

Title Policy Endorsements in Commercial Transactions

1.	PowerPoint slides
2.	List of Endorsements, Ch. 7. Preparing the Forms, <i>Fund Procedures Handbook</i> , p. 7-70 (September, 2019)
3.	Endorsement Premium Chart, Ch. 9. Rating and Submitting the Forms, <i>Fund Procedures Handbook</i> , p. 9-57 (September, 2019)
4.	Title Insurance Coverage in Florida and Interstate Commercial Real Estate Lending (© 2016, ATFS, LLC)
5.	Form E Endorsement (rev. 12/10)
6.	ALTA Endorsement 8.1-06 Environmental Protection Lien (With Florida Modifications) (rev. 12/10)
7.	ALTA 9.0-06 Endorsement – Restrictions, Encroachments, Minerals (With Florida Modifications) (rev. 12/01/13)
8.	ALTA Endorsement 12-06 Aggregation (With Florida Modifications) (rev. 12/10)
9.	Title Policy Endorsements in Commercial Transactions (webinar) Syllabus (Rule 69B-228.090(1)(f) F.A.C.)
10.	DFS Student Acknowledgement



Fund Affiliate Assembly

Title Policy Endorsements in Commercial Transactions

Bob Rohan

Regulatory Compliance Counsel

Lender Request

The lender, a large insurance company in the Midwest, sent the detailed loan commitment letter with the borrower to our member/agent, whose terms and conditions included, inter alia, the following regarding title insurance for the Florida properties:

"Title Insurance, Searches and Survey Requirements

A. Title and Title Insurance

Lender shall, ~~on behalf of Borrower and at Borrower's expense, procure a 1970 ALTA title insurance policy, with creditors rights protection, and with any endorsements Lender may require, insuring Lender, its successors and assigns, as their interests may appear, in an amount at least equal to the final amount of the Loan Amount, which policy shall provide that Lender's security instrument constitutes a first lien or charge upon the Premises subject only to such items as shall have been approved in writing by Lender and its attorneys...~~"

"In connection with the above, Lender also requires the following endorsements:



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Lender Request

- a. ALTA Form 1-06 Street Assessments
- b. ALTA Form 3.1 Zoning Endorsement (with parking)
- c. ALTA Variable Rate Endorsement
- d. ALTA Environmental Endorsement
- e. Comprehensive Endorsement ALTA Form 9.3-06 OR BOTH ALTA 9-06 (Rev. 4-2-12) AND ALTA 9.6-06 (Rev. 4-2-12/13)
- f. ALTA General Survey Endorsement
- g. ALTA Contiguity Endorsement
- h. ALTA Assignment Endorsement
- i. ALTA Shared Appreciation Endorsement
- j. ALTA 14-06 Future Advance Endorsement
- k. ALTA Access and Entry Endorsement
- l. ALTA Utility Access Endorsement
- m. ALTA Separate Tax Parcel Endorsement;
- n. ALTA Endorsement for Location of Improvements and Land Location;
- o. ALTA Doing Business Endorsement
- p. ALTA Subdivision Endorsement
- q. ALTA Usury Endorsement
- r. Endorsements for mineral rights
- s. ALTA Assignment of Rents and Leases
- t. Endorsements against reverter
- u. "Fairway" endorsement



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Title Insurance Policy

- Coverage for insured; liability for underwriter
 - Insuring Clauses
 - Exclusions
 - Conditions & Stipulations
 - Schedule A
 - Schedule B
 - Endorsements

(American Land Title Association - Owner's Policy Adapted 6/17/2006) (With Florida Modifications)

OWNER'S POLICY OF TITLE INSURANCE
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Any matter 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 Section 18 of the Conditions.

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 Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the insured by reason of:

1. Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from:
 - (a) A defect in the Title caused by:
 - (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
 - (ii) failure of any person or entity to have authorized a transfer or encumbrance;
 - (iii) a document affecting Title not properly created, executed, witnessed, valid, acknowledged, notarized, or delivered;
 - (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
 - (v) a document executed under a fabricated, expired, or otherwise invalid power of attorney;
 - (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
 - (vii) a defective judicial or administrative proceeding.
 - (b) The loss of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
 - (c) Any encumbrance, easement, violation, variation, or adverse circumstance affecting the Title that would be disclosed in an accurate and complete land survey of the Land. The term "encumbrance" includes encumbrances of existing improvements located on the Land onto adjoining land, and encumbrances onto the Land or existing improvements located on adjoining land.
3. Unmarketable Title.
4. No right of access to and from the Land.
5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to:
 - (a) the occupancy, use, or enjoyment of the Land;
 - (b) the character, situation, or location of any improvement erected on the Land;
 - (c) the subdivision of land; or
 - (d) environmental protection.

If a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce but only to the extent of the violation or enforcement referred to in that notice.

(Covered Risks continued)

In Witness Whereof OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, has caused this policy to be signed and sealed as of Date of Policy shown in Schedule A, the policy to become valid when countersigned by an authorized signatory of the Company.



OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY
A Title Company
 400 Southwestern Street, Suite 1000, Fort Worth, Texas 76104
 (817) 339-1111

Monica President
David Wolf Secretary

OFF - SERIAL

FORM OFB (rev. 12/12) (With Florida Modifications) 1 of 8




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Risk Management

- Consider the facts and risks
 - Is additional coverage appropriate
- Guideline compliance
 - Each endorsement has specific underwriting guidelines
- Resolve gray areas & assumptions
- Proper procedures
 - Identify, issue and submit

The Fund
Procedures Handbook

This Volume Contains
 Revisions Through
 September 2019





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ALTA Endorsements – Florida Approved (OIR)

- Condominium (ALTA 4.1-06)
- Planned Unit Development (ALTA 5.1-06)
- Variable Rate Mortgage Series (ALTA 6-06; 6.2-06)
- Manufactured Housing Unit (ALTA 7-06)
- Environmental Protection Lien (ALTA 8.1-06)
- Assignment (ALTA 10-06)
- Mortgage Modification (ALTA 11-06)
- Aggregation (ALTA 12-06)
- Leasehold Series (ALTA 13-06; 13.1-06)
- Future Advance Series (ALTA 14-06; 14.2-06; 14.3-06)
- ALTA 9 Series (ALTA 9-06; 9.1-06; 9.2-06)



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Other Endorsements – OIR Approved

- Additional Interest (AIE)
- Balloon Mortgage (BME)
- Change of Partners, Members or Shareholders (CPE)
- Construction Loan Update (CLU)
- Contiguity (CE)
- Foreign Currency (FCE)
- Navigational Servitude (NSE)
- Option (OE)
- Reverse Mortgage (RME)
- Revolving Credit (RCE)
- Shared Appreciation (SAE)
- Survey (SE)
- Form E (Form E)



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Commonly Requested – *Not Approved*

- Access
- Location
- Improvements – street address (CLTA only)
- Streets (CLTA only)
- Street Assessment Endorsement (CLTA only)
- Subdivisions
- Zoning
- Single or Multiple Tax Parcel
- Usury
- Doing Business As
- Arbitration



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Deleting Elements of Coverage in Endorsement

- *“This endorsement is amended in that element(s) of coverage _____ is (are) deleted.”*
- Schedule B exception
- Form E endorsement



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Common Commercial Endorsements (ALTA)

- Environmental Protection Lien (ALTA 8.1-06)
- Restrictions, Encroachments, Minerals (ALTA 9-06; 9.1-06; and 9.2-06)
- Leasehold – Owners (ALTA 13-06)
- Leasehold – Loan (ALTA 13.1-06)
- Assignment (ALTA 10-06)
- Aggregation (ALTA 12-06)
- Variable Rate Mortgage (ALTA 6-06)
- Variable Rate Mortgage – Negative Amortization (ALTA 6.2-06)
- Future Advance – Priority (ALTA 14-06)
- Future Advance – Letter of Credit (ALTA 14.2-06)



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ALTA 8.1-06

Environmental Protection Lien
(With Florida Modifications)

Premium – Minimum \$25

Expanded coverage against
lack of priority of Insured
Mortgage over any
environmental protection lien*
recorded at Date of Policy

Is there a recorded notice of, or a
recorded environmental protection
lien for cleanup and removal?

*Lien authorized by CERCLA
(a/k/a “Superfund”)



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ALTA 9-06

Restrictions, Encroachments,
Minerals – Loan Policy
(With Florida Modifications)

Premium – Minimum 10% of total
premium on underlying policies

Expanded coverage for
violations of restrictions,
encroachments, mineral rights

Review all known CCRs

Examine current survey showing
recorded Sch. B easements

Identify existence of severed
mineral rights/rights of entry



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ALTA 9-06 – Element of Coverage #1

- 1.(a) No CCRs affect the lien of the mortgage
- (b) Unless expressly shown as Sch. B exception:
 - (1) No current violations of enforceable CCRs; *and* improvements do not violate platted setback lines
 - (2) No Sch. B CCRs
 - establish an easement; provide lien for liquidated damages; provide a separate charge/assessment; provide for an option to purchase, a right of first refusal, or prior approval of future purchaser/occupant
 - (3) No boundary encroachments
 - (4) No encroachment on Sch. B easement
 - (5) No notices of CCR violations – environmental



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Element #1(b)(2) – “Expressly Excepted”

1.(b) Unless expressly shown as Sch. B exception:

(2) No Sch. B exceptions

- establish an easement
- provide lien for liquidated damages
- provide a separate charge/assessment
- provide for an option to purchase
- provide a right of first refusal
- require prior approval of future purchaser/occupant

Sch. B excepted document(s) which include such right(s) must also recite that the document includes the restriction and is not covered



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ALTA 9-06 – Elements of Coverage #2 – 5

2. No future violation of CCR will cause

(a) impairment or loss of lien; or

(b) loss of title (if insured acquires title in satisfaction of secured debt)

3. Damages to existing improvements (excluding lawns, shrubbery or trees) if:

(a) removal from Sch. B excepted easement is enforced; or

(b) caused by exercise of right of entry related to mineral rights

4. Damages due to court order/judgment requiring removal of encroachment onto adjoining land

5. Damages due to court order/judgment requiring removal of existing improvement for violating CCRs or platted setback lines



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ALTA 9-06 – Compliance with #1(a) and #2

Review all recorded, or otherwise known CCRs

Do any CCRs include provisions by which the mortgage lien could be divested, subordinated or extinguished; or by which the validity, priority or enforcement of the insured mortgage lien could be impaired?

Will future violation cause impairment or loss of lien; or loss of title if insured acquires title in satisfaction of secured debt?



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ALTA 9-06 – Compliance with #1(b)(1)

Review all recorded, or otherwise known CCRs and survey

Evidence of no violations should be supported by affidavit from owner; review survey for platted setback violations

If there are existing violations list as Sch. B exceptions

Caution: violations which could occur without physical evidence merit special attention (e.g., prohibition on serving alcohol)



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ALTA 9-06 – Compliance with #1(b)(2)

Review all recorded CCRs

Do any contain an identified restriction?

If yes, recite the matter by separate Sch. B exception; or within the Sch. B exception of offending CCR:

“Such (CCR) 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.”



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ALTA 9-06 – Compliance with #1(b)(5)

Review all recorded instruments

Are there notices of violations of CCRs relating to environmental protection?

If so, list notices as Sch. B exceptions and delete this element of coverage



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ALTA 9-06 – Compliance with #3(b)

Review all recorded instruments

Do any mineral interests exist? If yes, has the right of entry been released by the holder, or by operation of law, or been eliminated by MRTA?

If right of entry exists coverage may not be given

Element of coverage 3(b) can be deleted with a proper Sch. B exception



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ALTA 9-06 – Compliance with Survey Related Elements

Review current survey which must depict any recorded easements shown as Sch. B exceptions

Do any improvements encroach onto easements?

Do any improvements encroach onto neighboring land?

Do any neighbor improvements encroach onto insured land?

Do any improvements encroach onto platted setbacks?

Draft specific survey exception and include exceptions to Form 9 coverage as needed

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



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ALTA 9.1-06

Restrictions, Encroachments,
Minerals – Owner's Policy –
Unimproved Land
(With Florida Modifications)

Premium – Minimum 10% of
premium on underlying policy

Expanded REM coverage for
Owner's Policy

Lien protections irrelevant

Private charges/assessments not
covered

No coverage for encroachments
onto neighboring lands

Coverage for damages from rights
of entry, possibility of reverter or
forfeiture



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ALTA 9.2-06

Restrictions, Encroachments,
Minerals – Owner's Policy –
Improved Land
(With Florida Modifications)

Premium – Minimum 10% of
premium on underlying policy

More coverage than ALTA 9.1-06 due to
improved nature of insured property

Coverage related to encroachments
onto neighboring lands, into easements,
and beyond setbacks similar to loan
policy endorsement

Caution: setback violations relate only to
those shown on the plat; violations of
government regulations including those
related to building and zoning are
specifically excluded under Exclusion #1
(owner's policy jacket)



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ALTA 13-06

Leasehold – Owner's

Premium – None

Coverages for tenant under owner's policy insuring leasehold interest

Sch. A (OF6) identifies interest as leasehold estate

Valuation (TN 19.03.03)

Proper execution and recording of lease (or short form/memorandum)

Comply with TN 19.03.05 requirements including Sch. B exceptions: Interest of fee owner and interests encumbering fee



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ALTA 13.1-06

Leasehold – Loan

Premium – None

Coverages provided under loan policy insuring leasehold interest

Sch. A (MF6) identifies interest as leasehold estate

TN 19.03.05 and TN 19.01.01

Additional Schedule B exceptions:

- Access if ingress/egress indeterminable
- Water rights if applicable

Department/Secretary of State for federal and judgment creditor liens against lessee/mortgagor



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ALTA 10-06

Assignment
(With Florida Modifications)

Premium – Minimum \$100
(commercial or greater than
1-4 family residential)

Validity of recorded assignment of
note and mortgage
excepting intervening recorded matters;
federal bankruptcy, state insolvency,
similar creditors' rights laws (fraudulent
or preferential conveyance or transfer)

Search title for intervening matters;
disclose those which could affect validity
(e.g., CEB lien)

Tax lien search as to assignor required
(TN 30.02.08)

Form E needed for "date down"



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ALTA 12-06

Aggregation
(With Florida Modifications)

Premium – None

Combines coverage of all loan
policies issued if impractical to
issue loan policies covering multi-
site transactions

All insured properties located in Florida;
all loans have cross-collateralization
authority

Each commitment contemplates use of
the endorsement which will be attached
to each policy issued

Specially requested form authorized by
your underwriting counsel



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ALTA 6-06

Variable Rate Mortgage

Premium – Minimum \$25

Priority will be maintained even if certain changes in the loan terms occur (e.g., the interest rate)

Recorded mortgage must give notice it is special type of mortgage securing a note containing provisions for changes in the rate of interest

Note must be specifically identified in mortgage and contain all provisions controlling the changes in the rate of interest

Mortgage may not allow negative amortization



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ALTA 6.2-06

Variable Rate Mortgage –
Negative Amortization

Premium – Minimum \$25

Negative amortization/deferral of interest will not impair lien priority

Recorded mortgage states: special type of mortgage securing note containing changes in interest rate and negative amortization provisions

Note specifically identified in mortgage must contain all provisions controlling changes in the rate of interest including negative amortization



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ALTA 6-06 and 6.2-06 Variable Rate Endorsements

Do not insure against loss or damage based upon:

Usury; or

Any consumer credit protection or truth in
lending law

Do not extend Date of Policy or increase the Amount of
Insurance



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ALTA 14-06

Future Advance - Priority

Premium – Minimum \$25

Validity, priority, and enforceability
of future advances, other than
those related to construction

Typically used for revolving note
mortgages which finance farm loans,
inventory or operating costs, and
HELOCs

Covers interest rate changes and
addition of unpaid interest to principal

Sch. B exception required whenever
endorsement given



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ALTA 14.2-06

Future Advance – Letter of Credit

Premium – Minimum \$25

Validity, priority, and enforceability of future advances, other than those related to construction

Similar to ALTA 14-06 but does not cover interest rate changes

Mortgage that collateralizes obligations of a borrower under a letter of credit (e.g., given to municipality to secure obligations of a developer – draw would not occur unless developer unable to make required payment)



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ALTA 14-06 and 14.2-06 Future Advance Endorsements

Both cover future advances of principal, including re-advances, interest on interest, or the addition of unpaid interest to principal

Mortgage complies with notice requirements of Sec. 697.04, F.S.

Secures existing and future advances

Advances made within 20 years of mortgage date

Sch. B exception for advances exceeding amount of insurance

If Amount of Insurance less than mortgage amount future advances require additional premium (Form E and Rating Worksheet)



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ALTA 14-06 and 14.2-06 Differences

ALTA 14.2-06 does not provide coverage for interest rate changes

No exclusion in ALTA 14.2-06 for:

Advances made after bankruptcy; or recorded notice limiting maximum amount of advances

Federal tax lien filed more than 45 days before advance

Usury or consumer protection laws



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Common Commercial Endorsements (FLA)

- Construction Loan Update (CLU)
- Revolving Credit (RCE)
- Balloon Mortgage (BME)
- Additional Interest (AIE)
- Shared Appreciation (SAE)
- Contiguity (CE)
- Survey (SE)
- Navigational Servitude (NSE)
- Change of Partners, Members or Shareholders (CPE)



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CLU

Construction Loan Update

Premium – Minimum \$100
(commercial or greater than
1-4 family residential)

Confirms construction loan
disbursement has increased
liability under the policy to include
the disbursed amounts

Search title and list intervening matters
but confirm none affect priority

Does not change date of policy or
effective date

Similar protection may be provided to
owner by using “escalator clause” in
policy (TN 25.03.02)



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RCE

Revolving Credit

Premium – Minimum \$25

Insures continuing coverage of
future advances in which the
outstanding principal balance may
increase/decrease over time but
will never exceed stated maximum

Developer use for revolving line of credit

Similar to Future Advance – Priority
(ALTA 14-06) but may be used for
construction loans

Comply with notice requirements of
Sec. 697.04, F.S.



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BME

Balloon Mortgage

Premium – Minimum \$100
(commercial or greater than
1-4 family residential)

Assurance mortgage valid and enforceable and mortgage will not lose priority if borrower exercises conditional right to refinance

Borrower can modify and execute a new note; or pay off old loan and execute new note and mortgage and priority will be retained

Mortgage rider must provide conditional right to refinance at maturity



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AIE

Additional Interest

Premium – Minimum \$100
(commercial or greater than
1-4 family residential)

Affirmative coverage related to additional interest provisions in mortgage which typically allow lender to participate in revenues generated by property (e.g., rents)

“Additional Interest” means amounts calculated pursuant to formula in mortgage

Loan policy may be insured for up to 150% of principal debt

Prior approval required



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SAE

Shared Appreciation

Premium – Minimum \$100
(commercial or greater than
1-4 family residential)

Shared appreciation mortgage provisions allowing lender to participate in any increased property value will not render lien unenforceable nor impair priority

Doesn't insure anticipated appreciation will be received or paid

Loan policy may be insured for up to 150% of principal debt

Prior approval required



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CE

Contiguity

Premium – Minimum \$100
(commercial or greater than
1-4 family residential)

Assurance an insured parcel consisting of more than one legal description constitutes one contiguous parcel

May not be used to establish contiguity with parcel not included in legal description of property insured

Obtain current survey and surveyor's certificate confirming contiguity

Describe manner in which parcels are contiguous



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SE

Survey

Premium – Minimum \$100
(commercial or greater than
1-4 family residential)

Assurance real property described
in policy is same as shown on a
survey obtained in the transaction
despite variations

Current survey typically supplemented
with surveyor's certificate affirming the
legal descriptions reference the same
property

Discuss variations, other than de
minimis, with Fund Underwriting
Loan and Owner policies



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NSE

Navigational Servitude

Premium – Minimum 10% of total
premium on underlying policies

Covers forced removal of
improvements due to
governmental rights over
navigable waters and lands
formerly under navigable
waters

Request typically triggered by
navigational servitude exception in
Commitment

Loan and Owner policies



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NSE – Navigational Servitude Endorsement

Property formerly under navigable waters, which has been artificially filled, results in navigational servitude exception

NSE may be given if filled lands present no risk to navigation

If illegally filled sovereignty lands exception also required and NSE must exclude coverage for sovereignty lands

Nearly always requires Underwriting approval

See Title Notes Ch. 32 – Waters and Watercourses



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CPE

Change of Partners,
Members, or Shareholders

Premium – Minimum \$100
(commercial or greater than
1-4 family residential)

Owner's policy coverage will continue if new partners, members, shareholders, beneficiaries, or certificate holders are added or old ones withdraw

State laws of entity's domicile, as well as the entity's governing documents (e.g., articles, bylaws, partnership agreement, operating agreement, or trust), are examined to confirm any such change will not result in dissolution or termination of the entity



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Lender Request

Endorsement Re: Assessments: Can refer to... ALTA® Endorsement 1-06 Street Assessments ALTA® Endorsement 9.6.1-06 Private Rights - Current Assessments - Loan Policy	No Florida Counterpart, and specifically forbidden by F.A.C. 690-186.005(15)(a)(6)
ALTA® Endorsement 3-06 Zoning Unimproved Land (6-17-06) ALTA® Endorsement 3.1-06 Zoning-Completed Structure (10-22-09) ALTA® Endorsement 3.2-06 Zoning – Land Under Development (04-02-12);	No Florida counterpart. Zoning affirmation, if demanded by lender, usually addressed in ALTA survey and/or attorney opinion letter
ALTA Variable Rate Endorsement (6.1)	Available in Florida
ALTA Environmental Endorsement (8.1)	Available in Florida
Florida “Comprehensive Endorsement” Florida Form 9.3-06 “Reverter” endorsement	Florida Form 9-06 for Lenders Florida Form 9.1-06 for Owner’s –Unimproved land Florida Form 9.2-06 for Owner’s – Improved Land Florida Form 9.3-06 and 9.5-06 <i>no longer offered, available.</i>
ALTA General Survey Endorsement	Available in Florida
ALTA Contiguity Endorsement	Available in Florida



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Lender Request

ALTA Assignment Endorsement (10-06)	Available in Florida
Shared Appreciation Endorsement	Available in Florida
ALTA Forms 14-06 Future Advance Endorsement	Available in Florida but superfluous, should not be used for construction which lender is obligated to finance as of closing/Date of Policy
ALTA® Endorsement 17-06 Access and Entry Assures that land abuts and has actual vehicular and pedestrian access to a named street that is physically open and publicly maintained, and insured may use curb cuts or entries along that portion of the street.	Legal access is insured in policy jacket. Otherwise, no Florida counterpart, and specifically forbidden by F.A.C. 690-186.005(15)(a)(3)
ALTA® Endorsement 17.2-06 Utility Access Assures there is no lack of access by specific utilities on, over, under rights of way due to gap or between R/W, easements, and insured Land, or due to termination by grantor.	No Florida counterpart, and specifically forbidden by F.A.C. 690-186.005(15)(a)(3)



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Lender Request

<p>ALTA® Endorsement 18-06 Single Tax Parcel</p> <p>Assures that the land described in the policy is a single and separate tax parcel and not part of a larger parcel of land.</p>	<p>No Florida counterpart. Contiguity endorsement helps. Customary to simply check the tax parcels in Florida prior to closing.</p>
<p>ALTA® Endorsement 22.06; 22.1-05 (CA-116) Location of Land, Improvements</p> <p>Assures lender regarding land, improvement located on land with street address, and attached map is accurate as to the location and the dimensions of the improvements.</p>	<p>No counterpart in Florida, and specifically forbidden by F.A.C. 690-186.005(15)(a)(4)</p> <p>No maps are attached to Florida policies. If there are questions regarding any discrepancy between a description in the deed and the one in the survey, the Survey endorsement helps, and a survey affidavit may be required.</p> <p>Florida form 9 insures against the improvements encroaching onto neighboring land, and therefore arguably implicitly, that the improvements are located on the proper Land described on Schedule A.</p>
<p>ALTA® Endorsement 24-06 Doing Business</p>	<p>No Florida counterpart, and specifically forbidden by F.A.C. 690-186.005(15)(a)(1)</p>



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Lender Request

<p>ALTA® Endorsement 26-06 Subdivision Endorsement</p> <p>Provides coverage to an Owner or Lender that the identified land is a lawfully created parcel under the relevant laws and regulations to create a subdivision.</p>	<p>No Florida counterpart. If demanded by lender, often handled by attorney opinion letter.</p>
<p>ALTA® Endorsement 27-06 Usury Endorsement</p> <p>Provides coverage against loss or damage that may be sustained by the lender by reason of the insured mortgage being invalid or unenforceable because the loan violates state usury provisions. This Endorsement is intended for issuance with an ALTA Loan Policy.</p>	<p>No Florida counterpart and specifically forbidden by F.A.C. 690-186.005(15)(a)(8)</p> <p>This coverage is explicitly excluded in the Exclusions section of the policy jacket for Florida. If demanded by lender, often handled by attorney opinion letter.</p>
<p>“Mineral Rights Endorsements”</p> <p>ALTA® Endorsement 35-06 Minerals and Other Subsurface Substances – Buildings</p> <p>ALTA® Endorsement 35.1-06 Minerals and Other Subsurface Substances – Improvements</p> <p>ALTA® Endorsement 35.2-06 Minerals and Other Subsurface Substances – Described Improvements</p> <p>ALTA® Endorsement 35.3-06 Minerals and Other Subsurface Substances – Land Under Development</p>	<p>No Florida counterpart; minerals addressed in Florida Form 9 series.</p>



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Lender Request

ALTA® Endorsement 37-06 Assignment of Rents or Leases	No Florida counterpart
"Endorsement Against Reverter"	Florida Form 9 series, with specific exception to be inserted in Schedule B.
"Fairway" Endorsement	Florida has CPE - Change of Partners, Members or Shareholders Endorsement

"Deletion of Arbitration provisions"	No need to delete because arbitration is only by mutual consent in Florida in terms in jacket. Mandatory arbitration in ALTA forms in other states is not in the Florida forms approved by the Office of Insurance Regulation (OIR).
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Thank You!
for attending

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List of Endorsements

Condominium Endorsement (ALTA 4.1-06)

The Condominium Endorsement (ALTA 4.1-06) is often given with owner's and loan policies when the insured property consists of a condominium unit. It provides the Insured with various affirmative coverages peculiar to condominiums, such as the valid creation of the condominium.

PUD Endorsement (ALTA 5.1-06)

The PUD Endorsement (ALTA 5.1-06) is given most often with loan policies, and is used when the property is located in a residential development that is subject to recorded covenants, conditions, or restrictions.

Variable Rate Mortgage Endorsement (ALTA 6-06)

The Variable Rate Mortgage Endorsement (ALTA 6-06) assures the lender that their priority will be maintained even when certain changes are made in the interest rate.

Variable Rate Mortgage Endorsement — Negative Amortization (ALTA 6.2-06)

The Variable Rate Mortgage Endorsement (ALTA 6.2-06) assures the lender that the occurrence of negative amortization/deferral of interest will not impair their lien priority.

Manufactured Housing Unit Endorsement (ALTA 7-06)

The Manufactured Housing Unit Endorsement (ALTA 7-06) insures that a specifically described mobile home constitutes part of the Insured property.

Environmental Protection Lien Endorsement (ALTA 8.1-06)

The Environmental Protection Lien Endorsement (ALTA 8.1-06) provides for affirmative coverage against loss or damage by reason of a lack of priority of the Insured Mortgage over any environmental protection lien recorded at the Date of Policy.

ALTA Endorsement 9-06 (ALTA 9-06)

This endorsement (ALTA 9-06) 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.

ALTA Endorsement 9.1-06 (ALTA 9.1-06)

The ALTA 9.1-06 endorsement is used with owner's policies when the Land is unimproved land. It provides the Insured with several commonly requested affirmative coverages, such as those dealing with encroachments, easements and mineral rights.

ALTA Endorsement 9.2-06 (ALTA 9.2-06)

This endorsement (ALTA 9.2-06) is used with owner's policies when improvements are located on the Land. It provides the Insured with several commonly requested affirmative coverages, in particular those dealing with encroachments and restrictions.

List of Endorsements

Assignment Endorsement (ALTA 10-06)

The Assignment of Mortgage Endorsement (ALTA 10-06) is used when the note and the mortgage are assigned by the holder to someone else. It is most used when an institutional mortgagee assigns a mortgage in the secondary market.

Mortgage Modification Endorsement (ALTA 11-06)

The Mortgage Modification Endorsement (ALTA 11-06) is issued only to insure modifications to mortgages previously insured by Old Republic with a 2006 ALTA loan policy in circumstances in which the modification does not cause loss of priority or require the payment of a substitution loan rate premium. This endorsement does not advance the Date of Policy.

Leasehold — Owner's Endorsement (ALTA 13-06)

The Leasehold – Owner's Endorsement (ALTA 13-06) defines the coverages provided to a tenant under a policy insuring a leasehold interest. The form describes the coverages more completely than the Owner's – Leasehold policy form it replaces. The endorsement must be issued in conjunction with an owner's policy (OF6).

Leasehold — Loan Endorsement (ALTA 13.1-06)

The Leasehold – Loan Endorsement (ALTA 13.1-06) defines the coverages provided to a lender under a policy insuring a leasehold interest. The form describes the coverages more completely than the Mortgagee – Leasehold policy it replaces. The endorsement must be issued in conjunction with a loan policy (MF6).

Future Advance — Priority Endorsement (ALTA 14-06)

The Future Advance – Priority Endorsement (ALTA 14-06) insures the validity, priority, and/or enforceability of future advances other than advances pursuant to construction loans. The endorsement must be issued in conjunction with a loan policy (MF6).

Future Advance — Letter of Credit Endorsement (ALTA 14.2-06)

The Future Advance – Letter of Credit Endorsement (ALTA 14.2-06) insures the validity, priority and enforceability of future advances other than advances pursuant to construction loans in mortgages securing letters of credit, surety agreements, and reimbursement agreements. The endorsement must be issued in conjunction with a loan policy (MF6).

Future Advance — Reverse Mortgage Endorsement (ALTA 14.3-06)

The Future Advance Reverse Mortgage Endorsement (ALTA 14.3-06) assures the lender that changes in the rate of interest or the occurrence of negative amortization will not impair the lender's lien position. The endorsement also provides that future advances are also included within the coverage of the policy. The ALTA 14.3-06 and the Reverse Mortgage Endorsement (RME) may be used interchangeably with loan policies.

List of Endorsements

Additional Interest Endorsement (AIE)

The Additional Interest Endorsement, is used with loan policies only, provides the Insured under a loan policy with affirmative coverage related to additional interest provisions in the mortgage.

Balloon Mortgage Endorsement (BME)

The Balloon Mortgage Endorsement, is used with loan policies only, assures the lender that its mortgage will not be invalid or unenforceable because it contains a conditional right for the borrower to refinance. It also assures that the mortgage will not lose its priority if the borrower exercises the conditional right to refinance.

Change of Partners, Members or Shareholders Endorsement (CPE)

The Change of Partners (Fairways) Endorsement is used in connection with owner's policies under which the Insured is a corporation, partnership, limited partnership, limited liability company or business trust. It provides that insurance coverage will continue even if new partners, members, shareholders, beneficiaries, or certificate holders are added or old partners, members, shareholders, or certificate holders withdraw.

Construction Loan Update Endorsement (CLU)

The Construction Loan Endorsement is used to update a loan policy as construction loan disbursements are made.

Contiguity Endorsement (CE)

The Contiguity Endorsement provides affirmative coverage that a parcel of land consisting of more than one legal description constitutes one contiguous parcel of land.

Foreign Currency Endorsement (FCE)

The Foreign Currency Endorsement is used in connection with loan policies that contain provisions for the re-evaluation of the Indebtedness based upon changes in the conversion rate between U.S. dollars and a stated foreign currency.

Form E Endorsement (Form E)

Endorsement Form E is used to correct or amend either a commitment or policy that has been issued (for example, to correct an error in the spelling of a name or in conjunction with a mortgage modification agreement).The exclusive method for changing the Date of Policy or effective date on a loan policy is through the use of the Form E endorsement.

List of Endorsements

Navigational Servitude Endorsement (NSE)

The Navigational Servitude Endorsement provides affirmative coverage as to losses arising by reason of forced removal of improvements based upon the exercise of governmental rights with respect to control over navigable waters or lands that formerly constituted navigable waters.

Option Endorsement (OE)

The Option Endorsement insures a person or entity who has the right to purchase the subject property under a recorded option.

Reverse Mortgage Endorsement (RME)

The Reverse Mortgage Endorsement assures the lender that changes in the rate of interest or the occurrence of negative amortization will not impair the lender's lien position. The endorsement also provides that future advances are also included within the coverage of the policy. The Reverse Mortgage Endorsement (RME) and the ALTA 14.3-06 may be used interchangeably with loan policies.

Revolving Credit Endorsement (RCE)

The Revolving Credit Endorsement is used with loan policies in instances under which the principal fluctuates from time to time as the borrower draws against a line of credit.

Shared Appreciation Endorsement (SAE)

The Shared Appreciation Endorsement insures the lender against loss or damage by reason of the invalidity or unenforceability of the mortgage resulting from shared appreciation interest provisions contained therein. It also provides coverage as to loss or damage by reason of loss of priority of the lien of the Insured Mortgage as security for the unpaid principal balance, the stated interest, and the shared appreciation interest, which loss of priority results from provisions in the mortgage for payment of shared appreciation interest.

Survey Endorsement (SE)

The Survey Endorsement, given with either an owner's or a loan policy, assures that the lands described in Schedule A of the policy are the same lands described in a specific survey.

Endorsement Premium Chart

Endorsement Type	Form Code	Applicable To		Premium Calculation
		Owner's Policy	Loan Policy	
ALTA Endorsement 9-06 (Restrictions, Encroachments, Minerals)	ALTA 9-06		X	1
ALTA Endorsement Form 9.1-06	ALTA 9.1-06	X		
ALTA Endorsement 9.2-06 (Restrictions, Encroachments and Minerals — Improved Land)	ALTA 9.2-06	X		
Navigational Servitude Endorsement	NSE	X	X	
Construction Loan Update	CLU		X	2
Contiguity Endorsement	CE	X	X	
Shared Appreciation	SAE		X	
Foreign Currency	FCE		X	
ALTA 10.0-06 Assignment of Mortgage	AM6/10.06		X	
Additional Interest	AIE		X	
Change of Partners	CPE	X	X	
Balloon Mortgage	BME		X	
Option Endorsement	OE	X		
Survey	SE	X	X	
ALTA 4.1-06 (Condo Endorsement)	ALTA 4.1-06	X	X	3
ALTA 5.1-06 (Planned Unit Development)	ALTA 5.1-06	X	X	
ALTA 6.0-06 (Variable Rate Mortgage Endorsement)	ALTA 6.0-06		X	
ALTA 6.2-06 (Variable Rate Mortgage — Negative Amortization)	ALTA 6.2-06		X	
ALTA 7.0-06 (Manufactured Housing Unit)	ALTA 7.0-06	X	X	
ALTA 8.1-06 (Environmental Protection)	ALTA 8.1-06		X	
ALTA 14.0-06 (Future Advance Priority)	ALTA 14.0-06		X	
ALTA 14.2-06 (Future Advance Letter of Credit)	ALTA 14.2-06		X	

		Applicable To		
Endorsement Type	Form Code	Owner's Policy	Loan Policy	Premium Calculation
ALTA 14.3-06 (Future Advance Reverse Mortgage)	ALTA 14.3-06		X	3
Revolving Credit	RCE		X	
Reverse Mortgage	RME		X	
Form E — General Endorsement	E	X	X	4
ALTA 11.0-06 (Mortgage Modification)	ALTA 11.0-06		X	
ALTA 13.0-06 Leasehold Owner's	ALTA 13.0-06	X		
ALTA 13.1-06 Leasehold Loan	ALTA 13.1-06		X	

If an endorsement is issued with either an owner's policy or a loan policy, the premium is:

- 1** – Minimum of ten percent (10%) of the premium of underlying policy. If the endorsement is issued to a simultaneous loan policy, the premium is a minimum of ten percent (10%) of the sum of the premiums for the owner's and loan policy to which the endorsement applies.
- 2** – One-to-four family residential premium: minimum of \$25.00 and a maximum of \$100.00. Other risks (commercial or greater than one-to-four family): minimum of \$100.00
- 3** – Premium: minimum of \$25.00
- 4** – No additional charge.

Fund members are advised to charge the minimum rate for all endorsements based upon a stated minimum. All other costs should be allocated as "closing services."

Title Insurance Coverage in Florida and Interstate Commercial Real Estate Lending

I. Introduction - The Scope of Commercial Title Insurance: Types of transactions, properties, estates, concerns

There are hosts of types of transactions that the commercial real estate practitioner is called upon to help with in today's challenging economic times. Notwithstanding the recent uptick in real estate values, the Great Recession and precipitous decline in real estate values over the last several years has led to more stringent bank regulations. Mortgage modifications commonly involve principal paydowns and 'spreader' agreements to add additional collateral located both in state and out of state. Credit facilities are frequently modified so that they are further cross-collateralized or cross-defaulted to include other property and other loans. Many modifications include provisions for different types of defeasance of title from the mortgagor short of foreclosure, should the mortgagor subsequently default on the loan. Transactions also include working through the details of mezzanine financing and taking over failed projects and restarting them, both under, and outside of the umbrella of bankruptcy protection.

The commercial real estate practitioner's task is further complicated by the fact that, unlike residential transactions which arguably can be thought of as homogenous or fungible, commercial transactions involve very different types of properties, each with inherently different issues. They include, for example, condominiums, condominium conversions to apartments, and co-ops; multifamily housing; affordable housing; senior housing; residential and commercial PUDs; mixed use development; public-private joint ventures; golf courses & recreational uses; farmland; shopping malls & retail development; warehouse & industrial properties; office buildings with long term leasing, and rights of ways for various uses (recreational trails, pipelines, railroads) to name a few. They may include development districts and bond financing, complicated long term leases, and involve severed estates, both subsurface (e.g. oil, gas and mineral) and aerial (easements for unobstructed ocean view; aviation easements for flight paths near airports; horizontal estates in high rises; transferable developmental rights, etc.)

Another overlay of complexity is furnished by the differing and unique ordinances and regulations passed by local jurisdictions. With tax bases and revenues generally showing anemic, if any growth, many jurisdictions have discovered the utility of passing bills to levy charges with super priority status, though that trend has slowed since the case of

City Of Palm Bay V. Wells Fargo Bank, 114 So.3d 924 (Fla. 2013). Some counties have special assessments regarding sheet flow and stormwater runoff from commercial tracts. Others require re-inspections and new certificates of uses as part of a foreclosure. Open-permits present their own host of issues, especially when the contractor who pulled the permit is out of business, and the building code has changed for the incomplete project.

These varying types of transactions, property types, estate types, and local ordinances present several distinct title insurance issues. In consummating or 'closing' a transaction, the practitioner must therefore resolve these issues when furnishing commercial title insurance, while doing so efficiently and economically by utilizing title insurance that may already be in place.

This complex landscape is further complicated by the fact that loan decisions are made, and projects are increasingly financed by out of state lenders which is addressed in the next section.

II - The Lending Environment: Out of State Lender's 'Outlandish' Requests

The advent of interstate banking has given rise to banks and other lending institutions that are truly 'national' in fact and size. Some herald such growth as allowing for more capital and more financing options to be available in any given locale. Others decry such growth as creating institutions that are too big to fail and with furnishing a greater supply of capital that encouraged local lenders to make, season, and sell loans that they never would have made if they had to portfolio such loan and service them for their life.

Whatever one's thoughts are on this issue, one consequence of such growth is undeniable. Practitioners are dealing less with a local lender who knows local law and what can therefore be furnished, and more with a national lender. Moreover, national lenders often prepare an omnibus, one size-fits-all, loan commitment letter and set of closing instructions that require products and endorsements that are not only unavailable in Florida; they are explicitly forbidden by the Florida Administrative Code. Such instructions create impossible situations of which members and title companies routinely complain.

Perhaps nothing better exemplifies this interstate *Brave-New-World* of lending the commercial real estate practitioner faces than a discussion a recent typical transaction. Specifically, separate credit facilities existed on 6 big box stores, three in Florida shopping centers, and the three others in Georgia, North Carolina, and Colorado. The lender sought to have all the separate mortgages first assigned to itself, in order to then consolidate, restate, and modify the loans under the umbrella of a master indenture. The current periodic payments and fixed interest rate would be lessened, but the range and the ceiling on the variable interest could exceed the current interest rate. The amortization period would be lengthened, but a principal paydown was required and the prepayment premiums from the loan inception were to be re-instated.

The lender, a large insurance company in the Midwest, sent the detailed loan commitment letter with the borrower to our member/agent, whose terms and conditions included, inter alia, the following regarding title insurance for the Florida properties:

"Title Insurance, Searches and Survey Requirements

A. Title and Title Insurance

Lender shall, on behalf of Borrower and at Borrower's expense, procure a 1970 ALTA title insurance policy, with creditors rights protection, and with any endorsements Lender may require, insuring Lender, its successors and assigns, as their interests may appear, in an amount at least equal to the final amount of the Loan Amount, which policy shall provide that Lender's security instrument constitutes a first lien or charge upon the Premises subject only to such items as shall have been approved in writing by Lender and its attorneys..."

"In connection with the above, Lender also requires the following endorsements:

- a. ALTA Form 1-06 Street Assessments
- b. ALTA Form 3.1 Zoning Endorsement (with parking)
- c. ALTA Variable Rate Endorsement
- d. ALTA Environmental Endorsement
- e. Comprehensive Endorsement ALTA Form 9.3-06 OR BOTH ALTA 9-06 (Rev. 4-2-12) AND ALTA 9.6-06 (Rev. 4-2-12/13)
- f. ALTA General Survey Endorsement
- g. ALTA Contiguity Endorsement
- h. ALTA Assignment Endorsement
- i. ALTA Shared Appreciation Endorsement
- j. ALTA 14-06 Future Advance Endorsement
- k. ALTA Access and Entry Endorsement
- l. ALTA Utility Access Endorsement
- m. ALTA Separate Tax Parcel Endorsement;
- n. ALTA Endorsement for Location of Improvements and Land Location;
- o. ALTA Doing Business Endorsement
- p. ALTA Subdivision Endorsement
- q. ALTA Usury Endorsement
- r. Endorsements for mineral rights
- s. ALTA Assignment of Rents and Leases
- t. Endorsements against reverter
- u. "Fairway" endorsement

Once Lender has had an opportunity to review the title commitment and survey, *Lender may require other endorsements*. Specifically, if at this time you, the borrower, are aware of any encroachments on the premises, Lender requires affirmative endorsements insuring over such encroachments.

Please also delete the Arbitration provisions.

Please deliver a copy of this letter to your title company together with the title insurance requirements set forth above."

To respond to this request, we'll start with a macro-view of commercial title insurance and the tools at hand in Florida to meet the lender's needs.

III. Commercial Title Insurance & the Panoply of Tools to Furnish It

Notwithstanding the large percentage of the market that commercial real estate title insurance constitutes, it apparently has never been defined by Florida Statute, the Florida Administrative Code, or in Florida case law.

Also, there are no specifically "commercial" title insurance policies or endorsements, per se. Rather, there are simply the approved title insurance forms in Florida for use for *all* real estate, through which *commercial* title insurance is furnished.¹ This list is considerably smaller than the list of ALTA policies and endorsements that have been authorized by other jurisdictions and which are being widely used throughout the country.²

A detailed review of all forms that can be used to furnish commercial title insurance in Florida is beyond the scope of this presentation. This presentation will therefore focus on key areas or groups of policies and schedules which typically are utilized to furnish the desired commercial title insurance coverages. They are...

- A) the policies themselves, i.e., the Lender's and the Owner's policies, and specific provisions within them;
- B) the Florida Form #9 series endorsements frequently furnished with them;
- C) the Florida #14 series;
- D) other endorsements common in commercial transactions, such as the Survey Endorsement; the Contiguity Endorsement; the Assignment Endorsement; the Shared Appreciation Endorsement; Change in Partners (Fairways) Endorsement; and the Mortgage Priority Guarantee (which is not technically an endorsement, but a stand-alone product).

¹ See, for example, the list of Florida title insurance forms at Appendix Page 1.

² See, for example, the list of ALTA title insurance forms at Appendix Pages 45 through 48.

IV. The Lender's & Owner's Policies, & Select Coverages in Them

A) The Mortgagee/Loan Policy:

For commercial loans, the key coverage is, of course, furnished by the mortgagee policy itself, now known as the Loan Policy. It has gone through several revisions since 1970, which are explicated below.

1) The 1970 ALTA Policy [Amended 10-17-84] – Coverages:

The 1970 Mortgagee contained the following coverages:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on such title;
3. Lack of a right of access to and from the land;
4. Unmarketability of such title;
5. The invalidity or unenforceability of the lien of the insured mortgage upon said estate or interest except to the extent that such invalidity or unenforceability, or claim thereof, arises out of the transaction evidenced by the insured Mortgage and is based upon
 - a. usury, or
 - b. any consumer credit protection or truth in lending law;
6. The priority of any lien or encumbrance over the lien of the insured mortgage;
7. Any statutory lien for labor or material which now has gained or hereafter may gain priority over the lien of the insured mortgage, except any such lien arising from an improvement on the land contracted for and commenced subsequent to Date of Policy not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance; or
8. The invalidity or unenforceability of any assignment shown in Schedule A, of the insured mortgage or the failure of said assignment to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

2) The 1992 ALTA Policy – Coverages:

The 1992 ALTA Loan policy revised the above to afford the following coverage.

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
4. Lack of a right of access to and from the land;
5. The invalidity or unenforceability of the lien of the insured mortgage upon the title;
6. The priority of any lien or encumbrance over the lien of the insured mortgage;
7. Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:

- (a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or
 - (b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance;
8. The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens.³

3) The 2006 ALTA Policy – Coverages:

The 2006 ALTA loan policy significantly expanded coverage of the prior 1992 policy. There is no one area where coverage contracted or was curtailed from what was previously afforded. The specific number of “Coverages” was expanded from 8 to 14, for example, and there is now coverage against a defect in the title caused by...

- “(i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
- (ii) failure of any person or Entity to have authorized a transfer or conveyance;
- (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
- (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
- (v) a document executed under a falsified, expired, or otherwise invalid power of attorney;
- (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
- (vii) a defective judicial or administrative proceeding.”

While these coverages are significant, to state them is also to explain what they cover, without real need of further elaboration.⁴

³ See, for example, Appendix Page 2.

⁴ See, generally, Appendix, Pages 7-8.

B) Creditors Rights Defined

Given the routine requests by lenders for specific versions of the ALTA loan policy with specific coverage for creditors rights, it seems appropriate to first define creditors rights. Generally speaking, creditors' rights are the rights of creditors to have a transaction set aside in an appropriate forum (e.g., federal bankruptcy court or state court) for being a 'preferential transfer' which unfairly benefits one creditor at the expense of another. While there is no one litmus test to determine just what is a preferential transfer, tell-tale signs include insufficient consideration for the transfer of the asset to one 'preferred' creditor at the expense of another similarly situated creditor; a transfer that renders one insolvent; a transfer to 'insider', and transfer within a specified time period prior to the filing of bankruptcy. Under 11 U.S.C., Sec. 547, for example, a bankruptcy trustee can set aside as an "avoidable preference" mortgages that benefit creditors who held an antecedent debt that was owed by the debtor before such transfer was made, if the debtor was also insolvent.

Creditors' rights also include the right of a creditor to set aside a transaction for being a "fraudulent conveyance". Such a conveyance may be the result of *active* fraud, i.e., a conveyance that was made "... with actual intent to hinder, delay, or defraud any entity. . . ."⁵ Or, it may be the result of constructive fraud. In such case, the transfer was for "less than reasonably equivalent value" in exchange for such transfer or obligation; the transaction was "to or for the benefit of an insider", or it effectively rendered the debtor "insolvent" as defined by federal law.⁶

Creditors' rights also include the right of a creditor to set aside a transaction or conveyance for constituting a "Fraudulent Transfer" under Fla. Stat. ch. 726.01 et. seq.⁷

⁵ See 11 U.S.C., Sec. 548 (a)(1)(A).

⁶ See, generally, 11 U.S.C., Sec. 548

⁷ Other examples of transactions that trigger creditors' rights concerns include the following, which are reprinted from "*Using the 1970 ALTA Policy Forms and Creditors' Rights Issues*", by Pat Jones, Fund V.P., Underwriting, The Fund Concept, March, 2003:

1. The grantor/seller is not receiving fair market value for the property.
2. The grantor/mortgagor and grantee/ mortgagee are related.
3. The owner/grantor will be rendered insolvent by the transfer of the property interest in question (may be a fee or mortgage interest).
4. The grantor/owner is giving a deed in lieu of foreclosure; or a deed in lieu of foreclosure appears in the chain within one year of the date of the current transaction.
5. The current owner or a prior owner in the recent chain of title is or has been a debtor in bankruptcy.
6. The mortgage being insured is given to secure an obligation previously incurred by the owner of the property.
7. The mortgage being insured secures the debt of someone other than the mortgagor. In this situation, a mortgage is executed by the property owner, but someone other than the owner signs the promissory note or other obligation.
8. The mortgage is executed by owners of different parcels to secure the same indebtedness. This "multiple borrowers" scenario is a variation of no. 7 above. The risk presented is that the owner of the mortgaged property did not receive reasonably equivalent value for mortgaging its

The basic remedy upon finding a transaction to be a preferential transfer or fraudulent is to set aside and avoid such transaction, with the attendant loss of title. Such a result can inflict severe financial harm to a creditor holding a first mortgage against such property and the owner of such property who naturally seek to have insurance to protect against such risk. Such insurances have been provided in different ways by three different kinds of policies over the last 40 years, which is the subject of the next section.

C) Creditors Rights Coverage in the Mortgagee/Loan Policy Since 1970

1) 1970 Mortgagee Policy [Amended 10-17-84]

The 1970 policy does not contain an express creditors' rights exclusion to coverage. In fact, the word "creditor", or the term "creditors rights" did not even appear in the policy. This has lead many to interpret the 1970 version to mean that creditors' rights *were* covered by such policy. Moreover, even though courts have held that the 1970 policy form does *not* provide creditors' rights coverage, holders of such policies have continued to tender defense of such claims to their respective underwriters.

This policy and protection is no longer offered. Effective September 1, 2011, the Texas legislature added Section 2502-006 to the Texas Insurance Code. It prohibits a title insurance company doing business in Texas from providing creditors' rights coverage for the transaction vesting title in the insured or creating the lien of the insured mortgage anywhere in the United States. The only exception is where the laws of another state require the coverage. As a result, the use of such policy affording such coverage ended nationwide.

As an aside, the intellectually curious may ask how Texas had the authority to do this, to affect, or more accurately, end such coverage nationwide. The reason proffered, among others, was that such coverage was ultra-hazardous, so that furnishing it in Texas or elsewhere could affect the solvency of a title insurer licensed in Texas, to detrimentally impact policyholders and the Texas Title Insurance Guaranty Association.

A fine point needs to be made here, which may, in part explain the reason why some lenders still ask for the ALTA 1970 Loan policy in Florida. Though that policy is not

property, and in the event the owner files bankruptcy, the creditors of the debtor can have the mortgage on the debtor's property set aside or subordinated to their claims.

9. The proceeds of the sale or of the mortgage are going to someone other than owner or the mortgagor. One example of such a scenario is the "leveraged buy out," or LBO, which involves the purchase of a business using the assets of the company as a source of funds for the purchase.
10. The mortgage is spread to other parcels owned by entities different from the record owner. This is another variation of the "multiple borrowers" scenario.
11. The mortgage to be insured is given to secure a guarantee.

offered, that does not mean that its *approval* for use by the Florida Office of Insurance Regulation (“OIR”) has been withdrawn or voided. The Florida Land Title Association meets regularly to review forms and to advise OIR regarding revisions to them. At the October 2015 meeting, OIR advised Florida underwriters of the process to be utilized to officially remove OIR’s formal approval of the 1970 ALTA Mortgagee Policy; the 1970 ALTA Mortgagee Policy as amended in 1984, and the 1992 ALTA Mortgagee Policy. That process of withdrawing formal OIR approval has begun.

2) 1992 ALTA Mortgagee Policy

The 1992 Mortgagee Policy introduced the following specific *exception* for creditors’ rights:

“Any claim, which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors’ rights laws, that is based on:

- (a) the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer; or
- (b) the subordination of the interest of the insured mortgagee as a result of the application of the doctrine of equitable subordination; or
- (c) the transaction creating the interest of the insured mortgagee being deemed a preferential transfer except where the preferential transfer results from the failure:
 - (i) to timely record the instrument of transfer or
 - (ii) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.”

As one can see, the above explicitly *excepted* from coverage, for the first time, claims that the current transaction (creating the interest of the insured mortgagee) was a fraudulent conveyance or transfer, or a preferential transfer (except as noted above).

3) 2006 ALTA Loan Policy

The *coverage* regarding creditors’ rights was expanded in the 2006 loan policy to provide in its entirety as follows:

“ The invalidity, unenforceability, lack of priority, or avoidance of the lien of the Insured Mortgage upon the Title

- (a) resulting from the avoidance in whole or in part, or from a court order providing an alternative remedy, of any transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction creating the lien of the Insured Mortgage because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors’ rights laws; or
- (b) because the Insured Mortgage constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors’ rights laws by reason of the failure of its recording in the Public Records
 - (i) to be timely, or
 - (ii) to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.”⁸

⁸ See Appendix Page 8, Coverage #13

As one can see, the provision regarding the subordination of the interest of the insured mortgagee has been deleted from the 1992 version, as that is really a post policy matter. Also, the coverage is expanded to explicitly cover an “avoidance, in whole or part” as well as a court order providing for an alternative remedy.

The above may lead one to ask, *‘So what is relevance of these coverages for today’s commercial practitioner and the transaction at hand?’*

The answer is twofold. First, today’s marketplace is replete with defeasance transactions, such as deeds-in-lieu of foreclosure, in which the mortgagor/grantor is insolvent or rendered insolvent by the transfer. Many of these transactions often fit the definition of a preferential transfer or fraudulent conveyance which could be set aside years after such conveyance by a bankruptcy trustee or by a court under state law. Yet many of these properties are re-conveyed and insured long before such set-aside period has expired. For this reason, among others, lenders often request a two year chain of title with a title insurance commitment. Second, while there is no creditors’ right protection in the current transaction in which the insured estate has been created, the 2006 ALTA Loan policy does insure against preferential transfers and fraudulent conveyances in the transaction prior to the current one. As such, a practitioner could unwittingly insure a recent, past transaction against creditors’ rights when insuring a *current* transaction, even though the time for exercising such rights may not have expired.

Therefore, when insuring a current transaction, a practitioner must be vigilant to confirm the ‘bona fides’ (e.g. adequate consideration; transfer not to an insider, etc.) of the past and present transaction, to guard against insuring a transaction that can be set aside as preferential or fraudulent.

D) Other Specific Coverages in the Loan Policy - The “Insured”

1) 1992 ALTA Loan Policy: The “Insured” includes...

- i. “...the owner of the indebtedness secured by the insured mortgage....”
- ii. “...each successor in ownership of the indebtedness except...obligors”
- iii. “any governmental agency...which is an insurer or guarantor under an insurance contract... insuring or guaranteeing the indebtedness secured by the insured mortgage....”
- iv. Party that acquires by foreclosure, Deed in Lieu;
- v. Successors to corporation by operation of law

2) 2006 ALTA Loan Policy: The definition of “Insured” was significantly expanded in the 2006 Loan Policy which provides as follows:

“(e) “Insured”: The Insured named in Schedule A.

(i) The term “Insured” also includes

(A) the owner of the Indebtedness and each successor in ownership of the Indebtedness, whether the owner or successor owns the Indebtedness for its own account or as a trustee or other fiduciary, except a successor who is an obligor under the provisions of Section 12(c) of these Conditions;

(B) the person or Entity who has “control” of the “transferable record,” if the

- Indebtedness is evidenced by a “transferable record,” as these terms are defined by applicable electronic transactions law;
- (C) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;
- (D) successors to an Insured by its conversion to another kind of Entity;
- (E) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title
- (1) if the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,
 - (2) if the grantee wholly owns the named Insured, or
 - (3) if the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity;
- (F) any government agency or instrumentality that is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the Indebtedness secured by the Insured Mortgage, or any part of it, whether named as an Insured or not....”⁹

Note that the 1992 policy limited the “Insured” to “successors in ownership of the indebtedness”, and to “successors to corporation by operation of law....” The 2006 ALTA loan policy expands the definition to include successors by “dissolution, merger, consolidation, distribution, or reorganization,” and wholly owned entities, or an entity which wholly owns the “Insured”. This expands debt-restructuring options when dealing with a troubled entity and loan in which there may be no need for the payment of documentary stamps or additional title insurance premium fees.

E) Other Specific Coverages in the Loan Policy - The “Indebtedness”

1). 1992 Loan Policy. Indebtedness is not directly or squarely defined in this policy. Rather, it is indirectly described in the Conditions and Stipulations as the least of ...

- “(i) the Amount of Insurance stated in Schedule A;
- (ii) ...principal...secured by the insured mortgage as of Date of Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage... and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made; or
- (iii) the amount paid by any governmental agency....”¹⁰

2). 2006 ALTA Loan Policy The definition of “Indebtedness”, and therefore the coverage afforded by the policy, is expanded to include the sum of...

- (i) the amount of the principal disbursed as of Date of Policy;
- (ii) the amount of the principal disbursed subsequent to Date of Policy;
- (iii) the construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement;
- (iv) interest on the loan;
- (v) the prepayment premiums, exit fees, and other similar fees or penalties allowed by law;

⁹ Appendix Page 9 , Condition #1e

¹⁰ Appendix Page 3 , Conditions & Stipulations #2c.

- (vi) the expenses of foreclosure and any other costs of enforcement;
- (vii) amounts advanced to assure compliance with laws or to protect the lien or the priority of the lien of the Insured Mortgage before the acquisition of the estate or interest in the Title;
- (viii) the amounts to pay taxes and insurance; and
- (ix) the reasonable amounts expended to prevent deterioration of improvements....”¹¹

Again, this expanded definition affords the commercial real estate practitioner more flexibility in dealing with the troubled loan, because more expenses associated with it are covered.

V The Owner’s Policy:

The significant expansion of “Coverages” in the 2006 ALTA Owner’s Policy parallels that of the 2006 Loan Policy discussed earlier.¹² Attention will now therefore turn to the same specific areas in the Owner’s Policy that were detailed in the 2006 ALTA Loan policy.

A) Specific Coverages in the Owner’s Policy - Creditors’ Rights & Exception for Them

The changes and coverage afforded by the 2006 ALTA Owner’s policy mimics the verbiage of the 2006 ALTA Loan policy, with the obvious differences that such coverage is afforded the owner rather the insured.¹³

B) Specific Coverages in the Owner’s Policy - The “Insured”

1) The 1992 Owner’s Policy

This version simply defines the insured to be

- i. “...the insured named in Schedule A”
- ii. those who succeed to the interest of the named insured by operation of law.. including ...heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors....”¹⁴

2) The 2006 Owner’s Policy

This version expanded the definition of the Insured to include...

- (d) ...The Insured named in Schedule A...
 - (i) (A) successors to the Title of the Insured by operation of law... including heirs, devisees, survivors, personal representatives, or next of kin;
 - (B) successors ... by dissolution, merger, consolidation, distribution, or reorganization;
 - (C) successors...by its conversion to another kind of Entity;
 - (D) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title
 - (1) if the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,
 - (2) if the grantee wholly owns the named Insured,

¹¹ Appendix Page 9 , Condition #1d

¹² See, for example, Appendix Pages 21-22

¹³ See, generally, Appendix Page 22, Covered Risk #9

¹⁴ Appendix Page 17, Conditions and Stipulations #1

- (3) if the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity, or
(4) if the grantee is a trustee or beneficiary”¹⁵

Again, these broadened definitions expand the options for the commercial real estate attorney when restructuring a transaction. Previously, “Insured” only included the person (natural or legal) named on Schedule A, with coverage being lost if title was transferred to another entity. Now, title insurance coverage still remains in place when title is transferred by a number of means (dissolution, merger, consolidation, distribution, reorganization, conversion) or to a wholly owned entity, or to an entity which wholly owns the insured.

VI. Commercial Real Estate Coverage Under Select Endorsements

A) The Florida Form 9 for Lenders

Lenders routinely ask for the Florida Form 9 endorsement to be issued with the loan policy for the many affirmative coverages it provides, most of which deal with violations of restrictions and encroachments. Until May, 2014, there were two different endorsements that can be issued to fulfill this request, the Florida Form 9-06 and the Florida Form 9.3-06.

Many lenders still ask for the Florida Form 9.3-06. *It is no longer available and should not be issued. As of May 19, 2014, Florida’s Office of Insurance Regulation approved the discontinuance of its use.*

Lenders still ask for it, however, explaining their belief that since it has a higher number, it is a later and better version, much like a later version of a software program. Others believe it affords more and better coverage than Florida Form 9-06, and at first blush, it appears to. The definition for the words “covenants, conditions or restrictions” is more detailed in the discontinued version, for example.

1) Litigation Regarding Florida Form #9 & Prescriptions for Practitioners

Florida Form 9-06 (and Forms 9.1 and 9.2-06 for owners) when first approved, insured that, unless excepted on Schedule B...

“...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...”
(Emphasis Added)

In *Nationwide Life Insurance Company v. Commonwealth Land Title Insurance*, 687 F.3d 620 (3rd Cir. 2012), Liberty Mills, the owner of a shopping mall, sold the mall

¹⁵ See Appendix Page 23, Conditions #1

to PMI Associates. As part of that sale, Liberty Mills and PMI entered into a declaration encumbering the property which vested Liberty Mills, the Seller, with the right of prior approval of future purchasers from PMI, and an express option to purchase. PMI subsequently gave a \$3.5 million mortgage to Nationwide Insurance. It was insured with a loan policy which was endorsed with the ALTA Form #9 endorsement insuring against "...an option to purchase (and) a right of first refusal or the prior approval of a future purchaser or occupant," unless expressly excepted on Exhibit B. The right of prior approval of future purchasers, however, was not expressly set forth in Schedule B of the loan policy. Only the exception for the Declaration (which contained such right) was listed in Schedule B.

PMI defaulted on its mortgage and gave a deed in lieu of foreclosure to Nationwide. Nationwide then attempted to sell the mall, but Franklin Mills (successor to Liberty Mills) refused to approve the buyer. Nationwide then submitted a claim under the loan policy which was denied, so Nationwide filed suit. The question ultimately certified to the 3rd Circuit Court of Appeals was

"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."¹⁶

The 3rd Circuit Court of Appeals ruled that the ALTA 9 Endorsement applied to whole instruments listed on Schedule B, so that if one wanted to except from coverage a provision within one of the instruments (such as a right to approve a future buyer) *that provision would need to be separately set forth on Schedule B*. Since it wasn't, the ALTA insured over or against such right of first refusal, and the case was remanded to determine damages.

Thus, according to the Third Circuit Court of Appeals, if one wants to make an exception for "an option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant", one should specifically list such right or interest on Schedule B of the policy, and not rely on the fact that it is contained within a declaration that is set forth as an exception on Schedule B.

¹⁶ Nationwide at page 623; See Appendix Page 34.

2) Post *Nationwide* Revisions:

Due to this case, the Florida Form 9 series were revised. Specifically, the following language was added to Fla. Form 9-06:

“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.”

3) Required Schedule B Exceptions

Consequently, agents should specifically except on Schedule B any provisions which establish or provide for the following matters which are enumerated in paragraphs 1(b)(2) of the 9-06 and/or 1(b) of the 9.1-06 and 9.2-06:

- easements on the land,
- liens for liquidated damages,
- a private charge or assessment,
- an option to purchase,
- a right of first refusal,
- prior approval of a future purchaser or occupant,
- right of reentry and/or the possibility of reverter or a right of forfeiture because of violations on the land of any enforceable covenants, conditions or restrictions.

B) Other Common Florida Commercial Real Estate Endorsements

There are several other endorsements commonly used in commercial transactions that merit some discussion before addressing the lender's title request and requirements above..

1) Survey Endorsement¹⁷ The Survey Endorsement is, of course, given with either an owner's or a loan policy. It assures that the lands described in Schedule A of the policy are the same lands described in a specific survey. This is frequently necessary in Florida because the Florida Administrative Code explicitly requires a surveyor to set forth on the survey the differences between the description in a deed, and the tract as laid out on the ground. More specifically, F.A.C. 61G17-6.004 (2) (a) 3 requires that *“Any discrepancies between the survey map and the real property description must be shown.”* F.A.C. 61G17-6.004 (2) (c) further requires that...

“Potential boundary inconsistencies that the survey process did not attempt to detect shall be clearly indicated and explained on the survey map or in the report. Where evidence of inconsistency is found, the nature of the inconsistency shall be shown upon the survey map, such as: a. Overlapping descriptions or hiatuses; b. Excess or deficiency; c. Conflicting boundary lines or monuments; or d. Doubt as to the location on the ground of survey lines or property rights.”

¹⁷ See Appendix Page 36

Before issuing the survey endorsement, a survey which includes the above and meets the minimal technical standards in F.A.C. 61G17-6.003 should be obtained, together with a certificate from the surveyor to establish that the descriptions, in fact, refer to the same property, notwithstanding any variations. Such survey should also be made, signed and dated by a Florida Registered Surveyor and Mapper.

2) Contiguity Endorsement¹⁸ Commercial real estate development usually involves the assembling of several tracts into a larger tract for the desired project. That raises that specter of multiple parcels having been surveyed by different surveyors, whose descriptions for the subject properties may not completely abut, match up, or otherwise fully 'close' with one another. The Contiguity Endorsement provides affirmative coverage that a parcel of Land consisting of more than one legal description constitutes one contiguous parcel of Land. Before issuing, a survey should be obtained that meets the minimum technical requirements of F.A.C. 61G17-6.003 and which is made, signed, and dated by a Florida Registered Surveyor and Mapper. A certificate from the surveyor certifying that the subject parcels are in fact contiguous should also be obtained.

3) Assignment Endorsement The Assignment Endorsement set forth in the Appendix at Page 40 is self-explanatory. Note that it provides that "This endorsement shall be effective provided that the note or notes secured by the lien of the Insured Mortgage have been properly endorsed and delivered to the Insured at Date of Endorsement."

Accordingly, one should confirm that such note has, in fact, been delivered to the insured, especially given the frequency with which notes are currently lost. The reason for this requirement is the Florida rule-of-law which holds that the lien of a mortgage follows the note secured thereby.¹⁹ Hence, possession of the note is key.

In meeting the lender's request above, there is one important point to emphasize. The *Assignment of Mortgage Endorsement* has also been approved for discontinuance by OIR as of May 19, 2014, and should not be used. Only the ALTA Endorsement 10-06 Assignment should be used which expressly contains creditors rights exceptions.

4) Future Advance²⁰ Perhaps by force of habit, out of state lenders are requesting the 14 series endorsements when the loan or modification has provisions to fund future improvements on the mortgaged property or properties. This is no longer necessary with the new ALTA-06 loan policies, however. The coverage in the new loan policy jacket explicitly insures the mortgage over any statutory lien for services, labor, or material arising from construction of an improvement or work related to the Land when the improvement or work is either "(a) contracted for or commenced on or before Date of Policy; or (b) contracted for, commenced, or continued after Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on Date of Policy to advance." Stated otherwise, the ALTA 14-06 is not to be used

¹⁸ See Appendix Page 37

¹⁹ See *Holmes v. Dunning*, 133 So.557 (Fla. 1931); *Downing v. First National Bank of Lake City*, 81 So.2d 486 (Fla. 1955); and *American Bank of the South v. Rothenberg*, 598 So.2d 289 (Fla. 5th DCA 1992).

²⁰ Appendix Pages 41 & 42.

for construction loan advances. Its purpose is to insure validity, priority, and enforceability of future advances, other than those advances related to construction. It is similar to a revolving credit endorsement.

5) Shared Appreciation Endorsement²¹ This is an endorsement whose use appears to be increasing in the current market. With the plunge in property values during the Great Recession, life-long customers of lenders are carrying mortgages on commercial tracts in amounts that are much higher than they can currently borrow. Lenders appear to be overcoming some of their reluctance to lend, and are re-financing older loans that are ballooning, in exchange for a share of the anticipated future appreciation. In turn, that creates the need to insure such shared appreciation provisions within the loans, hence the need for the endorsement.

The endorsement does not insure that the hoped-for appreciation will be paid. Rather, it simply insures that the shared appreciation provisions within the mortgage will not render the lien of the mortgage unenforceable, nor will the priority of the lien be lost.

6) Change in Partners (Fairways) Endorsement²² This endorsement is used in connection with an owner's policy under which the Insured is a corporation, partnership, limited partnership, limited liability company, or business trust. It provides that insurance coverage will continue even if new partners, members, shareholders, beneficiaries, or certificate holders are added or old partners, members, shareholders, or certificate holders withdraw.

D) The Mortgage Priority Guarantee²³

The Mortgage Priority Guarantee is not really an endorsement, per se, but rather, a stand-alone policy. As the form itself states, it simply provides that the validity, enforceability, or priority of the mortgage described therein has not been diminished or lost by reason of the modification or amendment. It does not assure the validity, enforceability or priority of the mortgage itself.

VII. “The 8 Ball” - The Forbidden Endorsements & Substitution Loan Rates

Florida not only authorizes specific title insurance coverages. It also specifically *prohibits* the furnishing of types of coverages that are offered in other states. Section (15)(a) of F.A.C. 690-186.005, for example, specifically provides as follows:

“(15)(a) The following are prohibited endorsements and affirmative coverages that shall not be issued in this state:

1. Doing Business Endorsement.
2. Non Imputation Endorsement (Imputation of knowledge).

²¹ Appendix Page 40

²² Appendix Page 43

²³ Appendix Page 44.

3. Access.
 4. Location.
 5. Expanded Insured Endorsement.
 6. Street Assessment Endorsement.
 7. Zoning Endorsement.
 8. Usury.
- (b) The extension of special affirmative coverage by indirect means is prohibited.”

Moreover, F.A.C. 69O-186.003 (15) provides that substitution loan rates apply to any endorsement which insures a modification of a mortgage which was insured by an outstanding policy where the modification agreement effects *any* change in the terms, conditions, priority, or security, *other than*:

- (a) An extension of the time for payment of the secured obligation;
- (b) Any decrease in the interest rate of the insured mortgage, provided the “cap” on a variable rate mortgage is not greater than the original “cap” and/or the “cap” is not greater than the original fixed rate;
- (c) Any increase in the interest rate of the insured mortgage, provided the endorsement contains an exception for the loss of priority occasioned by the increase;
- (d) Changes in an amortization schedule to extend the term of the insured mortgage;
- (e) A release of a portion of the secured property;
- (f) A correction to either perfect the lien of the insured mortgage or comply with the terms of the lender's original commitment;
- (g) Future advances made pursuant to Section 697.04, Florida Statutes; or
- (h) Encumbrances of additional parcels under a revolving construction loan agreement contained in the original mortgage and contemplated by subsection 69O-186.003(10), F.A.C

VIII. Response to Interstate Lender’s Request for ALTA Endorsements

Now that we have reviewed the different versions of the ALTA Loan policies from 1970 through the present; defined and reviewed various creditors rights under federal and state law; considered how the different ALTA loan policies dealt with them; considered what endorsements are available in Florida; considered what is explicitly forbidden by the Florida Administrative Code; we can see that the above requests cannot be honored.

An appropriate response to such a request may include, or incorporate parts of the following chart:

Forms/ Action Often Requested by Out of State Lenders	Florida Counterpart
1970 ALTA Loan Policy	<ul style="list-style-type: none"> - Not offered in Florida; Should by using ALTA-06 - 1970 ALTA policy did not offer any creditors rights protection anyhow

Forms/ Action Often Requested by Out of State Lenders	Florida Counterpart
1992 ALTA Loan Policy	<ul style="list-style-type: none"> - Should be using ALTA-06 - Contains Specific Exception for Creditors Rights - Endorsements Still Allowed, but must use the 1992 ALTA set
2006 ALTA Loan Policy	<ul style="list-style-type: none"> - Provides no Creditors Rights protection in the <u>current</u> transaction, but provides some Creditors Rights protection in the immediately preceding transaction. <p>N.B. When one transaction quickly follows another, be careful not to unwittingly insure against creditor's rights before the period has expired for the creditor to exercise such rights</p>
"Deletion of Arbitration provisions"	No need to delete because arbitration is only by mutual consent in Florida in terms in jacket. Mandatory arbitration in ALTA forms in other states is not in the Florida forms approved by the Office of Insurance Regulation (OIR).
Endorsement Re: Assessments: Can refer to... ALTA® Endorsement 1-06 Street Assessments ALTA® Endorsement 9.6.1-06 Private Rights - Current Assessments - Loan Policy	No Florida Counterpart, and specifically forbidden by F.A.C. 690-186.005(15)(a)(6)
ALTA® Endorsement 3-06 Zoning Unimproved Land (6-17-06) ALTA® Endorsement 3.1-06 Zoning-Completed Structure (10-22-09) ALTA® Endorsement 3.2-06 Zoning – Land Under Development (04-02-12);	No Florida counterpart. Zoning affirmation, if demanded by lender, usually addressed in ALTA survey and/or attorney opinion letter
ALTA Variable Rate Endorsement (6.1)	Available in Florida
ALTA Environmental Endorsement (8.1)	Available in Florida
Florida "Comprehensive Endorsement" Florida Form 9.3-06 "Reverter" endorsement	<p>Florida Form 9-06 for Lenders Florida Form 9.1-06 for Owner's – Unimproved land Florida Form 9.2-06 for Owner's – Improved Land</p> <p>Florida Form 9.3-06 and 9.5-06 <u>no longer offered, available.</u></p>
ALTA General Survey Endorsement	Available in Florida
ALTA Contiguity Endorsement	Available in Florida

Forms/ Action Often Requested by Out of State Lenders	Florida Counterpart
ALTA Assignment Endorsement (10-06)	Available in Florida
Shared Appreciation Endorsement	Available in Florida
ALTA Forms 14-06 Future Advance Endorsement	Available in Florida but superfluous, should not be used for construction which lender is obligated to finance as of closing/Date of Policy
<p>ALTA® Endorsement 17-06 Access and Entry</p> <p>Assures that land abuts and has actual vehicular and pedestrian access to a named street that is physically open and publicly maintained, and insured may use curb cuts or entries along that portion of the street.</p>	<p>Legal access is insured in policy jacket.</p> <p>Otherwise, no Florida counterpart, and specifically forbidden by F.A.C. 690-186.005(15)(a)(3)</p>
<p>ALTA® Endorsement 17.2-06 Utility Access</p> <p>Assures there is no lack of access by specific utilities on, over, under rights of way due to gap or between R/W, easements, and insured Land, or due to termination by grantor.</p>	No Florida counterpart, and specifically forbidden by F.A.C. 690-186.005(15)(a)(3)
<p>ALTA® Endorsement 18-06 Single Tax Parcel</p> <p>Assures that the land described in the policy is a single and separate tax parcel and not part of a larger parcel of land.</p>	No Florida counterpart. Contiguity endorsement helps. Customary to simply check the tax parcels in Florida prior to closing.
<p>ALTA® Endorsement 22.06; 22.1-05 (CA-116) Location of Land, Improvements</p> <p>Assures lender regarding land, improvement located on land with street address, and attached map is accurate as to the location and the dimensions of the improvements.</p>	<p>No counterpart in Florida, and specifically forbidden by F.A.C. 690-186.005(15)(a)(4)</p> <p>No maps are attached to Florida policies. If there are questions regarding any discrepancy between a description in the deed and the one in the survey, the Survey endorsement helps, and a survey affidavit may be required.</p> <p>Florida form 9 insures against the improvements encroaching onto neighboring land, and therefore arguably implicitly, that the improvements are located on the proper Land described on Schedule A.</p>
ALTA® Endorsement 24-06 Doing Business	No Florida counterpart, and specifically forbidden by F.A.C. 690-186.005(15)(a)(1)

Forms/ Action Often Requested by Out of State Lenders	Florida Counterpart
<p>ALTA® Endorsement 26.06 Subdivision Endorsement</p> <p>Provides coverage to an Owner or Lender that the identified land is a lawfully created parcel under the relevant laws and regulations to create a subdivision.</p>	<p>No Florida counterpart. If demanded by lender, often handled by attorney opinion letter.</p>
<p>ALTA® Endorsement 27-06 Usury Endorsement</p> <p>Provides coverage against loss or damage that may be sustained by the lender by reason of the insured mortgage being invalid or unenforceable because the loan violates state usury provisions. This Endorsement is intended for issuance with an ALTA Loan Policy.</p>	<p>No Florida counterpart and specifically forbidden by F.A.C. 690-186.005(15)(a)(8)</p> <p>This coverage is explicitly excluded in the Exclusions section of the policy jacket for Florida. If demanded by lender, often handled by attorney opinion letter.</p>
<p>“Mineral Rights Endorsements”</p> <p>ALTA® Endorsement 35-06 Minerals and Other Subsurface Substances – Buildings</p> <p>ALTA® Endorsement 35.1-06 Minerals and Other Subsurface Substances – Improvements</p> <p>ALTA® Endorsement 35.2-06 Minerals and Other Subsurface Substances – Described Improvements</p> <p>ALTA® Endorsement 35.3-06 Minerals and Other Subsurface Substances – Land Under Development</p>	<p>No Florida counterpart; minerals addressed in Florida Form 9 series.</p>
<p>ALTA® Endorsement 37-06 Assignment of Rents or Leases</p>	<p>No Florida counterpart</p>
<p>“Endorsement Against Reverter”</p>	<p>Florida Form 9 series, with specific exception to be inserted in Schedule B.</p>
<p>“Fairway” Endorsement</p>	<p>Florida has CPE - Change of Partners, Members or Shareholders Endorsement</p>

IX Trends In Multistate Transactions and Fl. Stat. §627.7831

627.7831 Commitments; charges; collection.—

(1) When a title insurance commitment to insure a title or risk is issued at the request of the insured or the insured’s representative, agent, or agency, a portion of the premium must be charged for the commitment when issued. The portion of the premium charged for the commitment must be credited to the premium due upon issuance of the title insurance policy.

(2) The amount charged under subsection (1) must be collected no later than the date of the closing or 12 months after the date of the commitment, whichever occurs earlier, or another date agreed to in writing at the time of issuance of the commitment.

(3) This section does not apply to a transaction involving a residential property.

History.—s. 97, ch. 92-318; s. 14, ch. 99-286.

ENDORSEMENT

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Endorsement No. _____ to Policy No.: _____

Name of Original Insured:

Original Effective Date:

Original Amount of Insurance: \$

Agent's File Reference:

Current Amount of Insurance: \$

The policy is hereby amended as follows:

(Continue text of endorsement on separate continuation sheet if necessary.)

but in all other respects remains unchanged.

Name of Agent

Date

Agent No.

Agent's Signature

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

ALTA ENDORSEMENT 8.1-06 ENVIRONMENTAL PROTECTION LIEN
(With Florida Modifications)

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Endorsement No. _____ To Policy No. _____

The Company insures against loss or damage sustained by the Insured by reason of lack of priority of the lien of the Insured Mortgage over:

- (a) any environmental protection lien that, at Date of Policy, is recorded in those records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge, or is filed in the records of the clerk of the United States district court for the district in which the Land is located, except as set forth in Schedule B; or
- (b) any environmental protection lien provided by any state statute in effect at Date of Policy, except environmental protection liens provided by the following state statutes:

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

(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 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 12-06 AGGREGATION
(With Florida Modifications)
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Endorsement No. _____ To Policy No. _____

The following Policies are issued in conjunction with one another and do not insure as to any property located outside of the State of Florida:

<u>POLICY NUMBER:</u>	<u>COUNTY:</u>	<u>STATE:</u>	<u>AMOUNT:</u>
_____	_____	Florida	_____
_____	_____	Florida	_____
_____	_____	Florida	_____
_____	_____	Florida	_____

Notwithstanding the provisions of Section 8(a)(i) of the Conditions of this Policy, the Amount of Insurance available to cover the Company's liability for loss or damage under this Policy at the time of payment of loss hereunder shall be the aggregate of the Amount of Insurance under this Policy and the other Policies identified above. At no time shall the Amount of Insurance under this Policy and the other Policies identified

above exceed in the aggregate \$ _____. Subject to the provisions of Section 10(a) of the Conditions of the Policies, all payments made by the Company, under this Policy or any of the other Policies identified above, except the payments made for costs, attorneys fees, and expenses, shall reduce the aggregate Amount of Insurance by the amount of the payment.

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

Title Policy Endorsements in Commercial Transactions (webinar)
Syllabus (Rule 69B-228.090(1)(f) F.A.C.)

August 20, 2020

3:15 to 4:15 pm

Provider information:

Attorneys' Title Fund Services, LLC
6545 Corporate Centre Boulevard
Orlando, Florida 32822
(407) 240-3863
EducationRegistrar@TheFund.com

Classroom course outline:

1. Purpose of endorsements to title insurance policies
 - a. Effect on title insurance policy
 - b. Risk management
 - i. Appropriateness of endorsement
 - ii. Guidelines for issuance
2. Florida approved forms
 - a. Role of the Florida Office of Insurance Regulation
 - i. Title Insurance (Ch. 69B-186 F.A.C.) and Title Insurance Rates (Ch. 69O-186 F.A.C.)
 - ii. Title Insurance Contracts (Ch. 627, Pt. XIII, F.S.)
 - b. ALTA forms - approval process
3. Commonly issued endorsements
 - a. ALTA forms (see materials)
 - b. Florida forms (see materials)

P.O. BOX 628600
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32862-8600
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800.336.3863
www.TheFund.com



DFS Student Acknowledgement

I _____ certify that, I participated in and attended
(name)

all sessions of The Fund Affiliate Assembly 2020 course: Title Policy Endorsements In

Commercial Transactions (Webinar) #113393 on August 20, 2020.

My DFS license number is _____ .
(DFS license number)

(signature)

(print name)

(date)