

The Mutual Indemnification Agreement For Title Insurance in New York State

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Resolving an exception to title which should have been disposed of when a prior title insurance policy on the same property was issued used to regularly be a tortured process, often undertaken in haste on the eve of closing, sometimes even while a closing was in progress. The prior title insurance company or agent, once it received a written request for proof of how an exception was disposed of and could attend to it, had to first locate its file in order to respond. If the prior company was an agent and the proof was either not found or was inadequate, a letter of indemnification would have to be requested of the agent's underwriter. This proved to be an extremely inefficient process for facilitating the timely closing of titles.

On July 22, 2003, seven title insurance companies in New York State, following the lead of title insurers in Alabama and Florida, signed a Mutual Indemnification Agreement for the purpose of streamlining the process of clearing back title matters. This Agreement was expanded effective April 1, 2005 with the execution of the First Amended and Restated Mutual Indemnification Agreement ("First Restated Agreement"), and it was further amended effective April 1, 2006 by the signing of the currently governing Second Amended and Restated Mutual Indemnification Agreement (the "Second Restated Agreement"). A Memorandum of Mutual Indemnification Agreement, as amended and restated, explaining the operation of the Second Restated Agreement, has been distributed generally to title company personnel and agents.

Sixteen title insurers licensed in the State of New York are, as of the preparation of this article, signatories to the Second Restated Agreement. They are Chicago Title Insurance Company, Commonwealth Land Title Insurance Company, Conestoga Title Insurance Company, Fidelity National Title Insurance Company, First American Title Insurance Company of New York, Lawyers Title Insurance Corporation, Northeast Investors Title Insurance Company, Old Republic National Title Insurance Company, The Security Title Guarantee Corporation of Baltimore, Stewart Title Insurance Company, Ticor Title Insurance Company, Ticor Title Insurance Company of Florida, Titledge Insurance Company of New York, Inc., United General Title Insurance Company, Washington Title Insurance Company, and Westcor Land Title Insurance Company. Transnation Title Insurance Company of New York, an original signatory, has merged into Commonwealth Land Title Insurance Company. Each company has a designee, such as this author for First American, to administer the Second Restated Agreement and respond to questions as to its application.

The procedure that a title company or agent must follow under the Agreement is not complicated. Generally, if an exception to title is a "Covered Risk", as defined in the Second Restated Agreement, the title insurer to be indemnified (the "Indemnitee") has a copy of either the title insurance policy issued by or on behalf of the prior title insurer (the "Indemnitor") or a copy of the Indemnitor's marked-up title report, and the Covered Risk is not listed as an exception to title in the Indemnitor's title policy or marked-up report, the Indemnitor is deemed to indemnify the new insurer without further action on the part of either company. If the Covered Risk was excepted but insurance was afforded against collection or enforcement, the Indemnitee is indemnified by the prior title insurer, provided that the new title insurer similarly excepts but insures against collection or enforcement.

For the relationship of Indemnitor and Indemnitee to apply when the new title insurer, directly or by an agent, is issuing an Owner's policy, the Indemnitor must have issued either (i) an Owner's policy insuring the current record owner (or its successor under either title policy or title insurance Rate Manual provisions for the continuation of coverage), (ii) a Loan Policy when its insured, now transferring an interest in the property, has acquired title by a foreclosure of the insured mortgage or by a deed-in-lieu, or (iii) a Loan policy when the new proposed insured is acquiring title as the successful bidder in the foreclosure of the previously insured mortgage.

For a title insurer issuing a Loan policy to be an Indemnitee, the Indemnitor must have issued (i) an Owner's policy insuring the current record owner (or its successor under with title policy or title insurance Rate Manual provisions for the continuation of coverage), or (ii) a Loan policy when the Indemnitee is to be insuring the assignment, consolidation, extension, modification or the spread of the mortgage insured by the Indemnitor.

What is a "Covered Risk"? For a title policy issued by an Indemnitee after April 1, 2005, mortgages and money judgments (not including federal tax liens), and common charge liens filed by Condominium Boards of Managers, the liens of which have not expired by operation of law, against persons or entities out of title, each in an amount not exceeding \$500,000, can each be a Covered Risk, provided that no execution has been made or action commenced to foreclose or otherwise enforce the lien in question on the issue date of the Indemnitee's policy. For federal tax liens the limit is \$250,000 (as was the case also for mortgages and money judgments against a person or entity out of title for policies issued prior to April 1, 2005) for each federal tax lien.

For a title policy issued by an Indemnitee on and after April 1, 2006, a mortgage in the original principal amount that does not exceed \$750,000 is a Covered Risk, provided there no action has been commenced to foreclose or to otherwise enforce the mortgage on the date the Indemnitee issues its policy.

The First Restated Agreement added as a Covered Risk, for both an Owner's or Loan policy of the new insurer issued on and after April 1, 2005, a mortgage in the original principal amount of \$500,000 or less, open of record, made by the current record owner, not excepted in a Loan policy issued by an Indemnitor, when the proceeds of the mortgage insured by the Indemnitor were used to pay off that prior mortgage. For an obligation of indemnification to exist for this Covered Risk additional steps must be taken. The Indemnitee must obtain a copy of (i) the payoff letter for the mortgage, (ii) the certified, bank or attorney's escrow account check(s),

issued for payment of the amount stated in the payoff letter as due, and (iii) the letter with which payment was sent to the holder of the mortgage or its representative as stated in the payoff letter. The mortgage amount for this Covered Risk was increased by the Second Restated Agreement to \$750,000 for Indemnitee's policies issued on and after April 1, 2006.

Among other Covered Risks are proof of the death of a prior owner, the payment of estate taxes by, and exceptions relating to the devolution of title from, an Estate when a conveyance for consideration to a bona fide purchaser has been recorded, other devolution of title issues arising prior to the date of the Indemnitor's policy, and errors in the property description contained in a deed or conveyance (other than a mortgage) which was executed prior to the deed insured under an Indemnitor's Owner's policy, provided that the last insured deed contains the correct description.

Mechanic's liens, notices of pendency (and the related, underlying actions), real estate taxes and related tax liens, a federal tax lien in an amount greater than \$250,000, and, when the Indemnitee's policy is issued on and after April 1, 2006, a mortgage in an amount greater than \$750,000 are examples of matters which are identified in the Agreement as not being Covered Risks. For title issues that are not Covered Risks, proofs and formal letters of indemnification must still be obtained from the prior title agent and its insurer.

Notwithstanding the exclusion of certain matters from the scope of what are Covered Risks, the operation of the Mutual Indemnification Agreement has significantly limited the number of instances in which recourse must be made by a title insurer or agent to a prior company. As a result, the Agreement has simplified an important part of the title clearance process for closings in New York State.

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