

New Title Insurance Policies, Endorsements

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Title insurers in New York have in recent years made available a novel form of Owner's policy of title insurance, expanded the provisions of the governing Rate Manual filed with the New York State Insurance Department ("Department")¹ relating to the continuation of insurance under an Owner's title policy, and issued a number of new and revised forms of policy endorsements. One of the companies also now issues a policy to insure transactions involving the pledging of personal property collateral under the Uniform Commercial Code.² This article discusses those changes.

NEW TITLE POLICIES

The Department this year approved two new policy forms. The Title Insurance Rate Association ("TIRSA") Owner's Extended Protection Policy ("TOEPP") became available on January 11 and the Eagle 9 ? UCC Insurance Policy ("UCC Policy") became available on April 23. The TOEPP is a plain language, consumer-oriented alternative Owner's policy available to insure ownership by a natural person of improved property that is a residential condominium unit or a one-to-four family residence. The Eagle 9 TM policy provides perfection and priority insurance to a lender taking as collateral a security interest under Article 9 of the Uniform Commercial Code.

The TOEPP is substantially the same policy as First American's Eagle Protection Owner's Policy, which has been adopted by the California and American Land Title Associations and is issued in other states and usually identified as the "Eagle" policy. The TOEPP/Eagle policy affords an insured extensive additional title insurance protection. As with the standard ALTA 1992 form of Owner's title policy used in New York, the policy insures against actual loss, including costs, attorney's fees and expenses, incurred by reason of a "Covered Risk". These risks include the usual ALTA policy's insurance coverage, including protection for the "gap" to recording and against inchoate mechanics liens. The Eagle policy also includes other valuable protection.

The Eagle policy for the first time provides post-policy coverage for a variety of items. The policy insures, for example, against loss if, after the policy date, a forgery affecting the insured's title occurs, an easement burdening the insured title is asserted, or a structure (other than boundary walls or fences) is built on a neighboring property which encroaches onto the insured

premises. This post-policy protection would have been invaluable to 11 homeowners in Brooklyn whose properties, it was reported in major daily newspapers last August, were fraudulently conveyed between 1996 and 1998 by the same person. Expenses to clear record title would not be protected against under a standard title policy.

Insurance over matters relating to the regulation of the use of land is also made available to a homeowner, subject to deductibles and maximum dollar limits of liability. The policy protects a homeowner unable to obtain a building permit due to a violation of a subdivision law or regulation existing at the policy date or required to correct or remove an improvement made in violation of subdivision requirements.

The insured also has policy coverage if required to remove a structure (other than boundary walls and fences) existing on the policy date because any portion of the structure was built without a proper building permit or otherwise violates a zoning ordinance. There is also coverage against the inability of the insured to use the land for a single-family residence due to a violation of applicable zoning. The premium for the Eagle Policy is 120 percent of the regular Owner's policy rate.

Although the Eagle Policy provides that the amount of insurance automatically increases by 10 percent each year for the first five years, up to 150 percent of the policy amount, the Department requires a Market Value Rider endorsement be made available even when an Eagle Policy is issued.³ Accordingly, TIRSA filed with the Department a Market Value Policy Rider endorsement to be used with the TOEPP. It deletes the provision of the TOEPP that automatically increases the policy amount and provides standard market value rider coverage. The charge for the endorsement is 5 percent of the policy premium.

The other new policy in New York is the UCC Policy available from the First American Title Insurance Company of New York (of which the author is an officer). This policy insures a lender, as of the policy date, against actual loss or damage sustained due to the failure of the insured security interest to "attach", or be effective, as against the debtor. The UCC Policy further insures that the lender's security interest is properly "perfected", assuring the lender, for example, that (i) any required financing statement meets the requirement of Revised Article 9 as to form and content and was filed in the proper filing office, and (ii) the insured lender's security interest is not subject to, and is enforceable against, the interests of other secured parties. The company will pay costs, legal fees and expenses incurred in defending the insured security interest if it is asserted that the insured security interest is not valid or enforceable or does not have the priority as insured.⁴

CONTINUATION OF INSURANCE

Often asked is whether and under what circumstances a transferee of an interest in real property situated in New York State may succeed to the benefits of a title policy issued to its transferor. This issue usually arises when a gift transfer is being made or when title is being transferred to an entity in which the insured will retain all beneficial interests. Whether the transferee has rights under an existing Owner's policy depends on the date on which the policy was issued.

The ALTA forms of Owner's policy issued in New York since 1990 and the New York Board of Title Underwriters ("NYBTU") policy form (available prior to the adoption of the ALTA Owner's policy) provide, in effect, that the term "insured" includes those who succeed by operation of law and not by purchase. Included amongst those who would succeed by operation of law are an insured's heirs, distributees, devisees, survivors, personal representatives, next of kin and corporate or fiduciary successors. The NYBTU form did not, and the ALTA forms have not included within the definition of "insured" other transferees, such as family members and entities wholly owned by the insured, which might take title without consideration from the insured under an owner's policy.

The NYBTU Rate Manual did, however, expand the range of transferees that would be deemed insured under an Owner's policy. Policy liability would also continue, as of the original policy date, to transferees that were members of the insured's immediate family and who obtained the insured interest without consideration, and also transferees of real property when there was no real change in beneficial ownership. These provisions, as to no consideration transfers, were considered equitable extensions of the policy provisions.

Although there are Owner's policy endorsements which do continue policy liability as of the original policy date on conversion of an insured owning entity to a Limited Liability Company or a Limited Liability Partnership and on the transfer of title from an insured Industrial Development Agency back to the true beneficial owner of the premises, the expansive provisions of the NYBTU Rate Manual were not continued when the ALTA Owner's policy form was adopted in New York in 1990. A family member or an entity related to an ALTA Owner's policy insured could purchase a new title policy.

At least that was the situation for ALTA Owner's policies of title insurance issued prior to January 28, 1999 when an amendment to the TIRSA Rate Manual on "Continuation of Insurance" took effect. For an Owner's policy issued on and after January 28, 1999 there is (subject to any rights and defenses the insurer has against the insured) continuing liability to the insured's grantee if title is transferred for no consideration (i) to, from and between corporations, partnerships, limited liability companies, and individuals for no consideration where there is no change in beneficial ownership; (ii) to a member of the named insured's "immediate family" (as defined in the Rate Manual); or (iii) to a trust created by the named insured in which all beneficiaries are the insured or members of his or her "immediate family". Taking title subject to a mortgage does not for the continuation of coverage mean, without more, that there is a transfer for consideration.

Notwithstanding the Rate Manual provision for the continuation of coverage to a transferee from a named insured, there is no change made to the policy date and no coverage is afforded for the validity, form and sufficiency of the instrument(s) effecting the transfer. In addition, the change only applies to Owner's policies issued on and after January 28, 1999. The issue of continuing coverage to a transferee thus remains an issue for the transferee of an interest insured under an ALTA Owner's policy issued before that date.

When the policy is an ALTA Owner's policy issued before the change, the transferee may choose to rely on Section 2 of the Conditions and Stipulations of the ALTA Owner's policy. Under that

Section, the coverage of the policy continues in force as of its original date for the benefit of the named insured so long as the insured has liability under covenants of warranty contained in the instrument of transfer. Accordingly, the insured may execute a deed or assignment of an insured estate that includes an express warranty of title to the interest being transferred. If there is a title claim, the transferee would make a claim against the insured which would proceed under its title policy. However, the common law may act to extend the liability of the transferor under its warranty to even remote grantees, which may render this option less than compelling.⁵

ENDORSEMENTS

Contiguity, Mortgage Tax, Partial Release of Mortgaged Premises, and Tax Parcel endorsements became available on December 27, 2000, and an Access endorsement became available on October 22, 1999. They enable a uniform response to lender requests that certain formal endorsements be available in New York, instead of the lender merely relying on affirmative assurances added to Schedule B of the policy. These are (excepting as to the Contiguity endorsement that may also be issued on an Owner's policy and the Market Value Rider for the TOEPP Policy), Loan policy endorsements. The cost for each of these endorsements, which can be issued following underwriting review, is minimal.

The Access endorsement insures the lender against loss if the land insured does not abut upon an identified physically opened street. The policy form, without the endorsement or affirmative insurance, only insures a right of legal access to and from the land. The Contiguity endorsement applies if there is more than one parcel being insured and coverage is required that the legal descriptions of those parcels are contiguous along a common boundary line. The Partial Release of Mortgaged Premises endorsement assures a lender that an insured mortgage remains a valid and enforceable lien on that portion of the mortgaged premises not being released.

The Mortgage Recording Tax endorsement insures the owner of the insured indebtedness against loss or damage that may be sustained if mortgage recording taxes have not been paid. This endorsement acknowledges a general understanding that since a Loan policy insures the enforceability of the insured mortgage, the failure to pay mortgage recording tax is within the scope of the policy coverage. A mortgage subject to recording tax cannot under New York law be foreclosed unless the tax is paid.⁶

Revised endorsements, available at a minimal cost, include Environmental Protection Lien ("8.1 Endorsements"), "Industrial Development Agency or Similar Public Benefit Corporation Transfer to Beneficial Owner endorsement" ("IDA Endorsement"), "New York City 'Development Rights'", and "Waiver of Arbitration" endorsements. These revisions were approved on April 24, 2001, except for the IDA endorsement, the revision of which was effective on December 27, 2000.

The 8.1 Endorsements afford a lender protection over filed environmental protection liens not excepted in Schedule B (other than those relating to specified sections of the Public Health Law and New York City's Administrative Code). These endorsements were modified to delete the limitation that the endorsement could only be issued in connection with a loan on land used or to be used primarily for residential purposes.

The former New York City "Air Rights" endorsement was changed to more accurately identify such transactions as involving "development rights", and it is therefore now captioned the New York City "Development Rights" endorsement. Other corrections and non-substantive changes were made to the text of the endorsement. The separate Owner and Loan policy endorsements providing for the waiver of the provision for arbitration in the Conditions and Stipulations of the policies were combined into a single Waiver of Arbitration form. The new form also deletes the arbitration provision in the TOEPP when it is affixed to that policy.

The IDA Endorsement is attached to an Owner's policy at the time of its issuance to an IDA to later automatically afford the benefits of that policy to the IDA's grantee. Under the endorsement as previously revised on January 28, 1999, the grantee had to be either the grantor of the deed that conveyed title to the IDA or that grantor's nominee. The revision expands the coverage of the endorsement to include transactions involving Public Benefit Corporations similar to an IDA (collectively herein the "IDA"). It also defines the term "nominee" to include certain relationships to the Beneficial Owner that will allow a related entity to succeed to the coverage of the endorsement. Further, it extends the benefits of the endorsement to an unrelated assignee of the leasehold made by the IDA back to the Beneficial Owner or its nominee, provided that the assignee's leasehold interest was insured by the title company that issued the Owner's policy to the IDA. The IDA endorsement may obviate the need to obtain a new Owner's policy when the IDA conveys fee title to the lessee.

The Mezzanine Financing Endorsement, available as of April 24, 2001, is an endorsement to an Owner's policy issued at 30% of the policy's premium. It provides for payment of a loss under the related Owner's policy to a mezzanine lender and it affords the lender some degree of "First Loss", "Fairway", and "Non-Imputation" coverage.⁷

On October 22, 1999, the former TIRSA Contract Vendee endorsement was renamed the TIRSA Residential Contract Vendee endorsement. It now applies only to a contract to purchase a one to four family residence. The Insurance Department also approved Commercial Contract Vendee and Option endorsements.

The Commercial Contract Vendee and Option endorsements insure against loss or damage to an insured vendee or optionee if the insured interest is held to be unenforceable by a reason other than the vendee or optionee's failure to fulfill the terms of the contract or option. Insurance is afforded against loss or damage if either a bankruptcy trustee or the contract vendor/optionor (or its successor record titleholder) as a debtor in possession refuses to convey and the insured is in possession of the land. There is also coverage against the inability of the insured to take title free of adverse interests not excepted in the title policy, as endorsed. The Vendee and Option endorsements list exceptions to coverage.

The amount of title insurance under either of the Commercial Contract Vendee or Option endorsements must be for an amount that is not less than the down payment, but the coverage can be increased to include amounts representing the cost of contemplated improvements and other development and construction costs the vendee or optionee may incur, including (i) reasonable legal fees and other expenses for obtaining building and occupancy permits; (ii) architectural, engineering and construction management fees; (iii) the cost of environmental

testing and review and landscaping; and (iv) interest on loans obtained for the construction of the building and improvements.

The liability of the title insurer under these endorsements increases when covered expenses are paid so long as the insured has no actual or constructive notice of any defect in or objection to title. To resolve the objection that the insured ought not to be impacted by matters affecting title which are of record and not actually known to it, the Commercial Contract Vendee and Option endorsements provide that the insured may elect for the policy to be downdated to the date on which a subsequent payment is made under the contract or option or a covered expense is incurred. The Date of Policy, subsequent to which certain title matters are excepted from coverage, is defined to be the original policy date or the date of the last downdate of the coverage.

The pricing for these two endorsements and the credit available on the subsequent purchase of an Owner's policy by the vendee or optionee when it takes title should be discussed with a title company representative.

There has been an expansion in the number and scope of title insurance policies and endorsements in New York. Taking advantage of them as they apply to a transaction can be beneficial.

¹The Title Insurance Rate Manual, title policies and endorsements, are generally filed by the Title Insurance Rate Service Association ("TIRSA") on behalf of its member title insurance companies with the New York State Insurance Department for approval prior to issuance.

²The Eagle 9 TM UCC Insurance Policy was filed independently by the First American Title Insurance Company of New York.

³Insurance Law Section 6409(c) requires each title insurer to offer "an optional policy form which will insure the title of owner-occupied real property used predominantly for residential purposes which consist of not more than four dwelling units for an amount equal to the market value of the property at the time a loss is discovered".

⁴For a more extensive discussion of the UCC Policy, and a comparison with the Mezzanine Financing endorsement, see Berey, "Article 9 Products - Covering Mezzanine Loan Financing in New York", New York Law Journal, June 13, 2001.

⁵See 6 Warren's Weed New York Real Property, "Warranty" (Matthew Bender, 2001).

⁶Tax Law Sections 253 and 258(1).

⁷See Berey, "Article 9 Products - Covering Mezzanine Loan Financing in New York", New York Law Journal, June 13, 2001.

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