

# Investors Title

INNOVATIVE BY INSTINCT

## UNDERWRITING MANUAL *Texas Supplement*

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## **I. Underwriting Topics**

### **A. How to Use These Topics**

The *General Underwriting Principles Manual* contains all "general" underwriting and exceptions and requirements. The *Supplement* contains exceptions and requirements peculiar to the state. Always review both the *General Underwriting Principles Manual* and the *Supplement* on each topic for underwriting practices.

## B. Access

**Access is Insured** - Texas title insuring forms include access as a covered risk unless such coverage is removed according to the instructions in Procedural Rule P-37.

“Access” that is insured generally in a title policy is “legal” access, not “physical” access. The Access Endorsement (T-23) does provide very limited physical access coverage to and from a specific public street.

**What is Access?** - Legal access means that there is an enforceable legal right to get to the land. Physical access means that there is a road, street, path, or other viable means to get to the land by walking, driving by vehicle, by boat on water, etc. Physical implies too that there are no physical barriers to such access like a fence, wall, tree or trees, deep creek or arroyo, river, or a cliff embankment. Remember, the policies only insure “legal” access.

Legal access is most often accomplished by a public road or street being adjacent to the land to be insured. Land that has been “platted” into a subdivision pursuant to state law should always have legal access pursuant to a public or private road established and defined on the plat. Subdivision plats must conform to statutory platting requirements and municipal and county ordinances and be approved by local governmental authorities as part of the official subdivision platting process (creation of a subdivision with legal description of land established by “lots”) and the subdivision plat must be filed in the County platting or subdivision records.

Subdivision plats may include a statement of public dedication of the streets and roadways created in the plat. In Texas there has been a statutory procedure for platting since 1976. There are recorded plats that predate the statutory procedures that have and should be relied upon to establish legal lots and streets and roadways if in common and continuous use in the community.

A county or municipality also may legally establish and define roadways and streets as public roads outside of the platting process by ordinance, order or decree. A street or road that has been established as a public road affords legal access.

Legal access may also be established by agreement. The most common method is by Easement Agreement that creates a right to access a piece of property (the dominant estate) by crossing adjoining property(ies) (the servient estate) that lies between the dominant estate and a public road. Such easement is an easement appurtenant and runs with the land which means that the easement is attached to or considered a part of the land that it serves and if the land is conveyed the easement is also conveyed whether the deed specifically includes the easement or not.

### 1. **Excluding Access Coverage in the Title Policy -**

**Procedural Rule P-37 says:**

**P-37. Lack of a Right of Access**---If the company is not satisfied as to the insurability of access to and from the land, the title to which or a lien thereon is to be insured, it may make the following exceptions to the insuring form:

- a. To the Owner Policy ( [Form T-1](#) ): "Lack of a right of access to and from the Land. Covered Risk number 4 is hereby deleted."
- b. To the [Mortgagee Policy](#): "Lack of a right of access to and from the Land. Covered Risk number 4 is hereby deleted."

- c. To the Residential Owner Policy ( [Form T-1R](#) ): "Lack of a right of access to and from the land. Company deletes the insurance of access under Covered Title Risks."

## 2. Access – General or Specific

General Access – The T-1 and T-1R Owner’s and the T-2 Loan Policies insure access as a “covered risk” unless the access coverage is removed pursuant to P-37 above. General access means that no specific road, route or adjacent property is described as the point or place of access. It is just a general right without any further description. Policy coverage of a general right of access is usually adequate for lenders and owners particularly in residential transactions in platted subdivisions.

Specific Access – The Commitment and policies, after proper and complete title examination has been completed on the land over which the easement passes, can describe an easement tract as a separately insured tract of land and under the estate or interest insured, as “Access Easement pursuant to the easement created in document recorded in \_\_\_\_\_, Real Property records, \_\_\_\_\_, Texas. This is most likely available and applicable with rural metes and bounds property where there is an access easement agreement that creates the access across another’s property(ies) to get to the insured tract.

This is a “specific” right of access. The policy will specifically describe the document that creates the easement and that document will specifically describe the exact location of the access easement. Even though the easement is being specifically insured, exception must be made in Schedule B to the “terms and conditions of the easement created in \_\_\_\_\_” as well as to any liens, encumbrances, or defects that affect the land and predate and are recorded prior to the easement grant.

Even if there is specific access described in a deed or an easement agreement, if the insureds do not request specific access coverage, the general coverage is automatic, available and acceptable.

There is no specific additional charge for an easement to be specifically insured as access in a policy, but an additional chain of title charge pursuant to R-9 may be applicable if the easement is being created as a part of the current transaction (see terms of R-9). If the easement has a separate value, that should be included in the sales price of the land and easement combined. If the seller is not supplying the easement, but the easement is being obtained and will be insured in the Owner’s Policy, even if no actual consideration is being paid for obtaining the easement, a value for the easement should be assigned and covered in the policy amount.

## 3. Special Issues with Access

1. **Utilizing prior title work.** Texas title insuring forms did not cover access generally prior to October 1, 1991. When using information from a starter/base file or prior policy, realize that title work prior to that date generally will not include a determination of access.
2. **Gap or vacancies between property lines or the land and the access.** Some surveyors indicate on the survey plat whether or not the property has access and how. In reviewing a survey plat always verify that there is access shown. If it is a rural or metes and bounds described property make sure that there is a public or private road that adjoins the property. Make sure there is no gap or strip of land

between the boundary of the access right of way and the subject land. A gap of any size matters. The access and the land must have a contiguous border.

3. **Railroads crossing the land or lying between the land and the public access.** Even if there is a long used, well constructed road crossing the railroad, if that road is not a municipal or county verified public road, then an easement from the railroad company is necessary and should be recorded. If property is traversed by a railroad call underwriting.
4. **Creating an easement over a subdivision lot to access land outside the subdivision or common ownership of subdivision lot and adjoining acreage.** Call underwriting.
5. **Limited controlled access property.** Some roads and streets, most particularly along large express ways and their adjacent feeder roads, the Texas Department of Transportation (TXDOT) may, for safety reasons and to minimize congestion, designate areas as "controlled access" which generally prohibits access from adjacent properties. Generally, there is a recorded document that defines these areas, but local knowledge and custom is very important in recognizing and taking appropriate steps to limit policy coverage of access if the transaction includes property that is or may be subject to a controlled access order of TXDOT.

#### **4. Access Endorsement (T-23)**

Attached to Policy No.

Issued by

BLANK TITLE INSURANCE COMPANY

HEREIN CALLED 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 single street, road, or highway] (the "Street"), or (ii) the Street is not physically open.

This endorsement is made a 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.

#### **FORM T-23: Access Endorsement**

##### **5. R-30 PREMIUM FOR ACCESS ENDORSEMENT (T-23).**

When the Access Endorsement (T-23) is issued with a Mortgagee Policy of Title Insurance (T-2) or Owner Policy (T-1) in accordance with Rule P-54, the premium for the Access Endorsement (T-23) shall be \$100 for each policy.

## 6. P-54. ACCESS ENDORSEMENT (T-23)

A Company may issue its Access Endorsement ([T-23](#)) on or after the date Rate Rule [R-30](#) is effective to a Loan Policy ([T-2](#)) or Owner's Policy ([T-1](#)) on land which contains improvements and which is not residential real property, if its underwriting requirements are met and if it is paid the premium, if any, prescribed in Rate Rule [R-30](#). The Company may add any exception to the endorsement that it considers, in its sole discretion, to be appropriate. The Company shall delete any insuring provision or portion thereof if it does not consider that risk acceptable. Any insured matter covered in the Access Endorsement ([T-23](#)) may be insured only by the use of this endorsement.

### a) Access Endorsement T-23 Underwriting Guidelines

1. The land insured cannot be “residential real property.” (See definition of “residential real property” in Procedural Rule P-1u.)
2. The land must have “improvements” on it. (There must be something more than just fences and/or sidewalks. The improvements should be substantial. Call underwriting if not clear.)
3. If the access to be insured in the T-23 is pursuant to an easement, please call underwriting.
4. An acceptable survey must be provided that:
  - a. verifies that the street to be named in the endorsement abuts the land and that the street is “physically open;”
  - b. shows the location of the relevant easement, if applicable;
  - c. shows substantive improvements located on the land; and
  - d. shows that there exists one or more curb cuts providing actual vehicular access from the named street onto the land. Pedestrian access is also covered by the endorsement unless removed. Such access should be apparent, if not call underwriting.
5. If endorsement coverage is requested to more than one street, a separate endorsement form must be utilized per street, but only one endorsement premium is charged per policy.

## C. Adverse Possession

Texas law from inception has always recognized the legal concept of obtaining title to land through continuous use and possession. This concept, known as “adverse possession” is not widely recognized in other states.

The laws of adverse possession are more directed to “limitations periods” and various requirements of possession and title documentation during those periods that affect the ability of the record title holder to recover (and or maintain) their title than how the adverse possessor establishes title.

The statutes defining the time periods to bring an action for recovery of land that may be adversely possessed are found primarily in Section 16 of the Civil Practice and Remedies Code ("C.P.& R. Code") of Vernon's Texas Codes Annotated ("V.T.C.A."). The laws establish limitations periods for a true owner to defeat an adverse claimant for 3, 5, 10 and 25 year periods.

### 1. Definitions

Definitions contained in Section 16 of the Civil Practices & Remedies Code are as follows:

**adverse possession** means an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person.

**color of title** means a consecutive chain of transfers to the person in possession that:

- is not regular because of a muniment that is not properly recorded or is only in writing or because of a similar defect that does not want of intrinsic fairness or honesty; or
- is based on a certificate of headright, land warrant, or land script.

**peaceable possession** means use and control of real property that is continuous and is not interrupted by an adverse suit to recover the property or an intervening period of use and possession by the record owner.

**title** means a regular chain of transfers of real property from or under the sovereignty of the soil.

### 2. ELEMENTS

Adverse possession is an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person. (Civil Practices & Remedies Code, Section 16.021)

Additionally, the courts have generally held that to constitute adverse possession sufficient to deprive the owner of legal title to his property by an adverse claimant, such possession must be continuous (peaceable without interruption of a suit to recover) and uninterrupted for the statutory period and must be actual, notorious, distinct and hostile, and of such character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant.

Texas tends to be liberal on the application of the limitation periods. All the statutes require peaceable and adverse possession. The statutes also require that someone cultivate, use or enjoy. Essentially, the requirements are as follows:

a) Possession

Possession must be actual, visible, exclusive, notorious, continuous (peaceable without interruption of a suit to recover), and hostile.

The statutory definition of possession uses the word peaceable, that is, continuous and not interrupted by adverse suit or intervening possession by another. Furthermore, adverse possession (as defined under Section 16.021) is an actual and visible appropriation of the land.

The courts have elaborated to some extent on the statutory definitions. For instance, the courts have held that the land must be appropriated to the purpose for which it is adapted. The possession must also be exclusive and thus cannot be shared with the owner. An occasional use of the land for timber purposes is of itself not sufficient.

Furthermore, it is not essential that an actual residence be situated on the land; nor is it necessary that a tenant actually occupy the land between harvesting one crop and planting another. As such, the requirement of continuity is not defeated by temporary and reasonable breaks either in the possession or in the enclosure where there is no intention to abandon possession.

b) Cultivate, use or enjoy

Use, along with the act of possession, must be either the element of use, cultivation, enjoyment, or other acts of ownership. However, it is only necessary to use the land for the purpose for which it is adapted.

c) Must do both A and B under a "Claim of Right"

"Claim of right" has been defined by the courts to mean that the claimant must have entered on the land intending to claim it as his own and to keep it for himself.

As stated above, the adverse claimant's claim must be adverse or hostile to the true owner (i.e., under a "Claim of Right"). It is not necessary that he claim adversely to the entire world but only the true owner. The claimant must not in any way acknowledge the title in any other person than himself and he must assume that there is an owner against whom he is claiming the title. An adverse claim may also be defeated if the record owner can prove that the use by the possessor was actually with the permission of the record owner. In that case the "adverse" aspect fails.

### **3. Payment of Taxes**

Regardless of the statute involved, the payment of taxes is regarded as an indication of a claim of ownership. Non-payment of taxes may also be significant.

However, except for the five year and the twenty-five year statutes, the payment or non-payment of taxes in itself is not binding one way or the other.

Under the five year statute the payment of all taxes against the land prior to delinquency is an essential element.

If the property being claimed is not subject to taxation by reason of exemption, the failure to pay taxes does not prevent the claimant from perfecting limitation title under the five year statute.

#### **4. Effect of Disability (§ 16.022)**

If the true owner is under a disability at the time the property vests or adverse possession commences, the time of the disability is not included in the statutory limitation period (the statute of limitations is tolled).

Disabilities include: 1) if the owner is under the age of 18 (regardless of marriage), or 2) not of sound mind, or 3) serving in the United States Armed Forces during a time of war.

**Note:** Except as provided by the 25 year limitation statutes (Sections 16.027 and 16.028), after the termination of the legal disability, a person has the same time to present a claim that is allowed to others under chapter 16 of the C.P.&R. Code.

#### **5. Tacking of Successive Interests (§ 16.023)**

To satisfy a limitations period, peaceable and adverse possession does not need to continue in the same person, but there must be privity of estate between each holder and his successor. "Privity of estate" exists between successive occupants or possessors of land within the meaning of statute permitting adverse possession to be continued in different persons having privity of estate between them, when the earlier occupants' possession and claim passed or was transferred to the latter occupants by agreement (deed), gift, devise or inheritance.

See *Hutto v. Cook*, 139 Tex. 571, 164 S.W.2d 513 (1942)

Article 5516, R.C.S.1925, provides that: 'Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them.' Privity of estate, as said in Vol. 2, p. 169, s 89, of Texas Jurisprudence, is shown under the following circumstances: 'Privity of possession between successive occupants or possessors of the land is shown to have existed, \* \* \* by proof that the earlier occupant's possession and claim passed or was transferred to the later occupant by agreement, gift, devise or inheritance.' Also, see *McAnally v. Texas Company*, 124 Tex. 196, 76 S.W.2d 997. Where it is shown that the earlier occupant died and the later occupant went into possession as an heir, privity between them is established, and their periods of possession may be tacked. *Olive v. Bevil*, 55 Tex. 423; 2 Tex.Jur., p. 170, s 89; 2 C.J.S., Adverse Possession, s 79b, p. 623; 1 Amer.Jur., p. 880, s 153; Tiffany's The Law of Real Property, 3d Ed., 1939, Vol. 2, p. 435, s 1146

#### **6. Requirements Limitations Periods to Effectuate Adverse Possession**

##### **a) Adverse Possession: 3-Year Limitations Period (§ 16.024)**

A person must bring suit to recover real property held by another in peaceable and adverse possession under title (defined under the statute to mean a regular chain of transfers of real property from or under the sovereignty of the soil) or color of title (defined under the statute to mean a consecutive chain of transfers to the person in possession that is not regular because of the muniment that (A) is not properly recorded

or is only in writing or because of a similar defect that does not want of intrinsic fairness or honesty, or (B) is based on a certain certificate of headright, land warrant, or land script.) not later than three (3) years after the date the cause of action accrues.

It is extremely difficult to prove a limitations title under the three year statute, and Texas is one of the few states that has a three-year limitation period.

b) Adverse Possession: 5-Year Limitations Period (§ 16.025)

A person must bring suit not later than five years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property, pays applicable taxes on the property, and claims the property under a duly registered deed. This statute does not apply to a claim based on a forged deed or a deed executed under a forged power of attorney.

Requirements (for 5 year claim):

- 1) All the traditional requirements must be met.
- 2) The claimant must pay all taxes.
- 3) Claim under a deed (can't be a forged deed).
- 4) No links to the sovereign are required.
- 5) Can be based on a void deed, so long as it appears valid on its face.
- 6) The statute begins to run when the deed is recorded, and the adverse claimant must be in possession at the time the statute of limitations begins.

See *Hunter v. Dodds*, 624 S.W.2d 365, 369 (Tex.App.-Waco 1981, no writ).

Title by limitation under the five-year statute results from possession with claim of ownership, evidenced by a deed or deeds duly registered and compliance with the other requirements of the statute. For the purpose of limitation, it is wholly immaterial that the deed conveys no title. An instrument in the form of a deed not void on its face, even though the grantor be wholly without title, satisfies the requirement of the statute.

c) Quitclaim Deeds:

In order to determine whether or not a “quitclaim” deed will qualify under the statute, you must look to the face of the instrument itself. The instrument must contain language that effectively acts to transfer the land itself instead of just “all my right, title and interest”. If it does, then it is treated as a deed. The basic general Quitclaim Deed in Texas does not transfer specific title and therefore does not qualify.

See *Porter v. Wilson*, 389 S.W.2d 650 (Tex.1965).

An instrument which purports to convey such right, title and interest as a grantor may have and no more will not qualify as a deed under the statute as it does not purport to convey the land itself nor does it specify any particular interest which is purportedly conveyed. Here the limitation claimants contend that the instrument under which they hold affords a basis for a limitation claim to all of Lots 21 and 24 under the five-year statute. The circumstance that the instrument employs the words, ‘all our right, title and interest’ or the word ‘quitclaim’ is not fatal to their contention as it must be

determined from the instrument as a whole whether it purports to convey the land itself or merely such interest as the grantor may have therein.

d) Adverse Possession: 10-Year Limitations Period (§ 16.026)

A person must bring suit not later than ten (10) years after the day the cause of action accrues to recover real property held in peaceful and adverse possession by another who cultivates, uses, or enjoys the property. Without a title instrument, peaceful and adverse possession is limited under this statute to one hundred sixty (160) acres, including improvements, unless the number of acres actually enclosed exceeds 160. If the number of enclosed acres exceeds 160 acres, peaceable and adverse possession extends to the real property actually enclosed. Peaceable possession of real property held under a duly registered deed or other memorandum of title that fixes the boundaries of the possessor's claim extends to the boundaries specified in the instrument.

(1) Enclosed Land (§ 16.031)

A tract of land owned by one person that is entirely surrounded by land owned, claimed, or fenced by another is not considered enclosed by a fence that encloses any part of the surrounding land. Possession of the interior tract by the owner or claimant of the surrounding land is not peaceable and adverse possession unless the interior tract is separated from the surrounding land by a fence or at least one-tenth of the interior tract is cultivated and used for agricultural purposes or is used for manufacturing purposes.

See: Santa Fe Energy Operating Partners, L.P. v. Carrillo, 948 S.W.2d 780, 784, n. 2 (Tex.App.-San Antonio 1997, writ denied)

Legally sufficient evidence supported jury's implicit finding that at least one-tenth of interior tracts were used for agricultural purposes for more than ten years as required for purported owners of land to obtain title to tracts by adverse possession under ten-year statute of limitations; purported owners fenced entire tract, containing portions they held of record and portions they did not hold of record, purported owners later added interior fence dividing property in half, purported owners had used entire acreage for grazing cattle since that time, and purported owner testified that almost all of land was cultivated. V.T.C.A., Civil Practice & Remedies §§ 16.021(1), 16.026, 16.031(b).

(2) Adjacent Land (§ 16.032)

Possession of land that belongs to another by a person owning or claiming five thousand (5,000) or more fenced acres that adjoined the land is not peaceable and adverse unless the land is separated from the adjacent enclosed tract by a substantial fence and at least one-tenth of the land is cultivated and used for agricultural purposes or used for manufacturing purposes or there is actual possession of the land.

e) Adverse Possession: 25-Year Limitations Period Notwithstanding Disability (§ 16.027)

A person, regardless of whether the person is or has been under a legal disability, must bring suit not later than 25 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property.

f) Adverse Possession With Recorded Instrument: 25-Year Limitations Period (§ 16.028)

A person, regardless of whether the person is or has been under a legal disability, may not maintain an action for the recovery of real property held for 25 years before the commencement of the action in peaceable and adverse possession by another who holds the property in good faith and under a deed or other instrument purporting to convey the property that is recorded in the deed records of the county where any part of the real property is located.

Adverse possession of any part of the real property held under a recorded deed or other recorded instrument that purports to convey the property extends to and includes all of the property described in the instrument, even though the instrument is void on its face or in fact.

A person who holds real property and claims title under this section has a good and marketable title to the property regardless of a disability arising at any time in the adverse claimant or a person claiming under the adverse claimant.

g) Evidence of Title to Land by Limitations (The "Exercise of Dominion" Statute) (§ 16.029)

In a suit involving title to real property that is not claimed by the State, it is prima facie evidence that the title to the property has passed from the person holding apparent record title to an opposing party if it is shown that for one or more years during the twenty-five years preceding the filing of the suit, the person holding apparent record title to the property did not exercise dominion over or pay taxes on the property and during the period the opposing party and those whose estate they own have openly exercised dominion over or pay taxes on the property and during the period the opposing party and those whose estates they own have openly exercised dominion over and have asserted a claim to the land and have paid taxes on it annually before becoming delinquent for as long as twenty-five years.

## 7. Co-Tenants

Co-tenants are owners who hold a present right to possession in undivided interests in a tract of land. Since there is a unity in their right to possession, the ordinary rules relating to the adverse claim are not applicable. The law presumes that the possession of one co-tenant is a right of the common title. One cannot assert an adverse claim against another co-tenant unless the other co-tenant is aware that the adverse claim is being asserted.

Based on the Texas Supreme Court's holding in *Todd v. Bruner* (see synopsis below), National Investors Title Company will not rely on limitations title to divest the interest of a co-tenant except when there has been clear repudiation of the co-tenancy (e.g. 25+-year-old deed purporting to convey the full fee simple title and executed by one or more co-tenants without accounting for the interest of another co-tenant.) As shown below, the Court in *Todd v. Bruner* specifically held that, without clear repudiation of co-tenancy, possession and payment of taxes become irrelevant, because every co-tenant is entitled to occupy the property, and every co-tenant is legally obligated to pay the ad valorem taxes (but it does accrue a possible right of reimbursement from other co-tenants).

*Todd v. Bruner*, 365 S.W.2d 155 (Tex. 1963): HELD, *ten-year title limitations statute did not bar plaintiffs' recovery of their undivided interest in the land, because defendants'*

*predecessor failed to adequately notify plaintiffs' predecessor of supposed repudiation of the common title.* “Insofar as the true owner of property is concerned, there is a vast difference between the notice of adverse claim conveyed by the presence of a stranger in possession and that of a cotenant in possession. It is not unusual for one cotenant to have exclusive possession and make beneficial use of lands for rather long periods of time and ordinarily such use is with the acquiescence of the other cotenants. Cotencancy is a common form of land tenure when owners belong to the same family. . . . *The statutes of limitation are statutes of repose. They are intended to settle and support land titles and are not designed to afford a method whereby one member of a family may appropriate property belonging to his kinsman.* Hence the legal requirement that notice of repudiation of the common title should be clear, unequivocal and unmistakable. . . . Any cotenant has a right to be in the possession of property in which he owns an interest, hence if the acts of the respondents and their predecessors in title are susceptible of explanation consistent with the existence of the common title then such acts cannot be such as to give constructive notice to the cotenants out of possession. [Citations omitted.] *Possession, coupled with payment of taxes, is not notice to a cotenant of a repudiation of the common title.* Stiles v. Hawkins, Tex.Com.App., 207 S.W. 89; Poenisch v. Quarnstrom, Tex.Sup.Ct., 361 S.W.2d 367 [italics added].” 365 S.W.2d 159, 160.

## 8. Underwriting Requirements

### a) Adverse Interests Disclosed By Inspection or Survey:

The possibility always exists that the property to be insured may be physically occupied by someone other than the record owner, under a claim of right which may be adverse to the record owner. As outlined in “Rights of Parties in Possession” section of this supplement, Title Companies, in accordance with Procedural Rule P-3, are authorized to take exception in Schedule B of any title policy to:

Rights of parties in possession.

This exception protects the Title Insurer (underwriter) against possible claims arising through adverse possession. This important exception allows the underwriter to deny a claim based on information that should have been available to buyer and seller by inspection of the land. Remember in the normal transaction, no title person ever actually sees the property and therefore has no way of knowing about issues of possession other than what is disclosed by the parties themselves or the surveyor and survey plat. If specific issues of possession are disclosed by the parties or survey plat or otherwise that are not authorized by a recorded document, then special exception must be taken to such matter in Schedule B.

Note: an underwriter may not deny a claim based on the exception “Rights of parties in possession” if there is actually a document of record that establishes or provides some evidence or claim of right to use the defined land for a possessory purpose (such as an easement) whether the title examination discovered the document or not.

A common possession issue which might result in a policy claim that should be disclosed by an inspection or survey is on a residential transaction where a fence is inset more than 1 foot on the land to be insured. In this situation it may be assumed that the adjoining land owner, regardless of who purportedly owns the fence, believes that his property goes all the way to the fence and he may have “used and possessed” the area between the actual

property line and the fence in such a way and for the requisite time to establish adverse possession.

If a survey discloses the existence of a fence inset (not along an alley or street) by more than 1 foot, then the title commitment and policies should include an exception that reads as follows:

Rights of adjoining land owners in and to that portion of the land on the \_\_\_\_\_ side of the land lying between the fence line and the boundary line as shown on survey dated \_\_\_\_\_, by \_\_\_\_\_, RPLS.

The most costly claims arise between owners of large tracts of land; although, it is certainly not uncommon for property owners to fight over very small strips of land. A specific Boundary Line Agreement executed by the adjoining land owners acknowledging the plat boundary line and not the fence as the true boundary line may be necessary to resolve the inset fence issue. Of course the recorded Boundary Line Agreement would then be specifically excepted to in Schedule B.

## **9. Title Practices**

The laws governing adverse possession are complicated and confusing. Title insurance should not be issued on title based only on evidence or affidavits of adverse possession. National Investors Title Company will generally require a final judgment quieting title in the adverse possessor with such judgment being based on personal service on those persons having record title or otherwise holding an equitable interest. Please call or contact underwriting where record title reflects a claim of adverse possession in the last 50 years of the chain of title and/or where the current seller is seeking to convey property without satisfactory or verifiable record title.

## D. Arbitration

### 1. Generally

Arbitration is a form of alternative dispute resolution (ADR) where a disagreement or complaint between parties is submitted to individuals chosen as arbitrators (or arbiters), to hear the parties evidence and arguments regarding the dispute in an informal setting (not a courtroom) and then make a decision that resolves the dispute. Arbitration can be “binding,” which means the decision is final between the parties with no ability to take the dispute to a different venue to “retry” the case; or non-binding where after the arbitration decision, the dispute still can be retried in a court of law. In the last twenty years, the use of arbitration and its sister ADR format, mediation has greatly increased – the reasons:

1. to avoid the expense and time of litigation and a courtroom trial, and
2. to relieve the serious backlogs and congestion in the court systems.

Arbitration can be authorized and/or mandated by agreement/contract, pre or post dispute (voluntary) and by legislation or governmental regulation (involuntary).

Title insurance forms in Texas, even though they are promulgated by the Texas Department of Insurance pursuant to statutory requirements, when issued, legally are a contract between the underwriter and the named insured(s) and subject to interpretation and concepts of contract law.

An arbitration provision is included in the “CONDITIONS” section of the:

- T-1 Owner’s Policy of Title Insurance
- T-1R Texas Residential Owner’s Policy of Title Insurance One-to-Four Family Residence
- T-2 Loan Policy of Title Insurance
- T-2R TEXAS SHORT FORM RESIDENTIAL LOAN POLICY-ONE-TO-FOUR FAMILY

See specific wording below:

#### OWNER’S POLICY OF TITLE INSURANCE (T-1)

##### 14. ARBITRATION.

Either the Company or the Insured may demand that the claim or controversy shall be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association (“Rules”). Except as provided in the Rules, there shall be no joinder or consolidation with claims or controversies of other persons. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy. All arbitrable matters when the Amount of Insurance is \$2,000,000 or less shall be arbitrated at the option of either the Company or the Insured, unless the Insured is an individual person (as distinguished from an Entity). All arbitrable matters when the Amount of Insurance is in excess of \$2,000,000 shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules shall be binding upon the parties. Judgment

upon the award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.

#### TEXAS RESIDENTIAL OWNER'S POLICY OF TITLE INSURANCE ONE-TO-FOUR FAMILY RESIDENCES (T-1R)

##### 8. ARBITRATION

If it is permitted under Texas or federal law, you and we may agree to arbitration when you file a claim. The arbitration may decide any matter in dispute between you and us.

Arbitration is one means of alternative dispute resolution. It may lessen the time and cost of claims settlement. You may wish to consider another form of mediation or use the court system. If you choose arbitration, you may give up some discovery rights and your right to sue.

The arbitration award may:

- a. include attorneys' fees if allowed by state law, and/or
- b. be entered as a judgment in the proper court.

The arbitration shall be under the Title Insurance Arbitration Rules of the American Arbitration Association. You may choose current Rules or Rules in existence on Policy Date.

The law used in the arbitration is the law of the place where the property is located. You can get a copy of the Rules from us.

**Note: the arbitration provision in the T-1R is really just a notice or disclosure of the concepts and potential uses of arbitration and does not bind either party to arbitration.**

#### LOAN POLICY OF TITLE INSURANCE (T-2)

##### 13. ARBITRATION.

Either the Company or the Insured may demand that the claim or controversy shall be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association ("Rules"). Except as provided in the Rules, there shall be no joinder or consolidation with claims or controversies of other persons. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy. All arbitrable matters when the Amount of Insurance is \$2,000,000 or less shall be arbitrated at the option of either the Company or the Insured, unless the Insured is an individual person (as distinguished from an Entity). All arbitrable matters when the Amount of Insurance is in excess of \$2,000,000 shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules shall be binding upon the parties. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.

The Commitment for Title Insurance T-7 contains a separate page that serves as a notice and a form to delete the arbitration provisions of the T-1 and T-2 policies under certain situations.

This page should always be included with an issued Commitment.

## DELETION OF ARBITRATION PROVISION

(Not applicable to the Texas Residential Owner Policy)

Arbitration is a common form of alternative dispute resolution. It can be a quicker and cheaper means to settle a dispute with your Title Insurance Company. However, if you agree to arbitrate, you give up your right to take the Title Company to court and your rights to discovery of evidence may be limited in the arbitration process. In addition, you cannot usually appeal an arbitrator's award.

Your policy contains an arbitration provision (shown below). It allows you or the Company to require arbitration if the amount of insurance is \$2,000,000 or less. If you want to retain your right to sue the Company in case of a dispute over a claim, you must request deletion of the arbitration provision before the policy is issued. You can do this by signing this form and returning it to the Company at or before the closing of your real estate transaction or by writing to the Company.

The arbitration provision in the Policy is as follows:

“Either the Company or the Insured may demand that the claim or controversy shall be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association (“Rules”). Except as provided in the Rules, there shall be no joinder or consolidation with claims or controversies of other persons. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy. All arbitrable matters when the Amount of Insurance is \$2,000,000 or less shall be arbitrated at the option of either the Company or the Insured, unless the Insured is an individual person (as distinguished from an Entity). All arbitrable matters when the Amount of Insurance is in excess of \$2,000,000 shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules shall be binding upon the parties. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.”

\_\_\_\_\_  
SIGNATURE

\_\_\_\_\_  
DATE

Procedural Rule P-36 provides the required wording and instructions as to deleting the arbitration provisions from the policy forms and also contains the Deletion of Arbitration form as included above in the Commitment page addressing deletion of arbitration. The procedural parts of P-36 are as follows:

P-36. Arbitration Provisions.

A Company shall notify its proposed insured under a Loan Policy (Form T-2 or T-2R) or an Owner's Policy (Form T-1) of the insured's right to delete the arbitration provision [§13 of the Conditions and Stipulations of the Loan and §14 of the Conditions and Stipulations of the Owner's Policy (Form T-1) from the policy at no additional charge to the insured.

- A. A Company shall, upon specific request of the proposed insured under a Loan Policy (Form T-2 or T-2R), delete Section 13 of the Conditions relating to arbitration from that policy by
1. Typing in Schedule B of the policy the following language:  
"Section 13 of the Conditions of this Policy is hereby deleted."
  2. Selecting the appropriate option in Schedule A of the policy to "delete Section 13."
- B. A Company shall, upon specific request of the proposed insured under an Owner's Policy (Form T-1), delete Section 14 of the Conditions relating to arbitration from that policy by typing in Schedule B of the policy the following language:  
"Section 14 of the Conditions of this Policy is hereby deleted."
- C. If a Company does not issue a commitment prior to issuance of the Owner's Policy (Form T-1) or Loan Policy (Form T-2 or T-2R), it shall provide the promulgated Deletion of Arbitration form to the insured before issuance of the policy or shall delete the arbitration provision as provided above.

Any request made under this procedural rule must be made prior to the issuance of the policy. There is no Rate rule addressing arbitration because there is no charge for deleting the arbitration provisions from the referenced policies. When a deletion of arbitration has been requested and is applicable, P-36 must be followed specifically.

## E. Condominiums, Townhouses, PUDs, and Cooperatives

### 1. **Defining issue – pre 1/1/94 and post 1/1/94**

Chapter 81 of the Property Code (the “Condominium Act”) and certain provisions of Chapter 82 of the Property Code (the “Uniform Condominium Act”) apply to a condominium regime created before 1/1/94.

Chapter 82 applies to a condominium regime created on or after 1/1/94.

A condominium for which the declaration was recorded before 1/1/94 may be governed exclusively under Chapter 82 if either: (1) the owners of units vote to amend the declaration (in accordance with the procedure authorized by the declaration) and that amendment is filed for record in the condominium records, or (2) the declaration, although recorded before 1/1/94 states, that the provisions of Chapter 82 will apply to the condominium regime after 1/1/94.

### 2. **Creating and Maintaining a Condominium Regime Created Prior to 1/1/94**

#### a) What is a “condominium” and what elements comprise a “condominium”?

*Condominium* means a form of real property ownership that combines separate ownership of individual apartments or unit with common ownership of other elements.

*Declaration* means the instrument that establishes property under a condominium regime.

*Property* means real property, whether leased or owned, the improvements on the property, and the incorporeal rights that are appurtenant to the property

*Building* includes each principal structure on or to be erected on real property dedicated in a declaration to a condominium regime

*Apartment* means an enclosed space, regardless of whether it is designed for residential or other use, that consists of one or more rooms in a building and that has a direct exit to a thoroughfare or to a common space that leads to a thoroughfare

*General common elements* means the property that is part of a condominium regime other than property that is part of or belongs to an apartment in the regime, including: (a) land on which the building is erected; (b) foundations, bearing walls and columns, roofs, halls, lobbies stairways, and entrance, exit and communication ways; (c) basements, flat roofs, yards, and gardens, except as otherwise provided; (d) premises for the lodging of janitors or persons in charge of the building, except as otherwise provided; (e) compartments or installation of central services such as power, light, gas, water, refrigeration, central heat and air, reservoirs, water tanks and pumps, and swimming pools; and (f) elevators and elevator shafts, garbage incinerators, and all other devices and installations generally existing for common use

*Limited Common Elements* means a portion of the common elements allocated by unanimous agreement of a council of owners for the use of one or more but less than all of the apartments, such as special corridors, stairways and elevators, sanitary services common to the apartments of a particular floor, and similar areas or facilities

b) How is a condominium regime created and administered?

A zoning, subdivision, building code, or other real property use law, ordinance or regulations may not prohibit the condominium form of ownership or impose any requirement on a condominium that it would not impose on a physically identical development under a different form of ownership. Otherwise, Chapter 82 of the Property Code does not invalidate or modify any provision of any zoning, subdivision, building code, or other real property use law, ordinance or regulation. (Section 82.006 – applies to all condominiums)

An owner or developer of an existing or a planned building establishes a condominium regime by recording a master deed, master lease, or declaration (Section 81.101).

The declaration must contain:

1. the legal description of the real property dedicated to the condominium regime, depicted by a plat of the property that locates and identifies by letter each existing or proposed building.
2. a general description of each apartment, including the square footage, location, number and other information necessary for identification of the apartment, depicted by a plat of the floor of the building in which the apartment is located that identifies the building by letter and the floor and apartment by number.
3. a general description of each area not already described that is subject to individual ownership and exclusive control, such as a garbage or carport, depicted by a plat that shows the area and appropriately identifies it by letter or number.
4. a description of the general common elements that are not described under No. 1 above.
5. a description of the limited common elements.
6. each apartment's fractional or percentage interest in the entire condominium regime.
7. a provision that the declaration may only be amended at a meeting of the apartment owners at which the amendment is approved by the holders of at least 67 percent of the ownership interests in the condominium.
8. a provision that an amendment of the declaration may not alter or destroy a unit or a limited common element without the consent of the owners affected and the owners' first lien mortgagees.

A declaration, master deed, or master lease for a condominium may contain any covenants or other matters the declarant considers appropriate (Section 81.102)

Each county clerk shall maintain suitable records called "Condominium Records" in which the clerk shall record master deeds, master leases, and declarations for condominiums. A county clerk shall record plats and other instruments in a declaration without prior approval from any other authority (Section 81.103).

(1) Amendment

After a condominium declaration is recorded with a county clerk, the declaration may not be amended except at a meeting of the apartment owners at which the amendment is approved by the holders of at least 67 percent of the ownership interests in the condominium (Section 81.111).

(2) Termination (Section 81.110)

- a) The creditors who have recorded encumbrances against any portion of the building must agree to accept the undivided portions of the property owned by the debtors as security.
- b) If the declaration does not provide for termination by agreement of the owners, then the owners must agree unanimously to terminate. If the declaration does provide for termination by agreement of the owners, then either the stated percentage of owners set out in the declaration, or 67 percent of the owners, whichever is greater, must agree to terminate. No amendment may be made to a declaration to reduce the vote required for termination of the condominium regime.
- c) After agreement of the creditors and owners, the owners request the county clerk of the county in which the regime is located to merge the records of the estates that comprise the condominium regime.
- d) If a condominium regime is terminated, each apartment owner owns an undivided interest in the common property that corresponds to the undivided interest previously owned by the apartment owner in the common elements.
- e) Property that has been removed from a condominium regime may be dedicated to another condominium regime at any time.

c) What have you got when you've got an "apartment" in a condominium (regime established prior to 1/1/94 and not voluntarily governed under the Uniform Condominium Act)?

(1) Apartment Ownership (Section 81.104) –

- a) An owner of an apartment in a condominium regime owns it exclusively, and the owner may possess, convey or encumber the apartment, or subject it to judicial acts, independently of other apartments in the condominium regime.
- b) An individual title or interest in an apartment in a condominium regime is recordable.
- c) The entire interest in the condominium regime shall be divided among the apartments.
- d) A person may own an apartment in a condominium regime jointly or in common with others.
- e) A condominium association may not alter or destroy an apartment or a limited common element without the consent of all owners affected and the first lien mortgagees of all affected owners

(2) Apartment Boundaries (Section 81.105) –

- a) The boundaries of an apartment in a condominium regime are the interior surfaces of the apartment's perimeter walls, floors, and ceilings, and the exterior surfaces of the apartment's balconies and terraces.

- b) Except for common elements, the portion of a building on the boundaries of an apartment in a condominium regime and the airspace within those boundaries are part of the apartment.
- c) In interpreting a legal instrument relating to an apartment, the physical boundaries of the apartment are conclusively presumed to be the proper boundaries of the apartment regardless of any settling, rising, or lateral movement of the building containing the apartment and regardless of variances between boundaries shown on the plat of the building and the actual boundaries of the building.

**Interest in Common Elements (Section 81.107)** – An owner of an apartment in a condominium regime shares ownership of the regime’s common elements with the other apartment owners. An apartment owner may use the common elements according to their intended purposes, as expressed in the plat, declaration, or bylaws of the condominium regime, without interfering with the rights of the other apartment owners. The ownership of the general and the limited common elements of a condominium regime may not be judicially partitioned or divided while they are suitable for a condominium regime (Section 81.108).

**Conveyance of Common Elements (Section 81.109)** – An apartment in a condominium regime and the undivided interest of an apartment owner in the common elements of the regime that are attributable to the apartment may not be conveyed separately. If a conveyance of an apartment does not refer to the common elements, the undivided interest of the apartment owner in the general and the limited common elements of the regime attributable to the apartment are conveyed with the apartment.

### **3. *Developing and Maintaining a Condominium Regime created after 1/1/94***

- a) What is a “condominium” and what elements comprise a condominium?

*Condominium* means a form of real property with portion of the real property designated for separate ownership or occupancy, and the remainder of the real property designated for common ownership or occupancy solely by the owners of those portions. Real property is a condominium only if one or more of the common elements are directly owned in undivided interests by the unit owners. Real property is not a condominium if all of the common elements are owned by a legal entity separate from the unit owners, such as a corporation, even if the separate legal entity is owned by the unit owners.

*Declaration* means a recorded instrument, however denominated, that creates a condominium, and any recorded amendment to that instrument

*Unit* means a physical portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described by the declaration

*Identifying Number* means a symbol or address that identifies only one unit in a condominium

*Common elements* means all portions of a condominium other than the units and includes both general and limited common elements

*General common elements* means common elements that are not limited common elements

*Limited common elements* means a portion of the common elements allocated for the exclusive use of one or more but less than all of the units

*Plan* means a dimensional drawing that is recordable in the real property records of the condominium plat records and that horizontally and vertically identifies or describes units and common elements that are contained in buildings

*Plat* means a survey recordable in the real property records of the condominium plat records and containing the information required under Section 82.059 (see “How is a condominium is created and administered?” below)

*Unit owner* means a declarant or other person who owns a unit, or a lessee of a unit in a leasehold condominium whose lease expires simultaneously with any lease the expiration or termination of which will remove the unit from the condominium, but does not include a person having an interest in a unit solely as security for an obligation

*Declarant* means a person, or group of persons acting in concert, who:

1. As part of a common promotional plan, offers to dispose of the person’s interest in a unit not previously disposed of; or
2. Reserves or succeeds to any special declarant right.

*Development rights* mean a right or combination of rights reserved by a declarant in the declaration to:

1. Add real property to a condominium;
2. Create units, common elements, or limited common elements within a condominium;
3. Subdivide units or convert units into common elements; or
4. Withdraw real property from a condominium.

*Special declarant rights* means rights reserved for the benefit of a declarant to:

1. Complete improvements indicated on plats and plans filed with the declaration;
2. Exercise any development right;
3. Make the condominium part of a larger condominium or a planned community;
4. Maintain sales, management, and leasing offices, signs advertising the condominium, and models;
5. Use easements through the common elements for the purpose of making improvements within the condominium or within real property that may be added to the condominium; or
6. Appoint or remove any officer of board member of the association during any period of declarant control.

b) How is the condominium regime created and administered?

A zoning, subdivision, building code, or other real property use law, ordinance or regulations may not prohibit the condominium form of ownership or impose any requirement on a condominium that it would not impose on a physically identical development under a different form of ownership. Otherwise, Chapter 82 of the Property Code does not invalidate or modify any provision of any zoning, subdivision, building code, or other real property use law, ordinance or regulation. (Section 82.006 – applies to all condominiums)

(1) Creation (Section 82.051)

- a) A condominium may be created only by recording a declaration executed in the same manner as a deed by all persons who have an interest in the real property that will be conveyed to the unit owners and by every lessor of a lease the expiration or termination of which will terminate the condominium or reduce its size. The declaration shall be recorded in each county in which any portion of the condominium is located.
- b) A declarant may not convey an interest in a unit until each holder of a mortgage on the unit immediately before conveyance has executed a consent to declaration, and the consent has been recorded, or is recorded concurrently with the conveyance, as apart of the declaration or an amendment to the declaration.
- c) If a recorded declaration is not properly executed, that defect may be cured by a subsequent execution conforming for paragraph 1) above. After an execution defect is cured in this manner, the declaration is retroactively effective on the date it was first recorded.
- d) A county clerk shall, without prior approval from any other authority, record declarations and amendments to declarations in the real property records, and a county clerk shall record condominium plats or plans in the real property records or in books maintained for that purpose, as a declarant may request. The book for the condominium plat records shall be the same size and type as the book for recording subdivision plats.

(2) Contents of Declaration for All Condominiums (Section 82.005) – the declaration for a condominium must contain:

- a) The name of the condominium, which must include the word “condominium” or be followed by the words “a condominium” or a phrase that includes the word “condominium” and the name of the association;
- b) The name of each county in which any part of the condominium is located;
- c) A legally sufficient description of the real property included in the condominium;
- d) A description of the boundaries of each unit created by the declaration, including the unit’s identifying number;
- e) A statement of the maximum number of units that the declarant reserves the right to create;
- f) A description of the limited common elements (other than fixtures partially within and partially outside the boundaries of a unit, and fixtures designed to serve a single unit but located outside that unit’s boundaries);
- g) A description of any real property, except real property subject to development rights that may be allocated subsequently as limited common elements, together with a statement that the property may be so allocated;

- h) An allocation to each unit of its allocated interests;
- i) Any restrictions of use, occupancy, or alienation of the units;
- j) A description of and the recording data for recorded easements and licenses appurtenant to or included in the condominium or to which any portion of the condominium is or may become subject by reservation in the declaration'
- k) The method of amending the declaration;
- l) A plat or plan or the recording data of a plat or plan that has been recorded in the real property or condominium plat records'
- m) A statement of the association's obligation to rebuild or repair any part of the condominium after a casualty or any other disposition of the proceeds of a casualty insurance policy;
- n) A description of any development rights and other special declarant rights reserved by the declarant, together with a legally sufficient description of the real property to which each of those rights applies, and a time limit within which each of those rights must be exercised;
- o) If any development right may be exercised with respect to different parcels of real property at different times, a statement to that effect, together with:
  - a) either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development rights, or a statement that no assurances are made in those regards, and
  - b) a statement as to whether, if any development right is exercised in any portion of the real property subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real property.

(3) Additional items to be included in declarations for leasehold condominiums (Section 82.056)

- a) Any lease, the expiration or termination of which may terminate the condominium or reduce its size, must be recorded. The lessor shall sign the declaration, and the declaration must state:
  - 1. the recording data for the lease;
  - 2. the date on which the lease is scheduled to expire,
  - 3. a legally sufficient description of the real property subject to the lease,
  - 4. any right of the unit owners to redeem the reversion and the manner in which the unit owners may exercise that right, or a statement that the unit owners do not have that right;
  - 5. any right of the unit owners to remove improvements within a reasonable time after the expiration or termination of the lease, or a statement that the unit owners do not have that right; and
  - 6. any right of the unit owners to renew the lease and the conditions of renewal, or a statement that the unit owners do not have that right.
- b) After the declaration for a leasehold condominium is recorded, neither the lessor nor the lessor's successor in interest may terminate the leasehold interest of a unit owner who makes timely payment of the unit owner's share of the rent and otherwise complies with all covenants that, if violated, would entitle the lessor to terminate the lease. A unit owner's leasehold interest is not affected by failure of any other person to pay rent or fulfill any other covenant.

- c) Acquisition of the leasehold interest of a unit owner by the owner of the reversion or remainder does not merge the leasehold and fee simple interests unless the leasehold interests of all unit owners subject to that reversion or remainder are acquired.
  - d) If the expiration or termination of a lease decreased the number of units in a condominium, the allocated interests shall be reallocated as though those units had been taken by condemnation unless otherwise provided by the declaration. Reallocation shall be confirmed by an amendment to the declaration prepared, executed and recorded by the association.
- (4) Additional items to be included in declarations with regard to allocation of common element interests, votes and common expense liabilities (Section 82.057)
- a) The declaration shall allocate a fraction or percentage of undivided interest in the common elements and in the common expenses of the association, and a portion of the votes in the association, to each unit and state the formulas used to establish those allocations. These allocations may not discriminate in favor of units owned by a declarant.
  - b) If units may be added to or withdrawn from the condominium, the declaration must state the formulas to be used to reallocate the allocated interests among all units included in the condominium after the addition or withdrawal.
  - c) The declaration may provide:
    - 1. that different allocations of votes must be made to the units on particular matters specified in the declaration and
    - 2. for class voting on specified issues affecting the class if necessary to protect valid interests of the class.
  - d) A declarant may not use cumulative or class voting to evade any limitation imposed on declarants by Chapter 82 of the Property Code. Units may not constitute a class because the units are owned by a declarant.
  - e) Except for minor variations due to rounding, the sums of the undivided interest in the common elements and of the common expense liabilities allocated at any time to all the units shall equal one if stated as fractions or 100 percent if stated as percentages. If a discrepancy exists between an allocated interest and the result derived from application of the pertinent formula, the allocated interest prevails.
  - f) The common elements are not subject to partition. Any purported conveyance, judicial sale, or other voluntary or involuntary transfer of an undivided interest in the common elements without the unit to which that interest is allocated is void.
- (5) Additional items to be included in declarations with regard to limited common elements (Section 82.058)
- a) The limited common elements and the provisions of the declaration relating to the right to use the limited common elements may not be altered without the consent of each affected unit owner and the owner's first lien mortgagee.
  - b) Except as otherwise provided by the declaration, a limited common element may be reallocated by an amendment to the declaration, executed by the unit owners between or among whose units the reallocation is made. The persons executing the amendment shall deliver it to the association, which shall record it at the expense of the reallocating unit owners.

- c) A common element not previously allocated as a limited common element may not be allocated except pursuant to the declaration made in accordance with Section 82.055(7). The allocation shall be made by amendment to the declaration.

(6) Additional items to be included in declarations with regard to plats and plans (Section 82.059)

- a) Plats and plans are a part of the declaration and may be recorded as a part of the declaration or separately. Each plat or plan must be legible and contain a certification that the plat or plan contains all information required by this section.
- b) Each plat must show:
  - 1. The name and a survey or general schematic map of the entire condominium;
  - 2. The location and dimensions of all real property not subject to development rights, or subject only to the development right to withdraw, and the location and dimensions of all existing improvements within that real property;
  - 3. A legal sufficient description of any real property subject to development rights, labeled to identify the rights applicable to each parcel;
  - 4. The extent of any encroachments by or on any portion of the condominium;
  - 5. To the extent feasible, a legally sufficient description of all easements serving or burdening any portion of the condominium, and the location of any underground utility line that is actually known by the declarant at the time of filing the declaration to have been constructed outside a recorded easement;
  - 6. The location and dimensions of any vertical unit boundaries not shown or projected on recorded plans and the unit's identifying number;
  - 7. The location, with reference to established data, for any horizontal unit boundaries not shown or projected on recorded plans and the unit's identifying number;
  - 8. A legally sufficient description of any real property in which the unit owners will own only an estate for years, labeled as "leasehold real property";
  - 9. The distance between noncontiguous parcels of real property constituting the condominium;
  - 10. The location and dimensions of limited common elements, other than fixtures partially within and partially outside the boundaries of a unit, and fixtures designed to serve a single unit but located outside that unit's boundaries;
  - 11. In the case of real property not subject to development rights, all other matters required by law on land surveys; and
  - 12. The distance and bearings locating each building from all other buildings and from at least one boundary line of the real property constituting the condominium.

- c) A plat may also show the intended location and dimensions of a contemplated improvement to be constructed anywhere within the condominium, which must be labeled either “MUST BE BUILT” or “NEED NOT BE BUILT”;
- d) To the extent not shown on the plats, plans must show:
  - 1. The location and dimensions of the vertical boundaries of each unit, and the unit’s identifying number;
  - 2. The horizontal unit boundaries, with reference to established data, and the unit’s identifying number; and
  - 3. Any units, appropriately identified, in which the declarant has reserved the right to create additional units or common elements.
- e) Unless the declaration provides otherwise, the horizontal boundaries of part of a unit located outside a building have the same elevation as the horizontal boundaries of the inside part and need not be depicted on the plats and plans. Interior walls and partitions within a unit need not be included in the plats of plans.
- f) On exercising any development right, the declarant shall record either new plats and plans necessary to conform to the requirements of this section or new certifications of plats and plans previously recorded if those plats and plans otherwise conform to the requirements of this section.
- g) An independent licensed surveyor or engineer shall certify at least one plat, whether contained in one or more pages, showing all perimeter land boundaries of the condominium, except for additional real property, and showing the locations on the ground of all buildings labeled “MUST BE BUILT” in relation to land boundaries.
- h) Certifications of any other plat or plan required by Chapter 82 shall be made by an independent licensed architect, surveyor, or engineer.

(7) Amendment of declaration (Section 82.067)

A declaration, including the plats and plans, may be amended only by vote or agreement of unit owners to which at least 67 percent of the votes in the association are allocated, or any larger majority the declaration specifies, except in those instances where action is permitted by only the declarant, the association or certain unit owners under other provisions of Chapter 82.

To be effective, an amendment to the declaration must be recorded in each county in which any portion of the condominium is located. Amendments must be prepared, executed, recorded and certified by an officer of the association designated for that purpose or, in the absence of designation, by the president of the association.

(8) Termination of condominium (Section 82.068)

- a) Unless the declaration provides otherwise, a condominium may be terminated only by the agreement of 100 percent of the votes in the association and each holder of a deed of trust or vendor’s lien on a unit. The declaration may not allow a termination by less than 80 percent of the votes in the association if any unit is restricted exclusively to residential uses.
- b) An agreement of unit owners to terminate a condominium must be evidenced by the execution or ratification of a termination agreement by the requisite number of unit owners. If, pursuant to a termination agreement, the real property constituting the condominium is to be sold following termination, the termination agreement must set forth the terms of the sale. The

termination agreement and all ratifications of the agreement must be recorded in each county in which a portion of the condominium is located.

- c) Foreclosure or enforcement of a lien or encumbrance against the entire condominium does not of itself terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a portion of the condominium does not withdraw that portion from the condominium, unless the portion is withdrawable real property or unless the mortgage being foreclosed was recorded before the date the declaration was recorded and the mortgagee did not consent in writing to the declaration.
- c) What have you got when you have a “unit” in a condominium (regime established on or after 1/1/94)?

(1) **Unit Boundaries (Section 82.052)**

Except as otherwise provided by the declaration or plat:

- a) If walls, floors, or ceilings are designated as boundaries of a unit, then all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting part of the finished surfaces are a part of the unit, and all other portions of the walls, floors, or ceilings are a part of the common elements
- b) If any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture is partially within and partially outside the designated boundaries of a unit, then the portion serving only that unit is a limited common element allocated solely to that unit, and the portion serving more than one unit or the common elements is a part of the general common elements
- c) Subject to the provision immediately above, the spaces, interior partitions, and other fixtures and improvements within the boundaries of a unit are a part of the unit; and
- d) Shutters, awnings, window boxes, doorsteps stoops, porches, balconies, patios, and exterior doors and windows or other fixtures designed to serve a single unit, but located outside the unit’s boundaries, are limited common elements allocated exclusively to that unit.

**4. Matters Pertaining to Closing**

a) Separate Titles and Taxation (Section 82.005)

- 1) If there is a unit owner other than a declarant, each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real property.
- 2) If there is a unit owner other than a declarant, each unit must be separately taxed and assessed, and no separate tax or assessment may be rendered against common elements for which a declarant has not reserved development rights. Any portion of the common elements for which a declarant has reserved any development right must be separately taxes and assessed against the declarant, and the declarant alone is liable for payment of those taxes.
- 3) If there is no unit owner other than a declarant, the real property constituting the condominium may be taxed and assessed in any manner provided by law.

- 4) The laws relating to homestead exemptions from property taxes apply to condominium units, which are entitled to homestead exemptions in those cases in which the owner of a single family dwelling would qualify.

b) Management of a condominium regime formed prior to 1/1/94 (under Chapter 81)

- 1) The council of owners of a condominium regime may adopt and amend bylaws (Section 81.201).
- 2) The bylaws of a condominium regime govern the administration of the buildings that comprise the regime (Section 81.202).
- 3) The apartment owners who own at least 51 percent of the interests in a condominium regime, as determined under the declaration, are a majority of the apartment owners (Section 81.203).
- 4) By resolution of a majority of the council of owners, or in the manner provided or required by the declaration or bylaws, the council of owners may acquire the insurance it deems appropriate for the protection of the buildings and the apartment owners. Each apartment owner and mortgagee of an apartment owner is a beneficiary of the policy, whether named as a beneficiary or not, in proportion to the interest of an apartment owners in the condominium regime as established by the declaration (Section 81.205).
- 5) If an apartment owner conveys the apartment and assessments against the apartment are unpaid, the apartment owner shall pay the past due assessments out of the sale price of the apartment, or the purchase shall pay the assessments, in preference to any other charged against the property except real property tax liens or an obligation due under a validly recorded mortgage (Section 81.208).

c) Management of a condominium regime formed after 1/1/94 (under Chapter 82)

- 1) A unit owners' association must be organized as a profit or nonprofit corporation. The declarant may not convey a unit until the Secretary of State has issued a certificate of incorporation. The membership of the association at all times consists exclusively of all the unit owners or, following termination of the condominium, all former unit owners entitled to distribution of proceeds, or the owners' heirs, successor, or assigns (Section 82.101).
- 2) The Unit Owners' Association has a variety of powers, some of which are to: (1) adopt and amend bylaws, (2) adopt and amend budgets for revenues, expenditures and reserves, (3) collect assessments for common expenses and assessments from unit owners, and (4) maintain and repair the condominium, and (5) generally conduct the business of managing the condominium (Section 82.102).

d) Condominium Information Statement

Before offering to the public any interest in a unit, a declarant (or other party to whom declarant has transferred the responsibility) shall prepare a condominium information statement.

The condominium information statement must contain or accurately disclose:

- 1) The name and principal address of the declarant and of the condominium;
- 2) A general description of the condominium that includes the types of units and the maximum number of units;

- 3) The minimum and maximum number of additional units, if any, that may be included in the condominium;
- 4) A brief narrative description of any development rights reserved by a declarant and of any conditions relating to or limitations upon the exercise of development rights;
- 5) Copies of the declaration, articles of incorporation of the association, the bylaws, any rules of the association, and amendments to any of them, and copies of leases and contracts, other than loan documents, that are required by the declarant to be signed by the purchasers at closing;
- 6) A projected or pro forma budget for the association that: (a) must be prepared in accordance with generally accepted accounting principals and a consideration of the physical condition of the condominium and (b) must include a statement of the amount included in the budget as a reserve and the projected monthly common expense assessment for each type of unit.
- 7) A general description of each lien, lease, or encumbrance on or affecting the title to the condominium after conveyance by the declarant;
- 8) A copy of each written warranty provided by the declarant;
- 9) Description of any unsatisfied judgments against the association and any pending suits to which the association is a party or which are material to the land title and construction of the condominium of which a declarant has actual knowledge;
- 10) A general description of the insurance coverage provided for the benefit of unit owners; and
- 11) Current or expected fees or charges to be paid by unit owners for the use of the common elements and other facilities related to the condominium.

If a building contains units that may be occupied for residential use, the condominium information statement of a condominium containing any conversion building (a building that was occupied prior to becoming a condominium) must additionally contain:

- 1) A dated statement by declarant, based on a report by an independent architect or engineer, describing the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the building;
- 2) A dated statement by the declarant of the expected useful life of each item reported immediately above or a statement that no representations are made in that regard; and
- 3) A list of violations of building code or other governmental regulations of which the declarant has received notice and that have not been cured, together with the estimated cost of curing those violations (Section 82.154).

A declarant shall promptly amend the condominium information statement to reflect a material and substantial change in its contents and shall provide the amended condominium information statement to a prospective purchaser before closing (Section 82.153).

The person preparing all or part of the condominium information statement is liable for any false or misleading statement or for any omission of material fact in the portion of the condominium information statement that the person prepared (Section 82.152)

e) Resale Certificate

If a unit owner other than a declarant intends to sell a unit, before executing a contract or conveying the unit, the unit owner must furnish to the purchaser a current copy of the declaration, bylaws, any association rules, and a resale certificate that must have been prepared not earlier than three months before the date it is delivered to the purchaser. The resale certificate must be issued by the association and must contain the current operating budget of the association and statements of:

- 1) Any right of first refusal or other restraint contained in the declaration that restricts the right to transfer a unit;
- 2) The amount of the periodic common expense assessment and the unpaid common expenses or special assessments currently due and payable from the selling unit owner;
- 3) Other unpaid fees or amounts payable to the association by the selling unit owner;
- 4) Capital expenditures, if any, approved by the association for the next 12 months;
- 5) The amount of reserves, if any, for capital expenditures and of portions of those reserves designated by the association for a specified project;
- 6) Any unsatisfied judgments against the association;
- 7) The nature of any pending suits against the association;
- 8) The insurance coverage provided for the benefit of unit owners;
- 9) Whether the board has knowledge that any alterations or improvements to the unit or to the limited common elements assigned to that unit violate the declaration, bylaws, or association rules;
- 10) Whether the board has received notice from a government authority concerning violations of health or building codes with respect to the unit, the limited common elements assigned to that unit, or any other portion of the condominium;
- 11) The remaining term of any leasehold estate that affects the condominium and the provisions governing an extension or renewal of the lease; and
- 12) The name, mailing address, and telephone number of the association's managing agent, if any.

Not later than the 10th day after the date of receiving a written request by a unit owner, an association shall furnish to the selling unit owner or the owner's agent a resale certificate signed and dated by an officer or authorized agent of the association containing the required information. A selling unit owner or the owner's agent is not liable to the purchaser for erroneous information provided by the association in the certificate.

If an association does not furnish a resale certificate or any information required in the certificate within the 10-day period, the unit owner may provide the purchaser with a sworn affidavit signed by the unit owner in lieu of the certificate. The affidavit must state that the unit owner requested information from the association concerning its financial condition and that the association did not timely provide a resale certificate or the information required in the certificate. If a unit owner has furnished an affidavit to a purchaser, the unit owner and the purchaser may agree in writing to waive the requirement to furnish a resale certificate. Failure to provide a resale certificate does not void a deed to a purchaser.

A purchaser, lender or title insurer who relies on a resale certificate is not liable for any debt or claim that is not disclosed in the certificate. An association may not deny the validity of any statement in the certificate (Section 82.157).

An information statement or resale certificate need not be prepared or delivered in the case of:

- A modification or waiver by the agreement of a purchaser of a unit in a condominium in which all units are restricted to nonresidential use;
- A gratuitous disposition of a unit [gift, no consideration paid];
- A disposition pursuant to court order;
- A disposition by a government or governmental agency;
- A disposition by foreclosure or deed in lieu of foreclosure; or
- A disposition that may be canceled at any time for any reason and without penalty.

## **5. Title Policy Matters**

“Land” as defined in policies of title insurance when the condominium was formed prior to 1/1/94 and is not voluntarily governed under the Uniform Condominium Act that went into effect on 1/1/94.

### **a) Apartment Deeds (Section 81.106)**

A deed to an apartment in a condominium regime must:

1. Include by reference the plats in the declaration
2. State the encumbrances against the apartment;
3. Described the apartment according to the plat; and
4. State the apartment’s fractional or percentage interest in the condominium regime.

### **b) Conveyance of Common Elements (Section 81.109)**

An apartment in a condominium regime and the undivided interest of an apartment owner in the common elements of the regime that are attributable to the apartment may not be conveyed separately. If a conveyance of an apartment does not refer to the common elements, the undivided interest of the apartment owner in the general and the limited common elements of the regime attributable to the apartment are conveyed with the apartment.

“Land” as defined in policies of title insurance when the condominium was formed after 1/1/94 or is voluntarily governed under Uniform Condominium Act that went into effect on 1/1/94.

### **a) Description of Units (Section 82.054)**

A description of a unit is a sufficient legal description of the unit and all rights, obligations, and interests appurtenant to the unit that were created by the declaration or bylaws if the description contains:

1. The name of the condominium;
2. The recording data for the declaration, including any amendments, plats, and plans;
3. The county in which the condominium is located; and
4. The identifying number of the unit.

Additional considerations with regard to the definition of “land”:

Occasionally there is a discrepancy between the original declaration and the plats recorded with it, or a discrepancy between the original declaration and subsequent amendments, resulting in confusion regarding which general limited common elements and limited common elements pertain to a particular unit. For this reason, title insurers sometimes decline to include the general limited common elements and limited common elements in the legal description of the property to be insured. Section 82.054 supports that practice.

Occasionally a prospective purchaser wants to know if he will own the land [dirt] under his unit. In a condominium, the “land” is a general common element, and the purchaser will own an undivided percentage of the land upon which the condominium is built but will not exclusively own the land under his unit.

**6. Procedural Rule P-2: Amendment of Exception to Area and Boundaries (from the Basic Manual for the Writing of Title Insurance in the State of Texas)**

a) General Instructions

*In either an Owner or Mortgagee Policy, when the Insured desires to have amended the exception as to area and boundaries, (i.e. Item 2 of Schedule B) to delete all save “shortages in area”, a title insurance company may accept an existing real property survey and not require a new survey when providing area and boundary coverage if the title insurance company is willing to accept evidence of an existing real property survey, and an affidavit verifying the existing survey, notwithstanding the age of the survey or the identity of the person for whom the survey was prepared. If the transaction involves Residential Real Property, the affidavit verifying the existing survey shall be the Form T-47 Residential Real Property Affidavit. The policy to be issued shall cover the same land as described in the evidence of the existing real property survey. The Company may, if it considers the additional hazard insurable, amend such exception (the Company may waive the requirement of a survey in connection with the issuance of its Mortgagee Policy insuring the lien on a condominium unit), by indicating same in Schedule B of the policy or by endorsement as provided herein upon payment of the premium prescribed in R-16 in the case of an Owner Policy. The survey must be acceptable to the Company.*

Note that, according to P-2, the waiver of a survey is in connection with the issuance of a mortgagee policy only.

**Underwriting**

**National Investors Title does not require a survey and authorizes agent to rely on the declaration, plans and plat, along with an executed T-47, in connection with the issuance of an owner’s policy on a Condominium unit only.**

**7. Insuring Issues Pertaining to the Condominium Endorsement (T-28)  
(from the Basic Manual for the Writing of Title Insurance in the State of  
Texas)**

a) Condo Endorsement T-28

Attached to Policy No.  
Issued by BLANK TITLE INSURANCE COMPANY  
HEREIN CALLED THE COMPANY

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

- 1. The failure of the unit identified in Schedule A and its common elements to be part of a condominium within the meaning of the condominium statutes of the jurisdiction in which the unit and its common elements are located.*
- 2. The failure of the documents required by the condominium statutes to comply with the requirements of the statutes to the extent that such failure affects the title to the unit and its common elements.*
- 3. Present violations of any restrictive covenants which restrict the use of the unit and its common elements and which are contained in the condominium documents, except violations relating to environmental protection unless a notice of a violation thereof has been recorded or filed in the public records and is not excepted in Schedule B. The restrictive covenants do not contain any provisions which will cause a forfeiture or reversion of title.*
- 4. The priority of any lien for charges and assessments at Date of Policy provided for in the condominium statutes and condominium documents over the lien of any insured mortgage identified in Schedule A.*
- 5. The failure of the unit and its common elements to be entitled by law to be assessed for real property taxes as a separate parcel.*
- 6. Any obligation to remove any improvements which exist at Date of Policy because of any present encroachments or because of any future unintentional encroachment of the common elements upon any unit or of any unit upon the common elements or another unit.*
- 7. The failure of title by reason of a right of first refusal to purchase the unit and its common elements which was exercised or could have been exercised at Date of 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: \_\_\_\_\_*

b) Endorsement coverage analysis and requirements

(1) Item 1 – Failure of the unit to be part of a condominium

Review section entitled “How is a condominium regime created and administered?” for the procedure to create a condominium.

Also remember Section 82.003 (definition of “condominium”) which provides that real property is a condominium only if one or more of the common elements are directly owned in undivided interests by the unit owners, and that real property is not a condominium if all of the common elements are owned by a legal entity separate from the unit owners, such as a corporation, even if the separate legal entity is owned by the unit owners. The declaration and bylaws must be reviewed to make this determination.

If the property does not fit the description of a condominium, then it should not be insured as such.

(2) Item 2 – Failure of the documents required by the condominium statutes to comply with the requirements of the statutes to the extent that such failure affects the title to the unit and its common elements

In the same way that any legal description of real estate may fail or be insufficient because of lack of specificity or incompleteness, so too the description of the unit in the declaration and/or supporting documents must be specific and complete and define a specific space.

(3) Item 3 – Present violations of restrictive covenants which restrict the use of the unit and its common elements.

This insuring provision does not include violations relating to environmental protection unless a notice of such violation is filed for record in the public records. If the examiner does find a recorded notice of violation, this document should be excepted to in Schedule B.

(4) Item 3 – The restrictive covenants do not contain any provision which will cause a forfeiture or reversion of title.

If the restrictive covenants do contain a forfeiture or reversion of title provision, then the forfeiture or reversion must be specifically excepted to in Schedule B.

(5) Item 4 – The priority of any lien for charges and assessments over the lien of any insured mortgage.

If the association lien for charges and assessments is not expressly subordinated in the declaration or bylaws to the type of lien being insured, then the association lien must be specifically excepted to in Schedule B. Be particularly careful about construction and home equity liens.

(6) Item 5 – Failure to unit and common elements to be entitled by law to be assessed for real property taxes as a separate parcel.

See section entitled “Provisions that apply to both ‘apartments’ and ‘units’ ”. The law already provides that the unit and common elements are entitled by law to be assessed for real property taxes as a separate parcel, so technically, nothing further needs to be done with regard to this insuring provision. However, the unit owner and his lender will probably want the particular unit with its associated common elements to be taxed separately from the remainder of the condominium. The tax certificate should be reviewed to make that determination. If the unit and common elements are not taxed separately, then the prospective unit owner and lender should be advised.

(7) Item 6 – Obligation to remove improvements because of present encroachments or future unintentional encroachments of common elements.

Section 82.064 states: “To the extent that a unit or common element encroaches on another unit or common element, a valid easement for the encroachment exists. The easement does not relieve a unit owner of liability in case of the owner’s willful misconduct nor relieve a declarant or any other person of liability for failure to adhere to the plats and plans.” The easement created in this statute appears to protect the title insurer; therefore, there is no need to except to a known encroachment.

(8) Item 7 – Failure of title by reason of a right of first refusal.

Rights of first refusal can be created in either the declaration or the bylaws of the owners’ association. Both documents should be reviewed to determine whether these rights exist. The condominium information statement is not required to specify the existence of a right of first refusal, but does require that the declaration and bylaws be furnished to a prospective buyer. *The resale certificate does require specific disclosure of a right of first refusal.*

## F. Good Funds

Procedural Rule **P-27**, Disbursement From Escrow or Trust Fund Accounts, defines what is “Good Funds” in Texas and requires that good funds (meaning funds that have been collected by or in the possession of the receiving bank that cannot be recalled or rescinded) in an amount equal to all disbursements must be received and deposited before any disbursements may be made. Good Funds include: cash, wire transfer, cashier’s check, certified check, teller’s check, uncertified funds (personal checks, money orders, bank drafts, etc.) less than \$1,500, checks or warrants from governmental units or checks from an institution that has provided an Immediately Available Funds Procedure Agreement, T-37 or T-37A.

Teller’s checks rarely state that they are a teller’s check. Many come designated as an “Official Check.” An Official Check is not defined as good funds. However, if an Official Check is determined to fit within the definition of a Teller’s Check, then it is acceptable as good funds. See definition of a Teller’s Check in P-27 A.1.d.

If a lender wants to provide a check prior to closing that will be available for deposit and immediate funding upon closer obtaining a “funding number” from the lender or their appointed servicer (generally known as table funding), this procedure does not comply with the Good Funds rule, P-27 unless a transaction code is obtained pursuant to a fully executed T-37 or T-37A, Immediately Available Funds Procedure Agreement. See the named forms and P-27A.1.j. and B.5. It is advisable that a single point of contact be established in agent’s office to document and monitor the T-37 and/or T-37As and to obtain transaction codes from the designated person stated therein.

P-27 also advises that even if funds appear to be “Good Fund,” a trustee or closer is not required to disburse relying on such purported “good funds” if reasonable business judgment would indicate that the funds may not be collected.

### 1. Underwriting Guidelines

1. Be ever vigilant in determining that all funds necessary to disburse every debit in a file must be “good funds” meaning collected funds by the banking institution which holds the escrow account, before any disbursements are made. P-27 is a good rule that is promulgated specifically to protect the title insurance industry, the escrow officer and the consumers in a transaction.
2. Remember that a personal check is only good funds if it is less than \$1500.
3. An Official Check is not acceptable unless verified as a Teller’s Check.
4. Wired funds are always preferable to all other means of transferring money (except for ACH transfers).
5. Do not accept checks issued by foreign banks – only accept wired funds.
6. An escrow officer has significant discretion in determining whether or not funds and funding methods result in “good funds.” If there is any doubt about whether funds are “acceptable” always err on the side of waiting for “collected funds” as verified by the bank holding the escrow account.

Note - (remember accepting cash {in a single payment or a series of payments that total} in excess of \$10,000 in one transaction or in related transactions from the same person in the course of a 12 month period, requires IRS Notification under Form 8300).

Note 2 – the handling of transaction funds and the determination of good funds is an escrow and settlement service not covered by the Issuing Agency Agreement between title agent and National Investors Title insurance Company. Underwriter Guidelines are established herein only for the purpose of determining and maintaining the insurability of a transaction.

## G. Family Member Transactions – Homestead Pretended Sale

Sale of homestead property between family members is always suspect, particularly when the seller does not relinquish possession to the purchaser at closing.

One of the main issues is whether the transaction is actually a pretended sale of the homestead property. While a potential pretended sale can take many forms, the most common arises from the inability of the homestead owner to obtain the equity in the property through a Home Equity or Reverse Mortgage loan or is unable to obtain or qualify for any other loan, either because the property is homestead or because of borrower's age, lack of income, economic situation/credit scores, etc.

Most consumers do not understand the complicated issues surrounding Texas homestead rights and the Texas significant Constitutional limitations on the kind of liens that can be legally created against a homestead. Likewise, they may not understand that a sale of the homestead property to a family member who can qualify for the desired loan, to circumvent homestead laws, is inappropriate, potentially illegal, fraudulent and/or qualifies under the law as a "pretended sale." Even if done innocently and without intent to circumvent or violate a law, if the prospect arises that the property may be lost to foreclosure, the seller will likely embrace the homestead protections and seek to set aside the conveyance and subject lien as a pretended sale because it provides them enormous leverage in negotiating with the lender. It also creates a claim for the lender under its Loan Policy if there was no special exception to a pretended sale or to the assertion of homestead by the seller.

The Texas Constitution treats a pretended sale of a person's homestead as void.

**Section 50(c), Article 16, TEXAS CONSTITUTION:** "No mortgage, trust deed, or other lien on the homestead shall ever be valid unless it secures a debt described by this section, whether such mortgage, trustee deed, or other lien shall have been created by the owner alone, or together with his or her spouse in case the owner is married. All pretended sales of homestead involving any condition of defeasance shall be void."

Texas courts have historically favored protecting the homestead rights of the owner(s) even when the owner/seller may have lied or mislead others in circumventing homestead requirements or restrictions. If the selling family member does not intend for the sale to be a permanent, unconditional conveyance of the property, the conveyance can be later disputed by that person as an unenforceable conveyance of the person's homestead.

Orozco v. Sander, 824 S.W.2d 555 (Tex. 1992)—"At issue in this case is whether there is any evidence that Timothy Sander arranged the pretended sale of Maria Orozco's homestead, as the jury found, and thus created an unconstitutional second lien on it. A majority of this court holds that there is. Orozco sued Timothy Sander, Armando Villanueva, Ticor Title Insurance Company, and the original lien holder, Fireman's Fund Mortgage Corporation, alleging that they induced her to execute an unlawful deed on her homestead in violation of Article 16, Section 50 of the Texas Constitution. . . . The jury awarded Orozco \$50,000 in compensatory damages and \$75,000 in exemplary damages. . . . The record reflected that Sander and Villanueva carried out the pretended sale in the following manner: (1) Sander established the criteria for the sale and provided the forms for the transaction; (2) Villanueva obtained the money for the sale from Sander; (3) Orozco deeded her homestead to Villanueva in exchange for Villanueva executing a

purchase money note in the original principal of \$25,000, a deed of trust to secure the new note and another deed of trust to secure the assumption of the original indebtedness; (4) Villanueva leased Orozco's home back to her for the amount of money that she owned on the loans, but she had to pay the rent to Sander, instead of Villanueva; (5) in four to six years, when Orozco repaid Sander, Villanueva would reconvey the homestead to Orozco; (6) at closing, Sander purchased the \$25,000 note from Orozco for \$15,2150; (7) from the proceeds of sale, Orozco gave Villanueva \$5,000 to pay off the original note; however, Villanueva kept the money for himself instead of repaying the original indebtedness; (8) shortly after closing, Villanueva defaulted on the new note and the original note; (9) Sander and the original note holder notified Orozco of the default and their intention to foreclose on the property.”

## **1. Underwriting**

**Commitment and Owner's Title Policy** - the Commitment and Owner's Title Policy issued on a family members transaction must have the following exception placed in Schedule B:

Any claim, loss, damages, assertion of rights or allegations that the conveyance of the land was made under duress, without adequate consideration or as a pretended or illegal sale.

**Loan Policy** - To issue a Loan Policy insuring the lien created as a part of a sale of property that is or might be the homestead of seller to another family member without specific underwriting approval, the following requirements must be satisfied.

1. The transaction cannot exceed \$250,000.
2. Reasonable verification that the property to be insured is vacant or currently occupied by buyer. Obtain and analyze credible information regarding Seller's current residence and/or future residence to determine whether Seller is or has abandoned subject property as their homestead. Tax records and seller's designation on those tax records as to homestead exemption, on both subject property and property to which Seller is moving are important. Other supporting information as to actual residence or abandonment (by moving) of a homestead should be obtained from disinterested third parties, such as neighbors, mailman, etc.
3. The selling family member must execute a sworn Homestead Designation and Disclaimer that uses legal descriptions not addresses, to be recorded upon closing and funding. The Homestead Designation must designate other Texas property as owned and occupied as their homestead.
4. The ownership and occupancy of the seller's designated homestead property must be reasonably verified. You should always obtain a copy of the vesting deed for the designated property and verify through your own title search or the search of another title agent that the designated property is currently owned by the seller. The address on the seller's driver's license should match the address shown for the designated property. If review of the appraisal district records (and/or utility bills) indicates that the mailing address for both properties match the address for the designated property then this is additional verification that can be useful. It is further helpful to review appraisal district records to determine whether the designated homestead has been declared as homestead for ad valorem taxes.
5. For property situated in an urban area, the property to be sold and disclaimed must not be contiguous to the property claimed as homestead, unless the claimed homestead tract exceeds 10 acres.

6. For property situated in a rural area, the designated property must be 200 rural acres or more for a married couple or 100 rural acres or more for a single person.

For all transactions not meeting these requirements, underwriting approval is required.

**Note 1** - general requirements for these transactions are that the house and grounds be vacant, with all of seller's personal property removed, on the day of closing and inspected by the issuing or closing company or otherwise verified by knowledgeable parties memorialized in an affidavit, with photographs taken when feasible for the escrow file. When the seller has vacated the home prior to closing and the purchaser has already taken possession, inspection may be waived if the seller can provide evidence that he/she has established another residence ahead of closing, either by acquiring or renting another home (deed or written lease and at least two utility accounts in the seller's name are required).

If these conditions cannot be met, any Loan Policy issued in the transaction between related parties must contain the following pretended-sale exception:

Any claim, loss, damage or allegation or finding that the insured lien is invalid or unenforceable because of or resulting from acquisition of title to the land by the borrower through pretended or simulated sale of homestead in violation of Section 50(c), Art. 16, TEXAS CONSTITUTION or other law or regulation.

**Note 2** – Use of a Power of Attorney in any family member transaction, whether the attorney in fact is a family member or not, is highly suspect and requires underwriting approval.

## H. Foreclosure – Deed of Trust Lien

In Texas, the most common security device used to secure a loan on real estate is the deed of trust. It grants to the lender/mortgagee a lien on the property being purchased or pledged as security (collateral) for the loan. The deed of trust empowers a person or persons designated as the trustee(s) to sell the collateral when a default occurs in payment of the loan or in other requirements of the loan such as duty to maintain insurance or pay ad valorem taxes, etc.

### 1. **Non-judicial Foreclosure:**

Foreclosure process that involves no judicial intervention and is free of court order. A deed of trust containing a "power of sale" may be non-judicially foreclosed in compliance with the terms as agreed upon by the parties contained therein. However, at a minimum, the foreclosure must be conducted in strict compliance with [Section 51.002 of the Texas Property Code](#). If the provisions of the Deed of Trust and/or the statute are not followed, the result will be a void foreclosure. Additionally, since 2005, the entire foreclosure process may be administered by a mortgage servicer on behalf of the note holder/lender pursuant to the requirements in Section 51.0025 of the Texas Property Code. See also, definition of "mortgage servicer" under Section 51.001(3) which includes that the mortgagee may be the mortgage servicer. In other words, if a lender has not appointed a mortgage servicer then the lender itself (mortgagee) is the mortgage servicer of the loan and all references in this part of the Code to mortgage servicer also mean lender (mortgagee).

### 2. **Requirements of § 51.002:**

Notice of the foreclosure sale (notice of sale):

- a. must be given to all parties that are obligated to pay the debt including all guarantors, assumptors, and all prior obligors to the note that have not been released by the lender;
- b. must be sent via certified mail at least twenty-one (21) days before the sale to each debtor who, according to the records of the lender or mortgage servicer of the debt, is obligated to pay the debt. [Tex. Prop. Code § 51.002\(b\)\(3\)](#);
  - Effective September 1, 2011, notice required under this subsection must also state the name and address of the sender of the notice and contain a statement that is conspicuous, printed in boldface or underlined type, and substantially similar to the following: "Assert and protect your rights as a member of the armed forces of the United States. If you are or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to the sender of this notice immediately." [Tex. Prop. Code § 51.002\(i\)](#);
- c. the 21 day period required by this section commences on the day the notice is deposited in the mail, not when it is received. [Valley v. Patterson, 614 S. W. 2d 867 \(Tex. Civ. App. Corpus Christi 1981, no writ\)](#)
- d. the entire day of mailing is included in calculating the 21 day notice. The day of the foreclosure sale is NOT included in the calculation;
- e. must be posted at the county courthouse:
  - at least twenty-one (21) days prior to the sale at the county courthouse in all counties in which the property is located, [Tex. Prop. Code § 51.02\(b\)\(1\)](#),

- if the property is in fact located in more than one county, then the notice must specify in which county the sale will be conducted.
- f. must be filed with the county clerk at least twenty-one (21) days prior to the sale. [Tex. Prop. Code § 51.002 \(b\)\(2\)](#)
- g. by certified mail is complete when the notice is deposited in the United States mail, postage prepaid and addressed to the debtor at the debtor's last known address. The affidavit of a person knowledgeable of the facts to the effect that service was completed is prima facie evidence of service. Tex. Prop. Code Sec. 51.002(e) Receipt of the Notice is not required if properly mailed - proper mailing is all that is required. [Hausmann v. Texas Sav. & Loan Ass'n., 585 S. W. 2d 796 \(Tex. Civ. App.- El Paso 1979, writ ref'd n.r.e.\)](#)

The commissioner's court in each county should designate the area or location for foreclosure sales. If no area or location has been designated, the notice to debtor must specify where the sale will be conducted and the sale must be conducted in that specified area. [Tex. Prop. Code § 51.002\(a\)](#)

Conducting the foreclosure sale:

- Foreclosure sales can only occur on the first Tuesday of each month between the hours of 10 AM and 4 PM. [Tex. Prop. Code § 51.002\(a\)](#)
- The notice of sale must specify the earliest time at which the sale could be held and the sale must take place within three (3) hours of the stated time. [Tex. Prop. Code § 51.002\(c\)](#)
- h. Additional notice if the debtor's **residence** is involved:
  - Before the debt can be accelerated and/or the notice of sale is given on a debtor's residence, a twenty (20) day notice of "right to cure" default must be given. The cure period can be greater than 20 days, but it must be 20 days at a minimum. [Tex. Prop. Code § 51.002\(d\)](#)
  - Again, the day of the mailing of the notice of "right to cure" is included in the 20 day notice, but the day on which the notice of sale is given cannot be included in the calculation of the 20 day "right to cure." In other words, the 20 day "right to cure" and the 21 day notice of sale cannot overlap and must run in their entirety separately.
  - Effective September 1, 2011, notice required under this subsection must also state the name and address of the sender of the notice and contain a statement that is conspicuous, printed in boldface or underlined type, and substantially similar to the following: "Assert and protect your rights as a member of the armed forces of the United States. If you are or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to the sender of this notice immediately." [Tex. Prop. Code § 51.002\(i\)](#);

**NOTE:** A trustee's power to sell is derived from the deed of trust and the powers conferred on the trustee must be strictly followed. Thus, as stated previously, if the deed of trust provisions establish requirements in addition to those set forth under § 51.002 of the Property Code then such additional requirements must be complied with. The title agent may rely on either 1) an affidavit from the trustee or substitute trustee that the terms and

conditions of the deed of trust have been complied with, or 2) the recitals contained in the trustee's or substitute trustee's deed which state the same.

The recitals should also specifically outline the requirements of Section 51.002 which have been complied with and provide specific information rather than general representations.

### **3. Effect of Foreclosure of Deed of Trust on other liens**

**Generally** foreclosure extinguishes the rights of inferior lienholders to enforce their liens against the secured property. Specific liens:

1. **Judgment Liens:** Foreclosure of a deed of trust lien will extinguish an abstract of judgment that is recorded subsequent to the deed of trust unless the AJ is from a Federal Court and the judgment is in favor of the United States or a federal quasi governmental entity (ie. FDIC, Dept. of Agriculture, etc).
2. **Municipal Utility Liens:** A municipality can impose a utility lien on real property for “unpaid municipal utility services provided to real property”. This type of municipal lien is superior to all other liens including previously recorded judgment liens. However, a municipal utility lien is inferior to a “bona fide mortgage” if the bona fide mortgage was recorded before the municipality’s lien. [Texas Local Gov’t Code §402.0025](#)
3. **Nuisance Lien (aka Weed Lien or Clearance Lien):** A municipality may assess the cost of removing weeds, rubbish, or other hazardous material as a lien. Generally these liens arise from the local government’s determination that it must take action for public safety as the result of the owner’s failure to remove a hazard. Consequently, the cost of such hazard removal is assessed against the property having the hazardous condition. In order to perfect a lien, a lien statement must be filed with the county clerk. The filed lien is not cut off by foreclosure and is only inferior to tax liens and liens for street improvements. [Texas Health & Safety Code § 342.007](#)
4. **Property Owner’s Association Lien:**
  - The foreclosure of a purchase money lien will extinguish a property owner’s association lien which has been subordinated to the recorded vendor’s lien or deed of trust. The obligation to pay the assessment is a covenant that runs with the land, usually created at time of platting the subdivision in the Declaration of Restrictions and the lien to secure such assessment will, in most cases, be superior to the vendor’s lien or Deed of Trust. However, the restrictive covenants may provide that the association lien is automatically subordinate to a purchase money lien or other type of liens. It is imperative that the restrictive covenants be reviewed very carefully in order to determine the actual priority of the liens.
  - Absent a subordination provision in the restrictions, a homeowner's assessment lien established in the restrictive covenants has priority over subsequent liens and rights (such as homestead rights) and transfers that occur before the assessment is due. *Inwood North Homeowner's Association v. Harris*, 736 S.W.2d 632 (Tex. 1987)
5. **Environmental Liens:**

The cleanup of a designated environmental problem can be charged to any owner, current or in the chain of title from the time the problem occurred. Both the State of Texas and the US Environmental Agency (pursuant to CERCLA) have the ability to mandate environmental hazard abatement and payment for remediation, including filing a lien against the land. Generally such liens have super priority over other liens and will not be extinguished by foreclosure of a deed of trust recorded after date of commencement of the environmental issue.

6. State liens:

State Tax Liens are extinguished by the foreclosure of a prior deed of trust except:

a. Texas Workforce Commission Lien (wage lien):

If an employer fails to pay all wages due an employee, the Texas Workforce Commission after proper hearing can record a “Wage Lien” against the employer and the lien attaches to all real and personal property of the employer and has priority over every other lien already filed against the property except a property tax lien. [Tex. Lab. Code §61.0825](#) (See “Texas Workforce Commission Lien” section in this Texas supplement for a more detailed explanation of this lien and its priority)

b. Ad Valorem Taxes (property taxes):

Ad valorem taxes attach to the property automatically on January 1<sup>st</sup> of every year for the taxes that will be due for that year. (property taxes are paid in arrears in Texas) They are not extinguished by a valid foreclosure of any other lien regardless of when they arose and continue to be liens on the property until they are paid. [Texas Tax Code § 32.04](#), [Texas Tax Code § 32.05](#) and [Texas Tax Code § 32.06](#)

NOTE: An ad valorem tax lien may be transferred under Texas Tax Code § 32.06 (essentially refinanced) but does not lose priority when this occurs and may still be foreclosed as a tax lien. Title examiner must look carefully for evidence of any such transfer and should not assume that subsequently recorded instruments particularly a Deed of Trust evidencing such a transfer are subordinate to the foreclosed lien.

7. Federal Tax Liens:

a. Though federal tax liens generally have priority over all other liens regardless of the date of filing, IRS liens do not have priority over a purchase money lien. However, if a federal tax lien is of record thirty (30) days before the foreclosure sale day, the Internal Revenue Service must be given notice at least twenty-five (25) days prior to foreclosure by certified mail or delivery service. [26 U.S.C. § 7425 \(b\)&\(c\)](#)

- i. It is critical that notice to the IRS of a planned foreclosure of a purchase money Deed of Trust lien must be post marked by the U.S. Postal Service on the envelope at least 25 days before the foreclosure sale. The date of sale is not included in the 25-day calculation.
- ii. No notice is necessary if the federal tax lien is filed less than thirty (30) days before the foreclosure sale.
- iii. If no notice is given to the IRS, there is no way to cure and the IRS lien primes the purchaser’s title and an attempted subsequent re-foreclosure of the deed of trust has no effect on the federal tax lien.

Note: such a foreclosure is not considered defective because the IRS was not given notice and may not be “rescinded” based on failure to provide the IRS notice.

- b. A pre-foreclosure notice does not extinguish the IRS lien, but rather gives the IRS the right to redeem the property, for the foreclosure sale price, within 120 days of the foreclosure sale date. [26 U.S.C. §7425 \(d\)](#)
  - i. If the IRS does not redeem, the purchaser at the foreclosure sale takes the property free of the IRS lien.
  - ii. If the 120 day right of redemption applies, then the following exception should be added to Schedule B:

“Right of the United State to redeem for 120 days from \_\_\_\_\_ (date of the sale) arising out of the foreclosure evidenced by the Trustee’s Deed recorded in Volume \_\_\_\_\_, Page \_\_\_\_\_, Real Property Records of \_\_\_\_\_ County, Texas.”

- iii. Waiver of the Right of Redemption: The right of the federal government to redeem property sold at either a judicial or non-judicial foreclosure sale may be waived by the execution of a proper Certificate of Release, a Certificate of Discharge of the Property, or a Certificate of Nonattachment (the waiver must include a full description of the property).

8. Department of Justice Liens (DOJ Liens):

- a. A DOJ lien is a federal lien in favor of the United States which secures fines and/or restitution imposed under [18 U.S.C. § 3571](#) against a criminal defendant in a federal case, and is imposed against all property owned by the defendant. As with other liens, it becomes effective upon recording of a notice of the fine/restitution in the real property records of the county in which the real property is located.
- b. Pursuant to [18 U.S.C. § 3613\(d\)](#), a notice of lien shall be considered a notice of lien for taxes for the purpose of any state or local law providing for the filing of a tax lien. As such, if the lien has been filed at least 30 days prior to foreclosure then the same 25-day notice requirements discussed above must be satisfied. If this 25-day notice is not given, the lien is not wiped out by the foreclosure sale.

Note: such a foreclosure is not considered defective because the IRS and/or the DOJ were not given notice and may not be “rescinded” based on failure to provide the notice to the IRS and/or DOJ.

- c. Unlike a lien in favor of the IRS, the redemption period for the United States is one (1) year instead of 120 days. [28 U.S.C. § 2410\(c\)](#)

9. Mechanic’s and Materialman’s Liens:

- a. Typically, the foreclosure of a prior deed of trust will extinguish all construction lien claims except those involving removables. However, in the absence of a properly executed affidavit of commencement of construction, it is difficult to ascertain the exact date the commencement

of construction or delivery of materials occurred. Under the relation back theory, if any work is started or materials delivered to a construction project before the construction deed of trust is recorded, all mechanic's lien claimants (sub contractors and suppliers) will have lien priority over the deed of trust (including parties who provide labor or material to the project after the deed of trust is recorded). The title examiner should not automatically assume mechanic's liens are extinguished by the foreclosure of what appears to be a superior lien. [Texas Prop. Code § 53.124](#) If lien priority is not clear from the recorded instruments (must have an Affidavit of Commencement filed), then the title agent must contact Texas Underwriting Counsel for guidance.

- b. **Removables:** parties who provide materials to the property that can be removed without causing material damage to the items being removed and the real property structure (“removables”) will have the right to remove those items regardless of the existence of a prior recorded deed of trust.

A removable lien has priority over a previously recorded security instrument on the land. *First Nat. Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex.1974). The following are examples of removables (as held by Texas Courts): garbage disposals, dishwashers, windows, doors, carpets, appliances, smoke detectors, burglar alarms, light fixtures, door locks, pumps, compressors, air conditioning and heating systems, fans, toilets, basins, light fixtures, wall switches, electrical control panels, hardware and cabinets.

1. The test to determine whether an improvement is a removable can be found in the following cases: *Exchange Sav. & Loan Ass'n v. Monocrete Pty. Ltd.*, 629 S.W.2d 34 (Tex. 1982) and also in *In re Orah Wall Financial Corp.*, 84 B.R. 442 (Bankr.W.D.Tex. 1986).

Title examiner should not rely on the foreclosure of a deed of trust lien as cutting off a filed mechanic's lien claim, without underwriting approval.

#### **4. Additional Matters to Consider:**

1. Death of Grantor of lien: since a dependent administration can be opened at any time within four years of the mortgagor's death, National Investors Title will not issue a title policy if the subject property was foreclosed within four years of the mortgagor's death, and no administration was opened during that period. The personal representative of the decedent's estate can force the foreclosed property back into the probate estate (rescind the foreclosure) and sue the mortgagee for conversion. *American Sav. & Loan Ass'n of Houston v. Jones*, 482 S.W.2d 62 (Tex.Civ.App.—Houston [14th Dist.]1972, writ ref'd n.r.e.).

A creditor whose debt is secured by a mortgage, lien or other security device is estopped from pursuing the usual collection remedies when the debtor is deceased, and once a probate proceeding is opened, title to all real and personal property of the decedent vests in the probate estate subject to the custody and control of the personal representative.

The creditor's collection remedies differ depending on whether there is an administration open on the estate and whether the administration is independent or dependent.

- a. Dependent Administration: the opening of a dependent administration suspends the power of sale in a deed of trust. The creditor must file an application for "public sale" seeking the court's permission to foreclose under the terms of the deed of trust and [Texas Prop. Code § 51.002](#) and the court must authorize the foreclosure. . A confirmation order after the sale is not required. If a dependent administration is pending and a foreclosure is conducted without approval of the court, the foreclosure is void.
  - b. Independent Administration: if an independent administration is pending, a lender can foreclose with notice of foreclosure to the independent executor/executrix, the attorney for the estate and all other persons obligated to pay the debt. *Bozeman v. Follitt*, 556 S.W.2d 608(Tex.Civ.App.—Corpus Christi 1977, writ ref'd n.r.e.). Title examiner must review the notice of sale to confirm that the independent executor/executrix was notified.
  - c. No Administration: if no administration is pending, a foreclosure is voidable during the four (4) years following the mortgagor's death. As stated previously, should an administration be opened within four (4) years from date of death, a duly appointed administrator could file suit to have the sale cancelled.
2. Bankruptcy of Debtor: there is an automatic stay of any foreclosure under all bankruptcy chapters until 1) the case is closed, 2) the case is dismissed, 3) the subject property is properly abandoned from the bankruptcy estate, or 4) a discharge is granted and there is a final accounting made by the trustee.
- a. Automatic Stay: the automatic stay commences immediately upon the filing of the bankruptcy petition. [11 U.S.C. § 362](#)
    - i. Annuling the Automatic Stay: if a foreclosure has been conducted after the filing of a bankruptcy petition in violation of the automatic stay, it may be possible to validate the foreclosure. The issuance of an order from the bankruptcy court that **annuls** the stay will act to confirm the foreclosure as valid.
  - b. Order Lifting the Stay: If a secured creditor wishes to foreclose its lien, it must obtain an order from the bankruptcy court lifting the automatic stay as to the specific debt and foreclosure. This order must have been entered prior to the foreclosure and a certified copy of the order should be recorded in the Real Property Records. The title examiner must review this Order Lifting the Stay as part of determining the accuracy and adequacy of the foreclosure.
  - c. Abandonment of Debtor's Property: after notice and hearing, the trustee may abandon bankruptcy estate property that is burdensome or is of inconsequential value or benefit to the estate. [[11 U.S.C. § 554\(a\)](#)] Property that is properly abandoned is no longer part of the bankruptcy estate and is not subject to the automatic stay or any other bankruptcy procedures. Determining whether property has been properly abandoned in a bankruptcy can sometimes be very difficult. If title examiner is trying to establish that the automatic stay is not applicable because of abandonment

of the property, or that the debtors are selling or mortgaging land during an ongoing bankruptcy based on abandonment, call underwriting.

3. Military Status of Debtor: under the Servicemember’s Civil Relief Act (“SCRA”), Congress made provision for the protection of the civil rights of persons in the military service of the United States. The purpose of the SCRA is to prevent the collection of debts from servicemembers whose call to active duty materially affected the default. The Act does not extinguish a borrower’s debt; it merely suspends a creditor’s collection rights while the servicemember is on active duty and for three months after discharge from active duty, unless there is a written agreement between the parties or upon the entry of a court order.
  - a. Section 51.05 of the Texas Property Code was added in 2009, and its provisions mirror the requirements of the SCRA; however, it provides coverage up to 9 months after discharge rather than the federal coverage of 3 months.
  - b. Note: National Investors Title will rely on a recital in the trustee’s deed or separate affidavit of foreclosing trustee that indicates the debtor was not in the military at the time of foreclosure or within 9 months of discharge. If such an affidavit is not available, the foreclosing lender must provide a Department of Defense certificate that states whether such person is in the service. The certificate may be obtained through the Department of Defense at the following website: [www.dmdc.osd.mil/scra/owa/home](http://www.dmdc.osd.mil/scra/owa/home)
4. Capacity: insanity is not a defense against a pending foreclosure unless a mortgagor has been adjudicated incapacitated prior to the notice of foreclosure. If there has been a finding of incapacity and an appointment of a guardian of the mortgagor’s estate (either a minor or otherwise incapacitated person), court approval must be obtained. However, the court can abandon the property by court order.
5. Receivership: the lender cannot foreclose if a receiver has been appointed through another legal matter (divorce, probate, etc.). An order of the court where the receivership is pending is required before the foreclosure can occur.
  - a. **Note:** although a mortgagee is entitled to notice, most receivers fail to give notice of the receivership and also fail to file a lis pendens in the real property records. As such, the title agent must examine any court proceedings involving the mortgagor (filed in the county where the property is located) in order to confirm that a receivership is not pending.
6. Appointment of Substitute Trustee: The beneficiary’s power to appoint a substitute trustee must be specifically stated in the deed of trust. Most deed of trust forms grant the beneficiary the absolute right to appoint a substitute trustee with or without cause.
  - a. The appointment of a substitute trustee does not have to be recorded unless it is required in the deed of trust (however, the title examiner should require a copy for review and recording). If the deed of trust requires that the appointment be recorded, it must be recorded prior to any notice of sale by the substitute trustee.

- b. A mortgage servicer may administer the foreclosure of property on behalf of a mortgagee if 1) the mortgage servicer and the mortgagee have entered into an agreement granting the current mortgage servicer authority to service the mortgage; and 2) the required foreclosure notices disclose that the mortgage servicer is representing the mortgagee under a servicing agreement with the mortgagee and the name of the mortgagee and the address of the mortgagee; or the address of the mortgage servicer, if there is an agreement granting a mortgage servicer the authority to service the mortgage. [Texas Prop. Code § 51.0025](#).
  
7. **Lien Re-attachment:** inferior liens are not affected by the foreclosure of a senior lien if the debtor purchases the property at the foreclosure sale. Additionally, if the senior lien creditor purchases the property at the foreclosure and subsequently sells the property back to the debtor, then the inferior liens re-attach to the property and are not affected by the foreclosure of the senior lien.

## **5. Judicial Foreclosures**

Upon a default of a loan secured by a deed of trust, the lender can foreclose its lien either by instituting a judicial foreclosure proceeding or through the exercise of the power of sale contained in the deed of trust (non-judicial - as outlined above). When the purchase of real property is financed, a vendor's lien is retained by the seller in the deed to secure the unpaid purchase money for the real property. If a third party lender is making the loan, the vendor's lien is assigned by the seller to the third party lender. This vendor's lien exists separate from a deed of trust lien and may be enforced judicially by a suit to foreclose the lien.

Suit to foreclose must be filed in district court unless less than four (4) years have elapsed since the death of the mortgagor, in which case the suit must be filed in probate court (as outlined above). All mortgagors and mortgagees should be made parties to the suit. Service of process is the same as in any civil suit, and the sale must be held under the same procedures as any execution and sale pursuant to a judgment (the entry of the judgment alone does not divest title absent execution and sale).

The petition must state:

1. That the suit is to foreclose a mortgage lien;
2. The amount of the claim;
3. A description of the mortgage;
4. A full legal description of the mortgaged property;
5. Allegations of execution and delivery of the note secured by mortgage and ownership of the note by plaintiff;
6. Prayer for judgment and foreclosure of lien; and
7. A copy of the deed of trust should be attached.

The judgment must state:

1. That the plaintiff recover his/her debt, damages and costs (specifying amounts);
2. The Existence and foreclosure of plaintiff's lien; and
3. That order of sale and execution be issued.

## 6. Foreclosure of a Home Equity Loan

Requires court order authorizing the foreclosure. **After acceleration and before posting** the foreclosure sale notice, the mortgagee must obtain a court order from the district court authorizing the foreclosure and then the deed of trust can be foreclosed in accordance with its terms and in compliance with Section 51.002 of the Texas Property Code, just like any other deed of trust. [Tex. Const. art. XVI § 50a\(6\)\(D\)](#)

## 7. Foreclosure of a Reverse Mortgage Loan

Requires court order unless the foreclosure occurs as a result of a default because (1) all borrowers have died, or (2) the homestead property securing the loan is sold or otherwise transferred, then no court order is required. In those cases, the reverse mortgage deed of trust can be foreclosed in accordance with its terms and in compliance with Section 51.002 of the Texas Property Code, just like any other deed of trust.

If the foreclosure occurs as a result of a default because all of the borrowers have died, then the creditor will still have to follow the collection remedies as outlined above in the “Death of Grantor” section of this supplement. Although a court order will not be required from district court, it is very possible that one will be required from the probate court (depending on the facts). [Tex. Const. art. XVI, § 50\(k\)\(11\)](#)

[Texas Rules of Civil Procedure 735 and 736](#) establish the guidelines for obtaining the required court order.

1. [Rule 735](#): offers three methods available to foreclose a home equity loan. They are:
  - a. a suit seeking judicial foreclosure (see previous section on Judicial Foreclosures);
  - b. a suit or counterclaim seeking a final judgment which includes an order allowing foreclosure under the security instrument and Texas Property Code §51.002; or
  - c. an application under Rule 736 for an order allowing foreclosure (this is an expedited court order process) pursuant to the standard non-judicial procedure.
2. [Rule 736](#): the objective of this rule is to simplify the process of obtaining the court order without inundating the courts. When reviewing these foreclosures it is imperative that the title examiner review the Deed of Trust or Mortgage to confirm that it complies with [Section 50\(a\)\(6\) \(Q\) \(vi\)](#) of the Constitution by disclosing that the security instrument is given to secure an extension of credit of the type defined by [Section 50\(a\)\(6\), Article XVI](#), of the Texas Constitution.

*NOTE: An order entered pursuant to Rule 736 is simply an order to allow the applicant to proceed with the foreclosure sale (it is not a determination of any other matter concerning the loan or the enforceability of the deed of trust). All other aspects of the foreclosure process must be followed (specifically, compliance with the terms of the Deed of Trust and Section 51.002 of the Texas Property Code).*

- a. **Application:** the verified application must be filed in the district court in any county where all or any part of the real property encumbered by the lien to be foreclosed is located. The application must:
  - i. be styled: “In re: Order for Foreclosure Concerning (*Name of person to receive notice of foreclosure*) and (*Property Mailing Address*)”;

- ii. identify by name the party who, according to the records of the holder of the debt, is obligated to pay the debt secured by the property;
  - iii. identify the property by mailing address and legal description;
  - iv. identify the security instrument encumbering the property by reference to volume and page, clerk's file number or other identifying recording information found in the official real property records of the county where all or any part of the property is located or attach a legible copy of the security instrument;
  - v. allege that:
    1. a debt exists;
    2. the debt is secured by a lien created under [Tex. Const. art. XVI, § 50\(a\)\(6\)](#), for a home equity loan, or [§ 50\(a\)\(7\)](#), for a reverse mortgage;
    3. a default under the security instrument exists;
    4. the applicant has given the requisite notices to cure the default and accelerate the maturity of the debt under the security instrument, [Tex. Prop. Code § 51.002](#), [Tex. Const. art. XVI, § 50\(k\)\(10\)](#), for a reverse mortgage, and applicable law;
  - vi. describe facts which establish the existence of a default under the security instrument; and
  - vii. state that the applicant seeks a court order required by [Tex. Const. art. XVI, § 50\(a\)\(6\)\(D\)](#), for a home equity loan, or [§ 50\(k\)\(11\)](#), for a reverse mortgage, to sell the property under the security instrument and [Tex. Prop. Code § 51.002](#). A notice required by [Tex. Const. art. XVI, § 50\(k\)\(10\)](#), for a reverse mortgage, may be combined or incorporated in any other notice referenced in [Rule 736\(1\)\(E\)\(4\)](#). The verified application and any supporting affidavit shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence, provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated
- b. **Notice:** all parties obligated for the debt must be served with a formal notice advising that an application has been filed seeking a court order to foreclose the mortgagor's homestead. If the mortgagor is represented by an attorney and the applicant's attorney has knowledge of the name and address of the attorney, an additional copy of the application and notice shall be sent to respondent's attorney.
- i. The applicant or applicant's attorney shall certify to the court compliance with the service requirements of [Rule 736](#). The applicant shall file a copy of the notice and the certificate of service with the clerk of the court. The certificate of service shall be prima facie evidence of the fact of service.
- c. **Response:** a response is due on or before 10:00 a.m. on the first Monday after the expiration of thirty-eight (38) days after the date of mailing of the application and notice to respondent, exclusive of the date of mailing, as set forth in the certificate of service.
- i. If no response is timely filed, the court shall grant the application on a default basis.
  - ii. If a response is filed, [Rule 736\(6\)](#) requires that a hearing be set within 10 days, unless the parties agree to a later date.
- d. **Order to Proceed with Notice of Sale and Sale:** the court shall grant the application if the court finds applicant has proved the elements of [Rule 736\(1\)\(E\)](#). Otherwise, the court shall deny the application. The granting or denial of the application is not an appealable order.

- i. If granted, a certified copy of the order should be filed in the deed records of the county where the property is located. The failure to file the order does not invalidate the sale, but the title agent should require it to be filed.
- ii. The order shall recite the mailing address and legal description of the property, direct that foreclosure proceed under the security instrument and [Tex. Prop. Code § 51.002](#), provide that a copy of the order shall be sent to respondent with the notice of sale, provide that applicant may communicate with the respondent and all third parties reasonably necessary to conduct the foreclosure sale, and, if respondent is represented by counsel, direct that notice of the foreclosure sale date shall also be mailed to counsel by certified mail.
- e. **Abatement and Dismissal:** a proceeding under [Rule 736](#) is automatically abated if, before the signing of the order, notice is filed with the clerk of the court that the respondent has filed a petition in district court contesting the right to foreclose. A proceeding that has been abated shall be dismissed.

## **8. Deed in Lieu of Foreclosure**

Is a deed given and accepted as an alternative to foreclosure. It is a voluntary conveyance of the property in return for the forgiveness of the debt. However, it is important to note that a deed given in lieu of foreclosure does not cut off inferior liens.

Deeds-in-lieu are often attacked on grounds of fraud and duress. As such, it is important that the deed recite that it was entered into freely and without coercion and at the mortgagor's request. Other grounds for judicial attack include, but are not limited to: 1) an assertion that the parties intended the deed to be given as additional security and that the deed was not an absolute conveyance, 2) the unfairness of the consideration, 3) that the mortgagor was insolvent at the time of the execution of the deed, and 4) that the deed is either a preferential or fraudulent transaction according to the provisions of the federal Bankruptcy Act.

It's not uncommon for a mortgagee, who is taking a deed in lieu of foreclosure, to preserve the priority position of the deed of trust against subsequently filed liens or encumbrances by not releasing the mortgage debt. For title insurance purposes, it is extremely important that the mortgage debt be released. If the mortgage debt is not released, the courts may treat the new deed as merely a deed given as security for a debt or they may hold the deed to be invalid.

## **9. Underwriting Guidelines (Deeds in Lieu of Foreclosure)**

There are numerous risks involved with insuring title subsequent to the filing of a Deed in Lieu of Foreclosure. Title examiner should seek underwriting support for each individual case. The following are minimum requirements that must be satisfied:

1. The Deed from the borrower/grantor to the lender must recite that:
  - a. The Deed is an absolute conveyance made in lieu of foreclosure; and
  - b. The Deed is given either in full cancellation and extinguishment of the debt described in the Deed of Trust, or is given in consideration of the full release of the borrower from any personal obligation on the note;

2. The Deed of Trust (and vendor's lien accompanying, if any) should be released of record but often is not in an effort to preserve the right of original lender, now owner, to foreclose the lien if an inferior lien or other title issue that is inferior to the original lien can and needs to be removed by foreclosure. If the Deed of Trust is not released of record, it must be shown as a Schedule B exception in a Commitment/policy subsequently issued. However, if the lender, now owner, conveys the property with a general warranty deed that does not take exception to the prior deed of trust lien, then the lien does not have to be specifically released because the grantor, who is also the holder of the lien, has warranted the title to be free of the lien.
3. National Investors Title Insurance Company will not issue an Owner's Title Policy to the grantee in the Deed in Lieu (nor do they need it if they had a LP on the lien). To insure a subsequent transaction within 2 years of the recording of the Deed in Lieu, issuing agent must be furnished with an estoppel letter from the borrower/grantor of the Deed in Lieu that includes the following:
  - a. There was no equity in the property and the consideration for the Deed in Lieu was adequate;
  - b. The conveyance was voluntary, there was no duress or undue influence and the borrower/grantor executed the Deed in Lieu with full understanding of what he/she was doing;
  - c. The borrower/grantor waives any rights or claims, known or unknown, to the property and conveyed with the intent to vest title in the Grantee without recourse; and
  - d. The borrower/Grantor has surrendered possession of the property to the Grantee; and
4. Verification that possession of the property has been surrendered to the Grantee.  
Note: This specifically prohibits any lease back to the borrower.

Copies of the documents and/or affidavits must be submitted to Company for approval and possible additional requirements.

### **10. Insuring after a Non-Judicial Foreclosure Sale**

Foreclosure presents significant title insurance risk.

1. **Void Sale:** one in which the trustee has no authority to conduct the sale or deliver the trustee's deed. In these instances the legal title does not pass to the purchaser. Examples of void sales are:
  - a. foreclosure occurred after the debt was barred by limitations;
  - b. the debtor was not in default at the time of foreclosure, or
  - c. the mortgagee had agreed to extend the time for payment.
2. **Voidable Sales:** one that is subject to attack because of failure to follow the proper foreclosure procedures. Examples of voidable sales are:
  - a. improper posting of notice,
  - b. foreclosing before the expiration of the statutory notice period; or

- c. misconduct of the trustee who exercised the power.

### **11. Underwriting Guidelines for insuring after a Foreclosure Sale**

1. Underwriters are extremely hesitant to provide title insurance to the purchaser(s) at a foreclosure sale. To do so essentially causes the underwriter to take on full liability for the foreclosure process which is very hard if not impossible to evaluate.
2. National Investors Title Insurance Company will not provide title insurance to a buyer or lender at a foreclosure sale.
3. National Investors will consider insuring subsequent sales from buyer(s) at the foreclosure, but a General Warranty Deed will be required and if less than 4 years have elapsed from the filing date of the trustee's foreclosure deed, the following are required for all subsequent sales or loan transactions:
  - a. verify that all foreclosure requirements under §51.002 of the Texas Property Code were completed;
  - b. verify that the foreclosure was conducted in compliance with the terms of the deed of trust;
  - c. verify that the borrower/mortgagor who was foreclosed is not in possession of the property. If the foreclosed borrower, or anyone in their family or related entities is in possession, call underwriting to determine how to proceed;
  - d. determine that no other parties, such as tenants under prior leases, are in possession - their rights may not have been extinguished by the foreclosure. If any person or entity is in possession not under a recorded lease, call underwriting to determine how to proceed;
  - e. if title examination reveals an IRS lien, judgment lien in favor of the US, federal lien securing the payment of a criminal fine under 18 USC § 3613, or any other interest held by the US that was recorded prior to the foreclosure, verify that all required notices were provided to the IRS or US and that any applicable right of redemption period has expired, or if not expired, except to the applicable right of redemption or right to repurchase.
  - f. verify the chain of ownership of the note and foreclosed lien from inception of note through foreclosure.
  - g. verify that the beneficiary named in the deed of trust (or the last assignment of record) or a mortgage servicer acting for the beneficiary instigated the foreclosure;
  - h. verify that the trustee named in the deed of trust or a properly appointed substitute trustee conducted the foreclosure for the beneficiary;
  - i. verify that all of the debtors were alive at the time of the foreclosure;
  - j. verify that apparent junior liens and encumbrances were extinguished by the foreclosure. If there is any doubt, contact underwriting for approval;
  - k. verify that any Deed of Trust recorded before the foreclosure but after the Deed of Trust that was foreclosed (that appears to be an inferior lien), was not a transfer tax lien that would have priority over the foreclosed lien.
  - l. if title examination reveals a Texas Workforce Lien under Chapter 61 of the Texas Labor Code filed before foreclosure, it must be released;
  - m. verify that none of the debtors were in active duty military service at the time of the foreclosure or 9 months prior to the foreclosure; it is acceptable to obtain an affidavit from the foreclosing trustee to satisfy this requirement, unless knowledge to the contrary exists;

- n. n .if the deed of trust being foreclosed secures a **home equity loan** verify that the foreclosing lender obtained a Rule 736, Texas Rules of Civil Procedure Order allowing the foreclosure;
- o. if the deed of trust foreclosed secured a reverse mortgage and the loan was in default for a reason other than: (i) all of the borrowers had died; or (ii) the homestead property had been sold or transferred, verify that the foreclosing lender obtained a Rule 736, Texas Rules of Civil Procedure Order allowing the foreclosure;
- p. if there was a bankruptcy pending at the time of the foreclosure, verify that a proper order lifting the automatic stay was obtained by the lender or that the property had been effectively abandoned from the estate – and in all cases of bankruptcy call underwriting for approval;
- q. if the foreclosure was a judicial foreclosure, and less than one year has elapsed since the recording of the Sheriff's foreclosure deed, the docket in the Court case must be reviewed on the day of or the day before closing, to verify that no appeal or collateral attack has been filed.

## **I. Home Office Issue (HOI)/Directly Issued Policy**

In Texas, title insurance agents are licensed by county based on requirements for title plants, and can only produce a title insurance policy covering land in a county in which they are licensed. Theoretically, a title insurance underwriter (title company) is license for the whole state and therefore can issue its policies in any county in the state upon compliance with search and examination requirements of the records in the county of issuance.

There are several situations where a title agent might handle, search title and examine, or close a transaction which includes property in a county where the agent is not licensed:

1. A transaction with a single piece of property that is located in two or more counties or a multi-property, multi site deal;
2. The agent may have a good customer that requests the agent process the customers business regardless of the county in which the property is located; or
3. The underwriter may handle a multi county deal based on title and examination from an agent in each county where transaction land is located.

These are the types of transactions that require a home office issue (HOI) policy. Requirements and procedures for this type of issuance are established in rules P-1aa, P-31, and P-58 with the format correctly referred to as a “directly issued policy.” However, within the industry the common terminology refers to these polices as home office issue (HOI).

**P-1aa. Directly Issued Policy** - A title insurance policy issued and countersigned by a duly authorized officer, or employee, of a title insurance company, whose principal activities performed on behalf of such title insurance company take place in one or more designated offices maintained by the title insurance company located in the State of Texas, and which address is designated in writing and placed on file with the Title Insurance Section of the Texas Department of Insurance.

### **P-31. Authorized Execution of Directly Issued Policy.**

All directly issued policies of title insurance (authorized by Art. 9.34, Insurance Code, defined in Procedural Rule P-1.aa., and sometimes referenced "Home Office Issue") shall be countersigned, prior to delivery, by a bona fide officer or employee of the Title Insurance Company issuing the directly issued policy. Each employee or officer countersigning directly issued policies shall be employed at a designated office location in the State of Texas maintained by the issuing Title Insurance Company for the issuance of directly issued policies. Each Title Insurance Company shall file annually on or before January 31 of each calendar year a written designation of its office addresses with the Texas Department of Insurance, together with the name and position of each person or persons at each designated address it has authorized to countersign directly issued policies at such address.

No person or entity may be authorized, designated or empowered to countersign directly issued policies for a Title Insurance Company until designated with the Texas Department of Insurance in compliance with this Rule P-31. For the purpose of this rule all directly issued policies must reflect original countersigned signatures and it is prohibited to affix facsimile or any other form of signature that is not the originally executed signature of a designated individual.

**P-58. Report on Directly Issued Policy**

Each Title Insurance Company shall compile and submit to the Department annually, as part of the Texas Title Insurance Statistical Plan, a report of all directly issued [sometimes commonly referred to as Home Office Issued] policies of title insurance which shall include at least the following information:

- (1) Location of insured land identified by standard three (3) digit county code as set forth in Table 7 of the Texas Title Insurance Statistical Plan;
- (2) Gross Premium (for policy and all endorsements) and limits of liability on each policy issued;
- (3) Date of Policy;
- (4) Transaction identification number (guaranty file number or other identifier);
- (5) Requesting Agent's TDI Agency/Direct Operation Company ID Number as shown on the Agent/Direct Operation license;
- (6) Cooperating Agent's TDI Agency/Direct Operation Company ID Number as shown on the Agent/Direct Operation license; and,
- (7) Directly Issued Policy "DIP" Status Code (Best Evidence = 0; Multicounty = 1).

The report shall be sorted by county (primary sort) and by the requesting agent's TDI Agency/Direct Operation Company ID Number as shown on the Agent/Direct Operation license (secondary sort) within each county. The report may contain additional information, totals, or subtotals as deemed necessary by the Title Insurance Company or as required by the Department.

**NOTE:** This required report is generally referred to as the DIP report for directly issued policies and is created by and the responsibility of the underwriter. However, it may sometimes be referred to as the DIPP report based on the acronym, directly issued policy production report.

Also relevant are the procedural rules relating to the split of premium between "cooperating" agents on a single transaction, P-24 as well as the timeliness of producing title work, P-25, and required time for providing copies of policies to title provider, P-26.

**P-24. PAYMENT FOR SERVICES RENDERED BY A TITLE INSURANCE COMPANY, TITLE INSURANCE AGENT, OR DIRECT OPERATION TO ANOTHER TITLE INSURANCE COMPANY, TITLE INSURANCE AGENT OR DIRECT OPERATION**

In negotiating the portion of the premium to be paid by a Title Insurance Company ("Company"), Title Insurance Agent ("Agent"), or Direct Operation ("Direct Operation"), including any of their attorneys who are licensed escrow officers ("Escrow Officers") to another Company, Agent, Direct Operation or any of their Escrow Officers for: (i) furnishing title evidence, (ii) furnishing title evidence and examining title, (iii) closing a transaction, or (iv) closing a transaction and examining title, the payments shall not exceed the following percentages as applied to the portion of the title insurance premium remaining after payment of the underwriter's portion of the premium:

- a) If the insured policy amount is in excess of \$125,000  
Furnishing title evidence, or furnishing title evidence and title examination by the Company, Agent, or Direct Operation furnishing the evidence 50% Closing the transaction, or Closing the transaction and title examination

- b) If the insured policy amount is 125,000, or less  
Furnishing title evidence, or furnishing title evidence and title examination by the Company, Agent, or Direct Operation furnishing the evidence 90% Closing the transaction, or Closing the transaction and title examination 10%

In addition to these percentages, reasonable charges may also be made and paid for copies of documents.

Any payment in excess of the sums calculated by use of the percentages specified in this Rule shall be deemed to be an unreasonable and excessive amount, unless the Company, Agent, or Direct Operation providing such services and the Company, Agent, or Direct Operation, paying for such services

- (i) under section (a) above enter into a prior written agreement not less than ninety (90) days prior to closing specifying and agreeing to percentages (but not services) different from those provided in this Rule or
- (ii) under section (b) above are licensed in the same county or in contiguous counties and enter into a prior written agreement not less than ninety (90) days prior to closing specifying and agreeing to percentages (but not services) different from those provided in this Rule .

All payments must be remitted no later than the thirtieth (30th) day after the date of recording by the county clerk of an instrument conveying an interest in the land.

On and after January 1, 2013, the insured policy amount in sections (a) and (b) above shall be \$150,000.00.

This Rule, including the provisions pertaining to prior written agreements, and the percentages specified in this Rule apply to each Escrow Officer of a Company, Agent, or Direct Operation to the same extent and in the same manner as is applicable to the Company, Agent, or Direct Operation for which the person is acting as an Escrow Officer.

Nothing in this Rule shall affect the division of premium between a title insurance company and its subsidiary title insurance agent when the title insurance company directly issues its policy or contract of title insurance company pursuant to § 2704.002, Insurance Code. For purposes of this Rule, a subsidiary is a company at least fifty percent (50%) of the voting stock of which is owned by the title insurance company or by a wholly owned subsidiary of the title insurance company.

**P-25. Reasonable Time for Furnishing Title Evidence.**

Pursuant to Texas Insurance Code Chapter 2704, a reasonable time for furnishing title evidence is determined to be as follows:

- (1) With Prior Title Evidence Satisfactory to the Title Insurance company:
  - (a) On Acreage Tracts---15 days.
  - (b) On Subdivision Tracts---10 days.
- (2) Without Prior Title Evidence Satisfactory to the Title Insurance Company:
  - (a) On Acreage Tracts---30 days.
  - (b) On Subdivision Tracts---21 days.

These time periods shall begin on the date the order for title evidence is received. If all title insurance agents and direct operations for the county refuse to provide title evidence within such time and for the payments provided in Rule P-24, a title insurance company may directly issue its policy if the title insurance company obtains the best evidence available.

Title agents and direct operations who request that title evidence be provided by another title agent or direct operation shall maintain auditable records and documents demonstrating compliance with this rule. Such auditable records include, but are not limited to, letters, faxes, e-mails, fax confirmations, and certified mail receipts.

**P-26. Copies of Policies Provided to Agents.** Title insurance agents or direct operations that provide title evidence on which policies of title insurance are issued shall be provided with legible complete copies of all policies or contracts of title insurance actually issued in the transaction within 30 days from the date of the policy, which is determined to be a reasonable time.

**Underwriting logistics:**

1. HOI/directly issued policies should be completed in all aspects by agent using standard promulgated forms generated from National Investors Title Insurance electronic policy (iJacket) system. Policies must be signed by an authorized officer of the underwriter. Policies may be emailed or hard copies may be sent to:

National Investors Title Insurance Company  
3445 Executive Center Drive, Suite 110  
Austin, Texas 78731

Or email to: [tava.patterson@nititle.com](mailto:tava.patterson@nititle.com)

The original policy will be returned to the agent for delivery to the insured.

2. A National Investors Title Insurance Company form: DIRECTLY ISSUED POLICY FORM, (see copy below) fully executed must accompany the policy(ies) in 1. above.
3. A copy of the fully completed and signed T-00 Verification of Services Rendered must also accompany the policy(ies) in Number 1 above.

SEE FORM BELOW

## National Investors Title Insurance Company

3445 Executive Center Drive, Suite 110  
Austin, Texas 78731

### DIRECTLY ISSUED POLICY FORM

1. County Where Insured Property is Located: Code Number: \_\_\_\_\_ County Name: \_\_\_\_\_  
\_\_\_\_\_
2. 

<u>Gross Premium</u>	<u>(Policy Amount(Liability))</u>	<u>Policy Number</u>
Owner \$ _____ (Including Endorsements)	Owner \$ _____	_____
MTP \$ _____ (Including Endorsements)	MTP \$ _____	_____
2nd MTP \$ _____ (Including Endorsements)	2nd MTP \$ _____	_____
3. Date of Policy(ies) \_\_\_\_\_
4. Information from Requesting/Issuing Agent (Agent requesting title work and issuing policy):  
Name \_\_\_\_\_  
Texas Department of Insurance ID Number \_\_\_\_\_
5. File Number of Requesting/Issuing Agent \_\_\_\_\_
6. Information about Cooperating Agent (Agent furnishing the title work):  
Name \_\_\_\_\_  
Texas Department of Insurance ID Number \_\_\_\_\_
7. Reason for Directly Issued Policy: Out of County Order/Best Evidence (0) \_\_\_ Multiple Counties (1) \_\_\_

**ALL FIELDS ARE REQUIRED TO BE COMPLETED.**

PLEASE SEND YOUR DIRECTLY ISSUED POLICIES (HOME OFFICE ISSUES) TO OUR OFFICE FOR SIGNATURE WITH THIS FORM ATTACHED. WE WILL BE UNABLE TO SIGN ANY POLICY THAT DOES NOT HAVE THIS FORM ATTACHED.

PLEASE FEEL FREE TO MAKE COPIES OF THIS FORM FOR YOUR USE WITH DIRECTLY ISSUED POLICIES.

NAME OF PERSON COMPLETING FORM: \_\_\_\_\_ PHONE NO./EMAIL: \_\_\_\_\_

## J. Homeowners' Associations/Property Owner's Association

A **homeowners' association (HOA)**, also called a **property owners' association** (sometimes referred to as POA, but causes confusion with reference to a Power of Attorney), is a private entity formed for the purpose of maintaining facilities, private access ways and common areas for the development that it serves, and may also regulate construction standards and other neighborhood features. The development served may be a subdivision, condominium, PUD, or other established development.

Most homeowners' associations are created under the terms of recorded restrictive covenants written to govern a particular property development, and such covenants typically provide that purchasers of property within the development automatically become members of the association upon purchase of the restricted property. Often the restrictive covenants will provide for members' voting rights, rights to use of common areas and facilities, and for assessments to be levied by the association to cover operating expenses and upkeep of private roadways, common areas, and facilities. Assessments are usually secured by a lien, enforceable by the homeowners' association, as set out in the restrictive covenants.

Homeowners' associations in Texas are governed by state statutes, with some laws applying only to specific Texas counties (see Texas Property Code §201, §204, §205, §206, §210 and §211, generally) or apply only to certain types of property (see Texas Property Code §208, as to historic property). Other statutes govern associations across the state, in particular as follows:

Texas Property Code §207 applies to any subdivision with a homeowners' association that is entitled to levy regular or special assessments. §207.003 requires the association to disclose various information items upon written request from a subdivision property owner, owner's agent, or title insurance company acting on behalf of the owner. Principal among these items is a **Resale Certificate**, which is required to include several facts relating to the association, most importantly for title insurance purposes a statement as to whether the restrictions contain a right of first refusal or other restraint on the owner's right to transfer the restricted property and a description of any conditions on the owner's property that are in violation of the restrictions and of which the association has actual knowledge. By terms of the statute, the title insurance company may also request an **update to the Resale Certificate**. The update is required to indicate whether the association will waive any rights of first refusal and will show the status of any unpaid special assessments or dues. It is advisable to update certificates as to unpaid assessments in the event that the original certificate is no longer current, as where a transaction has failed to close for a lengthy period of time. If the association fails to respond timely to requests for the Resale Certificate, §207.004 offers some relief as to liability for unpaid dues and the association's lien to secure unpaid dues.

Texas Property Code §209 is styled the **Texas Residential Property Owners Protection Act**. §209.004 requires the association to file a **Management Certificate**, listing information relating to the association, in each county where any portion of the managed subdivision is located. §209.009 prohibits an association from foreclosing an assessment lien if the debt secured by the lien consists solely of fines or attorney's fees associated with fines assessed. §209.010 provides for notice to a foreclosed owner and §209.011 allows for redemption by the owner under certain conditions. §209.012 prohibit an association from creating new easements over a subdivision lot without the owner's consent.

**Title insurance concerns as to an HOA stem from three areas: priority of the lien securing unpaid assessments, easements in favor of the association, and conditions on the property which violate restrictive covenants.**

- a) As to lien priority, the initial question to answer is whether the lien securing assessments is superior to a deed of trust lien to be insured. Restrictions may automatically subordinate the assessment lien to purchase money and construction liens, but not other kinds of liens – for example, home equity liens, which were not contemplated at the time that older restrictive covenants were written. If a lien is not expressly subordinated by the restrictive covenants, you should obtain a specific subordination from the association as to the lien to be insured. Remember that you may show subordinated liens on the loan policy per Procedural Rule P-64 in conjunction with P-11(b)(8) if the insured lender makes a written request for such treatment. Foreclosure of assessment liens is a second issue, regulated as described above. In order to avert foreclosure when an owner's policy is to be issued, or when the loan policy to be issued insures a lien that is subordinate to the association's lien, satisfactory evidence should be obtained indicating that assessments have been paid current. You should consult Texas underwriting counsel for particular requirements as to these foreclosures when insuring out of the foreclosure. **In any case, you should specifically except to the lien for assessments or charges, if the association has such a right, as well as to any recorded certificate of nonpayment of assessments.**
- b) Typically any easement favoring the association will be set out in the restrictive covenants. Common easements include fence, landscape and sign easements, allowing for fencing, decorative landscaping and subdivision signage which are maintained by the association. You may also see a right of entry set out in the restrictive covenants, which provides the association may enter the property in order to remedy a covenant violation. **You should make specific Schedule B exceptions for each easement as applicable, rather than relying upon the Schedule B (1) exception.**
- c) As to conditions upon the property which violate restrictive covenants, you may find it helpful to refer to the Resale Certificate issued by the association as well as a suitable survey plat showing the property. Recall that conditions in violation of the restrictive covenants will affect coverage offered under the T-19 and T-19.1 endorsements, as will the existence of a right of first refusal or rights of reverter. **You should make specific Schedule B exceptions for any present violations of restrictive covenants, including violations of building setback lines shown on the subdivision plat or recorded restrictive covenants. You should also make specific exception on Schedule B for any rights of first refusal or rights of reverter set out in restrictive covenants of record.**

### **1. Underwriting Summary**

1. Exception to the specific recording information of restrictive covenants affecting the land to be insured must be put in Schedule B, #1 of all Commitments and all policies issued.
2. The restrictive covenants must be carefully reviewed by the title examiner to determine whether the restrictions: create a lien for assessment, the priority of such lien, the assessment period, create easements and/or other rights such as reverter or rights of first refusal, etc.

3. If the restrictive covenants create a lien for the benefit of the HOA to secure the assessment, then special exception to such lien must be made in Schedule B significantly as follows:

**Lien to secure assessment by [Name of Homeowners' Association] as set forth in document recorded in \_\_\_\_\_.**

**This special exception should remain on any Owner's Title Policy issued.**

**On any Loan Policy issued, this special exception should remain if the HOA lien is not subordinated to the lien to be insured, either by the terms of the restrictions or by specific subordination agreement obtained for this transaction. If the HOA lien is subordinated to the lien to be insured, then this exception may be deleted from the Loan Policy or shown as subordinated if lender requests subordinate liens or leases to be shown pursuant to Procedural Rule P-64.**

**(Special Note – many title agents make a special exception in Schedule B as to the right or ability of the HOA to make assessments. That may be important to the lender, but title company in issuing title insurance is specifically interested in and concerned not about the assessment itself but the lien securing the assessment. Please make sure your specific exception in Schedule B (not that in #1, Sch. B) excepts to the lien created in the restrictions, not just to the assessments or dues.)**

4. If you are unsure how to contact the HOA to determine whether there are assessments due, there should be a Management Certificate of record providing that information.
5. If the transaction is a sale, obtain a Resale Certificate and take appropriate exception to items shown as described above.
6. Obtain an Update to Resale Certificate if original Resale Certificate expires.
7. Comply with lender's closing instructions as to priority of lien to be insured in the Loan Policy and as to payment of outstanding HOA assessments and/or collection of escrows for future payment of same by lender.
8. Dormant or non existing HOA where restrictions of record create an HOA and provide a lien for assessments – Property Code Sec. 209.004 requires every HOA to record a Management Certificate in every county where any of the burdened property is located. If they fail to record a Management Certificate or to timely update it as per the statute, then upon a bona fide sale, the assessment and lien for such prior assessment are not collectible from the buyer, title company or subsequent owners and the lien as to that unpaid amount is unenforceable.

**Underwriting approval is required** to insure without exception to prior assessments and/or the lien for assessment because of failure to file a Management Certificate or to update it appropriately or due to dormant or never activated HOAs.

## K. Loan Policy Aggregation Endorsement T-16 and Reinsurance Issues

It is not very often that the T-16 Loan Policy Aggregation Endorsement (referred to as the “Tie-In” endorsement in most other states) is requested. It might be seen when a corporation is financing or refinancing its debt and owns multiple sites where it operates its business like a chain of nursing homes or restaurants, tire stores, electronic stores, etc.

If Loan Policies are issued by the same underwriter on properties in various locales, all securing the same indebtedness or loan and the lender requests issuance of a T-16 Loan Policy Aggregation Endorsement:

1. Call underwriting (**210-225-6666 or 1-877-256-8098**) to make sure the endorsement applies to your facts. Issuance of this endorsement can be very confusing, especially when it is requested with issuance of policies in other states. The policy you are issuing may not exceed your policy limits nor require any reinsurance documentation or submission.
2. But remember, if the “aggregated amount” of the policies to be listed in the requested endorsement exceeds \$5,000,000 then this issuance needs to be submitted to our reinsurance department at our main office in North Carolina prior to issuance of the Commitment (if known at that time). Please send to or contact Charity Taylor at [ctaylor@invtitle.com](mailto:ctaylor@invtitle.com) or by phone at 919-968-2200.
3. You may not know when the order is taken that there will be an aggregation endorsement requested at closing. However, you should suspect there might be if the order indicates a note or indebtedness (a bond series) that greatly exceeds the value of the property that you are to cover (say a \$40M note and your property is on the tax rolls for \$1.3M). It would be efficient upfront to question the lender or servicing agent placing the title policy order as to what is the additional collateral for this loan and where is it located? Are other National Investor’s Title Insurance Company agents issuing Loan Policies on other land in their counties covering this same indebtedness?

Related rules and forms: **P-9(b)(13), R-11(J), and Form T-16.**

## L. Power of Attorney

During the 2013 Texas legislative session a new Statutory Durable Power of Attorney form was established. The new form was effective January 1, 2014 and codified at Section 752 of the new Texas Estates Code (see form below). It is a business and property power of attorney form and is not applicable to health care or termination of life issues. For real estate transactions and issuance of title insurance, it is the preferred form.

Section 752.001(b), Texas Estates Code, states that any form that is “substantially” the same as the statutory form is afforded the same statutory meaning and guarantees as the actual promulgated form. Unfortunately, there is no definition of or suggested guidelines to determine whether another form is “substantially” the same as the statutory form. Contact underwriting if the form differs from the statutory form in any substantive way.

Unlike the old form, this new form requires the maker to specifically initial on the line in front of a chosen power in order to grant that power to the Attorney in Fact. NITIC requires that the form indicate that “A. Real property transactions” is a selected power by principal initialing that power, or “N” which activates all the listed powers. An “X” or check mark on the line in front of a power is not accurate or effective. It must be the maker’s initials.

If the POA is being used in a purchase or borrowing transaction, then besides selection of “(A)” Real property transactions”, section “(E) Banking and other financial institution transactions” must be initialed by the maker of the POA. The maker of the POA also may select all the stated powers by initialing “N. ALL OF THE POWERS LISTED IN (A) THROUGH (M). YOU DO NOT HAVE TO INITIAL THE LINE IN FRONT OF ANY OTHER POWER IF YOU INITIAL LINE (N).”

Also the maker must decide whether the power is effective at the time of signature or not until the maker is determined (diagnosed) to be disabled or incapacitated. The terms of the form say, if the power is not effective until maker is disabled or incapacitated, then either maker should have defined how disability or incapacity is to be verified or if no such special instruction was included, then by physician certification in writing, after examination of maker, at a date later than the date of the POA is executed, that maker is incapacitated by reason of being incapable of managing his/her financial affairs.

### 1. Underwriting Guidelines – P.O.A.

Powers of Attorney are inherently risky. While they are an excellent estate planning tool, they are also the potential subject of fraud and duress. They are never acceptable for mere convenience. Foreign travel or medical or military status are primary and acceptable reasons for use of a POA in a real estate transaction. Remember it is always better to have the actual person sign the document instead of an attorney-in-fact when possible. With various overnight courier services and/or electronic transmission of documents, there are fewer reasons to accept the use a POA in a real estate transaction.

The POA, whether it is the “Statutory” form or one drafted for maker by attorney or other source, must be carefully reviewed by the title agent to verify that:

- a) the form is acceptable,
- b) it is filled out properly and completely,
- c) it is properly executed and notarized (remember that the POA is not acceptable if there is any question **about the capacity or competency of the maker at the time**

**the POA was signed** – if the signature of maker is not on the signature line or does not look anything like a signature, then further inquiry as to the maker’s capacity at the time the POA was made is definitely warranted, including contacting the Notary and inquiring whether he/she can and will testify to maker’s capacity at the time of signing the POA.)

- d) the attorney in fact appointed in the POA is the same person that will be signing the documents,
- e) the form is “durable” meaning that it has language that clearly says that the effectiveness of the POA shall survive the incapacity of the maker or that the power becomes effective when the principal becomes incapacitated. The selection of when the form becomes effective continues to have an “automatic” selection feature of the prior form, so that if maker doesn’t choose either “(A) This power of attorney is not affected by my subsequent disability or incapacity, or (B) This power of attorney becomes effective upon my disability or incapacity” then it is assumed that the principal chose (A),
- f) under “SPECIAL INSTRUCTIONS” that there are no specific limitations of powers that affect the current transaction, and
- g) if there is a specific termination date for the POA, and that it is still currently effective.

If the statutory form is used, it is not necessary that the POA be specific. It does not need to specifically reference the subject real estate transaction and/or the sales price. If it does, that is certainly acceptable, but not required.

In Texas there is no defined format that must be used for the attorney in fact to sign for the POA maker. The preferred way is for the signature line to be for maker and for the attorney in fact to sign the maker’s name and add that it is signed by the attorney in fact. See example:

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John Smith by attorney in fact, Robert Thomas

The most important item of concern with a signature under a POA is for the Notary Certificate to accurately reflect the format of the actual signature line and that the attorney in fact appeared before the notary and acted on behalf of the POA maker. It should not say that the maker appeared before the notary, because he/she didn’t.

In closing a transaction in which a POA is utilized:

- a) Texas law requires that the POA must be recorded in the county where the land is located. Some people are reluctant to give the original POA to the title company for fear of it being lost. If they wish to record it themselves, then closing will have to wait until the recordation of the POA is confirmed. Where available, with eRecording, the original doesn’t leave the office and can be handed back to the attorney in fact, solving that problem.
- b) After documents are signed, **but before any disbursement or recording of the transaction documents**, the POA must be confirmed with the maker by direct telephone contact or email or fax statement, wherein the POA maker confirms ~~confirming~~ that he/she ~~maker~~ is aware of and approves the transaction which the Attorney in fact is signing for maker and that the validity of the POA and the use thereof in this transaction has not been rescinded or revoked. This direct verification is a critical and very necessary step in the proper and acceptable utilization of a POA in a transaction to be insured.

Please call underwriting if the POA maker is in the military or otherwise is not available to verify the POA and confirm the actions of the attorney in fact in the particular transaction.

Prior "statutory durable power of attorney" forms effective prior to January 1, 2014 are still available on the internet and otherwise. If a prior form is presented and signed prior to January 1, 2014 and it is complete and correct, you may use it for your transaction. However, if you are presented with a form that is entitled "Statutory Durable POA" but not yet signed or is signed after January 1, 2014 but it is not the current (2014) form shown herein, you may not rely on or use that power of attorney. In other words, prior legislatively created "Statutory Durable POA" forms are obsolete for execution after January 1, 2014. At that point only the form effective January 1, 2014 is the "statutory" form.

If you are presented with what appears to be a prior "statutory" form but the word "Statutory" has been removed from all parts of the form and the maker has signed that form in 2014 or after, that is probably an acceptable form which the maker has chosen as their form of POA. Proper scrutiny as to form requirements stated herein will be necessary to determine whether it is an acceptable POA.

If a POA is presented to be used for a borrower in connection with the closing of a home equity loan or a reverse mortgage loan, the POA must be executed and notarized at a Texas title agent or title company or at the lender making the loan or at an attorney's office. For this application, if the POA was not signed in your title company, you must have written confirmation from the other title agent/company, lender, or attorney where it was signed and notarized, authenticating that it was signed and notarized at their office to comply with home equity and reverse mortgage loan rules.

## **2. Form (effective January 1, 2014)**

### **STATUTORY DURABLE POWER OF ATTORNEY**

**NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, SUBTITLE P, TITLE 2, ESTATES CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.**

You should select someone you trust to serve as your agent (attorney in fact). Unless you specify otherwise, generally the agent's (attorney in fact's) authority will continue until:

- (1) you die or revoke the power of attorney;
- (2) your agent (attorney in fact) resigns or is unable to act for you; or
- (3) a guardian is appointed for your estate.

I, \_\_\_\_\_ (insert your name and address), appoint \_\_\_\_\_ (insert the name and address of the person appointed) as my agent (attorney in fact) to act for me in any lawful way with respect to all of the following powers that I have initialed below.

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS LISTED IN (A) THROUGH (M).

TO GRANT A POWER, YOU MUST INITIAL THE LINE IN FRONT OF THE POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF THE POWER. YOU MAY, BUT DO NOT NEED TO, CROSS OUT EACH POWER WITHHELD.

- \_\_\_ (A) Real property transactions;
- \_\_\_ (B) Tangible personal property transactions;
- \_\_\_ (C) Stock and bond transactions;
- \_\_\_ (D) Commodity and option transactions;
- \_\_\_ (E) Banking and other financial institution transactions;
- \_\_\_ (F) Business operating transactions;
- \_\_\_ (G) Insurance and annuity transactions;
- \_\_\_ (H) Estate, trust, and other beneficiary transactions;
- \_\_\_ (I) Claims and litigation;
- \_\_\_ (J) Personal and family maintenance;
- \_\_\_ (K) Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;
- \_\_\_ (L) Retirement plan transactions;
- \_\_\_ (M) Tax matters;
- \_\_\_ (N) ALL OF THE POWERS LISTED IN (A) THROUGH (M). YOU DO NOT HAVE TO INITIAL THE LINE IN FRONT OF ANY OTHER POWER IF YOU INITIAL LINE (N).

**SPECIAL INSTRUCTIONS:**

Special instructions applicable to gifts (initial in front of the following sentence to have it apply):

\_\_\_ I grant my agent (attorney in fact) the power to apply my property to make gifts outright to or for the benefit of a person, including by the exercise of a presently exercisable general power of appointment held by me, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

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UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:

- (A) This power of attorney is not affected by my subsequent disability or incapacity.
- (B) This power of attorney becomes effective upon my disability or incapacity.

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.

IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT YOU CHOSE ALTERNATIVE (A).

If Alternative (B) is chosen and a definition of my disability or incapacity is not contained in this power of attorney, I shall be considered disabled or incapacitated for purposes of this power of attorney if a physician certifies in writing at a date later than the date this power of attorney is executed that, based on the physician's medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental condition to another person for purposes of this power of attorney. A third party who accepts this power of attorney is fully protected from any action taken under this power of attorney that is based on the determination made by a physician of my disability or incapacity.

I agree that any third party who receives a copy of this document may act under it. Revocation of the durable power of attorney is not effective as to a third party until the third party receives actual notice of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

If any agent named by me dies, becomes legally disabled, resigns, or refuses to act, I name the following (each to act alone and successively, in the order named) as successor(s) to that agent:  
\_\_\_\_\_.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

\_\_\_\_\_  
(signature of principal)

State of \_\_\_\_\_  
County of \_\_\_\_\_

This document was acknowledged before me on \_\_\_\_\_(date) by  
\_\_\_\_\_.  
(name of principal)

\_\_\_\_\_  
(signature of notarial officer)

(Seal, if any, of notary) \_\_\_\_\_  
(printed name)

My commission expires: \_\_\_\_\_

## M. Private Transfer Fees

A freehold covenant or a private transfer fee is a covenant designed to run with the land that requires subsequent sellers or buyers to pay a “transfer fee” of a specified percentage of the consideration to be paid on the sale of the property. Section 5.017 of the Texas Property Code was established to provide guidance as to the validity of such transfer fee covenants. Section 5.017 became effective January 1, 2008.

### 1. Fee for Future Conveyance of Residential Real Property and Related Lien Prohibited (§ 5.017)

- a) In this section, “property owners' association” has the meaning assigned by [Section 209.002](#).

*Under Section 209.002 “Property owners' association” or “association” means an incorporated or unincorporated association that 1) is designated as the representative of the owners of property in a residential subdivision; 2) has a membership primarily consisting of the owners of the property covered by the dedicatory instrument for the residential subdivision; and 3) manages or regulates the residential subdivision for the benefit of the owners of property in the residential subdivision.*

- b) A deed restriction or other covenant running with the land applicable to the conveyance of residential real property that requires a transferee of residential real property or the transferee's heirs, successors, or assigns to pay a declarant or other person imposing the deed restriction or covenant on the property or a third party designated by a transferor of the property, a fee in connection with a future transfer of the property is prohibited. A deed restriction or other covenant running with the land that violates this section or a lien purporting to encumber the land to secure a right under a deed restriction or other covenant running with the land that violates this section is void and unenforceable. For purposes of this section, a conveyance of real property includes a conveyance or other transfer of an interest or estate in residential real property.
- c) This section **does not apply to** a deed restriction or other covenant running with the land that requires **a fee** associated with the conveyance of property in a subdivision that is **payable to**:

(1) a property owners' association that manages or regulates the subdivision or the association's managing agent if the subdivision contains more than one platted lot;

(2) an entity organized under [Section 501\(c\)\(3\), Internal Revenue Code](#) of 1986; or

*Section 501(c)(3) provides as follows: Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is*

*carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.*

(3) a governmental entity.

d) Retroactive effect

Section 5.017(b) of the Property Code, which prohibits and declares void deed restrictions and other covenants running with the land that require certain transfer fees, does not apply to restrictive covenants that were in existence and recorded prior to the statute's effective date. (Tex. Atty. Gen. Op., No. GA-0780 (2010)).

**2. Underwriting Requirements:**

If a "Transfer Fee" covenant as described in Sec. 5.017, Texas Property Code, appears to affect property on which you are asked to insure title, include the following exceptions in **all** commitments, binders and title insurance policies, including the Addendum to the Short Form Loan Policy (T-2R):

Covenants, Conditions and Restrictions in instrument recorded \_\_\_\_\_, which purport to establish a "transfer fee" due and payable upon each transfer of the Land with payment secured by a lien on the Land. Notwithstanding any Covered Risk, policy provision, or endorsement to the contrary, this policy does not insure against and excepts to all terms of the referenced instrument and any and all loss, damage, or lack of priority of lien due to the "transfer fee" assessment and lien securing same and any failure to pay the fees or assessments on past, current or future transfers of the Land.

Additionally both Seller and Borrower in a sale transaction must sign the attached Disclosure and Hold Harmless Agreement as to Transfer Fees. This fully executed document should remain in the transaction file.

For additional reference, please see the Texas Department of Insurance Commissioner's Bulletin #B-0018-10 (Title Bulletin No. 169) which is attached hereto.

**COMMISSIONER'S BULLETIN #B-0018-10**

Title Bulletin No. 169

April 26, 2010

**TO: ALL INSURERS WRITING TITLE INSURANCE IN THE STATE OF TEXAS AND ALL DIRECT OPERATIONS AND AGENTS THEREOF**

**RE: FUTURE TRANSFER FEE COVENANTS**

It has come to the attention of the Texas Department of Insurance (“the Department”) that some sellers are demanding that title agents and underwriters issue title insurance in sales transactions which include a future transfer fee covenant. A future transfer fee covenant provides for a seller to receive a fee upon subsequent sales of the insured property.

As with any new product, the Department expects you to take prudent steps to carefully evaluate the risk of coverage and whether your organization has the resources to insure and monitor the status of the covenant’s obligations over time. If you determine to issue the policy but except to such liens, the exception should be accomplished in accordance with Section IV, Procedural Rule 5 (P-5) of the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* (“Basic Manual”). Licensees are reminded that general exceptions to coverage are not permitted except by rule. In the absence of such a rule, a specific reference to an instrument must be provided when listing a Schedule B exception pursuant to P-5 of the Basic Manual.

Violation of the Insurance Code or Department rules may subject you to disciplinary action, including fine, penalty, license suspension, license revocation, and/or other appropriate administrative remedy. If you have any questions regarding this Bulletin, please contact the Title Division at (512) 322-3482 or via email at: [title@tdi.state.tx.us](mailto:title@tdi.state.tx.us).

Mike Geeslin  
Commissioner of Insurance

**PRIVATE TRANSFER FEE DISCLOSURE  
And Hold Harmless**

**Date:**

**Seller:**

**Buyer:**

**Guaranty File No.:**

**Property Description (hereinafter "Property):**

1. The Property which Buyer is purchasing in this transaction may be subject to a restrictive covenant which requires payment by a seller of a transfer fee upon any transfer of the property. This fee is not imposed by any governmental entity and may be binding upon Buyer for any future transfer of the Property, "transfer" being defined by the terms of the document and covenant establishing the transfer fee, recorded in \_\_\_\_\_ Official Public Records of \_\_\_\_\_ County, Texas.
2. The stated amount of the fee is \_\_\_\_ percent ( \_\_\_\_ %) of the total consideration paid for the Property in this transaction, that being \$ \_\_\_\_\_ which will be charged to the Seller. Any change in the Sales Price in this transaction will affect the transfer fee amount that may be owed by the Seller.
3. Failure to pay the fee may result in an automatic lien upon the Buyer's property to secure the unpaid fee.
4. When Buyer sells or transfers the Property in the future, this fee may be charged again based upon the price at that time and at which the property is being sold.
5. The fee will be paid to the following entity(ies) or person(s) in this sale:  
\_\_\_\_\_.

6. Any title policy that insures the Property will contain an exception to coverage for the document and covenant establishing the transfer fee and for any lien resulting from the covenant.

7. Any party having questions concerning the document or covenant creating the fee and lien is advised to consult the attorney of their choice. Neither the title insurance agent closing this transaction nor the title insurance underwriter insuring this transaction have provided or offered any legal advice to Buyer or Seller regarding the transfer fee, lien or document or covenant creating them.

The undersigned hereby indemnify and hold [Title Agent] and [Underwriter] harmless from any costs, loss, or obligations that the undersigned may incur as a result of or arising out of the assessment, payment, or any other matter relating to the transfer fee and/or lien(s) securing payment of the transfer fee.

Seller certifies that they sign this Disclosure and Hold Harmless freely and without duress and that the information herein is true and correct.

Seller \_\_\_\_\_

Seller \_\_\_\_\_

Buyer certifies that they sign this Disclosure and Hold Harmless freely and without duress and that the covenant and transfer fee have been disclosed to Buyer and that Buyer's Owner's Title insurance policy will contain exceptions to the document and covenant establishing the transfer fee and the lien securing payment of the transfer fee.

Buyer \_\_\_\_\_

Buyer \_\_\_\_\_

## N. Rights of Survivorship

Historically, the law has created several ways for co-owners of property to “hold title jointly” such as tenants in common, joint tenants, tenants by the entirety, etc. The unique factor of a joint tenancy is an automatic “right of survivorship” (as described below). However, joint tenancy was abolished by statute in Texas many years ago. Holders of undivided interest in Texas are presumed to take title as tenants in common (each tenant is entitled to possession of the whole estate). In a tenants in common ownership, when an owner dies the interest of the decedent in the property does not automatically pass to the remaining joint owners but passes by will or intestacy from the decedent as if the decedent’s interest had been severed.

Nothing, however, prevents multiple owners (co-owners) of the same property from contractually agreeing with each other to hold or take title with each individual’s interest passing, outside of probate or inheritance, to those remaining co-owners that survive, with ultimate vesting of the entire fee simple in the last one living. This is called a “right of survivorship.” In Texas, a right of survivorship may be created by written agreement between co-owners (of any quantity) or between spouses as to community property. It is common for deeds to say that X conveys to Y and Z, “with right of survivorship” or “as joint tenants with right of survivorship, or even (the very antiquated language) “as joint tenants with right of survivorship and not as tenants in common and not as tenants by the entirety.” The “right of survivorship” is a contractual obligation and can be created in a separate written agreement and does not have to appear in a conveyance document.

### 1. **Texas Probate Code § 46. JOINT TENANCIES.**

(a) If two or more persons hold an interest in property jointly, and one joint owner dies before severance, the interest of the decedent in the joint estate shall not survive to the remaining joint owner or owners but shall pass by will or intestacy from the decedent as if the decedent's interest had been severed. The joint owners may agree in writing, however, that the interest of any joint owner who dies shall survive to the surviving joint owner or owners, but no such agreement shall be inferred from the mere fact that the property is held in joint ownership.

(b) Subsection (a) does not apply to agreements between spouses regarding their community property. Agreements between spouses regarding rights of survivorship in community property are governed by Part 3 of Chapter XI of this code.

#### a) Examination Caution:

When you see a conveyance of record which indicates that the grantees were to hold title as **joint tenants** (but it does not include the “right of survivorship wording), and any grantee is now deceased, you should inquire as to whether the joint tenants previously entered into a separate written survivorship agreement. See further Underwriting requirements below.

**Community Property:** Agreements between spouses governing rights of survivorship in community property are separately regulated under Section 46(b) of the Texas Probate Code (see above) which references Sections 451-462 of the Texas Probate Code.

Section 452 sets forth certain phrases that are sufficient to create a right of survivorship in community property if they are included in a written agreement signed by both spouses. These phrases are as follows: (1) "with right of survivorship"; (2) "will become

the property of the survivor"; (3) "will vest in and belong to the surviving spouse"; or (4) "shall pass to the surviving spouse." Texas Probate Code - Section 452. Formalities

An agreement between spouses may be revoked in various ways per Section 455 of the Probate Code. Texas Probate Code - Section 455. Revocation If the agreement does not provide terms of revocation, the spouses may sign a written instrument to revoke, or one spouse may sign a revoking instrument and deliver it to the other spouse. Finally, the agreement may be revoked as to specific property by conveyance of the property, if the conveyance is not inconsistent with the terms of the survivorship agreement and applicable law.

Following the death of one spouse, the surviving spouse may follow the procedure outlined in Section 456 Texas Probate Code - Section 456. Proof Of Agreement of the Probate Code in order to obtain an adjudication proving up the survivorship agreement. Per Section 458 Texas Probate Code - Section 458. Effect Of Order of the Probate Code, an order of adjudication serves to protect various rights of the surviving spouse as to property subject to the survivorship agreement. Section 460 of the Probate Code provides protections for persons acting without notice of the existence of an agreement creating a right of survivorship in community property. Texas Probate Code - Section 460. Protection Of Persons Or Entities Acting Without Knowledge Or Notice

## **2. Underwriting:**

If documents in chain of title indicate that property was conveyed to multiple owners with right of survivorship and one or more owners are deceased at time of subsequent conveyance:

1. require evidence or confirm that apparent deceased owner was/is deceased. If inventory has been filed, make sure that this property was/is not included. If included, proceed as if Right of Survivorship was rescinded prior to death.
2. if right of survivorship is just stated in the deed:
  - a) check in deed to see if Buyers/Grantees also executed the deed acknowledging their "agreement" to hold title jointly with right of survivorship. If Buyers/Grantees did not sign deed;
  - b) require copy of written agreement between all co-owners/spouses and upon obtaining, review for adequacy and if notarized require Agreement to be recorded in county where property is located. If not recordable, have survivor make an affidavit stating relevant terms of "Right of Survivorship Agreement" and record Affidavit with closing documents.
3. if co-owners/spouses never made a written survivorship agreement, the right of survivorship fails and you should proceed as if no survivorship was ever attempted or intended, requiring probate and/or heirship proceedings on the deceased co-owner/spouse.

## O. Scope of Examination

The examination of any real estate title will be subject to the quality and content of the title plant upon which the examination is based. Certain aspects of the title plant are regulated by Texas law and must meet regulatory requirements for licensing of the title plant. Section 2501.004 of the Texas Title Insurance Act requires that a title plant must:

1. be geographically arranged;
2. cover a period beginning not later than January 1, 1979, and be kept current; and
3. be adequate for use in insuring titles, as determined by the department (of insurance).

Procedural Rule P-12 further requires that miscellaneous alphabetical indices be maintained by name. The records that must be included in a title plant per P-12 are plat or map records, deeds, deeds of trust, mortgages, lis pendens, abstracts of judgment, federal tax liens, mechanic's liens, attachment liens, divorce actions, wherein real property is involved; probate records; chattel mortgages, attached to realty and financing statements relating to items which are, or are to become, attached to realty.

National Investors Title Insurance Company's (NITIC) requirements for title searches and examination in Texas are as follows:

### 1. **Prior Title Evidence ("Starter Files"):**

#### a) Owner's Policies:

Agent may begin a title examination utilizing and relying on a complete prior Owner's Title Insurance policy in its possession if:

1. the policy covers the same property as will be insured in the current transaction,
2. the policy is a T-1 or T-1R Owner's Title Policy,
3. the policy was issued on an underwriter currently licensed in the State of Texas,
4. the policy was issued by a reputable, currently licensed and operating Texas agent,
5. the search begins ninety days prior to the date of the policy,
6. the search includes the names of the vested owners named in the prior policy and all owners for a period of twenty (20) years prior to the current date, and
7. the examination includes documents recorded for the transaction from which the prior policy was issued.

#### (1) Exceptions to this standard:

##### (a) *THIN PLANT Policy*

NITIC will not accept as satisfactory prior title evidence, a prior owner's policy produced by an agent or underwriter utilizing a "thin" title plant. {A "thin plant" may be described as (1) a computer or software program that merely searches the county clerk's records or a separate databank or copy of the county clerk's records for documents that reflect the legal description of the subject property and does not contain a geographically index copy of all land records, or (2) a title plant that is posted from County Clerk's indexes without the benefit of reading and posting from the actual instruments that were filed of record.} Agent should

consult Texas underwriting counsel as to any questions regarding such prior policies or “thin plant” issues.

*(b) Monetary Limit*

Further, agent must consult Texas underwriting counsel before relying upon a prior policy where the new policy coverage will be in excess of two million dollars (\$2,000,000).

b) Title Commitments:

Agent should not rely upon another company’s prior title commitment as complete prior title evidence. It is suggested that prior commitments be employed only as additional evidence of prior title for platted subdivision properties in tandem with a base file for the subdivision. In any event, it should never be assumed that Schedule C requirements made in the commitment were met prior to closing and agent should specifically look for evidence of fulfillment of those requirements.

c) Special Considerations as to Prior Policies:

NITIC understands that certain title plants exchange prior commitments through joint plants or individually, but all starter information should be obtained in accordance with Texas law and in strict compliance with Texas Department of Insurance rules and regulations. Local knowledge and circumstances may suggest that agent place more or less faith in the accuracy of a prior policy. Use of a prior policy as a starter for an examination is a short cut and agent must use its best judgment in relying upon policies issued by other companies. Where the new policy will exceed the agent’s authority to issue without underwriter approval, in addition to overlimits approval, use of a prior policy as a starter must be obtained from Texas underwriting counsel. Never assume that any mineral search was conducted when the prior policy contains a general exception/exclusion to all minerals pursuant to Procedural Rule P-5.1. If the new commitment and policy will not contain the same P-5.1 exception/exclusion, the agent must conduct a full mineral search as set forth below.

**2. Lack of Prior Title Evidence:**

a) Platted Subdivisions with Base File

Where agent does not have an acceptable prior owner’s policy, but does have a subdivision base file, agent should refer to its base file for the platted subdivision for general easements, mineral reservations, restrictions, building setbacks, and so forth. Agent should examine the property forward from the date of the subdivision plat and review the plat for any matters particular to the lot or lots being examined. Where property has been resubdivided, agent should still refer back to the original plat for matters unique to the particular lot(s) under examination and should examine forward from the appropriate plat depending upon whether the agent possesses a resubdivision base file.

b) Acreage and Platted Subdivisions lacking Base File

Where agent has no prior title evidence, the agent must make a full search and examination of the title. If the agent intends to show specific exceptions for mineral severances/reservations and will not be using the promulgated exclusion/exception set forth in Procedural Rule P-5.1, the agent should examine back to at least 1900 or earlier

to locate all mineral severances/reservations of record, as judgment warrants. Likewise, agent should examine back to 1900 or earlier to ascertain easements, restrictive covenants, or other encumbrances upon the property. For vesting of title, it is National Investors' preference that agent search back to the extent that their plant in tandem with a mineral and encumbrance search. If this is not possible, agent should examine title vesting from at least 1950 forward, except where agent finds a final court order entered in a Trespass to Try Title or a Quiet Title action, in which case they may proceed from the date of the final court order.

### **3. *Special Considerations as to Name Searches:***

#### **a) Federal Debt Collection Procedure Act of 1990 (28 USC §3001 et seq)**

A judgment in favor of the United States in a federal civil action will result in a lien on all real property of the judgment debtor upon the filing of a certified copy of the abstract of judgment (28 USC §3201). The lien lasts twenty years and is superior to purchase money liens. For this reason, an agent should always be sure the name search is comprehensive for present owners and predecessors in title over the past 20 years, and includes as well the purchaser's name(s).

#### **b) USA Patriot Act**

The Office of Foreign Assets Control (OFAC) maintains a list of known or suspected terrorists at <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> . The list is continually updated. Joint plants may already update from the list; otherwise the U.S. Treasury website offers the list in various formats. Agent should search the transaction purchaser's name against the list and notify OFAC for further instructions if a purchaser appears on the list. Further information is available on this web page as to "hits" on the list and contacting OFAC: <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx> .

## P. Tax Liens

### 1. AD VALOREM TAXES

#### a) Where the tax bill comes from

Appraisal District: Each County has an Appraisal District that identifies all parcels of land in the county and determines the value of the property for tax purposes. Generally property is taxed at market value, what the property would sell for on the open market. (Taxes on real property are sometimes referred to as “ad valorem” taxes. “Ad valorem” is a Latin phrase that means “at value”.) However, the value for tax purposes can be reduced based on the personal situation of the property owner and the use to which the property is put. An exemption is granted for certain personal situations, such as the age and physical condition of the property owner. A valuation method other than market value is utilized when property is put to certain agricultural uses. The Appraisal District determines whether exemptions can be granted and whether alternative valuation methods can be used. Once the Appraisal District has identified the parcels of land and the values at which they should be taxed (taking into account any applicable exemption or alternate valuation method), the Appraisal District creates and sends to each taxing jurisdiction (county, city, school, water district, etc.) a list of the taxable properties in that jurisdiction and their assessed values (the “tax roll”).

Taxing Jurisdiction: Each taxing jurisdiction has a Board that prepares the annual budget for the taxing jurisdiction, deciding how much money the taxing jurisdiction needs in order to provide the services that it is required by law to provide. The Board then determines the tax rate that it will assess for the current year, how much will be charged for each \$100 of the assessed value of the properties shown on the tax roll generated by the Appraisal District. The total amount required for the budget is divided by the total assessed value of all properties in the taxing jurisdiction, and the result is the tax rate. (For example, if the budget requires \$20 million in revenue, and the total assessed value of all properties in the taxing jurisdiction is \$60 million, then the tax rate would be \$0.33 per \$100. The tax on a property with an assessed value of \$100,000 would be \$333.33.) Each taxing jurisdiction generates the tax bills and receives the payment of the tax bills for the properties located within the jurisdiction. A piece of property usually is located in more than one taxing jurisdiction, and the property will be taxed by each taxing jurisdiction. However, many smaller taxing jurisdictions choose to contract with larger taxing jurisdictions in the county to collect their taxes. It is very common to see a tax bill that includes the taxes for more than one taxing jurisdiction.

#### b) The amount of the tax bill

The amount of the tax bill is determined by multiplying the assessed value of the property (as determined by the Appraisal District) with the tax rate set by the taxing jurisdiction. While the starting point for all assessed values is the price that the property would sell for on the open market (as estimated by the Appraisal District), exemptions and alternate valuation methods can affect the final assessed value upon which the tax bill is calculated.

c) Exemptions

The exemptions that are allowed are “homestead”, “over-65”, “disabled”, “100% disabled veteran”, and “over-55 surviving spouse”. These are called “personal exemptions” because they apply to a person who owns the property. At least one property owner must meet the qualification for the exemption in order for it to be granted. The exemption is granted upon approval by the Appraisal District of an application submitted by the property owner. The property owner must establish that he has record title to the property and holds some estate in land. These exemptions will not be granted on more than 20 acres of land; for tax purposes larger tracts can be divided into the 20 acres claimed for the exemption and the remainder of the property. Most Appraisal Districts will grant the exemption based on a life estate. Some Appraisal Districts will grant personal exemptions when record title is held in a trust if the trust is a “family trust” and the property is occupied by members of the family.

The “homestead” exemption requires that the person claiming the exemption has record title to the property on January 1 of the tax year and that the person occupies the property as his principal residence. The “over -65” exemption requires that a property owner be sixty-five years of age or older and occupies the property as his principal residence. The “disabled” exemption requires that the property owner prove up his disability and that he occupies the property as his principal residence. The “100% disabled veteran” exemption requires that the property owner prove that he is a veteran and is 100% disabled which entitles the owner to pay no tax on the property that he occupies as his principal residence (homestead) and to a reduction of assessed value on all other property he owns. The “over-55 surviving spouse” must establish that the person is fifty-five or older and is the surviving spouse of a person who was entitled to claim the “over-65” exemption.

These exemptions have certain dollar amounts associated with them. These amounts are subtracted from the market value of the property (as established by the Appraisal District) to determine the assessed value. The amount of the tax is computed by multiplying the assessed value by the tax rate of the taxing jurisdiction. So, applying an exemption reduces the amount of tax a property owner pays. (For example, a \$15,000 exemption is granted for homestead property. If the market value of the property is \$100,000 and the tax rate is \$1.00 per each \$100 of assessed value, then tax without the exemption would be \$1,000. But if the exemption is granted, then the tax would be \$850.00 [ $\$100,000 - \$15,000 = \$85,000$ ;  $\$85,000 \times \$1.00/\$100 = \$850$ ].)

d) Alternate valuation methods

While the assessed value of property is generally based on its market value, alternate valuation methods can be used to establish value under the appropriate circumstances. In these situations the assessed value is determined by the land’s capacity to produce agricultural products rather than by what the land would sell for on the open market.

The two most common alternate valuation methods are the “open space valuation” (also called the “1-d-1 appraisal”) and the “agricultural use valuation” (also called the “1-d appraisal”). In order to qualify for the “agricultural use valuation”, the property owner must establish that farming or ranching is his primary occupation and source of income. Comparatively few people qualify for this valuation method. Much more common is the “open space valuation” which requires that the property owner demonstrate that the land has been used for agriculture for five of the previous seven years and that the agricultural use was of the degree of intensity that is typical in the area. “Agriculture” is broadly

defined and can include producing crops, livestock, timber, plants and flowers if grown commercially, or land left idle as part of normal crop rotation or government programs, and wildlife management.

Under this type of valuation, the assessed value of the property is based on the Appraisal District's determination of the income that would be derived from the "crop". Usually the income that is derived from the "crop" is less than the market value of the land. Since the amount of tax is determined by multiplying the assessed value by the tax rate, taxes will be less when the property is under an "agricultural use valuation" or "open space valuation". (Consider the example of a ranch with a market value of \$2 million, income from crops of \$250,000, and tax rate of \$1.00 per \$100 of assessed value. If no "open space valuation" is granted, then the tax would be \$20,000 [ $\$2 \text{ million} \times \$1.00/\$100 = \$20,000$ ]. If "open space valuation" is granted, then the tax would be \$2,500 [ $\$250,000 \times \$1.00/\$100 = \$2,500$ ].

Use of alternate valuation methods does have one disadvantage. If the use of the property is ever changed to a "non-agricultural" purpose, then additional taxes will be charged for each of the previous five years if the land received the "open space valuation" and for each of the previous three years if the land received the "agricultural use valuation". The additional tax will be the difference between what would have been paid if the assessed value of the property had been at market rate and the amount of taxes that were actually paid, plus seven percent interest for each year from the date on which the taxes would have been due. This additional tax is called a "rollback" tax.

e) When the tax bill is payable

(1) Timing

Generally, a tax bill is due and payable when it is received. By statute, tax bills are to be issued no earlier than October 1 of a tax year. However, sometimes the tax rates have not been set by a taxing jurisdiction as of that date. Without a tax rate, a tax amount cannot be calculated, and a tax bill cannot be generated. Generally, taxes are not delinquent until February 1 of the following tax year. On February 1 of the following tax year, the base tax amount plus applicable penalty and interest will become due and payable. However, by law a property owner has at least twenty-one days to pay after a tax bill is mailed without being subject to penalty and interest. If the bill is mailed after January 10, then the property owner has until the first day of the next month that will provide at least twenty-one days for paying the bill.

(2) Penalty and interest

If payment is delinquent, regular penalty charges may be as high as twelve percent (12%), depending on how long the tax remains unpaid. Interest is charged at the rate of one percent (1%) per month, and interest continues to accrue as long as the tax remains delinquent. There may also be an additional fifteen percent (15%) penalty added if the taxing jurisdiction hires a private attorney to collect the delinquent taxes.

## **2. Supplemental assessments**

Although the records of a taxing jurisdiction may indicate that taxes are fully paid for a certain tax year, two situations can occur that will result in additional taxes being assessed for that year. The first situation is described as a "supplemental assessment". A supplemental assessment can occur in two ways. One is when the Appraisal District

discovers that additional property should have been covered by a tax bill and wasn't, such as when improvements are added to the property without the owner advising the Appraisal District. The other is when taxes were calculated using an exemption that was not in effect, such as when a person claiming an "over-65" exemption dies and the persons who inherit do not qualify for that exemption and do not advise the Appraisal District that the exemption has expired. The second situation is the "rollback" tax that is assessed when use of property taxed under "agricultural use valuation" or "open space valuation" changes (generally called a "triggering event").

When the error or triggering event is discovered, the Appraisal District will determine the appropriate assessed value of the property for the applicable tax years. The information about the revised assessed values for the applicable tax years will be put on a "supplemental tax roll" that is sent to the appropriate taxing jurisdictions. The taxing jurisdictions then generate a tax bill for the additional amounts owed and mail it to the property owner. The supplemental tax roll can be prepared at any time of year. The tax bills resulting from a supplemental assessment or a rollback are payable under the same pattern as other tax bills. Payment of the base tax amount is due when the bill is mailed and not delinquent until the first day of the next month that will provide at least twenty-one days for paying the bill. Once delinquent, penalty and interest accrue as of January 1 of the tax year for which the taxes are assessed, and not from the tax year in which the supplemental tax roll was generated or the tax year in which the bill was mailed.

### **3. Why title companies care about property taxes and tax bills**

By statute, a lien attaches to property as of January 1 of the tax year to secure the applicable taxing jurisdictions for payment of all real property taxes assessed against the property. The real property tax lien is superior to all other voluntary liens and almost all involuntary liens against the property, even if the tax lien attaches later in time than these other liens. If taxes are not paid, the taxing jurisdictions are entitled to foreclose under their tax lien, either obtaining title to the property themselves or allowing a third party to purchase the property at foreclosure sale.

Ad valorem taxes in Texas are considered to be paid "in arrears" meaning that they are paid at the end of or in the year following the year in which the taxes accrue. In many other states it is the opposite and the taxes are due at the beginning of the taxing year. This difference is what causes lenders to make certain requirements in their closing instructions as to tax escrows and policy coverage's relating to whether the taxes are "not yet due and payable."

The obligation to pay the real property taxes is also the personal liability of the persons who own the property during the tax year. Taxing jurisdictions can sue the persons who were obligated to pay the taxes and obtain a money judgment for any unpaid taxes. The judgment can be for the full amount of taxes owed or just for the difference between the full amount of taxes owed and amount obtained through the foreclosure of the property. A judgment lien against the individual property owner does not have the same priority as the tax lien on the property. This judgment lien operates the same as any other judgment lien and has its priority as of the date of recording the Abstract of Judgment (AJ) in the real property records of the county.

An owner's policy of title insurance insures that there are no liens against the insured property other than those specifically excepted to in Schedule B. A loan policy insures that

no other lien has priority over the insured lien unless the other lien is excepted to in Schedule B of the policy. Therefore, if a tax lien exists and is not properly addressed in the policies of title insurance, then assertion of rights under the tax lien will result in a claim under the policies.

#### **4. Caution as to tax liens**

Section 32.06 of the Texas Tax Code allows for transfer of a tax lien to a party paying taxes on behalf of the property owner. You may find deeds of trust securing such liens of record accompanied by sworn statements authorizing payment of taxes by a third party other than the property owner. You must be especially vigilant in examination of such liens when examining titles involving loan foreclosures, as the liens securing ad valorem taxes may present priority issues.

#### **5. The tax exception in policies of title insurance**

In addition to the general coverage regarding liens, Schedule B of the policies of title insurance contains a specific exception from coverage pertaining to real property taxes:

Standby fees, taxes and assessments by any taxing authority for the year \_\_\_\_\_, and subsequent years; and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership, but not those taxes or assessments for prior years because of an exemption granted to a previous owner of the property under Section 11.13, Texas Tax Code, or because of improvements not assessed for a previous tax year.

The blank in the clause “standby fees, taxes and assessments by any taxing authority for the year \_\_\_\_\_, and subsequent years” should be filled in with the year that follows the last year for which all taxes are paid. The significance of this portion of the exception is that taxes are not insured as being paid for the year stated and for any succeeding year, but taxes are insured as being paid for the years preceding the year stated.

The clause “and subsequent taxes and assessments by any taxing authority for prior year due to change in land usage or ownership” pertains to “rollback” taxes. This language cannot be deleted from an owner’s policy of title insurance but can be deleted from a loan policy of title insurance (or interim construction binder) in accordance with Procedural Rule P-20 and Rate Rule R-19.

The clause “but not those taxes or assessments for prior years because of an exemption granted to a previous owner of the property under Section 11.13, Texas Tax Code, or because of improvements not assessed for a previous tax year” pertain to supplemental taxes that may become due after the date of the policy either because a particular tax exemption for a previous year was allowed in error, or because property that should have been taxed was not included on the tax rolls for a previous year. The significance of this portion of the exception is that the policies of title insurance will protect against supplemental taxes assessed after the date of the policy with regard to tax years that the policy insures as having been paid. **CAUTION:** Be alert for situations that might result in a supplemental assessment. If possible, make sure the supplemental assessment is paid at or prior to closing. If not, you cannot insure the taxes as paid through the years for which a supplemental assessment might arise.

## **6. Procedural Rule P-20 and associated Rate Rules**

### **a) Taxes for the current year.**

With regard to taxes for the current year, policies of title insurance cannot insure that taxes are paid unless all of the taxes for the current tax year have been assessed by the taxing authorities; and one of the following situations has occurred:

1. If taxes have been paid by the owner, the title company has satisfactory evidence that the assessed taxes for the current year have been paid;
2. If taxes have not been paid by the owner, the title company collects all funds at closing and will pay the taxes in the ordinary course of business.  
CAUTION: Make sure taxes are paid before delinquency. If taxes are not paid before delinquency, the title company may have to pay the extra penalty and interest.
3. If taxes have been paid by the current lender from the property owner's escrow account held by lender, and the title company has satisfactory evidence of such payment. Confirmation of receipt of such payment by all taxing collection authorities is generally required.
4. If there is insufficient evidence that the current lender has paid the taxes from the property owner's escrow account, the title company may accept a sufficient indemnity executed by a responsible party together with a deposit of funds in an amount sufficient to pay the assessed taxes. The funds on deposit are to be used to pay the taxes under the terms of the indemnity before they become delinquent or refunded to the proper party upon receipt by the title company of satisfactory evidence that assessed taxes for the current year have been paid. NOTE: Prior to the most recent revision of P-20, the title company was required to pay the taxes for the current year in order to insure that those taxes were paid. This practice required the seller or borrower to wait for reimbursement until either the paid off lender refunded its escrow account or the taxing jurisdiction refunded the duplicate payment. The current practice under the revised P-20 is more advantageous to the consumer.  
CAUTION: Make sure taxes are paid before delinquency. If taxes are not paid before delinquency, the title company may have to pay the extra penalty and interest.

### **b) Rollback taxes - P-20B**

With regard to rollback taxes, the clause "and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership" contained in the standard tax exception may be deleted from a loan policy of title insurance or interim construction binder if the premium of \$20 is collected in accordance with Rate Rule R-19 and one of the following situations has occurred:

1. The title company has satisfactory evidence that the assessed taxes for the current year are not based on agricultural use or open-space valuation.
2. The rollback taxes have been assessed by all of the taxing authorities, and the rollback taxes are collected at closing by the title company, and the title company will pay the rollback taxes in the ordinary course of business. CAUTION: Make sure taxes are paid before delinquency. If taxes are not paid before delinquency, the title company will have to pay the extra penalty and interest.

c) Not yet due and payable - P-20C

In a loan policy or interim construction binder, with regard to taxes that are not yet due and payable, the title company may:

1. If satisfied that all taxes, standby fees and assessments by any taxing authority for the year of issuance of the policy are not yet due and payable, insert the words “Company insures that standby fees, taxes and assessments by any taxing authority for the year \_\_\_\_\_ are not yet due and payable” at the end of the tax exception or check the appropriate box in the policy form.
2. If satisfied that some of the taxes, standby fees and assessments for the year of issuance of the policy are not yet due and payable, insert the words “Company insures that standby fees, taxes and assessments by any taxing authority for the year \_\_\_\_\_ are not yet due and payable as to [insert name of applicable taxing authority/authorities] only.”
3. In either instance, the premium of \$5 must be collected in accordance with Rate Rule R-24.

d) Where title companies get tax information

## (1) Taxing jurisdictions

All taxing jurisdictions are required by law to provide, for a fee, to property owners and other interested parties certificates stating that taxes have been paid through a certain year and that there are no known delinquencies. Each property has associated with it one or more tax account numbers which have been assigned by the Appraisal District. Title companies may provide the taxing jurisdiction with a legal description of the property for which it seeks information. The taxing jurisdiction will then verify the account numbers applicable to the property and issue tax certificates for the accounts that pertain to the property.

## (2) Title company research

Sometimes the title company performs the research using the records of the taxing jurisdiction to verify the account numbers applicable to the property and then requests tax certificates from the taxing jurisdiction based on its own research. Sometimes the title company performs the research but does not obtain tax certificates from the taxing jurisdiction. It might seem that the practice of not obtaining tax certificates increases a title company's risk; however, that is often not the case. Even though taxing jurisdictions produce tax certificates, they often do not consider the tax certificates binding if they later discover that delinquent taxes are owed, and they still collect the delinquent taxes. If a title company has relied upon a tax certificate produced by a taxing authority to issue policies that insure that taxes are paid through a certain year, then the title company may have to pay any delinquent taxes that are later discovered. Therefore, when a taxing jurisdiction does not honor its tax certificate, the tax certificate has minimal value.

## (3) Tax services

The fact that taxing jurisdictions often do not honor their tax certificates provided the opportunity for the creation of a type of private business. The records of the taxing jurisdiction are public records, open to anyone for research purposes. There are companies, commonly called “tax services” that will search the records of the taxing jurisdiction to identify the account numbers associated with a piece of property and determine whether there are any delinquencies or unpaid taxes associated with those

account numbers. Tax services will also provide information about the assessed value of the property and the exemptions and alternate valuation methods that may apply to the property. In areas where there are water districts and home owner associations, tax services will also provide information pertaining to those entities. Tax services provide the information necessary to complete the water district disclosure notice required by statute (current bonded indebtedness and tax rates). Tax services usually also obtain information about home owner association assessments (current monthly payment, existence of any delinquent payments, existence of any fees to transfer ownership of the property on the records of the association, existence of any assessments other than the regular monthly payment, address to mail payments, and contact information).

The format that tax services use to present its information is also called a “tax certificate”, but the “tax certificate” issued by a tax service is not the same thing as a tax certificate issued by a taxing authority. The main difference is that a tax service will pay any delinquent taxes and assessments of home owner associations that are not set out on its tax certificate and will bear liability for inaccuracy of any information presented in its tax certificate. Generally, a title company obtains more protection by obtaining a tax certificate from a tax services company than by obtaining information and certificates from the taxing jurisdictions. Another advantage is that the charge for a tax certificate produced by a tax service can be passed on to the appropriate party (seller or borrower) in the insured transaction. However, when the tax service does pay delinquent taxes and assessments, the tax service also reserves the right to seek reimbursement from the property owner who had the obligation to pay the tax. The exercise of this right may be detrimental to the title company if the property owner, or someone working with him, is a valued customer of the title company. Therefore, the title company and tax service must reach a mutual understanding of how such a situation will be handled.

e) Cautions about using tax information

Historically, more money has been paid for claims under title policies with regard to property tax issues than any other issue. Only the mortgage fraud issues of the past few years have caused greater claims losses. Implementing the following procedures will reduce claims arising from property tax issues.

- 1) Verify that you have obtained complete information from a tax services company or each taxing jurisdiction in which the property is located.
- 2) Verify that you have identified all account numbers relevant to the property to be insured and have obtained all relevant information on each account number.
- 3) Compare the improvements shown on the Appraisal District records of the property with the information about improvements that you have from the contract or survey, etc. If there are more improvements on the property than are shown by the Appraisal District records, then there is a possibility that supplemental taxes for omitted property may be assessed in the future. Also, where the tax certificate indicates that a manufactured home is located upon the property and shows it as personal property, verify as to whether it has been or is to be converted to real property.
- 4) Identify whether exemptions have been granted on the property. Determine that the conditions that justify the exemptions existed at all applicable times. If not, then there is a possibility that supplemental taxes based on a higher valuation may be assessed in the future. This is a situation that can become a claim under the policy you issue, so it must be addressed.

- 5) Remember that you cannot just rely on searches of tax information, whether provided by a tax service or taxing jurisdiction or the title company's research, to determine whether supplemental taxes may be assessed at some time in the future. Once the condition that justifies the supplemental assessment has become known to the Appraisal District and the process for generating a tax bill for that supplemental assessment has been completed, then a search of tax information will reveal the existence of the supplemental assessment. However, from beginning of the situation giving rise to the supplemental assessment to the time that the supplemental tax bill can be generated, you can only determine whether there is a possibility of supplemental assessment by knowing the facts. You can expect that some of the facts (such as exemptions and alternate valuation) will be provided in the tax search, but you must question the parties to the transaction to determine whether there has been any change that might trigger a supplemental assessment.
- 6) Determine that you are using the most current assessed value to prorate taxes. Procedural Rule P-1(f) requires that the closer determine that current property taxes have been prorated based on the latest available information. Tax services typically obtain information in electronic form from the Appraisal District and the taxing jurisdictions once every week or two weeks. Therefore, you may have to check the Appraisal District records directly in order to obtain the latest available information on the assessed value of the property covered by your policy.
- 7) Pay all taxes due from closing, and do not allow the property owner to pay taxes directly to the taxing authorities. A taxing jurisdiction will issue a paid tax receipt if the property owner tenders payment by check. However, that paid tax receipt will be void if the check bounces, and the tax will remain unpaid. If you have insured that these taxes are paid, then the unpaid taxes can become a claim under the policy. Although the property owner is liable for the payment of these taxes, the title company may not be able to collect the funds from him and may have to advance money to pay the taxes.
- 8) Remember that title companies can escrow funds for payment of taxes only under the situations described in Procedural Rule P-20. Bulletin 153 is generally construed to prohibit escrowing funds for payment of taxes when the amounts that will become due have not been specifically determined by the taxing jurisdictions at the date of closing. Therefore, a closer should seek guidance from management with regard to situations in which the closer determines that supplemental taxes may become due (omitted property, expired exemptions, change of usage that triggers rollback tax, etc.) and the amount of such taxes have not been specifically determined by the taxing jurisdictions.
- 9) Proper payment of taxes is an escrow function. As between underwriter and agent, the agent is responsible for performing escrow functions properly. Therefore, in the event of a claim for taxes under a title insurance policy, the underwriter will expect the agent to either pay the claim directly or reimburse the underwriter if the underwriter pays the claim.
- 10) As additional protection to the underwriter and agent it is advisable that you include clauses similar to the following in your composite closing affidavits that are signed by the parties at closing:
  - a) Property taxes for the current year have been prorated between BUYER/BORROWER and SELLER, who each acknowledge and agree that these prorations are based either on tax amounts for the preceding year, the sales price or estimates of the appraised value and/or estimated tax rates for the current year, or some other common method of estimation. BUYER/BORROWER and SELLER each agree that, when

amounts of the current year's taxes become known and payable (on or about October 1<sup>st</sup>), they will adjust any matters of re-proration and reimbursement between themselves and that Title Company shall have no further liability or obligation with respect to these prorations. BUYER/BORROWER AND SELLER agree to indemnify Title Company for all costs resulting from unpaid taxes, including court costs and attorney's fees and all expenses related thereto. SELLER warrants and represents that there are no past due taxes owed on the Property and if such warranty and representation is untrue, the SELLER will reimburse Title Company, on demand, for any sums paid by Title Company to pay such taxes, and any related penalty and interest. SELLER recognizes their responsibility for all taxes prior to the date of closing the subject transaction. Should it develop at a later date, that taxes other than those collected at closing are due for prior years, seller agrees to make full settlement to Title Company.

- b) Although the Appraisal District may independently determine BUYER/BORROWER's new ownership and billing address through deed record research, BUYER/BORROWER is still obligated by law to "render" the Property for taxation, by notifying the Appraisal District of the change in the Property's ownership and of BUYER/BORROWER's proper address for tax billing.
- c) BUYER/BORROWER is advised that current year's taxes may have been assessed on the basis of various exemptions obtained by the SELLER (e.g., AG, homestead, over-65, etc). BUYER/BORROWER acknowledges that BUYER/BORROWER may not benefit from the exemption claimed by SELLER for the current year or in the future. It is the BUYER/BORROWER's responsibility to qualify for BUYER/BORROWER's own tax exemptions and to meet any requirements prescribed by the taxing authorities. BUYER/BORROWER acknowledges and understands these obligations and the fact that Title Company assumes no responsibility for future accuracy of the Appraisal District records concerning ownership, tax-billing address, or status of exemptions.

## **7. Proration issues**

### **a) Standard and reverse prorations**

In a purchase transaction, generally the seller is responsible for payment of the portion of the taxes for the current tax year attributable to the period of time that he owned the property, and the buyer is responsible for payment of the portion of the taxes for the current tax year attributable to the period of time that he owned the property. "Proration" is the calculation and payment of these amounts as appropriate to the particular situation.

- 1) If the closing occurs during the period from January 1 until the tax bills can actually be paid (sometime toward the end of the tax year), the "standard proration method" is used. This method can also be used if the taxes will not be paid at closing. The amount of tax for the tax year is calculated, using the previous year's tax amounts until such time as the assessed value for the current year becomes available and the tax rates for the current year become available. The amount of tax for the tax year is divided by the number of days in the year

and multiplied by the number of days of the year that the seller owns the property. This amount is charged to the seller on the closing statement and credited to the purchaser. The theory is that the amount due from the seller is collected at closing and given to the buyer so that the buyer will have that money when time comes to pay the taxes.

- 2) If the closing occurs between the time that the tax bills can actually be paid and the time that the taxes become delinquent, then the “reverse proration method” is used when the taxes for the current year are to be paid from closing. The portion owed by the buyer for the portion of the year that he will own the property is calculated. This amount is collected from the buyer and credited to the seller on the closing statement. The amount of the tax bill for the entire year is then charged to the seller on the closing statement and disbursed from closing.

b) Exemption issues

In a purchase transaction the effect of personal tax exemptions (“homestead”, “over-65”, “disabled”, “100% disabled veteran”, “over-55 surviving spouse”) on tax prorations must be considered carefully. Personal exemptions do not transfer from a seller to a buyer, even if the buyer meets the qualifications for the exemption. Each person claiming an exemption must qualify for the exemption by proper application to the Appraisal District. However, in many situations personal exemptions are “portable”, meaning that the exemption can be transferred by the qualified person from property that he is selling to property that he is buying. The seller and purchaser first must determine whether the Appraisal District in that county will allow the transfer of the particular exemptions to which they are entitled. The seller and purchaser then must decide whether they will transfer the exemptions. The variations are too numerous to discuss in detail. Ultimately, whether to prorate on the assessed value with exemptions or on the assessed value without exemptions is a matter to be negotiated between the seller and purchaser. The closer should require that the seller and purchaser advise the closer of the agreement they reach on this issue and should not decide how to prorate without obtaining consent of the seller and purchaser. (The TREC one-to-four family resale contract offers no specific guidance. Paragraph 13 of the contract simply states that “the tax proration may be calculated taking into consideration any change in exemptions that will affect the current year’s taxes”.)

c) Tax-exempt party

In a purchase transaction where one of the parties is tax-exempt, the closer should find out how the Appraisal District in the county handles that particular situation. If the seller is tax-exempt, then the seller will not be charged for taxes on the portion of the year that it owns the property, but the buyer will be charged for taxes on the portion of the year that it owns the property. If the title company is not going to insure that the taxes for the current year are paid, then the title company will not have to do anything further. However, if the title company is going to insure that the taxes for the current year are paid, then the title company will have to work with the Appraisal District and taxing jurisdictions to make sure that the tax for the portion of the year that the buyer owns the property does get assessed and can be paid. If the buyer is tax-exempt, then the seller will be charged for taxes on the portion of the year that it owns the property, and the buyer will be credited for that amount. The buyer will claim its tax-exempt status with the Appraisal District and will pay taxes attributable to the portion of the year that the seller owned the property when the tax bills are generated.

d) “Split-outs”.

Sometimes a piece of property that is being sold does not have its own distinct tax account number but, on the tax rolls, is part of a larger piece of property (the “parent tract”). This situation occurs frequently when property has been taxed as acreage and becomes platted into subdivision lots. The property being sold has not been “split out” from its parent tract. The actual proration can be handled by simple arithmetic. A fraction is determined: the numerator (top number) is the size of the property being sold, and the denominator (bottom number) is the size of the parent tract. The total amount of tax due on the parent tract is multiplied by the fraction, and the result is then prorated. If the title company is not going to insure that taxes for the current year are paid, then the title company will not have to do anything further. However, if the title company is going to insure that the taxes for the current year are paid, then the title company will either have to determine that the taxes for the parent tract have been paid or work with the Appraisal District and taxing jurisdictions to determine that the tax account for the property that is being sold does get set up and that the taxes on that specific property do get assessed and can be paid. Be careful – this is a tricky situation when property is subdivided. Until all parent accounts on all the tracts that make up the subdivision are paid, there remains a tax lien on each subdivision lot even though a subsequent account on just a single lot will not show any tax due.

## **8. Examination issues pertaining to taxes**

a) Tax lien lenders

Certain lenders are willing to loan money to property owners in order to pay delinquent property taxes (“tax lien lenders”). Sections 32.06 and 32.065 of the Texas Tax Code pertain to this type of transaction and describe how the lien in favor of the taxing jurisdiction is transferred to the tax lien lender and how the tax lien lender can foreclose if it is not paid. These sections of the Tax Code contain many provisions which must be observed; however, three issues are of primary importance with regard to this type of lien.

- 1) The lien of the taxing jurisdiction must be assigned to the tax lien lender by written recorded document complying with Section 32.06.
- 2) The tax lien lender can foreclose either under the tax lien assigned by the taxing jurisdiction, in which case the judicial foreclosure proceeding that would have been conducted by the taxing jurisdiction is used, or under a deed of trust executed by the borrower, in which case a non-judicial foreclosure proceeding can be used after the tax lien lender obtains a court order authorizing the foreclosure under Rules 736 of the Texas Rules of Civil Procedure.
- 3) The priority of the tax lien remains the same, even after it is assigned to a tax lien lender and even if the tax lien is secured by a deed of trust to the tax lien lender. Therefore, the tax lien remains superior to all other voluntary liens and almost all involuntary liens against the property, even if the tax lien accrued after the recording of these other liens. Foreclosure of the tax lien cuts off all other subordinate liens, but foreclosure of subordinate liens does not cut off the tax lien.

b) Unpaid court costs

Title examination may reveal suits for delinquent taxes which often attached prior to the acquisition of the property by the current property owner. Whatever tax information is obtained for closing should be reviewed to determine whether these taxes should be paid at closing. Frequently the property taxes for which the suit was brought have been paid but various costs of court and the suit have not, resulting in the tax suit on the court records remaining as an active suit even after the tax has been paid. The costs of court are secured by the same statutory lien against property that secures the taxing jurisdictions for payment of the real property taxes. These costs must be paid and the suit dismissed to insure all taxes have been paid and to avoid subsequent foreclosure of the tax lien for such costs.

**9. Insuring after foreclosure of a tax lien**

If you are asked to insure property that has been foreclosed on based on an ad valorem tax lien, please contact underwriting for discussion of the many issues to consider and for authorization. Some of the common issues and requirements are:

- 1) Rights of redemption in favor of property owners that have been foreclosed upon (or in favor of holders of a pre-recorded existing lien if the foreclosure is conducted by a tax lien lender).
- 2) The tax suit or foreclosure process must be reviewed to determine that all applicable procedures were followed and all interested parties were served with notice of the proceeding. If there is any procedural irregularity, then the limitation period for challenging the proceeding must have expired. Liens held by parties who did not receive notice of the suit will be listed as exceptions to coverage.

a) Special issues regarding tax lien foreclosed property:

- 1) The quality of title passed under the deed given pursuant to a judicial foreclosure of a tax lien and the quality of title passed under the deed given by the tax lien lender pursuant to a non-judicial foreclosure of a tax lien is the same as that held by the property owner who was foreclosed upon. These deeds do not contain any warranty of title by the constable/sheriff or tax lien lender.
- 2) If the property owner who was foreclosed upon comes back into title as a result of a judicial or non-judicial foreclosure of a tax lien, then any lien against the property owner survives the foreclosure and is not cut off.

## Q. Texas Business Organizations Entities and Sole Proprietorships

### 1. Sole Proprietorship

- a) This is an individual person, not an entity.
- b) The individual holds title to real estate and is responsible as they would be otherwise for debts & liens affecting such real estate.
- c) The individual may do business under a d/b/a (assumed name) by filing a Certificate of Assumed Name with the local County Clerk in each county where the person maintains a business or professional premises or conducts a business or professional service.
- d) Documents reflecting a d/b/a should reflect the sole proprietor as "NAME, d/b/a NAME OF BUSINESS".
- e) Statutory reference: Chapter 71, Texas Business and Commerce Code

#### a) Underwriting Requirements:

1. Agents should conduct a general search against the names of the individual and the d/b/a.
2. Agents should consider property titled in an individual operating under an assumed name as being titled in the individual, and therefore should review the record accordingly for requirements as to homestead, community property, and liens.

### 2. Corporation

- a) An entity is created by filing Articles of Incorporation with the Texas Secretary of State
- b) Entity name must specify it as a corporation by including "company", "corporation", "incorporated", "limited", or an abbreviation of one of those words
- c) Typical structure includes a board of directors, elected annually by shareholders, & meeting annually to elect officers
- d) Officers are authorized to act on behalf of the corporation in various capacities
- e) Bylaws govern operation of the corporation
- f) Corporation doing business under a d/b/a (assumed name)
- g) Must file a Certificate of Assumed Name with the county clerk for the county where its principal office is located, and with the Texas Secretary of State
- h) Assumed name must be a name other than the name stated in the corporation's certificate of formation or similar document

#### a) Underwriting Requirements:

1. Agents must obtain a certificate of good standing for the corporation from the Texas Comptroller's Office, available here:  
<https://ourcpa.cpa.state.tx.us/coa/Index.html>
2. Agents must obtain a corporate resolution authorizing the transaction and designating the individual(s) that may act on behalf of the corporation in the transaction
3. Agents should review articles of incorporation and bylaws of the corporation to verify authority of the individual(s) named in the corporate resolution supporting the transaction
4. Tax liens, Abstracts of Judgment, child support liens, etc, that are specifically against an individual that may also be a shareholder, officer or Board member of the corporation, do not attach to real estate owned by the corporation. However,

if a corporation is family owned, has only a single shareholder or otherwise used fraudulently to hide assets from creditors or lawsuits, a suit maybe brought to “pierce the corporate veil” which when ordered by a court, essentially dissolves the corporation and makes the involved individuals and the assets of the corporation liable for the subject debts.

### **3. Foreign Corporation**

- a) Corporations formed in states of the United States other than Texas.
- b) In most cases, must register with the Texas Secretary of State in order to transact business in Texas (see Section 9.001 et seq., Texas Business Organizations Code).
- c) “Transacting business” does not include simply owning real estate, or creating a lien or security interest in real estate as borrower or lender (see Section 9.251, Texas Business Organizations Code).

#### a) Underwriting Requirements:

1. See Corporation, above.
2. Agents should not be concerned with whether or not the foreign corporation is registered with the Texas Secretary of State; however such assessment may be a requirement of a lender involved.

### **4. Alien Corporation**

A corporation formed in a country other than the United States.

#### a) Underwriting Requirements:

1. Agent must obtain a copy of the certificate or articles of incorporation, or equivalent.
2. Agent must obtain a suitable corporate resolution authorizing the transaction and designating the individual(s) that may act on behalf of the corporation in the transaction.
3. Agent must obtain a satisfactory opinion of an attorney qualified to offer opinions as to foreign corporate law governing the corporation; the opinion should include the following elements:
  - a. The corporation was validly created under the laws of the country or province where it was formed.
  - b. The corporation is in good standing in the country where it was formed.
  - c. The corporation has the authority to enter into the insured transaction.
  - d. The designated individual(s) to act on behalf of the corporation are duly authorized to do so.

### **5. Limited Liability Company (LLC)**

- a) Created by filing Certificate of Formation with the Texas Secretary of State:
  1. Typically specifies whether the LLC will be managed by members or manager.
  2. Should identify initial member(s) of the LLC; must have at least one member.
  3. Should identify manager, if any; manager need not be a member.
  4. LLC’s may also have been created by filing of Articles of Organization.
- b) Name must include “limited liability company”, “limited company”, or an abbreviation of those.
- c) Company agreement a/k/a operating agreement governs operation of the LLC:
  1. May only be modified by all members of the LLC unless otherwise provided.

2. May be amended to increase or decrease number of managers.
- d) Statutory reference: Chapter 101, Texas Business Organizations Code

a) Underwriting requirements:

1. Agents must obtain a certificate of good standing for the LLC from the Texas Comptroller's Office
2. Agents must obtain a corporate resolution authorizing the transaction and designating the individual(s) that may act on behalf of the LLC in the transaction
3. Agents should review the certificate of formation or articles of organization together with the operating agreement to determine management authority

## 6. Series LLC

- a) Created by provision in an LLC's company agreement allowing for a designated series of members, managers, membership interests, or assets:
  1. Designated series must have separate rights, powers or duties with respect to specified property or obligations of the LLC, or with respect to profits/losses associated with specified property or obligations.
  2. Designated series must have a separate business purpose or investment objective.
- b) Debts, liabilities, obligations and expenses for a particular series are enforceable only against assets of that particular series, provided records reflect (may be by list, category, quantity or formula) and such limits are stated in the company agreement and certificate of formation.
- c) Assets of a series may be held in the name of the series, in the name of the LLC, or through a nominee.
- d) Each series may:
  1. Sue and be sued;
  2. Contract;
  3. Hold title to assets, including real property, personal property & intangibles;
  4. Grant liens and security interests in assets of the series;
- e) Management of series:
  1. By managers or members as set out in company agreement;
  2. If not set out, will be by manager(s) associated with the series or member(s) associated with the series, depending on whether LLC is managed by member(s) or manager(s).
- f) Winding up – series may be wound up without winding up the LLC unless company agreement provides otherwise
- g) Preferable to title real estate held be a series as either “ABC, LLC – Series XYZ” or “XYZ, a Series of ABC, LLC”
- h) Foreign series LLC's must provide supplemental information in registration with the Texas Secretary of State (see Section 9.005, Texas Business Organizations Code)
- i) Statutory reference: Section 101.601 et seq., Texas Business Organizations Code

a) Underwriting Requirements:

1. See Limited Liability Company, above.
2. Conveyances should reflect title as set forth in (g), above.
3. The Series LLC concept is relatively new in Texas law. Call underwriting to approve format to insure any policy involving a Series LLC.

## 7. Joint Venture

- a) Typically a joint association of two or more persons assembled to carry out a single transaction. A joint venture is a general partnership under the law.
- b) Established by mutual agreement.
- c) Venture parties are jointly, severally and individually liable for JV assets.
- d) Preferable for title that real estate be held by JV as “Name and Name, doing business as X Venture, a Joint Venture” or “X Venture, a Joint Venture composed of Name and Name” Title may be held in just “X Venture” or “X Venture, JV” but more scrutiny will be required – see below.

### a) Underwriting Requirements:

- 1. May also hold title as “X Venture, J.V.” or “X Venture, Joint Venture” but such vesting will require anyone dealing with the asset to obtain a copy of the Joint Venture agreement to establish parties to the JV and supporting affidavit(s) verifying parties to the JV.
- 2. All parties to the JV must join in conveyances unless otherwise designated by written agreement.
- 3. Agents should run a general name search against each party to the JV.
- 4. Abstracted Judgments (AJ), liens and lis pendens affecting any of the joint venture parties should be construed as affecting JV property.
- 5. Agents should obtain a copy of the JV agreement to verify terms and parties to complete the transaction.

## 8. General Partnership

- a) Established by mutual agreement, written or oral.
- b) Generally defined as “an association of two or more persons to carry on a business for profit as owners” (Section 152.051, Texas Business Organizations Code).
- c) Determination of whether a partnership is created is governed by factors set forth in Section 152.052, Texas Business Organizations Code.
- d) Partnership property is not property of the partners, and partners’ spouses hold no interest in partnership property (Section 152.101, Texas Business Organizations Code).
  - 1. Property becomes partnership property if acquired in either:
    - i. The name of the partnership, or
    - ii. The name of one or more partners, when the conveyance indicates the grantee’s capacity as a partner or the existence of a partnership (Section 152.102, Texas Business Organizations Code).
- e) All partners are jointly, severally and individually liable for all partnership assets/debts.

### a) Underwriting Requirements:

- 1. All parties to GP must join in conveyances unless otherwise designated by written agreement.
- 2. Agents should run a general name search against each partner.
- 3. Judgment liens and state tax liens against a partner are not liens against partnership property unless arising from a partnership debt.
- 4. Agents should obtain a copy of the partnership agreement to verify terms and parties.
- 5. Agents should contact Texas underwriting counsel for further requirements in the event that all partners will not join in a transaction or if there are liens or other encumbrances against any partners.

## **9. Limited Partnership**

- a) Formed by filing a certificate of limited partnership with Secretary of State and execution of a limited partnership agreement by all limited partners.
- b) Must have one or more general partner; may be an individual, partnership, corporation or LLC.
- c) Name must contain the word “limited” or “limited partnership”, or an abbreviation of either.

### a) Underwriting Requirements:

- 1. Agents must obtain a copy of the partnership agreement to verify parties and terms.
- 2. Agents should take care to ensure that execution and acknowledgment of conveyances reflect the partnership structure, typically being a corporate general partner acting on behalf of the LP.

## **10. Professional Association**

- a) Created by filing certificate of formation with Texas Secretary of State.
- b) An association, not a partnership or corporation, formed for the purpose of providing professional services by medical doctors, optometrists, veterinarians, dentists, chiropractors or licensed mental health professionals.
- c) Composed of licensed individuals (not professional organizations).

### a) Underwriting Requirements:

- 1. Agents should obtain copies of the certificate of formation and governing documents of the association.

## **11. Professional Corporation**

- a) Created by filing certificate of formation with Texas Secretary of State.
- b) Formed for the purpose of providing a professional service that for-profit or non-profit corporations are prohibited by law from rendering.
- c) May not be formed for the purpose of the practice of medicine by a physician, surgeon or other doctors of medicine.
- d) May only be owned, governed or managed by an individual licensed by the State of Texas to practice the same service as the professional corporation, or by a professional organization rendering the same service through professional individuals.
- e) Professional services specifically set out in governing statute (Section 301.003, Texas Business Organizations Code) include personal service rendered by an architect, attorney, certified public accountant, dentist, physician (but see (c) immediately above), public accountant or veterinarian.

### a) Underwriting Requirements:

- 1. See Corporations, above.

## **12. Procedural and Rate Rule Issues**

- a) P-38 requires that a T-1R policy may only be issued when the insured is a natural person at the date the policy is issued; in all other cases issue T-1 policy.
- b) P-57 Additional Insured Endorsement:
  - 1. May be issued to a family partnership or family corporation solely composed of or owned by members of the insured’s family and the insured;

2. Agents should contact Texas underwriting counsel for specific requirements;
- c) Continuing policy coverage for T-1 policies:
  1. Note definition of “insured” includes as to entities “successors to an Insured by dissolution, merger, consolidation, distribution or reorganization” and “successors to an Insured by its conversion to another kind of Entity”;
  2. “Insured” may also include a grantee of an Insured under a deed delivered without payment of actual valuable consideration, if:
    - a) the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured; or
    - b) the grantee wholly owns the named Insured; or
    - c) the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity.

## R. Texas Workforce Commission Lien – Super Priority

### 1. *What is the nature of a wage lien?*

If an employee is not paid by his or her employer, the employee can file a complaint with the Texas Workforce Commission (TWC). There is a hearing and appeals process. If the commission finds the claim is valid, TWC can file a wage lien against the employer. Once filed, the wage lien attaches to all the property belonging to the employer. The wage lien attaches at the time the order of the Commission becomes final. The wage lien may be recorded in the book/database entitled “State Tax Liens” kept by the county clerk as provided by Section 113.004, Tax Code.

### 2. **“Super” Lien Status**

As is outlined below, the Texas legislature gave “super lien” status to Texas Workforce Commission Administrative Liens established under Chapter 61 of the Texas Labor Code. Section 61.0825 provides: **“a lien established under this subchapter is superior to any other lien on the same property, with the exception of a lien for ad valorem taxes.”** This statute is specific to wage liens and applies to all liens imposed by Chapter 61 without regard to whether the lien was imposed before, on, or after the date of enactment (effective date being September 1, 2001).

### 3. **Statutory Requirements – Texas Labor Code**

#### a) § 61.020. Failure to Pay Wages; Attorney General Action

The attorney general may seek injunctive relief in district court against an employer who repeatedly fails to pay wages as required by this chapter.

#### b) § 61.051. Filing Wage Claim

An employee who is not paid wages as prescribed by this chapter may file a wage claim with the Commission in accordance with this subchapter. A wage claim must be filed in a manner and on a form prescribed by the Commission and must be verified by the employee. A wage claim must be filed not later than the 180th day after the date the wages claimed became due for payment. The 180-day deadline is a matter of jurisdiction.

The employee may file the wage claim: (1) in person at an office of the Commission; (2) by mailing the claim to an address designated by the Commission; (3) by faxing the claim to a fax number designated by the Commission; or (4) by any other means adopted by the Commission by rule.

#### c) § 61.081. Creation and Attachment of Lien

A final order of the Commission against an employer indebted to the State for penalties or wages, unless timely appealed to a court, is a lien on all the property belonging to the employer. The lien for an unpaid debt attaches at the time the order of the Commission becomes final. (This is sometimes referred to as a “Payday Lien.”)

d) § 61.082. Enforcement of Lien

Subchapters A and B, Chapter 113, Tax Code, govern the enforcement of a lien established under this subchapter. In administering and enforcing the lien, the Commission has the duties imposed and the powers conferred on the Comptroller for the enforcement of other liens under Subchapters A and B, Chapter 113, Tax Code.

e) § 61.0825. Priority of Lien

A lien established under this subchapter is superior to any other lien on the same property, with the exception of a lien for ad valorem taxes. (“Super Priority”)

**NOTE:** While the lien is a “Super Priority” lien it is still not an enforceable lien against homestead property as it does not fall into the category of valid liens against homestead property as established by the Texas Constitution [Tex. Const. art. XVI, § 50(a)] Thus, it is possible that the debtor may obtain a partial release of the lien to the extent the property is their homestead.

f) § 61.084. Release of Lien

A lien under this subchapter may be released in the manner provided by Subchapter A, Chapter 113, Tax Code, for a state tax lien. If the liability secured by the lien is fully paid, the commission shall mail a release of lien to the employer. The employer is responsible for filing a release of lien with the appropriate county clerk and paying the county clerk's fee for recording the release.

**Duration of the Lien** – No limitation statute applies to this lien. In other words, this lien does not expire and cannot be barred by limitations.

#### **4. Underwriting Requirements:**

While a TWC wage lien is a state lien, its “Super Priority” status means that **it is superior even to a purchase money lien whether created and recorded before or after the attachment of the wage lien.** Furthermore, the “Super Priority” provision of the statute applies to all wage liens even if the lien was recorded before the law became effective on September 1, 2001. **If you find a wage lien filed against the seller or buyer/borrower, you must list it on Schedule C of the Title Commitment and if unreleased at closing, you must except to it on Schedule B of the Owner’s Title Policy and/or Loan Title Policy or any other insuring form issued. Any issues regarding a wage lien should be directed to underwriting.**

Additionally, it is important to note that foreclosure of a Deed of Trust lien (whether the Deed of Trust was filed prior to the wage lien or not) will not extinguish the wage lien.

## S. Wraparound Mortgage (a/k/a wrap note or wrap financing)

A **wraparound mortgage** is a form of secondary financing where seller provides to purchaser, seller financing in which the new note and lien “wraps around” and exists in addition to one or more superior Deed of Trust lien(s) (that already encumber the property at the time of the transaction to be insured).

Under a “wrap,” a seller accepts a promissory note from the buyer that includes:

1. the amount due on the note of the existing mortgage (the “underlying note”), plus
2. the amount of the remaining purchase money balance after deducting the down payment, if any.

By agreement, generally the new purchaser makes monthly payments to the seller (or to a 3<sup>rd</sup> party escrow agent), and then seller or escrow agent is responsible for making the payments to the underlying lender. Should the purchaser default on those payments, seller has the right to foreclosure its Deed of Trust lien to recapture the subject property.

Since title to the property is actually transferred from the seller to the buyer, most wraparound transactions will violate the due-on-sale clause of the underlying Deed of Trust lien, if the lien contains such a clause (most do).

For clarification, a due-on-sale clause is a clause found in most Deeds of Trust giving the lender the right to accelerate the Note and foreclose on the property if the property is sold without the lender’s written consent.

The following is an example of a “Due-on-Sale” clause:

*“If Grantor transfers any part of the property or any interest therein, without Beneficiary's prior written consent, Beneficiary may declare the debt secured by this deed of trust immediately payable. In that event, Beneficiary will notify Grantor that the debt is payable and may, without further notice or demand to Grantor, invoke any remedies provided in this instrument for default. Exceptions to this provision for declaring the note due on sale or transfer are limited to the following: (a) creation of a lien or encumbrance subordinate to this deed of trust; (b) creation of a purchase-money security interest for household appliances; (c) transfer by devise, descent, or operation of law on the death of a joint tenant; and (d) grant of a leasehold interest of three (3) years or less without an option to purchase.”*

If the underlying mortgage or deed of trust contains a “due-on-sale” clause, then it will be very important to either 1) obtain a written estoppel or waiver from the underlying mortgagee, or 2) add an exception to Schedule B of the policy similar to the following:

Deed of Trust dated \_\_\_\_\_, recorded in Volume \_\_\_\_\_, Page \_\_\_\_\_, \_\_\_\_\_ Records of \_\_\_\_\_ County, Texas, executed by \_\_\_\_\_, to \_\_\_\_\_, Trustee(s), securing the payment of one note in the principal amount of \$\_\_\_\_\_, payable to the order of \_\_\_\_\_, as therein provided, *including, but not limited to, the possible enforcement of the due-on-sale provision contained therein, and consequences of default arising from failure to obtain the mortgagee’s written consent to the insured transaction.”*

Should the parties elect not to obtain written approval from the underlying mortgagee, then (in addition to the exception set forth above) the title agent must obtain a signed disclosure and

hold harmless agreement. At a minimum, the disclosure and hold harmless agreement should include an acknowledgement that: (i) there is a due-on-sale provision contained in the underlying mortgage or deed of trust; (ii) failure to contact and obtain the written consent of the underlying mortgagee may be considered an event of default that could cause the lien to be foreclosed; (iii) the parties have instructed the Company to refrain from contacting the lender; and (iv) the parties agree to hold the Company harmless from and indemnify the Company against any losses arising as a result of the failure to obtain the underlying mortgagee's written consent for the sale of the property which is the subject of the transaction.

Note – there are inherent risks to all parties in a wraparound mortgage transaction as well as to the title agent and underwriter insuring. The potential trigger of the due-on-sale clause discussed above is one. There is also the potential for seller not to use payments made by buyer to payoff the underlying/existing mortgage. Sometimes, Buyer and Seller agree that Buyer will make split payments directly to the original lender and pay seller a separate amount for the additional amount Seller financed for Buyer. Title company staff should be very careful not to advise parties to the transaction as to the documentation or propriety of utilizing wraparound mortgage financing and should advise the parties to obtain their own counsel for this purpose...

Caution -- If a title agent is handling a transaction in which a wraparound mortgage is being paid off, then the title agent must obtain payoff information for both the underlying note and the wraparound mortgage. The holder of the underlying note will receive payment in full. The holder of the note secured by the wraparound mortgage will receive the difference between the payoff on the note secured by the wraparound mortgage and the amount paid to the holder of the underlying note. The amount required to pay off the underlying note should be tendered directly to the holder (or servicer) of that note and NOT to the holder of the note secured by the wraparound mortgage. It is strongly suggested that the title agent obtain the payoff information from the holder of the underlying note directly. Such an inquiry from a title agent is a normal business activity and will not reveal that the "due on sale" clause has been violated.