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REAL ESTATE CLOSING SEMINAR

THE DISPUTED TITLE

History of the County Clerk's Office
by John M. Carbone, Esquire

The County Clerk is one of three county-wide elected Constitutional Officers in the State of New Jersey. The others are the Sheriff and Surrogate. The term of office of a County Clerk is five years. The County Clerk is responsible for the administration of a broad range of services including the filing and recording of all documents affecting real estate ownership/transfer, the processing of U.S. Passport applications, assisting individuals who wish to become Notary Public, the issuance of Alcoholic Beverage Control Identification Cards, the filing of Business Trade Names, and the supervision of elections.

A review of the history of recording real estate documents offers a unique perspective on the evolution of the County Clerk. Historically to undertake the transfer of ownership of real estate, the only persons who could read and write were the clergy who were held in great regard by the kings and their courts. The clergy appointed other learned people who could read and write but were not necessarily "religious", and under "vows of the church". They were called "clericus". So important were "clericus" or "clerks" thought to be, that they enjoyed the protection of the church and doctrine of "benefit of clergy" which prohibited the courts from gaining jurisdiction over these persons and gave them a total privilege of exemption from punishments for crimes. This was not abolished in England until 1827 but was so abhorred by the colonists that one of the first acts of the United States Congress on April 30, 1790 was to abolish the benefit of clergy where it existed. *(Blackstone, supra., sec.80)*

For 500 years, through the 16th century, the transfer of property occurred by documents written and held by the "clerks". And because these "clerks" could read and write, they became "clerks to the courts" of the various lords in England maintaining records of the Court proceedings. With the colonization of the United States, that procedure was adopted within the legal jurisdictions of the various lords and the attendant "clerks".

Because of the distance between the "motherland" and the "colonies" inhabitants formed various agreements for the recording and transfer of property. The first was in 1676 entitled "The Concessions and Agreements of the Proprietors, Freeholders and Inhabitants of the Providence of West New Jersey" which made provisions for the recording of deeds and other conveyances of land. Conveyances which were recorded were of full force and effect, those which were not recorded within six months were of no force and effect. The statute was so ignored that an Act was passed in 1695 imposing a penalty of "twenty shillings on every person who refused or neglected to bring his deed or conveyance to the proper recording clerk within six months." A similar agreement was adopted into under the "Fundamental Constitutions of East New Jersey", dated 1683, which required the recordation in a public "registry" of all deeds, otherwise they were "void at law

Both the East and the West Jersey proprietors ceded and surrendered their respective rights back to the British crown in 1702 raising concern that no method existed for the transfer of property. Various colonial governments attempted to adopt legislation, but none ever reached the final approval of the king.

After the Revolutionary War, the State of New Jersey returned to the basic concept that recording was necessary to protect purchasers of property. Under the "Conveyancing Act of 1799", which is the precursor of the existing New Jersey statutes for recording "every conveyance of property must be "recorded" in a "register" or it shall be "void and of no effect...".

These laws required and directed that these recordation's and registrations be done by the various "clerks of the inferior courts of common pleas and quarter sessions" who were "...appointed by the council and assembly...and commissioned by the governor..."*(New Jersey Constitution of 1776, Article XII).*

The maintenance of those records was perceived as a supplemental "judicial" function under the Constitution since the clerk of the court of the county served first as clerk to the court and then as clerk to the citizens. A fundamental problem with the Constitution of 1776 was that the three branches of government, executive (governor), legislative (council), and judicial, were not three equal branches in power and standing. Ultimately under that Constitution all decisions of the judiciary, and all actions of employees of the judiciary (clerks) were subject to review by the Governor and Council. Thus, court orders could be overturned, ignored, or enforcement of the orders refused by "politicians". Through long legal wrangling this situation was resolved in the New Jersey Constitution of 1844. There all three branches, executive, legislative and judicial, were made equal, the right of final appeal from the New Jersey "Supreme Court" went to the U.S. Supreme Court and not to the Governor and Privy Council. But most importantly, the clerks were removed from the control of the executive and judiciary, had their powers conferred upon them by the voters of the State of New Jersey, were made constitutional officers, and served for fixed terms. The Constitution of 1844 provided, in paragraph 5, that:

Clerks and surrogates of counties shall be elected by the people of their respective counties, at the annual elections for members of the general assembly. They shall hold their offices for five years.

As of the 1844, clerks were recognized not as an employee or officer of the courts, but as distinct constitutional officers. An examination of the statutes does not show any statutory change in their role, functions, duties and responsibilities. Their role and functions were conferred by paragraph 11 of the Constitution of 1844 which provided that:

> Clerks of counties shall be clerks of the inferior courts of common pleas and quarter sessions of the several counties, and perform the duties, and be subject to the regulations now required of them by law, unless otherwise ordained by the legislature.

The clerks carried forward all the powers that they had previously as "clerks" for the filing and recording of documents. But the powers of recording, etc. were recognized as constitutional conferment (by the people) and not mere law (by the legislation).

By 1848, the clerk is recognized as a constitutional officer, is responsible through prior statutes for the recordation and filing of documents affecting real property, and maintaining their prior "judicial" and civil functions in their constitutional office. The position of clerk was transferred from the section of the Constitution dealing with judiciary in 1796 to the section of the Constitution dealing with "civil officers" in the Constitution of 1844.

Other than very minor changes in the language, the role, duty, responsible and authority of the county clerks continued under the Constitution of 1947 under Article XII, section 2, par.2, which provides:

> County clerks...shall be elected by the people of their respective counties at general elections. The term of office of county clerks...shall be five years...Whenever a vacancy shall occur any such office it shall be filled in the manner provided by law.

In 1904 the provisions of *N.J.S.A. 40:39-2* were adopted which gave a county the option of creating a non-constitutional office of legislative creation called the Office of the Register of Deeds and Mortgages if the county had a population exceeding 185,000. By amendment to this statute, it was subsequently increased to a minimum population of 250,000. The counties of Essex, Hudson, and Passaic now have an Office of the Register of Deeds and Mortgages. Thus, a constitutional power was transferred to a non-constitutional office without a constitutional amendment.

> In one of the few decisions on the recording of deeds, *Freeholders of Middlesex v. Conger, 67 N.J.L. 444, 447(N.J. Sup. Ct. 1902)*, its stated that:
>
> ...Our first act which provided a system for recording deeds was the act respecting conveyances of June 7th, 1799, section 10 of which provided for recording deeds, properly acknowledged, with the secretary of state, and the act also provided that the clerk of the Court of Common Pleas of the county shall record in large, well-bound books, of good paper, to be provided for that purpose, and carefully preserved, all deeds and conveyances of lands lying and being in said county which should be delivered to him to be recorded. To which books every person shall have access at proper seasons and be entitled to transcripts from the same on paying the fees allowed by law.
>
> In *Freeholders of Middlesex*, the County Board of Freeholders sought to take custody of the real property records of the county and take them away from the clerk. The court found, that: The duties of the clerks of counties are defined by the constitution, and they are, in addition to being clerks of the Courts of Common Pleas and Quarter Sessions, to perform the duties and be subject to the regulations now required of them by law, until otherwise ordained by the legislature. *Const. Art. 10, par.11.*

The rights and duties of clerks of counties are therefore fixed by the constitution of 1844 as they existed by law, and are so to continue until otherwise ordained by the legislature. *(Freeholders of Middlesex, supra, at 446).*

As the Court stated:

> The act of 1846 had made no change in the duties or powers of the clerk which existed prior to 1844, and, by the express provision of the constitution above cited, there being no change in the law, whatever rights the clerk then had or whatever duties were then required, still exist, unless they have been changed in some way by the revision of the act respecting conveyances in 1898.
>
> A careful examination of that act fails to disclose any change in the control of the clerk over the records of deeds and mortgages. *Id. at 447.*

The court found that the administration of the existing property records and recording of deeds was constitutionally conferred by the people on the clerks and beyond the control of the freeholders.

The long historical role of the Clerks, as constitutional officers, performing what is now a statutory function in recording documents of title, establishes an area of expertise and unique function.

RECORDING vs. FILING

by John M. Carbone, Esquire

Recording means the copying of an instrument to be recorded into the public records in the book kept for that purpose under a County Clerk or Register of Deeds.

Filing, on the other hand, is merely the "depositing" of a document with the recording officer in that office. To file a paper is to deliver it to the proper officer who keeps it on file and open to public inspection. Originally, the file was a string or wire upon which were fastened writs and other exhibits for safe-keeping and ready reference, but today the "file" denotes merely the filing cabinets or places in the offices where records and files are kept.

Under recording, the document is word for word "recorded", "copied", or "transcribed" and that is maintained as the official record with the original document being returned to the holder thereof. *N.J.S.A.* 46:19-3.

In filing, the document is processed and retained by the recording officer and is not returned to the owner.

In law, to record signifies to enroll, to write out on parchment or paper or in a book, for the purpose of preservation and perpetual memorial; to transcribe a document an official volume for the purpose of giving notice of the same, of furnishing authentic evidence and for preservation. *Mahnken v. Meltz*, 97 N.J.L. 159, 161 (E & A. 1921); *People ex rel. Simons v. Dowling*, 146 N.Y.S. 919, 920, 84 Misc. 201, *affirmed*, 148 N.Y.S. 1137, 164 App. Div. 911.

Understanding The Title Insurance Policy

Ronald G. Russell

Title insurance doesn't guarantee that there won't be title problems—it provides a way to deal with them when they arise.

MANY LAWYERS and their clients have misconceptions regarding title insurance and what to expect when a claim arises. Title insurance is an indemnity contract by which the insurer agrees to indemnify the insured against losses covered by the policy. It is not a representation or guarantee that no title defects exist. This distinction is an important one. An insurer may be aware of the existence of a potential title defect and choose to insure over it. A title policy is not

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a representation of the state of title to the property, but insures against loss resulting from any defects. Consequently, the standard policy forms give the insurer considerable latitude in deciding how to address claims. Most notably, an insurer may chose to defend title or take other corrective action rather than write a check to the insured for a claimed loss. This article discusses the key policy provisions affecting title insurance claims, what to expect when you make a policy claim, and the resolution of claims disputes.

KEY TITLE INSURANCE POLICY PROVISIONS • Standard title insurance policy forms have existed for many years. As a result, there is a substantial body of case law and commentary on how the forms are interpreted and apply.

Policy Structure

The title insurance policy forms generally used are those that are promulgated by the American Land Title Association ("ALTA"). Standard forms evolved to satisfy the requirements of the secondary mortgage market. A standard title insurance policy contains five major components:

- The insuring provisions contained on the first page of the policy state what is insured;
- The insuring clauses are modified by "Exclusions from Coverage";
- The "Conditions and Stipulations" define policy terms and address various matters including claims procedures;
- Schedule A identifies the amount of insurance, the insured, and the land covered by the policy.
- Schedule B contains "Exceptions" from coverage including preprinted standard exceptions and special exceptions that are unique to the insured land.

Insuring Clauses

The insuring clauses are found on the first page of the policy jacket. Because the purpose of an owner's policy is different than that of a lender's policy, the insuring clauses differ. A lender's policy insures the enforceability and priority of a mortgage lien, not just title.

Owner's Policy

The standard owner's coverage states that subject to the other provisions of the policy, the insurance company insures against loss or damage sustained or incurred by the insured by reason of:

- Title to the estate or interest described in Schedule A being vested other than as stated therein;
- Any defect in or lien or encumbrance on the title;
- Unmarketability of the title; and
- Lack of a right of access to and from the land.

Significantly, the insuring clauses also state that the insurer will pay the costs, attorneys' fees, and expenses incurred in defense of the title, as insured, subject to the terms and conditions stated in the policy.

Lender's Policy

The first four insuring clauses of a lender's policy are the same as the owner's policy. A lender's policy contains the following additional insuring clauses that insure against loss or damage by reason of the following:

- The invalidity or unenforceability of the lien of the insured mortgage upon the title;
- The priority of any lien or encumbrance over the lien of the insured mortgage;
- Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor, or materials (a) arising from an improvement or work related to the land which is con-

tracted for or commenced before the policy date ("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;

- Any assessments for street improvements under construction or completed at Date of Policy which now have gained or hereafter may gain priority over the insured mortgage; or
- The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A of the policy, 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.

Like the owner's policy, the lender's policy provides for the payment of attorneys' fees and expenses in the defense of title or the lien of the insured mortgage subject to the policy's terms.

Exclusions From Coverage

The broad coverage stated in a title policy's insuring clauses is modified by the express exclusions and exceptions contained in the policy. The 1992 ALTA Owner's Policy contains four preprinted exclusions with several subsections. The lender's policy contains seven pre-printed exclusions, four of which are the same as in the owner's policy. The standard exclusions are not tailor-made for the particular policy, but cover certain types of risks that are not generally disclosed by a title examination or for which the insured may bear responsibility. The following exclusions are found on the inside of the policy jacket.

Land Use Regulation And Police Power

The standard owner's and lender's policies exclude from coverage those losses resulting from violations of governmental land use regulations and from exercises of the government's police power. Such matters are excluded because, in most states, a violation of building and zoning laws or other governmental land use regulations cannot be determined by a title search. Title insurers have determined that they do not want to assume the task of locating and interpreting land use laws, ordinances, and rulings. This exclusion also provides that exercises of police powers—restraints on property rights for the protection of public health, safety, and welfare—are excluded from coverage.

This exclusion, as well as certain of the exclusions discussed below, contains a "public records" qualification. If notice of the land use regulation or a title defect resulting from a violation or alleged violation "has been recorded in the public records at Date of Policy," the exclusion does not apply. Consequently, the issue frequently arises as to whether such a notice has been recorded in the "public records." The title policy's definition of "public records" limits the insurance company's responsibility to "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." This limitation is consistent with the title search function provided by title insurance. The title examiner searches those records which by law impart constructive notice to determine if there are matters that the policy will not insure against.

Eminent Domain

Standard policies also exclude from coverage any losses resulting from rights of eminent domain. This exclusion is included because eminent domain proceedings cannot always be discovered by a standard title examination.

Once notice of eminent domain does appear in the "public records," the exclusion has no application.

Matters Created, Suffered, Assumed, Or Agreed To By The Insured

Paragraph 3(a) of both standard owner's and lender's policies excludes from coverage title defects "created, suffered, assumed, or agreed to by the insured claimant." This exclusion is intended to prevent the title insurer from being liable for matters caused by the insured's "intentional, illegal, or inequitable conduct." *See Mattson v. St. Paul Title Co.*, 277 Ark. 290, 641 S.W.2d 16, 18 (1982). Courts have also defined the terms "suffered," "assumed," and "agreed to" used in this exclusion. Various courts have concluded that "suffered" means that the insured had the ability to prohibit or prevent the defect, but intentionally permitted the defect to occur. *See, e.g., American Savings and Loan Assoc. v. Lawyers Title Ins. Corp.*, 793 F.2d 780, 784 (6th Cir. 1986); *First American Title Ins. Co. v. Kessler*, 452 So.2d 35, 39 n.5 (Fla. App. 1984). Courts have defined "assumed" to require both knowledge and intent to assume the specific defect. *See, e.g., Mid-South Title Ins. Corp. v. Resolution Trust Corp.*, 840 F. Supp. 522, 529 (W.D. Tenn. 1993). The provision "agreed to" has been held to mean that the insured contractually accepted the lien or defect with specific knowledge of its extent. *See Arizona Title Ins. and Trust Co. v. Smith*, 21 Ariz. App. 371, 519 P.2d 860, 863 (1974). The insured's intent to agree to a defect cannot simply be inferred from the insured's knowledge of the defect. *See Tumwater State Bank v. Commonwealth Land Title Ins. Co.*, 51 Wash. App. 166, 752 P.2d 930, 933 (1988). As noted by one commentator:

"Most of the cases construing these terms in this exclusion have focused on (1) whether language in the insured's purchase or mortgage contract suggests that the insured knew of and intended to take title subject to a specific lien, encumbrance, or other title defect; or (2) whether the insured contractually assumed an obligation to perform some act and then failed to do so."

J. Palomar, *Title Insurance Law* §6.04[2] at 6-38 (1996).

Unrecorded Defects Known To The Insured

Standard exclusion 3(b) excludes from coverage defects that are not known to the title insurance company, not recorded in the "public records," but known to the insured and not disclosed in writing to the title insurance company before the issuance of the policy. This exclusion places a duty on the insured not to misrepresent knowingly the status of title and not to defraud the title insurer. The term "knowledge" is defined by the policy as "actual knowledge." Even when the insured has actual knowledge of the defect, however, the exclusion applies only when the insured fails to disclose the defect and the defect is not shown in the "public records." In *Cameron v. Benson* 57 Or. App. 169, 643 P.2d 1360 (1982), *rev'd on other grounds*, 295 Or. 98, 664 P.2d 412 (1983), the court held that the title insurance company was responsible where it did not except from coverage a mortgage and certain judgments. The insured had actual knowledge of the mortgage and judgments and failed to make disclosure of that information. The court refused to apply this exclusion, reasoning that the policy, "specifically excluded from coverage for encumbrances known to the insured and not shown by the public records. Implicit in that language is an assumption by [the insurer] of the risk of encumbrances shown in the public records, whether or not the insured had knowledge of them at the time the policy issued."

Other courts have held that if an insured actively misrepresents or conceals matters from the insurer, the insurer may have a defense based on fraud or breach of the implied

covenant of good faith and fair dealing. *See* Annot., *Misrepresentation or Concealment by Insured or Agent Avoiding Liability by Title Insurer*, 17 A.L.R. 4th 1077.

Defects Causing No Loss

Standard exclusion 3(c) excludes coverage for title defects resulting in no loss or damage to the insured. Courts have recognized that "title insurance is intended to indemnify an insured for losses suffered by reason of defects in the title to the property or by reason of liens or encumbrances on the property itself." *Valley Bank and Trust Co. v. U.S. Life Title Ins. Co.*, 776 P.2d 933 (Utah App. 1989) (quoting *Brown v. St. Paul Title Ins. Corp.*, 634 F.2d 1103, 1107 (8th Cir. 1980)). Because title insurance is a contract for indemnification, the insurer has no obligation to pay until the insured has suffered a loss. Many of the cases addressing this exclusion arise from the issue of whether the discovery of a defect in title triggers a loss or whether the insured must experience an out-of-pocket loss before the insurer becomes liable.

Post-Policy Defects

Standard exclusion 3(d) excludes coverage for title defects arising after the policy was issued. Because a title insurer insures "as of Date of Policy," title defects are covered only if they existed before the date the policy was issued. The title insurance company searches the chain of title and insures title through the date the policy is issued before deciding what risks it will insure against and what risks it will except from coverage. Any title problems that arise after that time are not included within the policy's coverage.

In most transactions, the title company performs a preliminary title search before closing and produces a commitment or preliminary title report. That report allows the buyer to inspect title and require that the seller cure identified title defects before the transaction can be closed. Upon collecting the necessary deeds, reconveyances, or other instruments necessary to cure those defects, the title insurer can extend its search through the time that the deed of conveyance is recorded and issue its actual title insurance policy through that date. Defects arising after that date are not covered.

Gratuitously Transferred Interests

The final clause of exclusion 3 is subparagraph (e), which provides that the policy excludes defects that would not have been incurred if the insured had paid value for the insured estate or interest. This exclusion prevents coverage when an insured owner or lender is deemed not to have been a purchaser for value and, therefore, not entitled to recording act protection. In other words, the loss of priority to a person protected by the recording act when the insured is not protected because the insured failed to pay value, will defeat a claim on the policy.

Lender's Violation Of State Doing Business Laws

Standard loan policies contain a pre-printed exclusion for situations in which the unenforceability of the insured lien results from the lender's failure to comply with "doing business" laws of the state where the land is situated. A comparable provision is not contained in the owner's policy. In some states, doing business statutes prohibit a foreign lender from making loans or require a certificate of authority from the state as a prerequisite. Consequences for violation of these laws may be the unenforceability of the transaction or criminal penalties. This exclusion places the responsibility for preventing loss under the statutes directly on the lender. The lead case examining this exclusion is *Title Ins. Co. of Minnesota v. American Savings and Loan Assoc.*, 866 F.2d 1284, 1285 (10th

Cir. 1989) (interpreting Colorado's "doing business" law).

Violation Of Usury Or Consumer Protection Laws

Standard lender's policy forms exclude damage or loss resulting from "invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer protection or truth in lending law." Under this provision, the title insurance company is not responsible if the insured mortgage or trust deed is found to be unenforceable because the underlying loan is usurious or because the insured violated consumer and credit protection or truth in lending laws.

Mechanic's Liens

The sixth numbered exclusion to the standard loan policy disallows coverage of losses resulting from:

"Any statutory lien for services, labor, or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is 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."

This exclusion must be read in conjunction with insuring clause 7 on the front of the lender's policy which states that the policy insures against loss arising from:

"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."

Because of the similarity of the language used in insuring clause 7 (stating what is covered), and exclusion 6 (stating what is not covered), the language must be reviewed carefully to understand how the provisions relate to one another.

Title insurers are willing to protect a lender against mechanic's liens arising from work contracted for or commenced before the policy date. Under many states' mechanic's liens laws, priority is determined by the date work was first commenced. Title insurers are willing to accept this risk because they can inspect the property to determine if any work has commenced. In addition, the title insurer can obtain appropriate indemnifications or other security from the owner if there is a concern regarding broken priority.

Title insurers are also willing to insure mechanic's liens arising from contracts or work commenced after the policy date under some circumstances. If the work is financed by proceeds of the insured loan which had been advanced by the policy date or that the lender was obligated to advance at that date, the insurer's risk is minimized. Insuring clause 6(b) provides priority coverage against mechanic's liens under these circumstances. On the other hand, when post-policy improvements are financed by optional advances, there is a significant risk that mechanic's liens will take priority with respect to the optional advances, and with respect to the entire loan under some state statutes. The

language contained in paragraph 6 of the standard loan policy exclusion specifically excludes coverage for work contracted for and commenced after the policy date that is not financed by proceeds the lender is obligated to advance as of the policy date.

Creditors' Rights

The creditors' rights exclusion is found in paragraph 4 of the standard owner's policy and in paragraph 7 of the standard lender's policy. The 1992 ALTA owner's policy contains the following creditors' rights exclusion:

"Any claim, which arises out of the transaction vesting in the Insured the estate or interest insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:

(i) The transaction creating the estate or interest insured by this policy being deemed a fraudulent conveyance or fraudulent transfer; or

(ii) The transaction creating the estate or interest insured by this policy being deemed a preferential transfer except where the preferential transfer results from the failure:

(a) To timely record the instrument of transfer; or

(b) Of such recordation to impart notice to a purchaser for value or a judgment or lien creditor."

The corresponding creditors' rights exclusion contained in the lender's policy is substantively the same, but reflects the different interest held by a lender.

By the exclusion's terms, the claim must arise out of the transaction by which the lender or owner received the insured interest. The exclusion does not apply when a transaction earlier in the chain of title is avoided because of creditors' rights laws. This exclusion is designed to protect the title insurer against the risk of the transaction being voided as a fraudulent conveyance, a preferential transfer, or a transfer in violation of creditors' rights under either state or federal law. The risk of an insolvent seller or borrower cannot be prevented by the title insurer through title examination.

Conditions And Stipulations

After the exclusions from coverage contained in the policy, the coverage is modified by the pre-printed section entitled "Conditions and Stipulations." These provisions define the terms used in the policy and describe the responsibilities of the insurer and the insured.

Policy Definitions

In reference to the policy exclusions, the policy defines certain terms. For example, "knowledge" is defined as "actual knowledge, not constructive knowledge or notice which may be imputed to an insured...." In addition, the policy defines "public records" as "records established under state statutes at Date of Policy for the purpose of imparting constructive notice...."

The term "insured" is defined differently in the owner's and lender's standard policies. In the owner's policy, the insured is defined as the named insured and "those who succeed to the interest of the named insured by operation of law as distinguished from purchase...." By contrast, the lender's policy defines the insured as "the owner of the indebtedness secured by the insured mortgage and each successor in ownership of the indebtedness" with certain exceptions. Consequently, a party who purchases the property from the insured owner is not an insured under the policy. However, a lender who purchases the indebtedness secured by a mortgage becomes an "insured" under the policy.

Continuation Of Insurance

The second paragraph of the Conditions and Stipulations defines the term of the policy. Again, the owner's and lender's provisions

must be distinguished. Under the standard owner's policy, the coverage continues in force "only so long as the insured retains an estate or interest in the land, or holds an indebtedness 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 covenants or warranty made by the insured in any transfer or conveyance of the estate or interest...."

Consequently, the insured's coverage terminates if the insured conveys to a purchaser without giving warranties of title.

The standard lender's policy continuation provision provides that the policy will continue in force in favor of:

- An insured who acquires title "by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage";
- Certain transfers of the estate so acquired to a parent or wholly owned subsidiary; and
- Any governmental agency that acquires the property by virtue of a contract of insurance or guaranty of the indebtedness.

These provisions recognize the needs of the lending industry and the governmental agencies that insure loans. The lender's continuation of insurance provision further provides that coverage terminates, similar to an owner's policy, if the insured acquires title and subsequently transfers the property to a purchaser by way of a conveyance without any covenants of warranty.

Insured's Obligations

The Conditions and Stipulations also define the insured's obligations with regard to claims made under the policy. Those obligations include the following:

- To provide a prompt written notice of any claim. Conditions and Stipulations paragraph 3;
- To follow up any notice of claim with a signed and sworn "proof of loss." Conditions and Stipulations paragraph 5. Note that in *Zions First Nat'l Bank v. Nat'l American Title Ins. Co.*, 749 P.2d 651 (Utah 1988), the Utah Supreme Court held that "substantial compliance" with the proof of loss condition was sufficient to meet the purpose of giving notice to the title insurance company. The court held that the insurer could not refuse to defend against a title claim solely on the basis that the insured's proof of loss was "unsworn," or that it failed to calculate the amount of the loss;
- To cooperate with the insurer's defense of the insured title. Conditions and Stipulations paragraph 4(d);
- To restrict the insured's right to settlement by precluding any claim for liability voluntarily assumed by the insured in settling any claim or suit without the insurer's prior written consent. Conditions and Stipulations paragraph 9(c).

Insurer's Settlement And Defense Options

The Conditions and Stipulations also provide the insurer with several options in responding to claims. Once the insurer determines that a claim is covered by the terms of the policy, the insurer is given the following options:

- To pay or tender payment of the amount of insurance. Conditions and Stipulations paragraph 6(a);
- To pay or otherwise settle with parties other than the insured or with the insured claimant. Conditions and Stipulations paragraph 6(b);
- To select counsel of its own choice and at its own cost to "provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien, or encumbrance or

other matter insured against by this policy." Conditions and Stipulations paragraph 4(a);

- To "institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest, as insured, or to prevent or reduce loss or damage to the insured." Conditions and Stipulations paragraph 4(b);

- To "institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest, as insured, or to prevent or reduce loss or damage to the insured." Conditions and Stipulations paragraph 4(b);

- To "pursue any litigation to final determination by a court of competent jurisdiction" and "to appeal from any adverse judgment or order." Conditions and Stipulations paragraph 4(c).

Once the title insurance company has undertaken the defense of its insured or brought an action to establish title, the pursuit of the litigation to "final determination" could take a number of years. Because a substantial period of time may be involved, it is not surprising that insureds have brought claims against insurers for damages they claim to have suffered while title is being established. Some courts considering such claims have concluded that defects must be removed by the insurer within a reasonable time and if the insurer fails to do so, the insurer may be liable for interim damages. *See, e.g., Nebo, Inc. v. Transamerica Title Ins. Co.*, 21 Cal. App. 3d 222, 98 Cal. Rptr. 237 (1971).

Subrogation Rights

As with other lines of insurance, title insurance policies provide for a right of subrogation when the insurer pays a claim. Conditions and Stipulations paragraph 13. The issue of subrogation frequently arises when an insurer pays or otherwise resolves an encumbrance and then asserts its right of subrogation against the insured's grantor pursuant to the covenants of title contained in a warranty deed. In that situation, the warranty deed is typically prepared by the title insurance company that issued the policy to the grantee under the warranty deed. In addition, the grantor, as the seller in the transaction, most likely paid the title insurance premium for its grantee. The policy, by its terms, does not provide any coverage to the grantor who is not an "insured" as defined by the policy. The grantor in that situation often asserts the defense that it would be inequitable to permit the insurer to assert a warranty claim under the subrogation clause in the policy since the grantor paid the premium and relied on the title commitment and policy. Some courts have accepted this defense. *See, e.g., Lawyers Title Ins. Corp. v. Capp*, 369 N.E.2d 672 n.1 (Ind. App. 1977); *U.S. Life Title Ins. Co. v. Romero*, 98 N.M. 699, 652 P.2d 249 (App.), *cert quashed*, 652 P.2d 1213 (1982). Other courts have permitted an insurer to assert subrogation rights under a warranty deed against a seller.

Exceptions To Coverage

Schedule B of standard title insurance policies contains preprinted general exceptions in Part One and special exceptions which are typed into the policy in Part Two. The difference between an exception and an exclusion has been described by one commentator as follows: "An exception becomes a particular interest for which coverage is not provided; an exclusion is more general and may be for either an interest in the property or a type of activity giving rise to an interest, modifying and limiting coverage." D. Burke, *Law of Title Insurance* §16.1, at 16:1 (1993).

Exceptions differ from region to region throughout the United States. The ALTA

owner's policy for the western region contains the following six preprinted exceptions in Part One of Schedule B:

- Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records;
- Any facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of said land or by making inquiry of persons in possession thereof;
- Easements, claims of easement, or encumbrances which are not shown by the public records;
- Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose and which are not shown by the public records;
- Unpatented mining claims, reservations, or exceptions in patents or in Acts authorizing the issuance thereof;
- Water rights, claims, or title to water;
- Any lien, or right to a lien, for services, labor, or material theretofore or hereafter furnished, imposed by law and not shown by the public records.
- Most lender's policies typically omit the preprinted exceptions. The exceptions in a lender's policy are more likely to be the result of negotiations between the lender and the title insurer.

Taxes And Special Assessments

The first standard exception is for taxes and special assessments that are not shown as liens by the records of the appropriate taxing authority or the "public records." This exception protects the title insurer from the risk of taxes and special assessments that may be authorized by law but have not appeared in any record before the policy date. Only if a lien has been recorded or is contained in the taxing authority's records will the insured have a claim for the tax or assessment.

Parties In Possession

The second standard exception provides that the policy does not insure against losses resulting from defects not shown by the "public records" but which could be ascertained by an inspection of the land or by making inquiry of persons in possession. This exception results from the legal rule that a party's open possession of land may constitute constructive notice of a claimed interest. In addition, that possession could ripen into adverse possession or some other type of possessory interest. Because title insurers do not typically inspect the land as part of a title examination, this exception puts the burden on the insured to ascertain the interests of any parties who may be in possession.

Off-Record Easements And Encumbrances

The third preprinted exception provides that the policy does not insure against easements or encumbrances not shown by the "public records." This exception is intended to cover easements by prescription, by necessity, by implication and the like that cannot be discovered by a title search. Because easements that are shown by the "public records" as defined by the policy are not affected by this exception, the issue regarding this exception's application often turns on whether the easement is disclosed by the "public records." *See, e.g., Upton v. Mississippi Valley Title Ins. Co.*, 469 So.2d 548, 555-56 (Ala. 1985) (no title insurance coverage for easement described in an unrecorded judgment); *Sterns v. Title Ins. Trust Co.*, 18 Cal. App. 3d 271, 95 Cal. Rptr. 682 (1971) (recorded surveys which did not impart constructive notice under California law were not "public records" within the meaning of a title insurance policy).

Accurate Survey

The exception for matters that would be disclosed by an accurate survey is designed to protect the insurer from matters affecting title, but are not shown by the chain of title. It is the insured's obligation to obtain a survey. Typically, the insured can pay an additional premium to receive an extended coverage policy which omits the Schedule B general exceptions, including the exception for what would be revealed by a correct survey. In addition, the insured may desire to provide a survey to the insurer and purchase an endorsement expressly covering encroachments and boundary disputes.

Unless a boundary conflict is disclosed by the documents of record, the survey exception applies to bar to any claims under the policy as a result of the boundary dispute. Such claims may result from an asserted boundary by acquiescence, adverse possession, monuments that have been displaced, or boundaries established by erroneous surveys. Such disputes are often emotionally charged between adjoining property owners and become expensive to litigate requiring expert testimony to establish the boundary lines.

Mineral And Water Rights

Standard title insurance policies only insure ownership of the surface estate of the land. Because mineral rights can be severed from the surface rights, policies often contain a preprinted exception for mineral rights. In addition, title insurance companies are unwilling to accept the risks attendant to the ownership of water rights and, therefore, except coverage for water rights and claims of title to water.

Mechanic's Liens

Owner's policies contain a preprinted exception for mechanic's liens. By contrast, lender's policies contain an insuring clause which provides a limited coverage against mechanic's liens and a preprinted exclusion reinforcing the limit on coverage. The plain language policy form does not except coverage for mechanic's liens.

Special Exceptions

Upon completing the title search, the title insurance company will list in Schedule B, Part Two, the special exceptions to coverage relating to the specific land that is the subject of the policy. The parties to the transaction then may attempt to have the listed title defects cured before closing. Depending on the type of problem and the risk involved, the insured also might be able to negotiate with the title insurer to purchase an endorsement for an additional fee to delete or insure over some of the items listed as special exceptions in the preliminary report. The special exceptions that are not resolved are typed on the final policy.

SUBMITTING A CLAIM • The procedure for submitting a claim is governed strictly by the terms of the policy. Generally, the claim must be submitted in writing as soon as the insured becomes aware that a claim exists.

Paragraph 3 of the Conditions and Stipulations requires that the insured notify the title insurance company promptly and in writing:

- In case of any litigation involving title;
- In case knowledge may come to the insured of any adverse claim for which the title company may be liable; and
- If title is rejected as unmarketable.

If such notice is not timely given, the policy provides that the title insurance company's liability with respect to such matter is terminated subject to a prejudice limitation. That is, the failure to provide timely notice terminates the title company's liability only in the event that the failure results in prejudice to the company and

its ability to defend the insured or resolve the title problem.

To speed up and facilitate the processing of the claim, it is advisable for the claimant to submit the following as early as possible:

- The initial notice of claim pursuant to the policy terms;
- A copy of the policy;
- Copies of pertinent documentation like written correspondence, summons, and complaint;
- Proof of loss with documentation evidencing the existence and value of the loss;
- A written list of deadlines and dates of service of process so the insurer can timely respond; and
- A copy of the written notice and enclosures to the title insurance agency that issued the policy to facilitate the obtaining of the title by the underwriter, and the underwriter's response to the claim.

Paragraph 5 of the policy Conditions and Stipulations further requires the insured to submit a proof of loss or damage. The proof of loss must be furnished to the insurance company within 90 days after the insured claimant has ascertained the facts giving rise to the loss or damage.

CLAIMS DISPUTES • Disputes may arise regarding a submitted title insurance claim. The insurer may conclude that the claim is beyond the scope of the policy or is excluded or excepted from coverage by operation of the provisions described above. If the insurer denies the claim, insist that the denial be stated in writing, that the insurer recite the facts on which the denial is based, and specify the basis for denying the claim. If you believe that the insurer has failed to consider relevant facts, has misapplied the policy provisions, or has improperly denied the claim for other reasons, your best recourse is to take it up with the title company first before initiating litigation or another dispute resolution process. If a mistake is pointed out by clear communication with the insurance company's representative, it can be corrected. If a dispute regarding coverage cannot be resolved with the insurer, the ALTA policy forms specify that disputes are subject to mandatory arbitration at the request of one party unless the policy amount is in excess of $1 million.

Arbitration is a familiar process that has been applied in many dispute resolution contexts. Generally stated, arbitration is a process in which the parties agree to submit their dispute for resolution to a neutral third-party arbitrator or panel. The decisions of the arbitrator are binding on the parties and can typically be enforced through the courts. *See generally* James Readey, *Alternative Dispute Resolution—A Trial Lawyer's Primer*, 53 Ins. Couns. J. 300 (1986); Michael Hoellering, *Arbitrability of Disputes*, 41 Bus. Law. 125 (1985). The parties can agree either before or after a dispute begins to submit a dispute to arbitration.

Policy Provisions

An arbitration clause was not added to the ALTA policy forms until 1987. An arbitration clause is found as standard condition in the post-1987 ALTA forms and in the general conditions to both the 1992 ALTA owner's and lender's policies. The complete text of that condition reads as follows:

"Unless prohibited by applicable law, either the Company or the Insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is

$1 million or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is in excess of $1 million shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.... The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.... A copy of the Rules may be obtained from the Company upon request."

The inclusion of this general condition recognizes the advantages of arbitration as a dispute resolution method. Arbitration can avoid the high costs and delays attendant to litigation and offers the benefit of a decision-maker who is familiar with issues facing the title industry.

Scope Of Arbitrable Issues

The policy arbitration clause is broadly worded and provides that "arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the company in connection with its issuance or the breach of a policy provision or other obligation." This language is broad enough to include claims under the title policy itself as well as related tort claims. From the insurer's standpoint, issues regarding negligence in performing abstracting services may present the most useful opportunities for arbitration. *See* William Colavito, *Revised ALTA Title Insurance Forms*, 2 Prob. & Prop. 41, 43 (Jan.-Feb. 1989). The language is also sufficiently broad to include claims for bad faith. *See* J. Palomar, *Title Insurance Law* §8.06, at 8-51 (2000) (noting that "the language also would encompass an insured's claim that the title insurer has acted in bad faith.") The scope of arbitrable issues may be affected by application of state and federal arbitration acts, the nature of the claim, and applicable substantive law.

Application Of State And Federal Arbitration Acts

When a transaction involves properties located in different jurisdictions, the arbitrability of a dispute may depend upon the application of the arbitration act of the jurisdiction in which the property is located. Many states have adopted a version of the Uniform Arbitration Act which contains no limitation on what kinds of disputes are subject to mandatory arbitration. Uniform Arbitration Act §§1-25 (1955), 7 U.L.A. 4 (1979). Other states, however, have adopted state laws specifically prohibiting mandatory arbitration provisions in insurance policies. *See* J. Palomar, supra, §8.06 at 8-52; *see, e.g., Young v. Security Union Title Ins. Co.*, 971 P.2d 1233 (Mont. 1998) ("when [the statute] provides that arbitration agreements in 'insurance policies' are invalid and unenforceable, that provision pertains to title insurance policies, as well as other types of insurance coverage"). As a result, state statutes should be consulted to determine whether a mandatory arbitration clause can be enforced. In transactions involving interstate commerce, the Federal Arbitration Act preempts state statutes. Federal Arbitration Act, 9 U.S.C. §1, et seq.

When interstate commerce is involved, state courts must apply the Federal Arbitration Act in construing the parties' arbitration agreement. *See, e.g., Fidelity National Title of Tenn. v. Jerraco Management, Inc.*, 722 So.2d 740 (Ala. 1998); *Jack B. Anglin Co., Inc. v. The Honorable Arthur Tipps,*

Judge, 842 S.W.2d 266, 269-270 (Tex. 1992); *see also Southland Corp. v. Keating*, 104 S.Ct. 852, 861 (1984). In *Fidelity National Title of Tenn. v. Jerraco Management, Inc.*, 722 So.2d 740 (Ala. 1998), the Alabama Supreme Court upheld a title insurer's motion to compel arbitration in the face of a state statute prohibiting compulsory arbitration. The transaction in which the policy was issued "involved" interstate commerce and, as a result, the interpretation of the arbitration clause in the policy was governed by and found to be enforceable under the Federal Arbitration Act, which preempted contrary state law. The court observed that the title policy affected interstate commerce since it was issued by a Tennessee corporation protecting an Alabama corporation's mortgage in connection with a federally regulated loan transaction. *Cf. Stewart Title Guaranty Co. v. Mack*, 945 S.W.2d 330 (Texas App. 1997) (rejecting the insurer's argument that arbitration could be compelled under the Federal Arbitration Act when the transaction did not involve interstate commerce).

Title Versus Escrow Matters

The broad language of the arbitration clause covers all disputes between the insurer and the insured "arising out of or relating to" the title policy issued in the transaction and "any service of the [insurer] in connection with its issuance or breach of a policy provision or other obligation." This language encompasses both claims under the policy and disputes arising in connection with the escrow closing in which the policy is issued. Consequently, the arbitration provision would apply to a claim that the title insurer committed negligence in closing the transaction, searching title, or failing to disclose information.

Mediation

Mediation is the process in which a neutral mediator assists the parties to reach a mutually agreeable resolution to a dispute. E. Plapinger and D. Stienstrau, *ADR and Settlement in the Federal District Courts*, at 65 (1996). The mediation process is probably the oldest and most popular alternative dispute resolution technique. Mediation has been recommended for disputes involving title insurance policies that do not have an arbitration clause. J. Palomar, supra, §8.06[2] at 8-58.

Mediation can be a highly effective process for the resolution of pre-policy and post-policy disputes. For example, a dispute may arise after the issuance of the commitment regarding whether the commitment's requirements have been satisfied. Even if an arbitration clause applies, mediation may be used to avoid expensive litigation.

The success of mediation is largely dependent upon the parties' willingness to seek a negotiated resolution to a dispute. According to the AAA, statistics show that 85 percent of commercial matters submitted to voluntary mediation end in written settlement agreements. American Arbitration Association, *A Guide of Mediation and Arbitration for Business People*, which can be found online at www.adr.org/.

CONCLUSION • Title insurance is not a guarantee against title defects. In fact, the structure of the standard policies anticipates that defects may exist. When defects arise, the title insurer can resolve them by defending title or taking other corrective action. The insurer's obligation to indemnify a loss applies only if the insurer is unable to resolve the defect. Knowing what to expect when a claim is made can dispel misconceptions that may result in claim disputes.

PRACTICE CHECKLIST FOR
Understanding The Title Insurance Policy

A crucial concern in any real estate transaction is that a clear title is conveyed to the seller. Ordinary due diligence can usually uncover any problems, but when it doesn't, the operation of a title insurance policy can make all of the difference.

• The first major component of the title insurance policy is its insuring provisions. These appear on the first page of the policy, and differ depending on whether it is an owner's policy or a lender's policy. For an owner's policy, the insurance company insures against loss or damage sustained or incurred by the insured by reason of:

__ Title to the estate or interest described in Schedule A being vested other than as stated therein;

__ Any defect in or lien or encumbrance on the title;

__ Unmarketability of the title; and

__ Lack of a right of access to and from the land.

• A lender's policy contains the same first four insuring clauses as the owner's policy, but has additional insuring clauses that insure against loss or damage by reason of the following:

__ The invalidity or unenforceability of the lien of the insured mortgage upon the title;

__ The priority of any lien or encumbrance over the lien of the insured mortgage;

__ Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor, or materials arising from specified circumstances;

__ Any assessments for street improvements under construction or completed at date of policy which have gained or may gain priority over the insured mortgage; and

__ The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A of the policy, 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.

• The standard exclusions from coverage exclude title defects arising from:

__ Land use regulation and police power;

__ Eminent domain;

__ Matters created, suffered, assumed, or agreed to by the insured;

__ Unrecorded defects known to the insured;

__ Defects causing no loss;

__ Post-policy defects;

__ Gratuitously transferred interests;

__ Violation of usury or consumer protection laws;

__ Mechanic's liens; and

__ Creditors' rights.

• Schedule A of the policy identifies the amount of insurance, the insured, and the land covered by the policy.

- The next major part of the policy is "Conditions and Stipulations." These define terms and describe the responsibilities of the insurer and insured (notices, subrogation, settlement, and so on).
- The final major part of the policy is "Exceptions." Exceptions are more specific than exclusions, and title insurance policies sometimes carry them to address specific circumstances or questions in a transaction.

Deed

This Deed is made on
BETWEEN

whose post office address is

referred to as the Grantor,
AND

whose post office address is

referred to as the Grantee.
The words "Grantor" and "Grantee" shall mean all Grantors and all Grantees listed above.

1. Transfer of Ownership. The Grantor grants and conveys (transfers ownership of) the property (called the "Property") described below to the Grantee. This transfer is made for the sum of

The Grantor acknowledges receipt of this money.

2. Tax Map Reference. (N.J.S.A. 46:15-1.1) Municipality of
Block No. Lot No. Qualifier No. Account No.

☐ No lot and block or account number is available on the date of this Deed. (Check box if applicable.)

3. Property. The Property consists of the land and all the buildings and structures on the land in the of
County of and State of New Jersey. The legal description is:

☐ Please see attached Legal Description annexed hereto and made a part hereof. (Check Box if Applicable.)

Prepared by: *(print signer's name below signature)*	(For Recorder's Use Only)
_____	

The street address of the Property is:

4. Promises by Grantor. The Grantor promises that the Grantor has done no act to encumber the Property. This promise is called a "covenant as to grantor's acts" (N.J.S.A. 46:4-6). This promise means that the Grantor has not allowed anyone else to obtain any legal rights which affect the Property (such as by making a mortgage or allowing a judgment to be entered against the Grantor).

5. Signatures. The Grantor signs this Deed as of the date at the top of the first page. (Print name below each signature.)

Witness by:

_____ _____ (Seal)

_____ _____ (Seal)

STATE OF NEW JERSEY, COUNTY OF SS:
I CERTIFY that on

personally came before me and stated to my satisfaction that this person (or if more than one, each person):
(a) was the maker of this Deed; and,
(b) executed this Deed as his or her own act; and
(c) made this Deed for $ as the full and actual consideration paid or to be paid for the transfer of title. (Such consideration is defined in N.J.S.A. 46:15-5.)

RECORD AND RETURN TO:

_____

Print name and title below signature

Mortgage

This mortgage is made on
BETWEEN the Borrower(s)

whose address is

referred to as "I,"
AND the Lender

whose address is

referred to as the "Lender."

If more than one Borrower signs this Mortgage, the word "I" shall mean each Borrower named above. The word "Lender" means the original Lender and anyone else who takes this Mortgage by transfer.

1. **Mortgage Note.** In return for a loan that I received, I promise to pay $ (called "Principal"), plus interest in accordance with the terms of a Mortgage Note (referred to as the "Note") dated . The Note provides for monthly payments of $ and a yearly interest rate of %. All sums owed under the Note are due no later than . All terms of the Note are made part of this Mortgage.

2. **Property Mortgaged.** The property mortgaged (called the "Property") to the Lender is located in the of , County of and State of New Jersey. The Property includes: (a) the land; (b) all buildings that are now, or will be, located on the land; (c) all fixtures that are now, or will be, attached to the land or building(s) (for example, furnaces, bathroom fixtures and kitchen cabinets); (d) all condemnation awards and insurance proceeds relating to the land and building(s); and (e) all other rights that I have, or will have, as owner of the Property. The legal description is:

☐ Please see attached Legal Description annexed hereto and made a part hereof (check box if applicable).

3. **Rights Given to Lender.** I mortgage the Property to the Lender. This means that I give the Lender those rights stated in this Mortgage and also those rights the law gives to lenders who hold mortgages on real property. When I pay all amounts due to the Lender under the Note and this Mortgage, the Lender's rights under this Mortgage will end. The Lender will then cancel this Mortgage at my expense.

4. **Promises.** I make the following promises to the Lender:

a. **Note and Mortgage.** I will comply with all of the terms of the Note and this Mortgage.

b. **Payments.** I will make all payments required by the Note and this Mortgage.

c. **Ownership.** I warrant title to the premises (N.J.S.A. 46:9-2). This means I own the Property and will defend my ownership against all claims.

d. **Liens and Taxes.** I will pay all liens, taxes, assessments and other government charges made against the Property when due. I will not claim any deduction from the taxable value of the Property because of this Mortgage. I will not claim any credit against the Principal and interest payable under the Note and this Mortgage for any taxes paid on the Property.

e. **Insurance.** I must maintain extended coverage fire or property insurance on the Property. The Lender may also require that I maintain flood insurance or other types of insurance. The insurance companies, policies, amounts, and types of coverage must be acceptable to the Lender. I will notify the Lender in the event of any substantial loss or damage. The Lender may then settle the claim on my behalf if I fail to do so. All payments from the insurance company must be payable to the Lender under a "standard mortgage clause" in the insurance policy. The Lender may use any proceeds to repair and restore the Property or to reduce the amount due under the Note and this Mortgage. This will not delay the due date for any payment under the Note and this Mortgage.

f. **Repairs.** I will keep the Property in good repair, neither damaging nor abandoning it. I will allow the Lender to inspect the Property upon reasonable notice to me.

g. **Statement of Amount Due.** Upon request of the Lender, I will certify to the Lender in writing:
(a) the amount due on the Note and this Mortgage, and
(b) whether or not I have any defense to my obligations under the Note and this Mortgage.

h. **Rent.** I will not accept rent from any tenant for more than one month in advance.

i. **Lawful Use.** I will use the Property in compliance with all laws, ordinances and other requirements of any governmental authority.

5. **Eminent Domain.** All or part of the Property may be taken by a government entity for public use. If this occurs, I agree that any compensation be given to the Lender. The Lender may use this to repair and restore the Property or to reduce the amount owed on the Note and this Mortgage. This will not delay the due date for any further payment under the Note and this Mortgage. Any remaining balance will be paid to me.

6. **Tax and Insurance Escrow.** If the Lender requests, I will make regular monthly payments to the Lender of: (a) 1/12 of the yearly real estate taxes and assessments on the Property; and (b) 1/12 of the yearly cost of insurance on the Property. These payments will be held by the Lender without interest to pay the taxes, assessments and insurance premiums as they become due.

7. **Payments Made for Borrower(s).** If I do not make all of the repairs or payments as agreed in this Mortgage, the Lender may do so for me. The cost of these repairs and payments will be added to the Principal, will bear interest at the same rate provided in the Note and will be repaid to the Lender upon demand.

8. **Default.** The Lender may declare that I am in default on the Note and this Mortgage if:
   a. I fail to make any payment required by the Note and this Mortgage within days after its due date;
   b. I fail to keep any other promise I make in this Mortgage;
   c. the ownership of the Property is changed for any reason;
   d. the holder of any lien on the Property starts foreclosure proceedings; or
   e. bankruptcy, insolvency or receivership proceedings are started by or against any of the Borrowers.

9. **Payments Due Upon Default.** If the Lender declares that I am in default, I must immediately pay the full amount of all unpaid Principal, interest, other amounts due on the Note and this Mortgage and the Lender's costs of collection and reasonable attorney fees.

10. **Lender's Rights Upon Default.** If the Lender declares that the Note and this Mortgage are in default, the Lender will have all rights given by law or set forth in this Mortgage. This includes the right to do any one or more of the following:
   a. take possession of and manage the Property, including the collection of rents and profits;
   b. have a court appoint a receiver to accept rent for the Property (I consent to this);
   c. start a court action, known as foreclosure, which will result in a sale of the Property to reduce my obligations under the Note and this Mortgage; and
   d. sue me for any money that I owe the Lender.

11. **Notices.** All notices must be in writing and personally delivered or sent by certified mail, return receipt requested, to the address given in this Mortgage. Address changes may be made upon notice to the other party.

12. **No Waiver by Lender.** Lender may exercise any right under this Mortgage or under any law, even if Lender has delayed in exercising that right or has agreed in an earlier instance not to exercise that right. Lender does not waive its right to declare that I am in default by making payments or incurring expenses on my behalf.

13. **Each Person Liable.** This Mortgage is legally binding upon each Borrower and all who succeed to their responsibilities (such as heirs and executors). The Lender may enforce any of the provisions of the Note and this Mortgage against any one or more of the Borrowers who sign this Mortgage.

14. **No Oral Changes.** This Mortgage can only be changed by an agreement in writing signed by both the Borrower(s) and the Lender.

15. **Signatures.** I agree to the terms of this Mortgage and have set my hand and seal hereunto. If the Borrower is a corporation, its proper corporate officers sign and seal this mortgage.

Witnessed or Attested by: _____ (Seal)

_____ _____ (Seal)

STATE OF NEW JERSEY, COUNTY OF SS:
I CERTIFY that on

personally came before me and stated to my satisfaction that this person (or if more than one, each person):
(a) was the maker of the attached instrument; and,
(b) executed this instrument as his or her own act.

_____

Print name and title below signature

NOTE MORTGAGE	*Dated:*
	Record & Return to:
Borrower(s),	
TO	
Lender(s).	

To the County Recording Officer of County:

This Mortgage is fully paid. I authorize you to cancel it of record.

Dated _____ _____ (Seal)

Lender

COANJ

Constitutional Officers Association of New Jersey

Introduces

The Recorders Document Reference Manual

The manual includes:

- Recording requirements for over 165 documents recorded with County Clerks / Registers throughout the State of New Jersey
- Realtry Transfer Tax calculations
- Recording fees
- Explanation of acknowledgments
- Glossary of terms

..... and much more information for recordation.

A valuable guide for
Law firms - Title Companies - Mortgage Companies
Financial Institutions - Government Agencies

Item	Quantity	Unit Cost	Subtotal
CD Rom(s)	_____	$60.00 each	_____
S/H (CD)	_____	$1.00 each	_____
Manual(s)	_____	$50.00 each	_____
S/H Manual)	_____	$4.00 each	_____
		Grand Total	_____

Ship To:

Name:_____

Address:_____

_____

_____

_____ _____

Authorized Signature Date

Please make checks payable to: COANJ

Print and fill out this form.
Mail the completed form and Check To:

Union County Courthouse
2 Broad Street, Room 115
Elizabeth, NJ 07207
Attention: Alan J. Falcone, Deputy Clerk