Negotiating Title Commitments

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Nancy Short Ferguson, Chicago Title: as Title Insurer Counsel
Starting the Process: The Title Insurer’s Counsel

- Understanding the Policy
  - Schedule A - Date, Insured, Land and title interest
  - Schedule B - Exceptions, liens, encumbrances
  - Endorsements - Affirmative Coverages
  - Covered Risks, Exclusion, Conditions
- Insurance only -
  - NOT a guarantee of the title
    - What are your client’s timing and business needs?
  - Right to file a claim, which may involve ongoing litigation - NOT what your client wants!
Lender vs. Owner Protection

Owner’s Policy
Core Coverages:
1. Title not vested in Owner
2. Any defect, lien or encumbrance on title
3. Unmarketability of title
4. Lack of right of access to and from the land

Loan Policy
Core Coverages:
1. Title not vested in Owner
2. Any defect, lien or encumbrance on title
3. Unmarketability of title
4. Lack of right of access to and from the land
5. Invalidity or Unenforceability of lien
6. Priority of any lien/encumbrance over insured mortgage
7. Lack of priority against Mechanics/ Materialmen's liens
8. Invalidity or Unenforceability of any assignment of the insured mortgage if assignment shown in Schedule A.
## Lender vs. Owner Protection

<table>
<thead>
<tr>
<th></th>
<th>Loan Policy</th>
<th>Owners Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Coverage Amount:</strong></td>
<td>Decreases as loan paid</td>
<td>Same or increases</td>
</tr>
<tr>
<td><strong>Loss Determined:</strong></td>
<td>After foreclosure AND title claim (not default) causes loss</td>
<td>Immediately at claim</td>
</tr>
<tr>
<td><strong>Terminates:</strong></td>
<td>Loan paid OR sale to third party at foreclosure</td>
<td>So long as insured owns property OR has liability for warranties</td>
</tr>
</tbody>
</table>
Lender vs. Owner: Claims Comparison

**Owner’s Policy**

Title defect may result in an **immediate** monetary claim by owner/insured.

**Lender’s Policy**

Title defect results in a claim ONLY when:

1. Debt accelerated by lender
2. Lender foreclosed or exhausted remedies
3. Lender has not received full payment of amount owed
4. Lender shows that covered title defect caused the shortfall in recovery
Borrower’s Counsel Perspective: Client/Borrower’s Perspective

“JUST INSURE IT” *

? no survey,
? no (or generic) exceptions,
? add in some affirmative coverage,
? only a limited title search,
? at a re-issue rate!

*with credit to Nike
Starting the Process: The Lender’s Counsel

- Title insurer: financial strength
- “Insuring over” v. Correcting.
- Is the lender relying on the credit or the collateral?
CCR’s, PLATS and other title documents

- READ & ANALYZE for this client and this project
- Operational matters
- Restrictions
- Lien Rights
- Declarant Control Period
- Estoppel Certificate

REMEMBER THE NEED TO READ!!
- Funeral home
- Golf course
- Other tenant leases (CVS)
- Private right (Nationwide)
## Affirmative Coverage: The New Forms in the ALTA 9 Series

<table>
<thead>
<tr>
<th>Coverage</th>
<th>Lender</th>
<th>Owner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Covenants, Conditions &amp; Restrictions (not private rights)</td>
<td>9-06</td>
<td>9.1-06 (Unimproved)</td>
</tr>
<tr>
<td></td>
<td>9.3-06</td>
<td>9.2-06 (Improved)</td>
</tr>
<tr>
<td></td>
<td>9.7-06 (Land Under Dev)</td>
<td>9.8-06 (Land Under Dev)</td>
</tr>
<tr>
<td></td>
<td>9.10-06 (current violations)</td>
<td></td>
</tr>
<tr>
<td>Private rights (assessments, options, rights of first refusal &amp; rights</td>
<td>9.6-06</td>
<td>9.9-06</td>
</tr>
<tr>
<td>of prior approval)</td>
<td>9.6.1-06</td>
<td></td>
</tr>
<tr>
<td>Encroachments over boundaries or onto easements</td>
<td>9-06</td>
<td>ALTA 28 series</td>
</tr>
<tr>
<td></td>
<td>9.7-06 (Land Under Dev)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>9.10-06 (current violations)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>ALTA 28 series</td>
<td></td>
</tr>
<tr>
<td>Mineral &amp; subsurface rights</td>
<td>9-06</td>
<td>ALTA 35 series</td>
</tr>
<tr>
<td></td>
<td>9.7-06 (Land Under Dev)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>9.10-06 (current violations)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>ALTA 35 series</td>
<td></td>
</tr>
</tbody>
</table>
Private Rights

- Private rights must be specifically identified in exception
- *Prior* ALTA 9 (now moved to ALTA 9.6)
  - provided insurance coverage for “any loss arising from any *instrument referenced in Schedule B* that contains both covenants, conditions, or restrictions, as well as, among other items, an option to purchase, a right of first refusal, or a prior approval of a future purchaser or occupant.” It did “not restrict its coverage to specific provisions within such instruments.”
- *Nationwide v. Commonwealth, 579 F.3d 304* (2009),
Easements

Blanket Easements

For new construction, LOCATE THE EASEMENTS & UTILITIES!!
Easements

• Utilities access available?
• Cost and procedures?

*But, see, Swaim v. Simpson*
### ALTA Endorsement Forms Series 28, in a Nutshell

<table>
<thead>
<tr>
<th>Improvement</th>
<th>Encroachment</th>
<th>Coverages</th>
</tr>
</thead>
<tbody>
<tr>
<td>28</td>
<td>Existing Building</td>
<td>Onto easement</td>
</tr>
<tr>
<td>28.1 (Existing Building) 28.2 (Described Improvement) 28.3 (Specific Plans)</td>
<td>Building / Improvement on the Land</td>
<td>Onto adjoining or easement</td>
</tr>
<tr>
<td>28.1</td>
<td>Existing Building on Adjoining land</td>
<td>Onto Land</td>
</tr>
<tr>
<td>28.2</td>
<td>Described Improvement on adjoining land</td>
<td>Onto Land</td>
</tr>
</tbody>
</table>
ALTA 34 – Identified Risk Coverage

• “All purpose” basic format for affirmative coverage, conforming to Alliance case
  • "Identified Risk“ (such as particular type of violation, use or encroachment) for which affirmative coverage is requested,
  • Specific type of affirmative coverage - such as enforced removal or enforcement for a particular type of use, loss or damage for enforcement of restriction
  • Recorded instrument in Schedule B Exception

• Coverages:
  • Final decree
  • Insurability
  • Defense (subject to Conditions)
Identified Risks - Family Feuds??
Man comes home to find neighbor has taken half his driveway
Feud between N.C. neighbors escalates with wall of tires

By Tribune News Service

PLEASANT GARDEN —
Two feuding North Carolina families took their dispute to the next level this month, with the creation of a fence between them made entirely of used tires from the local landfill.

It's more than 200 feet long and contains between 150 and 250 tires, depending on which of the two families is doing the talking. And neither family minds talking about it, as long as they're not talking to each other.

Karen McKinney says she hasn't spoken to neighbor Jennifer Best Guyer since September 2017. McKinney believes Guyer's "tire fence" was put up as an act of revenge. "This is not a fence," McKinney said. "It is a solid waste Pitiful pile of trash, hazardous to the environment and an eyesore to look at."

Not true, says Guyer, a former crafts store manager who created it. "It is a work of art," Guyer said. "I don't think it's ugly, I love it."

Her creation, which stands four tires high, can be found in the Pleasant Garden community, outside Marion. Both families say they have lived there for years. Trying to pinpoint how their disagreements began isn't easy, but it seems to have bubbled over in a dispute over someone using somebody else's private driveway. That led to hiring a surveyor to check the property lines, and that led to a belief a fence might be a good idea.

Guyer says she got the idea for a tire fence off the crafts site Pinterest. She adds that it's the only type of fence she can afford.

Her plan was to have it up indefinitely, like a monument, but things changed abruptly in the past day, she says.

News of the fence reached McDowell County officials, and Guyer says she was told Thursday she has 30 days to take it down. After that, she says, she'll be fined $50.

McKinney, who has lived in the area 21 years, is not convinced that will settle things, however, and she says she's braced for Guyer might do next. "As long as it's environmentally friendly and isn't an eyesore, we don't care," McKinney says. "If they will stay on their own property, mind their own business, leave us alone, we can all live in peace and it will all be fine."

Guyer said she's already making plans. "If the tires have to go, "other art will be going there," Guyer says. "Especially now that I know it's not about the tires or my fence. It's how (McKinney) don't like anything I put there. I am trying to come up with other art' and my wheels are turning!"
New Court Documents Reveal Details of Yard Dispute That Hospitalized Rand Paul

Kentucky senator repeatedly stacked branches by property line, angering neighbor
E-Recording

• Delivery method, but requirements same as “paper”
  • Originals held by Submitter
• Expedite recordings, especially in multiple counties & states
• Minimize the “gap” for gap closings
• Title examination “gap” in updating between availability and currency of physical filings and records
  • expanding in paper and electronic world

NC Closing Attorney / Best Practices Task Force webinar for more details
Title Search & Tacking

• Disclosure to and Informed Consent of Client
• Client’s intended future use, especially developer:
  • Would an error in the prior policy affect?
• Close review of prior policy, all exceptions, limitations
• Prior insurer - still around? Solid enough to back up your planned future use and coverage?
• Title warranties still in place, or not?
  • Post foreclosure, prior warranties no longer viable
Millisecond Rule of Priority

Priority:
• G.S. 47-18
• G.S. 47-20

Photo Credit: Kayla Shepherd, University of Alaska Southeast (Juneau), 9/11/18
Milliseconds Rule of Priority
But pleasures are like poppies spread:
You seize the flower, its bloom is shed;
Or like the snow fall on the river,
A moment white - then melts forever,
Or like the Aurora Borealis rays,
That move before you can point to their place;
Or like the rainbow's lovely form,
Vanishing amid the storm.
No man can tether time or tide,
The hour approaches Tom must ride:
That hour, of night's black arch - the key-stone,
That dreary hour he mounts his beast in
And such a night he takes to the road in
As never a poor sinner had been out in.
Rights of First Refusal

- Anderson v. Walker
- Lender vs. Owner coverage - and Due Process
- No statutory form under G.S. 47-18
Railroads

- Type and Title:
  - Fee
  - Easement
  - Reversionary interests
  - Charter vs. express grant

- Extent
  - Width
  - Relocations

- Abandonment
  - Tracks removed
  - National Surface Transportation Board (former ICC) withdrawal in The Federal Register

If the right-of-way details matter to your client, CONTACT THE RAILROAD!
Set expectations:

• Title searches take a lot of time.

• There may not be a definitive “answer”.

• Without formal agreement with the railroad, some risks may be uninsurable.
Railroads: Width

• Do not rely on the visible evidence of the width.

• The railroad does not need to use the entire corridor to have an interest.

• Source of railroad’s interest: Charter, Deed, Condemnation.
Railroads: Width

What if you want the rail corridor to abut a property line?

Be mindful of. . . .

“Gaps and Gores”
What to do about a gap?
Railroads: No Right to a Crossing!

- Existing crossings may be closed.
- Source of title claims.

TIP: Get an access endorsement insuring the specific access point.
Railroads: Crossings

Establishing a Crossing by Right:

- Reservation by Deed?
- Easement by Necessity?
- Written Crossing Agreement with Railroad?
Leasehold Coverages & Endorsements

• Memorandum - G.S. 47-18 and G.S. 47-118
• Schedule A: Insured, estate insured, Land,
• Schedule B: Terms & Conditions (rent, insurance, waste, term, assignability, use restrictions)
• ALTA 13 and ALTA 13.1 Endorsements - additional coverage
• Calculating the coverage
• Assignments - Landlord approvals & estoppels
<table>
<thead>
<tr>
<th>Series</th>
<th>Coverage</th>
<th>Owner</th>
<th>Loan</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>Zoning</td>
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<td>8</td>
<td>Environmental</td>
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<td>9</td>
<td>CCR’s</td>
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<td>14</td>
<td>Future Advances</td>
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<td>X</td>
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<tr>
<td>17</td>
<td>Access</td>
<td>X</td>
<td>X</td>
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<tr>
<td>19</td>
<td>Contiguity</td>
<td>X</td>
<td>X</td>
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<tr>
<td>22</td>
<td>Location</td>
<td>X</td>
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<td>24</td>
<td>Doing Business</td>
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<td>X</td>
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<tr>
<td>25</td>
<td>Same as Survey</td>
<td>X</td>
<td>X</td>
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<tr>
<td>26</td>
<td>Subdivision</td>
<td>X</td>
<td>X</td>
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<td>27</td>
<td>Usury</td>
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<tr>
<td>28</td>
<td>Encroachments</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>34</td>
<td>Identified Risk</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>
Drafting and Revising Endorsements

Alliance Mortgage Company v. Rothwell

“The Company assures the insured that at the date of this policy there is located on said land 4-unit Residence known as 447 Haight Street, #1, 2, 3, 4, San Francisco, California 94117. The Company hereby insures the insured against loss which said Insured shall sustain in the event that the assurance herein shall prove to be incorrect.”

Distinguish between guarantee of a state of facts rather than indemnity insurance.
Construction Loans, Lien Agents & Mechanics’ Lien Coverage (Lender vs. Owner)

- Future Advance Clause - MAKE IT BROAD AND BIG!
- Lender protection: Require appointment of Lien Agent and posting of Appointment at the project site prior to closing, for protection of construction deed of trust
  - Appointment required at first contract (architect? Surveyor?)
  - Faster permitting
  - Fewer signers on subordinations
  - RECOMMEND: Record deed of trust before draws
  - Fewer signers on waivers for later sale or refi
- Cancellation process coming 10/1/18
Authority: Proof of existence and authority of signatories

- Secretary of State - North Carolina
- Secretary of State (equivalent) - state of organization
- Annual Reports
- Other documents executed
- Resolutions
- Statutes (depending on entity)
- Revised G.S. 47-18.3 (a partially cured protection)