



## Newly Adopted 2006 ALTA Title Insurance Forms

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Following is a summary of the new American Land Title Association title insurance forms adopted in 2006. The forms have been filed with the Ohio Department of Insurance and are now emerging in selected other states. It is anticipated that these same forms will eventually be adopted by almost all of the states in the U.S.

### General Information

The 2006 forms were formally approved by the American Land Title Association (“ALTA”) on June 17, 2006. The new 2006 ALTA Owner’s and Loan Policy forms have been filed with the Department of Insurance of the State of Ohio and were made available for Ohio transactions ordered after November 30, 2006. The 1992 Policy forms are being officially withdrawn (i.e. will no longer be available) after March 31, 2007.

#### *Intentions of the new forms:*

- To provide a broader coverage;
- To more clearly express the coverage by affirmatively stating the “Covered Risks” rather than the method commonly found in the 1992 forms of using “exclusions to exclusions” language. Such “double negatives” raised an uncertainty as to whether coverage actually exists. The question was, do two negatives equal a positive?;
- To eliminate the demand for the 1970 Policy Jacket;
- To bring the forms current with the 21<sup>st</sup> Century by addressing such developments as electronic conveyances; and

- To provide a “base” form that works well for both residential and commercial transactions.

Most changes occur in the following sections of the new forms:

- Covered Risks (New Section) - Coverage undertaking through which the title Insurer sets out the basic statements of the risks insured;
- Exclusions from Coverage – Limit the extent of coverage given by the insuring clauses; and
- Conditions – The provisions which govern the relationship between the parties (i.e. the contractual obligations of the Insured and the Company).

#### *Additional Forms:*

- New Title Commitment form; and
- Forty-four Endorsement forms were filed to complement the 2006 ALTA Policy Jackets.

### Highlights of Changes to Coverage:

**Breadth of Coverage and Electronic Conveyances (*Owner’s & Loan*)** – Covered Risk #2 was added to broaden the expression of the various means by which a title defect could be created, which among many, includes “a document not properly filed or indexed in the public records including failure to perform those acts by electronic means authorized by law.”

**Survey Coverage (*Owner’s & Loan*)** – Expanded to include insurance against loss when improvements of the insured premises encroach onto adjoining land.

**Mechanic's Lien Coverage (Loan)** – Expanded and better expressed than on previous forms. This exclusion was deleted because the new Covered Risk speaks for itself. This risk is covered for all mechanic's liens arising out of material delivered and/or work contracted or commenced:

- Prior to the Date of Policy; or
- After the Date of Policy if the construction is financed by proceeds of the loan that the Insured Lender has advanced or is obligated on Date of Policy to advance.

**Creditor's Rights Coverage (Owner's & Loan)**

– Rather than excluded from coverage, this risk is now affirmatively insured over regarding defects in the chain arising prior to the insured transaction.

**Gap Coverage (Owner's & Loan)** – Expressly insures the “Gap” for transactions in which funding occurs before the filing of the documents with the county recorder. An exclusion for Real Estate Tax and Assessment Liens was added to clarify that these items are not included in such gap coverage.

***New and Expanded Definitions:***

**“Amount of Insurance” (Owner's & Loan)** – This is self-explanatory, however, previously it was not a defined term;

**“Date of Policy” (Owner's & Loan)** - This is self-explanatory, however, previously it was not a defined term;

**“Entity” (Owner's & Loan)** – Defined as a corporation, partnership, trust, limited liability company, or other similar legal entity; and

**“Indebtedness” (Loan)**

- Expanded to include post-policy advances of principal (but the insured will also need the ALTA 14 Endorsement Series, Future Advances Endorsement to insure validity, enforceability, and priority of the Insured Mortgage for those advances);

- The definition now includes obligatory post-policy construction loan advances, prepayment premiums, exit fees and other similar fees or penalties; and
- The term indebtedness becomes important in the measure of loss and “Extent of Liability” of the title Insurer.

**“Insured” (Owner's & Loan)**

- Expanded to include successors by dissolution, merger, consolidation, distribution, or reorganization;
- Expanded to include successors by conversion to any different form of entity; and
- Expanded to include certain voluntary conveyances “without actual valuable consideration” (e.g. a subsidiary, parent, or affiliate transfer).

**“Unmarketable Title” (Owner's & Loan)** – Expanded to include a prospective lessee's and lender's interests.

***Elimination of the Coinsurance Provision (Owner's)*** – This provision was eliminated thereby increasing the value of the new policy. Previously the coinsurance provision had the effect of making the Insured a coinsurer of the risk of partial loss under either one of the following two circumstances:

- When the owner purchased insurance in an amount less than 80% of the property value at time of loss; or
- When the Insured constructed improvements post-policy that increased the value of the land by more than 20%.

***Elimination of the “Apportionment” Provision (Owner's)*** - This provision was deleted thereby increasing the value of the new policy. In the context of a multi-site transaction included within a single policy, previously this provision had the effect of limiting the Insured's maximum recovery on a single parcel by prorating the Amount of Insurance based on the value of each parcel. By its elimination, the result will now be the same as if the Insured obtained a separate Owner's Policy on each site together with a Tie-In Endorsement.

*Elimination of the “Last Dollar” Condition (Loan)* – The elimination of this condition eliminates the Insured Lender’s need for a “Last Dollar” Endorsement for loan transactions in the context of a mixed-collateral, multi-site, or partially secured loan transaction when the loan amount is greater than the Amount of Insurance.

*Elimination of the “Liability Non-Cumulative” Provision (Loan)* – The elimination of this provision protects the lender of a junior mortgage against failure to recapture its loss when both the senior and junior mortgages are insured by the same Insurer and the recovery value of the real estate is exhausted by the claim payments to the senior lender.

*Elimination of the “Produce Policy” as a Condition to Payment of Loss (Owner’s & Loan)* – This is self-explanatory in that the Insured no longer is required to produce a copy of the title policy in order to recover its loss through an approved claim.

*Arbitration Condition (Owner’s & Loan)* – In both the Owner’s and Loan Policies, this condition was revised to:

- Increase the threshold from \$1 million to \$2 million in which arbitration can be unilaterally invoked by either the Insured or the Insurer;
- Arbitration is now limited to the parties of the Policy only (i.e. no class action arbitrations – “no joinder or consolidation with claims or controversies of other parties”); and
- Reference is now made to the Title Insurance Arbitration Rules of the American Land Title Association – posted to the ALTA website ([www.alta.org](http://www.alta.org)).

*Addition of the “Incorporation Provision Relating to Endorsements” (aka the “Boilerplate Provision”) (Owner’s & Loan)* which reads as follows:

“Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not

- modify any of the terms and provisions,
- modify any prior endorsement,
- extend the Date of Policy; or
- increase the Amount of Insurance.”

*The “Choice of Law; Forum” (Owner’s & Loan)* - This provision was added to the increasing number of “cross-border” transactions in which citizens of another country are buying or making loans secured by land in the U.S.

- The Choice of Law provision confirms that the law that applies is the law of the jurisdiction where the land is located; and
- The Choice of Forum provision confirms that any litigation or other proceeding must be brought in a state or federal court within the U.S. or its territories having appropriate jurisdiction.

For more information please feel free to contact us:



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