

The New ALTA Title Insurance Policies (With Comparisons)



Shannon J. Skinner

is a partner with the Seattle office of Kirkpatrick & Lockhart Preston Gates Ellis LLP. Her practice centers on commercial real estate and financing transactions. Her experience includes the acquisition and financing of regional shopping malls, hotels, office buildings, retail centers, manufacturing facilities, apartment buildings, public facilities, and museums. Conduit, corporate, and asset-backed financing transactions are part of her practice. She has worked on matters ranging from complex urban redevelopment projects to rural timber financing. She has represented a substantial number of national and local lenders in making loans, developing lending policies and forms, and coordinating multistate transactions. She can be reached at shannon.skinner@klgates.com.

Shannon J. Skinner

Making the leap from 1970 to the 21st Century.

THE AMERICAN LAND TITLE ASSOCIATION

(“ALTA”) adopted new forms of owner’s and loan title insurance policies and endorsements as of June 2006. These forms were the result of a multi-year process to update, improve, and address issues with the 1992 policies. The 2006 policies include more express insuring clauses, integrate coverage found in endorsements, and address many concerns of customer groups. The wording has been improved with more definitions and affirmative statements (rather than exceptions within exclusions). Nevertheless, for many sophisticated consumers of title insurance, the 1970 forms of policy were preferred to the 1992 policies, and the 1992 policies were not widely accepted if the 1970 forms were available. For these insureds, the more relevant comparison is with the 1970 policies.

One principal feature of the new policies is new express insuring clauses. At least two appellate cases have held that for there to be coverage in a title policy, it must be expressly stated in the insuring clauses. *See, e.g., Somerset Savings Bank v. Chicago Title Insurance Co.*, 649 N.E. 2d 1123 (Mass. 1995); *Lick Mill Creek Apartments v. Chicago Title Insurance Co.*, 283 Cal. Rptr. 231 (Cal. Ct. App. 1991). An exception from an exclusion from coverage may not, therefore, provide insurance. Certainly the title companies increasingly take the view that an express insuring

clause is required. For example, the 1970 policy does not include insuring clauses affirmatively covering police power actions or environmental liens; rather, there is an exception to these exclusions if notice has been recorded. The 2006 policies expressly cover these to the extent that notice is recorded in the appropriate records. New coverages are automatically included, such as against preferences arising from untimely recording and gap recordings. The list of insured parties is expanded and the 90-day requirement for giving proof of loss is deleted. A check-the-box list of ALTA endorsements allows many of these to be incorporated into the loan policy by reference. The apportionment provision of the owner's policy is deleted (and the 1992 co-insurance clause was not included). A more detailed comparison of the policy forms are attached as Exhibits L (Loan) and O (Owner).

In addition to the new policy forms, the ALTA promulgated many new endorsements. Some of these, like the access/abuts street, are improved in

their coverage. The endorsement forms that have been modified to match the 2006 policies have the "-06" designation after the number.

Given the improvements in the express insuring clauses and endorsements, as well as the convenience factor from greater availability and improved readability, the 2006 policies on balance are superior to the 1970 policies. This assumes that the insured obtains endorsements deleting the creditor's rights exclusion and the arbitration provision (for policies under \$2 million), which was the practice when using the 1992 policies. The proof of loss/examination under oath provisions are more onerous on insureds from the 1970 forms but these do not seem unreasonable. Insureds cannot rely on a court finding that deleting an exception or an exception to an exclusion provides affirmative coverage. Thus, commercial real estate owners and lenders should become familiar with the 2006 policy forms and begin using them in their transactions.

EXHIBIT L LOAN POLICY

COMPARISON OF 2006 AND 1970 ALTA POLICIES

(Note: when using the description of a provision as "same" below, this is meant to describe provisions that are essentially the same in effect or similar even though wording may be different.)

2006 Covered Risks	1970 Covered Risks
Title being vested other than as stated.	Same.
Defect, lien, or encumbrance on title, including by reason of forgery, fraud, undue influence, duress, incompetency, incapacity or impersonation; failure of entity to authorize, improper execution formalities; improper document creation by electronic means allowed by law; execution under invalid power of attorney; improper recording/indexing; defective judicial/administrative proceeding.	Same, except list of risks not included.
Lien of real estate taxes or assessments due but unpaid.	Not expressly included; subsumed in lack of priority.

Encroachments, encumbrance, violation, variation or adverse circumstance that would be disclosed by accurate survey. Encroachment includes encroachment of improvements on insured land onto adjoining property.	Not expressly included; was thought to be achieved by deleting the survey exception. Encroachments off of land possibly not covered because outside of insured land. <i>See Transamerica Title Ins. Co. v. Northwest Building Corp.</i> , 733 P.2d 431 (Wash. Ct. App. 1989).
Unmarketable title (including right to refuse to buy, lease, or lend).	Unmarketable title (including right to refuse to buy, lease or lend).
No right of access to insured land. Same.	No right of access to insured land.Same.
Violation or enforcement of laws (including those relating to building and zoning) restricting, regulating, prohibiting or relating to occupancy, use and enjoyment of the land, dimensions, subdivision, environmental protection, or under exercise of police powers IF notice is recorded in public records (which includes district court for environmental liens).	Coverage was thought to be included through exception to exclusion from coverage.
Exercise of rights of eminent domain if notice recorded in public records.	Coverage was thought to be included through exception to exclusion from coverage.
A taking that has occurred and is binding on rights of BFP.	Not expressly included; subsumed in title being vested other than as stated.
Invalidity of lien of insured mortgage, including by reason of forgery, fraud, undue influence, duress, incompetency, incapacity or impersonation; failure of entity to authorize, improper execution formalities; improper document creation by electronic means allowed by law; execution under invalid power of attorney; improper recording/indexing; defective judicial/administrative proceeding.	Same, except that list of risks not included. Exception for usury and consumer protection moved to Exclusions.
Lack of priority of insured mortgage over any other lien or encumbrance.	Same.

Lack of priority of insured mortgage (i) as security for each advance over construction liens arising from improvements or work contracted for or commenced before date of policy; (ii) contracted for, commenced or continued after date of policy and funded by loan secured by insured mortgage that insured has advanced or is obligated to advance as of date of policy; or (iii) over lien of assessments for street improvements under construction or completed as of date of policy.	Same, except does not include (iii) (was covered under ALTA Endorsement Form 1).
Invalidity of assignment of insured mortgage if shown on Schedule A or failure of assignment to vest title to insured mortgage in named insured free of liens.	Same.
Invalidity of insured mortgage by reason of (i) avoidance of transfer of land constituting fraudulent conveyance or preference under bankruptcy or other creditor's rights laws occurring BEFORE the transaction creating the lien of the insured mortgage; or (ii) insured mortgage constituting a preference because of untimely or improper recording.	Not addressed in 1970 policy and was subsumed in insuring clause 1 (title being vested other than as shown). Was exception to exclusion in 1992 policy. Clause (ii) is express new coverage in 2006 policy.
Any other defect or encumbrance on title or other matters included in covered risks that is created, attaches or is recorded in public records after date of policy but before recording of insured mortgage.	New express gap coverage.
Express statement that title company will pay costs and attorneys' fees incurred in defense of insured matter to extent provided in conditions.	
2006 Exclusions from Coverage	1970 Exclusions from Coverage
Laws (including those relating to building and zoning) restricting, regulating, prohibiting or relating to occupancy, use and enjoyment of the land, dimensions, subdivision, environmental protection, or violations/enforcement thereof, or police powers (UNLESS covered under insuring clause, which covers if notice is recorded before date of policy).	Same, except coverage if notice is recorded was exception to exclusion, not affirmative coverage.

Rights of eminent domain (UNLESS covered by insuring clause, which covers if notice is recorded before date of policy).	Same, except coverage if notice is recorded was exception to exclusion, not affirmative coverage.
Defects, liens, encumbrances, adverse claims, and other matters (i) created, suffered, assumed or agreed to by the insured claimant; (ii) not known to the title company, not recorded but known to the insured and not disclosed in writing; (iii) resulting in no loss or damage; (iv) attaching subsequent to date of policy (although this does not limit certain coverages that have post-policy elements); or (v) resulting in loss that would not have been sustained if insured had paid value for the insured mortgage.	Same, except (v) not included.
Unenforceability of insured mortgage due to insured's failure to comply with doing-business laws.	Same.
Unenforceability of insured mortgage due to usury, consumer credit protection, or truth in lending laws.	Same (was exception to coverage).
Claim under bankruptcy or other creditor's rights laws that the insured mortgage is a fraudulent conveyance or preference UNLESS covered under insuring clause (which covers such matters occurring before the insured mortgage transaction).	1970 policy does not have creditor's rights exclusion; this was one of the main objections to the 1992 policy (although insurers believe that these matters were not covered under 1970 policy in any event). With 2006 policy, need to request endorsement to delete creditor's rights exclusion. This is frequently available for routine mortgage loan transactions. Can be an issue in leveraged buy-outs and debt restructuring transactions.
Lien for taxes and assessments imposed between date of policy and recording of insured mortgage.	Not in 1970 policy; added as exception to new gap coverage in 2006 policy.
2006 Schedule A	1970 Schedule A
Allows check-the-box to incorporate by reference certain list of ALTA endorsements (including condo, variable rate, environmental protection, leasehold, comprehensive, future advances, location).	No equivalent.

2006 Schedule B	1970 Schedule B
Same.	Same.
2006 Conditions	1970 Conditions
New definitions included for Amount of Insurance, Date of Policy, Entity, Indebtedness, Insured Mortgage, and Title. Note that “Indebtedness” includes post-policy advances (e.g., principal, interest, prepayment and exit fees, taxes and insurance, protective advances), payable as a matter of damages; this is major benefit for insured.	
Expanded definition of Insured, including successor owner of debt, whether for own account or as trustee; holder of transferable electronic record; successors of entity conversions, dissolutions, mergers, reorganizations; grantee under deed given without consideration to affiliates and subsidiaries; governmental agencies/instrumentalities that insure or guaranty the debt. (Note: all defenses are preserved against other insureds except BFPs for value and governmental agencies.)	Includes successor owner of debt and governmental insurers/guarantors.
Continuation of Insurance.	Similar.
Notice of claim: insured to give prompt notice of litigation, knowledge of claim, or rejection of title as unmarketable. Coverage is reduced to extent that failure to give prompt notice prejudices title co.	Equivalent.
Proof of loss; duty to cooperate: Specifies details for proof of loss; includes duty to make books and records available; requires insured claimant to submit to examination under oath. Ninety-day period deleted but cooperation is more onerous on insured than 1970 policy.	Includes requirement to give proof of loss within 90 days after loss is determined. Details on proof and cooperation not included.
Defense/prosecution of actions.	Equivalent.

Option or pay or settle.	Equivalent.
Extent of liability: includes new provision that if title company defends/prosecutes and is unsuccessful, amount of insurance is increased by 10 percent or insured has right to have loss determined either as of date of claim or date settled and paid.	Equivalent, except does not include bump-up in damages if title company does not settle and unsuccessfully pursues litigation.
Limitation on liability, reduction in insurance, termination of liability. Includes new limit for governmental insurers/guarantors to amount paid to settle insurance/guaranty claim.	Equivalent.
Payment of loss within 30 days after definitely fixed.	Same.
Title company rights of recovery after settlement and payment: subrogation rights, but cannot be exercised until insured has recovered its losses.	Similar. Includes express permission to modify debt, release collateral or obligors until notice of claim.
Arbitration: requires arbitration under ALTA rules for policies of \$2 million or less. (AAA dropped its rules for title insurance disputes.)	Arbitration not included in 1970 policy and was objectionable feature for many lenders under 1992 policies (although only for policies of \$1 million or less, which eliminated most commercial policies). Endorsement can be requested to delete arbitration requirement.
Policy is entire contract: provides for incorporation of endorsements (which don't modify policy, extend date or increase amount unless expressed) so this language won't appear in endorsements.	
Choice of law and forum is state where land is located.	Not included.

- Reminders when using the 2006 Loan Policy:
 - ___ You need to request deletion of creditor's rights exclusion and affirmatively insure against creditor's rights risk through ALTA Endorsement 21-06;
 - ___ You need to request deletion of arbitration condition if policy is \$2 million or less;
 - ___ Future advance endorsement is required for future advance coverage. Future advances of principal are arguably not insured because the priority risk is limited to date of policy and post-policy events are excluded. The reason is because the definition of "indebtedness" includes future advances but this term is not used in the covered risks section but rather in the payment of losses and settlement sections. Under the line of cases that an express insuring clause is required, a future advance endorsement should be requested (and is one of the boxes that can be checked to have included by reference). Note: advances to protect security are not future advances and an endorsement is not required for these.

EXHIBIT O

OWNER'S POLICY

COMPARISON OF 2006 AND 1970 ALTA POLICIES

(Note: when using the description of a provision as "same" below, this is meant to describe provisions that are essentially the same in effect or similar even though wording may be different.)

2006 Covered Risks	1970 Covered Risks
Title being vested other than as stated.	Same.
Defect, lien, or encumbrance on title, including by reason of forgery, fraud, undue influence, duress, incompetency, incapacity or impersonation; failure of entity to authorize, improper execution formalities; improper document creation by electronic means allowed by law; execution under invalid power of attorney; improper recording/indexing; defective judicial/administrative proceeding.	Same, except list of risks not included.
Lien of real estate taxes or assessments due but unpaid.	Not expressly included; subsumed in lack of priority.
Encroachments, encumbrance, violation, variation, or adverse circumstance that would be disclosed by accurate survey. Encroachment includes encroachment of improvements on insured land onto adjoining property.	Not expressly included; was thought to be achieved by deleting the survey exception. Encroachments off of land possibly not covered because outside of insured land. <i>See Transamerica Title Ins. Co. v. Northwest Building Corp.</i> , 733 P.2d 431 (Wash. Ct. App. 1989).

Unmarketable title (including right to refuse to buy, lease, or lend).	Unmarketable does not include refusal to lease or lend.
No right of access to insured land.	Same.
Violation or enforcement of laws (including those relating to building and zoning) restricting, regulating, prohibiting or relating to occupancy, use and enjoyment of the land, dimensions, subdivision, environmental protection or under exercise of police powers IF notice is recorded in public records (which includes district court for environmental liens).	Coverage was thought to be included through exception to exclusion from coverage.
Exercise of rights of eminent domain if notice is recorded in public records.	Coverage was thought to be included through exception to exclusion from coverage.
A taking that has occurred and is binding on rights of BFP.	Not expressly included; subsumed in title being vested other than as stated.
Title being vested other than as stated by reason of (i) avoidance of transfer of land constituting fraudulent conveyance or preference under bankruptcy or other creditor's rights laws occurring BEFORE the transaction creating the lien of the insured mortgage; or (ii) insured mortgage constituting a preference because of untimely or improper recording.	Not addressed in 1970 policy and was subsumed in insuring clause 1 (title being vested other than as shown). Was exception to exclusion in 1992 policy. Clause (ii) is express new coverage in 2006 policy.
Any other defect or encumbrance on title or other matters included in covered risks that is created, attaches, or is recorded in public records after date of policy but before recording of deed.	New express gap coverage.
Express statement that title co. will pay costs and attorneys' fees incurred in defense of insured matter to extent provided in conditions.	
Laws (including those relating to building and zoning) restricting, regulating, prohibiting or relating to occupancy, use and enjoyment of the land, dimensions, subdivision, environmental protection, or violations/enforcement thereof, or police pow-	Same.

ers (UNLESS covered under insuring clause, which covers if notice is recorded before date of policy).	
Rights of eminent domain (UNLESS covered by insuring clause, which covers if notice is recorded before date of policy).	Same.
Defects, liens, encumbrances, adverse claims and other matters (i) created, suffered, assumed or agreed to by the insured claimant; (ii) not known to the company, not recorded but known to the insured and not disclosed in writing; (iii) resulting in no loss or damage; (iv) attaching subsequent to date of policy (although this does not limit certain coverages that have post-policy elements); or (v) resulting in loss that would not have been sustained if insured had paid value for the insured estate.	Same.
Claim under bankruptcy or other creditor's rights laws that the insured mortgage is a fraudulent conveyance or preference UNLESS covered under insuring clause (which covers such matters occurring before the insured vesting transaction).	1970 policy does not have creditor's rights exclusion; this was one of the main objections to the 1992 policy (although insurers believe these matters were not covered under 1970 policy in any event). With 2006 policy, would need to request endorsement to delete creditor's rights exclusion. This is frequently available for routine purchase transactions.
Lien for taxes and assessments imposed between date of policy and recording of insured deed.	Not in 1970 policy; added as exception to new gap coverage in 2006 policy.
2006 Schedule A	1970 Schedule A
Same.	Same.
2006 Schedule B	1970 Schedule B
Same.	Same.
2006 Conditions	1970 Conditions
New definitions included for Amount of Insurance, Date of Policy, Entity, Title.	

Expanded definition of Insured, including successors in interest by operation of law (e.g., heirs and devisees) (same); holder of transferable electronic record; successors of entity conversions, dissolutions, mergers, reorganizations; grantee under deed given without consideration to affiliates and subsidiaries (intended to eliminate Fairway issue). (Note: all defenses are preserved against other insureds.)	Only includes successors by operation of law. Need to endorse to voluntarily transfer to subsidiaries or trusts.
Continuation of insurance.	Similar.
Notice of claim: insured to give prompt notice of litigation, knowledge of claim or rejection of title as unmarketable. Coverage is reduced to extent that failure of prompt notice prejudices title company.	Equivalent.
Proof of loss; duty to cooperate: Specifies details for proof of loss; includes duty to make books and records available; requires insured claimant to submit to examination under oath. Ninety day period deleted but cooperation is more onerous on insured than 1970 policy.	Includes requirement to give proof of loss within 90 days after loss is determined. Details on proof and cooperation not included.
Defense/prosecution of actions.	Equivalent.
Option or pay or settle.	Equivalent.
Extent of liability: includes new provision that if title company defends/prosecutes and is unsuccessful, amount of insurance is increased by 10 percent or insured has right to have loss determined either as of date of claim or date settled and paid.	Equivalent, except does not include bump up in damages if title company does not settle and unsuccessfully pursues litigation. (Note: does not include co-insurance provision in 1992 policy.)
Limitation on liability, reduction in insurance, termination of liability.	Equivalent.
Payment of loss within 30 days after definitely fixed.	Same.
Amount of insurance reduced by amounts paid to insured mortgagee.	Same.

Not included.	Apportionment: If policy covers more than one parcel and loss affects less than all, title company can pay on pro rata basis unless agreed value for each parcel is already established by endorsement.
Title co. rights of recovery after settlement and payment: title co. has subrogation rights but cannot exercise until insured has recovered its losses.	Similar.
Arbitration: requires arbitration under ALTA rules for policies of \$2 million or less. (AAA dropped its rules for title insurance disputes.)	Arbitration not included in 1970 policy and was objectionable feature for many lenders under 1992 policies (although only for policies of \$1 million or less, which eliminated most commercial policies). Endorsement can be requested to delete arbitration requirement.
Policy is entire contract: provides for incorporation of endorsements (which don't modify policy, extend date, or increase amount unless expressed) so this language won't appear in endorsements.	
Choice of law and forum is state where land is located.	Not included.

- Reminders when using 2006 Owner's Policy:

___ You need to request deletion of creditor's rights exclusion and affirmatively insure creditor's rights risk through ALTA Endorsement 21-06;

___ You need to request deletion of arbitration condition if policy is \$2 million or less.