



A Deep Dive Into the Form 9

Presented by
LEGAL EDUCATION DEPARTMENT
of
Attorneys' Title Fund Services, Inc.

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All references herein to title insurance policy forms and endorsements are intended to refer to the policy forms and endorsements issued by Fund members as duly appointed title agents of Old Republic National Title Insurance Company.

These materials are for educational use in Fund seminars. They should not be relied on without first considering the law and facts of a matter. Legal documents for others can only be prepared by an attorney after consultation with the client.

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A Deep Dive Into the Form 9



Kara Scott
Legal Education Attorney

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ALTA Form 9 Endorsement with FL modifications

- What is it?
- Why do lenders ask for it?
- How do we issue it?



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What is it?

Title Insurance 101

Loan Policy

M21

(With Florida Modifications)

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Covered Risks – Loan Policy Jacket

AMERICAN LAND TITLE ASSOCIATION
LOAN POLICY OF TITLE INSURANCE
(With Florida Modifications)

ISSUED BY OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

This policy, when issued by the Company with a Policy Number and the Date of Policy, is valid even if this policy or any endorsement to this policy is issued electronically or lacks any signature.

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at the address shown in Condition 16.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, Old Republic National Title Insurance Company, a Florida corporation (the "Company"), insures as of the Date of Policy and, to the extent stated in Covered Risks 1, 13, and 14, after the Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

- The Title being vested other than as stated in Schedule A.
- Any defect in or lien or encumbrance on the Title. Covered Risk 2 includes, but is not limited to, insurance against loss from:
 - a defect in the Title caused by:
 - forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
 - the failure of a person or Entity to have authorized a transfer or conveyance;
 - a document affecting the Title not properly authorized, created, executed, witnessed, sealed, acknowledged, notated (including by remote online notarization), or delivered;
 - a failure to perform those acts necessary to create a document by electronic means authorized by law;
 - a document executed under a falsified, expired, or otherwise invalid power of attorney;
 - a document not properly filed, recorded, or indexed in the Public Records, including the failure to have performed those acts by electronic means authorized by law;
 - a defective judicial or administrative proceeding; or
 - the repudiation of an electronic signature by a person that executed a document because the electronic signature on the document was not valid under applicable electronic transactions law.

continued on next page

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY
A One-4 Company
1400 South Flamingo Blvd., Suite 900, Tampa, FL 33607
(813) 377-1111

Chomera President
David Wild Secretary

SERIAL M21 -

Insures, as of the Date of Policy, against loss or damage:

- Incorrect vesting
- Defect in Title
- Lien or encumbrance
- Unmarketable Title
- Lack of access
- Violation of governmental regs
- Invalidity or unenforceability of the mortgage lien
- Lack of priority of mortgage lien

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Policy Coverage

Policies do not cover risks associated with Restrictions, Encroachments and Mineral Rights



Risks - Restrictions

- Violation of an enforceable CCR
- Future violation of CCR which results in
 - Loss of mortgage priority
 - Invalidity or unenforceability of mortgage
 - Divestment of title acquired in satisfaction of indebtedness



CCR Example

- “Upon recording, the Association’s claim of lien shall relate back to the date of the filing of the original Declaration of Condominium”

First Mortgagee. The priority...shall be determined by the Florida Condominium Act, Chapter 718, Florida Statutes (2003), as amended from time to time

- Sec. 718.118(5)(a), F.S. “...as to first mortgages of record, the lien is effective from and after recording of a claim of lien in the public records of the county in which the condominium parcel is located”

Risks - Restrictions

- Recorded notice of violation of CCR related to environmental protection
- Relevant matter “hidden” within a CCR
 - Easement
 - Lien for liquidated damages or private charges or assessments
 - Purchase option, right of first refusal, or right to approve future purchaser or occupant



Examples

- “Assessments against Owners shall be made by the Board of Directors of the Association, in the manner provided in the Bylaws and as follows...”
- “The approval of the Association that is required for the transfer of ownership of units shall be obtained in the following manner...”
- “All leases shall be subject to prior approval of the Association”

Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co., 687 F.3d 620 (3d Cir. 2012)

- Recorded master declaration included right to prior approval of future purchasers
- Nationwide purchased loan policy from Commonwealth with an ALTA 9 endorsement. Policy excepted master declaration from coverage
 - Deed in lieu of foreclosure to Nationwide
 - Nationwide attempted to sell
 - Liberty Mill’s refused to approve sale
 - Nationwide filed claim
- Held: Nationwide protected by ALTA 9 endorsement because right to prior approval not “expressly excepted” on Sch. B

Risks – Encroachments, Mineral Rights

1. Forced removal of improvement

- Encroachment across platted setback line
- Encroachment into Schedule B excepted easement
- Encroachment onto or from neighboring land



2. Damage to improvements caused by legal exercise of right of entry by mineral rights owner

Owner's Policy

021

(With Florida Modifications)

Covered Risks – Owner’s Policy Jacket



Insures, as of the Date of Policy, against loss or damage:

- Incorrect vesting
- Defect in Title
- Lien for taxes
- Unmarketable Title
- Lack of access
- Violation of governmental regs
- Prior transfer - fraudulent conveyance or voidable transfer
- Matter recorded after Date of Policy but prior to insured deed

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Risks - Restrictions

- Violation of an enforceable CCR
- Relevant matter “hidden” within a CCR
 - Easement
 - Purchase option, right of first refusal, or right to approve future purchaser or occupant
 - Right of re-entry, possibility of reverter, or right of forfeiture



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Reverter Example

- This conveyance is however made upon the following condition and limitations:

That if . . . intoxicating liquor shall ever be sold upon said premises or any part thereof, then . . . premises hereby conveyed shall thereupon immediately revert to the grantor herein and its legal representatives, and the estate hereby granted shall thereupon terminate

CCR Examples

- Drainage Easements: “A blanket non-exclusive easement and right on, over, under and through the ground within the Properties to maintain and to correct drainage of surface water and other erosion controls”
- Approval of Sale or Transfer of Unit: “The approval of the Association that is required for the transfer of ownership of units shall be obtained in the following manner...”
- Approval of Leasing: “All leases shall be subject to prior approval of the Association”

Unenforceable Restrictions

- The Civil Rights Act of 1866 (42 U.S.C. Secs. 1981, 1982) prohibits racial discrimination in sale or rental of real property
- The Fair Housing Title (Title VIII) of the Civil Rights Act of 1968 (42 U.S.C. Sec. 3604) prohibits exceptions for restrictions relating to race, color, religion or national origin from appearing in a title insurance commitment or policy
- TN 28.01.05

Risks – Encroachments, Mineral Rights

1. Forced removal of improvement
 - Encroachment across platted setback line
 - Encroachment into Schedule B excepted easement
 - Encroachment onto or from neighboring land



2. Damage to improvements caused by legal exercise of right of entry by mineral rights owner

Form 9 Series

Form 9 Series - Affirmative Coverage



- ALTA Endorsement **9-06** Restrictions, Encroachments, Minerals – Loan Policy (With Florida Modifications)
- ALTA Endorsement **9.3-06** Restrictions, Encroachments, Minerals – Loan Policy (With Florida Modifications)
- ALTA Endorsement Form **9.1-06** Restrictions, Encroachments, Minerals – Owner’s Policy – Unimproved Land (With Florida Modifications)
- ALTA Endorsement **9.2-06** Restrictions, Encroachments, Minerals Owner’s Policy – Improved Land (With Florida Modifications)

ALTA Form 9 Coverage



REM


1. Restrictions
2. Encroachments
3. Mineral Rights

Restrictions



CCRs

- Covenant: Agreement to act (“affirmative”), or not to act (“restrictive”)
- Condition: a contingency, the happening of which may trigger an action or event
- Restriction: Limitation on use of the Land
- May be coupled with reverter or right of re-entry



Form 9-06 Coverage - Lender

Paragraph One:

There are no CCRs under which the Mortgage lien can be divested, subordinated or extinguished, or validity impaired.


Unless excepted in Schedule B:

- There are no violations of CCRs
- CCRs do not include an easement, lien for liquidated damages, private charge or assessment, option to purchase, rights of first refusal or prior approval of future purchaser/occupant
- There are no recorded notices of violations of CCRs

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Future Violations of CCRs:

- Future violations causing insured lien to become invalid, unenforceable, or lose priority;
- Loss of Title if the lender acquires Title in satisfaction of the indebtedness



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Impact of Form 9 – Loan Policy

- Affirmatively assures continuing priority and enforceability of insured lien
- Assures the lender that Title will not be lost if acquired by insured in satisfaction of debt
- Any violation of CCR will not result in final court order or judgment denying right to maintain existing improvement

Nationwide Case



- Requires the lender and owner to be put on notice regarding specific provisions in the CCRs that could result in loss or damage.
- Provisions in CCRs must be referenced with specificity in Schedule B

Form 9-06 – Paragraph 1

- Lender should be put on notice of CCR matters which provide for:
 - An easement
 - Lien for liquidated damages
 - Private charge or assessment
 - Option to purchase
 - Right of first refusal
 - Prior approval of purchaser or occupant
- Environmental protections referenced in CCRs may be ignored unless:
 - There is a recorded notice of violation, or
 - Violation could affect lien priority or enforcement



Form 9.1 or 9.2 – Paragraph 1

- Affirmatively assures there are no violations of CCRs as of the Date of Policy
- Owner is put on notice of CCR matters which provide for:
 - An easement
 - Right of re-entry
 - Possibility of reverter
 - Right of forfeiture
 - Option to purchase
 - Right of first refusal
 - Prior approval of purchaser or occupant
- Environmental protections referenced in CCRs may be ignored unless notice of violation is recorded



Encroachments



Must specifically identify on Schedule B:

- Encroachment across platted setback line
- Encroachment onto or from neighboring land
- Encroachment into Sch. B excepted easement

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Encroachments



Form 9 covers the forced removal of improvement from identified exception

- Encroaching across platted setback line
- Encroaching into Schedule B excepted easement
- Encroaching onto neighboring land

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Impact of Form 9



- Specific survey exception in Schedule B identifies encroachments excepted from coverage by the policy
- Form 9 Endorsement assures there are no encroachments other than as specifically identified on Sch. B
- Form 9 Endorsement affirmatively covers damage or loss occasioned by forcible removal of improvements from an identified encroachment

What if there is no current survey?

Survey – Condominium Units

- Waiver of Survey Exception – ALTA 9-06 and 9.2-06 Endorsements (TN 8.05.06)
 - Declaration includes original survey as exhibit
 - Reasonable determination no subsequent issues
 - Delete standard survey exception & issue Form 9
- See “Form 9 and Survey Requirements When Insuring a Condominium, Townhouse, or Cooperative”
 - 54 Fund Concept 22 (Feb. 2022)

Surveys for Refinances

- Surveys – Requirements (TN 25.03.06)
 - Loan policy upon refinance
 - Older survey where no changes have occurred on the property
 - Owner affidavit
 - Specific survey exception needed for 9-06 or 9.3-06 issuance
 - What if there is no survey at all? (for refinances only)
 - Platted, single-family residential with prior policy
 - Standard survey exception removed from prior policy
 - Specific survey exception carried forward from prior policy if providing Form 9³⁸ coverages



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Prior Survey

Surveys – Requirements (TN 25.03.06)

- Owner's policy
 - Platted, single-family residential
 - Satisfactory prior survey
 - Survey certified to prior or current owner
 - Seller to furnish affidavit



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Form 9 without Survey?

- The ALTA 9-06 endorsement (Restrictions, Encroachments, Minerals) is attached to this policy as Endorsement No. _____ Element of coverage 1(b)(1) thereof is hereby modified to read as follows:
 - There are no present violations on the Land of any enforceable covenants, conditions, or restrictions
 - Elements of coverage 1(b)(3), 1(b)(4), 3(a), 4, and 5 are hereby deleted from the endorsement in their entirety
- **Caveat:** If survey needed to determine if CCR has been violated, endorsement may not be given without survey examination
- Page 7-92 Fund Procedures Handbook (2021)

When location of easements or rights-of-way of record, other than those on record plats, is required, this information must be furnished to the surveyor and mapper



Mineral Rights



1. Severance of “mineral estate” from the “surface estate”
2. There is an exercise of right of entry (R/E)
3. Causing damage to:
 - existing improvements (loan policy)
 - existing buildings (owner improved) or
 - future buildings (owner unimproved)

On-Demand Webinar - Buried Treasure: Mineral & Subsurface Rights

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Examples

1. Deed Reservation: “Reservation of all oil, gas and minerals and rights thereto as described in that certain Fee Simple Deed [recording information]...”
2. Automatic Reservation: “This Quit Claim Deed made this 23 day of October 2018 between Town of Micanopy, a Florida municipal corporation whose post office address is...”
3. Deed to mineral rights: Legal Description: “Interest in and to all the oil, gas, and other minerals of every kind and character in, on or under, or that may be produced from that certain tract or parcel of land situated in...”

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Right of Entry



If Right of Entry is not released, Form 9 may be given if element of coverage is removed; or upon appropriate underwriting risk analysis

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Analysis

1. Has mineral estate been severed by deed, reservation or operation of law?
2. Is Right of Entry released or extinguished by operation of law?
 - Marketable Record Title Act (MRTA) – private land transfers
 - Sec. 270.11(3), F.S. (less than 20 acres) – public land transfers
3. Is Right of Entry likely to be exercised?

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Deleting Form 9 Coverage – Mineral Rights

When Right of Entry has not been released, add following to Schedule B

“Notwithstanding anything contained herein to the contrary, the following coverage is hereby deleted...”

Element of coverage 3(b) of the ALTA 9-06 endorsement

Element of coverage 4 of the ALTA 9.3-06 endorsement

Element of coverage 2 of the ALTA 9.1-06 endorsement

Element of coverage 2(b) of the ALTA 9.2-06 endorsement

- See also “Addressing Oil, Gas and Mineral Reservations Held by State and Local Governments”, 51 Fund Concept 111 (Nov. 2019)

Why do Lenders ask for it?

Loan Policy Coverages

- Covered risks in Policy Jacket do not include REM coverage
- Schedule B includes exceptions to coverage
- Lenders require REM coverage to sell loans on the secondary mortgage market



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The Fund

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How to Issue It

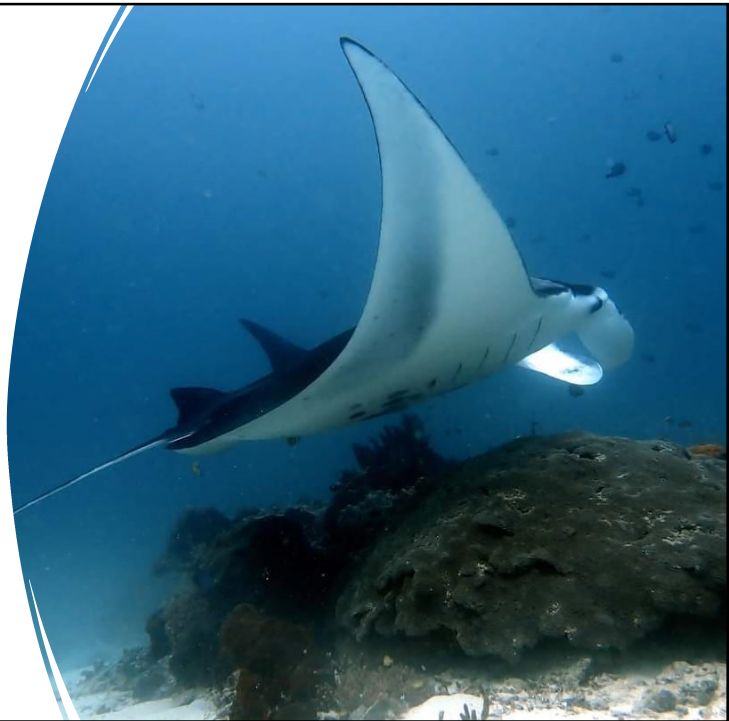
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The Fund

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Determination of Insurability Required

- Sec. 627.7845(1), F.S.
- “A title insurer may not issue a title insurance commitment, endorsement, or title insurance policy until the title insurer has caused to be made a determination of insurability based upon the evaluation of a reasonable title search...and such other information as may be necessary...”



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Procedure

Review recorded and known instruments containing CCRs

- Determine if any could divest, subordinate, or extinguish the insured lien or affect its validity, priority or enforcement (e.g., HOA lien priority)
- List as exceptions any existing setback violations
- Add note in Sch. B to an excepted CCR if it provides for an easement, option to purchase, right of first refusal, or prior approval of future purchaser or occupant; lien for liquidated damages, private charge or assessment, right of re-entry, or possibility of reverter or right of forfeiture – NOTICE to lender and owner
- If CCR imposes easement it must be separately listed on Schedule B

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The Fund

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Procedure (continued)

- Confirm future violations will not affect lien or cause reversion of title
 - Lack of existing violations should be supported by affidavit of person with knowledge
 - Physical violations may require survey examination
- Make Schedule B exception for recorded notices of violations of CCRs related to environmental protection

Procedure (continued)

- Provide surveyor with Schedule B recorded documents which identify easement; require inclusion on survey map
- Examine survey and identify encroachments across platted setback lines, across property boundary lines and into easements
- Draft specific survey exception itemizing each encroachment
- Determine if any encroachment warrants exclusion of Form 9 element of coverage; if so, add exclusion language to specific survey exception draft

Specific Survey Exception

- Encroachments, encumbrances, violations, variations, or adverse circumstances, if any, actually shown on the survey prepared by _____, dated _____, bearing Job # _____:
 - a. [itemize specific survey matter];
 - b. [itemize specific survey matter];
 - c. [itemize specific survey matter]
- If an improvement encroaches upon an easement add:
“ALTA Endorsement 9-06 element of coverage no. 3(a) shall not apply with respect to this encroachment.”

Minor Violations of Setbacks – TN 28.01.03

Affirmative coverage over minor setback lines – consider:

- Loan to value – at least 10% equity cushion
- Nature of improvement (permanent v. easily removable)
- Severity of issue (10% or less of setback impacted)
- Uniqueness (common to neighborhood)
- No reverter
- Any current objections or legal proceedings



A Deep Dive Into the Form 9



Kara Scott
Legal Education Attorney

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Thank you for your time and attention

For more information please contact:

Kara Scott

KScott@TheFund.com



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OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Endorsement No. _____ To Policy No. _____

The insurance provided by this endorsement is subject to the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

The company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

1. Any incorrectness in the assurance that, at Date of Policy:
 - (a) There are no covenants, conditions or restrictions under which the lien of the Mortgage referred to in Schedule A can be divested, subordinated or extinguished, or its validity, priority or enforceability impaired.
 - (b) Unless expressly excepted in Schedule B:
 - (1) There are no present violations on the Land of any enforceable covenants, conditions or restrictions, nor do any existing improvements on the land violate building setback lines shown on a plat of subdivision recorded or filed in the Public records.
 - (2) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the land does not, in addition, (i) establish an easement on the Land; (ii) provide a lien for liquidated damages; (iii) provide for a private charge or assessment; (iv) provide for an option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant.
 - (3) There is no encroachment of existing improvements located on the Land onto adjoining land, nor any encroachment onto the Land of existing improvements located on adjoining land.
 - (4) There is no encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.
 - (5) There are no notices of violation of covenants, conditions and restrictions relating to environmental protection recorded in the Public Records.
2. Any future violation on the Land of an existing covenant, condition or restriction occurring prior to the acquisition of title to the estate or interest in the Land, provided the violation results in:
 - (a) invalidity, loss of priority or unenforceability of the lien of the Insured Mortgage; or
 - (b) loss of Title to the estate or interest in the Land if the Insured shall acquire Title in satisfaction of the Indebtedness secured by the Insured Mortgage.
3. Damage to existing improvements (excluding lawns, shrubbery or trees):
 - (a) which are located on or encroach upon that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or
 - (b) which results from the future exercise of any right to use the surface of the Land for the extraction or development of minerals excepted from the description of the Land or excepted in Schedule B.
4. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment excepted in Schedule B.
5. Any final court order or judgment denying the right to maintain any existing improvement on the Land because of any violation of covenants, conditions or restrictions or building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

Wherever in this endorsement the words "covenants, conditions or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants, conditions or limitations contained in an instrument creating a lease.

As used in paragraph 1(b)(1) and 5, the words "covenants, conditions or restrictions" shall not be deemed to refer to or include any covenants, conditions or restrictions relating to environmental protection.

The failure to expressly except any matter delineated in paragraphs 1(b)(1), 1(b)(2) or 1(b)(5) of this endorsement constitutes the Company's agreement to indemnify against loss or damage resulting from any matters delineated in paragraphs 1(b)(1), 1(b)(2) or 1(b)(5) only and provides no coverage for any other matters set forth in the covenants, conditions and restrictions.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

Name of Agent

Agent No.

Agent's Signature

Old Republic National Title Insurance Company
By Carolyn Monroe
President

ALTA ENDORSEMENT 9.3-06 RESTRICTIONS, ENCROACHMENTS, MINERALS
(With Florida Modifications)

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Attached to Policy Number _____

The insurance provided by this endorsement is subject to the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

1. Any incorrectness in the assurance that, at Date of Policy:
 - a. There are no covenants, conditions, or restrictions under which the lien of the Insured Mortgage can be divested, subordinated, or extinguished or its validity, priority, or enforceability impaired.
 - b. Unless expressly excepted in Schedule B,
 - i. There are no present violations on the Land of any enforceable covenants, conditions, or restrictions, or existing improvements on the Land that violate any building setback lines shown on a plat of subdivision recorded or filed in the Public Records.
 - ii. Any instrument referred to in Schedule B as containing covenants, conditions, or restrictions on the Land does not, in addition, (A) establish an easement on the Land, (B) provide a lien for liquidated damages, (C) provide for a private charge or assessment, (D) provide for an option to purchase, a right of first refusal, or the prior approval of a future purchaser or occupant.
 - iii. There is no encroachment of existing improvements located on the Land onto adjoining land nor any encroachment onto the Land of existing improvements located on adjoining land.
 - iv. There is no encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.
 - v. There are no notices of violation of covenants, conditions, or restrictions relating to environmental protection recorded or filed in the Public Records
2. Any future violation on the Land of any existing covenants, conditions, or restrictions occurring prior to the acquisition of Title by the Insured, provided the violation results in:
 - a. invalidity, loss of priority, or unenforceability of the lien of the Insured Mortgage; or
 - b. loss of Title if the Insured shall acquire Title in satisfaction of the Indebtedness.
3. Damage to improvements existing at Date of Policy, excluding lawns, shrubbery, or trees, located or encroaching on that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved.
4. Damage to improvements existing at Date of Policy excluding lawns, shrubbery, or trees, located on the Land resulting from the future exercise of any right to use the surface of the Land for the extraction or development of minerals excepted from the description of the Land or excepted in Schedule B.
5. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment excepted in Schedule B.
6. Any final court order or judgment denying the right to maintain any existing improvements on the Land because of any violation of covenants, conditions, or restrictions, or building setback lines shown on a plat of subdivision recorded or filed in the Public Records at Date of Policy.

Wherever in this endorsement the words "covenants, conditions, or restrictions" appear, they do not include the terms, covenants, conditions, or limitations contained in an instrument creating a lease.

As used in paragraphs 1.b.i. and 6, the words "covenants, conditions, or restrictions" do not include any covenants, conditions, or restrictions (a) relating to obligations of any type to perform maintenance, repair, or remediation on the Land, or (b) pertaining to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances, except to the extent that a notice of a violation or alleged violation affecting the Land has been recorded or filed in the Public Records at Date of Policy and is not excepted in Schedule B.

The failure to expressly except any matter delineated in paragraphs 1.b.i., 1.b.ii. or 1.b.v. of this endorsement constitutes the Company's agreement to indemnify against loss or damage resulting from any matters delineated in paragraphs 1.b.i., 1.b.ii. or 1.b.v. only and provides no coverage for any other matters set forth in the covenants, conditions and restrictions.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Name of Agent

Old Republic National Title Insurance Company

By: Carolyn Monroe

President

Agent's Signature

ALTA ENDORSEMENT FORM 9.1-06
RESTRICTIONS, ENCROACHMENTS, MINERALS - OWNER'S POLICY - UNIMPROVED LAND
(With Florida Modifications)

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Endorsement No. _____ To Policy No. _____

The insurance provided by this endorsement is subject to the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

The Company insures the insured against loss or damage sustained by reason of:

1. The existence, at Date of Policy, of any of the following unless expressly excepted in Schedule B.
 - (a) Present violations on the land of any enforceable covenants, conditions or restrictions.
 - (b) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the land which, in addition, (i) establishes an easement on the land; (ii) provides for an option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant; or (iii) provides a right of reentry, possibility of reverter or right of forfeiture because of violations on the land of any enforceable covenants, conditions or restrictions.
 - (c) Any encroachment onto the land of existing improvements located on adjoining land.
 - (d) Any notices of violation of covenants, conditions and restrictions relating to environmental protection recorded or filed in the public records.
2. Damage to buildings constructed on the land after Date of Policy 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 minerals excepted from the description of the land or excepted in Schedule B.

Wherever in this endorsement the words "covenants, conditions or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants, conditions or limitations contained in an instrument creating a lease.

As used in paragraph 1(a) the words "covenants, conditions or restrictions" shall not be deemed to refer to or include any covenants, conditions or limitations relating to environmental protection.

The failure to expressly except any matter delineated in paragraphs 1(a), (b) or (d) of this endorsement constitutes the Company's agreement to indemnify against loss or damage resulting from any matters delineated in paragraphs 1(a), (b) or (d) only and provides no coverage for any other matters set forth in the covenants, conditions and restrictions.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Name of Agent

Agent No.

Agent's Signature

Old Republic National Title Insurance Company
By **Carolyn Monroe**
President

ALTA ENDORSEMENT 9.2-06 RESTRICTIONS, ENCROACHMENTS, MINERALS
OWNER'S POLICY - IMPROVED LAND
(With Florida Modifications)

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Endorsement No. _____ To Policy No. _____

The insurance provided by this endorsement is subject to the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

The Company insures the Insured against loss or damage sustained by reason of:

1. The existence, at Date of Policy, of any of the following unless expressly excepted in Schedule B:
 - (a) Present violations on the Land of any enforceable covenants, conditions, or restrictions, or any existing improvements on the Land which violate any building setback lines shown on a plat of subdivision recorded or filed in the Public Records.
 - (b) Any instrument referred to in Schedule B as containing covenants, conditions, or restrictions on the Land which, in addition, (i) establishes an easement on the Land; (ii) provides for an option to purchase, a right of first refusal, or the prior approval of a future purchaser or occupant; or (iii) provides a right of re-entry, possibility of reverter, or right of forfeiture because of violations on the Land of any enforceable covenants, conditions, or restrictions.
 - (c) Any encroachment of existing improvements located on the Land onto adjoining land, or any encroachment onto the Land of existing improvements located on adjoining land.
 - (d) Any encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.
 - (e) Any notices of violation of covenants, conditions, or restrictions relating to environmental protection recorded or filed in the Public Records.
2. Damage to existing buildings at Date of Policy:
 - (a) Which are located on or encroach upon that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved;
 - (b) 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 minerals excepted from the description of the Land or excepted in Schedule B.
3. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment, other than fences, landscaping, or driveways, excepted in Schedule B.
4. Any final court order or judgment denying the right to maintain any existing building on the Land because of any violation of covenants, conditions, or restrictions, or building setback lines shown on a plat of subdivision recorded or filed in the Public Records at Date of Policy.

Wherever in this endorsement the words "covenants, conditions, or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants, conditions, or limitations contained in an instrument creating a lease.

As used in paragraphs 1(a) and 4, the words "covenants, conditions, or restrictions" shall not be deemed to refer to or include any covenants, conditions or limitations relating to environmental protection.

The failure to expressly except any matter delineated in paragraphs 1(a), (b) or (e) of this endorsement constitutes the Company's agreement to indemnify against actual monetary loss or damage resulting from any matters delineated in paragraphs 1(a), (b) or (e) only and provides no coverage for any other matters set forth in the covenants, conditions and restrictions.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

Name of Agent

Agent No.

Agent's Signature

Old Republic National Title Insurance Company
By Carolyn Monroe

THE ALTA 9-06: SELECTED ISSUES - COVENANTS, CONDITIONS, RESTRICTIONS AND SURVEYS

BY JALINDA B. ("JAY") DAVIS, FUND SR. UNDERWRITING COUNSEL

The ALTA 9-06 (9-06) is applicable to loan policies and is perhaps the most frequently issued endorsement. It provides an insured lender with several commonly requested affirmative coverages, most of which concern violations of covenants, conditions, restrictions and encroachments. Contrary to misconceptions, this endorsement may not be issued on an automatic basis due to the breadth of the affirmative coverage provided by the endorsement. Many determinations must be made prior to the issuance of the 9-06. This article focuses on issues which arise in conjunction with the issuance of the 9-06 when the proposed insured lands are encumbered by covenants, conditions, restrictions and encroachments or other matters revealed by a survey. The insuring guidelines reviewed in this article apply similarly to the ALTA 9.1-06 and ALTA 9.2-06 endorsements which are sometimes issued with owner's policies.

Covenants, Conditions, Restrictions. A common oversight made in connection with the issuance of the 9-06 is the failure to review recorded covenants, conditions and restrictions (CCRs) prior to closing only to later discover, post-closing, that certain terms and conditions of the CCRs have been violated resulting in the possibility of a claim under the 9-06. While recorded CCRs are most commonly associated with condominium properties and properties located in residential subdivisions, both commercial and residential properties conveyed independent of a subdivision or condominium project may also be encumbered by CCRs. Additionally, a deed conveying a single parcel of land may include CCRs. As a result, it is important to identify any instrument in the chain of title which includes covenants, conditions or restrictions and conduct a thorough review for issues which may pose an insuring risk under the 9-06.

By its very language, element of coverage 1(a) of the 9-06 provides a reminder of the necessity to review any instrument containing CCRs. This element of coverage assures that there are no covenants, conditions or restrictions under which the lien of the insured mortgage could be divested,

subordinated or extinguished or its validity, priority or enforcement impaired. The only way this element of coverage can be provided is through review of all CCRs which encumber the property to be insured for confirmation that such assurance is correct.

A common misconception is that mere insertion of a blanket exception for CCRs under Schedule B of the loan policy may eliminate 9-06 coverage for all matters set forth in CCRs encumbering the property to be insured. Fund Members should examine any instrument listed in Schedule B that contains covenants, conditions or restrictions in order to determine whether or not any such instrument includes any of the items enumerated in subparagraphs (i) through (iv) of item number 1(b)(2) of the 9-06, specifically: easements on the land, a lien for liquidated damages, a private charge or assessment, an option to purchase, a right of first refusal and prior approval of a future purchaser or occupant.

Any of the above enumerated 1(b)(2) items included in CCRs encumbering the property to be insured must be expressly excepted in Schedule B. For example, if a declaration of condominium imposes charges, assessments or liens and requires prior approval of a future purchaser or occupant, the following language should be added to the end of the paragraph in Schedule B which makes exception for the declaration of condominium: *"...which declaration establishes and provides for liens, charges, assessments and prior approval of a future purchaser or occupant."* It is important to note that by virtue of element of coverage 1(a) of the 9-06, the endorsement affirmatively insures that those provisions will not have the effect of divesting, subordinating or extinguishing the insured mortgage or impairing its validity, priority or enforceability. Additional provisions of CCRs which permit change in use or other private rights may merit specific exception. Any questions, issues or concerns in connection with any of the enumerated 1(b)(2) items should be directed to Fund Underwriting Counsel. For further discussion on

element of coverage 1(b)(2) of the 9-06, see also “Loan Policy ALTA 9 Endorsement Interpreted,” 38 *Fund Concept* 44 (Apr. 2006); “ALTA 9 Coverage,” 44 *Fund Concept* 100 (Nov. 2012); “Revised ALTA Endorsements and Forms,” 46 *Fund Concept* 98 (Sep. 2014); and *The Fund Procedures Handbook*, Ch. 7.

Surveys. There are a few common misconceptions about coverage under the 9-06 as it relates to survey matters. The first, and perhaps the most common misconception, is whether or not a survey is necessary in order to issue a 9-06. Generally speaking, the 9-06 may not be issued unless a current survey has been obtained. However, some lenders do not require surveys in connection with certain types of loans. The 9-06 may still be issued in such a situation, but must be modified by way of the following special language which must be inserted in Schedule B of the loan policy:

“The ALTA 9-06 endorsement (Restrictions, Encroachments, Minerals) is attached to this policy as Endorsement No. _____. Element of coverage 1(b)(1) thereof is hereby modified to read as follows: ‘There are no present violations on the Land of any enforceable covenants, conditions, or restrictions.’ Elements of coverage 1(b)(3), 1(b)(4), 3, 4 and 5 are hereby deleted from the endorsement in their entirety.” See *The Fund Procedures Handbook*, Ch. 7. Exceptions permitting deletion of the standard survey exception and providing full 9-06 coverage are detailed within TN 25.03.06(B).

Another misconception concerning survey matters and coverage under the 9-06 involves encroachments. For example, consider elements of coverage 1(b)(3) and 1(b)(4) of the 9-06. Element of coverage 1(b)(3) assures that, *unless expressly excepted in Schedule B*, there are no encroachments of existing improvements located on the insured property which encroach onto adjoining land and there are no encroachments of existing improvements located on adjoining land which encroach onto the insured property. Element of coverage 1(b)(4) assures that, *unless expressly ex-*

cepted in Schedule B, there are no encroachments of existing improvements located on any portion of the insured property subject to an easement excepted in Schedule B. Therefore, any existing encroachment falling under item 1(b)(3) or 1(b)(4), must be specifically set out as an exception in Schedule B of the loan policy for disclosure purposes. Listing of 1(b)(3) and 1(b)(4) type encroachments in Schedule B of the loan policy removes the affirmative coverage under item number 1 of the 9-06. However, special consideration must be given to whether affirmative coverage will be provided under item numbers 3, 4 or 5 of the 9-06 for specific encroachments and matters as scheduled in Schedule B. This affirmative coverage is automatically provided unless specifically excluded by an additional Schedule B exception. A determination of such coverage depends on the nature of the encroachment and whether or not it falls under item number 3, 4 or 5 of the 9-06. More importantly, unless such an encroachment is minor and poses little risk pursuant to underwriting guidelines as set forth in TN 25.03.07 and *The Fund Procedures Handbook*, Ch. 7, such encroachment requires Fund Underwriting Counsel authorization before affirmative coverage under the 9-06 may be provided.

For example, in connection with element of coverage 1(b)(4), subparagraph 3(a) of the 9-06 provides coverage for damage to existing improvements (excluding lawns, shrubbery or trees) located within an easement resulting from exercising the right to maintain the easement for the purpose for which the easement was granted or reserved. If there are no improvements located upon the portion of the insured property subject to an easement, subparagraph 3(a) poses no problem. In general, however, this coverage may still be provided where encroachments of improvements onto typical utility or drainage easements exist, as long as the improvement is removable and relatively minor (e.g., a fence or driveway) and there should be at least a 10% equity cushion in the subject property. Any facts falling outside these general guidelines must be discussed with and approved by Fund Underwriting Counsel. See *The Fund Procedures Handbook*, Ch. 7.

In connection with item number 1(b)(3), item number 4 of the 9-06 provides coverage for loss or damage arising from a final judgment requiring the removal of any encroachment from the insured property onto neighboring land. Any transaction involving such an encroachment must be reviewed with Fund Underwriting Counsel.

Encroachments that are insignificant, minor and easily removable present less risk but still require evaluation pursuant to underwriting guidelines. If there is any indication of a boundary dispute, element of coverage number 4 may not be provided. It is important to note that item number 4 of the 9-06 does not provide coverage for encroachments of improvements from adjoining lands onto the insured property or other encroachment matters. See *The Fund Procedures Handbook*, Ch. 7.

In connection with item number 1(b)(1), element of coverage number 5 of the 9-06 provides coverage for loss or damage arising from a final judgment denying the right to maintain any existing improvement because of a violation of covenants, conditions or restrictions or platted setback lines. This element of coverage may be provided for insignificant or minor encroachments that comply with underwriting guidelines, otherwise this element of coverage should not be provided without prior approval by Fund Underwriting Counsel. For more information on insuring requirements and guidelines as to this element of coverage, see *The Fund Procedures Handbook*, Ch. 7.

Notwithstanding the foregoing, it is important to note that in the event an element of coverage provided under the 9-06 is not provided in a particular transaction, there must be an appropriate notation in the paragraph of Schedule B containing the exception. For example, if a building encroaches 30 feet onto adjoining land, this must be listed as a Schedule B exception (per element of coverage 1(b)(3)), and the following language must be added:

“Element of coverage No. 4 of the ALTA 9-06 endorsement (Restrictions, Encroachments, Minerals) shall not apply with respect to the aforesaid encroachment.” See *The Fund Procedures Handbook*, Ch 7.

Finally, pursuant to TN 25.03.07(3)(b), Fund Members may use either a general survey exception or a specific survey exception which lists all survey matters. However, the 9-06 may not be provided where a general survey exception is used in a loan policy. When a 9-06 endorsement is issued with a loan policy, and when either an ALTA 9.1-06 or 9.2-06 endorsement is issued with an owner’s policy, the specific survey exception must be used. The following is an example of the specific survey exception:

This policy does not insure against loss or dam-

age by reason of the following exceptions:

Any rights, easements, interests or claims which may exist by reason of, or reflected by, the following facts shown on the survey prepared by Ronald Thompson Surveyors, LLC dated September 27th, 2015, bearing Job #3255-2015:

- A. Encroachment of concrete drive upon utility easement in favor of Florida Power on the Northeasterly boundary of the Property.*
- B. Encroachment of portable wood frame shed upon platted building setback line on the Southwesterly boundary of the Property.*
- C. Encroachment of brick paver and fence upon the 60 foot draining easement along the Southerly boundary of the Property.*

The following general survey exception may be used when the 9-06 is not provided to the insured lender and neither the ALTA 9.1-06, nor the ALTA 9.2-06 is issued to the insured owner:

This policy does not insure against loss or damage by reason of the following exceptions:

Encroachments, overlaps, boundary line disputes and any other matters which would be disclosed by an accurate survey and inspection of the premises; alternatively, if a survey meeting the requirements of Sec. 627.7842(1)(a), F.S., is presented, then only those encroachments, overlaps, boundary line disputes, and other matters which are actually shown on the survey presented to and relied upon by the underwriter in the issuance of this policy.

Conclusion: Before closing and issuing the 9-06, ALTA 9.1-06 or ALTA 9.2-06, it is imperative to review all instruments in the chain of title containing covenants, conditions or restrictions. Provisions which provide for easements on the land, a lien for liquidated damages, private charges or assessments, op-



tions to purchase, rights of first refusal and prior approval of a future purchaser or occupant must be specifically shown as exceptions in Schedule B of the loan policy as discussed above. In addition, specific exception must be made under Schedule B of the loan policy for any encroachments revealed by a survey. However, it is important to recognize that the affirmative coverages provided in the 9-06 are limited and some encroachments revealed by a survey may not fall under any of the affirmative coverages provided. Finally, covenants, conditions or restrictions and encroachments that pose an insuring risk should be discussed with, and approved by, Fund Underwriting Counsel before closing and issuing a 9-06. See *The Fund Procedures Handbook*, Ch. 7.

DO YOU HAVE CFPB QUESTIONS?

You can speak with a live representative, or you can send in your questions/concerns to the email address provided.

CFPB Hotline:
(844) CFPB-FAQ or (844) 237-2327

CFPB Email:
cfpbfaq@thefund.com

You can also visit:
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5. Power of Attorney

Q. *Frankie and Mary Newlywed are refinancing their non-homestead property. Mary is traveling abroad and will not be back in time for the closing. Mary executed a power of attorney (POA) at the U.S. Consulate, and had it delivered to the Fund Member’s office in advance of the closing. The POA is properly executed and notarized by the Vice Consul and witnessed by two witnesses. The POA grants adequate specific powers to the attorney-in-fact for the refinance transaction. For the purpose of issuing a loan policy insuring the new mortgage, may the Fund Member rely on the execution formalities observed in this POA?*

A. Yes. The POA was notarized by a Consulate official authorized by Sec. 695.03(3), F.S., to take acknowledgements. Secs. 709.2105(2) and 709.2106(1), F.S., provide that all POAs executed in Florida or in a foreign country, on or after Oct. 1, 2011, must have two witnesses, regardless of whether the property is homestead or not. However, if the POA had been executed in another state as opposed to a foreign country, the POA could be used to mortgage non-homestead property as long as the POA complied with the laws of the state in which it was executed. Sec. 709.2106(3), F.S. In order to convey or mortgage homestead property using a POA, Sec. 689.111, F.S. requires that the POA be executed in the same manner as a deed, including two witnesses, no matter where the POA was executed. TN 4.02.01(B)(3).



Application of Surveys to The ALTA 9-06 Endorsements With Florida Modifications

By Deborah B. Ullman, Fund Underwriting Counsel

The Form 9 endorsements as approved by the American Land Title Association (ALTA) were modified for use in Florida. For the purposes of this article, the entire series of ALTA 9-06 Endorsements with Florida modifications will be referred to as “Form 9 Endorsement.” As part of the closing process, a Fund Member typically receives a request from a lender and occasionally from an owner for the issuance of an unmodified (often referred to as “clean”) Form 9 Endorsement with the title insurance policy. The Fund’s Underwriting Department often receives inquiries seeking assistance with the review of a survey and determining whether an unmodified Form 9 Endorsement can be issued. This article addresses some common issues seen when reviewing a survey and its effect on issuing an unmodified Form 9 Endorsement. A lender may request either the ALTA 9-06 or the ALTA 9.3-06, both Form 9 Endorsement. These two endorsements can be used interchangeably. There are also two types of Form 9 Endorsements that can be issued with an owner’s policy: the ALTA 9.1-06 for vacant land and the ALTA 9.2-06 for improved land.

A Form 9 Endorsement provides affirmative coverage over several issues, including, but not limited to covenants, conditions and restrictions; violations of building setback lines; the right of entry related to oil, gas, and mineral rights; notices related to environmental protection; and encroachments. This article is limited to a discussion regarding how an encroachment reflected on the survey may impact the issuance of a Form 9 Endorsement. A good discussion of how to

address covenants, conditions and restrictions under a Form 9 Endorsement can be found in the “The ALTA 9-06: Selected Issues – Covenants, Conditions, Restrictions and Surveys” 48 *Fund Concept* 18 (Feb. 2016).

A Form 9 Endorsement may not be issued on an automatic basis. Once a Fund Member has reviewed the guidelines for issuing a Form 9 Endorsement as set forth in the *Fund Procedures Handbook*, they can reach out to the Fund’s Underwriting Department with any questions and for approval. First, a review of a survey should be undertaken. If the property being insured is a condominium, a new survey is not typically required to be reviewed since a copy of the original survey should be attached to the Declaration of Condominium that is recorded in the public records. If there is no survey attached to the Declaration of Condominium or any of its recorded amendments, Fund Members should contact Fund Underwriting Counsel prior to deleting the standard survey exception or issuing an unmodified Form 9 Endorsement.

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One of the main reasons for issuance of the Form 9 Endorsement is the affirmative coverage provided for damage or loss that may occur from the forced removal of improvements that encroach onto easements or adjoining property. Once the survey has been reviewed, Schedule B-II of the commitment, and Schedule B of the policy, should specifically notate all such encroachments. In addition, any violation of the setback lines evident from the survey should be mentioned. A specific survey exception disclosing all such matters is required because the Form 9 endorsement states that the elements of affirmative coverage extend to the matters excepted in Schedule B of the policy. Below is an example of how the specific survey exception should appear:

Encroachments, encumbrances, violations, variations, or adverse circumstances, if any, actually shown on the survey prepared by _____, dated _____, bearing Job # _____:

- a. *[itemize specific survey matter];*
- b. *[itemize other specific survey matter].*

It is important to note that minor or easily removable improvements that encroach do not present as great a risk as more permanent or structural improvements. Some examples often seen are where a fence extends onto the neighbor's property, or a fence or driveway extends over an easement. In these examples, while the fence or driveway encroachment would be recited within the specific survey exception, an unmodified Form 9 Endorsement can usually be issued.

A far more difficult and important analysis to issuing an unmodified Form 9 Endorsement occurs where a more permanent improvement, for example a concrete building, extends into the abutting neighbor's property or over an easement. A Fund Member should contact the Fund Underwriting Department to discuss additional analysis and evaluation of whether an unmodified Form 9 Endorsement could be issued. Some of the factors to consider when issuing the Form 9 Endorsement in this case are the age of the building, the extent of the encroachment, the equity in the property if a loan is involved, and the likelihood of a court order requiring removal of the encroachment.

Where the extent of the encroachment will not permit issuance of an unmodified Form 9 Endorsement and the affirmative coverage must be modified, the language removing or modifying the affirmative coverage in the Form 9 Endorsement is inserted within the specific survey exception describing the encroachment. The language of the actual endorsement is established and approved through the State Office of Insurance Regulation and cannot be changed. In our example, the fence and driveway are matters to which the affirmative coverage will apply, and a carve out is required

for the concrete building that encroaches onto the abutting neighbor's property. The specific survey exception could be recited in the commitment and subsequent policy as follows:

Encroachments, encumbrances, violations, variations, or adverse circumstances, if any, actually shown on the survey prepared by _____, dated _____, bearing Job # _____:

- a. Concrete building on western side of subject property encroaches onto adjoining property. [Element of coverage No. 4 of the ALTA 9.06 Endorsement (Restrictions, Encroachments, Minerals) shall not apply with respect to the aforesaid encroachment.]
- b. Fence extends onto the neighbor's property.
- c. Driveway crosses over utility easement to abut the right-of-way.

Where a buyer's counsel or a lender may insist that an unmodified Form 9 Endorsement be issued with their policy, there are insuring solutions that can be discussed with Fund Underwriting Counsel, such as a non-disturbance agreement from the adjoining property owner or the easement holder affected by the encroachment.

The *Fund Procedures Handbook* is a great resource that Fund Members can turn to for general guidance, examples, and proposed language. The chapter titled "Preparing the Forms" discusses Form 9 Endorsement coverages on both Lender's and Owner's policies, and recites examples of encroachments and describes how to insert the appropriate language onto Schedule B of the title policy if an encroachment exists, as well as, if Form 9 coverage must be modified.

The request for Form 9 Endorsements is a common one, but issuance of the Form 9 Endorsement is not perfunctory. The survey must be examined to identify all encroachments and violations. If matters of concern are noted, the guidelines discussed here and set forth in the *Fund Procedures Handbook* must be reviewed. The issuance of an unmodified Form 9 Endorsement is often appropriate even when such matters are disclosed. Fund Underwriting counsel are available to discuss any questions regarding the matters shown on the survey and the Form 9 series of endorsements and can be particularly helpful when assessing the need to eliminate any elements of coverage, and, if so, the appropriate process. □

Form 9 and Survey Requirements When Insuring a Condominium, Townhouse, or Cooperative

By Charles D. Nostra, Fund Sr. Underwriting Counsel

Fund underwriting counsel field many inquiries about the need for a survey when issuing a Form 9 series endorsement and when and if the requirement may be waived. This article aims to provide Fund Members with clarity and guidance.

First, some background on the ALTA 9-06 series endorsements and the survey coverage. There are four ALTA 9 endorsements approved for use in Florida. The Florida Office of Insurance Regulation has approved the forms with Florida Modifications, which vary slightly from the model forms created by ALTA.

The Florida-approved Form 9 series includes the ALTA 9-06 (Lender's policy), 9.1-06 (Owners Policy unimproved land), 9-2.06 (Owner's Policy improved land), and the newly-reinstated 9.3-06 (Lender's Policy.)

For the purposes of discussion in this article, reference will be made to the ALTA 9-06, as this is the most frequently issued endorsement in the series. The Form 9-06, also known as the Comprehensive or the REM 9 endorsement, provides many different affirmative coverages, including six elements of coverage directly related to survey issues.

Those elements of affirmative coverage are as follows:

Section 1(b) provides affirmative coverage in the event that there is an error in assuring that none of the stated matters exist if they are not shown on Schedule B. The endorsement insures the owner of the Indebtedness against loss or damage sustained by reason of any incorrectness in the assurance that, at

Date of Policy, unless expressly excepted in Schedule B:

- (1) there are no violations of Covenants Conditions & Restrictions (CCRs) with respect to building types or building setbacks in the CCR's or recorded plat.
- (2) any instrument referred to as containing covenants, conditions or restrictions on the land does not establish an easement on the Land.
- (3) there is no encroachment of existing improvements located on the Land onto adjoining land, nor any encroachment onto the Land of existing improvements located on adjoining land.
- (4) there is no encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted from coverage in Schedule B.

Section 3 contains two parts, both of which provide coverage as to loss or damage sustained by reason of damage to existing improvements. The first part, contained in subparagraph 3(a), concerns improvements located within easement areas and damage resulting from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved. The second part, contained in subparagraph 3(b), concerns damage resulting from the future exercise of rights of entry for the extraction or development of minerals.

Section 4 provides coverage as to loss or damage arising from a final judgment requiring the removal of any encroachment from the Land onto neighboring land.

And finally, Section 5 provides coverage as to loss or damage arising from a final judgment denying the right to maintain any existing improvement because of a violation of covenants, conditions, or restrictions or platted setback lines. The covenants, conditions, or restrictions are such that a survey would be necessary to determine whether there is an existing violation or an easement affecting the land.

If any specific area of the coverages above cannot be provided, an exception carving out that coverage for the item must be inserted into Schedule B. For example, if a building encroaches onto adjoining land, the encroachment would be listed as a Schedule B exception as per element of coverage 1(b)(3), and the follow-

ing language would be added immediately after the encroachment exception:

“Element of coverage No. 4 of the ALTA 9.06 endorsement (Restrictions, Encroachments, Minerals) shall not apply with respect to the aforesaid encroachment.”

Issuance of the Form 9 generally requires a current or existing survey and the affidavit of an owner or borrower. A sample affidavit can be found as Affidavit No. 95 in the Affidavit Practice Manual. There are exceptions to the rule, as described in the *Fund Title Notes*. TN 25.03.06 B applies to refinance transactions and permits reliance upon an older survey, or even just a prior policy with the standard survey exception removed that contains specific survey exceptions, and an affidavit from the borrower(s). TN 25.03.06 C provides the procedure for use of an older survey with an owner’s affidavit for issuing an owner’s policy. These same guidelines may be applied for issuing a Form 9

In rare instances, an insured lender will accept a Form 9 without survey coverage, but the coverage provided through the Form 9 must be modified. Since the language of the endorsement is promulgated by the State of Florida Department of Insurance Regulation and the form itself may not be modified, the coverage it affords may be modified, when necessary, by adding a specific Schedule B exception and using the following language:

The ALTA 9-06 endorsement (Restrictions, Encroachments, Minerals) is attached to this policy as Endorsement No. _____. Element of coverage 1(b)(1) thereof is hereby modified to read as follows: ‘There are no present violations on the Land of any enforceable covenants, conditions, or restrictions.’ Elements of coverage 1(b)(3), 1(b)(4), 3, 4, and 5 are hereby deleted from the endorsement in their entirety.

Before closing and issuing a policy with the aforementioned exception modifying the Form 9 to remove the survey related coverage, the Fund Member must verify that said modification to the Form 9 is acceptable to the insured lender and in compliance with its closing instructions.

Guidelines for Form 9 Coverage when insuring Condominiums, Townhomes and Cooperatives

Condominiums:

All condominiums in Florida are required to have a survey of the buildings and improvements as part of

the Declaration of Condominium when recorded. Since no unit owner can make a change to the common elements, the requirement for a current survey is modified. As set forth in TN 8.05.06, Fund Members are authorized to determine, in any reasonable manner satisfactory to them, whether since initial submission of the Declaration of Condominium, there has been any subsequent construction on adjoining land which may encroach on the lands of a condominium project. The Fund Member can review the survey of the footprint for the current buildings and improvements contained in the Declaration and compare that to the county property appraiser’s website or an aerial mapping service such as Google Maps to ensure there are no additional improvements. If no additional improvements are found, the Fund Member may issue the Form 9. If there are obvious differences, the Fund Member should contact Fund Underwriting to discuss.

Townhomes:

Townhomes are unusual in that they can be established under a condominium declaration, where only the interior of the unit is owned, and the building and exterior land surrounding the unit is considered common area owned and controlled by the Association; or they can be established as single-family unit which may include front, side, and rear yards.

When a townhome is established as a condominium and a survey is recorded in the Declaration, the rules for Condominiums above may be applied for issuance of the Form 9. If established as a single-family home and the unit owners own and may make changes to the exterior of the units and yards, a survey will be required for a Form 9.

Cooperative Apartments (Co-ops)

Co-ops are in a class by themselves. The units are typically located within an apartment building, and the ownership of the building, underlying land and other improvements is vested in the Cooperative Association. While apartment “owners” are members of the Association (shareholders), the Association, as a separate legal entity, owns the

land and building(s). The purchase of stock certificates and the issuance of a proprietary lease gives the owner the right to occupy an apartment within the co-op, and that interest is insured as a leasehold interest. As with condominiums, the apartment "owners" are not permitted to make any changes outside the unit which they occupy. The difference from condominiums is that the governing documents for the co-op are not required to have a survey, so there is nothing upon which to rely. If the lender requires a Form 9 when insuring a co-op, the standard survey exception and the unrecorded easement exceptions 2 C and D of the commitment must remain in the final policy in addition to the exception in Schedule B, as discussed above for modifying the Form 9 when no survey is provided.

The issuance of a Form 9 is a common request made in real estate transaction. Hopefully, this article has taken some of the mystery out of issuing a Form 9 without a survey for Condominiums, Townhomes, and Co-ops. As always, if you have questions please contact Fund Underwriting counsel for assistance. □

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fail-safe "validate" button confirms the accuracy before the system will allow a submission to occur. The Fund has created a [guide](#) to help you complete a CTR.

The application is submitted on behalf of an organization's "Supervisory User" who will be the account management person for the organization. Sub-accounts may be created to provide unique access to others in their organization (separate email addresses and passwords), however each must use the supervisor's 8-digit PIN for CTR submissions. For this reason, we recommend most Fund member offices are best served by sharing the supervisor's logon for submissions rather than setting up additional "General User" accounts.

When the time comes to submit a CTR, a successful logon will open in a new, visually appealing homepage. Instead of the previous two-step process, the download report and report submission functions are now

located within the "File Now" icon on the homepage. After form completion, "signing" and saving the form will activate the "Ready to File" indicator; and selecting it will automatically begin the submission process. Previously, a filer would have to re-access the homepage and attach the completed CTR after saving it to the user's desktop. Now the completed form is saved within the user's account making it easier to include with the submission.

After each submission, an email is automatically generated acknowledging acceptance, and the transaction is added to the new "Track Status" section of the user's homepage. This email response, together with the copy of the submitted CTR, must then be forwarded to The Fund. The Fund has created a [training video](#) to aid Members in the process.

Previously, CTR filers had little guidance for managing their accounts. In connection with this update, FinCEN published a [Website Modernization Overview](#) to bridge the gap and provide a complete guide to using the E-Filing portal. Changes are summarized to assist those who have filed before. In addition, the new guide explains the features of the new homepage, provides instructions on how to file and how to track reports, and offers tips on managing the user account.

Over the years, the evolution of the filing process has taken a number of twists and turns. FinCEN regularly reports its satisfaction with the program and appears dedicated to the continued collection of information to support its goal of suppressing money-laundering activity. Waiting in the wings is implementation of the "Corporate Transparency Act" found in Title LXIV of the "William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021." The Act will require the reporting of "beneficial ownership information for corporations, limited liability companies, or other similar entities formed under the laws of the States" once implementing regulations have been published. The United States Treasury has been tasked with promulgating these regulations and those efforts are ongoing. □

TITL

**TITLE INSURANCE
THROUGH LAWYERS**

**** Reminder ****

If you have not sent in your contribution to Title Insurance Through Lawyers (TITL), please do so now.

Restrictions, Encroachments, Minerals Endorsement Loan Policy (ALTA 9-06)

To fill out this form, refer to the *Example of Restrictions, Encroachments, Minerals Endorsement Loan Policy (ALTA 9-06)*.

Purpose

The ALTA 9-06 endorsement is used only with loan policies. It provides the Insured with several commonly requested affirmative coverages, most of which concern violations of restrictions and encroachments. The coverage is identical to the previous Florida Form 9 (FF9) endorsement. The ALTA 9-06 may be used with the MF6/M21 loan policy pursuant to underwriting guidelines set forth below.

Note: This endorsement may not be issued on an automatic basis. Many determinations must be made by the title agent.

Requirements for Issuance

Numbered paragraphs in this section refer to elements of coverage:

1(a) Element of coverage 1(a) assures that there are no covenants, conditions, or restrictions under which the lien of the Insured Mortgage could be divested, subordinated, or extinguished, or its validity, priority, or enforcement impaired. This element of coverage may be given once the title agent determines that the assurance is correct. (Although not expressly stated in the endorsement, the reference to covenants, conditions, or restrictions should be considered those of Public Record or of which the examiner has actual knowledge.)

1(b) This element of coverage requires that certain matters be expressly excepted in Schedule B. All of the other elements of coverage of this endorsement, in effect, provide affirmative coverage as to such matters.

1(b)(1) The first portion of element of coverage 1(b)(1) concerns the absence of existing violations of any covenants, conditions, or restrictions. Any existing violations must be listed as exceptions in Schedule B. Normally, evidence that no violations exist will consist, at the very least, an affidavit from the owner. A survey might also be needed.

Of course, the exact nature of the proof required to establish the nonexistence of violations will depend upon the terms of the covenants, conditions, and restrictions and the particular facts and circumstances involved. Particular caution must be exercised when a violation could occur without

physical evidence such as violation of a restriction against serving alcohol beverages on the premises.

The second portion of element of coverage number 1(b)(1) concerns the absence of violations of plat setback requirements. Exception must be made in Schedule B for any violations of plat setback requirements. Such violations should be revealed by the current survey.

1(b)(2) As to element of coverage 1(b)(2), the issuing title agent must examine any instruments listed in Schedule B that contain covenants, conditions, or restrictions, in order to determine whether any such instrument includes any of the items enumerated in subparagraphs (i) through (iv). That is, any instruments listed in Schedule B that contain covenants, conditions, or restrictions must be reviewed to determine whether they contain easements, liens for liquidated damages, private charges or assessments, or provide for options to purchase, rights of first refusal, or prior approval of a future purchaser or occupant. Any such item must be expressly excepted in Schedule B.

Example: If subdivision restrictions impose a maintenance assessment upon the lot owner, such assessment should be specifically listed as an exception in Schedule B.

Rather than expressly and in detail listing the items enumerated in this element of coverage, it is sufficient to use generic language, provided that it meets the lender's approval.

Example: In the paragraph of Schedule B that describes a Declaration of Condominium, the following language might be added: "Such Declaration of Condominium establishes and provides for easements, liens, charges, assessments, an option to purchase, a right of first refusal, and the prior approval of a future purchaser or occupant."

Please note that, by virtue of element of coverage number 1(a), the endorsement affirmatively insures that those provisions will not have the effect of divesting, subordinating, or extinguishing the Mortgage, or impairing its validity, priority, or enforceability.

1(b)(3) Element of coverage 1(b)(3) assures that, unless listed in Schedule B, there is no encroachment of existing improvements located on the Land onto adjoining land, nor any encroachment onto the Land of existing improvements located on adjoining land. Any such encroachments (which would be shown on the survey) must be listed as Schedule B exceptions.

Example: If there is a slight fence encroachment from the subject Land onto the neighboring land, a Schedule B exception would be inserted as follows: "Encroachment of wood fence along the southerly boundary of Land, as revealed by the survey prepared by XYZ Surveying Company dated May 2, 1991, bearing job number 1234."

Please note that element of coverage number 4 of this endorsement has the effect of providing affirmative coverage as to loss or damage sustained by reason of a final court order or judgment

requiring the removal of an encroachment onto adjoining land.

1(b)(4) Element of coverage 1(b)(4) assures that, unless listed in Schedule B, there is no encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B. Appropriate Schedule B exceptions must be made for improvements located within easement areas. The survey must show all easements excepted in Schedule B, in order to determine whether any such encroachment exists.

If the Land is a condominium unit, the survey exception is often waived without obtaining a current survey. The requirements are set forth in *TN 08.05.06B*. The ALTA 9-06 may still be provided, unless there is evidence of encroachments occurring subsequent to the original survey that was attached to the Declaration of Condominium.

1(b)(5) Element of coverage 1(b)(5) assures that there are no notices of violations of covenants, conditions, and restrictions related to environmental protection recorded in the Public Records. If any such notices are recorded, this coverage cannot be given, and the notices must be listed as Schedule B exceptions.

2. Element of coverage number 2 insures against loss or damage sustained by reason of future violations of existing covenants, conditions, or restrictions, if the violation results in either the impairment or loss of the lien of the Insured Mortgage or loss of Title to the Land if the Insured acquires Title in satisfaction of the secured debt. This element of coverage may be provided if the issuing title agent has carefully reviewed the covenants, conditions, or restrictions, and determined that any future violation of any existing covenants, conditions, or restrictions will not affect the lien of the Insured Mortgage or cause a reversion of the Title. The vast majority of covenants, conditions, and restrictions will not have any such effect.

3. Element of coverage number 3 contains two parts, both of which provide coverage as to loss or damage sustained by reason of damage to existing improvements. The first part, contained in subparagraph 3(a), concerns improvements located within easement areas and damage resulting from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved. The second part, contained in subparagraph 3(b), concerns damage resulting from the future exercise of rights of entry for the extraction or development of minerals.

3(a) If there are no improvements located upon the portion of the Land that is subject to an easement, the first part of element of coverage number 3 poses no problem. In general, this coverage may still be provided where encroachments of improvements onto typical utility or drainage easements exist, so long as the improvement is removable (e.g., a fence or driveway) and it is relatively minor. Preferably, there should be at least ten percent (10%) equity cushion (e.g., mortgage amount of \$90,000.00 and fair market value of \$100,000.00). Facts falling outside these general guidelines should be discussed with Fund underwriting counsel.

3(b) The second portion of element of coverage 3 may always be provided if Schedule B contains no exceptions for mineral interests and the legal description of the subject Land does not except any mineral interests. If mineral interests exist, this element of coverage may not be given unless: (i) the holders of the mineral interests have released rights of entry (by a duly executed and recorded instrument); or (ii) the mineral interests have been released by operation of law. Refer to *TN 27.01.02* and *TN 27.04.01C*.

4. Element of coverage number 4, which provides coverage as to loss or damage arising from a final judgment requiring the removal of any encroachment from the Land onto neighboring land, may always be provided when no encroachments onto adjoining Land are excepted in Schedule B.

If such encroachments do exist, the issuing title agent, possibly in consultation with Fund underwriting counsel, must assess the degree of risk of the entry of a court order or judgment requiring the removal of the encroachment and what impact that could have (i.e., loss or damage) on the insured lender. If there is any indication of a boundary dispute, this element of coverage may not be given.

Many such encroachments will be insignificant, and easily removable, such as a fence being a few inches over the property line or part of a concrete pad extending onto adjoining land. If the minor encroachments have existed for a long time without objection, the risk is diminished even further. If the court-ordered removal of the encroachment would affect the lender's security, or if the amount of the mortgage exceeds ninety percent (90%) of the fair market value of the Land, this element of coverage should not be given without first securing approval from Fund underwriting counsel. When the building itself encroaches onto adjoining land, this coverage will not be available except in unusual circumstances.

5. Similar determinations must be made in connection with element of coverage number 5, when there are violations of covenants, conditions, or restrictions or platted setback requirements. This element of coverage provides insurance as to loss or damage arising from a final judgment denying the right to maintain any existing improvement because of a violation of covenants, conditions, or restrictions or platted setback lines.

When setback violations are an issue, the guidelines are as follows:

- The instrument that imposes the setback requirement must not contain a reverter clause.
- The structure or improvement that violates the setback requirement must be completed.

The violation should not be more than ten percent (10%) of the total setback requirement. (For example, if the setback requirement is 25 feet, the maximum violation allowable would be 2.5 feet).

There must be no proceeding pending, and so far as the title agent knows or can determine by inquiry, no current objection to the violation and no indication of any future proceeding in

- connection with the violation.

In element of coverage number 5, affirmative coverage is provided against loss or damage sustained by reason of "[a]ny final court order or judgment denying the right to maintain any existing improvement on the land because of any violation of... building setback lines shown on a [recorded] plat..." Coverage is not provided as to loss or damage resulting from violations of law, but is limited to violations of platted setback requirements.

Exclusion from coverage number 1 (in the loan policy) expressly excludes from coverage "[a]ny law ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to (i) the occupancy, use or enjoyment of the Land; (ii) the character, dimensions, or location of any improvement now or hereafter erected on the land.... or the effect of any violation of any such law, ordinance or governmental regulation." If, there is a violation of local law, we strongly recommend this be disclosed to the Insured, notwithstanding the lack of coverage in either the policy or the endorsement. No policy exception is required absent recorded notice of violation or intent to enforce.

If there are violations of covenants, conditions, or restrictions, or platted setback requirements falling outside the guidelines set forth above, this element of coverage may not be given without prior approval by Fund underwriting counsel.

Schedule B - Exceptions

In the event that any element of coverage provided within this endorsement is not given in a particular transaction, there must be an appropriate notation in the paragraph of Schedule B containing the exception.

Example: If a building encroaches 30 feet onto adjoining land, this would be listed as a Schedule B exception (per element of coverage 1(b)(3), and the following language would be added: "Element of coverage No. 4 of the ALTA 9.06 endorsement (Restrictions, Encroachments, Minerals) shall not apply with respect to the aforesaid encroachment.

Generally speaking, the ALTA 9-06 endorsement may not be issued unless a current survey has been obtained. Some lenders do not require current surveys in connection with certain types of loans.

The ALTA 9-06 may still be given in such situations, but must be modified by way of the following special language inserted under Schedule B:

The ALTA 9-06 endorsement (Restrictions, Encroachments, Minerals) is attached to this policy as Endorsement No. _____ Element of coverage 1(b)(1) thereof is hereby modified to read as follows: 'There are no present violations on the Land of any enforceable covenants, conditions, or restrictions.' Elements of coverage 1(b)(3), 1(b)(4), 3, 4, and 5 are hereby deleted from the endorsement in their entirety.

Of course, before giving the elements of coverage remaining in the endorsement after it has been so modified, the applicable instructions set forth above must be followed. Also, if the covenants, conditions, or restrictions are such that a survey would be necessary to determine whether there is an existing violation, the endorsement should not be given without obtaining and reviewing a current survey.

Issuance with Commitment

Lenders occasionally request that various endorsements be issued with the title insurance commitment, as well as with the final loan policy. Technically, it is improper to give the ALTA 9-06 endorsement (or any other endorsement) with a commitment, since there is not yet any "Indebtedness secured by the Insured Mortgage." Furthermore, the survey and other necessary documentation are rarely available at the time the commitment is issued.

One way to satisfy a lender in this situation is to indicate, under Part II of Schedule B of the commitment, the following:

The ALTA 9-06 endorsement shall be issued together with the ALTA loan policy to be based upon this commitment, provided that all underwriting requirements pertaining to the issuance thereof are satisfied.

If desired, a sample of the ALTA 9-06 endorsement may be attached as an exhibit to the commitment. Rather than using the intentionally broad "all underwriting requirements" language, the title agent may of course specifically delineate the requirements for the issuance of the ALTA 9-06 endorsement. Also, in the rare instance where the survey and other necessary documentation are available at the time the commitment is issued, a "pro forma" ALTA 9-06 endorsement may be attached to the commitment, with appropriate corresponding Schedule B exceptions.

Checklist for ALTA 9.06 Endorsement

This checklist should help the title agent to determine whether the affirmative coverage provided by the ALTA 9-06 endorsement can be given.

Element of Coverage (1)

1(a) Are there any covenants, conditions, or restrictions under which the lien of the insured mortgage could be divested, subordinated, or extinguished, or its validity, priority, or enforcement impaired? If not, this element of coverage may be given.

1(b)(1) The following must be listed as Schedule B Exceptions: Any existing violations of covenants, conditions, or restrictions, or any violations of plat setback requirements.

1(b)(2) Examine instruments listed in Schedule B containing covenants, conditions, or restrictions, and note in Schedule B any easements, liens for liquidated damages, private charges or assessments, options to purchase, rights of first refusal, or prior approval of a future purchaser of

occupant. Alternatively, generic language may be used (refer to the instructions).

1(b)(3) Note as Schedule B exceptions any encroachments of improvements from the Land onto adjoining land and any encroachments onto the subject Land of improvements located on adjoining land.

1(b)(4) Make Schedule B exceptions for improvements located within easement areas.

1(b)(5) Make Schedule B exceptions for notices of violations of covenants, conditions and restrictions related to environmental protection recorded in the Public Records.

Element of Coverage (2)

Review covenants, conditions, or restrictions to determine that any future violation will not affect the lien of the Insured Mortgage or cause a reversion of Title.

Element of Coverage (3)

3(a) Coverage may be given only where there are no improvements located upon the portion of the Land that are subject to an easement or where any such encroachments are removable and relatively minor.

3(b) Coverage may be given if: there are no mineral interests; when the holders of any mineral interests have released rights of entry (by a duly executed and recorded instrument); or the mineral interests are released by operation of law. Refer to *TN 27.01.02* and *TN 27.04.01C*.

Element of Coverage (4)

Coverage may be given when there are no encroachments onto adjoining land. If such encroachments exist, the title agent must assess the degree of risk of the entry of a court order or judgment requiring removal, and what effect that might have on the Insured Mortgage. Consult with Fund underwriting counsel if necessary.

Element of Coverage (5)

As to setback violations, coverage may be given when all of the following conditions are met:

- Instrument imposing setback requirement contains no reverter clause;
- The structure or improvement violating the setback requirement is completed;
- The violation is not more than ten percent (10%) of the total setback requirement; and
- There is no proceeding pending, and the title agent has no knowledge of current objections.

If there are violations of covenants, conditions, or restrictions that fall outside of the guidelines set forth above, the title agent should consult with Fund underwriting counsel.

How to Prepare the ALTA Restrictions, Encroachments, Minerals Endorsement - Loan Policy (ALTA 9-06)

Type or print the following information:

- **Endorsement No.:** Type the endorsement number.
- **To Policy No.:** Type the letters and numbers of the policy to which this is an endorsement.
- **Name of Agent:** Type the name of the title agent (the attorney or firm).
- **Agent No.:** Type the Fund Member number.

Agent's Signature: The title agent signs on this line. The signature must be visible. Under the title

- agent's signature, type the signer's name.

Distribution

Send a copy to The Fund. Send the original to the Insured. Keep a copy for your files.

Premium

A minimum of ten percent (10%) of the sum of the premium(s) of the underlying policy or policies must be charged.

Related Documents

Restrictions, Encroachments, Minerals Endorsement Loan Policy (ALTA 9-06) - ExampleFile

Restrictions, Encroachments, Minerals Endorsement Loan Policy (ALTA 9-06) - FillableFile

NATIONWIDE LIFE INSURANCE COMPANY v. COMMONWEALTH LAND TITLE INSURANCE COMPANY (2012)

United States Court of Appeals, Third Circuit.

NATIONWIDE LIFE INSURANCE COMPANY v. COMMONWEALTH LAND TITLE INSURANCE COMPANY, Appellant.

No. 11–3123.

Decided: July 24, 2012

Before SLOVITER, CHAGARES, and JORDAN, Circuit Judges.

Craig R. Blackman (Argued), Michelle C. Orloski, Neal R. Troum, Stradley, Ronon, Stevens & Young, Philadelphia, PA, for Appellant. Justin K. Miller, C. Paul Scheuritzel (Argued), Larsson & Scheuritzel, Philadelphia, PA, for Appellee. Edward J. Hayes, Lauren P. McKenna, Fox Rothschild, Philadelphia, PA, for Amicus–Appellants.

OPINION OF THE COURT

This interlocutory appeal requires interpretation of a title insurance policy that contains a widely-used endorsement known as the American Land Title Association 9 Endorsement (“the ALTA 9 Endorsement”). Specifically, this court must decide whether the scope of coverage under ¶ 1(b)(2) of the ALTA 9 Endorsement encompasses losses resulting from entire instruments, or whether the coverage is limited to losses caused by the particular types of encumbrances listed in that paragraph.

I.

Background

Commonwealth Land Title Insurance Co. (“Commonwealth”) issued the title insurance policy at issue in this case to Nationwide Life Insurance Co. (“Nationwide”) in connection with real property in the Franklin Mills Mall in Philadelphia County, Pennsylvania (“the Property”). The Franklin Mills Mall is a large shopping center specializing in retail stores. The Property was owned by Liberty Mills Limited Partnership (“Liberty Mills”) when Liberty Mills entered into a Master Declaration and Agreement of Easements, Covenants, Conditions and Restrictions (the “Master Declaration”) with Liberty Mills Residual Limited Partnership in 1988, which governs all stores in the Mall. Later that year, PMI Associates (“PMI”) purchased the Property from Liberty Mills, at which time PMI and Liberty Mills also entered into a Declaration of Restrictions. The Declaration of Restrictions vested Liberty Mills with, inter alia, the right to prior approval of future purchasers of the Property and an express option to purchase.

PMI borrowed \$3.5 million from Nationwide in 2001, using the Property as collateral. Nationwide purchased a title insurance policy (“the Policy”) from Commonwealth to insure its

lender's interest in the Property. The Policy contains a specific endorsement that is known as the ALTA 9 Endorsement, which states (in relevant part):

The Company [Commonwealth] insures the owner of the indebtedness secured by the insured mortgage [Nationwide] against loss or damage sustained by reason of:

1. The existence at Date of Policy of any of the following:

.

(b) Unless expressly excepted in Schedule B .

(2) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the land which, in addition, (i) establishes an easement on the land; (ii) provides a lien for liquidated damages; (iii) provides for a private charge or assessment; (iv) provides for an option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant

.

J.A. at 317.1 Among the documents listed in Schedule B Part I were the Declaration of Restrictions and the Master Declaration, but no specific restriction found within those documents was explicitly listed.

PMI defaulted on its loan from Nationwide in 2003 and conveyed the Property to Nationwide by fee simple deed in lieu of foreclosure. Nationwide attempted to sell the Property to Ironwood, Real Estate, LLC (“Ironwood”), but Liberty Mills' successor in interest—Franklin Mills Limited Partnership (“Franklin Mills”)—refused to approve Ironwood as a buyer in accordance with the rights conferred by the Declaration of Restrictions.² Ironwood's offer to purchase the Property was contingent upon Franklin Mills' approval of the anticipated use by Ironwood of the Property as a technical school. Franklin Mills rejected this proposed use, perhaps as being inconsistent with the use restrictions found within the Declaration of Restrictions, which required the Property to be used “only for the purposes of a variety or general merchandise store” absent prior consent from Franklin Mills. J.A. at 329. These use restrictions were left in force under a settlement agreement reached in another case, in which Nationwide had sued Franklin Mills in an attempt to invalidate the encumbrances on title that prevented this sale. See *Nationwide Life Ins. Co. v. Franklin Mills Assocs. Ltd. P'ship*, No. 04–5049 (E.D.Pa. Feb. 28, 2008), ECF No. 30.

Nationwide submitted a claim for coverage to Commonwealth, asserting that the restrictions relied upon by Franklin Mills to justify its refusal of Ironwood as a purchaser rendered the Property unusable and unsalable. Commonwealth denied Nationwide's claim.

Nationwide filed a complaint in the District Court, and Commonwealth filed a motion to dismiss, asserting that Nationwide was seeking coverage for harm alleged to arise from the Declaration of Restrictions, which was listed in Schedule B and was thus expressly excepted from coverage under the Policy. The District Court granted Commonwealth's motion, and Nationwide appealed.

After oral argument, this court reversed and remanded, holding that “Commonwealth bore the burden of detecting the restrictions stated in the Declaration, and had to list those restrictions explicitly [and not just the Declaration itself] as exceptions to avoid covering loss from them.” *Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co.*, 579 F.3d 304, 319 (3d Cir.2009) (“Nationwide I”).³

On remand, Nationwide filed an amended complaint, and Commonwealth and Nationwide filed cross-motions for summary judgment. The District Court denied Commonwealth's motion in its entirety and granted Nationwide's motion in part, holding, *inter alia*, that the Policy with the ALTA 9 Endorsement affords insurance coverage for losses and damages incurred by Nationwide as a result of the Declaration of Restrictions. See *Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co.*, No. 05–281, 2011 WL 611802 (E.D.Pa. Feb.17, 2011).⁴

Commonwealth filed a motion for reconsideration or, alternatively, for interlocutory appeal, and Nationwide filed a response in opposition. The District Court denied the motion for reconsideration but granted a certificate of appealability. The question certified by the District Court is:

Whether the American Land Title Association 9 Endorsement provides title insurance coverage for whole instruments listed in Schedule B or whether the scope of coverage is limited to particular types of encumbrances.

Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co., Order at 1, No. 05–281 (E.D.Pa. Mar. 23, 2011), ECF No. 67.

II.

Jurisdiction and Standard of Review

The District Court had jurisdiction pursuant to 28 U.S.C. § 1332. This court has jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

When this case was previously before us, we noted that “[i]nterpretation of an insurance policy is a question of law over which we exercise plenary review.” *Nationwide I*, 579 F.3d at 307. We stated, “[u]nder Pennsylvania law, which applies to this action, we ascertain the intent of the parties by reading the policy as a whole, and we give unambiguous terms their plain meaning. We also consider evidence of industry custom and practice. We construe ambiguous terms strictly against the insurer, but avoid reading the policy to create ambiguities where none exist.”

Id. at 307–08 (internal citations and quotation marks omitted); see also *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 566 Pa. 494, 781 A.2d 1189, 1193 (Pa.2001) (“If words have a special meaning or usage in a particular industry, then members of that industry are presumed to use the words in that special way, whatever the words mean in common usage and regardless of whether there appears to be any ambiguity in the words.”).

III.

Discussion

Commonwealth does not dispute that Nationwide's harm was caused by provisions within the Declaration of Restrictions. Commonwealth also does not dispute that ¶ 1(b)(2) of the ALTA 9 Endorsement applies to the Declaration of Restrictions.⁵ Commonwealth argues only that its listing the Declaration of Restrictions on Schedule B excluded losses arising from that instrument from coverage except as to the ¶ 1(b)(2) restrictions found therein, which (under this court's prior decision) must be expressly listed in Schedule B to be excluded from coverage. Therefore, the remaining question is whether the failure to expressly except a ¶ 1(b)(2) restriction in Schedule B places only losses arising from that specific restriction back into coverage, or whether losses sustained by reason of any provision in the entire instrument in which the ¶ 1(b)(2) restriction is found are placed back into coverage.

The District Court held that “[a]ny loss arising as a result of any portion of that instrument—and not from any particular provision contained therein—falls within the scope of the ALTA 9 Endorsement coverage.” *Nationwide*, 2011 WL 611802, at *14 (footnote omitted). The District Court reasoned that “[b]y its plain language, . the Endorsement only defines what types of instruments are covered and then clearly insures against any loss sustained from the instrument itself.” *Id.* The District Court noted that “[h]ad the Endorsement meant otherwise, it would have eliminated the language ‘any instruments’ .“ *Id.*

We agree, and thus hold that the ALTA 9 Endorsement provides coverage to losses arising from entire instruments that fit within its plain language, not just the ¶ 1(b)(2) restrictions within those instruments that have not been expressly excepted. If ¶ 1(b)(2) was not intended to cover losses arising due to entire instruments, then the phrase “any instrument” would have been omitted, as it was in ¶ 1(b)(1), (3), (4), and (5) of the same ALTA 9 Endorsement.

Commonwealth and the Amici argue that this plain language interpretation of the ALTA 9 Endorsement provides far more coverage to the insured than the interpretation that is accepted by the vast majority of the title insurance industry. Commonwealth argues that “evidence of the ALTA 9 endorsement's customary usage within the title insurance industry makes clear that ALTA 9 is intended to provide additional coverage only for harm arising from a very specific category of extraordinary encumbrances that would affect the validity, priority, or enforceability of the insured mortgage—i.e., the ALTA 9[¶] 1(b)(2) encumbrances.” Appellant's Br. at 24. Indeed, it may be that the title insurance industry has been using the ALTA 9 Endorsement with

the understanding that it only provides coverage for loss resulting from the ¶ 1(b)(2) restrictions.⁶ Nevertheless, caselaw requires us to follow the plain language of the ALTA 9 Endorsement rather than deferring to industry custom and usage that does not give the phrase “any instrument” special meaning, but instead simply ignores that language. *J.C. Penney Life Ins. Co. v. Pilosi*, 393 F.3d 356, 363 (3d Cir.2004) (Under Pennsylvania law, “[w]here . the language of an insurance contract is clear and unambiguous, a court is required to enforce that language.” (internal quotation marks and citation omitted)); *Sunbeam*, 781 A.2d at 1193 (allowing evidence of the “special meaning” of words within an industry); see also *Meyer v. CUNA Mut. Ins. Soc.*, 648 F.3d 154, 167 (3d Cir.2011) (“[U]nder Pennsylvania law, in close cases, a court should resolve the meaning of insurance policy provisions in favor of coverage for the insured.” (citing *Motley v. State Farm Mut. Auto. Ins. Co.*, 502 Pa. 335, 466 A.2d 609, 611 (Pa.1983))).

IV.

Conclusion

We will affirm the District Court's holding that the ALTA 9 Endorsement insures against any loss sustained from an instrument that is covered by the plain language of ¶ 1(b)(2). This case will return to the District Court for the determination of damages owed to Nationwide.

FOOTNOTES

1. The restrictions listed in (i)-(iv) will hereinafter be referred to as “the ¶ 1(b)(2) restrictions.”
2. The parties dispute whether this refusal was based on one of the ¶ 1(b)(2) restrictions or, instead, the use restrictions. The parties agree, however, that whatever restrictions formed the basis for the refusal were found within the Declaration of Restrictions. See Appellee's Br. at 6; Reply Br. at 2 n. 1 (“There is no dispute that the use restrictions contained within the Declaration of Restrictions were largely (if not solely) to blame for the fall through of this particular sale.”).
3. Nationwide argues that Commonwealth's current position is barred by the law of the case doctrine. To the extent that the language in this court's prior opinion appears to suggest that Commonwealth is obligated to cover Nationwide's claim, the procedural posture of the last appeal restricts the impact of this language: this court held only that Commonwealth is obligated to cover Nationwide's claim if the facts as alleged in Nationwide's complaint are true. In other words, this court only held that Commonwealth must cover Nationwide's claim if the restriction causing Nationwide's harm was covered by the ALTA 9 Endorsement and not expressly excepted from coverage on Schedule B. Because Nationwide asserted its harm was caused by a ¶ 1(b)(2) restriction, this court had no reason to determine whether the failure to list a ¶ 1(b)(2) restriction on Schedule B meant the entire instrument containing that restriction was covered by the ALTA 9 Endorsement. Thus, the question certified for this interlocutory appeal has not yet been answered by this court, and the law of the case doctrine is inapplicable.

4. The District Court also held that Nationwide is entitled to appropriate prejudgment interest but that issues of material fact preclude summary judgment as to the questions of Commonwealth's alleged bad faith and the precise determination of damages. See *id.* at *32, 466 A.2d 609.

5. See also *Nationwide I*, 579 F.3d at 309–10 (“[B]ecause the Declaration is an ‘instrument referred to in Schedule B as containing . restrictions on the land which . provides for an option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant,’ loss arising from it is covered under paragraph 1(b)(2) of the ALTA 9 Endorsement ‘[u]nless expressly excepted in Schedule B.’ “ (alterations in original) (quoting the Policy)). Specifically, Commonwealth agrees that the Declaration of Restrictions contains at least an option to purchase and a prior approval of a future purchaser provision. See Reply Br. at 6.

6. Both parties address recent proposed amendments to the ALTA 9 Endorsement, which will ensure that the effect of this court's decision will be limited to title insurance policies that were issued with the older version of the ALTA 9 Endorsement. Because the amendments show only that the ALTA 9 Endorsement was changed to reflect a recent relevant court opinion, the significance of the changes can only be determined through speculation.

SLOVITER, Circuit Judge.



CERTIFICATE OF ATTENDANCE

Certified Paralegals are required to record evidence of 50 hours of continuing legal education hours to renew the CP credential every 5 years. CLE hours are recorded in CPs' accounts through the [NALA online portal](http://www.nala.org). Of the 50 hours, 5 hours must be in legal ethics, and no more than 10 hours may be recorded in non-substantive areas. If attending a non-NALA sponsored educational event, this certificate may be used to obtain verification of attendance. Please be sure to obtain the required signatures for verification of attendance. The requirements to maintain the CP credential are available from NALA's web site at <https://www.nala.org/certification/certtest2view>. Please keep this certificate in the event of a CLE audit or further information is needed.

PLEASE COMPLETE THE SPACES BELOW AND ATTACH A PROGRAM

Session Length In Hours	Session Topics (Description and Speakers)	Validation of Attendance
1.0 Substantive	Deep Dive Into the Form 9 Endorsement / Kara Scott	<i>Kara Scott</i>

Name of CP (Please Print)			NALA Account Number (On Mailing Label)		
			149113		
Signature of CP			Name of Seminar/Program Sponsor		
			Deep Dive Into the Form 9 Endorsement / ATFS, Inc.		
Address			Authorized Signature of Sponsor Representative		
			<i>Kara Scott</i>		
			Date of Educational Event:		
City:		State (XX):			
Preferred e-mail address			Location:		
			Recorded Webinar		

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Ethics	



FL BAR Reference Number: 2412448N

Title: Deep Dive Into the Form 9

Level: Intermediate

Approval Period: 05/01/2025 - 11/30/2026

CLE Credits

General 1.0

Certification Credits

Real Estate 1.0