What Is Title Insurance on Its 150TH Anniversary?

Description

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Welcome to the first installment of the 3-part series exploring the 150th Anniversary of Title Insurance.

An essential characteristic of title insurance, and one that was critical to its growth, is strict liability.

The Insured is not required to establish that the title insurer was negligent in its own examination in order to prove there is coverage, unlike the attorneyâ??s examination, which will not result in a right to recover simply because erroneous and will require the substantiation of negligence. This characteristic of all title insurance policies is essential to their use and widespread acceptance.

The vulnerabilities facing any client who has secured search and examination services from an attorney or other title examiner were displayed by *Watson v. Muirhead*. Watson v. Muirhead, 57 Pa. 161 (1868). This seminal case concluded that the conveyancer was not liable in negligence for an incorrect conclusion that a judgment was not an encumbrance against the ground-rent lien:

The rule of liability for errors of judgment as applied to them conveyancers ought to be the same as in the case of gentlemen in the practice of law or medicine. It is not a mere art, but a science. â??That part of the profession,â?• said Lord Mansfield, â??which is carried on by attorneys is liberal and reputable, as well as useful to the public, when they conduct themselves with honor and integrity; and they ought to be protected when they act to the best of their skill and knowledge. But every man is liable to error; and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake. ** A counsel may mistake as well as an attorney. Yet no one will say that a counsel who has been mistaken shall be charged. *** Not only counsel, but judges, may differ, or doubt, or take time to consider. Therefore, an attorney ought not to be liable in case of a reasonable doubt.â?• â?¦ The rule declared by Lord Mansfield has been followed in all the subsequent cases. â??No attorney,â?• said C. J. Abbott, â??is bound to know all the law; God forbid that it should be imagined that an attorney or a counsel, or even a judge, is bound to know all the law; or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into.â?• â?¦**

If the defendant had undertaken to act upon his own opinion that the judgment, which appeared on the searches, was not a final one, and therefore not a lien upon the ground-rent, the title of which it was his duty to examine, could we say that, before the decision of this courtâ?¦, the mistake was one which could only result from the want of ordinary knowledge and skill or the failure to exercise due caution? But when in addition it appears that having been previously employed to investigate the same title, he had submitted it to eminent counsel, who had given a written opinion in its favor without even expressing a doubt as to the judgment in question, to hold him responsible would be to establish a rule, the direct effect of which would be to deter all prudent and responsible men from pursuing a vocation environed with such perils. We think the

court below was right in refusing to charge as requested in the plaintiffâ??s points; all of which assume as matter of law that to pass the title with such an encumbrance upon it was evidence of want of ordinary knowledge and skill and of due caution. We see therefore no error for which we ought to reverse. Watson v. Muirhead, 57 Pa. 161 (1868).

As this case concluded, an opinion will not result in liability if erroneous, absent proof of negligence. Perhaps it also reflected a culture less willing to attribute negligence to the mistaken decisions, as well as the distinction between the practice of a conveyancer and an attorney. While not novel in its conclusion, the *Watson* case was credited as the impetus for a different service to be provided to a purchaser of an interest in real property.

What are the Statutory Definitions of Title Insurance

The Pennsylvania Corporation Act of 1874 subsequently authorized title insurance companies to issue title insurance and conferred broad authority on such insurers to engage in multiple lines of insurance, an early trend of the law that resulted in harm to many insureds before the value of monoline restrictions was adequately appreciated:

37. TITLE INSURANCE AND TRUST COMPANIES.

Companies which may have been heretofore, or which may hereafter be, incorporated under the provisions of this act for the insurance of owners of real estate, mortgagees and others interested in real estate, from loss by reason of defective titles, liens and incumbrances, shall have the power and right:

***First.* TO INSURE TITLES. â?? To make insurances of every kind pertaining to or connected with titles to real estate, and to make, execute and perfect such and so many contracts, agreements, policies and other instruments as may be required therefor.**

***Second.* TO RECEIVE AND DISPOSE OF PROPERTYâ?¦**

***Third.* TO INSURE FIDELITY AND ACT AS DEPOSITORY. To make insurance for the fidelity of persons holding places of responsibility and of trustâ?¦**

***Fourth.* TO EXECUTE TRUSTSâ?¦**

***Fifth.* TO ACT AS AGENTS, ETCâ?¦.**

***Sixth.* TO BECOME SURETY. â?? To become sole surety in any case whereby law one or more sureties may be required for the faithful performance of any trust, office, duty, action, or engagement.**

***Seventh.* POWER TO RECEIVE AND CONVEY REAL ESTATEâ?¦**

***Eighth.* To purchase and sell real estate and take charge of the same.**

***Ninth.* TO ACT AS SECURITY. â?? To act as security for the faithful performance of any contract entered into with any person or municipal or other corporation, or with any state or government, by any person or persons, corporation or corporations.**

Tenth. **To become sole security for the faithful performance of the duties of any national, state, county or municipal officer, and to execute such bonds or recognizances as may be required by law in such cases.**

Eleventh. **To become security for the faithful performance of the duties of any clerk or employee of any corporation, company, firm or individual.**

Twelfth. **To become security for the payment of all damages that may be assessed or directed to be paid for lands taken in the building of any railway, or for the purposes of any railway, or for the opening of streets or roads, or for any purpose whatever where land or other property is authorized by law to be taken.**

Thirteenth. **To become security upon any writ of error or appeal, or in any proceeding instituted in any court of this commonwealth, in which security may be required:**

Provided, however, **That nothing in this act shall be construe as to dispense with the approval of such body, corporation, court or officer, as is by law now required to approve such security.**

Thereafter, the first title insurance company established was Real Estate Title Insurance Company of Philadelphia, which later became Commonwealth Land Title Insurance Company and is now part of the Fidelity family of title insurers.

Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co., 579 F.3d 304 (3d Cir. Pa. 2009), *amended by* 586 F.3d 1011 (3d Cir. Pa. 2009), *on remand at, motion granted by, in part, motion denied by, in part*, 2011 U.S. Dist. LEXIS 5933 (E.D. Pa. Jan. 20, 2011), *summary judgment granted, in part, summary judgment denied, in part by, summary judgment denied by, motion denied by, as moot,* 2011 U.S. Dist. LEXIS 16446 (E.D. Pa. Feb. 17, 2011), *reconsideration denied by, request granted*, 2011 U.S. Dist. LEXIS 29692 (E.D. Pa. Mar. 23, 2011), *affirmed by* 687 F.3d 620 (3d Cir. Pa. 2012).

Title insurance is an obscure line of insurance. Title insurance insures with respect to the title to real property. Title insurance may insure various rights in and uses of the land, such as fee simple, easement, profit a prendre, some licenses, surface rights, air rights, subsurface rights, mineral rights, covenants running with the land, and liens. Title insurers may operate within all jurisdictions of the United States except in Iowa (but title insurers may insure title to land in Iowa from other locations), Guam, Northern Mariana Islands, Puerto Rico, U.S. Virgin Islands, and numerous foreign countries (either by doing business in the foreign countries or insuring in the United States).

The standard title insurance policy insures against

- defects in the title;
- liens and encumbrances on the title;
- adverse ownership of or rights in the title;
- lack of legal right of access to the land;
- unmarketability of the title;
- validity of the lenderâ??s insured mortgage; and
- priority of the lenderâ??s insured mortgage.

Title insurance agrees to provide defense as to insured matters, which may constitute 30â??40 percent of the aggregate claims related expenses of the title insurer.

Title insurance also may insure with respect to the security interests and other rights in the personal property in approximately half of the states, including Alaska, Arkansas, California, Delaware, District of Columbia, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming as well as in Puerto Rico. Uniform Commercial Code (UCC) insurance as a casualty product may be available for issuance in some other jurisdictions.

Title insurance insures the title to the land and generally does not insure as to the physical condition of the land. There are widespread exceptions to this generalization; in some cases, title insurance does insure with respect to the physical condition of the land, such as the types of improvements located on the land through the ALTA 7.1 and ALTA 7.2 (Conversion), the ALTA 22 Series (Location) endorsements, the location of the improvements in the ALTA 9 Series (Covenants, Conditions, Restrictions; Encroachments; Minerals; and Private Rights) endorsements, the ALTA 28 Series (Encroachments and Easements) endorsements, and the physical access coverage by the ALTA 17 Series (Access) endorsements. Each of these coverages is facilitated by a survey or inspection of the land. Similarly, title insurance may insure as to the physical occupancy of the land by deleting any exception for the rights of the parties in possession or the rights that would be discovered by an inspection or survey of the land.

The following is an example of a definition of title insurance established by the Nebraska Revised Statutes and derived from the National Association of Insurance Commissioners (NAIC) Title Insurers Model Act:

Title insurance business or business of title insurance means:

(a) **Issuing as a title insurer or offering to issue as a title insurer a title insurance policy;**

(b) **Transacting or proposing to transact by a title insurer any of the following activities when conducted or performed in contemplation of or in conjunction with the issuance of a title insurance policy:**

1. **Soliciting or negotiating the issuance of a title insurance policy;**
2. **Guaranteeing, warranting, or otherwise insuring the correctness of title searches for all instruments affecting titles to real property, any interest in real property, cooperative units, and proprietary leases and for all liens or charges affecting the same;**
3. **Handling of escrows, settlements, or closings;**
4. **Executing title insurance policies;**
5. **Effecting contracts of reinsurance; or**
6. **Searching or examining titles;**

(c) Guaranteeing, warranting, or insuring searches or examinations of title to real property or any interest in real property;

(d) Guaranteeing or warranting the status of title as to ownership of or liens on real property by any person other than the principals to the transaction; or

(e) Transacting or proposing to transact any business substantially equivalent to any of the activities listed in this subdivision in a manner designed to evade the provisions of the Title

Insurers Act;â?¦. National Association of Insurance Commissioners (NAIC) Title Insurers Model Act.

The Nebraska definition is consistent with the prevailing understanding of title insurance, which includes a guarantee of a search, a warranty of a search, and the insurance of other rights in the title to the land, such as the rights arising out of the zoning or building permits.

(20) Title insurance policy means:

(a) A contract insuring or indemnifying owners of, or other persons lawfully interested in, real property or any interest in real property, against loss or damage arising from any or all of the following conditions existing on or before the policy date and not excepted or excluded:

1. **Defects in or liens or encumbrances on the insured title;**
2. **Unmarketability of the insured title;**
3. **Invalidity, lack of priority, or unenforceability of liens or encumbrances on the stated property;**
4. **Lack of legal right of access to the land; or**
5. **Unenforceability of rights in title to the land; or**

(b) A contract insuring or indemnifying owners of personal property or secured parties or others interested therein against loss or damage pertaining to adverse claims to title, liens, encumbrances upon, or security interests in personal property or fixtures, including the existence or nonexistence of the attachment, perfection, or priority of security interests in personal property or fixtures under the Uniform Commercial Code or other laws, rules, or regulations establishing procedures for the attachment, perfection, or priority of security interests in personal property or fixtures, or the accuracy or completeness of the search or filing results obtained from public registries established for determining liens or security interests in personal property or fixtures, and arising from any or all of the following conditions not excepted or excluded:

1. **Other liens or encumbrances on the stated personal property or fixtures;**
2. **Invalidity, lack of priority, or unenforceability of liens or other security interests in the stated personal property or fixtures; or**
3. **Any other matters relating directly or indirectly to the lien status of the stated personal property or fixtures;â?¦. Neb. Rev. Stat. Â§ 44-1981.**

Another example of a law authorizing the insurance of a broad set of rights relating to real property is Michigan law, which authorizes the insurance against matters â??adversely affecting the rights of use, enjoyment, or disposition of the real estateâ?•:

â??Title insuranceâ?• means the insuring, guaranteeing, or indemnifying of designated owners of real estate or any interest in real estate against loss or damage that may result because the title is vested in a manner otherwise than as stated in the title insurance policy, because the title is unmarketable, or because the title is subject to liens, encumbrances, or other matters adversely affecting the rights of use, enjoyment, or disposition of the real estate, and not excepted in the policy, all in accordance with the terms of a title insurance policy approved as to substance and form, or doing anything equivalent in substance to any of the foregoing in a manner designed to evade the provisions of this chapterâ?¦.

â??Title insurance policyâ?• means any policy or contract insuring, guaranteeing, or indemnifying against loss or damage suffered by owners of real estate or by other persons interested in the real estate by reason of liens, encumbrances upon, defects in, or the unmarketability of the title to the real estate, or other matters affecting the title to real estate or the right to the use and enjoyment of the real estate, and insuring, guaranteeing, or indemnifying the condition of the title to real estate or the status of any lien on the real estate. Mich. Comp. Laws Â§ 500.7301.

Virginia also has a representative definition:

***â??Title insuranceâ?•* means insurance against loss by reason of liens and encumbrances upon property, defects in the title to property, and other matters affecting the title to property or the right to the use and enjoyment of property. â??Title insuranceâ?• includes insurance of the condition of the title to property and the status of any lien on property. Va. Code Ann. Â§ 38.2-123.**

Does Title Insurance Now Give Post-Policy Coverage

Most states do not, by definition, address the effective date of coverage, so that the statute expressly authorizes insurance only as to the conditions existing on or before the Date of Policy. Consequently, most state laws[1] clearly allow â??post-policyâ?• Future advances and numerous other endorsements, post-policy forgery endorsement, and several Covered Risks in the ALTA Homeownerâ??s Policy, ALTA Expanded Coverage Residential Loan Policyâ??Assessments Priority, and ALTA Expanded Coverage Residential Loan Policyâ??Current Assessments. Even in those few states, such as Alabama, Connecticut, District of Columbia, Hawaii, Kansas, Nebraska, New Mexico, and Oklahoma, that state that the insurance policy may insure as to â??conditions existing on or before the date of the policyâ?• or similar language, the statutes do not appear to be exclusive in listing coverage available, so long as the insurance provided is substantially equivalent.*See* Cal. Ins. Code Â§ 12340.1; Fla. Stat. Â§ 624.608; Tex. Ins. Code Ann. Â§ 2501.003.

The insuring provision provides â??post-policyâ?• coverage as to mechanicâ??s liens, subject to the effect of Exclusions 3.a. of the 2021 ALTA Loan Policy (acts of the insured) and Exclusion 3.b. of the 2021 ALTA Loan Policy (knowledge of the insured).

The Covered Risks address and assume the argument that a creditorsâ?? rights matter is a post-policy matter, because the post-policy exclusion (Exclusion 3.d of the 2021 ALTA Ownerâ??s and Loan Policies provides that it does not apply to these Covered Risks. Absent such language it is a possibility that a post-policy defense applies is obvious. That defense has been successful:

The condition of preferred transfers arose only because the debtor chose to file bankruptcy and chose to file within the critical time period. Both of these events, which might give rise to an avoidance, transpired after the title policy issued, and, therefore, the loss of the secured position would be excluded from the coverage of the policy because it was occasioned by subsequent events.Chi. Title Ins. Co. v. Citizens & S. Natâ??l Bank, 821 F. Supp. 1492, 1495 (N.D. Ga. 1993), *affirmed by sub nom*. Chi. Title Ins. Co. v. Nationsbank, 20 F.3d 1175 (11th Cir. Ga. 1994).

Is Creditorsâ?? Rights Coverage Still Title Insurance

Title insurers experienced significant creditorsâ?? rights claims giving rise to doubt as to the wording and use of the Creditorsâ?? Rights Endorsement.

Covered Risk 9 of the 2021 ALTA Ownerâ??s Policy insures against loss because of:

9. The Title being vested other than as stated in Schedule A, the Title being defective, or the effect of a court order providing an alternative remedy:

a. **resulting from the avoidance, in whole or in part, of any transfer of all or any part of the Title to the Land or any interest in the Land occurring prior to the transaction vesting the Title because that prior transfer constituted a:**
    1. **fraudulent conveyance, fraudulent transfer, or preferential transfer under federal bankruptcy, state insolvency, or similar state or federal creditorsâ?? rights law; or**
    2. **voidable transfer under the Uniform Voidable Transactions Act; or**
b. **because the instrument vesting the Title constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar state or federal creditorsâ?? rights law by reason of the failure:**
    1. **to timely record the instrument vesting the Title in the Public Records after execution and delivery of the instrument to the Insured; or**
    2. **of the recording of the instrument vesting the Title in the Public Records to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.**

Covered Risk 13 of the 2021 ALTA Loan Policy insures against loss because of:

13. The invalidity, unenforceability, lack of priority, or avoidance of the lien of the Insured Mortgage upon the Title, or the effect of a court order providing an alternative remedy:

a. resulting from the avoidance, in whole or in part, of any transfer of all or any part of the Title to the Land or any interest in the Land occurring prior to the transaction creating the lien of the Insured Mortgage because that prior transfer constituted a:

i. **fraudulent conveyance, fraudulent transfer, or preferential transfer under federal bankruptcy, state insolvency, or similar state or federal creditorsâ?? rights law; or**
ii. **voidable transfer under the Uniform Voidable Transactions Act; or**

c. because the Insured Mortgage constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar state or federal creditorsâ?? rights law by reason of the failure:

i. **to timely record the Insured Mortgage in the Public Records after execution and delivery of the Insured Mortgage to the Insured; or**
ii. **of the recording of the Insured Mortgage in the Public Records to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.**

This creditorsâ?? rights coverage addresses and provides coverage relating to transactions occurring prior to the transaction creating the interest being insured. The 2021 ALTA Policy clarifies the coverage by insuring against loss or damage by a court order providing an alternative remedy. Section 550(a) of the Bankruptcy Code authorizes an alternative remedy in allowing the bankruptcy trustee to â??â?¦recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property.â?• The 2021 ALTA Policies do not provide coverage for a creditorsâ?? rights claim

arising out of the current transaction except to the extent limited voidable preference coverage is given for delayed or ineffective recording.

Creditorsâ?? rights coverage could have potentially resulted in catastrophic loss to title insurers when provided on a Loan Policy or an Ownerâ??s Policy. For example, in *Official Committee of Unsecured Creditors of Tousa, Inc. v. Citicorp North America, Inc. (In re Tousa, Inc.)*, the bankruptcy court invalidated mortgages securing $200 million and $300 million with Wells Fargo as Administrative Agent and awarded additional damages against the lenders. The court concluded that â??the Conveying Subsidiaries (a) did not receive reasonably equivalent value in exchange for the liens granted, (b) *were insolvent* both before and after the transaction, and (c) *were left with unreasonably small capital* with which to operate their businesses as a result of the transaction, the liens will be avoided and the value of the property conveyed will be recovered with interest for the benefit of the respective Debtorsâ?? estates.â?• Official Comm. of Unsecured Creditors of Tousa, Inc. v. Citicorp N. Am., Inc. (*In re* Tousa, Inc.), 422 B.R. 783 (Bankr. S.D. Fla. 2009), *quashed by, appeal dismissed by, in part, judgment entered by* 444 B.R. 613 (S.D. Fla. 2011), *reversed by, remanded by*, *and affirmed by* 680 F.3d 1298 (11th Cir. Fla. 2012), *affirmed by, on remand at, motion denied by and as moot, 3V Capital Master Fund Ltd. v. Official Comm. of Unsecured Creditors of TOUSA, Inc. (In re Tousa, Inc.),* 2017 U.S. Dist. LEXIS 230491 (S.D. Fla. Mar. 8, 2017). In addition to invalidating the mortgages, the court awarded all principal, interest, costs, expenses, and other fees associated with the loan transaction, the cost of pursuing the litigation, and the diminution in value of (title subject to) the liens since the date the mortgages were executed. Underscoring the argument that creditorsâ?? rights coverage cannot be safely evaluated, the court rejected two procedures that had been used to underwrite creditorsâ?? rights coverage: (1) a solvency opinion that was determined not to be credible and (2) â??savings clausesâ?• in Loan Documents (e.g., â??Such joint and several liability and each such Lien shall be valid and enforceable to the maximum extent that would not cause such joint and several liability or such Lien to be unenforceable under applicable law, and such joint and several liability and such Lien shall be deemed to have been automatically amended accordingly at all relevant timesâ?•). Official Comm. of Unsecured Creditors of Tousa, Inc. v. Citicorp N. Am., Inc. (*In re* Tousa, Inc.), 422 B.R. 783 (Bankr. S.D. Fla. 2009), *quashed by, appeal dismissed by, in part, judgment entered by* 444 B.R. 613 (S.D. Fla. 2011), *reversed by, remanded by*, *and affirmed by* 680 F.3d 1298 (11th Cir. Fla. 2012), *affirmed by, on remand at, motion denied by and as moot, 3V Capital Master Fund Ltd. v. Official Comm. of Unsecured Creditors of TOUSA, Inc. (In re Tousa, Inc.),* 2017 U.S. Dist. LEXIS 230491 (S.D. Fla. Mar. 8, 2017).

The Covered Risk for creditorsâ?? rights in the 2021 ALTA Policies applies to these laws. In 2014, the National Conference of Commissioners changed the Uniform Fraudulent Transfer Act to the Uniform Voidable Transactions Act and substituted â??voidable transactionâ?• for â??fraudulent transfer.â?• The 2021 ALTA Policies provide this additional coverage in Covered Risk 9 of the Ownerâ?•s Policy and Covered Risk Covered Risk 13 of the Loan Policy.

As finalized in the 2021 ALTA Policy creditorsâ?? rights covered risk refers to â??state insolvencyâ?• and â??similar state or federal creditorsâ?? rights lawâ?• so that the Covered Risk could apply to any stateâ??s insolvency law that may be asserted for a transaction in the chain of title and similar state or federal creditorsâ?? rights law. The creditorsâ?? rights exclusion in the 2021 ALTA Policy applies to â??state insolvency, or similar creditorsâ?? rights lawâ?• and seemingly applies to any relevant state insolvency or creditorsâ?? rights law, even if that law was the law of state other than the state of the Land but does not clearly apply to a federal creditorsâ?? rights law. The difficulty with the inconsistent use of â??stateâ?• and â??Stateâ?• in the policy is the possible application of the defined term

â??Stateâ?• to use of â??state.â?• There could have been a separate definition of â??stateâ?• or the defined term â??Stateâ?• could have been removed, but there is no such definition so that one can easily discern a distinction in meaning.

The term â??stateâ?• in the creditorsâ?? rights exclusion with respect to â??state insolvency, or similar creditorsâ?? rights lawâ?• in each 2021 ALTA Policy, and in each endorsement containing a creditorâ??s rights exclusion, in the final form version used â??stateâ?• and not â??Stateâ?• to â??stateâ?•, in order to be consistent and to affirm that the Exclusion applies broadly to the laws of any state that are asserted in the creditorsâ?? rights claim. Presumably, it would be argued that the Exclusion would apply to tribal laws. The key to understanding these provisions is recognition of the definition of â??State,â?• which is â??The state or commonwealth of the United States within whose boundaries the Land is located.â?• Contrast this definition with defined term â??Stateâ?• in the ALTA 47 Series (Operative Law) endorsements: â??â??Stateâ?? and â??stateâ??: The state or commonwealth of the United States within whose exterior boundaries the Land is located. The terms â??Stateâ?• and â??stateâ?• also include the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, and Guam.â?•

The issue relating to the applicable state insolvency law in the chain would possibly arise from the law of the state where the debtor is located or resides, and not necessarily the state where the Land is located.

The 2021 ALTA Ownerâ??s and Loan Policies insure against loss because of â??the effect of court order providing an alternative remedy.â?• Section 550(a) of the Bankruptcy Code states that â??Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such propertyâ?¦.â?•

In contrast the 2006 ALTA Ownerâ??s Policy only insured against â??Title being vested other than as stated in Schedule A or being defective (a) (a) as a result of â?¦ a court order providing an alternative remedyâ?¦.â?• Similarly, the 2006 ALTA Loan Policy only insured against â??The invalidity, unenforceability, lack of priority, or avoidance of the lien of the Insured Mortgage upon the Title (a) resulting fromâ?¦ a court order providing an alternative remedyâ?¦â?• Consequently the 2006 ALTA Policies did not expressly insure against a court order, which did not avoid a transfer of Title prior to the transaction vesting Title or creating the lien of the to the Insured, but which did award damages to the bankruptcy estate trustee or debtor.

The 2021 ALTA Policies also insure against a transfer of Title prior to the transaction vesting Title or creating the lien of the Insured Mortgage as â??a voidable transfer under the Uniform Voidable Transactions Act,â?• whereas the 2006 ALTA Policies insure only against a fraudulent conveyance or fraudulent transfer or a preferential transfer prior to the transaction vesting Title or creating the lien of the Insured Mortgage. While other Covered Risks may also be applicable, none explicitly refers to the Uniform Voidable Transactions Act.

The Uniform Voidable Transactions Act (UVTA), which was formerly named the Uniform Fraudulent Transfer Act (UFTA), has been adopted in numerous states. The 2014 amendments to the UFTA changed the name of the Act to the Uniform Voidable Transactions Act and substitutes â??voidableâ?• for â??fraudulent.â?•

Section 3(b) of UVTA provides that person gives reasonably equivalent value if that person acquires an interest of the debtor in an asset pursuant to a regularly conducted, non-collusive foreclosure sale or execution of a power of sale upon default under a mortgage, deed of trust, or security agreement.

Section 4 of UVTA provides that â??A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditorâ??s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtorâ??s ability to pay as they became due.â• Defenses available under Section 8 of UVTA include a transfer against a person who took in good faith and for reasonably equivalent value given the debtor or against a subsequent transferee or obligee.

Section 8 of UVTA provides that, to the extent a transfer is voidable, the creditor may recover judgment for the value of the asset transferred or the amount necessary to satisfy the creditorâ??s claim. This act is separate from the fraudulent transfer and fraudulent transactions acts, necessitating a change to the covered risks and exclusions.

Section 10 of UVTA, relating to Governing Law, states that a claim for relief under this Act is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred and explicitly applies extraterritorially: â??10(b) â??A claim for relief in the nature of a claim for relief under this Act is governed by the local law of the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred.â• Consequently, a court may be required to apply the UVTA laws of another state if the property transferred is located in the state of forum but the debtor is located in the other state. A debtorâ??s location (evaluated on the basis of authentic and sustained activity, not on the basis of manipulations employed to establish a location sustained artificially, according to the Comments) is the individualâ??s principal residence, the one place of business of an organization with only one place of residence, and the chief executive office of an organization with more than one place of residence.

The 2021 ALTA Ownerâ??s Policy excludes a claim that the current transaction is a voidable transfer under the Uniform Voidable Transactions Act:

Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditorsâ?? rights law, that the transaction vesting the Title as shown in Schedule A is aâ?¦

â?¦

b. voidable transfer under the Uniform Voidable Transactions Actâ?¦.

The 2021 ALTA Loan Policy excludes a claim that the current transaction is a voidable transfer under the Uniform Voidable Transactions Act:

Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditorsâ?? rights law, that the transaction creating the lien of the Insured Mortgage is aâ?¦

â?¦

b. voidable transfer under the Uniform Voidable Transactions Actâ?¦.

Noticeably the word â??Stateâ?•, which is a defined term, is not used in this Covered Risk or in the Exclusion in the 2021 ALTA Policies. The term State means: â?•The state or commonwealth of the United States within whose exterior boundaries the Land is located. The term â??Stateâ?• also includes the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, and Guam.â?• The Covered Risk provides insurance as to state insolvency and similar state and federal creditorsâ?? rights laws. Because the term State is not used, that coverage does extend to similar Tribal law. Tribal law has become more of a concern as the fallout from title industry concern about the *McGirt* case has been reflected in numerous ways, including the creditorsâ?? rights covered risk and exclusion.

Neither the Covered Risks, the 2006 ALTA Ownerâ??s and Loan Policies creditorsâ?? rights exclusions (Exclusion 6 of the 2006 ALTA Loan Policy and Exclusion 4 of the 2006 ALTA Ownerâ??s Policy), the 2021 ALTA Ownerâ??s and Loan Policies creditorsâ?? rights exclusions (Exclusion 6 of the 2021 ALTA Loan Policy and Exclusion 4 of the 2021 ALTA Ownerâ??s Policy), nor the former ALTA 21-06 (Creditorsâ?? Rights) refer to equitable subordination, unlike the creditorsâ?? rights exclusion in the 1992 ALTA Loan Policy that made such reference. The reference to equitable subordination in the 1992 ALTA Loan Policy was unnecessary because equitable subordination, generally, is an â??act of the insuredâ?• and a â??post-policyâ?• matter, both of which were otherwise excluded in the 1970 and 1992 ALTA Ownerâ??s and Loan Policies and would be excluded in the 2006 ALTA Ownerâ??s and Loan Policies and the 2021 ALTA Ownerâ??s and Loan Policies, except to the extent the creditorsâ?? rights covered risk applies. The 1992 ALTA Loan Policy excluded equitable subordination in Exclusion 7(b):

The exclusion was an issue of magnitude relating to the current insured transaction only, because additional protection is provided to a party as to prior transfers in the title, 11 U.S.C. Â§ 550 (Bankruptcy Code). and because the coverage given with respect to a claim that the current transaction is a voidable preference because of delayed or ineffective recording can be addressed by standard underwriting.

Creditorsâ?? rights coverage insured against stated loss because of

(1) insolvency of the seller or mortgagor,
(2) unreasonably small capital of the seller or mortgagor, and
(3) belief or intent of the seller or mortgagor to incur debts beyond its ability to pay.

All of these matters can trigger an avoidance of the transfer or a judgment for money, for example, if the consideration for the loan is given to an affiliate or corporate parent of the mortgagor or seller, and not to the mortgagor or seller. Such creditorsâ?? rights coverage had frequently been provided in many states by all of the major title insurers, principally to lenders. However, these are all matters within the control of the lender, and that can be evaluated by the lender.

Creditorsâ?? rights coverage could have potentially resulted in catastrophic loss to title insurers when provided on a Loan Policy or an Ownerâ??s Policy. For example, in *Official Committee of Unsecured Creditors of Tousa, Inc. v. Citicorp North America, Inc. (In re Tousa, Inc.)*, the bankruptcy court invalidated mortgages securing $200 million and $300 million with Wells Fargo as Administrative Agent and awarded additional damages against the lenders. The court concluded that â??the Conveying

Subsidiaries (a) did not receive reasonably equivalent value in exchange for the liens granted, (b) *were insolvent* both before and after the transaction, and (c) *were left with unreasonably small capital* with which to operate their businesses as a result of the transaction, the liens will be avoided and the value of the property conveyed will be recovered with interest for the benefit of the respective Debtorsâ?? estates.â?• Official Comm. of Unsecured Creditors of Tousa, Inc. v. Citicorp N. Am., Inc. (*In re* Tousa, Inc.), 422 B.R. 783, 863â??865 (Bankr. S.D. Fla. 2009), *quashed by, appeal dismissed by, in part, judgment entered by* 444 B.R. 613 (S.D. Fla. 2011), *reversed by, remanded by, and affirmed by* 680 F.3d 1298 (11th Cir. Fla. 2012); *affirmed by, on remand at, motion denied by and as moot,* 3V Capital Master Fund Ltd. v. Official Comm. of Unsecured Creditors of TOUSA, Inc. (In re TOUSA, Inc.), No. 10-cv-62035-KMM, 2017 U.S. Dist. LEXIS 230491 (S.D. Fla. Mar. 8, 2017).

In addition to invalidating the mortgages, the court awarded all principal, interest, costs, expenses, and other fees associated with the loan transaction, the cost of pursuing the litigation, and the diminution in value of (title subject to) the liens since the date the mortgages were executed. Underscoring the argument that creditorsâ?? rights coverage cannot be safely evaluated, the court rejected two procedures that had been used to underwrite creditorsâ?? rights coverage: (1) a solvency opinion that was determined not to be credible and (2) â??savings clausesâ?• in Loan Documents (e.g., â??Such joint and several liability and each such Lien shall be valid and enforceable to the maximum extent that would not cause such joint and several liability or such Lien to be unenforceable under applicable law, and such joint and several liability and such Lien shall be deemed to have been automatically amended accordingly at all relevant timesâ?•). Official Comm. of Unsecured Creditors of Tousa, Inc. v. Citicorp N. Am., Inc. (*In re* Tousa, Inc.), 422 B.R. 783, 863â??865 (Bankr. S.D. Fla. 2009), *quashed by, appeal dismissed by, in part, judgment entered by* 444 B.R. 613 (S.D. Fla. 2011), *reversed by, remanded by, and affirmed by* 680 F.3d 1298 (11th Cir. Fla. 2012); *affirmed by, on remand at, motion denied by and as moot,* 3V Capital Master Fund Ltd. v. Official Comm. of Unsecured Creditors of TOUSA, Inc. (In re TOUSA, Inc.), No. 10-cv-62035-KMM, 2017 U.S. Dist. LEXIS 230491 (S.D. Fla. Mar. 8, 2017**).** In *Tousa,* the court rejected the attempt to contract around the provisions of the Bankruptcy Code: â?? **The savings clauses are unenforceable for the additional reason that efforts to contract around the core provisions of the Bankruptcy Code are invalid.â?•** Official Comm. of Unsecured Creditors of Tousa, Inc. v. Citicorp N. Am., Inc. (*In re* Tousa, Inc.), 422 B.R. 783, 863â??865 (Bankr. S.D. Fla. 2009), *quashed by, appeal dismissed by, in part, judgment entered by* 444 B.R. 613 (S.D. Fla. 2011), *reversed by, remanded by, and affirmed by* 680 F.3d 1298 (11th Cir. Fla. 2012); *affirmed by, on remand at, motion denied by and as moot,* 3V Capital Master Fund Ltd. v. Official Comm. of Unsecured Creditors of TOUSA, Inc. (In re TOUSA, Inc.), No. 10-cv-62035-KMM, 2017 U.S. Dist. LEXIS 230491 (S.D. Fla. Mar. 8, 2017).

The ALTA 21-06 (Creditorsâ?? Rights) was designed for issuance with a 2006 ALTA Ownerâ??s Policy or 2006 ALTA Loan Policy when insuring with respect to the voidability of an estate or interest or the lien of the Insured Mortgage because of the occurrence on or before the Date of Policy of a fraudulent transfer or a preference under federal bankruptcy, state insolvency, or similar creditorsâ?? rights laws, subject to the terms and provisions of the endorsement, the Exclusions from Coverage, and other terms of the policy. The revision or the decertification and withdrawal of the ALTA 21-06 (Creditorsâ?? Rights) were discussed with the benefit of outside antitrust counsel. The ALTA Forms Committee was unable to arrive at an agreement on the applicable terms for the ALTA 21-06 (Creditorsâ?? Rights) and concluded that developing a new or revised standard ALTA endorsement was not achievable or in the industryâ??s best interest, nor in the best interest of the customer groups. Because there was no agreement on the revision of the existing ALTA 21-06 (Creditorsâ?? Rights) and because many customers and other parties perceived that title insurers were not well positioned to evaluate the

matters addressed by this endorsement, the Committee concluded that the most appropriate resolution was to recommend that the ALTA 21-06 (Creditorsâ?? Rights) be decertified and withdrawn as an ALTA endorsement. This action did not affect the ability of each title insurer to separately decide what coverage or endorsement, if any, it will be willing to provide. Each title insurer is free in each transaction to agree to issue any creditorsâ?? rights endorsement or other coverage or not to issue such endorsement or other coverage at all, as it shall separately and individually decide. The ALTA Board of Governors voted to decertify the ALTA 21-06 (Creditorsâ?? Rights) on February 3, 2010.

After the ALTA decertified (withdrew) the ALTA 21-06 (Creditorsâ?? Rights) as an ALTA endorsement, the California Land Title Association (CLTA) withdrew its prior filing of the Creditorsâ?? Rights Endorsement. Rating Bureaus later withdrew previously filed Creditorsâ?? Rights Endorsements in states such as Delaware, Louisiana, New Jersey, North Carolina, Ohio, Oregon, and Pennsylvania.

The New York State Insurance Department previously determined that title insurance is not designed to provide creditorsâ?? rights coverage. The New York State Insurance Department in reviewing title insurance policies filed with the Department stated that â??in view of testimony received and contemporary complexity of corporate deals such as leveraged buyouts, mergers and acquisitions, and tender offersâ??often involving and impacting real estate transactionsâ??the Insurance Department has determined that â??*a creditorsâ?? rights exclusion is appropriate and should be included in title insurance policies. Title Insurance was never intended to cover these phenomena. Unrequited creditors of a real estate seller or buyer should not be able to claim against title insurance*.â?• N.Y. State Ins. Depâ??t, Title Ins. Memorandum Decision & Opinion (Nov. 19, 1991) (emphasis added).

The Florida Office of Insurance Regulation concluded by letter dated July 17, 2009 that a Creditorsâ?? Rights Endorsement did not provide title insurance coverage: â??*This endorsement is not title insurance* because, in insuring loss or damage sustained by the insured by reason of the avoidance, in whole or in part, or a court order providing some other remedy, based on the voidability of any estate, interest, or insured mortgage because of an occurrence on the date of policy of a fraudulent transfer or a preference under federal bankruptcy, state insolvency, or similar creditorsâ?? rights laws, the coverage is prospective. The determination of insurability cannot be based on the evaluation of a reasonable title search as is required byâ?¦applicable law.â?• Similarly, the New Mexico Office of Superintendent of Insurance and the Texas Department of Insurance never adopted any creditorsâ?? rights coverage.

Subsequently, several additional states considered whether a Creditorsâ?? Rights Endorsement (or similar coverage relating to the current transaction) constitutes the business of title insurance and could be filed for use by a title insurer or whether it constitutes another line of insurance, such as casualty insurance, mortgage insurance, or mortgage guaranty insurance, so that it may not be offered in the future. If it did not constitute the business of title insurance, any future offer of such coverage might violate the monoline statute of many states that prohibit title insurers from providing other forms of insurance that are not title insurance. States, such as Hawaii and Wisconsin, concluded that a Creditorsâ?? Rights Endorsement is not title insurance.

California did not allow the filing of any Creditorsâ?? Rights Endorsements after this time. An example of a state with various statutes that may be construed as prohibiting creditorsâ?? rights coverage arising out of the current transaction is California.

Subsequently, Texas adopted Texas Insurance Code Section 2502.006:

Certain Extra Hazardous Coverages Prohibited

(a) A title insurance company may not insure against loss or damage sustained by reason of any claim that under federal bankruptcy, state insolvency, or similar creditorâ??s rights laws the transaction vesting title in the insured as shown in the policy or creating the lien of the insured mortgage is:

1. **a preference or preferential transfer under 11 U.S.C. Section 547;**
2. **a fraudulent transfer under 11 U.S.C. Section 548;**
3. **a transfer that is fraudulent as to present and future creditors under Section 24.005, Business & Commerce Code, or a similar law of another state; or**
4. **a transfer that is fraudulent as to present creditors under Section 24.006, Business & Commerce Code, or a similar law of another state.**

(b) The commissioner may by rule designate coverages that violate this section. It is not a defense against a claim that a title insurance company has violated this section that the commissioner has not adopted a rule under this subsection.

(c) Title insurance issued in or on a form prescribed by the commissioner shall be considered to comply with this section.

(d) Nothing in this section prohibits title insurance with respect to liens, encumbrances, or other defects to title to land that:

1. **appear in the public records before the date on which the contract of title insurance is made;**
2. **occur or result from transactions before the transaction vesting title in the insured or creating the lien of the insured mortgage; or**
3. **result from failure to timely perfect or record any instrument before the date on which the contract of title insurance is made.**

(e) A title insurance company may not engage in the business of title insurance in this state if the title insurance company provides insurance of the type prohibited by Subsection (a) anywhere in the United States, except to the extent that the laws of another state require the title insurance company to provide that type of insurance.

This law prohibits a title insurer from doing business in Texas if it provides creditorsâ?? rights coverage arising out of the current transaction in any other state, absent a requirement by that state for such coverage. This law applies to any title insurance policy delivered, issued for delivery, or renewed (by issuance of a new policy) on or after January 1, 2012.

This creditorsâ?? rights exclusion excludes liability for specified creditorsâ?? rights claims arising out of the transaction creating the lien of the Insured Mortgage while Covered Risk 13 of the 2021 ALTA Loan Policy covers specified creditorsâ?? rights claims by reason of previous transactions in the chain of title. The Exclusion in the 2021 ALTA Policies includes two new significant matters: (1) a clarification that the voidable preference is excluded if not given as a contemporaneous exchange for new value and (2) additional reference to a voidable transaction under the Uniform Voidable Transactions Act.

The 2021 ALTA Policy creditorsâ?? rights Covered Risk refers to â??state insolvencyâ?• and â??similar state or federal creditorsâ?? rights lawâ?• so that the Covered Risk could apply to any stateâ??s insolvency law that may be asserted for a transaction in the chain of title and similar state or federal creditorsâ?? rights law. The creditorsâ?? rights Exclusion in the 2021 ALTA Policy applies to â??state insolvency, or similar creditorsâ?? rights lawâ?• and seemingly applies to any relevant state insolvency or state creditorsâ?? rights law, even if that law was the law of a state other than the state of the Land or similar creditorsâ?? rights laws that should include a federal creditorsâ?? rights law or Tribal laws. The argument will be that both federal creditorsâ?? rights laws and tribal laws are â??similarâ?• laws, although the question remains whether the construction should mean similar state creditorsâ?? rights laws only. The difficulty with the inconsistent use of â??stateâ?• and â??Stateâ?• in the policy is the possible application of the defined term â??Stateâ?• to use of â??state,â?• which may not occur since these words are used separately and intentionally There could have been a separate definition of â??stateâ?• or the defined term â??Stateâ?• could have been removed or the word â??stateâ?• could have been distinguished in the definition of State, but there is no such definition of state or clarification of State, or the word â??stateâ?• could have been entirely removed from this Exclusion (so that it said insolvency or similar creditorsâ?? rights laws).

The term â??stateâ?• appears in the creditorsâ?? rights exclusion as â??state insolvency, or similar creditorsâ?? rights lawâ?• in each 2021 ALTA Policy, and in each endorsement containing a creditorâ??s rights exclusion. In these forms the final form version used â??stateâ?• and not â??Stateâ?• in order to be consistent and to affirm that the Exclusion applies broadly to the laws of any state that are asserted in the creditorsâ?? rights claim. It should be argued that the Exclusion would apply to tribal laws, although that is not stated. The key to understanding these provisions is recognition of the definition of â??State,â?• which is â??The state or commonwealth of the United States within whose boundaries the Land is located.â?•

This creditorsâ?? rights exclusion in the 2021 ALTA Policies excludes liability for specified creditorsâ?? rights claims arising out of the transaction vesting the Title while Covered Risk 9 of the 2021 ALTA Ownerâ??s Policy covers creditorsâ?? rights claims by reason of previous transactions in the chain of title. The Exclusion in the 2021 ALTA Policies includes two new matters: (1) a clarification that the voidable preference is excluded if not given as a contemporaneous exchange for new value, and (2) additional reference to a voidable transaction under the Uniform Voidable Transactions Act.

The exclusion in the 2006 ALTA Policies and the 2021 ALTA Policies does not address other creditorsâ?? rights laws that are not predicated on assertion of a fraudulent transfer, fraudulent conveyance, or preferential transfer, such as a separate entity law providing parity of debts to a member or entity owner and debts to unsecured creditors of the entity.

This addition referring to the Uniform Voidable Transactions Act is intended to modernize the ALTA 2021 Policies by referring to the Uniform Voidable Transactions Act, which has been adopted in at least 20 states and is an amended version of the Uniform Fraudulent Transfer Act.

The 2006 and 2021 ALTA Loan Policies exclude liability for a voidable preference claim arising out of the transaction creating the lien of the Insured Mortgage because the transfer was not a contemporaneous exchange for new value given to the debtor (regardless of the subsequent timing of recording). The 2006 and 2021 ALTA Ownerâ??s Policies also exclude liability for a voidable preference claim arising out of the transaction vesting the Title because the transfer was not a contemporaneous exchange for new value given to the debtor (regardless of the subsequent timing of

recording). Under 11 U.S.C. Â§ 547(c) the â??trustee may not avoid under this section a transfer as a voidable preference to the extent that such transfer was intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and in fact, a substantially contemporaneous exchange.â?•

Exclusion 6.c.ii. of the 2021 ALTA Loan Policy is the same as Exclusion 6(b) of the 2006 ALTA Loan Policy. Exclusion 4.c.ii. of the 2021 ALTA Ownerâ??s Policy is the same as Exclusion 4(b) of the 2006 ALTA Ownerâ??s Policy.

The creditorsâ?? rights exclusion has been added primarily because of the inability of the title insurer to determine the solvency of the grantor or mortgagor and to clarify that title insurers do not ordinarily insure against insolvency of a party to the insured transaction. Insolvency frequently triggers a creditorsâ?? rights issue under 11 U.S.C. Â§Â§ 548, 547, and 510 of the Bankruptcy Code, state fraudulent transfer laws, state Corporation Acts, and similar laws. The exclusion, in broader form, was added to the 1990 ALTA Ownerâ??s and Loan Policies and was limited and modified in 1992 (Exclusion 7 of the 1992 ALTA Loan Policy and Exclusion 4 of the 1992 ALTA Ownerâ??s Policy). The 1990 ALTA Loan Policy provided a very broad creditorsâ?? rights exclusion that was amended in 1992**: â??Any claim, which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditorsâ?? rights laws.â?•**

The creditorsâ?? rights exclusion would apply, for instance, if the current transaction was attacked as a voidable preference or fraudulent transfer. Title insurance companies have experienced substantial losses because of the attacks on leveraged buyout transactions as fraudulent transfers and have become acutely aware of the difficulty of analyzing the economics of transactions that are not primarily real estate transactions and assets**.***See* United States v. Tabor Court Realty Corp., 803 F.2d 1288 (3d Cir. Pa. 1986), *writ of certiorari denied sub nom.* McClellan Realty Co. v. United States, 483 U.S. 1005, 107 S. Ct. 3229 (1987) (for discussion of leveraged buyout). Transactions would also be designed to incorporate multiple steps to avoid the assertion of a direct, fraudulent transfer. Nevertheless, it has been recognized that the court may collapse various LBO transactions and treat them as one transaction.United States v. Tabor Court Realty Corp., 803 F.2d 1288 (3d Cir. Pa. 1986), *writ of certiorari denied sub nom.* McClellan Realty Co. v. United States, 483 U.S. 1005, 107 S. Ct. 3229 (1987) (the loan to the target corporation which, in turn, made the unsecured loan to the acquisition company); Wieboldt Stores, Inc. v. Schottenstein, 94 B.R. 488 (N.D. Ill. 1988), *reconsideration denied by, summary judgment denied by* 131 B.R. 655 (Bankr. N.D. Ill. 1991); Crowthers McCall Pattern, Inc. v. Lewis, 129 B.R. 992 (Bankr. S.D.N.Y. 1991) (the target and acquisition companies merged); Moody v. Sec. Pac. Bus. Credit, Inc., 127 B.R. 958 (Bankr. W.D. Pa. 1991), *affirmed by* 971 F.2d 1056 (3d Cir. Pa. 1992); SPC Plastics Corp. v. Griffith (*In re* Structurlite Plastics Corp.), 1998 FED App. 0015P (6th Cir.), 224 B.R. 27 (B.A.P. 6th Cir. Ohio 1998) (the lender made the loan to the target corporation, which then made the unsecured loan to the acquisition company); Liquidation Trust of Hechinger Inv. Co. of Del., Inc. v. Fleet Retail Fin. Grp. (*In re* Hechinger Inv. Co. of Del., Inc.), 327 B.R. 537 (Bankr. D. Del. 2005), *affirmed by* 278 F. Appâ??x 125 (3d Cir. Del. 2008); Kipperman v. Onex Corp., 411 B.R. 805, 837 (Bankr. N.D. Ga. 2009) (â??A court determines reasonably equivalent value in an LBO case by â??collapsingâ?? the transaction and ascertaining what the target, rather than any third party, ultimately received in terms of debt retirement, working capital, etc., in exchange for taking on additional debt.â?•), *reconsideration denied by, in part*, 2010 U.S. Dist. LEXIS 18669 (N.D. Ga. Mar. 2, 2010).

The National Conference of Commissioners on Uniform State Laws also called the Uniform Law Commission (ULC) site explains that â??the Uniform Law Commission promulgated the Uniform Fraudulent Transfer Act in 1984. Forty-five states, the District of Columbia, and the U.S. Virgin Islands have enacted the Act as of 2015. The Act replaced a very similar uniform act created in 1918, which remains in force in two states as of 2015.

In 2014, the Uniform Law Commission amended the Uniform Fraudulent Transfer Act for the first time since its creation in 1984. These changes address a few narrowly defined issues and are not a comprehensive revision. First, the title of the Act is now the â??Uniform Voidable Transactions Actâ?? (UVTA). The original title was a misleading description because fraud has never been a necessary element of a claim under the Act and the Act has always applied to the incurrence of obligations as well as to transfers of property. Thus, the name change aims to clarify the purpose and application of the Act.â?• For example, Section 4 of the UVLTA states that a transfer made by the debtor is voidable as to a creditor of the transfer was made with actual intent to hinder, delay, or defraud a creditor of the debtor, or without receiving reasonably equivalent value for the transfer if the debtor (1) was engaged or about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction, or (2) intended to incur, or believed or reasonably should have believed that the debtor would incur debts beyond the debtorâ??s ability to pay as they became due.

The creditorsâ?? rights exclusion will apply only if the issue arises out of the current transaction. It will not apply if the issue arises out of a prior transaction (such as refinance of prior mortgaged leveraged buyout financing or a prior foreclosure or prior deed in lieu of foreclosure). The creditorsâ?? rights exclusion would not apply if the transaction were avoidable because of the delay or the failure to timely record the documents or the failure of recordation to constitute constructive notice.

The creditorsâ?? rights exclusion will apply if a trusteeâ??s action seeks to avoid several prior transactions in the chain of title and to avoid the insured mortgage based on the allegation that the insured failed to pay value and acquired the interest in the property with the intent to hinder, delay, and defraud creditors. Such allegations are not asserting that the insured mortgage is invalid because prior transfers are invalid but because the insured mortgage is a fraudulent transfer for which value was not given. Concept Dorssers v. Pac. Nw. Title Ins. Co., No. C09-1692RSL, 2010 U.S. Dist. LEXIS 26584 (W.D. Wash. Mar. 19, 2010).

Even absent the creditorâ??s rights exclusion, significant creditorâ??s rights claims may not be insured against. Those claims include the following:

1. Improper disbursement to the account of the parent corporation of the mortgagorâ??s general partner after the Date of Policy.Mark Twain Kan. City Bank v. Lawyers Title Ins. Corp., 807 F. Supp. 85 (E.D. Mo. 1992) (excluded as act of insured and post-policy event), *affirmed without opinion by* 996 F.2d 1221 (8th Cir. Mo. 1992), *reported in full at* 1993 U.S. App. LEXIS 14477 (8th Cir. Mo. June 18, 1993). â??The act of transferring monies to an account other than that of the borrower, under circumstances such that the Bank knew or should have known that this transfer was not proper, which then causes the note and deed of trust to fail because the borrower does not receive a substantial portion of the loan, â??createsâ?? the defect as that word is used in this policy exclusion.â?• Mark Twain Kan. City Bank v. Lawyers Title Ins. Corp., 807 F. Supp. 85, at 87 (E.D. Mo. 1992) (excluded as act of insured and post-policy event), *affirmed without opinion by* 996 F.2d 1221 (8th Cir. Mo. 1992), *reported in full at* 1993 U.S. App. LEXIS 14477 (8th Cir. Mo.

June 18, 1993).

2. A subsequent preference avoidance action, as a matter known by the insured.First Natâ??l Bank & Trust Co. v. N.Y. Title Ins. Co., 171 Misc. 854, 12 N.Y.S.2d 703 (N.Y. Sup. Ct. 1939) (matter known by insured based on knowledge of insolvency).
3. A subsequent preference avoidance action as a post-policy event.Chi. Title Ins. Co. v. Citizens & S. Natâ??l Bank, 821 F. Supp. 1492 (N.D. Ga. 1993), *affirmed by sub nom.* Chi. Title Ins. Co. v. Nationsbank, 20 F.3d 1175 (11th Cir. Ga. 1994) (even though the title insurer may have inserted more specific language in other policies does not mean this policy contemplated coverage of the risks; this was also a credit risk that is the responsibility of the lenders absent specific language to the contrary). â??The condition of preferred transfers arose only because the debtor chose to file bankruptcy and chose to file within the critical time period. Both of these events, which might give rise to an avoidance, transpired after the title policy issued, and, therefore, the loss of the secured position would be excluded from the coverage of the policy because it was occasioned by subsequent events.â• Chi. Title Ins. Co. v. Citizens & S. Natâ??l Bank, 821 F. Supp. 1492 (N.D. Ga. 1993), *affirmed by sub nom.* Chi. Title Ins. Co. v. Nationsbank, 20 F.3d 1175 (11th Cir. Ga. 1994). Based on this reasoning, any subsequent bankruptcy resulting in a voidable preference or fraudulent transfer attack would not be covered, even if the 1970 ALTA Ownerâ??s and Loan Policies were issued or the 1992 creditorsâ?? rights exclusion was deleted. The only adequate solution would then be securing the 2006 ALTA Ownerâ??s and Loan Policies and an ALTA 21-06 (Creditorsâ?? Rights).
4. Failure of the mortgagor to receive consideration for a mortgage securing debt to a third party is not insured against; the policy did not insure the debt (based on title insurerâ??s limited involvement). Pac. Am. Constr. v. Sec. Union Title, 1999 UT 87, 987 P.2d 45 (1999).

Delayed execution and recording of the mortgage:

This policy does not insure against loss or damage, and the Company will not pay costs, attorneysâ?? fees, or expenses, by reason of any claim that arises out of the transaction creating the mortgage by reason of the operation of federal bankruptcy, state insolvency, or similar creditorsâ?? rights law that is based on the mortgage being a:

a. **fraudulent conveyance or fraudulent transfer;**
b. **voidable transfer under the Uniform Voidable Transactions Act; or**
c. **preferential transfer to the extent the mortgage is not a transfer made as a contemporaneous exchange for new value or for any other reason unless the preferential transfer results solely from the failure:**
    1. **to timely record the mortgage in the Public Records after execution and delivery of the mortgage to the Insured; or**
    2. **of the recording of the mortgage in the Public Records to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.**

A challenge based on the insuredâ??s allegedly tortious or fraudulent acts in acquisition of title to delay or hinder creditors of its stockholders is not a defect in title as insured under the policy. Without consideration of the Exclusions from Coverage, the insured was not protected under the policy against this claim. The challenge relates instead to the manner in which the insured acquired a valid title, and such attack would be a post-policy matter. Farrington Corp. v. Commonwealth Land Title Ins. Co., 86 Wash. App. 399, 936 P.2d 1157 (1997) (these attacks are instead an attack on the manner in which the insured acquired â??valid titleâ•; this case should give further pause to those who rely upon the 1970

ALTA Loan Policy without a Creditorsâ?? Rights Endorsement to secure â??coverageâ?•).

In appropriate circumstances, the claim may be a matter known by or created, suffered, assumed, or agreed to by the insured. Absent clear, specific language insuring against the creditorsâ?? rights risk, the risk would not be covered by the policy. Consequently, an astute insured would require a specific endorsement, such as the ALTA 21-06 (Creditorsâ?? Rights), when it was available.

A right to reject a lease, option, or contract pursuant to 11 U.S.C. Â§ 365 of the Bankruptcy Code is not a matter covered by this creditorsâ?? rights exclusion; rather, it is a matter arising after Date of Policy and excluded as a post-policy matter unless such issue is covered by affirmative insurance or endorsement insuring the continued priority and enforceability after Date of Policy. That is why Option Endorsements that contain post-policy coverage also include an exception to rejection in a subsequent bankruptcy. Likewise, the insurance of a lien does not insure the continued validity of the lien for later advances, absent a Future Advance Endorsement or Revolving Credit Endorsement, which typically excepts to subsequent bankruptcies. It appears that many but not all cases affirm the view that the rejection of a lease in a bankruptcy terminates the lease, any sublease, and any mortgage of the leasehold estate, the contrary view being that the rejection does not terminate a sublease or mortgage. Med. Malpractice Ins. Assâ??n v. Hirsch (In re Lavigne), 114 F.3d 379 (2d Cir. 1997) (rejection doesnâ??t completely terminate the contract); Kuney, â??Will Mission Product Control Ground Lease Rejection and Survival of Subordinate Interests,â?• 29-8 ABIJ 24 (August 2020) (â??There has been a longstanding divide among the courts on whether the rejection of a lease by a bankrupt tenant terminates the interest of subordinate interests, including both subtenants and leasehold mortgages.â?•); Syufy Enters. v. City of Oakland, 104 Cal. App. 4th 869, 128 Cal. Rptr. 2d 808 (2002) (sublease terminated by rejection of lease and order to master tenant to vacate premises); Fisher Bros. Mgmt. Co. LLC v. Genco Shipping & Trading Ltd. (In re Genco Shipping & Trading Ltd.), 550 B.R. 676 (S.D.N.Y. 2015) (master lease was not terminated solely by rejection of lease, which was a breach but did not completely terminate the contract).

For examples of response to this issue, the ALTA 14-06 (Future Advanceâ??Priority), ALTA 14.1-06 (Future Advanceâ??Knowledge), and ALTA 14.3-06 (Future Advanceâ??Reverse Mortgage), which are issued with the 2006 ALTA Loan Policy, except to

â?¦any Advance made after a Petition for Relief under the Bankruptcy Code (11 U.S.C.) has been filed by or on behalf of the mortgagor.

ALTA 14.2-06 (Future Advanceâ??Letter of Credit), which is issued with the 2006 ALTA Loan Policy, excepts to

Limitations, if any, imposed under the Bankruptcy Code (11 U.S.C.) on the amount that may be recovered from the mortgagorâ??s estate.

The ALTA 14 (Future Advanceâ??Priority), ALTA 14.1 (Future Advanceâ??Knowledge), and ALTA 14.3 (Future Advanceâ??Reverse Mortgage), which are issued with the 2021 ALTA Loan Policy, except to

â?¦any Advance made after a Petition for Relief under the Bankruptcy Code (11 U.S.C.) has been filed by or on behalf of the mortgagor.

ALTA 14.2 (Future Advanceâ??Letter of Credit), which is issued with the 2021 ALTA Loan Policy, excepts to

The limitations, if any, imposed under the Bankruptcy Code (11 U.S.C.) on the amount that may be recovered from the mortgagorâ??s estate.

Issuance of a policy without a creditorsâ?? rights exception or exclusion does not necessarily imply coverage of creditorsâ?? rights issues. â??Just because Chicago Title may have inserted even more specific language in other policies does not mean that the language in this contract actually contemplated coverage of the risk of a preference action voiding the bankâ??s secured interest.â?• Chi. Title Ins. Co. v. Citizens & S. Natâ??l Bank, 821 F. Supp. 1492, 1495 (N.D. Ga. 1993), *affirmed by. sub nom*. Chi. Title Ins. Co. v. Nationsbank, 20 F.3d 1175 (11th Cir. Ga. 1994).Public policy also favors a construction that the lender should bear the creditorsâ?? rights risk â??absent specific language to the contraryâ?¦. The lender was in a far better position to determine possible future risks in extending further credit. Such risks would have included a bankruptcy and an adverse action taken by the debtor-in-possession against its bank creditor.â?•Chi. Title Ins. Co. v. Citizens & S. Natâ??l Bank, 821 F. Supp. 1492, 1495 (N.D. Ga. 1993), *affirmed by. sub nom*. Chi. Title Ins. Co. v. Nationsbank, 20 F.3d 1175 (11th Cir. Ga. 1994)**.** The *Chicago Title* case strongly suggests that issuance of the 1970 ALTA Ownerâ??s or Loan Policy, alone, is not sufficient to clearly and directly secure creditorsâ?? rights coverage against claims of preferential transfer or fraudulent transfer. Given the Covered Risk in the 2006 ALTA Ownerâ??s and Loan Policies for prior transactions and voidable preferences, the deletion of the creditorsâ?? rights exclusion as to matters arising out of the current transaction may not result in creditorsâ?? rights coverage for the current transaction. Unlike the 1970 and 1992 ALTA Ownerâ??s and Loan Policies, the 2006 ALTA Ownerâ??s and Loan Policies have clear, distinctive insuring provisions covering creditorsâ?? rights claims arising out of prior transactions and relating to preferences because of tardy filing or the lack of constructive notice.

The creditorsâ?? rights exclusion could not be deleted in Florida, New Mexico, New York, Pennsylvania, and Texas (although in Florida and Pennsylvania the 1970 and 1970 (revised 1984) ALTA Ownerâ??s and Loan Policies remained available for numerous years). The Texas creditorsâ?? rights exclusion was slightly different from the 1992 ALTA Ownerâ??s and Loan Policies creditorsâ?? rights exclusion but is now consistent with the 2006 ALTA Loan Policy.

Some have assumed that the â??carve outâ?• provisions in the Exclusions would create coverage for listed recorded matters. However, this is at best doubtful. For example, the *Elysian* case ruled, â??Elysian the insured cannot rely upon an exclusion to coverage to extend coverageâ?¦. Elysian the insured points to a provision that excludes from coverage any â??loss or damage, costs, attorneysâ?? fees or expenses which arise by reason of:

(a) Any law, ordinance or governmental regulation (including but not limited to building or zoning laws, ordinances, or regulations) restricting, regulating, prohibiting, or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions, or location of any improvement now or hereafter erected on the land;â?¦or the effect of any violation of these laws, ordinances or governmental regulations, *except to the extent that a notice of the enforcement* thereof or a notice of a defect, lien, or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.â?? Unlike an assessment lien, for example, the Notice of substandard dwelling did not affect title. It therefore did not give rise to coverage under the basic insuring provisions of the policy, and the exclusion does not expand that coverage to include the Notice.â?•Elysian Inv. Grp. v. Stewart Title Guar. Co., 105 Cal. App. 4th 315, 129 Cal. Rptr. 2d 372, 379 (2002).

It is also stated, â??the deletion of exceptions does not, in and of itself, create coverage where none exists.â?• This position is consistent with the viewpoint that the deletion of an Exclusion may not result in insurance coverage equivalent to that Exclusion. Based on that reasoning, the insured should always rely upon an endorsement or insuring provision, rather than upon the deletion or amendment of an Exclusion. First Am. Title Ins. Co. v. Dahlmann, 2006 WI 65, 291 Wis. 2d 156, 715 N.W.2d 609 (2006).

Following that logic, it was folly to rely upon the 1970 ALTA Ownerâ??s and Loan Policies to secure any creditorsâ?? rights coverage, when creditorsâ?? rights coverage could be widely given.

The position that an Exclusion cannot create coverage is based upon the premise that the insuring provisions do not initially provide coverage, for, assuming that, it does not matter what action is taken with respect to an Exclusion. Given that the insuring provisions do not provide coverage, the Exclusions should be viewed as irrelevant, because the question simply becomes whether the Exclusion limits coverage. If an Exclusion includes a carve-out, then the result would be that the Exclusion would not apply if the carve-out was relevant, but it would still be necessary to assert an insuring provision. â??Before considering whether any exclusions apply, a court must examine the coverage provisions to determine whether coverage exists at allâ?¦. This rule is significant for two reasons. First, when an occurrence is clearly not within the coverage clause, it does not also have to be specifically excluded. â??Second, although exclusions are construed narrowly and must be proven by the insurer, the burden is on the insured to bring the claim within the basic scope of coverage and (unlike exclusions) courts will not indulge in a forced construction of the policyâ??s insuring clause to bring a claim within the policyâ??s coverage.â??â?•Rosen v. Nations Title Ins. Co., 56 Cal. App. 4th 1489, 66 Cal. Rptr. 2d 714, 718 (1997).

â??If there is *no* coverage, then an exception that prevents application of an exclusion from coverage has no application.â?• Vestin Mortg., Inc. v. First Am. Title Ins. Co., 2006 UT 34, 139 P.3d 1055, 1059 (2006).

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4. Legislative
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