

# **Title Insurance for Construction Loans**

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## **Title Insurance for Construction Loans**

- **Maintaining Insurance on the Priority of the Lien of the Insured Mortgage over Mechanics' Liens**
- **Maintaining the Proper Amount of Insurance as the Construction Progresses**

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**ALTA 1992 Loan Policy Insuring Clauses**

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, STEWART TITLE GUARANTY COMPANY, a Texas corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

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7. 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 Date of Policy; or

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(b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance;

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#### **ALTA 1992 Loan Policy Exclusions From Coverage**

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

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6. Any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance.

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#### **ALTA 1992 Loan Policy Exceptions From Coverage**

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

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### **General Exception**

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

### **Special Exceptions**

. . . Mechanics' lien in the amount of \$100,000 in favor of G & C Plumbing, Inc. against ABC, Corp. dated June 1, 2005 and recorded in Book 1235 at Page 678 of the Fairfield Land Records.

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### **Underwriting Requirements to Delete General and/or Special Mechanics' Lien Exceptions**

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- **General Exception - Inchoate mechanics' liens that can relate back prior to mortgage recording**
  - Affidavits & Indemnities from owner and GC that no work has commenced
  - Site inspections and photography prior to closing showing no evidence of commencement of work
  - Where available, filing a Notice of Commencement after the recording of the mortgage to document the commencement of construction

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- **Special Exceptions - Recorded mechanics' liens**
  - Releases, Discharges or Subordinations
  - Judicial discharge by substitution of a bond
  - Secured Indemnities

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**Underwriting Requirements to Insure Against Liens arising from an Improvement or Work Related to the Land which is Contracted for or Commenced Subsequent to Date of Policy and which is Financed in whole or in part by Proceeds of the Indebtedness Secured by the Insured Mortgage**

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### **Initial and Future Advances**

- Where available, use statutory “safe harbor” language in the mortgage instrument which gives all advances the same priority as if they had been advanced at the time that the mortgage was delivered

*Example: Conn. Gen. Stats. Sec. 49-3*

**Sec. 49-3. Mortgage securing future advancements.** (a) Any mortgage to secure future advancements of money for construction or repair of buildings or improvements on land in this state, including site improvements of every kind with or without the construction or repair of any buildings, is sufficiently definite and certain and valid to secure all money actually advanced under and in accordance with its provisions, up to but not exceeding the amount of the full loan therein authorized, with the same priority as if it had been advanced at the time the mortgage was delivered, (1) if the mortgage contains a description of the loan in substantially the following form: "Whereas buildings or improvements on said premises are in process of construction or repair, or to be erected or repaired; and whereas the said grantee has agreed to make the loan herein described to be paid over to said grantor in installments as the work progresses, the time and amount of each advancement to be at the sole discretion and upon the estimate of said grantee, so that when all of the work on said premises shall have been completed to the satisfaction of said grantee, said grantee shall then pay over to said grantor any balance necessary to complete the full loan of \$....; and whereas the grantor agrees to complete the erection or repair of said buildings to the satisfaction of said grantee within a reasonable time from the date hereof or at the latest on or before .... months from this date", or (2) whenever one or more advances are to be made when a certain event or condition occurs, if the mortgage contains the pertinent portions of the above clause, and such additional clauses as shall set forth with reasonable certainty and accuracy the particular sums which are to be advanced and the event or condition which determines when such sums are to be advanced to the grantor. A mortgage that otherwise complies with subdivision (1) of this subsection shall be valid notwithstanding any provision in any other agreement between the mortgagee and mortgagor that sets forth either particular sums which are to be advanced or the event or condition which determines when such sums are to be advanced, or both, whether or not such other agreement is recorded on the land records. Nothing herein invalidates any mortgage which would be valid without this subsection.

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- Where such statutory "safe harbors" are not available, the Amounts of Insurance in the policy will reflect the amounts of the actual advances made by the construction lender by way of a **Pending Disbursement Clause** and subsequent **Date Down Endorsements**

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### **Pending Disbursement Clause**

Pending disbursement of the full proceeds of the loan secured by the mortgage described in Schedule A, this Policy insures only to the extent of the amount actually disbursed to date, in the aggregate amount of \$\_\_\_\_\_. This policy may be increased as each disbursement is made in good faith and without knowledge of any defects, liens or encumbrances on the title, up to the face amount of the Policy. At the time of each disbursement of the proceeds of the loan, the title must be continued down to that time for defects, liens or encumbrances on the title intervening or recorded between Date of Policy and the date of the disbursement.

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### **Date Down Endorsement**

1. Schedule A of the above policy is hereby amended in the following particulars:
  - (a) The effective Date of Policy is hereby extended to (current date of disbursement)
  - (b) The Amount of Insurance is hereby increased from \$\_\_\_\_\_ by \$\_\_\_\_\_ to \$\_\_\_\_\_

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### **Date Down Endorsement**

2. Schedule B of the above commitment is hereby amended in the following particulars:  
(Tax years, survey matters, etc.)

This endorsement is made a part of the policy and is subject to all the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and prior endorsements, if any, nor does it increase the face amount thereof

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### **Underwriting Requirements for Date Down Endorsements**

- Date down title search to look for mechanics' liens, etc.
- Controls over disbursement process
  - Receipts from subcontractors
  - Waivers and subordination of mechanics' liens
  - Confirmation of the amounts advanced by lender

## **Title Insurance for Construction Loans**

**For Additional Information about Mechanics' Lien coverage, please click on the following links at Stewart Title's *Virtual Underwriter* on-line underwriting library at:**

**<http://www.vuwriter.com/>**

**<http://www.vuwriter.com/vumanuals.jsp?displaykey=UM00000302>**

**<http://www.vuwriter.com/masterindex.jsp>**

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**Questions?**