



# FIDELITY NATIONAL TITLE UPDATES

MAY 2007

"Appreciate the Fidelity Difference"

SPECIAL EDITION

## 2006 ALTA POLICIES GET NYS APPROVAL

### Insurers Permitted to Issue New ALTA Policies

Effective May 1, 2007, the New York Insurance Department has approved the use of the new *American Land Title Association* (ALTA) 2006 forms of Owner's and Loan Policy. The NY rating bureau, *Title Insurance Rate Service Association* (TIRSA) Rate Manual has also revised its forms of NY Standard Owner's and Loan Endorsement, as well as its other endorsement forms to accommodate the new policies. Also, and as discussed later on in this Bulletin, the TIRSA has withdrawn three endorsements (Survey, Last Dollar and Limited Liability Company etc.), and the charges imposed therefore, as the coverage afforded by these endorsements is now included within the policy's basic coverage. Aside from the withdrawal of these endorsements, there is no other change in the TIRSA rates and the deviation rates adopted in the Fidelity family. Following is a discussion of the major highlights of the 2006 ALTA Policy Forms (2006 Policy).

The 2006 forms must be used for all closings occurring on or after May 1, 2007. The existing ALTA 1992 policy forms can only be used for transactions that closed prior to that date.

While the 2006 Policy forms may appear to be different from the ALTA 1992 versions, most of the changes are the result of summarized as follows:

- C *Reorganizing the policy, by relocating all limitations on the Exclusions that create coverage to the new Covered Risks section.*
- C *Streamlining the policy, by simplifying language, adding new definitions to reduce wordiness and clarify meanings.*
- C *Modernizing the policy, by deleting burdensome and unused provisions, including the modern concepts of electronic recording and document transfer and by revising the "claims" obligations provisions of both the Insured and the Company.*
- C *Enhancing the policy, by adding new benefits for the Insured.*

#### *Changes Discussed*

1. ***Reorganizing the policy, by relocating all limitations on the exclusions that create coverage to the new Covered Risks section:*** The significant changes include the creating of a comprehensive list of covered risks. It was the feeling of the ALTA Forms Committee that it would benefit both the Insured, and the insurers, to locate all of the risks the title insurance policy covers, including those that are found as limitations to the standard exclusions, on a single comprehensive schedule entitled *Covered Risks*.

- C Among the Covered Risks, which is not new to the basic coverage of the policy, are matters that might be shown on a title survey (see Covered Risk 2(c)). This coverage has, however, been modified by the "*TIRSA NY Standard Endorsement*" as follows –

- C In the *Owner's Policy* version of the NY Standard Endorsement (also used with Leasehold, Contract Vendee and Option Policies), the Covered Risk survey language is eliminated entirely from the Owner's Policy and the TIRSA Manual (Part 1, ¶ 1(L)(1)) requires that a survey exception be inserted on Schedule B.

(1) FOR ALL OWNER'S POLICIES: In the absence of a survey acceptable to the company the policy must contain the following language: "subject to any state of facts an accurate survey would show."

- C In the *Loan Policy*, the survey Covered Risk is eliminated *except on policies issued insuring 1-4 family dwellings*. On all other properties (including vacant land), a survey exception is mandatory (Part 1, ¶ 1(L)(1)). However, as to 1-4 family dwellings, *the insurer has the option to delete or omit the survey exception on Schedule B*.

(2) FOR LOAN POLICIES: If the land is improved by other than a 1-4 family dwelling or is vacant land and in the absence of a survey acceptable to the Company, the policy must contain the following language: "subject to any state of facts an accurate survey would show."

- C If a survey is **NOT** provided and the property meets Fidelity's Survey Underwriting Guidelines, the survey exception set forth below may be deleted. The underwriting guidelines are the same as those required for the issuance of the old Survey Endorsement.

- C The survey exception that will be used in all Fidelity policies is as follows:

*Any encroachment, encumbrance, violation, variation, or adverse*

*circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land.*

The foregoing language substantially conforms to the language required by the TIRSA Manual.

- A Loan Policy on a 1-4 family dwelling may be issued without the required survey exception if the following requirements are met.

C *The Land has been improved and is used as a 1-4 family dwelling only for more than two years; and*

- *The Land is located in a jurisdiction that requires Building Permits and issues Certificates of Occupancy; and*

- *The Land is shown on a filed subdivision map or the property is described by metes and bounds with courses and distances to monument the boundaries; and*

- *The owner executes the Company's standard form of Survey Affidavit.*

- *Survey Endorsement withdrawn:* Because the survey coverage has been incorporated into the policy, the TIRSA Survey Endorsement and the charge imposed for the endorsement has been withdrawn, the survey coverage can be given by deleting the survey exception from a Loan Policy on a 1-4 family dwelling without additional charge.

C The Covered Risk schedule includes coverage for "Creditors' Rights" (see Covered Risk 9) this, however, is not, new coverage. The creditor's rights exclusion in the 1992 ALTA Policy was limited in two ways. First, the exclusion in the 1992 Policy and the 2006 policy forms applies only to the transaction creating the interest insured under the policy. Second, the exclusion was not applicable where the loss resulted from the failure to perfect the Insured's interest by timely recording.

The Creditors' Rights exclusion for insured transaction remains as it was in the 1992 Loan Policy. However, the exclusion no longer expressly excludes loss from the imposition of Equitable Subordination of the insured mortgage. The ALTA Forms Committee felt that since such loss always results from the improper "acts of the Insured," the existing exclusion for such matters is applicable to a claim that the insured lender should be equitably subordinated.

- Totally new for an ALTA policy form is "Gap Coverage," insuring the time period between the *Date of Policy* and the date the documents vesting the insured

estate are recorded. Although Gap Coverage is new as a basic Covered Risk in the ALTA policy, it is not new in New York and some other states. In all prior title insurance policy forms, coverage exists only as to matters occurring or *attaching at or prior the Date of Policy* specified on Schedule A. In the 2006 policy, several of the Covered Risks add coverage for events occurring *after* the Date of Policy. In the Owner's Policy, Covered Risks 9 (Creditor's Rights) and 10 (GAP) provide coverage for losses resulting from events occurring after the Date of Policy. The 2006 policy, however, is not the equivalent of an extended owner's policy such as the NY's TOEPP form. The NY Standard Endorsement modifies the GAP coverage by also excluding "water and sewer charges as well as Taxes and Assessments from matters not covered in the Gap."

2. ***Streamlining the policy, by simplifying language, adding new definitions to reduce wordiness and clarify meanings.***

Added to the 2006 Policy form are a number of definitions of terms intended to clarify and standardize the meaning of these terms as used in the Policy.

3. ***Modernizing the policy, by deleting burdensome and unused provisions, including the modern concepts of electronic recording and document transfer and by revising the "claims" obligations provisions of both the Insured and the Company.***

C Removed from the *Loan Policy* is the Liability Non-Cumulative provision. It has been our experience, industry wide, that lenders, particularly the US Small Business Administration, objects to this provision as it severely impaired the benefits of the policy to a subordinate lender. The subordinate lender is now fully protected under its policy. In the *Owner's Policy* form the *Liability Noncumulative* provision has been retained.

C The *Coinsurance* provision, first introduced in 1987, has also been dropped from the 2006 Policy. It has been found to be a serious impediment to the acceptability of the 1987-1992 Owner's policies. Our claims experience has demonstrated that few claims administrators have invoked its benefits even if the provision applied. The *Apportionment* provision in the '92 Owner's policy has been dropped from the new Owner's Policy. Apportionment forces the Insured to value, as of the *Date of Policy*, each of two or more non adjacent properties Insured under a policy if a claim arose. The apportioned values of each parcel create a separate "Amount of Insurance" for each parcel. The Insured would not be able to shift coverage from parcels unaffected by the title defect to the property affected by the title defect in the event the affected property if the loss exceeds its value. Under the 2006 Policy form, the Insured can shift

coverage from one property to the another. This feature, termed "aggregation" has always been available to lenders under the Loan Policy, by endorsement in respect to multiple policies, but not to multiple parcels in a single policy.

- C *The provisions that govern the claims making process and the obligations of both the Insured and the Company have been completely overhauled* to better define these obligations. The effect on the Company's liability based on "late notice" has been clarified and is subject to the degree of prejudice resulting from such late notice. The Insured's failure to cooperate can totally void coverage.
- C *The Arbitration provision has also been revised* to eliminate reference to the *American Arbitration Association*. The AAA no longer provides title insurance arbitration under the special rules developed for title insurance arbitrations. The AAA found that there was virtually no demand for its services. Secondly, the arbitration threshold has been increased to *two-million* from one-million dollars to keep pace with increased property values. Arbitration of disputes under policies of *two-million dollars or less, can, if not waived by the Insurer, be invoked by either the Insured or the insurer. Both parties, however, must agree to arbitration when the policy amount exceeds two-million dollars.* The Waiver of Arbitration Endorsement is available for both Owner's and Loan policies. The 2006 Policy adopts the rules formerly promulgated by the AAA for title insurance arbitration irrespective of the organization that conducts the arbitration. Arbitration is limited to issues involving the policy and the transaction giving rise to the policy. Except as permitted under these rules, third parties cannot be joined in the arbitration preceding.
- C *Because of changes to the policy, TIRSA has withdrawn the Survey, Last Dollar and TIRSA Limited Liability Company and Limited Liability Partnership endorsements.*
  - C The *Survey Endorsement* was withdrawn because of the addition of Covered Risk 2(c), as modified by the new Standard NY Endorsement.
  - C The need for the *Last Dollar Endorsement* was eliminated by revising the definition of *Amount of Insurance* to reassure policyholders that the "last dollar" issue created by Section 9(b) of the Conditions and Stipulations of the 1987, 1990 and 1992 policies have been eliminated.
  - C Finally, the *LLC & LLP Endorsement* has been withdrawn since the definition of "Insured" has been expanded to include *successors by*

*dissolution, merger, consolidation, distribution, reorganization by a conversion to another type of entity.* The *TIRSA Fairway Endorsement* has been retained, although technically, it too appears to no longer be necessary.

- 4. **Enhancing the policy, by adding new benefits for the Insured:** Two new benefits related to the claims handling process are found in paragraph 8 of the Conditions. This section reflects the industry's strong desire to provide its customers with a more valuable product.

- C If the Insurer chooses to litigate a claimed title defect, lien or encumbrance against the title, and is unsuccessful, the Amount of Policy is increased by 10 percent.
- C In addition, the Insured is given the right to elect to value the loss at either the time the claim is made or the loss is actually paid.

## 8. DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters Insured against by this policy.

- ...
  - (b) If the Company pursues its rights under Section 5 of these Conditions and is unsuccessful in establishing the Title, as insured,
    - i. the Amount of Insurance shall be increased by 10%, and
    - ii. the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

The 2006 Policy forms represents the first total overhaul and rewrite of the ALTA forms since 1970. It is the ALTA's objective to keep its policy forms relevant to the needs the real estate industry. We feel strongly that this objective has been accomplished with the new 2006 ALTA Owner's and Loan policy forms.



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