

What About Those 2021 ALTA Policy Forms?

Description

(Part One)

After several years of review and editing, the American Land Title Association will roll out a new portfolio of owner's and loan policies, a new title commitment, a new endorsement series (47's Operative Law), and numerous technical amendments to existing endorsement forms to align them with the policies' changes. This article will address the changes in the standard loan and owner's policy and the new series 47 endorsement. The second part in another issue of the *Examiner*, will review the changes to the Homeowners policy, Extended Coverage Residential Loan policy, the commitment, closing protection letters, and any changes to endorsements. Public comment periods with ALTA have closed but industry stakeholders are still submitting comments that are being reviewed. Comments on the forms were obtained by the ALTA Title Insurance Forms Committee from industry stakeholders, including FNMA, FHLMC, ABA, ACREL, ACMA, and major lenders, as well as recognized experts in title insurance. The Board of Directors of ALTA has approved the loan and owner's policy forms, but subsequent technical corrections may be made prior to the official issue date of July 1, 2021.

If you are only an appointed agent in Virginia, you can anticipate that your underwriter will file these 2021 ALTA forms on or soon after July first and ask that they be used for transactions going forward. There will be a period of time taken for training and providing forms to software providers. Understanding the new forms is what you can undertake now. The practical rollout will take some time. In time - probably the end of 2022 - ALTA will archive the 2006 forms.

It was debated within ALTA for several years whether to amend the policy forms or to revise and publish new forms as of a certain date. Ultimately, the Board settled on the decision to revise and publish new forms as was done in 2006 to replace the 1992 policy forms. Driving this decision was the reality that several amendments to the diverse forms over the last fifteen years was creating a mishmash of effective dates, resulting in forms' filings on a nearly annual basis for underwriters. Also, recent court rulings (such as *McGirt v. Oklahoma* discussed below in the Series 47 endorsement section) and a public press for greater racial equality in the summer of 2020 raised legal issues that generated rethinking on substantive provisions in many forms in the ALTA portfolio. It just made good sense to amend and publish new forms at one historical moment and archive older forms after a reasonable time passed.

Changes to the Covered Risks Section of the Standard Loan and Owner's Policies

What you may notice as you review the new policy forms is that much remains the same or that actual changes are language only, making minor substantive differences. That being said this article will try to focus on the changes that you are most likely to need to know in your daily title insurance underwriting operations. Claims counsel, both with underwriters and outside retained counsel, will focus on specific language as claims' handling and coverage provisions will be different in the future.

Both policies (both policies used throughout means the ALTA 2021 Loan and ALTA 2021 Owner's policies) have added a new introductory paragraph that acknowledges the reality that most policies today are issued in an electronic format. Further, an electronic issued and/or signed policy is fully valid and enforceable. This language should obviate the need to issue an ALTA 39-06 (Policy Authentication) endorsement.

Covered Risks 1 through 8 of both policies are essentially unchanged, as is CR 9 (creditor's rights) and CR 10 (gap coverage between Date of Policy and a later recording date if any) of the owner's policy. This means that title other than vesting (CR 1), Unmarketable title (CR 3), and access (CR 4) remain linchpins of title insurance policy. Covered Risk 2 (defects in title) now includes defects that might arise due to remote online notarization or repudiation of an online signature to a recorded document, and adds a boundary line overlap as a specific defect. CR 5 (police powers) has been revised to make the enforcement notice of the conditional clause part of the coverage itself. Now matters that are traditionally non-title issues (zoning, environment, building, subdivision, etc.) are covered if an Enforcement Notice is recorded among the Public Records constituting constructive notice. Definitions of Enforcement Notice (added) and Public Records (revised) in § 1 of the Conditions are also part of the new policy changes. CR 6 (police powers not covered in CR 5), CR 7 (eminent domain by recorded notice), CR 8 (eminent domain by an action effective as constructive notice to a bfp), and CR 9 (creditor's rights) are essentially the same. CR 6 does include forfeitures, national security takings, etc. now but only to the extent an enforcement notice is recorded. CR 8 includes PACA-PSA Trust takings to the extent a notice is recorded. CR 9 includes the Uniform Voidable Transactions Act as another creditor's rights law.

Covered Risk 9 of the loan policy (invalidity or unenforceability of the lien of the insured mortgage) includes loss caused by a RON or online signature failure applied to the recorded mortgage. CR 10 (loss of priority to other liens) is expanded and improved to define more fully the Indebtedness protected by specifying components of it. [Also see its relationship to Schedule B.II. below.] CR 11 (priority of the lien on the Title) and CR 12 (assignment) are unchanged. CR 13 (creditor's risk) includes the Uniform Voidable Transactions Act reference. CR 14 is similar gap coverage as CR 10 in the owner's policy.

The Interregnum

Lodged between the Exclusions from Coverage and Schedule A of both policy forms is a section styled, *Transaction Identification Data*. The information provided here Issuing Agent, Issuing Office, Issuing Office's ALTA Registry ID, Loan ID Number, Issuing Office File Number, and Property Address is all nice to know information for all the parties, but the data has nothing to do with the title to the insured land. Clearly stated in the opening line of the section is that the data provided is not covered by the policy and the underwriter has no liability to the Insured for any inaccuracy in the information.

This information was previously provided in the 2016 ALTA commitment form. It is actually an optional section, but it is likely that underwriters will adopt it in their filed forms. The rationale for including the section is that lenders may more readily identify their loan transactions to policies issued and facilitate assignment or sale of loans on the secondary mortgage market.

Changes to Schedule A

Schedule A of both the loan and owner's policy is essentially unchanged from the 2006 ALTA policy forms. Item 6 of the loan policy no longer includes the laundry list of ALTA endorsements. Instead, a simple blank space is provided to insert ALTA endorsements, by number, that are added to and incorporated into the policy. Endorsements that contain substantial transaction information should be attached to the policy, rather than the ALTA endorsement number being inserted in Item A.6.

Changes to Schedule B

Two items have changed in the textual portion of Schedule B, which is to say, everything has changed. Special Exceptions that may be included routinely will continue as required by your underwriter, but the paragraphs leading into Schedule B and Schedule B, Part II, have changed.

In the 2006 policies, it was common practice to add language to Exceptions for restrictive covenants deleting any covenant containing prohibited discriminatory provisions. The 2021 policies will include a paragraph opening Schedule B that states such language as part of the policy. Here is the pending language:

This policy does not republish any covenant, condition, restriction, or limitation

This language will obviate the need to include such language with every Exception that might contain ancient recorded discriminatory language.

The ALTA Title Forms Committee has directed further attention to this provision since the 2021 policy forms were first approved by the Board of Governors for use as of July 1, 2021. That occurred in 2020. The Committee has focused further discussion on a growing number of state laws that seem to mandate redaction of such discriminatory language in ancient, historic, recorded documents. The Committee has recommended additional language to the Board and the language will likely be included in the final forms certified by ALTA for use this summer. Here is the additional language that will be part of the lead-in to Schedule B:

Some historic land records contain Discriminatory Covenants that are illegal a

Note that "Discriminatory Covenant" is now a capitalized word and a new definition will be added to the Conditions section of both policies. This language will be found at Cond. 1.e. of the loan policy and Cond. 1.d. of the owner's policy:

"Discriminatory Covenant"

: Any covenant, condition, restriction, or limitation that under applicable la

The classifications of personal characteristics have been enlarged, but still left open for future designations, as such anti-discriminatory laws, while broad under the federal Fair housing Laws, continue to be expanded by other federal and state legislation.

Schedule B, Part II, of the loan policy, will also have new language that refers to Covered Risk 10. That CR 10 provides that the lien of the insured mortgage is superior to another lien or encumbrance upon the title. Therefore, unless excepted, another lien of record is already insured to be subordinate to the lien of the insured mortgage. The statement in Sch. B.II of the 2006 loan policy saying that a lien of record is subordinate to the lien of the insured mortgage would be redundant. The new language does state that the terms and conditions of specific subordination language contained in an item listed under

B. II is excepted out of the coverage of CR 10:

Covered Risk 10 insures against loss or damage sustained by the Insured by rea

In other words, your policy production procedure will not change as you will continue to list items of record that are subordinate to the lien of the insured mortgage under Schedule B.II.

Changes to Conditions

1. Definitions of Terms

In this section, I will not reference the sub-section number as those designations may change as a result of the inclusion of new defined term, Discriminatory Covenant, mentioned above.

“Affiliate” is a new defined term although it has the same meaning as understood for an “affiliated Entity” in the 2006 policies.

“Amount of Insurance” and “Date of Policy” are essentially unchanged.

“Discriminatory Covenant” is a new defined term and was discussed above.

“Enforcement Notice” is a new defined term and relates to certain Covered Risks, as discussed above.

“Entity” is essentially the same definition as the 2006 policies, but limits a defined entity to an organization that can own real estate under the law applicable to the location of the land.

“Indebtedness” (loan policy) will be read by lenders as improved coverage. The language is slightly changed. Advances that are made to protect the priority of the lien (e.g., paying real estate taxes) are only part of the Indebtedness if made prior to acquisition of the Title by the Insured.

“Insured” is a defined term that has some small but subtle changes from the 2006 policies. Sub-sections (A), (B), and (C) make it clear that the successor entity must be a successor to the Title held by the named Insured. Sub-section (D) has enlarged the grantee from the Insured be an “Affiliate” (as defined term) and no longer excludes a grantee who has paid actual valuable consideration.

“Insured Claimant” is essentially the same.

“Insured Mortgage” is slightly rewritten but the definition remains the same.

“Knowledge” as a defined term now includes both actual knowledge and actual notice of a matter, but does not include constructive notice such as is imputed by Public Records.

“Land” and “Mortgage” are unchanged in meanings, although “Mortgage” adds “security deed” to list of examples of mortgage types.

“PACA-PSA Trust” is a new defined term and relates to Covered Risks and Exclusions from Coverage language.

“Public Records” is essentially the same as before but more carefully defines what public records are not included as items of constructive notice for title insurance purposes. Here is the new language:

The recording or filing system established under state statutes in effect at the time of the recording or filing does not include any other recording or filing system, including any pertaining to the recording or filing of documents.

“State” is a new defined term that has been proposed in 2021 as a result of the *McGirt* decision (see more below under ALTA 47 series endorsements). Here is the proposed language of the new defined term:

The state or commonwealth of the United States within whose exterior boundaries the land is located also includes Washington D.C., the Commonwealth of Puerto Rico, the U.S. Virgin Islands, and the District of Columbia.

Note that tribal lands and Native American jurisdictions are not included.

“Title” remains defined as the interest in the Land identified in Schedule A.

“Unmarketable Title” is an unchanged defined term from the 2006 policies.

2. Continuation of Coverage

In 2006, this section was titled “Continuation of Insurance.” Although the language is rewritten to be more clearly stated, the provision is essentially the same.

3. Notice of Claim to Be Given by Insured Claimant

This section is rewritten, but the import is the same: The Insured must provide notice of a claim as soon as it has “Knowledge” of any litigation concerning the Title to the Land or a rejection of the Title or the lien of the Insured Mortgage. Prejudice to the insurer due to a delay in notification of a claim remains a defense under the policy against the Insured.

4. Proof of Loss

The insurer may now require a signed proof of loss without first establishing that it cannot reasonably determine the amount of loss.

5. Defense and Prosecution of Actions

Handling of claims and exercising of insurer’s rights under the policy remain the same in the 2021 policies as the 2006 versions.

6. Duty of Insured Claimant to Cooperate

This provision is essentially the same as the 2006 policies. However, one language change in this section is indicative of a broader change throughout the new policies. The ALTA Title Forms Committee discussed the word “shall” many times, because caselaw in many states had shown that “shall” was not necessarily obligatory, but could be permissive. In trying to find a word that would be obligatory, searching dictionaries and thesauruses, the Committee concluded that common

definitions and synonyms used “shall” as often as not. After much debate, the Committee settled on “must” and you will see several changes from “shall” to “must” in Condition 6.

7. Options to Pay or Otherwise Settle Claims; Termination of Liability

Section 7 has minimal language changes, but no substantive coverage revisions.

8. Contract of Indemnity; Determination and Extent of Liability

In addition to a change to the title to this section, Section 8 does improve coverage for an Insured. First, the new policies reaffirm what a title policy is not, continuing the language from the new ALTA title commitment:

This policy is a contract of indemnity against actual monetary loss or damage

The first sentence above was found in the 2006 policies, but the balance of this paragraph is new. The intent of the language is reduction of tort claims against the insurer for negligence or other torts arising out of the search, underwriting, or closing of the Title.

Sub-section (a) as to extent of loss is essentially unchanged. A new sub-section (b) is added that allows the Insured to determine the date of loss for calculation of the amount of loss. The 2006 policies were silent on a date upon which the amount of loss should be calculated, certainly not giving the Insured input on that date:

b. Fair market value of the Title in Condition 8.a.iii. is calculated using either:
i. the date the Insured acquires the Title as a result of a foreclosure or deed in lieu of sale;
ii. the date the lien of the Insured Mortgage or any assignment set forth in Item 1 of the Declaration of Mortgage is recorded;
b. Except as provided in Condition 8.c. or 8.d., the fair market value of the Title shall be the value of the Title as determined by the Insured on the date of loss.

Sub-sections (c) and (d) of the loan policy and Sub-sections (c), (d), and (e) of the owner’s policy provide a third option for the date of loss calculation (date claim is made) and increase the policy amount by 15% (up from 10%) if the company is unsuccessful in establishing title as insured.

9. Limitation of Liability

Although rewritten, Sub-sections (a), (b), and (c) of the 2021 policies contain similar coverage to the 2006 policies. Newly added Sub-sections (d) and (e) of the loan policy and (d) of the owner’s policy require that the Insured own the Indebtedness or have acquired the Title at the time a claim is paid (loan) and reassert that the Transaction Identification Data is not covered/insured by the policy.

10. Reduction or Termination of Insurance

This section in the owner’s policy reasserts that payments made (except those for costs or fees) reduces the Amount of Insurance. For example, should a claim be paid for the loss in value of the Land due to an unreported easement, an endorsement to the policy should be issued that adds the easement as an Exception and reduces the Amount of Insurance by the amount of the payment.

This section in the loan policy does the same as above, plus more for the insured lender. New Sub-section (b) states that the amount credited against the Indebtedness at foreclosure does not reduce the Amount of Insurance. Sub-section (c) restates that a settlement or release of the Insured Mortgage by

the Insured terminates coverage under the policy.

11. Liability Noncumulative (Owner's Policy)

This section reasserts that payment of a claim on a Title issue on an excepted mortgage reduces the Amount of Insurance to the owner insured.

12. (Owner's)/11.(Loan) Payment of Loss

The insurer will pay a loss within thirty days after a loss is determined.

13.(Owner's)/12.(Loan) Company's Recovery and Subrogation Rights Upon Settlement and Payment

This section provides similar conditions as the 2006 policies. Again, it is reasserted that an Insured *must* cooperate in exercise of subrogation rights by the insurer, instead of *shall* cooperate in the former policies.

14.(Owner's)/13.(Loan) Policy Entire Contract

This section reiterates that the policy is a contract and claims arise in contract law only. Also, the contract of insurance includes any endorsement and, in fact, can only be modified by an endorsement in writing. Any endorsement is subject to all provisions of the policy, including the Exceptions, Exclusions, and Conditions.

15.(Owner's)/14.(Loan) Severability

Severability applies to save the entire contract of insurance even if only a part of a term or condition is found invalid or unenforceable.

16.(Owner's)/15.(Loan) Choice of Law and Choice of Forum

This section was rewritten (again with the use of *must* instead of *shall*) and adopted the same coverage as the 2006 policies. Law of the jurisdiction where the Land is located *must* be applied to resolve legal issues, including conflicts of law, and the tribunal for litigation must be in the United States or its territories.

This section is impacted by the 2020 U.S. Supreme Court decision, *McGirt v. Oklahoma*, which is discussed below in connection with the ALTA 47 series endorsements.

17.(Owner's)/16.(Loan) Notices

Notices to the insurer are to be sent to the address provided in this section.

18.(Owner's)/17. (Loan) Class Action

This a new provision in both policy forms. It has been argued many times that a real estate transaction is uniquely a single event without common threads so as to constitute a representative for a class in litigation. Results for that argument have been only middling, as additional issues of consumer protection, consumer credit, etc. have been held paramount and title policy claims got dragged into the

class certification. Since Virginia does not have a class action court process, this provision may be ignored. Federal courts, however, do have class actions available. Since there are often related federal consumer issues with title and closing claims, it will be interesting to see if federal courts will honor this provision and not certify a class if requested by a would-be representative plaintiff.

19.(Owner's)/18.(Loan) Arbitration

As in the 2006 policies, binding arbitration may be requested by either party if the Amount of Insurance is not more than \$2,000,000.00. Both parties must agree to arbitration above that amount. Arbitration must be sought on an individual, not a class, basis. If there is determination by the arbitrator that a part of the matter cannot be arbitrated, then that part is all that is capable of decision by a court. That is, if a part of the arbitration case is not arbitrable, the court may only resolve the non-arbitrable portion of the claim; it does not review the entire matter *de novo*.

ALTA 47 Series Endorsements

Paraphrasing from the ALTA Title Forms Committee's action item submitted to the ALTA Board of Governors, the decision by the U.S. Supreme Court in the case of *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020) found that a criminal defendant, who lived on a tribal reservation but was charged with an offense occurring in an Eastern Oklahoma town, was not subject to the jurisdiction of the state of Oklahoma. This decision also addressed the jurisdiction of the tribal government over a geographic area which had once been a reservation, but which supposedly had been disestablished by Congress. That "jurisdiction" in ALTA policies and other forms might be defined to include tribal governing bodies was neither intended nor anticipated. The Title Forms Committee set up a new Operative Law Subcommittee to discuss this issue and draft updates to the 2021 policies. The discussions led to four new Endorsements and two new Addendums to the 2006 policy forms that are expected to become effective on April 2, 2021. Common among the Endorsements and Addendums is new defined terms for "State" and "Tribe"; revisions to the Condition section relating to choice of laws (to exclude applying the law of a Tribe); and some language changes in the Exclusions from Coverage section. Note that, if these recommendations are accepted, the changes may be entered directly into the 2021 policy forms effective on July 1, 2021. The revised policy documents are:

- ALTA 47[-06] Operative Law "Owner's" Policy Endorsement
- ALTA 47.1[-06] Operative Law "Loan" Policy Endorsement
- ALTA 47.2[-06] Operative Law "Homeowner's" Policy Endorsement
- ALTA 47.3[-06] Operative Law "Expanded Coverage Residential Loan Policy-[Assessments Priority][Current Assessments] Endorsement
- Addendum (Operative Law) Short Form Residential Loan Policy [Current Violations]
- Addendum (Operative Law) Short Form Expanded Coverage Residential Loan Policy [Assessments Priority] [Current Assessments]

Coming Next Time

In Part II of this article, 2021 changes to the title commitment, closing protection letters, Homeowner's policy, extended coverage residential loan policies, short form loan policies, and endorsements will be discussed.



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