UNDERWRITING MANUAL:

If any conflict exists between this Manual and the terms of your title insurance Issuing Agency Agreement with Westcor, the Issuing Agency Agreement will control.

For additional copies of this manual, please see the Westcor Land Title Insurance Company website (www.wltic.com) where you can download this information. Additional copies may be requested from your Regional Office or by contacting the Corporate Office in Maitland, Florida.

WESTCOR
LAND TITLE INSURANCE COMPANY

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Acknowledgments

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Disclaimer

Westcor is proud to make available this Underwriting Manual for your use. We sincerely believe that it will be a great help to you in your business. We trust that you will find it informative and easy to use.

Title insurance underwriting is an especially complex endeavor with thousands of factors affecting title transfers. No single volume could cover every contingency, and we don't pretend that this manual will, either. Consider this book to be a set of guidelines to help you through your workday, providing direction on many questions that may arise. If you have any doubt about a particular situation or how it applies to your jurisdiction, please call your regional underwriting counsel. Westcor counsel can provide you with an appropriate answer to your underwriting situation. It's a toll-free call and you'll get your answer right away.

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Access

Overview

Title policies include an insuring provision which covers the insured for loss resulting from a '*lack of a right of access to and from the land'*. Access directly affects the use and marketability of real property. Access to the insured land is always over some land other than the insured land. It may be provided by a dedicated street, a legally created easement or another specifically granted right. If a publicly dedicated street or highway abuts the insured land and the ability to cross between the two parcels is not restricted, then the insured land would have access. Access means the ability of the owner to get to the land.

The access provision in the commitment and policy relates to the existence of a *legal* right of access not *physical* access. A title insurance policy does not insure the physical usability, existence or characteristics of a means of access. Also, a policy does not insure a particular means of access. It merely insures that a valid, legal right of access exists as of the date of the policy. However, the type of physical access to the property must meet the standard of being reasonable. Access to a home with a garage would be the legal ability to walk or drive to the insured land. Access to the top floor unit of a condominium would probably mean only walking access and would not include the right to drive an automobile to the door of the condominium unit. Accordingly, each property must be reviewed to determine what would constitute *reasonable* access.

If the insured land abuts only private land, then access is restricted. Driveways and, in some cases, private roads do not necessarily constitute *legal* access. Such access rights must be evidenced by a written, recorded easement and access should not be insured unless the access is (shown) described in a written and recorded easement. A private easement should be considered a separate tract of property which abuts the subject property in an amount (width) sufficient to provide physical (vehicular, if appropriate) access from the insured land to a public roadway. Occasionally, a small gap or gore may separate a lot or parcel from a public roadway. In these instances it may be necessary for the municipality, county, or state to abandon title to that portion of property separating the insured parcel and the road.

Whenever access of the insured land to a public roadway is restricted, limited or does not exist, an exception to lack of access must be noted. The terms and conditions of any easement providing access must be shown as an exception on Schedule B.

Underwriting Instructions

Title policies may be issued insuring access only when legal access is provided by a prior recorded easement or the property abuts a dedicated public roadway. Implied and/or prescriptive easement rights are not considered legal rights of access and should not be insured on an owner's or loan policy. Please note that the policy does not insure convenient access or any particular right of access, but the access insured must still meet the standard of being reasonable. If coverage is sought for any particular right of access, see guidelines under **Easements** and **Endorsements**.

Important Note: The **ALTA Homeowners Policy (1998)** form includes a different insuring clause concerning access. That particular form insures the **existence** of a **useable** means of access. It does not insure just the existence of a legal right of access but also insures the existence and usability of the access right. This is a different and higher standard for insurance of access and requires additional underwriting analysis. The additional underwriting standards and guidelines for this policy form are discussed under **Homeowners Policy Form** in these Guidelines.

Acknowledgments

Overview

Laws and definitions regarding acknowledgments vary from state to state. However, there are several issues that are common to almost every jurisdiction. Generally, an acknowledgment refers to a form of certification made by a notary public, judicial officer, or other authorized individual which is attached to deeds, security instruments, leases and other real estate instruments, certifying that the maker or makers of such instruments appeared before the notary, judicial officer or other authorized individual and acknowledged that they signed the instrument freely and voluntarily (without compulsion, fear, or under duress), and for the purposes indicated in the instrument.

Underwriting Instructions

Because laws and practices regarding acknowledgments vary from state to state, it is important that you familiarize yourself with, and comply with, statutory requirements.

Generally, Westcor agents must follow guidelines for acknowledgments:

1. Notarize, witness, or attest signatures only when the signatory *personally appears before you, appears to be legally competent and states that the signature being acknowledged is authentic and voluntary.*

2. Obtain proof positive that the person whose signature you are acknowledging is, in fact, who they say they are. They should be either *personally known* to the notary or *properly identified*. Westcor requires that its agents obtain valid, *current government issued picture identification* which includes the signatory's signature and physical description (e.g., a current driver's license).

3. Require proof that the individual signing the document, (attorneys-in-fact, partner, trustee, etc.) has proper authority to execute in a representative capacity the document being acknowledged (i.e., through an acceptable power of attorney, partnership agreement, trust document, etc.). Remember that unless the document creating the powers of partners, trustees, corporate officers, etc., specifically provides for it, those fiduciary powers may generally not be delegated via a power of attorney.

4. Confirm that all information in the acknowledgment section has been completed and conforms to the information contained in the body of the document (i.e., name, title, date, etc.).

5. Make sure that strict compliance with statutory requirements for recordation has been met (i.e., correct number of witnesses have executed the document, acknowledgment form and verbiage, proper seals have been affixed, etc.), many states have specific, statutorily required language for acknowledgments as well as requirements for seal and commission expiration date. Also, some states appoint notaries for only certain counties. Failure to comply with those requirements may result in the document being void or voidable.

Generally, acknowledgments should contain the following information:

1. Individual Acknowledgment

    a. Name of individual

    b. Personally appeared before them

    c. Personally known or proved to be the person signing and acknowledging.

2. Attorney-in-Fact Acknowledgment

   a. Name of Principal as contained in body of deed, by

   b. Name of Attorney-in-Fact, as attorney-in-fact

3. Corporation Acknowledgment

   a. Name of Officer

   b. Capacity of Officer

   c. Corporation Name

   d. State of Incorporation

4. Partnership Acknowledgment

   a. Name of Partner

   b. Name of Partnership

5. REMEMBER: In some states (e.g., California), a generic statutory acknowledgment form MUST be used which makes no reference to the capacity of the signatory, and failure to use said form will disallow the filing/recording of the document. Also remember that regardless of the form of acknowledgment used, the proper capacity of the signatory MUST be noted in the signature area of the document.

If you have any questions regarding local practice or acknowledgment laws in your state, or if asked to accept an acknowledgment taken in a foreign jurisdiction, contact your local Westcor Counsel.

See also: **Corporations**, **Partnerships**, **Attorneys-in-Fact**, **Execution of Instruments**

Acreage

Overview

As a general rule, Westcor *does not* insure the actual amount of acreage to property and reference to the quantity of land should be avoided.

If acreage is to be insured, the acreage must be certified to Westcor in an acceptable current survey. Also, it is important to obtain an accurate legal description of the land including the section, township, and range in which it is located. In many cases, abbreviations may be used. For instance, the *"the Northwest quarter of the Northeast quarter of the South half of Section 7, Township 30 South, Range 26 East"* may be shown as the *"NW 1/4 of the NE 1/4 of the S 1/2, Sec. 7, T-30-S, R-26-E."*

In some cases, acreage descriptions may include a carved out portion of land that requires a more detailed metes and bounds description. It is necessary to verify that the property description begins and ends at the same point of beginning for proper closure of the parcel. An estimate of the amount of acreage may be included at the end of the metes and bounds description (e.g., *"containing 3.5 acres M.O.L."*) although the quantity of such acreage is not generally insurable.

When insuring acreage property that has been carved out of a larger portion of land, be sure to verify not only that the "new" legal description closes properly, but that it is completely contained within the larger parcel(s) of land from which it is carved, and that it is not affected by any overlapping conveyances.

Underwriting Instructions

If you are asked to insure the *quantity* of acreage, contact Westcor underwriting counsel for express permission and prerequisites. A current, accurate survey of the land will always be required.

Always add the language "more or less" after the amount of acreage in any legal description when amounts are shown. And whenever any reference to the amount of acreage is mentioned in the description, the following exception should be taken:

> *"Any inaccuracy in statement made as to the quantity of land contained within the boundaries of the land described in Schedule 'A'."*

As an alternative, the references to the amount of acreage should be deleted from the insured legal description.

Should a survey contain a reference as to the amount of acreage of the property and we are asked to remove the standard exception for survey matters, the following exception should be made in Schedule B of the policy:

> *"Any inaccuracy in any statement made on survey (describe survey) as to the quantity of land contained within the boundaries of the land described in Schedule 'A'."*

See also: **Affirmative Coverages**, **Survey Matters**

Adverse Possession

Overview

Adverse possession is a basis for claiming title to property when a person or entity who is not the rightful owner of a specified parcel of land enters into possession of the land and maintains possession for the statutory period of time. Generally, cases have ruled that such possession must be open, notorious, hostile, and continuous for a statutory period of years.

Adverse possession may be made "*under color of title"* or *"without color of title."* When taken under color of title, the adverse possessor is in possession by virtue of a recorded document, a deed, tax deed (or even a void or forged deed), or will – that leads him to believe he has a legal right to the property. When taken without color of title, the adverse possessor has no such documentation by which to assert his supposed legal right to the property. In some states, adverse possession taken without color of title requires the adverse possessor to pay all taxes and matured installments of special improvement liens that attach to the property during the period of adverse possession. Some states provide for a shorter period of possession when there is color of title and payment of taxes.

Title by adverse possession is not considered marketable title and, therefore, the title must be confirmed by a proper court order prior to issuing title insurance on same.

Underwriting Instructions

Westcor requires a judicial determination of adverse possessory interests (i.e., final non-appealable court order in favor of the present owner or proposed insured) in order to insure title in the name of a party who claims property by adverse possession. Absent a final court order, Westcor will not insure property owned or claimed by an adverse possessor.

Affirmative Coverages

Overview

Affirmative Coverage also referred to as "insuring over" or "insuring around", is a provision wherein a title insurer may add, extend or modify title insurance provisions or delete, diminish or qualify title exceptions to enhance title coverage provided by the policy.

This may be accomplished by any of the following:

- Providing Affirmative Language which may insure against loss or damage arising from the occurrence of a certain event
- The use of supplemental insuring provisions contained in endorsements
- By the deletion of some of the exclusions from coverage or exceptions contained in the policy

Underwriting Instructions

Affirmative Language: "Insuring Over/Around" Title Defects

Most lenders require that Affirmative Coverages be given to general or specific exceptions as listed in Schedule B of the final policy insuring them for loss or damage which may result due to that matter. Rather than omitting the interest or encumbrance affecting title from the policy, the agent should list the matter as an exception to coverage in both the commitment and final policy, even though the Company may be provided with an indemnity letter from another party. The necessary affirmative coverage may then be given by attaching the appropriate endorsement to the policy. Another method for providing affirmative coverage is by inserting a note or additional language at the end of the exception in Schedule B to state the nature and extent of affirmative coverage. However, this method is not preferred and the Company discourages using this alternative method. The use of endorsements to provide supplementary or affirmative coverage is preferred.

Always check with the underwriting and/or legal department for approval before providing affirmative language other than those provided for in this manual. You must be extremely careful in the wording of affirmative coverages. Leaving out or including just one wrong word can expose the Company to a large degree of liability in the event of a claim.

- **Insuring Over an Actual Lien or Encumbrance:**
  Language should conform substantially to the following:

  "The Company hereby insures the insured against loss or damage incurred, in an amount not exceeding the insurance amount of this policy, by reason of the enforcement of the lien identified as Item ___ of Schedule B, against the insured property as a lien encumbering or having priority over the estate or interest insured by this policy."

- **Insuring Over an Encroachment:**
  Language should conform substantially to the following:

  "The Company hereby insures against loss or damage which the insured shall sustain by reason of the entry of any court order or judgment which constitutes a final determination and requires the removal of the existing improvements because of the encroachment or encroachments thereof specifically set forth at exception number _____ in Schedule B."

  As outlined elsewhere in this manual, encroachments should *not* be insured over in an owner's policy without specific authorization from the Company.

  See also: **Encroachments**, **Survey Matters**.

- **Insuring Over Matters of Record:**
  Generally, the Company does not authorize an Agent to insure over prior liens of record. Before insuring over any matter of record, contact the underwriting and legal department for written authorization. At a minimum, the Company will require a properly executed Indemnity Agreement from all parties involved; sufficient funds to be held in escrow (generally a minimum of 1½ times the amount of the liability) for a specified amount of time (pending completion of work, matter has been resolved, or until the statute of limitations has expired); and written authorization from the Company. You may not insure over pending litigation which may affect title to the insured property.

- **Unacceptable Affirmative Coverages:**

Caution!

The following examples of *unacceptable* affirmative language should never be used when "insuring over" matters:

  - The Company hereby insures against the *consequences* of any attack…
  - This policy hereby insures against *any* loss by reason of the aforementioned lien…
  - The Company hereby insures the insured against *all* loss or damage as a result of said violation…
  - The Company hereby insures against the forced removal or *attempted* forced removal…
  - This policy hereby insures against loss or damage arising out of any enforcement or *attempted* enforcement of the rights, if any.

Endorsements

Endorsements modify the existing policy language or extend additional coverage not otherwise provided by the policy. To obtain specific information regarding the definition and use of Westcor's most commonly used endorsements please refer to the Endorsements section of this manual or contact your local Westcor Agency Manager.

See also: **Endorsements**

After-Acquired Title

Overview

"After-acquired Title" is a legal doctrine recognized in many jurisdictions which provides that, when a grantor purports to convey or mortgage property to which he is not vested, any title subsequently obtained by that grantor automatically passes to his grantee by operation of law. The purpose of this doctrine is to give effect to the intent of the parties to a conveyance, or security instrument as evidenced by the documents they execute. After-acquired title applies when Joe, who has no interest in the land, conveys title to the land to Mary and then subsequently acquires title to the land from Fred, who originally held legal title to the land. At the time Joe acquires title, such title automatically passes to Mary.

This doctrine has been codified into a statutory provision in some states but originally it was an equitable doctrine to prevent unjust enrichment. As a general principle, warranty deeds and grant deeds are deemed to transfer after acquired title, but quitclaim deeds do not.

Underwriting Instructions

While title obtained pursuant to the after-acquired title doctrine may be legally valid, the chain of title will not be entirely intact. Westcor agents should not rely on the doctrine without specific authorization of Westcor Counsel. The best rule of thumb is to obtain and record a confirmatory deed or mortgage.

Airspace

Overview

Title to estates or interests in land created above ground may themselves be the separate subjects of title insurance, provided that an accurate description with respect to horizontal and vertical planes are established such that the "cube of air" can be defined and located. This concept may be employed to separate a building from the land upon which it rests as a financing technique or a tax saving device. It is also used in large urban centers where it is necessary to divide and utilize available airspace in addition to the limited prime surface land to create multiple floored living arrangements without the use of condominium laws. It may also be used to define an area that may be restricted from construction which would obstruct the view or sunlight for an adjacent parcel of land. The airspace concept should not be confused with the separation of the ownership of land and buildings by agreement under the terms of certain sale-leaseback transactions. In those transactions, the building may not exist as a separate parcel of real estate unless it is separately defined and attached to other ownership interests in the land. Most forms of condominium ownership involve rights in airspace defined in the declaration of condominium and the condominium statutes of the relevant state. The concept of airspace addressed in this section applies to airspace rights other than those derived through a declaration of condominium.

Underwriting Instructions

Consult local underwriting counsel as the laws governing use of airspace varies from jurisdiction to jurisdiction.

The basic requirements to insure airspace rights are:

1. A determination must be made as to the record owner of the underlying land at the time of severance of the air parcel from the underlying land. This severance creates a new "chain" of title for the air parcel ownership. Look for a "covenants, conditions, and restrictions" document in the chain of title which may define ownership rights and obligations as to both the air parcel(s) and the underlying land. In the alternative, a ground lease may be required to provide supporting space for the separate air space ownership.

2. The parcel of airspace must be located or defined by engineering and survey data (a legal description) sufficient to adequately define the insured parcel. At the very least, this must be a three-dimensional description which defines a floor elevation plane or datum and a ceiling elevation plane or datum with respect to the perimeter description of a horizontal surface. This three-dimensional description must be aligned with a surveyed tract of surface land. A surveyor or engineer should be able to identify the perimeters of the insured airspace with certainty in reference to a known surveyed tract of land which can be identified in the land records of the county in which the airspace (and surface land) is located.

3. The airspace must have the benefit of a written and recorded easement or other appurtenant right in the referenced land surface to support any structure erected or to be erected within the airspace. This right may be set forth in a ground lease or "covenants, conditions and restrictions" document which may also include provisions for ingress and egress as stated below.

4. The airspace must have a written easement for ingress and egress (if ingress and egress is required). This easement must also be recorded in the office of the recorder of deeds for the county in which the airspace and the referenced surface land is located. Please note that the "right of access to the insured land" is one of the insuring provisions of the policy. The easement for ingress and egress to airspace will probably be across private land (and may include other airspace). Consequently, an exception in Schedule B must be raised to modify the insuring provisions of the policy relating to access and to disclose the terms of the access easement.

6. The covenants, conditions and restrictions for the use of the airspace must be identified in a recorded document referenced to the underlying land and must be raised by exception in Schedule B of the policy.

7. Review that the airspace parcel created does not violate any "plat act" requirements according to local laws.

8. If easements are to be insured, they will have to be added as an additional insured parcel.

9. Contact your local underwriter counsel for requirements for waiver of the general exceptions to the policy related to survey pursuant to any request for "extended coverage". A survey may be required.

See also: **Condominiums**, **Easements**.

CAUTION: Other than for condominiums, insuring airspace or rights in or to airspace constitutes an unusual and extra – hazardous risk that must be submitted to and approved by Westcor Counsel.

Assignments

Overview

A promissory note which is secured by a mortgage or deed of trust may be transferred or assigned by endorsement on the note and delivery to the assignee. The assignment of the obligation carries with it the rights of the assignor to the security for the promissory note. In Paragraph 8 of the ALTA Loan Policies, the validity and enforceability of any assignment of the insured mortgage or deed of trust shown in Schedule A, and also the failure of the assignment to vest title to the mortgage in the assignee free and clear of all liens, are automatically insured. This requires an agent to determine, among other things, that the document labeled "assignment" is in fact insurable. Furthermore, the second portion of the insuring provision which insures the assignee that the insured mortgage is "free and clear of all liens" makes it necessary to search not only the name of the mortgagor, but also the name of the mortgagee for possible prior assignments or liens which may have attached to the mortgagee's interest in the mortgage. Although state law often does not require an assignment to be recorded in the real estate records, the records must be searched to verify that no prior assignment has been recorded. **As a prerequisite to issuing insurance to an assignee**, **a separate assignment of the note and security instruments must be recorded**. While most intervening matters filed between the effective date of the original mortgage and the date of recording of the subsequent assignment will generally be subordinate to the assignment, state law may vary. Agents must be concerned with the effects of changing the effective date of the policy upon the standard risks of survey matters, unrecorded mechanics liens, and parties in possession. For instance, you should not bring forward the effective date regarding matters of survey or mechanics liens if construction has occurred following recordation of the mortgage, unless you are certain that such matters could not affect the validity or enforceability of the assigned mortgage or gain priority over it.

An assignment should never be insured without insuring the underlying mortgage, because, in the event the underlying mortgage was not sufficient to create a proper lien, the assignment of that mortgage would be equally ineffective. In some cases, an assignee may wish to be insured in an amount equal to the existing loan balance rather than the original mortgage amount. This is acceptable, provided 1) you receive an estoppel letter from the assignor stipulating the existing loan balance and 2) notation is made in the loan policy that the amount insured is made upon the representation by the assignor that the loan balance has been reduced from the original mortgage amount of the existing balance.

Underwriting Instructions

In the issuance of a loan policy insuring a mortgage or deed of trust which has been assigned, the assignment must be placed of record and the assignee named as the insured under Schedule A of the policy. The requirements are the same for the issuance of a policy insuring the original mortgage or deed of trust but, in addition, the note secured by the mortgage or deed of trust must be examined to determine that the chain of endorsements on the note from the original beneficiary to the proposed insured is unbroken and not in conflict with any assignments which may have been recorded. Furthermore, satisfactory evidence of the authority of the individual executing the assignment must be obtained. A search of the public records must be made to disclose prior assignment, partial releases, modifications or other matters that could affect the deed of trust.

If the assignee requests an endorsement to an existing loan policy, care must be taken to review the underwriting requirements for each specific endorsement. If the endorsement being requested includes a change of the effective date, extreme care must be taken to verify that no matters could affect other provisions of the policy, such as unfiled mechanic's liens.

See also: **Deeds of Trust**, **Endorsements**, **Mortgages**.

Bankruptcy

Overview

Bankruptcy proceedings affect the ownership, conveyance and encumbrance of real property as well as the attachment, priority, and enforceability of mortgages, judgments, and liens. Contrary to popular belief, bankruptcy *does not automatically discharge the debtor of all debts, nor does it extinguish all judgments and liens filed against the debtor's property. While the debtor may be personally relieved from liability for properly scheduled pre-bankruptcy debts, pre-petition mortgages, judgments, and other liens continue to encumber the property of the debtor, unless properly invalidated in accordance with specific bankruptcy procedures.* (See also: **Judgments**, **Bankruptcy**.)

Caution!

Bankruptcy proceedings generally fall into one of two categories, prior party or current party:

- *Prior party* proceedings are those which occurred prior to the current title holder being vested.

  Underwriting Instructions for Prior Party Proceedings:
  When examining the file, you must determine that such prior conveyance did, in fact, convey marketable title. If certified copies of pertinent documents from the bankruptcy case file have been recorded in the local public records and you are able to determine that the title then conveyed was and is marketable, there is no requirement to make further inquiry as to the bankruptcy case.

- *Current party* proceedings typically involve the current owner or co-owner who, prior to conveying title to or mortgaging the subject property, voluntarily files a Petition for Bankruptcy.

  Underwriting Instructions for Current Party Proceedings:
  For current party proceedings, you must review the bankruptcy records and disclose the appropriate requirements/conditions on the title insurance commitment.

Examination of Records

Underwriting Instructions

If the property to be insured is located in a county where the local bankruptcy court is located, a search should be made of the *bankruptcy court records* to determine whether or not the subject property was, or is, involved in a bankruptcy. If the property is *not* located in the same county as the local bankruptcy court, no special search need be made *unless* there exists a notice of bankruptcy recorded in the *public records* of the county where the property is situated, or you believe, for some other reason, that a bankruptcy has occurred or is currently pending. Matters shown in local public records or other information that leads you to believe a bankruptcy proceeding may be pending place you under a duty to investigate further.

Voluntary Petition or Entry of Order for Relief

By voluntarily filing a *Petition for Bankruptcy,* the debtor submits his property to bankruptcy administration. In the case of an involuntary proceeding, the debtor's creditors may ask the court for an *Order for Relief.* Under a voluntary petition, the court automatically acquires jurisdiction over the property of the debtor; however, it is not until the entry of an Order for Relief has been filed that the court is able to acquire jurisdiction with respect to involuntary proceedings.

Scheduled Debts/Secured and Unsecured Creditors

At the time bankruptcy proceedings are commenced, *all* property (real and personal) of the debtor becomes part of the bankrupt estate. As noted below, certain property may be exempted from such proceedings or

may, during the course of the proceeding, be determined burdensome or of inconsequential value to the estate and may be abandoned (released back to the debtor) during the bankruptcy proceeding.

As part of the bankruptcy proceedings all debts of the debtor are to be listed in the bankruptcy records. Debts listed are thereafter referred to as *scheduled debts.* Those *not* listed are considered *unscheduled* debts.

Underwriting Instructions

All property of the debtor should be considered unmarketable unless sold under court order or abandoned as part of the bankruptcy proceedings.

In addition, some debts – be they scheduled or unscheduled – are *secured debts* (i.e., mortgages, car loans, etc.) while other debts are *unsecured* (i.e., signature loans or unsecured lines of credit). Whether a debt is secured or unsecured determines whether the entities who extended the credit or made the loans to the debtor are *secured creditors* or *unsecured creditors.*

Appointment of Trustee/Debtor-in-Possession

In Chapter 7 cases, a trustee is always appointed and the debtor may not act as debtor-in-possession. In Chapter 11, 12, and 13 cases, a trustee may be appointed or, if acceptable to both the court and creditors as evidenced by an approved plan under the applicable chapter, the debtor may remain in control of the estate as debtor-in-possession subject to the provisions of the plan.

Exempt or Abandoned Property

Debtors may be able to claim certain property to be exempt from bankruptcy court jurisdiction under either federal or state exemption provisions. Once the debtor claims the property as exempt on the schedules, in the absence of timely objections, the property claimed as exempt is exempted. Fully exempted property may be sold by the debtor without further court order in a Chapter 7 or Chapter 11 case. In a Chapter 13 case, local rules may require court approval as well as approval of the trustee.

Property of the estate which was properly scheduled in the bankruptcy proceedings may be *abandoned* by the trustee if it can be shown that such property is burdensome or of inconsequential value to the estate. A court order approving the abandonment should be obtained and recorded in the land records.

Exceptions for liens on property as a result of an abandonment proceeding must be reflected since such proceeding *will not* eliminate liens which were properly perfected and attached to the property prior to commencement of the bankruptcy proceedings. Liens against abandoned property which were recorded at the time of the bankruptcy filing or which attached to the property or against the debtor/owner *after* bankruptcy must also be shown as exceptions to title, unless otherwise discharged.

With respect to insuring transactions involving property abandoned through bankruptcy, the order of abandonment must be recorded. After the order of abandonment has been recorded, title to the abandoned property re-vests in the debtor who may then deal with the property outside of the bankruptcy.

Order of Discharge: Dischargeable and Non-Dischargeable Debts

Not all debts are dischargeable in bankruptcy and the debtor remains personally liable for the payment of such non-discharged debts. Entry of the Discharge will typically *not* reveal which debts are being discharged and which are not. A perfected lien, arising from a debt which is properly scheduled and discharged in bankruptcy, will not attach to property acquired by debtor subsequent to the discharge, provided such property was not acquired by assets retained from the bankruptcy by the debtor. A perfected

lien, properly scheduled but *not* discharged in bankruptcy, remains a lien on all property acquired during or subsequent to bankruptcy. Liens perfected subsequent to the discharge *will attach* to all property retained by the debtor following the bankruptcy as well as property acquired by the debtor subsequent to the bankruptcy. In Chapter 7 (liquidation) cases, an inquiry must be made to determine whether such debts have been discharged or continue to be enforceable against the debtor and his subsequently acquired property. *Non-discharged liens must be shown as an exception to title.*

Under Chapter 7 cases, the filing of a Discharge will effectively forgive the personal liability of the debtor from all scheduled and dischargeable debts arising prior to the commencement of the case. This, however, only pertains to debts which were listed in the debtor's schedule. Debts *not listed* in the debtor's schedule (*unscheduled debts*) – including those which arose prior to the commencement of the case – would not be considered dischargeable.

The *effect* of a discharged debt upon entry of the Discharge is that it *becomes unenforceable against the debtor personally.* The discharge protects the debtor from any attempt at collection or recovery by creditors with respect to the discharged debt.

However, if the discharge was obtained a) through fraud then unknown by the requesting party; b) by failure of the debtor to report certain estate property; or c) by refusal of the debtor to obey lawful order or respond to material questions approved by the court – the Discharge may be *revoked.* Such request for revocation may be made within one year after the discharge was granted in the case of fraud, or within one year from the date of discharge or the date the case was closed, whichever is later, for other cited reasons.

Therefore, prior to insuring title, a review of the bankruptcy file should show that more than one year has elapsed since the date of discharge or the date the case was closed (whichever is later) and that no order revoking the discharge has been granted.

Types of Bankruptcy; General Procedures

There are two basic types of bankruptcy proceedings: liquidation and reorganization. *Liquidation,* as its name suggests, liquidates the non-exempt assets of the debtor which are then used to pay off his creditors. *Reorganization,* on the other hand, economically rehabilitates the debtor by enabling him to recognize existing debts and structure new payout agreements with creditors. Chapters 1, 3, and 5 of The Code provide general information that applies to all bankruptcy cases and deal with procedural aspects of same. Chapters 7, 11, 12, and 13 are considered special chapters that affect only cases begun and administered under their provisions. A review of the Petition for Bankruptcy or case docket will disclose the applicable Chapter of a particular bankruptcy case. In some cases, proceedings begun under one Chapter may later be converted to another Chapter.

Automatic Stays

Upon filing a Petition for Bankruptcy, an *automatic* stay goes into effect, prohibiting any activity by the debtor, debtor's creditors, or any other party from commencing any new action or continuing any existing action against property owned by the debtor (which, upon the original filing, became property of the estate). No conveyance, encumbrance, or action to enforce any existing encumbrance or lien may be taken against the estate property as long as the stay is in effect.

It is not uncommon to find that the debtor filed for bankruptcy subsequent to a creditor instigating foreclosure action against him. A foreclosure in progress at the time bankruptcy proceeding is commenced is *stayed;* meaning that no further action may be taken with respect to the foreclosure until the stay is lifted or the bankruptcy court authorizes such action by granting relief from the stay with respect to the subject property and pending foreclosure action.

From a title perspective, you may rely upon a *final order* of the bankruptcy court which grants relief from the automatic stay when insuring title involving foreclosures of mortgages or deeds of trust.

Notice and Hearing

The Bankruptcy Code requires that an opportunity for sufficient hearings, by interested parties, be provided for in bankruptcy proceedings. Throughout The Code is found the language, "*after notice and hearing*". While *notice* must be given to appropriate parties with respect to actions taken throughout the proceedings and an *opportunity for hearing* must exist with respect to same, this does not necessarily mean that there *will* be hearings held. Generally, hearings are held when responses are filed objecting to certain petitions or motions which may have been filed by interested parties. Therefore, if no responses are filed, a hearing will not be held.

Appeals Process

The Code provides that anyone wishing to *appeal* an order entered by the bankruptcy court must file such appeal within 10 days of final order. An order is considered final once it is entered on the bankruptcy court clerk's docket. The court may extend the appeal period for an additional 20 days, provided a motion to extend is received within the original 10-day period or, within 20 days of the date of final order if a showing of excusable neglect can be shown. From a title perspective, no judgment, order, or decree of a bankruptcy court is final until all appeals have been heard and/or the time for the appeals process has expired.

Conversion

In some cases, a bankruptcy case may be *converted* from one special Chapter to another. For instance, a Chapter 11 reorganization case or Chapter 13 repayment case may be converted to a Chapter 7 liquidation case in the event the reorganization or repayment plan fails. In the event of conversion, the date of the filing of the original Petition for Bankruptcy will be considered the date of commencement for the converted case.

Dismissal

Generally, the *dismissal* of a bankruptcy case by the court effectively revests title in the debtor of all property vested in him prior to the commencement of the case and reinstates any liens, transfers, proceedings, or other such matters which were in effect against the debtor prior to the commencement of bankruptcy.

Special Chapters

Chapter 7

Chapter 7 governs liquidation or straight bankruptcy cases and is the most common of all bankruptcy proceedings. This type of proceeding is available to individuals, partnerships, and corporations with the exception of railroads, insurance companies, and certain savings institutions. *Filing of the petition* may be voluntary (by debtor) or involuntary (by creditors). The date of the voluntary filing of the petition by the debtor is considered the equivalent of the date of the entry of the *Order for Relief* in an involuntary proceeding initiated by creditors. This is when the court acquires jurisdiction over the debtor's property and may move to appoint a trustee. Title to *all* the debtor's assets is transferred to the bankruptcy estate, and the debtor no longer has the ability to deal with the assets outside of the bankruptcy proceeding. Afterward *certain* assets may be exempted from sale or abandoned by the trustee under appropriate court order. Title to such exempt or abandoned property then revests in the debtor.

The debtor may *not* act as a debtor-in-possession under Chapter 7. The debtor's estate, consisting of both real and personal property – with the exception of exempt or abandoned property – is liquidated (sold off) and the cash is then used to satisfy creditor's claims.

Underwriting Instructions

From a title perspective, the entry of a Discharge releases the debtor from personal liability for dischargeable debts and prohibits enforcement by creditors against the debtor for such debts. When insuring title to real property acquired by the debtor *after* the commencement of his bankruptcy case, no scheduled debts (i.e., those disclosed of record) should be ignored unless the examined bankruptcy file shows that the period for request for revocation has expired (see above) and no order revoking the discharge has been granted.

Documents necessary to convey title in a Chapter 7 Bankruptcy:

1. Order of Abandonment, and
2. Deed from debtor.

or

1. Court Order approving sale and conveyance of the specific property, and
2. Deed from bankruptcy trustee.

Chapter 11

Chapter 11 provides for the planned restructuring of existing debts and is available to individuals, partnerships, corporations, and railroads. The proceeding is commenced by the filing of the petition by debtor (voluntary) or by his creditors (involuntary).

A Chapter 11 proceeding provides the debtor an opportunity to create a *debt-restructuring* plan that permits him to continue on with business as usual while providing the creditors sufficient repayment on existing debt obligations. Creditors affected by the plan have veto power over the plan. While court approval of the actual plan is not required, court approval *confirming* the plan is required.

Upon request by an interested party, the court has the authorization to appoint a trustee. If none is appointed, the debtor with an approved plan may continue to act as a debtor-in-possession and manage his business. In some cases, a trustee or receiver may be appointed to supervise management of the business by the debtor.

Generally, the Chapter 11 debtor has 120 days following the filing of the petition or entry of an Order for Relief in which to file his reorganization plan. If the plan is filed within that time, the debtor has an additional 60 days to obtain acceptance of the plan by all affected creditors. In the event the reorganization plan does not meet with the approval of creditors or, upon adoption, does not work out as planned, the Chapter 11 proceeding may be converted to a Chapter 7 liquidation plan. Debtors who file Chapter 11 voluntarily may convert to a Chapter 7 at any time. The court may convert a Chapter 11 case to a Chapter 7 case without the debtor's consent, provided just cause is shown and such conversion is in the best interests of creditors, *unless* the debtor is a farmer or non-profit corporation. The latter cannot be converted without the debtor's consent.

Once the plan is properly accepted by the appropriate (affected) creditors, the plan must be confirmed by the court. Prior to making such confirmation, the court must find that full disclosure of the debtor's affairs was made and that the plan is fair, adequate, and suitable and that it meets the statutory requirements of 11 U.S.C. 1129(b). If the plan does comply it must be confirmed; if it does not, it must be denied. Once confirmation by the court is obtained, the plan becomes binding on the debtor, all creditors, all equity holders, and any entity acquiring property under the plan. *Revocation* of an Order of Confirmation may only be obtained if such confirmation was obtained by fraud and then, only upon request of an interested party made within 180 days from the date of entry of the confirmation order.

Underwriting Instructions

Provided an examination of the case files shows that a) there has been no denial of the debtor's authority to convey or transfer title to subject property by the plan or by court order; b) the conveyance or transfer of such title is specifically provided for in the plan; and c) the court order confirming the plan has become final and a certified copy of the same has been recorded in the public records in the county where the subject property is located, such conveyance or transfer may be insured. *In the event circumstances other*

than those shown above arise, you should obtain Westcor counsel approval prior to insuring the transaction.

Documents necessary to convey title under Chapter 11:

1. Court order confirming Chapter 11 plan, and
2. Deed from Debtor;

or

1. Deed from Debtor (or Trustee, if appointed) and order of bankruptcy court approving sale.

Chapter 12

Chapter 12 is similar in nature to Chapter 11 with respect to the debtor submitting a plan for restructuring his debt. However, Chapter 12 applies only to family farmers with regular annual income. The proceeding is commenced only by the filing of a voluntary petition. Upon request by an interested party, the court has the authorization to appoint a trustee. If no trustee is appointed, the debtor may continue to act as a debtor-in-possession and manage his business under a confirmed plan.

Chapter 13

Chapter 13 provides debt restructuring relief for individuals with regular income who want to pay their debts, have adequate income to pay such debts, and have a plan for payment of same that is acceptable to their creditors. There are monetary limits on secured and unsecured debts under this plan, so as to keep certain debtors (i.e., sole proprietors) from filing Chapter 13 when they should, in fact, file Chapter 11.

The proceeding may be commenced only by the filing of a voluntary petition, and the restructuring plan must be approved by the court. In some cases, an involuntary petition may be filed by creditors, however the case will not proceed until the debtor has consented to same.

A trustee will always be appointed, either by the court or via election by creditors. The trustee, therefore, has power over the property of the estate until an acceptable plan is confirmed. Estate property, under Chapter 13, consists of all property which would be within the jurisdiction of the courts under a Chapter 7 case *plus* all earnings acquired by the debtor after commencement of the case, up to the date the case is closed, dismissed, or converted to a Chapter 7 case.

Note: *A Chapter 13 case may be converted to a Chapter 7 case at any time, or may be dismissed by the court upon request by debtor.*

A Chapter 13 case requires the debtor to file a reorganization plan and obtain appropriate creditor approval. Generally, the plan may not extend beyond five years. *Secured creditors* (i.e., creditors with liens on estate property) must either accept or reject the plan and *cannot* be bound by a plan they have not consented to. *Unsecured creditors,* however, can be bound to the plan without consent provided such plan is confirmed by the court. In order for the court to confirm a Chapter 13 plan, the court must determine that the value of the estate property available to unsecured creditors is equal to or greater than that which would be available to them under a Chapter 7 case; that all secured creditors have accepted the plan, and that the debtor is able to comply with the plan. As with Chapter 11 cases, an Order of Confirmation may be revoked, after notice and hearing, if it is found to have been procured by fraud.

Once all payments due under the plan have been paid, the court may file an Order of Discharge which effectively relieves the debtor of all unsecured debts provided for in the plan or which were disallowed by the trustee except for debts owed to a spouse, former spouse, or child for alimony, support, or maintenance in connection with a separation or divorce agreement or property settlement agreement.

Within one year of discharge, an interested party may request *revocation of discharge* which, following due notice and hearing, may be granted by the court provided it was obtained by fraud or knowledge of the fraud came to the requesting party after the discharge was granted.

Underwriting Instructions

Provided an examination of the case file shows that a) there has been no denial of the debtor's authority to convey or transfer title to subject property by the plan or by court order; b) the conveyance or transfer of such title is specifically provided for in the plan; and c) the court order confirming the plan has become final and a certified copy of same has been recorded in the public records in the county where the subject property is located, such conveyance or transfer may be insured. *In the event circumstances other than those shown above arise, you should obtain Westcor counsel approval prior to insuring the transaction.*

Documents necessary to convey title under Chapter 13:

1. Order confirming Chapter 13 (wage earner plan); and
2. Deed from Debtor.

Invalidating Liens

As stated above liens attaching prior to the filing of the bankruptcy petition still encumber the debtor's property after the debtor's discharge of personal liability unless:

1. The agent verifies that there is notice in the bankruptcy file to the specific lien creditor of the debtors motion to discharge the lien, and either no objection has been entered, or after a hearing the bankruptcy overruled the objection, and;

2. The Bankruptcy Court entered an order avoiding the specific lien, or;
   a. The Bankruptcy Court's order of sale states the property is to be sold free and clear of the specific lien, and;
   b. The Court's order references the applicable bankruptcy code section being relied upon, and all applicable appeal periods have run.

All cases where liens are purported to be invalidated or discharged by bankruptcy must be referred to Regional Counsel for underwriting approval.

Important: *A discharge of a debtor in bankruptcy does not release a judgment lien against the debtor's property.* The discharge only acts to stop the collection of the debt against the debtor personally. *The discharge does not extinguish the judgment lien and therefore, continues to attach to real property.* The simplest way to remember this is: *Caution!*

> *"A lien going into bankruptcy is a lien coming out of bankruptcy."*

A release of the judgment lien must be obtained and recorded or, an order of the bankruptcy court to sell free and clear of the lien must be obtained and reviewed by underwriting counsel.

Important consideration in bankruptcy: Many actions concerning real property in a bankruptcy must be approved or confirmed by an order of the bankruptcy court. All such orders are appealable and are not final until finally adjudicated or appealed or the appeal period has expired with no appeal filed. No title insurance may be issued based on a bankruptcy court order until after an appeal is no longer possible.

Beaches; Beach Rights

Overview

An exception to title should be made regarding the possible rights of the public to use that (dry sand) part of the subject property which lies between the abutting body of water and the natural line of vegetation, bluff, extreme high water mark, or other apparent boundary line separating the public use area from the upland private area. Many states follow the "*Public Trust Doctrine"* which permits the public access to beach areas for recreational and other related purposes. In those instances where the Public Trust doctrine is not applicable, there may exist a *prescriptive easement* across such areas as a result of constant or substantial public use. In many areas, title to tide lands has been a subject of considerable litigation.

Underwriting Instructions

Any commitment or title policy insuring land abutting an ocean, gulf, or any beach front property or other areas that attract public use **must** contain the following exception:

> *"The right, title or interest, if any, of the public to use any part of the land which lies between the abutting body of water and any or all of the following: a) the natural line of vegetation; b) the most extreme high water line; c) the bulkhead line; d) any other line which has been or which hereafter may be legally established as relating to such public use."*

If a specific use of the land is disclosed, the following exception should be made:

> *"Any rights, interests or claims which may exist or arise by reason of the following facts disclosed by an inspection of said land:*
>
> *a. The fact that a [road, path, etc.] extends over a portion of said land, and is used by the public for access to and from the adjoining body of water known as [name body of water]; or*
>
> *b. The fact that portions of said land are used by the public for beach and recreational purposes."*

Because laws are so different from state to state, contact your local underwriter for guidance specific to your state. An agent must not rely entirely on prior title policies to determine exceptions for waterfront interests. An independent determination of the appropriate exceptions should be made in each instance.

See also: **Wetlands**, **Riparian/Littoral Rights**.

Bona Fide Purchasers

Overview

A *bona fide purchaser* (a.k.a. *bona fide purchaser for value and without notice*) is one who has paid full value for the property and has no knowledge of any outstanding interest held by third parties. In most states, a purchaser must meet these criteria in order to obtain full protection under the recording act. Generally, the purpose for these criteria is to prevent a seller from giving away part or all of his property to another so as to avoid demands of creditors who might otherwise obtain a lien against the property. A *bona fide purchaser* is essentially protected against any unrecorded equities or interests to which the title might have been subject had the seller/prior owner never conveyed title. Documents that are properly recorded according to state law impart constructive notice and defeat BFP status.

Of course, there are situations in which a person is *not* a purchaser for value. Two of the most common situations include obtaining title to property by *gift* deed or by inheritance or devise. With respect to gift deeds, you must be concerned with the possibility of liens for state and federal gift taxes and for unrecorded debts or interests created by the grantor and, therefore, an exception must be made for these liens and interests. If, however, it appears that the conveyance may involve fraud on the part of the grantor with respect to creditors or such conveyance may render the grantor insolvent, the transaction may not be insurable and you should contact Westcor counsel immediately.

Consideration

Generally, all contracts must be supported by consideration in order to be legally binding. Consideration is the benefit(s) exchanged between parties to a contract. For example, if you buy a watch from a jeweler, the consideration you receive is the watch while the consideration the jeweler receives is your money. A contract for sale includes consideration from the buyer (money) and consideration from the seller (title to the property being conveyed).

Strictly speaking a deed is not a contract and, therefore, need not recite consideration in order to effect a conveyance of title. However, a failure to give consideration may have undesirable consequences for the purchasers, so it is customary to recite consideration in a deed. A deed need not set forth the exact consideration paid to be valid. A deed reflecting standard consideration language – e.g., "*$10 and other good and valuable consideration, the receipt and sufficiency of which being acknowledged"* – would be sufficient for conveyance purposes.

Underwriting Instructions

For insuring purposes, there must be an established consideration which has been paid in order to establish that grantee is a bona fide purchaser (i.e., purchaser for value and without notice). A conveyance without consideration paid – such as a gift deed for love and affection – may be insured provided the transaction has been investigated and meets Westcor's requirements for insuring gift deeds. A subsequent conveyance to an arms-length bona fide purchaser for value and without notice would be insurable, since consideration was paid and the purchaser/grantee has no knowledge of any outstanding interest held by third parties with respect to the property. Most title insurance policies include an exclusion from coverage which negates liability if the insured is not a bona fide purchaser.

See also: **Gift Deeds**.

Boundaries, Disputed

Overview

Prior to insuring a transaction involving property which is part of a boundary line dispute between the subject property owner and adjacent property owner, it is mandatory that the property owners enter into a boundary line agreement which establishes the exact location of the dividing line between the respective properties and contains the requisite language to effectively quitclaim from and to each party those areas which are required to establish such boundary.

In the event either or both parties have mortgages or other liens encumbering their respective properties, it is also necessary that the lienholders consent to or join in the execution of the such boundary line agreement.

Underwriting Instructions

In order to insure a transaction involving property without exception to a boundary line dispute, all parties with an interest in the disputed property must enter into a boundary line agreement which establishes the location of the dividing line between the properties. Each and every interested party must then quitclaim to each other the respective area within their boundaries; otherwise an exception for coverage must appear in Schedule B-I of the title policy conforming to the following:

> *"Rights and claims of parties along the ____ boundary of the insured property, the exact location of which is in dispute, and to which the Company does not insure the location of a title to property adjacent to said line."*

As mentioned above, existing lenders and/or lienholders must also ratify the transaction.

Building Setback Lines

Overview

Building setback lines appear on subdivision or lot plats or by zoning laws as areas that restrict the location of improvements *behind* or *within* certain boundaries. The most common building setback line is the *minimum building setback* line that designates the building setback from a street, right of way or side lot lines. The minimum building setback line (MBSL) is designed to insure conformity in the location of improvements within the development or subdivision. It is not uncommon for improvements to encroach upon minimum building setback lines to a small degree, especially on small, irregularly-shaped lots, corner lots, or lots developed on a cul-de-sac.

Another type of building setback line is the building envelope. The building envelope may be either a designated area of a subdivision in which construction may take place, thereby establishing a designated buffer zone around the perimeter of an entire subdivision or development in which improvements should not be located or a designated area of each lot in which construction may take place. Minor encroachments onto either the no-build buffer zone or out of a designated building site are more rarely seen than in minimum building setback line situations, but they do occur.

Underwriting Instructions

Existing Construction

It is the policy of our company to provide affirmative coverage under loan policies when minor encroachments are present. Minor encroachments are defined as encroachments of improvements over minimum building setback lines (MBSL) or the encroachment of improvements onto easements. *For reference purposes, such encroachments may be no more than a few inches over the MBSL requirements.*

Encroachments of fences and gravel drives onto easements or over boundary lines may be insured if they are less than 3 feet. Gross encroachments of improvements (*10% or more over the MBSL requirements)* such as concrete retaining walls, etc., should be treated on a case-by-case basis. Please contact Westcor's underwriting counsel for affirmative coverage involving more severe encroachment problems. You may proceed with the following affirmative coverage when warranted by the above criteria:

Describe the encroachment under Schedule B of the commitment or policy, then add the following:

> *This policy insures the insured against loss or damage the insured shall sustain in the event of a final order of a court of competent jurisdiction that compels removal of the encroachment described in this exception.* As an alternative, the same type of affirmative coverage may be provided (if underwriting requirements are satisfied) by attaching an endorsement to the policy which refers to the endorsement exception on Schedule B and uses the same basic affirmative insurance language mentioned above.

New Construction

Westcor Title will not insure against loss by encroachments of new construction. It will be necessary to have the developer/builder/owner obtain a variance zoning board approval from the local planning commission, or other municipal authority, in order to proceed with title insurance. While a variance of zoning board approval will not change a recorded deed restriction, affirmative coverage may be considered on a case-by-case basis.

See also: **Survey Matters**, **Encroachments**.

Canals

Overview

Canals are man-made, artificial ditches that are generally created pursuant to an easement or in conjunction with condemnation of land for that purpose. When insuring property that abuts or is crossed by a canal, an exception should be made as to title to any portion of the land located within the boundaries of the canal. If the property is subject only to an easement for canal purposes, an exception should be made for such easement.

Underwriting Instructions

When insuring property abutting or crossed by a canal, exception must be made as follows:

> *"Any and all rights of others in and to any portion of the land located within the boundaries of the [NAMED] canal and to so much of the land as is necessary for the use and maintenance of said canal."*

When insuring property which is subject to an easement for canal purposes, the following exception must be made:

> *"Easement for canal purposes over the [describe] as described in [INSTRUMENT] dated _____ recorded _____, in Book _____, Page _____, County of _____, State of _____."*

See also: **Wetlands**, **Littoral/Riparian Rights**.

Capacity

Overview

If there is no suggestion or proof to the contrary, you may assume that a *grantor* is of legal age and is mentally competent to convey title to real property. If the grantor is not of legal age, but is married, the act of marriage may remove the disability of minority and a deed executed by such married person would have the same effect as if the person were of legal age. However, marriage cannot be relied upon to give validity to an incompetent grantor. A guardian or conservator must be appointed according to state law.

The fact that a *grantee* may not be of legal age or is mentally incompetent has no effect on the conveyance by grantor, in that it is not a requirement for a valid deed that the grantee must be of legal age. An evaluation of representatives of an incompetent or minor must be made by reviewing the applicable trust document, order of appointment, letters or authority or power of attorney to determine that such individual has the authority (legal capacity) to execute the requisite deed or mortgage on behalf or a minor or incompetent person.

Underwriting Instructions

See specific guidelines re: **Powers of Attorney**, **Minors**, **Guardianships**, **Corporations**, **Trusts**, or **Incompetence**.

Cash Reporting

Overview

Section 6050 [1] of the Internal Revenue Code (Title 26 USC) was added by the tax reform act of 1984. The IRS uses this information to track money laundering and other illegal activities.

Pursuant to the above, any title insurance agent, settlement agents, escrow company, or law firm providing closing and settlement services for the purchase and sale of real property receiving more than $10,000 in cash in a single transaction, or related transactions, must report the cash transaction to the Internal Revenue Service. The form provided for this purpose is IRS Form 8300, pictured below.

The definition of "cash" for reporting purposes includes coins and currency of the United States (and any other country). However, this definition may also include certain cashier's checks, bank drafts, traveler's checks, and money orders for amounts of less than $10,000 which total in aggregate, more than $10,000 that is received in an transaction in which the recipient knows that the instrument is being used in an attempt to avoid the reporting of the transaction.

Personal checks drawn on an individual's personal account for any amount are not considered to be cash. Cashier's checks, bank drafts, traveler's checks, or money orders in an amount of more than $10,000 are not considered to be cash. (The logic is that it is assumed the banking institution responsible for issuing the draft for more than $10,000 will be responsible for reporting the matter to the IRS.) Also, cashier's checks, bank drafts, etc., which constitute the proceeds of a bank loan in any amount, are not considered cash.

Underwriting Instructions

Cash transactions must be reported on IRS Form 8300 if all of the following requirements are met:

1. The aggregate amount of cash received is over $10,000 (receipt of exactly $10,000 in cash is not reportable, but receipt of $10,001 is reportable).

    a. The reportable amount may be received either in one lump sum of cash (or cash equivalent) in excess of $10,000; or

    b. In installment payments that cause the total cash (or cash equivalent) received within one (1) year of the initial payment to total more than $10,000.

2. Received in the course of your trade or business;

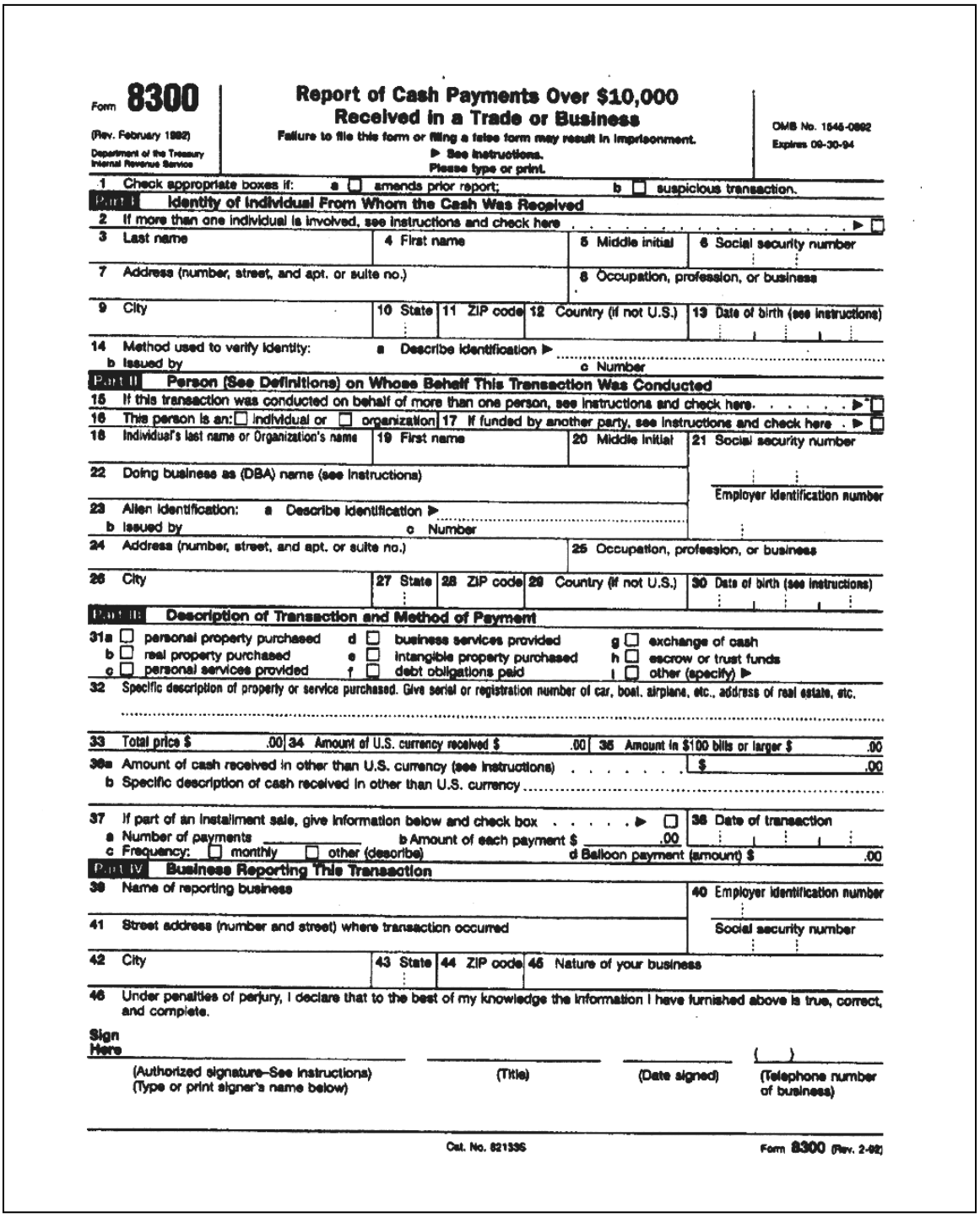
3. Received from the same buyer (or the buyer's agent); and

4. Received in a single transaction or in two or more related transactions:

    a. Any transactions involving the same buyer (or an agent for this buyer) that occur within a 24-hour period are called "related transactions";

    b. If over $10,000 in cash is received from the same buyer in two or more transactions occurring within a 24-hour period, you must treat the transactions as one and report the cash payments on Form 8300.

Watch out for "structuring" or suspicious transactions. Should a purchaser come to closing with two cashier's checks from two different financial institutions – each one less than $10,000 – with a combined aggregate total of more than $10,000, the purchaser may be trying to avoid cash reporting requirements. If the closing agent accepts checks under these circumstances, the agent may be found guilty of assisting in the structuring of the sale transaction, and be criminally prosecuted.



Form **8300**

(Rev. February 1992)

Department of the Treasury
Internal Revenue Service

Report of Cash Payments Over $10,000 Received in a Trade or Business

Failure to file this form or filing a false form may result in imprisonment.

▶ See instructions.
Please type or print.

OMB No. 1545-0892
Expires 09-30-94

1 Check appropriate boxes if: a ☐ amends prior report; b ☐ suspicious transaction.

Part I Identity of Individual From Whom the Cash Was Received

2 If more than one individual is involved, see instructions and check here . . . . . ▶ ☐

3 Last name | 4 First name | 5 Middle initial | 6 Social security number

7 Address (number, street, and apt. or suite no.) | 8 Occupation, profession, or business

9 City | 10 State | 11 ZIP code | 12 Country (if not U.S.) | 13 Date of birth (see instructions)

14 Method used to verify identity: a Describe identification ▶ ..... b Issued by ..... c Number .....

Part II Person (See Definitions) on Whose Behalf This Transaction Was Conducted

15 If this transaction was conducted on behalf of more than one person, see instructions and check here . . . . . ▶ ☐

16 This person is an: ☐ individual or ☐ organization | 17 If funded by another party, see instructions and check here . ▶ ☐

18 Individual's last name or Organization's name | 19 First name | 20 Middle initial | 21 Social security number

22 Doing business as (DBA) name (see instructions) | Employer identification number

23 Alien identification: a Describe identification ▶ ..... b Issued by ..... c Number .....

24 Address (number, street, and apt. or suite no.) | 25 Occupation, profession, or business

26 City | 27 State | 28 ZIP code | 29 Country (if not U.S.) | 30 Date of birth (see instructions)

Part III Description of Transaction and Method of Payment

31a ☐ personal property purchased
b ☐ real property purchased
c ☐ personal services provided
d ☐ business services provided
e ☐ intangible property purchased
f ☐ debt obligations paid
g ☐ exchange of cash
h ☐ escrow or trust funds
i ☐ other (specify) ▶

32 Specific description of property or service purchased. Give serial or registration number of car, boat, airplane, etc., address of real estate, etc.

33 Total price $ .00 | 34 Amount of U.S. currency received $ .00 | 35 Amount in $100 bills or larger $ .00

36a Amount of cash received in other than U.S. currency (see instructions) . . . . . $ .00

b Specific description of cash received in other than U.S. currency .....

37 If part of an installment sale, give information below and check box . . . . . ▶ ☐ | 38 Date of transaction

a Number of payments _____ b Amount of each payment $ .00

c Frequency: ☐ monthly ☐ other (describe) d Balloon payment (amount) $ .00

Part IV Business Reporting This Transaction

39 Name of reporting business | 40 Employer identification number

41 Street address (number and street) where transaction occurred | Social security number

42 City | 43 State | 44 ZIP code | 45 Nature of your business

46 Under penalties of perjury, I declare that to the best of my knowledge the information I have furnished above is true, correct, and complete.

Sign Here

(Authorized signature–See instructions) (Type or print signer's name below) | (Title) | (Date signed) | ( ) (Telephone number of business)

Cat. No. 62133S | Form 8300 (Rev. 2-92)

Sample of IRS Form 8300, Rev 2/92

The IRS also requires the agent to report any transactions which appear to be suspicious or give signs of possible illegal activity even if no report would otherwise be required. Although no specific standards have been published by the IRS to define the obligation of a closing agent to uncover illegal activity, the agent should be careful to use common sense.

Apparent attempts to evade the cash reporting requirements should be avoided by filing Form 8300 to the IRS even if it is not otherwise required. Also, avoid counseling or advising customers of ways to circumvent the reporting requirements. Cash purchasers may still be advised to obtain a cashier's check or money order for closing purposes, but advice should not be given as to means of avoiding the cash reporting requirements. Form 8300 may be obtained from your local IRS office or call to order the form at 1-800-TAX-FORM (800-829-3676).

Cemeteries

Overview

In order for a tract of land used for cemetery purposes to be insurable, it must be properly dedicated for such purposes, with no prior restriction against such usage, and be permissible under applicable law.

Some lands, especially family-owned rural tracts, may contain private burial plots or family cemeteries, without having been officially "dedicated" for those purposes. Such lands may be insured but the portion containing burial plots cannot be insured without approval of Westcor counsel. An acceptable survey must be received showing the location of the burial plots or cemetery areas. Exceptions must be noted on Schedule B for rights or claims of parties in possession or any parties claiming any kinds of rights or ownership in the land by virtue of its use for burial plots or cemetery purposes. An exception must also be included to any rights or claims of easement or ingress and egress to or from burial plots (this exception must apply to the portion of the land being insured).

Individual burial plots are not insurable.

Underwriting Instructions

Provided the agent submits the Company's Policy Authorization Request (for unusual risks), the agent may be given specific authorization to insure an entire cemetery on a case-by-case basis. Never issue title insurance on property platted for or used as burial plots unless specifically authorized by Westcor underwriting counsel.

If a deed, survey or inspection discloses the existence of burial plots or cemeteries, or their existence is otherwise made known to the agent, their exact location must be identified and excluded from coverage in the commitment and final title policy as follows:

> *"This policy hereby excludes from coverage that portion of the land situated within the area of the [CEMETERY, BURIAL PLOT, ETC.] as further described in that certain [SURVEY, INSPECTION, DEED, ETC.] dated ____, by _____; recorded in Book _____, Page _____."*

In addition, exceptions for claimed rights of ownership and easement and rights of ingress and egress to the cemetery or burial plot must show in the commitment and final policy and may conform as follows:

> *"Rights or claims of easement to or from and ingress and egress in and to the [CEMETERY, BURIAL PLOT, ETC.] located on said land as described in that certain [SURVEY, INSPECTION, DEED, ETC.] dated _____, by _____; recorded in Book _____, Page _____."*

and,

> *"Rights or claims of parties in actual or constructive possession or any parties claiming an kinds of rights or interests in the land by virtue of its use for burial plots or cemetery purposes."*

Churches

Overview

When one party to a transaction is a church, care must be taken to determine exactly who or what the entity is that holds title and that proper authority exists for the transaction to take place. Church transactions often present challenging questions as to the structure of the church-entity and who is authorized to sign on its behalf. Issues of authority are especially sensitive in church transaction. Personal, emotional, and legal issues must be carefully addressed before insuring a transaction involving a church.

If the church is incorporated, it should be treated like any other corporate party. Difficulty and uncertainty arise when the church is an unincorporated association of some type, because few jurisdictions recognize these as separate legal entities.

Underwriting Instructions

In order to be considered marketable, title to church property should be vested either in the trustees of the church (unincorporated churches), a corporation (incorporated churches), or in a bishop or other applicable church official (corporation sole churches). Proper documentation showing the church organization and entity status must be provided.

Some considerations to be addressed in dealing with churches include:

Most unincorporated religious organizations are either Ecclesiastical or Congregational in structure.

Ecclesiastical Structure

When title is held by a religious organization that is subordinate to a general church organization which includes one or more levels of superior governing bodies, the controlling organization will have adopted a written constitution or similar enactment which addresses the ownership, mortgaging and disposition of property. The constitution should be reviewed to learn what is necessary to comply with the governing agreements, as well as any other applicable document of operation which governs the conveyance of real property.

Although the title may be vested in the Trustees, the trust is regarded as a passive trust. Any action of the trustees must be supported by an authorizing resolution of the church membership acting in accordance with its by-laws or controlling rules.

If title is held in the name of a bishop in his official capacity for the benefit of the church, the only resolution or affidavit necessary should be an affidavit that the individual signing in the capacity of Bishop is in fact the person holding that office at the time.

Congregational Structure

When the property is held by a religious organization which is wholly independent of other church governing bodies, the Trustees are usually authorized to act upon the majority vote of the members present at a duly called meeting. A copy of the congregation's by-laws or other regulations for meetings and conveyance of title should be reviewed for procedures. A copy of a duly passed congregational resolution authorizing the transaction should be obtained.

Unincorporated Churches

Title into an unincorporated church (e.g., *Prayerful Presbyterian Church*), itself, is not considered valid since it is not a legal entity and therefore, cannot acquire or transfer title to real property. Therefore, when insuring a conveyance into an unincorporated church, title must vest in the trustees or other specifically designated representatives of the church, although it is not necessary to list the actual names of such

trustees or representatives. For example, title vested in the *Trustees of the Prayerful Presbyterian Church* would be considered acceptable.

When insuring either a conveyance out of an unincorporated church or an encumbrance of church-owned real property, the deed or mortgage must be executed by all the then current church trustees. It is necessary to obtain a certificate stating the names of the current trustees of the church from the pastor, secretary, or other church-authorized administrative person, and a resolution of the governing body of the church attesting to the authority of that person to act.

Generally speaking, the above holds true for all unincorporated church transactions involving real property with the possible exception of a Methodist Church. A conveyance of Methodist church-owned property requires a certified copy of the resolution of the Quarterly Conference of the church which sets forth approval of the sale, sales price, and empowerment of the trustees to execute and deliver the required documents and accept the proceeds from the sale. A certificate, signed by the clerk or secretary of the Quarterly Conference – stating that due notice of the Quarterly Conference was given by announcement from the pulpit at a regular church service at least 10 days prior to the meeting – should accompany such resolution.

In addition to the resolution and clerk's certificate, the pastor and district superintendent of the church must execute the deed – along with the named trustees – so as to evidence their assent to such sale at the agreed-upon price and terms (see guidelines at the end of this chapter for some specific denominations).

Incorporated Churches

When insuring a transaction involving the conveyance or encumbrance of church-owned property by an incorporated church, it is necessary to obtain evidence of corporate existence (i.e., certificate of incorporation) from the state of incorporation and to obtain and review a certified copy of the articles of incorporation and bylaws. If the appropriate powers to convey and/or encumber church property by the appropriate officials are not set forth within the articles of incorporation or bylaws, it will be necessary to require a specific corporate resolution authorizing the conveyance or encumbrance, along with the designation of the church officials empowered to execute the requisite transfer/loan instruments and, if necessary, a clerk's certificate identifying the officials so named.

Corporations Sole

A corporation sole consists of only one person and his successors, such as a Catholic bishop of a diocese. Therefore, a bishop would effectively take, convey, and/or encumber title in his name as bishop of the named diocese, along with his successors and assigns, as a corporation sole.

CAVEAT: Litigation has resulted over church ownership of real property in many jurisdictions. These cases raise issues of ownership between individual congregations and governing church bodies as well as issues of authority to act by the individuals purporting to represent the church. Also, lawsuits by minority or dissenting interests in the church challenging transactions by the church are not unprecedented. Utmost care must be exercised to verify legal structure, ownership, governing authorities, status of title, and properly documented and certified authority when dealing with church transactions. Your review of the title must comply with your state law.

Information and Guidelines for Certain Denominations and Specific Religious Organizations

(***Note***: This list is not exhaustive or exclusive. This is information that is known or has been discovered. Information concerning other religious organizations will be added from time to time.)

Assembly of God
Assembly of God churches are usually unincorporated congregations associated with a District Council of Assemblies of God. Title to local church property is under the control of the congregation acting through

designated Trustees. In the event of a congregation's demise, title to congregational property reverts to the incorporated District Council.

Baptist
Baptist churches are congregational in structure. Trustees hold title to the property and act on resolutions of the congregation. The resolution should name the Trustees and authorize them to undertake the proposed transaction.

Christian Church
Christian churches are congregational. The church acts through Trustees upon resolutions adopted by the congregation at properly called congregational meetings.

Christian Science
Local congregations exercise independent control over their property. Most congregations are not incorporated but are organized through a "Board of Directors". Land title transactions occur through congregational resolution authorizing the Board to act.

Church of Christ
Churches of Christ are congregational in structure. Land title transactions are conducted through a Board of Trustees authorized to act by congregational resolution.

Church of Jesus Christ of Latter Day Saints
The Church of Jesus Christ of Latter Day Saints operates as a Utah Corporation. "Sole" Authority to hold and convey property is in one person who is the corporation. As such, he executes all instruments on behalf of the corporation. The presiding Bishop as the "Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints" may acquire, hold, donate, or otherwise convey property without approval of the members. Instruments are executed in the name of the corporation, signed by the person representing the corporation in the official capacity designated in the Articles of Incorporation or by authorized agents designated in a certificate filed by the corporation in the office of the Secretary of State. The acknowledgment will be made in the State of Utah, County of Salt Lake.

Church of the Nazarene
The Church of the Nazarene is an ecclesiastical organization consisting of a Superintendency, a General Assembly, and District Assemblies. Local congregations may incorporate and may hold title in the corporate name. When title is held by Trustees, it may be transferred by the Trustees acting upon instruction of the majority vote of the congregation at an annual meeting or a specially called meeting, with written approval of the District Superintendent. If a debt is incurred, the additional approval of the District Board of Church Extension is necessary.

Episcopal
Episcopal Churches are ecclesiastical in structure, with local congregations governed by an "Episcopal Church Council" of the diocese in their location. This Council is a non-profit corporation. Real property conveyances originate with a resolution of the local congregation authorizing the "Vestry" to take the proposed action. The Vestry then conducts a meeting and authorizes the Senior Warden and Junior Warden of the Vestry to execute the necessary documents. Both the Congregational and Vestry actions should be supported by authorizing resolutions. Mortgages of local church property should be joined by the diocese, by act of the President of the Board of Trustees.

Jehovah's Witnesses
Local congregations have independent control of their property. Title is held by Trustees, or a Board of Directors, if incorporated. Title is conveyed upon the vote of the local congregation, which instructs the Directors or Trustees to act.

Jewish
All Jewish congregations, whether Orthodox, Conservative, or Reform, are congregational in structure. Land titles are held through the means of Trustees. The Trustees conduct transactions upon instruction by congregational resolutions.

Lutheran
Although ecclesiastical in structure with a District and Supervising Synod, title to property is held by Trustees named by the local congregation. The Trustees act by resolutions of the congregation or a Board of Directors if incorporated. Higher governing body approval is not required.

Methodist, Free
The Free Methodist Church is a distinct and separate religious organization from the better-known United Methodist Church. It has an ecclesiastical structure that includes a District Superintendent and a National Board of Directors. Title is held in the congregation's name (if incorporated) or through a Board of Trustees. Sale of the property must be upon a vote by the Board of Trustees and must reflect the consent of the District Superintendent and the Board of Directors of the Free Methodist Church of North America.

Methodist, United
The United Methodist Church is an ecclesiastical church, with local congregations governed through a "quarterly conference". If the congregation is incorporated, title to its real property is held in its corporate name. If the congregation is not incorporated, title is held by Trustees for the benefit of the congregation. A conveyance by the church must be preceded by a notice of the proposed action to the congregation and a resolution passed by the quarterly conference authorizing the action. The resolution must direct that the documentation be executed by specified officers of the Board of Trustees (or Board of Directors, if incorporated). The written consent of the local church pastor and of the District Superintendent must be affixed to the conveyance documents.

Pentecostal
The Pentecostal Church of God of America is a single religious corporation. It has an Executive Board that is authorized by the church's constitution to act on behalf of the church without further authorization from local congregations.

Presbyterian Church of America
For purposes of land titles, the Presbyterian Church is congregational. If incorporated, the church holds title in the corporate name. The officers of the corporation acting under authority of the Board of Directors, which constitutes the governing body of the church and must authorize any conveyance or transfer of church property, may sign transfer documents. The resolution or certificate of authority issued by the Board of Directors should be placed of record concurrently with the deed or other transfer document.

Condemnation (Eminent Domain)

Overview

Condemnation or eminent domain proceedings can occur through the power of the government to take private property for public use without the owner's consent. The 1992 ALTA title policies exclude from coverage any loss arising from "*rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.* The 2006 ALTA title policies exclude from coverage any loss arising from *"Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8."*

Where condemnation or eminent domain proceedings are pending – i.e., for purposes of creating or widening roads or streets – an exception should be made for such proceedings, provided notice of such proceedings is recorded in the public records or you have actual knowledge of same.

Where there exists a prior taking, an examination of the public records should disclose either:

1. An *Order of Taking* granting possession to the government provided the requisite deposit of the estimated value of the property being taken has been paid within the statutory period, at which time a *Receipt of Deposit* will be recorded and title will vest in the government; or

2. A *Final Judgment* condemning the property, based upon the filing of a petition for eminent domain in the circuit court records of the appropriate county, such judgment setting forth the statutory period in which the government must make deposit in an amount equal to the determined compensation for the taking as set forth in said judgment; or

3. Such other form of notice recorded or filed in the public records as is permitted by your state's law.

The estates and rights in the land may be taken by "Easement" or "Fee Simple". If the decree recites that an easement is taken, title shall be shown subject to such easement. If the decree recites "Fee Simple", and the proceedings are otherwise normal, such portion shall be excepted from the description of the land to be insured.

Underwriting Instructions

If Notice of legal proceedings exercising the powers of eminent domain are recorded in the public records or are otherwise known to the agent, an exception to that notice must be taken as follows:

> *"Condemnation or Eminent Domain Proceedings in the ___ feet of said land condemned for ___ purposes, by (final decree entered/pending) in the County Superior Court, Case No.___. (Type the description of the land and the use for which it was taken.)*

The proceedings for the interest condemned must be thoroughly examined by the issuing agent and determined whether statutorily valid. If you are not familiar with the rules and regulations regarding condemnation in your area, contact your underwriting department for further instruction.

Condominiums

Overview

Generally, a condominium is an estate in real property ownership representing a combination of a separate or exclusive ownership in the condominium *unit* and the undivided ownership interest in common with others in the *common elements.*

Generally, the condominium *unit* is made up of the airspace as enclosed by the floor, walls and ceiling and is owned exclusively by the unit owner. The *common elements* are the interests owned by all unit holders in the land, foundations, walls, floors, ceilings, halls, heating and utility systems, recreational facilities and the real property on which the unit sits. These common elements may be *general,* such as the swimming pool or hallways, or *limited* and its use restricted to specific owners (e.g. parking spaces or patios attached to the individual unit). The laws of most states provide that ownership of an airspace unit cannot be separated or partitioned from the percentage ownership in the common elements assigned to that unit. The estates in condominiums are generally held as *Fee,* wherein title is vested fee simple to the unit owner with an undivided interest as tenants in common with other unit holders to the common area, or *leasehold,* wherein the individual unit owner has the exclusive right to possession of the unit and an undivided right of possession to the general common elements. The interests created by a condominium project must conform to all statutory requirements creating condominium estates for that particular state.

A condominium is typically created by a *condominium declaration* and *condominium map.*

The *condominium declaration* must be statutorily created by the developer of the project to conform to that state's Condominium laws and should specify whether ownership will vest fee simple or leasehold, the designation of limited common elements, a statement of the rights and obligations of the unit owners, and a legal description of the property.

The *condominium map* identifies the location of each unit and its general and limited common elements. The map must provide a three-dimension drawing showing the boundaries of each airspace unit-length, width, and height.

The *condominium owner's association* is generally a non-profit corporation made up of unit owners whose responsibilities typically include the maintenance of the project, grounds, and common areas, as well as the assessment and collection of association dues, which are collected for that purpose. Under the declaration, the association may be given special rights or interests such as the right of first refusal to purchase any unit being sold or transferred, or an easement for maintenance of the individual unit.

The declaration will usually provide that a first mortgage held by an institutional lender has priority over condominium assessments, but only as to those fees assessed after the mortgage. Should the unit owner not pay this portion of the assessments, the declaration or statutory law will generally provide that the association may secure payment for assessments by recording a lien against the owner's individual unit in the county records. In some jurisdictions, the association may *not* be required to file a lien in the county records for unpaid assessments and statutorily, non-payment of assessments will automatically constitute a lien on the unit. Should the association choose to pursue the collection of this lien, they may initiate foreclosure proceedings. Therefore, when insuring condominiums, it is essential that the agent obtain verification that all assessments have been brought current and there are no interests (such as rights of first refusal) adverse to our insured.

At some point in the out-sale process the developer will relinquish control of the condominium project to the association, or this may occur automatically by statute. After this point, the ability of the developer to correct errors in the map or other documents is minimized or eliminated and the association itself will be considered the authorized party. Questions in this regard must be directed to Westcor Counsel.

Underwriting Instructions

In order to insure the condominium units, all condominium documents must be read by the title examiner. The examiner should review all condominium documents and deeds for the following:

1. The interests created must comply with all state laws and requirements creating condominium estates.

2. Compliance with State Law providing that the unit and common elements may be assessed individually for tax purposes. (All taxes for years prior to the creation of the condominium must be paid in full).

3. The restrictions must be reviewed for any forfeiture or reversionary provisions. If such provisions are contained in the instrument, they must specifically state that they are subordinate to the insured mortgage (reversionary clauses should be set out word-for-word as exceptions on Schedule B of the commitment or policy). See also: **Restrictions**.

4. Review the state condominium law to verify that the insured mortgage is not statutorily subordinate to condominium assessment liens. (Some states allow six months or more of post-mortgage assessments to take priority by statute. In such cases, exceptions should be taken to the effect of such statute by specific reference).

5. Certification by the condominium association stating that all assessments are current and paid. (Any unpaid assessments or liens must be paid and released or excepted to in the commitment and final policy.)

6. No recorded instrument contains a right of refusal. (If such right does exist, an exception must be made in the commitment and final policy. This exception may not be deleted unless the agent obtains a waiver of these rights, in recordable form, from all parties involved).

7. When reviewing title to condominiums, all underlying mortgages affecting the entire project or individual units should be fully or partially released or exception made in the commitment or policy.

Every condominium commitment and policy must contain the following exceptions:

> *"Limitations and conditions imposed by the condominium law of _____as set out in [STATUTORY CITATION}"; and*
>
> *"Terms, provisions, covenants, conditions, easements, rights, options, and liens established by and contained in the [DECLARATION OF CONDOMINIUM] of [CONDOMINIUM PROJECT], of record in [RECORDING INFORMATION]."*

New condominium projects may not be insured without prior authorization by Westcor Counsel.

Construction Loans

Overview

A construction loan provides the financing to build or complete a house, structure, project, development or other improvements to land. In most instances, construction loan proceeds are disbursed in successive draws and such draws are usually staggered throughout the process of constructing the improvements. It is customary in most markets for the lender to control the draws, and to require lien waivers from laborers or suppliers when they are paid. The lender has the duty to monitor the project to ensure that the level of completion of the improvements is commensurate with the amount of construction funds disbursed. In certain markets, title companies, escrow companies, or attorneys may disburse construction loan funds using similar disbursements/ payment/waiver procedures. It is the title agent's responsibility to reduce the underwriter's exposure to mechanics' and materialmen's liens. Therefore, it is necessary for the agent to be familiar with relevant state law as they relate to mechanics' liens and their potential for priority over an insured mortgage.

In some jurisdictions, please be aware that insuring against unfiled mechanics' liens during construction or within the lien-filing period after construction is considered to be unusual and high-risk underwriting. Any Westcor agent must obtain specific, written approval from the company's local underwriting counsel before providing such coverage or disbursing a construction loan. Recording a construction loan mortgage or deed of trust prior to the commencement of construction or the delivery of materials to be used in construction is adequate to establish the priority of the lien of such mortgage in some states. However, the unique requirements of a state's statutory framework along with case law developments require that title agents be knowledgeable about the specifics of the mechanics' lien law of their state.

It is acceptable, when insuring a construction loan, to issue the standard ALTA Loan Policy provided Schedule B, Part 1 contains a *pending disbursements clause* which limits liability to the amount actually disbursed up to the face amount of the policy as shown on Schedule A. (See discussion below.)

Prior to the release of each draw, the lender may want an endorsement bringing the title to date and insuring that there are no intervening mechanics' or materialmen's liens or other matters outstanding which could adversely affect the lien priority of the mortgage.

Contemplated Improvements Clause (Owner's Policy)

Many times a closing will involve the purchase of an unimproved lot in anticipation of constructing a home on the lot. In some situations, construction financing will occur simultaneously with the purchase of a lot. The title agent may be asked to issue a simultaneous owner's and loan policy. It is usually requested that the owner's policy be issued in the amount of the lot purchase price and the lender's policy in the amount of the construction loan, resulting in an owner's policy with an effective amount less than that of the loan policy.

It is preferable in this situation to advise the lot purchaser to acquire title insurance coverage not only in an amount adequate to cover the value of the unimproved lot, but also to cover the value of the anticipated improvements. Without this full coverage, the insured could potentially suffer a title loss in excess of coverage amount.

When asked to issue an owner's policy in the amount of the purchase price paid for the land and existing improvements plus the cost of construction of pending improvements, a *Contemplated Improvements Clause* must be inserted in the owner's policy which limits the initial liability of the insurer to the amount actually paid for the land and existing improvements, with an increase in liability as the pending improvements are constructed and paid for, up to the maximum amount stated in the policy.

The premium charged will be based on the total amount of the policy – i.e., the amount paid for the land and existing improvements plus the total anticipated cost of all improvements.

Pending Disbursement Clause (Lender's Policy)

Typically, a request is made to issue a loan policy in the full amount of the loan and, through successive draws, be updated through the date of each draw with the insured amount increasing by the amount disbursed on the loan until all work is completed and the final draw paid, at which time the insured amount of the policy reaches the full amount of the loan and the Amount of Insurance stated in the policy.

A loan policy given to insure a construction loan will be issued for the loan amount prior to the full disbursement of loan proceeds. Liability of the policy must be limited to the amount of the loan actually disbursed but allowed to increase as additional disbursements are made. This may be accomplished by inserting a *pending disbursement clause*, which may vary from state to state. Such clause limits the amount of liability of the insurer to the amount of funds actually disbursed up to the full amount of the policy.

Underwriting Instructions

The priority of the lien created by recording is especially important in construction loan situations. If it is necessary to determine that no improvements have commenced in order to insure priority in your jurisdiction, the following requirements must be met:

1. Owner/Builder Affidavit stating that no work has commenced and no delivery of materials has been made that would create a lien prior to our insured's mortgage.

2. Satisfactory indemnification to the company for any losses arising from mechanics' liens. **Note:** *This indemnity must be based on receipt and analysis of current financial statements provided by the owner and contractor, and approval of the financial statements and indemnity agreements by Westcor underwriting counsel.*

3. Completion and submission of Westcor's Request for Policy Authorization for Unusual Risks.

4. Verification/Evidence of non-commencement of construction must be obtained by agent and retained in the agent's file. Such evidence may consist of photographs that are dated and certified.

5. Surveyor's report disclosing that no commencement has begun, nor have materials been delivered to the site.

6. Recording of the construction loan mortgage concurrently with the inspection in no. 4.

Note: *Items 3 and 4 must bear a date which coincides with date of recording. Westcor requires that concrete evidence of non-commencement of construction is retained in your file.*

Note: *Please be aware that in states in which no legal priority can be obtained for construction lenders, additional requirements are necessary and Westcor agents must consult the company's local underwriting counsel for approval.*

Contemplated Improvements Clause (Owner's Policy)

The following clauses (or similar promulgated clauses) should be included in Owner's Policies where the policy amount exceeds the actual consideration and improvements are contemplated on the property in question:

1. *"Liability hereunder at the date hereof is limited to [amount of actual consideration]. Liability shall increase as contemplated improvements are made so that any loss payable hereunder shall be limited to said sum plus the amount actually expended by the insured in improvements at the time such loss occurs. Any expenditures made for improvements subsequent to the date of this policy will be deemed made as of the date of this policy. In no event shall the liability of the Company hereunder exceed the face amount of this policy. Nothing contained in this paragraph shall be construed as limiting any exception or printed provision of this policy."*

2. *"Any and all liens arising by reason of unpaid bills or claims for work performed or materials furnished in connection with improvements placed or to be placed upon the subject of land."*

Please be advised that the title commitment should contain a statement that the above items will appear on the final title policy.

Pending Disbursement Clauses (Loan Policy)

If coverage is requested in a liability amount that includes contemplated improvements, the following clause (or similar promulgated clauses) must be inserted on Schedule B of loan commitments and loan policies when insuring a construction loan:

> *"Pending disbursement of the full proceeds of the loan secured by the mortgage described herein, the Company insures only to the extent of the amount actually disbursed but increases as each disbursement is made in good faith and without knowledge of any defects in, or objections to the title, up to the face amount of the policy. Notwithstanding anything contained in this policy to the contrary, this policy does not guarantee the completion of the improvements, nor the sufficiency of funds for the completion thereof."*

Contract (Agreement) for Deed

Overview

A contract for Deed (also known as Contract for Sale, Agreement for Deed or Land Installment Contract) is a hybrid form of deed/mortgage that results in a transfer of title from vendor (seller) to vendee (buyer) upon payment in full of all monies due under the Contract or Agreement.

An ALTA Owner's Policy may be issued to insure the equitable interest of a contract purchaser (a.k.a., contract vendee). There are two basic ways in which such a policy may be issued. The first is to insure the contract purchaser/vendee under the contract seller/vendor's interest. This requires showing the name of the purchaser/vendee as the named insured while, at the same time, showing the insured interest (i.e., fee simple) vested in the seller/vendor. In addition, an exception for the contract for deed between the parties must be made on Schedule B of the policy, along with an exception as to the interest of the fee simple title holder.

An alternative method is to insure the contract purchaser/vendee's (equitable) interest, which entails showing the names of the purchaser/vendee as the named insured and reflecting the estate or interest in the land as being the "*rights of the contract purchaser/vendee"* with such estate or interest shown as being vested in such "*contract purchaser"* or "*contract vendee." Insuring the contract purchaser/vendee's (equitable) interest should be limited to those jurisdictions where priority is given (by statute or case law) to contract purchasers/vendees against other bona fide purchasers or creditors when the contract for deed is recorded.*

In some states, judgments and state tax liens against a contract seller/vendor recorded *subsequent* to the contract itself will not attach to the vendee's interest, but the seller/vendor's interest in the contract may be subject to levy on execution pursuant to a money judgment. Judgments against the seller recorded prior to the time of the contract must be cleared of record or listed as an exception to title. It is important to note that judgments, federal tax liens, or other liens against a *contract purchaser/vendee* must be cleared or shown as exceptions. For insuring purposes, it is best to treat contract purchasers/vendees the same as fee owners.

Most states recognize the doctrine of Equitable Conversion. This doctrine effectively "converts" or considers the interest of the contract purchaser into legal title or ownership and the interest of the contract seller into that of a mortgagee. This is the basis for claims of creditors of the purchasers to attach to the property but not such claims against the seller.

Underwriting Instructions

The agent must first determine that equitable interest estates have priority in their area. If not, the property may not be insured without specific instructions from Westcor's underwriting counsel.

1. Review the contract to ensure that:
   a. All parties to the transaction are specified;
   b. All parties have properly executed the contract in written form;
   c. The terms and consideration of payment have been detailed within the body of the instrument;
   d. The sales price is an adequate consideration;
   e. The contract contains the legal description of the property and meets all statutory requirements.

2. To insure the purchaser/vendee under the contract seller/vendor's interest:
   a. List the name of the contract purchaser/vendee on Schedule A of the policy under "Name of Insured", referencing only their names and not marital status or other vesting information.
   b. List the estate or interest as insured as "Fee Simple".

c. List the title as vested in the name of the contract seller/vendor as contained in the last deed of record.
d. Exceptions as shown below.

3. To insure the vendee's interest only:
   a. List the name of the contract purchaser/vendee on Schedule A of the policy under "Name of Insured", referencing only their names and not their marital status or other vesting information.
   b. The estate vested should conform to the following language:
      "___as to the rights created by that certain [TYPE OF INSTRUMENT including description of sellers, purchasers, date, and recording information.]
   c. Under the Estate or Interest, list the following:
      "The interest of [CONTRACT PURCHASER(S) VENDEE(S)], under that certain [TYPE OF INSTRUMENT] referred to in Schedule A, and the effect of any failure to comply with such terms, covenants and provisions."
   d. Exceptions as shown below.

Some buyers and/or sellers may object to recording the actual contract for deed and making the terms of the sale public. At the very least and only where permitted by state law, a memorandum or notice of contract must be filed in order to insure the transaction. Generally, unrecorded contracts are uninsurable.

The following exceptions must be included under Schedule B-1 of the policy:

> *"Those terms, conditions and provisions under that certain [TYPE OF INSTRUMENT] referred to in Schedule A, and the effect of any failure to comply with such terms, covenants and provisions."*
>
> *"Subject to the rights, title and interest of the fee simple title holder, pursuant to the [TYPE OF INSTRUMENT] referred to in Schedule A."*

If the contract seller(s)/vendor(s) are in possession of the property under an unrecorded contract, and the property is not being transferred, and the contract purchaser/vendee(s) are obtaining financing, the following requirement should be made in the lender's title commitment.

> *"NOTE: It has been brought to our attention that {CONTRACT SELLER(S)/VENDOR(S) are in possession of the subject property by virtue of a certain {TYPE OF INSTRUMENT], joinder of said {CONTRACT SELLER(S)/VENDOR(S)] on the mortgage, or a written subordination of their rights to the lien of the insured mortgage is required."*

If insuring a different sale or a mortgage made by the seller/vendor, before a contract for sale or agreement for deed may be ignored, the purchaser/vendee must properly release his interest, or the contract seller/vendor must foreclose, or a court order quieting title must be obtained and approved by WESTCOR Counsel.

See also: **Vendor's Lien**.

Corporations

Overview

When insuring a transaction involving a corporation as purchaser, seller, or borrower it must be determined that the corporation legally exists and is in good standing. This information may be acquired through the Department of the Secretary of State in the state of incorporation. For new corporations acquiring title to real property on or about the date of incorporation, it is necessary to verify that incorporation occurred prior to the conveyance – for if incorporation has not occurred, the conveyance would be void due to lack of a proper grantee (legal entity).

In addition, the articles of incorporation and bylaws should be reviewed and it should be verified that the bylaws do not prohibit the specified type of transaction (i.e., conveyance or encumbrance). It is also necessary to obtain a certified copy of the corporate resolution authorizing the sale or mortgage.

Specific state laws should be reviewed as to which corporate officers may execute deeds and mortgages/deeds of trust (i.e., CEO, President, and Vice President). If someone other than a statutorily approved corporate officer is signing, such person must be approved by the corporation through its resolution. Where the corporate seal is required, a handwritten, typed, or imprinted scroll or seal is acceptable, depending on applicable state law.

Disposition of Substantially All Corporate Property and Assets

Prior to insuring a transaction which involves the disposition of all or substantially all of the corporation's real property, a certified copy of a corporate resolution of the Board of Directors should be obtained. Such resolution should certify that those executing the deed have been authorized to sell such corporate-owned property by affirmative vote given at a meeting of stockholders or by written consent of such stockholders of record, who hold a majority of the stock, and are entitled to vote on such matters.

Dissolved Corporations

With respect to conveyances of real property from dissolved corporations, please refer to specific state law or contact underwriting counsel for further guidance. Conveyances by foreign dissolved corporations will usually be governed by the laws of the state in which the property is located.

Underwriting Instructions

In order to address concerns, the following items are generally required in order to approve title from or a mortgage made by a corporation:

1. Verification from Secretary of State in the state of incorporation that the corporation is a legal entity in good standing. If a corporation currently has title to the property, verify the date of incorporation and check the date against that of the deed by which title was conveyed to the corporation.

2. A certified copy of a resolution of the Board of Directors authorizing the transaction.

3. Evidence that the corporation legally exists and that there are no liens for unpaid corporate or franchise taxes.

4. In the case of a nonprofit corporation, evidence that the transaction meets any special requirements under state statute for nonprofit corporations.

See also: **Deeds**.

Corporations, Foreign

Overview

Prior to insuring a transaction involving a foreign corporation (i.e., a corporation formed in a state other than the state where the subject property is located), the corporation should obtain a Certificate of Authority from the subject-property state which allows it to transact business in that state. Generally, such Certificate of Authority is adequate to prove corporate existence. If the foreign corporation does not have a Certificate of Authority to transact business in the state where the subject property is located, verification of its status must be verified through the Department of State or equivalent office in the state of incorporation. The requirement or a certificate of authority for a foreign corporation varies according to state law. Check with your Westcor Underwriting counsel for the requirements in your state. Basically, the above holds true for corporations incorporated in foreign countries (a.k.a., "alien" corporations). If the corporation does not have a Certificate of Authority to transact business in the state where the subject property is located, verification of corporate status must be obtained from the place of incorporation and a copy of such verification must be recorded in the official records of the county in which the subject property is located. In addition, a certified copy of the articles of incorporation, charter, and /or bylaws must also be recorded as proof that the corporation has the authority to engage in the proposed transaction and that those executing documents on behalf of the corporation are authorized to do so. If document are in a foreign language, an English translation must be made and filed of record.

Generally speaking, once a foreign corporation obtains a Certificate of Authority to transact business in a specific state, it will hold the same power and will be ruled under the same regulations as domestic corporations in such state with respect to real property transactions. However, a dissolved foreign corporation in the process of selling its real property in another state will fall under the laws of the state in which the property is located with respect to disposition of such property.

Underwriting Instructions

In titles involving alien corporations, state statutes must be consulted in order to determine that the transaction is proper. Some states limit the amount of acreage or type of property (e.g., agricultural) that an alien corporation may own.

See also: **Corporations**.

Co-tenancies

Tenants In Common

Overview

Generally, a tenancy in common is the most common form of co-ownership and is the tenancy of default when no other co-tenancy is established or when a joint tenancy with right of survivorship or a Tenancy by the Entirety is severed. Tenants in common may own equal or unequal shares in the property, and may acquire an interest in the property at the same or different times, from the same or different grantors, through the same or different instruments. Each may dispose of the interest in any manner desired. In the event of death of a tenant in common, the co-tenancy interest becomes a part of the estate.

Underwriting Instructions

Because laws are different from state to state, contact your local underwriter for guidance specific to your state. Generally, unless specifically requested, no designation of co-tenancy should be made in Schedule A of any policy.

Insuring less than the entire undivided interest

Where fee simple title is vested in undivided interests and you are requested to insure the undivided interest of fewer than all the co-owners, the following exception should be taken in both the commitment and Schedule B-1 of the title policy:

> *"Rights and claims of co-tenants and co-owners of the insured estate and rights of anyone claiming under them, including but not limited to rights and claims for partition, improvements, reimbursement, contribution, creditors claims, and any and all agreements between co-tenants or co-owners, recorded or unrecorded."*

Joint Tenants

Overview

In order to create a joint tenancy, four unities (possession, interest, time, and title – the PITT group) must exist unless excused by state statute.

Possession All Joint Tenants individually have equal rights to possession.
Interest All Joint Tenants have an equal ownership interest in the land.
Title All Joint Tenants must have equal title, i.e., fee simple.

Time All Joint Tenants must have the land conveyed to them by the same instrument at the same time by the same grantor.

A deed, from an owner to himself and another with wording verifying his intent to create a joint tenancy with right of survivorship, should be considered to have created survivorship rights. However, deeds with wording limited to *joint tenants* or *as joint tenants and not as tenants in common* may not suffice to establish survivorship rights in some jurisdictions. The language necessary to create a joint tenancy is dependent on and controlled by state law.

Provided survivorship rights have been established, in the event one party dies, his or her portion of the title, as a joint tenant, will pass to the surviving joint tenant(s), free of any claims of any heirs or devises under a will (or creditors, depending on state law) of the deceased.

A joint tenancy interest may be severed voluntarily by all joint tenants or by a conveyance of the interest of any one joint tenant, or involuntarily by an execution sale of any interest subject thereto. A levy and sale or bankruptcy sale against one joint tenant will operate to sever that joint tenancy interest. Such interest may be sold without the other joint tenant(s) being made a party to the action. At the time of levy and sale the joint tenancy will be severed and the new purchaser will become a *tenant in common* with the other co-owner(s).

Joint tenancy applies to individuals only and cannot apply to entities such as partnerships, corporations, etc., which may have life spans other than natural persons.

Underwriting Instructions

Because laws are different from state to state, contact your local underwriter for guidance specific to your state. Generally, unless specifically requested, no designation of co-tenancy should be made in Schedule A of any policy.

In most states the right of survivorship of a joint tenant operates independently of the probate estate of the deceased joint tenant. Upon death of a joint tenant the surviving joint tenant(s) take title by operation of law. The death of a joint tenant must usually be shown by recording a death certificate.

Often borrowers may ask the title company to advise them on how they should hold title, particularly when planning their estates. Westcor agents should be careful not to advise borrowers on this legal matter.

Tenants By the Entirety

Overview

Historically, property jointly held by husband and wife as tenants by the entirety has not been subject to liens filed against only one spouse, provided the couple was married at the time of acquisition of the property and remained married to each other, continuously and uninterruptedly, throughout the date of the current conveyance or encumbrance. Tenancy by the entirety must meet all requirements (unities) of joint tenancy in addition to the fact that both parties must be married to each other. This special exempt status as to creditors of one spouse may be limited to the marital homestead property of the "innocent" spouse in some states. If, however, the couple divorces, such entirety estate would automatically convert to a tenancy in common and would remain so, even if the couple remarried each other. The only way in which an estate by the entireties could be re-established is if the now-remarried couple executes a deed to themselves as tenants by the entirety.

Tenancy by the Entirety includes the right of survivorship. Upon the death of either spouse, the property automatically passes to the surviving spouse.

Tenancy by the Entirety is not recognized in all states. Where it is recognized, typically, a conveyance having two people as "husband and wife" as grantee will automatically create a tenancy by the Entirety. In other states marital rights, homestead rights or statutory community property rights may apply.

It is the opinion of the Internal Revenue Service regarding federal tax liens that separate but identical liens filed against a husband and wife individually will attach as a lien to jointly-held property including property held as an estate by the entirety. Therefore, such liens must be made an exception to title unless satisfied and released or subordinated as to the lien of the current/new mortgage. In the latter case, the lien would still be reflected as an exception to title on the owner's and loan policies; however, it would be reflected as a subordinated interest on Schedule B, Part II of such loan policy. The Supreme Court of the United States has determined that federal tax law supercedes state law concerning tenancy by the Entirety and a federal tax lien against only one spouse/tenant will pierce the entireties shelter and attach to the property (U.S. v. Craft).

Underwriting Instructions

Because laws are different from state to state, contact your local underwriter for guidance specific to your state. Generally, unless specifically requested, no designation of co-tenancy should be made in Schedule A of any policy.

In some areas, recent litigation has affected the protection previously afforded under tenants by the entirety against liens filed against only one spouse. Therefore, in those jurisdictions where title is held by the entireties and a judgment has been filed against one spouse, Westcor has taken the position that satisfactory payment and release or subordination of any and all judgments and/or Federal Tax Liens filed against either one or both of the tenants by the entireties must be a requirement in the title commitment or made an exception in both the owner and loan policies.

Joinder of spouse is mandatory when mortgaging or conveying property held by the entireties. Upon the death of a tenant by the entirety, the agent should obtain, review, and record, if necessary:

1. A continuous marriage affidavit, if applicable;

2. A certified copy of the death certificate;

Community Property Overview

Community property overview is created by statute in a small number of states. Although the laws vary as to what rights and interests spouses have as a result, the basic tenet of community property is that all property acquired during the marriage is owned by both spouses. In community property states, spousal ownership rights are automatically created unless a clear statement of “as sole and separate property” is expressed.

Underwriting Instructions

Because laws vary from state to state, contact your local Westcor underwriter for guidance specific to your state.

See also: **Federal Tax Liens**, **Judgments**.

Creditor's Rights

Overview

Fraudulent conveyances or preferential transfers of real property – especially those occurring immediately prior to or during a debtor's insolvency – are areas of concern for bankruptcy and state courts. Transactions that increase the debt (loan-to-value) ratio by lowering the assets of a debtor, thereby leading to potential insolvency of the debtor, can create creditor's rights problems.

In general, the Bankruptcy Code views any transactions occurring within 90 days prior to the filing of the petition for bankruptcy as a preferential transaction (i.e., an action that gives one creditor favorable treatment at the expense of other creditors), and Section 547 of the Code makes it easier to set aside such alleged preferential transfers. The Code strives to balance the equities of legitimate transfers with those which are fraudulent, intentional attempts to hide assets of the bankrupt estate. Therefore, all transfers, including those which are legitimate, are open to potential problems.

With respect to insuring a transaction involving a *deed in lieu of foreclosure,* it is recommended that an *estoppel affidavit* be obtained from the grantor/debtor that speaks to potential creditor's rights problems. Such affidavit should state that the conveyance was intended to be an absolute conveyance given freely and voluntarily without coercion nor under duress; that the deed was not given as a preference against any other creditors of the affiant/grantor; that no other persons or entities held an interest in the property at time of conveyance; that the affiant/grantor is solvent and no other creditor's rights would be prejudiced by the conveyance; and that the affiant/grantor is not under obligation of any other mortgage whereby a lien exists or has been created against the subject property.

Underwriting Instructions

Should your lender request that the creditors rights exclusion [ALTA Loan Policy (Exclusion #7] be deleted from an ALTA policy, such deletion must be in the form of an endorsement, rather than through affirmative insurance stated in the policy. In order to provide such an endorsement to a loan policy, it is necessary to determine that the transaction is supported by adequate consideration. In situations where you are considering removal of the exclusion by endorsement, you must contact Westcor underwriting counsel for authorization.

- Property is conveyed or mortgaged without apparent consideration when there are lawsuits pending against the seller
- Property is conveyed from debtor to self and spouse as tenants by the entirely just prior to a judgment or lawsuit being filed against the seller
- Several lawsuits/judgments are pending against the debtor and the debtor executes a promissory note securing a previous debt
- There is a leveraged buyout situation.

Should you suspect that a transfer or mortgage of property is being made for the purpose of defrauding a creditor, consult Westcor underwriting counsel immediately.

Deeds

Overview

A deed is a *written* instrument, voluntarily executed, which creates an absolute and irrevocable grant, transfer or conveyance of real property or an interest therein.

Corporation

Prior to insuring a conveyance of real property by deed from a corporation, it is necessary to verify that the corporation legally exists and is in good standing; that the corporate bylaws and/or corporate resolution authorizes the conveyance of corporate-owned real property; and that the persons executing the deed on behalf of the corporation have been authorized to do so.

The deed should reflect the name of the corporation as it appears on the certificate/articles of incorporation, as well as the state of incorporation – e.g., ABC Corporation, a Tennessee corporation – in the body of the instrument as well as above the signature of the officer(s) signing on behalf of the corporation. In addition, the title(s) of the officer(s) executing the instrument should be noted in the signature areas as well as the acknowledgment section and, if required, the corporate seal should be properly affixed.

State laws governing the proper execution of corporate deeds should be reviewed and followed. The CEO, President, and Vice-President are typically recognized, statutorily, as those authorized to execute deeds, mortgages, and other instruments. If a corporate officer – other than those recognized by statute – executes the deed on behalf of the corporation, a certified copy of the corporate resolution authorizing such person (by name and/or title) must be obtained and reviewed prior to insuring the transaction.

Generally, a corporate deed executed under corporate conveyancing statutes will require the signature of the authorized officer of the corporation as well as affixation of the corporate seal, which may be by seal imprint or handwritten or typed scroll or seal. Some states may also require attestation by the secretary of the corporation. Alternately, some states may authorize execution of corporate deeds under general conveyancing statutes, which negates the need for corporate seal and attestation by the corporate secretary but may necessitate attestation by (two) witnesses.

Note: Since any corporation operates and conducts business under the supervision and direction of the corporation's Board of Directors, any conveyance or transfer of corporate property must be authorized and supported by express action of the Board of Directors. Any such conveyance should be authorized by a written resolution of the Board of Directors which specifically authorizes the corporate action and authorizes the individuals or officers of the corporation to execute the document for and on behalf of the corporation. Unless required by state law or directed by underwriting counsel, it is not necessary to record the corporate resolution. The resolution should be kept in the agent's file.

See also: **Corporations**.

Partnership

Deeds from General Partnerships

Deeds conveying property owned in the name of a general partnership must be executed in the name of the partnership in accordance with statutory requirements. Prior to insuring title to such conveyances a copy of the partnership agreement should be reviewed or a supporting affidavit in recordable form should be obtained reflecting the name of the partnership and setting forth the names of all partners currently existing and stating that:

1. The partnership is currently in existence under a valid partnership agreement;

2. The partner or partners executing the deed are authorized to do so under the partnership agreement or that all partners have consented to the conveyance;

3. Any corporate general partners have not been dissolved. This is also true if the general partners are either a partnership, a limited partnership, or a limited liability company.

Deeds from Limited Partnerships

Deeds from limited partnerships must be executed in the name of the limited partnership in accordance with statutory requirements. Prior to insuring title to such conveyance it will be necessary to verify, through the Department of State, that the partnership is in good standing and has remained in good standing since it took title to the property being conveyed. In addition, a copy of the partnership agreement or a supporting affidavit in recordable form should be obtained which establishes that the general partner executing the deed is authorized to convey real property held by the limited partnership and that the limited partnership agreement has not been amended, modified, or revoked. Only a general partner may execute a deed on behalf of a limited partnership. Limited partners may not execute such instruments. The general partner executing the deed on behalf of the limited partnership cannot have been nor currently be a debtor in a bankruptcy proceeding, because a partnership may not be bound by a conveyance executed by a bankrupt partner. Additionally, item 3 in the *Deeds from General Partnerships* section applies to this section.

Deeds from Limited Liability Companies

Deeds from Limited Liability Companies ("LLC") must be executed in the name of the LLC (which must contain the words *limited liability company* or the abbreviated *"LLC"*) as follows:

1. If the LLC operates through officers appointed or elected pursuant to the terms of its operating agreement, such instruments must be executed by at least two elected or appointed officers in the manner provided for in the operating agreement. Such officers should consist of (a) a chairperson, president, or a vice president, and (b) any secretary, assistant secretary, or chief financial officer.

2. If the LLC operates through a manager or managers in accordance with the terms of its operating agreement, such deeds should be executed by at least two managers. However, if the LLC operates through a single manager, only his signature should be subscribed in the deed.

3. If the LLC operates through its members and has not elected or appointed officers/managers pursuant to an operating agreement, such deeds must be executed by members holding a majority of the economic interest of the LLC.

4. Since LLC's are recent entities created by the individual states, some states may authorize execution of LLC deeds under general conveyancing statutes.

In order to insure title from an LLC, it is necessary to obtain the following items:

1. A copy of the filed articles of organization in order to ascertain:
   a. The LLC's legal formation and its effective date;
   b. Member or Manager Management;
   c. Limitations that may affect the transaction or the acts of the persons executing the deed.

2. A current list of the names of the members at the time the deed was executed. This requirement is made in order to check the general index for probate or bankruptcy matters that may cause a dissolution of the LLC.

3. A copy of the LLC's operating agreement, if one has been adopted together with all amendments to such agreement. Additionally, a certificate that the operating agreement is a true and correct copy of the agreement now in effect.

4. A copy of the certificate of registration, a copy of the articles of organization certified by authorities of the state of origin if it is a foreign LLC, and verification from the state of origin that the LLC is in good standing.

General Warranty

A general warranty deed provides the most comprehensive guarantee of title protection for the purchaser of real property, due to the covenants, or warranties, given by the seller/grantor. A general warranty deed includes a covenant of *full warranty or warranty forever*, which guarantees that the grantor will *"warrant and forever defend"* the right and title to the real property being conveyed unto the grantee against the claims of all persons whomsoever.

Item 2 of the conditions and stipulations section of the ALTA owner's policy states that the *"coverage of this policy shall continue in force as of Date of Policy in favor of the insured…so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest*."

General warranty deeds (and all other deeds) must be executed and acknowledged in accordance with applicable state laws.

It should be noted that some of the states in the Western United States have adopted the *Grant Deed* or a statutory form of *Bargain and Sale Deed* which is used in lieu of the General Warranty Deed. The warranties contained in these deeds are prescribed by the statutes of such states.

Special Warranty

Special warranty deeds differ from general warranty deeds in that they limit the seller/grantor's liability in warranting title to the purchaser/grantee to only those acts which the seller/grantor has personally done that might cloud or encumber the title to the land being conveyed. Developers and builders often prefer to issue a special warranty deed, rather than a general warranty deed, so as to limit the extent of their potential liability to those matters they are directly responsible for. This type of deed may also be used for conveying a tax title, in which case it will be referred to as a tax deed.

Quitclaim

Quitclaim deeds are often used to clear clouds on the title. In lieu of the granting and conveyancing language found in general warranty deeds, a quitclaim deed will reflect the party of the first part's intent to *remise, release,* and *quitclaim* any interest or title he or she may have unto the party of the second part. Since the party of the first part typically holds no apparent legal right, title, or interest in the property being insured, it would be inappropriate for such person to "grant" or "convey" an established interest or, further, to warrant and defend title to the property. A quitclaim deed does not purport to convey any established interest but merely remises, releases and quitclaims any such interest or title the party of the first part might have.

See also: **Deed in Lieu**.

Underwriting Instructions

In order for a deed to be valid and enforceable:

1. The grantor must have been competent at the time of its execution.

2. The grantee must be adequately identified.

3. The deed must contain granting or conveyancing language.

4. The deed must describe the property to a reasonable certainty.

5. The deed must be properly executed by grantor and spouse, as applicable.

6. The deed must have delivery and acceptance to and by the grantee.

Each state has statutory formalities that must be observed in conveyances of land lying within its borders. These typically include one or more of the following: proper execution (individual, corporate, etc.); witnesses; and acknowledgment by a notary or other authorized individual. In addition, a deed must be recorded in the real property records of the county in which the land lies before the interest of the grantee can be insured.

Caution: Beware of possibility of fraud.

As is also discussed in the section on Gift Deeds of this Manual, caution must be exercised when examining title when the chain of title includes deeds, especially quit claim deeds, which appear to stand alone with no new loan transaction showing of record concurrently or just a "stand-alone" deed transferring title. If such a deed, of any type or nature, appears questions should be asked about the reasons for the deed, verification of authenticity and confirmation of the signatures on the deed and if they were voluntary.

Experience has shown that sometimes "stand-alone" deeds are shortly (within a few days or weeks) followed by a new loan on the same property. The "stand-alone" deed is subsequently found to be a forgery. Deeds between or among family members (individuals with the same last name), deeds conveying property from one spouse to the other, gift deeds, deeds which show no (or nominal) consideration, and deeds with no acknowledgment (or defective acknowledgment) should be investigated for authenticity. Also handwritten documents which suggest the parties hurriedly completed a form document should be investigated.

These conditions will not always confirm wrong-doing, and there may be no problem discovered in many instances. However, experience has shown that these can be indicators ("red-flags") of wrong-doing, and the bad transactions can be discovered and good or valid transaction may be confirmed by asking questions of the parties involved (especially the grantors in such deeds) to verify authenticity.

Although not the exclusive method for perpetrating frauds, quit claim deeds are more likely to be used in fraudulent schemes. Any time a quit claim deed is the type of document used to vest title in the current seller or mortgagor, questions should be asked to verify authenticity. Vesting title by a quit claim deed is more common in some jurisdictions, but in other states, quit claim deeds are used only as curative instruments. Local practices may govern your scrutiny of quit claim deeds.

Deeds in Lieu of Foreclosure

Overview

Many borrowers, when faced with foreclosure proceedings by their mortgage lenders, elect to execute and deliver a *deed in lieu of foreclosure*, in full or partial satisfaction of the secured obligation. Only those deeds in lieu which are voluntarily executed and deemed to be an absolute conveyance by mortgagor to mortgagee, with all mortgagor's rights thereby terminated, may be insured. The deed in lieu should contain language stipulating that it is a deed of *absolute conveyance of title in consideration for the cancellation of the debt secured by the [referenced] mortgage and is not intended to be a mortgage or some type of security instrument."*

In addition, an *estoppel affidavit* should be obtained from the grantor(s), and the lenders, if possible, for the purpose of addressing any potential creditor's rights problems. Such affidavit should state that the conveyance is intended to be an absolute conveyance and is not given with conditions or sale agreement for repurchase or lease, and does not act as security for a debt and is freely and voluntarily given without coercion nor under duress; and in consideration for cancellation of the debtedness and released the mortgage that the deed is not being given as a preference against any other creditors of the affiant/grantor; that no other persons or entities hold an interest in the property at time of conveyance; that the affiant/grantor is solvent and no other creditor's rights will be prejudiced by the conveyance; and that the affiant/grantor is not under obligation of any other mortgage whereby a lien exists or has been created against the subject property.

Since deeds in lieu do not extinguish liens and encumbrances recorded *after* the mortgage, such matters filed of record against the property or the mortgagor as of the date the deed in lieu is recorded must be excepted in the title policy. In some cases, the mortgagee may attempt to preserve the lien priority of its mortgage by stipulating in the language set forth above that the consideration is intended to be a release of only the personal liability of the grantor (borrower) and that the fee simple title being conveyed will not merge with the lien, so that the lien may be preserved in favor of the mortgagee. The mortgage will then remain as an exception to title on the new owner's policy issued in favor of the mortgagee.

Deed in Lieu in Chain of Title

A subsequent conveyance of real property – that includes a deed in lieu appearing of record in the chain of title which does not contain language the same or similar to that shown above – may be acceptable provided the statutory period for expiration of the lien of such mortgage has expired or the mortgage has been satisfied of record. If the statutory period has not expired or a satisfaction has not been recorded, a corrective deed may be required.

If, however, the mortgagee/grantee under the deed in lieu, subsequently conveys title to a third party by warranty deed, the necessity for the former mortgagee to also record a satisfaction of mortgage may be moot, in that conveying under general warranty essentially warrants full title and the then-mortgagee-grantee/now-grantor can no longer claim that title was subject to such mortgage. Consult applicable state laws conserving the effect of such a warranty of title. It is always the preferred practice to require a release or satisfaction of the mortgage to property clear the record and avoid any possibility of a future problem.

Underwriting Instructions

1. A conveyance by deed in lieu of foreclosure can never be insured without prior authorization by Westcor underwriting counsel.

2. Unless otherwise instructed by Westcor underwriting counsel, the following exception must appear on any commitment or policy insuring a deed in lieu of foreclosure:

"Any invalidity of or avoidance of the transfer of the title to the insured property pursuant to the provisions of the Bankruptcy Code (11 U.S.C.) or similar creditor's rights or state insolvency laws."

This exception must appear in any policy issued within one (1) year after the recordation date of the deed to the mortgagee/grantee and thereafter if a petition in bankruptcy was filed by or against the mortgagor/grantor or mortgagee/grantee within the one-year period.

[Upon specific approval from Westcor underwriting counsel, a policy may be issued to a lender or bona fide purchaser after 90 days but within the one-year period without exception to the above if the following can be determined:

a. The amount of the indebtedness is not less than seventy percent (70%) or equivalent of the fair market value of the property;

b. The mortgagee/grantee is not a relative, partner, affiliate, or other "insider" as defined under 11 USCA Sec. 101 of the Bankruptcy Code;

c. Mortgagee/Grantee or purchaser is without knowledge of the violability of the mortgagor's transfer, such as insolvency of mortgagor/grantor, within 90 days of recordation date of the deed to mortgagee;

d. No petition for bankruptcy has been filed against the mortgagor/grantor or mortgagee/grantee within 90 days of recordation date of the deed to the mortgagee.]

3. In addition to the above creditor's rights exception, the following requirement must be met:

   a. The conveyance must be an absolute deed in lieu of foreclosure reciting full satisfaction and discharge of the indebtedness.

      The deed in lieu should contain language similar to the following:

      "This deed is given as an absolute conveyance of the title in consideration of the cancellation of the debt in the amount of [AMOUNT OF INDEBTEDNESS] as secured by that mortgage dated _____ in the original amount of $_____, in favor of [LENDER NAME] and recorded on _____ in Book _____, Page _____, said Recorder's Office and a release satisfaction of said mortgager and is not intended to be an additional security."

   b. It must be determined that the current value of the property is not substantially in excess of the balance due under the mortgage (which should not be less than 70% of the fair market value of the property).

   c. Possession of the property must be surrendered by the mortgagor/grantor.

   d. An affidavit signed by and between the parties and their principals must be obtained attesting to the fact that there are no recorded or unrecorded side agreements as to the property (such as an option to repurchase) or any proceeds there from.

See also: **Deeds**, **Quit Claim**.

Descriptions, Legal

Overview

Legal descriptions come in many different forms: lot/block, unit/phase, sectional, metes and bounds, reference to a recorded plat, and other types. The legal description to property is considered to be sufficient if the property can be identified and located by a surveyor.

The type of legal description most common in or around metropolitan areas will be by reference to a recorded plat. Lots – or in the case of condominiums – units, will typically be described as lot or unit number, block or phase number, subdivision name and plat recording reference. References should be made to all of these items. A recorded survey may serve as an insurable legal description provided it is certified by a licensed surveyor and there are provisions for this type of description in your jurisdiction.

With respect to metes and bounds descriptions, if the current legal description *differs* from the description contained in the prior recorded document, the difference may stem from the fact that the lands to be insured have been carved out of a larger parcel of land (current parcel is smaller than prior parcel) or that more than one parcel has been combined either as contiguous parcels or with new legal descriptions encompassing the combined smaller parcels. Also, through time and with advancing technology, surveying equipment and methods have become more accurate. The accuracy of the equipment and the surveyors may vary, giving different results, which must be reconciled before the land can be insured. It is important to make sure the entire property has been searched in the public records.

When dealing with metes and bounds descriptions, one should be able to trace from the point of beginning through all calls and end at the point of beginning without lifting pen from paper; if a break occurs, the legal description should be re-verified by a surveyor or engineer. If the parcel does not close, running the description in reverse may help to locate the problem.

As to all legals – metes and bounds, lot/block, unit/phase – the legal description set forth in the contract, loan closing instructions, title commitment, deed, mortgage, other applicable documents, and final title policies should be the same. Any discrepancies in the description should be corrected and applicable documents should be amended and initialed, as needed, to bring them into conformity.

Underwriting Instructions

Platted Property:

When insuring platted property, it is essential that the reference be made to the appropriate book and page number where the plat of property being insured is recorded. Such plat may have been recorded in a deed book or plat book. A policy should not be issued for platted property unless the plat has been properly filed of record. Unfiled plats result in insufficient legal description and are, therefore, not insurable.

Metes and Bounds:

Except as noted above, the legal description of the current transaction should match that shown on the prior deed of record and, as applicable, the prior owner's and/or loan policies. If a new, non-matching metes and bounds description has been proposed by a surveyor, most likely a new survey will be required. You should contact Westcor for further instruction.

Discrepancies:

If you should determine that there are discrepancies between the survey and legal descriptions as contained in the prior or current deed of record, it may be necessary to obtain quitclaim deeds or boundary line agreements in order to make the property insurable. Keep in mind that prior lenders and other lien holders must enter into such conveyances or agreements in order to eliminate their right to foreclosure and extinguish the rights granted.

Divorce

Overview

In most divorce cases the parties involved usually settle their differences by some form of Property Settlement Agreement. When an agreement is reached, the parties may execute deeds dividing their property or may divide same by formal agreement. Alternately, the property may be divided by judgment.

When a Property Settlement Agreement (PSA) is used by the parties to settle property rights, they normally list all of their property and then prepare a list of property that each is to receive. Following the list of property that one party is to receive, the other party may use granting or conveyancing language such as "does hereby grant, bargain and convey" such property to the receiving spouse. In such a case, the agreement itself will divest title and a deed is not necessary. The agreement, upon final hearing, will normally be incorporated into the judgment.

In cases where parties do not enter into a PSA, the division of marital property may be accomplished by judgment. In this event the judgment will set out or list the property that each party is to receive and will follow with wording as follows: "…It is *therefore ordered adjudged and decreed* by the Court that title to such property is hereby vested in…". If title is vested and divested in this manner, it is not necessary that the parties execute deeds.

In some cases the parties may enter into a PSA and schedule the property that each is to receive with a provision that each party will execute all necessary instruments to carry out the Agreement. In such cases, the Agreement will not be effective until the instruments are properly executed. Divorce decrees, property settlement agreements, and all other types of partitions must be of record in the county clerk's office to constitute a judgment wherein one of the parties – most likely the plaintiff – will receive an equitable right to the property which may affect the title in numerous ways. Title should be examined carefully.

Underwriting Instructions

Be certain that any conveyances, as a result of divorce, are properly executed and recorded in the county records. Contact Westcor underwriting counsel for approval in cases of unusual or extraordinary circumstances.

Drug Forfeitures

Overview

Drug-related forfeitures of real property are usually accomplished under one of three federal statutes:

1. The Controlled Substances Act (21 U.S.C. 881)
2. RICO (18 U.S.C. 1963)
3. The Criminal Forfeiture provisions of the Drug Abuse Prevention and Control Chapter (21 U.S.C. 853)

Because it is not necessarily tied to a criminal prosecution, forfeiture under the Controlled Substances Act is considered a civil forfeiture. The other two federal statutes provide for criminal forfeiture because a criminal conviction is a prerequisite to the forfeiture of the property.

In addition, many states have enacted legislation providing for forfeiture of such property. State laws vary widely as to their effect on real property. For this reason, only a general treatment of issues that may arise under state law is possible within the confines of this manual. Questions about the statutes of specific states and their application should be directed to Westcor underwriting counsel.

Relation Back

One of the principal variations among statutes is when the forfeiture takes effect. Federal law and the laws of some states provide that the date of the forfeiture relates back to the date of the illegal act. Others give effect to the forfeiture upon seizure of the property. Still others provide that forfeiture is effective upon the filing of notice in the public records. The implications of these distinctions are enormous. If the relation back principle is recognized, the government can more easily reach property in the hands of third parties and thereby prevent criminal defendants from avoiding forfeiture by transferring assets.

Bona Fide Purchasers

Generally, the power of the government to reach property in the hands of third parties is tempered by protection for “bona fide purchasers” or “innocent owners”. States vary as to the degree of protection provided, depending on what type of knowledge, if any, the third party may have had that the property was associated with a drug crime. Some states use an objective standard of knowledge and they protect third parties who, given the circumstances, had no reason to suspect that the property was connected with illicit activity. Other states use a subjective standard and protect third parties with no actual knowledge that the property was tainted. The federal civil forfeiture law appears to require actual knowledge, and the federal courts generally apply that standard. Nevertheless, the U.S. Supreme Court has not specifically addressed this issue.

Record Notice

Federal law mandates compliance with the notice requirements of the state in which the property is located. If state law requires the recording of a lis pendens or other similar document giving notice of an action affecting real property, then the federal government must file a lis pendens in a forfeiture action in order to protect the priority of any interest it may obtain in the property. However, federal law contains no independent notice requirements, so if a state does not require the recording of a lis pendens, then the government need not record one.

Due Process

Unless the government is seeking forfeiture of property in the hands of third parties, the government’s heavy burden of proof and the relatively stringent safeguards afforded the criminally accused generally satisfy constitutional due process requirements for deprivation of property. Civil forfeitures, on the other

hand, do not require proof beyond a reasonable doubt or compliance with the protections given criminal defendants. Frequently, the government can seize personal property without an opportunity for the owner to be heard.

Real property is more difficult for the government to seize, because there is no danger of it being commingled with other property or moved to another jurisdiction. Consequently, notice and the opportunity to be heard are nearly always required for the seizure of real property.

Underwriting Instructions

Because of the *relation back* principle outlined above, there is no foolproof method of eliminating claims for losses from forfeitures. However, certain fact situations should cause an agent concern.

Suspicious Parties in the Chain of Title

As noted under **Cash Reporting**, watch out for suspicious transactions or signs of possible illegal activity. Many title claims may occur – not where we are insuring a forfeiture, but where we suspect one may occur – because of a forfeiture of the property as proceeds of drug-related or other illegal transactions. Never issue a final policy without consulting Westcor underwriting counsel where: *Caution!*

- A party to the transaction brings a large amount of cash to closing, which may indicate drug activity.
- There are current criminal proceedings filed against a party to the transaction. In certain instances, this could indicate the proceeds may be drug-related.
- You have personal knowledge or are otherwise notified that a participant in the closing transaction may be a drug dealer.

Be extremely careful in how you handle any suspicious events. Never allege that the property may be subject to forfeiture or accuse anyone of illegal activity. Contact Westcor underwriting counsel for guidance should you suspect a transaction may be drug-related.

See also: **Cash Reporting**.

On a case-by-case basis, Westcor may insure a transfer of property from the United Sates after forfeiture pursuant to 21 U.S.C. 881, 21 U.S.C. 853, or 18 U.S.C. 1963 under the following circumstances:

Civil Forfeiture under 21 U.S.C. 881

Before insuring real property under Civil Forfeiture 21 U.S.C. 881, the following documentation must be obtained and reviewed:

1. **Order for the Warrant of Arrest of the Real Property**
   This document must be hand-signed by a judge or magistrate and filed of record in the local real property records.

2. **Copy of the Complaint**
   This document must specifically request the forfeiture of the property as well as the alleged basis under which the forfeiture is being conducted.

3. **Proof of Personal Service**
   All owners and/or lienholders of the property (including spouses with marital or community property rights) who are not executing deeds or releases must be given notice by personal service. Generally, this is accomplished via the process and return receipt. Evidence of the personal service must be filed of record in the local real property records. Any transactions where personal service

does not occur on all the above must be approved in writing by Westcor counsel before a commitment or policy may be issued.

4. **Proof of Notice of Publication**
   Notice of the forfeiture must be published in the federal district where the land is located. If the proceeding takes place in a district other than where the property is located, notice must be published in both districts.

5. **Order Authorizing Forfeiture**
   This order must adequately describe and specifically authorize the forfeiture of the real property. This document must be filed of record in the local real property records.

6. **Final Letter from United States Attorney's Office**
   This letter from the U.S. Attorney (or other acceptable party) must state that the order is final and non-appealable (generally, 90 days after the entry of the order if no motion is filed).

In addition to the above, the following requirements must also be met to the satisfaction of the company:

1. The forfeiture must occur in the federal district where the land is located or in the district where criminal prosecution of the owner is occurring.

2. If an owner of the property is subject to criminal prosecution, that prosecution must be final and no longer subject to appeal.

3. Verification by inquiry or inspection that no one is in possession of the land (except through the United States).

4. The proposed insured must execute an affidavit/acknowledgment attesting that they have been advised the forfeiture is involved in the chain of title.

5. If the sales price of the property exceeds $100,000, you must call Westcor counsel and/or submit Westcor's Authorization Request (for unusual risks) for written authorization before issuing a commitment or policy.

Criminal Forfeitures Under 21 U.S.C. 853 and 18 U.S.C. 1963

Before insuring real property under Civil Forfeiture 21 U.S.C. 853 and 18 U.S.C. 1963, the following documentation must be obtained and reviewed:

1. **Certified Copies of the Indictment**
   You must review the indictment to verify that it requests the forfeiture of the property by an acceptable legal description. Certified copies of the indictment must be recorded in the local county recorder's office.

2. **Certified Copies of the Court Order**
   Review to verify that it authorizes forfeiture and seizure of the property. Copies should be filed of record.

3. **Proof of Personal Service**
   All owners and/or lienholders of the property (including spouses with marital or community property rights) who are not executing deeds or releases must be given notice by personal service. Generally, this is accomplished via the process and return receipt. Evidence of the personal service must be filed of record in the local real estate records. Any transaction where personal service does not occur on all the above must be approved in writing by Westcor counsel before a commitment or policy may be issued.

4. **Proof of Notice of Publication**
   Notice of the forfeiture must be published in the local newspaper.

5. **Motion for Final Order of Forfeiture**
   The United States must file the motion and a subsequent final order of forfeiture must be entered by the court.

6. **Final Order of Forfeiture**
   This order, entered by the court, must adequately describe and specifically authorize the forfeiture of the real property. The order must be final and non-appealable (as verified by the U.S. Department of Justice or other acceptable party). Certified copies of the Final Order must be recorded in the county recorder's office.

In addition to the above, the following requirements must also be met to the satisfaction of the company:

1. The United States must convey the subject property by virtue of a warranty deed warranting the validity of the forfeiture.

2. The proposed insured must execute an affidavit/acknowledgment attesting that they have been advised the forfeiture is involved in the chain of title.

3. The defendant/owner must be convicted of a criminal offense and the conviction must be final and non-appealable. This may be verified through the United States Department of Justice or other knowledgeable party.

4. Obtain verification (preferably by inspection) that no one is in possession of the land (except through the United States).

5. If the sales price of the property exceeds $100,000, you must call Westcor underwriting counsel and/or submit Westcor's Authorization Request (for unusual risks) for written authorization before issuing a commitment or final policy.

Forfeitures Under State Law

Many states provide for forfeiture of real estate for criminal acts, such as racketeering. Before insuring property where state forfeiture appears back in the chain of title, call Westcor underwriting counsel. Among other matters, we will need to consider whether there has been personal service on all owners and/or lienholders, the type and finality of the forfeiture, specific state laws regarding the forfeiture of real property, and the authority of the state or authority to convey.

Important Note: *Due to the nature of forfeiture remedies, constitutional protections, difficulty in determining and showing of record satisfaction of all statutory requirements, and the likelihood of challenge to title deriving from a forfeiture proceeding, Westcor is very cautious when asked to insure property which has been subject to a federal or state forfeiture. Approval by Westcor underwriting counsel is absolutely required before such property may be insured.*

Easements

Overview

An easement is a limited right to use the land of another. Easements may be either a benefit or burden to the proposed insured property. All easements, although conferring a benefit, nearly always create an obligation on the benefited party, terms of which should be set out as an exception. An easement may also simultaneously be a benefit and a burden such as a reciprocal easement agreement in a shopping center. If an easement is a burden to the insured property then an exception must be raised for the easement in Schedule B. If an easement is a benefit to the insured property then it may be appropriate to consider the easement as an additional insured parcel in Schedule A. Your local underwriting counsel of Westcor should be consulted for title insurance issues relating to easements.

An easement may be *appurtenant*, that is, one which benefits a specific property and runs with the dominant or benefited land. Or, an easement may be *in gross,* which benefits a specific individual and does not benefit any particular land. Easements are assignable and subject to sale and conveyance just like any other interest in land. Easements *in gross* are rarely insurable, and easements that are not conveyed in a written document are not insurable.

Easements may be created by deed or other recorded instrument. However, as easements are a right and interest in land, in most jurisdictions, there must be a conveyance of the easement in order to create it. The mere recitation or drawing of an easement on a plat may not be sufficient to create an easement. If a recorded plat of the subject property shows an easement that affects the property, an exception should be raised even if no further documentation is found for the easement.

Easements may be created by necessity as when a landowner owning two adjacent parcels, one with access to a public thoroughfare and one without, conveys the landlocked parcel without an express easement or right of way. In most jurisdictions the parcel with the access to the public thoroughfare will be charged with an easement benefiting the otherwise landlocked parcel. An easement by necessity is not insurable without an order of a court of competent jurisdiction granting such an easement.

Easements may be by prescription. This is a method of creating an easement similar to establishing title by adverse possession. If one has used a portion of a property continuously for the required time period, openly and notoriously, without the permission or objection of the landowner, the land may be charged with an easement by prescription. Unexplained paths, driveways, or other features on or crossing the land that do not appear to be of exclusive benefit to the land itself may benefit others using the land. One reviewing a survey must be wary for such features. A prescriptive easement is not insurable without an order of a court of competent jurisdiction granting such an easement.

Underwriting Instructions

Easements which are appurtenant are those which are granted to an owner of a specific property to be used and enjoyed in conjunction with the use and enjoyment of the benefited and typically adjoining property. The property which enjoys the benefit of an easement is referred to as the dominant estate. An appurtenant easement attaches to and is incidental to the use of the dominant estate. An appurtenant easement runs with the land and will be automatically conveyed along with the dominant estate which it benefits. In most jurisdictions this is so even if a subsequent deed in the chain of title which describes and conveys the dominant estate fails to describe the appurtenant easement. The ownership of the easement belongs to the person that owns the dominant estate, unless it is specifically severed from the dominant estate by a recorded instrument.

Rights of Way

A right of way is an easement for the purpose of passing over the land of another for a particular and expressly stated purpose. A right of way is sometimes used to describe a strip of land over which an

easement passes. It may also be appurtenant to the use of a parcel of land. The term "right of way" is frequently used interchangeably with "easement". The two terms are mostly synonymous except that "right of way" is typically used to identify a particular kind of easement or purpose for an easement.

A right of way may be an alley, sidewalk, road, street, railroad, power line, sewer line, water line, or even a shared driveway. When the insured parcel contains any of these or any right of way, those should be excepted under the policy as well as the rights of others to use the right of way.

Licenses

A license is a grant of the personal right to use the land for a limited purpose, which is revocable. Typically a license expires upon the death of the licensee. A license is typically not assignable as it is a personal right. A license is not an insurable interest in land but will certainly be a burden on the land until revoked or terminated. A license will not mature to an easement because its existence acknowledges the owner's rights in and authority over the land.

Underwriting Instructions

Insuring Easements

Prior to insuring an appurtenant easement, or any easement, a proper legal description of the easement must be obtained. There must be a recorded instrument that describes the easement as well as the purpose of the easement. There must be a valid conveyance of that easement to the current owner and to the proposed insured. Legal descriptions for the property to be insured as well as for the appurtenant easement must appear on Schedule A of the title policy, if the easement is to be insured. The parcel burdened by the easement must also be searched to determine that the easement was properly created and that all who had an interest in the servient parcel joined in the conveyance of the easement when it was originally established, including mortgagees.

Easements in gross will usually not be insured. Consult your local underwriting counsel for guidance.

Easements Burdening the Subject Property

When insuring the title to property which is subject to an easement or right of way, the rights of all persons entitled to use the easement must be excepted from the policy coverage under Schedule B. All easements should be listed as exceptions, with appropriate recording information as well as the type and, if known, the location of the easement.

The following are suggested ways to set out easements:

> *"Easement for a power line running through subject property, as shown by instrument dated _____, _____ recorded in the _____ office for _____County, in _____ Book _____, Page _____."*
>
> *"Easement of _____ feet for [DESCRIBE PURPOSE OF EASEMENT] according to plat of said [ADDITION OR SUBDIVISION] recorded in Plat Book _____, Page _____, _____ County records."*
>
> *"Easement over the _____ feet for [DESCRIBE PURPOSE OF EASEMENT] according to [DEED OR INSTRUMENT] recorded in Deed Book _____, Page ____, _____ County records."*
>
> *"Easement granted to _____ over the _____ feet of said lot according to [DEED OR INSTRUMENT] recorded in Deed Book ____, Page ____, _____ County records."*
>
> *"Easement for driveway purposes over the _____, for the use and benefit of the adjoining property according to [DEED, INSTRUMENT OR AGREEMENT] recorded in Deed Book ____, Page ____, _____ County records."*

The following are suggested ways to set out exceptions for rights of way:

> *"Rights of the public in and over that portion of [sidewalk, alley, etc.] affecting subject property."*

"Right of way running over the Southwest portion of subject property as shown by survey of John Doe, dated _____, _____."

"Right of way of [NAME OF ROAD OR STREET] over that portion of above property embraced therein."

See also: **Access**, **Survey Matters**.

Encroachments

Overview

Encroachments are described as the projection or overlapping of certain improvements either from or onto the property to be insured in relation to property boundary lines, easements, minimum building set-back lines, or restricted areas without legal authority. For insuring purposes, encroachments must be dealt with by listing the items as exceptions from coverage. The Company will, however, in some circumstances, agree to provide affirmative coverage to lenders in situations where the risk of loss to the mortgagee is considered negligible.

Underwriting Instructions

It is the policy of our company to provide affirmative coverage under lender's title policies when minor encroachments are present. Minor encroachments are defined as encroachments of improvements over minimum building setback lines (less than a few inches) or similar encroachment of improvements onto easements. Encroachments of fences and gravel drives onto easement or over boundary lines may be insured if they are less than 3 feet. Gross encroachments of improvements (more than a few inches over the minimum building setback line requirements or onto easements by concrete retaining walls, etc.) should be treated on a case-by-case basis. Please contact the underwriting department for affirmative coverage involving the more severe encroachment problems.

When warranted by the above criteria, the following affirmative coverage may be afforded:

[Describe the encroachment under Schedule B of the commitment or policy, then add the following:]

> *"However, this policy affirmatively insures the insured against loss as a result of the enforcement of a decree of a final judgment from a court of competent jurisdiction ordering the removal of said encroachment."*

Similar coverage can be provided by an endorsement which includes substantially the same language and refers to a specific Schedule B exception.

See also: **Survey Matters**, **Restrictions**, **Boundaries**, **Affirmative Coverage**.

Endorsements

Overview

Endorsements to title policies serve to modify or amend the wording or language of the title policies, thereby expanding – or sometimes limiting – the coverage afforded under such title policies. This enables insurers to tailor coverage to meet specific transaction or customer needs. Affirmative coverage is best added to a policy by virtue of endorsements rather than by additions to Schedule B. In some states, however, affirmative coverage within Schedule B is not permitted and coverage must be given through endorsement to policy.

NOTE: Endorsements have been removed for extensive revision and re-write.

Environmental Liens

Overview

The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601 et seq. (known as "CERCLA" or the "Superfund" Act, as amended and supplemented by the Superfund Amendments and Reauthorization Act of 1986 (SARA), P.L. 99-499, provides for the filing of environmental protection liens for the cost of cleaning up hazardous materials on real property. Although the CERCLA lien arises at the time that cleanup is commenced, the lien is subordinate to all liens which have been perfected under state law prior to the recordation of a Notice of Lien in the appropriate public records. Many states have passed legislation which requires the lien be recorded in the same public records in which the state requires real property documents to be recorded. Much of this legislation is similar to the Uniform Federal Lien Registration Act, which applies to all federal liens including CERCLA liens. In the absence of such state legislation, however, the lien may be filed with the clerk of the U.S. District Court having jurisdiction where the land is located, and the priority of the lien is established upon such filing. Agents and examiners must be familiar with the laws of the applicable state and, if necessary, search the records of the U.S. District Court to determine if a CERCLA lien has been filed. If uncertainty exists relating to the individual state's law relating to recording requirements, contact your local state or regional counsel to determine the records required to be examined.

Many states have passed similar environmental legislation modeled after CERCLA. However, several states have laws that provide for a "super-lien" which establishes the priority of the environmental protection lien to be superior to all other liens and encumbrances. Contact your local state or regional counsel if you are unsure of the filing requirements for state environmental liens and whether or not super-lien priority applies in your state.

Underwriting Instructions

Should your search disclose a state or federal environmental protection lien, or if a potential problem of hazardous waste is otherwise made known to you, an exception to the matter must be shown under Schedule B of the commitment and final policy as follows:

> *Notice and lien concerning violation of laws, ordinances, or governmental regulations relating to environmental protection recorded (date) in recording info.*

Note: *Every ALTA title insurance policy form used since 1984 includes an exclusion from coverage for environmental liens. This general exclusion provides that the policy does not protect against environmental liens. However, if an environmental lien is recorded against land being insured, we recommend that a special exception to the lien should be noted on Schedule B of the policy*.

See also: **Endorsements**, **Environmental Protection Lien (ALTA 8.1**

Execution of Instruments

Overview

When insuring conveyances or encumbrances of real property, it is essential to verify that the person or persons executing the instruments are authorized to do so.

Generally, those executing instruments must be of legal age and be mentally competent. Deeds and mortgages from those holding title to real property should be executed in the same manner as they hold title (i.e., John Harbinger Doe will sign as his name appears of record and not as John H. Doe or John Doe). In 'homestead' states, the spouse of the person conveying title or encumbering real property will normally be required to join in the execution of the deed or mortgage, even though he or she may not hold an interest or be in record title of the property.

When insuring conveyances or encumbrances involving corporations, limited liability companies, partnerships, or the statutory entities capable of holding and conveying title, one must verify that the entity exists and is in good standing and, if not provided for via statute, a corporate resolution or partnership agreement, as applicable, should be obtained authorizing the person or persons who will be executing the documents to do so on behalf of the corporation or partnership. Typically, the CEO, President, or Vice President will be recognized, by statute, as being authorized to sign deeds and mortgages on behalf of their corporations. The rules described under Deeds section for limited liability companies are applicable to the execution of other instruments executed on behalf of such limited liability companies. As in all entities created by law, the powers for a limited liability company to act must comply with the terms of its articles of organization and its operating agreement. With respect to general or limited partnerships, execution by all general partners would be preferable; however, execution by any one general partner will suffice with proper supporting documentation giving this authority.

Deeds and mortgages executed in the name of a trust should be signed by the trustee, while those executed under power of attorney should be signed by the appointed attorney-in-fact. Conveyances and encumbrances made in accordance with a will should be executed by the personal representative of the estate.

In all cases, documents should be reviewed to determine who is authorized to sign – i.e., corporate resolution, partnership agreement, articles of organization and operating agreement of a limited liability company, trust documents, power of attorney, wills, probate records.

Underwriting Instructions

Westcor requires that you obtain proof positive (valid, government issue picture identification which includes signature) that persons executing instruments are, in fact, who they say they are. Also, documentary proof that persons signing documents on behalf of others (such as attorneys-in-fact, trustees, partners, etc.) have the authority to execute same on behalf of such others, absolutely must be obtained for each transaction.

Although Westcor does not endorse mail-away closings, in certain instances it may be necessary. To help eliminate problems and lessen the possibility for error or fraud, contact a local attorney or Westcor agent in the area to close the transaction for you. Obtain the telephone number of the notary acknowledging the instrument and verify the signatures with him or her by telephone. Also, request that the notary return photocopies of the signatories driver's license to you so that you may compare the signatures on the license against those on the documents.

See also: **Acknowledgments**, **Deeds**, *Westcor Escrow and Settlement Procedures Manual*.

Extended Coverage

Overview

Deletion of Printed Exceptions (Extended Coverage)

Rights or claims of parties in possession not shown by the public records (Owner's Policy)

This exception may be deleted routinely from owner's policies on owner-occupied residential property if the proposed insured so requests. It can be deleted from rural or farm property upon presentation of a recent survey. This survey must not show the potential for boundary line disputes or other evidence of potential adverse possessors. It can also be deleted from commercial property or residential investment property with an affidavit from the seller that there are no tenants holding unrecorded leases.

Easements, or claims of easements, not shown by the public record

This exception can be removed routinely from and owner's policy if the property is located in a platted subdivision. For other properties, a survey is required to remove this exception.

Encroachments, overlaps, boundary line disputes, or other matters which would be disclosed by an accurate survey or inspection of the premises

When insuring title to a *mortgagee only* on 1-4 Family Residential properties up to $1 million in a platted subdivision, a survey is no longer required to give coverage for survey matters when utilizing an ALTA Loan Policy or Short Form Policy. *This change does not apply to owner's policies, construction loan policies, new construction, acreage tracts, commercial loans, or residential properties for more than four families.* Exceptions must still be made for recorded easements and any unrecorded easements you may discover from an old survey, a prior policy or other reliable source. (The above does not apply to Florida.)

When insuring property not within a platted subdivision, wherein the lender requires title insurance be given without exception to survey matters, but is not requiring that a new survey be ordered, Westcor will accept prior surveys issued to the current owner within ten (10) years provided the property is a refinance only of residential property and an affidavit has been obtained from the current owner stating that there have been no improvements to the insured property since the date of that prior survey. The survey cannot be used to delete the survey exception when issuing a policy on a resale.

See also: **Survey Matters**.

Any lien or right to a lien, for services, labor, or material hereto or hereafter furnished, imposed by law and not shown by the public records

Most loan policies will require that this exception be deleted; however, the agent must be careful in doing so. Different rules will apply for different situations. These situations will include: 1) when the property is unimproved or has been improved for some time; 2) when construction on the property is imminent; and 3) when construction has recently been completed. For specific Underwriting Instructions in deleting this exception, see also **Mechanics' Liens**.

Federal Tax Liens

Overview

A federal tax lien is a statutory lien provided for by Internal Revenue Code § 6321 which arises upon the non-payment of taxes owed to the Internal Revenue Service. The lien arises on the date of assessment and attaches to all of the taxpayer's property. However, a federal tax lien does not establish its priority relative to other perfected liens or interests until a Notice of Federal Tax Lien is filed in either (a) the public records designated by the laws of the State in which the property is located or (b) the clerk of the U. S. district court for the judicial district in which the property is located whenever the state has not by law designated one office in which all federal liens are required to be filed. Federal tax liens do not have any super-priority over previously recorded liens or interests. Federal tax liens are considered enforceable against homestead property, even in states such as Florida and Texas.

Duration of Federal Tax Liens

A federal tax lien is valid for 10 years and 30 days from the date of assessment, unless prior to expiration of this period of limitations, the lien is properly re-filed within the time allowed by law. The date of assessment is disclosed in Column (d) of the Notice of Federal Tax Lien, and the last day for re-filing is shown in Column (e). Prior to November 5, 1990, a federal tax lien was valid for 6 years unless re-filed within 6 years and 30 days from the date of assessment. If re-filed, the duration of the lien was extended an additional 6 years. Under the Federal Omnibus Reconciliation Act of 1990, which went into effect on November 5, 1990, the duration of federal tax liens was extended from 6 years to 10 years, and the re-filing period was extended from 6 years and 30 days to 10 years and 30 days from the date of assessment. Therefore, a title search that extends back 10 years and 30 days from the current date should pick up all effective federal tax liens.

Care should be taken, however, in relying completely upon the statute of limitations. Circumstances such as the taxpayer's suit in Tax Court or bankruptcy may toll the running of the enforcement period. Also, the taxpayer may have entered into a waiver agreement with the Internal Revenue Service which extends the time of payment, and thus the enforceability of the lien. If you have actual notice of such a waiver agreement or other circumstance which may extend the IRS's ability to enforce the lien, then you should not rely on the statute of limitations alone, but rather require a Release of Lien from the Internal Revenue Service.

Release, Discharge, Nonattachment, or Subordination of Federal Tax Liens

The IRS will usually employ one of four methods to free property from a federal tax lien:

1. Issuance of a Release of Federal Tax Lien (IRS form 668[z]) which indicates a complete satisfaction of the entire debt secured by the lien. To obtain this release, the taxpayer must pay off the tax debt in whole, or negotiate an amount acceptable to the IRS in satisfaction of the lien. Although less frequent, a Release of Federal Tax Lien may also be obtained upon submitting proof to the IRS that the statute of limitations has expired so that the lien is unenforceable or upon the IRS acceptance of a bond to secure payment of the debt.

2. Issuance of a Certificate of Discharge of Property from Federal Tax Lien (IRS Publication 783). In this case, the IRS agrees to release the lien as it applies to specified property only, and the lien will remain valid against all other property owned by the taxpayer. The IRS most commonly uses this procedure in cases where the taxpayer is selling the property at full value to a third party, and either all of the net proceeds of the sale (after normal sales costs and commissions) are paid to the IRS or the taxpayer has no equity in the property after taking into account the liens which are senior to the Internal Revenue Service's lien. The application for a Certificate of Discharge from Federal Tax Lien (Publication 783) must be filed with the Collection Division's Special Procedures Staff. The application must include an estimate of the fair market value and usually a written appraisal by a disinterested appraiser together with any other information requested by the

IRS. Additional information usually includes a copy of the anticipated settlement statement prior to the settlement, which must be approved by the IRS. *Unapproved alterations may result in a refusal by the IRS to issue the Certificate of Discharge*.

3. Issuance of a Certificate of Nonattachment (Publication 1024) is normally used in a situation in which the party involved in the transaction is not the same person identified in a recorded tax lien, but has a similar name.

4. Issuance of a Certificate of Subordination of the federal tax lien (IRS Publication 784). The request must show that the amount realizable on the tax lien will ultimately be increased and collection facilitated as a result of the subordination. This method is most often used when dealing with a refinance of a borrower with a federal tax lien against them.

Foreclosure of Prior Liens

When a federal tax lien has been recorded subsequent to a lien or mortgage being foreclosed, the federal tax lien will not be extinguished by the foreclosure unless certain steps are taken. If a judicial foreclosure procedure is being utilized to foreclose the prior lien, the United States must be joined as a party. If the senior lien is being foreclosed pursuant to a non-judicial procedure, proper notice must be given to the district office of the Internal Revenue Service by certified mail at least 25 days prior to the sale date. The agent should obtain satisfactory evidence that the proper procedure was followed and that the notice requirements were satisfied. If not, the federal tax lien is not extinguished, and remains an encumbrance upon title.

United States' Right of Redemption

Once the property subject to a federal tax lien has been foreclosed by a senior lienholder, the United States has 120 days from the date of the foreclosure sale, or the period allowable for redemption under local law, whichever is longer, to redeem the foreclosed property. The United States may, upon application (Form 487), release their right of redemption. Therefore, unless the United States has specifically waived its right of redemption, an exception must be made for possible right of redemption on any commitment or policy issued within the United States' redemption period.

Tenancy by the Entirety

Whether a federal tax lien attaches to the interest held by either the husband or the wife in property held in tenancy by the entirety depends upon the law of the state where the land is located. Contact your local state or regional counsel to determine the effect of a federal tax lien on property held in tenancy by the entirety. A recent (2003) decision of the United States Supreme Court ruled that the federal law concerning tax liens will supercede state law protection of tenants by the Entirety. Be sure to consult your Westcor underwriting counsel to determine the effects of this case on your state law.

Underwriting Instructions

Liens Against Current or Prior Owners

When insuring a refinance in most jurisdictions, if a federal tax lien against the current or former owner has attached to the property, the federal tax lien will retain priority over the new lender's interest. Therefore, such liens must be listed as exceptions on the commitment and policies, the lien must be paid and the lien released, or otherwise subordinated to the lien being insured.

In some states, however, the priority of the new lender's lien will relate back and take the priority of the deed of trust or mortgage securing the debt being satisfied. This relation back to the priority of the lien being paid off is based on the principle of "equitable subrogation". In such states the federal tax lien will be subordinate to the lien being insured. Therefore, the federal tax lien should be shown on Schedule B, Part 2 of a loan policy as a subordinate matter. Equitable subrogation may or may not be recognized in your state. Agents' questions regarding the law in their state should be addressed to local state or regional counsel.

When insuring a sale in which a federal tax lien against the current or former owner has attached to the property, such lien must be removed from the property by release, discharge, or subordination. Otherwise, the lien must be shown as an exception on the owner's title policy.

Liens against Purchasers

The Internal Revenue Service recognizes the common law "purchase money doctrine". They have taken the position that the lien of a mortgage in which *all* the proceeds are used to acquire title to a parcel of property is superior to the lien created by a previously recorded tax lien against the purchaser (Revenue Ruling 68-57). Therefore, if the federal tax lien is against the purchaser of the property, no exception need be taken on the purchase money lender's policy. (In the State of Louisiana, however, the foregoing does not apply. Federal tax liens against the purchasers in that state will take priority over the purchase money mortgage. For this reason, it is mandatory that the purchasers' names be searched for federal tax and other liens which must be either paid or listed as exception.) If secondary financing is being insured, the purchase money doctrine will not protect the secondary lender, and an exception for the federal tax lien must be taken. In addition, exception for the federal tax lien against the purchaser must be made on any owner's title policy since the lien will attach immediately upon the purchaser's acquisition of an interest in the property.

Insuring During the United States' Right of Redemption

Unless the United States has released their right of redemption, an exception on any commitment or policy issued during the United States' redemption period must be made as follows:

> *"Rights of the United States to redeem subject property within the period of ('120 days' or 'insert the period of time permitted junior lienors to redeem under local law') from the date of the foreclosure sale of the deed of trust or mortgage recorded in Book ____ at Page _____. Said sale having taken place on _____".*

See also: **Foreclosures**, **Tenancy by the Entirety**.

Filled-In Lands

Overview

With respect to insuring filled-in land, it is important to ascertain whether the addition of land was natural (accretion) or artificial (filled). A natural extension of land created by the gradual and imperceptible depositing of materials onto the existing land is known as *accretion.* In short – due to the motion of water – sand, sediment, and other materials wash up on land and remain there. Over a long period of time, the addition of such materials creates an extension of the land. In some jurisdictions, title to accreted lands may belong to the owner of the property who is sometimes referred to as the *upland owner.* Filled-in land, however, is neither gradual nor imperceptible. The fill may have been done by the owner of the property or others, such as the Army Corps of Engineers. Depending upon specific state law, the title to filled-in lands may remain with the state or, alternatively, if the state has no ongoing interest in same, may have been conveyed by the state to a prior or current upland owner.

A third type of additional land is artificially exposed land. Such exposure, of formerly submerged lands, most often occurs through drainage and reclamation activities normally performed by or on behalf of the state. As with filled-in land, the title may remain with the state, or if the state has no ongoing interest in same, may have been conveyed by the state to a prior or current upland owner.

Since filled-in or artificially created lands may remain the property of the state, prior to insuring same a conveyance from the state of such lands must be recorded, conveying title to same in the name of a prior or the current upland owner. If such conveyance is not forthcoming, an exception to the policy must be made excluding possible adverse ownership claims by the state from coverage as to those portions of land that comprise sovereignty lands not previously conveyed by the state or legally excluded from prior state conveyances of other types of lands.

Underwriting Instructions

Generally, Westcor does not insure accretion. In some states accreted lands may be considered the property of the upland owner and are, therefore, insurable. More commonly, title to accreted land (and filled land as well) must be determined by court order in a quiet title lawsuit.

Since title to filled-in lands is subject to the ownership of the state and the regulatory rights of the federal government, an exception for these rights must be listed in the commitment and policy as follows:

> *"The property described herein being artificially filled-in land on formerly navigable waters, this policy is subject to any adverse claim by the State of _____ and/or the United States Government by reason of sovereignty and/or riparian rights, if any."*

See also: **Wetlands**.

FIRPTA

Overview

The Foreign Investment Real Property Tax Act (FIRPTA) requires the transferee (buyer) to deduct and withhold a tax equal to 10% of the amount realized when a foreign person disposes of a United States real property interest. The withholding obligation also applies to certain partnerships, corporations which are not domiciled in the U.S., and the fiduciary of certain trusts and estates. The "amount realized" includes cash paid or to be paid, the outstanding amount of any liability assumed by the transferee, the fair market value of other property transferred or to be transferred, and the amount of any liability assumed by the transferee or to which the U.S. real property interest is subject immediately before and after the transfer. The tax must be deducted from transferor's proceeds, IRS forms 8288 and 8288A must be completed, the withheld tax must be paid, and the forms must be sent to the IRS by the 20th day following the date of transfer.

There are two special exemptions under the regulations. If the transferor provides the transferee with an affidavit stating, under penalties of perjury, that the seller is not a foreign person and by providing the seller's U.S. taxpayer identification number, then withholding is not required and no personal liability of the transferee for the tax exists. The other exemption applies if (a) the transferee is acquiring a residence, (b) the transferee actually uses the property as his or her new residence, and (c) the sales price is $300,000 or less. An affidavit should be obtained from the transferee stating his or her intent to reside at the premises.

Foreign transferors who do not already meet the exemptions under the Act may apply to the IRS for a withholding certificate *prior to the transfer*. Withholding can be reduced or even eliminated when the IRS issues such a certificate. In this case, the transferee must still withhold the tax, but need not file the forms to remit the tax to the IRS until the 20th day after the IRS' final determination regarding the application. The regulations require that the IRS act with respect to any such application within 90 days of receipt. The certificate may be relied upon unless it is known to be false. These certificates may be issued if the transferor is exempt from the tax, an agreement has been made for payment of the tax, or the transaction produces no taxable gain or an amount of gain which justifies reduced withholding.

Underwriting Instructions

FIRPTA states that the transferor's or the transferee's agent may be liable for withholding under certain instances. Generally, a title agent acting in a fiduciary capacity only as an agent on behalf of Westcor is not considered an agent for the transferor or the transferee and is therefore not responsible for reporting under FIRPTA. However, if the Westcor agent is also acting in a separate capacity on behalf of the transferor or transferee (e.g., real estate agent or attorney), the agent may be obligated to comply with FIRPTA. Any amounts withheld must be reported to the IRS within 20 days from the date of the transfer, using IRS Forms 8288 and 8288A.

Foreclosure

Overview

When a lien creditor, in order to satisfy the debt owed to it, resorts to a sale of the liened property through the foreclosure process, the property rights of the debtor and junior lien creditors are intended to be extinguished. In order to insure the title subsequent to such a sale, the title insurer must be satisfied that 1) all statutory and contractual requirements of the foreclosure process were complied with, thereby eliminating any possibility that the sale will be overturned, and 2) there are not outstanding Rights of Redemption.

Foreclosures can be divided into two classes. *Non-Judicial* foreclosure, allowed in many states, requires little or no involvement by any court, and is usually the quickest and most inexpensive choice for mortgagees (including Beneficiaries under deeds of trust). The process of *Judicial* foreclosure (through a court) is used either because non-judicial foreclosure is not permitted under state law or there are additional issues that need to be resolved by a court. The foreclosure process is governed by state statutes and the terms of the lien instrument. The particular requirements of the state's foreclosure statutes must be followed.

Non-Judicial Foreclosure

The following is a general list of items that potentially must be confirmed in states where, in practice, the title examiner reviews the elements of the non-judicial foreclosure process.

- Mortgage instrument contains a Power of Sale provision.
- Substitution of Trustee has been properly recorded (where necessary or appropriate).
- Notice of Sale has been given to appropriate parties, including the United States (if it holds a junior lien), and properly posted, in accord with mortgage and statutes. Some states require recordation of a Notice of Default, and then the lapse of a period of time before a Notice of Sale can be given.
- Advertisement in proper publication has occurred, in accord with mortgage and statute.
- Proper time periods between the events constituting the foreclosure process were respected, in accord with mortgage and statute.
- In some states, a Memorandum or Certificate of Sale has been filed.
- Proof of compliance with the Soldiers' and Sailors' Civil Relief Act (or appropriate waiver in Security Instrument).
- Proper "Trustee's Deed" (or similar instrument).
- Compliance with other statutory requirements.
- Satisfaction of all rights of redemption and expiration of all applicable redemption periods.

Non-Judicial Foreclosure on Deceased Debtors

Probate records must be checked prior to foreclosure for debtors who may be deceased. If a debtor is deceased, the probate code must be followed prior to foreclosure. Notice to a deceased debtor in most states is not sufficient to allow a non-judicial foreclosure sale to be insurable.

Non-Judicial Condominium Foreclosure Sales

In most states, by law or custom, all condominium units have homeowners' associations (HOA) and those HOA's have assessments. Generally, these assessments will be subordinated to purchase money liens. As a basic principle, in most states HOA's can foreclose a lien only through a judicial process. Non-judicial foreclosures are typically reserved only for mortgages and deeds of trust according to statute. However, if you are insuring an HOA's non-judicial foreclosure, you must check the redemption rights of the owner of the unit and/or the subordination agreements between the condominium homeowner association and the lender per the recorded documents to determine 1) whether there is a redemption right; or 2) that the HOA lien is subordinate to the other liens. Also, it is absolutely necessary to fully comply with all statutory and due process of law requirements before any such insurance is provided.

See also: **Condominiums**.

Judicial Foreclosure

In the judicial foreclosure process, the creditor sues the debtor for repayment or other satisfaction of the debt, and this results in a judgment being entered against the debtor. In this way, judicial foreclosures are similar to any other sale to enforce a money judgment. The court decrees that the property shall be sold to satisfy the judgment, and the resulting sale by the proper government official terminates the interest of the debtor. If the proceeds of the sale are not sufficient to satisfy the debt, the creditor can, in some jurisdictions, proceed to obtain a *deficiency judgment,* a personal money judgment against the debtor in the unsatisfied amount.

In order to insure title derived from judicial sales, the insurer must be satisfied that all applicable procedural requirements have been met. The process includes: naming all of the necessary debtors and junior lien creditors as defendants (including the United States, if it holds a junior lien); proper notice and service of process on all necessary parties; compliance with Servicemembers Civil Relief Act; reinstatement period (in which the debtor may reinstate the debt by making up all defaulted payments plus costs); trial; judgment; notice of sale; sale; *Redemption* period (not applicable in some jurisdictions); "Sheriff's Deed" or similar instrument conveying title to purchaser.

In some jurisdictions, the failure to name a junior lien creditor as a defendant results in that lien not being extinguished by the foreclosure sale.

Servicemembers Civil Relief Act of 2003

This Federal statute provides protection to people in military service from loss of certain interests in property during the period which they are involved in a military conflict, and can preclude foreclosure. In all foreclosure situations, the title insurer must be satisfied that 1) where a debtor is in the military, that the Act was fully complied with throughout the foreclosure process, or 2) none of the debtors were in the military. As confirmation that none of the debtors were in the military, an affidavit from the foreclosing entity, or sufficient language in the Trustee's Deed to this effect, is usually sufficient.

Extinguishment of Federal Tax Lien

Non-Judicial Foreclosure:

If the United States holds a junior tax lien which was filed more than 30 days prior to the date of a non-judicial foreclosure sale, the foreclosure will not divest the property of the tax lien unless proper notice of the foreclosure sale has been sent to the District Director of the IRS at lease 25 days prior to the foreclosure sale. (If the federal tax lien was filed less than 30 days prior to the actual foreclosure sale date, no notice is required for the tax lien to be extinguished.) If no notice is given to the IRS, then the property will remain subject to the tax lien, even after the foreclosure sale. However, even in the absence of the proper prior notice, the IRS has the ability to extinguish its lien by executing a proper Consent to Sale. It should be

noted that even if the lien of the IRS is properly noticed and extinguished, the IRS has 120 days in order to redeem the property under its lien.

When relying on notice to extinguish and IRS Lien, the agent must obtain evidence of personal service of notice of the foreclosure to the Director of the Internal Revenue Service in the form of certified mail return receipt.

Judicial Foreclosure:

Generally, a junior United States tax lien will be discharged upon judicial foreclosure of a prior lien only if the United States is made a party to the proceeding. However, if the federal tax lien has not been filed at the time of recording of a lis pendens of the judicial proceeding, the resulting judgment of foreclosure will discharge the United States' lien even though the United States was not named in the suit.

Rights of Redemption

A Right of Redemption is an ability, within a statutorily specified time period following the foreclosure sale, to take title away from the foreclosure purchaser by reimbursing his purchase price, plus interest. If a right of redemption exists, an exception must be included in Schedule B. In many states title does not vest until the redemption period has lapsed. Therefore, title may not be marketable.

Rights of Redemption are held in various jurisdictions by the foreclosed-out borrower and junior lien creditors, and in other jurisdictions they have been entirely abolished. In some jurisdictions, these rights can be waived, but in many places, any attempt to waive a right of redemption is invalid.

In any foreclosures divesting a junior United States lien arising under the Internal Revenue laws, the United States holds a Right of Redemption of either 120 days from the date of sale or the time permitted for redemption under local law, whichever is longer. As stated previously, proof of personal service of notice of the foreclosure to the Director of the IRS is required. If the junior United States lien arises under a law other than the Internal Revenue code, the Redemption period is one year from the date of sale. The United States can specifically waive its redemption rights by executing a proper form. Any questions as to waiver of Rights of Redemption should be directed to company counsel.

Bankruptcy

When a party files a petition in Bankruptcy, an Automatic Stay of all collection activity against that debtor is instituted. Any action in the foreclosure process occurring after the filing of the petition and before an order of Relief from the Automatic Stay has been granted is void. Title insurers must examine bankruptcy situations very carefully to verify that the foreclosing creditor obtained this Relief from Stay before proceeding.

Underwriting Instructions

The underwriting requirements for foreclosed property vary from state to state, depending mainly upon the extent to which state courts allow the overturning of foreclosure sales in the case of failure to meet statutory/contractual requirements. If you are not aware of the acceptable practice for your jurisdiction, please contact your Westcor underwriting counsel for guidance.

> *When relying on notice to extinguish and IRS Lien, the agent must obtain evidence of personal service of notice of the foreclosure to the Director of the Internal Revenue Service in the form of certified mail return receipt.*

If the United States holds a Right of Redemption, include the following exception:

> *The right, if any, of the United States to redeem said land with ("120 days" if foreclosure was a non-judicial sale pursuant to a mortgage or deed of trust; otherwise, insert the period of time permitted*

junior lienors to redeem under local law) from the date of sale held on _____ as provided for in 26 U.S.C. 7425.

If another party holds a Right of Redemption, include the following exception:

The right, if any, of _____ to redeem said land within _____ days from the date of sale held on as provided for in _____.

Gift Deeds

Overview

A gift deed appearing in a chain of title – reflected by consideration shown as "love and affection" or other indications of a gift such as similarity in names of parties or transfer by quitclaim deed –will, in most states, be considered valid. However, all conveyances for no consideration or inadequate consideration raise questions as to fraud and forgery.

Underwriting Instructions

Generally, Westcor does NOT authorize its agents to insure gift deeds. Any request to insure the grantee of a gift deed must be approved by underwriting counsel.

The following matters will be considered by underwriting counsel in determinant insurability. When insuring property conveyed by gift deed, it is extremely important to investigate the circumstances under which the deed was given. What are the circumstances under which the transaction came about? Be aware of unusual circumstances or answers to your inquiries. Independent verification of the intent of the grantor should be established whenever possible. In any questionable situation, contact Westcor legal counsel before issuing the Company's commitment or policy.

Also, run the grantor(s) name for judgments. Were there liens filed shortly before or after the deed was conveyed? Is there pending litigation, or are you otherwise aware of possible litigation against the grantors? If so, the property may have been conveyed to avoid the creditors and the deed might possibly be set aside as a fraudulent transfer. Exceptions for judgments against the grantor, as well as liens which have been recorded prior to the proposed insured deed or mortgage, must be made.

In addition, an exception should be made regarding possible liens for federal and/or state gift taxes as follows:

> *"Any lien for federal or state gift tax payable by reason of the transfer from 'A' to 'B'."*

In situations where an owner's policy is requested on property where the title is acquired by a gift deed, the policy must be written in the amount of the fair market value of the property as established by an acceptable appraisal or other valuation means.

If the seller/mortgagor under the current transaction obtained title via a gift deed, it is recommended that the grantor/donor of such gift deed execute an affidavit, acceptable to Westcor, acknowledging that he or she was (and remains) competent at and since the date the gift was made; that the gift was voluntary; that the grantor/donor was solvent at the time of transfer and was not made insolvent there from; and specifically, that the grantor/donor did not make such conveyance in order to defraud or hinder any of the grantor/donor's creditors.

Finally, the following exception needs to be raised if a gift deed appears in the chain of title and any judgments appear against the grantor:

> *The conveyance from _____ to _____, date __/__/____, recorded __/__/____, in Liber/Reel/Book _____ at page _____, appears to have been made for no (or inadequate) consideration. The following judgment(s) appears against the grantor. The judgment(s) must be disposed of or the circumstances explained to the satisfaction of the Company because of the possibility that the conveyance may be set aside as a fraudulent conveyance to defraud creditors.*

Note: *Gift deeds or deeds supported by nominal or no consideration, particularly among family members have been shown frequently to be fraudulent. A typical scenario included a gift deed to a family member and, shortly thereafter (but not part of the same transaction), a mortgage loan secured by the property is taken out by the grantee of the deed. No loan payments are ever made by the borrower and when the lender*

institutes foreclosure, the true owners of the property maintain that the gift deed was a forgery and the property was never conveyed. Although not always the case, loans of this nature are frequently made by "hard money lenders" who charge high fees and interest rates because of the high risk of the loan. Extra precautions should be taken as outlined above when insuring a gift deed or a loan to the grantee of a gift deed.

See also: **Bona Fide Purchaser/Consideration**, **Creditor's Rights**, **Quitclaim Deed**.

Guardianship

Overview

As a preliminary note, states which have enacted the Uniform Probate Code or some version of that Code (UPC) refer to the position here identified as "guardian" according to the UPC terminology, considered a court-appointed officer called "conservator". Under the UPC, "guardian" refers to a position which applies only to the person of a ward or "protected person" whether a minor or incompetent. In UPC states guardians have no authority to affect real property of the ward without court approval. The UPC designates conservators as the court-appointed official with broad powers with respect to the real property of the ward. Conservators must be appointed by a court. This appointment is evidenced by the issuance of a document called "letters". The discussion which follows concerning "guardians" will generally apply to conservators in UPC states.

Guardianship and Conservatorship are governed by state law. These laws may vary and you must determine the specific requirements of laws in your state. Consult with your Westcor underwriting counsel for specific instructions.

An understanding of the various types of guardianship, the requirements of appointment, and the requisite duties of guardians is important in the examination of title. For instance, a person may be a guardian of *person* or *property* or both. *Natural guardians* are considered to be the mother and father, jointly, of their own children or adopted children, during minority. All instruments executed by a natural guardian are considered to be binding on the ward. With respect to guardianship of incompetents, there must exist a petition for judicial inquiry, a certificate of an authorized physician, a court hearing before an examining committee, and a finding or adjudication by the court stating the nature and extent of the incompetency. When a person is adjudicated mentally or physically incompetent, a guardian of the person shall be appointed and a guardian of the *property* may also be appointed, or the named guardian may act as both. Formal guardianship of a minor is similar in nature to the requirements above with respect to the filing of a petition; a court hearing; and as adjudicated, the appointment of guardian(s) of the minor of his person, his property, or both.

Title examiners should note the references made to *guardianship of person* and *guardianship of property*. For purposes of insuring title, we are concerned with *guardianship of property.* Court orders, with respect to sale, encumbrance, or lease of real property of the ward, are of great importance, regardless of whether the ward is a minor or incompetent.

Generally, the powers of guardian – upon court approval – include the power to sell, mortgage, lease, or otherwise encumber said real property. However, in most states, such sale must be authorized or confirmed by the court. Title examination should include review of the certified petition for sale setting forth the reasons for said sale; an adequate description of the property; the price and terms of sale, mortgage or other contract; and whether the sale is private or public; as well as the subsequent terms and conditions of the court orders approving said sale, mortgage, or lease.

With respect to entireties property, all legal or equitable interests in real and personal property owned by an incompetent for whom a guardian of property has been appointed may be sold, transferred, conveyed, or mortgaged if the spouse who is not incompetent joins in the sale, transfer, conveyance, or mortgage of the property. When both spouses are incompetent, the sale, transfer, conveyance, or mortgage must be made by the guardian(s) of each spouse. In many states, guardians are prohibited from purchasing property or borrowing money from his or her ward unless the property is sold at public sale, and then only if the guardian is a spouse, parent, child, brother, or sister of the ward or a cotenant of the ward in the property to be sold.

Underwriting Instructions

When insuring any transaction where a guardian of a minor or incompetent is mortgaging or conveying property, the commitment must contain the following requirement:

> *"Certified Copy of 1) Petition and Order Appointing ____, Guardian; and 2) Specific Court Order authorizing the (sale/mortgage/lease/etc.) of the real property described herein must be obtained from a court of competent jurisdiction and filed in the appropriate county records."*

The Certified Petition and Order must contain the following:

1. Reasons for the sale/mortgage/lease
2. Adequate legal description of the property
3. Price and terms of sale/mortgage/lease
4. Whether the sale is private or public
5. Subsequent terms and conditions of the court order approving said sale/mortgage/lease.

Unless this requirement is met to the satisfaction of the title agent, exception to the matter must be made in the title policy.

In UPC states, the appointed official for dealing with the property of a minor or incompetent is termed "conservator". In those states a guardian is usually appointed only to care for the person of a ward and does not have the statutory authority to take any actions affecting the property of the ward. Under the UPC, a conservator is appointed by a court which issues "Letter of Conservatorship". When issued, the Letters authorize the conservator to take all actions concerning the property of the ward without further court order or approval. To show the authority of the conservator to act, the Letters should be recorded in the land records of the county where the property is located.

See also: **Capacity**, **Incompetence**, **Minors**.

Heirs At Law

Overview

When a person dies intestate (without a will), all real property passes by intestate succession to the decedent's heirs at law. To establish marketable title, a judicial determination naming the heirs at law must be obtained. While this proceeding is time consuming, the Company is afforded protection from an omitted heir when it relies on a final judgment determining heirship. When a deed from the heirs at law appears in the chain of title, it should be supported by a recorded Decree of Heirship or Decree of Distribution identifying the same heirs who signed the deed. Under limited circumstances an affidavit may be acceptable to the company to show that those named as grantors were, in fact, *all* the heirs of the decedent. Westcor underwriting counsel must approve acceptance of an heirship affidavit. If no judicial determination of heirship or approved affidavit from grantor/heirs is obtained, an exception to title as to the rights of possible undisclosed heirs must be made.

NOTE: Notwithstanding local practices and customs which include acceptance of affidavits of heirship in lieu of a judicial heirship determination, only on very rare, exceptional occasions will Westcor underwriting counsel approve acceptance of an affidavit of heirship. Such affidavits may **not** be relied upon to vest title in a current seller or borrower. Judicial determination of heirship by a final, non-appealable court order of competent jurisdiction is always required to vest title unless expressly waived by Westcor underwriting counsel.

Underwriting Instructions

1. Obtain judicial determination of decedent's heirs at law.

2. When relying on a prior deed back in the chain of title from the heirs at law, with express approval of Westcor underwriting counsel you may obtain an affidavit from a disinterested party, (e.g., a priest or neighbor) certifying to Westcor Title Insurance Company that the named grantors were all heirs of the decedent.

3. If no judicial determination is made or no affidavit acceptable to the Company is provided and approved, the following exception must appear on the commitment and policy:

   "Rights of possible undisclosed heirs of____, deceased."

See also: **Probate**.

Homestead

Overview

Homestead laws vary greatly from state to state. Homestead rights in most states are an *exemption* from the claims of creditors, not an encumbrance on title. However, the homestead right or exemption requires special treatment to satisfy the law, and the homestead right must be treated as though it constitutes a kind of encumbrance which must be waived or released to validate a transaction. Basically, the purpose of a homestead exemption is to protect the family home, but the protection takes many forms. In some states, the homestead is protected against forced sale by certain creditors. In many states, a surviving spouse is allowed to use the homestead free from the claims of creditors. Some states protect spouses by requiring that both spouses join in the conveyance or encumbrance of the homestead, even if title is vested in just one of the spouses. A homestead exemption is allowed in some jurisdictions for purposes of ad valorem taxes, with a percentage of the appraised value of the homestead exempted from the taxes.

Generally, homestead rights are created by state constitutions, state statutes, the federal bankruptcy laws, and federal legislation. The applicable law must be studied to determine what constitutes the homestead, what protection is afforded, and what limitations, exclusions, and requirements affect the homestead rights.

Federal tax liens *do* attach against homestead property, in all states.

Underwriting Instructions

- Federal tax liens must be released or listed on Schedule B as exceptions to title.
- Because homestead laws are so different from state to state, contact your local underwriter for guidelines specific to your state.

See also: **Bankruptcy**, **Federal Tax Liens**, **Probate**.

Hospitals, Health Centers & Nursing Homes

Overview

The federal government, through the provisions of numerous Federal Statutes, such as Title 42, USC – and the *Hill-Burton Act*, 42 USC Section 291 to be specific – may make grants to assist in the construction or modernization of public or other nonprofit hospitals and medical facilities. Such funds may generally be recovered by the government by the original applicant or his or her assigns/transferees should it be determined that the initial owner or subsequent transferee violate the initial conditions under which the funds were given. Such circumstances include the following:

- Facilities are not used for purposes as provided for under the act/statute(s) authorizing the funds
- The owner does not qualify for federal funding
- Facilities are used for religious worship.

The right to recover federal funds is not required to be secured by a lien on the property, nor is notice of the right to recovery required to be reflected in the chain of title to the real property. Therefore, when insuring a transaction for a nursing home or hospital, inquiry must be made to ascertain if federal funds were used in the construction or improvements of the facilities. If determined that federal funds were used, an exception must be made as to the rights of the United States to recover any federal funds advanced as provided under such Act.

More information on Hill-Burton facilities, including a list of Hill Burton obligated facilities, is on the Health Resources and Services Administration web site here:

http://www.hrsa.gov/gethealthcare/affordable/hillburton/compliance.html

Underwriting Instructions

Should you determine that a public/quasi-public, nonprofit medical/health facility being insured is associated with a federal act or statute providing for the recovery of federal funds, the following exception must be taken in the commitment and final policy:

> *"Any right of the U.S. to recover funds from the owners or subsequent transferee of said property, or any portion thereof, by reason of the advance of federal funds, including, but not limited to those authorized under _____."*

This exception may not be deleted without prior written authorization from Westcor underwriting counsel.

Improvements

Overview

An improvement is a valuable addition made to property. It is more than mere replacement or repair and is intended to enhance the beauty, value and utility of the property. Buildings or houses are improvements, as are streets, sewers, sidewalks, utilities, etc.

An improvement becomes part of the land and the owner of the land will in most cases also be the owner of the improvements located upon the land. The standard form American Land Title Association policies define "land" as: "*the land described in Schedule A, and affixed improvements that by law constitute real property."*

Like any other interest of right in land, improvements may also be severed from the land by a conveyance of the improvements. Unless the improvement or house which is being conveyed is to be removed from the property, such a conveyance will always be in conjunction with a lease for the use of the land that supports the improvements. The lease will typically be a 99 year lease and most likely will contain provisions renewing the lease.

After the ownership in the improvements has been severed from ownership of the land on which the improvements are located, the improvements may be freely conveyed without conveying an ownership interest in the land. The leasehold interest in the land will normally be assigned to the purchaser along with the subsequent conveyances of the improvements.

Improvements and Fixtures

A fixture is a former chattel, or personal property, which retains its separate identity and is connected to real property in such a way that it becomes part of the real property. One may think of a furnace or boiler and the related pipes and duct work in a house as an example of a fixture. When purchasing a home, the heating system would be included as part of the home, i.e., as part of the improvements to the real property. Fixtures do not qualify for separate insurance coverage under a title policy.

Fixtures may be the subject of separate liens, in the form of financing statements filed in conformity with the Uniform Commercial Code (UCC). One will see these quite often in a commercial transaction where the fixtures may have been financed separately from the balance of the improvements. If a lender asks for affirmative coverage over the affects of any filed financing statements, a search of the appropriate records must be performed at the state as well as local county level to discover any financing statements. These statements should be indexed against the name of the debtor named in the financing statement, and the UCC requires that the statement also describe the property where the goods are held. This may not be a legal description and may be an address.

Although a financing statement secured against a fixture would not attach to the real property, it will still be a lien on the collateral listed since this collateral (as a fixture) becomes part of the real property, the financing statement must be terminated before a new lender or new owner is insured. Under the UCC in most states, security interests in goods which become fixtures have priority over subsequently recorded real estate interests. If the security interest in goods is a purchase money security interest, it arises before the goods become fixtures and, therefore, is a SENIOR lien as to those fixtures and is PRIOR to a previously recorded mortgage.

In no event should there ever be any affirmative statement in a policy or commitment that a chattel has or has not become affixed to the insured property or they have or have not become fixtures.

Insuring Improvements Only

Insuring title to the improvements in one party and title to the land upon which they are affixed in another party is often referred to as a "severed improvement", "split fee", or "constructive severance" transaction.

As indicated earlier, the party owning the improvements also must have a properly created and documented leasehold estate in the land. (See also: **Leasehold Estates**.)

It is important to determine whether the severed improvements are real or personal property. Provided the improvements have, or will continue to be, permanently affixed to the land, and the estates or interests have been properly created, separately described land and improvements are capable of title insurance coverage for both owners and lenders if there is a concurrent recorded leasehold interest in the land held by the owner of the improvements.

Depending upon the instruments creating the interest, the policy will show title vested in fee simple to the severed improvements and in leasehold as to the land. Before insuring such an interest the documents creating the severed improvements must be carefully reviewed to determine if a fee absolute or qualified interest is created in the improvements. A qualified ownership is generally created in a lease transaction where the conditions of ownership are limited by its terms, and upon the happening of a certain event, such as the expiration of the lease, the estate will revert back to the lessor. If the interest in the improvements is qualified, Schedule A of the policy should reflect that the ownership in the improvements is vested in a qualified fee.

A mobile home would not qualify for insurance coverage as a severed improvement because of its readily movable nature. A mobile home would remain personal property unless it was permanently affixed to the property when it would then become an improvement to the real property and non severable. You may never separately insure mobile homes; the policy must only describe the land upon which the mobile home sits.

See also: **Manufactured Housing and Endorsements**, **ALTA 7**.

Underwriting Instructions

Fixtures

The laws dealing with fixtures and improvements may vary greatly from state to state, so you should consult with your local underwriting counsel when faced with these issues. When dealing with fixture financing statements, they must usually be recorded in both the appropriated state and local offices where chattel records are filed. Those same records must be searched to discover fixture financing statements.

The following exceptions and requirements may be used when dealing with fixture financing statements:

Requirements:

Termination of financing statement No. _____ showing _____ as debtor and _____ as secured party filed on _____ in the office of _____.

Termination of financing statement showing _____ as debtor and _____ as secured party filed as instrument/book _____, page _____, on _____, among the land records of _____ County, State.

Exceptions:

Financing statement No. _____ showing _____ as debtor and _____ as secured party filed _____ in the office of _____.

Financing statement showing _____ as debtor and _____ as secured party filed _____ as instrument/book no. _____, page _____, among the land records of _____ County, State.

Severed Improvements

To determine whether severed improvements are real or personal property, the agent must thoroughly review the instruments creating the interest for the intention of the parties involved. Documentation must not only properly describe the improvements, title to which is being or has been constructively severed from that of the land, but must also provide clear language assuring that the building and improvements are and shall remain real property. The agent must also obtain written verification that it is the intention of the parties that the improvements are not to be physically removed from the land to which they are affixed and there are no agreements to the contrary. In addition, there must be a lease agreement between the owner of the land and the owner of the improvements.

If title to a severed improvement is not insurable as an absolute or unqualified fee estate as outlined in the overview above, the leasehold estate in the underlying land may be insured and described under Schedule A as a leasehold estate if there is a recorded lease or memorandum of lease. (See also: **Leasehold Estates**.)

The agent should also make an exception for any easements for access, maintenance, use, and support of such buildings and improvements which, although not necessarily constructed, may be implied by the separate estate or interests created by the severance. An exception must also be taken for the terms and conditions of the agreement by which title to the improvements was severed from the land.

Easement created by express grant or reservation:

> *"Easement for the access, maintenance, use and support (QUOTE VERBATIM FROM INSTRUMENT CREATING THE EASEMENT) of the buildings and improvements situated on and excepted from the land described herein, as (GRANTED TO/RESERVED BY) _____ in deed recorded _____."*

Easement Created by Implication:

> *"Such easements or other rights for the access, maintenance, use and support of buildings and improvements situated on and excepted from the land described herein, as maybe implied from the severance of the title to buildings and improvements (GRANTED TO/EXCEPTED BY) _____ in document recorded _____ as _____."*

Lease Exception:

> *"Terms and conditions of the lease by which the insured occupies the land described in Schedule A including the obligation to make payments under the lease."*

Severance Exception:

> *"Terms and conditions of the (name the agreement using the exact language) severing title to the improvements from the title to the land dated _____, recorded _____ as instrument/book _____, page _____, in _____ County, State."*

All severed improvement transactions must be submitted to Westcor Underwriting counsel along with the Company's Policy Authorization Request (for unusual underwriting risks).

See also: **Leaseholds**, **Leasehold Estates**, **Easements**, **Fixtures**.

Incompetence

Overview

In order to be considered valid, the grantor of a deed or mortgagor of property must be of age and legally competent. The age of majority (or legal capability) varies by state. Traditionally, age 21 has been considered majority. Many states continue to adhere to their law. Some states have lowered majorities to 18 years. Likewise, a guardian or conservator must be appointed for any sale or other transfer of property for someone who has not reached the age of legal majority. Individuals who have not reached the age of majority (considered minors) or have been adjudicated by court order to be legally incompetent are considered to be under a legal disability thereby necessitating the court appointment of a guardian or conservator for any real property transaction involving such a person. Please note that having a physical handicap does not necessarily render a person incompetent. Court orders, with respect to sale encumbrance, or lease of real property of a minor or incompetent are necessary either for appointment of the conservator or court approval of transaction by a guardian.

Generally, the powers of guardian - upon court approval - include the power to sell, mortgage, lease, or otherwise encumber said real property. However, in most states, such sale must be authorized or confirmed by the court. Title examination should include review of the certified petition for sale setting forth the reasons for said sale, mortgage or other contract; and whether the sale is private or public as well as the subsequent terms and conditions of the court orders approving said sale, mortgage, or lease.

In states which have adopted the Uniform Probate Code, appointment of a conservator for a minor or incompetent person requires court involvement. The letters of conservatory must be examined for restrictions and must be recorded.

Indian Lands

Overview

Because of the various state and federal regulations, and judicial decisions interpreting treaties and regulating Indian affairs, title to land now or formerly owned of occupied by an individual Indian, Indian tribe, or other Indian entity creates an extraordinary amount of risk and requires an extensive amount of research, review and specific knowledge of the subject before it may be insured. Guidelines for insurability will vary from state to state.

Risks generally revolve around the failure to treat Indian titles carefully according to the particular federal laws which apply to Indian land titles. Title 25 United States Code and federal regulations specifically address Indian matters and require strict adherence. In many states, the Company considers Indian lands uninsurable. However, upon specific approval from Westcor, the Company may agree to insure these lands subject to specific Indian claims and any other applicable limitations. The agent must be alert to instances where Indian land or former Indian lands were later acquired by non-Indians or any instance where an Indian was involuntarily divested of the land to non-Indian purchasers. Before insuring Indian land titles, the Company requires that the agent submit a Policy Authorization Request for Unusual Underwriting Risks to Westcor Underwriting counsel for written authorization.

Underwriting Instructions

Prior to the issuance of any commitment or title policy insuring title to land now or formerly owned or occupied by an individual Indian, Indian tribe, or other Indian entity, the agent will need to provide the following information to the Company:

1. A Title Status Report as provided by the Bureau of Indian Affairs (BIA). A Title Status Plat must also be obtained from the BIA.

2. The agent must determine that there is proper judicial authority for the lender to conduct foreclosure proceedings should the mortgagee need to foreclose on the Indian land in the future.

3. Should the agent determine that the state court does not have jurisdiction to conduct judicial foreclosure and non-judicial foreclosure remedy is unavailable, title insurance may not be issued.

4. The agent must consider the competency and/or authority of Indian entities and tribes to enter into specific transactions.

5. Verify that there is consent to transfer the property issued by the Department of the Interior, Bureau of Indian Affairs (BIA) of record.

6. The full name of the tribe or organization.

7. A full copy of the charter or constitution, all amendments, and current bylaws and resolution.

8. Proof that the property was properly divested from the Indian entity.

9. Other off-record matters such as treaties or executive orders controlling or limiting the use and/or transfer of the land.

Inheritance

Overview

When insuring a conveyance by inheritance or devise, the agent must determine that the estate has been settled with all taxes and debts paid, and that potential demands of prior unrecorded creditors or other debt obligations of the deceased grantor have been disposed of through probate proceedings or other relevant statutory authority. However, where the estate has not been settled, the Company will not usually issue a policy unless there is a sale by order of the court in which the liens of legatees and debts are transferred to the proceeds of the sale and are no longer liens on the real estate. The time for appeals must also have expired. When a commitment is requested while an estate is in the course of administration, an exception must be made for claims or demands against the decedent's estate, or inheritance taxes, discovery and probate of will, and any unrecorded deeds or interests created by the deceased or his estate.

It should be noted that, in an inheritance situation, the person or persons inheriting title to real property are not considered bona fide purchasers *for value* due to the fact that they did not pay any value for such property.

Title vested in heirs at law or devises under a will, even with a court order establishing such interests, does not create marketable title. Such title continues to be subject to appeals, claims of creditors of the estate, spousal interest, and state and federal taxes, and cannot be insured until all claims and appeal periods have expired, tax waivers are received, and the estate has been cleared without possibility of reopening.

Underwriting Instructions

1. Verify that the owner of the property is in fact, deceased by virtue of a certified copy of the death certificate.

2. Verify that the federal estate and state inheritance taxes have been paid, or that no such taxes were due.

3. Obtain judicial determination heirship.

See also: **Heirship at Law**, **Probate**.

Judgments

Overview

Creation of Judgment Liens

The creation of a judgment lien varies from state to state. In some areas a judgment is a lien as soon as it is entered in the court's own records. In others, a judgment does not become a lien against real property until a certified copy of the judgment has been recorded in the public land records of the county in which the property is located. Where there exist multiple properties of the debtor which are located in two or more counties or parishes, copies of the judgment must be recorded in all applicable counties in order for a lien to be placed against all such properties.

Entireties Property

Historically, a judgment lien against one spouse did not attach to property owned by husband and wife as tenants by the entirety, while a judgment against both spouses did attach. In community property states, however, title to community property is usually subject to judgment liens against either or both of the spouses. Due to recent litigation affecting the protection previously afforded under tenants by the entirety, Westcor requires that when insuring a transaction involving a judgment lien against one spouse, the judgment lien must be paid in full or subordinated, or an exception must be made in both the commitment and final policy.

See also: **Co-tenancies**.

Bona Fide Purchasers

While an *uncertified* or improperly recorded judgment may not legally create a lien against real property it may, in the case of a transaction involving anyone other than a bona fide purchaser for value and without notice (i.e., an arms length transaction), adversely affect the rights of the purchaser – especially if the conveyance was made for fraudulent purposes to the detriment of the debtor's creditors.

Statute of Limitations

The statute of limitations regarding judgments should be reviewed for your state as to various types of judgment liens. Some states require that judgment liens be re-filed within specified periods of time until the total life of the judgment lien has expired; and, if not properly re-filed, such lien will cease to attach.

Statutes of Limitation can be tolled for certain events. Therefore, should the lienholder be an individual rather than an institution, contact Westcor for specific approval before relying on the expiration of a lien under the statute of limitation.

Federal Tax Liens

It is the opinion of the Internal Revenue Service – regarding federal tax liens – that separate but identical liens filed against a husband and wife individually will attach as a lien to jointly-held property including property held as an estate by the entirety. Therefore, such liens must be made an exception to title unless satisfied and released, substituted against other property, or subordinated as to the lien of the current/new mortgage. In the latter case, the lien would still be reflected as an exception to title on the owner's and loan policies; however, it would be reflected as a subordinated interest on Schedule B, Part II of such loan policy.

Federal tax liens will attach to all real property owned by the debtor/taxpayer including homestead property. Effective November 5, 1990, the validity of Federal Tax Liens has been extended from 6 years, 30 days to 10 years and 30 days after the date of the assessment (column (d) in the notice of lien) of the tax unless re-filed. A certified judgment on the other hand, in favor of the U.S. Government, will remain in force 20 years from entry, and may be extended for an additional 20 years.

See also: **Federal Tax Liens**.

Purchase Money Mortgages

State law will dictate priority of purchase money mortgages over judgment liens (Louisiana, for example, does not provide purchase money mortgages priority over judgments.) In most jurisdictions, however, true purchase money mortgages generally take priority over judgment liens correctly filed against the purchasers/borrowers of the insured property. These judgments should be disclosed to the lender (or seller if they are taking back a purchase money mortgage) in the title commitment and listed as a subordinate matter under Schedule B-II of the title policy. If you have any questions regarding the priority of judgment liens over purchase money mortgages for your area, contact your Westcor underwriting counsel.

Bankruptcy

Important: A discharge of debtor in bankruptcy does not release a judgment lien against the debtor's property. The discharge only acts to stop the collection of the debt against the debtor personally. The discharge does not extinguish the judgment lien and therefore, continues to attach to real property. The simplest way to remember this is:

> *"A lien going into bankruptcy is a lien coming out of bankruptcy."*

A release of the judgment lien must be obtained and recorded, or an order of the bankruptcy court to sell free and clear of the lien must be obtained and reviewed by underwriting counsel.

See also: **Bankruptcy**.

Underwriting Instructions

A thorough search of the appropriate records must be made to ascertain all judgments and similar liens which affect the property to be insured. Any adverse matters found must be satisfied or subordinated to the insured mortgage or shown as exceptions in both the commitment and title policy as follows:

> *A Judgment dated ____, against ____, defendant, in favor of ____, plaintiff, in the original amount of ____, recorded ____, records of ____ County/Parish, State of ____.*

Leasehold Estates

Overview

A leasehold estate is created by a lease agreement and exists for a designated period of time. A lease is an agreement (written or unwritten) by which the owner of the land (the landlord or lessor under the lease) transfers to another party (the tenant or lessee under the lease) the right to the exclusive possession and use of the land for a definite period of time. A leasehold estate is referred to as a possessory estate because the owner of the leasehold estate does not own the land.

Leasehold interests should be insured using ALTA leasehold policy forms, designed for this specific purpose. Item 1(h) of the Conditions and Stipulations of the 1992 ALTA leasehold policy defines leasehold estate as *"the right of possession for the term or terms described in **Schedule A** hereof subject to any provisions contained in the lease which limit the right of possession."* Schedule A, Item 2 describes the estate or interest being insured as being a leasehold estate created by specifically described lease documents, while Item 3 describes the leasehold term. Items have also been added to the Conditions and Stipulations of leasehold policies, describing the method of valuation of the estate or interest being insured and the miscellaneous items of loss in the event the insured is evicted (Items 13 and 14 of the leasehold loan policy and Items 14 and 15 of the leasehold owner's policy). If insuring using a different policy form, an exception must be made, in Schedule B, as to the terms and conditions of the lease.

States that do not use the 1992 ALTA Leasehold Policy may have specific forms or endorsements that must be used. Check with local underwriting counsel for requirements.

Generally, a leasehold estate can be encumbered, and a Leasehold Loan policy can be issued insuring the mortgage covering the leasehold estate. See the Underwriting Instructions below and check with local underwriter counsel for specific requirements or forms that must be used.

Generally, unless prohibited by the terms of the lease agreement, a lessee may assign its interest in the lease to a third party or sublease a portion of leasehold estate to a third party. See the Underwriting Instructions below and check with local underwriter counsel for specific requirements or forms that must be used.

NOTE: In 2002, ALTA promulgated Leasehold Endorsements to be used with the standard 1992 owners and loan policies to insure leasehold estates. These endorsements were subsequently revised for use with the ALTA 2006 policies. Westcor has implemented the use of these endorsements and the leasehold policy forms have been phased out.

Underwriting Instructions

The following are general guidelines. Consult with local underwriting counsel for state-specific requirements.

Review the lease agreement. It should contain the following items:

1. Names of all parties involved and execution by all lessors and all lessees (and acknowledgements if required by state law);

2. An insurable legal description of the property;

3. A grant of the leasehold estate, usually accomplished by words such as "lease", "demise", "let", or "rent";

4. A commencement date that is certain (e.g., a term that commences "when construction is completed" is *not* a date that is certain);

5. A certain term that is a specific date on which the lease begins and a specific date on which it ends;

6. Time and manner of payment (i.e., the consideration for the lease).

The lease or a memorandum of lease must be recorded in the appropriate real property records. If a memorandum of lease is recorded, the laws of most states require that the memorandum must include at least the information mentioned above in items 1-6. This constitutes the minimum information a Memorandum of Lease must include to impart record notice of the lease.

Title to the land must be examined to make certain that the lessor had fee simple title to the land at the time of the execution of the lease.

All outstanding exceptions to fee title must be shown as exceptions to the leasehold estate.

To insure a mortgage covering a leasehold estate:

- Verify that the lease agreement does not contain any provisions that would prohibit the mortgaging of the leasehold estate;

- Obtain the written consent of the lessor, if the lessor's consent is required by the lease agreement;

- Obtain written verification from the lessor that the lease is in full force and effect and that neither lessor nor lessee is in default under the lease (sometimes referred to as an Estoppel Certificate) ;

- Search judgment and other general lien indexes, and except to any liens filed against the lessee, unless state law prevents such liens from attaching to a leasehold estate; and

- Record the mortgage.

To insure a leasehold estate obtained by an assignment of lease or a sublease:

- Verify that the lease agreement does not contain any provision that would prohibit the assignment or sublease;

- Obtain the written consent of the lessor, if the lessor's consent is required by the lease agreement;

- Obtain written verification from the lessor and lessee that the lease is in full force and effect and that neither lessor nor lessee is in default under the lease; (sometimes referred to as an Estoppel Certificate)

- Record the assignment of lease or the sublease; and

- Except to the terms and conditions of the Assignment of Lease or the Sublease.

Liens

Overview

A lien is a claim or encumbrance on property which constitutes security for the payment of a debt, obligation, or duty. It may be created voluntarily by the owner of the property or involuntarily by actions or proceedings at law. Generally, a court judgment becomes a lien against real property once an Abstract, Transcript, or certified copy of the judgment is recorded in the county where the property is located. However, in some states the lien may be created by entry of the judgment in the court. The laws and rules as to what constitutes a lien, how it is created, its duration, and where it can be searched for and discovered are all determined by applicable state law and may vary from state to state. The duration of a lien and the effect it has on real property depends, in part, upon the type of lien and the statutory provisions creating it. When insuring title to property encumbered by a lien, such lien must either be satisfied and released of record or subordinated to the interest being insured; otherwise it must be shown as an exception to title.

Underwriting Instructions

For specific underwriting assistance, see guidelines under **Assignments**, **Environmental Liens**, **Federal Tax Liens**, **FIRPTA**, **Judgments**, **Mechanic's and Materialmen's Liens**, **MERS**, **Mortgages**, **Subordination Agreements**, **UCC**, **Vendor's Lien**, etc., as such topics may apply.

Life Estates

Overview

A life estate is an ownership estate in real property that exists only for the lifetime of its owner or the lifetime of a designated third party (sometimes called a life estate per autre vie). A life estate can also be identified as an "estate for years". It is still measured by the physical life of the life estate owner. Life estates can only be measured by the life of a natural person.

A life tenant is the owner of a life estate. (Although the words "life tenant" are used to describe the owner of a life estate, a life estate is an ownership interest, not a lease.)

A reversion is that portion of a fee estate that continues in the grantor after the grantor has conveyed a life estate. For example, when A conveys a life estate to B, the portion of the fee estate remaining in A is a reversion. When B's life estate ends, the right to ownership and possession will revert to A. In this example, A is both grantor and a reversioner.

A remainder is a fee estate created in a third party (other than the grantor) that does not become an ownership interest until the life estate is terminated. It is a future possessory interest that vests immediately upon its granting. For example, when A conveys a life estate to B, with the remainder to C, the fee estate conveyed to C is a remainder. When B's life estate ends, the right to possession and ownership becomes vested in C. C is a remainderman.

A life estate can be created by deed, will, trust agreement, or by operation of law (for example, under the homestead, dower, and courtesy laws of some states, a surviving spouse may receive a life estate in the real property of the deceased spouse).

A life estate that extends beyond a current living generation may violate the Rule Against Perpetuities.

Specific state law must be reviewed to determine the benefits, limitations, obligations, and duties pertaining to life estates, remainders, and reversions.

A life estate can be granted to a third party, or it can be retained by a grantor. For example, A can convey a life estate to B, or A can convey the property to B, reserving a life estate for A.

A life estate terminates upon the death of the person identified in the conveyancing document as the measuring life. For example, if A conveys to B for the life of B, the life estate is terminated when B dies. Likewise, if A conveys to B for the life of C, the life estate is terminated when C dies. A life estate may also be terminated upon the occurrence of an event triggering termination under the document that created the life estate. A statutory life estate may be terminated as provided by the applicable state statute. When the life estate is terminated, title is vested in the owner of the reversion interest or the remainderman.

A life tenant may sell, mortgage, lease, or otherwise dispose of her or his life estate interest, unless prohibited or restricted by the document creating the life estate. However, whatever interest the life tenant transfers is still subject to the life estate limitations. The life estate interest still terminates upon the death of the life tenant or other measuring life.

A reversioner and a remainderman may transfer and encumber her or his interest (reversion or remainder) in the same manner as a present interest, subject to the life estate. However, remember the reversion or remainder interest is future by nature and is subject to the life estate.

Underwriting Instructions

Call for local underwriter approval before insuring a transaction involving a life estate, remainder, or reversion. The following are general guidelines. The requirements in your state may be different.

- To insure a life estate, the estate to be insured on Schedule A should be described as "A *life estate created by [describe document creating life estate]"*.

- When insuring a life estate, note a Schedule B exception to *"all rights, title, and interest of [insert names of all reversioners and remaindermen], their successors or assigns, as to the [reversion or remainder] interest created by [describe document creating the reversion or remainder]"*.

- If the document creating the life estate includes any conditions or restrictions, note a Schedule B exception to *"terms and conditions set forth in [describe document creating life estate]"*.

- To insure the interest held by a reversioner or a remainderman, the estate to be insured on Schedule A should be described as *"fee simple"* or *"remainder in fee simple"*.

- When insuring the interest held by a reversioner or a remainderman, note a Schedule B exception to *"all rights, title, and interest of [insert names of all life tenants], as to the life estate created by [describe document creating the life estate]"*.

- If both the life tenant and reversioner or remainderman are to be insured, show the name of the insureds as *"[name of life tenant] and [name of reversioner or remainderman], as their interests may appear"*.

- If both the life tenant and reversioner or remainderman are to be insured, show title vested in *"[name of life tenant], as to a life estate, and [name of reversioner or remainderman], as to a [reversion or remainder]"*.

- All liens, voluntary and involuntary, created by or against the life tenant and the reversioners or the remaindermen must be released, re-conveyed, or satisfied, or they must be or listed on Schedule B as exceptions to title.

- Some documents creating life estates give to the life tenant the power to convey or encumber the fee estate. Obtain local underwriter approval before relying on such powers to insure without the joinder of the reversioners or the remaindermen.

- If a life estate has terminated, require evidence of the death of the life tenant, or, if applicable, the person whose life was used to measure the term of the life estate. This evidence of death must be an official document (such as a properly certified Certificate of Death issued by the governmental entity of the state responsible for such certifications) and recorded in the land records. A simple affidavit or sworn statement that the life tenant has died is *not* sufficient.

Lis Pendens

Overview

A lis pendens, also known in some jurisdictions as "Notice of Pendency of Action" or "Notice of Commencement of Action", is a legal document which serves to provide constructive notice pursuant to state law that a legal action (lawsuit) has been commenced in which an interest in certain real property is being claimed or asserted in the action. The literal translation of lis pendens is "a pending suit".

A lis pendens is not a lien on property, but rather a notice that a possible interest is being claimed in certain real property. The filing or recordation of a lis pendens in the public records establishes constructive notice from the date of recording to subsequent purchasers, encumbrances, creditors, and other third parties that a lawsuit is pending that involves an interest in the subject real property or may affect title to the subject property. The recording of a lis pendens establishes the priority of the claim of interest in the land. When there is a lis pendens of record, anyone acquiring an interest in the subject property is subject to and will be bound by the outcome of the pending lawsuit.

A lis pendens must contain certain statutorily required information including the parties to the action and the specific description of the property involved. Agents should not pass on or determine the validity of a recorded lis pendens based upon a technical deficiency in the notice.

Underwriting Instructions

When insuring real property against which a lis pendens has been filed, the agent must obtain and record a release of lis pendens, determine that the lis pendens is no longer effective by operation of law, or make exception in policies as follows:

> *"A Lis Pendens dated _____, filed by _____, Plaintiff, recorded _____, in Book _____, Page _____, records of _____ County/Parish, State of _____, and any claims or rights that may be evidenced by, or judgments or orders rendered pursuant to, the Lis Pendens or lawsuit."*

Manufactured Housing

Overview

The ALTA form 7, Manufactured Housing Endorsement, is issued as affirmative coverage that the manufactured housing unit situated on the insured land is included in the policy definition of "land." The individual prefab pieces delivered to the site are considered personal property until they are erected into a finished unit and attached to the land, at which time they convert to real property and, therefore, become part of the land as defined in the terms of the ALTA policies.

Caution must be exercised to be sure that the manufactured units are permanently attached to the land and all ownership and liens applicable to the units as personal property have been terminated. Title certificates must be surrendered and purged, UCC liens (both separately filed with the Secretary of State and in the land records and noted on the Certificate of Title) must be fully paid and released, and all sales and personal property taxes paid and terminated. The units must be transferred to be taxed with the land as real property.

Underwriting Instructions

See also: **Endorsements**, **ALTA 7-Manufactured Housing Endorsement**.

Mechanics' and Materialmen's Liens

Overview

Items 7(a) and (b) of the ALTA loan policy jacket insure against loss of damage sustained or incurred by the insured by reason of "*lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material a) arising from an improvement or work related to the land which is contracted for or commenced prior to the date of policy; or b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to the date of policy and which is financed in whole or in part by the proceeds of the indebtedness secured by the insured mortgage which at date of policy the insured has advanced or is obligated to advance.*"

With respect to mechanics' (labor/service providers) and materialmen's (suppliers of materials) liens, Schedule B of all title policies should contain an exception for:

> *"any lien or right to lien for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records,"*

and such exception should not be deleted unless it can be verified that:

- No work has been performed on the property whatsoever.
- The statutory period of time for filing a lien has elapsed since the last work was performed.
- That pending construction will not commence until the insured mortgage has been recorded.

In cases of recently completed work where the statutory lien period has not expired, applicable releases, satisfactions or lien waivers must be obtained from all applicable parties including contractors, subcontractors, labor/service providers, and suppliers of materials. Also, proper and satisfactory indemnity agreements for unrecorded liens must be obtained.

In some states, mechanics' liens and materialmen's liens will, upon recording, revert back for priority purposes to the date of commencement of work on the project or filing of a notice of commencement; therefore, it is essential that the insured mortgage be recorded prior to such notice and that construction does not commence until such notice is recorded in accordance with statutory provisions. As a consequence of the "relation back" aspect of mechanics' liens, it is essential to comply with state law concerning priority when providing coverage against mechanic's liens. If a policy will be issued without exception to unrecorded mechanics' liens, consult your Westcor underwriting counsel for any special requirements which must be made to avoid potential losses from mechanics' liens.

Underwriting Instructions

The procedures for removing the mechanics' liens exception are outlined below, but these procedures must not just be followed by rote. The agent must apply common sense to each transaction before removing the exception.

Different rules apply for different situations, such as:

- When the property is unimproved or has been improved for some time.
- When construction on the property is imminent.
- When construction has recently been completed.
- When construction has begun before recording.

- Owner's policies.

Property Unimproved or Improved for Some Time

If no work has been performed within the period for liens to be filed after work has been performed, then in most instances a lien cannot arise which has priority over the insured mortgage. In order to remove the exception for unfiled liens, the Company will accept, in most instances, an affidavit and indemnity agreement from the seller and/or borrower that no work has recently been performed on the property. Such affidavits are obviously self-serving, and the indemnity actually may have little value, so the agent must exercise good judgment in determining when not to rely on such affidavits. If any questions arise, please contact Westcor underwriting counsel.

Property Unimproved But Construction Imminent

In most jurisdictions, the relative priority of the mortgage with labor or materialmen's liens is determined by the time of recording of the mortgage in relation to the commencement of work on the property. Therefore, in most instances, recording the mortgage before work commences will assure priority. In most instances, the lien exception can be removed upon the execution by the seller/borrower/contractor of Affidavit of Non-Commencement of Construction. The agent must also perform a physical inspection of the property to verify no work has commenced prior to recording the mortgage. The agent should be alert for any set of facts which might indicate that construction has in fact begun before recording of the mortgage, and special care must be taken to record the mortgage as soon as possible after the closing. For commercial construction projects, the Company requires that pictures of the unimproved construction site be taken immediately before the recording of the mortgage. Westcor underwriting counsel should be called if there are any questions. Be aware that "commencement of work" on the property is defined differently in various states. In some states "commencement of work" for mechanics' liens priority may mean the start of planning, architectural drawings, soil testing, or other off-site work. In these states, priority of a mortgage or ownership interest may be legally impossible to obtain against mechanics' liens which may be recorded in the future.

Construction Recently Completed

The most dangerous of these situations regarding unfiled lien coverage is when construction has recently been completed and the time for filing liens has not yet passed. This situation is more dangerous in that, unlike the other two, the knowledge that work or construction has been performed is certain; the only question is whether all those who are owed money have been paid. Affidavits and Indemnity Agreements in these circumstances are even more self-serving.

The Company will, however, allow the non-record mechanics' lien exception to be removed from loan policies when construction has just been completed. Within this category, there are two situations with separate rules. In instances where the owner of the property has recently completed remodeling existing improvements and is either refinancing or selling, the Company will rely on a standard lien affidavit, discussed previously. In instances where a contractor or individual is selling a new house, please call Westcor underwriting counsel for guidelines to be followed in the agent's particular region. Upon authorization from Westcor, a Contractor's/Owner's Affidavit may be acceptable. In some cases, provision of mechanics' liens coverage during or soon after construction is completed may require more extensive investigation, review of lien waivers or releases, evaluation of financial states of owners, contractors, or other indemnitors, or other procedures to control risk. Consult your Westcor underwriting counsel for instructions concerning this coverage.

Construction Begun Before Recording

Insurance against the risk of unfiled liens where construction began before recordation of the mortgage is outside the usual scope of title insurance protection. The Company will *rarely* entertain the risk of labor or materialmen's liens during construction, in the absence of surety bonds naming the Company as co-obligee. If such approval is to be obtained, it will be given only in reliance upon financially responsible indemnitors, for which evidence of financial stability must be submitted, and upon satisfactory independent evaluation as to the sufficiency of funds available for completion of the project. In addition, control of disbursements,

waivers, and other protective devices may be a condition of affording any coverage. Such insurance cannot be given without approval from Westcor underwriting counsel.

Special Rules for Owner's Policies

The mechanics' liens exception should not be removed from owner's policies, unless specifically requested by the insured, and then only with underwriter approval. The exception should *never* be removed to benefit an owner whose failure to pay laborers or suppliers may result in liens arising against the property.

Minerals

Overview

A fee simple estate in land includes title to both the surface estate and the mineral estate. The mineral estate (either the entire estate or lesser interests or rights in the mineral estate) can be severed from the remainder of the land. The severance of minerals can be accomplished in several ways, such as an exception or reservation in a deed, a deed of the surface only, a deed of minerals or mineral rights, a mineral lease, or a mortgage of the mineral estate only. Minerals can be conveyed, encumbered, and leased, just like any other interest in land.

Generally, the owner of the mineral estate has the right to use the surface, including the right of ingress and egress, for purposes of exploration, drilling, mining, and otherwise extracting the minerals.

An exception on Schedule B must be made for every document containing a grant, a reservation, or a lease of a mineral right or interest (unless only the surface estate is being insured, as discussed below). In most states, once a mineral interest is shown as an exception to title, it is not necessary to show subsequent transfers of such interest.

If only the surface estate is being insured, an exception for *all* minerals, as set forth in the Underwriting Instructions, should be made. When a complete exclusion has been made as to all minerals, it is not necessary to also list specific exceptions to mineral reservations, grants, or leases.

Mineral leases may have either a fixed term or an indefinite term. When the term is indefinite, it is typically a short fixed period followed by a period that continues so long as minerals are produced. If a fixed-term lease has expired by its terms, it need not be excepted to. It is much more difficult to determine if an indefinite-term lease has expired because production has ceased. Because of the risk involved in such a determination, require either a written release of the lease, executed by the lessee, or a judicial determination that the lease has terminated. In some states, an Affidavit of Nonproduction from the landowner and two disinterested parties may be used to prove up that the lease has terminated.

In some jurisdictions, affirmative coverage is available to insure the owner or lender of the surface estate against loss or damage caused by drilling or mining operations by the owner of the mineral estate. In most jurisdictions, the affirmative coverage is provided by way of a mineral endorsement. The Underwriting Instructions below must be complied with before giving any type of affirmative coverage.

Because of the extraordinary risk involved in insuring a mineral estate separate and apart from the ownership of the land, Westcor will not insure just a mineral estate (or any other mineral interest or right).

Underwriting Instructions

If a policy excepts to all minerals or specifically excepts to the documents affecting the minerals, it should also contain the following exception on Schedule B:

> *"The right to use the surface estate for ingress and egress and any other right or privilege incident to the ownership of the mineral estate."*

Affirmative coverage may be available to insure against loss or damage caused by the use of the surface. Typically, it will be available if there is a recorded waiver of surface rights or if the subject property is located in a city that has an ordinance that completely prohibits drilling or mining. Consult local underwriting counsel for state-specific requirements.

If all minerals are excluded from coverage,

- In Schedule A, the estate or interest to be insured should be "fee simple – surface estate only," and
- In Schedule B, the following exception should be placed:

> *"There is expressly excluded from coverage hereunder and the company does not insure title to oil, gas, and other minerals of every kind and character, in , on, and under the property herein described."*

Unless all minerals are excluded from coverage (as discussed above), a specific exception should be made in Schedule B for every document containing a grant, reservation, or lease of a mineral right or interest. At the end of each exception, the following language should be added:

> *"Title to said interest has not been investigated subsequent to the date of said instrument."*

To remove a mineral lease as an exception, require one of the following:

- A fixed term that has expired, without renewal;
- A release of the lease, executed by the lessee;
- A judicial determination that the lease has terminated; or
- If the lease has a term that continues so long as there is production, an Affidavit of Nonproduction executed by the landowner and two disinterested parties (*if* allowed by local underwriting practices).

Westcor does *not* insure severed mineral interests or rights. Westcor does *not* insure against loss or damage resulting from mine or drilling subsidence.

See also: **ALTA Endorsement Form 9,** Endorsements, Mineral Rights.

Minors

Overview

Although uncommon, a deed conveying property to a child would not be considered invalid simply because the child is a minor; however, such minor child would not be able to convey or encumber title to the property until he is of legal age. A conservator or guardian of such minor child – with a proper court appointment – may be able to convey, encumber, or otherwise affect the use of the property on behalf of the minor child, usually with court approval, provided applicable laws such as those noted below are followed.

Natural guardians are considered to be the mother and father, jointly, of their own children or adopted children, during minority. Instruments executed by a natural guardian are, however, considered to be binding on the ward only for personal property. Statutory provisions limiting the value of property owned by the minor which can be conveyed by a natural guardian without court approval may exist in some states. As a general principle, natural guardians must obtain court appointment and approval to transfer or otherwise affect real property of a minor. Formal guardianship of a minor generally requires the filing of a petition; a court hearing; and adjudication and the appointment of guardian(s) of the minor or his person.

In states which have adopted the Uniform Probate Code, a conservator must be court appointed to convey or transfer real property owned by a minor. (This is true even if the natural parents of the minor seek to convey the minor's property.)

Generally the powers of guardian – upon court approval – include the power to sell, mortgage, lease, or otherwise encumber said real property. However, in most states, such sale must be authorized or confirmed by the court. Title examination should include review of the certified petition for sale setting forth the reasons for said sale; an adequate description of the property; the price and terms of sale, mortgage or other contract; and whether the sale is private or public, as well as the subsequent terms and conditions of the court orders approving said sale, mortgage, or lease.

In Uniform Probate Code states, a conservator must be appointed to sell or convey any real property of a minor. Such appointment is evidenced by a document called "Letters". The Letters must be recorded and usually no further court approval or confirmation is required. Letters must be carefully examined for any restrictions on authority.

Underwriting Instructions

When insuring any transaction where a guardian of a minor or incompetent is mortgaging or conveying property, the commitment must contain the following requirement (similar requirement for Uniform Probate Code conservators):

> *"Certified Copy of (1) Petition and Order Appointing _____, Guardian; and (2) Specific Court Order authorizing the (sale/mortgage/lease) of the real property described herein must be obtained from a court of competent jurisdiction and filed in the appropriate county records."*

The Petition for *Order of Sale* should contain the following items:

1. The reasons for the sale or mortgage;
2. An adequate description of the property;
3. The price and terms of the sale, mortgage, or other contract;
4. Whether the sale is private or public; AND

5. The subsequent terms and conditions of the court orders approving the sale or mortgage.

Unless this requirement is met to the satisfaction of the title agent, exception to the matter must be made in the title policy.

See also: **Guardianships**, **Incompetence**, **Capacity**.

Missing Persons

Overview

Statutory provisions exist in most states to deal with persons who have been missing for an unreasonable period of time (e.g., 90 days or more). Generally, the court may appoint a trustee to manage and control the estate of the missing person during his period of absence. Similarly, a person who remains missing for the requisite statutory period may be deemed deceased and his estate may subsequently be administrated. In the absence of a quiet title action, or the proper statutory procedure establishing of record the death of the missing person and the probate of his estate, transactions insuring property owned by missing persons should not be insured without express underwriter approval.

Underwriting Instructions

When insuring transactions where a party is missing, Westcor requires a court appointed trustee and order to mortgage or sell the property as outlined above. Contact your local Westcor counsel for state specific statutory provisions and additional instructions.

Mortgages

Overview

A mortgage is an interest in land created by a written agreement to provide security for the performance of a duty or payment of a debt. In a "mortgage or title" state, the mortgage operates as a conveyance of the legal title to the property to the mortgagee. In a "lien" state, the mortgage is a pledge of the title to the property but is not regarded as an actual conveyance of the title. There are a variety of mortgage options available to borrowers, as shown below. From an insuring standpoint, the mortgage creates a lien on the real property which must be satisfied of record at the time the loan is paid in full. If a mortgage is not properly satisfied of record, statutory provisions exist which limit the duration of the lien from the specified date of maturity (e.g., five years) or, if no maturity date exists, from the inception of the mortgage (e.g., 20 years). Duration of mortgages is determined by state statute.

A lender making a loan to finance the purchase of real property will generally want a loan policy showing that the lender's lien is in first position or has superior priority. Any prior or intervening liens must, therefore, be satisfied and released or subordinated to the lien of such mortgage. Intervening or prior liens not released or subordinated must be shown as exceptions to title.

Adjustable Rate

An adjustable rate mortgage (called an ARM) has a lower initial interest rate that is subsequently adjusted to a set index at incremental periods during the term of the mortgage.

Balloon

A balloon mortgage involves periodic payments which cumulatively are less than the amount necessary to fully amortize the principal amount borrowed, resulting in a balloon payment at time of maturity to pay the loan in full. To be a "true" balloon mortgage, such final payment must be at least twice the amount of any one periodic payment.

Construction

A construction mortgage is usually a short-term mortgage which may or may not be converted to a permanent mortgage. Generally, construction loan proceeds are paid out in "draws" and a pending disbursements clause must appear in the loan policy, which serves to limit the liability of the insurer to the amount actually disbursed.

Deed of Trust

A deed of trust is used in lieu of a mortgage in "lien" states. A mortgage is a two-party document (grantor [borrower] and lender). A deed of trust is a three-party document (grantor [borrower], trustee, and lender [beneficiary]). Although the language of a Deed of Trust purports to convey the title to the named Trustee, it is usually not regarded as a conveyance in effect. The deed of trust creates a lien on property to secure payment of an indebtedness or obligation. However, the named trustee does have the power to convey the property in a foreclosure.

The terms "mortgage" and "deed of trust" are commonly used interchangeably. Both documents are used to secure the payment of an obligation or indebtedness, and both function in much the same way although, as mentioned above, they are different kinds of documents. Whether a mortgage or deed of trust is issued is a function of state law and local practice. Most deeds of trust can be foreclosed in a non-judicial notice proceeding. Depending on state law, mortgages usually must be foreclosed by filing a foreclosure law suit in a court with jurisdiction. However, the laws of some states allow mortgages to be non-judicially foreclosed with proper notice.

Note: For purposes of this article, the same principles stated about mortgages are intended to also apply to deeds of trust.

Purchase Money

While, technically, any mortgage taken to finance the purchase of real property is a purchase money mortgage, some states consider only seller take-back mortgages – where the seller holds financing for the buyers – to be purchase money mortgages.

Variable Rate

A variable rate mortgage is one that ties the interest rate to some specified index of market interest rates and therefore causes the interest rate and mortgagor's monthly payment amount to fluctuate.

Underwriting Instructions

Balloon Mortgages

In order to give certain coverages or endorsements for a balloon mortgage, the trust deed/mortgage and rider must include a Conditional Right to Refinance.

Purchase Money Mortgages

To establish priority, verify that all proceeds are being used for the purchase of the home – no funds from the lender are going to pay off credit cards or other debts.

Options to Purchase

Overview

An option to purchase is a contractual right or interest granted by the owner of property to someone who wants to purchase the property at a future time. The option to purchase gives the proposed purchaser the right to purchase the property in the future according to certain specified terms at a certain time in the future or upon occurrence of specified future events.

There are two basic forms of options to purchase:

- A stand-alone document which grants an option to purchase to a person holding a less than fee simple interest in the property or a person with no interest in the property.

- A lease-option, whereby the lessee has an option to purchase the leased property under the terms of the lease.

The laws of some states consider an option to purchase as being a personal contract right (personal property) rather than an interest in real property and therefore, such option would not be insurable. Other states recognize only options tied to specific real property interests, such as the lease-option. It is important to know how the laws in your jurisdiction treat options. Consult with your Westcor underwriting counsel before agreeing to insure an option to purchase in any form.

In order to provide constructive notice, an option must be recorded and must not violate the rule against perpetuities in your state. In addition, the option instrument must clearly establish the purchase price for the option.

Underwriting Instructions

When insuring a stand-alone option, the regular ATLA owner's policy may be used, showing the estate or interest being insured as an *"option to purchase a [specified] estate as granted in _____ recorded in_____."* When insuring a lease-option (a lease in which an option to purchase is granted to the lessee), a leasehold policy may be used to insure both the leasehold estate and the option to purchase. Alternately, a leasehold policy, insuring the leasehold estate, may be issued in conjunction with an owner's policy insuring the option to purchase. When insuring under two policies, you must take exception in Schedule B of the owner's policy as to the option provision of the recorded lease.

In addition to the above, when insuring a stand-alone option or leasehold option, an exception should be made as to any loss or damage resulting from the bankruptcy of the optionor; and another exception made regarding the optionee's responsibility to comply with the terms and conditions of the option agreement and, in the case of a lease-option, to comply with the terms and conditions of the lease.

The policy insuring the option would have to be issued for the option price or the full value of the property, whichever is greater.

The following exceptions should be used:

1. Loss or damage resulting from the rejection of the option referred to in Schedule A hereof in any proceedings in or related to the Bankruptcy Act of the United States subsequent to the date hereof or resulting from loss of title by the optionor by sale for taxes and/or assessments herein excepted or hereafter accruing.

2. (for an option to purchase contained within a lease) Terms and provisions of the lease described under Schedule A above creating the estates or interests insured hereunder. **Note:** By insuring the interest of the insured as optionee under the option contained in said lease, the company insures

that by virtue of the option, the insured has the prior right to a conveyance of the fee simple title, subject to the exceptions herein contained, the Exclusions from Coverage and the Conditions and Stipulations of this policy, upon legally exercising the option and fulfilling its terms and conditions; and that such right may be successfully maintained against any other parties claiming through or under the lessor. At the time of exercising the option and taking title pursuant thereto, the optionee must determine in whom title is then vested through or under the lessor, and the liens and encumbrances on said title attaching subsequent to the recording of said option, and the company assumes no liability hereunder for cost or expense incurred by the insured in making such determinations or, there being no question of the validity or priority of the option involved, in prosecuting such suit or suits as may be necessary to procure the necessary deed from the party or parties in whom title is then vested or the necessary discharge of the liens and encumbrances then on the property.

3. (for a stand-alone option to purchase) Terms, provisions, conditions, limitations, and restrictions contained in the Option to Purchase described on Schedule A hereof, and the instrument which grants or contains the said Option to Purchase.

4. This Policy insures the status of title to the land described on Schedule A hereof only as of the Date of Policy stated on Schedule A. This Policy does not insure against rights, liens, encumbrances, or interests attaching to the land subsequent to the Date of Policy or status of title at the time the Option to Purchase is exercised.

5. This Policy does not insure the enforceability of the Option to Purchase described in Schedule A, and no obligation is assumed herein to enforce the performance or terms of said Option to Purchase.

NOTE: Approval by Westcor underwriting counsel is required for an option to be insured. Counsel must be provided with sufficient information from which to analyze the nature and insurability of the option and the requirements and exceptions which must be listed.

Parties In Possession

Overview

It is common practice to take exception for rights or claims of parties in possession not shown by the public records. This standard exception is designed to protect the Company from claims of adverse possessors, claims of non-record interests, and from tenants under unrecorded leases. This exception relates to both actual occupancy of the property or any other possessory interests such as easements or driveways. Such standard exception does not alleviate the responsibility of the issuing agent to examine the public records and to make specific exception for outstanding possessory rights which are of record.

In cases where the purchaser or mortgagee knows of or should have knowledge of the possessory interest of a third party, such purchaser/mortgagee is no longer considered to be a "bona fide purchaser for value *without notice*" and will not, therefore, be afforded protection against such possessory interests under the policy. Generally, an affidavit obtained from the seller or mortgagor, stating that they are the sole parties in possession, is sufficient to delete the standard exception for parties in possession.

Underwriting Instructions

Upon determination that the seller or mortgagor is in sole possession of the property, this exception can be deleted routinely from owner's policies on owner-occupied residential property, if the proposed insured so requests, by having them execute an affidavit stating that they are the sole party(ies) in possession. This affidavit should be retained in the agent's files. It can be deleted from rural or farm property upon presentation of a recent survey. This survey must not show the potential for boundary line disputes or other evidence of potential adverse possessors.

The parties in possession exception may be deleted on commercial property or residential investment property transactions with an affidavit from the seller that there are no tenants holding unrecorded leases. Otherwise, the following exception should be taken in Schedule B:

> *"Rights of tenants, under unrecorded leases or tenancies."*

Commercial properties present a particular problem because tenants must be presumed to occupy all or part of the property. It is customary to require a certified rent roll before insuring such property. With the certified rent roll, the general exception can be deleted and a special exception noted for rights of tenants according to the rent roll.

NOTE: The rights of parties in possession not shown by the public records exception certainly addresses non-record leases, but it applies equally to non-record contract purchases, optionees in possession, trails, driveways and other possible easement claims, encroachments from adjoining property and fences which do not follow the property boundaries. Care must be taken any time this exception is deleted to inquire as to any and all of these possible non-record interests to be sure they do not affect the land being insured.

See also: **Affirmative Coverage**, **Deletion of Standard Exceptions (Extended Coverage)**.

Partnerships

Overview

Generally, most states recognize partnerships as legal entities that can acquire, convey, and encumber real property in the partnership name; however, the partners of the partnership may also acquire title individually, if desired. For instance, a deed to Perennial Partnership, a [state] general partnership vests title in the partnership name while a deed to John Doe, Richard Roe, and Sam Snow doing business as Perennial Partnership, a [state] general partnership would serve to vest title in the names of the partners. If, however, title is held in the name(s) of less than all partners, any subsequent conveyance or encumbrance would require execution by all named partners and the authority to act on behalf of the partnership must be verified.

For normal conveyance purposes, title held in the partnership name must be conveyed in the partnership name, and the deed must be executed by one or more of the general partners, in accordance with the partnership agreement of the general or limited partnership. If the transaction being insured is considered to be in the usual course of partnership business, it is generally not necessary to review the partnership agreement. However, transactions not in the usual course of business require that the partnership agreement be reviewed to ascertain that the transaction is authorized by the partnership and that the appropriate partners execute the requisite instruments. Transactions considered not to be in the usual or ordinary course of business would be a conveyance of partnership property to one or more general partners; conveyances made for nominal consideration; mortgages to secure debts of third parties; and conveyances or encumbrances of all or substantially all partnership assets.

Joint Ventures

A joint venture is a temporary form of business structure, normally used when two or more persons or parties combine efforts to complete one or more business transactions. No written agreements are required for the formation of a joint venture. Joint ventures are often used in real estate development as a means of raising capital and spreading risk. The rights, duties, and obligations are similar to those of partners in a general partnership except that they are restricted to the transaction or transactions for which the joint venture was formed. Once the purpose of the joint venture has been accomplished, the entity ceases to exist without need of formal dissolution proceedings.

In states where a joint venture is not viewed as an entity legally able to hold title to real property, those involved in the joint venture may acquire property in their names, individually, with or without reference being made to the joint venture. If the individuals of the joint venture are married, their spouses' interests must also be accounted for. Upon subsequent conveyance or encumbrance of such property, those holding an interest in the property would be required to execute the requisite deed or mortgage in the manner in which they took title. In states which recognize joint ventures as holding the same powers as partnerships, such entities may acquire, convey, and encumber title to real property in the joint venture name, subject to applicable laws.

Underwriting Instructions

In most instances, the Company requires the signatures of all partners on a deed or mortgage. Only if the authority is specifically given to less than all partners to sell or mortgage, or if the partnership is in the business of buying and selling real estate, can title be insured based on a deed or mortgage without the signatures of all partners.

Generally, joint ventures should be treated just as partnerships are treated. If less than all joint venturers are executing the documents, written authorization to act on behalf of the joint venture is required. Title under joint ventures must be vested in the individuals names, *(e.g., Tom Jones and Jane Johnson d/b/a/ J & J Company, a joint venture)*. The deeds must be executed individually and the acknowledgment also made as to the individual. If married, their spouses' interests must also be accounted for.

See also: **Deeds**.

Party Walls

Overview

Party walls are those common walls located on or along the boundary line between adjoining properties for the benefit and use of the owners of both properties. Each owner has an easement in that portion of the wall owned by the other and an easement over as much of the adjoining property as is necessary for the lateral support of the wall and the attached building.

An exception must be taken for a recorded party wall agreement that defines the rights and obligations of the parties. In townhouse developments where each owner owns fee simple title to the land under his specific unit and holds a common interest with adjacent property owners in the party walls, there must be a recorded agreement, declaration, or covenant containing a provision covering party walls. That agreement, covenant, or declaration must also be raised as an exception. If there is no recorded party wall agreement, but a party wall is common to exist, an exception should be raised for the party walls and the rights of the adjoining neighbors according to these guidelines:

- If there is no agreement of record and the party wall is located on the property line, an exception must be made for the rights of the adjoining property owner as to the party wall and as much of the insured land as is necessary for lateral support of the wall and the attached building.

- If there is no agreement of record and the party wall is completely located on the insured land, an exception must be made as to the rights of the adjoining property owner as to the wall and as to the encroachment.

- If there is no agreement of record and the wall is completely located on the adjoining property, exception must be made as to the existence of the party wall, the rights of the adjoining owner in and to the party wall, and the encroachment unto the adjoining property, unless the parties record a party wall agreement containing the requisite easement.

Where walls are adjacent and self-supporting such as in zero lot line developments, provided the walls are independent, self-supporting, and do not cross the property line, no exception need be made for the wall. If there is an encroachment by the wall then the encroachment must be raised as an exception unless there is an agreement allowing the maintenance of the wall on the adjoining property.

Underwriting Instructions

In general, the following exceptions should be used when insuring property with a party wall:

1. Where survey shows party wall, but there is no recorded agreement:

   "Party wall and rights of others in and to the party walls, as shown by survey by _____, dated _____."

2. Where deed indicates existence of party wall:

   "Party wall as set out in deed recorded in Book ____, Page_____."

3. Where many deeds refer to party wall:

   "Party wall as set out in deed recorded in Book ____, Page _____ and various other deeds of record."

4. Where agreement recorded setting forth the interests and liabilities of Parties thereto:

   "Party wall agreement relating to the party wall located on said property, recorded in Book ____, Page _____."

Planned Unit Development

Overview

A *planned unit development (PUD)* may generally be defined as a parcel of land containing property and improvements owned and maintained by a homeowners' association, corporation, or trust for the benefit and use of individual PUD units within such a parcel of land. There exists, through the association, corporation, or trust, an automatic non-severable membership of individual unit owners, who must pay mandatory assessments. The purpose of the common property is to enhance the enjoyment of the premises along with the value of the property securing a PUD unit mortgage. A *"de minimus PUD"* refers to common property that has little or no effect upon the value securing the PUD unit mortgage and little, if any, influence on the enjoyment of the premises.

Underwriting Instructions

Each commitment and policy insuring a PUD must contain an exception similar to the following for the documents creating the PUD development:

> *"Terms, provisions, conditions, easements, restrictions, options, and liens created by and set forth in the declaration recorded [recording information]".*
>
> *"Any and all authority of the [describe] homeowner's association to regulate and/or levy assessments against the subject property and rights of others in the common areas, if any."*

The agent must also determine that any and all assessments have been paid in full; otherwise, exception must be made in the title policy.

ALTA Endorsement Form 5 applies to loans made on a planned unit development or to an owner who buys in such development.

See also: **Endorsements**, **ALTA 5**, **PUD**.

Powers of Attorney

Overview

In order to be considered valid, a Power of Attorney (POA):

5. Must afford the named attorney-in-fact the power to convey and/or encumber real property;

6. If non-durable, the Principal named in the POA must be alive and mentally competent at time of execution and delivery of the requisite deed or mortgage;

7. The POA must not have been revoked; AND

8. The POA must be properly recorded.

While most states recognize durable Powers of Attorney that reference the disposition of "all my property" – for insuring purposes a specific POA, setting forth the legal description of the property to be conveyed or encumbered, is preferable.

The signature line should reference the names of the principal and the attorney-in-fact – e.g., *"Paula Principal by Angela Agent, her Attorney-in-Fact."* Likewise, the notary acknowledgment section should reference both – e.g.*, "Angela Agent, as Attorney-in-Fact on behalf of Paula Principal."* When recording, the POA should precede the instrument executed by the attorney-in-fact.

Underwriting Instructions

Use of powers of attorney is not encouraged, but documents based on their use can be insured. The examiner must make sure that:

1. The power of attorney provides the attorney-in-fact full power to "convey" or "mortgage" the subject property;

2. The principals were living and mentally competent at the time of execution and delivery of such conveyance or mortgage, or the POA must be durable in form;

3. The POA had not been revoked. In some states, death of the principal, his/her insanity or incompetency, bankruptcy or insolvency, and/or subsequent marriage can revoke a POA; and

4. The POA was/is properly recorded.

5. Must be a recent POA with limitations as to time periods.

Additionally, in some jurisdictions, a POA must be in recordable form, which would include compliance with statutory requirements for witnessing and/or acknowledgments.

Westcor recommends that the POA be *specific* as to the property (contains an adequate legal description) and also have the operative language setting forth the powers of the attorney-in-fact to convey or execute documents on behalf of the Principal. In some jurisdictions, the language "to perform any and all acts" is not sufficient.

NOTE: A common tactic used in fraud claims is for the perpetrator of the fraud to present, **at closing**, a power of attorney. Supposedly signed and acknowledged outside of closing which authorizes the attorney in fact to sign deeds, mortgages, etc. for the present closing. When this occurs, the power of attorney (just

like a deed signed outside of closing) must be carefully scrutinized and questioned. Verification of its authenticity is absolutely required.

Probate Proceedings

Overview

Traditionally, the term "probate" included the procedural acts necessary to establish the legal validity of a will and governed the procedural administration of a decedent's estate involving a will. However, in more modern terminology, "probate" contemplates the procedures for administering a decedent's estate, whether with or without a will. In most states such procedures are handled by the Probate Court. States assign jurisdiction for probate matters to different courts, some to a special court only for this purpose, others to the courts which hold general jurisdiction over all civil matters. An individual dies intestate when he or she dies without leaving a valid will. An individual dies testate when he or she dies leaving a properly executed will. Both intestate and testate estates are normally administered by the Probate Court.

When an individual dies he or she continues to hold ownership of property. Title remains vested in the deceased person until such time as it is conveyed by sale by the executor, administrator, or personal representative doing estate administration or transferred by court order or judicial determination. When notified that the record title holder is deceased, you should show title in *(name)_____ deceased"* (the name of deceased title holder). However, this may vary depending on the laws of your state.

Whenever you are asked to insure property which is part of a decedent's estate, you should confirm that probate proceedings have been instituted to properly dispose of the property, and that all applicable estate taxes have been paid. If the inheritance and federal estate taxes have not been paid, they should be shown as exceptions on the title policy.

Underwriting Instructions

Seek your local Westcor counsel's opinion on probate laws. However, generally, the following should be reviewed for conformity by the examiner:

Testate Estate:

1. Will
2. Order admitting the will to probate
3. Letters of Testamentary
4. Proof of publication of notice to creditors
5. Federal and state tax clearances or non-taxable certificate from the Internal Revenue Service and the Commissioner of Revenue of the State
6. Order of Distribution, if any
7. Final Order.

Intestate Estate:

1. Petition for Letters of Administration and the Letters
2. Letters of Administration or letters appointing personal representative
3. Final Decree of Heirship
4. Proof of publication of the notice to creditors

5. Federal and state tax clearances or non-taxable certificate from the Internal Revenue Service and the Commissioner of Revenue of the State

6. Order of Distribution, if any

7. Final Order.

If you are insuring a sale transaction which requires that a personal representative convey the subject property, you must obtain the necessary documentation appointing the individual as personal representative and verify that the individual has the authority to sign the deed. In addition, the authority should be filed of record.

See also: **Heirs at Law**, **Inheritance**.

Purchase Money Mortgages

Overview

Generally, to qualify as a true purchase money mortgage, the following must occur:

- A buyer must secure a loan made by a third party lender. A mortgage taken back by a seller for all or a portion of the purchase price is also considered a purchase money mortgage;
- All of the loan proceeds must be applied to the purchase price of the property;
- The loan must be secured by the purchased property;
- The mortgage must be dated and recorded concurrently with the deed transferring the property to the mortgagor.

Provided the purchase money mortgage complies with the above, in most states it will enjoy priority over any prior or subsequent claims or liens attaching to the property through the mortgagor, except prior Federal Abstracts of Judgment.

The Internal Revenue Service has ruled that a purchase money security interest or mortgage, valid under local law, is entitled to priority even though it may arise after a notice of federal tax lien has been filed against the purchaser/borrower. (In the state of Louisiana, however, the forgoing does not apply. Federal tax liens (FTLs) filed against purchasers in that state will take priority over the purchase money mortgage. For this reason, it is mandatory that the purchasers' names are searched for federal tax liens in Louisiana and all discovered FTLs either paid or listed as exceptions.)

If secondary financing is being insured, the purchase money doctrine will not protect the secondary lender, and an exception for a federal tax lien or any other intervening liens must be taken.

Underwriting Instructions

Although the insured mortgage will generally have priority over Federal Abstracts of Judgment against purchasers, Westcor agents must diligently search the records for Federal Abstracts of Judgment filed against the purchasers. If detected, these liens should be listed as exceptions in both the title commitment and under Schedule B of the final title policy.

If the agent has been given constructive notice that a judgment creditor is actively pursuing the enforcement of its lien, an exception to the lien must be made in the commitment and final policy.

When insuring a mortgage which secures purchase money and additional sums, such as payment of credit cards or construction of improvements, its priority is unclear. Therefore, when insuring this type of transaction, an exception must be taken for any existing claims or liens against the mortgagor.

In some jurisdictions, to qualify as a purchase money mortgage, a mortgage must also:

1. Encumber property which is a residential dwelling with not more than four residential units (1-4 family residential property); and
2. The property must be occupied by the purchaser/borrower as a primary residence.

These additional requirements, however, are not the usual requirements in most states. Consult your Westcor underwriting counsel for applicability of these additional qualifications in your jurisdiction. Some transactions involve multiple purchase money mortgages. For example, a property acquisition may include both a new loan from a third-party lender and a seller carry-back loan for a portion of the purchase price.

Most institutional third-party lenders will require that the mortgage securing the third-party loan must have priority over the seller carry-back mortgage. As a result, the third-party mortgage is usually recorded in first priority position, ahead of the seller carry-back mortgage. Both of the loans are considered purchase money mortgages and are entitled to the priority of such mortgages. However, the relative priorities between the two purchase money mortgages may not be quite as defined. Law in some states gives special priority to a "vender's" purchase money mortgage (the seller carry-back) over a purchase money mortgage made by a third-party lender. Care must be taken to insured the correct and/or priority between the purchase money mortgages according to the laws of your jurisdiction. The order in which the mortgages are recorded must be documented by instructions from the lenders and the mortgage securing the junior priority loan should include a provision that it is junior and subject to the other purchase money mortgage.

Railroads

Overview

When insuring title to real property which is adjacent and contiguous to a railroad right-of-way, an exception should be made for potential rights of the railway for ingress and egress purposes. In order to be considered contiguous to the railroad right-of-way, the subject property may lie within 100 to 400 feet of the center line of the main track of the railroad as originally laid out, notwithstanding the intervention of streets, roads, or separate ownerships of land that may lie between the center line of the railroad and the land to be insured. The distance from the center line will depend on the provisions of the railroad act which created the right-of-way. Generally, deeds containing no specific overall width as to the railroad are to be construed as conveying at least 200 feet (but this width is determined by the railroad act which created the railroad right-of-way and must always be checked and verified.). Therefore, unless the agent can verify with certainty that the land to be insured comes no closer than 100 feet from the center line of the main track of the railroad line, an exception must also be made for any easements or claims of easements of the [named] railroad.

Underwriting Instructions

When insuring property which is contiguous to a railroad right-of-way, the commitment and final title policy must contain the following exception:

> *"Ingress and egress, if any, of the _____ railroad in and to the right-of-way line of said railroad adjoining the ____ boundary of the property herein insured."*

The exception for easements or claims of easements on property as outlined in the overview list above may conform to the following:

> *"Any easements, or claims of easements, of the ____ Railroad."*

Railroad as Owner in Chain of Title:

Before insuring property wherein the chain of title shows that the land was formerly owned by a railroad company, the agent must carefully review the instrument by which the railroad company acquired its interest in and to the land to determine the intention of conveyance of the parties.

Generally, a grant or conveyance of real estate to a railroad company is intended to vest title or interest as an *easement* rather than fee simple title, depending on the language used. Unless the agent has proven that the railroad company acquired fee simple title, the estate as insured on Schedule A should list "EASEMENT" rather than fee simple title and the following exception shown in the commitment and final title policy:

> *"The interest herein insured is an easement only, and not fee simple title."*

Caution: Land Grant railroads which received their right-of-way by grants from the federal government by congressional act are subject to reversionary interests. If the railroad abandons, sells, or ceases to use the right-of-way for a railroad, the property may revert to the federal government. It is always necessary to determine the source of a railroad's title or ownership before insuring a conveyance out from a railroad or property formerly owned by a railroad.

Any of the following situations would infer that the interest was intended as an *easement* only:

- Lack of adequate consideration.
- Deed contains a reversionary clause.

- The railroad company charter does not authorize the acquisition of property other than for railroad purposes.
- The property conveyed is a small strip of land.
- Phrases are found in the instrument which restrict the use of the land: e.g., conveyed as "an easement/right-of-way only" or "for railroad or depot purposes only."
- The instrument contains a right of reverter or provides conditions for its conveyance: e.g., "as long as used for railroad purposes", "as long as the same shall be used for a railroad", or "on condition that a crossing be maintained."
- When insuring access that crosses a railroad right-of-way, it is important to determine if the access is via an easement rather than a renewable license.

For additional information, contact Westcor underwriting counsel.

Receivers

Overview

Often, Receivers will be appointed to hold or distribute property or funds of others during litigation. Once a Receiver has been appointed, the court has complete control over the distribution of those assets. Any sale by a Receiver must be done by court order. Therefore, an attempt to sell, mortgage, lease or convey those assets by the owner is void.

Underwriting Instructions

The following guidelines are given when insuring property sold by a Receiver:

1. The agent should obtain and examine a certified copy of the order of sale. This order should contain a minimum of the following:
   a. Complete description of the property;
   b. Whether the sale is to be private or public;
   c. Price, terms and conditions of the sale;

2. How the sales proceeds are to be distributed. (If not stated, the proceeds are paid to the clerk of the court to be held until the rights of all claimants are determined.)

3. Expiration of the time for appeal (or an affidavit from the Receiver attesting that there has been no appeal from the Order Appointing the Receiver and the Order of Sale).

4. If the time for appeal has not run, the following exception should be made in the commitment and policy:

   a. "Subject to the rights of appeal from the order *appointing* the Receiver and/or the order of the sale, if any".

5. A Certified Copy (conformed copies are not acceptable) of the Report and Confirmation of the Sale must be obtained prior to closing.

6. Recordation of the Receiver's Deed.

Certified Copies of the Order of Sale, Report and Confirmation of Sale, and the Receiver's Deed must be recorded in the records in which the property is located.

Restrictions

Overview

When insuring title to real property encumbered by restrictions, an exception for such restrictions must be made in both owners and loan policies along with a notation as to whether or not the restrictions are accompanied by a reverter or forfeiture clause in the event of violation. If a forfeiture or reverter clause has been modified, such modification must be noted. The forfeiture or reverter must be reviewed to determine if the interests of a mortgage holder are protected, if not, then the exception should state that the insurer accepts no liability for any past or present violation of the restrictions. If the restrictions have been violated, such violation must be shown as a separate exception. Most importantly, if the restrictions are accompanied by right of reverter or forfeiture in event of violation, and a known violation has occurred, no policy should be issued until a deed can be obtained from the party entitled to such reversionary or forfeiture rights.

Generally, lenders will require some form of affirmative coverage with respect to exceptions for restrictions – language to the effect that the restrictions contain no reversion or forfeiture clause, that the restrictions have not been violated, and that a future violation will not cause a reversion or forfeiture of title. Provided a review of the restrictions shows that no reversion or forfeiture clauses exist and that no violations of restrictions have occurred, such affirmative language may be given through the use of various endorsements.

Some lenders will also ask that affirmative coverage include the assurance that the use intended for the property will not result in a violation of the restrictions. Since violation of use restrictions is one of the most common forms of violations, it is unwise to provide affirmative coverage against such violations, especially when a potential violation will be the first of its nature in the subdivision or might become a nuisance or otherwise offend or annoy neighboring property owners.

Where building restriction lines appear on a recorded subdivision plat or on the plat of a survey, an exception should be noted to the platted restrictions. Affirmative insurance, stating that such setback lines have not been violated should not be given unless and until it can be verified, by an inspection or a recent survey, that the improvements on the property do not, in fact, violate the setbacks. Where there has been a violation, the violation must be noted as a separate exception.

Any affirmative assurance, if given, should be set out on a separate endorsement after approval by local Westcor Title underwriting counsel.

No affirmative insurance should ever be given on owners policies regarding the exception for restrictions or building line restrictions unless underwriter approval is obtained.

Underwriting Instructions

General Exception for Restrictions

"Covenants, Conditions and Restrictions contained in instrument dated _____, filed _____, in Book ____, Page _____, _____ County/Parish Recorder's Office."

Restrictions (No Reverter or Forfeiture Clause or Violations)

Provided the restrictions have been reviewed and there is no reversionary clause and a current, accurate survey has been provided and the agent has checked it against the restrictions and determined there has been no violation of the restrictions, affirmative language may be provided as follows: *

"Covenants, Conditions and Restrictions contained in instrument dated _____, filed in Book _____, Page _____, _____ County/Parish Recorder's Office. However, this policy hereby insures that, as of the date hereof said, conditions and restrictions have not been violated and that a future violation will not cause a forfeiture or reversion of title."

* Notwithstanding this affirmative language, the preferred method for providing affirmative coverage is by appropriate endorsement and not affirmative language.

Restrictions (With Reverter or Forfeiture Clause)

The fact that there exists a reversionary clause, no matter how designated (reverter, rights of reentry, etc.), should be set out *as an exception* in Schedule B of the commitment or policy.

Minor Violations

If a review of the recorded plat or survey discloses a violation of restrictions, the agent must determine the risk posed by such violation. If the violation is minor and it has been determined that there is little or no possibility of the violation resulting in a loss to the Company because the statute of limitations may have run on enforcement or some other similar reason, affirmative coverage may be given after securing approval from local underwriting counsel as a separate endorsement as follows:

> *"A review of the survey dated _____ by _____ discloses that the west side of the house located on the premises encroaches 6 inches over the building restriction line along the west boundary of the property However, this policy hereby insures against loss or damage which the insured shall sustain by reason of the entry of a final court order or judgment which constitutes a final determination and requires the removal of the existing improvements as a result thereof."*

In some jurisdictions specific endorsements exist to provide affirmative coverage for minor violations of restrictions. With approval of Westcor underwriting counsel, such endorsements can be used to provide this coverage.

Major violations which may not be affirmatively insured against should be brought to the lender's attention immediately. The loan should not be closed until amended closing instructions have been received from the lender authorizing the agent to proceed with the closing and accepting the exception in the final title policy. The agent should also disclose the matter to the purchasers/borrowers at closing and obtain a written acknowledgment of the violation(s).

As an alternative, with approval and guidance from your local Westcor counsel you may suggest that the parties seek a variance from the local governmental authority with jurisdiction of such matters if the setback that is violated is one established by local law or ordinance. Such variance will have to be granted before affirmative coverage may be granted, and even if granted, an exception will still have to be taken for the violation. If the violation is of a setback established by a recorded agreement or plat of subdivision, then all of the parties or successors to the original agreement will have to execute a modification of the agreement allowing the violation, and in the case of a setback established by subdivision plat, the owners of the properties in the subdivision will have to execute a modification allowing the violation. Once the restriction has been modified, with the approval of local underwriting counsel affirmative coverage may be granted.

It is important to stress than any affirmative coverage constitutes extra hazardous risk and as such any requests by a proposed insured for affirmative coverage for violations of use restrictions must be approved by Westcor's underwriting counsel. The affirmative coverage must be on a separate endorsement and may require the payment of an additional hazardous risk premium. Before approving such language, it must be proved that:

1. The use restrictions are ancient;

2. The character of the neighborhood has drastically changed so as to make the violated use a reasonable use of the property in conformity with the present uses and character of the neighborhood;

3. The properties immediately surrounding the properly to be insured have similar violations of the use restrictions;

4. No recent attempts have been made to enforce such restrictions.

Contact your local Westcor counsel for further guidance and written authorization.

Reversionary Clauses

Overview

A reversionary clause serves to protect the interest of the person or entity making restrictions on property and, in the event of a violation of such restrictions, title to the property subject to such violation may revert back to the reversionary party. Whenever a reversionary clause exists it must be set out as an exception to title, unless it has been properly released through a deed expressly stating such purpose and intention.

Underwriting Instructions

Reversionary clauses, no mater how designated (reverters, rights of reentry, etc.), preferably should be set out verbatim in Schedule B of the commitment or policy. Although it would be the Company's position that a reversionary clause has been sufficiently incorporated into the exceptions from coverage by a mere reference to the Restrictive Covenants in which it appears, the Company believes that it is a better business practice to set out such a drastic exception from coverage in detail.

See also: **Restrictions**.

Rights of Way

Overview

A right of way is a privilege to pass over the land of another for a particular and expressly stated purpose. The term "right of way" is sometimes used interchangeably with "easement". However, this usage is not necessarily correct. A right of way may be an easement or a fee ownership. It is similar to an easement. A right of way is sometimes used to describe a strip of land over which an easement passes. It may also attach to and be incidental to the use of a parcel of land, in the same manner for an appurtenant easement. When insuring the title to property which is subject to a right of way, the right of all persons entitled to use the right of way must be excepted from the policy coverage under Schedule B.

The term "right of way" does not necessarily have legal significance since it can be either a fee title interest or an easement. The legal status of "right of way" depends on the nature of the original grant and the context of its use. Care must always be exercised when dealing with "rights of way" and proper exceptions should be noted regardless of its status as a fee interest or an easement.

Underwriting Instructions

All rights of way should be listed as exceptions, with appropriate recording information as well as the type and location of the right of way.

The rights of all persons entitle to use the right of way should be excepted from the policy coverage in Schedule B.

The following are suggested ways to set out exceptions regarding rights of way:

- "Rights of the public in and over that portion of _____affecting subject property."
- "Right of way running over the Southwest portion of subject property, as shown by survey of John Doe, date_____ , 19__."
- "Right of way of (NAME OF ROAD OR STREET) over that portion of _____ above property embraced therein."

See also: **Easements**, **Alleys**.

Riparian/Littoral Rights

Overview

Riparian rights and littoral rights refer to the rights appurtenant to the ownership of land partially covered by or bordering on a body of water. These rights are not easily defined and may be considered interchangeable for purposes of title insurance. They may include the right to ingress, egress, boating, fishing, and bathing (swimming), among others. These are the rights to use the abutting body of water. The extent of rights to use the connected body of water by the landowner, neighboring riparian landowners, and the public in general vary from state to state and within given states depending upon the nature of the body of water.

Underwriting Instructions

Whenever land is bordered by or extends beneath a body of water, an exception as to riparian and littoral rights is always required. The nature and extent of riparian rights can never be insured without a referral to Westcor underwriting counsel. Title to submerged land or previously submerged land could be subject to a Federal Navigational Servitude based on government powers pursuant to the commerce clause of the Constitution of the United States of America. It may be impossible to release or convey such rights. Any attempts to convey such lands may be revocable if deemed contrary to the Public Trust Doctrine. The Public Trust Doctrine provides the sovereign state will hold all lands in trust for the benefit of the public. Careful analysis of the derivation of title and uses of the land must be made in every instance when affirmative coverage is sought with respect to riparian or littoral rights. The initial presumption as to any body of water is that it is a navigable body of water. Accordingly, others may have rights of use for navigation purposes in addition to rights to uninterrupted flow of the water. The terms: *accretion, reliction, erosion,* and *avulsion* are generally associated with the changes in the location of the waterlines as a result of natural causes. The definition of these terms may vary from state to state. Many of these terms are used interchangeably. A determination of which of these terms is applicable should be made only after consultation with underwriting counsel. Be careful not to rely on prior title insurance policies to determine waterfront interests. The nature, extent, or existence of riparian rights may never be insured without thorough analysis by Westcor underwriting counsel. An independent determination must be made in each instance.

Often deeds or mortgages are prepared with language such as “together with all riparian rights” included after the legal description of the land. The agent should be careful not to incorporate this or similar terms anywhere in the title policy. Although title insurance does not insure riparian rights, mistakenly including this language with the legal description in Schedule A may lead to the insured to believe the Company is providing this coverage.

Whenever the land abuts a body of water, proper exceptions must always be raised in Schedule B. These exceptions could take the following forms:

> *Rights, if any, of the United States of America, State/Commonwealth of _____, the municipality or other local government and the public in and to that part of the land, if any, as may have been formed by means other than natural accretions or may be covered by the waters of Lake _____.*
>
> *Rights of the United States of America, State/Commonwealth of _____, the municipality or other local government and the public in and to that part of the land lying within the bed of the _____River.*
>
> *Rights of owners of land bordering on the _____ and others to the continued and uninterrupted flow of the water (without diminution or pollution).*
>
> *Rights of the public and owners of land bordering on the _____ River/Lake to navigational and/or riparian recreational and/or other rights to use said water.*

Any and all rights of the United States of America, the State/Commonwealth of _____, the local government and the public, if any, in and to the use of all or any part of the land lying between the body of water abutting the subject land and the natural line of vegetation, bluff or extreme high water mark or other apparent boundary line separating the publicly used area from the upland private area.

This policy does not insure title to artificially filled lands, submerged lands, or land which may have been under water or which has been added to the subject land by accretion, reliction or avulsion.

This policy does not insure title to any portion of the land lying below the high water mark of _____.

This policy does not insure against any decrease of the subject land, if any, caused by erosion or changes in the shoreline or centerline or meander line of the body of water known as _____.

This policy does not insure against any claim of ambiguity or uncertainty in the exact location of the boundary along the body of water known as _____.

This policy does not insure against the rights of federal, state, or local jurisdictions to regulate usage of the shore area.

See also: **Filled in Lands**, **Water Rights**, **Wetlands**.

Severed Improvements

Overview

Insuring title to the improvements in one party and title to the land upon which they are affixed in another party is often referred to as a "severed improvement", a "split fee", or a "constructive severance" transaction. The party owning title to the improvements must also own a possessory interest in the land it is affixed to by virtue of ground lease.

It is important to determine whether the severed improvements constitute real or personal property. Provided the improvements have, or will continue to be, permanently affixed to the land, and the estates or interests have been properly created, separately described land and improvements are eligible for title insurance coverage for both owners and lenders.

Depending upon the instrument creating the interest, the interest in severed improvements and title policy should show title to the severed improvements vested as a fee estate. Qualified ownership is generally created in a lease transaction where the conditions of ownership are limited by its terms, and upon the happening of a certain event, such as the expiration of the lease, the estate will revert back to the lessor. Before insuring a fee interest, the instrument creating the separation must be unqualified as to the limitation of the term, and there may be no other conveyance by the owner of the improvements upon the happening of an event, e.g., the expiration or sooner termination of a lease. In transactions where the interest created cannot be determined, exception under Schedule A of the final policy should make reference to the estate or interest as conveyed or reserved by the instrument and its recording date. The policy must also note a Schedule B exception to the terms and provisions of the ground lease.

Underwriting Instructions

To determine whether severed improvements constitute real or personal property, the agent must thoroughly review the instruments creating the interest to ascertain the intention of the parties involved. Documentation must not only properly describe the improvements, title to which is being or has been constructively severed from that of the land, but must also provide an assurance that the building and improvements "are and shall remain real property". The agent must also obtain written verification that it is the intention of the parties that the improvements are not to be physically removed from the land to which they are affixed, and there are no "side agreements" to the contrary.

The agent should also make an exception for any easements for access, maintenance, use, and support of such buildings and improvements which, although not necessarily constructed, may be implied by the separate estate or interests created by the severance.

Easement created by express grant or reservation:

> *"Easement for the access, maintenance, use and support of buildings and improvements situated on and excepted from the land described herein, as may be implied from the severance of the title to buildings and improvements (GRANTED TO/EXCEPTED BY)____,in document recorded_____."*

Easement created by implication:

> *"Such easements or other rights for the access, maintenance, use and support of buildings and improvements situated on and excepted from the land described herein, as may be implied from the severance of the title to buildings and improvements (GRANTED BY/EXCEPTED BY) ____, document recorded _____."*

When insuring severed improvements, exception should be noted to the terms and provisions of the ground lease. With severed improvements it is always required that the improvements be supported by a ground lease. Otherwise, the improvements would encroach onto the land on which they are located.

All severed improvement transactions must be submitted to Westcor underwriting counsel along with the Company's Policy Authorization request (for unusual underwriting risks).

Subordination Agreements

Overview

When insuring a mortgage where there are intervening liens that prevent the lender from holding first lien priority, such other liens may be subordinated to the lien of the subject mortgage. If applicable, where lienholders voluntarily execute proper subordination agreements, such subordinated liens should be shown on Schedule B, Part II of the ALTA loan policy.

Underwriting Instructions

When insuring transactions that rely on any subordination agreement, such instrument must be reviewed carefully and found to comply with the following requirements:

1. To be insurable, a Subordination Agreement must be specific as to the particular transaction:
   a. Instrument must be dated;
   b. Must specifically recite the names of the existing mortgagor, mortgagee, new lender, the new loan document, its amount, and the recording information of both documents;
   c. Contain a proper legal description of the land affected;
   d. Contain language to the effect that the existing mortgage holder subordinates its interest to the new loan without condition;
   e. If the new loan makes provisions for future advances or extensions, the subordination agreement must state that it is also subordinate to these matters.

2. The instrument must be properly executed, acknowledged, and recorded.

3. If there are modifications or changes in the terms of the new mortgage after the original transaction, an amended subordination may be required to reflect these changes.

4. The Company does not rely on automatic subordinations. Because many courts refuse to enforce automatic subordinations to future construction loans, Westcor does not authorize the issuance of its policies insuring a first lien position pursuant to blanket, automatic, or general subordinations.

5. The agent should obtain proof that the individual executing the subordination agreement has the authority to act on behalf of the company.

6. A mortgage which has been subordinated must be listed as an exception under Schedule B-II of the final title policy (subordinate matters) and may conform to the following language:

   "Mortgage dated _____, executed by _____, in the original amount of $_____, in favor of _____, recorded _____, in Book ____, Page _____, Records of _____ County, State of _____; made SUBORDINATE to the insured mortgage by Subordination Agreement dated _____, and recorded on _____, Book _____, Page _____, Records of _____ County/Parish, State of _____."

7. Check with your local Westcor underwriting counsel for any state-specific requirements.

Caveat: Section 1823 of the Federal Deposit Insurance Corporation Act allows the FDIC to disallow or not be bound by any document which diminishes or reduces the interest of a failed bank unless such document has been expressly approved by resolution of the bank's Board of Directors or Loan Committee. This applies to subordination agreements which subject a mortgage to the bank to another loan. To avoid possible problems which could arise in the event of failure of the subordinating bank, Westcor requires that any subordination agreement signed by a bank, savings and loan institution, federal savings bank, or other financial institution governed by FDIC must be approved by a resolution of the bank's Board of Directors or Loan Committee, and a copy of this resolution must be retained in the agent's file.

Survey Matters

Overview

The standard exception regarding survey matters may be deleted provided a current acceptable survey, properly certified, is received. In order to be considered acceptable, the survey must reflect the property address (where available), city, county, and state where the property is located; the lot/block and subdivision name, along with applicable plat book and page number or accurate metes and bounds description; clearly defined boundary lines and notation of any discrepancies in the measurement of property lines; location of property in relation to the nearest discernable monument, where possible; location of all improvements in relation to property lines, notation of any encroachments between subject and adjoining properties; and any visible uses of the property which would indicate potential easements.

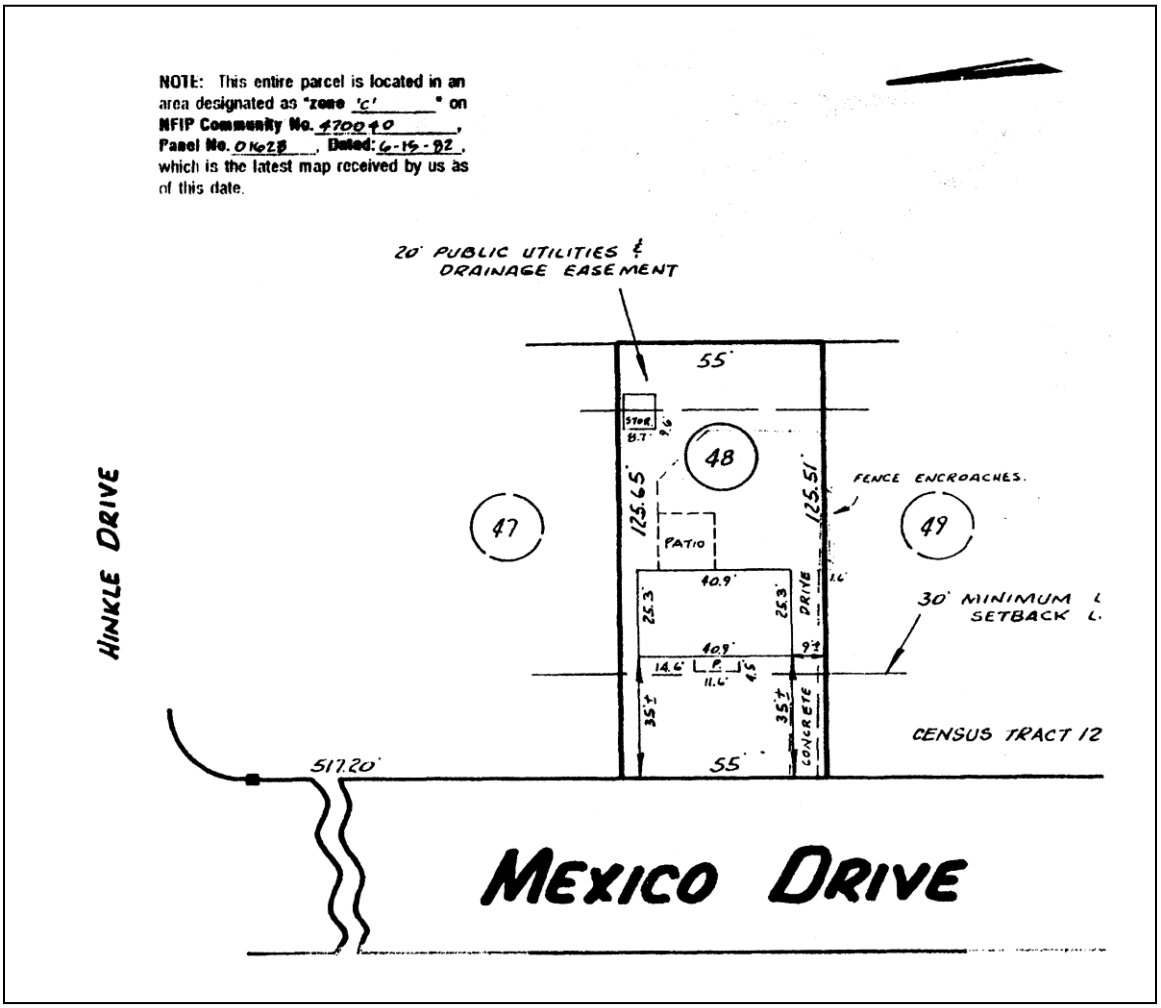
Any easements, encroachments, or boundary line disputes as revealed by the survey, must be specifically excepted in both the owner's and loan policies including reference to the survey reflecting such matters. The standard survey exception may be deleted, provided specific exceptions are made as to the matters above.

Underwriting Instructions

When insuring title to a *mortgagee only* on 1-4 Family Residential properties up to $1 million in a platted subdivision, a survey is no longer required to give coverage for survey matters when utilizing an ALTA Loan Policy or Short Form Policy. *This change does not apply to owner's policies, construction loan policies, new construction, acreage tracts, vacant land, commercial loans, mixed-use properties or residential properties for more than four families*. Exceptions must still be made for recorded easements and any unrecorded easements you may discover from an old survey, a prior policy, or other reliable source. (The above guideline does not apply to the State of Florida.)

When insuring property not within a platted subdivision, where the lender requires title insurance be given without exception to survey matters, but is not requiring that a new survey be ordered, Westcor will accept prior surveys issued to the current owner within 6 years provided the property is a *refinance only of residential property* and an affidavit has been obtained from the current owner stating that there have been no improvements to the insured property since the date of that prior survey. The survey cannot be used to delete the survey exception when issuing a policy for a resale.

The following pages contain surveys that show examples of encroachments or other survey matters that require specific types of underwriting treatment. Examples number 1 and 2 are acceptable for affirmative coverage, and examples number 3 and 4 must be listed as exceptions.

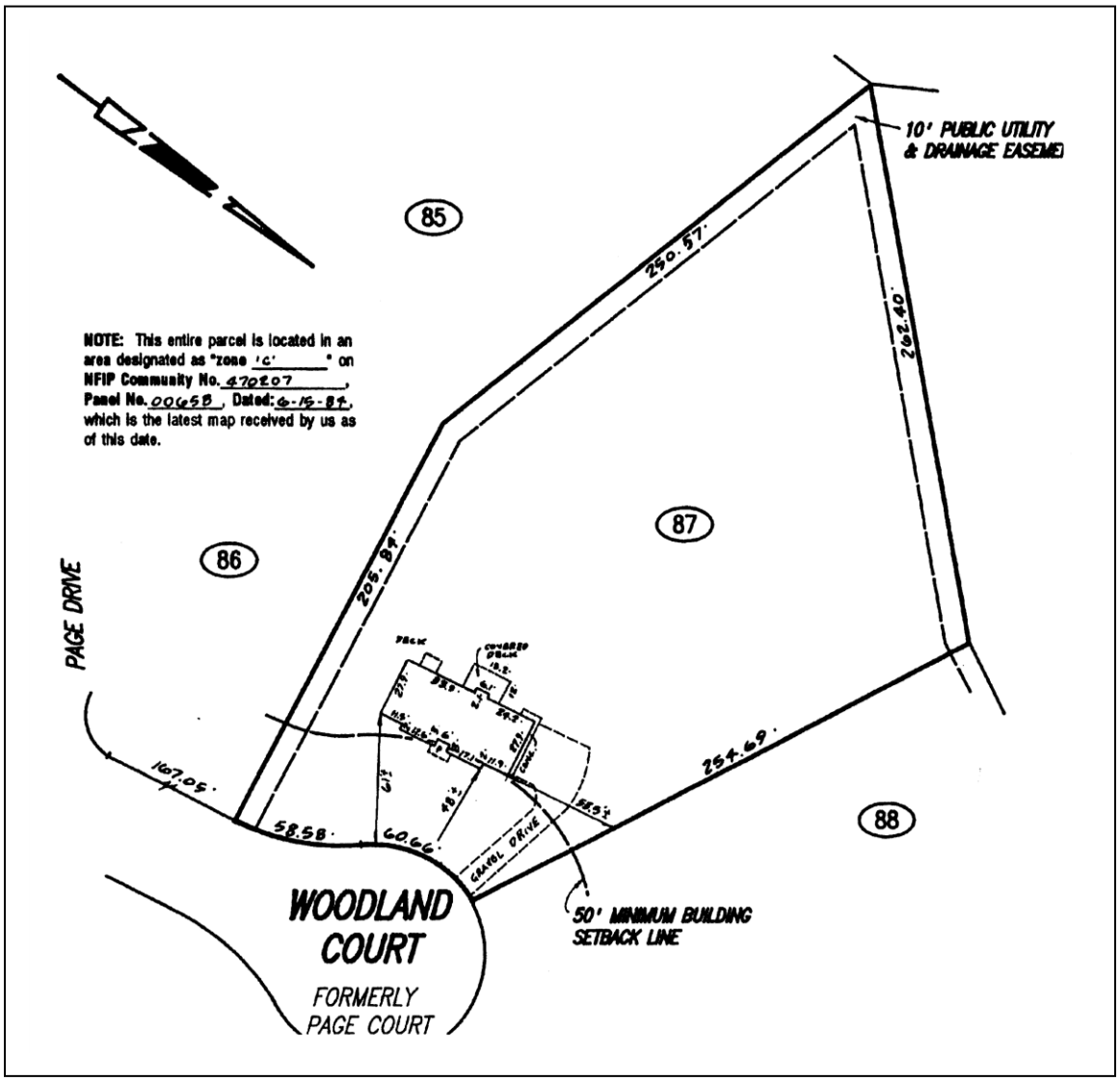


Example 1

The encroachment of the shed onto the public utilities and drainage easement and the minor fence encroachment may be insured for mortgage purposes only utilizing the following wording:

> *"Encroachment of a shed into the 20' public utilities and drainage easement and the encroachments of the fence along the southerly lot line of Lot #48. The company hereby insures for mortgage purposes only against loss or damage which the insured shall sustain by reason of the entry of any court order or judgment which constitutes a final determination and requires the removal of the existing improvements because of the encroachments or encroachments thereof."*

NOTE: The preferred method for providing affirmative coverage is by endorsement.

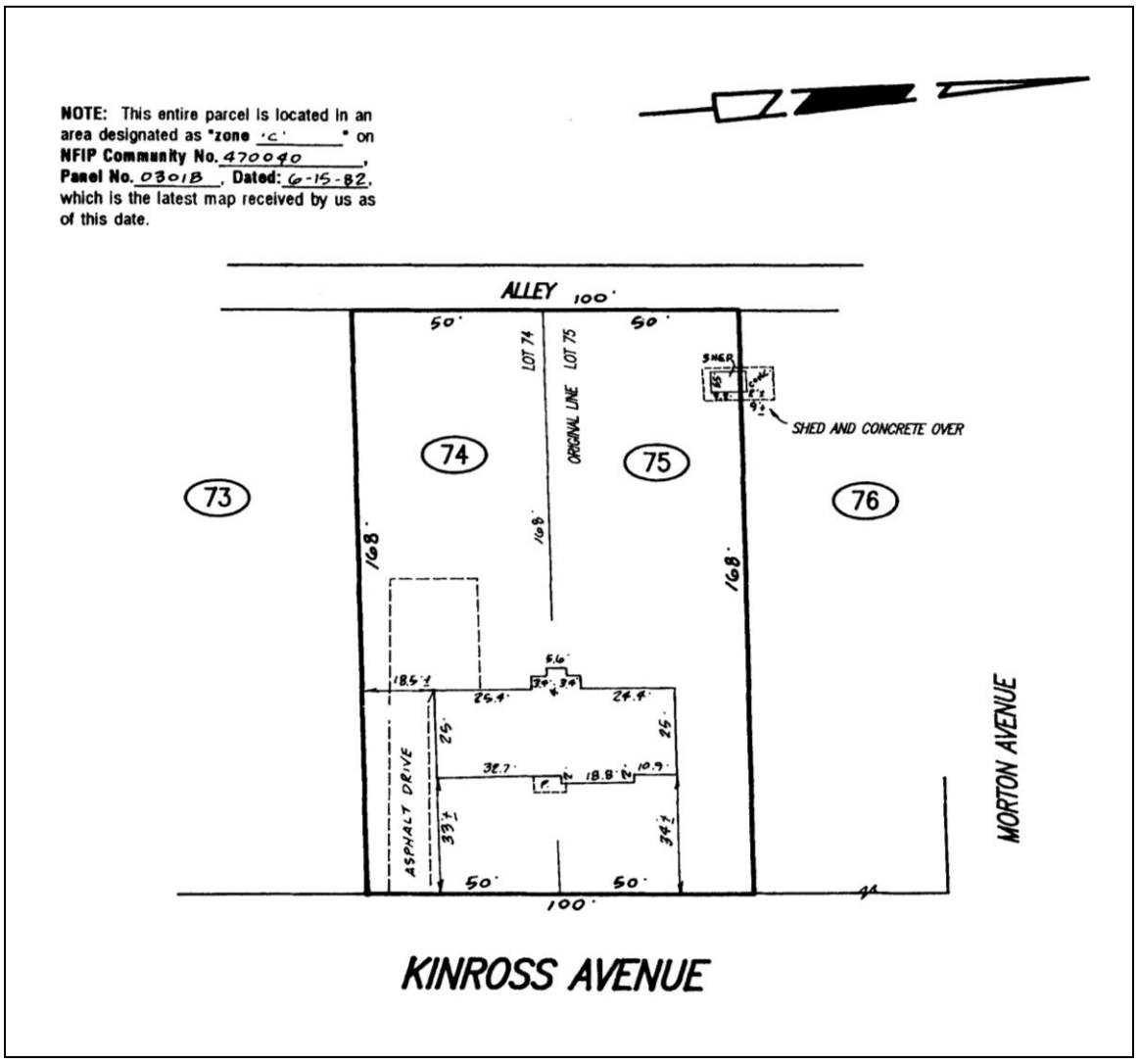


Example 2

The encroachment of the house onto the minimum building setback line may be affirmatively insured for mortgage purposes only using the following language:

> *"The survey dated ____ by (Surveyor), shows a two foot encroachment of the house and improvements over the 50' minimum building setback line. The company hereby insures for mortgage purposes only against loss or damage which the insured shall sustain by reason of the entry of any court order or judgment which constitutes a final determination and requires the removal of the existing improvements because of the encroachments or encroachments thereof."*

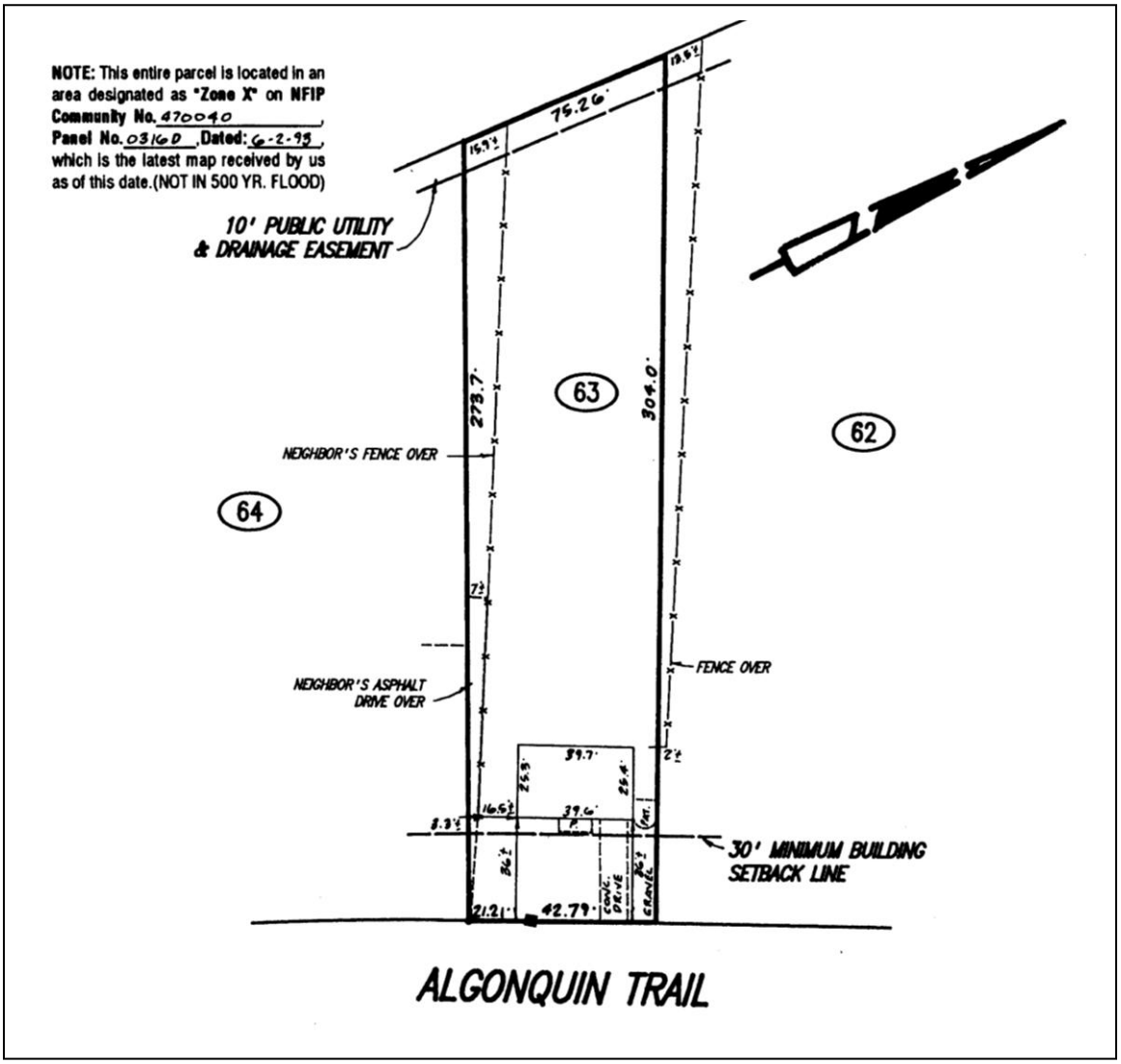
NOTE: The preferred method for providing affirmative coverage is endorsement.



Example 3

The shed and concrete pad may not be insured and must be included in Schedule B as an exception. The exception may be worded as follows:

> *"Nine foot encroachment of shed and concrete pad over the northerly lot line onto adjoining Lot #76."*



Example 4

The encroachment of the neighbor's fence and subject property fence are not insurable. The following exception from coverage must be made:

> *"Encroachment of the neighbor's fence over the southerly lot line onto the subject premises and the encroachment (projection) of the fence over the northerly lot line onto the adjoining Lot #62, and any right, title or interest or claim thereof in or to the insured land by adjoining owners."*

By no means do the above examples demonstrate all of the situations that may occur when insuring title to property. However, the illustrations do show situations that occur fairly frequently and are also indicative of Westcor's treatment of different types of encroachments and/or survey matters.

See also: **Affirmative Coverages**, **Building Setback Lines**, **Surveys**.

Synthetic Leases

Overview

A synthetic lease is a financing arrangement that is classified as a lease for financial accounting purposes and as a loan for tax purposes. This type of lease is sometimes referred to as a "tax ownership/operating lease or an "off balance sheet" financing. A synthetic lease involves the purchase of real estate from a third party seller by a Special Purpose Entity (SPE) that then leases the property to the lessee. The lessor provides acquisition and construction funding. The funds advanced by the lessor are repaid through the rent that the lessee pays. If the lease is properly structured, the lessee/borrower will be recognized as a lessee under the accounting rules and as an owner and borrower under applicable federal income tax code provisions.

Synthetic lease transactions usually resemble leveraged sale-leaseback transactions, so a description of the re-characterization risk encountered in sale-leasebacks is useful to understand the title industry's approach to synthetic leases. Many sale-leaseback transactions contain features that could persuade a court to determine that the transaction created a financing instead of a lease. In these cases, the court may decide to re-characterize the transaction to a financing by interpreting the interest of the lessee as a fee interest and the interest of the lessor as a mortgage lien.

Indicators of Risk

Due to a number of title claims in the industry that have resulted from some re-characterization challenges to sale-leaseback transactions, companies have responded by taking exception to this risk in those transactions where this possibility appears too great. A typical list of the risks indicating that a sale-leaseback might be re-characterized as a financing usually includes:

1. The purchase price for the sale is less than the property is worth.

2. The "rent" is equal to or greater than the debt service for an equivalent loan.

3. The purchaser has a "put option" to return the property to the seller, or the seller must repurchase it, at the end of the lease.

4. The seller's repurchase option price reduces to a token sum over the life of the lease.

5. The seller will build improvements on the leasehold, but the term of the lease is too short to depreciate its investment on the improvements.

6. The lease permits substitution of properties in a multi-property transaction.

7. The lease may indicate that it is for security only, or make reference to "the lender" or "this mortgage."

Underwriting Instructions

Agents that are asked to insure a synthetic lease transaction should contact underwriting counsel for guidance. If underwriting counsel is uncomfortable with the structure of the transaction because it contains too many of the risks listed above, counsel will suggest the agent add a re-characterization exception to Schedule B of the commitment and title policy as follows:

> *"Any assertion or determination that (a) the lease referred to at item _____ of Schedule B is not a "true lease" or (b) the vesting of title in [the insured] is part of a loan transaction, including the assertion that the deed to [the insured] and the lease constitutes a mortgage or other security device."*

Note: *Affirmative insurance should never be added to this exception.*

Underwriting counsel may even decide that it is not necessary to raise any exception in the first place because of the availability of a defense under one of the following theories:

1. *The "Act of the Insured" Defense*: the risk of re-characterization is excepted from coverage under the title policy exclusions because it is a matter "created, suffered, assumed, or agreed to" by the insured, or

2. *The "Post Policy" Defense*: the risk of re-characterization is excepted from coverage because it is a "defect, lien, encumbrance, adverse claim, or other matter…attaching to or created subsequent to Date of Policy."

If approved by underwriting counsel, the agent may issue an Owner Policy to the SPE and a Leasehold Policy to the lessee. In both policies in Schedule B, there must be an exception to the terms and conditions of the recorded synthetic lease documentation.

Insuring a Fee Transaction after a Synthetic Lease Transaction

Whenever an agent is requested to insure a conveyance of property which has been the subject of a Synthetic Lease Transaction, consideration must be given to the elimination of any potential interests or liens created by that transaction.

In order to vest unencumbered title, the following documents should be executed and recorded:

1. Deed from the SPE fee owner/mortgagee with the joinder of the lessee/real owner.

2. Termination of the leasehold interest created by the synthetic lease.

3. Release, discharge, or satisfaction of the fee mortgage created by the synthetic lease.

Unless these documents are executed and recorded, a future bankruptcy of either the SPE or lessee could result in a claim under the policy insuring the new owner. The trustee in bankruptcy would be in a position to assert that the absence of recorded termination documents results in either an outstanding interest in or a lien on the property.

CAVEAT: A synthetic lease transaction is a very sophisticated, coupler arrangement that requires special care and analysis for title insurance purposes. No such transaction may be insured without involvement of and approval by Westcor Underwriting Counsel.

Tax Titles

Overview

Tax titles arise out of the non-payment of taxes, assessments, or other public charges by the real property owner resulting in a forfeiture of title by all who have an interest in that property. Although this is a general description applicable to most jurisdictions, the actual laws and timing requirements of each jurisdiction will be different based upon specific state statutes and local ordinances. Guidance from local underwriting counsel must always be sought when faced with tax sales.

In a tax sale, title is most often conveyed by an administrative tax deed. Generally, when taxes on land are not paid, the tax collector may sell either the land or a tax certificate on such land at public auction. A tax sale certificate is then issued to the successful bidder who pays the unpaid taxes and requisite interest, costs, and related charges. If there is no buyer, the certificate is issued to the county. After the statutory period of time has elapsed – e.g., two years – following the year of issuance of the tax sale certificate, the owner of the certificate is entitled to apply to the tax collector for a tax deed if the owner of the land has not paid the tax certificate holder or the county the redemption amount of the taxes, interest, penalties, and charges from the tax sale.

Upon notice of sale being properly published and sent to the owner and any lienholders or mortgagees of record, the land is sold at public auction. At that time, the owner of the tax sale certificate may bid in the amount required to redeem the tax certificate plus other related costs, and a tax deed will then be issued to the purchaser. In other jurisdictions the action may actually be one to foreclose upon the tax certificate or one to foreclose the equity of redemption. In any case the result is the same and that is to divest the owner of the property. In some jurisdictions, if the owner has not redeemed the property from the original tax sale by within the prescribed time period the tax deed may be issued by the tax assessing office or clerk of court and the issuance of the tax deed will divest the former owner of all title to the land and constitute a new and independent source of title.

A tax sale will not only divest the non-paying owner of the land but all who have an interest in the property, whether they are a mortgagee, judgment creditor, remainderman, lessee, or co-tenant. Easements, rights of ways, covenants, conditions, and restrictions will typically survive a tax sale and will continue to burden the property. One must also keep in mind that an owner of a tax certificate or a tax sale purchaser may also be divested at a subsequent tax sale for failing to pay real estate taxes, assessments, or other public charges. Another matter to keep in mind is that in most jurisdictions a co-tenant will not be able to acquire exclusive title to property as against his co-tenants by virtue of successful bid at a tax sale. A payment made by one co-tenant will ordinarily be for the benefit of all co-tenants or joint owners.

Underwriting Instructions

Because courts may be sympathetic to an owner that lost his property for pennies on the dollar, and as equity abhors a forfeiture, tax sales are often set aside. The slightest defect in the tax sale may cause it to be vacated. The procedures or the implementation of procedures for a sale of real property for non-payment of taxes and the validity of tax sales are often attacked even if a sale was held in strict compliance with all state and local laws, based upon failure to give proper notice as required under the Due Process Clause of the United States Constitution. For these reasons it is the policy of the Company not to insure property where the title search reveals that the title is derived from a tax sale that occurred less than twenty years before the effective date of the search.

The company will consider exceptions to this policy on a case-by-case basis. Please contact Westcor's local counsel for guidance. In general WLTIC guidelines will be as follows:

1. The tax deed has been of record at least *20* years or the time required to gain title by adverse possession;

2. A review of the tax assessments and collection records has determined that the state and local tax laws have been strictly complied with;

3. Delinquent taxes were not paid by the dispossessed former owner prior to issuance of the tax deed;

4. Evidence is obtained and recorded in the records verifying that the taxes are paid and current and further verifying the continuous payment of the taxes by the tax deed grantee or successors in title for at least 20 years or the time required for adverse possession;

5. Subsequent to the tax deed there has been no possession adverse to the tax deed grantee or his successor in title;

6. That the tax deed purchaser or his successors have held exclusive possession of the property for at least the minimum required to establish adverse possession;

7. A review of the tax sale proceedings (which must be judicial proceedings) must reflect strict compliance with the notice requirements of the Due Process Clause of the U.S. Constitution as set out under Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), as expanded by Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), and its progeny, i.e., notice to affected individuals must be reasonably calculated, under all of the circumstances to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections; or

8. A deed from the former dispossessed owner to the tax deed holder conveying title along with a release from all mortgagees and lienholders; or

9. A final non-appealable order from a court of competent jurisdiction quieting title in the tax sale purchaser or his successors in a case in which the summons and complaint was personally served on an owner that lost the property at the tax sale as well as on all mortgagees and lienholders.

With items 1-7 above, the Company may also require the execution of a ratification by the original dispossessed owners. Contact Westcor underwriting counsel for written authorization before insuring any transaction which contains a tax sale in the chain of title.

Taxes and Assessments

Overview

Taxes and assessments which are due and payable at time of closing are to be listed on the requirements page of the title commitment and are to be paid in full in conjunction with the closing. Taxes and assessments which are not yet due and payable must be shown as an exception to title and may include the notation *"a lien but not yet due and payable."*

Special assessments, such as street improvements, sewer lines, and sidewalk repair may result in a lien against abutting properties served by such improvements. An exception must be made for special assessments which remain unpaid. Similarly, certain assessments may be set up on an installment payment plan and such installments must be current at time of closing, with an exception being made for the lien of such continuing assessments.

Deed restrictions or declarations of condominiums that contain a clause authorizing levy assessments against property owners are to be specifically excepted in the policy as to such potential assessments, unless written verification from the assessment authority is received, which states that all assessments have been paid to current date.

Liens for unpaid taxes are to be shown as exceptions to title on the commitment and final title policy unless paid in full.

Underwriting Instructions

Always check the offices of the appropriate taxing authority for the status of taxes which are currently due and payable or delinquent. In addition, when insuring Planned United Developments ("PUDS"), condominium units, or other developments which incorporate association fees or dues, all homeowner's fees and/or assessments must be brought current and paid at closing. Status of taxes and assessments must be obtained in writing from the assessing or levying authority. Verbal information is not acceptable and cannot be relied upon.

Always include an exception in any commitment or policy for any existing lien for taxes or assessments which are due but not paid or are not yet due and payable.

Timeshare Estates

Overview

The concept of timeshare estates varies from state to state, so it is difficult to make any general statements about their nature. However, timeshare ownership usually applies to condominium projects (usually located in resort areas) and provides multiple owners of an individual unit the right to occupy it during various and specific time periods of the year. Timeshare ownership involves an undivided interest in a specific unit according to the number of weeks purchased. For instance, a person buying a one week timeshare will own an undivided 1/52 interest in a unit in the timeshare property.

There are many types of interests created in timeshare projects ranging from actual co-ownership tenancy to "club memberships" or "vacation licenses" where no actual ownership exists. When timeshare estates are held as *tenants in common*, each owner has the undivided right to use the property for a specific time period during the year. The timeshare purchaser may own what is commonly called an *"interval estate"* (an estate for years in a specific, described parcel of real estate for a designated recurring period of time), or a *"time-span estate"* (an undivided interest in fee simple in a designated parcel of real estate with the exclusive right of occupancy in that parcel of real estate for a designated recurring period of time). There may also be a *leasehold* timeshare estate.

Under a co-tenancy, it is possible that the interests of all owners of a particular time-share unit may be sold to enforce one owner's delinquent state or federal tax liens with the balance of the proceeds from the sale being distributed pro rata.

Underwriting Instructions

When a timeshare purchaser only obtains a contractual right-to-use the facility as owned by the club, commonly called a *vacation license or club membership*, no ownership rights are created and therefore the purchaser does not own an insurable interest in the land. *Westcor agents are not authorized to issue its commitment or final policy insuring these types of transactions*.

Under timeshare regimes that provide for individual ownership interests in real property, title insurance may be issued. Typically, Schedule A of the commitment will be unchanged, except the legal description, which must describe the timeshare estate number (or other designation), condominium unit number, and timeshare declaration recording information, and must include a clause similar to the following:

> *"Each such timeshare estate constituting a one fifty-second (1/52) undivided interest in the respective Condominium Unit described above in the Condominium established by [TITLE OF CONDOMINIUM DECLARATION], dated ____, and recorded ____."*

In addition to the usual exceptions for condominiums (e.g. Master Declarations, Declaration of Easements, etc.), the specific timeshare declaration, and other matters of record, both the commitment and any final policies must contain exceptions for the following matters (these exceptions should be modified in accordance with the language and contents of the actual project documents):

> *"Nothing contained herein shall be construed as insuring that tax assessments against the interest described in Schedule A will be made in any particular manner."*
>
> *"This policy does not insure against the consequences of a merger of all the timeshare estates in one parcel/unit by operation of law."*
>
> *"This policy does not insure against loss by reason of the hold-over or unauthorized occupancy by other owners/users of any unit or by the association, the developer, its lessees or other third parties holding over pursuant to the procedures for reserving usage as set forth in the timeshare declaration, as amended."*

> *"This policy does not insure against loss or damage which may be caused as a result of the enforcement of any state, federal or judicial lien against any other party holding an interest in and to the subject unit."*
>
> *"A right-of-entry for purposes shown and incidental purposes, during the "maintenance periods" as provided in the declaration of condominium and/or timeshare declaration, as the case may be, referred to herein for cleaning, servicing and maintenance." (If applicable.)*

Any record matter affecting the underlying fee must be excepted in both the commitment and final policy.

It is important that Westcor agents determine the nature of the interests being insured and their insurability under state law. If you are unfamiliar with the insurance of timeshare estates, please contact Westcor underwriting counsel for approval before issuing any commitment or policy.

See also: **Condominiums**, **Contract (Agreement) for Deed**.

Trusts

Overview

A trust may be defined as a fiduciary relationship in which one person holds interest subject to an equitable obligation to keep or use that interest for the benefit of another and generally comprised of the following elements:

1. A settlor or "trustor"
2. One or more trustees
3. One or more beneficiaries
4. The agreement giving the trustee certain powers, and
5. Property which is the subject of the trust.

Trusts may be created in different ways: "living trusts" or "inter vivos trusts" are created by living persons conveying property to a trustee. "Testamentary trusts" are created by wills wherein a decedent's will appoints a trustee to administer the assets of the estate following his death.

At common law, a trust is not a legal entity capable of holding title or dealing with it in any way. For example, deeds conveyed to the "John Doe Trust" are generally not valid conveyances according to the common law rule. The deed should have been conveyed into the trustee in that capacity: e.g., James Doe, Trustee of the [John Doe Trust].

When insuring title to property being acquired, conveyed, or encumbered by a trust, the trust document must be reviewed to ascertain that it is a valid and active trust and that the action taken by the trustee is within the scope of authorized powers conveyed upon him by the trust.

Property conveyed to an individual, corporation, or partnership with the wording "trustee" or "as trustee" , and with no other reference made to a specific trust, beneficiary, or the granting of powers may, depending upon applicable state law, be viewed as having been conveyed to such individual, corporation, or partnership individually and not as trustee. The act of placing the wording "trustee" or "as trustee" should not be construed as automatically creating a trust, especially in those cases where any other reference to such trust is clearly absent.

In modern jurisprudence many states have now enacted statutes which allow trusts to hold title in the trust name. In those states a conveyance to "The John Doe Trust" is considered valid. In most states this authority is concurrent with the common law method so either concept is considered valid. Some states require that certification by affidavit of the trust name, the name and address of the trustee and other relevant information must be recorded for a conveyance to the trust name to be valid.

Underwriting Instructions

When insuring property being bought, sold, or mortgaged by a trust, the agent must call for and examine the trust agreement in order to establish that the trustee is acting within the authority provided under the trust. If there is any question as to the sufficiency of the power of the trustee to act, then the agent should require deeds from all beneficiaries under the trust agreement. A copy of the trust instrument or memorandum of trust should be retained in the agent's files for future reference.

UCC Financing Statements

Overview

Fixture Filings

Certain transactions may include a transfer of personal property in addition to real property. It is important to remember that ALTA title policies insure only those improvements which, by law, have been converted to permanent fixtures and are considered part of the real property. These transactions may be subject to financing statements filed under the provisions of the Uniform Commercial Code, which may take priority over the insured instrument.

Personal Property or Fixture?

A "fixture" is an article that was once personal property, but that has been installed in or attached to land or a building in some more or less permanent manner, so that such article is regarded in law as part of the real estate. In most states, in the absence of an express agreement, an item is considered personal property or a fixture according to the following six criteria:

1. The nature of the items in question.
2. The manner of the annexation to the real property.
3. The purpose for which annexation is made.
4. The intention of the parties (especially the annexing party).
5. The degree of difficulty and extent of loss involved in removing the items from the realty.
6. The damage to the secured property caused by the removal.

If by a preponderance of the evidence using these factors the item is deemed to be part of the real estate, then the item is a fixture. If the tests indicate the item is personal property, it is "goods" and not a fixture.

Financing Statements

In most states, a security interest in personal property which is or is to become a fixture is governed by the Uniform Commercial Code (UCC). A financing statement must be filed in order to perfect a security interest in fixtures. Lenders often file UCC-1 Financing Statements (for personal property) in addition to the mortgage securing the financing of the real property.

The UCC-1 Financing Statement is generally filed in two places:

- With the Secretary of State
- In the public land records of the county in which the property is located.

Part of the search and examination process is to verify that no unexpired UCC Financing Statements exist of record. The statute of limitations for such statements varies from state to state. Prior to the expiration date (usually 6 months prior to expiration) the UCC may be extended for an additional period of time. If the financing statement has expired by its own terms or by applicable law, then it should be considered to no longer exist. Additionally, if a review of the financing statement determines that only non-fixtures are included (such as computers, copiers, or inventory), then it does not affect real property.

The problem with locating some UCC Financing Statements is that not all states require the inclusion of the legal description of the property and, in some cases, the name of the debtor reflected on the statement is not

that of the current record owner. At times, the only common link between the statement and the property being insured is the physical property address. Some states have amended the UCC requirements to include provisions for identifying such property.

Underwriting Instructions

Any existing or newly filed financing statements covering fixtures must be excepted on the final title policy. If the financing statement has been assigned or continued, the exception should reflect the original financing statement as well as the assignment or continuation. If the agent can ascertain that the personal property secured by the financing statement or chattel mortgage has not become a fixture and thus real property according to the law of the jurisdiction, then it is permissible to omit these recorded statements for the loan policy. However, it is advisable to disclose the existence of these statements to the proposed insured for informational purposes.

An agent should never insure machinery, equipment, or fixtures as part of the insured land without prior approval of Westcor underwriting counsel.

Commitments and policies should contain an exception to any financing statement that affects the property if it has not been properly disposed of.

Contact your local Westcor counsel for any questions regarding specific provisions of your state.

Vendor's Liens

Overview

In some jurisdictions, a seller of real estate who has not been paid the full purchase price and does not take any lien or security beyond the personal obligation of the purchaser is recognized as having an implied equitable lien upon the land conveyed. This lien may be enforceable not only against the vendee (purchaser), but against any purchaser who may have had notice that the full consideration has not been paid.

A vendor's lien may be evidenced of record by a notice of contract or similar instrument, or the lien may be reserved in a conveyance. However, a vendor's lien may also be shown by unrecorded documentation such as escrow documentation or disclosure by the proposed insured or another party. Generally, a recorded notice of a vendor's lien has the same priority as a purchase money mortgage and is superior to any liens existing at the time the vendor's lien is created, except for Federal Abstracts of Judgment.

Before insuring title to a property where a vendor's lien exists, the lien must be properly released, quitclaimed, subordinated, waived, or determined to have expired under the statute of limitations.

Underwriting Instructions

Where a vendor's lien has attached to property being insured, a requirement for the proper release of the interest of the vendor must be made under Schedule B of the commitment. Unless the lien is disposed of to the satisfaction of the agent, it must be excepted to in the final title policy.

See also: **Contract for Deed**.

Water Rights

Overview

Water rights refer to the right to take water from a body of water, including underground or percolating waters. Water rights can be granted for many purposes, but most commonly are granted in connection with farming, ranching, and mining. Because of the complexity of state-by-state water rights, Westcor requires that all policies except or exclude water rights from coverage, unless specifically approved by Westcor underwriting counsel.

Underwriting Instructions

The following exception should be taken in Schedule B as follows:

> *"Water rights, claims or title to water, whether or not shown by the public records."*

In some states, water rights are included in a standard, pre-printed policy exception, so a separate exception on Schedule B is not necessary.

Where water rights are applicable, other specific exceptions for other related rights and interests may be necessary (e.g., an easement across the land to extract water from a well or pump).

See also: **Riparian/Littoral**, **Easements**, **Wetlands**.

Waterfront Property and Wetlands

Overview

In reviewing the title to any parcel of property, the title examiner or attorney is primarily interested in four issues:

- Who is the vested owner;
- What property do they own, i.e., what are the boundaries;
- How is their ownership defined, what rights and benefits do they enjoy;
- What burdens or encumbrances have been placed upon the land.

In examining property that borders on a body of water or contains wetlands, the answers to these questions become more difficult because of the ever-changing nature of shore lands and wetlands. The difficulty is then compounded by the complex and varied laws that affect these properties. Wetlands are defined under the Clean Water Act and various other federal and state statutes. The EPA, Army Corps of Engineers, state natural resources department, state environmental departments, and the U.S. Coast Guard, may have regulatory authority over these properties, not to mention various other local or state agencies that may have been established to regulate development along waterfront properties.

The single most difficult task faced by a title insurer is to determine the legal character of wetland property. Its legal character may be very different than its physical appearance. Wetlands include tidelands, submerged lands, swamp and overflow lands, inland lakes and rivers, marshes, bogs, and uplands which border a body of water. Wetlands, for conveyancing purposes, may also be treated as dry land or upland property. Wetlands may be defined by legislation or regulations as land which is normally dry but has a high water table or supports a certain type of vegetation. Because of these uncertainties, local underwriting counsel must be consulted.

Water as a Boundary

A deed conveying a parcel of land bordering on a body of water may describe the conveyed land with reference to the adjoining water. The description may give a call and a distance as part of a metes and bounds description to the water's edge, bank of a river, or low or high water mark, or it may simply state that the river, bay, lake, or ocean is a boundary line. Although the deed may give an exact distance and direction, that does not answer the question of how close to the water or how much of the land is conveyed. Shore lines erode and rivers meander; the only certainty with land bordering water is that the shore line or bank will change over time. Physical features will change and the rules for determining the extent of ownership in each state are different.

The effect such change has on land ownership depends upon how the change occurs. Changes to a shoreline, which occur gradually or by "imperceptible degrees" in response to the normal and natural action of the water will, in many jurisdictions, actually shift the legal boundary. These changes occur through erosion, reliction, or accretion. Under normal circumstances, Westcor Title would not insure the ownership of this additional land. On the other hand, sudden, perceptible changes do not result in a shift in the legal boundary. Such sudden action is referred to as avulsion (i.e., the effects of a violent storm) or the artificial filling of wet areas.

To confuse matters further, different bodies of water are also subject to different rules. Any inquiry into the extent of the ownership interest should start with a determination of whether the land under the water or even the land adjacent to the water is subject to private ownership. The answers to such inquiries, although academically stimulating and educational, are difficult and fraught with peril for the title insurer. These inquiries must, nonetheless, be made on those occasions when we encounter the waterfront property with a

dock or a marine condominium providing ownership of a boat slip or even a condominium built on piers or filled lands.

Even if private ownership of shore lands or subaqueous land can be proven and is allowed, it will typically be subject to stringent federal, state, and local regulation, as well as be burdened by rights vested in the public. When insuring lands bordering a body of water, several exceptions for these rights must be taken, as set out in the Underwriting Instructions section below. These would include the right of the public to use the shore, the navigational servitude imposed on navigable waters, and others.

The Public Trust

Generally, with a few exceptions, a state owns tidelands, submerged lands, and lands lying below navigable lakes and rivers within its borders by reason of its sovereignty. Sovereign ownership by the states has two distinct elements. The first is the proprietary ownership of the land, which, under certain limited circumstances, may be sold by the state to others. The second is the interest held by the state in trust for the public, which, except for very limited circumstances may not be sold by the state. Sovereign ownership and the difficulties encountered in attempting to determine the character of the property which is the subject of a title order make wetlands an extra-hazardous title risk.

The law in this area has primarily evolved from the English common law where those waters that were affected by tides and the abutting shores of those waters were deemed to be in the public domain and the King held title to those waters in trust for the benefit of the public. The concept of the land held by the sovereign for the benefit of the public goes back to the time of the Magna Charta. Royal ownership of these lands became the law of the colonies. After the revolution, the original states succeeded to the interests of the crown in the tidelands and large flowing waters. New states entering the union enjoyed the same rights of sovereignty and ownership under the equal footing doctrine. The leading case on this point is Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892) where the court held that the state's ownership of the Lake Michigan shore in Chicago was impressed with a trust for the benefit of the public. Put simply, generally, a state owns tidelands, submerged lands, and lands lying below navigable lakes and rivers within its borders by reason of its sovereignty.

While this public interest is referred to in various ways in different jurisdictions, it will be referred to here as "the public trust." This public trust encompasses the public's right to use tidelands and other navigable waters for commerce, navigation, and fishing.

In a more recent case, Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791 (1988), the Supreme Court reaffirmed that the state was vested with title to all lands under all waters affected by tide, whether navigable or not. The recent trend has been to expand the effect of the public trust by designating such activities as recreational use and even the preservation of tidelands in their natural state as a valid exercise of the public trust power. The public trust continues to exist even if the property is conveyed by the state into private ownership. These public rights may, as a practical matter, render the property worthless to its private owner.

Navigable Waters

The term navigable has been used to identify those waters that are reserved for public use and, hence, title to the bed and the water would lie with the state or federal government. Navigable waters are essentially waters not subject to meaningful private ownership and are either tidal or non-tidal.

The federal law and the laws of the states have continued to develop and change to fit the changing circumstances since the colonial times. In England all waters of importance to commerce were affected by tides. On the American Continent, rivers and large inland lakes were not affected by tides but yet were important to commerce and used for navigation. The concept of navigable waters was expanded by court decisions and gave the federal government jurisdiction and ownership of these non-tidal waters under the Commerce Clause of the U.S. Constitution. When states entered the Union they were then given title to the navigable waters within their borders. State ownership of the lands under these waters was expanded and codified under the Submerged Lands Act of 1953.

Under a federal definition of navigability, if the water in question at one time belonged to the federal government and the federal government transferred it to the state when the state joined the Union, then the water is deemed navigable, if, when it was transferred, the water was used or could have been used in its ordinary condition for commerce. For the 31 states that acquired their navigable waters from the federal government, public ownership of these waters and lands is then determined by this federal definition by examining the water's natural condition at the time of statehood. The balance of the states include the 13 original states, which preceded the existence of the federal government, and the five states formed from the original states, as well as Texas, which was a republic before joining the union. In those 19 states the federal definition may not be dispositive on the issue.

Federal Navigational Servitude

The Commerce Clause of the U.S. Constitution gives the federal government the exclusive power to regulate interstate and foreign commerce, which gives the federal government the authority over all navigable waters of the United States. This right is paramount to all other interests, including the rights a state or individual may have in the land. This federal navigational servitude exists over all lands presently or formerly flowed by the navigable waters of the United States. The exercise of this paramount right may result in a taking of property without compensation being paid.

The navigational servitude would affect filled-in lands that may now be dry but were previously under the waters of a navigable waterway. This places such land at the risk of some day being cleared, having the fill removed, and being returned to its former wet state. It also affects all piers and bulkheads on navigable waters.

Piers, Bulkheads, Man-made Fill

Although private ownership of shoreline improvements may be possible, its existence may be by revocable license subject to termination and forced removal. The construction or even repair of any improvements is subject to scrutiny at various levels and regulation by many different states, local, and federal agencies. Shore improvements would most likely be subject to navigational servitude and other easement rights. No affirmative coverage should ever be given covering any such improvements, and any policy insuring property with any such improvements should contain appropriate exceptions as shown in the Underwriting Instructions. As with any complex issue, local underwriting counsel must be consulted before issuing policies on waterfront properties.

Rights of the Public

Because wetlands are, in fact, attractive to the public, adjoining private lands may be subject to claims that the public has the right to cross the private lands to get to the wetlands or navigable waters. Such claims have been based upon custom, prescriptive easement, or the doctrine of implied dedication. Wetlands may also be classified as a wasteland and be impressed with the rights of the public as a commons and subject to the public's right to fish, fowl, or hunt.

Surface Runoff

Under common law, surface water was viewed as a common enemy and each landowner had the right to fight off or drain surface water as best he could. These rights were tempered in that good faith was to be used in the efforts to remove surface water and one was and is typically prohibited from collecting water on one's land and then discharging it in volume upon the land of another with injurious results.

A landowner is able to take steps to drive off surface waters from the land if such acts are reasonably necessary to protect the land. Liability to another landowner may result if his efforts are unreasonable and an adjoining property owner is injured.

Rivers and Streams

Properties located on or having flowing waters run through them raise additional concerns. Downstream owners have the right to expect the continued uninterrupted flow of the waters past the subject property without unreasonable diminution or pollution. In the western part of the country, water rights are a highly specialized area of the law and the right to make use of the flowing waters on the property may be severed by agreement or forfeited by lack of use.

Upstream owners also have the right to the continued flowage of the waters, and the owner would in most cases be prevented from blocking off the flow of the water so as to dam up the river and stream and cause flooding on the neighboring property. The owner would, in most cases, be prevented from altering the course of the stream or river as that would impede the flow of waters and could cause injury to the adjoining neighbors.

The river may qualify as a navigable body of water and be subject to a navigational servitude, and the public may have rights to fish, navigate, or carry on commerce.

Underwriting Instructions

We must remember that we can only insure matters as reflected in the public land records and only to the extent allowed to by the laws controlling ownership of land bordering water. A survey may not be able to track a legal description along a water boundary as it may have changed. The description along the water may have been inaccurate to begin with. Ownership issues and easements as they pertain to bulkheads, piers, fill, and dry land created by accretion or reliction may not be reflected in the land records and may not be insurable interests.

The following Schedule B exceptions are used when insuring different types of waterfront or wetlands property. Their purpose is to avoid insuring risks. This list is not exhaustive, but covers basic situations only. Situations can be encountered which require modification of these exceptions or different exceptions altogether. Some states use promulgated forms that already exclude the rights or interests that may arise because of water-related issues.

Since wetlands present extra-hazardous title risks, Westcor underwriting counsel must approve reports, commitments, or policies covering wetlands before they are issued.

Property abutting any body of water:

1. Any and all rights of the United States of America, the State/Commonwealth of _____, the local government and the public, if any, in and to so much of the land lying below the high water mark of the _____, unaffected by fill, man-made jetties and bulkheads.

2. Title to that portion of the property lying below the high water mark of _____.

3. Subject to any wetland regulation by the local, state or federal authorities and the rights of the public, if any.

4. Riparian or littoral rights are not insured.

5. Title to artificially filled lands, submerged lands, or land which may have been under water or which has been added to the subject property by accretion, reliction, or avulsion is not insured.

6. Any claim alleging that the actual acreage or square footage of the insured parcel is less than the amount in the parcel described in Schedule A.

7. Any claim based upon ambiguity or uncertainty in the exact location of the boundary along the high water line of _____.

8. Rights of the public to use the lands below the high water line for fishing, fowling, navigating, or conducting commerce.

9. Title to or the right to use or maintain any docks, piers, bulkheads, jetties, or artificially filled lands are not insured.

10. Navigational servitude over that portion of the property that is or may have been under water.

Property abutting an ocean, gulf, bay, tidal river, swamp, or estuary:

Any adverse claim based upon the assertion that some portion of said land is tidal or submerged lands.

Property on or containing a stream or river:

1. Rights of others entitled to the continued uninterrupted flow of the _____ without diminution or pollution.

2. Rights of others in and to the use of the waters of _____ and the natural flow thereof.

Beaches and shore areas:

1. Rights, if any, of the public to use any part of the land lying below the high water mark or below the natural line of vegetation, bluff, or other apparent boundary line separating the publicly used area from the upland private area.

2. Rights of the state, local, or federal government to regulate usage of the shore area.

Swamps, bogs, and marshes:

Rights of the state, local, or federal government to regulate usage of any wetlands on the subject property and the rights of the public, if any, thereto.

See also: **Beaches**, **Riparian/Littoral Rights**, **Waters and Filled-in Lands**.

Zoning

Overview

ALTA owner's and loan policies specifically exclude zoning matters from coverage. While some states do permit such coverage to be made via endorsement, other states expressly forbid it. Since the ALTA policies themselves – through the Exclusions from Coverage – specifically exclude such matters, it is not necessary to make further exception regarding zoning laws and ordinances. However, any zoning violations noted of record should be specifically excepted in such policies.

Zoning matters contained within the body of restrictions or other agreements, designed to limit or regulate the use of specific property, should be treated as restrictive covenants and not as express zoning matters. If restrictions contain, or a notation is made on the recorded plat as to, a requirement that the subject lands comply with local zoning laws, specific exception must be made re same.

Affirmative insurance for the status of zoning may be requested by lenders in certain commercial transactions. For guidelines on its issuance, see **Endorsements**, **Zoning**.

Underwriting Instructions

Any zoning violations noted of record must be listed in Schedule B of the title policy as follows:

> *"Violations of Zoning Regulations as disclosed by [describe instrument], dated _____, recorded _____ in Book _____, Page _____, Records of _____ County/Parish, State of _____."*

If restrictions or other agreements contain or make notation as to a requirement of the land to comply with zoning laws, exception must be shown on Schedule B of the title policy as follows:

> *"Compliance with that certain requirement that the property comply with local zoning laws disclosed in [describe instrument], dated _____, recorded _____ in Book _____, Page _____, Records of _____ County/Parish, State of _____."*

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