

New Title Insurance Policies In New York

*By Michael J. Berey
Senior Vice-President and Senior
Underwriting Counsel
First American Title Insurance Company of
New York*

On June 17, 2006 the American Land Title Association ("ALTA") approved a 2006 ALTA Owner's Policy, a 2006 ALTA Loan Policy, and a 2006 ALTA Short Form Residential Loan Policy (One-to-Four Family). The 2006 ALTA Owner's Policy and 2006 ALTA Loan Policy, as amended by revised forms of Standard Endorsements, and the ALTA's 2006 Short Form Residential Loan Policy (One-to-Four Family) with Title Insurance Rate Service Association, Inc. ("TIRSA") Amendments, were approved by the New York State Insurance Department effective May 1, 2007.

Whether previously policy forms will be available in a particular State depends on state regulatory requirements or procedures implemented by each title insurer. In New York, under the revised TIRSA Rate Manual as approved by the State Insurance Department, the 1992 ALTA Owner's and Loan Policies (the "1992 Policies") and the 1992 Short Form Residential Loan Policy cannot be issued for a transaction closing on or after May 1, 2007.

In addition to the New York Standard Endorsements, other TIRSA Endorsements were revised, effective May 1, to correspond their text to the 2006 ALTA Owner's and Loan Policies. The TIRSA Limited Liability Company and Limited Liability Partnership Endorsement, issued with the 1992 ALTA Owner's Policy, and the TIRSA Last Dollar Endorsement and the TIRSA Survey Endorsement (Loan Policy) (1-4 Family), issued with the 1992 ALTA Loan Policy, were withdrawn and will not be issued with the 2006 ALTA Owner's and Loan Policies, for the reasons noted below.

The 2006 ALTA Owner's Policy, as amended by the revised form of New York Standard Endorsement, has eleven Covered Risks; the 1992 ALTA Owner's Policy in New York had five Insuring Clauses. The 2006 ALTA Loan Policy has fourteen Covered Risks; the 1992 ALTA Loan Policy in New York had eight Insuring Clauses. A number of the Covered Risks were, in the 1992 Policies, carve outs from Exclusions From Coverage. For example, the 1992 Policies excluded claims arising out of the transaction creating the insured interest resulting from the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws due to the insured transaction been deemed a preferential transfer, unless the claim of preferential transfer resulted from the failure to timely record the instrument of transfer. The 2006 Policies include as

a Covered Risk a claim of preferential transfer resulting from the failure of the insured instrument of transfer vesting Title or the Insured Mortgage to be timely recorded. Changing what were formerly exclusions to Exclusions from Coverage in the 1992 Policies to Covered Risks in the 2006 Policies was in response to Court decisions which did not look beyond the Insuring Clauses of the 1992 Policies to find coverage benefitting the Insured. [1]

Included among the Covered Risks in the 2006 Policies is coverage against matters that have been created or attached, or filed or recorded in the Public Records, after closing but prior to the recording of the insured instrument (so-called "Gap" coverage), limited in an Exclusion From Coverage amended by the revised New York Standard Endorsements to exclude real estate taxes, assessments, water charges and sewer rents, and coverage against loss resulting from a claim that a transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction vesting Title, in the case of an Owner's Policy, or prior to the transaction creating the lien of the Insured Mortgage, in the case of a Loan Policy, was a fraudulent or preferential transfer.

Under the 2006 ALTA Owner's and Loan Policies the Amount of Insurance will increase by 10% if the Insurer pursues its rights under Policy Condition 5 ["Defense and Prosecution of Actions"] and is unsuccessful in establishing the Title or the lien of the Insured Mortgage, as insured. In addition, in such an event, the Insured will have the right to have the loss determined either as of the date the claim was made or as of the date the claim is settled and paid.

In the 2006 ALTA Owner's and Loan Policies the threshold up to and including which either the Insured or the Company can require arbitration has been increased to \$2,000,000, from \$1,000,000 in the 1992 ALTA Policies. The ALTA's Title Insurance Arbitration Rules, instead of the Title Insurance Arbitration Rules of the American Arbitration Association, as provided in the 1992 ALTA Policies, will apply to a matter in arbitration.

The 1992 ALTA Owner's Policy had limited provisions for the continuation of policy coverage on the transfer of title to a related person or entity. TIRSA added a "Continuation of Insurance" section to its Rate Manual effective January 28, 1999 to allow for the continuation of the benefits of the 1992 ALTA Owner's Policy as of the original Date of Policy if title was transferred without consideration to an immediate relative of the insured or to an entity in which the interests were held by the insured. The 2006 ALTA Owner's Policy, on the other hand, includes an expansive definition of the "Insured" which allows for the continuation of Policy coverage as of the original Date of Policy for the benefit of, for example, a successor to the Insured "by dissolution, merger, consolidation, distribution or reorganization" and the grantee of the Insured which is wholly owned by the Insured or by an affiliated Entity of the Insured. This renders unnecessary the TIRSA Limited Liability Company and Limited Liability Partnership Endorsement which will not, therefore, be issued with a 2006 ALTA Owner's Policy. The TIRSA Rate Manual was amended to make it clear that the Rate Manual's provisions for the Continuation of Coverage are supplemental to those in the 2006 ALTA Owner's Policy.

The 2006 ALTA Loan Policy similarly extends the benefits of the Policy to other persons or Entities including, for example, "successors to an Insured by dissolution, merger, consolidation, distribution or reorganization" and "the person or entity who has 'control' of the 'transferable

record' if the indebtedness is evidenced by a 'transferable record', as these terms are defined by applicable electronic transactions laws". The latter was presumably intended to include with the definition of "Insured" administration by the Mortgage Electronic Registration System ("MERS") of the obligation secured an insured Mortgage.

The 2006 ALTA Loan Policy includes a Coverage Risk affording survey coverage to an insured lender even when there is no survey. This Covered Risk, as modified by the revised New York Standard Endorsement, is limited in New York to those instances in which the Land in question is land improved by a one-to-four family dwelling. When there is no survey reading or survey exception raised in the Policy, this Covered Risk eliminates the need for a TIRSA Survey Endorsement (Loan Policy) (1-4 Family); that Endorsement will, therefore, not be issued with a 2006 ALTA Loan Policy. An appropriate affidavit and underwriting review will typically be required for this Policy coverage to be effective, without a general survey exception being added to the Policy. The Covered Risk affording survey coverage in the 2006 ALTA Owner's Policy has been deleted by the revised New York Standard Endorsement for that Policy.

The Conditions and Stipulations of the 1992 ALTA Owner's Policy provided for the Insured to be a coinsurer in the event of a loss under certain circumstances and the manner in which a loss would be apportioned if more than one parcel was insured in the same Owner's policy. These Coinsurance and Apportionment provisions of the the 1992 ALTA Owner's Policy are not included in the 2006 ALTA Owner's Policy.

Although so-called "last dollar" text, stating that only the last dollars repaid are those secured by the mortgage when the indebtedness is or may be greater than the secured amount, when applicable, may be required for a mortgage to comply with the requirements of New York State's mortgage recording tax and to enable issuance of the Mortgage Recording Tax endorsement without an policy exception, the "last dollar" provision of the Conditions and Stipulations in the 1992 ALTA Loan Policy ("payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage...shall reduce the amount of insurance pro tanto") is not included in the 2006 ALTA Loan Policy. The TIRSA Last Dollar Endorsement will not, therefore, be issued with an 2006 ALTA Loan Policy.

In addition, the Liability Noncumulative section in the Conditions and Stipulations of the 1992 ALTA Loan Policy is not included in the Conditions of the 2006 ALTA Loan Policy. Under that provision of the 1992 ALTA Loan Policy, policy coverage for a lender making a loan secured by a subordinate mortgage would be reduced by amounts paid under a loan policy issued to insure the lien of the senior mortgagee.

Lastly, for this article, the 2006 ALTA Loan Policy contains a new definition of "Indebtedness", which includes, as did the 1992 ALTA Loan Policy's subsection on Amount of Insurance, the principal of the loan disbursed as of the Date of Policy, interest on the loan, the expenses of foreclosure and any other costs of enforcement, amounts advanced to insure compliance with laws or to protect the lien or the priority of the lien of the insured mortgage, and reasonable amounts expended to prevent the deterioration of improvements. However, the definition of "Indebtedness" in the 2006 ALTA Loan Policy also includes as compensable items the amount of principal disbursed subsequent to the Date of Policy, prepayment premiums, exit fees, and other

similar fees or penalties allowed by law, and amounts expended by the insured lender to pay taxes and insurance.

Under Subsection 8(a) ["Determination and Extent of Liability"] of the Conditions of the 2006 ALTA Loan Policy, the liability of the Insurer under the policy will not exceed the least of the (i) the Amount of Insurance, (ii) the Indebtedness, (iii) the difference between the value of the Title as insured and as subject to the risk insured against, or (iv) if a governmental agency or instrumentality is the Insured Claimant the amount it paid to acquire the Title or the Insured Mortgage in satisfaction of its insurance contract or guranty.

Payments to an Insured lender in the event of a claim under the 2006 ALTA Loan Policy which reduces the Indebtedness will reduce the Amount of Insurance. Payments under the 2006 ALTA Loan Policy which do not reduce the Indebtedness do not reduce the Amount of Insurance.

Purchasers of real property, lenders, and their counsel, on a review of the 2006 ALTA Owner's and Loan Policies, should conclude that these new policies afford expanded coverage and are otherwise improvements over the 1992 Policy forms.

1. "2006 ALTA Policy and Endorsement Forms", Paul L. Hammann, Underwriting Director, and Senior Underwriting Counsel, First American Title Insurance Company, posted at <http://www.firstam.com/listshortcut.cfm?id=5282>.

Published in the New York Law Journal on May 30, 2007