

# HOME RUN OR RUN HOME

## WHAT YOUR TITLE POLICY IS AND IS NOT

By: David E. Hart, Esq.

### I. INTRODUCTION

The title insurance policy is an essential part of any real estate transaction. It is therefore important to understand what title insurance is and is not. With that understanding, one can form appropriate expectations, understand when to file a claim and anticipate the result of that claim. Of course, it is always the hope that the need to file a title claim will never arise. However, should the need arise, an understanding of your title insurance policy is invaluable.

### II. WHAT TITLE INSURANCE IS AND IS NOT

A. Title Insurance is a contract of indemnity. That is to say that when an insured has suffered a covered loss, he/she/it will be made whole by compensation, reimbursement or repair of the title defect.

1. The insured must suffer an actual loss. The mere existence of a defect is insufficient.
2. Unless and until someone asserts a right or interest adverse to the insured's interest, no loss has occurred.
3. Potential and/or future losses which cannot be quantified are not actual losses which can be the basis of a claim under a title policy.
4. The loss suffered by the insured must be one covered under the terms and conditions of the title policy.
5. The defect must have existed at the date of the policy. The very essence of a title insurance policy is that the insurer relies upon

an abstract of the condition of title as of the date of the title insurance policy.

B. A title insurance policy is not a guarantee of the state of title. That is to say that the title insurer does not, and cannot, always restore title to the insured. Rather, the insurer will either repair title, compensate or reimburse the insured to the extent of the loss suffered up to the policy limits.

1. In this sense, a title insurance policy is like certain other insurance contracts, for example, a health insurance policy. A health insurer does not, and cannot, guarantee that its insured will remain healthy. Rather, it will, under its policy, pay costs and expenses incurred as a result of an injury or illness.

2. The title insurer will reimburse and/or compensate the insured only up to the extent of the policy limits.

### III. THE POLICY

A. Each title policy insures against loss or damage sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated, as the result of such things as:

- a. Forgeries.
- b. Fraud.
- c. Misfilings by the Register of Deeds.
- d. Defective deeds.

2. Any defect in or lien or encumbrance on the title.
3. Unmarketability of title.
4. Lack of right of access to and from the land.
  - a. The title insurance policy insures losses sustained by reason of a lack of a right of access to and from the land but does not insure or assure the quality of the right of access.
  - b. Unless stated the policy does not insure the location of the access

B. In addition to the above, loan policies insure against loss or damage sustained or incurred by the insured by reason of:

1. The invalidity or unenforceability of the lien of the insured mortgage upon the title.
  - a. Mortgage signed by only husband or wife.
  - b. Mortgage executed by person without appropriate entity authority.
2. The priority of any lien or encumbrance over the lien of the insured mortgage.
  - a. Unpaid taxes.
  - b. Intended second mortgage recorded first.
3. The lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:
  - a. Arising from an improvement or work related to the land which is contracted for or commenced prior to date of policy; or
  - b. Arising from an improvement or work related to the land which is contracted for or commenced subsequent to date of

policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at date of policy the insured has advanced or is obligated to advance.

4. The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage.

C. In addition to the actual loss suffered by reason of the above, the title insurer will also pay the costs, attorneys' fees and expenses incurred in defense of the title or lien as insured but only to the extent provided in the conditions and stipulations set forth in the policy.

D. Unmarketability is not necessarily synonymous with uninsurability.

E. The loan policy insures against the invalidity or unenforceability of a mortgage lien not the debt secured by it.

1. The loan policy does not insure that the debt itself is enforceable, i.e. not barred by usury laws and the like.

2. The title policy does assure or insure the condition of the collateral property or the value of it.

F. Insurance against loss sustained due to the lack of priority over construction liens is particularly important.

1. Subpart A of this policy provision provides that the policy insures only against loss arising from an improvement or work related to the land which is contracted for or commenced prior to the date of the policy. Where the first actual physical improvement of the property occurs after the date of the policy, no coverage is afforded because the assertion of the lien priority would be a post policy matter.

2. Subpart B of this policy provision speaks to the construction loan scenario. At the time of periodic disbursements of the insured mortgage loan proceeds the lender requires that the title policy be endorsed so as to insure the priority of the disbursed money over construction liens.

G. The policy includes certain exclusions from coverage.

1. The policy does not insure against any loss, cost, fee or expense which arises by reason of any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to:

a. The occupancy, use or enjoyment of the land;

b. The character, dimensions or location of any improvement now or thereafter erected on the land;

c. A separation in ownership or change in the dimensions or area of the land or any parcel of which the land is or was a part; or

d. Environmental protection, or the effect of any violation of these laws, ordinances, or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien, encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at date of policy.

2. Excluded from the coverage of the policy are losses, costs, fees or expenses which arise by reason of any governmental police power not excluded by (1) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance

resulting from a violation or alleged violation affecting the land has been recorded in the public records at date of policy.

3. The policy exclusions include losses suffered as a result of rights of eminent domain unless the notice of the exercise thereof has been recorded in the public records at date of policy, but does not exclude from coverage any taking which has occurred prior to date of policy which would be binding on the rights of a purchaser for value without knowledge.

4. The policy exclusion also includes losses resulting from defects, liens, encumbrances, adverse claims or other matters:

a. Created, suffered, assumed or agreed to by the insured claimant;

b. Not known to the title insurance company, not recorded in the public records at the date of policy, but known to the insured claimant and not disclosed in writing to the company by the insured claimant prior to the date of the insured claimant became an insured under the policy;

c. Resulting in no loss or damage to the insured claimant;

d. Attaching or creating subsequent to date of policy;

e. Resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the estate or interest insured by the policy.

5. The policy exclusions also include loss suffered by reason of any claim, which arises out of the transaction vesting in the insured, the estate or interest insured by the policy, by reason of the operation of federal bankruptcy, state insolvency or similar creditors' rights laws, that is based, that is based on:

- a. The transaction creating the estate or interest insured by the policy being deemed a fraudulent conveyance or fraudulent transfer; or
  - b. The transaction creating the estate or interest insured by the policy being deemed a preferential transfer except where the preferential transfer results from the failure:
    - i. To timely record the instrument or transfer; or
    - ii. Of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.
6. The loan policy form also includes an exclusion of losses resulting from the unenforceability of the lien of the insured mortgage because of the inability or failure of the insured at date of policy or the inability or failure of any subsequent owner of the indebtedness to comply with applicable doing business laws of the state in which the land is situated.
7. The loan policy also provides an exclusion for losses relating to the validity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law.
8. Finally, the loan policy includes an exclusion for losses resulting from any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to date of policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at date of policy the insured has advanced or is obligated to advance.

- H. Schedule A is uniquely tailored for each specific policy. It consists of:
1. The effective date or the “date of policy” as used in the policy language.
  2. The amount of insurance also known as the policy limits.
  3. The name of the insured.
  4. The estate or interest that is being insured and the party who holds the title to the estate or interest being insured.
  5. The legal description of the land that is the subject of the insured interest.
- I. Schedule B of the policy sets forth the exceptions to coverage and provides that the policy does not insure against loss or damage (and the company will not pay costs, attorney’s fees or expenses) which arise by reason of the specific exceptions set forth.
1. Both owner’s and loan policies include the following general exceptions:
    - a. Rights or claims of parties in possession not shown by the public records.
    - b. Encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises.
    - c. Any lien, or right to a lien, for services, labor or materials heretofore and hereafter furnished, imposed by law and not shown by the public records.
  2. Owner’s policies include the following additional exceptions to coverage:



- a. Easements or claims of easements not shown by the public records in existing water, mineral, oil and exploration rights.
- b. Taxes or special assessments which are not shown as existing liens by the public records.
- c. Restrictions upon the use of the premises not appearing in the chain of title.

3. Schedule B also includes exceptions to coverage which are unique to that policy. These exceptions include items for which the title insurer had a made a specific requirement on the title commitment and for which the requirement was not met. Mortgages, security interest, liens, claims to the interest or estate which is being insured and which could defeat the estate or interest if not eliminated, defects and judicial proceedings, failures or defects of authority in entity transfers, unpaid taxes, etc. are types of special exceptions which will be found in this part of Schedule B. Schedule B also lists easements, rights of way, building and use restrictions and other encumbrances.

J. The conditions and stipulations section of the title insurance policy includes all of the terms or rules applicable. The terms and conditions also include the definitions of terms used in the policy. These conditions and stipulations are recited under the following headings:

1. Definitions of Terms.
2. Continuation of Insurance.
3. Notice of Claim to be given by Insured Claimant.
4. Defense and Prosecution of Actions; Duty of Insured Claimant to Cooperate.
5. Proof of Loss or Damage.

6. Options to Pay or Otherwise Settle Claims; Termination of Liability.
7. Determination and Extent of Liability.
8. Apportionment, Owner's Policy Only.
9. Limitation of Liability.
10. Reduction of Insurance; Redaction or Termination of Liability.
11. Liability Noncumulative.
12. Payment of Loss.
13. Subrogation Upon Payment or Settlement.
14. Arbitration.
15. Liability Limited to this Policy; Policy Entire Contract.
16. Severability.
17. Notices, Where Sent.

K. Title insurance underwriters offer various endorsements which change, alter, enhance or diminish the coverage provided under the title insurance policy. In each transaction, your counsel will advise you as to which endorsements are necessary and desirable under the circumstances of the particular transaction. The decision of an underwriter whether to provide certain endorsements must be made on a case by case basis.

#### IV. WHEN AND HOW TO FILE A CLAIM

The procedure for the filing of a claim under the title insurance policy is set forth in the Conditions and Stipulations section of the policy jacket.

- A. The insured must notify the title insurer promptly in writing.
  1. In case of any litigation,

2. In case knowledge shall come to the insured of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the title insurer may be liable under the policy, or

3. If title to the estate or interest, as insured, is rejected as unmarketable.

B. If prompt notice is not given to the title insurer, then all liability of the title insurer to the insured is terminated with regard to the matter or matters for which prompt notice is required. This termination of coverage only occurs when the failure to give prompt notice results in prejudice to the title insurer's rights.

C. It is prudent to give notice to the title insurer at the earliest indication of an adverse claim of title or interest. This may result in a response from the title insurer that the claim is premature. However, the making of a premature claim is always better than a delay in making a claim which results in the loss of coverage.

1. Notice of the following should always be provided to the title insurer.

a. A recorded instrument evidencing the interest of another which is adverse to the insured interest or estate.

b. A lawsuit asserting an interest in the subject property which is adverse to the insured interest or estate.

c. Notices of forfeiture or foreclosure relating to encumbrances or liens of any sort which might be superior to the insured interest or estate.

2. Notice need not be given to the title insurer of claims, instruments or occurrences which are subsequent to the date of the

policy and, therefore, do not constitute a defect covered under the policy.

D. In order to make a claim under a title insurance policy, an insured must, in addition to and after the notice of claim, provide to the title insurer a proof of loss or damage signed and sworn to by the insured claimant.

1. Such proof of claim must be furnished within ninety (90) days after the insured claimant ascertains the facts giving rise to the loss or damage.

2. The proof of loss or damage must describe the defect in, or lien or encumbrance on the title or other matter insured against by the policy which constitutes the basis of the loss or damage.

3. The proof of loss must state, to the extent possible, the basis of calculating the amount of the loss or damage.

E. In addition to the proof of claim, the title insurer may require that the insured claimant:

1. Submit to an examination under oath.

2. Produce for examination, inspection and copying, all records, books, ledgers, checks, correspondence and memoranda which reasonably pertain to the loss or damage.

3. Grant his/her/its permission, in writing, for a representative of the title insurer to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party which reasonably pertain to the loss or damage.

F. Should the insured claimant fail to submit to examination or provide the information reasonably requested, the liability of the title insurer under the policy is terminated.

G. It is important that all notices and proofs of claim provided under the policy be made at the address specified in the title insurance policy. Although, as a practical matter, title insurance issuing agents sometimes assist an insured by forwarding on notices and claims to their underwriters, providing notice of an adverse claim or a proof of loss to a title agent does not satisfy the Conditions and Stipulation of the title insurance policy.

V. REMEDIES UNDER THE POLICY

Once notice of a title defect has been given to the title insurer, a Proof of Loss has been submitted by the insured and the insured has submitted to an examination under oath and provided such documents and information as requested by the title insurance company, the title insurer should either accept the claim, with or without reservation, or reject it.

A. When the insurer has accepted a claim, it will cure the title defect and/or compensate and/or reimburse the insured for loss or damages suffered.

B. Where the insured has been sued, the insurer will, at its own cost and without unreasonable delay, provide for the defense of the insured.

1. The title insurer will only defend as to those stated causes of action alleging a defect, lien, or encumbrance or other matter insured against by the policy. Uninsured claims brought in the same lawsuit with insured claims must be defended by the insured at his/her/its own expense.

2. The title insurer has the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to insured causes of action. The title insurer is not liable for and will not pay the fees of any other counsel.

C. The title insurer has the right, at its own expense, to institute and prosecute any action proceeding or to do any other act which in its opinion

may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured, or to prevent or reduce loss or damage to the insured.

1. When litigation is defended or prosecuted by the title insurer, the company may pursue litigation to final determination by a court and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order. The decision of whether to appeal is the right of the insurer under the policy.

2. The title insurer has the right to bring any lawsuit it deems appropriate in the name of the insured.

D. The insured must cooperate with and aid the title insurer in any lawsuit or proceeding.

1. Such cooperation includes securing evidence, obtaining witnesses and/or affecting settlement.

2. If the title insurer and/or its ability to defend or prosecute an action is prejudiced by the failure of the insured to furnish cooperation, the title insurer's obligations under the policy terminate.

E. At any time, the title insurer may pay or otherwise settle claims and thereby terminate its liability. The title insurer has the following options available to it:

1. To pay or tender payment of the amount of insurance or to purchase the indebtedness.

- a. The insurer may simply pay to the insured the amount of insurance (policy limits) together with any costs, attorneys' fees incurred which were authorized by the title insurer up to the time of payment, or

- b. The title insurer may purchase the indebtedness secured by the insured mortgage for the amount owing thereon together with any costs, attorneys' fees and expense which were authorized by the title company up to the time of the purchase. If the title insurer offers to purchase the indebtedness under this provision, the owner of the indebtedness shall transfer, assign and convey the indebtedness and the insured mortgage, together with any collateral security, to the title insurance company.
2. Once the company has exercised its option to tender payment of the policy limits or to purchase the indebtedness, all of the title insurer's liability and obligations to the insured under the policy are terminated. This includes a termination of the title insurer's liability or obligation to defend, prosecute, or continue any litigation and the insured must surrender the original policy to the title insurance company for cancellation.
3. The title insurer may, at its option, pay or otherwise settle with parties other than the insured or with the insured claimant.
  - a. The title insurer may pay or otherwise settle directly or may do so in the name of the insured claimant.
    - i. The company may purchase the interest of the party asserting a claim adverse to the insured and cause such interest to be discharged or extinguished.
    - ii. The title insurer may cause the adverse interest to be conveyed to the insured in its name thus remedying the defect.
  - b. The title insurer may pay or otherwise settle with the insured claimant the loss or damage provided for under the

policy, together with any costs, attorneys' fees and expenses incurred which were authorized by the title insurer up to the time of payment.

4. Once the title insurer has exercised its option to pay or settle either with the insured or with third parties, the insurer's obligations to the insured under the policy for the claimed loss or damage are terminated, including the obligation to defend, prosecute or continue any litigation.

F. The title insurance policy sets forth a procedure for the determination of and a limitation upon the extent of liability. The title insurance policy only insures against actual monetary loss or damage sustained or incurred by the insured who has suffered loss or damage by reason of matters insured against by the policy.

1. The liability of the title insurer under the policy is limited to the least of the following:

a. The amount of insurance as stated in Schedule A (often referred to as policy limits).

b. The amount of unpaid principal indebtedness secured by the insured mortgage at the time the loss or damage insured against by the policy occurs, together with interest thereon; or

c. The difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by the policy.

2. It is important to remember that the liability of the title insurer is limited to the least of the above. If the value of the property is less than the policy limits, the insured's recovery under the policy is limited to the value of the property.



3. An owner's policy provides for a method of calculating the extent of liability where an improvement is erected on the land which increases the value of the insured estate or interest by at least twenty (20%) per cent over the amount of insurance stated in Schedule A. Therefore one who receives a title insurance policy as part of its land acquisition transaction and then builds upon the land might consider increasing its title insurance coverage upon completion of the building.

G. Where a dispute arises between the insured and the insurer under the policy, either party may demand an arbitration pursuant to the title insurance arbitration rules of the American Arbitration Association. All arbitrable matters when the amount of insurance is in excess of One Million Dollars shall be arbitrated only when agreed to by both the insured and the insurer. The arbitration award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party.