The Alta 2006 Title Insurance Policies:

Because Rules of Grammar are Sometimes Rules of Convenience

By John D. Bartley, O'Reilly Rancilio PC

Title insurance companies are now issuing new forms of owner's and loan policies known as the 2006 ALTA Owner's Policy and 2006 ALTA Loan Policy. The new 2006 policies were adopted by the American Land Title Association (ALTA) Board of Governors on June 17, 2006. The forms have been approved in Michigan, and the title companies are in receipt of their title policy jackets. The old form of policies, known as the 1992 ALTA policies remain available, as do the 1987 and 1970 versions. The older versions of policy forms are considered "archived" ("http://www.alta.org/forms" www.alta.org/forms) policy forms to be issued by a title insurer at their option if requested by the party to be insured.

Other than an increase in the arbitration requirement, more particularly discussed later herein, I find no advantage to the insured in obtaining an archived form of policy. For the insurer, however, an archived form of policy might remain their form of choice if they weren't compelled to issue the new 2006 version as there are many substantive improvements for an insured under the new policy forms.

A summary of the benefits to the insured under the new policy forms are provided herein, but first is an explanation of the title chosen for this article because in some ways it underscores the reasons why the revisions were deemed necessary. Some of the coverage described as being "new" is actually the same coverage intended in the prior policy forms, but due to arguments introduced in litigation, there became too much uncertainty and risk in what we were actually receiving when purchasing a policy. This uncertainty arises from what I would describe as an exceptions-to-the exclusions fallacy.

Bishop Robert Lowth wrote A Short Introduction to English Grammar with Critical Notes in 1762 wherein the double-negatives-make-a-positive rule was first introduced to English language. This rule has endured the ages with few challenges, but its logical application is now challenged by title insurers when facing liability under a claim. For example, under the 1992 ALTA policy, an item found in the "Exclusions from Coverage" section provides that an insured is not covered against violations of zoning, ordinances or permits UNLESS notice of such violation appears in the public records and the title company fails to include such notice on Schedule B of the title commitment. Therefore, you are NOT covered unless they did NOT show the recorded notice, which therein lies the two negatives. By applying the Lowth rule of grammar to this statement, the reasonable insured party believes that the insured IS covered if there was a recorded notice and the insurer failed to include the item on Schedule B. Well, therein lies the fallacy because title insurers facing claims under this section of a 1992 policy have argued against coverage by claiming that the scope of coverage under the policy is to be found only under the insuring clauses or "covered risks" of the policy. In other words, you can't look in the exclusions from coverage section of a title policy to find elements of coverage even if standard rules of grammar would allow a reasonable, if not obvious interpretation that such coverage was intended.

> you can't look in the exclusions from coverage section of a title policy to find elements of coverage...

By applying this illogic to a "marked-up" title commitment issued at a closing, what is the extent of coverage provided under a 1992 form of policy and under a 2006 form of policy when the insured receives such mark-up? For example, is the insured lender protected over construction liens recorded after the loan closing but in compliance with the Construction Lien Act? The answer is yes, since the 1992 loan policy jacket already included Section 7 of the Insuring Clauses, and issuance of the policy with-

out the general exceptions would indicate that the title company had determined that all requirements for issuance of such loan policy "without exceptions" were satisfied by or on behalf of the insured. The answer for a lender is also yes under the 2006 loan policy since such coverage is included under Section 11(a) of the Covered Risks. However, what about the insured purchaser under an owner's policy? Is such owner covered over any statutory lien for services, labor or materials arising from an improvement or work related to the land which is contracted for or commenced prior to the closing date? Under the 1992 form of policy, the insured expects coverage to be provided by receiving a marked-up commitment at closing wherein the title insurer crosses out General Exception #4 ("Any lien, or right to a lien, for services, labor or materials heretofore or hereafter furnished, imposed by law and not shown by the public records"). By the removal of such general exception from the title commitment, the insured therefore expects that coverage has or will been provided by the insurer. Alternatively, it may be argued that coverage for the insured under the owner's policy derives from Section 2 of the Insuring Clauses ("Any defect in or lien or encumbrance on the title;"). However, coverage under the 1992 and 2006 policies are limited through the "Date of Policy shown on Schedule A". Since, under Section 570.1111 of the Construction Lien Act, a lien may be filed within 90 days after the last date of improvement to the subject property, how then is coverage available if such lien is recorded after the "Date of Policy". The answer may be that an owner is not covered for such construction liens under the 1992 policy unless the title insurer had been compelled to remove general exception #4, which would mean that the insured is relying on coverage through an application of the double-negatives-make-a-positive rule. Under the 2006 form of owner's policy, which includes an expansion of the phrase "any defect in or lien or encumbrance on the title" under Covered Risk Section 2, and which such expansion does not include any reference to liens for improvements contracted for or commenced on or before Date of Policy, where then is coverage to be found? If General Exception #4 is crossed out by the title insurer at closing, is such removal an affirmation of coverage, or might its effect be discarded by an argument that no such affirmative coverage is found in the Covered Risks section of the 2006 form of owner's policy since the lien was recorded after the Date of Policy. Also, to extend such application of the exception to exclusion fallacy even further, will there be a day when coverage over a construction lien is challenged by a title insurer whose closing agent crossed out General Exception #4 under a 1992 form of owner's policy? Before the reader excuses my concerns as being merely an exercise of logic with no real risk, they should factor in the following as one more element for consideration. The 1992 owner's policy includes General Exception #2 ("Encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises."). At or prior to a closing where title insurance shall be provided under the 1992 owner's policy, a title insurer would be provided a survey in sufficient form to compel such title insurer to cross out General Exception #2, thereby providing coverage over loss or damage to the insured if the building is later found to be constructed over an easement, or other such matters. Now, the 2006 form of owner's policy has been written to include such affirmative coverage over matters that would be disclosed by an accurate survey under Covered Risk 2(c). However, the coverage provided to an owner under Covered Risk 2(c) of a 2006 owner's policy is not effective if the title insurer adds such General Exception #2 to the title commitment. Therefore, after the insurer is provided sufficient documentation to remove General Exception #2, coverage over survey matters can be found under Covered Risk #2(c) rather than under an application of the double-negatives-make-a-positive rule. Why the drafters of the 2006 owner's policy added survey matters as a Covered Risk and provided no similar affirmative coverage over construction liens may therefore be telling, especially when coupled with the expansion of the Covered Risk section of such policy in a well publicized attempt to eliminate their exceptions-to-exclusions image problem. To solve this issue, the title insurance industry should provide an endorsement to be available on an owner's policy adding such coverage over construction liens as one of the "Covered Risks". Until such endorsement is made available, I suggest that on future marked-up commitments for owner's policies, the reader may be better protected if their title insurer is compelled to add the phrase "to be included within Covered Risk 2(c)" at General Exception #4 rather than to simply cross out such exception.

The ALTA Board of Governors has also provided many real improvements and expansions to coverage within the 2006 policies. A brief summary of highlights to such improvements are as follows:

Coverage for Electronic Transactions: Covered Risk 2(a)(iv) in the 2006 Owner's and Loan policies insure

against "failure to perform those acts necessary to create a document by electronic means authorized by law."

Coverage for Improper Electronic Filing: Some counties in Michigan allow the title insurer to record documents via electronic filing through scanning of documents. The policies now insure against a failure to properly file (by any means), record, or index an instrument in the public records (Covered Risk 2(a)(vi)).

Gap Coverage: Covered Risk 10 of the 2006 Owner's Policy and Covered Risk 14 of the 2006 Loan Policy add affirmative "gap" coverage. A gap endorsement is therefore no longer necessary. So, now when the title insurer provides a marked-up commitment and fails to revise the date of coverage, the insured purchaser is automatically provided coverage under the owner's policy through the date and time of recordation of the deed or other instrument of transfer, and the insured lender is also automatically covered through the date and time of recordation of the mortgage under the loan policy.

Creditor's Rights: Covered Risk 13 of the 2006 Loan Policy provides new creditor's rights coverage for transactions occurring prior to the transaction creating the interest being insured. For coverage over the subject transaction, the reader will need to request from the insurer the Creditor's Rights Endorsement ALTA Form 21-06.

Expansion of the term "Unmarketable Title": This term has been expanded in Covered Risk 3 of the 2006 Owner's and 2006 Loan Policies to include coverage when a lessee is released from an obligation to lease or a lender is released from an obligation to lend due to a contractual condition requiring the delivery of marketable title.

A gap endorsement is therefore no longer necessary.

Expansion of the term "Insured": The section of the 2006 Owner's and Loan policies entitled "Conditions" (formerly "Conditions and Stipulations" under the 1992 form of policy) includes an expanded definition of the term "insured" at Conditions 1(d) of the 2006 Owner's Policy and 1(e)(A) of the 2006 Loan Policy to include the following: (a) successors to the named insured by operation of law, dissolution, merger, consolidation, distribution or reorganization; (b) successors to the named insured by conversion to a different form of entity; (c) certain voluntary conveyances by the named insured under a deed delivered without payment of actual valuable consideration conveying the Title, including: (i) where the equity interests of the grantee are wholly owned by the named insured; (ii) where the grantee wholly owns the named insured; and (iii) where the grantee is wholly owned by an affiliate of the named insured provided the affiliate and the named insured are both wholly owned by the same person or entity. Also, under Conditions 1(d)(A)(i)(D)(4) of the 2006 Owner's Policy the term "Insured" now includes a grantee of an insured under a deed delivered without payment of actual valuable consideration conveying title where the grantee is the trustee or beneficiary of a trust established by the named insured for estate planning purposes.

Expansion of the term "Indebtedness": This term has been expanded in Conditions 1(d) of the 2006 Loan Policy to include the sum of: (a) the amount of principal disbursed as of the date of policy; (b) the amount of principal disbursed subsequent to the date of the policy; (c) the construction loan advances made subsequent to the date of the policy for the purpose of financing in whole or in part the construction of an improvement to the land or related to the land that the Insured was and continued to be obligated to advance at the date of the advance; (d) interest on the loan; (e) prepayment premiums and other fees and penalties; (f) the expenses of foreclosure and any other costs of enforcement; and (g) advances as defined in Conditions 1(vii), (viii) and (ix), which are generally referred to by lenders as protective advances.

Elimination of sworn proof of loss: Conditions 4 of both the 2006 Loan Policy and 2006 Owner's Policy eliminates the requirement for a sworn proof of loss within 90 days after the Insured determines the facts giving rise to loss that is found in the Conditions and Stipulations 5 of each of the 1992 policies. Instead, the insurer must first attempt to determine the loss, and then may require the insured claimant to provide a signed proof of loss (not in the form of an affidavit) to describe the defect, lien, encumbrance or other matter insured against that constitutes the basis of the loss or damage, and to the extent possible, the basis of calculating the extent of such loss or damage.

Increases to extent of liability: Conditions 8 of the 2006 Loan Policy and 2006 Owner's Policy provides that if the insurer takes the defense and is unsuccessful in establishing the title as insured, then: (a) the amount of insurance is increased by an additional 10%; and (b)

the insured can have the loss determined as of the date the claim was made by the insured claimant or as of the date it is settled and paid.

Elimination of "co-insurance": The co-insurance provision in Conditions and Stipulations 7(b) of the 1992 Owner's Policy has been eliminated from the 2006 Owner's Policy. Under the 1992 policy, when the owner purchased insurance in an amount less than 80% of the then value or of full consideration paid for the land, or when the insured subsequently constructed improvements that increased the value of the land by 20% over the amount of insurance purchased, then the insured owner was considered a co-insurer and recovery would be based on a pro-rata calculation.

Elimination of apportionment: The apportionment provision in Conditions and Stipulations 8 of the 1992 Owner's Policy has been eliminated from the 2006 Owner's Policy. Under the 1992 policy, when the policy included two or more parcels that were not used as a single site, and a claim arose against one of the parcels, then the insured could limit the insured's maximum recovery by prorating based on the value of each parcel as of the date of policy.

Elimination of "last dollar" problem: Conditions and Stipulations 10 of the 1992 Loan Policy allowed that all payments under the policy would reduce the amount if insurance "pro tanto". The 2006 Loan Policy includes Conditions 10 wherein all payments under the policy shall reduce the amount of insurance by the amount of the payment. The effect of this change is the elimination of the need for a Last Dollar Endorsement when using the 2006 Loan Policy.

No need to produce the title policy: Conditions and Stipulations 12(a) of the 1992 Owner's Policy and Conditions and Stipulations 11(a) of the 1992 Loan Policy obligated the insurer to produce either the policy or proof satisfactory to the insurer that the policy could not be produced because it had been lost or destroyed. These have been eliminated since the title insurer should be able to keep its own records.

Increase in Arbitration threshold: An arbitration provision is contained in Conditions 14 of the 2006 Owner's Policy and Conditions 13 of the 2006 Loan Policy. The 1992 policies also included arbitration provisions. However, the amount of insurance threshold up to which arbitration can be invoked unilaterally by either the insured or the insurer has been increased from 1 million under the 1992 policies to 2 million under the 2006 policies. In commercial transactions, the arbitration provision is often eliminated by an endorsement to the policy.

Coverage for Manufactured Housing Units: ALTA 7.1-06 is a new endorsement provides an expansion of the term "land" in the 2006 Loan Policy to include a manufactured housing unit located on the land at the date of policy. ALTA 7.2-0 provides similar coverage under the 2006 Owner's Policy

New "ALTA 9" endorsements: There are three new ALTA 9 endorsements. In each of the three versions, an additional insuring provision has been added to afford coverage for damage to improvements, including lawns, shrubbery or trees located on the land on OR AFTER date of policy resulting from the future exercise of any right of surface entry to extract or develop minerals that have been severed from the underlying title and are excepted from the legal description of the insured property or from the policy's coverage by an exception under Schedule B. However, there was no change from the prior form of ALTA 9 endorsement wherein coverage remains for damage to existing improvements (and not future improvements), including lawns, shrubbery, or trees, located or encroaching on that portion of the land subject to any easement included by the insurer as a Schedule B exception.

This article is an attempt to highlight some of the major changes to be found in the 2006 form of policies. The endorsements provided for the 2006 policies are also revised, and such revisions have not been addressed herein. Additional, more in depth comparisons can be found at the web site of www.alta.org. There have been no substantive revisions in title policies for 20 years, and overall, these new policies provide more coverage for the insured. ■

John D. Bartley is a shareholder with the Sterling Heights law firm of O'Reilly Rancilio P.C. Mr. Bartley practices in the areas of commercial lending and real property law. He can be reached by phone at 586-726-1000 or by e-mail at jbartley@orlaw.com.

Footnotes:

- *Fromkin, Victoria; Rodman, Robert & Hyams, Nina (2002). An Introduction to Language, Seventh Edition, Heinle, p. 15. ISBN 0-15-508481-X.*

- *See Standford Ranch, Inc. v Md. Cas. Co., 89 F.3d 618, 627 (9th Cir 1996) (citing St. Paul Fire & Marine Ins. Co. v Cross, 145 Cal. Rptr. 836, 840-841 (1978)): In interpreting an insurance contract, this court must first look to the insuring agreement and determine whether coverage exists. If coverage exists, then this court must look to the contract exclusions to see if coverage is otherwise excluded. If coverage does not exist under the insuring agreement, the inquiry is at an end. There is no need to look to the exclusions because they cannot expand the basic coverage granted in the insuring agreement.*

- *Mich. Comp. Laws Section 570.1101 - 570.1305 (1982)*