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Review of the New Title Insurance Endorsements

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A proper course on endorsements and affirmative coverage must begin with a short ‘refresher’ on title insurance basic principles so the topic can be studied in proper context.

TITLE INSURANCE BASICS: A REFRESHER SUMMARY

To protect against defects in real property titles, Title Insurance Companies were formed in the United States over 100 years ago. Title insurance is a single premium contract of indemnity. If the title is other than as represented on the face of the policy, and if the insured suffers a loss caused by covered defects, the insurer will reimburse the insured for that loss and any related legal expenses, up to the face amount of the policy.

Title Insurance is different from other forms of insurance in a couple of ways. It gives coverage for events or matters that may have occurred in the past versus in the future. It is not issued based on an ‘actuarial table’ or other mathematical calculation, but upon a careful review of the specific title documents.

A title insurance policy is usually issued in a standard format. The most popular forms of title insurance coverage are the American Land Title Association (ALTA) Owner’s Policy, the ALTA Long Form Loan Policy and ALTA Short Form Loan Policy. The latest version of these Policies is the 2006 Form.

A title policy is divided into parts: the Insuring Provisions (coverage), the Exclusions and the Conditions, with the Schedules A, B and B-2 as attachments. The coverage of the 2006 Policy is significantly broader from the prior ALTA 1992 form.

On the first page of both the Owner's and Loan ALTA Policy is a statement of the coverage provided by the title insurer, incorporating by reference Schedules A and B. Schedule A identifies the basic elements of the contract such as the date of the policy, amount of insurance, name of the insured, and the Land subject to the policy. Schedule B identifies the specific exceptions from coverage.

Next follows a number of "Exclusions" from coverage. Exclusions are standardized general exceptions to the policy's coverage and are contained in each of the Policy forms. The next section contains the 'Conditions' of the policy which set out the necessary contractual provisions of the indemnity, such as the procedure for asserting a claim, definition of terms, as well as the process for determining a loss and the amount payable in the event of a loss.

The final portion of the Policy, Schedule B, sets out the particular "Exceptions" to coverage. These exceptions are specific defects or encumbrances affecting the title to the property described in Schedule A. "Exclusions" are easily distinguished from "Exceptions." "Exclusions" are matters not covered by the basic policy, while a Schedule B 'Exception' is a matter that would be covered by the insuring provisions but for the itemization of the particular exception.

ENDORSEMENTS

An endorsement is an amendment to the contract of indemnity. It is directed to some policy provision of special concern to the insured. To issue an endorsement additional research or investigation, termed 'underwriting,' is required to determine if the endorsement can or should be issued. In commercial transactions, an extra premium is usually charged for the additional risk. Endorsements can also provide the insured specific affirmative coverage against loss arising out of a known defect. The number and types of endorsements are limited only by the insurer's willingness to assume the risk for the premium, and the satisfaction of all state regulatory matters governing the authority of title insurers to provide coverage. Title insurance underwriters are willing to accept the basic risks for the base premium; however, if the title insurer is asked to increase or enhance coverage, by endorsement, it will evaluate the additional risk on an individual basis and may require supplemental documentation, indemnification and/or an additional premium.

Endorsements are restricted and obtained only by underwriting approval and obtained by payment of the established premium.

One may categorize endorsements according to which portion of the Policy they are directed. Endorsements may be directed to a specific Insuring Provision, Exclusion, Condition or a Schedule A or B provision. The purpose may be either to remove, limit, clarify, expand or affirmatively insure for the particular matter or portion of said matter.

Studying endorsements by considering this categorization is only one tool, and the categories and endorsements do overlap.

A. Expanded Coverage Endorsements

1. ALTA 7 Series: Expands the definition of “Land”

- a. ALTA 7-06 (Manufactured Housing Unit) [Adopted 6/17/06]:
“Land” includes the manufactured housing unit.
- b. ALTA 7.1-06 (Manufactured Housing –Conversion; Loan) [Adopted 6/17/06]: Adds expanded affirmative coverage to address the personal property issues of a manufactured home.
- c. ALTA 7.2-06 (Manufactured Housing – Conversion; Owner’s) [Adopted 6/17/06]: Adds expanded affirmative coverage to address the personal property issues of a manufactured home.

2. ALTA 10 Series (Loan Only): Expands coverage for the lender

- a. ALTA 10-06 (Assignment) [Revised 2/3/10]
- b. ALTA 10.1-06 (Assignment and Date Down) [Revised 2/3/10]

3. ALTA 11 Series (Loan Only): Expands and extends coverage for a lender

- a. ALTA 11-06 (Mortgage Modification) [Adopted 6/17/10]

- b. ALTA 11.1-06 (Mortgage Modification with Subordination)
[Adopted 10/22/09]
 - c. ALTA 11.2-06 (Mortgage Modification with Additional Amount of Insurance Endorsements)
- 4. ALTA 12 Series: Essentially increases amount of coverage available for a loss**
- a. ALTA 12-06 (Aggregation) [Adopted 6/17/06]: Loan Only.
 - b. ALTA 12.1-06 Aggregation – State Limits – Loan Policy Endorsement
- 5. ALTA 15 Series: Includes affirmative coverage over Condition 1(d) and Exclusion 3(a)**

When issuing any of the ALTA 15 series endorsements, a non-imputation affidavit with indemnity is required from all the outgoing and remaining equity participants in the entity. The affidavit certifies that they have not done any acts and have no knowledge of any matters or facts that would affect title to the property except as disclosed therein. Current financial statements may also be required from each affiant/indemnitor to demonstrate the ability to support the indemnity.

- a. ALTA 15-06 (Nonimputation - Full Equity Transfer) [Adopted 6/17/06]: The 15-06 addresses the transaction when all of the

ownership interests of an entity are transferred to a new party (or parties) and a new Owner's Policy is issued to the incoming owner(s).

- b. ALTA 15.1-06 (Nonimputation – Additional Insured) [Adopted 6/17/06]: The 15.1-06 is designed for transactions where less than all of the equity interests in the entity are being transferred and an existing Owner's Policy is endorsed to add an incoming party (or parties) as additional insured(s). This endorsement only protects the incoming party or parties as of the effective date of the policy. This endorsement contains a signature block for the insured entity to indicate its consent to the additional insured party or parties, because the endorsement provides that any payment made under this endorsement will reduce the amount of insurance otherwise available under the policy.

- c. ALTA 15.2-06 (Nonimputation – Partial Equity Transfer) [Adopted 6/17/06]: The 15.2-06 is designed for transactions where less than all of the equity interests in the entity are being transferred and the incoming party obtains its own new Owner's Policy insuring its interest.

6. **ALTA 17 Series:** Expands the coverage to “actual” pedestrian and vehicular access.
 - a. ALTA 17-06 (Access and Entry) [Adopted 6/17/06] (public road)
 - b. ALTA 17.1-06 (Indirect Access and Entry) [Adopted 6/17/06] (by easement)
 - c. ALTA 17.2-06 (Utility Access) [Adopted 10/16/08] (utility facility)

7. **ALTA 18 Series:** Clarifies the description of the ‘Land’
 - a. ALTA 18-06 (Single Tax Parcel) [Adopted 6/17/06]
 - b. ALTA 18.1-6 (Multiple Tax Parcel) [Adopted 6/17/06] (adds easement tax sale coverage)

8. **ALTA 19 Series:** Clarifies and expands coverage
 - a. ALTA 19-06 (Contiguity – Multiple Parcels) [Adopted 6/17/06]:
Contiguity of the insured parcels to each other.
 - b. ALTA 19.1-06 (Contiguity – Single Parcel) [Adopted 6/17/06]:
Contiguity of the “single tract” of insured “Land” to the adjoining land.

9. **ALTA 22 Series:** Street Address

- a. ALTA 22-06 (Location) [Adopted 6/17/06]
- b. ALTA 22.1-06 (Location and Map) [Adopted 6/17/06]

10. ALTA 25 Series: Clarifies and expands the definition of the ‘Land’

- a. ALTA 25-06 (Same as Survey) [Adopted 10/16/08]
- b. ALTA 25.1-06 (Same as Portion of Survey) [Adopted 10/16/08]

11. ALTA 28 Series

- a. ALTA 28-06 (Easement – Damage or Enforced Removal) [Revised 2/3/10]: Encroachments onto Easements for Existing Buildings only – *Loan Policy Only*
- b. ALTA 28.1-06 (Encroachments – Boundaries and Easements) [Adopted 4/2/12]: Existing encroachments over boundaries and easements – has a “carve out” for matters not to be insured.
- c. ALTA 28.2-06 – Boundaries & Easement – Described Improvements Endorsement

B. ‘Exclusion’ Endorsements

- 1. ALTA 2-06 (Truth in Lending):**

- a. ALTA 2-06 (Truth in Lending) [Adopted 6/17/06]: Extends coverage for a portion of Exclusion 5, Truth in Lending relative to the right of recession.
- 2. ALTA 3 Series: Exclusion 1 for Owner's and Loan**
- a. ALTA 3-06 (Zoning) [Adopted 6/17/06]: Basic zoning affirmative coverage.
 - b. ALTA 3.1-06 (Zoning – Completed Structure) [Revised 10/22/09]: Basic zoning with additional specific affirmative matters (e.g., parking spaces, height, etc.)
 - c. ALTA 3.2-06 (Zoning – Land Under Development) [Adopted 4/2/12]: Similar to the 3.1-06 but includes future development if done in accordance with plans.
- 3. ALTA 8 Series: Exclusion 1**
- a. ALTA 8.1-06 (Environmental Protection Lien) [Adopted 6/17/06]: Residential
 - b. ALTA 8.2-06 (Commercial Environmental Protection Lien) [Adopted 10/16/08]: Not limited to Residential
- 4. ALTA 24: Exclusion 4 – Loan Policy**

- a. ALTA 24-06 (Doing Business) [Adopted 10/16/08]: When insured lender may not be formally qualified to do business in the state.

5. ALTA 27: Exclusion 5

- a. ALTA 27-06 (Usury) [Adopted 10/16/08]: Affirmative coverage for the states usury law.

C. 'Conditions' Endorsements

1. ALTA 13 Series: Minor clarifications for the Owner's and Loan Policies

- a. ALTA 13-06 (Leasehold – Owner's) [Revised 4/2/12]
- b. ALTA 13.1-06 (Leasehold – Loan) [Revised 4/2/12]

2. ALTA 14 Series: Expands definition of “Indebtedness” in paragraph 1 Conditions

The ALTA 14 Endorsements were designed for loans that involve future advances or revolving credit. The ALTA 14-06 is used when optional future advances are entitled to the same priority as obligatory advances. If the applicable state law limits priority for advances made after the date the lender has received actual or written notice of any lien, then the proper form is the ALTA 14.1-06 which expressly excludes coverage if the insured had actual knowledge of an intervening matter. Both the ALTA 14-06 and 14.1-06 ensure that the lender can re-advance funds and the lien will retain its priority even if the outstanding loan balance reaches zero. Exception is made for advances made after

the borrower's bankruptcy, loss of priority as the result real estate taxes and assessments, federal tax liens, environmental liens, or usury. They also (along with the ALTA 14.2-06 Endorsement) have an optional (bracketed) exception for mechanic's lien. Endorsement Form 14.2-06 is designed for the situation where the mortgage or deed of trust secures a reimbursement obligation for "future advances" by the lender under a letter of credit or surety bond. The mortgage or deed of trust should state that the lien continues to exist and the reimbursement agreement remains in full force and effect even if there is currently no outstanding balance due.

- a. ALTA 14-06 (Future Advance – Priority) [Revised 2/3/11]
- b. ALTA 14.1-06 (Future Advance – Knowledge) [Revised 2/3/11]
- c. ALTA 14.2-06 (Future Advance – Letter of Credit) [Revised 2/3/11]
- d. ALTA 14.3-06 (Future Advance – Reverse Mortgage) [Revised 2/3/11]

3. ALTA 16: Owner's Policy

- a. ALTA 16-06 (Mezzanine Financing) [Adopted 6/17/06]: Title Insurance for equity financing.

This endorsement is designed for use with new Owner's Policies where the equity interests (one-hundred percent or less) in the insured entity is being pledged as security for a mezzanine loan. The mezzanine lender wants to make sure there is an Owner's

Policy in place insuring the vestee entity's ownership of the title free of undisclosed liens and other defects and that the mezzanine lender has rights under an Owner's Policy to any payments otherwise payable to the insured entity.

4. ALTA 20: Item 8 of Conditions – Loan Policy

- a. ALTA 20-06 (First Loss-Multiple Parcel Transactions) [Adopted 6/17/06]: One should underwrite the title issues when the First Loss endorsement is requested for a loan policy as one would when issuing an owner's policy. The ALTA 20-06 entitles a mortgage lender, in multi-property transactions, to payment on a loss without first requiring foreclosure of all the properties secured by the mortgage or deed of trust.

5. Deletion of Arbitration: Language in jacket deletes Condition 13 in the Loan policy and 14 in the Owner's policy.

NEW ALTA ENDORSEMENTS

In 2011, ALTA was prepared to issue several new endorsements and revisions to the ALTA 9 series of endorsements. However, early in 2011 a case was decided in the U.S. District Court for the Eastern District of Pennsylvania that changed the action plan of ALTA. The holding of Nationwide Life Ins. C. v. Commonwealth Land Title Ins. Co., No. 05-281, 2011 WL 611802 (E.D. Pa. Feb. 17, 2011) (*Affirmed __F. 3d __, 2012 WL 3004938 (C.A. 3(Pa.)) was contrary to the industry understanding of the ALTA 9 (1) (b)(ii) “covenants, conditions, restrictions” coverage extended by the ALTA 9 endorsement. The proposed ALTA 9 endorsements and other proposed endorsements set to be released were withdrawn for reconsideration. ALTA made revisions, and published the forms for comment in early 2012. Soon thereafter, as of April 2, 2012, ALTA had approved fifteen (15) new and seven (7) revised endorsements.

A. The ALTA 9 ‘Restrictions, Encroachments and Minerals’ Endorsement Series:

The most comprehensively revised endorsement series was the ALTA 9 Restrictions, Encroachments and Minerals series. The extent of the revisions has resulted in some confusion for practitioners relative which form should be utilized for a particular transaction. Some of the revisions to the ALTA 9 series were: (i) adding a preamble to reassert the applicability of the policy terms, (ii) removing the old Section 1(b)(ii) and placing a revised version of the Section 1(b)(ii) language in the New ALTA 9.6-06 Private Rights, and (iii) eliminating the Section 2 coverage for encroachments and

minerals from the ALTA 9.1, 9.2 and 9.3. {See new ALTA 28.1-06 and ALTA 35-06 Series}

**Desk Reference Guide for the ALTA 9 Series of Endorsements 2012:* Attached.

B. Miscellaneous 2012 ALTA Endorsements

1. **Zoning:** ALTA responded in 2012 to the customer need for a zoning endorsement in development/construction transactions. In practice, when customers requested zoning in such transactions, the coverage may have been given if the plans were approved by the zoning authority, but the specialized coverage had to be drafted specially for each such transaction. In response, ALTA has adopted a new ALTA 3.2-06 (Zoning- Land Under Development) adopted 4/2/12.
2. **Leasehold:** The ALTA 13-06 (Leasehold – Owner’s) and the ALTA 13.1-06 (Leasehold – Loan) [Revised 4/2/12] were revised to clarify the definition of personal property and the valuation provisions so they are consistent with the relevant new ALTA 36 Leasehold endorsements for Energy Projects. (ALTA 36-06 and ALTA 36.2-06)
3. **Encroachments:** A new ALTA 28.1-06 (Encroachments – Boundaries and Easements) [Adopted 4/2/12] is now available to give similar coverage to what was formerly included in the old ALTA 9, 9.1, 9.2, and the 9.3-06 for enforced removal coverage for encroachments into easements and onto adjoining land.

4. Minerals: ALTA adopted as of April 2, 2012 the ALTA 35-06 series relative mineral surface damage coverage formerly included in the old ALTA 9 series. The old ALTA 9 series mineral surface damage coverage is now only included in the 2012 revised ALTA 9-06 and the 9.7-06 for Loan policies. The new ALTA 35-06 (4-2-12) series provides flexibility in the market to provide mineral surface damage coverage when the ALTA 9-06 and the ALTA 9.7-06 may not be suitable in a particular transaction. It should be noted that the ALTA 35-06 series together with the ALTA 9-06 and the 9.7-06 for 2012, each of which gives mineral surface damage coverage, also clearly exclude from such coverage any resulting contamination, explosion, fire, fracturing, vibration, earthquake, subsidence and negligence by a person or an entity exercising a right to extract or develop minerals or other subsurface substances. The ALTA 35-06 endorsements also have a provision where an agent can carve out particular rights excepted from the endorsement coverage if necessary. The ALTA 35-06 endorsements, when approved for a particular transaction, can be issued on Owner's and Loan policies.

Each of the individual endorsements in the ALTA 35-06 series provide coverage for enforced removal or alteration of any 'Improvement' because of the exercise of the right to use the surface for development of minerals and other subsurface substances. The variation in each is the specific definition of an 'Improvement.'

- a. ALTA 35-06 (Minerals and other Subsurface Substances-Buildings)
[Adopted 4/2/12]
 - (i) **“Improvement”** is defined as a building on the land as of date of Policy.

- b. ALTA 35.1-06 (Minerals and other Subsurface Substances-Improvements) [Adopted 4/2/12]
 - (i) **“Improvement”** is defined as a building, structure located on the surface of the Land, and any paved road, walkway, parking area, driveway, or curb, affixed to the Land as of date of Policy and that by law constitutes real property. It excludes crops, landscaping, lawn shrubbery and trees.

- c. ALTA 35.2-06 (Minerals and other Subsurface Substances-Described Improvements) [Adopted 4/2/12]
 - (i) **“Improvement”** is not particularly defined so that coverage can be particularly tailored to the transaction by itemized exhibit to the endorsement.

- d. ALTA 35.3-06 (Minerals and other Subsurface Substances- Land Under Development) [Adopted 4/2/12]

- (i) **“Improvement”** is defined as a building, structure located on the surface of the Land, and any paved road, walkway, parking area, driveway, or curb, affixed to the Land as of date of Policy and that by law constitute real property. The definition excludes crops, landscaping, lawn shrubbery and trees. The term **“Future Improvement”** means the same as “Improvement” above but as said improvements are to be constructed on or affixed to the Land in the locations according to certain defined ‘plans’.

- 5. Energy:** ALTA has also addressed the market need for a series of ‘Energy Project’ endorsements to address the new Wind and Solar Energy projects. This series, the ALTA 36-06 (Energy Project –Leasehold/Easement – Owner’s) [Adopted 4/2/12] through the ALTA 36.6-06 (Energy Project – Encroachments) [Adopted 4/2/12] address the specific needs for these specialized transactions. The primary issues covered in the several ALTA 36-06 endorsement variations are new valuation sections, the addition of energy project-specific definitions, coverage for easements as well as leasehold estates, coverage for ‘severable improvements’ (see ALTA 31-06), enforced removal and additional coverage for future improvements.

C. New 2014 ALTA Endorsements

1. **ALTA 32 Series (Construction Loan –Loss of Priority):** Series deals with situations in which a mortgage does not have priority over a mechanic’s lien, or has lost priority to a mechanic’s lien.

These endorsements may only be issued with a loan policy insuring a mortgage; the proceeds of which are intended to finance the construction of improvements on Land. All three ALTA 32 series endorsements are similar in that all three endorsements insure against loss or damage by reason of: (1) the invalidity or unenforceability of the lien of the Insured Mortgage, and (2) the lack of priority of the lien of the Insured Mortgage, as security for each Construction Loan Advance made on or before the Date of Coverage, over any lien or encumbrance on title in the Public Records and not shown in Schedule B.

While each endorsement insures against the above, they differ in the following ways:

- a. ALTA 32-06 (Construction Loan–Loss of Priority) [Adopted 4/1/14]: Insures against the lack of priority of the lien of the Insured Mortgage, as security for each Construction Loan Advance over any mechanics lien, but only to the extent that the charges for which the mechanics lien is claimed were designated for payment in the documents supporting a Construction Loan Advance disbursed by or on behalf of the Insured on or before the Date of Coverage.
- b. ALTA 32.1-06 (Construction Loan—Loss of Priority—Company’s Direct Payment (or payment Insured with Company’s written approval)) [Adopted 4/1/14]: Insures against the lack of priority of

the lien of the Insured Mortgage, as security for each Construction Loan Advance over any mechanics lien, but only to the extent that direct payment to the mechanic's lien claimant has been made by the Company or by the Insured with the Company's written approval.

- c. **ALTA 32.2-06 (Construction Loan –Loss of Priority –Insured's Direct Payment Endorsement) [Adopted 4/1/14]:** Insures against the lack of priority of the lien of the Insured Mortgage, as security for each Construction Loan Advance over any mechanics lien, if notice of the mechanic's lien is not filed or recorded in the public records, but only to the extent that direct payment to the mechanic's lien claimant has been made by the Insured or on the Insured's behalf on or before the Date of Coverage.

- 2. **ALTA 33-06 (Disbursement Endorsement) [Adopted 4/1/14]:** May be used when a loan policy has been endorsed with either an ALTA 32-06 or ALTA 32.1-06 and may extend the Date of Coverage as to mechanic liens on an incremental basis and amend Schedule A and/or Schedule B of the loan policy.

- 3. **ALTA 37-6 (Assignment of Rents or Leases Endorsement) [Adopted 4/1/14]:** Insures against loss or damage sustained by the Insured by reason of: (1) any defect in the execution of an assignment or rents or leases

document identified in Part II of Schedule B; or (2) any assignment of a lessor's interest in any lease or leases or any assignment of rents affecting the Title and recorded in the Public Records at Date of Policy other than as set forth in any instrument disclosed in Schedule B.

- 4. ALTA 38-06 (Mortgage Tax Endorsements) [Adopted 4/1/14]:** Provides coverage against loss or damage by reason of the invalidity or unenforceability of the lien of the Insured Mortgage as security for the Indebtedness resulting from the failure to pay, at the time of recording, any portion of the Mortgage Tax; or the lack of priority of the lien of the Insured Mortgage as security for the Indebtedness resulting from the failure to pay, at the time of recording, any portion of the Mortgage Tax.
- 5. LATISSO 104 (Co-Insurance—Single Policy Endorsement) [Adopted 4/1/14]:** This endorsement is for commercial policies. LATISSO-104 was based on the ALTA 23-06 Coinsurance—Single Policy. This endorsement will be voluntarily requested by sophisticated commercial insureds.
- 6. LATISSO 105 (Special Measure of Loss –Loan Policy Endorsement) [Adopted 4/1/14]:** May only be issued with a loan policy issued in connection with an amendment to Condition 8(a)(iii) whereby Condition 8(a)(iii) is replaced in its entirety for the purpose of determining the extent of liability of the Company for loss or damage by reason of any defect, lien,

encumbrance or other matter insured against by the loan policy to reflect the difference between (A) the value of the Title as insured without the Defect, taking into consideration, at the time notice of claim is given to the Company, the (1) use or intended use of the Land as a single integrated site for a type of project and (2) income actually generated by that use, and (B) the value of the Title subject to the Defect, taking into consideration the factors set forth in (A)(1) and (2) as referenced. Note: Endorsement may only be issued when the Amount of Insurance in Schedule A of the Policy includes the aggregate of the Full Value of the Land for the use or intended use of the Land as a single integrated site for a type of project and income actually generated by that use.

7. **LATISSO 106 (Special Measure of Loss –Owner’s Policy Endorsement) [Adopted 4/1/14]:** This endorsement has the same terms as above (LATISSO 106), but may only be issued with an owner’s policy.

8. **ALTA 11.2-06 (Mortgage Modification with Additional Amount of Insurance Endorsement) [Adopted 8/4/14]:** This endorsement is designed to be issued when a Mortgage Modification is executed and additional insurance is requested. It insures against loss or damage sustained by the Insured by reason of: (1) the invalidity or unenforceability of the lien of the Insured Mortgage resulting from the modification of the Insured Mortgage; (2) the lack of priority of the lien of the Insured Mortgage at the date of the

endorsement, and from specified matters, set forth in paragraph 3.c. of the endorsement, not being subordinate to the lien of the insured mortgage. In addition, this endorsement has a provision whereby the Amount of Insurance may be increased to a certain amount to be stated therein. The endorsement is used to reflect an increase in the amount of the mortgage.

9. **ALTA 41-06 Series:** Provides the owner or lender with coverage against loss or damage resulting from the use of the surface of the land for the extraction or development of water.

Insures against loss or damages sustained by reason of the enforced removal or alteration of any Improvement resulting from the future exercise of any right existing at Date of Policy to use the surface of the Land for the extraction or development of water excepted from the description of the Land or excepted in Schedule B.

- a. ALTA 41-06 (Water—Buildings Endorsement) [Adopted 8/4/14]:
“Improvement” means a building on the Land at Date of Policy.
- b. ALTA 41.1-06 (Water—Improvements Endorsement) [Adopted 8/4/14]: ***“Improvement”*** means a building, structure located on the surface of the Land, and any paved road, walkway, parking area, driveway, or curb, affixed to the Land at Date of Policy and that by law constitutes real property, but excluding any crops, landscaping, lawn, shrubbery, or trees.

- c. ALTA 41.2-06 (Water—Described Improvements Endorsement)
[Adopted 8/4/14]: Provides coverage for improvements that are listed as exhibits to the endorsement.

- d. ALTA 41.3-06 (Water—Land Under Development Endorsement)
[Adopted 8/4/14]: Provides coverage for “Improvements” and “Future Improvements.” **“Improvement”** means a building, structure located on the surface of the Land, and any paved road, walkway, parking area, driveway, or curb, affixed to the Land at Date of Policy and that by law constitutes real property, but excluding any crops, landscaping, lawn, shrubbery, or trees. **“Future Improvement”** means a means the same as “Improvement” above but as said improvements are to be constructed on or affixed to the Land in the locations according to certain defined ‘Plans’.

10. ALTA 42-06 (Commercial Lender Group Endorsement) [Adopted 8/4/14]: This endorsement may be applicable when a “Lender Group,” as defined in the endorsement, owns a portion of the indebtedness. For purposes of this endorsement, an individual lender in the Lender Group is a “Participant”. A Participant does not include a non-insured obligor as described in Section 12(c) of the Conditions. The endorsement insures the Insured under a Loan Policy against loss or damage by reason of the invalidity or unenforceability, or loss of priority of the lien of the Insured

Mortgage caused by transfers after the Date of Policy of portions of the Indebtedness by the Participants and provides that a Participant is an Insured.

11. ALTA 43-06 (Anti-Taint Endorsement) [Adopted 8/14/14]: May be applicable when a portion of the indebtedness secured by the Insured Mortgage is a Revolving Credit Loan. It insures the Insured under a loan policy against loss or damage by reason of the loss of priority of the lien of the Insured Mortgage as security for the amount of the Indebtedness advanced as the Term Loan resulting from reductions and subsequent increases of the outstanding principal amount of the Indebtedness payable as the Revolving Credit Loan.

12. ALTA 44-06 (Insured Mortgage Recording –Loan Endorsement) [Adopted 8/14/14]: Insures the Insured under a loan policy against loss or damage sustained by the Insured by reason of the failure of the Insured Mortgage to have been recorded in the Public Records as set out in the endorsement.

D. “Affirmative Coverage” – ALTA 34

“Affirmative Coverage” is a prevalent term used in the industry but is one not completely understood, and one that is patently ambiguous. It is usually directed to a specific exception to title found in the record to which the proposed insured wants the Company to insure over with ‘affirmative coverage,’ even though ‘affirmative coverage,’ in and of itself is not clear.

Additionally, the affirmative coverage can be stated in as many different ways as there are attorneys in the transaction! Each attorney can ‘have a go’ at how it should be worded; this practice is no longer available upon the adoption of ALTA 34-04.

The ambiguity surrounding most affirmative coverage provisions raises more questions than it answered. If an exception to title is insured over by adding additional language in the particular numbered exception, such as “[t]he Company insures the insured from loss or damage resulting from the matters excepted herein,” should additional premium collected for the additional risk? Will the Company pay attorney fees for a defense of the matter? What is the client expectation for the additional verbiage sometimes requested: “... loss or damage from a Final Decree... vesting title other than as insured?” In order to clear the confusion in the industry ALTA adopted in 2011, the Identified Risk endorsement, the ALTA 34-06 (8/1/11). This endorsement can be used for any requests for ‘affirmative coverage’ so that there is clarity as to coverage and responsibility. The ‘Identified Risk’ Endorsement clearly gives defense cost coverage, and indemnity coverage if there is a loss. But the endorsement also protects the Company from marketability claim issues and from any affirmative duty to remove the exception.

E. ExpressMap®

Developed by First American, *ExpressMap®* is an alternative to an ALTA/ACSM land title survey, which allows for provision of title insurance coverage and removes the survey exceptions to satisfy lender requirements. *ExpressMap* is created through a proprietary process that combines a current aerial photograph of the property as described within the title report, along with the exception items shown in Schedule B (easements, rights of way, covenants, conditions, restrictions, etc.).

- 1. Special – *ExpressMap®* Certification Endorsement:** This endorsement is meant to accompany the use of the *ExpressMap®* product and insures against the failure of the *ExpressMap®* (1) to delineate the same land as the land described in the policy to which this endorsement is attached, and (2) there being any observable easements or other interests adverse to the insured except as shown on the *ExpressMap®* and in Schedule B of the policy.

ALTA 9
DESK REFERENCE

1992

ALTA 9 (Loan Policy)

Restrictions, Encroachments & Minerals

ALTA 9.1 (Owner–Unimproved)

Restrictions, Encroachments & Minerals – Unimproved Property

ALTA 9.2 (Owner – Improved)

Restrictions, Encroachments & Minerals – Improved Land

ALTA 9-06 (Loan Policy)

Restrictions, Encroachments, Minerals

Adopted 6/17/06 - Same as 1992

ALTA 9.1-06 (Restrictions, Encroachments, Minerals–Owner’s Policy–Unimproved Land)

Adopted 6/17/06 - Same as 1992

ALTA 9.2-06 (Restrictions, Encroachments, Minerals – Owner’s Policy – Improved Land)

Adopted 6/17/06 - Same as 1992

ALTA 9.3-06 *NEW*

(Restrictions, Encroachments, Minerals – Loan Policy) Adopted 6/17/06 – Added mineral surface damage coverage to include “future improvements”.

ALTA 9.4-06 *NEW*

(Restrictions, Encroachments, Minerals – Owner’s Policy – Unimproved Land) Adopted 6/17/06 – Added mineral surface damage coverage to include “future improvements”.

ALTA 9.5-06 *NEW*

(Restrictions, Encroachments, Minerals – Owner’s Policy – Improved Land) Adopted 6/17/06 – Added mineral surface damage coverage to include “future improvements”.

ALTA 9-06 (Loan Policy) Modified 4/2/12 –

- (a) private rights under §1(b)(ii) moved to the ALTA 9.6-06 & limited
- (b) BSL violation limited to enforced removal;
- (* Use ALTA 9-06 and 9.6-06 together)

ALTA 9.1-06 (Owner’s Policy) Modified 4/2/12 –

- (a) private rights ALTA 9.6-06 **not** available to owner;
- (b) encroachments moved to ALTA 28.1
- (c) mineral surface damage coverage moved to ALTA 35.3

ALTA 9.2-06 (Owner’s Policy) Modified 4/2/12 –

- (a) Encroachments moved to ALTA 28.1 and limited
- (b) mineral surface damage coverage moved to ALTA 35-06
- (c) BSL violation limited to enforced removal;
- (d) Private rights **not** available to owner

ALTA 9.3-06 (Loan Policy) Modified –

- (a) Encroachments moved to ALTA 9.7 -06 (existing and future) and ALTA 28.1 (existing);
- (b) Mineral surface damage coverage moved to ALTA 9.7 or 35.3;
- (c) BSL violation limited to enforced removal;
- (d) Private rights moved to ALTA 9.6-06

ALTA 9.4-06 WITHDRAWN

Use ALTA 9.1; 28.1 and 35.3 for Owner Unimproved Land
No private rights available, need plans

ALTA 9.5-06 WITHDRAWN

Use ALTA 9.2; 28.1 and 35.3 for Owner Improved Land
No private rights available, need plans

ALTA 9.6-06 (Private Rights – Loan Policy) Adopted 4-2-12

Private Rights is a New Term for old ALTA 9 § 1(b)(ii) coverage.

ALTA 9.7-06 (Restrictions, Encroachments, Minerals – Land Under Development – Loan Policy) Adopted 4-2-12. Same as the ALTA 9-06 above but includes “future improvements.”

ALTA 9.8-06 (Covenants Conditions and Restrictions – Land Under Development – Owner’s Policy) Adopted 4-2-12. Same as the ALTA 9.2-06 above but includes “future improvements.”

2006

2012