

Understanding Extended Coverage and the New Procedures for its Issuance

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The front cover of the American Land Title Association (ALTA) 1992 Owner's Policy jacket contains the insuring provisions where by title insurance companies insure (subject to certain exclusions, exceptions, conditions and stipulations) the owner of the real property. In particular it states that "...the Company insures, as of the Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of the Insurance stated in Schedule A, sustained or incurred by the insured by reason of: ... 2. Any defect in or lien or encumbrance on the title."¹

This insuring provision, taken alone without reference to any other provision of the policy, indemnifies the owner regardless of whether such a defect, lien, or encumbrance resulted from a recorded instrument or a nonrecord matter. Taken as a whole, however, the ALTA policy is not intended to provide such coverage.

In an effort to exculpate liability from nonrecord matters, the ALTA 1992 Owner's Policy contains five standard or general exceptions. The Five General Exceptions remove coverage for title matters that are not shown by the public records.

The term "public records" is defined in the conditions and stipulations section of the policy jacket as: "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."² Therefore, by raising these Five General Exceptions the title insurer can limit its liability to those matters that can be ascertained from a search of the records designated by state statute as imparting constructive notice.

Extended Coverage is the insurance coverage provided over the Five General Exceptions. With sufficient documentation, a title insurer may provide Extended Coverage by deleting the Five General Exceptions from the policy, thereby insuring over the nonrecord matters described in the Exceptions (see Exhibit 'A' for a copy of Policy Modification Endorsement 4). This article will briefly discuss the Five General Exceptions and the requirements necessary for the approval of Extended Coverage for both residential and commercial property.

Generally, a title insurer accepts only those risks for which it is provided sufficient clearance or assurances that such a risk has been eliminated, or risks that it is convinced are unlikely to develop into a claim in the future. As such, a title insurer, in issuing Extended Coverage, is not willing to accept the risk of deleting these nonrecord matters without additional assurances that would limit its exposure to possible claims.

I. The Five General Exceptions

The following General Exceptions are printed on the first page of the schedule of exceptions from coverage, known as Schedule B:

(1) *Rights or claims of parties in possession not shown by the public records.*

When a customer places a title order, the title insurer reviews the public records, determines the owner(s) of the real property, and notes any recorded adverse interests in Schedule B of the policy. General Exception (1) limits the title insurer's responsibility of coverage to those parties in possession shown by the public records and would raise those interests as Schedule B exceptions in order to exclude them from coverage. All nonrecord parties in possession would not have to be raised separately as Schedule B exceptions because General Exception (1) already excludes them from coverage.

As a general rule the purchaser of real property has a duty to inspect the premises and is subject to any nonrecord parties in possession. The title insurer under the standard policy language does not assume this duty. A purchaser may request coverage over these nonrecord parties in possession. Possession has been defined in the context of title insurance as actual, open, visible and exclusive use.

The courts have held that possession must be sufficiently open to put a reasonable person on notice of the possessor's claim to the land.³ Generally, the possession must be visible from the surface, as courts have rejected the arguments that even a party maintaining an improvement that is not visible

from the surface is in possession of the land.⁴ (Unrecorded underground interests would be excluded from coverage under General Exception (3) as discussed below).

Purchasers may obtain title insurance over nonrecord possession rights by means of Extended Coverage. This can be accomplished if the purchaser can provide the title insurer with sufficient clearance documentation (discussed below) that discloses no unrecorded parties in possession so as to allow the title insurer to issue Extended Coverage deleting General Exception (1). If the clearance provided to the title insurer discloses a nonrecord party in possession, Extended Coverage can be given subject to any disclosed interests being raised as a Schedule B exception. Only a quitclaim deed, abrogation, or termination of the interest will remove the Schedule B exception.

(2) *Encroachments, overlaps, boundary line disputes and any matters which would be disclosed by an accurate survey and inspection of the premises.*

The title insurer is not in a position to know about the nonrecord matters described in General Exception (2) without inspecting the property. In order to consider deleting General Exception (2), the title insurer needs to review an accurate survey. The type of accurate survey required for clearance is different for both residential and commercial property. (discussed below).

An accurate survey is defined as a survey that makes sense of the legal description of the property identified in Schedule A of the title insurance policy and accurately depicts any improvements on the land.⁵ If such a survey is provided to the title insurer in order for the purchaser to induce the title insurer to delete General Exception (2), the title insurer will review the survey and either issue Extended Coverage deleting General Exception (2) without raising any additional exceptions, or issue the Extended Coverage subject to matters disclosed by the survey that are raised as specific Schedule B exceptions.

By deleting General Exception (2), the title insurer is insuring, subject to Schedule B, the accuracy of the land as to its location with reference to streets and other lots in the subdivision shown on the plat of subdivision. In addition, a policy with Extended Coverage insures over gaps and overlaps and boundary line disputes. It insures over encroachments of the improvements on the insured land onto any easements on the land or onto adjoining land. It also insures over encroachments of improvements on adjoining land onto the insured land.

Assurance is also given that there are no violations of any covenants and restrictions on the land relating to the structure, as would be disclosed by an accurate survey.

(3) *Easements or claims of easements not shown by public records.*

General Exception (3) is intended to insulate a title insurer from losses resulting from easements that were created as a matter of law, by grant, by prescription, by implication, or in any other manner, and that cannot be discovered by searching the public records.

Unrecorded easements most frequently relate to the activities of public or quasi-public utility companies. The title insurer has no way of searching utility company records in order to reduce the risks associated with these unrecorded easements.

If requested to provide Extended Coverage to delete General Exception (3), the purchaser should provide the necessary clearance documentation (discussed below). If this documentation does not disclose any new nonrecord easements or claims of easements, Extended Coverage would be approved deleting General Exception (3) and no additional Schedule B exception would be raised. If, however, the clearance documentation (discussed below) reveals nonrecord easements, these easements would be raised as Schedule B exceptions and Extended Coverage would be given subject to these Schedule B exceptions. This exception could only be removed with the termination or abrogation of the individual easement.

(4) *Any lien, or right to a lien, for services, labor or material heretofore or hereafter furnished, imposed by law and not shown by the public records.*

General Exception (4) exculpates the title insurer from liability for an insured's loss resulting from the priority of a mechanics' lien that was not of record on the policy date. In Illinois, the mechanics' lien laws allow mechanics' liens to attach to the land and relate back to the date that the original construction contract was entered into. (Even a subcontractor's lien can relate back to the date a contract was entered into between the general contractor and owner.) A potential lien claimant can obtain priority over third parties by recording his lien as late as four months after the completion of the work.

If the clearance documentation (discussed below) indicates that there was no recent work on the land, the title insurer will delete General Exception (4). If, on the other hand, the clearance indicates that contracts had already been entered into for work on the land, or if work had recently been completed, the owner should provide the title insurer with the following:

- (a) A sworn owner's statement, listing all of the contracts entered into between the owner and any contractors and the status of each contract;
- (b) A sworn general contractor's statement, showing the names and addresses of all subcontractors, the amounts due or to become due; and
- (c) Lien waivers and affidavits from the subcontractors concerning their work on the land and any materials supplied to or by them.

If these documents show that all contractors, subcontractors, and material suppliers were paid in full, then the title insurer will delete General Exception (4). Any remaining mechanics' lien rights revealed in the title insurer's review of the documentation would be added as Schedule B exceptions and Extended Coverage would be approved subject to Schedule B.

(5) *Taxes or special assessments which are not shown as existing liens by the public records.*

General exception (5) relates to special assessment taxes that were not levied against the property before the policy was issued. The title insurer must raise an exception for any pending proceeding for the levy of a special assessment filed in the circuit court of the county where the real estate is located in order to satisfy its obligation of searching the public records. Similarly, it must raise a title exception for any recorded special service area tax ordinance. The purchaser takes subject to special assessments that may have been merely authorized by a published ordinance or resolution, but which has not become a lien appearing in the public records as defined by the policy.

If Extended Coverage is requested to delete General Exception (5), and in the clearance documentation (discussed below) the purchaser indicates that there is a special assessment that is not confirmed of record, the title insurer would raise the special assessment as a Schedule B exception and issue Extended Coverage subject to this exception. If no additional tax or special assessment is revealed then Extended Coverage can be approved deleting General Exception (5) without any new Schedule B exception being raised on the title policy.

II. Chicago Title's clearance requirements for the approval of Extended Coverage on residential property (single-family or multiple-dwelling units of four or fewer units)

Very simply stated, the Five General Exceptions can be deleted for residential property and vacant property that is located in an already established subdivision with the production of an ALTA Statement and a current accurate survey (not less than six months old). If, however, any new matters are disclosed by the clearance documentation, then the Extended Coverage would be approved subject to these matters, which would be specifically raised as Schedule B exceptions.

Approval of Extended Coverage for vacant property that is not located in an already established subdivision is treated the same as unimproved commercial land as discussed below. There is no charge for the issuance of Extended Coverage on residential property that has been improved with a residential structure.

III. Chicago Title's clearance requirements and procedures for the approval of Extended Coverage on commercial/industrial property

This section will look at what clearance is needed for the approval of Extended Coverage over each of the Five General Exceptions on commercial/industrial property. The requirements differ depending on whether the land is improved with commercial/industrial structure, falls within a vacated street or alley or in an abandoned railroad right of way or is unimproved. There is always an additional premium required for the issuance of Extended Coverage on commercial/industrial property.

(A) Land improved with commercial/industrial property

General Exceptions (2) and (3) will be deleted with the production of:

- (1) A survey, no more than six months old made to ALTA/ACSM or at least to the joint Illinois Land Survey/Bar Association standards and certified to Chicago Title Insurance Company; and
- (2) An affidavit from the owner (or beneficiary of the title-holding land trust) stating whether, during the term of the affiant's ownership, (1) the affiant made grants of utility easements that have not been recorded; (2) whether the affiant has received notice of the existence of unrecorded utility easements; or (3) whether the affiant has knowledge that a utility company exercised or attempted to exercise unrecorded easement rights. (See attached Extended Coverage Affidavit – Exhibit 'B'.)

The production of utility letters has traditionally been required for the issuance of Extended Coverage over General Exceptions (1) and (3). Utility letters are letters from utility companies that disclose the existence of any unrecorded easements that exist on a particular tract of land. These letters were written by all of the utility companies that could have facilities or lines on the land.

Currently, when a request is made for a utility letter some of the utility companies have either invited the person requesting the letter to examine the utility records in the office of the utility company, charged a fee for the letter, or have stopped giving them altogether. This requirement, however, is now eliminated by Chicago Title for land improved with a commercial/industrial structure, due to the increased difficulty in acquiring these letters by our customers, as long the above clearance material is produced for review.

This elimination of the requirement for utility letters on land improved with a commercial/industrial structure, should be very beneficial for the customers of Chicago Title in that they will, in many instances, no longer have to send for or follow up on utility letters, but instead they need only execute the aforementioned affidavit in lieu of obtaining utility letters.

General Exceptions (4) and (5) will be deleted upon the execution of a completed ALTA statement by both the seller and the purchaser. Owner's and contractor's statements, affidavits and waivers may be required, in addition to the

ALTA statement, if the ALTA statement discloses that contracts for improvement to the land have been let or if work had recently been completed (see General Exception (4) above).

General Exception (1) will be deleted if both of the requirements for the issuance of Extended Coverage over General Exceptions (2) through (5) are provided to Chicago Title.

(B) Land falling in a vacated street or alley or in an abandoned railroad right-of-way

General Exception (3) will be deleted with the production of utility letters from those utilities providing gas, electrical, sewer, water and cable television services to the land. (For a list of contacts please check with your local Chicago Title underwriter). If utility letters cannot be obtained and extended coverage is still desired over General Exception (3), then an exception in Schedule B will be raised for, "The rights of public and quasi-public utilities in the land."

General Exception (2) will be deleted with the production of a survey, no more than six months old made to ALTA/ACSM or at least to the joint Illinois Land Survey/Bar Association standards and certified to Chicago Title Insurance Company.

General Exceptions (4) and (5) will be deleted upon the proper execution of a completed ALTA statement by both the seller and the purchaser. Owner's and contractor's statements, affidavits and waivers may be required, in addition to the ALTA statement if the ALTA statement discloses that contracts for improvement to the land have been let or if work had recently been completed (see General Exception (4) above).

General Exception (1) will be deleted if both of the requirements for the issuance of Extended Coverage over General Exceptions (3) through (5) are provided to Chicago Title.

(C) Unimproved land

General Exception (3) will be endorsed over with the production of utility letters from those utilities providing gas, electrical, sewer, water and cable television services to the

land. (For a list of contacts please check with your local Chicago Title underwriter). If utility letters cannot be obtained and extended coverage is still desired over General Exception (3), then an exception in Schedule B will be raised for, "The rights of public and quasi-public utilities in the land." This exception may be waived if utility letters are later provided or, if construction is in progress, a letter is issued by a surveyor, architect or engineer certifying that the foundation is fully in place and that no unrecorded utility equipment has been encountered.

General Exception (2) will be deleted with the production of a survey, no more than six months old made to ALTA/ACSM or at least to the joint Illinois Land Survey/Bar Association standards and certified to Chicago Title Insurance Company.

General Exceptions (4) and (5) will be deleted upon the proper execution of a completed ALTA statement by both the seller and the purchaser. Owner's and contractor's statements, affidavits and waivers may be required, in addition to the ALTA statement, if the ALTA statement discloses that contracts for improvement to the land have been let or if work had recently been completed (see General Exception (4) above).

General Exception (1) will be endorsed over if both of the requirements for the issuance of General Exceptions (3) through (5) are provided to Chicago Title.⁶

IV. Conclusion

The above clearance items for both residential and commercial/industrial property will be reviewed for completeness and any title policy that may be issued will remain subject to any exceptions that may be raised as a result of any new matters shown by the clearance documentation. (The Extended Coverage requirements are codified in the attached Exhibit 'C').

It is very important for a transactional attorney to understand the importance of acquiring Extended Coverage. Even though the rules have changed to make it easier to obtain Extended Coverage, one should not assume that all of the issues can be resolved at closing. Preparation well in advance of closing is the only way to anticipate any surprises that may come about before the day of reckoning.

BIBLIOGRAPHY

1. AMERICAN LAND TITLE ASSOCIATION OWNER'S POLICY (10-17-92), pg. 1.
2. AMERICAN LAND TITLE ASSOCIATION OWNER'S POLICY (10-17-92), *Conditions and Stipulations*, 1.(f)., pg. 3
3. Black's Law Dictionary, abridged 5th edition 1983, 1988 West Publishing Co., page 607. Title Insurance Law, Joyce Dickey Palomar (1998 West), Section 7.02[1], pg. 7-5.
4. Title Insurance Law, Joyce Dickey Palomar (1998 West), Section 7.02[1][a], pg. 7-7.
5. *Id.*, at Section 7.02[2][a], pg. 7-21.
6. Portions of Section III were taken from the Chicago Title Examining Bulletin No. 477, "Extended Coverage – Commercial – Industrial Property – Utility Letters," Doug Karlen, (Feb. 2, 1999).

EXHIBIT "A"

ENDORSEMENT

ATTACHED TO AND FORMING A PART OF
POLICY NUMBER

ISSUED BY

CHICAGO TITLE INSURANCE COMPANY

POLICY MODIFICATION ENDORSEMENT 4

GENERAL EXCEPTION NUMBER(S) 1, 2, 3, 4 AND 5 OF SCHEDULE B OF THIS POLICY ARE
HEREBY DELETED.

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.

END1PG

EXHIBIT "B"

STATE OF ILLINOIS)
)
COUNTY OF)

EXTENDED COVERAGE AFFIDAVIT

The undersigned, being first duly sworn, deposes and states that with respect to the land described in Chicago Title Insurance Company commitment number _____ .

1. That Affiant is the record owner of the land or the owner of the beneficial interest in the land trust holding record title to the land;
2. That during the term of such ownership, Affiant has not entered into any unrecorded agreements granting utility or other easements over, across, or under the land to any public or quasi-public utility or to any other person, except the following, if any:

[If None, state None]

3. That during the term of such ownership, Affiant has not received any notice of unrecorded utility or other easements over, across, or under the land, except the following if any;

[If None, state None]

4. That during the term of such ownership, Affiant has not received any notice or obtained any knowledge of the exercise or attempted exercise of unrecorded utility rights or other unrecorded easement rights by any public or quasi-public utility or by any other person over, across, or under the land, except the following, if any;

[If None, state None]

The Affiant makes this affidavit for the purposes of inducing Chicago Title Insurance Company to issue its owner's policy without exceptions for unrecorded easements.

Date

Signature of Affiant

Printed Name and Address of Affiant

Subscribed and sworn to before me this _____ day of _____ .

Notary Public



EXHIBIT "C"

CHICAGO TITLE INSURANCE COMPANY

171 NORTH CLARK STREET, CHICAGO, ILLINOIS 60601-3294

ORDER NO.:



CUSTOMER IDENTIFICATION

EXTENDED COVERAGE REQUIREMENTS

With respect to a request to issue a policy which endorses over General Exceptions 1 through 5 of Schedule B, the Company should be furnished the following items prior to closing so that a determination of its ability to issue such coverage may be made:

- (A) An executed STATEMENT REQUIRED FOR THE ISSUANCE OF ALTA OWNER AND LOAN POLICIES. If any improvements have been made on the land within the last six months, satisfactory evidence should be furnished of the payment in full of the cost of furnishing services, labor and material in connection with such improvements. Additionally, copies of any leases and amendments thereto should be submitted;
- (B) A plat of survey, not more than six months old, that is prepared in accordance with ALTA/ACSM Land Title Survey Standards, certified to Chicago Title Insurance Company;
- (C) If the land is unimproved, letters from the various utilities, municipalities and cable companies serving the land, stating their involvement, if any, must be obtained. The following procedures should be followed to obtain letters regarding involvement of utilities;
 - (1) Address a letter to the utilities listed below;
 - (2) Request information as to whether there are any public utilities which have any interest, facility or easement in the land in question;
 - (3) Describe the land both by street address and legal description;
 - (4) Enclose a copy of the title commitment and one small drawing or sketch of the plat depicting said land for each utility;
 - (5) State that the reason for seeking information is to provide extended coverage on a policy to be issued by Chicago Title Insurance Company;
 - (6) The utilities are listed below;

ComEd
Department of Water and Sewers (Usually the City/Village Engineer)
Northern Illinois Gas, People's Gas, or North Shore Gas
Local Cable Company(ies)

Upon examination of the items requested above, the Company reserves the right to make the policy subject to such further exceptions as may then be deemed necessary.

Any questions regarding the above should be directed to the attention of the undersigned.

