

MESSAGE FROM THE WLTA PRESIDENT

by Dwight Bickel  
WLTA President

THE VALUE PROVIDED BY  
THE 2006 ALTA POLICIES

On June 17, 2006, the American Land Title Association (ALTA) adopted many new and revised forms for use by title insurance companies throughout the United States. This article is a brief guide for WLTA members and affiliated members to help them understand the changes made to the basic title insurance forms. A detailed comparison essay and copies of all the forms are available at [www.wltaonline.org/resources](http://www.wltaonline.org/resources).

The 2006 policy forms have been designed to more adequately satisfy the needs of the commercial market. The new forms continue to be the basic policy form and appropriate for any property type. Where the ALTA Homeowner's Policy is available, it continues to be significantly more coverage for residential property.

There should be very little impact on the customers or on the procedures of real estate transactions. The new policy forms have the same component parts and look about the same. The changes are primarily on the jacket.

Schedule A will look almost the same and Schedule B is not changed at all.

Just like the prior forms, the new forms automatically provide extended coverage, expecting Schedule B to contain general exceptions where standard coverage is issued. There is very little change to the process of preparing a commitment or underwriting to issue the policy.

The 2006 policy forms provide new value to the Insureds: improved coverage provisions, improved definitions, improved claim administration procedures and substantially improved Conditions describing the rights and duties of both parties.

Policy Coverage.

There are many new covered risk paragraphs. Upon analysis, there is not such a significant increase in the covered risks. Many of the specific risks that are now detailed were previously included within the few, broad coverage



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IMPORTANT REMINDERS

- Don't forget to sign up for the 2006 Tri-State Land Title Convention taking place August 17-19. Information can be found on our website at [wltaonline.org](http://wltaonline.org)
- If you cannot make the entire convention, we urge you to attend the WLTA Business Meeting at 2:00pm on August 18th. The meeting is free to members and there is no need to register in advance.

## JUDICIARY CASE REPORT

by Derek Matthews

*Chief Region Counsel, Stewart Title Guaranty Company*

The title industry's perceived failure to abide by RESPA has led HUD to consider drastic changes to the law.

### RESPA AND TITLE INSURANCE

The title industry has received unprecedented attention in the national media in recent years. Unfortunately, most of this attention has focused on allegations that industry members violated the Real Estate Settlement Procedures Act ("RESPA") and similar state laws. Passed by Congress in 1974, RESPA prohibits those in the settlement service business from giving anything of value to real estate agents, brokers, lenders, builders and others in a position to refer business. RESPA does not require a quid pro quo. In other words, there can be a violation even if no business is referred in return for the "thing of value." RESPA also prohibits the receipt of referral fees or kickbacks, and many real estate brokers have paid fines recently for doing so.

RESPA is enforced primarily by the Department of Housing and Urban Development ("HUD"), though it can also be enforced by state agencies. Until very recently, enforcement of RESPA by HUD was negligible. From 1974 to 2004, there were only 30 RESPA related settlements with HUD. However, 14

settlements were reached in 2005 alone!

RESPA also allows for private lawsuits against violators. This has led to the filing of numerous class action lawsuits against title companies and others who are alleged to have violated RESPA's kickback prohibition. Many of these suits have concluded in large financial settlements, which is sure to spur further litigation in this area.

Many states have laws or regulations similar to RESPA, and some have been very aggressive in enforcing them. For example, title companies have paid multi-million dollar settlements in several states relating to allegations that referral fees were being disguised as reinsurance premiums.

The title industry's perceived failure to abide by RESPA has led HUD to consider drastic changes to the law, and has Congress considering various changes to title insurance regulation. While the eventual changes that come may, in the long run, be beneficial for the industry, the uncertainty of how and what changes will occur is likely to lead to many nervous years ahead for those of us in the industry.



## '06 LEGISLATIVE SESSION SYNOPSIS

by Gary Kissling

*President, Fidelity Title Company  
Yakima, WA*

and Betty J. Schall

*Vice President, Underwriting Counsel, Old  
Republic National Title Insurance Company*

If you know of proposals that may affect our industry, please notify Gary Kissling, Betty Schall or anyone on the Executive Board.

The 2006 Legislative Session was the second of the two year cycle and was a "short" session. In short sessions, budgetary matters usually dominate the attention of both houses but some bills of concern to us are always introduced. The following is a brief synopsis of the bills that were enacted into law. Unless otherwise noted, statutes enacted in 2006 become effective June 7, 2006.

### **Chapter 58 Laws of 2006, Homeowner's Associations: Discriminatory Provisions**

The intent of this statute is to allow a homeowner's association to amend their governing documents to remove discriminatory covenants that are void and/or unenforceable under the federal Fair Housing Amendments Act of 1988 and /or RCW 49.60.224. While the goal is admirable, the Legislative Committee consensus was that the bill as written will not achieve that goal because the offensive language will remain in the recorded documents. Our efforts to work with drafters were rebuffed. Dwight Bickel, Gary Kissling and Suzanne Larsen testified and/or talked with sponsors about this issue. The bill does not impose any duty on title insurers and does not appear to change our practices.

### **Chapter 21 Mortgage Lending Fraud Prosecution Account**

This statute imposes a \$1.00 fee on recording a mortgage or deed of trust for increasing state investigations of mortgage fraud.

### **Chapter 203 Non-Probate Assets Disposed Under a Will**

This bill has no direct impact on

our industry. It primarily affects non-probate distribution of personal property such as financial accounts.



### **Chapter 204 Uniform Transfer to Minors Act; effective date July 1, 2007**

This statute changes the definition of a "minor" for purposes of application of this Act to 25 years to allow the transferor to elect to have the custodian control the property gifted until the minor is 25. The election must be in writing in the document creating the gift or in an extension executed after July 1, 2007.

We expect that next year's session may be more active. The Legislative Committee is currently monitoring several proposals that may result in bills for the 2007 Session. One is from the Real Property, Probate and Trust Section of the Bar that would amend the Deed of Trust Act. Betty Schall is our liaison on that issue. Another concerns possible amendment of environmental covenants, Ashley Callahan is our liaison on that. Also, George Peters is a member of a group reviewing possible changes in the Condominium Act but that is not expected to be introduced next year. It is important for us to have input on bills before they are introduced whenever possible. If you know of proposals that may affect our industry, please notify Gary Kissling, Betty Schall or anyone on the Executive Board so that the Association can be an effective advocate for us.

## SERIAL BANKRUPTCY FILERS: BEWARE!

by Marjorie Bardwell

*Senior Underwriting Counsel, Chicago Title Insurance Company*

**If the individual debtor has had one dismissal within one year preceding the current filing, the stay for secured creditors will automatically expire 30 days after the second filing**

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, effective October 17, 2005, contained substantial changes to the Federal Bankruptcy Code. Among those changes was a new set of sanctions for "serial filers" or debtors that file successive petitions, usually in order to delay pending foreclosure actions. This abuse of the automatic stay is dealt with under new sections 362 (b) (20); 362 (c) (3) and 362 (d) (4) of the Code.

The common scheme was to file bankruptcy on the eve of the Sheriff's or Trustee's sale, stopping the sale and requiring the lender to seek a lifting of the automatic stay in the bankruptcy case, then dismiss the bankruptcy case as the lender was about to get the stay lifted. Repeat as necessary to delay the ouster of the non-paying borrower as long as possible, sometimes for years.

The Code now provides that if the individual debtor has had one dismissal within one year preceding the current filing, the stay for secured creditors will automatically expire 30 days after the second filing, if not extended by the court. If there have been two or more filings within the preceding year, the stay will not be imposed

at all. There is a provision that the court can enter an order confirming that no stay is in effect. Some courts have indicated that they will not enter such an order in that it adds to their workload.

The important thing to know is that even though a title insurer should be able to "do the math" and identify those cases that appear to be serial by examining the bankruptcy court records, and thus be tempted to assume that there is no stay in effect, there is a provision that the bankruptcy court upon certain conditions can, within 30 days from the filing of the newest petition, impose the stay in the subsequent case. In addition, the previous cases may have been filed in different districts.

Therefore, if the title insurer is requested to rely upon the "automatic lifting of the automatic stay" by a lender commencing or in the middle of foreclosure, the lender may need to provide confirmation of some of the facts surrounding the previous filings and that there has been no request to re-impose the stay in the current case.



## REDUCE THE RISK OF EMPLOYEE FRAUD

by Stephanie Cihak

*Senior Vice President,  
Title and Escrow Services Industry Manager,  
Union Bank of California*



involve falsification of an organization's financial statements, such as overstating revenues or understating liabilities or expenses.

**U.S. employers are being fleeced by their own employees to the tune of about \$660 billion a year.**

The typical U.S. business loses 6% of its annual revenues to "occupational fraud," according to the Association of Certified Fraud Examiners (ACFE). U.S. employers are being fleeced by their own employees to the tune of about \$660 billion a year, the ACFE estimates.

Add to these figures the potential that employee fraud has for damaging an organization's reputation and future business prospects — when fraud cases get into the newspaper — and it's evident that this type of crime poses a dangerous risk to any business.

It's equally clear that organizations are driven to protect profitability and, therefore, must focus on reducing employee fraud losses.

### Forms of Fraud

Employee fraud can occur in a variety of forms. The ACFE segments it into three categories:

- Asset misappropriations involve theft or misuse of an organization's assets. Common examples include skimming revenues, stealing equipment and supplies, and payroll fraud.
- Corruption occurs when fraudsters wrongfully use their influence in a business transaction to procure some benefit for themselves or another person. Examples are accepting kickbacks and engaging in conflicts of interest.
- Fraudulent statements generally

### Basic Risk Reduction Steps

The ACFE says the median recovery among victim organizations is only 20% of the original loss, and almost 40% of victims recover nothing. So prevention efforts are critical.

"Some of the most effective strategies for combating occupational fraud are just common sense practices," says Stephanie Cihak, Senior Vice President, Title and Escrow Services Industry Manager at Union Bank of California. "One of the most important is establishing policies and procedures for maintaining separation of duties related to financial transactions."

Employees authorized to issue checks or initiate electronic payments should not also be approving those payments or balancing accounts, even if only temporarily due to another employee's vacation, she advises.

Another basic but powerful fraud reduction measure is reviewing and balancing account statements as soon as they become available, so you can put an end to fraud scams that might be ongoing, Cihak suggests.

"It's important to continually review procedures and policies, as well

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## TRUSTS AND EXCISE TAX

by David E. Lawson

*Vice President and Pacific Northwest Underwriter,  
Chicago Title Insurance Company*



**The new investor in the trust may have told the original owners that they would have a right to re-acquire the property or the beneficial interests in the trust.**

Several recent transactions have come to light in which property owners deed their property into a trust which does not appear to be an obvious estate planning "living trust" or "family trust." Unlike with a living trust, the trustee is rarely the former property owner. And, the trust is often named after the property address and/or it is called an "investment trust" or a "land trust." Many of these trusts are designed to have transferable beneficial interests. Some trusts may be designed to effectively sell the land and avoid paying excise tax. Others may be designed to hide a transferee's interest from creditors whose liens or judgments would otherwise attach to the property.

Although the initial deed to the trustee may be claimed as exempt from real estate excise tax (because the grantor is the beneficiary), it often happens that the beneficial interest in the trust is sold off-record to a new investor very shortly after the deed was executed. Sometimes a new trustee is appointed, too. Transfer of a 50% or greater interest in a trust is considered to be an excise taxable sale in most instances, with tax imposed on 100% of the value of the property. Therefore it is prudent that a title insurer assume that the State Department of Revenue may interpret the documents as imposing an excise tax lien on the property.

An additional title insurance risk is that the new investor in the trust may have told the original owners that they would have a right to re-acquire

the property or the beneficial interests in the trust.

A number of exceptions and requirements should be shown any time it is suspected that title is vested in a trust in which beneficial interests may have been transferred. The following is a list of issues that can be raised in a commitment, most of which apply to all trusts:

- Terms, powers, conditions and limitations of the trust under which title is held, calling for a copy of the trust agreement, and any amendments, for review.
- Calling for proof that the trustee has complied with the 20-day notice to the beneficiaries of the nature and terms of the intended transaction, if the property constitutes more than 25% of the net fair market value of the trust principal, as provided for by RCW 11.100.140.
- Calling for evidence of the identities of all parties holding any beneficial interest or other interest in the trust, and their spouses.
- Calling for copies of any transfers of interests in the trust.
- Calling for written consent to the proposed transaction by the holders of all interests in the trust.
- Calling for written consent to the proposed transaction by the former owner(s) of the property.
- An exception for "matters which may be disclosed by a search of the

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paragraphs. Several of the new coverage paragraphs are matters that were previously an exception contained within the exclusions. This responds to judicial policy interpretation that coverage must be found within the covered risks, rather than construed from exceptions within the exclusions.

For example, the 2006 policy forms are designed to give coverage for creditors' rights in those circumstances where the 1992 exclusion contained an exception. Although oversimplified, the 2006 forms provide coverage against two creditors' rights risks. First, the policy protects against any attack against the prior chain of conveyances. Second, the policy protects against any attack against the present transaction due to the failure to record, or the failure of the recording to give legal notice binding upon the bankruptcy trustee.

The 2006 forms continue to exclude coverage against all further creditors' rights attacks. The only proper method to provide creditors' rights coverage with the new form is to issue the ALTA Form 21 Endorsement.

Both the 2006 policy forms include coverage for matters created after the date of policy through the time of recording the insured instruments. However, most Washington transactions do not require delivery of a policy dated prior to recordation.

Both new forms state a new Covered Risk against loss caused by encroachments of the neighboring property onto the Insured's land and encroachments of the Insured's improvements onto adjoining land. Therefore, any known encroachment of an improvement must be listed as an exception in Schedule B.

#### **Revised Conditions.**

The primary value of the new basic policy forms is realized from the revisions of the definitions and conditions paragraphs. There are several very significant changes to definitions improving the rights of the Insureds.

Both policy forms improve the rights of successors and assigns as an Insured. These changes should avoid the need for Insureds to obtain endorsements in many circumstances to acknowledge rights to the policy, such as transfers to a trust, mergers, or changes in entity form.

The 2006 Loan Policy significantly expands the definition of Indebtedness, requiring payment of more types of financial loss to the lender in the event the title company elects to pay the indebtedness to settle a claim.

The new forms resolve several issues that have troubled customers. For example, paragraph 9(b) of the prior loan policies reduced the amount of insurance upon a borrower payment. The 2006 Loan Policy avoids the need for "last dollar" endorsements by defining the Amount of Insurance and deleting that paragraph.

The claim administration paragraphs have been simplified for the Insured. Giving prompt Notice of Claim remains the initial and the critical duty of the Insured. Thereafter, a Proof of Loss is only required in the event the Company is unable to determine the amount of loss or damage and only when requested.

The 2006 policy forms include two new provisions in response to customer complaints about cases where the title insurance company chooses to defend, or prosecute, in order to avoid loss to the insured payable under the policy. That important title company option

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to establish the title, or to prevent or reduce loss is essentially the same as ALTA policies since 1970.

However, if the title company litigation is not successful, the new forms provide two benefits to more adequately compensate the Insured. Condition paragraph 8(b) provides (1) the Amount of Insurance is increased by 10% and (2) the Insured may determine or measure its loss either when the claim was made or at the conclusion of the litigation.

### Deleted Conditions

Several provisions have been entirely eliminated from the new forms.

#### 1. The Owner's Policy Coinsurance Paragraph is Gone

Condition paragraph 7(b) first appeared in the 1987 Owner's Policy. It reduced the amount of the Insured's claim in several circumstances, both where the policy amount was less than the land value, but also in cases where the Insured made significant improvements subsequent to the acquisition. When the coinsurance provision was enforced, it was the subject of debate, defenses and ultimately negotiation.

#### 2. The Owner's Policy Apportionment Paragraph Is Gone

Condition paragraph 8 has existed since the 1970 forms. Contained only in owner's policies, it applies to limit the recovery for loss incurred on one parcel affected by a title claim, when the policy includes more than one parcel of land. This condition paragraph was quite unacceptable in the commercial market, where multiple parcels were insured with one policy.

#### 3. Mechanic's Lien Exclusion Is Gone

From 1970 through 1992, coverage against unrecorded labor and material

liens required interpretation of the broad coverage paragraphs, Exclusion 6 that specified conditions of a lien that would not be covered and Condition paragraph 8(d)(ii) that further limited coverage. The 2006 loan policy specifies coverage against such liens, deletes Exclusion 6 and deletes that Condition.

#### 4. The Lender's Policy "Subsequent Advance" Limitation Is Gone

Condition paragraph 8(d)(i) stated that the title company was not liable for any indebtedness created subsequent to the Date of Policy. That was a significant limitation on the amount a lender was entitled to receive in the event the title company elected to pay the amount of indebtedness to discharge its obligations. The 2006 Loan Policy clearly includes subsequent advances in the definition of indebtedness.

The 2006 Loan Policy does not insure against loss of priority of the lien of the mortgage to the extent of the additional advance. Priority of additional advances is insured by using ALTA form 14, 14.1 or 14.2 endorsements, issued at the date of policy or at the date of the advance.

#### 5. The Lender's Policy "Liability Non-cumulative" Provision Is Gone

Since the 1970 Loan Policy, Condition paragraph 10 provided that a policy insuring a second lien would have a reduction in policy amount if a claim payment was made to an unrelated loan policy insuring a prior lien. It was somewhat difficult to justify.

### New Endorsements

The Forms Committee of the American Land Title Association in the past four years drafted many new endorsement forms intended to satisfy the growing demand of the title com-

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### “EMPLOYEE FRAUD” CONTINUED FROM PAGE 5

as employee access to information, accounts and funds,” she says.

Other common fraud-fighting measures include establishing company codes of conduct, conducting background checks of finance personnel, and instituting fraud awareness training.

#### How Banks Can Help

Many financial managers may not realize that banks have invested heavily in looking for ways to protect against fraud and can offer helpful advice to their customers. There are many bank services available that you should consider utilizing to protect your accounts against employee fraud. Security features such as dual

authorization and authentication with the use of tokens for online payment initiation services, ACH debit blocks and filters, and fraud-fighting reconciliation services—like Positive Pay—can all limit the potential for fraud losses.

“Web statements and image on demand are important tools, making statement information available to clients much sooner,” Cihak says. “Information reporting products also provide intra-day and prior-day information, so you can spot and investigate anomalies faster.”

Learn how to minimize fraud losses by reviewing your organization’s needs with your Bank Relationship Manager.

### “TRUSTS AND EXCISE TAX” CONTINUED FROM PAGE 6

public records” against the names of any holders of interests in the trust under which title is vested, and their spouses, if any

- The lien of real estate excise tax, including interest and penalties, if any, arising from the deed through which title is vested, and/or arising from any assignment of beneficial interest in the trust under which title is vested, indicating that the deed and/or any assignment of beneficial interest in the trust may have been taxable if any party other than the named former owner currently holds

any beneficial interest in the trust.

The title insurer needs to determine in each instance if it is willing to insure title. There are some types of trusts which may never be considered insurable. Other trusts may be insurable if all issues, including excise tax, are resolved and if the title insurer is comfortable that accurate and complete information on all off-record transfers is provided.

All files with this type of trust (or any other unusual trust) should be reviewed by an underwriter or counsel.

### “ALTA POLICIES” CONTINUED FROM PAGE 8

pany customers. Review the full list of new and revised endorsement forms at [www.wltaonline.org/resources](http://www.wltaonline.org/resources).

The 2006 basic policy forms are substantially different in coverage and formatting, using new definitions. Therefore, the ALTA has adopted a parallel list of endorsements that refer to the coverage and formatting

of the 2006 basic policy forms. All the existing ALTA endorsements have been revised, from form 1 through form 22.1.

The numbering convention that was adopted simply adds “-06” to each endorsement form number, to distinguish the revised forms to be issued with the 2006 policy forms.