

**2012 WLTA Educational Seminar  
Lynnwood  
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**Title Insurance Policy Coverage:  
New Endorsements  
Drafting Exceptions**

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# The 04-02-2012 ALTA 9 Series Endorsements

## *Nationwide v Commonwealth*

**2004**

- Nationwide Life Insurance Co sued Commonwealth Land Title Insurance Company alleging a loss under Section 1 (b)(2)(iv) of the ALTA 9.

**Cause  
of  
Action**

- Nationwide alleged there was a right of prior approval in the covenants of a shopping center that affected the land acquired by foreclosure.



## *Nationwide v Commonwealth*

### ALTA 9 Section 1 (b)(2)(iv)

The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

1. The existence at Date of Policy of any of the following: ...
  - (b) *Unless expressly excepted in Schedule B...*
    - (2) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the land which, in addition ... (iv) provides for an option to purchase, a right of first refusal or ***the prior approval of a future purchaser or occupant.***



## *Nationwide v Commonwealth*

**Is this “a right of first refusal or the prior approval of a future purchaser or occupant?”**

. . . provided, however, that in no event shall Buyer use the Property and/or the building for any of the purposes listed on Exhibit 3 [*listing the types of stores already in the Mall*]; and provided further, however, that Buyer shall not change the use of the Property from a variety or general merchandise store (as described above) without prior written consent of Seller (which shall not be unreasonably withheld or delayed if the proposed use otherwise satisfies the foregoing requirements of this sentence.)



## *Nationwide v Commonwealth*

**Oct 19, 2005**

**2005 WL  
2716492  
(E.D.Pa.)**

Opinion by US District Court finds for Commonwealth because there was an exception in Schedule B for the instrument containing the covenants, conditions and restrictions that had the 'right of prior approval.'

**Forms  
Committee**

Began considering a revision to clarify the intent of the section.



## *Nationwide v Commonwealth*

### **ALTA 9 Section 1 (b)(2)(iv)**

The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

1. The existence at Date of Policy of any of the following: ...
  - (b) Unless expressly excepted in Schedule B...
    - (2) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the land which, in addition ... (iv) provides for an option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant.



## *Nationwide v Commonwealth*

**Aug 31, 2009**

**579 F.3d 304**

The US Court of Appeals, Third Circuit reversed the District Court, saying:

“We thus hold that Commonwealth bore the burden of detecting the restrictions stated in the Declaration, and had to list those restrictions explicitly as exceptions to avoid covering loss from them.”

**Feb 3, 2011**

New revisions of all ALTA 9 series endorsements were adopted by the ALTA Board of Governors.



## *Nationwide v Commonwealth*

Feb 17, 2011

2011 WL  
611802 (E.D.  
PA)

Two Weeks after the ALTA adopted the new forms, the District Court handed down its opinion on remand from the Third Circuit.

“In short, the Court finds that the ALTA 9 Endorsement provides insurance coverage for **any loss arising from any instrument referenced in Schedule B** that contains both covenants, conditions, or restrictions, as well as, among other items, an option to purchase, a right of first refusal, or a prior approval of a future purchaser or occupant. **The Endorsement does not restrict its coverage to specific provisions within such instruments.**”





# The Revised Forms in the ALTA 9 Series

| Endorsement     | Revisions through<br>02-03-2011  | 04-02-2012 Revision  |
|-----------------|--|--|
| <b>ALTA 9</b>   | <b>Restrictions, Encroachments,<br/>Minerals</b><br>Loan Policy                      | <b>Restrictions, Encroachments,<br/>Minerals</b><br>Loan Policy                    |
| <b>ALTA 9.1</b> | <b>Restrictions, Encroachments,<br/>Minerals</b><br>Owner's Policy - Unimproved Land | <b>Covenants, Conditions,<br/>Restrictions</b><br>Owner's Policy - Unimproved Land |
| <b>ALTA 9.2</b> | <b>Restrictions, Encroachments,<br/>Minerals</b><br>Owner's Policy - Improved Land   | <b>Covenants, Conditions,<br/>Restrictions</b><br>Owner's Policy - Improved Land   |
| <b>ALTA 9.3</b> | <b>Restrictions, Encroachments,<br/>Minerals</b><br>Loan Policy                      | <b>Covenants, Conditions,<br/>Restrictions</b><br>Loan Policy                      |



# The New Forms in the ALTA 9 Series

| Endorsement     | Revisions through<br>02-03-2011  | New Revision   |
|-----------------|--|--|
| <b>ALTA 9.4</b> | <b>Restrictions, Encroachments,<br/>Minerals</b><br>Owner's Policy - Unimproved Land | <b>Decertified</b>   |
| <b>ALTA 9.5</b> | <b>Restrictions, Encroachments,<br/>Minerals</b><br>Owner's Policy - Improved Land   | <b>Decertified</b>   |
| <b>ALTA 9.6</b> | <b>Note: These are the<br/>Nationwide Coverages</b>                                  | <b>Private Rights<br/>Loan Policy</b>  |
| <b>ALTA 9.7</b> |  | <b>Restrictions, Encroachments,<br/>Minerals</b><br>Land Under Development – Loan Policy |
| <b>ALTA 9.8</b> |  | <b>Covenants, Conditions, Restrictions</b><br>Land Under Development – Owners Policy     |



# The 04-02-2012 ALTA 9 Series Endorsements

## New ALTA 9 Definitions

- a. “Covenant” means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.
- b. “Improvement” means an improvement, including any lawn, shrubbery, or trees, affixed to either the Land or adjoining land at Date of Policy that by law constitutes real property.

## Instead of The new forms say

- (b) Unless expressly excepted in Schedule B...
- b. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;



# The 04-02-2012 ALTA 9 Series Endorsements

## ALTA 9.1

## ALTA 9.2

## ALTA 9.3

- The CC&R endorsements do not include insurance for minerals or encroachments
  - Minerals coverage in ALTA 35 to 35.3
  - Encroachments Coverage in Covered Risk 2c and ALTA 28.1
- Can we drop “comprehensive” now?

## ALTA 9.6

- Private Rights are the rights involved in *Nationwide*
  - There is no provision for a specific exception
  - Don't use it unless no “Private Rights” appear in the transaction documents.



## The 02-03-2011 ALTA 3.2

### ALTA 3.2 Zoning – Land Under development

- This is the first “Land Under Development” Endorsement
- Like the ALTA 9.7 and 9.8 it adds definitions for
  - Improvement
  - Plans
- There are also Land Under Development endorsements adopted as the
  - ALTA 35.3 Minerals
  - ALTA 36.4 and 36.5 Energy Projects



## The ALTA 13 and 13.1 (Rev. 02-03-2011)

### ALTA 13 and 13.1 Leasehold Endorsements

• These familiar endorsements were revised to reflect changes made in developing the ALTA 35 Energy Project Endorsements

- Definitions of
  - “Personal Property”
  - Tenant Leasehold Improvements
- Valuation Section and Additional Items of Loss
- New Section 4 environmental Exclusion
- Editing tweaks



## The 02-03-2011 ALTA 28.1

### **ALTA 28.1** **Encroachments** **– Boundaries** **and Easements**

- Covered Risk 2(c) of the policy since 2006 provides most of the traditional encroachment coverage from the ALTA 9, but not encroachment onto easements
- The ALTA 28.1 restates the old ALTA 9 coverage with that encroachment onto easement coverage, so it can be used with a CC&R endorsement to give the coverage taken from those endorsements.



## The 02-03-2011 ALTA 35 Series

### ALTA 35 Series

### Minerals and Other Sub-Surface Substances

- These add the minerals coverage dropped from the CC&R Endorsements.
- The difference between them is in the definition of Improvement in Section 2
  - ALTA 35 it means a building
  - ALTA 35.1 it is the ALTA 9 definition
  - ALTA 35.2 fill in the blank
  - ALTA 35.3 Land Under Development





## The 02-03-2011 ALTA 36 Series

### ALTA 36 Series Energy Project

- Developed from the wind farm endorsements circulating in the industry
- Apply to projects for any means of power generation
  - ALTA 36 Leasehold Easement - Owners
    - Derived from the ALTA 13 to apply to projects built on a leasehold or easement in gross.
    - It defines an “Electricity Facility”
    - Values as an “integrated project”



# The 02-03-2011 ALTA 36 Series

## ALTA 36 Series Energy Project

- ALTA 36.1 Leasehold Easement – Loan
- ALTA 36.2 Leasehold – Owners
- ALTA 36.3 Leasehold – Loan
- ALTA 36.4 CC&R – Owners
- ALTA 36.5 CC&R – Loan
  - (Not an REM for loans)
- ALTA 36.6 – Encroachments
  - Applies to Electricity Facility and Severable Improvements



## The 02-03-2011 ALTA 31

### ALTA 31 Severable Improvements

- Severable Improvement" means property affixed to the Land on or after Date of Policy that by law does not constitute real property because:
  - of the character and manner of attachment to the Land &
  - it can be severed from the Land without causing material damage to it or to the Land.
- The endorsement doesn't insure Title to a Severable Improvement
- Only loss to the value of the Severable Improvement caused by a defect in the Title



## The 02-03-2011 ALTA 32 Series

### ALTA 32 Construction Loan – Loss of Priority

- Creates limited liability for loss of priority to certain mechanic's liens as originally described in *Bankers Trust Co v. Transamerica Title Insurance Co*, 594 F.2d 231 (10<sup>th</sup> Cir. 1979).
- The intent was only to recognize loss of priority for mechanic's liens caused by a diversion of construction funds away from the project
- It does not recognize liability for contractor disputes or cost overruns



## The 02-03-2011 ALTA 32 Series

### Definitions

- “Date of Coverage”, is [\_\_\_\_\_] [Date of Policy] unless the Company sets a different Date of Coverage by an ALTA 33-06 Disbursement Endorsement issued at the discretion of the Company.
- “Construction Loan Advance,” shall mean an advance that constitutes Indebtedness made on or before Date of Coverage for the purpose of financing in whole or in part the construction of improvements on the Land
- “Mechanic’s Lien,” shall mean any statutory lien or claim of lien, affecting the Title, that arises from services provided, labor performed, or materials or equipment furnished.



# The 02-03-2011 ALTA 32 Series

## Coverage

- Sections 3(a) & 3(b) provide for coverage where ***a notice*** of a Mechanic's Lien ***is filed or recorded in the Public Records*** at Date of Coverage
- Section 3(c) is the Construction Loan Advance Coverage where ***no notice*** of a Mechanic's Lien ***is filed or recorded in the Public Records*** at Date of Coverage
- The ALTA 32.1 differs from the ALTA 32 only in the limitations in Section 3(c)



# The 02-03-2011 ALTA 32 Series

## Distinguishing between the ALTA 32 and ALTA 32.1

### ALTA 32

- Grants Mechanic's Lien coverage in Section 3(c) but only to the extent that the charges for the services, labor, materials or equipment for which the Mechanic's Lien is claimed were designated for payment in the documents supporting a Construction Loan Advance disbursed by or on behalf of the Insured on or before Date of Coverage.

### ALTA 32.1

- Grants Mechanic's Lien coverage in Section 3(c) but only to the extent that direct payment to the Mechanic's Lien claimant has been made by the Company or by the Insured with the Company's written approval.



## The 02-03-2011 ALTA 32 Series

Is a  
standard  
ML  
coverage  
exception  
needed?

- The endorsement deletes Covered Risk 11(a), that is the specific ML coverage. However, Covered Risks 2 and 10 still apply!
  2. Any defect in or lien or encumbrance on the Title.
  10. The lack of priority of the lien of the Insured Mortgage upon the Title over any other lien or encumbrance.





## The 02-03-2011 ALTA 32 Series

An  
Exception  
is  
necessary  
when  
issuing an  
ALTA 32  
or  
ALTA 32.1

- Therefore, when ML coverage is provided by the ALTA 32, a Schedule B exception is required in Schedule B:

**Any statutory lien or claim of lien, affecting the Title, that arises from services provided, labor performed, or materials or equipment furnished, except as insured by the attached ALTA 32 Endorsement as it may be revised by ALTA 33 Disbursement Endorsements.**



## The 02-03-2011 ALTA 33

### ALTA 33 Disbursement Endorsement

- The ALTA Disbursement Endorsement advances the Date of Coverage for the ALTA 32 series only
- It does not advance the Date of Policy
- Avoid adding options 1.a and 1.b
- It allows amendments to Schedules A & B so you can use it to advance the Date of Policy if your customer insists.
- Take care when advancing the Date of Policy because it will affect all coverages, including survey related coverages



# Drafting and Revising Endorsements

In addition to *Nationwide*, one other case has exerted a strong influence on drafting endorsements - *Alliance Mortgage Company v. Rothwell*, 10 Cal. 4th 1226, 44 Cal. Rptr. 2d 352 (1995).

The decision in Alliance distinguished between ***a guarantee of a state of facts*** and ***indemnity insurance***.



# Alliance Mortgage v. Rothwell

## Insurance of a state of facts

- The Alliance Mortgage Policy said:
  - “The Company assures the insured that at the date of this policy there is located on said land 4-unit Residence known as 447 Haight Street, # 1, 2, 3, 4, San Francisco, California 94117. The Company hereby insures the insured against loss which said Insured shall sustain in the event that the assurance herein shall prove to be incorrect.”
- Also beware of :
  - **The Company insures the Insured against loss or damage sustained by reason of any incorrectness in the assurance that, at Date of Policy: . . .**
  - **The Company assures the Insured against loss or damage sustained by reason of any incorrectness in the following assurance that: . . .**
  - **This policy affirmatively insures . . .**



# *Alliance Mortgage v. Rothwell*

## Indemnity Insurance

- After *Alliance Mortgage* The ALTA and CLTA endorsements were revised to this formula (copied from the current ALTA 3.1)
  1. The Company insures against loss or damage sustained by the Insured in the event that, at Date of Policy,
    - a. according to applicable zoning ordinances and amendments, the Land is **not** classified Zone \_\_\_\_\_
- Any endorsement or coverage in Schedule B (if you must do that) should begin with the same formula.



## Drafting Considerations

- Say precisely what you mean. (Avoid “legalisms” )
- Prefer active to passive voice in verbs.
- When drafting an endorsement, use an ALTA form as a model. Always use the ALTA boilerplate incorporation of the rest of the policy.
- Read your draft critically.



## Current Endorsement Coverage Statements:

1. The Company Insures against loss or damage sustained by reason of any existing improvements located on the land encroaching onto the easement shown in Exception \_\_\_ of Schedule B.

### ALTA 28

2. The Company insures against loss or damage sustained by the Insured if the exercise of the granted or reserved rights to use or maintain the easement(s) referred to in Exception(s) \_\_\_\_\_ of Schedule B results in:

- (a) damage to an existing building located on the Land, or
- (b) enforced removal or alteration of an existing building located on the Land .



## Use the Defined Terms Correctly

- **Date of Policy** - -                    **not** “effective date”
- **Land** - - - - -                    **not** “insured premises” or  
“the property described in  
Schedule B”
- **Title** - - - - -                    **not** “the estate or interest  
described in Schedule A”
- **Insured Mortgage**                    **not** “the said mortgage.”
- **Amount of Insurance**                    **not** “policy liability.”





## Draft Exceptions to Complete this Sentence:

**We issue insurance policies, not title reports**

**Schedule B begins with:**

This policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses that arise by reason of:

**Avoid exceptions like**

“The Company does not represent that the acreage or square footage calculations are correct.”

**A better attempt**

“Representations of the acreage or area in the property descriptions in Schedule A”



## Draft Exceptions to Identify the Document, NOT to Explain or Limit the Effect of the Document:

**We issue  
insurance  
policies,  
not title  
reports**

### **Explanation and Limits:**

Easement for temporary access by We B Contractors for construction of a parking garage affecting only the east five feet.

### **Exception to Coverage for:**

Easement and the terms and conditions thereof, recorded October 20, 2012, as A.F. 2012102000234.



# Representations and Notes

## Avoid 'Notes' in Schedule B

### Note:

How do we argue in a claim that a policy is not a title opinion to avoid negligence liability, ***but we attempt to add information on the Title in the policy?***

### If the note is to avoid liability for the matter

Its an Exception, and should be listed as one in Schedule B

### If the note is 'for information purposes only'

It has no place in a title insurance policy



# Representations and Notes

Is it really so wrong to add some assurances to help the customer?

Abengoa Bioenergy asked a Chicago Title Agent for an accommodation search of properties adjacent to a proposed ethanol plant for zoning notifications.

The agent did not do a full title search, and missed seven property owners, who sued and forced Abengoa to build elsewhere at greater expense.

Last summer, a jury awarded Abengoa a verdict of **\$48,400,000** in damages against Chicago Title.

