

WHEN BAD THINGS HAPPEN

CLE Presentation

Arkansas Bar Association
Annual Meeting

Hot Springs, Arkansas

June 16, 2017

JEB JOYCE

QUATTLEBAUM, GROOMS & TULL PLLC
4100 Corporate Center Drive, Suite 310
Springdale, Arkansas 72762 (479) 444-5202

jjoyce@qgtlaw.com

WES LASSEIGNE

LENDERS TITLE COMPANY
One Allied Drive, Suite 1710
Little Rock Arkansas, 72701 (501) 225-3519

wlasseigne@lenderstitle.com

PAT MCALPINE

STEPHENS INSURANCE, LLC
111 Center Street
Little Rock, Arkansas 72702 (501) 377-8141

Patrick.mcalpine@stephens.com

TITLE INSURANCE

- What is title insurance?
- Title insurance is a comprehensive **indemnity contract** that guarantees to make good on a loss arising from a defect in title involving real estate or property. Title insurance protects a policy holder against loss from an occurrence that has already happened, such as a forged deed somewhere in the chain of title. A lender's policy protects only the lender's interest. Separate policies are required to protect both interests.

- Contracting for title insurance in connection with a purchase of property/financing of property – common questions
- Between a buyer and seller, who has the obligation to order and pay for title insurance in a purchase contract?
- What is the difference between a title commitment and a title policy?

- What is “merchantable” or “marketable” title? Marketable title is one that is free from reasonable doubt. There is reasonable doubt when there is uncertainty as to some defects appearing in the course of its deduction, and the doubt must be such as affects the value of the land or that will interfere with its sale. *Griffith v. Maxwell*, 63 Ark. 548, 39 S.W. 852.
- Typical real estate contract provision regarding title insurance:

5. Title Insurance. Seller, at Seller's expense, shall obtain a title commitment issued by Title Company, as agent of Chicago Title Insurance Company, for a current ALTA 2006 Owner's title insurance policy, in an amount equal to the Purchase Price, showing good and merchantable title to the Premises in Seller (the "Commitment"), containing, without limitation, access, survey, zoning and contiguity endorsements and all other endorsements requested by Buyer, and subject to exclusively the following items ("Permitted Exceptions"):

Schedule B – Part I Requirements

- **Noted Items** - The preliminary title report often contains items of which the insured is required to comply. Determine if these items are for informational purposes only, or if the parties need to comply with these items.

COMMITMENT FOR TITLE INSURANCE

SCHEDULE B - SECTION I

Commitment No: 11-005602-180

Effective Date: May 30, 2011

I. The following are the requirements to be complied with:

1. Instruments necessary to create the estate or interest to be insured must be properly executed, delivered and duly filed for record.
2. Payment to or for the account of the grantors or mortgagors of the full consideration for the estate or interest or mortgage to be insured.
3. **Furnish executed Owner's Disclosure & Agreement.**
4. **Warranty Deed from Curtis Finch, Jr. and spouse (if married) vesting fee simple title in 6500 Forbing, LLC.**
5. **Mortgage (deed of trust) from 6500 Forbing, LLC to Eagle Bank & Trust Company, which specifically designates that the purpose of the loan is for the construction of improvements on or to the property and obligating the lender to disburse the entire loan proceeds.**
6. **Furnish a copy of the Articles of Organization and Operating Agreement, including any and all amendments thereto, of 6500 Forbing, LLC. All necessary instruments must be executed in conformity with said Operating Agreement. Unless the necessary instruments are executed by all members, we must be furnished with evidence satisfactory to Lenders Title Company that all necessary consents, authorizations, notices and actions relating to the subject transaction have been provided and/or taken.**
7. **Furnish a current membership roster of 6500 Forbing, LLC.**
8. **Submit Pre-Construction Affidavit executed by Owner/Mortgagor affirming that construction has not commenced on the insured property. Construction shall commence and no materials will be delivered until the Construction Mortgage has been properly filed of record.**
9. **Payment of the General Taxes for the year 2010. (Tax Parcel Number for property is: 44L1840000100)**

NOTE: Standard Exceptions will be deleted from the loan policy.

NOTE: The following Endorsements will be issued with the loan policy:

ALTA 1-06 (Street Assessments) (If Applicable)

ALTA 3.06 (Zoning)

ALTA 9.3-06 (Comprehensive with minerals)

ALTA 17-06 (Access)

ALTA 18-06 (Tax Parcel)

ALTA 22-06 (Location)

Same as Survey Endorsement

ALTA Assignment of Rents Endorsement (If approved and registered in Arkansas by Old Republic

National Title Insurance Company)

Gap Coverage

Schedule B - Part II

Exceptions

- **Taxes** - Determine whether taxes are delinquent and indicate which taxes must be paid prior to closing
- **Easements** - All other easements have been reviewed. The easements have been located, the improvements do not violate or encroach upon the easements and there are no unanticipated restrictions, additional rights of the easement holder or financial burdens upon the property.
- **Covenants, Conditions & Restrictions** -
These are limitations or qualifications on land by a previous owner. Often these are recorded against an entire tract or subdivision for the benefit of all owners.
- **Mortgage/ Deeds of Trust** – Review for any Mortgages/Deeds of Trust recorded on the property.
- **Leases** – Review to determine if any recorded tenant leases affecting the property.

Schedule B - Part II

Exceptions

- **Other Liens** - Determine whether there are any other liens affecting the property and if they are to be removed, or if an endorsement is to be obtained prior to closing.
- **Noted Items** - The preliminary title report often contains items of which the insured is required to comply. Determine if these items are for informational purposes only, or if the insured is to comply with these items.

1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the Proposed Insured acquires for value of record the estate or interest or mortgage thereon covered by this Commitment.
2. Standard Exception:
 - (a) Rights or claims of parties in possession not shown by the public records.
 - (b) Easements or claims of easements, not shown by the public records.
3. Special Exceptions:
 - (a) **Taxes and assessments for the year(s) 2011 and thereafter, which are not yet due and payable, plus any penalties and interest which may accrue.**
 - (b) **Future assessments of the Little Rock Sanitary Sewer System.**
 - (c) **Building Setback Lines and Easements as shown on Plat of record in Plat Book 6, Page 59, records of Pulaski County, Arkansas, described as 60 foot Building Setback Line on the South of property, as shown on survey by E. S. "Stan" Cunningham (Brooks Surveying, Inc.), dated June 3, 2011.**
 - (d) **Any rights of the City of Little Rock, Arkansas in that portion of subject property, if any, described in Warranty Deed executed October 12, 1982 by Sterling Stores Company, Inc. to the City of Little Rock, Arkansas, filed for record October 19, 1982 as Instrument Number 82-36613, records of Pulaski County, Arkansas, containing concrete block building, as shown on survey by E. S. "Stan" Cunningham (Brooks Surveying, Inc.), dated June 3, 2011.**
 - (e) **Right of Way/Easement in favor of Missouri Pacific Railroad Company, and recorded in Deed Book 722, Page 485, in Pulaski County, Arkansas, as shown on survey by E. S. "Stan" Cunningham (Brooks Surveying, Inc.), dated June 3, 2011.**
 - (f) **Right of Way/Easement in favor of Forbing Road Sewer Improvement District No. 200 of Pulaski County, Arkansas, and recorded in Deed Book 771, Page 397 and in Deed Book 771, Page 401, in Pulaski County, Arkansas, as shown on survey by E. S. "Stan" Cunningham (Brooks Surveying, Inc.), dated June 3, 2011.**
 - (g) **Right of Way/Easement in favor of the City of Little Rock, Arkansas, for the use and benefit of the Little Rock Municipal Water Works, and recorded in Deed Book 1372, Page 553, in Pulaski County, Arkansas, as shown on survey by E. S. "Stan" Cunningham (Brooks Surveying, Inc.), dated June 3,**

Title insurance is exclusively an American invention

- The creation of title insurance addressed the concerns raised in *Watson v. Muirhead* (57 Pa. 161) [issue of liability of a conveyancer who searched and abstracted title to real property for Watson]
- Provides:
 - (1) responsibility without proof of negligence;
 - (2) financial protection through a reduction of the risk of insolvency; and
 - (3) the assumption of risks beyond those disclosed in the public records (for which the abstractor was not liable).

What does a title insurance policy cover?

- A title insurance policy essentially states that if the insured suffers a loss as a result of title defect, the insurer will reimburse the insured for that loss and any related legal expenses, up to the face amount of the policy.
- There are two basic types of policies:
 - Owner's Policy
 - advisable with the purchase of any real property
 - generally purchased by the Seller unless negotiated otherwise
 - provides coverage for as long as insured owns the property and can provide coverage after insured sells if sued for breach of warranty of title for a defect covered under the policy
 - Mortgagee's Policy
 - typically a requirement of securing a loan
 - borrower purchases
 - continues for the life of the loan

Title insurance differs significantly from other forms of insurance

- The primary purpose of title insurance is to eliminate risks and prevent losses caused by defects in title arising out of events that have happened in the past.
- Title insurers perform an extensive search of the public records to determine whether there are any adverse claims or defects in title to the subject real estate.
- Those adverse claims and defects are either eliminated prior to the issuance of a title policy or their existence is excepted from coverage.

Why title insurance in lieu of an attorney's opinion?

- In some states, it is a real estate attorney who handles the closing and renders an opinion on the condition of the real estate title.
- Title insurance enables the real estate attorney to offer the client substantially greater protection than what is attainable with a legal opinion alone.
- Title insurance resolves this dilemma by backing up the attorney's title search with guaranteed financial indemnity from a licensed, regulated corporate insurer, providing adequate capital and reserves to respond to claims, and avoids an owner's claim being barred by the running of a statute of limitations with respect to negligence of the attorney.

What distinguishes title insurance from other lines of insurance

- A title insurance policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured who has suffered loss or damage by reason of matters insured against by this policy.
- Title insurance only requires the payment of a single premium and can provide coverage for an owner indefinitely.
- Title insurance insures against past defects in the title to the property up to the effective date of the policy, rather than from the policy date forward.

What duties does a title insurer owe its insureds

- “Duty to Defend” - obligates the insurer to pay for legal expenses (costs, attorney fees, and other related expenses) for the defense of the title to the real property as insured
 - Not subject to nor does it reduce the policy liability amount
- “Duty to Indemnify” - the insurer may attempt to correct or clear any defect to the title on the insured property or reimburse the insured for any loss that is suffered in the event that a title defect cannot be cured.
 - Limited to the liability amount stated in the policy. As provided in the Conditions and Stipulations of a policy, an insurer may elect to pay the full policy amount to the insured which would terminate its duty to defend and any other liability under the policy.

Can coverage for certain risks be negotiated?

- In a word, Yes
- Coverage can be sculpted within reason to accommodate the insured's needs through:
 - Endorsements which expand coverage can be requested where applicable
 - Deletion of or affirmative coverage over certain exceptions

What does an endorsement to a policy do?

- Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsement.

Can the terms of an endorsement be negotiated?

- Generally speaking, No
- The Arkansas Insurance Department requires that title insurance policies and endorsement forms be filed with and approved by the Department prior to use

What are some common commercial endorsements? (owner's and loan)

- Zoning Endorsement (ALTA Forms 3-06, 3.1-06, and 3.2-06)
- Environmental Protection Lien-Commercial Endorsement (ALTA Endorsement Form 8.2-06)
- Restrictions, Encroachments and Minerals (ALTA Forms 9-06, 9.1-06, 9.2-06, 9.3-06, 9.6-06, 9.7-06 and 9.8-06)
- Leasehold Owner's and Lender's Endorsements (ALTA Forms 13 and 13.1)
- Non Imputation Endorsement (ALTA Forms 15-06, 15.1-06, 15.2-06)
- Access and Utility Endorsements (ALTA Forms 17-06, 17.1-06, and 17.02-06)
- Separate Tax Parcel Endorsement (ALTA Forms 18-06 and 18.1-06)
- Contiguity Endorsement (ALTA Forms 19-06 and 19.1-06)
- Location Endorsements (ALTA Forms 22-06 and 22.1-06)
- Same as Survey Endorsement (ALTA Forms 25-06 and 25.1-06)
- Subdivision Endorsement (ALTA Form 26-06)
- Easement Endorsement – Damage or Forced Removal (ALTA Forms 28-06 and 28.1-06)

What about endorsements to a loan policy?

- Variable Interest Rate Endorsements (ALTA Form 6-06, 6.2-06)
- Assignment Endorsement (ALTA Forms 10-06; 10.1-06)
- Modification of Mortgage Endorsement (ALTA Forms 11-06 and 11.1-06)
- Tie-In (Aggregation Endorsement) (ALTA Form 12-06)
- Future Advance Endorsements (ALTA Form 14-06, 14.1-06, 14.2-06, 14.3-06)
- First Loss Payable Endorsements (ALTA Form 20-06)
- Doing Business Endorsement (ALTA Endorsement Form 24-06)
- Usury Endorsement (ALTA Endorsement Form 27-06)
- Interest Rate Swap Endorsements (ALTA Forms 29-06, 29.1-06, 29.2-06 and 29.3-06)
- Assignment of Rents Endorsement (ALTA Form 37)

PROPERTY INSURANCE

- Leases often have confusing property insurance issues.
- Insurance provisions often tied to how much of a building is under lease-
 - One spot in a shopping center-tenant personal property only
 - A stand alone building, tenant usually required to insure the entire premises

Property Insurance-Example

ARTICLE 15.

INSURANCE

A. During the Term, Tenant, at its own cost and expense, will obtain or provide and keep in full force and effect, Commercial General Liability Insurance protecting Landlord and Tenant against any and all liability or claims of liability arising out of, occasioned by, or resulting from any accident or otherwise, in or about the Premises, with combined single limits of not less than \$1,000,000 per occurrence for injury and damage to property and \$1,000,000 per occurrence for death or bodily injury to persons. Tenant will also keep Tenant's Property located on or within the Premises insured for their replacement value. Certificates of insurance will be provided to Landlord upon Landlord's request.

B. Tenant will keep the Premises insured throughout the Term against loss or damage by fire, with extended coverage vandalism and malicious mischief, sprinkler leakage and all other perils of direct physical loss or damage insuring the improvements located on the Premises and all appurtenances thereto, for the replacement value thereof. Tenant shall add Landlord and Landlord's Lender with respect to the Premises as additional insureds.

C. Tenant and Landlord will cooperate with each other in connection with the collection of any insurance monies that may be due in the event of loss and Tenant will execute and deliver to Landlord such proofs of loss and other instruments which may be required for the purpose of obtaining recovery of any such insurance monies.

Property Insurance-Example 2

Lessee will procure and maintain fire insurance with extended coverage covering all of its equipment, fixtures, merchandise and other property located within said Premises, including the interior decorating, installed by or at Lessee's request, in an amount equal to at least eighty percent (80%) of the value thereof and public liability insurance naming Lessor as additional insured thereunder against injury to person and property and loss of life sustained in or upon the Premises with limits of at least One Million Dollars (\$1,000,000) for property damage. Lessee shall deposit with Lessor

Property Insurance-Example 3

ARTICLE 13

INSURANCE

During the Term, Tenant, at its own cost and expense, shall obtain or provide and keep in full force and effect the following insurance:

A. All-risk property insurance covering fire and extended coverage vandalism and malicious mischief, sprinkler leakage and all other perils of direct physical loss or damage insuring the improvements located in the Demised Premises, including the Demised Premises, and all appurtenances thereto, for the full replacement value thereof.

B. Commercial General Liability Insurance protecting Landlord and Tenant against any and all liability or claims of liability arising out of, occasioned by, or resulting from any accident or otherwise, in or about the Demised Premises, with combined single limits of not less than \$2,000,000 per occurrence for injury and damage to property and \$2,000,000 per occurrence for death or bodily injury to persons.

C. Business Interruption Insurance covering Tenant's business revenues up to \$2,000,000, in the event of a loss arising out of an insured peril. Such insurance shall also contain an endorsement covering Tenant's leasehold interest in the Premises which will provide for a continuation of rental payment during the durations of the casualty period.

How does a GL Policy Work With a Lease?

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
 - (b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

Definitions

9. "Insured contract" means:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

Endorsements

- Enc
 - You
- A. Section II - Who Is An Insured** is amended to include any person or organization you are required to include as an additional insured on this policy by a written contract or written agreement in effect during this policy period and executed prior to the "occurrence" of the "bodily injury" or "property damage."

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY POLICY, COVERAGE APPLICABLE TO COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE (SECTION I - COVERAGES) ONLY

- A. Section II - Who Is An Insured** is amended to include any person or organization you are required to include as an additional insured on this policy by a written contract or written agreement in effect during this policy period and executed prior to the "occurrence" of the "bodily injury" or "property damage."
- B.** The insurance provided to the above described A additional insured under this endorsement is limited as follows:
1. COVERAGE A BODILY INJURY AND PROPERTY DAMAGE (Section I - Coverages) only.
 2. The person or organization is only an additional insured with respect to liability
- i. The preparing, approving, or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; and
 - ii. Supervisory, inspection, architectural, or engineering activities.
5. This insurance does not apply to "bodily injury" or "property damage" arising out of "your work" or "your product" included in the "product-completed operations hazard" unless you are required to provide such coverage by written contract or written agreement and then only for the period of

Miscellaneous Issues

- Effectiveness of Insurance Certificates
- Cancellation of Insurance and Notice of Cancellation to third parties
- Listing parties as Additional Insured/Mortgagee