

The New 2016 ALTA Commitment: Expressing Limitations on Liability

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May 25, 2017

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A significant change to one of the standard title insurance forms recently was approved by ALTA. The new 2016 ALTA Commitment both streamlines the existing features of the title insurance commitment and, for the first time, expressly sets out many of the fundamental title insurance industry assumptions underlying such commitments. The clear and laudable aim of this new form is more clarity, less misunderstanding, and therefore a better relationship among the contracting parties. This article summarizes the changes to the form, with a particular focus on the important new notice and the express prescription on the title insurance issuing agent's limited role on behalf of the title insurer.

Background

On June 9, 2016, the ALTA Board of Governors approved recommendations to adopt new and revised forms, including the 2016 ALTA Commitment for Title Insurance, which was published in final with an effective date of Aug. 1, 2016.

The 2016 ALTA Commitment is a more streamlined version of the 2006 ALTA Commitment, and it contains important clarifications of the obligations between the title insurer, proposed insured and title insurance issuing agent.

While you will recognize many of the changes as mere codifications of the existing standard, industry understanding of what a title insurance commitment is, what it does, and why it is issued, its new terms are worth considering in some detail.

Notice

The most significant revision is the incorporation of a "Notice," prominently placed at very top of the jacket of the 2016 ALTA Commitment. The Notice expressly sets forth that the 2016 ALTA Commitment is only an offer to issue the specified title insurance policy and not "an abstract of title, report of condition of title, legal opinion, opinion of title, or other representation of the status of title." In other words, the 2016 ALTA Commitment is simply the first step in the formation of a binding contract, the title insurance policy. The Notice further confirms that the procedures used by the title insurer in determining insurability, including any title search or examination, are for the benefit of the insurance company only.

The Notice is of particular significance because, previously, title insurance commitments had been asserted as the basis of tort claims against title insurers and some courts had actually determined that a title insurance commitment could be the basis for a title insurer's liability in tort, if, for example, a title encumbrance or defect of record was not listed in the commitment. The error in this determination is that it is premised on the fundamental misconception that a commitment is designed to disclose the state of title, including all title encumbrances and defects of record, to the proposed insured.

Commitments are not, of course, designed to disclose the state of title, and title insurers are not engaged in the business of abstracting title, issuing legal opinions of title, or making any representations as to the state of title. Instead, title insurance is best thought of as the process by which a title insurer comes to determine the risk of, and premium for, issuing a policy of title insurance that will provide the insured with a defense and possible indemnification in the event that title is not as insured, pursuant to the terms, conditions and stipulations of the policy that is ultimately issued. Thus, commitments have always only been, as the 2016 ALTA Commitment now expressly states, an offer to issue a policy to a proposed insured if the conditions of the commitment are met.

Importantly, an offer to issue a title insurance policy and the policy itself are not warranties or guaranties that title is as set forth in the offer (commitment) or the ultimate contract (policy). Instead, the policy is a contract of indemnification and expressly contemplates the obligations of the insured and insurer in the event there is an allegation that title is not as insured. For example, title insurance policies impose specific notice obligations on the insured in the event of a claim and also provide the insurer with a range of options on how to address a claim, including defending, curing, or paying diminution in value. In other words, the title insurance policy that is the end result of the offer contained in the title insurance commitment, far from warranting that title is as insured, expressly contemplates the possibility that title will not be as insured and then sets forth the parties' contractual obligations under those circumstances.

It is not difficult to understand why an insurance industry that calculates its insurance premiums based on potential limited contractual liability arising from the risk of a recorded encumbrance or defect was concerned to correct misinterpretations of its contractual offer to issue title insurance as representation of title that could open insurers to potentially unlimited tort damages. It is an important goal for the title insurance industry and for all of the participants in the residential and commercial real estate industry, as title insurance is what allows real estate professionals to close real estate transactions efficiently, affordably, and with confidence.

The Commitment

The 2016 ALTA Commitment is comprised of the Notice, Schedule A, the Requirements in Schedule B, Part I, the Exceptions in Schedule B, Part II and the Commitment Conditions. Each part of the 2016

ALTA Commitment is required for it to be effective and, in particular, the amount of insurance and the name of the proposed insured must be included in Schedule A before it becomes effective. The 2016 Commitment expressly states that it terminates within 6 months of the effective date if the requirements in Schedule B, Part I are not met before that time. The 2016 ALTA Commitment conditions, discussed below, also go on to state that if the Schedule B, Part I requirements are not met within this time, then the insurer's obligations and liability terminate along with the commitment.

The Commitment Conditions

- **Definitions:** The 2016 ALTA Commitment now contains definitions of certain key terms such as "Knowledge," "Land," and "Public Records," that will prove helpful to anyone reading it, including proposed insureds.
- **Counter-signature:** The condition that the commitment be counter-signed by the insurer or the insurer's title insurance issuing agent had always been expressed simply in the fact of the authorized signature block, but the 2016 ALTA Commitment Conditions now expressly state this requirement.
- **Right to Amend:** The 2016 ALTA Commitment now also expressly states the insurer's right to amend the commitment at any time to add defects, liens, encumbrances, adverse claims or other matters recorded in the official records and places detailed and specific limitations on any possible liability to the proposed insured in the event of such an amendment.
- **Limitation on Liability:** The 2016 ALTA Commitment also expressly limits liability of the title insurer by providing that only the identified proposed insured is entitled to make a claim pursuant to the commitment, that such claims must be in contract pursuant to the terms and provisions of the commitment, that the commitment is the entire agreement between the parties until the policy is issued at which point the obligations and liability under the commitment terminate, that any modifications must be in writing, and that any modifications to Schedule B, Part II Exceptions, will not require the insurer to provide coverage beyond the commitment or the policy.

The Title Issuing Agent

In many jurisdictions, a closing agent, in addition to acting as the closing and escrow agent for the parties, can also serve in the limited capacity as title insurance issuing agent for the insurer. Although the independent title insurance agent relationship is frequently set forth in a written agency agreement with the insurer that strictly limits the scope of the agent's authority on behalf of the insurer, the parties to the transaction often subsequently allege that the agent was the insurer's agent for all purposes. Those allegations, like the allegations of tort liability for misrepresentations in the commitment, have the potential to give rise to extra-contractual and potentially unlimited liability for insurer, given that closing agents have a duty to close a transaction in a reasonably prudent manner and their liability arises in negligence.

In order to address this problem, the 2016 ALTA Commitment affirmatively states that the title insurance issuing agent is the insurer's agent only for that purpose and not the insurer's agent for the purpose of providing closing or settlement services. Thus, this provision should help to clarify one of the most frequently misunderstood roles in any real estate transaction and end title insurers' potential for liability for providing closing services, when they do not contract and are not paid for those services.