



Continuation of Coverage

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Normally when questions arise as to whether or not coverage under a title insurance policy continues to protect a new owner they relate to an Owner’s Policy. Lender’s policies generally have the insured listed as “(name of lender), its successors and/or assigns, as their interest may appear.” Often this is shortened to “(name of lender), ISAOA ATIMA.” Such language clearly covers any entity or person who holds the promissory note, whether by assignment (which is purchase from the prior noteholder), merger/buy out (when lenders merge or one purchases another), sale by the trustee at foreclosure, or sale by the lender who purchased the property at foreclosure (REO property). When a lender ends up owning real estate as the result of foreclosure their loan policy essential converts to an owner’s policy.

Condition 2 in the Loan Policy states:

2. CONTINUATION OF INSURANCE

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured after acquisition of the Title by an Insured or after conveyance by an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

Let’s break down the language in this paragraph that explains the lender’s continued coverage.

Coverage continues in favor of the Insured (lender)

- a. *After acquisition of Title by an Insured* (lender ends up owing the real estate, i.e., “real estate owned” or REO property)
Or
- b. *After conveyance by an Insured* (lender sells the real estate)
- c. BUT only as long as Lender
 - (1) *retains an estate or interest in the Land*, (Lender continues to own the real estate)
Or
 - (2) *holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured*, (Lender financed the sale to the purchaser who bought the REO property from them)
Or

- (3) *only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title.* (Lender has to give a General warranty deed to the purchaser for this to apply. A Special Warranty only covers matters during the time the Lender is the owner, and a Quitclaim deed denies having any ownership interest at all.)

Agents should never get questions from lenders about continued coverage. It's only important to agents when dealing with the Virginia Inter-Underwriter Indemnity Agreement (a/k/a Mutual Indemnity Agreement) effective October 10, 2015, amended by Old Republic to add other underwriters in January 2016. Not all underwriters are parties to the agreement, so be sure to use our Checklist (Appendix A).

When relying on the Virginia Inter-Underwriter Indemnity Agreement be sure to add a note in Sch B-2 of the commitment and Sch B of all policies "NOTE: Prior owner's policy with (name of underwriter, even if ORT) Policy # (add number)." This lets us know what policy was relied upon for liability purposes.

Owner's Policy Coverage

Whether or not coverage is continued in an owner's title policy depends on the policy involved. Current policy language is about continuation of coverage is below.

12/02/2013 ALTA Residential HomeOwner's Policy

Exclusions

5. Failure to pay value for Your Title.

Conditions:

2. CONTINUATION OF COVERAGE

- a. This Policy insures You forever, even after You no longer have Your Title. You cannot assign this Policy to anyone else.
- b. This Policy also insures:
- (1) anyone who inherits Your Title because of Your death;
 - (2) Your spouse who receives Your Title because of dissolution of Your marriage;
 - (3) the trustee or successor trustee of a Trust or any Estate Planning Entity to whom You transfer Your Title after the Policy Date;
 - (4) the beneficiaries of Your Trust upon Your death; or
 - (5) anyone who receives Your Title by a transfer effective on Your death as authorized by law.
- c. We may assert against the insureds identified in Section 2.b. any rights and defenses that We have against any previous insured under this Policy.

06/17/2006 ALTA Owner's Policy

Conditions:

1. Definition of terms

- (d) "Insured": The Insured named in Schedule A.
(i) The term "Insured" also includes

- (A) successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives, or next of kin;
- (B) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;
- (C) successors to an Insured 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,
 - (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 of a trust created by a written instrument established by the Insured named in Schedule A for estate planning.

While we can certainly dissect the language in the policy as we did with the loan policy, it's much more interesting to deal with specific questions and search for the answers in the policy language. Most of the language covers what happens due to a policyholder's death, or switching title into/out of living trusts or various types of entities.

Hypothetical 1:

Agent's email: "I have a customer that purchased a piece of real estate as investment property in his name and his wife's name. They want to set up an LLC and transfer the property to the LLC. What do I need to do to assign the owner's policy to the LLC?"

Does the customer have a standard owner's policy or an ALTA Homeowner's policy (enhanced policy)?

If the customer has a HO policy, they will need a new policy or need to convey by a General Warranty deed and be willing to have their LLC sue them under the deed to trigger possible title insurance coverage. Note: HO policies may be issued for investment property, but only if all owners are individuals. (See Appendix B for HO policy guidelines. Agents often issue HO policies to entities, opening their company to liability.)

Why is conveyance by a General Warranty deed significant? Remember the discussion above about lender's policies and warranties in the deed. A special warranty deed or quitclaim deed cuts off title insurance coverage since they have no continuing liability that predates their ownership interest under their deed after conveyance to the entity. Remember, generally title insurance covers the history of ownership of the real estate prior to the insured's purchase.

If they have a standard policy, they would be covered if they meet the terms of Condition 1 (d)(i)(D)(1). (I actually send copies of the language from the policies and highlight the affected section.) No endorsement needs to be issued. In fact, issuing an endorsement could be a problem since it might further be endorsed if the company changed ownership, which might invalidate the policy once a claim arose. Claims department would trace the policy number back to original insured parties.

Hypothetical 2:

Mike and Abbie purchased real estate in 2015 as tenants by the entirety. For tax planning reasons they are conveying their real estate into a revocable living trust. They want to know if they need a new title insurance policy?

First question to resolve: Did they have an ALTA Homeowner's Policy (HO

policy) or an ALTA Standard Owner's Policy (standard policy)?

If they have a HO policy Condition 2 (b)(3) applies and coverage is continued.

If they have a Standard owners policy Condition 1 (d)(i)(D)(4) applies and coverage is continued as long as the conditions are met. The settlor/trustor must also be the trustee and/or the beneficiary of the trust.

Hypothetical 3: *Same as # 2, but what if the owners split the estate into 2 trusts, one for each spouse, so Mike is the settlor/trustee/ beneficiary of his trust and Abbie is the same for her trust?*

No change. They still have continued coverage.

NOTE: A very big problem with living trusts is the trust agreement cannot be found after the settlor dies. If powers and successor trustees are not included in the deed to the trustees, then no one can identify the beneficiary, and no one has the power to sell the real estate without a court order. It defeats the purpose of setting up a living trust in the first place.

Hypothetical 4: *Same as # 2, but Mike and Abbie purchased the real estate as trustees of their living trust rather than as a married couple as tenants by the entirety. If a judgment exists against one of them would it be covered by the title policy?*

Tenants by the entirety protection does not protect them from a judgement against one of them unless they first owned it as a married couple in that manner, then conveyed the real estate to the revocable living trust for tax reasons. Revocable living trusts are subject to the debts of the settlors. If this is an irrevocable living trust, they will not be the trustees.

Hypothetical 5:

Heath and Max purchased an owner's title policy issued by you last year. The seller was a former lender who obtained title at foreclosure. They've received a letter from Sofia's attorney saying Sofia, who lives in Arizona, owns the real estate, not Heath and Max. Her mother gave it to her 10 years ago and retained a life estate. The equity line deed of trust that was foreclosed was signed only by her mother, not by Sofia as the fee owner. Her mother is now deceased.

Who owns the real estate? If the facts are accurate and mother only had a life estate when the Deed of Trust was signed, Sofia owns the real estate. This is an actual example of total failure of title. The title abstractor missed the deed of gift from mother to Sofia. Regardless of the type of owner's policy issued, Heath and Max are covered. They file a claim and the title underwriter negotiates with Sofia. Whether the lender has coverage depends on the type of deed they gave. If it was special warranty, it's possible they are not covered by title insurance, but would have liability to Heath and Max, or their title company under subrogation rules.

Would Sofia be protected by her mother's title policy? No. She did not pay value for her interest. It was a deed of gift. She did not obtain a separate owner's title policy. Title insurance is a policy of indemnity, but a business decision has been made by Old Republic to sell a standard owner's policy to donees, those who are the recipients of such a gift.

If Sofia has an owner's title policy she would have filed a claim once she was aware of her mother's property being sold, and the letter Heath and Max received would be from her title underwriter's claim department.

Hypothetical 6:

Total failure of title is a rare occurrence.

- a) Seller sold 50 acres in Franklin County to a logging company. All parties, including the tax assessor, thought the property was located in one location. The purchasers had a survey done a few weeks *after* closing. Turns out the actual

property owned by the sellers was a mile down the road, and had corn growing on it. No timber. Luckily it was a cash deal and seller still had the funds. It was a mutual mistake of a material fact. The property was deeded back to the original owner. Title insurance, in this case, was not involved.

- b) *Fourteen years after David purchased raw land in Goochland County he was sued under his General Warranty deed because it was only 2 acres of land not 3. His title insurance from the 1980s was for \$80,000.00. The property had sold three times in 14 years since he sold it. Will his title policy cover this?*

Yes. The title underwriter had the litigation dismissed and paid the full amount of the policy. Language in the policy at that time, similar to what's included today, and the use of General Warranty deeds, the title underwriter paid the policy in full. Total failure of title. At this point the policy ceases to exist.

Additional facts: David's lot was the first one in the subdivision. He built a house and later sold it. A timber company owned the adjacent real estate. They had their land surveyed and discovered the error. It was their land. They did not want to sell it. None of the improvements were in the affected acre. Each person in the chain of title sold by general warranty deed. The developer from whom David purchased the lot was out of business (the bane of having developers using single purpose entities currently). The surveyor made a mistake in originally surveying the subdivision. Pure human error – what title insurance really covers.

Hypothetical 7

Susan calls your office needing help. Her neighbor has just sued her to stop her from using an access road that crosses the neighbor's property. She wants to know what you are going to do about it since you closed the purchase of the property years ago. When you investigate you find an ALTA Owner's policy issued to Serendipity Farms Virginia, LLC. Susan used to own the company with Tim and Barbara, but Tim and Barbara moved to Mexico to live in the sun. The company dissolved for failure to pay annual SCC fees. Is Susan covered by the policy?

A number of questions need to be answered. Who owned the company when it dissolved? If all 3 were still owners when it dissolved does Susan have contact with Tim and Barbara? Can she get them to sign documents? Did it dissolve more than 5 years ago?

Once all the logistical matters are resolved the owner's policy covers "successors to an Insured by dissolution." Whomever was a member/manager at the time of dissolution and is still living can convey as a trustee in liquidation. If a member/manager is deceased their heirs can convey their interest. Successors in interest due to death or dissolution are covered by the owner's policy.

Hypothetical 8

Purchasers sat at the table with the settlement agent and listened carefully to all that was said about the benefits of an owner's title policy and the necessity for a survey. They declined both. A month later they call back. They've moved into the neighborhood and are a bit settled. After further discussion they want a survey and an ALTA Homeowner's policy. Can they get one?

An owner can purchase title insurance at any time after they own real estate. The longest time period I'm currently working with is commercial property that was acquired in the 1950s by an entity who now wants title insurance. That's fine with us. The value of the policy will be the current appraised value. If there is no appraisal, then the current assessed value. But Schedule B of the policy will contain an exception for matters occurring after their date of original acquisition, whether by purchaser or by deed. Unlike other types of insurance based on statistical analysis of unknow future factors, title insurance studies the history of ownership and insures what's occurred in the past that might cause a problem with ownership or use of the real estate. A person cannot obtain coverage for the time they have owned the real estate.

If the new owners now want title insurance because neighbors are aware of a utility easement that's just popped up in the neighborhood causing questions as to where it will be actually located, or some other similar problem, the new owners would not be covered for that matter. A specific exception would be taken. How would you know? They call saying, "We've heard from the neighbors that there may be an unlocated utility easement that could affect our lot. We'd like to buy insurance now." It's similar to the reasons no one will sell property and casualty insurance when a hurricane is forecast. The risk is significantly increased.

Sometimes a purchaser doesn't decide they want a survey until a few days prior to settlement. Can they get survey coverage if the survey isn't done prior to settlement? Yes, but the policy will take exception to all matters shown on the survey. A primary purpose for a purchaser to obtain a survey is to identify problems for the seller to address prior to settlement.

What about increasing the amount of coverage on their owner's title policy? In one situation a couple purchased property when a new subdivision was developed. Almost 20 years later they learned about a claim dealing with cemeteries in the subdivision. This specific lot was not affected, but they wanted to increase their title coverage to cover current value of their investment. That was acceptable. If they had been located in the section with the cemetery issue an exception would be added. The date of the policy didn't change. Just the amount of coverage changed.

One example where we declined to insure: X owned real estate. He anticipated a very large judgment would be recorded against him in relationship to a business in which he was the sole owner and had some IRS liens against him, so he sold the real estate to his brother. X continued to live in the property. Fifteen years later X was purchasing the real estate from his brother and wanted a current title insurance policy. We declined to insure, unless we used the original date of purchase.



VIRGINIA: Inter-Underwriter Indemnity Agreement Checklist

Please use this checklist to document your file for your current transaction (the "Transaction") when you are relying upon another underwriter's prior policy ("the Prior Policy") in issuing an Old Republic National Title Insurance Company ("Old Republic") Lender's and/or Owner's Policy (the "Current Policy") without taking exception to a potential title defect in reliance upon the Inter-Underwriter Indemnity Agreement (the "Agreement"). Please make sure a copy of this checklist and the Prior Policy you are relying on are both included as part of your remittance. **DO NOT RELY ON THE AGREEMENT TO INSURE OVER OR DELETE A POTENTIAL TITLE DEFECT UNLESS YOU ANSWER "YES" TO ALL OF THE QUESTIONS BELOW. IF YOU ANSWER "NO" TO ANY QUESTION, OR ARE UNSURE OF THE ANSWER TO ANY QUESTION, PLEASE CONTACT OLD REPUBLIC UNDERWRITING COUNSEL FOR GUIDANCE.**

Prior Policy Underwriter: _____

Prior Policy Number: _____

1. Is the Prior Policy issued by Chicago Title Insurance Company, Commonwealth Land Insurance Company, Conestoga Title Insurance Company, Fidelity National Title Insurance Company (including Lawyer's Title), First American Title Insurance Company, Investors Title Insurance Company, North American Title Insurance Company, Stewart Title Guaranty Company, Title Resources Guaranty Company, Westcor Land Title Insurance Company, or WFG National Title Insurance Company? Yes No

2. Is the Prior Policy an Owner's Policy issued to the seller or borrower in your Transaction?

OR

Is the Prior Policy a Lender's Policy issued to a lender who acquired the insured property by foreclosure or deed in lieu of foreclosure, AND who is the seller in your Transaction, AND the Current Policy is an Owner's Policy issued to an insured unrelated to seller, AND the potential title defect is a monetary lien identified in Question 4, subsections a – d, below? Yes No

3. Does the Prior Policy insure property located in Virginia that is to be insured under the Current Policy? Yes No

4. Is the potential title defect you want to insure over one of the following: Yes No
 - a. A deed of trust or mortgage that has not been effectively released, discharged, or reconveyed;
 - b. An attachment, judgment lien, child support lien, condominium or community association lien, or a statutory lien for services, labor or material;
 - c. A lien for federal estate taxes or state estate, transfer or inheritance taxes arising by reason of the death of previous owners of the Land;
 - d. A lien for other federal, state or municipal taxes;
 - e. The marital rights arising in favor of spouses of previous owners of the insured property;
 - f. A lack of authority or capacity of the grantor to convey the insured property to the current or previous owner of the property;
 - g. The failure of the insured property to be effectively conveyed to the current or previous owner of the property by reason of a defective judicial or administrative proceeding; OR



OLD REPUBLIC TITLE

h. A document effecting the insured property not being properly created, executed, witnessed, sealed, acknowledged, notarized, delivered, or recorded in the Public Records.

IF UNSURE, PLEASE CONTACT OLD REPUBLIC'S STATE UNDERWRITING COUNSEL.

- 5. Did the potential title defect(s) you want to insure over arise prior to the date of the Prior Policy AND was not suffered, created or assumed by the insured under the Prior Policy? Yes No
- 6. You have confirmed the Prior Policy does not expressly take exception for, or expressly provide affirmative coverage in Schedule B-1 or by endorsement over, the potential title defect(s) you want to insure over. Yes No
- 7. You are issuing a policy with a face amount that is less than the face amount of the Prior Policy, or you have confirmed the potential title defect(s) do not exceed (individually or in the aggregate) the face amount of the Prior Policy. Yes No
- 8. You have confirmed that the potential title defect(s) do not exceed (individually or in the aggregate) \$500,000.00. Yes No
- 9. You are not aware of, and the public records do not show, any litigation or foreclosure proceeding arising from the potential title defect(s) since the date of the Prior Policy. Yes No

File No.: _____

Agency: _____

Date: _____

Agent Signature: _____

PLEASE INCLUDE THE NAME OF THE UNDERWRITER WHO ISSUED THE POLICY, AND THE POLICY NUMBER OF THE POLICY, ON WHICH YOU ARE RELYING IN A NOTE IN THE POLICY(IES) YOU ISSUE.



ALTA Homeowner's Policy – A Brief Summary

- I. Only applicable for
 1. 1-4 family residence or condominium unit
 2. Insured is a Natural Person (or trustee of a living trust)
 3. Lot is in a platted standard subdivision or condominium unit (no family subdivisions, no metes and bounds unless approved by ORT underwriter)
 4. Improved residential real estate (no raw land).
 5. Completed construction (i.e., not while construction is in progress)
 6. If issued with new construction the certificate of occupancy must be issued.

- II. Subject to dollar limitations for Covered Risks 16, 18, 19 and 21. This exception should be listed in Sch B-2 of the commitment.

- III. If a current survey is not obtained Covered Risks 21, 22, 23 and 24 are deleted and no coverage is given. This exception should be listed in Sch B-2 of the commitment.

- IV. 20% higher premium is charged for the increased coverage.

- V. Includes an inflation clause that increases the face amount of the policy by 10% a year for the first five years it's in existence, to a maximum of 150% after 5 years.