

NEW ALTA COMMERCIAL ENDORSEMENT COVERAGES (2003-2004)

By John C. Murray

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I. Introduction

In late 2003 and early 2004, the American Land Title Association (“ALTA”) adopted fifteen new commercial title-insurance endorsements. Many of these endorsements are familiar and have commonly been issued by title insurance companies (where permitted by applicable statutes and regulations governing title insurance) in connection with commercial real estate transactions. The primary goal of the new endorsements was to standardize certain available coverages in order to encourage the use of the same endorsement forms by all title insurers, reduce the time spent on negotiation of these special coverages, and provide certainty and consistency in judicial interpretation of the coverages provided. Many of the endorsements also provide substantially enhanced coverage. The new endorsements are organized into eight groups of one-to three endorsements (revolving credit/line of credit; non-imputation; mezzanine loan; access; separate tax parcel; contiguity; first loss; and creditors’ rights). The presence of bracketed provisions in certain of the endorsements means that the language contained therein is optional depending on applicable state law and the facts of the particular transaction (and underwriting considerations of the title company). The new endorsements also contain some technical “clean-up” language to ensure clarity, and to ensure consistency with the terminology used in the title policy. The new endorsements may be reviewed by accessing the ALTA website at the following URL: alta.org., and clicking on the link that says “Standards/Forms.” Although the new endorsements were designed for use in commercial real estate transactions, many can also be used in residential transactions. Some of the new endorsements may not be available (or may require formal approval) in those states that strictly regulate title insurance coverages, endorsements and rates (such as New York, Mexico, Texas and Florida), and customers should consult with their title underwriters regarding availability (and pricing).

The following is a brief discussion and description of each of the new ALTA commercial endorsements (each new endorsement form is also set forth).

II. The ALTA Future Advance Endorsements

In October 2003 the ALTA adopted new Endorsement Forms 14 (Future Advance - Priority), 14.1 (Future Advance – Knowledge), and 14.2 (Future Advance – Letter of Credit). Endorsement Form 14 is designed for loans that involve future advances or revolving credit, and is applicable in states that provide optional future advances the same priority as obligatory advances. If the applicable state statute limits priority for advances made after the date the lender has received actual or written notice of any lien, then the proper form is Endorsement Form 14.1 (which expressly excludes coverage if the insured had actual knowledge of an intervening lien). The Form 14 and 14.1 Endorsements also

ensure that the lender can re-advance funds and the lien will retain its priority even if the outstanding loan balance reaches zero. They further provide ALTA variable rate mortgage coverage. But they except coverage for advances made after the borrower's bankruptcy, loss of priority as the result real estate taxes and assessments, federal tax liens, environmental liens, or usury. They also (along with the Form 14.2 Endorsement) have an optional (bracketed) exception for mechanic's liens, depending on applicable state law regarding the priority of mechanic's liens in this situation. Many state statutes provide that the mortgage or deed of trust must state that it secures future advances under a revolving credit transaction, and that the mortgage or deed of trust must state the maximum loan amount that can be disbursed. Endorsement Form 14.2 is designed for the situation where the mortgage or deed of trust secures a reimbursement obligation for "future advances" by the lender under a letter of credit or surety bond. The mortgage or deed of trust should state that the lien continues to exist and the reimbursement agreement remains in full force and effect even if there is currently no outstanding balance due. Because the ALTA determined that advances in these types of transactions are subject to special protection in bankruptcy and against federal tax liens, these exceptions are not contained in Endorsement Form 14.2. Also, there is no variable rate coverage, because this issue does not arise in connection with the types of transactions insured under Endorsement Form 14.2. The new ALTA Endorsement Forms 14, 14.1, and 14.2 read as follows:

ENDORSEMENT
Attached to Policy No.

Issued by
BLANK TITLE INSURANCE COMPANY

1. The insurance for Advances added by Sections 2 and 3 of this endorsement is subject to: the exclusions in Section 4 of this endorsement and the Exclusions from Coverage in the Policy, except Exclusion 3(d); the provisions of the Conditions and Stipulations, except Section 9(b); and the Exceptions contained in Schedule B.
 - a. “Agreement,” as used in this endorsement, shall mean the note or loan agreement secured by the insured mortgage or the insured mortgage.
 - b. “Advances,” as used in this endorsement, shall mean only those advances of principal indebtedness made after the Date of Policy as provided in the Agreement, including expenses of foreclosure, amounts advanced pursuant to the insured mortgage to pay taxes and insurance, assure compliance with laws or to protect the lien of the insured mortgage before the time of acquisition of the estate or interest in the land and reasonable amounts expended to prevent deterioration of improvements, together with interest on those advances.
2. The Company insures against loss or damage to the insured as a result of:
 - a. The invalidity or unenforceability of the lien of the insured mortgage as security for each Advance.
 - b. The lack of priority of the lien of the insured mortgage as security for each Advance over any lien or encumbrance on the title.
 - c. The invalidity or unenforceability or loss of priority of the lien of the insured mortgage as security for the unpaid indebtedness and Advances resulting from: (i) re-Advances and repayments of indebtedness; (ii) lack of outstanding indebtedness before an Advance; or (iii) failure to comply with the requirements of state law to secure Advances.
3. The Company also insures against loss or damage to the insured as a result of:
 - a. The invalidity or unenforceability of the lien of the insured mortgage resulting from any provisions of the Agreement that provide for: (i) interest on interest; (ii) changes in the rate of interest; or (iii) the addition of unpaid interest to the principal indebtedness.
 - b. Loss of priority of the lien of the insured mortgage as security for the principal indebtedness, including any unpaid interest which was added to principal in accordance with any provisions of the Agreement, interest on interest, or interest as changed in accordance with the provisions of the insured mortgage, which loss of priority is caused by (i) changes in the rate of interest; (ii) interest on interest; or (iii) increases in the unpaid principal indebtedness resulting from the addition of unpaid interest.

“Changes in the rate of interest,” as used in this endorsement, shall mean only those

changes in the rate of interest calculated pursuant to a formula provided in the insured mortgage at Date of Policy.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) resulting from:
 - a. Advances made after a Petition for Relief under the Bankruptcy Code (11 U.S.C.) has been filed by or on behalf of the mortgagor.
 - b. The loss of priority of Advances to real estate taxes or assessments imposed on the land by governmental authority arising after the Date of Policy.
 - c. The loss of priority to a federal tax lien of any Advance made more than forty-five days after a notice of federal tax lien has been filed in the public records.
 - d. The loss of priority of Advances to any federal or state environmental protection lien.
 - e. Usury, or any consumer credit protection or truth-in-lending law.
 - f. [The loss of priority of an Advance to a mechanic's or materialmen's lien.]
5. The Amount of Insurance defined in Section 2(c)(ii) of the Conditions and Stipulations shall include Advances.
6. Section 8(d) of the Conditions and Stipulations shall not apply to Advances.

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

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY:

ENDORSEMENT
Attached to Policy No.

Issued by
BLANK TITLE INSURANCE COMPANY

1. The insurance for Advances added by Sections 2 and 3 of this endorsement is subject to; the exclusions in Section 4 of this endorsement and the Exclusions from Coverage in the Policy, except Exclusion 3(d); the provisions of the Conditions and Stipulations, except Section 9(b); and the Exceptions contained in Schedule B.
 - a. “Agreement,” as used in this endorsement, shall mean the note or loan agreement secured by the insured mortgage or the insured mortgage.
 - b. “Advances,” as used in this endorsement, shall mean only those advances of principal indebtedness made after the Date of Policy as provided in the Agreement, including expenses of foreclosure, amounts advanced pursuant to the insured mortgage to pay taxes and insurance, assure compliance with laws or to protect the lien of the insured mortgage before the time of acquisition of the estate or interest in the land and reasonable amounts expended to prevent deterioration of improvements, together with interest on those advances.
2. The Company insures against loss or damage to the insured as a result of:
 - a. The invalidity or unenforceability of the lien of the insured mortgage as security for each Advance.
 - b. The lack of priority of the lien of the insured mortgage as security for each Advance over any lien or encumbrance on the title.
 - c. The invalidity or unenforceability or loss of priority of the lien of the insured mortgage as security for the unpaid indebtedness and Advances resulting from: (i) re-Advances and repayments of indebtedness; (ii) lack of outstanding indebtedness before an Advance; or (iii) failure to comply with the requirements of state law to secure Advances.
3. The Company also insures against loss or damage to the insured as a result of:
 - a. The invalidity or unenforceability of the lien of the insured mortgage resulting from any provisions of the Agreement that provide for: (i) interest on interest; (ii) changes in the rate of interest; or (iii) the addition of unpaid interest to the principal indebtedness.
 - b. Loss of priority of the lien of the insured mortgage as security for the principal indebtedness, including any unpaid interest which was added to principal in accordance with any provisions of the Agreement, interest on interest, or interest as changed in accordance with the provisions of the insured mortgage, which loss of priority is caused by (i) changes in the rate of interest; (ii) interest on interest; or (iii) increases in the unpaid principal indebtedness resulting from the addition of unpaid interest.

“Changes in the rate of interest,” as used in this endorsement, shall mean only those

changes in the rate of interest calculated pursuant to a formula provided in the insured mortgage at Date of Policy.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) resulting from
 - a. Advances made after a Petition for Relief under the Bankruptcy Code (11 U.S.C.) has been filed by or on behalf of the mortgagor.
 - b. The loss of priority of Advances to real estate taxes or assessments imposed on the land by governmental authority arising after the Date of Policy.
 - c. The loss of priority to a federal tax lien of any Advance made more than forty-five days after a notice of federal tax lien has been filed in the public records.
 - d. The loss of priority of any Advance made after the insured has knowledge of the existence of liens, encumbrances or other matters affecting the land intervening between the Date of Policy and the Advance, as to the intervening lien, encumbrance or other matter.
 - e. The loss of priority of Advances to any federal or state environmental protection lien.
 - f. Usury, or any consumer credit protection or truth-in-lending law.
 - g. [The loss of priority of an Advance to a mechanic's or materialmen's lien.]
5. The Amount of Insurance defined in Section 2(c)(ii) of the Conditions and Stipulations shall include Advances.
6. Section 8(d) of the Conditions and Stipulations shall not apply to Advances.

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

[Witness clause optional]

BLANK TITLE INSURANCE
COMPANY
BY:

ENDORSEMENT
Attached to Policy No.

Issued by
BLANK TITLE INSURANCE COMPANY

1. The insurance for Advances added by Section 2 of this endorsement is subject to: the exclusions in Section 3 of this endorsement and the Exclusions from Coverage in the Policy, except Exclusion 3(d); the provisions of the Conditions and Stipulations, except Section 9(b); and the Exceptions contained in Schedule B.
 - a. “Agreement,” as used in this endorsement, shall mean the letter of credit, surety agreement or reimbursement agreement, relating to the repayment of Advances that are secured by the insured mortgage.
 - b. “Advances,” as used in this endorsement, shall mean only those advances of principal indebtedness made after the Date of Policy as provided in the Agreement, including expenses of foreclosure, amounts advanced pursuant to the insured mortgage to pay taxes and insurance, assure compliance with laws or to protect the lien of the insured mortgage before the time of acquisition of the estate or interest in the land and reasonable amounts expended to prevent deterioration of improvements, together with interest on those advances.
2. The Company insures against loss or damage to the insured as a result of:
 - a. The invalidity or unenforceability of the lien of the insured mortgage as security for each Advance.
 - b. The lack of priority of the lien of the insured mortgage as security for each Advance over any lien or encumbrance on the title.
 - c. The invalidity or unenforceability or loss of priority of the lien of the insured mortgage as security for the unpaid indebtedness, and Advances resulting from (i) re-Advances and repayments of indebtedness; (ii) earlier periods of no indebtedness owing during the term of the mortgage; or (iii) failure to comply with the requirements of state law to secure Advances.
3. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys’ fees or expenses) resulting from:
 - a. The loss of priority of Advances to real estate taxes or assessments imposed on the land by governmental authority arising after the Date of Policy
 - b. The loss of priority of Advances to any federal or state environmental protection lien.
 - c. Usury.
 - d. [The loss of priority of an Advance to a mechanic’s or materialmen’s lien.]

4. The Amount of Insurance defined in Section 2(c)(ii) of the Conditions and Stipulations shall include Advances,
5. Section 8(d) of the Conditions and Stipulations shall not apply to Advances,

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

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY:

III. Non-Imputation Endorsements

In October 2003 the ALTA adopted the new ALTA Endorsement Forms 15, 15.1, and 15.2. Endorsement Form 15 (Non-Imputation – Full Equity Transfer) addresses the situation where the all the ownership interests of an entity are transferred to a new party (or parties) and a new Owner’s Policy is issued to the incoming owner(s). In order to protect itself when issuing the Form 15.0 Endorsement, the title insurer commonly will require a non-imputation affidavit from all the outgoing equity participants in the entity, which document certifies that they have not done any acts and have no knowledge of any matters or facts that would affect title to the property except as disclosed therein, and which indemnifies the title insurer against any liability based on its reliance on such statements. The title insurer may also require current financial statements from each affiant/indemnitor to demonstrate their ability to honor such obligations and undertakings. Endorsement Form 15.1 is designed for those situations where less than all of the equity interests in the entity are being transferred and the existing Owner’s Policy is endorsed to add an incoming party (or parties) as additional insured(s). However, it only protects the incoming party or parties as of the effective date of the policy; the policy is not downdated to reflect subsequent events that might adversely affect the title (e.g., defects, liens, encumbrances or adverse claims) or provide coverage for such matters. This endorsement contains a signature block for the insured entity to indicate its consent to the additional insured party or parties, because the endorsement states that any payment made under this endorsement will reduce the amount of insurance otherwise available under the policy. In order to protect itself when issuing the Form 15.1 Endorsement, the title insurer commonly will require a non-imputation affidavit from all the outgoing and remaining equity participants in the entity, which certifies that they have not done any acts and have no knowledge of any matters or facts that would affect title to the property except as disclosed therein, and which indemnifies the title insurer against any liability based on its reliance on such statements. The title insurer may also require current financial statements from each affiant/indemnitor to demonstrate their ability to honor such obligations and undertakings. Endorsement Form 15.2 (Non-Imputation – Partial Equity Transfer Endorsement) is designed for the situation where less than all of the equity interests in the entity are being transferred and the incoming party obtains its own new Owner’s Policy insuring its interest. In order to protect itself when issuing the Form 15.2 Endorsement, the title insurer commonly will require a non-imputation affidavit from all the outgoing and remaining equity participants in the entity, which certifies that they have not done any acts and have no knowledge of any matters or facts that would affect title to the property except as disclosed therein, and which indemnifies the title insurer against any liability based on its reliance on such statements. The title insurer may also require current financial statements from each affiant/indemnitor to demonstrate their ability to honor such obligations and undertakings. Each of the new Series-15 non-imputation endorsements broadens the coverage formerly provided by protecting the incoming party or parties from the exclusions in the Owner’s Policy, with respect to existing or former equity holders in the entity owning the insured land, for (1) matters created, suffered, assumed or agreed to by the insured (Exclusion 3(a)), (2) matters known to the insured but not found in the public records and not known or disclosed to the title insurer (Exclusion 3(b), and (3) loss the insured suffers because it has not paid value for the interest in the land covered by the policy (Exclusion 3(e)).

(Formerly, the insured was only protected with respect to Exclusion 3(b).) The new ALTA Endorsement Forms 15, 15.1, and 15.2 read as follows:

**American Land Title Association Endorsement Form 15 (Nonimputation-Full
Equity Transfer)
Adopted 10/22/03
Section IV—26**

**[Entity as the named insured and vestee of the insured estate or interest identified
in Schedule A]**

ENDORSEMENT
Attached to Policy No.

Issued By
BLANK TITLE INSURANCE COMPANY

The Company agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b), or (e) to deny liability for loss or damage otherwise insured against under the terms of the policy solely by reason of the action or inaction or knowledge, as of Date of Policy, of

**[identify exiting or contributing partner(s) of the insured partnership
entity, member(s) or manager(s) of the insured limited liability
company entity, or officer(s) and/or director(s) of the insured
corporate entity],**

whether or not imputed to the insured by operation of law, provided

[identify the “incoming” partners, members or shareholders]

acquired the insured as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim, or other matter insured against by the policy.

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

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY:

[Entity as the named insured in the policy and vestee of the insured estate or interest identified in Schedule A]

ENDORSEMENT
Attached to Policy No.

Issued By
BLANK TITLE INSURANCE COMPANY

For purposes of the coverage provided by this endorsement,

[identify the “incoming” partner, member or shareholder]

(“Additional Insured”) is added as an insured under the policy. By execution below, the insured named in Schedule A acknowledges that any payment made under this endorsement shall reduce the amount of insurance as provided in Section 10 of the Conditions and Stipulations.

The Company agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b), or (e) to deny liability to the Additional Insured for loss or damage otherwise insured against under the terms of the policy solely by reason of the action or inaction or knowledge, as of Date of Policy, of

[identify, as applicable, the existing and/or exiting partner(s) of the insured partnership entity, member(s) or manager(s) of the insured limited liability company entity, or officer(s) and/or director(s) of the insured corporate entity],

whether or not imputed to the Additional Insured by operation of law, to the extent of the percentage interest in the insured acquired by Additional Insured as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim, or other matter insured against by the policy.

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

AGREED AND CONSENTED TO:

INSURED

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY:

[Incoming partner, member, or shareholder, as the named insured in its own policy, where the vestee of the insured estate or interest identified in Schedule A is a partnership, limited liability company or corporation]

ENDORSEMENT
Attached to Policy No.

Issued By
BLANK TITLE INSURANCE COMPANY

The Company agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b), or (e) to deny liability for loss or damage otherwise insured against under the terms of the policy solely by reason of the action or inaction or knowledge, as of Date of Policy, of

[identify, as applicable, the existing and/or exiting partner(s) of the vestee partnership entity, member(s) or manager(s) of the vestee limited liability company entity, or officer(s) and/or director(s) of the vestee corporate entity],

whether or not imputed to the entity identified in paragraph 3 of Schedule A or to the insured by operation of law, but only to the extent that the insured acquired the insured's interest in entity as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim, or other matter insured against by the policy.

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

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY:

IV. Mezzanine Financing Endorsement

In October, 2003, the ALTA adopted Endorsement Form 16 (Mezzanine Financing). This endorsement is designed for use with new Owner's Policies where the equity interests (one-hundred percent or some lesser percentage) in the insured entity are being pledged as security for a mezzanine loan or as security for a guaranty by the equity holders of some other indebtedness (which may be a loan secured by a mortgage against the subject real estate owned by the vestee entity for which an ALTA Loan Policy may be issued to the "senior" mortgage lender). Since the real value of the equity holder's interest in the entity is based upon the ownership by that entity of the subject real estate (particularly in the context of so-called "single purpose" or "special purpose" entities so prevalent today in commercial real estate development and financing), the mezzanine lender wants to make sure there is an Owner's Policy in place insuring the vestee entity's ownership of the title free of undisclosed liens and other defects and that the mezzanine lender has rights under that Owner's Policy to any payments otherwise payable to the insured entity. This endorsement in effect provides non-imputation, additional insured, and "Fairway" coverage to the mezzanine lender (these coverages typically are not included in Owner's Policies). The Form 16 Endorsement (similar to the Form 15-series non-imputation endorsements described above) protects the mezzanine lender with respect to (1) matters created, suffered, assumed or agreed to by the insured (Exclusion 3(a)), (2) matters known to the insured but not found in the public records and not known or disclosed to the title insurer (Exclusion 3(b)), and (3) loss the insured suffers because it has not paid value for the interest in the land covered by the policy (Exclusion 3(e)). The Form 16 Endorsement assigns to the mezzanine lender the right to receive payments otherwise payable to the insured under the policy and, for that reason, the endorsement requires the signature of an authorized representative of the insured entity consenting to the assignment to the mezzanine lender of any loss payable under the Policy (to the extent of the mezzanine lender's interest). The Form 16 Endorsement can be issued when the mezzanine loan is closed or it can be issued to amend the borrower's existing Owner's Policy. The endorsement also assures the mezzanine lender that no amendment of the policy can be made without its written consent, and includes a "standstill" provision with respect to the title insurer's right of subrogation against the insured, the borrower, or a guarantor of the mezzanine loan. The Form 16 Endorsement is not available in all states, and mezzanine lenders should consult with their title underwriters regarding availability (and pricing). In addition to the Form 16 Endorsement, many mezzanine lenders obtain a UCC insurance policy (offered by some of the largest title insurance companies) in connection with mezzanine financing transactions, with appropriate endorsements to insure the attachment, perfection and priority of the lender's secured interest in the pledged equity interests under the Uniform Commercial Code as adopted in a particular state. (The Form 16 Endorsement does not provide this type of coverage for personal property interests.) The Form 16 Endorsement could be issued in connection with an existing Owner's Policy, but no coverage would be provided for any matters created subsequent to the original policy date. The new Form 16 Endorsement reads as follows:

ENDORSEMENT
Attached to Policy No.

Issued by
BLANK TITLE INSURANCE COMPANY

1. The Mezzanine Lender is:
and each successor in ownership of its loan (“Mezzanine Loan”) reserving, however, all rights and defenses as to any successor that the Company would have had against the Mezzanine Lender, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land.
2. The insured:
 - (a) assigns to the Mezzanine Lender the right to receive amounts otherwise payable to the insured under this policy, not to exceed the outstanding indebtedness under the Mezzanine Loan; and
 - (b) agrees that no amendment of or endorsement to this policy can be made without the written consent of the Mezzanine Lender except as provided in Section 12(a) of the Conditions and Stipulations.
3. The Company does not waive any defenses that it may have against the insured, except as expressly stated in this endorsement.
4. In the event of a loss under the policy, the Company agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b) or (e) to refuse payment to the Mezzanine Lender solely by reason of the action or inaction or knowledge, as of Date of Policy, of the insured, provided:
 - (a) the Mezzanine Lender had no knowledge of the defect, lien, encumbrance or other matter creating or causing loss on Date of Policy.
 - (b) this limitation on the application of Exclusions from Coverage 3(a), (b) and (e) shall:
 - (1) apply whether or not the Mezzanine Lender has acquired an interest (direct or indirect) in the insured either on or after Date of Policy, and
 - (2) benefit the Mezzanine Lender only without benefiting any other individual or entity that holds an interest (direct or indirect) in the insured or the land.
5. In the event of a loss under the Policy, the Company also agrees that it will not deny liability to the Mezzanine Lender on the ground that any or all of the ownership interests (direct or indirect) in the insured have been transferred to or acquired by the Mezzanine Lender, either on or after the Date of Policy.

6. The Mezzanine Lender acknowledges:
- (a) that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy; and
 - (b) that the Company shall have the right to insure mortgages or other conveyances of an interest in the land, without the consent of the Mezzanine Lender.
7. If the insured, the Mezzanine Lender or others have conflicting claims to all or part of the loss payable under the Policy, the Company may interplead the amount of the loss into Court. The insured and the Mezzanine Lender shall be jointly and severally liable for the Company's reasonable cost for the interpleader and subsequent proceedings, including attorneys' fees. The Company shall be entitled to payment of the sums for which the insured and Mezzanine Lender are liable under the preceding sentence from the funds deposited into Court, and it may apply to the Court for their payment.
8. Whenever the Company has settled a claim and paid the Mezzanine Lender pursuant to this endorsement, the Company shall be subrogated and entitled to all rights and remedies that the Mezzanine Lender may have against any person or property arising from the Mezzanine Loan. However, the Company agrees with the Mezzanine Lender that it shall only exercise these rights, or any right of the Company to indemnification, against the insured, the Mezzanine Loan borrower, or any guarantors of the Mezzanine Loan after the Mezzanine Lender has recovered its principal, interest, and costs of collection. If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to all rights and remedies of the insured claimant after the insured claimant shall have recovered its principal, interest, and costs of collection.

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

AGREED AND CONSENTED TO:

(Insert name of Insured)

(Insert name of Mezzanine Lender)

By: _____

By: _____

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY:

V. Access Endorsements

In October 2003 the ALTA adopted Endorsement Form 17 (Access and Entry), which extends existing policy coverage by insuring against loss if (1) the land does not abut a public street, (2) the street is not physically open and publicly maintained, (3) the insured has no “actual vehicular and pedestrian access,” and (4) the land has no existing curb cuts or entries. The title insurer may require a current survey of the property in order to issue this endorsement, which survey shows the accuracy of items (1)-(3) above. In January 2004, the ALTA adopted new Endorsement Form 17.1, which provides coverage against loss if (1) a specified easement parcel, as described on Schedule A or Schedule C of the policy, does not provide another portion of the land identified in Schedule A or Schedule C with both vehicular and pedestrian access to and from a specified street, (2) the street is not physically open and publicly maintained, or (3) the insured has no right to use existing curb cuts or entries along that portion of the street abutting the easement. The title insurer may require a current survey of both the dominant and servient parcels in order to issue this endorsement, which survey shows that accuracy of the matters insured against under the Form 17.1 Endorsement. The title insurer also will want to assure itself, before issuing this endorsement, that the insured easement parcel cannot be extinguished by foreclosure, levy, or execution of a real-estate tax or assessment lien on the easement parcel under applicable state law. The new ALTA Endorsement Forms 17 and 17.1 read as follows:

American Land Title Association

**Endorsement 17
(Access and Entry)
Adopted 10/22/03
Section IV—30**

ENDORSEMENT
Attached to Policy No.

Issued by
BLANK TITLE INSURANCE COMPANY

The Company insures against loss or damage sustained by the insured if, at Date of Policy: (i) the land does not abut and have both actual vehicular and pedestrian access to and from [insert name of street, road, or highway] (the “Street”), (ii) the Street is not physically open and publicly maintained, or (iii) the insured has no right to use existing curb cuts or entries along that portion of the Street abutting the land.

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

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY:

American Land Title Association Endorsement 17.1 (Indirect Access and Entry)

**Adopted 1/17/04
Section IV-30a**

ENDORSEMENT
Attached to Policy No.

Issued by
BLANK TITLE INSURANCE COMPANY

The Company insures against loss or damage sustained by the insured if, at Date of Policy: (i) the easement identified [as Parcel _____ in Schedule [A][C] (the ‘Easement’)] does not provide that portion of the land identified [as Parcel _____] in Schedule [A][C] both actual vehicular and pedestrian access to and from [insert name of street, road, or highway] (the ‘Street’), (ii) the Street is not physically open and publicly maintained, or (iii) the insured has no right to use existing curb cuts or entries along that portion of the Street abutting the Easement.

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

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY:

VI. Tax Parcel Endorsements

In October 2003 the ALTA adopted new Endorsement Forms 18 (Single Tax Parcel) and 18.1 (Multiple Tax Parcel). The Form 18 Endorsement is a conventional tax parcel endorsement, for use where the land described on Schedule A of the title policy is a single and separate tax parcel and not part of a larger parcel of land. It insures against loss if the tax parcel includes more or less land than the land that is described on Schedule A of the policy. The Form 18.1 Endorsement covers property that consists of multiple tax parcels, including both fee and easement parcels. It insures against loss if the separate parcels described on Schedule A are not assessed for real estate tax purposes under the respective tax identification numbers listed in the endorsement. It further insures against loss as the result of the described easement being terminated or disturbed because of the non-payment of real estate taxes or assessments on the easement parcel. The title insurer will want to assure itself, before issuing this endorsement, that the insured easement parcel cannot be extinguished by foreclosure, levy, or execution of a real-estate tax or assessment lien on the parcel under applicable state law. The new ALTA Endorsement Forms 18 and 18.1 read as follows:

American Land Title Association

**Endorsement 18 (Single Tax Parcel)
Adopted 10/22/03
Section IV—31**

ENDORSEMENT
Attached to Policy No.

Issued by
BLANK TITLE INSURANCE COMPANY

The Company insures against loss or damage sustained by the insured by reason of the land being taxed as part of a larger parcel of land or failing to constitute a separate tax parcel for real estate tax purposes.

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

[Witness clause optional]

BLANK TITLE INSURANCE
COMPANY

BY:

ENDORSEMENT
Attached to Policy No.

Issued by
BLANK TITLE INSURANCE COMPANY

The Company insures against loss or damage sustained by the insured by reason of:

1. those portions of the land identified below not being assessed for real estate tax purposes under the listed tax identification numbers or those tax identification numbers including any additional land:

Parcel:

Tax Identification Numbers:

2. the easements, if any, described in Schedule A being cut off or disturbed by the non-payment of real estate taxes or assessments imposed on the servient estate by a governmental authority.

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

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY:

VII. Contiguity Endorsements

In October 2003 the ALTA adopted Endorsement Forms 19 and 19.1. Endorsement Form 19 is designed for the situation where the land described in the title policy consists of two or more separately described parcels of property that appear to have common or contiguous boundaries along portions of each of the parcels. Endorsement Form 19 insures that the individual parcels are contiguous along specific property lines and insures against any loss due to any gaps, strips, or gores between or separating any of the contiguous boundary lines. (The title insurer likely will require a survey, or other acceptable evidence, to establish the boundaries of the individual properties in order to provide this coverage and to demonstrate that no gaps, strips, or gores exist). The endorsement requires that the specific boundaries as to which each parcel is contiguous be identified. Endorsement Form 19.1 insures that the single parcel of land described on Schedule A of the title policy is contiguous to adjacent land not described in or insured by the policy. The endorsement would describe the adjacent uninsured parcel as well as any contiguous boundaries. (The title insurer likely will require a survey, or other acceptable evidence, to confirm that the insured parcel is in fact contiguous to the adjacent, uninsured parcel and that there are no gaps, gores, or strips of land separating the parcels). The endorsement requires that the specific boundaries as to which each parcel (the insured parcel and the adjacent uninsured parcel) is contiguous be identified. The new ALTA Endorsement Forms 19 and 19.1 read as follows:

[For use when multiple parcels make up the “land” as defined in the policy]

ENDORSEMENT

Attached to Policy No.

Issued By

BLANK TITLE INSURANCE COMPANY

The Company insures against loss or damage sustained by the insured by reason of:

- (1) the failure [of the _____ boundary line of Parcel A] of the land to be contiguous to [_____ boundary line of Parcel B] **[for more than two parcels, continue as follows: “; of the _____ boundary line of Parcel B] of the land to be contiguous to [the _____ boundary line of Parcel C] and so on until all contiguous parcels described in the policy have been accounted for];** or
- (2) the presence of any gaps, strips or gores separating the contiguous boundary line described above.

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

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY
BY:

[For use when the insured desires contiguity coverage between the “land” as defined in the policy and some other parcel of land]

ENDORSEMENT
Attached to Policy No.

Issued By
BLANK TITLE INSURANCE COMPANY

The Company insures against loss or damage sustained by the insured by reason of:

- (1) the failure of the land to be contiguous along its _____ boundary line to [describe the land that is contiguous to the “land” as defined in the policy by its legal description or by reference to a recorded instrument – e.g. “. . . that certain parcel of real property legally described in the deed recorded as Instrument No. _____, records of _____ County, State of]; or
- (2) the presence of any gaps, strips or gores separating the contiguous boundary line described above.

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

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY
BY:

VIII. First Loss Endorsement

On April 19, 2004, ALTA adopted Endorsement Form 20 (First Loss – Multiple Parcel Transactions), which entitles a mortgage lender, in multi-property transactions, to payment on a loss without requiring foreclosure of all of the properties secured by the mortgage or deed of trust. Loss under a Loan Policy is determined by the likelihood that the lender would suffer a loss or damage that would result in a claim under the Loan Policy. Broadly speaking, there are several conditions that must precede a claim by an insured lender. Not only must a title defect exist (which would result in a claim under the policy), but additionally the lender must suffer a loss that would require at least two independent conditions to exist. First, the borrower must be in default under the insured mortgage or deed of trust. Second, after successfully foreclosing on the mortgage or deed of trust, the value of the property (as diminished by the title defect) must be less than the outstanding indebtedness due on the loan. It is these two additional requirements that provide the title underwriter greater latitude when insuring a lender as opposed to an owner of real property. Because the liability under the Loan Policy is generally reduced from the original face amount (and because mortgage loans are seldom made for 100% of the value of the property), the lender may have a difficult time demonstrating loss or damage, i.e., that the value of the land (even subject to the title defect) is less than the reduced liability under the policy. By way of comparison, an insured under an Owner's Policy would be able to tender a claim for any insured defect without considering these matters. In multi-property transactions, lenders may be reluctant to foreclose on all of the security in order to establish a loss under the Loan Policy, if just one of the properties has a title defect. The overall collateral value may be sufficient to service the debt (and the overall loan-to-value ratio may be unimpaired), and the lender may not wish to jeopardize a favorable relationship with an otherwise creditworthy borrower by accelerating the entire debt and commencing a foreclosure proceeding (perhaps driving the borrower out of business). Endorsement Form 20 is designed to address these lender concerns, and does not require foreclosure of all of the secured parcels insured under the policy before the lender is entitled to be indemnified for a loss (the obligation to defend remains unchanged). This endorsement obligates the title insurer to pay the insured the "Material Impairment Amount," i.e., the difference between the aggregate value of all the collateral (real and personal), as diminished by any title defect that results in a claim under the policy, and the amount of the outstanding mortgage indebtedness. The endorsement does not require the insured to first accelerate the debt, or to exercise any remedies or pursue any action with respect to any of the secured parcels of property, whether by foreclosure or the exercise of its rights under any other ancillary documents or agreements such as guaranties, assignments of rents, bonds or insurance policies. The title company retains its right of subrogation (including its right of subrogation against the debtor and any guarantor of the debt), but that right is subordinate to the rights and remedies of the insured lender. If the title insurer pays a loss under this endorsement to the insured lender, it retains the right ultimately to seek reimbursement from the insured lender for any amounts paid in excess of the secured indebtedness, up to the amount of such loss payment. The new ALTA Endorsement Form 21 reads as follows:

ENDORSEMENT
Attached to Policy No.

Issued by
BLANK TITLE INSURANCE COMPANY

This endorsement is effective only if the Collateral includes at least two parcels of real property.

1. For the purposes of this endorsement:
 - (a) "Indebtedness" means all monetary obligations evidenced by the loan documents at Date of Policy as secured by the insured mortgage, but limited to the balance outstanding at the time the claim is made.
 - (b) "Collateral" means all property, including the land, given as security for the Indebtedness.
 - (c) "Material Impairment Amount" means the amount by which any matter covered by this policy for which a claim is made diminishes the value of the Collateral below the Indebtedness.

2. Subject to the provisions of Section 8 of the Conditions and Stipulations, in the event of a claim resulting from a matter insured against by this policy, the Company agrees to pay that portion of the Material Impairment Amount that does not exceed the limits of liability imposed by Sections 2 and 7 of the Conditions and Stipulations without requiring:
 - (a) maturity of the Indebtedness by acceleration or otherwise;
 - (b) pursuit by the insured of its remedies against the Collateral;
 - (c) pursuit by the insured of its remedies under any guaranty, bond or other insurance policy.

3. Nothing in this endorsement shall impair the Company's right of subrogation. However, the Company agrees that its right of subrogation shall be subordinate to the rights and remedies of the insured. The Company's right of subrogation shall include the right to recover the amount paid to the insured pursuant to paragraph 2 from any debtor or guarantor of the Indebtedness after payment or other satisfaction of the remainder of the Indebtedness and other obligations secured by the lien of the insured mortgage. The Company shall have the right to recoup from the insured claimant any amount received by it in excess of the Indebtedness up to the amount of the payment under paragraph 2.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior

endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

BLANK TITLE INSURANCE
COMPANY

BY:

IX. Creditors' Rights Endorsement

On April 19, 2004, the ALTA adopted Endorsement Form 21 (Creditors' Rights), which insures against loss an Owner's or Loan Policy because of the occurrence, on or before the date of the policy, of a fraudulent transfer or preference under federal bankruptcy law or state insolvency or creditors' rights laws. The endorsement also confirms that the title insurer will pay all costs, expenses and attorneys' fees to defend the insured against such claims. It expressly excludes coverage for loss, however, incurred as the result of any deliberate "bad acts" of the insured, i.e., any transfer or conveyance that the insured knew, at the time it acquired any estate or interest in the subject property, was actually intended to hinder, delay or defraud any creditor, or where the insured is found by a court not to have been a transferee or purchaser in good faith. Endorsement Form 21 does not insure a lender against a claim that its mortgage lien should be equitably subordinated in a subsequent bankruptcy proceeding, as this is considered a matter arising out of the lender's own voluntary conduct. (A title company's area of expertise is in reviewing land title records, not in examining the actions of the lender for evidence of misconduct, overreaching, or unconscionable behavior that may lead to subordination of all or a portion of the lender's claim against the borrower.)

The benefit of the Form 21 Endorsement is that it expressly provides affirmative coverage, so that the insured no longer has to request the removal of the existing policy exclusion for creditors' rights issues, or require a pre-1990 policy that did not contain the exclusion, and then wonder if the insuring provisions of the policy (without the exclusion) provided coverage for creditors' rights matters.

The title insurer must be careful, however, when issuing Endorsement Form 21, to provide affirmative coverage only for the specific risks that it feels comfortable that it can assume after conducting its due diligence. For example, the title insurer may decide, based on its analysis of the facts, to provide affirmative coverage against a claim alleging that the transaction constitutes a preferential transfer, but not for a claim alleging that the transaction constitutes a fraudulent conveyance. The agreement to provide such coverage places additional burdens on the title insurer, which may seek to be compensated for the additional risk by charging an additional risk premium for the endorsement. The title insurer may, in a transaction that presents a potential creditors' rights risk, need to conduct significant due diligence with respect to underwriting the transaction, including a detailed analysis of the following: the transferor's business and its financial statements; its payment history and ability to pay its business and trade debts as they are incurred; its capitalization both before and after the transfer; the amount of secured and unsecured credit obtained by the transferor both before and after the transfer; the incurrence of any large or unusual debt obligations; and the use of the funds and the party or parties to whom they will be distributed.

The legal costs of defending an action based on a creditors' rights claim may be substantial even if the title insurer ultimately prevails on the merits, and the title insurer may require that an independent third party with a demonstrated and substantial net worth indemnify the title insurer, for any loss incurred and paid under the policy and for the

costs of defense of any such claim (with, perhaps, the furnishing of security for such indemnity). Obviously, a “going concern” business (as would be the case with an entity that conducts a manufacturing or service operation) would require more due diligence than the typical passive real-estate bankruptcy-remote single-purpose borrowing entity (such as a limited liability company, limited partnership, or business trust) that has no personal liability for the mortgage debt and merely serves as an investment conduit vehicle for the equity holders.

The Form 21 Endorsement may need to be specifically approved by those states that strictly regulate title insurance coverages, endorsements and rates (such as New York, New Mexico, Texas and Florida) before they become available for general use in those states. The new ALTA Endorsement Form 21 reads as follows

ENDORSEMENT
Attached to Policy No.

Issued by
BLANK TITLE INSURANCE COMPANY

The Company insures against loss or damage sustained by the insured by reason of the avoidance in whole or in part, or a court order providing some other remedy, based on the voidability of any estate, interest, or mortgage shown in Schedule A because of the occurrence on or before Date of Policy of a fraudulent transfer or a preference under federal bankruptcy, state insolvency or similar creditors' rights laws.

The coverage provided by this endorsement shall include the payment of costs, attorneys' fees and expenses necessary to defend the insured against those counts, and no others, of any litigation seeking a court order which will result in loss or damage against which this endorsement provides insurance to the extent provided in the Conditions and Stipulations.

This endorsement does not insure against loss or damage if the insured: (a) knew when it acquired any estate, interest, or mortgage shown in Schedule A that the transfer, conveyance, or mortgage was intended to hinder, delay, or defraud any creditor; or (b) is found by a court not to be a transferee or purchaser in good faith.

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

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY: