

AN INTRODUCTION TO
MORTGAGE TITLE INSURANCE IN OKLAHOMA

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Presented on January 27, 1984

OUTLINE

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AN INTRODUCTION TO MORTGAGE TITLE INSURANCE IN OKLAHOMA

INTRODUCTION

discussion which is set out below presents a brief introduction to Mortgage Title Insurance as it is available in Oklahoma. While there are many aspects of title insurance which are universally applicable nationwide, there are a few Oklahoma statutes giving it an Oklahoma flavor. These statutes are important in the discussion set out below.

1. WHAT IS TITLE INSURANCE?

According to the Oklahoma Statutes "'title insurance' is insurance of owners of property, or others having an interest therein, or liens or encumbrances thereon, against loss by encumbrance, or defective title, or invalidity, or adverse claim to title."¹

Oklahoma statutes also provide that a "'title insurance policy' is any written instrument

purporting to show the title to real or personal property or any interest therein or encumbrance thereon, or to furnish such information relative to real property, which written instrument in express terms purports to insure or guarantee such title or the correctness of such information."²

2. WHAT ARE THE TWO PRINCIPLE DUTIES OF A TITLE INSURER?

Such title insurance is generally held to generate two contractual duties under the policy: "First, the title insurer owes a broad duty to defend an insured's title whenever a claim arises within the policy coverage. * Second, the insurer owes a duty to indemnify the insured in an amount up to the policy limits whenever the insured has suffered a loss or has been damaged as a result of a covered defect."³

3. WHAT ARE THE TWO DIFFERENT TYPES OF TITLE INSURANCE?

There are two major types of title insurance: owners and mortgage. The beneficiary dictates the type

policy and both types of policies can be issued in same transaction. Due to the possible misconception by a purchaser that the mortgage policy for the lender provides adequate or equal protection to the purchaser/borrower, the Oklahoma legislature passed a disclosure law whereby "If a title protection document will be issued to the mortgagee, the mortgagee shall give to the buyer at the time of loan application written notice of the following:

"1. Whether the title protection document will provide protection to the buyer; and

2. That the buyer should seek independent, competent advise as to whether the buyer should obtain any additional title protection document. In the event said additional title protection is desired, it shall be obtained by the buyer in a timely manner in order to

avoid undue delay of the closing under terms of the contract of sale."⁴

(See Exhibit A)

4. WHAT IS THE GENERAL PROTECTION AFFORDED UNDER A MORTGAGE POLICY?

"If the loss is covered, an insured may recover an amount which will compensate him for all of the detriment proximately caused up to the face value of the policy Under a lender's policy, damages are measured by the extend to which the defect has impaired the security."³

"A policy of title insurance protects a lender against loss or damage suffered by reason of invalidity or unenforceability of the insured loan or encumbrance due to unexcepted defects in the title to the secured real property. As such, only

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WHAT IS TITLE INSURANCE BASED ON?

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attorney with the additional protection against non-record hidden defects (e.g. fraud, forgery, incompetence, etc. offered by title insurance. This hybrid is due to our statutory requirement that a policy of title insurance can be issued only "after examination of a duly certified abstract of title prepared by a bonded and licensed abstractor."⁶ This local involvement, initiated by the examination of title by a state licensed attorney, is extended to the issuance of the policy as well through the statutory requirement that "Every policy of title insurance or certificate of title issued by any company authorized to do business in this state shall be countersigned by some person, partnership, corporation or agency, actively engaged in the abstract of title business in Oklahoma as defined and provided in Title 1, Oklahoma Statutes Annotated, or by an attorney licensed to practice in the State of Oklahoma duly appointed as agent of a title insurance company."⁶

6. WHAT IS THE DIFFERENCE BETWEEN A COMMITMENT AND A POLICY?

During the preparation and examination of an abstract of title, title defects and encumbrances sometimes discovered. These defects in the chain of title or liens and restrictions on the land identified on the Commitment through a series of "requirements" made for necessary title curative action (such as using quit claim deeds or court actions remedy identified defects), and through "exceptions" to the coverage for those encumbrances likely to be allowed to continue after the closing, such as restrictions, utility easements, assumed mortgages, etc.

Once the requirements have been met and loan made with all the related documents recorded the local County Clerk, then a Policy can be requested and issued. Any unmet requirements will either prevent

the issuance of the policy or, with the insured's approval, become continuing exceptions to the coverage

7 WHAT ARE THE USUAL MAJOR PARTS OF A MORTGAGE POLICY?

The usual major parts of the mortgage policy, as found in a standard American Land Title Association form mortgage policy, include: The Coverage, Exclusions, the Conditions and Stipulations, Schedule A and Schedule B. (See Exhibit B)

8. WHAT IS THE USUAL COVERAGE OF A MORTGAGE POLICY?

In general terms, the policy insures that the lender has a valid and first lien on the real property interest owned by the borrower. This coverage protects against both hidden (i.e., "latent") title defects as well as those title defects shown in the record (i.e., "patent") but which are missed by the abstractor and/or the examiner. More specifically, the policy indemnifies the beneficiary-lender, up to the amount of the policy, against actual loss and costs of

defense arising due to the following title defects:

"Subject to the exclusions from coverage, the exceptions contained in Schedule B and the provisions of the Conditions and Stipulations hereof, American First Land Title Insurance Co., an Oklahoma corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and costs, attorneys' fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested otherwise than as stated therein;
2. Any defect in or lien or encumbrance on such title;
3. Lack of a right of access to and from the land;
4. Unmarketability of title;
5. The invalidity or unenforceability of the lien of the insured mortgage upon said estate or interest except to the extent that such invalidity or unenforceability, or claim thereof, arises out the transaction evidenced by the insured mortgage and is based upon
 - a. usuary, or
 - b. any consumer credit protection or truth in lending law;
6. The priority of any lien or encumbrance over the lien of the insured mortgage;
7. Any statutory lien for labor or material which now has gained or hereafter may gain priority over the lien of the insured mortgage, except ~~that~~ any such lien arising from an improvement on the land contracted for and commenced subsequent to Date of Policy not financed in whole or in part by proceeds on the indebtedness secured by the

insured mortgage which Date of Policy the insured has advanced or is obligated to advance; or

8. The invalidity or unenforceability of any assignment to vest title to the insured mortgage in the named insured assignee free and clear of all liens."
(See Exhibit B)

9. WHAT ARE THE USUAL EXCLUSIONS IN A MORTGAGE POLICY?

Generally speaking the mortgage policy excludes from coverage any unanticipated governmental actions, any title matter arising subsequent to the policy's effective date and any matter arising from the lender's own actions. The policy specifically excludes from coverage the following matters:

"The following matters are expressly excluded from the coverage of this policy:

1. Any law, ordinance or governmental regulation (including but not limited to building and zoning ordinances) restricting or regulating or prohibiting the occupancy, use or enjoyment of the land, or regulating the character, dimensions or location of any improvement now or hereafter erected on the land, or prohibiting a separation in ownership or a reduction in the dimensions or area of the land, or the effect of any violation of any such law, ordinance or governmental regulations.

2. Rights of eminent domain or governmental rights of police power unless notice of the exercise of such rights appears in the public records at Date of Policy.

3. Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant; (b) not known to the Company and not shown by the public records but known to the insured claimant either at Date of Policy or at the date such claimant acquired an estate or interest insured by this policy or acquired the insured mortgage and not disclosed in writing by the insured claimant to the Company prior to the date such insured claimant became an insured hereunder; (c) resulting in no loss or damage to the insured claimant; (d) attaching or created subsequent to Date of Policy (except to the extent insurance is afforded herein as to any statutory lien for labor or material).

4. Unenforceability of the lien of the insured mortgage because of failure of the insured at Date of Policy or of any subsequent owner of the indebtedness to comply with applicable 'doing business' laws of the state in which the land is situated."
(See Exhibit B)

10. WHAT ARE THE TYPICAL CONDITIONS AND STIPULATIONS OF A MORTGAGE POLICY?

Other than the recital of certain standard definitions, the Conditions and Stipulations of policy provide:

(1) Continuation of coverage after insured acquires title via foreclosure or deed in lieu thereof,

(2) Insurer will promptly defend insured upon receipt of timely notice,

(3) Insurer has option to pay and otherwise settle a claim,

(4) Payment shall be lesser of actual or policy amount,

(5) The existence of a defect, if promptly removed by the insurer does not in itself give rise to a cause of action against the insurer,

(6) All payments made under this policy reduce the face amount,

(7) Insured will assign its rights to recover from 3rd parties to insurer,

Liability is limited to this policy, and

(9) Notices must be sent to the stipulated address.

(See Exhibit B)

11. WHAT ARE THE STANDARD EXCEPTIONS IN A MORTGAGE POLICY?

standard pre-printed Exceptions in a mortgage policy include:

(1) Rights or claims of parties in possession not of record; easements, or claims of easements, not shown in the public records;

(2) Encroachments, overlaps, boundary line disputes, and any matters which would have been disclosed by an accurate survey and inspection of the premises;

(3) Mechanics' and Materialmen's liens, not of record; and

Minerals and interests in minerals.

Additional exceptions are added for those restrictions and encumbrances which will be assumed or otherwise continue (e.g., plat restrictions, utility easements, etc.

WHAT IS SCHEDULE "A" TO THE POLICY?

Schedule A to the policy sets out: the effective date of the policy, the policy number, the face amount of the insurance, the premium paid, the file number, the name of the insured, the name of the holder of the fee simple title, a description of the mortgage document including: the date of the mortgage, the amount of the mortgage, the name of the mortgagors, name of the mortgagee and assignee, the date the mortgage was recorded, and the book and page of its recording, and, finally, the legal description. (See Exhibit B)

13. WHAT IS SCHEDULE "B" TO THE POLICY?

Schedule B to the policy is the listing of Exceptions to the policy's coverage and includes the standard Exceptions mentioned above, any liens or encumbrances expected to continue after closing and ad valorem taxes due and owing but not yet delinquent (See Exhibit B)

14. WHEN WILL A PAYMENT BE MADE TO THE INSURED, IN GENERAL?

insured has the burden of proving an insurable loss, and, therefore, he must demonstrate the existence of a defect which is covered by the policy as well as the amount of damages resulting therefrom. Because an insurer is liable only for the actual, out-of-pocket losses suffered by the insured, there can be no recovery if there has been no loss, even if there is an insurable defect."³

FOOTNOTES

1. 36 O.S. §709
2. 36 O.S. §5004
3. Pages 264-265, "A Return to Policy Limits: Title Insurance Company Liability in California", TITLE INSURANCE IN CURRENT TRANSACTIONS IN 1983 (PLI) 1983
4. 46 O.S. §20
5. Page 268, id
6. 36 O.S. §5001(c); Opin. Atty. Gen. Nos. 80-104 & 78-151

NOTICE OF AVAILABILITY OF OWNER'S
TITLE PROTECTION

ATTACHMENT A

Your lender is obtaining title protection through a policy of title insurance or an attorney's title opinion letter. This title protection document protects only the lender and not you.

You should seek competent advise as to whether you should obtain any additional title protection to protect you. If you desire owner's title protection, you can obtain it for a small additional cost, however, your request for such protection must be made in a timely manner in order to avoid undue delay of the closing.

This notice is made pursuant to Title 46 Oklahoma Statutes 1979 Supplement Sections 19-21

Receipt of this notice acknowledged this _____ day of _____, 19_____.

Issuer of Notice:

Buyer

Buyer

Forms courtesy of



American First Title & Trust

Re-order (405) 272-4800.

POLICY OF TITLE INSURANCE

ATTACHMENT B

Issued by


**American First
Land Title Insurance Co.**

 OKLAHOMA CITY, OKLAHOMA
Since 1889

POLICY NUMBER

502-19303

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS CONTAINED IN SCHEDULE B AND THE PROVISIONS OF THE CONDITIONS AND STIPULATIONS HEREOF, AMERICAN FIRST LAND TITLE INSURANCE CO., an Oklahoma corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and costs, attorneys' fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested otherwise than as stated therein;
2. Any defect in or lien or encumbrance on such title;
3. Lack of a right of access to and from the land;
4. Unmarketability of such title;
5. The invalidity or unenforceability of the lien of the insured mortgage upon said estate or interest except to the extent that such invalidity or unenforceability, or claim thereof, arises out of the transaction evidenced by the insured mortgage and is based upon
 - a. usury, or
 - b. any consumer credit protection or truth in lending law;
6. The priority of any lien or encumbrance over the lien of the insured mortgage;
7. Any statutory lien for labor or material which now has gained or hereafter may gain priority over the lien of the insured mortgage, except any such lien arising from an improvement on the land contracted for and commenced subsequent to Date of Policy 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; or
8. The invalidity or unenforceability of any assignment, shown in Schedule A, of the insured mortgage or the failure of said assignment to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

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IN WITNESS WHEREOF, American First Land Title Insurance Co. has caused this policy to be signed and sealed by its duly authorized officers as of Date of Policy shown in Schedule A.

AMERICAN FIRST LAND TITLE INSURANCE CO.

Attest:

Kraettli 2. Epperson

Secretary

By

Robert E. [Signature]

President

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy:

1. Any law, ordinance or governmental regulation (including but not limited to building and zoning ordinances) restricting or regulating or prohibiting the occupancy, use or enjoyment of the land, or regulating the character, dimensions or location of any improvement now or hereafter erected on the land, or prohibiting a separation in ownership or a reduction in the dimensions or area of the land, or the effect of any violation of any such law, ordinance or government regulation.
2. Rights of eminent domain or governmental rights of police power unless notice of the exercise of such rights appear in the public records at Date of Policy.
3. Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant; (b) not known to the Company and not shown by the public records but known to the insured claimant either at Date of Policy or at the date such claimant acquired an estate or interest insured by this policy; (c) acquired the insured mortgage and not disclosed in writing by the insured claimant to the Company prior to the date such insured claimant became an insured hereunder; (d) resulting in no loss or damage to the insured claimant; (e) attaching or created subsequent to Date of Policy (except to the extent insurance is afforded herein as to an statutory lien for labor or material);
4. Unenforceability of the lien of the insured mortgage because of failure of the insured at Date of Policy or of an subsequent owner of the indebtedness to comply with applicable "doing business" laws of the state in which the land is situated.

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CONDITIONS AND STIPULATIONS

1. DEFINITIONS OF TERMS

The following terms when used in this policy mean:

(a) "insured": the insured named in Schedule A. The term "insured" also includes (i) the owner of the indebtedness secured by the insured mortgage and each successor in ownership of such indebtedness (reserving, however, all rights and defenses as to any such successor who acquires the indebtedness by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin or corporate or fiduciary successors that the Company would have had against the successor's transferor), and further includes (ii) any governmental agency or instrumentality which is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing said indebtedness, or any part thereof, whether named as an insured herein or not, and (iii) the parties designated in paragraph 2 (a) of these Conditions and Stipulations.

(b) "insured claimant": an insured claiming loss or damage hereunder.

(c) "knowledge": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of any public records.

(d) "land": the land described, specifically or by reference in Schedule A, and improvements affixed thereto which by law constitute real property; provided, however, the term "land" does not include any property beyond the lines of the area specifically described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "public records": those records which by law impart constructive notice of matters relating to said land.

2. (a) CONTINUATION OF INSURANCE AFTER ACQUISITION OF TITLE

This policy shall continue in force as of Date of Policy in favor of an insured who acquires all or any part of the estate or interest in the land described in Schedule A by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage, and if the insured is a corporation, its transferee of the estate or interest so acquired, provided the transferee is the parent or wholly owned subsidiary of the insured; and in favor of any governmental agency or instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage; provided that the amount of insurance hereunder after such acquisition, exclusive of costs, attorneys' fees and expenses which the Company may become obligated to pay, shall not exceed the least of:

- (i) the amount of insurance stated in Schedule A;
- (ii) the amount of the unpaid principal of the indebtedness as defined in paragraph 8 hereof, plus interest thereon, expenses of foreclosure and amounts advanced to protect the lien of the insured mortgage and secured

by said insured mortgage at the time of acquisition of such estate or interest in the land; or

(iii) the amount paid by any governmental agency or instrumentality, if such agency or instrumentality is the insured claimant, in the acquisition of such estate or interest in satisfaction of its insurance contract or guaranty.

(b) CONTINUATION OF INSURANCE AFTER CONVEYANCE OF TITLE

The coverage of this policy shall continue in force as of Date of Policy in favor of an insured so long as such insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from such insured, or so long as such insured shall have liability by reason of covenants of warranty made by such insured in any transfer or conveyance of such estate or interest; provided, however, this policy shall not continue in force in favor of any purchaser from such insured of either said estate or interest or the indebtedness secured by a purchase money mortgage given to such insured.

3. DEFENSE AND PROSECUTION OF ACTIONS - NOTICE OF CLAIM TO BE GIVEN BY AN INSURED CLAIMANT

(a) The Company, at its own cost and without undue delay, shall provide for the defense of an insured in all litigation consisting of actions or proceedings commenced against such insured, or defenses, restraining orders or injunctions interposed against a foreclosure of the insured mortgage or a defense interposed against an insured in an action to enforce a contract for a sale of the indebtedness secured by the insured mortgage, or a sale of the estate or interest in said land, to the extent that such litigation is founded upon an alleged defect, lien, encumbrance, or other matter insured against by this policy.

(b) The insured shall notify the Company promptly in writing (i) in case of any action or proceeding is begun or defense or restraining order or injunction is interposed as set forth in (a) above, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest or the lien of the insured mortgage, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest or the lien of the insured mortgage, as insured, is rejected as unmarketable. If such prompt notice shall not be given to the Company, then as to such insured all liability of the Company shall cease and terminate in regard to the matter or matters for which such prompt notice is required; provided, however, that failure to notify shall in no case prejudice the rights of any such insured under this policy unless the Company shall be prejudiced by such failure and then only to the extent of such prejudice.

(c) The Company shall have the right at its own cost to institute and without undue delay 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 or the lien of the insured mortgage, as insured, and the Company may take any appropriate action under the terms of this policy, whether or not it shall be liable thereunder, and shall not thereby concede liability or waive any provision of this policy.

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