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A Title Policy for the New Millennium

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The American Land Title Association recently adopted the 2006 ALTA Owner's Title Policy - the "New Policy" - which was not made available to consumers in California until late 2006, and, despite being available for more than a year, has not been widely recognized as the title policy of choice for consumers and their attorneys.

While the New Policy is contemplated to replace the prior available forms of owner's title insurance policies, in particular the 1970 and the 1992 policies, consumers and their attorneys remain hesitant to deviate from past practice and continue to select either the 1970 Policy or the 1992 Policy, both of which remain available and are regularly issued by title insurers.

Although the 1992 Policy was promulgated by ALTA with the purported intent of improving upon the 1970 Policy, it has never succeeded in replacing the 1970 Policy, which is often the title insurance policy of choice for institutional purchasers of commercial real property in California.

Given the general reluctance of purchasers and practitioners to stray from the 1970 Policy over the past 37 years, it is not surprising that the New Policy has not yet been unequivocally accepted by purchasers and practitioners.

This column is intended to highlight certain material differences between the 1970 Policy and the New Policy in the hope of providing guidance to practitioners and purchasers when deciding which form to choose. It does not address all differences and nuances between the 1970 Policy and the New Policy, the complete forms of which should be carefully reviewed and compared, and an independent evaluation made, in order to determine which form to use for a particular transaction.

Staying Power of the 1970 Policy

The 1970 Policy has never been successfully replaced by the 1992 Policy. Among the disadvantages of the 1992 Policy compared with the 1970 Policy are the following:

- The 1992 Policy expressly excludes coverage for claims arising under federal bankruptcy, state insolvency or other similar creditors' rights laws based on the transaction conveying the insured interest being deemed a fraudulent conveyance or a preferential transfer (subject to certain exceptions). The 1970 Policy contains no such provision. The absence of a creditors' rights exclusion is commonly considered a significant advantage of the 1970 Policy. However, to be assured affirmative coverage for creditors' rights claims under the 1970 Policy or the 1992 Policy, an insured should obtain an ALTA Form 21 Creditors' Rights Endorsement ("ALTA 21").
- The 1992 Policy contains a co-insurance provision, making the insured a co-insurer of indemnity coverage where the amount of insurance is less than 80 percent of the purchase price or where the insured subsequently performs improvements that increase the value of the land by 20 percent or more.
- The 1992 Policy requires binding arbitration for disputes between the insurer and the insured where the amount of insurance is \$1 million or less.
- The 1992 Policy allows the insurer to compel the insured to give sworn testimony and to produce records that reasonably pertain to the loss or damage. Although the insured may designate such records as confidential, they may be disclosed to others if, in the insurer's "reasonable judgment ... it is necessary in the administration of the claim."

The New Policy in Town

The New Policy boasts significant advantages over the 1970 Policy, including the following:

- The New Policy not only includes all of the covered risks specified in the 1970 Policy, it also clarifies defect and lien coverage by enumerating a non-exhaustive list of items generally viewed as covered by the prior title policy forms, and provides six additional covered risks not specified in the 1970 Policy, including so-called "gap" coverage, which insures against any defects, liens and encumbrances other than real estate taxes and assessments created after the date of the policy but before the recording of the transfer instrument, and limited creditors' rights coverage.
- The 1970 Policy's waiver of claims not filed within 90 days after the loss or damage has been eliminated.
- The New Policy provides for a 10 percent increase in the amount of insurance if the insurer unsuccessfully pursues an action to eliminate a defect. The New Policy also allows the insured to make an election as to when the amount of the loss or damage is determined.
- The definition of "Insured" has been broadened to allow for certain estate planning transfers and transfers to affiliate, subsidiary or parent entities without the need to obtain an additional endorsement or new policy.
- The 1970 Policy's apportionment provision, limiting recovery under a multiple-parcel policy by allocating pro-rata portions of coverage to the parcels, has been deleted.
- The coinsurance concept added to the 1992 Policy has been removed.

Proceed with Caution

Nevertheless, the New Policy is not without its drawbacks, including the following:

- While the New Policy adds fraudulent conveyance and preferential transfer coverage similar to ALTA 21 for transfers occurring prior to the date of the policy, it excludes the actual transfer conveying the insured interest, which ALTA 21 covers. Therefore, obtaining ALTA 21 remains advisable.
- The New Policy retains the 1992 Policy's arbitration provision, but increases the policy amount threshold from \$1 million to \$2 million. Deletion of this provision may be desirable.
- The New Policy retains the insurer's right to compel the insured to give sworn testimony and to produce records.

Overall, the New Policy is a more clear and complete policy than the 1970 Policy, and generally provides a greater scope of coverage. The New Policy does have some disadvantages and we recommend discussing appropriate revisions and endorsements with your title insurer when procuring a New Policy. It remains to be seen how insurers will react to purchasers' and practitioners' comments to the New Policy, but the 1970 Policy just might be primed for retirement.

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