay.
- c. Whether or not We agree there is coverage, We may choose one or more of the options above. By doing so, We do not give up any rights.

## *Overview of Marketable vs. Insurable Title*

### **Selected Topics**

#### **Mortgage payoff, private mortgages, equity or HELOC**

**Practice Standard 17, page 140 of Written Materials**

**Form 66, Par. 1.6, page 141**

**Practice Standard 29, page 141**

**Form 66, Par. 1.5, page 142**

**Practice Standard 19, page 142**

#### **Municipal Liens and Municipal Lien Certificates**

**Title Standard 19, page 142**

#### **Mortgages**

**Undischarged, improperly discharged**

**Obsolete Mortgage Statute – MGL c. 260, § 33**

## *Overview of Marketable vs. Insurable Title*

### **Selected Topics - continued**

#### **Probates**

**Obtaining copies of probate documents**

**Court Website - <https://www.masscourts.org/eservices/home>**

**Recording certain probate documents**

**Missing probate - Affidavits of Kinship - REBA Title Standard 14, page 144**

**Titles coming out of Government Entities, Banks, or other entities with hundreds or thousands of index entries**

**HOA's and other contractual associations**

**Practice Standard 20, page 143**

## *Overview of Marketable vs. Insurable Title*

### **Selected Topics - continued**

**When a title issue appearing of record may not be a matter of title and may not render a title unmarketable.**

**Former Railroad Property – Somerset Savings Bank v. Chicago Title Insurance Company – see page 143 of Written Materials**

**Orders of Conditions – Lyon v. Duffy – see page 143 as well.**



## *Overview of Marketable vs. Insurable Title*

### **Selected Topics - continued**

#### **Title issues for discussion**

**Gift Deed under POA conveying principal's (grandmother) the Attorney in Fact's son.**

**Deed for nominal consideration from Principal under POA to Attorney in Fact's Son recorded 4/19/2022.**

**Followed a week later by Deed for nominal consideration from Son to the Attorney in Fact as Trustee of the Son's "(d)(4)(A) Trust."**

**June, 2022, Attorney in Fact as Trustee of the Son's "(d)(4)(A) Trust" sold to Builder for \$110,000.**

**October, 2022, Builder preparing to sell to next buyer.**

## *Overview of Marketable vs. Insurable Title*

### **Selected Topics - continued**

#### **Title issues for discussion**

**Gift Deed under POA conveying principal's (grandmother) the Attorney in Fact's son.**

16. **Gift Making Powers.** To make gifts, grants, or other transfers (including the forgiveness of indebtedness and the completion of any charitable pledges I may have made) that my Attorney-in-Fact in his or her sole discretion believes is advisable as an estate, tax, or benefits, planning measure, without consideration, either outright or in trust, to such person(s) (including my Attorney-in-Fact hereunder) or organizations as my Attorney-in-Fact shall select, including without limitation, the following actions: (a) transfer by gift in advancement of a bequest or devise to beneficiaries under my will or in the absence of a will to my descendants in whatever degree; and (b) release of any life interest, or waiver, renunciations, disclaimer, or declination of any gift to me by will, deed, or trust. My ultimate objective to any gifts would be to preserve the largest amount of my property for my family as a whole, and as such, a gift to my Attorney-in-Fact hereunder shall not be

## *Overview of Marketable vs. Insurable Title*

### **Selected Topics - continued**

#### **Title issues for discussion**

**Gift Deed under POA conveying principal's (grandmother) the Attorney in Fact's son.**

deemed a breach of his or her fiduciary duty. Any gifts made should align as closely as possible with the terms of my Will or other Estate Planning documents (such as a Trust) in order to fulfill my wishes for the ultimate disposition of my property, however I recognize that an exact match may not be possible and allow my Attorney-in-Fact the necessary discretion to carry out my wishes as best as possible. By including this paragraph in this document, I expressly state that I want my Agent to engage in planning for government benefits, including Medicaid, and I expect my Agent to make whatever gifts are allowed under the rules of the various government benefit programs;

## *Overview of Marketable vs. Insurable Title*

### **Selected Topics - continued**

#### **Title issues for discussion**

**Gift Deed under POA conveying principal's (grandmother) the Attorney in Fact's son.**

17. **Authority to Engage in Self-Dealing.** Any and all of my Attorneys-in-Fact are expressly authorized to engage in self-dealing, without limitation, and nothing contained in this document shall be construed to the contrary. Self-dealing shall include any and all transactions entered into on behalf of the principal in which the Attorney(s)-in-Fact may derive a benefit, either directly or indirectly, tangible, or intangible. The Attorney-in-Fact may purchase any of the Principal's assets personally, without it being considered a breach of the duty. The Attorney-in-Fact may purchase assets of the Principal and may also sell assets to friends of the Principal or to members of the Principal's family, at reasonable prices determined in good faith, all without it being any breach of the fiduciary duty of the Attorney-in-Fact.

*Overview of Marketable vs. Insurable Title*

**Selected Topics - continued**

**OMITTED TENANCY – PURPORTED CONFIRMATORY DEED – DELAYED RECORDING**

**QUITCLAIM DEED**

WE, PETER M. C. [REDACTED] And JOYCE A. C. [REDACTED], a/k/a PETER C. [REDACTED] and JOYCE [REDACTED] both of Littleton, Massachusetts,

in consideration of LESS THAN ONE HUNDRED AND 00/100 DOLLARS (\$100.00)

grant to PETER C. [REDACTED] and JOYCE C. [REDACTED], TRUSTEES OF THE C. [REDACTED] I FAMILY TRUST, under a Declaration of Trust dated December 12, 2012, a certificate of which is recorded with the Registry of Deeds herewith, of 12 L. [REDACTED] Road, Littleton, Massachusetts.

**DATED DECEMBER 12, 2012, RECORDED DECEMBER 28, 2012**



*Overview of Marketable vs. Insurable Title*

**Selected Topics - continued**

**OMITTED TENANCY – PURPORTED CONFIRMATORY DEED – DELAYED RECORDING**

QUITCLAIM DEED

WE, PETER C. [REDACTED] and JOYCE C. [REDACTED], TRUSTEES OF THE C. [REDACTED] FAMILY TRUST, under Declaration of Trust dated December 12, 2012, a certificate of which is recorded with the Middlesex South District Registry of Deeds in Book 6 [REDACTED], Page 5 [REDACTED]

IN CONSIDERATION OF Less than \$100.00

GRANT TO PETER M. CASSINARI and JOYCE A. CASSINARI, of 12 [REDACTED] Road, Littleton, Ma. 01460

**DATED OCTOBER 2, 2014, RECORDED OCTOBER 3, 2014**

**NO TENANCY STATED**

## *Overview of Marketable vs. Insurable Title*

### **Selected Topics - continued**

#### **OMITTED TENANCY – PURPORTED CONFIRMATORY DEED – DELAYED RECORDING**

**THIS IS A CONFIRMATORY DEED TO CORRECT AND CONFIRM A DEED FROM PETER C [REDACTED] AND JOYCE C [REDACTED] TRUSTEES OF THE C [REDACTED] FAMILY TRUST TO PETER M. C [REDACTED] AND JOYCE A. C [REDACTED], DATED OCTOBER 2, 2014 AND RECORDED AT THE MIDDLESEX SOUTH DISTRICT REGISTRY OF DEEDS IN BOOK 6 [REDACTED], PAGE 5 [REDACTED], IN WHICH THE TENANCY WAS INADVERTENTLY OMITTED AND THE TITLE REFERENCE WAS INCORRECT.**

Property Address: 12 L [REDACTED] Littleton, Ma

#### CONFIRMATORY QUITCLAIM DEED

WE, PETER C [REDACTED] and JOYCE C [REDACTED], TRUSTEES OF THE C [REDACTED] FAMILY TRUST, under Declaration of Trust dated December 12, 2012, a certificate of which is recorded with the Middlesex South District Registry of Deeds in Book 6 [REDACTED], Page 5 [REDACTED]

IN CONSIDERATION OF Less than \$100.00

GRANT TO PETER M. C [REDACTED] and JOYCE A. C [REDACTED] Husband and Wife as Tenants by the Entirety, of 12 L [REDACTED], Littleton, Ma. 01460

**DATED OCTOBER 2, 2016, RECORDED AUGUST 9, 2017 (DELAYED RECORDING)**

## *Overview of Marketable vs. Insurable Title*

### **Selected Topics - continued**

#### **OMITTED TENANCY – PURPORTED CONFIRMATORY DEED – DELAYED RECORDING**

**PETER DIED ON FEBRUARY 8, 2017.**

**DEATH CERTIFICATE AND ESTATE TAX AFFIDAVIT RECORDED.**

**DEATH CERTIFICATE SHOWS HE DIED AT A “LIFE CARE CENTER”  
(MASSHEALTH CLAIM??)**

**THERE IS NO PROBATE FOR HIM.**

*Kaufman v. Federal National Bank of Boston*, 287 Mass. 97 (1934) (estoppel of fiduciary applied to mortgage assigned by trustee when she actually held title individually). See generally, Crocker’s Notes on Common Forms §151 (Estoppel of fiduciary) (MCLE, Inc. 11th ed. 2020) discussing estoppel of fiduciary as applied to executors, guardians and a donee of a power of appointment.)

**M.G.L. c. 184, s. 8 – Conveyance to grantor and another.** (“Real estate, including any interest therein, may be transferred by a person to himself jointly with another person in the same manner in which it might be transferred by him to another person, and **a conveyance of real estate by a person to himself and his spouse as tenants by the entirety shall create a tenancy by the entirety.**”)

*Overview of Marketable vs. Insurable Title*

**Selected Topics - continued**

**OMITTED TENANCY – PURPORTED CONFIRMATORY DEED – DELAYED RECORDING**

**QUITCLAIM DEED**

I, **JOYCE A. C [REDACTED]** surviving spouse, of Littleton, Middlesex County, Massachusetts,

for consideration paid and in full consideration of **LESS THAN ONE HUNDRED AND 00/100 (\$100.00) DOLLARS**

grant to **RICHARD P. C [REDACTED]** and **LYNNE A. C [REDACTED]** as Joint Tenants with Rights of Survivorship, of 12 **L [REDACTED]**, Littleton, Middlesex County, Massachusetts 01460

**DATED FEBRUARY 8, 2018, RECORDED JUNE 7, 2018**



## *Overview of Marketable vs. Insurable Title*

### **Selected Topics - continued**

#### **OMITTED TENANCY – PURPORTED CONFIRMATORY DEED – DELAYED RECORDING**

**ATTORNEY'S AFFIDAVIT OF LATE RECORDING  
(NOT STATED TO BE PURSUANT TO MGL C. 183, § 5B AND DOESN'T CONTAIN  
STATUTORY CERTIFICATION OF RELEVANCE)**

1. I am a Massachusetts conveyancer licensed to practice law in the Commonwealth of Massachusetts.
2. I am a member in good standing in the Massachusetts Bar Association, Board of Bar Overseers, Registration # [REDACTED].
3. This office discovered that the Deed from Peter C [REDACTED] and Joyce C [REDACTED] Trustees of the C [REDACTED] Family Trust, under Declaration of Trust dated December 12, 2012, conveying the property to Peter M. C [REDACTED] and Joyce A. C [REDACTED] prepared by this office and recorded in the Middlesex South District Registry of Deeds in Book 6 [REDACTED], Page 5 [REDACTED], inadvertently omitted the Husband and Wife tenancy as intended by the Grantors.
4. A Confirmatory Deed intending to correct and confirm the tenancy was prepared and presented to the Grantors for signing on October 2, 2016 and delivered to this office unconditionally for recording.
5. The Deed was inadvertently retained in my file and not recorded as instructed.
6. The surviving spouse and all of the heirs of the decedent instructed me to record it after the death of the Husband/Grantor.
7. The Confirmatory Deed was recorded on August 9, 2017 at said Deeds in Book 6 [REDACTED], Page 4 [REDACTED].

**DATED OCTOBER 29, 2018, RECORDED OCTOBER 29, 2018**

*Overview of Marketable vs. Insurable Title*

**Selected Topics - continued**

**OMITTED TENANCY – PURPORTED CONFIRMATORY DEED – DELAYED RECORDING**

**REBA Title Standard No. 46**

**Delayed Recording**

Title derived through an instrument recorded an appreciable period of time after the date of execution of the instrument, whether or not the grantor is alive and legally competent at the time of recording, is not on that account defective.

*Caveat*

*Prior to November 26, 1975, deeds between spouses had to be recorded while both spouses were alive to be valid (M.G.L. c. 209, § 3). With respect to the problem of delivery, see M.G.L. c. 183, § 5.*

Adopted November 12, 1980  
(9-1-82)