Investors Title
INNOVATIVE BY INSTINCT

UNDERWRITING MANUAL

Texas Supplement

I. Underwriting Topics

A. How to Use This Manual

The General Underwriting Principles Manual contains all general underwriting exceptions and requirements issued by Investors Title out of North Carolina. Its guidance is specific to federal questions and issues that cross state boundaries. This Supplement contains exceptions and requirements particular to the state of Texas. Always review both the General Underwriting Principles Manual and this Supplement on each topic for underwriting practices.

Do not hesitate to contact Texas Underwriting Counsel at texasunderwriting@nititle.com for further clarification on anything in this manual, the General Underwriting Principles Manual, or any other underwriting topic.

B. Access

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

Access that is insured in a title policy is "legal" access, not actual "physical" access. Very limited physical access coverage to and from a specific public street can be insured through the Access Endorsement (T-23).

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, by driving a 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. Loc. Gov. Code 212.001 et. al. 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 an Easement Agreement that creates a right to access a piece of property (the dominant estate) by crossing adjoining property (the servient estate) that lies between the dominant estate and a public road. Such an easement is an easement appurtenant and runs with the land. That means the easement is attached to or considered a part of the land that it serves; if the land is conveyed, the easement is also conveyed whether the deed specifically includes the easement or not.

A Public Access Easement can provide access to land. However, never list the Public Access Easement as an insured parcel in Schedule A.

1. Excluding Access Coverage in the Title Policy -

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

a. To the Owner's Title 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 Loan Title Policy (Form T-2): "Lack of a right of access to and from the Land. Covered Risk number 4 is hereby deleted."

c. To the Residential Owner's Title 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 Title Policies and the T-2 Loan Policy 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,_____ County, Texas." This is most likely available and applicable with rural metes and bounds property where there is an access easement agreement that creates access across another's property 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 also 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 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. 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

a. **Utilizing prior title work**. Texas title insurance 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.

b. **Gap or vacancies between property lines or the land and the access**. Some surveyors

indicate on the survey plat whether 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.

c. **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, contact underwriting.

d. If creating an easement over a subdivision lot to access land outside the subdivision or common ownership of subdivision lot and adjoining acreage, contact underwriting..

e. **Limited controlled access property**. The Texas Department of Transportation (TXDOT) may, for safety reasons and to minimize congestion, designate areas along large expressways and their adjacent feeder roads as "controlled access". These controlled access areas generally prohibit access from the highway or feeder directly onto adjacent properties. Generally, there is a recorded document that defines these areas, however 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.

If you have property that relies on the above-described streets for access, then add the following Schedule B exception to the policies:

> The Land has frontage or abuts ____, which is a controlled access highway. This policy does not insure against the exercise of power by competent governmental authority to limit, control or deny access, ingress or egress to the Land from said highway or service road which the Land abuts, nor does it insure that the Insured has or shall continue to have access, ingress or egress from such property to and from said highway and service road.

4. Adding Physical Access Coverage to the Policy

The Company can insure physical access to property from a particular street on both the Owner's Title Policy and the Loan Title Policy using the T-23 Access Endorsement form. To issue this endorsement, see the National Investors Texas Endorsement Manual for requirements.

C. Adoption

In Texas, an adopted person inherits property through their adopted parents, just as if they were born to those parents. In addition, the adopted person inherits through any natural parent whose parental rights were not terminated at the time of the adoption. This issue may come up when discussing an Affidavit of Heirship for an individual who had a child but gave that child up for adoption. The title agent will want to confirm that the deceased's parental rights were terminated.

For purposes of intestate distribution, an adoptive parent inherits through their adopted child as if the child was a natural child of that parent. Tex. Est. Code §201.054.

Note, however, for purposes of intestate distribution (see Intestate Distribution below), the natural parents of an adopted child do not inherit from that child. Tex. Est. Code §201.054..

While a person is traditionally adopted through a court order, a child may sometimes be adopted "by estoppel". This is a bit like common law marriage. The child is brought into the home, and the child and adult live in a relationship consistent with that of a natural child and parent. There must also be an agreement by the parent to adopt the child. This becomes a sticky problem, particularly when someone dies intestate (without a will), and there is a non-biological child claiming to be a child via adoption by estoppel. It is not the title agent's job to litigate disputes, so assume that all "children's" claims are valid and require everyone to sign everything.

D. *Ad Valorem* Taxes (Property Taxes)

1. Overview

In Texas, cities, counties, school districts, hospital districts, and other local government bodies (each called a "t**axing unit**") impose property taxes. The State of Texas does not impose any state-wide *ad valorem* taxes. The taxation of property in Texas is governed by the Texas Constitution, the Property Tax Code, and the property tax provisions of the Texas Administrative Code.

A lien attaches to real property in Texas on January 1 of each year for the taxes that will become due on the property later that year—even though the amount of that lien is not known at the time. To complicate matters, the collection of property taxes in Texas happens in arrears, meaning that the bill for the current year's taxes does not become due until the end of the same calendar year. Before the bill goes to the property owner, the *appraisal district* must determine the taxable value of the property and each *taxing unit* must calculate the tax rate of all the taxed property in its jurisdictions. Because of this inverted calendar, many issues arise in the title industry related to property taxation.

While State law covers taxation of both real property and personal property, this section will focus only on the taxation of real property. Issues covered will include the process of valuing property and assessing taxes (including, for example, the difference between the appraisal district and the tax office duties), how to confirm tax information and calculate taxes due, applicable procedural rules, issues arising from delinquent taxes and transferred tax liens, and a checklist to reduce claims related to property taxes.

2. Why Tax Liens Are Important to Title Companies

Title companies give particular attention to tax liens in every transaction because of the special priority and duration the liens are afforded under Texas law. Historically, more money has been paid under title policies for claims relating to property tax issues than any other issue—only the mortgage fraud issues of the past few years have caused greater claims losses. Therefore, it is important to understand who and what can be pursued if a tax lien is not paid.

Whoever owns a property on January 1 is personally liable for all taxes assessed on the property for the entire year, even if the property is sold mid-year—and he will remain liable, even when he no longer owns the property. This type of liability is called *in personam*, meaning that "the person" is responsible for the tax payment. The January 1 owner may contract with someone else to assume their liability for the taxes, but the taxing units will always look to the January 1 owner if they want to pin personal liability on someone for delinquent taxes.

In addition to the January 1 owner being personally liable for that year's taxes, the taxes create a lien against the property. This type of liability is called *in rem*, meaning that "the thing" (or in this case, the property) is burdened with a tax lien for the tax payment. The lien attaches to the property on January 1 of each year for all the taxes, penalties, and interest ultimately imposed on the property, regardless of whether the taxes are imposed in the year the lien attaches and even though the amount of the lien is not known at the time. The lien exists in favor of each taxing unit having power to tax the property. The tax liens have equal priority, regardless of the year they attach or the taxing unit to which they are owed. The lien is *perfected* on attachment, which means that no written notice of the lien must be recorded in the official public records for the lien to be considered collectible.

The lien remains in place against the property until the taxes secured by the lien are paid. Accordingly, the tax lien will continue to remain in effect even if the property owner sells or transfers the property to a third party.

The tax lien is superior to all 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.

3. Appraisal Process

a) Valuation of Real Property

The Texas Constitution has two main requirements to make property taxes as fair as possible in the State. First, all property is taxed in proportion to its value (thus the name "*ad valorem*" taxes, meaning "according to value.") Second, taxation must be "equal and uniform."

The County Appraisal District ("CAD") is tasked with attempting to fulfill those requirements. In each county the CAD determines the *taxability* and *value* of all property within the county's geographical borders. Property is valued at its fair market value as of January 1 of each year, based on the individual characteristics affecting its value.

By May 15 or as soon thereafter as is practicable each year, the chief appraiser (who essentially is the figurehead and leader of each appraisal district) is required to prepare a list of all taxable property in the district and its appraised value. The appraisal district is required to maintain detailed records of each appraised property; the details include valuation history, geographic details, and ownership information, among other things.

b) Applying Exemptions and Special Valuations That Affect Value and Taxability

(1) Exemptions

The Texas Constitution says that taxation must be equal and uniform, but the taxed value of property (also known as the "assessed value") can be reduced based on the property owner's situation and the property's use. These situations are referred to as **tax exemptions**, and it is the Chief Appraiser of each county who determines whether exemptions can be granted. Exemptions affect how much tax is ultimately assessed on the property –they either completely remove a property from the list of taxable properties, or they reduce the property's taxable value.

A 100% total exemption, for example, is that granted on a county courthouse—a publicly-owned building used for public purposes. Other *total exemptions* include (1) public property, that is, property owned by the State or a political subdivision that is used for public purposes, (2) property exempt by federal law, (3) certain properties owned by charitable organizations, (4) certain properties owned by religious organizations, (5) certain schools operated by organizations that do not result in private profit, (6) and residence homesteads of veterans totally disabled while serving (or the surviving spouse of one who was killed in action, in specific situations.)

Other exemptions, both total and partial, are granted based on the circumstances of the

owner. These may be referred to as "personal exemptions"—the owner must be a person (or persons), a family trust, or the holder of a life estate—and they are only granted on residential property. The appraisal district determines whether the exemption should be granted. For all these exemptions, the property owner must make a formal application to the district for the exemption and show that he or she is the record owner of the property (or that they have a life estate in the property), that it is their principal residence, and that the property fits the legal limits for a Texas homestead. Partial exemptions have different dollar values associated with them, as established by Texas law and the local taxing units. The amounts are subtracted from the *market value* of the property (as established by the appraisal district) to determine the final *assessed value*.

For example, as of May 2023, a $40,000 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. If the exemption is granted, the tax would be $600.00 [$100,000 - $40,000 = $60,000; $60,000 x $1.00/$100 = $600].

The most common type of personal exemption is the homestead exemption, which effectively reduces the taxable value of a person's homestead property. To obtain a homestead exemption, a property owner is entitled to claim the homestead exemption as soon as he moves into the property and makes it his permanent residence.

The misnamed "over-65 exemption" applies to residential property owned by those who are age sixty-five or older. A property owner can apply for this exemption, which further reduces the taxable value of their homestead, when they turn 65. This exemption also can be "inherited", so to speak. If a married property owner has the over-65 exemption on their residence and passes away, their surviving spouse can obtain a similar exemption if they are at least 55 years old at the time of their spouse's death. This is often referred to as the "surviving spouse exemption."

The "disabled" exemption is given to property owners based on the extent of their disability as determined by Federal law.

A property owner can claim either an over-65 exemption or a disability exemption, but not both.

Veterans who are disabled are also entitled to relief, depending on the extent of their disability. The exemption increases in proportion to the percent they are rated disabled. They may be eligible for a complete exemption on their residence homestead and a partial exemption on any other properties they own.
If a member of the military dies in combat, their surviving spouse is entitled to a complete property tax exemption, if the property remains their homestead and they do not remarry.

Note that the above personal residence homestead exemptions will not be granted on more than 200 acres of land; for tax purposes larger tracts can be divided into the 200 acres claimed for the exemption and the remainder of the property.

(2) Special Valuations

In addition to exemptions, **special valuation rules** permit certain types of real property to be valued at less than fair market value for tax purposes. These types of valuation are commonly referred to as "agricultural exemptions", but no exemption is applied to the property's taxable value; instead, the property is valued using a different scale than other properties. Such valuations can significantly reduce a property owner's tax liability each year, so the state and counties impose major restrictions and set out lengthy guidelines to establish how a property owner can obtain the designation. Such special valuations require application by the property owner and taxes may be subject to recapture (or "rollback", discussed below) in the event of certain changes in use or ownership of the property.

Article VIII of the Texas Constitution allows for two types of special valuations: the first for "agricultural use" and the second for "qualified open-space land".

(a) 1-d Agricultural Appraisal

The more traditional special valuation is for land designated for agricultural use and is commonly referred to as the "1-d appraisal." The property owner must show 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 growing crops, raising exotic animals, or raising livestock. Under a 1-d appraisal, the assessed value of the property is the income that would be derived from the property's agricultural use rather than the market value of the property. The income is almost always less than the market value of the land. Because the amount of tax is determined by multiplying the assessed value by the tax rate, taxes are usually significantly less when the property is under an agricultural use valuation or open-space valuation. In short, whether it is granted depends on *how the landowner uses the property to make income*.

Consider the example of a ranch with a market value of $2 million, income from crops of $250,000, and tax rate of $1.50 per $100 of assessed value. If no open space valuation is granted, then the tax would be $30,000 [$2 million x $1.50/$100 = $30,000]. If open space valuation is granted, then the tax would be $3,750 [$250,000 x $1.50/$100 = $3,750].

(b) 1-d-1 Open Space Appraisal

By comparison, whether the qualified open-space valuation ("1-d-1 appraisal") is granted depends in large part on *the way the property is used*. The provision is primarily for land used to protect endangered species or land used for conservation or restitution projects. These categories are regulated by both state and federal laws.

(c) The Rollback Tax

Special valuation methods do have one disadvantage: the rollback tax. If the ownership changes or if use of the property is ever changed to a non-agricultural or non-open space purpose, then additional taxes may be assessed for each of the

previous three years. This additional tax is called a "rollback" tax. It is seen mostly on land subdivided and platted for commercial or residential development. The additional taxes will be the difference between what would have been paid if the assessed value of the property had been at market value and the amount of taxes that were actually paid, plus five percent interest for each year from the date on which the taxes would have been due.

c) Certification of the Appraisal Roll

Before the tax assessor-collector can send bills for taxes, the appraisal district must finalize the value of all taxable property in the county. The values are finalized when the chief appraiser "certifies" the annual appraisal roll. That action is the end of a very long process, however.

To get the tax assessment and collection process going every year, each chief appraiser is required to deliver written notice (called a "Notice of Appraised Value") to each property owner of the appraised value of their real property if (1) the appraised value is greater than in the prior year, (2) the appraised value is greater than as rendered by the property owner, or (3) the property was not on the tax roll the prior year. If a property owner disagrees with the Chief Appraiser's notice based on the appraised value, an ownership error, or the denial of an exemption or special valuation, he may file a formal protest before the property value is "certified" (finalized.)

If the owner does not file a protest, or, after a protest is resolved through administrative or legal action, the property's appraised value is certified as final. Only then can the Chief Appraiser send the official "certified appraisal roll" to the taxing units. The appraisal roll lists all taxable property as well as the value at which each property should be taxed after the application of exemptions and special valuations. The annual deadline for the chief appraiser to certify to each taxing unit in the district the value of taxable property within that taxing unit is June 25. Properties whose values still under protest must be separately identified.

4. Assessment and Collection of Taxes

Once the appraisal district has finalized property values and exemptions, the local taxing units and assessor-collectors become involved in the process.

a) Local Control

Each taxing unit sets its own tax rate. Before the rate can be calculated, the taxing unit needs to determine its annual budget. With the budget and the total taxable value of all property within its jurisdiction, the taxing unit can calculate its effective tax rate. The effective tax rate is an amount which, when applied to the total value of the taxable property within its jurisdiction, allows the taxing unit to meet its annual budget.

For example, if a city budget requires $20 million in revenue, and the total assessed value of all properties in the taxing jurisdiction is $60 million, the city's tax rate would be $0.33 per $100. The tax on a property with an assessed value of $100,000 would be $333.33. The formulae also consider the prior year's levy, collection rates, and other information.

b) Tax Bills

(1) Typical Assessment and Collection Cycle

The annual tax cycle in Texas lasts for thirteen months, beginning on January 1 of each

calendar year. Taxes are paid in arrears, meaning that they are paid at the end of the tax cycle. For this reason, it is common to see closing instructions relating to taxes that "are not yet due and payable."

The tax assessor-collector for each taxing unit prepares and sends bills to the property owners by October 1 of each year or as soon thereafter as is practicable. Taxes generally become delinquent if not paid by January 31 of the following year. On the rare occasion that the tax bills are not mailed out before January 10, the delinquency date will be postponed to the first day of the month following the expiration of 21 days after the mailing.

(2) Supplemental Assessments

In addition to rollback taxes as described above, supplemental assessments after the initial billing cycle can also result in additional amounts owed. These amounts are supplemented to the tax roll after the initial tax bill is sent. They stem from either exemptions that were erroneously on a tax account or for property that was not included on the tax roll. For example, if a property has an elderly homestead exemption on the account for 2023, but the elderly property owners ceased living in the property in 2021, the district can go back in time to assess taxes on the value of the property that previously had escaped taxation due to the erroneously applied exemption.

When the error or triggering event is discovered, the appraisal district will determine the appropriate assessed value of the omitted property for the applicable tax years. The information about the revised assessed values for the applicable tax years will be put on a "supplemental appraisal roll" that is sent to the affected taxing units. The taxing units 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: the base tax amount is due when the bill is mailed, and it is delinquent the first day of the next month that will provide at least twenty-one days for paying the bill.

c) Collection of Taxes

(1) Penalties and Interest

If a property owner does not pay the property taxes by the delinquency date, the taxing units will impose penalties and interest. Penalties accrue at 6% for the first month of delinquency or portion thereof plus 1-2% for each additional month, with the delinquent penalty maxing out at 12%. Interest accrues at 1% per month or portion thereof, with no maximum. Additionally, if a taxing unit engages a private attorney to collect its delinquent taxes (which almost all do in Texas) and the taxes are not paid by July 1, the taxing unit can impose a collection penalty. The penalty ranges from fifteen to twenty percent of the total amount of base taxes, delinquent penalties, and interest due on the date a tax payment is made.

(2) Suits to Collect Delinquent Taxes

The deadline for a taxing unit to collect its delinquent taxes is lengthy—the taxing unit can file a suit up to *twenty years* from the date the taxes originally became delinquent. Recall that the taxes are collectible both from the *property* as well as the *owner.* The

taxing units therefore have two ways to recover any delinquent taxes through litigation. In a suit for the delinquent taxes, the judgment usually includes an order assessing personal liability against the owner. However, the taxing units aren't always successful in collecting the amounts due from the property owner, so they therefore obtain a judgment foreclosing the tax lien against the property. The property is then sold to recover the delinquent amounts. Although foreclosure eliminates all inferior liens on the property, the personal judgment against the property owner, when abstracted in the public records, only has priority over subsequently recorded judgments.

(3) Right of Redemption After Foreclosure

Another red flag to be aware of is the right of redemption after a foreclosure sale. Even after a sale the person who owned the property or held a lien against it at the time of foreclosure may have the right to buy back (or "redeem") the property by paying the foreclosure purchaser the purchase price plus a penalty and certain costs. If the property was a residential homestead or designated agricultural use property, the property owner has two years from the date the purchaser's deed was filed to redeem. If other types of property are involved, the redemption period is limited to 180 days after the purchaser's deed is filed.

For informational purposes only, in order to redeem, the property owner must pay the purchaser an amount equal to the purchaser's bidding price, the amount of the deed recording fee, and the amount the purchaser paid as taxes, penalties, interest, and property costs, plus a redemption penalty of 25% of the aggregate total if the property owner redeems the property in the first year of the redemption period, or 50% of the aggregate total if redeemed in the second year. Redemptions are not handled by title companies.

d) Transfers of Tax Liens (also known as Property Tax Loans)

(1) The Transaction and the Lien Priority

Tax lien transfers are an alternative method of property tax payment available to Texas real property owners, but one that creates many issues in the title examination process. The transaction involves a private third party (the "tax lien transferee" or "property tax lender") to whom a property owner gives written authority to pay his taxes. When the tax collector receives the owner's authorization along with the transferee's payment, the collector certifies that the lien is transferred to the transferee. The owner is supposed to then pay his tax lien obligation back to the transferee over time: the amount the transferee originally tendered to the collector plus the costs of the transaction, interest, and any charges incurred in the collection of the amount owed.

Transferred tax liens create issues in the title world because they have been common only since the early 2000's. Many people did not know that the lien remains a superior tax lien even after it is transferred to a private person or entity. Under the law, the transfer of a tax lien to a private third party has no effect on the nature of the lien; it remains a tax lien, and the transferee steps into the shoes of the transferring taxing units. In other words, the transferee gets the right to foreclose the tax lien just as the taxing unit could have done. The transferred lien is superior to mortgages, materialmen's liens, and other recorded contractual liens, regardless of the date they were filed. Also, they have equal priority with any future or prior property tax liens. Therefore, if a person owes taxes to a local

taxing unit as well as to a private tax lien transferee, those liens have equal priority with each other. Similarly, if any lien that is inferior to a tax lien is foreclosed (such as a mortgage lien, home equity lien, or materialmen's lien), the transferred tax lien will remain against the property, unaffected by the foreclosure of the junior interest.

(2) Examination Issues

What makes tax lien transfers difficult for title examiners is that the documents recording the transfers either look like inferior (subsequent) mortgage liens or they do not look like anything the examiner is used to seeing. Typical titles for documents relating to transferred tax liens include the following: Deed of Trust, Tax Lien Deed of Trust, Tax Lien Contract, or Certified Statement of Transferred Tax Lien.

Another big issue for examiners is that they might not know that the tax lien remains super-priority, even after it is transferred, as described above.

(3) Foreclosure of a Transferred Tax Lien

Depending on the date the tax lien was transferred from a tax collector to the private sector, the foreclosure of a transferred tax lien can look either like a private mortgage loan foreclosure or like a taxing unit's foreclosure suit. There have been three types of foreclosure proceedings permitted over the course of the last eighty-plus years. When the law first arose in the 1930's, a transferee could only foreclose through a full-blown judicial foreclosure suit, following the same procedures as a taxing unit would follow to foreclose its own tax lien. If the lien was transferred between September 1, 1995, and September 1, 2007, the law permitted the transferee to do a simple nonjudicial foreclosure (like that of a first-lien mortgage) after accelerating the obligation and posting a notice of foreclosure sale. For tax liens transferred between September 1, 2007, and May 29, 2013, a transferee could do the same type of nonjudicial foreclosure, but he would have to stop mid-way to get a court to look over the notices and confirm that he had the right to foreclose. This procedure is referred to as a Rule 736 Foreclosure, which is the same process home equity lenders must follow in Texas. These nonjudicial foreclosures were no longer authorized for liens transferred after May 28, 2013; beginning on that date, any transferred lien must be foreclosed through a judicial foreclosure suit.

5. Verifying Tax Information

Because of the tax lien's priority over almost every type of contractual lien, it is extremely important to confirm the status of property taxes every time a title transaction closes. There are several ways to obtain the information; the key is to make sure that your sources are reliable and that they stand behind their data. The three main considerations are (1) you must be sure that every taxing unit is accounted for (*e.g.,* the city, the county, the school, any MUD); (2) you must obtain accurate balances owed; and (3) if there is nothing owed, you must address current year liability, supplemental tax, and rollback potential.

a) Confirming Taxing Units and Balances Owed

Every piece of property in Texas lies within the geographical boundaries of a county that, unless the property is exempt, assesses taxes against the property. The property also will be taxed by a school district and possibly a municipality (a city, village, or town.) In addition to the primary

three types of taxing units (county, school, and municipality), other smaller taxing units may assess property taxes against the parcel. Examples include municipal utility districts and subdivisions of the county, such as hospital districts, road and flood districts, and county college districts. Every taxing unit may have its own tax collector, whereas in some counties, tax collections are consolidated – one tax collector handles the assessment and collection process for multiple (if not all) taxing units. Because not every piece of property has the same number of taxing units, and because not all tax collectors handle all the taxes that might be owed on a property, it can be difficult to confirm the tax balances owed on a particular parcel. There are two ways to obtain the information: self-confirmation or third-party tax services.

(1) Title Company Research

The first method a title company can use to confirm tax accounts and balances is "self-service" –the title company gets its information straight from the taxing units. By going to the local CAD with the legal description of a property, one can confirm all the taxing units in the county that assess taxes against the parcel. The CAD will also indicate which tax collectors collect for each of the relevant taxing units. Once you know which tax collector(s) assess the subject property, you must contact each of them to get the amounts owed.

Each tax collector is required, upon request and for a small fee, to issue a tax certificate that shows the amount of taxes, plus any accrued penalties and interest, due on a property. The certificate must show the balance owed for each of the taxing units for which the collector is responsible. The Tax Code places a high level of responsibility on the tax collector to make sure their tax certificate is correct. If a property is conveyed accompanied by a tax collector's certificate that erroneously indicates that no taxes are due, the tax lien for any missed taxes is extinguished, and the collector has to remove them from the tax roll.

The collector is also supposed to include on its certificate "any known costs and expenses" related to a delinquent tax collection suit pending against the property. However, many tax offices don't retain that information. Instead, the tax office will send you to the law firm that handles the delinquent tax suits.

There are two problems with the self-service method of tax confirmation. First, if a taxing unit issues an erroneous tax lien certificate, or if the law firm doesn't correctly state the amount of fees and costs due on a property, they will not easily remove the tax lien or the understated fees and costs; you will inevitably expend a lot of time and resources convincing them that they have a duty under the Tax Code to live up to their written statements. The second issue is that one has no third-party recourse if they make a mistake. It is not uncommon to miss a small taxing unit, such as a MUD, when researching the relevant taxing units. If a taxing unit is missing, and those taxes are not appropriately resolved in the closing, the title company is responsible. For those reasons, title companies usually avoid the self-service option of confirming tax amounts owed.

(2) Tax Services

The second way to confirm property tax balances is through companies referred to as "tax services." These companies research the tax rolls themselves and provide their own "tax certificates" that show any taxes, penalties, interest, costs, and fees owed on a property.

In addition to what is shown on the taxing unit's tax certificates, the tax services' certificates include the property's assessed value and whether there are any exemptions or special use valuations on the property account. Tax services go even beyond the tax lien information. Tax services' certificates provide information necessary to complete the water district disclosure notice required by statute (current bonded indebtedness and tax rates.) They also show homeowner association assessments (current monthly payment, any delinquent payments, any fees required to transfer ownership of the property, any additional unpaid assessments, and the contact information for the association.)

Title companies generally rely on private tax services for two reasons. First, the service does the leg work to determine which taxing units assess the subject property, and they also obtain the additional non-tax information. Second, a tax service usually guarantees that it will be liable for inaccurate information in its tax certificate, even additional information. As with an official tax certificate, the tax service's charge can be passed on to the appropriate party (seller or borrower) in the insured transaction.

b) Court Costs and Attorney's Fees in Delinquent Tax Suits

Another factor that complicates calculation of the tax lien payoff is the additional amounts for court costs and attorney's fees that may be due if a delinquent tax suit is pending against a property. The ways these amounts are confirmed and collected vary not just by county but by taxing unit. If a title examination indicates that a tax suit is pending on a property, a close inspection of the payoff amounts is necessary. The payoff amounts should include not just taxes, penalties, and interest to the tax collector(s), but court costs and possibly attorney's fees as well. These amounts may be collected by the District Clerk of the county in which the suit was pending or by the law firm hired to collect the delinquent taxes. If the suit had progressed to the point of being set for foreclosure, amounts also may be due to the local sheriff or constable. Extreme care is needed to confirm that all amounts owed are paid; until the costs and fees associated with a suit are paid, the lien will remain against the property.

c) Current Year Taxes and Prorations

In addition to making sure that any past due taxes are resolved, one must also address liability for current year taxes as well as the possibility of future taxes.

(1) Proration of Current Year Taxes

Technically, the Tax Code says that a person who owns a piece of property on January 1 is personally liable for that entire year's taxes, even if he sells it during the year; however, that law is not very equitable (or "fair") to someone who sells mid-year. In practice, therefore, taxes are prorated at the time of a purchase transaction, with the buyer and seller each taking responsibility for a part of the taxes in proportion to the amount of time they owned the property. "Proration" is the term used to refer to the calculation and payment of these amounts in each situation.

Recall that taxes do not become due until approximately October 1 each year. If the closing occurs during the period from January 1 until the tax bills are due, the "standard proration method" is used. This method can also be used if the taxes are not paid at closing. The amount of tax for the tax year is calculated using the most up-to-date tax amounts. These amounts might be the prior year's valuation and tax rates. 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.

If the closing occurs between the time that the tax bills can be paid and the date the taxes become delinquent, then the "reverse proration method" is used when current year taxes are paid at closing. The buyer's pro rata portion is calculated, then 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. See "The Tax Exception" section below for more information on how to handle current year taxes.

(2) Exemption Issues Affecting Proration

If a party to a transaction has a partial or full exemption from taxation, the effect of that exemption must be considered when calculating the proration.

Personal Exemptions. Personal tax exemptions ("homestead", "over-65", "disabled", "100% disabled veteran", "over-55 surviving spouse") do not transfer from a seller to a buyer, even if the buyer meets the qualifications for the same exemption. Each person claiming an exemption must qualify for the exemption by proper application to the CAD. On the other hand, because the exemption belongs to the person, sometimes a property owner can transfer their exemption from one qualified property to another. For example, if a person has an over-65 exemption on one home, then buys a different house to be used as his homestead, he or she may apply for the exemption to be transferred to the new home.

Because there are many factors to consider in determining whether an exemption can and will be transferred, the parties to a transaction must negotiate whether to prorate with the exemption in place. The title company should obtain the seller and purchaser's consent and agreement as to how to prorate in this situation. Unfortunately, contracts do not typically address this issue. For instance, 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".

Tax-exempt Party. If the **seller** in a purchase transaction is exempt from property taxes, the seller will not be charged taxes on the portion of the year that it owns the property. The buyer will be charged taxes on the remainder of the year that he 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 CAD and taxing jurisdictions to make sure that taxes are assessed for the portion of the year that the buyer will own the property.

If the **buyer** is tax-exempt, then the seller will be charged 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 CAD and, when the tax bills are generated, pay the

taxes attributable to the portion of the year that the seller owned the property.

Searches of tax information, whether provided by a tax service or the title company's research, cannot be relied on to show whether supplemental taxes may be assessed in the future. Only when the appraisal district learns that facts have changed that create the duty to supplement taxes (and the tax office generates a supplemental bill for the omitted taxes) will it be obvious. In the meantime, those associated with the insured transaction have a duty to question the parties to the transaction to determine whether the circumstances might trigger a supplemental assessment.

(3) Parent Accounts, Split outs, and Killed Accounts

Sometimes a piece of property being sold does not have its own distinct tax account number on the tax rolls but is part of a larger parcel (the "parent account".) When the appraisal district changes the roll to show the property as a separate account, the small new lot is known as the split-out, or child account. In other situations, a large parent account might be divided into two or more parcels, creating all new children accounts from the parent account. In each of these situations, the original parent account is eventually "killed"—the appraisal district stops appraising that larger parcel as a unique account, and all the property is taxed under the newly created split-out accounts. Alternatively, if the split-out portion is not large in relation to the parent account, the appraisal district might keep the parent account the same, but just make a change to its legal description for the years following the split-out.

This situation occurs frequently when property has been taxed as acreage is subdivided into subdivision lots. It also may occur when a large tract owner sells off just a small portion of his land or when a property owner divides acreage into two or more tracts for his or her children. How the taxes are handled for the year of the sale or division depends in large part on the time of year that the sale occurs and how the particular CAD in which the property lies treats such changes. All these situations require working closely with the CAD.

Such split-outs are highly risky until the parent account is killed and all the taxes on the parent account are paid. The risk comes from the law that says the tax lien remains on all property associated with the parent account until the parent account is paid. Therefore, even if a small parcel is split out and the taxes are paid going forward from the date of the split, if any taxes are owed on the parent account, the lien on that account extends to all the property originally under it.

The calculation of taxes for the lot to be sold is relatively easy if the property subject to the sale is similar in "quality" to the property that will remain owned by the seller. Assuming that the subject property being sold has not been "split out" from its parent tract at the time of the sale, the proration is 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 property to be sold varies significantly from the property that will remain, a survey and appraisal will be required to obtain an estimated valuation on the subject property so that taxes can be apportioned.

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, the transaction becomes much more complicated and riskier. Consider the sale of one lot in a subdivision where, for example, the parent account is 100 acres, and it is being divided into 100 one-acre lots. Ideally, the CAD will change the appraisal roll for that year to reflect that the parent account is killed, and a new account is set up for each of the 1-acre properties. That is not always what happens, however, so the title company will either have to confirm that the taxes for the parent tract have been paid or work with the CAD and taxing units to determine that the tax account for the property being sold does get set up, and that the taxes on that specific property do get assessed and can be paid. Even in that situation, the risk remains that until the parent account taxes are paid, a lien remains against the split-out.

6. The Tax Exception in Title Policies

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 listed as an exception in Schedule B of the policy. Therefore, if a tax lien exists and is not properly addressed in the policies of title insurance, any assertion of rights under the tax lien will result in a claim under the policies.

a) Schedule B Exception

Title insurance provides general coverage regarding liens. However, Schedule B contains a specific *exception from coverage* pertaining to real property taxes. It is item 5 in the Owner's Policy and item 3 in the Loan Policy and reads as follows:

> [This policy does not insure against …] 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 it 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" is a carve-out to the Schedule B exception. This pertains 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 (usually improvements) 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.* The estimated supplemental tax amount may be escrowed to protect all parties.

b) Procedural Rule P-20 and Associated Rate Rules

(1) Taxes for the Current Year – Procedural Rule P-20A

Policies of title insurance cannot insure that taxes are paid unless all the taxes for the current tax year both (1) have been assessed by the taxing authorities and (2) one of the following situations has occurred:

(a) 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;
(b) 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; or
(c) 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 generally is required.

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.

CAUTION: Make sure that payment for taxes is tendered by mail or in person to the tax collector in the same month for which the balance is obtained. Failure to pay current taxes by the delinquency date may result in penalties and interest, which increase on the first day of every month until paid.

Note that rule P-20 previously provided that the title company pay the taxes for the current year 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.

(2) Rollback Taxes – Procedural Rule P-20B

The clause "and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership" (the rollback clause) 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:

(a) The title company has satisfactory evidence that the assessed taxes for the current year are not based on agricultural use or open-space valuation; or

(b) The rollback taxes have been assessed by all 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.

The title professional should not attempt to estimate and pay the rollback taxes to the tax assessor-collector before the taxes are rolled back. Tex. Tax Code §§23.46, 23.58.

(3) Not Yet Due and Payable - Procedural Rule 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:

(a) If none of the year's taxes, standby fees, or assessments by any taxing unit are due and payable yet, 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. Effective November 1, 2024, the Company can specify whether which year's taxes are not yet due and payable; previously the Company was limited to insuring the taxes of the year in which the policy was issued.

(b) If at least 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 only [insert name of applicable taxing unit(s)] are not yet due and payable for the year _____."

In either instance, the premium of $5.00 must be collected in accordance with Rate Rule R-24.

7. Procedure to Avoid Claims

Implementing the following procedures will reduce claims arising from property tax issues:

a. Verify that you have obtained complete information from a tax services company or each taxing jurisdiction in which the property is located.

b. Verify that you have identified all tax account numbers relevant to the property to be insured, including parent and split-out accounts, and have obtained all relevant information on each account number.

c. 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 the appraisal district records indicate, then there is a possibility that supplemental taxes for omitted property may be assessed in the future. Also, if 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.

d. Be alert for situations that might result in a supplemental assessment. Identify whether exemptions have been granted on the property. Determine whether the conditions that justify the exemptions existed at all applicable times, or whether the exemption was erroneously in place for at least some period of time. If not, then there is a possibility that supplemental taxes based on a higher valuation may be assessed in the future. If possible, make sure the supplemental assessment is paid for at or prior to closing. If not, you cannot insure the taxes as paid through the years for which a supplemental assessment might arise.

e. 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 to obtain the latest available information on the assessed value of the property covered by your policy.

f. 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. 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.

g. Remember that title companies can escrow funds for payment of taxes only under the situations described in Procedural Rule P-20. TDI's 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 about 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.

h. 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.

i. As additional protection, include clauses like 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 1st), 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 later, 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 CAD 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 CAD 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 based on 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 CAD records concerning ownership, tax-billing address, or status of exemptions.

8. Insuring Title after a Tax Lien Foreclosure

Most tax liens are foreclosed by judicial foreclosure, however, insuring them comes with a host of issues. See the Foreclosure section of this Supplement and the Checklist to Analyze Insurability for more information.

E. 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 Tex. Civ. Prac. & Rem. Code §16. The laws establish limitations periods for a true owner to defeat an adverse claimant for 3-, 5-, 10- and 25-year periods.

1. Definitions

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. (Tex. Civ. Prac. & Rem. Code §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 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. The occasional use of the land for timber purposes is in itself not sufficient.

Furthermore, it is not essential that an actual residence be situated on the land; nor is it necessary that a tenant 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 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 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 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

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 (that is, the statute of limitations is tolled). Tex. Civ. Prac. & Rem. Code §16.022.

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 Sates Armed Forces during a time of war.

Note: Except as provided by the 25-year limitation statutes, after the termination of the legal disability, a person has the same time to present a claim that is allowed to.

5. Tacking of Successive Interests

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. Tex. Civ. Prac. & Rem. Code §16.023. "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.

6. Requirements Limitations Periods to Effectuate Adverse Possession

a) 3-Year Limitations Period (Tex. Civ. Prac. & Rem. Code §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) 5-Year Limitations Period (Tex. Civ. Prac. & Rem. Code §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 quitclaim deed, a forged deed or a deed executed under a forged power of attorney.

Requirements (for 5-year claim):

- All the traditional requirements must be met.
- The claimant must pay all taxes.
- Claim under a deed (can't be a forged deed, a quitclaim deed or a deed executed under a

forged power of attorney).
- No links to the sovereign are required.
- Can be based on a void deed, so long as it appears valid on its face.
- 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.

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:

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.

d) 10-Year Limitations Period (Tex. Civ. Prac. & Rem. Code §16.026)

A person must bring a 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 enclosed exceeds 160. If the number of enclosed acres exceeds 160 acres, peaceable and adverse possession extends to the real property 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 (Tex. Civ. Prac. & Rem. Code §16.031)

A tract of land owned by one person that is 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.

(2) Adjacent Land (Tex. Civ. Prac. & Rem. Code §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) 25-Year Limitations Period Notwithstanding Disability (Tex. Civ. Prac. & Rem. Code §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) 25-Year Limitations Period with Recorded Instrument (Tex. Civ. Prac. & Rem. Code §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 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) (Tex. Civ. Prac. & Rem. Code §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 of 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 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 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. Cotenancy 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.

In 2017, the Texas legislature added a mechanism for a co-tenant to obtain land from a co-tenant who obtained the land at the same time (such as through inheritance) over the course of 15 years. This procedure is very specific and involves public notice, recordings in the real property records, and payment of taxes, among other things. The complete procedure is set out in Tex. Civ. Prac. & Rem. Code §16.0265. If you think you have a situation where a co-tenant acquired title by adverse possession over 15 years from a co-tenant, contact underwriting before proceeding.

8. Underwriting Requirements

a) Adverse Interests Disclosed by Inspection

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. 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 the buyer and seller by inspection of the land. Remember in a 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 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.

b) Adverse Interests Disclosed by Survey:

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 landowner, 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 landowners 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 costliest 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 landowners 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 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 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.

F. Affidavit of Heirship

When a property owner passes away intestate (that is, without a Will), the decedent's real property immediately vests in his heirs at law, subject to the payment of the decedent's debts. To establish the identity of those heirs, an Affidavit of Heirship (AOH) may be used and recorded in the real property records. Refer to National Investors Bulletin 2020-131 for full details.

1. Contents of an Affidavit of Heirship

The AOH must set forth all of the following:

i) Name and address of affiant;
ii) The length of time the affiant knew the decedent and in what capacity;
iii) Date and place of decedent's death; decedent's residence at the time of death;
iv) Decedent's complete marital history, including the manner and date of termination of each marriage, whether by death or divorce;
v) Children information. Either
   (1) A statement that decedent had no child born to, adopted by, or raised in the home of decedent during his lifetime; or
   (2) Name of each child born to, adopted by, or raised in the home of the decedent during his lifetime, and:
      (a) birth date, name of other parent, and current address of each living child; and
      (b) birth date, name of other parent, date of death and descendants of each deceased child;
vi) If Decedent was not survived by children, the name, birth date, and current address or date of death of decedent's parents and siblings;
vii) Whether decedent left a will and whether such will has been submitted to probate. In the event decedent left an unprobated will, the will and any codicil thereto must be attached to the AOH as an exhibit. **Note**. If this is the case, contact underwriting before proceeding.;
viii) Whether any administration was opened on the decedent's estate in any jurisdiction, and if so, details concerning the proceeding. **Note**. If this is the case, contact underwriting before proceeding;
ix) Information regarding all debts of decedent's estate, including:
   (1) Hospital bills and debts arising from last illness or cause of death;
   (2) Obligations or claims that may arise under the Medicaid Estate Recovery Program ("MERP"); and
   (3) Federal estate taxes; and
x) The following statement:
   "I am aware of the penalties under Federal law for perjury, which includes the execution of a false affidavit, pursuant to 18 U.S.C. §1621, which provides that anyone found guilty shall be fined, imprisoned, or both. I am also aware that making a false statement under oath or swearing to the truth of a false statement is a criminal act pursuant to Section 37.02 of the Texas Penal Code. I am also aware that under Section 32.46 of the Texas Penal Code, a person commits an offense if, with intent to defraud or harm a person, he, by deception, causes another to sign or execute any document affecting property or service of the pecuniary interest of any person, and that an offense under such section is a crime punishable by a fine of up to $10,000 and confinement for a term up to life in the Texas Department of Corrections."

Tex. Est. Code §203.002 provides a form for an Affidavit of Heirship.

2. Who Signs the Affidavit of Heirship?

The AOH must be executed by one of the heirs and corroborated by sworn statements from at least two disinterested persons. A disinterested person may not have an interest in the subject property or stand to gain an interest through intestate succession, must have personal knowledge of all facts concerning the marital and familial history stated in the AOH, and must have known the decedent personally for at least ten years. The disinterested witness is frequently a long-term friend, the family priest, doctor, next door neighbor, or distant cousin. Care should be taken that the witness knew the decedent starting from a date at least ten years before the decedent died, not starting ten years prior to the transaction closing date.

Because the AOH is being used to establish title to the property, the title agent should take control of the execution and notarization of the AOH to help reduce the possibility of fraud. Wherever possible, the AOH should be signed in the title agent's office or in front of a mobile or remote notary public selected by the title agent. It is not good practice for the AOH to be notarized by a "friend" of the heir or disinterested person. The title agent should take the same fraud precautions as it would as if it had a deed or deed of trust being signed out.

3. Closing and Underwriting Guidelines

- You must obtain a death certificate for the decedent issued by the appropriate governmental agency and maintain the certificate in your file.

- A name search must be performed for all identified heirs to identify involuntary liens that may have attached to the subject property.

- Because the heirs are considered the property owners upon the death of the decedent, all identified heirs must sign the closing documents, unless they convey their interest to a co-heir first. The spouse of an heir also must sign if the subject property is the homestead of that heir.

- If the property owner was age 55 or older when he died and it has been less than four years before closing, you must follow the MERP Procedures.

- If the property owner's death occurred less than four years prior to the date of closing, all heirs must sign an indemnity as to the debts of the estate.

- The AOH must be in a recordable form and include all the information set forth below in Tex. Est. Code §203.002.

- As to each deceased child or next heir(s) at law, the heir or beneficiary of that individual should be determined through probate or another AOH, as appropriate. Contact underwriting to waive or modify this requirement.

- The AOH and its exhibits, if any, must be recorded in the county real property records.

- If the property owner died less than one year prior to date the title order was placed, you must obtain underwriting approval to use an Affidavit of Heirship.

- If an administration or probate of the owner's estate has been opened in any court, you must obtain underwriting approval to use an Affidavit of Heirship.

4. Helpful Hints

The purpose of the Affidavit of Heirship is to set out in the real property records the family history of the decedent. The examiner then uses this information to determine the decedent's heirs according to Texas intestacy laws. Some older Affidavits have a paragraph which states "The heirs of the decedent are . . . ". Such statements should always be carefully examined. The average layperson does not understand Texas intestacy law and therefore would be unable to swear as to the "heirs" of the decedent.

National Investors has a Descent and Distribution Chart which may be helpful when determining heirs. As always, contact underwriting for confirmation if necessary.

When discussing children who were "raised in the home of decedent", the question of stepchildren always arises. National Investors takes the position that the purpose of the Affidavit of Heirship is to identify any biological children, adopted children or children who were adopted by estoppel by the decedent. A stepchild who was raised in the home of a stepparent but was always known as and identified as a stepchild would not have been adopted by estoppel and therefore should not be included on an Affidavit of Heirship. Of course, a stepchild that is formally adopted by the stepparent should be included on an Affidavit of Heirship. This can be a very fact-specific situation.

On occasion, a family will leave a person off the Affidavit of Heirship because that person has decided that they do not want their inheritance or simply does not want anything to do with the property in question. This is a "disclaimer" of interest. It is possible to disclaim an interest in inherited property, however, it is inappropriate to leave a person off an Affidavit of Heirship as the method of doing so. After all, the Affidavit of Heirship is the story of the family history of the decedent. The better way is to include the individual on the Affidavit of Heirship and then have that person record a disclaimer of interest separately in the real property records. The individual should consult with their attorney on how to do that properly.

5. What if they lied?

Tex. Est. Code §201.053 - A person who purchases for valuable consideration any interest in real or personal property of the heirs of a decedent, who in good faith relies on the declarations in an affidavit of heirship that does not include a child who at the time of the sale or contract of sale of the property is not a presumed child of the decedent and has not under a final court decree or judgment been found to be entitled to treatment under this subsection as a child of the decedent, and who is without knowledge of the claim of that child, acquires good title to the interest that the person would have received, as purchaser, in the absence of any claim of the child not included in the affidavit. This subdivision does not affect the liability, if any, of the heirs for the proceeds of any sale described by this subdivision to the child who was not included in the affidavit of heirship.

G. Apostille

If a document needs to be signed and notarized outside the United States, it can use a foreign notary and an apostille issued by the foreign country if the country has signed onto the Hague Convention. A list of member countries can be found here: https://www.hcch.net/en/states/hcch-members. Alternatively, the signer can sign in front of a notary at the U.S. Embassy or consulate. Alternatively, the signer can sign using Remote Online Notary (RON) so long as the signer can meet the knowledge-based authentication requirements of the RON provider. More information about apostilles can be found at The ABCs of Apostilles.

Note: If the document is not in English, it will also need a translation and translator's affidavit attached.

What is an Apostille?
An Apostille is a certificate that authenticates the origin of a public document (e.g., a birth, marriage or death certificate, a judgment, an extract or a register, or a notarial attestation). An Apostille is a form of certification set out in the 1961 Hague Convention, to which the United States became a subscriber in 1981. It is a form of numbered fields, which allows the data to be understood by the receiving country regardless of the official language of the issuing country.

What does an Apostille do?
The object of the Apostille is to "abolish the requirement of diplomatic or consular legalization for foreign public documents". The completed Apostille certifies the authenticity of the signature, the capacity in which the person signing the document has acted and identifies the seal/stamp which the document bears.

Who issues Apostilles?
Each subscribing nation may designate those authorities which may issue Apostilles for their jurisdiction. The United States has appointed the Secretary of State (or their counterpart) of the various states as said authority. The Secretary of State of Texas has expanded this authorization to include the Deputy Secretary of State and the division directors.

The Secretary of State of Texas may issue an Apostille on documents issued by persons on file with this agency, including county clerks, notaries public, statewide officials. Recently issued birth/death certificates issued by local registrars must have been issued within the past three (3) years for the Secretary of State to issue an Apostille.

The competent authority for issuance of Apostilles on documents issued by the federal government are the clerks of the federal courts.

What kind of documents do I need an Apostille for?
The Apostille may be obtained to transmit public documents executed in one subscribing country to another subscribing country wherein the documents need to be produced. The Hague Convention defines 'public documents' as:

- those originating in a court, clerk of a court, public prosecutor, or process server,
- administrative documents,
- notarial acts,

- official certificates placed on documents.

These types of public documents would include birth/death certificates, marriage licenses, divorce decrees, school transcripts and diplomas/degrees, among others.

H. Arbitration

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, are a contract between the underwriter and the named insured(s) and are subject to interpretation and concepts of contract law.

The arbitration provision is included in the "CONDITIONS" section of the:

- T-1 Owner's Policy of Title Insurance (paragraph 14)
- T-1R Texas Residential Owner's Policy of Title Insurance One-to-Four Family Residence (paragraph 8)
- T-2 Loan Policy of Title Insurance (paragraph 13)
- T-2R Texas Short Form Residential Loan Policy of Title Insurance (paragraph 13)

By default, the named insured and the underwriter agree to arbitration upon issuance of the T-1, T-2, or T-2R policies; the named insured must opt out of arbitration prior to issuance of the policy. The arbitration provision in the T-1R is just a notice or disclosure of the concepts and potential uses of arbitration and does not bind either party to arbitration.

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.

Procedural Rule 36 provides the required wording and instructions to delete the arbitration provisions from the policy.

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.

I. Assignment of Rents, Leases and Profits

See Investors Title General Underwriting Principles for a general discussion of assignments of rents, leases, and profits.

In Texas, specifically, a recorded mortgage or deed of trust (i.e., an "enforceable security agreement") automatically creates an assignment of rents on the subject real property, unless the document says otherwise, or the deed of trust is for a home equity or reverse mortgage. Tex. Prop. Code §64.051. However, many lenders still require that a separate assignment of rents document be signed and recorded at closing. When the underlying loan is paid off, both the recorded security instrument and the assignment of rents document should be referred to in the release document. However, if the underlying debt is paid off, the assignment of rents is no longer enforceable; therefore, the failure to describe the assignment of rents in the release document is not a fatal error that must be corrected.

If the subject property is not residential real property, then the Loan Policy is entitled to the Assignment of Rents/Leases Endorsement (T-27). Underwriting requirements for the T-27 are further detailed in the National Investors Endorsement Manual.

J. Assignment of Contracts (Assignments)

Under Texas law, contracts are assignable unless there is a specific clause in the contract that prohibits it. For example, the standard TREC sales contracts do not contain a clause prohibiting assignment of the contract. Therefore, the buyer can assign the contract to a new buyer at any time; there is no need to put "and/or assigns" after the buyer's name on the original contract. That is, the original buyer transfers all its rights under the contract to a third party in exchange for a fee.

Many investors (sometimes known as "wholesalers") take advantage of this easy ability to assign contracts to enter "assignment transactions". The investor executes a contract, as buyer, to purchase property at a low price. They then assign the contract, using an assignment agreement, to another buyer and charge the new buyer an "assignment fee". The assignment fee is essentially the investor's fee for finding the real estate for the final buyer. This type of transaction in recent years has been marketed as a method to make money in real estate without needing to put in your own money. These transactions are not illegal, but they tend to involve unsophisticated parties and incomplete contracts.

In an assignment transaction, the title agent must follow the instructions in both the original contract and the assignment agreement. The seller, the assignor and the buyer are parties to the contract, and all must be made aware of the existence of one another. The title policy will be issued to the final buyer, not the assignor.

1. Underwriting Guidelines

- The title agent must have a valid contract and a fully executed assignment agreement.

- If the assignment fee is paid prior to and outside of closing, the escrow office must obtain a release from the assignor, acknowledging his receipt of payment, referencing the amount, and releasing any right, title, or interest in the property.

- Procedural Rule P-66 limits the amount of the owner's title policy to the contract sales price. As such, the assignment fee, which is typically set forth in a separate assignment agreement, cannot be included in the amount of the owner's title policy. For example, if the original contract sales price is $100,000, and the assignment fee is $15,000, the OTP will be issued in the amount of $100,000.

- The title agent should review the contract to determine if assignment is prohibited.

- Assignment fees paid at closing must be reflected on the settlement statement/Closing Disclosure (including any preliminary settlement statement/Closing Disclosure sent to a proposed lender) and must be reflected as an "Assignment Fee" and not as a "marketing fee", "consultation fee", or any other misleading title.

- If the assignment fee is more than 25% of the original contract sales price, underwriting approval of the transaction is required.

- **Note:** If a FHA loan is involved anywhere in the transaction, the transaction is not insurable. FHA has a prohibition against contract assignments.

K. Availability of Reduced Premium

National Investors intends, in every transaction, to offer the rate most beneficial to the insured. Each title agent should make themselves familiar with the rate rules set forth by the Texas Department of Insurance. Per R-1, the basic premium rate applies to each policy issued, unless specified in the other rate rules. Some of the other rate rules which allow for a reduced (or lower) premium for the customer are as follows:

- R-5. Simultaneous Issuance of Owner's and Loan Policies – If the Owner's Policy and Loan Policy are issued at the same time, bearing the same date on the same piece of property, then the Owner's Policy is issued at the basic premium rate and the Loan Policy is issued at a reduced rate. The amount of the premium for the Loan Policy depends on the value of the Loan Policy as compared to the value of the Owner's Policy. See the rate rule for more information.

- R-6. Subsequent Issuance of Mortgagee Policy – If a Loan Policy has already been issued, and an Owner's Policy or additional Loan Policy covering that same loan/lien is requested a credit is given off the base premium of the policy. See the rate rule for more information.

- R-7. Mortgagee Policies Covering First and Subordinate Liens Issued Simultaneously – When a Loan Policy is issued on a first lien and other policies are issued on subordinate liens in the same transaction on the same land, the premium for the first lien policy is computed on the total of the combined liens, and the premium for each subordinate lien policy is $5.00.

- R-8. Loan Policy on a Loan to Take Up, Renew, Extend or Satisfy an Existing Lien(s) – When refinancing a loan and issuing a Loan Policy, a credit may be given for the premium paid on the loan being refinanced, under certain circumstances. See the rate rule for more information.

- R-18. Refinance of Construction Loan – When refinancing a construction loan for which a Loan Policy has been issued, the premium for the Loan Policy of the new loan (frequently referred to as the "permanent" loan) is the Minimum Basic Rate, so long as the new loan is no larger than the insured construction loan. See the rate rule for more information.

L. Bankruptcy

Bankruptcy is governed by federal law. The General Underwriting Principles Manual has an excellent discussion of bankruptcy in general, and Schedule C requirements for sales and refinances involving bankruptcy. This discussion will not duplicate what is in that manual. Note that each bankruptcy court has its own version of the bankruptcy forms, local bankruptcy rules, and interpretations of how things should be done.

The filing of bankruptcy by an individual or an entity, with few exceptions, creates an "automatic stay". This is an immediate injunction against most creditors and requires them to immediately stop taking any collection efforts against the debtor in bankruptcy. It also means the debtor in bankruptcy cannot transfer property to another, spend their money, or do other similar activities without court permission.

If any party to your transaction states they are in or have filed for bankruptcy at any point in the proceedings, immediately cease all activity and contact underwriting immediately.

M. Business Entities

In every title policy, the underwriter insures that the correct person has signed all the documents on behalf of the seller, the borrower, and any document in the chain of title (including releases, affidavits of heirships, etc.). Therefore, it is essential that the title agent understands who needs to sign on behalf of each type of business entity. The following is the documentation required for each type of Texas business entity and non-Texas entities.

1. Sole Proprietorship

a) General Information

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

b) 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) General Information

1. The Corporation is created by filing a Certificate of Formation with the Secretary of State. Prior to 2006, the organization document was titled "Articles of Incorporation".
2. Entity name must specify it as a corporation by including "company", "corporation", "incorporated", "limited", or an abbreviation of one of those words.
3. Typical structure includes a board of directors, elected annually by shareholders, & meeting annually to elect officers.
4. Officers are authorized to act on behalf of the corporation in various capacities.
5. Bylaws govern the operation of the corporation.
6. Corporation doing business under a d/b/a (assumed name)
    a. Must file a Certificate of Assumed Name with the Texas Secretary of State
    b. Assumed name must be a name other than the name stated in the corporation's certificate of formation or similar document.

b) Underwriting Requirements:

1. Agents must obtain a Certificate of Account Status (f/k/a Certificate of Good Standing) for the corporation 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 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 is otherwise used fraudulently to hide assets from creditors or lawsuits, a suit may be 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) General Information

1. Corporations formed in states of the United States other than Texas.
2. In most cases, must register with the Texas Secretary of State to transact business in Texas (see Tex. Bus. Orgs. Code §9.001 et seq.).
3. "Transacting business" does not include simply owning real estate or creating a lien or security interest in real estate as borrower or lender (see Tex. Bus. Orgs. Code §9.251).

b) Underwriting Requirements:

1. 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.
2. 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.
3. 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) General Information

1. A corporation formed in a country other than the United States.
2. In most cases, must register with the Texas Secretary of State to transact business in Texas (see Tex. Bus. Orgs. Code §9.001 et seq.).
3. "Transacting business" does not include simply owning real estate or creating a lien or security interest in real estate as borrower or lender (see Tex. Bus. Orgs. Code §9.251).

b) 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) General Information

1. Created by filing Certificate of Formation or Articles of Organization with the Texas Secretary of State:
2. Specifies whether the LLC will be managed by members or manager.
3. Should identify initial member(s) of the LLC; must have at least one member.
4. Should identify manager, if any; manager need not be a member.
5. Name must include "limited liability company", "limited company", or an abbreviation of those.
6. Company agreement a/k/a operating agreement governs operation of the LLC:
7. The Company Agreement may also specify whether the LLC is managed by members or managers and who those people are. If this information conflicts with the Certificate of Formation, the Company Agreement controls.
8. May only be modified by all members of the LLC unless otherwise provided. May be amended to increase or decrease the number of managers.
9. If there is no Company Agreement, then the Certificate of Formation in combination with the Texas Business Organization Code Chapter 101 sets forth the governing rules for the LLC.
10. Statutory reference: Tex. Bus. Orgs. Code Chapter 101

b) Underwriting requirements:

1. Agents must obtain a Certificate of Account Status (f/k/a Certificate of Good Standing) for the LLC from the Texas Comptroller's Office.
2. Agents must obtain Member Consent/Resolution confirming that the Members met and authorize the transaction and further designate the individual(s) that may act on behalf of the LLC in the transaction. The Consent/Resolution form should be signed by all the existing members of the company identifying the property. The requirement for Member Consent/Resolution could possibly be waived if the authority is clearly defined within the operating agreement.
3. Agents should review the certificate of formation or articles of organization together with the operating agreement to determine management authority.
4. Affidavit of Authority of Transfer may be an option if the LLC does not have an operating agreement.

6. Series LLC

a) General Information

1. A type of limited liability company, created by provision in an LLC's company agreement allowing for a designated series of members, managers, membership interests, or assets:
   a) 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.
   b) Designated series must have a separate business purpose or investment objective.
2. 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.
3. Assets of a series may be held in the name of the series, in the name of the LLC, or through a nominee.
4. Each series may:
   a) Sue and be sued;
   b) Contract;
   c) Hold title to assets, including real property, personal property & intangibles; and
   d) Grant liens and security interests in assets of the series.
5. Management of series:
   a) By managers or members as set out in company agreement; and
   b) 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).
6. Winding up – series may be wound up without winding up the LLC unless the company agreement provides otherwise.
7. Preferable to title real estate held be a series as either "ABC, LLC – Series XYZ" or "XYZ, a Series of ABC, LLC"
8. Foreign series LLC's must provide supplemental information in registration with the Texas Secretary of State (see Tex. Bus. Orgs. Code §9.005)
9. Statutory reference: Tex. Bus. Orgs. Code §101.601

b) Underwriting Requirements:

1. See Limited Liability Company, above.
2. Conveyances should reflect title as set forth in (7), above.
3. The Series LLC concept is relatively new in Texas law. Contact underwriting to approve format to insure any policy involving a Series LLC.

7. Joint Venture

a) General Information

1. Typically, a joint association of two or more people assembled to carry out a single transaction. A joint venture is a general partnership under the law.
2. Established by mutual agreement.
3. Venture parties are jointly, severally, and individually liable for JV assets.

4. 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.

b) 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.
6. See General Partnership below.

8. General Partnership

a) General Information

1. Established by mutual agreement, written or oral.
2. Generally defined as "an association of two or more persons to carry on a business for profit as owners" (Tex. Bus. Orgs. Code §152.051).
3. Determination of whether a partnership is created is governed by factors set forth in Tex. Bus. Orgs. Code §152.052.
4. Partnership property is not property of the partners, and partners' spouses hold no interest in partnership property (Tex. Bus. Orgs. Code §152.101).
5. Property becomes partnership property if acquired in either:
6. The name of the partnership, or
7. The name of one or more partners, when the conveyance indicates the grantee's capacity as a partner or the existence of a partnership (Tex. Bus. Orgs. Code §152.102).
8. All partners are jointly, severally, and individually liable for all partnership assets/debts.

b) 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 underwriting counsel for further requirements if all partners will not join in a transaction or if there are liens or other encumbrances against any partners.

9. Limited Partnership

a) General Information

1. Formed by filing a certificate of limited partnership with the Secretary of State and execution of a limited partnership agreement by all limited partners.
2. Must have one or more general partner(s) which may be an individual, partnership, corporation, or LLC.
3. Controlled by the general partner.
4. Name must contain the word "limited" or "limited partnership", or an abbreviation of either.

b) 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.
3. Note that, after obtaining the partnership agreement of the limited partnership, the agent will generally have to obtain the governing documents of the entity named as the general partner of the limited partnership.
4. Agents must obtain a Certificate of Account Status (f/k/a Certificate of Good Standing) for the limited partnership from the Texas Comptroller's Office.
5. Affidavit of Authority of Transfer may be an option if the limited partnership does not have a partnership agreement.

10. Professional Association

a) General Information

1. Created by filing certificate of formation with Texas Secretary of State.
2. 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.
3. Composed of licensed individuals (not professional organizations).
4. Frequently denoted with a "P.A." in the name.

b) Underwriting Requirements:

1. Agents should obtain copies of the certificate of formation and governing documents of the association to determine who is authorized to act on behalf of the professional association.
2. Agents must obtain a Certificate of Account Status (f/k/a Certificate of Good Standing) for the professional association from the Texas Comptroller's Office.
3. Affidavit of Authority of Transfer may be an option if the professional association does not have governing documents.

11. Professional Corporation

a) General Information

1. Created by filing certificate of formation with Texas Secretary of State.
2. Formed for the purpose of providing a professional service that for-profit or non-profit corporations are prohibited by law from rendering.
3. May not be formed for the purpose of the practice of medicine by a physician,

surgeon or other doctors of medicine.

4. 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.
5. Professional services specifically set out in governing statute (§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.

b) Underwriting Requirements:
   1. See Corporations, above.
   2. Affidavit of Authority of Transfer may be an option if the professional corporation does not have bylaws.

12. Affidavit of Authority to Transfer

In 2019, the Texas legislature created an alternative for certain types of entities to designate a person who has authority to sign for the entity when the entity transfers an interest in real property. This is particularly useful for the small entities that never created their operating agreements. This Affidavit of Authority to Transfer, if it complies with Tex. Prop. Code §12.019 and is recorded with the county clerk, acts as conclusive proof of the information within that Affidavit, and third parties may rely on it. More information on the Affidavit of Authority to Transfer can be found in Bulletin No. 2019-120.

Underwriting Requirements to rely on an Affidavit of Authority to Transfer:

1. The transaction amount may not exceed one million dollars.
2. The LLC, LP, or professional entity must be in good standing or active in the state where it was formed.
3. Review the entity's most recent franchise tax public information report and confirm that the affiant is an individual who is one of the following:
   a. a manager or member of the transferring LLC;
   b. the general partner of the transferring LP; or
   c. a director or officer of the transferring PA, PC, or PLLC.
4. Confirm that the person signing the AAT is NOT the person given authority to sign the closing documents. If the affiant IS the person designated to sign, use the entity's most recent franchise tax public information report to confirm:
   a. the affiant is an individual who is one of the following:
      i. the sole member and manager of the transferring LLC;
      ii. the sole general partner of the transferring LP; or
      iii. the sole director and officer of the transferring PA, PC, or PLLC; and
   b. the report identifies the affiant and no other person as an officer, director, member, manager, or general partner of the transferring entity.
5. The AAT must include the following:
   a. a statement that the affiant:
      i. is eighteen or older and fully competent to sign the affidavit;
      ii. understands that third parties are relying on the truthfulness of the AAT; and
      iii. understands that the AAT is signed under penalty of perjury;
   b. the name of the transferring entity, and that the entity is active or in good standing under

the laws of the state where the entity was formed;

c. the address, including street address, of the entity's principal place of business in Texas or, if the entity does not have a principal place of business in Texas, the address of the entity's principal place of business in the state or country where the entity was formed;
d. the legal description of the subject real property and an explanation of the transfer authorized;
e. the name and title of the individual authorized to sign for the entity in the pending transaction; and
f. if the affiant is the person designated with authority to sign in the pending transaction, a statement describing which of the positions listed in 4a, above, the affiant holds.

Note: A recorded Affidavit of Authority to Transfer can only be relied upon for one year from the date of recording unless it otherwise has an expiration date or has been terminated by a separate document.

13. Procedural and Rate Rule Issues

P-38 requires that a T-1R Residential Owner's Title 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 Owner's Title Policy. Therefore, if the buyer/borrower is any type of entity named above, other than a sole proprietorship, you must use a T-1 Owner's Title Policy.

The T-26 Additional Insured Endorsement may be issued on a T-1 Owner's Title Policy to a family partnership or family corporation solely composed of or owned by members of the insured's family and the insured or a limited liability company under certain circumstances pertaining to changes in membership. See the Texas Endorsement Manual for more information or contact underwriting.

Continuing policy coverage for the T-1 Owner's Title Policy:

a) 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";

b) "Insured" may also include a grantee of an Insured under a deed delivered without payment of actual valuable consideration, if:

i) the stock, shares, memberships, or other equity interests of the grantee are wholly owned by the named Insured; or

ii) the grantee wholly owns the named Insured; or

iii) 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.

N. Cemetery

A cemetery is a place that is used or intended to be used for interment, containing one or more graves, as defined in Tex. Health & Safety Code §711.001. Internment means the permanent disposition of remains by entombment, burial, or placement in a niche.

Once a property is dedicated for cemetery use, it cannot be used for any other purpose unless the dedication is removed by a district court, or the cemetery is enjoined or abated as a nuisance. Property is considered dedicated if one or more burials are present or a dedication of the property for cemetery use is recorded in the deed record. (Tex. Health & Safety Code §711.035)

Property dedicated to cemetery purposes and used as a burial ground may not be sold in such a manner as to interfere with its use as a cemetery. However, such property may be conveyed in fee simple if it is still used as a cemetery and the grantee continues to maintain the cemetery for the benefit of the public.

Improvements to property that would disturb an unknown or abandoned cemetery may not be carried out until the remains are removed under a written order issued by the State Registrar or their designee under §711.004(f). The property owner may petition the district court where an unknown or abandoned cemetery is located to remove the dedication for cemetery purposes, and the court shall then order the removal of the human remains from the cemetery to a perpetual care cemetery. Tex. Health & Safety Code §711.010(a)–(b).

Texas courts have ruled that no special ceremony or record is required to dedicate a cemetery; actual use as a cemetery is sufficient for dedication. Enclosure of land for use as a cemetery and evidence of burial are among the criteria for dedication.

A living person who has relatives buried in a graveyard does not, by that fact, own the land or plots in which they are buried. That person can, however, visit, ornament, and protect the graves from desecration even if he or she must cross private property to do so. However, the private property owner can establish reasonable paths of ingress and egress to the cemetery location and restrict its access to reasonable times. So, you can cross private property to visit the cemetery, but you must follow the property owner's rules to do so.

1. Underwriting Guidelines

The primary concern with cemeteries is that the public has the right to access the cemetery and to cross private property to do so. Therefore, if the cemetery is on the land to be insured, an exception must be taken in Schedule B to that right of access. One of the following exceptions should be included on Schedule B on both the Owner's Policy and the Loan Policy, as appropriate:

> Company assumes no liability by reason of the use of all or a portion of the land as a cemetery and excepts to any appurtenant rights.
>
> Any and all rights or privileges existing or which may later exist by virtue of a portion of the land being used as a cemetery, including the cemetery[shown on Survey No. _____, prepared by ___, dated ___ - or - described in document recorded in Volume ___, Page ___ of the Real Property Records of ___ County, Texas],together

with rights of sepulcher and interment and rights of ingress and egress to and from said cemetery.

O. Condominiums, Townhouses, PUDs, and Cooperatives

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

Tex. Prop. Code Chapter 81 (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.

Tex. Prop. Code 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. 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 (§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. Describe 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 (§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.

c) Description of Units (§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 regarding the definition of "land":

NOTE: 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. §82.054 supports that practice.

NOTE: 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.

3. Matters Pertaining to Closing

a) Separate Titles and Taxation (Tex. Prop. Code §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 the appropriate 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) Condominium Information Statement (Tex. Prop. Code §82.153)

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 which contains pertinent information about the condo, including documents that need to be signed by buyers at closing.

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.

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.

c) Resale Certificate (Tex. Prop. Code §82.157)

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:

- Any right of first refusal or other restraint contained in the declaration that restricts the right to transfer a unit;
- 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;
- Other unpaid fees or amounts payable to the association by the selling unit owner;
- Capital expenditures, if any, approved by the association for the next 12 months;
- The amount of reserves, if any, for capital expenditures and of portions of those reserves designated by the association for a specified project;
- Any unsatisfied judgments against the association;
- The nature of any pending suits against the association;
- The insurance coverage provided for the benefit of unit owners;
- 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;
- 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;
- The remaining term of any leasehold estate that affects the condominium and the provisions governing an extension or renewal of the lease; and
- 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 requires 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 an 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.

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.

4. Survey Coverage (P-2) Amendment of Exception to Area and Boundaries

Underwriting: National Investors does not require a survey and authorizes agents to rely on the declaration, plans and plat, along with an executed T-47, in connection with the issuance of survey coverage to an owner's and a lender's policy on a Condominium unit only.

5. Insuring Issues Pertaining to the Condominium Endorsement (T-28)

The T-28 Condominium Endorsement is governed by Procedural Rule P-9b(15). National Investor Title's specific guidelines for issuing this endorsement can be found in its Texas Endorsement Manual and should be review carefully. A few guidelines:

- The T-28 endorsement can only be issued on residential real property. Some of the newest uses of condominium regimes include office condominiums. Do not assume that a "condo" automatically is entitled to a T-28 endorsement.

- Any paragraph of the T-28 endorsement can be deleted if it does not apply to the condominium in question. It is imperative to read Appendix B of the Texas Endorsement Manual and reference the appropriate section above to determine what, if any, paragraph needs to be deleted. See also the section below. Contact underwriting if you need assistance.

  a) Endorsement coverage analysis and requirements

  (1) T-28 Paragraph 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 §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) T-28 Paragraph 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) T-28 Paragraph 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 an exception in Schedule B.

(4) T-28 Paragraph 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) T-28 Paragraph 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) T-28 Paragraph 5 – Failure of unit and common elements to be entitled by law to be assessed for real property taxes as a separate parcel.
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) T-28 Paragraph 6 – Obligation to remove improvements because of present encroachments or future unintentional encroachments of common elements.
§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) T-28 Paragraph 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.

6. Foreclosure of Condo Assessment Lien

An assessment levied by a condo association against a condo unit is secured by a lien on the unit. Foreclosure of condominium units is governed by Tex. Prop. Code § 82.113 (part of the Uniform Condominium Act). National Investors will insure post foreclosure in this case subject to the following requirements:

1. Obtain satisfactory evidence that the foreclosure did not result solely from delinquency in payment of fines, but rather from delinquency in payment of regular and/or special assessments/dues.

2. Observe lien priorities as set out in Section 82.113: Liens for ad valorem taxes and governmental assessments or charges, liens or encumbrances recorded prior to recording of the declaration, first vendor's liens or deed of trust liens recorded prior to the date of the delinquent assessment, and mechanic's liens recorded prior to the date of the delinquent assessment should be considered superior to the association lien. Assignments of rights to insurance proceeds prior to the date of the delinquent assessment are also superior.

3. Review the declaration, trustee's deed/supporting affidavits, and real property records to ensure any notice of sale requirements or other non-judicial foreclosure requirements set out in the declaration have been met. The declaration must be of record to perfect the lien securing assessments.

4. Verify appointment of the trustee by the association board. The statute requires a written resolution.

5. Observe the foreclosed owner's statutory right of redemption for 90 days after the date of foreclosure. The purchaser at the foreclosure sale is prohibited by statute from conveying ownership to any party other than the foreclosed owner during the redemption period. In such cases, we would require sale to take place following expiration of the redemption period.

6. Ensure that the foreclosure sale otherwise meets all requirements of Tex. Prop. Code §51.002.

7. Observe National Investors' usual post-foreclosure requirements, in particular verifying that the property has been vacated by the foreclosed owner.

NOTE: Please consult Texas underwriting counsel for foreclosure of units owned since January 1, 1994, or earlier.

Foreclosure may extinguish some liens, but not all. Contact underwriting for clarification about what

liens may or may not have been extinguished.

Note: National Investors will not insure the lender or buyer at a foreclosure sale.

P. Co-Insurance

Co-Insurance occurs when multiple underwriters insure the risk on a single transaction together. This happens on very high dollar transactions only. In Texas, there is a Co-Insurance Endorsement that can be issued on transactions over $15,000,000 when multiple underwriters are involved. See the National Investors Endorsement Manual and contact underwriting for more information.

Q. Correction Instruments

Despite careful drafting, ambiguities and errors in recorded real property conveyance instruments are inevitable. Texas courts have long allowed agreeable parties to use correction instruments in limited circumstances. Over time, multiple methods of correcting errors were developed. Sometimes the "scrivener" (the writer) of the document would record an affidavit explaining the error. Sometimes, the document was simply recorded again with the error corrected on it. Sometimes, the document was recorded again with correction language typed somewhere on the face of the document.

In 2011, the Texas legislature standardized the process of correcting recorded documents that convey real property or an interest in property. Any correction instrument that complies with the statute set out in Tex. Prop. Code §5.028 or §5.029, as appropriate, is:
1. effective as of the effective date of the original instrument being corrected;
2. prima facie evidence of the facts stated in the correction instrument;
3. presumed to be true;
4. subject to rebuttal; and
5. notice to a subsequent buyer of the facts stated in the correction instrument.

This method of correcting instruments became effective September 1, 2011, however, any correction instrument recorded before that date that substantially complies with Tex. Prop. Code §5.028 or §5.029 is also just as effective.

National Investors has a printable guide to nonmaterial versus material corrections available.

1. Nonmaterial Correction

Tex. Prop. Code §5.028 allows a person with personal knowledge of facts relevant to the correction of an instrument to sign a correction instrument for nonmaterial (clerical) errors. Examples of nonmaterial errors include the following:

1. a correction of an inaccurate or incorrect element in a legal description, such as a distance, angle, direction, bearing or chord, a reference to a plat or other plat information, a lot or block number, a unit, building designation, or section number, an appurtenant easement, a township name or number, a municipality, county, or state name, a range number or meridian, a certified survey map number, or a subdivision or condominium name; or
2. an addition, correction, or clarification of:
    a. a party's name, including the spelling of a name, a first or middle name or initial, a suffix, an alternate name by which a party is known, the identity of the trustee of a trust named as party, or a description of an entity as a corporation, company, or other type of organization;
    b. a party's marital status;
    c. the date on which the conveyance was executed;
    d. the recording data for an instrument referenced in the correction instrument;
    e. a fact relating to the acknowledgment or authentication;
    f. a legal description prepared in connection with the preparation of the original instrument but inadvertently omitted from the original instrument;
    g. an omitted call in a metes and bounds legal description in the original instrument that

completes the description of the property;

h. an acknowledgment or authentication that is required and was not included in the recorded original instrument of conveyance.

Note that a copy of the correction instrument must be sent to each party to the original instrument and the party's heirs, successors or assigns.

2. Material Correction

Tex. Prop. Code §5.029 allows for correction instruments for material errors, but those instruments must be signed by all of the parties to the original transaction or those parties' heirs, successors, or assigns, as applicable. Examples include a correction to:

1. add:
    a. buyer's disclaimer of an interest in the real property that is the subject of the original instrument of conveyance;
    b. mortgagee's consent or subordination to a recorded document executed by the mortgagee or an heir, successor, or assign of the mortgagee; or
    c. land to a conveyance that correctly conveys other land;
2. remove land from a conveyance that correctly conveys other land; or
3. accurately identify a lot or unit number or letter of property owned by the grantor that was inaccurately identified as another lot or unit number or letter of property owned by the grantor in the recorded original instrument of conveyance.

3. Underwriting Requirements

All correction instruments executed after September 1, 2011, must meet the requirements set out above. Contact underwriting for review if it appears that a document does not meet the requirements.

R. Deed in Lieu of Foreclosure

A 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. That is, the defaulting borrower (and owner of the property) gives the property to the lender in exchange for the lender forgiving the underlying debt. However, it is important to note that a deed in lieu of foreclosure does not extinguish inferior liens, nor does it automatically release the deed of trust lien for which it was given in exchange like a traditional foreclosure would.

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 debtor's/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 lender, 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 deed of trust lien. For title insurance purposes, it is extremely important that the deed of trust lien be released. If the deed of trust lien 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.

1. Underwriting Guidelines

There are numerous risks involved with insuring title after the filing of a Deed in Lieu of Foreclosure. Title examiners should seek underwriting approval 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 lien (and vendor's lien accompanying, if any) should be released of record but often is not 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 there is no recorded Release of Deed of Trust, 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 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 Loan Title Policy 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 waived 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.

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 affidavits must be submitted to underwriting for approval and possible additional requirements.

S. Divorce

Divorce is a legal proceeding culminated by a final judgment, or divorce decree, signed off on by a judge. In Texas, there is no legal separation or common law divorce. Once you are married, you are still married in the eyes of the law, even if you and your spouse no longer live together. This becomes very important since Texas is a community property state.

Property purchased during a marriage is always presumed to be community property, even if only one name is on the deed as grantor. Therefore, both spouses must be divested of their interest in that property when the property is sold, either through a divorce decree or through a deed from the ex-spouse.

Important Note: When discussing a divorce decree below, we mean a divorce decree issued by a Texas court.

When a party in title to real property, holding either as separate or community property, is involved in a divorce proceeding, the decree must be carefully examined to determine its effect on title to any real estate owned by either party. If the divorce is not yet final, contact underwriting for specific underwriting approval. We generally require acknowledgment of the transaction by the attorneys representing the spouses, as well as requiring both spouses to join in any conveyance. Alternatively, National Investors will require that the divorce decree judgment is final, that is, closing occurs more than thirty days after the execution of the divorce decree by the judge without any post-judgment motions having been filed by any party.

For a Divorce Decree to act as an insurable conveyance of title to real property, it must contain both a legal description of the property in question and appropriate "vesting" and "divesting" language. "Vesting" means that says that the property is vested to or awarded to one of the parties. "Divested" means that it says that the other party is divested of all ownership of that same property, that is, all his rights to that property are taken away.

If the divorce decree contains a legal description of the property and contains appropriate vesting and divesting language, a certified copy of the Divorce Decree filed in the real property records of the county where the land is located will be considered effective as a conveyance. Absent the two criteria, the divested spouse must sign a warranty deed (not a quitclaim deed) of the subject property.

The divorce decree should always be read carefully. Sometimes there are provisions related to real property written into the decree that should be added to Schedules B or C of the title commitment and policy. For instance, an ex-spouse might have a right of first refusal to purchase the property being awarded to the other spouse in the divorce. In this case, the ex-spouse should sign a release of the right of first refusal which should be recorded in the real property records. Occasionally, a divorce decree or property settlement agreement will specify how the proceeds of a sale of the property are to be distributed. In a situation of this type, National Investors requires that the terms of the decree or settlement be carried out at closing, or in the alternative that the parties agree to an alternate disposition of the proceeds of the sale.

Sometimes, the decree or separate written property partition agreement will award property to one spouse subject to a lien awarded to the other spouse. This "owelty" is an unequal partition in kind of real property among co-tenants, where one of the co-tenants is awarded a parcel that is more valuable than the parcel

awarded the other co-tenant. To equalize the partition, the co-tenant with the more valuable parcel owes a payment ("owelty") to the other co-tenant. The payment is secured by an owelty lien on the property. Occasionally, the language in the decree will be ambiguous and may be interpreted as possibly imposing a lien on the real estate. In either situation, we require a release of the lien or implied lien.

1. Possible Schedule C Requirements:

By divorce decree in Cause No. ___, ___ was awarded the property free and clear of the interest of the other party. Company requires that a certified copy of this decree be filed for record in the Real Property Records of ___ County, Texas; or alternatively requires that ___ convey to ___ by Warranty Deed.

In connection with divorce between ___ and ___ under Cause No. ___ in ___ County, Company requires a certified copy of the Final Decree and Property Settlement Agreement for examination and possible additional requirements and for recording in the Real Property Records of ___ County, Texas.

See page ___ of the Divorce Decree entered in Cause No. ___ regarding the division of the sale proceeds of the subject property. Any deviation from the divorce decree should be based upon the written authorization of both parties to the divorce.

See page ___ of the Property Settlement Agreement entered as part of the divorce decree in Cause No. ___ regarding the division of the sale proceeds of the subject property. Any deviation from the settlement agreement should be based upon the written authorization of both parties to the divorce.

By divorce decree in Cause No. ___, ___ was awarded the property subject to a lien in favor of _____. Company requires a release of the lien contained therein.

By divorce decree in Cause No. ___, ___ was awarded the property subject to a possible implied lien in favor of _____. Company requires a release of the implied lien contained therein.

2. Divorce and Liens of the Ex-Spouse

In many divorces, the real property is awarded to one spouse and divested from another spouse. The divorce decree, and subsequent signed deed from one spouse to the other, is sufficient to transfer title to the property as between those individuals only. The divorce decree or deed must be recorded in the real property records for the rest of the world to know that the ex-spouse no longer has an interest in the real property.

If there is no record in the real property records that the ex-spouse no longer has an interest in the real property, and involuntary liens are recorded against the ex-spouse in the real property records, the involuntary liens still attach to the real property and must be handled at closing.

3. Effect on Divorce on Other Things:

If the agent named in a power of attorney is the spouse of the principal, and the principal and the agent get

divorced after the execution date of the power of attorney, then the agent is no longer the principal's agent. It is treated as if the agent has resigned.

If, after making a will, the testator's marriage is dissolved, whether by divorce, annulment, or a declaration that the marriage is void, all provisions in the will, including all fiduciary appointments, shall be read as if the former spouse and each relative of the former spouse who is not a relative of the testator failed to survive the testator, unless the will expressly provides otherwise. Tex. Est. Code §123.001. The will is interpreted as though the former spouse predeceased the testator.

If a marriage between the transferor and the beneficiary of a Transfer on Death Deed (TODD) is dissolved by divorce, the TODD is revoked by recording the judgment (divorce decree) in the county where the land is located, provided the judgment is recorded before the death of the transferor.

4. Divorce in Other States

A divorce decree issued by a court in a state or country other than Texas has no jurisdiction over Texas property. You can still review the decree to determine who was awarded the property in the divorce. However, property will need to be transferred from one spouse to the other by warranty deed and recorded in the real property records. There is no option to record a certified copy of the divorce decree.

T. Estates, Wills and Administration

1. Wills

A) Formal Requisites of Wills
   1) Must Be Eighteen Years Old (or married or in Armed Forces) to Make a Will. Every person who has attained the age of eighteen years, or who is or has been lawfully married, or who is a member of the armed forces of the United States, being of sound mind, shall have the right and power to make a last will and testament. Tex. Est. Code §251.001
   2) What Constitutes a Will? A will is an instrument that is testamentary in character, revocable during the lifetime of the testator, and operative at the testator's death. Thus, an instrument that is irrevocable cannot be a will.

B) Types of Wills: Texas recognizes three types of wills: **attested** wills, **holographic** wills (handwritten, signed, but not witnessed), and **oral** wills (for personal property only, and valid only if made during the testator's last illness).
   1) Attested Wills. Tex. Est. Code §251.051 There are only three formal requirements for a will to be valid:
      a) Must Be in Writing
      b) Must Be Signed by Testator. A will must be signed by the testator (or "by another person for him at his direction and in his presence"). The testator's signature may be by an X mark. Orozco v. Orozco, 917 S.W.2d 70, 74 (Tex. App.-San Antonio 1996, writ denied)
      c) Must Be Attested by Two Witnesses. A will must be attested by two witnesses above the age of 14 who are credible and who sign their names to the will in the testator's presence. This is not a requirement for a holographic will.
   2) Holographic Wills
      a) Must Be in Testator's Handwriting and Signed by Testator. If the will is wholly in the handwriting of the testator, it is a holographic will. The attestation of the subscribing witnesses is not necessary. Tex. Est. Code §251.052
         (1) Texas does not require that it be dated.
         (2) The signature can appear anywhere on the will.
         (3) The will can be written on anything.
      b) Testamentary Intent Must Be Shown. The will should contain language that evidences the fact that it is the intent of the testator that the writing be considered his last will and testament (i.e., "This is my last will and testament.").

C) Revocation of Wills
   1) Revocation by Operation of Law
      a) **Subsequent Marriage Does Not Affect Will.** There is no "pretermitted spouse" statute in Texas. Marriage after the execution of a will has no effect on the provisions of a will.
      b) **Divorce or Annulment.** If, after making a will, the testator's marriage is dissolved, whether by divorce, annulment, or a declaration that the marriage is void, all provisions in the will, including all fiduciary appointments, shall be read as if the former spouse and each relative of the former spouse who is not a relative of the testator failed to survive the testator, unless the will expressly provides otherwise. Tex. Est. Code §123.001. The will is read as though the former spouse predeceased the testator.

2) Revocation by Subsequent Writing
   a) **Revoking Instrument Must Be Executed with Same Testamentary Formalities.** No will in writing, and no clause thereof or devise therein, shall be revoked, except by a subsequent will, codicil, or declaration in writing, executed with like formalities, or by the testator destroying or canceling the same, or causing it to be done in his presence. Tex. Est. Code §253.002

D) Pretermitted Children: If a child born or adopted after a will is executed (i) is not provided for or mentioned in the will, and (ii) is not provided for by any nonprobate transfers taking effect at the testator's death, the child shares in the estate as described below. Tex. Est. Code §255.051-056. This statute applies only to afterborn/after adopted children, including a child conceived during the testator's lifetime but born after his death. (does not apply to grandchildren). In applying the pretermitted child statute, the first step is to determine whether the testator had children at the time the will was executed.

1) Testator Had No Children When Will Executed Tex. Est. Code §255.054 If the testator has no child living when he executes his last will, the pretermitted child succeeds to the portion of the testator's separate and community estate to which the pretermitted child would have been entitled pursuant to §201.001 of the code had the testator died intestate without a surviving spouse owning only that portion of his estate not devised or bequeathed to the parent of the pretermitted child.

2) Testator Had Other Children When Will Executed Tex. Est. Code §255.053. If the testator had other children when the will was executed, the pretermitted child's rights will depend on whether bequests were made to any of the other children.

   a) If Will Makes No Gifts to Other Children. If the testator made no provision for any of the children living when the will was executed, the pretermitted child succeeds to the portion of the testator's separate and community estate to which the pretermitted child would have been entitled pursuant to §201.001 of this code had the testator died intestate without a surviving spouse owning only that portion of his estate not devised or bequeathed to the parent of the pretermitted child.

   b) If Will Makes Gifts to Other Children. If the testator had children at the time the will was executed and the will makes gifts to one or more of these children, the portion of the estate to which the pretermitted child is entitled is limited to the gifts made to the other children. The pretermitted child takes such share of the bequests to the other children "as he would have received had the testator included all pretermitted children with the children upon whom benefits were conferred and given an equal share of such benefits to each such child."

   c) If the Pretermitted child is a child of an affair. If a pretermitted child's other parent is not the surviving spouse of the testator (i.e., the child was a result of an affair), the portion of the testator's estate to which the pretermitted child is entitled under Subsection (a)(1)(A) or (a)(2) of this section may not reduce the portion of the testator's estate passing to the testator's surviving spouse by more than one-half. Tex. Est. Code §255.056. Note: This provision only applies if the decedent died on or after September 1, 2011.

E) Lapsed Gifts: If a will beneficiary dies during the testator's lifetime (or within 120 hours after the

testator's death) then the gift under the will lapses (i.e., it fails). Thus, if a devise or bequest, other than a residuary devise or bequest, fails for any reason, the devise or bequest becomes a part of the residuary estate. Tex. Est. Code §255.152

1) Anti-Lapse Statute. The Texas anti-lapse statute covers predeceasing beneficiaries who were descendants of the testator and descendants of the testator's parents (i.e., the testator's children, grandchildren, brothers, sisters, nephews, and nieces.) Tex. Est. Code §255.153

   a) The descendants of the devisee who survived the testator by 120 hours take the devised property in place of the devisee.

   b) The property shall be divided into as many shares as there are surviving descendants in the nearest degree of kinship to the devisee and deceased persons in the same degree whose descendants survived the testator. Each surviving descendant in the nearest degree receives one share, and the share of each deceased person in the same degree is divided among his descendants by representation.

   c) The anti-lapse statute applies unless the testator's last will and testament provides otherwise. For example, a devise or bequest in the testator's will such as "to my surviving children" or "to such of my children as shall survive me" will control.

2) Lapse in Residuary Estate Tex. Est. Code §255.152(b)

   a) If the residuary estate is devised to two or more persons and the share of one of the residuary devisees fails for any reason, the residuary devisee's share passes to the other residuary devisees, in proportion to the residuary devisee's interest in the residuary estate.

   b) Exception to this rule: If the predeceasing residuary beneficiary was within the scope of the anti-lapse statute (i.e., the testator's children, grandchildren, brothers, sisters, nephews, and nieces.) and left descendants, the anti-lapse statute supersedes the rule that the surviving residuary beneficiaries take.

2. Administration of Community Property

A) Powers of Surviving Spouse

1) When one spouse has died and no administration is pending, the surviving spouse has the power to sue and be sued for the recovery of community property; to sell, mortgage, lease, and otherwise dispose of community property for the purpose of paying community debts; to collect claims due to the community estate; and has such other powers as are necessary to preserve the community property, discharge community obligations, and wind up community affairs. Tex. Est. Code §453.003.

2) Do not rely on this procedure without seeking approval from Underwriting Counsel. This section does not vest title to the community property in the surviving spouse. A determination of whether property is community property and who the heirs of decedent are will still have to be accomplished to determine insurability of title.

B) Right of Survivorship in Community Property

1) To be effective, an agreement between spouses creating a right of survivorship in community property must be in writing and signed by both spouses. If an agreement in writing is signed by both spouses, the agreement shall be sufficient to create a right of survivorship in the community property described in the agreement if it includes any of the following phrases:
   a) "with right of survivorship";
   b) "will become the property of the survivor";
   c) "will vest in and belong to the surviving spouse"; or
   d) "shall pass to the surviving spouse."

2) An agreement that otherwise meets the requirements of this part, however, shall be effective without including any of those phrases. Tex. Est. Code §112.052

3) An agreement between spouses creating a right of survivorship in community property that satisfies the above requirements is effective and enforceable without adjudication. If an order adjudging such an agreement valid is obtained, however, the order shall constitute sufficient authority to all persons owing money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right, that is subject to the provisions of the agreement, and to persons purchasing from or otherwise dealing with the surviving spouse for payment or transfer to the surviving spouse, and the surviving spouse may enforce his or her right to such payment or transfer. Tex. Est. Code §§112.001-112.054

4) ***For insuring purpose as to a right of survivorship in community property, contact underwriting.*** Underwriting will need to see the written, signed agreement of the spouses, will generally require that it was recorded in the county where the subject property is located prior to the death of the first spouse, and that the surviving spouse is able and willing to provide an affidavit that the right of survivorship was never revoked by either spouse while both were alive. Often the title examiner will need to require that the parties obtain an order from the court that the agreement is valid and file the same in the Deed Records of the county in which the land is situated. ***NOTE: a deed where the grantee takes title "subject to a right of survivorship" (or similar language) does not meet the standards established in Tex. Est. Code §112.052 discussed above***. If the deed also has a written statement on it that the grantees make agreement to take and hold the property with right of survivorship and they sign the deed in a location that indicates their agreement to hold with right of survivorship, then the deed may qualify.

3. Jurisdiction and Venue over Probate Cases

"Probate" is the legal process of administering the estate of a deceased person by resolving all claims and distributing the deceased person's property under the will. It also refers to the judicial proceeding in which an instrument is determined to be the duly executed last will of the decedent. At the probate proceeding, a personal representative is appointed to carry out the estate administration (either an "executor" if named in the will or an "administrator" if named by the court).

The personal representative has the duty to oversee the administration of a decedent's estate. Essentially, the personal representative has the following functions: 1) Identify and Collect the assets of the Decedent's estate; 2) Pay any debts that the Decedent owed at the time of his or her death; and 3) Distribute the remaining assets according to either the Will or pursuant to Texas law if the Decedent died

without a Will.

A) Jurisdiction

1) Counties with Statutory Probate Court or County Court at Law. Due to the large volume of probate matters, some of the state's largest population counties (e.g., Bexar, Dallas, Harris, Tarrant, Travis, etc.), have statutory county probate courts. The jurisdiction of these courts is limited to probate matters. In addition, there are other counties that have statutory county courts at law that have concurrent jurisdiction with the constitutional county courts in probate matters.
   a) Statutory Probate Courts: these courts have jurisdiction over all estate matters. Additionally, these courts have concurrent jurisdiction with the district court in all actions in which a personal representative is a party and all actions involving an intervivos, testamentary, or charitable trust. Tex. Est. Code §32.005

2) Constitutional County Courts. In those counties which only have constitutional county courts, the county and district courts have concurrent jurisdiction. In uncontested cases (e.g., routine probates or guardianships), all matters are filed and heard in the county court. However, if there is a contested proceeding, the matter will either be transferred to the district court, or a statutory probate judge will be requested to hear the contested matter. The county court will continue to exercise jurisdiction over the management of the estate pending disposition of the contested matter.

B) Venue Tex. Est. Code §33.001

1) Texas Resident: venue lies in the county where the decedent resided, if the decedent had a domicile or fixed place of residence in this State.

2) Nonresident of Texas:

   a) Died in Texas: if the decedent had no domicile or fixed place of residence in this State but died in this State, then either in the county where the decedent's principal estate was at the time of the decedent's death, or in the county where the decedent died.
   b) Died outside of Texas: if the decedent had no domicile or fixed place of residence in this State, and died outside the limits of this State, then in any county in this State where the decedent's nearest of kin reside.
      (1) But if the decedent had no kindred in this State, then in the county where the decedent's principal estate was situated at the time of the decedent's death.

C) Attorney ad Litem. The judge may appoint an attorney ad litem to represent the interests of a person having a legal disability, a nonresident, an unborn or unascertained person, or an unknown or missing heir in any probate proceeding. Tex. Est. Code §53.104

D) Will Must Be Probated Within Four Years. The probate code provides that, except as to foreign wills, no will shall be effectual for the purpose of proving title to, or the right to the possession of, any real or personal property disposed of by the will, until such will has been admitted to probate. Tex. Est. Code §256.001

1) A will cannot be admitted to probate more than four years after the testator's death, unless it is shown that the party applying for probate is not in default for failing to present the will within the four-year period. Tex. Est. Code §256.003(a) If a will is offered for probate more than four years after the decedent's death, notice must be given to the decedent's heirs. Tex. Est. Code §258.051
   a) If it is shown that the party applying for probate was not in default in failing to present the will for probate, the will may be probated as a muniment of title. (See section on Muniment of Title below for a more detailed discussion of this procedure.)
   b) Letters Testamentary Cannot Be Issued After Four-Year Period. Even if a will is probated more than four years after the testator's death, letters testamentary cannot be issued and no estate administration can be held. Tex. Est. Code §256.003(b). Essentially, if the probate if filed after four years after death, only a muniment of title can be issued.

2) Purchasers from Heirs Protected. Persons who purchase real or personal property from the heirs more than four years after the decedent's death, in good faith and without knowledge of the existence of a will, have good title as against the devisees or legatees named in a will that is probated more than four years after death. Tex. Est. Code §256.003(c)

3) Period for Contesting a Probated Will. After a will has been admitted to probate, any interested person may institute suit in the proper court to contest the validity thereof within two years after such will shall have been admitted to probate, and not afterwards, except that any interested person may institute suit in the proper court to cancel a will for forgery or other fraud within two years after the discovery of such forgery or fraud, and not afterwards. Provided, however, that persons non compos mentis and minors shall have two years after the removal of their respective disabilities within which to institute such contest. Tex. Est. Code §256.204.

4. Simplified Administration

A) Probate of Will as Muniment of Title: The "Muniment of Title" process is a unique Texas procedure where the will is filed through a probate proceeding to transfer ownership of real estate to the named devisees in the will without the necessity of a full probate procedure. For instance, suppose the only asset is a tract of real estate, all creditors have been satisfied, estate taxes either were not due or have been paid, and there is no reason to administer the estate except to place title in the names of the devisees named in the will. Under this procedure, the only thing that is done is to admit the will to probate. No personal representative is appointed, and no letters of administration are issued even though the will names an independent executor. ***Note:*** This type of probate cannot be used in cases where there must be an administrator who can settle the estate by gathering a list of assets, liquidating them as needed, paying off debts and creditors and finally distributing the remainder of the estate to the heirs or beneficiaries.

1) Effect. An Order Admitting a Will to Probate as a Muniment of Title shall constitute sufficient legal authority to all persons owing any money to the estate of the decedent, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right belonging to the estate, and to persons purchasing from or otherwise dealing with the estate, for payment or transfer, without liability, to the persons described in such will as entitled to receive the particular asset without administration. The person or persons entitled to property under the provisions of such wills shall be entitled to deal with and treat the properties to which they are so entitled in the same manner as if the record of title thereof were vested in their names. Tex. Est. Code §257.102

2) Underwriting. If the decedent's will was probated as a muniment of title, a certified copy of the Order Admitting Will to Probate as a Muniment of Title and the Will should be recorded as a single document in the real property records of the county in which the property is located. The person named in the will as the recipient of the property (either directly or in the residuary clause) is now in title to the property. Because the will has been probated, there are presumed to be no debts of the estate, no MERP claims, and no federal estate taxes due.

B) Judicial Heirship Proceeding: This proceeding basically serves the same function as a "Muniment of Title" proceeding, except that it applies where the decedent died intestate rather than testate. This proceeding establishes, by court order, that the person is dead, that they left no will, and that they were survived by the named persons as heirs. It also determines the intestate shares of the named heirs.

1) A proceeding to declare heirship may be used:
   a) when a person dies intestate, owning or entitled to real or personal property in Texas and there will be no administration in Texas upon their estate; or
   b) when it is necessary for the trustee of a trust holding assets for the benefit of a decedent to determine the heirs of the decedent; or
   c) when a will has been probated in Texas or elsewhere, or an administration of the estate of decedent has been conducted in Texas, but some property (either real or personal) located in Texas has been omitted from such will or administration. Tex. Est. Code §202.002

2) The judgment of the court in a proceeding to declare heirship shall declare the names of the heirs of the decedent, and their respective shares and interests in the property of such decedent. Tex. Est. Code §202.201. Although such judgment may later be modified, set aside, or nullified, it shall nevertheless be conclusive in any suit between any heir omitted from the judgment and a bona fide purchaser for value who has purchased real or personal property after entry of the judgment without actual notice of the claim of the omitted heir. Similarly, any person who has delivered funds or property of the decedent to the persons declared to be heirs in the judgment, or has engaged in any other transaction with them, in good faith, after entry of such judgment, shall not be liable therefor to any person.

3) Underwriting: A certified copy of the Judgment Determining Heirship should be filed for record in the office of the county clerk of the county in which any of the real property described in such judgment is situated, and recorded in the Deed Records of such county, and indexed in the name of such decedent as grantor and of the heir's name in such judgments as grantor and of the heir's name in such judgments as grantees and from such filing, such judgment shall constitute constructive notice of the facts set forth therein.

C) Statutory Affidavit of Heirship: The Statutory affidavit of heirship is an informal (non-court) procedure that is sometimes available in Texas to establish ownership of a decedent's assets pursuant to intestacy. Title insurance underwriters have come to rely on these forms to establish record title. See Affidavit of Heirship section of these Guidelines for more information.

D) Small Estate Affidavit. Where a decedent died intestate leaving a probate estate whose value, not including homestead and exempt personal property, does not exceed $75,000, the heirs are entitled to the estate without the need for the appointment of a personal representative or any kind of administration. Tex. Est. Code §§205.001-205.003. This procedure is not available if the decedent

owned non-homestead real property.

1) Requirements: The distributees of the estate of a decedent who dies intestate shall be entitled, to the extent that the assets, exclusive of homestead and exempt property, exceed the known liabilities of said estate, exclusive of liabilities secured by homestead and exempt property, without awaiting the appointment of a personal representative when:
   a) no petition for the appointment of a personal representative is pending or has been granted;
   b) thirty (30) days have elapsed since the death of the decedent;
   c) the value of the entire assets of the estate, not including homestead and exempt property, does not exceed $75,000;
   d) there is filed with the clerk of the court having jurisdiction and venue an affidavit sworn to by two disinterested witnesses, by all such distributees that have legal capacity, and, if the facts warrant, by the natural guardian or next of kin of any minor or the guardian of any other incapacitated person who is also a distributee, which affidavit shall be examined by the judge of the court having jurisdiction and venue;
   e) the affidavit shows the existence of the foregoing conditions and includes a list of all of the known assets and liabilities of the estate, the names and addresses of the distributees, and the relevant family history facts concerning heirship that show the distributees' rights to receive the money or property of the estate or to have such evidences of money, property, or other rights of the estate as are found to exist transferred to them as heirs or assignees;
   f) the judge, in the judge's discretion, finds that the affidavit conforms to the terms of this section and approves the affidavit; and
   g) a copy of the affidavit, certified to by said clerk, is furnished by the distributees of the estate to the person or persons owing money to the estate, having custody or possession of property of the estate, or acting as registrar, fiduciary or transfer agent of or for evidence of interest, indebtedness, property, or other right belonging to the estate.

2) Underwriting: Title to a homestead that is the only real property in a decedent's estate may be transferred under a small estate affidavit. An affidavit that is used to clear title to a homestead must be recorded in the county in which the homestead is located. Purchasers who rely on a recorded affidavit are protected as against an heir who was not disclosed in the affidavit. The undisclosed heir's remedy is against the heirs who received consideration in a transfer of the homestead to the bona fide purchaser. Tex. Est. Code §205.006. **A Small Estate Affidavit does not transfer title to real property that is not homestead property**.

E) Effectuating Title Through Will Probated Outside of Texas

1) Probate of Foreign Will Accomplished by Ancillary Probate in Texas: The written will of a testator who was not domiciled in Texas at the time of his death which would affect any real or personal property in Texas, may be admitted to probate upon proof that it stands probated or established in any of the United States, its territories, the District of Columbia, or any foreign nation. An authenticated copy of the foreign proceedings which include a copy of the will and of the judgment, order, or decree admitting the will to probate along with an affixed seal of the court and certificate containing original signature of the judge or presiding magistrate shall be filed with the application. That is, a will that has been probated elsewhere can be probated in a Texas court. Tex. Est. Code §501.001

2) Filing and Recording Foreign Will in Real Property Records: An authenticated copy of a will that

conveys or otherwise disposes of Texas property, that has been probated in another state or country, along with an authenticated copy of the order or judgment issued in said probate case, may be recorded in the real property records of the county in which the property is located. Doing so will act as a muniment of title and convey the property. Tex. Est. Code §503.001

a) Note: Filing a foreign, probated will and order requires authenticated copies, not just certified ones. Authenticated copies are defined in Tex. Est. Code §501.002(c) and must:
   (1) be attested by and with the original signature of the court clerk or other official who has custody of the will or who is in charge of probate records;
   (2) include a certificate with the original signature of the judge or presiding magistrate of the court stating that the attestation is in proper form; and
   (3) have the court seal affixed if a court seal exists.

5. Independent Administration

A) Independent Administration, Generally

It's very common to find the following (or similar) provision in Texas wills:

> "I appoint _____ Executor of my estate, to serve without bond, and I direct that no action shall be had in the County Court in relation to the settlement of my estate other than the probating and recording of this, my will, and the return of the statutory inventory, any required appraisement, and a list of claims of my estate."

This clause follows the wording of section Tex. Est. Code §401.001, which provides for independent administration, and essentially summarizes what is involved in an independent administration. After the will has been admitted to probate, and the person designated as independent executor has been qualified (i.e., "Letters Testamentary" have been issued), he then files with the court an inventory of estate assets, an appraisement of their value, and a list of claims of the estate. Thereafter, he administers the estate without the numerous court hearings that are involved in the probate proceedings found in many states.

1) Power of the Independent Executor
   a) Sale of Real Property
      (1) Will Contains Power of Sale. Whenever by the terms of a will an executor is authorized to sell any property of the testator, no order of court shall be necessary to authorize the executor to make such sale, and the sale may be made at public auction or privately as the executor deems to be in the best interest of the estate and may be made for cash or upon such credit terms as the executor shall determine; provided, that when particular directions are given by a testator in his will respecting the sale of any property belonging to his estate, the same shall be followed, unless such directions have been annulled or suspended by order of the court. Tex. Est. Code §356.002.

      As such, if the will grants the independent executor a power to sell real property without court authorization or approval, the executor can sell real property in the estate irrespective of the existence of estate debts.

      It is also very common to see the following clause in a will:

"In addition to having all the powers of independent executors under the laws of Texas, the executor shall have all of the powers given to trustees under the Texas Trust Code."

The powers conferred on Trustees under the Texas Trust Code include the power to sell real estate. As such, it is understood that if the will contains such a provision, then the executor is free to sell without court supervision.

(a) Joint Executors or Administrators: When dealing with real estate, all the executors or administrators who have qualified as such and are acting as such shall join in the conveyance of real property, unless the court, after due hearing, authorizes less than all to act. Tex. Est. Code §307.002. Note, this is specific to real property. The Will may have authorized the executors to operate independently of one another. Regardless of that, they must act together to sell real property.

(2) Will Has No Power of Sale: Typically, an independent executor does not have the power to sell real property unless a power of sale is expressly given by the will. However, if there are debts, and the administration is pending, he has power to sell to pay the debts, even though the will does not expressly authorize a sale. For decedents who died on or after September 1, 2011, please see sections 401.006 and 145C of the Texas Est. Code and discussed hereafter.

(3) Granting Power of Sale by Agreement: In a situation in which a decedent does not have a will or a decedent's will does not contain language authorizing the personal representative to sell real property or contains language that is not sufficient to grant the representative that authority, the court may include in an order appointing an independent executor under §401.006 of the Est. Code any general or specific authority regarding the power of the independent executor to sell real property that may be consented to by the beneficiaries who are to receive any interest in the real property in the application for independent administration or in their consents to the independent administration. The independent executor, in such event, may sell the real property under the authority granted in the court order without the further consent of those beneficiaries. Note: This procedure is only available if the decedent died on or after September 1, 2011. Tex. Est. Code §401.006.

(4) Power of Sale of Estate Property (Power of Sale Implied by Existence of Certain Debts): Unless limited by the terms of a will, an independent executor, in addition to any power of sale of estate property given in the will, has the same power of sale for the same purposes as a personal representative has in a supervised administration, but without the requirement of court approval. Tex. Est. Code §402.052

(a) Protection of Person Purchasing Estate Property. A person who is not a devisee or heir is not required to inquire into an independent executor's power of sale of estate property if the person deals with the independent executor in good faith and:

(i) a power of sale is granted to the independent executor in the will or in the court order appointing the independent executor; or

(ii) the independent executor provides an affidavit, executed and sworn to under oath and recorded in the deed records of the county where the property is located, that the sale is necessary or advisable for any of the purposes described in §356.251(1) (i.e., The sale is made to pay expenses of administration, funeral

expenses and expenses of the last sickness of the decedent, and allowances and claims against the estate of the decedent).

(b) Note: This procedure is only available if the decedent died on or after September 1, 2011. Tex. Est. Code §402.053

2) All Distributees Agree on Independent Administration. The court can authorize an independent administration, if all distributees agree, where the decedent died intestate, where the will named an executor but did not give him independent administration powers, where the will did not name an executor, or the executor dies, resigns, or fails to qualify, and the will does not name a successor. Tex. Est. Code §§401.002 - 401.003.
   a) Must Be in Best Interest of Estate. If all distributees agree, the court will enter an order granting an independent administration "unless the court finds that it would not be in the best interest of the estate to do so."
   b) Securing Agreement of All Distributees: there are situations in which it could be difficult to obtain consent of all the distributees. Tex. Est. Code §401.004. A few of those situations are outlined below.
   c) Minor or Incompetent Beneficiary: if a distributee is a minor or incompetent, the guardian of the person of the distributee may sign the application on behalf of the distributee. If there is no guardian of the person, a guardian ad litem appointed by the court may sign the application.
   d) Trust Income Beneficiaries: if the will creates a trust, "the person or class of persons first eligible to receive the income from the trust" is the distributee who must agree to the independent administration. Similarly, if the will creates a life estate not in trust, the life tenant (and not the remaindermen) is deemed the distributee for this purpose.
   e) Bequest Contingent on Survival for Period of Time: if a decedent's will contains a provision that a distributee must survive the decedent by a prescribed period of time in order to take under the decedent's will, then, for the purposes of determining who shall be the distributee, it shall be presumed that the distributees living at the time of the filing of the application for probate of the decedent's will survived the decedent by the prescribed period.

B) Payment of Claims and Delivery of Exemptions and Allowances (only applies if the decedent died on or after September 1, 2011)
   1) Secured claims for money: In addition to notice within the required period, a creditor whose claim is secured by real property shall file a notice of election in the deed records where the property is located. If the creditor fails to record proper notice to be a matured secured creditor, the claim shall be a preferred debt and lien against the specific property, but it may not be asserted against other estate assets. Tex. Est. Code §403.052
   2) Matured Secured Claims: A secured creditor electing matured secured status must give notice to the independent administrator and must file a notice in the official records of the county in which the real property securing the indebtedness is located. Those creditors must obtain court approval or the administrator's consent to exercise any foreclosure rights. Tex. Est. Code §403.053
   3) Preferred Debt and Lien Claims: Secured creditors electing preferred debt and lien status are free to exercise judicial foreclosure but may not exercise any non-judicial foreclosure rights within six months after letters are granted. Tex. Est. Code §403.054

C) Closing an Independent Administration
   1) Filing of Closing Report or Notice of Closing Estate. There is no requirement that the independent executor formally close an administration and very few probates in the State of Texas are ever "officially" closed pursuant to the following procedure. However, the Estates code

does provide that the independent administration may be closed by affidavit when all of the debts known to exist against the estate have been paid, or when they have been paid so far as the assets in the hands of the independent executor will permit, when there is no pending litigation, and when the independent executor has distributed to the persons entitled thereto all assets of the estate, if any, remaining after payment of debts.

2) Closing Report. The independent executor may file in the county court records a closing report verified by an affidavit. The report must show:
   a) the property that came into the possession of the independent executor;
   b) that debts that have been paid;
   c) the debts, if any, still owing by the estate;
   d) the property of the estate, if any, remaining on hand after payment of debts; and
   e) the names and residences of the persons to whom the property of the estate, if any, remaining on hand after payment of debts has been distributed; and
   f) signed receipts or other proof of delivery of property to the distributes named in the closing report if the closing report reflects that there was property remaining on hand after payment of debts. Tex. Est. Code §405.005.
3) Notice of Closing Estate. Instead of filing a closing report, an independent executor may file a notice of closing estate verified by affidavit that states:
   a) That all debts known to exist against the estate have been paid or have been paid to the extent permitted by the assets in the independent executor's possession;
   b) That all remaining assets of the estate, if any, have been distributed; and
   c) The names and addresses of the distributes to whom the property of the estate, if any, remains on hand after payment of debts has been distributed. Tex. Est. Code §405.006
4) ***Filing of a closing report or notice of closing estate with a verified affidavit terminates probate court jurisdiction over the estate after the expiration of 30 days (unless an objection is filed within the 30-day period). Tex. Est. Code §405.007***
5) Distributee Application: a distributee may also file an application to close the administration and, after citation upon the independent executor, and upon hearing, the court may enter an order closing the administration and terminating the power of the independent executor to act as such. Tex. Est. Code §405.009.

6. Dependent (Court-Supervised Administration)

A) Steps in the Process -In General

It is important to remember that a dependent administration involves four steps at every stage in the process: ***petition, notice to interested parties, hearing,*** and ***subsequent confirmation***.

1) Petition. A petition (or application) must be filed setting forth the requested action, the reason it should be taken, and the condition and value of the estate at the time.
2) Notice to Interested Parties. Notice must be given to all interested parties: legatees and devisees named in the will (if there is a will) or heirs (if the decedent died intestate), and all unpaid creditors.
3) Court Hearing. A court hearing must be had on just about every matter, whether it involves payment of creditors' claims, sale of assets, or payment of taxes.
4) Judicial Confirmation. After the action has been taken, another hearing must be held (after notice to interested parties), reporting the action to the court and obtaining the court's confirmation and approval.

B) Sale of Real Property

No sale of any property of an estate shall be made without an order of the court authorizing the same. Tex. Est. Code §356.001

The procedural steps for the sale of real property in a dependent administration are as follows:

1) **Application for Sale of Real Estate** Tex. Est. Code §356.251. Application may be made to the court for an order to sell property of the estate when it appears necessary or advisable in order to:
   a) pay expenses of administration, funeral expenses and expenses of last sickness of decedents, and allowances and claims against the estates of decedents;
   b) dispose of any interest in real property of the estate of a decedent, when it is deemed to the best interest of the estate to sell such interest.

2) **Contents of Application for Sale of Real Estate** Tex. Est. Code §356.252. An application for the sale of real estate shall be in writing, shall describe the real estate or interest in or part thereof sought to be sold, and shall be accompanied by an exhibit, verified by affidavit, showing fully and in detail the condition of the estate, the charges and claims that have been approved or established by suit, or that have been rejected and may yet be established, the amount of each such claim, the property of the estate remaining on hand liable for the payment of such claims, and any other facts tending to show the necessity or advisability of such sale.

3) **Citation on Application** Tex. Est. Code §356.253. Upon the filing of such application and exhibit, the clerk shall issue a citation to all persons interested in the estate, describing the land or interest or part thereof sought to be sold, requiring them to appear at the time set by the court as shown in the citation and show cause why the sale should not be made, if they so elect. Service of such citation shall be by posting.

4) **Opposition to Application** Tex. Est. Code §356.254. When an application for an order of sale is made, any person interested in the estate may, during the period provided in the citation, file his opposition to the sale, in writing, or may make an application for the sale of other property of the estate.

5) **Hearing on Application and Any Opposition** Tex. Est. Code §356.255.
   a) The clerk of a court in which an application for an order of sale is filed shall immediately call to the attention of the judge any opposition to the sale that is filed during the period provided in the citation. The court shall hold a hearing on an application if an opposition to the sale is filed during the period provided in the citation.
   b) A hearing on an application for an order of sale is not required under this section if no opposition to the application is filed during the period provided in the citation. The court, in its discretion, may determine that a hearing is necessary on the application even if no opposition was filed during that period.
   c) If the court orders a hearing under Subsection (a) or (b) of this section, the court shall designate in writing a date and time for hearing the application and any opposition, together with the evidence pertaining to the application and opposition. The clerk shall issue a notice to the applicant and to each person who files an opposition to the sale, if applicable, of the date and time of the hearing.
   d) The judge may, by entries on the docket, continue a hearing held under this section from time to time until the judge is satisfied concerning the application.

6) **Order of Sale** Tex. Est. Code §356.256. If satisfied that the sale of the property of the estate described in the application is necessary or advisable, the court shall order the sale to be made; otherwise, the court may deny the application and may, if it deems best, order the sale of other property the sale of which would be more advantageous to the estate. An order for the sale of real estate shall specify:
   a) The property to be sold, giving such description as will identify it; and
   b) Whether the property is to be sold at public auction or at private sale, and, if at public auction, the time and place of such sale; and
   c) The necessity or advisability of the sale and its purpose; and
   d) Except in cases in which no general bond is required, that, having examined the general bond of the representative of the estate, the court finds it to be sufficient as required by law, or finds the same to be insufficient and specifies the necessary or increased bond, as the case may be; and
   e) That the sale shall be made, and the report returned in accordance with law; and
   f) The terms of the sale.

7) **Report of Sale** Tex. Est. Code §356.551. A successful bid or contract for the sale of real property of an estate shall be reported to the court ordering the same within thirty days after the date the bid is made, or the property is placed under contract. Reports shall be in writing, sworn to, and filed with the clerk, and noted on the probate docket. They shall show:
   a) The date of the order of sale.
   b) The property sold, describing it.
   c) The time and place of sale.
   d) The name of the purchaser.
   e) The amount for which each parcel of property or interest therein was sold.
   f) The terms of the sale, and whether made at public auction or privately.
   g) Whether the purchaser is ready to comply with the order of sale.

8) **Bond on Sale of Real Estate** Tex. Est. Code §§356.553-356.555. If the personal representative of the estate is not required by this Code to provide a general bond, the sale may be confirmed by the court if found to be satisfactory and in accordance with law. Otherwise, before any sale of real estate is confirmed, the court shall determine whether the general bond of said representative is sufficient to protect the estate after the proceeds of the sale are received. If the court so finds, the sale may be confirmed. If the general bond is found insufficient, the sale shall not be confirmed until and unless the general bond be increased to the amount required by the court, or an additional bond given, and approved by the court. The increase, or the additional bond, shall be equal to the amount for which such real estate is sold, plus, in either instance, such additional sum as the court shall find necessary and fix for the protection of the estate; provided, that where the real estate sold is encumbered by a lien to secure a claim against the estate and is sold to the owner or holder of such secured claim and is in full payment, liquidation, and satisfaction thereof, no increased general bond or additional bond shall be required except for the amount of cash, if any, actually paid to the representative of the estate in excess of the amount necessary to pay, liquidate, and satisfy such claim in full.

9) **Action of Court on Report of Sale** Tex. Est. Code §356.556. After the expiration of five days from the filing of a report of sale, the court shall inquire into the manner in which the sale was made, hear evidence in support of or against such report, and determine the sufficiency or insufficiency of the representative's general bond, if any has been required and given; and, if he is

satisfied that the sale was for a fair price, was properly made and in conformity with law, and has approved any increased or additional bond which may have been found necessary to protect the estate, the **court shall enter a decree confirming such sale**, showing conformity with the foregoing provisions of the Code, and authorizing the conveyance of the property to be made by the representative of the estate upon compliance by the purchaser with the terms of the sale, detailing such terms. If the court is not satisfied that the sale was for a fair price, was properly made, and in conformity with law, an order shall be made setting the same aside and ordering a new sale to be made, if necessary. The action of the court in confirming or disapproving a report of sale shall have the force and effect of a final judgment; and any person interested in the estate or in the sale shall have the right to have such decrees reviewed as in other final judgments in probate proceedings.

10) **Deed Conveys Title to Real Estate** Tex. Est. Code §356.557. When real estate is sold, the conveyance shall be by proper deed which shall refer to and identify the decree of the court confirming the sale. Such deed shall vest in the purchaser all right, title, and interest of the estate to such property, and shall be prima facie evidence that said sale has met all applicable requirements of the law.

11. **Delivery of Deed, Vendor's and Deed of Trust Lien** Tex. Est. Code §356.558.
   a) After a sale is confirmed by the court and the terms of sale have been complied with by the purchaser, the representative of the estate shall execute and deliver to the purchaser a proper deed conveying the property.
   b) If the sale is made partly on credit, the vendor's lien securing the purchase money note or notes shall be expressly retained in said deed, and in no event waived, and before actual delivery of said deed to purchaser, he shall execute and deliver to the representative of the estate a vendor's lien note or notes, with or without personal sureties as the court shall have ordered, and also a deed of trust or mortgage on the property as further security for the payment of said note or notes. Upon completion of the transaction, the personal representative shall promptly file or cause to be filed and recorded in the appropriate records in the county where the land is situated said deed of trust or mortgage.

7. The Administration Process

If the estate is being administered by an independent executor, then, as mentioned previously, all of the activities outlined below are done free of court control or supervision whereas in a dependent administration, these steps are taken upon petition to and order of the probate court, with notice to interested parties at every step in the process.

A) Appointment of Personal Representative

The personal representative makes application to the probate court for ***letters testamentary*** (if named as executor in a will) or ***letters of administration*** (if named by the court) granting the personal representative authority to administer the estate of the decedent. Upon order of the court granting letters, the personal representative takes the oath of office and posts bond, unless the decedent's will waives bond (as is often the case).

1) **Citations With Respect to Applications for Probate or for Issuance of Letters** Tex. Est. Code §§258.002 and 303.001. When an application for probate of a will (or for letters of

administration, if there is no will) is filed with the clerk of the probate court, the clerk issues a citation to all persons interested in the estate. The citation is served by posting at the county courthouse and by personal service on the testator's heirs (in the case of probate of a will) if the heirs are Texas residents and their addresses are known.

2) **Persons Disqualified to Serve as Executor or Administrator** Tex. Est. Code §304.003. No person is qualified to serve as an executor or administrator who is:
   a) An incapacitated person;
   b) A convicted felon, under the laws either of the United States or of any state or territory of the United States, or of the District of Columbia, unless such person has been duly pardoned, or his civil rights restored, in accordance with law;
   c) A non-resident (natural person or corporation) of this State who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate, and caused such appointment to be filed with the court;
   d) A corporation not authorized to act as a fiduciary in this State; or
   e) A person whom the court finds unsuitable.

3) **Waiver of Right to Serve** Tex. Est. Code §304.002. The surviving husband or wife, or, if there be none, the heirs or any one of the heirs of the deceased to the exclusion of any person not equally entitled, may, in open court, or by power of attorney duly authenticated and filed with the county clerk of the county where the application is filed, renounce his right to letters testamentary or of administration in favor of another qualified person, and thereupon the court may grant letters to such person.

4) **Letters Testamentary or Letters of Administration**: Once issued by the court, they serve as confirmation of the personal representative's authority to act on behalf of the estate. Tex. Est. Code §306.007

B) Inventory, Appraisement and List of Claims

1) **Inventory and Appraisement** Tex. Est. Code §309.051. After qualification, the personal representative collects all the assets of the estate so that they may be properly managed. The personal representative must file an inventory and list of claims of the estate with the probate court within 90 days of qualifying unless the court grants an extension. The list of claims is those owed to the estate, not those owed by the estate. Also, the personal representative may be required to file an "appraisement" (appraisal) of the estate assets if ordered to do so by the probate judge.
   a) Exception to Filing Inventory (Affidavit in lieu of Inventory) Tex. Est. Code §309.056 : if there are no unpaid debts, except for secured debts, taxes, and administration expenses, at the time the inventory is due, including any extensions, an independent executor may file with the court clerk, in lieu of the inventory, appraisement, and list of claims, an affidavit stating that all debts, except for secured debts, taxes, and administration expenses, are paid and that all beneficiaries have received a verified, full, and detailed inventory.
   b) The executor or administrator must still prepare a sworn inventory and provide a copy to all beneficiaries other than those receiving specific gifts. An "interested person," including an intestate heir or beneficiary under a prior will, may obtain a copy from the executor or administrator upon written request. Note: The above alternative is only available if the decedent died on or after September 1, 2011.

2) **Appointment of Appraisers** Tex. Est. Code §309.001. At any time after the grant of letters testamentary or of administration, the court for good cause on its own motion or on the motion of an interested party shall appoint not less than one nor more than three disinterested persons, citizens of the county in which letters were granted, to appraise the property of the estate. In such event and when part of the estate is situated in a county other than the county in which letters were granted, if the court shall deem necessary it may appoint not less than one nor more than three disinterested persons, citizens of the county where such part of the estate is situated, to appraise the property of the estate situated therein.

3) **List of Claims** Tex. Est. Code §309.052. There shall also be made out and attached to said inventory a full and complete list of all claims due or owing to the estate, which shall state:
   a) The name of each person indebted to the estate and his address when known.
   b) The nature of such debt, whether by note, bill, bond, or other written obligation, or by account or verbal contract.
   c) The date of such indebtedness, and the date when the same was or will be due.
   d) The amount of each claim, the rate of interest thereon, and time for which the same bears interest.
   e) In the case of decedent's estate, which of such claims are separate property and which are of the community.
   f) What portion of the claims, if any, is held in common with others, giving the names and the relationships, if any, of other part owners, and the interest of the estate therein.

4) **Action by the Court** Tex. Est. Code §309.054. Upon return of the inventory, appraisement, and list of claims, the judge shall examine and approve, or disapprove, them, as follows:

5) **Order of Approval**. Should the judge approve the inventory, appraisement, and list of claims, he shall issue an order to that effect.

6) **Order of Disapproval**. Should the judge not approve the inventory, appraisement, or list of claims, or any of them, an order to that effect shall be entered, and it shall further require the return of another inventory, appraisement, and list of claims, or whichever of them is disapproved, within a time specified in such order, not to exceed twenty days from the date of the order; and the judge may also, if deemed necessary, appoint new appraisers.

7) **Discovery of Additional Property** Tex. Est. Code §309.101. If, after the filing of the inventory and appraisement, property or claims not included in the inventory shall come to the possession or knowledge of the representative, he shall forthwith file with the clerk of court a verified, full and detailed supplemental inventory and appraisement.

8) **Use of Inventories, Appraisements, and Lists of Claims as Evidence** Tex. Est. Code §309.151. All inventories, appraisements, and lists of claims which have been taken, returned, and approved in accordance with law, or the record thereof, or copies of either the originals or the record thereof, duly certified under the seal of the county court affixed by the clerk, may be given in evidence in any of the courts of this State in any suit by or against the representative of the estate, but shall not be conclusive for or against him, if it be shown that any property or claims of the estate are not shown therein, or that the value of the property or claims of the estate actually was in excess of that shown in the appraisement and list of claims.

The title examiner must review the probate file to confirm that all the necessary procedures with reference to the inventory, appraisement and list of claims have been completed properly.

8. Testate Issues

A) Action of Court on Probated Will. Upon the completion of hearing of an application for the probate of a will, if the Court is satisfied that such will should be admitted to probate, an order to that effect shall be entered. Certified copies of such will and the order, or of the record thereof, and the record of testimony, may be recorded in other counties, and may be used in evidence, as the original might be, on the trial of the same matter in any other court, when taken there by appeal or otherwise. Tex. Est. Code §256.201.

B) When Clerk Shall Issue Letters. Whenever an executor or administrator has been qualified in the manner required by law, the clerk of the court granting the letters testamentary or of administration shall forthwith issue and deliver the letters to such executor or administrator. When two or more people qualify as executors or administrators, letters shall be issued to each of them so qualifying. Tex. Est. Code §306.004.

C) What Constitutes Letters. Letters testamentary or of administration shall be a certificate of the clerk of the court granting the same, attested by the seal of such court, and stating that the executor or administrator has duly qualified as such as the law requires, the date of such qualification, and the name of the deceased. Tex. Est. Code §306.005.

D) Period for Contesting Probate. After a will has been admitted to probate, any interested person may institute suit in the proper court to contest the validity thereof, within two years after such will shall have been admitted to probate, and not afterward, except that any interested person may institute suit in the proper court to cancel a will for forgery or other fraud within two years after the discovery of such forgery or fraud, and not afterward. Provided, however, that incapacitated persons shall have two years after the removal of their disabilities within which to institute such contest. Tex. Est. Code §256.204

9. Intestate Distribution

A) Passage of Estate on Decedent's Death Tex. Est. Code §101.001.

If a person dies leaving a lawful will:
(1) all of the person's estate that is devised by the will vests immediately in the devisees;
(2) all powers of appointment granted in the will vest immediately in the donees of those powers; and
(3) all the person's estate that is not devised by the will vests immediately in the person's heirs at law.

If a person dies without a lawful will, all that person's estate vests immediately in the person's heirs at law.

HOWEVER, in both cases, the decedent's estate vests as stated above subject to the payment of the debts of the decedent (except as exempted by law) and any court-ordered child support payments that are delinquent on the date of the decedent's death. Tex. Est. Code §101.051

That is, no one inherits until the debts have been paid!

Texas has different distribution schemes for separate property and community property.

Note: A person may die totally intestate (intestate as to the person) if the person did not leave a valid will. However, a person may also die partially intestate (intestate as to property) if the person's will fails to dispose of all the person's probate estate.

B) Persons Who Take Upon Intestacy

1) **Intestate Leaving No Husband or Wife**. Tex. Est. Code §201.001
   a) If a person who dies intestate does not leave a spouse, the estate to which the person had title descends and passes the person's children and the children's descendants.
   b) If no child or child's descendant survives the person, the person's estate descends and passes in equal portions to the person's father and mother.
   c) If only the person's father or mother survives the person, the person's estate shall:
      (1) be divided into two equal portions, with:
         (a) one portion passing to the surviving parent; and
         (b) one portion passing to the person's siblings and the siblings' descendants; or
      (2) be inherited entirely by the surviving parent if there is no sibling of the person or siblings' descendants.
   d) If neither the person's father nor mother survives the person, the person's entire estate passes to the person's siblings and the siblings' descendants.
   e) If none of the kindred described above survive the person, the person's estate shall be divided into two equal portions, with:
      (1) one portion passing to the person's paternal kindred; and
      (2) one portion passing to the person's maternal kindred. See the Estates Code for further discussion.

   NOTE: If either side of the family has completely died out, the entire estate will pass to the surviving side. See State v. Estate of Loomis, 553 S.W.2d 166 (Tex. Civ. App.—Tyler 1977, writ ref'd).

2) **Intestate Leaving Husband or Wife (Distribution of Separate Property)**. Tex. Est. Code §201.002. Separate property is defined as property owned by a spouse before marriage; property acquired during marriage by gift, will, or inheritance; and a spouse's tort recovery for personal injury. All other property acquired during marriage is community property. Where any person having title to any estate, real, personal, or mixed, other than a community estate, shall die intestate as to such estate, and shall leave a surviving husband or wife, such estate of such intestate shall descend and pass as follows:
   a) Surviving Descendants:
      (1) Personal Property: If the deceased have a child or children, or their descendants, the surviving husband or wife shall take 1/3 of the personal estate, and the balance of such personal estate shall go to the child or children of the deceased and their descendants. (The surviving spouse never takes more than one-third, whether there is one child or 10 children.)
      (2) Real Property: The surviving husband or wife shall also be entitled to an estate for life, in 1/3 of the land of the intestate, with remainder to the child or children of the intestate and their descendants.

b) No Surviving Descendants:
   (1) Personal Property: If the deceased has no child or children, or their descendants, then the surviving husband or wife shall be entitled to all the personal estate.
   (2) Real Property: the surviving spouse is also entitled to one-half of the lands of the intestate, without remainder to any person, and the other half shall pass and be inherited according to the rules of descent and distribution; provided, however, that if the deceased has neither surviving father nor mother nor surviving brothers or sisters, or their descendants, then the surviving husband or wife shall be entitled to the whole of the estate of such intestate.

3) **Intestate Leaving Husband or Wife (Distribution of Community Estate**) Tex. Est. Code §201.003. The presumption is that all property on hand on dissolution of the marriage, whether by divorce or death, is community property; and the burden of establishing an asset's separate character is on the party so contending. On the intestate death of one of the spouses to a marriage, the community property estate of the deceased spouse passes to the surviving spouse if:
   a) no child or other descendant of the deceased spouse survives the deceased spouse; or
   b) all surviving children and descendants of the deceased spouse are also children or descendants of the surviving spouse.

   NOTE: The surviving spouse (1) retains the one-half of the community property that the surviving spouse owned once the marriage was dissolved by death and (2) inherits the deceased spouse's one-half of the community.

   On the intestate death of one of the spouses to a marriage, if a child or other descendant of the deceased spouse survives the deceased spouse and the child or descendant is not a child or descendant of the surviving spouse, one-half of the community estate is retained by the surviving spouse and the other one-half passes to the children or descendants of the deceased spouse. The descendants shall inherit only such portion of said property to which they would be entitled if the decedent died intestate with no spouse. In every case, the community estate passes charged with the debts against it.

   NOTE: if a spouse died before September 1, 1993, their one-half of the community property was not inherited by the surviving spouse. Instead, the deceased spouse's share passed to the deceased spouse's descendants.

4) **Determination of Per Capita and Per Stirpes Distribution** Tex. Est. Code §201.101. When the intestate's children, descendants, brothers, sisters, uncles, aunts, or any other relatives of the deceased standing in the first or same degree alone come into the distribution upon intestacy, they shall take per capita, namely: by persons; and, when a part of them being dead and a part living, the descendants of those dead shall have right to distribution upon intestacy, such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive.

5) Matters Affecting and Not Affecting the Right to Inherit.
   a) Persons Not in Being. No right of inheritance accrues to any person unless the person is born before, or is in gestation at, the time of the intestate's death and survives for at least 120 hours. A person is: (1) considered to be in gestation at the time of the intestate's death if insemination or implantation occurs at or before the time of the intestate's death; and (2)

presumed to be in gestation at the time of the intestate's death if the person is born before the 301st day after the date of the intestate's death. Tex. Est. Code §201.056

b) Heirs of Whole and Half Blood. In situations where the inheritance passes to the collateral kindred of the intestate, if part of such collateral be of the whole blood, and the other part be of the half-blood only, of the intestate, each of those of half-blood shall inherit only half so much as each of those of the whole blood; but if all be of the half blood, they shall have whole portions. (i.e., half-blood heirs inherit half as much as whole-blood heirs) Tex. Est. Code §201.057.

c) Alienage. No person is disqualified to take as an heir because he or a person through whom he claims is or has been an alien. Tex. Est. Code §201.060

d) Convicted Persons. No conviction shall work corruption of blood or forfeiture of estate, except in the case of a beneficiary in a life insurance policy or contract who is convicted and sentenced as a principal or accomplice in willfully bringing about the death of the insured, in which case the proceeds of such insurance policy or contract shall be paid as provided in the Insurance Code of this State. Tex. Est. Code §201.058

e) Estate of Person Who Dies by Suicide. The estate of a person who commits suicide descends or vests as if the person died a natural death. Tex. Est. Code §201.061.

f) Parent-Child Relationship. A probate court may declare that the parent of a child under 18 years of age may not inherit from or through the child under the laws of descent and distribution if the court finds by clear and convincing evidence that the parent has abandoned the child, the child' mother or committed some crime causing harm to a child. Tex. Est. Code §201.062

6) Inheritance Rights of Children

a) Maternal Inheritance. For the purpose of inheritance, a child is the child of his biological or adopted mother or the mother as defined in a gestational agreement, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue. Tex. Est. Code §201.051

b) Paternal Inheritance.

(a) For the purpose of inheritance, a child is the child of his biological father if the child is born under circumstances described by Tex. Fam. Code §160.201 is adjudicated to be the child of the father by court decree as provided by Chapter 160, Family Code,1 was adopted by his father, or if the father executed an acknowledgment of paternity as provided by Subchapter D, Chapter 160, Family Code, or a like statement properly executed in another jurisdiction, so that he and his issue shall inherit from his father and from his paternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue. A person claiming to be a biological child of the decedent, who is not otherwise presumed to be a child of the decedent or claiming inheritance through a biological child of the decedent, who is not otherwise presumed to be a child of the decedent, may petition the probate court for a determination of right of inheritance. If the court finds by clear and convincing

evidence that the purported father was the biological father of the child, the child is treated as any other child of the decedent for the purpose of inheritance and he and his issue may inherit from his paternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue. This section does not permit inheritance by a purported father of a child, whether recognized or not, if the purported father's parental rights have been terminated.

7) **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. Tex. Est. Code §101.002. 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. Tex. Est. Code §111.001.
   b) The above does not apply to agreements between spouses regarding their community property. Agreements between spouses regarding rights of survivorship in community property are governed by Tex. Est. Code Chapter 112.

8) **Requirement of Survival by 120 Hours**. Tex. Est. Code §§121.051-121.152
   a) Survival of Heirs. A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property, and intestate succession, and the decedent's heirs are determined accordingly, except as otherwise provided in this section. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. This does not apply where its application would result in the escheat of an intestate estate.

   b) Disposal of Community Property. When a husband and wife have died, leaving community property, and neither the husband nor wife survived the other by 120 hours, one-half of all community property shall be distributed as if the husband had survived, and the other one-half thereof shall be distributed as if the wife had survived.

   c) Survival of Devisees or Beneficiaries. A devisee who does not survive the testator by 120 hours is treated as if he predeceased the testator, unless the will of the decedent contains some language dealing explicitly with simultaneous death or deaths in a common disaster or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will. If property is so disposed of that the right of a beneficiary to succeed to any interest therein is conditional upon his surviving another person, the beneficiary shall be deemed not to have survived unless he or she survives the person by 120 hours. However, if any interest in property is given alternatively to one of two or more beneficiaries, with the right of each to take being dependent upon his surviving the other or others, and all shall die within a period of less than 120 hours, the property shall be divided into as many equal portions as there are beneficiaries, and those portions shall be distributed respectively to those who would have taken in the event that each beneficiary had survived.

   d) Joint Owners. If any real or personal property, including community property with a right of

survivorship, shall be so owned that one of two joint owners is entitled to the whole on the death of the other, and neither survives the other by 120 hours, these assets shall be distributed one-half as if one joint owner had survived and the other one-half as if the other joint owner had survived. If there are more than two joint owners and all have died within a period of less than 120 hours, these assets shall be divided into as many equal portions as there are joint owners and these portions shall be distributed respectively to those who would have taken in the event that each joint owner survived. (i.e., the heirs step into the position as co-tenants)

9) **Inheritance by and From an Adopted Child** Tex. Est. Code §201.054. For purposes of inheritance under the laws of descent and distribution, an adopted child shall be regarded as the child of the parent or parents by adoption, such adopted child and its descendants inheriting from and through the parent or parents by adoption and their kin the same as if such child were the natural child of such parent or parents by adoption, and such parent or parents by adoption and their kin inheriting from and through such adopted child the same as if such child were the natural child of such parent or parents by adoption. The natural parent or parents of such child and their kin shall not inherit from or through said child, but except as provided by §162.507(c), Family Code, the child shall inherit from and through its natural parent or parents. Nothing herein shall prevent any parent by adoption from disposing of his property by will according to law. The presence of this Section specifically relating to the rights of adopted children shall in no way diminish the rights of such children, under the laws of descent and distribution or otherwise, which they acquire by virtue of their inclusion in the definition of "child" which is contained in this Code.

10) **Disclaimers** Tex. Est. Code Chapter 122

a) Concept. Tex. Prop. Code Chapter 240 provides a procedure by which a devisee of under a will may disclaim his or her interest in the property. This statute was adopted in 2015 and replaced the previous disclaimer procedures set forth in the Estates Code. The statute is based upon the Uniform Disclaimer of Property Interests Act. Most notably, this statute eliminated the nine-month deadline from the date of death in order to disclaim a property interest. Now, a disclaimer is barred only if there is a written waiver of the right to disclaim or if the disclaimant previously accepted the interest sought to be disclaimed. (Tex. Prop. Code §240.151) If effectively disclaimed, title will not vest in that devisee. Rather, title passes as if the party making the disclaimer predeceased the testator.

b) Involuntary Liens. Disclaimers can be used to avoid the attachment of many involuntary liens to property. However, a disclaimer is not effective to eliminate a child support lien against the person making the disclaimer. (Tex. Prop. Code §240.151(g)) Additionally, a disclaimer will not defeat a federal tax lien filed against the disclaiming party prior to the disclaimer. Drye v. United States, 528 U.S. 49 (1999).

c) Other Possible Disclaimers. The same procedures and concepts applicable to a disclaimer by a devisee under a will also apply to a disclaimer by an intestate heir. Someone who would acquire title under a survivorship agreement or transfer on death deed also may disclaim his or her interest in the property. If someone does attempt to disclaim property, a careful review of the relevant documentation is necessary to determine if all the statutory requirements have been satisfied.

d) Underwriting. Under prior law, the disclaimer must have been given within 9-months of the date of death. The effective date of the act was September 1, 2015, and the operative date is December 1, 2014. If the event giving rise to the disclaimer (the death of a decedent) occurred on or after December 1, 2014, the new disclaimer rules apply, and there is no time limit for disclaiming.

In those situations where the death occurred prior to the change in law and the disclaimer was not made timely, National Investors cannot rely on the disclaimer for title insurance purposes. We would instead require a deed from the disclaiming party. We would accept a deed without warranty in this instance, but not a quitclaim.

10. Federal Estate Tax

A) The Federal Estate Tax: A federal tax on any transfer of assets from a deceased person's estate to his or her heirs, except for transfers to spouses. A lien to secure payment of Federal Estate Taxes due, if any, arises upon death, with no necessity for the recording of any notice (i.e., an inchoate lien). The limitation period for a Federal Estate Tax Lien is 10 years from the date of death.

The title examiner should require information to determine whether the estate might be taxable. This includes a thorough review of the Inventory, Appraisement, and List of Claims filed in the probate case.

If the gross value of the decedent's estate exceeds the exemption amount (see table below), the decedent's personal representative must file an Estate Tax Return. The current exemption chart is as follows:

2011	$5,000,000
2012	$5,120,000
2013	$5,250,000
2014	$5,340,000
2015	$5,430,000
2016	$5,450,000
2017	$5,490,000
2018	$11,180,000
2019	$11,400,000
2020	$11,580,000
2021	$11,700,000
2022	$12,060,000
2023	$12,920,000
2024	$13,061,000

As of 2023, the above is scheduled to adjust for inflation every year until 2026, when it is scheduled to reset down to the 2011 amount, adjusted for inflation.

Underwriting: If the value of the estate exceeds the exempt amount, require a copy of the United States Estate Tax Closing Letter issued by The Internal Revenue Service that either shows that no taxes are due or that all taxes have been paid.

B) Property is Sold Before Estate Taxes are Paid.

1) A lien for unpaid federal estate taxes is called a hidden lien because it becomes effective upon the death of the decedent. No notice is required in the public records.

2) Procedural Rule P-11b(9) sets forth three alternatives for insuring around unpaid federal estate and state inheritance taxes.

a) Under Procedural Rule P-11b(9)(a), the title insurance company may insure around if the company reviews a balance sheet of the estate and determines that the estate will have no difficulty in paying its estate and inheritance taxes then the company may accept an indemnity from responsible persons protecting itself against loss due to unpaid estate and inheritance taxes.

(1) **Underwriting**: Require that the personal representative, estate's attorney, or the estate's accountant provide 1) a written estimate of the amount of estate and inheritance taxes that will be due, and 2) a written statement that the estate has sufficient assets to pay the taxes. The indemnity must be from the beneficiaries and the accountant for the estate, or the attorney for the estate. The title company should further require a letter signed by either the personal representative, the accountant for the estate, or the attorney for the estate, agreeing to see that the taxes are paid out of the assets of the estate.

b) Under Procedural Rule P-11b(9)(b), the title insurance company may insure around if the company requires sufficient money or other security to pay estate and inheritance taxes to be left in escrow with it pending payment of such taxes or pending the receipt of waivers of lien from the taxing authority or authorities.

(1) **Underwriting**: The title examiner should require that the personal representative or accountant of the estate provide an estimate of the estate and inheritance taxes that will be due. A written escrow agreement should be submitted to underwriting counsel for review and approval. Under no circumstances should the escrowed funds be released until the title company has received the United States Estate Tax Closing Letter.

c) Under Procedural Rule P-11b(9)(c), the title insurance company may insure around if the company examines the balance sheet of the estate and determines that the estate will have no difficulty in paying its inheritance and estate taxes, and the company obtains a letter from a responsible person agreeing to see that such taxes are paid out of the assets of the estate.

(1) **Underwriting**: Require that the personal representative, estate's attorney, or the estate's accountant provide 1) a written estimate of the amount of estate and inheritance taxes that will be due, and 2) a written statement that the estate has sufficient assets to pay the taxes. The indemnity must be from the beneficiaries and the accountant for the estate, or the attorney for the estate. The title company should further require a letter signed by either the personal representative, the accountant for the estate, or the attorney for the estate, agreeing to see that the taxes are paid out of the assets of the estate.

Note: Texas does not have any estate tax or inheritance tax.

U. Family Transactions

The sale of property between family members is always suspect, particularly when the seller remains in the property after closing.

One of the main issues is whether the transaction is a pretended sale of the homestead property. Recall that a person's "homestead" might not be their "residence". The presumption is that, if a person or their spouse owns only one property in Texas, that property may be claimed as their homestead, even if they reside elsewhere. The Texas Constitution treats a pretended sale of a person's homestead involving any condition of defeasance as void. Texas Constitution §50(c), Article 16 "Defeasance" is anything that would make the underlying transaction null and void, so any "sale" that ultimately is void is not a sale. In such a situation, the underwriter could suffer a total loss on its owner policy.

While a potential pretended sale can take many forms, the most common arises when a property owner, to access the equity in their home, sells it to a family member after they discover they are unable to qualify for a home equity or reverse mortgage loan due to their age, lack of income, or credit score. Most consumers do not understand the complicated issues surrounding Texas homestead rights and the significant Texas 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, or void if the sale is intended to circumvent homestead laws. Even if the seller has no intent to evade a restriction, if the property becomes subject to a foreclosure or bankruptcy proceeding, the seller (or the trustee, if in bankruptcy) will likely embrace the homestead protections and seek to set aside the conveyance (and the associated lien) as a pretended sale. This situation gives the owner enormous leverage in negotiating with the lender, which will likely result in a claim under the Loan Policy, unless there is a special exception to a pretended sale or to the assertion of homestead by the seller.

Underwriting

Commitment and Owner's Title Policy - the Commitment and Owner's Title Policy issued on a transaction between family members 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. Obtain reasonable verification that the property to be insured is vacant or currently occupied by the buyer.
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 the seller owns and occupies as their homestead.
4. 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.

   a. Although the tax homestead exemption is not dispositive as to whether a property is the owner's homestead, it may be indicative; thus the homestead designation status on both subject property and the property to which Seller is moving are important. The Seller should submit an affidavit to the appraisal district designating their new property as homestead and abandoning the homestead exemption on the subject property.
   b. 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.
5. The ownership and occupancy of the seller's designated new homestead property must be reasonably verified.
   a. You must 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.
   b. The address on the seller's driver's license should match the address shown for the designated property.
   c. The mailing address on appraisal district records and utility bills for the designated property should be the designated property.
6. 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.
7. 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 – **Vacant Property required.** 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 – **Power of Attorney.** 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.

V. FIRPTA (Foreign Investment in Real Property Tax Act)

See the FIRPTA section in the Investors Title General Underwriting Principles Manual for information on FIRPTA and what the title agent is required to do when the seller in the transaction is a foreign person. A foreign person is a nonresident alien individual or foreign corporation that has not made an election under section 897(i) of the Internal Revenue Code to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. It does not include a resident alien individual.

National Investors has also issued Bulletin No. 2022-141 on this topic.

Note that the standard TREC contracts in Texas contain the following paragraph which pertains to the FIRPTA requirement:

> FEDERAL TAX REQUIREMENTS: If Seller is a "foreign person," as defined by Internal Revenue Code and its regulations, or if Seller fails to deliver an affidavit or a certificate of nonforeign status to Buyer that Seller is not a "foreign person," then Buyer shall withhold from the sales proceeds an amount sufficient to comply with applicable tax law and deliver the same to the Internal Revenue Service together with appropriate tax forms. Internal Revenue Service regulations require filing written reports if currency in excess of specified amounts is received in the transaction.

Buyers will expect the title agent to provide the "affidavit or a certificate of nonforeign status" mentioned above at closing for the seller to complete. Most title software has a non-foreign status affidavit document preloaded that can be used for this purpose.

W. Flip Transactions

"Flip Transaction" or "flip" does not have a specific meaning in real estate. However, many investors use it to mean a series of real estate transactions for the same parcel of property where a final sale or closing provides the funds to complete the previous transactions. From the investor's perspective, A sells to B who sells to C. C provides the money which gets paid to A. B never brings any money to the transaction. B is typically the investor who is going to make money on the difference in the sales price in the A to B and B to C transactions.

However, National Investors (and Texas Department of Insurance) does not allow for this method of funding. Each transaction must be treated separately from one another for funding purposes. The A-B transaction must fully close and fund prior to the B-C transaction closing and funding. In this scenario, the B investor must provide funds for closing.

1. Underwriting Guidelines

- The A-B transaction must fully close and fund before the B-C transaction closes and funds. That is, B must fund the A-B transaction without any proceeds from the B-C transaction.
- If the B-C transaction involves an increased sales price of greater than 25% of the sales price in the A-B transaction, underwriter approval is required.
- If funding for the A-B transaction is expected to be something other than cash or a standard note and deed of trust (to be recorded) wherein real money is being wired into the escrow account (such as hard/private money funding), underwriter approval is required.
- If the A-B transaction is a short sale, the sale from B to C is not insurable.
- Two guaranty files must be created and each title commitment must reflect A in title. In the B-C file, a requirement should be added in Schedule C for a General Warranty Deed from A to B.
- Name searches should be performed on A, B and C for involuntary liens.
- If the transaction involves the pass through of the OTP premium from the A-B transaction to the B-C transaction, the parties must comply with Rate Rule R-2 and execute a "Qualified Policy Premium Pass-Through" agreement.

X. Foreclosure

In Texas, the most common device used to secure a loan on real estate is the deed of trust. It grants 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. Nonjudicial Foreclosure:

The most common type of foreclosure proceeding in Texas is a nonjudicial foreclosure - a process that involves no judicial intervention and is free of court order. A deed of trust containing a "power of sale" may be nonjudicially 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 Tex. Prop. Code §51.002. 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 §51.0025 of the Texas Property Code. See also, definition of "mortgage servicer" under §51.0001(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).

a) Requirements of §51.002 if the debtor's residence is involved:

Required notice if the debtor's residence is involved ("notice of right to cure"):

- Before the debt can be accelerated 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.
- 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 (see below) 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, the notice of "right to cure" 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."

b) Notice of the foreclosure sale (notice of sale):

- 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;
- 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;
- **Note:** 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.";

- 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;
- 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, and, if the property is, located in more than one county, then the notice must specify in which county the sale will be conducted.
- must be filed with the county clerk at least twenty-one (21) days prior to the sale. The county clerk must post the notice on its website. **Note**. This is not the real property records. The county clerk has a separate file for foreclosure notices.
- Notice 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 §51.002(e) Receipt of the Notice is not required if properly mailed - proper mailing is all that is required. The 21-day period required by this section commences on the day the notice is deposited in the mail, not when it is received.

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)

c) 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. However, effective September 1, 2017, if the first Tuesday of month occurs on January 1 or July 4, the foreclosure sale must be held between 10 AM and 4 PM on the first Wednesday of the month (that is, January 2 or July 5, as appropriate).
- 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.

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 establishes 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 §51.002 which have been complied with and provide specific information rather than general representations.

2. 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 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 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 recovers 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.

3. Expedited Court Proceedings for Foreclosure

Texas Rules of Civil Procedure 735 and 736 establish the guidelines for obtaining the required court order for purposes of foreclosing on home equity loans, reverse mortgages, property tax liens transferred prior to May 29, 2013, and property owners' association assessments. The objective of these rules is to simplify the process of obtaining the court order without inundating the courts.

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 Tex. Prop. Code §51.002).

The process for a Rule 736 Expedited Proceeding is generally as follows:

1. Prerequisites: The lender must send all notices (default, intent to accelerate, acceleration) to each debtor and property interest holder.
2. 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.
3. Notice: all parties obligated for the debt (the "respondents") must be served with a formal notice

advising that an application has been filed seeking a court order to foreclose. If the respondent 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. A copy must be sent to the property address.

4. 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. If no response is timely filed, the court shall grant the application on a default basis. 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.
5. 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.

Underwriting Requirement: 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.

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.

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.

4. Foreclosure of a Home Equity Loan

Requires at a minimum a Rule 736 court order authorizing the foreclosure as described above. The lien also may be foreclosed in a new suit seeking judicial foreclosure (see Judicial Foreclosures above) or in any suit or counterclaim seeking a final judgment that includes an order allowing foreclosure under the security instrument and Tex. Prop. Code §51.002.

5. Foreclosure of a Reverse Mortgage Loan

If either (1) all borrowers have died, or (2) the homestead property securing the loan is sold or otherwise transferred, then a reverse mortgage may be foreclosed in a nonjudicial foreclosure (see Nonjudicial Foreclosures above.) Otherwise, the law requires at a minimum a Rule 736 court order authorizing the foreclosure. The lien also may be foreclosed in a new suit seeking judicial foreclosure (see Judicial Foreclosures above) or in any suit or counterclaim seeking a final judgment that includes an order allowing foreclosure under the security instrument and Tex. Prop. Code §51.002.

If the foreclosure occurs because of a default because all 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 the 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)

If a court order for foreclosure is required, it may be obtained from the district court through a suit seeking judicial foreclosure (see Judicial Foreclosures above), in any suit or counterclaim seeking a final judgment which includes an order allowing foreclosure under the security instrument and Tex. Prop. Code §51.002, or through the expedited court order process set out in Texas Rules of Civil Procedure 736.

6. Foreclosure of a Tax Lien

Most tax liens are foreclosed by judicial foreclosure, however, insuring them comes with a host of issues:

1) **Redemption** - the right of a former owner or lienholder to buy back the foreclosed property after the sale. The right to redeem runs either 180 days or two years from the date the foreclosure deed was recorded, depending on the type of property and its usage.

2) **Challenge to Judgment** – a suit or other claim brought by a person or entity alleging they were a necessary party to the tax suit and that they did not receive sufficient notice or that the suit was procedurally deficient in some other way. Generally, a person who was a necessary party to a tax foreclosure suit has three ways to attack a foreclosure sale or the underlying judgment: through a motion for new trial, an appeal, or a bill of review. A bill of review is a new lawsuit that can be filed up to four years after the judgment of foreclosure is entered in the court record. 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.

3) **Challenge to Sale** – a suit or other claim by any person objecting to the sale on the basis of procedural or constitutional deficiencies. Two sections of the Texas Tax Code discuss this option. (Tex. Tax Code §§33.54, 34.08.) The Code allows a person one or two years from the date of the foreclosure sale to file a challenge, depending on the property type and usage. If the property was not used for homestead or agricultural purposes prior to foreclosure, the statute of limitations is one year from the date of the foreclosure deed; otherwise, it is two years. In addition to the Texas Tax Code provisions that set out the right to challenge a sale, the U.S. Constitution provides protection through the 14th Amendment's Due Process Clause.

Tax Lien Foreclosed Property Has Additional Title Issues to Consider:

1) The deeds issued after a tax lien foreclosure do not contain any warranty of title. The quality of title passed to the foreclosure purchaser is only as good as the interests of those persons who were named as defendants in the foreclosure suit. Therefore, it is important to always look at the state of title at the time the tax foreclosure suit was filed to determine whether the parties named in the suit were 100% vested in title.
2) If the property owner who was foreclosed upon redeems the property after a foreclosure, then any prior lien against the property owner is resurrected and once again enforceable against the property.

Schedule B Exceptions:

Depending on the situation, one or both of the below Schedule B exceptions may be required:

> **Invalidity Exception:** "Any claim, right, cause of action, or assertion of title or interest in the property made or brought before the expiration of four years from the date of judgment of

foreclosure, being [DATE OF JUDGMENT], in cause number [TAX SUIT NUMBER], [COURT NUMBER] District Court, [COUNTY OF SUIT] County, Texas, or any challenge to the foreclosure sale of the subject property within two years from the date of recording of the deed of foreclosure, being [DATE FORECLOSURE DEED WAS RECORDED], recorded at [INSERT EITHER "DOCUMENT NO. X" OR "VOL. X, PAGE Y"]."

Redemption Exception: "The right of any prior owner or lienholder to redeem the property pursuant to Tex. Tax Code §32.06(k) or §34.21 after a judicial foreclosure within [INSERT 180 DAYS or 2 YEARS, AS APPLICABLE] from the date of recording of the deed of foreclosure recorded at [INSERT EITHER "DOCUMENT NO. X" OR "VOL. X, PAGE Y"]."

The Checklist to Analyze Insurability is available to guide you through the process of determining whether a tax lien foreclosure in the property's history will impact your ability to insure the transaction. Please note that this checklist applies only to a *judicial* property tax foreclosure in Texas by a taxing unit or tax lien transferee that files a delinquent tax suit; these guidelines are not applicable to Rule 736 foreclosures by tax lien transferees. If you see an "Order of Foreclosure" followed by a substitute trustee's deed rather than a sheriff's or constable's deed, please contact underwriting for guidance, as this checklist will not apply.

7. Effect of Foreclosure of Deed of Trust on other liens

Generally, foreclosure of a deed of trust lien extinguishes the rights of inferior lienholders to enforce their liens against the secured property. Specific lien treatment:

a) Judgment Liens
Foreclosure of a deed of trust lien will extinguish an abstract of judgment that is recorded after 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 (e.g. FDIC, Dept. of Agriculture, etc.).

b) 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 and, therefore, would be extinguished by foreclosure of said bona fide mortgage. Tex. Local Gov't Code §552.0025

c) 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 act 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. 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. Tex. Health & Safety Code §342.007

d) 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 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).

e) 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) can 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 the date of commencement of the environmental issue.

f) State Liens

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

(1) 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 an *ad valorem* / property tax lien. Tex. Labor Code §61.0825 (See "Texas Workforce Commission Lien" section in this Texas supplement for a more detailed explanation of this lien and its priority)

(2) Ad Valorem Taxes (property taxes)

Ad valorem taxes attach to the property automatically on January 1st 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. Tex. Tax Code §32.04, Tex. Tax Code §32.05 and Tex. Tax Code §32.06

NOTE: An *ad valorem* tax lien may be transferred under Tex. Tax Code §32.06 (essentially refinanced) but does not lose priority when this occurs and may still be foreclosed as a tax lien. The 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.

(3) Federal Tax Liens

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 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)

- 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.
- No notice is necessary if the federal tax lien is filed less than thirty (30) days before the foreclosure sale.
- 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.

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). If the IRS does not redeem, the purchaser at the foreclosure sale takes the property free of the IRS lien. If the 120-day right of redemption applies, then the following exception should be added to Schedule B:

> "Right of the United States 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."

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).

(4) Department of Justice Liens (DOJ Liens):

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.

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 for federal tax liens 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 DOJ was not given notice and may not be "rescinded" based on failure to provide the notice to the DOJ.

A pre-foreclosure notice does not extinguish the DOJ lien, but rather gives the DOJ the right to redeem the property within one year of the foreclosure sale date (instead of the IRS' 120-day redemption period). 28 U.S.C. §2410(c). If the DOJ does not redeem, the

purchaser at the foreclosure sale takes the property free of the IRS lien. If the one year right of redemption applies, then the following exception should be added to Schedule B:

> "Right of the United States to redeem for one year 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."

(5) Mechanic's and Materialman's Liens:

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. Tex. 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 underwriting for guidance.

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. 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.

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.

8. Additional Matters to Consider

a) 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 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.

A creditor whose debt is secured by a mortgage, lien or other security device is prevented from pursuing the usual collection remedies when the debtor is deceased. 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.

1) 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 Tex. 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.
2) 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. Folliott, 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.
3) 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.

b) 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.

1) Automatic Stay: the automatic stay commences immediately upon the filing of the bankruptcy petition. 11 U.S.C. §362. The automatic stay prevents all creditors from taking any kind of collections action against the debtor in bankruptcy. However, 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.
2) 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.
3) 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, contact underwriting.

c) 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.

Tex. Prop. Code §51.015 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.

Note: National Investors 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: https://scra.dmdc.osd.mil

d) 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.

e) 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.

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) to confirm that a receivership is not pending.

f) 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.

- 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.
- The substitute trustee can be appointed either in the notice of sale or in a separate appointment of substitute trustee document.
- 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. Tex. Prop. Code §51.0025.

g) Lien Reattachment

Inferior liens are not affected by the foreclosure of a senior lien if the mortgagor/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.

9. Deed in Lieu of Foreclosure

A Deed in Lieu of Foreclosure is not the same as a non-judicial foreclosure and should not be treated as such. See the Deed in Lieu of Foreclosure section of this Supplement for more information.

10. Insuring after a Foreclosure Sale

Foreclosure presents significant title insurance risk. Foreclosure always runs the risk of a void sale or a voidable sale:

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.

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.

National Investors will not provide title insurance to a buyer or lender at a foreclosure sale.

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 applicable foreclosure requirements under Tex. Prop. Code §51.002 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, contact 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, contact 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 transferred 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. if the deed of trust being foreclosed secures a home equity loan, tax lien transferred prior to May 29, 2013, or homeowner assessment lien, 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 where a bankruptcy is pending, contact 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.

Y. Forfeitures of Real Property Under Federal Drug and RICO Laws

Real Property is subject to forfeiture if it facilitates an illegal activity (such as drug trafficking) or is the traceable proceeds of an illegal activity. The most common federal forfeiture statutes are:

- 21 U.S.C. 853 (drug abuse): A criminal "in personam" forfeiture requiring that the defendant individual be convicted of a crime.
- 18 U.S.C. 1963 (RICO): criminal "in personam" forfeiture requiring that the defendant individual be convicted of a crime.
- 18 U.S.C. 982 (money laundering, financial institution crimes, counterfeiting, wire and mail fraud, theft and fraud, etc.): A criminal "in personam" forfeiture requiring that the defendant individual be convicted of a crime.

On occasion, National Investors receives a request to insure property which was acquired by U.S. Marshall's office through one of the above federal forfeiture proceedings. We will not rely on a federal forfeiture to terminate the interest of innocent parties, including owners, governmental liens (such as tax liens) or to terminate mortgages held by institutional lenders or to terminate easements or restrictions.

All files which include property acquired through federal foreclosure or interests terminated through federal foreclosure are considered high risk and must be approved by Texas underwriting counsel.

Z. Geothermal Energy

Geothermal energy and associated resources below the surface of land are owned as real property by the landowner; or the owner of the surface estate of the land if the surface estate and the mineral estate of the land have been severed. The owner of the geothermal energy and associated resources below the surface of land and the owner's lessee, heirs, or assigns have the right to drill for and produce the geothermal energy and associated resources. The Texas Insurance Code allows title insurance companies to take general or special exception to the geothermal energy and associated resources below the surface of the land.

Schedule B Requirement: All commitments and policies issued after September 18, 2023, must contain the following exception:

> All leases, grants, exceptions, or reservations of the geothermal energy and associated resources below the surface of the land, together with all rights, privileges, and immunities relating thereto, appearing in the public records, whether they are listed in Schedule B or not, as provided by Sect. 2703.056(a) of the Texas Insurance Code.

AA. Guardianship

A minor or other person with a legal disability does not have authority to sell real estate under their own name. Instead, they must be represented by a Guardian of the Estate which has been appointed by a Texas court on their behalf. A Guardian of the Estate does not have unilateral authority to sell the ward's property but must receive permission from the court to do so. Tex. Est. Code 1158.001. There is a four-step closing process to accomplish this.

PRE-CLOSING REQUIRED STEPS

1. Step One: Application for the Sale of Real Estate: This application must be filed with the Court by the guardian. A hearing by the Court must then be held.

2. Step Two: Order of Sale: The court reviews the application to sell and issues an order granting the guardian the power to sell the property. Ideally, steps one and two should happen before a realtor begins marketing the property. Without these two steps the guardian does not have the authority to sell the property so any contract signed by the guardian may be unenforceable if the court does not later award the power to sell.

CLOSING REQUIRED STEPS

Once step one and two above have happened the guardian can go under contract and work towards closing. Closing and funding do not occur on the same day in a guardianship transaction because there are two more steps required before funding can be permitted. Although the documents may be signed by all parties, the parties must realize at closing that they are closing "into escrow" and that we cannot fund the transaction until the steps below have been completed.

3. Step Three: Report of Sale: Once documents have been signed the guardian files a Report of Sale with the court. It is important to note here that no changes may be made to the Closing Disclosure once it has been submitted to the court. This means that all parties must consent at closing to not prorate based on the date of funding and only on the day of closing.

4. Step Four: Decree Confirming Sale: The final piece is getting the Decree Confirming the Sale. This is the order from the court that authorizes the sale of the property. This order is issued by the Court after a waiting period. The decree will outline the terms of the sale, with which the sale must comply. The waiting period largely depends on the guardian's timeliness of getting the documents to the judge. It is really important for a realtor working on a guardianship transaction to set a reasonable expectation for the customers since the waiting period is up to the court. It is typically 5-10 business days in larger counties and could be much longer in smaller counties. Until the decree is issued all parties are in a holding pattern on funding.

1. Schedule C Requirement

Company has been advised that _____ is a minor. Company requires compliance with the guardianship laws of the State of Texas governing the sale of real property. Company must be provided with Letters of Guardianship for the Guardian of the Estate of _____. Specific to the subject property, Company must be provided with an Application for Sale of Real Property, an Order of Sale, a Report of Sale, and a Confirmation of Sale. The Warranty Deed executed by the Guardian of _____ must refer to and identify the decree of the court that

confirmed the sale upon the completion of the following requirements in the Probate Court:
1) Application for Sale filed,
2) Order of Sale signed by the judge,
3) Report of Sale filed, and
4) Decree Confirming Sale signed by the judge. The Warranty Deed executed by the Guardian of the Estate of _____ must refer to and identify the decree of the court that confirmed the sale.

2. Additional Considerations

A person who has been declared incompetent by another state's court is not competent to sign documents in Texas. However, the Guardian appointed in that other state is not authorized under Texas law to act on the ward's behalf. The Guardian may have to open an ancillary guardianship in Texas. Alternatively, if the amount of the ward's interest in the property being sold is less than $250,000 (or less than $100,000 if prior to September 1, 2023), then the property may be sold under the court proceeding set out in Tex. Est. Code §1351.051.

A Guardian of the Person appointed in Texas does not have authority to sell property of the ward. It must be the Guardian of the Estate. If no Guardian of the Estate has been appointed by a Texas court, and the amount of the ward's interest in the property being sold is less than $250,000 (or less than $100,000 if prior to September 1, 2023), then the property may be sold under the court proceeding set out in Tex. Est. Code §1351.051.

BB. 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 (such as Texas city of county governments), 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 the 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 Funds," 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.

Note - 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 – 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 the 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.

1. Underwriting Guidelines

- Be ever vigilant in determining that all funds necessary to disburse every debit in a file must be "good funds" meaning collected, and available, 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.
- Remember that a personal check is only good funds if it is less than $1,500.
- An Official Check is not acceptable unless verified as a Teller's Check.
- Wired funds are always preferable to all other means of transferring money.

- Do not accept checks issued by foreign banks – only accept wired funds.
- An escrow officer has significant discretion in determining whether 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.

2. Cryptocurrency

Cryptocurrency of any kind is not "Good Funds". See Bulletin No. 2022-140. National Investors will not insure a transaction where the consideration is paid in cryptocurrency. If the cryptocurrency is converted to U.S. dollars by the parties (not the title agent) prior to closing, and the following guidelines are followed, however, National Investors will insure without additional underwriting approval:

a) Schedule C Requirement:
If the contract calls for payment in the form of cryptocurrency, the value of the cryptocurrency in U.S. dollars must be determined prior to closing by the parties based on the market price of the cryptocurrency as indicated on a reputable crypto exchange or by a reputable crypto currency processer. The determination must be made no earlier than 72 hours prior to closing. The parties must agree in writing to the exchange rate, and the agreement must be submitted to the Company for review prior to closing. The consideration must be converted to and paid in U.S. dollars in the form of "Good Funds" as that term is defined by Procedural Rule P-27. Once converted to U.S. dollars and agreed to by the parties, the insured amount will also be the basis for the calculation of any withheld amounts (e.g., FIRPTA) related to the transaction.

b) Schedule B Exception:
Any claim or allegation relating to the amount of consideration paid, where the amount of the consideration was determined by the purchase price of the property converted from cryptocurrency to U.S. dollars.

CC. Homestead

1. Advantages of a Texas Homestead

There are two primary advantages for a person who establishes a Texas homestead.

1. Protection From General Creditors. The primary advantage of a Texas homestead is that the homestead is exempt from all liens except those that are constitutionally permitted. [Tex. Const. Art. XVI §50; Tex. Prop. Code §41.001]. This means the homestead is exempted from forced sale by general creditors.
2. Exemption For *Ad Valorem* Tax Purposes. The second advantage of a Texas homestead is the availability of a homestead exemption that reduces the amount of local *ad valorem* taxes owed by the owner. [Tex. Tax Code §11.13].

Note. A person can own property in Texas but not establish that property as their Texas homestead. However, that person can still claim that property as their homestead under federal bankruptcy laws and protect it from creditors.

Note. If a person lives outside of Texas, but owns property in Texas, they can still claim the Texas property as their Texas homestead for various purposes. We might need to confirm the individual owns property outside Texas and have them sign a non-homestead affidavit as to the Texas property in certain situations.

2. Creation of a Homestead

A formal written homestead designation is not required to establish a homestead, but it helps. To establish a homestead as to protection against general creditors, a person must:

1. Intend that the property be the homestead and:
    a. show overt acts of usage and occupancy. or
    b. engage in preparatory acts toward the actual occupancy within a reasonable time. And
2. Own the real property or have a present possessory estate (leasehold) in the real property.

Note. A person can have a homestead interest in the property that they are leasing. However, this is not a sufficient homestead interest for some purposes, such as home equity loans.

3. Types of Homesteads

A single adult person or a family may claim an urban or rural homestead as follows:

1. Urban. If used for the purposes of an urban home or as both an urban home and a business, any lot or contiguous lots (including improvements) up to 10 acres located in a city, town, or village. [Tex. Const. art. XVI §51; §41.002 TPC]. An urban homestead consists of the dwelling house comprising the residence, the land and the appurtenances therewith. As of January 1, 2000, the Texas Constitution and Tex. Prop. Code were amended to: (i) require an urban homestead to be limited to contiguous lots; and (ii) prohibit a separate, standalone business homestead.
2. Rural. If used for the purposes of a rural home, any tract or tracts of land (including improvements) up to 200 acres for a family, and up to 100 acres for a single adult person, not located in a city, town, or village. [Tex. Const. art. XVI §51; §41.002 TPC]. One of the tracts of land must include the permanent residence and the remainder of the land must be used to support

the family.

4. Statutory Presumption of an Urban Homestead

A homestead is presumed to be urban if, at the time the designation is made, the property is:

1. Located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision; and
2. Served by police protection, paid or volunteer fire protection, and at least three of the following services provided by a municipality or under contract to a municipality: (Electric, natural gas, sewer, storm sewer and water)

5. What Liens are Valid Against the Homestead

A Texas homestead is exempt from seizure for claims of creditors except for encumbrances properly fixed on homestead property. Encumbrances may be properly fixed on homestead property for:

1. Purchase money;
2. Taxes on the property;
3. An owelty of partition imposed against the entirety of the property by court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other resulting from a division or an award of a family homestead in a divorce proceeding;
4. The refinance of a lien against a homestead, including a federal tax lien resulting from the tax debt of both spouses, if the homestead is a family homestead, or from the tax debt of the owner;
5. Work and material used in constructing improvements on the property if contracted for in writing as provided in §53.254(a), (b), and (c);
6. Home equity loan;
7. Reverse mortgage;
8. The conversion and refinance of a personal property lien secured by a manufactured home to a lien on real property, including the refinance of the purchase price of the manufactured home, the cost of installing the manufactured home on the real property, and the refinance of the purchase price of the real property.

6. Abandonment of the Homestead

A homestead may be lost by the abandonment of the property as the homestead, however, a temporary absence from the homestead does not constitute abandonment. Whether or not the absence constitutes an abandonment is very fact specific. Some examples:

- A debtor's temporary absence to serve a prison sentence does not constitute abandonment.
- A pro football player's post trade absences for 3-4 months and 4-5 weeks are not sufficient to show abandonment.
- A debtor's 10 years in Arizona was not abandonment where debtor: (i) traveled frequently, (ii) did not buy new home, (iii) left furnishings in place, and (iv) returned home to Texas 2-4 times a year.

The temporary renting of the homestead to another does not in and of itself constitute abandonment. [Tex. Const. art. XVI §51; §41.003 TPC]. Generally, to constitute abandonment, there must be discontinuance of use, coupled with the intention not to use the property as a homestead again.

If a homestead claimant is married, a homestead cannot be abandoned without the consent of the

claimant's spouse.

7. Pretended Sales of Homestead are Void

A pretended sale of the homestead is void, that is, it is as if the sale never happened. Examples:

- sale to a relative where the seller will continue to live in the property;
- a sale/leaseback to a third party; and
- sale to a legal entity owned by the seller.

Note: National Investors will not insure any transaction involving a pretend sale of a homestead.

Effective September 1, 2023, the Texas Legislature established a method for certain rural property owners to transfer property to a legal entity owned by that property owner and have it affirmatively established that the transfer is not a pretended sale of a homestead. Tex. Prop. Code §41.0022. National Investors will insure a loan on property transferred to a legal entity following this procedure if the property owner, at the time of the transfer, has other established homestead property in Texas. Contact underwriting for approval if an affidavit relating to this transfer, usually titled "Affidavit Regarding Conveyance to an Entity", is discovered in a title examination.

8. Judgment Liens and the Homestead

An abstract of judgment constitutes a lien and attaches to any real property of the defendant, other than real property exempt from seizure or forced sale under Chapter 41 of the Tex. Prop. Code, the Texas Constitution, or any other law, that is in the county in which the abstract is recorded and indexed. [§52.001 TPC].

Effective September 1, 2021, Texas Property Code §52.0012 was amended to provide a procedure allowing an owner to record an affidavit in the real property records claiming a property as a homestead and notifying a specific creditor of that notice. The recording of the affidavit and certificate of mailing operates as a release of the judgment lien unless the creditor records a contradicting affidavit in the real property records within 31 days. Note that this affidavit/release procedure is only effective as to judgment liens abstracted on or after September 1, 2007. See Bulletin 2024-157 for a more complete discussion of the procedure.

Underwriting Requirement. A title agent must verify everything in Bulletin 2024-157 and the accompanying Checklist has been completed before using this procedure to clear an Abstract of Judgment on Schedule C. Contact underwriting with questions.

9. Sale of the Homestead by a Married Person

Whether the homestead is the separate property of either spouse or community property, neither spouse may sell, convey, or encumber the homestead without the joinder of the other spouse. Tex. Fam. Code §5.001. That is, if the property is the homestead of a seller, and that seller is married, the spouse of that seller must also sign the deed. It does not matter if the sellers are "separated" or in the middle of a divorce or if one spouse lives overseas. There is a method under the Family Code for one spouse allowing the sale of the home by one spouse only "under unusual circumstances", but it requires a court order.

Note that if the property is the homestead of one spouse, it is, under Texas law, the homestead of the other spouse. Spouses cannot have two separate Texas homesteads.

Although Texas does not recognize the legal status of "separated", some married individuals still consider themselves separated once they stop living together. In this situation, the title agent may receive push back from the sellers, particularly if the homestead is the separate property of one of the spouses, even though Texas law still requires both to sign the deed. Some separated couples have found the following Grantor line to be palatable:

> _____, a married person, joined herein by their spouse, ____, to convey any homestead and/or community property rights.

DD. Hospital and Institutional Liens

Hospitals are entitled to record a lien in the real property records against individuals who owe money for services rendered. However, these types of liens do not attach to real property. Tex. Prop Code §55.005. They can be shown on Schedule C of the title commitment as "FOR INFORMATION ONLY", but there is no requirement that they be released and should not be placed in Schedule B of the title policy.

The Hill-Burton Act of 1946 allows the federal government to recover funds from the owner or transferee of a medical facility after construction of improvements funded by federal funds. The Act also contains restrictions for usage of the property for purposes other than its original use. Therefore, the Hill-Burton Act should be considered when the property is, or has been, owned by a community hospital or other medical care institution. See National Investors' Bulletin "Hill-Burton Funds for Medical Facilities or Hospitals" and the General Underwriting Principles Manual for underwriting and closing requirements.

EE. 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 licensed 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 the 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).

Per P-58, National Investors sends a report annually to the Texas Department of Insurance about the HOI policies that it signs. This report is sometimes referred to as the DIPP report (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.

Underwriting logistics:

HOI/directly issued policies should be completed in all aspects by the title agent using standard promulgated forms generated from the National Investors electronic policy system (iJacket). Policies to be signed, as well as the fully completed and signed T-00 Verification of Services Rendered, may be emailed to hoi@nititle.com. Alternatively, hard copies may be sent to:

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

Policies will be signed by an authorized officer of National Investors and emailed back to the agent.

Note that a fully completed and signed T-00 Verification of Services Rendered must accompany the policy(ies).

FF. Homeowners' Associations / Property Owners' Associations

A homeowners' association (HOA), also called a property owners' association (sometimes referred to as POA (although that 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. It 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 Tex. Prop. Code §201, §204, §205, §206, §210 and §211, generally) or apply only to certain types of property (see Tex. Prop. Code §208, as to historic property). Other statutes govern associations across the state, as follows:

Tex. Prop. 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 if 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. For closing purposes, it is important to note that the homeowners' association may charge a fee for the Resale Certificate and has 10 business days from receipt of that fee to deliver the Resale Certificate to the title company.

Tex. Prop. Code §209 is styled the Texas Residential Property Owners Protection Act. §209.004 requires the association to record a Management Certificate, listing information relating to the association, in the real property records of each county where any portion of the managed subdivision is located and to post that some information on the Texas Real Estate Commission Website at hoa.texas.gov. §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 prohibits 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: 1) priority of the lien securing unpaid assessments, 2) easements in favor of the association, and 3) conditions on the property which violate restrictive covenants.

1) 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 underwriting counsel for 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.**

2) 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 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.**

3) 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. See Texas Endorsement Manual for more information. **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. HOA Liens and Restrictive Covenants

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 on the Owner's Title Policy as follows:

> Lien to secure assessment by [Name of Homeowners' Association] as set forth in document recorded in _____.

The above exception should be added to any Loan Policy issued 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 the following language may be added after it, pursuant to P-64: "Company insures the insured against loss, if any, sustained by the insured under the terms of the Policy if this item is not subordinate to the lien of the insured mortgage.".

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 the 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 – Tex. Prop. Code §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.

As of February 1, 2023, the standard TREC contract says that payment of a transfer fee assessed by property owners' associations is governed by the Addendum for Property Subject to Mandatory Membership in Property Owner Association, a standard addendum to TREC contracts.

2. Insuring after Foreclosure of HOA Lien

National Investors rarely insures within the first year of foreclosure of an assessment lien. There are redemption rights and notice rights in favor of lienholders as well as the property owner. By the time the HOA sends notice of the foreclosure sale (post-sale) to the owners and lienholders within 30 days of the sale, and then records an affidavit of the foregoing notice within 30 days of sending to the owner and lienholders, and the 180-day redemption period has run (begins to run from date of written notice of sale), 7 or 8 months have elapsed. Lienholders may not redeem until after the initial 90 days of the 180-day redemption period. If an owner or lienholder sends notice of intent to redeem, there may be extensions of the redemption period per the statutes. By the time all the various statutory redemption periods run, it can be closer to 9 months. There is a statutory prohibition against the buyer conveying the property during a redemption period.

Titles derived through HOA assessment lien foreclosures have been the source of a fair number of claims. The foregoing is why most underwriters do not consider insuring until one year after the foreclosure – and that is if the foreclosure was carried out properly.

National Investors is not willing to insure a transaction during the redemption period. We would be willing to take a close review of it after the redemption period has run.

GG. Indemnification

Indemnification is the act of one party agreeing to a second party that they will guarantee against, or compensate for, losses that the second party has incurred or will incur because of a specified incident.

Note: Indemnification should be used as a last resort to cure clouds on title. For example, if a release of a deed of trust lien is missing in the real property records, it is better to obtain and record a release of lien document than to rely on the Texas Master Indemnity Agreement, as described below.

Indemnification can be obtained for title matters by relying on the Texas Master Indemnity Agreement or requesting a Specific Letter of Indemnity.

1. Texas Master Indemnity Agreement

National Investors has signed the Texas Master Indemnity Agreement with several other underwriters in Texas, as provided by the Texas Department of Insurance. If examination reveals certain defects in title and the owner of the property has an owner's title policy issued by one of the underwriters with which National Investors has a signed Texas Master Indemnity Agreement and that policy does not take exception to the defect, then, under certain conditions, National Investors may also insure without exception to the defect.

If the answer to each of the following questions is "yes", the title agent may rely on the Texas Master Indemnity Agreement to issue a National Investors policy without exception to the potential defect or unleased lien:

1. National Investors has a Master Indemnity Agreement with the underwriter on the prior policy.
2. A copy of the prior policy is in the title agent's file.
3. The potential exception is either:
    a. a vendor's lien, deed of trust, mortgage, mechanic's lien contract, home equity lien, reverse mortgage, owelty, lien or other consensual lien; or
    b. an abstract of judgement lien, federal tax lien, state tax lien, federal lien securing of payment of criminal fine or restitution pursuant to 18 USC §3613 or appropriate state law against a predecessor in title (not the seller or mortgagor in the current transaction).
    c. **The following liens are NOT covered by the Master Indemnity**:
        i. Mechanic's liens by affidavit;
        ii. Child support liens;
        iii. *Ad valorem* (property) taxes or liens securing the payment of taxes; or
        iv. Municipal or county code compliance liens, including weed or sanitation liens, demolition liens, street assessment or paving liens, or utility liens.
4. The prior policy is either:
    a. An Owner's Policy issued to the seller in the current transaction; or
    b. A Loan Policy issued to a lender that (i) has acquired title to the property be foreclosure or a deed in lieu of foreclosure and (ii) is the seller or mortgagor in the current transaction.
5. The prior policy covers all or some of the land to be insured by the new National Investors policy.
6. The lien was recorded before the date of the prior policy.
7. The lien was not listed as an exception to the prior policy.
8. The aggregate amount of the lien(s) is less than $500,000.

9. The aggregate amount of the lien(s) is less than the face amount of the prior policy.
10. The real property records do not contain any notice of foreclosure proceedings, levy actions or other proceedings related to the lien.
11. The face amount of the new National Investors policy does not exceed the prior policy by more than 25 percent.
12. The seller in the current transaction will execute a General Warranty Deed.

If the answer to any of the above questions is "no" or you need assistance, send a copy of the prior policy and the title commitment to underwriting for review.

2. Specific Letter of Indemnity

If examination reveals a potential defect in title, the title agent should try to clear up the defect. However, in some cases, the defect cannot be cleaned up sufficiently nor can it be handled under the terms of the Texas Master Indemnity Agreement. In such cases, with underwriting approval, the agent may obtain a Specific Letter of Indemnity from the underwriter that issued the seller's owner title policy which did not take exception to the defect.

3. Requests for Specific Letters of Indemnity from National Investors

Just as National Investors may, at times, rely on a Specific Letter of Indemnity from a prior insurer, other underwriters or agents may also request Specific Letters of Indemnity from National Investors. All such requests should be sent to underwriting for handling.

All requests should contain the following information:

1. Email the request to texasunderwriting@nititle.com.
2. The issue(s) for which the Letter of Indemnity is being requested
3. The date of closing (if known)
4. Include copies of:
    a. The current Owner's Policy;
    b. The current commitment identifying the issue(s) for which the Letter of Indemnity is being requested; and
    c. Any supporting documents for those issues (i.e., mortgage, deed of trust, judgment, etc.)

HH. Insured Closing Letter

The Insured Closing Letter (ICL) is also known as the Insured Closing Service or Closing Protection Letter (CPL). It is a promulgated form issued to the lender, buyer, or seller in a transaction, at that party's request, that provides additional coverage for certain escrow matters at no cost.

1. ICL issued to Lender

At the lender's request, the title agent may issue the T-50 Insured Closing Service letter to the lender in a transaction. In this letter, National Investors agrees to reimburse the lender for any losses incurred on the transaction if the title agent fails to follow the lender's closing instructions, generally, and for losses due to the fraud or dishonesty of the title agent when handling the lender's funds. There are many conditions and exclusions to this coverage which are detailed in the T-50.

The ICL should be addressed to the lender only. It is not appropriate to put "successor and/or assigns" language after the lender's name, as they are already covered under paragraph (B) of the ICL. It is not appropriate to address the ICL to "MERS as nominee for . . .", as MERS (Mortgage Electronic Registration Systems, Inc.) is a registration database and not a lender.

2. ICL issued to Buyer or Seller

In a transaction over $500,000, at the request of the buyer or the seller, the title agent may issue to said buyer or seller the T-51 Insured Closing Service Letter. In this letter, National Investors agrees to reimburse the named party for losses due to the fraud or dishonesty of the title agent when handling the party's settlement funds.

3. iJacket

Insured Closing Letters are insuring forms signed by National Investors. Every ICL issued by a title agent needs to be registered with National Investors. The best way to do this is to pull the ICL through the iJacket system, either through the website or through its integration with your title software.

II. Life Estate Deed and Lady Bird Deed

It is possible for a property owner to convey ownership of the property to a third party but retain the right to reside in the property for the rest of the owner's lifetime. This is generally called a "life estate deed" and will contain language similar to the following:

> "Grantor reserves, for Grantor and Grantor's assigns, a legal life estate in and to the Property for the remainder of Grantor's life, including rights to full possession, benefit, use, rents, revenues, and profits of and from the Property, until the death of Grantor (the "Life Estate") at which time full legal and equitable title to the Property shall automatically vest in Grantee, free of any interest of Grantor, Grantor's successor, heirs, and/or assigns. Grantor shall have the right to reside in the Property without rent or charge during the Life Estate."

The Grantee in the above does not obtain fee simple title to the property, that is, complete title to the property, until the Grantor has died.

If the vesting deed is a life estate deed, then Schedule A, item 3 "record title" should list both the Grantor and the Grantee named in the life estate deed:

Grantor (as to a life interest)
Grantee (as to a remainder interest)

If the transaction is the sale of property in which someone has a life interest and someone has a remainder interest, then both interests must be conveyed or otherwise accounted for. If both the life estate holder and the remainderman are still alive, then both will sign the conveyance deed transferring title to the purchaser on the transaction. If the life estate holder has died, then the title agent should obtain a copy of the death certificate and the remainderman should execute an Affidavit of Death stating the facts of the life estate holder's death. The Affidavit of Death should be recorded in the real property records. This will evidence the fact that title is now fully vested in the remainderman. The remainderman would now be the only person to sign the deed to the new owner. Contact underwriting for a sample Affidavit of Death, if needed.

There is a specific type of Life Estate Deed known as an "Enhanced Life Estate Deed" or "Lady Bird Deed". In the Enhanced Life Estate Deed, the grantor retains the right to live on, use, possess and collect income from the property, mortgage or sell the property and keep the proceeds, and revoke or amend the Enhanced Life Estate Deed.

If the vesting deed is an Enhanced Life Estate Deed, then only the life estate holder is necessary to mortgage or sell the property. The named remainderman has no interest in the property until the life estate holder dies. If the life estate holder has died, then the title agent should obtain a copy of the death certificate and the remainderman should execute an Affidavit of Death stating the facts of the life estate holder's death. The Affidavit of Death should be recorded in the real property records. This will evidence the fact that title is now fully vested in the remainderman. The remainderman would now be the only person to sign the deed to the new owner. Contact underwriting for a sample Affidavit of Death, if needed.

JJ. Loan Policy Aggregation Endorsement

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, contact underwriting 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.

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 to question the lender or servicing agent placing the title policy order upfront as to the full nature of the collateral and its location.

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

KK. Mechanic's and Materialmen's Liens

1. Insuring Construction Loans

Funds advanced for "immediately contemplated improvements" are any funds during the life of the loan that will be advanced for new construction or repairs to the real property. This might be as simple as a new roof on a house or funds for complete installation of sewage, electrical, and paving of a new neighborhood. These loans can have names like development loans, construction loans, repair loans, hard money loans, etc. It is imperative that the title agent ask the lender what for the purpose of the funds advanced.

If any of the funds will be used for construction of any kind, the title agent needs to:

1. Put the P-8 Exceptions in the title commitment;
2. Verify that no construction has started prior to closing; and
3. Obtain an Affidavit of Non-Commencement

Each of these is detailed below.

2. P-8 Exceptions

Subcontractors and suppliers who provide work or supplies for construction may have a lien against the property even though no written lien claim is recorded. The priority of those liens can relate back to the first day that any construction began on the property (not just the day that claimant began working or brought supplies to the site).

In Texas, we are protected against these claims during the construction period through the exceptions required under Procedural Rule P-8.

a) Owner's Policy Exceptions

If the insured amount includes the cost of "immediately contemplated improvements" (such as new construction or repairs), the following exception must be added to Schedule B of the Owner's Policy:

> Any and all liens arising by reason of unpaid bills or claims for work performed or materials furnished in connection with improvements placed, or to be placed, upon the subject land. However, the Company does insure the Insured against loss, if any, sustained by the Insured under this Policy if such liens have been filed with the County Clerk of _____ County, Texas, prior to the date hereof.

The Owner's Policy must also contain the following "Liability" paragraph, where the blank is completed with the purchase price of the real estate:

> Liability hereunder at the date hereof is limited to $_____. Liability shall increase as contemplated improvements are made, so that any loss payable hereunder shall be limited to said sum plus the amount actually expended by the Insured in improvements at the time the loss occurs. Any expenditures made for improvements, subsequent to the date of this policy, will be deemed made as of the date of this policy. In

no event shall the liability of the Company hereunder exceed the face amount of this policy. Nothing contained in this paragraph shall be construed as limiting any exception or any printed provision of this policy.

b) Loan Policy Exceptions

- If the insured amount includes the cost of "immediately contemplated improvements" (such as funds for new construction or repairs), the following exception must be added to Schedule B of the Lender's Policy:

  Any and all liens arising by reason of unpaid bills or claims for work performed or materials furnished in connection with improvements placed, or to be placed, upon the subject land. However, the Company does insure the Insured against loss, if any, sustained by the Insured under this Policy if such liens have been filed with the County Clerk of _____ County, Texas, prior to the date hereof.

- The Loan policy must also contain the following "Pending Disbursement" paragraph:

  Pending disbursement of the full proceeds of the loan secured by the lien instrument set forth under Schedule A hereof, this policy insures only to the extent of the amount actually disbursed but increases as each disbursement is made in good faith and without knowledge of any defects in, or objections to, the title up to the face amount of the policy. Nothing contained in this paragraph shall be construed as limiting any exception under Schedule B, or any printed provision of this policy.

3. Independent Verification of No Construction

As close to closing as possible (preferably the day before), the title agent should do a personal, visual inspection of the property to be insured and verify that the construction that is the subject of the loan has not yet begun. For instance, if the loan is for the construction of a new roof, the title agent should verify that no roofing supplies have been delivered to the house, no one has started stripping off the old roof, and no one has started installing a new roof. If the loan is for the construction of a new house, the title agent should verify that no has started grading the property, delivered construction materials, poured a foundation, or similar activities. The title agent does not have to be an expert in construction but should make reasonable efforts to verify that no work has begun.

Alternatively, the title agent may rely on dated photographs from the lender's representative of the site that indicate that no work has begun.

If construction work has begun at the site, the title agent should take pictures, and contact the lender and underwriting. In most situations, the closing will be postponed until it can be verified that every contractor that has begun work or delivered materials has been paid for the work they have done to date.

4. Affidavits of Non-Commencement and Commencement

At closing, the property owner and original contractor should execute an "Affidavit of Non-Commencement" to establish that the construction has not yet begun as of the date that the deed of trust lien is established. Recording this Affidavit is not required. The Affidavit should be substantially similar to this Affidavit of Non-Commencement sample form.

For policies in which the insured amount includes immediately contemplated improvements, National Investors recommends that a "Commencement Affidavit" be signed by both the property owner and original contractor and filed with the county clerk where the property is located to comply with Tex. Prop. Code §53.124(c). The deadline to file this Affidavit is the 30th day after either the date of actual commencement of construction or the first delivery of materials to the land. The Affidavit should be substantially like this Commencement Affidavit sample form.

5. Insuring Recent Construction or Removing the P-8 Exceptions

As previously mentioned, the priority of mechanic's and materialman's lien claims can relate back to the first day that any construction began on the property (not just the day that claimant began working or brought supplies to the site). The risk of an unfiled lien is why truthful and complete Final Bills-Paid Affidavits and Affidavits of Completion from the General Contractor/Builder and Owner/Purchaser are so important when insuring a sale or permanent loan on a new home/improvement.

For policies insuring recently completed construction or to remove the P-8 language from a construction policy, National Investors requires additional procedures:

1) "Final Bills-Paid Affidavit (with Owner's Acceptance)": National Investors requires a "Final Bills-Paid Affidavit" from the Original Contractor in compliance with Section 53.259 of the Texas Property Code. The affidavit should be substantially similar to this Final Bills-Paid Affidavit sample form. The Owner should also join in the execution of this form to 1) evidence their acceptance, 2) confirm that all work has been completed and 3) confirm that, to their knowledge, all bills have been paid.

2) "Lien Waiver": National Investors requires Lien Waivers from subcontractors when:
   a) The "Final Bills-Paid Affidavit" indicates that subcontractors or suppliers remain unpaid;
   b) Any subcontractor or supplier has filed a Lien Claim Affidavit; or
   c) Any escrow agent has notice that a subcontractor or supplier claims to be unpaid.

3) "Affidavit of Completion": National Investors recommends an "Affidavit of Completion" be executed and filed with the County Clerk prior to the removal of the P-8 Exceptions.
   a) Both the Owner/Purchaser and Contractor/Builder should sign the Affidavit.
   b) The "Affidavit of Completion" should be substantially similar to this Affidavit of Completion sample form.

4) Verify with the lender that all funds have been disbursed and all bills, subcontractors, and suppliers have been paid.

5) Run a current title search to confirm that no MML claims have been filed against the property.

6. Recorded Mechanic's and Materialman's Lien Claims

1) Do not insure over a recorded MML Claim without a waiver, bond, or underwriting counsel approval.
2) Do not rely on a foreclosure as a "cut-off" of the MML claim without Underwriting Counsel approval.
3) Immediately prior to closing, always obtain a current title search to confirm:

a) No involuntary liens in a name search against Owner/Borrower.
b) No recorded MML claims against Builder/Contractor.
c) If there are no liens against Owner/Borrower and Builder/Contractor, you may rely on an acceptable Bills Paid Affidavit signed by Owner/Borrower and the Builder/Contractor.

LL. Minerals

National Investors will not insure the mineral estate to property. The title policy or commitment is not a representation of title even as to the mineral estate.

1. Underwriting Requirements

There are two ways to ensure that the title policy does not insure minerals, and each title commitment and policy must contain one or the other, according to Procedural Rule P 5.1.

Option 1: Schedule A, item 2, may contain the mineral exception, as follows:

> The interest in the land covered by this Commitment is: Fee simple subject to and Company does not insure title to, and excepts from the description of the Land coal, lignite, oil, gas, and other minerals in, under and that may be produced from the Land, together with all rights, privileges, and immunities relating thereto.

Option 2: Schedule B may contain what is known as the "general mineral exception":

> All leases, grants, exceptions or reservations of coal, lignite, oil, gas and other minerals, together with all rights, privileges, and immunities relating thereto, appearing in the Public Records whether listed in Schedule B or not. There may be leases, grants, exceptions or reservations of mineral interest that are not listed.

2. Endorsements

Upon request by the insured, and if it meets National Investors' underwriting standards, the title agent may issue the T-19.2 and T-19.3 Mineral and Surface Damage Endorsements, as provided in Procedural Rule P-50.1. See the National Investors Endorsement Manual for guidelines on issuing those endorsements.

3. Schedule B Exception Wording

It is acceptable to list mineral reservations, royalty interests and similar documents of record in Schedule B of the title policy when they are applicable to the subject property. Some of these documents address surface rights to the subject property. According to Procedural Rule P-53, it is not appropriate to state "Surface rights waived therein." after the exception if, in fact, surface rights to the property are waived in the exception document. Instead, the language regarding the surface rights should be quoted directly from the document, something to the effect of ". . . said document contains the language 'surface rights to the property waived by grantor. . . ".

MM. MERP (Medicaid Estate Recovery Program)

The Medicaid Estate Recovery Program, or MERP, is a federal program managed in Texas by the Texas Health and Human Services Commission.to collect Medicaid funds used by an individual for certain medical expenses from that individual's estate after their death. If a deceased property owner was 55 or older on the date of his death, his estate may be subject to a MERP claim. The State of Texas has four years from the date of death to file a MERP claim, even if the subject property has already been conveyed to another person. Therefore, all decedent's estates need to be reviewed for potential MERP claims.

If a decedent's estate has gone through probate, then the appointed executor or administrator has already verified to the court whether the estate was subject to a MERP claim. Therefore, the title agent does not have to do so or worry about paying the MERP claim out of the closing proceeds.

However, if the decedent's property is being transferred by way of intestacy (evidenced by an Affidavit of Heirship) or by way of a Transfer on Death Deed, then the property may be subject to a MERP claim. It is incumbent upon the title agent to see if a MERP claim needs to be paid out of the decedent's funds at closing.

Texas typically will not file a MERP claim if one or more of the following conditions exist; however, it is the responsibility of a representative of the decedent's estate to inform MERP of the condition. It is not the responsibility of the title agent to inform MERP nor can the title agent assume that MERP will not file a claim just because one of the following conditions exists:

- The value of the estate is $10,000 or less;
- The recoverable amount of Medicaid cost is $3,000 or less;
- There is a surviving spouse;
- There is a surviving child or children under 21 years of age;
- There is a surviving child or children who are blind or permanently disabled; or
- There is an unmarried adult child residing continuously in the decedent's homestead at least one year prior to death.

National Investors has developed a flowchart to help you determine whether a MERP determination is required for a particular Decedent.

1. Underwriting Guidelines

If the seller or other person in the chain of title died within the last four years at the age of 55 or older, and their estate has not gone through a court probate process, the title agent must comply with the following steps:

1. Submit a request to the state for certification that the decedent's estate is not subject to a MERP claim. The form for the request is currently found at the HHSC website.
2. You must receive the completed form from the State prior to closing. Assume a three-business day turnaround. Follow up with HHSC if you do not get a response at that timeframe.
3. If the completed form indicates there is a MERP claim, that amount must be paid at or before closing. Contact HHSC for the most current mailing address for payment.
4. If the parties believe the property should not be subject to the MERP claim, they must submit their request to HHS themselves, and the title agent must receive confirmation in writing that the claim has been withdrawn prior to closing.

NN. Minors and Incompetents

1. Selling Property

A person under the age of 18 or a person who has been declared mentally incompetent by a court in any state cannot convey property of any value in Texas without an appropriate court order. Texas provides a statutory alternative to a full guardianship proceeding in certain instances.

a) Minors

If the net value of the property to be sold is equal to or less than $250,000 (or $100,000, if the sale occurs prior to September 1, 2023), then the parent or managing conservator of a minor who is not a ward must obtain a court order to sell an interest of the minor in property without being appointed guardian. Tex. Est. Code §1351.001. Any sales proceeds obtained under this method must be paid into the registry of the court. Note however, that no Guardian must be appointed for the minor.

If a Guardian of the Estate has already been appointed for the minor or the net value of the property is greater than $250,000, then the Guardian of the Estate of the minor must obtain a court order to sell the property. See the Guardianship section above for more information.

b) Incompetents

If the incompetent seller has a Guardian of the Person, but no Guardian of the Estate, appointed by a Texas court, or the seller has a Guardian appointed by a state other than Texas, and the net value of the property to be sold is equal to or less than $250,000 (or $100,000, if the sale occurs prior to September 1, 2023), then the Guardian may obtain an order to sell the property without being appointed guardian of the ward's estate in Texas. Tex. Est. Code §1351.052. Any sales proceeds obtained under this method must be paid into the registry of the court.

In any other situation, if an individual has been declared incompetent by a court, an appropriate individual must be appointed Guardian of the Estate by a Texas court and obtain a court order to sell the property, as set out in the Guardianship section above.

2. Buying Property

There is nothing in Texas law that specifically prohibits a minor from owning real estate. However, concerns arise as to whether a minor can purchase real estate, as that entails entering into a contract with the seller, executing settlement documents with the title company, signing affidavits, etc. National Investors will not insure title in the name of a minor. If a minor wishes to take title to real estate through a purchase or similar arrangement, National Investors will require the minor to take title under the Texas Uniform Transfers to Minors Act.

OO. Mobile and Manufactured Homes

Manufactured Homes, also known as Mobile Homes (MH), in Texas are governed by the Texas Manufactured Housing Standards Act, or Texas Occupations Code Chapter 1201. This Act is administered by the Texas Department of Housing and Community Affairs (TDHCA).

A MH starts out in Texas as a piece of personal property. It can be moved around, just like a car. It also has a "title", like a car, called a Statement of Ownership (SO). TDHCA has a database of all MHs in Texas and the data that is listed on the SO. Any lien placed against the MH, such as a purchase money loan, must also be listed on the SO.

Anytime a personal property MH is moved, or its ownership is changed, the owner must apply for a new SO with TDHCA.

A MH can remain personal property, or it can become real property. To officially become real property, it must be permanently affixed to the land, its owner must apply for a new SO electing to treat the MH as real property, and the SO must be recorded in the real property records in which it is located. Once perfected, the MH is part of the real property, is taxed as real property, and is treated as real property for title insurance purposes, just as if it were a regular 1-4 family residence. No further SO is ever needed unless the MH is removed from the land and turned into personal property again. See Tex. Occ. Code §1201.2055(g).

1. If Mobile Home is Personal Property

a) The value of the MH is not included in the amount of insurance on the title policies.
b) The MH should be excluded from coverage on the title policies. Schedule B exception should read "This policy covers only the land described in Schedule A, and specifically excludes all improvements, including but not limited to the manufactured home located on such property. The coverage of this policy does not extend to any lien on such manufactured home or to any consequences of foreclosure or attempted foreclosure of any such lien."

2. When Financing a Personal Property MH into a Real Property MH

A common loan structure is to refinance the loan against a personal property MH along with a loan against the land underneath it into a single mortgage loan. To do this, the MH must be converted to real property.

Schedule C Requirement:

> Title Company has been advised that the loan to be insured is a refinance of a personal property lien against a manufactured home. The following requirements must be satisfied in order to insure the new lien.
>
> a. The loan document ("Security Document") creating the lien against the manufactured home (for example, retail installment contract, security agreement) must be provided to the Title Company for review. The Security Document must state that the lien against the manufactured home is a vendor's lien, a purchase money lien, or a retail installment lien.

b. Completion of the documents required by the Texas Department of Housing and Community Affairs to obtain a Statement of Ownership that reflects that the owner has elected to treat the home as real property.

c. Within 60 days after the issuance of the Statement of Ownership:

(i) A certified copy of the Statement of Ownership must be recorded in the real property records of _____ County.

(ii) Notice of the recording must be sent to the Texas Department of Housing and Community Affairs and to the Tax Assessor-Collector for _____ County. If the transaction is closed by someone other than _____ (Title Company), the closer must provide evidence that the notices were properly delivered.

d. The Deed of Trust to be insured must contain renewal and extension language that describes the Security Document that is being renewed and extended.

e. The Security Document must be attached to the Deed of Trust or an Affidavit to be recorded in the real property records of _____ County.

3. MH Endorsements

There are endorsements available to both the Owner's Policy and Loan Policy insuring, among other things, that the MH is considered real property. See the Texas Endorsement Manual for more information.

PP. Notary Public

A Texas Notary Public is a public servant with statewide jurisdiction who is authorized to take acknowledgments, administer oaths, take depositions, and certify copies of documents not otherwise recordable in the public records. The Texas Secretary of State commissions Texas notary publics. Information about Texas notaries can be found at the Texas Secretary of State website.

There are two types of Texas notary publics. There is the traditional notary public, or "notary public" as it is more commonly called. However, a notary public can also be commissioned as an "online notary public". The Texas Secretary of State keeps a searchable list of individuals who are notaries and online notaries.

Notaries public are governed primarily by Tex. Gov. Code Ch. 406 and the secretary of state's administrative rules found in Tex. Admin. Code Ch. 87. Other statutes, such as Tex. Civ. Prac. & Rem. Code Ch. 121, also govern certain notary conduct.

A notary public is not a notario or notario público, nor is a notario público a notary public.
A notary public is not authorized to practice law.
A notary public may not give legal advice or prepare legal documents.
A notary public may not charge a fee for preparation of immigration documents or represent someone in immigration matters.

The Secretary of State offers notary training videos and resources on its Notary Public Training website.

1. How to Verify Identity

It is the notary's job to verify the identity of the person acknowledging or executing the document being notarized. The notary can verify identity in three ways:

1. The notary personally knows the signer;
2. The signer provides a *current* identification card or other document issued by the federal government or any state government that contains the photograph and signature of the signer;
    a. Some examples include driver's license, U.S. passport, Texas handgun license, some U.S. military identification cards
    b. A U.S. permanent resident card can be used for identification purposes only if it contains the signature of the permanent resident.
3. A credible witness who is personally known to the notary swears as to the identity of the signer.

In a residential real estate transaction only, the signer can also be verified using a current passport issued by a foreign country (e.g., Mexican passport, Canadian passport). The Matricula card issued by the Mexican government to some of its citizens in the United States is never appropriate identification for notarization purposes.

Note: If the identification card has expired (e.g., the driver's license is past its expiration date), the identification card cannot be used for identification purposes.

2. Underwriting Requirements

A title insurance policy insures against loss from a defect in title caused by "forgery, fraud, . . . or impersonation." That is, the title policy insures that the people who signed the documents in the chain of title were who they said they were. Therefore, it is imperative that the notary verifies each signer's identity carefully. For instance, if the seller is "Mary Smith", the notary needs to make sure that it is the correct Mary Smith signing the documents, that Mary Smith's identification documents are not fraudulent, and that someone is not impersonating Mary Smith for purposes of this transaction.

Because the title agent is responsible for who signs the documents, the title agent should control the signing of the documents. A helpful tool might be to put a requirement like the following in Schedule C which then allows the title agent to require an in-person signing or signing by a notary of the title agent's choice:

> IF ANY PARTY IS NOT GOING TO SIGN AT THE OFFICE OF TITLE COMPANY:
> a. You must notify the Title Company at least 2 business days prior to closing; and
> b. You must agree in writing to pay the fee of the mobile notary approved by the Title Company. Mobile notary fees start around $125.00.

Alternatively, some documents may be signed by Remote Online Notarization or in a foreign country at the U.S. Embassy or Consulate. In very rare cases may a document be signed in a foreign country in front of a foreign notary public with an Apostille attached. Under no circumstances should the title agent insure based on documents signed in front of a notary of the signer's own choosing without underwriting approval.

It is not unusual for fraudsters to try to impersonate sellers and steal money be selling property that is not theirs to sell. If National Investors insures a sale, and it is found that the seller was an imposter, it is a complete failure of title. See National Investors Bulletin No. 2022-143 for ways to identify this scheme and prevent this type of loss.

3. Remote Online Notarization (RON)

In a Remote Online Notarization (RON), the signer and the online notary public meet online using interactive two-way audio-video technology that records the session between the signer and the notary public. The signer's identity is verified using knowledge-based authentication, that is, the signer is asked questions that only the signer should know the answers to and must get the answers correct to move on with the signing. Note that the knowledge-based authentication of the signer is required by statute and cannot be waived. The documents are uploaded electronically to the system. Both the signer and the notary sign, and the notary affixes the notary seal, electronically to the document. Therefore, there is no "wet" signature involved.

In Texas, only an individual with an "online notary commission" may conduct a RON, therefore, not every notary public can conduct a RON. The recordings of the signing sessions must also be stored for five years. Also, because the signer must be authenticated using knowledge-based authentication, a RON is only useful if the signer has a U.S. social security number and at least a year's worth of credit history in the United States. At the time of the signing, the online notary public must be located in Texas.

Any document signed and notarized by RON must indicate in the notarial certificate that the signer appeared in front of the online notary by interactive two-way audio and video communication. The

following is a recommended notary acknowledgement, although other sample forms are available at the Secretary of State:

THE STATE OF TEXAS

COUNTY OF _____

Before me, _____, on this day personally appeared by means of interactive two – way audio and video communication _____who are known to me or have provided satisfactory evidence of identity in accordance with Chapter 406, Texas Government Code to be the persons whose name are subscribe to the foregoing instrument an acknowledged to me that they executed the same for the purposes and consideration therein expressed. This notarial act was an online notarization.

Given under my hand and seal of office this _____ day of _____, 20___.

Notary Seal

_____
My Commission Expires

4. Remote Ink-Signed Notarization (RIN)

(1) RIN Effective January 1, 2024

Beginning January 1, 2024, documents in Texas can be signed by Remote Ink Notarization (RIN). Tex. Gov. Code § 406.1103. The online notary public, located in Texas, and the signer meet online using interactive two-way audio-video technology that records the session. The signer's identity is verified using knowledge-based authentication. The signer signs physical documents while on camera using an ink pen and returns the documents to the notary within three days. At that time the online notary affixes her signature and seal to the document.

Note that the principal needs to also execute the following on each document:

> I declare under penalty of perjury that the document of which this declaration is a part or to which it is attached is the same document on which (name of online notary public), an online notary public, performed an online notarization and before whom I appeared by means of two-way video and audio conference technology on (date).
>
> _____
> (Signature of principal)
>
> _____
> (Printed name of principal)";

In addition to the notarial certificate required by the document, the online notary needs to execute notarial certificate that includes a statement in substantially the following form:

> I, (name of online notary public), witnessed, by means of video and audio conference

technology, (name of principal) sign the attached document and declaration on (date).

Documents signed by RIN are effective as of the date signed by the principal.

(2) COVID-RIN (effective April 27, 2020-August 31, 2021)

Prior to April 27, 2020, Tex. Civ. Prac. & Rem. Code §121.006(c)(1) required a notary public acknowledging a signature on a real estate instrument to be in the physical presence of the person signing the document. From April 27, 2020, through August 31, 2021, this requirement was suspended because of the COVID-19 pandemic and a procedure now referred to as COVID- RIN was permitted.

In COVID-RIN, the signer and the notary public met online using interactive two-way audio-video technology that could record the session between the signer and the notary public. Both the signer and the notary public had to be in Texas at the time. The notary would verify the signer's identity and administer appropriate oaths. The signer, who would have received hard copies of the documents prior to the meeting, would sign the hard copies in wet ink while still online with the notary public. The signer then returned the wet ink versions to the notary public. The notary public then signed the documents and applied the notary seal.

Any notary acknowledgment made using COVID-RIN must contain the promulgated language "This notarization involved the use of two-way audio-video communication pursuant to the suspension granted by the Office of the Governor on April 27, 2020, under section 418.016 of the Texas Government Code."

More information about the RIN procedure that was in effect from April 27, 2020 through August 31, 2021 is available in National Investors Bulletin No. 2020-125.

5. Defective Acknowledgements

TEX. CIV. PRAC. & REM. CODE Sec. 16.033 excuses any defective acknowledgement (including complete lack of one) once the document stands in the record for two years.

QQ. Overlimits Approval

Each title agent which signs up with National Investors enters into an agency agreement. That agreement sets out the agent's authorization limit. For instance, if the agent's authorization limit is $3,000,000, then it can issue a title policy in any amount up to $3,000,000 without notifying National Investors ahead of time (subject to home office issue or extra-hazardous risk, of course).

For any transaction where the policy amount will exceed the agent's authorization limit, the agent must obtain Overlimits Approval from National Investor's underwriting before the title commitment is issued to any party to the transaction.

To request Overlimits Approval, send the following to underwriting:

1. Title commitment
2. Completed Over-the-Limit Approval Form
3. Prior policies insuring the property, if available
4. Survey, if available
5. Write up of anything that might be useful to know about the transaction

RR. Policy Date

Each title insurance policy has a "Date of Policy" at the top of Schedule A. This is the date that the policy becomes effective, and, according to TDI Bulletin No. 152, it should be the date of recordation of the instrument(s) that you are insuring.

According to TDI Bulletin No. 152, the time of recording of the instruments may also be shown in "date of policy". It is National Investor's policy that the time of recording shall be shown in the "date of policy".

Both the date and time of recording of the instrument to be insured will be stamped or handwritten on the instrument by the county clerk.

SS. Power of Attorney

In 2017 the Texas Legislature established a new Statutory Durable Power of Attorney form and related procedures for verifying its validity. The current form was effective September 1, 2017, and the relevant laws are codified in Chapters 751 through 753 of the Texas Estates Code. It is a business and property power of attorney form and is not applicable to health care or termination of life issues. The 2017 form replaced the one that became effective on January 1, 2014. A summary of National Investors' guidelines relating to the 2017 laws are below and in Bulletin 2017-104, Bulletin 2017-107 and Bulletin 2018-110.

Use of a Durable Power of Attorney ("DPOA") in a real estate transaction on which title insurance will be issued is inherently risky. While a DPOA is an excellent estate planning tool, it also has potential to be subject to fraud and duress. A DPOA is not acceptable for mere convenience purposes. Foreign travel, medical conditions, or military status are primary and acceptable reasons for use of a DPOA in a real estate transaction. Remember it is always better to have the actual owner sign the documents instead of an agent (attorney-in-fact). With various overnight courier services and electronic transmission of documents, there are fewer reasons to accept the use a DPOA in a real estate transaction; however, under current Texas law, there are fewer statutorily acceptable reasons to reject a DPOA.

Note that, under the current law, the person acting on behalf of the principal is the "agent". This person was previously called the "attorney-in-fact", but that term was eliminated from the governing laws in 2023. This supplement will use the term "agent" throughout.

The title agent must carefully review the Power of Attorney form to verify:

1. The form is acceptable ("See 1. Form", below);
2. It is filled out properly and completely;
3. It is executed and notarized properly;
4. The agent appointed in the DPOA is the same person who will be signing the documents;
5. The form is "durable", that is, it has language that clearly says that the DPOA shall survive the incapacity of the principal or that the powers become effective when the principal becomes incapacitated;
6. If there is a termination date in the DPOA or any other document, that it is still currently effective;
7. The agent has the powers needed to complete the transaction; and
8. Under the "SPECIAL INSTRUCTIONS" section, that there is no specific limitation of power affecting the current transaction.

1. Form

a) Durable Power of Attorney" versus a "Statutory Durable Power of Attorney."

The requirements for an instrument to be considered a "Durable Power of Attorney" are very broad. The power of attorney (whether a written instrument or another format) must:

1. Designate another person as the principal's agent, and give that agent power to act in place of the principal;
2. Be signed by the principal (or by a third person in the conscious presence and under the direction of the principal);
3. Include language regarding durability, i.e., it must either survive the principal's disability/ incapacity or become effective at that time; and

4. Be properly signed and acknowledged before a notary.

A "Statutory Durable Power of Attorney," on the other hand, is a type of DPOA that is designed for use in matters relating to a person's property and finances. The Statutory DPOA form is found in Chapter 752 of the Texas Estates Code. It is a suggested form, meaning that minor variations will not cause an otherwise properly executed Statutory DPOA to be considered inadequate. For real estate transactions and issuance of title insurance, the statutory form is preferred.

The Code gives any DPOA the same statutory meaning and guarantees as the Statutory DPOA, as long as it does not significantly differ from the promulgated form and if it is otherwise adequate. Contact underwriting if a form differs from the statutory form in any substantive way.

b) Old Statutory Durable Power of Attorney Forms

Prior versions of Statutory Durable Power of Attorney forms are still available on the internet and otherwise. If an old form signed prior to September 1, 2017, is presented, and it is complete and correct, you may use it for your transaction, if it met the statutory form's requirements in place at the time it was executed. However, if you are presented with a pre-2017 version entitled "Statutory Durable Power of Attorney", but it is not yet signed or it is signed after September 1, 2017, you will need to review its contents carefully. Any "Statutory" Durable Power of Attorney signed on or after September 1, 2017, and used in an insured transaction must be substantially in the same form as the one provided in the amended statute that took effect on that date. Properly scrutinize the requirements stated herein to determine whether it substantially conforms to the 2017 amended statute.

If a current statutory form is used, it is *not* necessary that the DPOA specifically reference the subject real estate transaction and/or the sales price.

c) Military POAs

Most military durable powers of attorney are acceptable. They still must have durability language as discussed below. They often are acknowledged by non-commissioned officers, but that is acceptable if they were notarized on a US military base and the person acknowledging the POA is designated for that purpose by the military. However, the protections and procedures provided in the Texas Estates Code and discussed herein are not applicable to military DPOAs. If you have any questions about the acceptability of a military POA, contact underwriting.

2. Form Completion and Execution

The DPOA form must be completed and executed properly.

a) Use Initials to Specify Powers

The current form requires the principal (the maker or signer of the DPOA) to specifically **initial** on the line in front of a chosen power to grant that power to the agent (previously known as the principal's "attorney in fact.") **An "X" or check mark on the line in front of a power is not accurate or effective; it must be the principal's initials.**

1. National Investors requires that the form indicates that the principal has initialed either "A. Real property transactions" or the last option which activates all the listed powers. If the DPOA is being used in a purchase or borrowing transaction, then in addition to selecting "(A)" Real property transactions", the principal should also initial

section "(E) Banking and other financial institution transactions".

2. Agents are limited in performing certain acts for the principal unless the form specifically gives those powers. Examples are making a gift or delegating authority granted under the power of attorney. Those powers are listed in a separate, optional section in the form.

b) Location for Execution of Home Equity and Reverse Mortgage Loans

If a DPOA is used in connection with the closing of a home equity loan or a reverse mortgage loan, the DPOA must have been executed and notarized at the office of a Texas title agent or title company, the lender making the loan, or an attorney. If the DPOA was not signed at your title company, you must have written confirmation from the other title agent/company, the current lender, or attorney where it was signed and notarized, confirming that it was signed and notarized at their office to comply with home equity and reverse mortgage loan rules.

c) Capacity of Maker (Principal)

The DPOA is not acceptable if there is any question about the capacity or competency of the principal at the time the DPOA was signed. If the signature of principal is not on the signature line or does not look anything like a signature, then further inquiry as to the principal's capacity at the time the DPOA was made is warranted, including contacting the Notary and inquiring whether he/she can and will testify to principal's capacity at the time of signing the DPOA. Underwriting may require a physician's letter confirming that the principal was under the physician's care and was competent as of the date the DPOA was executed.

d) Adding Legal Description of Property

If a current statutory form is used, it is *not* necessary that the DPOA specifically reference the subject real property transaction and/or the sales price.

3. Durability

The principal must state whether the power is effective at the time of signature or when the principal is later determined (diagnosed) to be disabled or incapacitated. The principal should 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". If the principal fails to designate either (A) or (B), then it is assumed that the principal chose (A), and the DPOA is effective immediately.

If you are presented with a power of attorney form that is NOT durable (i.e., it is effective for only a certain period of time), contact underwriting for approval.

For purposes of a DPOA, a principal is considered disabled or incapacitated if a physician certifies in writing, on a date after a DPOA is signed, that the principal is not mentally capable of managing his or her financial affairs.

4. Authority of Co-Agents and Successor Agents

If a principal designates co-agents in a DPOA, each co-agent may exercise authority for the principal independently, unless the DPOA otherwise provides. A principal may designate successor agents in the DPOA. Additionally, the principal may grant authority to his agent or another third party to appoint

successor agents.

5. Use of a DPOA for a Business Entity

The Statutory Durable Power of Attorney form is designed to be used by an individual for their personal financial and business matters. However, in 2023, the government code was amended to explicitly permit the use of a Statutory DPOA in certain real estate transactions in which the principal is the sole owner of a business entity. If you are asked to accept a DPOA where the agent is to act on behalf of a principal for a business entity, contact underwriting for approval.

6. Validity of DPOA

The law creates a presumption that a signature on a statutory durable power of attorney is valid. If a person accepts a DPOA in good faith, he may rely on that presumption, unless he has actual knowledge that the document (or the agent's authority under the document) is void, invalid, or terminated, or actual knowledge that the agent is exceeding his authority.

The 2017 law set out a procedure to follow when a person presented with a DPOA is concerned about it factually or legally. A person may request factual information related to a DPOA in the form of a "Certification of Durable Power of Attorney by Agent." Beginning September 1, 2017, National Investors requires a Certification for every DPOA used in an insured transaction. Legal information may be requested as well, in the form of an "Opinion of Counsel." (See Underwriting Requirements", below.)

7. Recording the DPOA

When closing a transaction in which a DPOA is utilized:

- A DPOA must be recorded if it is used in a real property transaction that requires the execution and delivery of instruments that will be recorded (essentially every insured transaction). The DPOA itself (either the original or a certified copy) must be recorded in the county where the land is located within thirty days of recording the documents for any insured transaction in which the DPOA was used, unless the same DPOA has already been recorded in that County.

- The statutory "Certification of Durable Power of Attorney by Agent" (see below) does not need to be recorded, but a copy must be kept in GF file, with evidence of when it was received and when it was reviewed by agent's examiner or closer.

- Some people are reluctant to give the original DPOA 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 DPOA is recorded and the recordation confirmed. Where available, with eRecording, the original doesn't leave the office and can be handed back to the agent, solving that problem.

8. Underwriting Requirements

National Investors requires a "Certification of Durable Power of Attorney by Agent" on every DPOA used on or after September 1, 2017. See Bulletin 2017-104 for guidance and a form.

a) Documents to Request

If you are asked to accept a DPOA in connection with a real estate transaction, before accepting the DPOA or taking any action in reliance on the DPOA:

1. **You must request a Certification of Durable Power of Attorney by Agent** form which is signed by the named agent under penalty of perjury. The purpose of the Certification is to clarify factual matters related to the principal, the agent, or the DPOA. For example, if you need a letter from a physician as to the principal's disability or capacity, you should request that it be sent as part of the Certification. Note that you may not rely on an old certification, even if you are using an old DPOA! The Agent must sign a new Certification of Durable Power of Attorney by Agent every time you use the DPOA.
2. Additionally, you may request an "Opinion of Counsel" as to legal matters related to the DPOA; however, we suggest discussing the issue with underwriting before making this request.
3. Third, if the DPOA is not in English, you must request an English translation. You should request a translation if **any** part of the document is not in English, including the notarization or seal.
4. There are deadlines to make these requests: for the Certification or Opinion of Counsel, the requests must be made within ten business days of the date the DPOA is presented to you. A request for translation must be made no later than the fifth business day after it is delivered to you. The person presenting the DPOA and you may agree in writing to extensions of these deadlines.

b) Reasons You May Reject a DPOA

Deadline - After you request a Certification (and possibly an Opinion of Counsel), and no later than the seventh business day after you receive back the Certification or Opinion, you must accept the DPOA or reject it. However, you may only reject it if your reason for rejection fits into at least one of the eleven statutory exceptions to acceptance:

1. **Bad Transaction**. You wouldn't do the transaction even if it were the principal (not the agent) who was signing the documents;
2. **Violation of Law or Policy**. Your engaging in the transaction would require you to violate any federal or Texas laws or any company policy that is designed to keep you in compliance with such laws;
3. **Bad History with Principal or Agent**. You wouldn't engage in a similar transaction with the agent because you (your company):
    a. have previously filed a suspicious activity report about the principal or the agent;
    b. believe that the principal or agent has a prior history involving financial crimes; or
    c. have had a previous, unsatisfactory business relationship with the agent due to or resulting in material loss, financial mismanagement by the agent, litigation, or multiple nuisance lawsuits filed by the agent (please consult with underwriting for details);
4. **Terminated Power**. You have actual knowledge that the agent's authority or the DPOA itself has been terminated;
5. **Requested Documents are Not Provided or Inadequate**. The agent refuses to give you a requested Certification, Opinion of Counsel, or Translation, or, if the agent complies with one or more of those requests, you still in good faith can't close the transaction because the Certification, Opinion of Counsel, or Translation is inadequate;
6. **Good Faith Belief**. Regardless of whether you requested or received an agent's

certification, opinion of counsel, or translation, you still believe in good faith that:

a. the power of attorney is not valid;
b. the agent does not have the authority to act as attempted; or
c. relying on the DPOA would violate a business entity's governing documents;

7. **Pending Lawsuit Regarding the Agent's Powers**. You know that a lawsuit to construe the power of attorney or review the agent's conduct is pending;

8. **Prior Lawsuit Regarding the Agent's Powers**. You know that in a prior lawsuit to construe the power of attorney or review the agent's conduct, the court found that the DPOA was invalid with respect to your type of transaction (or that the agent didn't have the purported authority);

9. **Abuse of Principal by Agent**. You have actual knowledge that the agent has been reported to law enforcement for physical or financial abuse, neglect, exploitation, or abandonment of the Principal;

10. **Conflicting Information from Agents**. You receive conflicting instructions or communications with regard to a relevant matter from either co-agents, agents acting under different powers of attorney signed by the same principal, or another adult acting for the principal; or

11. **Law Doesn't Require Acceptance or Agent Doesn't Have Power**. You are not required to accept the DPOA by law of the governing jurisdiction (for example, another state's laws), or the powers conferred under the DPOA that the agent is attempting to exercise are not included within the scope of activities to which the law of that jurisdiction applies.

c) How to Reject a DPOA

If you decide to reject the DPOA, you must do so in writing, and you must state the reason (from the list above) as to why you are rejecting it. The writing must be notarized if you want to reject the DPOA because of reasons (2) or (3). See Bulletin 2017-107 for more information and a rejection form.

9. Signing Documents Under a DPOA

In Texas there is no specifically required format that must be used for the agent to sign for the principal. The most common format is for the agent to sign the principal's name with the agent's capacity listed, as shown here:

_____
JOHN SMITH by his agent, ROBERT THOMAS

The notary must indicate that it was Robert Thomas who appeared before them to sign the documents. It should not state that the principal appeared before the notary.

TT. 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. These private transfer fees are void if:

1) They are paid to a declarant, the person imposing the transfer fee, or other third party; and
2) The recipient has not recorded a notice in the real property records with certain font requirements of the obligation to pay the transfer fee (Tex. Prop. Code §5.201 et. al).; and
3) The private transfer fee was originally recorded and in effect prior to January 1, 2008. Tex. Atty. Gen. Op., No. GA-0780 (2010)

Note: The above does not apply to transfer fees payable to property owners' associations (or their managing agents, an entity organized under §501(c)(3), Internal Revenue Code of 1986, or a governmental entity. As of February 1, 2023, the standard TREC contract says that payment of a transfer fee assessed by property owners' associations are governed by the Addendum for Property Subject to Mandatory Membership in Property Owner Association, a standard addendum to TREC contracts.

Standard TREC contracts contains a paragraph "TRANSFER FEES: If the Property is subject to a private transfer fee obligation, §5.205, Property Code, requires Seller to notify Buyer as follows: The private transfer fee obligation may be governed by Chapter 5, Subchapter G of the Texas Property Code."

As of February 1, 2023, the standard TREC contract says that payment of a private transfer fee is the obligation of the seller unless otherwise provided in the contract.

1. Underwriting Requirement:

If a "private transfer fee obligation" as described in Tex. Prop. Code §5.201 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), as required by Texas Department of Insurance Commissioner's Bulletin #B-0018-10:

> Covenants, Conditions and Restrictions in instrument recorded at Clerk's File No. _____, 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.

2. Closing Requirement

Both seller and buyer in a sale transaction must sign the Disclosure and Hold Harmless Agreement as to Transfer Fees. This fully executed document should remain in the transaction file

UU. Railroads

Railroads crossing the land or lying between the land and the public access can be an issue. 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, contact underwriting

VV. 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, that is, 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.

In Texas, for a "right of survivorship" to be effective, it must be evidenced by an agreement in writing between the parties. Merely including "right of survivorship" in the words of grant in a Deed is not sufficient. Thus, if the co-owners (whether married or not) intend to hold title in that manner, they should execute and record a separate agreement contractually agreeing with each other to hold or take title with everyone'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. The agreement should be recorded in the real property records.

So, two or more people who hold an interest in property jointly may agree in writing that the interest of a joint owner who dies survives to the surviving joint owner or owners. Tex. Est. Code §111.001(a). However, this agreement cannot be inferred from the mere fact that the property is held in joint ownership. Tex. Est. Code §111.001(b). Different rules apply if the joint owners are also spouses and the property in question is also community property. Tex. Est. Code §111.002(a).

Agreements between spouses regarding rights of survivorship in community property are governed by Chapter 112 of the Tex. Est. Code. §112.052(b) 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."

An agreement between spouses may be revoked in various ways. Tex. Est. Code §112.054. 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, but is not required to, receive an adjudication of the court proving up the community property survivorship agreement. Tex. Est. Code §112.101. An order of adjudication serves to protect various rights of the surviving spouse as to property subject to the survivorship agreement.

It is important to note that a community property survivorship agreement (and any revocation thereof) should be recorded in the real property records, otherwise, additional protections are granted to third party purchasers (Tex. Est. Code §112.204), creditors of the deceased spouse, and persons holding property on behalf of the deceased spouse (Tex. Est. Code §112.205).

1. 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.

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:

a. 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.

b. if right of survivorship is just stated in the deed:

   1. 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;

   2. 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.

c. 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.

WW. Scope of Examination

The examination of any real estate title will be subject to the quality and content of the title plant (also known as "abstract 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. §2501.004 of the Texas Title Insurance Act requires that a title plant must:

a. be geographically arranged;
b. cover a period beginning not later than January 1, 1979, and be kept current; and
c. be adequate for use in insuring titles, as determined by the Texas 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.

Although the Texas Department of Insurance permits a title plant to be licensed if its records date back to 1979, the ideal title search should relate back to at least January 1, 1900, or, if excluding the mineral estate from policy coverage, a minimum of 50 years. When acceptable records (described below) are available from prior title work done on the land, they may be relied upon to shorten that timeframe.

National Investors' requirements for title searches and examination in Texas are as follows and can be found in Bulletin 2018-112:

1. Land in a Residential Platted Subdivision:

a) Prior Owner Policy by any Currently Licensed Underwriter on the Same Land:
Agent may begin a title examination utilizing and relying on a complete prior Owner's Title Policy (OTP) in its possession if:
1. Retain a complete copy of the prior OTP in the permanent file. A prior commitment or copy of a prior title report is not sufficient for this purpose.
2. Start the search 90 days prior to the date of the prior OTP.
3. Conduct a 20-year name search for any title holder who appears in the chain of title since the date of the prior OTP, including the named insured in the prior OTP.
4. Rely on the prior OTP for easements, restrictions, and other specific exceptions affecting the property.
5. Consult underwriting counsel if the new policy will be more than two million dollars ($2,000,000).

b) No Prior Owner Policy, but Prior Start from another Title Company:
Agent may begin a title examination utilizing and relying on a title commitment or title report from another title company in its possession if:
1. Retain a complete copy of the prior commitment or title report in the permanent file.
2. Only rely on a prior commitment or title report if the title company from which it was obtained has an established good reputation in the marketplace. If the title agent's ownership and management is unsure of the prior title company's reputation, then the prior start may not be relied upon.

3. Search the 25-year period immediately preceding the date of the start relied upon.
4. Do a full name search for all parties in title for the previous 20 years.

A prior title commitment or title report may not be used for any new policy be more than two million dollars ($2,000,000).

c) No Prior Owner Policy or Start, but Subdivision Base File:

1. Start search from the last warranty deed with vendor's lien that either contains a title company file number and has clear evidence that it was closed through a title company (return address, notary who works for another company, etc.), or use a deed recorded simultaneously with a FHA, VA, or Fannie Mae deed of trust.
2. Rely on a base file to determine easements, restrictions, minerals, etc. that affect title. Include in the search the documents recorded, including deed and deed of trust, at the time of the start to the present time.
3. If an automated plant is used, review the plant printout between the date of the base and the date of the start to determine if any restrictions, easements, or other exceptions have been created.
4. In the event there has been a resubdivision of the property to be insured since the date of the base file, or if dealing with only a portion of the originally platted lot, go back to the resubdivision, or the recording of the documents wherein the lot was divided to begin the search. Still rely on the base file for easements, minerals, and other general exceptions, but add any exceptions that arise because of the resubdivision or division of the lot or otherwise thereafter.

d) No Prior Owner Policy Start, or Base File:

Do a full title search and a full name search for a period of not less than 50 years, if excluding the mineral estate. If insuring minerals, the title search must go back to 1900.

2. Unplatted Acreage, Farm/Ranch, or Commercial Property

a) Prior Owner Policy by any Currently Licensed Underwriter on the Same Land:

Agent may begin a title examination utilizing and relying on a complete prior Owner's Title Policy (OTP) in its possession if:

1. Retain a complete copy of the prior OTP in the permanent file.
2. Start the search 90 days prior to the date of the prior OTP.
3. Include all Schedule B exceptions from the prior OTP on the current commitment unless satisfactory evidence is obtained showing the interest has been released or terminated.
4. Do a full name search on the insured owner shown in the prior OTP as well as all other owners appearing from the date of your search.

b) No Prior Owner Policy:

Do a full search, including a full name search, for a period of not less than 50 years if excluding the mineral estate from policy coverage. If insuring the mineral estate, the search must go back to 1900.

3. Insuring Minerals

For every Policy that insures minerals, do a complete mineral search back to January 1, 1900. Do not assume that a mineral lease has terminated simply because it originated a long time ago. Seek underwriting approval if you are trying to exclude a mineral lease based on nonproduction for a defined period of time. Include the exception or exclusion regarding minerals pursuant to Procedural Rule P-5.1 in every Commitment and Policy unless requested by insured and otherwise in conformity with insurability standards established herein or by limitations of your title plant.

4. Searches on Purchasers

Search for any involuntary liens against the current purchasers that would take priority, such as the following:

- Abstract of Judgment or Judgment Lien to secure a judgment in favor of a federal governmental entity pursuant to 28 USC Section 32.01.
- A federal judgment lien imposing a criminal fine or a lien for restitution pursuant to 18 USC Section 3613
- A State of Texas Workforce Commission (TWC) Lien filed to secure unpaid wages (Texas Labor Code, § 61.081, et seq)

5. Special Considerations as to Prior Policies

National Investors 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 faith in the accuracy of a prior policy. Use of a prior policy as a starter for an examination is a short cut, and the 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.

6. 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 includes the present owners, predecessors in title over the past 20 years, and 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 .

7. Uninsured Transactions in the Chain of Title

a) Unverified Deed

Due to the increase in fraudulent transactions, special care should be taken regarding any unverified deed in the chain of title, that is, any deed in the chain of title that appears to have been recorded without benefit title company involvement in the transaction. For any unverified deed recorded in the real property records within the 12 months prior to the receipt of the contract by the title agent, the following Schedule C requirement must be included in the title commitment:

> **REQUIREMENT**: A Deed from _____ to _____ dated _____, __, ____, was recorded under Document No. _____, Official Public Records of _____ County, Texas, apparently not in connection with an insured transaction. Company requires verification directly from _____, Grantor, that said Deed was in fact executed and delivered by said Grantor.

The title agent must make every effort to contact the grantor on the unverified deed and confirm that the grantor intended to convey the property as stated in the deed.

b) Unverified Release

Due to the increase in fraudulent transactions, special care should be taken regarding any unverified release in the chain of title, that is, any release of lien or similar satisfaction of debt which is recorded or brought to a closing outside of a sale or refinance transaction. For any unverified release recorded in the real property records within the 12 months prior to the receipt of the contract by the title agent, or any unrecorded unverified release brought by the property owner into the title agent's office, the following Schedule C requirement must be included in the title commitment:

> **REQUIREMENT**: We find a Release of Lien dated _____, ___, _____, recorded under Document No. _____, Official Public Records of _____ County, Texas, releasing the above-described lien. However, this Release of Lien does not appear in connection with any recorded transaction involving the Property. Therefore, Company requires independent verification directly from the lienholder to confirm payment of the secured loan. The lienholder must be contacted to verify and confirm payment and satisfaction of the note and lien described above. If the loan payoff payment was made in connection with a new loan or other indebtedness, additional requirements may be made.

Further information on how to handle unverified deeds and releases can be found in Bulletin 2023-150.

XX. Surveys

The purpose of the survey is to show the state of the property as it is on the ground, whereas title agents typically have only examined the property using real property records.

1. What type of survey is required?

National Investors prefers a Category 1A Land Title Survey. This is very comprehensive and contains boundary locations, property lines, rights of way, easements, property surrounding the insured property, monuments noted, points of reference, adjacent property liens, and has the surveyor's seal and signature with a certification. A Category 1B Standard Land Survey is the same as a boundary survey and might work for unimproved property if it includes everything else listed above. A Category 3 Locative Survey is generally not acceptable; this type of survey does not show the improvements "as built".

In addition, the survey must be legible. If the scan or copy is too blurry to read the marking on it, it cannot be used. The survey must be complete. If any portion of the survey is cut off, including the name of the surveyor, the surveyor's seal, etc., then it cannot be used. In addition, if the survey refers to a metes and bounds attached, but there is no metes and bounds attached, then the survey is unacceptable. In addition, the survey must show completed improvements. For this reason, a subdivision plat is not a sufficient "survey" because it does not show the houses built in that subdivision.

For a more complete list of requirements for an acceptable survey, see Appendix A of the National Investors Texas Endorsement Manual.

2. Survey Affidavit

The survey should be certified to the current owner of the property (or the purchaser of the property, if appropriate). However, older surveys which are not certified to current owners can be used if someone is able to swear that about the state of the property from the date of the survey. Typically, this person is the property owner, but it may be a relative or neighbor. This person must have personal knowledge about the property, and that personal knowledge should date back to the date of the last survey or affidavit. The T-47 Residential Real Property Affidavit is used for this purpose.

Note the affiant should be able to swear that, to the best of their knowledge, since the date of the survey, there have been no:

- construction projects such as new structures, additional buildings, rooms, garages, swimming pools or other permanent improvements or fixtures;
- changes in the location of boundary fences or boundary walls;
- construction projects on immediately adjoining property(ies) which encroach on the property;
- conveyances, replattings, easement grants and/or easement dedications (such as a utility line) by any party affecting the property.

The T-47 affidavit does make provision for indicating whether changes to the land have been made since the date of the survey. Minor changes may not render the survey unacceptable. Contact underwriting with any questions as to whether the changes made to the land will require a new survey.

3. Schedule B Requirements

Every Schedule B should include the following exception:

> Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the title that would be disclosed by an accurate and complete survey of the Land.

This exception may only be deleted upon fulfilment of the requirements of Procedural Rule P-2.

Once an approved survey is received by the title company, the survey should be reviewed, and appropriate exceptions put on Schedule B of the title commitment. Things to be noted on the commitment include:

- Easements
- Rights of Way
- Setback lines
- Cemeteries
- Encroachments and protrusions
- Access issues
- Boundary Line Issues
- Fences inside or outside boundary lines

Some of these items may have already been found of record in the real property records. If that is the case, then, after the Schedule B item that is of record and shown on the survey, you may note "And as further evidenced by that survey dated __ prepared by ___". (Do not use the words "*as shown on survey dated __, prepared by __*".)

4. Inset Fences

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 landowners 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 costliest 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 landowners 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.

YY. Texas Workforce Commission Lien

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 §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

The attorney general may seek injunctive relief in district court against an employer who repeatedly fails to pay wages as required by this chapter. §61.020.

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. §61.051. 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.

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.") §61.081

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. §61.082

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") §61.0825

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. Thus, it is possible that the debtor may obtain a partial release of the lien to the extent the property is their homestead.

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. §61.084

4. 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.

5. 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. If you have questions regarding a wage lien, contact 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.

ZZ. Transfer on Death Deed (TODD)

A Transfer on Death Deed ("TODD") allows a property owner to designate who will receive his or her real property upon the owner's death, so that the property conveyance does not have to go through the owner's probate proceeding. The Estates Code was amended in 2015 to formally recognize TODDs in Texas. Tex. Est. Code Chap. 114. The law applies to a TODD executed and acknowledged on or after September 1, 2015.

The key elements of Texas law governing TODDs are as follows:

- Effective at Death: The TODD is not effective until the death of the grantor (referred to as the "transferor" in the TODD statutes.)
- Recording Requirement: To be effective upon the transferor's death, a TODD must be executed, acknowledged, and recorded in the correct county before the transferor's death.
- Grantee/Transferee Has No Rights: Until the transferor's death, the transferee has no interest or rights in the property. The transferor retains the ability to use, possess, sell, and encumber the property.
- Revocable: A TODD may be revoked at any time before the transferor's death, either expressly or through a conveyance in a subsequent deed, recorded before the transferor's death.
- No TODD through a Power of Attorney: A TODD created under a power of attorney by an agent (attorney-in-fact) is not effective. A TODD must be signed by the property owner, not his or her agent.
- Subject to Creditor Claims: Property transferred through a TODD may be subject to claims from creditors of the decedent transferor.

1. Underwriting Requirements

To insure a sale when the vested owner acquired title via a TODD, National Investors requires the following:

- Confirmation of the following:
  1. title was vested in the transferor prior to the TODD being recorded in the deed/real property records and remained so until transferor's death;
  2. the TODD was never revoked, rescinded or superseded by some other subsequent documentation that was recorded prior to transferor's death;
  3. the TODD was recorded prior to the transferor's death; and
  4. the transferee in the TODD survived the transferor by more than 120 hours.
- An affidavit signed by a person with personal knowledge, stating:
  1. there are no unpaid debts of the estate except those secured only by the subject property; and
  2. the estate is not subject to federal estate tax.
- An Affidavit of Death, recorded in the real property records, sworn to by a person with person knowledge, stating the date of death of the transferor on the TODD.
- MERP certification, if the transferor was 55 or older at the time of death and if death occurred within the last four years.
- Review and approval of the transaction by underwriting.

2. No Title Insurance for the Potential Transferee

National Investors will not insure the owner (transferee) whose interest will vest under a TODD because

it is not a present transfer of title, but a future potential transfer. Never prepare a commitment or provide a commitment that creates or requires the execution of a TODD.

3. No Separate Revocation Required

A property owner who executes and records a properly drafted TODD has the right to "change his mind" and either sell the property to someone other than the transferee in the TODD or to encumber the property with a loan.

If a transferor decides to revoke a TODD, the transferor does not need to obtain the consent of nor give notice to the transferee. The transferee has no interest in the real property if the transferor is alive, so the transferee has no right or need to be involved in the revocation.

If the vested owner previously executed a TODD and is now selling or encumbering the property, no separate revocation document is required. Also, the transferee in the previously recorded TODD does not have to participate in the transaction.

4. Form

The 2017 TODD form was repealed, so there is currently no statutory form for a transfer on death deed in Texas.

AAA. Trusts

Trusts themselves are not legal entities. A trust is an arrangement whereby a person entrusts a third party with their property. The original property owner is the **trustor** (or settlor), the third party is the **trustee**, and the person who benefits from the arrangement is the **beneficiary**. The trustee has a fiduciary duty to manage the property as laid out in the directive of the trustor in a document referred to as the trust instrument or trust agreement. While trustees are usually individuals, a corporation or financial institution also may act as a trustee. Consequently, the correct way to vest title in a trust is in "X, Trustee of Y Trust." Occasionally, you might see title conveyed merely to "Y Trust." Even in that situation, however, legal title to the property is still vested in the trustee(s) of the trust, not in the trust itself.

A Trust can be created two ways. The first is after death, through a Will. "I give my property, in Trust, to my daughter, Jane". These are called testamentary trusts. In the case of a testamentary trust, all the terms of the trust, including the name of the trustor (or settler), the trustee, the beneficiary, and the power of the trustee are laid out in the Will itself. The Will is the trust instrument or the trust agreement.

The second way to create a trust is explicitly during the lifetime of the trustor or settlor. These are called intervivos trusts. In the case of an intervivos trust, all the terms of the trust, including the name of the trustor, the trustee, the beneficiary, and the powers of the trustee are laid out in a trust instrument or trust agreement executed by the trustor. An intervivos trust can be revocable, meaning the trustor can undo the trust and take it all back, or irrevocable, meaning the trustor cannot undo the trust once it is signed.

1. Trust in the Chain of Title

The Texas Trust Code (part of the Property Code) gives the trustee power to buy and sell property on behalf of the trust and to borrow money in the name of the trust. If there is document in the chain of title where a trustee has signed on behalf of a trust, we can rely on the apparent authority of the trustee to act for the trust, as given in the Trust Code, unless we also see something in the record indicating that there are restrictions on that authority.

You may see a deed in the chain of title conveying property to "X, Trustee" without any disclosure of the trust. In this case, "X" is called an "undisclosed trust." If you then see a deed out of "X, Trustee," it will be considered to have conveyed good title to a bona fide purchaser, if said transaction appears to have been insured by a title underwriter.

In the chain of title, there may be a deed naming merely "Y Trust" as the grantee, with no trustee named. Legal title to the property is still vested in the trustee(s) of the trust, even though the trustee is not specifically named. Tex. Prop. Code §114.087. A further deed out of "X, Trustee of the Y Trust" shall be considered as sufficient authority for X to sign as trustee of the trust, unless there is something in the record indicating otherwise. Note there is no specific requirement to record a correction instrument to add the trustee's name to the document without the trustee's name.

2. Trust as the Buyer

Title should always be conveyed to the trustee of the trust, with the full name of the trust following, preferably with the origination date of the trust. For example, "John Doe, Trustee of the John Doe Trust dated 1/9/1999". Always review the trust agreement to verify that the trustee has the authority to

purchase property, borrow money on behalf of the trust, and encumber the property with a lien. If the trustee does not wish to provide a full copy of the trust agreement, as for a current Certification of Trust.

3. Trust as the Seller

Title should always be conveyed from the current trustee of the trust, with the full name of the trust following, preferably with the origination date of the trust. For example, "John Doe, Trustee of the John Doe Trust dated 1/9/1999". Always review the trust agreement to verify that the trustee has the authority to sell property. If the trustee does not wish to provide a full copy of the trust agreement, require a current Certification of Trust.

Note that it should always be the current trustee conveying property, even if a predecessor trustee took title to the property. For instance, it is possible that title was taken in the name of "John Doe, Trustee of the John Doe Trust dated 1/9/1999". However, John Doe has since aged and is no longer willing to fulfil the duties of trustee. The title agent needs to read the trust agreement and appropriately document its file with the resignation of John Doe, as trustee, and the acceptance of Sue Smith, as successor trustee, or whatever the trust agreement says about successor trustees. So, in this case, title would be conveyed to the new owner by "Sue Smith, Successor Trustee of the John Doe Trust dated 1/9/1999".

If the trust instrument does not provide for a successor trustee, or if the named successor cannot so act, it will be necessary to seek a court appointment of a successor.

Underwriting Requirement: The Certification of Trust should be recorded in the real property records when the seller of the property is the trustee of a trust and 1) the vesting deed failed to name the trustee and only named the trust or 2) the trustee named in the vesting deed is no longer the trustee and a successor trustee will be signing the current deed.

4. Certification of Trust

Regardless of the provisions of the Trust Code, the powers of the trustee may be further limited (or expanded) by the provisions of the trust instrument itself. This is the reason, when a trust is buying, selling, or borrowing in an insured transaction, always require a copy of the trust agreement (or other document creating the trust) for review to make certain that there are no limitations on the trustee's power to complete that transaction.

As an alternative to providing a copy of the trust instrument to a person other than a beneficiary, the trustee may provide to the person a certification of trust containing the following information **(**Tex. Prop. Code §114.086):

1) a statement that the trust exists and the date the trust instrument was executed;
2) the identity of the settlor;
3) the identity and mailing address of the currently acting trustee;
4) one or more powers of the trustee or a statement that the trust powers include at least all the powers granted a trustee by Subchapter A, Chapter 113;
5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
6) the authority of cotrustees to sign or otherwise authenticate and whether all or less than all of the cotrustees are required in order to exercise powers of the trustee; and
7) the manner in which title to trust property should be taken;

8) a statement that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification to be incorrect.

The Certification of Trust is also commonly called a memorandum of trust.

A recipient of a certification of trust may require the trustee to furnish copies of the excerpts from the original trust instrument and later amendments to the trust instrument that designate the trustee and confer on the trustee the power to act in the pending transaction.

A person making a demand for the trust instrument in addition to a certification of trust or excerpts as described above is liable for damages if the court determines that the person did not act in good faith in making the demand.

5. Schedule C Requirements

Any transaction with a trust as seller or borrower should include the following Schedule C requirements:

> The proposed transaction is a conveyance or mortgage of the land by the _____ Trust. The grantor on the insured instrument must be the currently acting trustees of the trust. In connection therewith, the Company will require the following:
> a. A copy of the trust instrument together with all amendments thereto; or
> b. A Certification of Trust executed by the purported trustees of the trust described by §114.086, Tex. Prop. Code. If a Certification of Trust is provided in lieu of the trust instrument, it must be signed by the trustee of the trust and must contain the following information:
> (1) A statement that the trust exists and the date of the trust instrument was executed;
> (2) The identity of the settlor;
> (3) The identity and mailing address of the currently acting trustees;
> (4) One or more powers of the trustee or a statement that the trust powers include at least all the powers granted a trustee by Subchapter A, Chapter 113;
> (5) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
> (6) The authority of co-trustees to sign or otherwise authenticate and whether all or less than all of the co-trustees are required in order to exercise powers of the trustee;
> (7) The manner in which title to trust property should be taken; and
> (8) A statement that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification to be incorrect.
>
> If either settlor is deceased, we require a complete copy of the trust to determine what was to happen upon their deaths. If the trust was to be distributed to named beneficiaries (or if power of sale/mortgage is not clear), the beneficiaries should either join or execute consent documents that approve the sale/loan and authorize the trustees to act.

6. Home Equity Loans and Trusts

If a homestead is held in the name of a "qualifying trust", then trustee can take out a home equity loan against the property, with the consent of the beneficiaries of the trust. To be a "qualifying trust', the trust must meet the requirements set out in Tex. Prop. Code §41.0021.

The Schedule C requirement for a home equity loan in the name of a qualifying trust is as follows:

> The proposed transaction is a Home Equity Loan to be taken out by the [enter name of Trust]. In connection therewith, the Company requires a copy of the trust instrument together with any and all amendments thereto in order to confirm that the Trust meets the requirements of a Qualifying Trust as defined by Section 41.0021 of the Tex. Prop. Code. The Company further requires the consent of all Trust Beneficiaries in order to comply with the Texas Constitution, Article 16, Section 50(a)(6)(A). The Company reserves the right to make additional requirements based upon review of the Trust instrument.

7. Powers of Attorney and Trusts

For any trust created before September 1, 2017, the trustee had no explicit right under statute to delegate his authority to another person or appoint an agent under a power of attorney to act on his behalf as trustee. Therefore, it is presumed that the trustee does not have the right to appoint an agent under a power of attorney unless the trust agreement specifically provides for that right.

For any trust created on or after September 1, 2017, statute grants the trustee the right to delegate his authority to another. If the trust instrument explicitly forbids delegation of authority, then the trustee may not do so. However, if the trust instrument does not explicitly forbid the delegation of authority, the trustee may delegate some or all of this authority or appoint an agent under a power of attorney. Note that, per Tex. Prop. Code Sec. 113.018, this delegation of authority must be in writing, signed, notarized, and is only good for six months from the date of the writing unless terminated earlier by the death, incapacity, resignation, or removal of the trustee.

8. Multiple Trustees

The Trust Code provides that where there are three or more trustees, a majority of them may act. Good underwriting practices require consent from all trustees to avoid getting in the middle of a dispute among them, unless the trust document specifically provides otherwise.

9. Fiduciary Duty / Self-Dealing

A trustee owes a fiduciary duty towards the beneficiaries of the trust. A fiduciary duty is a high degree of care, where the fiduciary (in this case, the trustee) may not profit from any transaction. Therefore, a trustee may not individually transact business with the trust – such as buying and selling property between himself individually and the trust. The trust agreement may, however, provide for exceptions to this general rule.

If you have a transaction where a Trustee proposes conveying trust property to himself, either by deed or mortgage (as collateral for a loan from himself to the trust), you must secure specific underwriting

approval before proceeding.

BBB. Wraparound Mortgage

A wraparound mortgage (also known as wrap financing or a wrap note) is a form of secondary financing where a lender provides to purchaser 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 or third-party lender accepts a promissory note from the buyer that includes:

- the amount due on the note of the existing mortgage (the "underlying note"), plus
- 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 lender (or to a 3rd party escrow agent), and then the lender or escrow agent is responsible for making the payments to the underlying lender. Should the purchaser default on those payments, the lender has the right to foreclose its Deed of Trust lien to recapture the subject property.

Since title to the property is 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."*

Effective January 1, 2022, there was comprehensive reform of the laws governing wrap mortgage loans (see Texas Finance Code Chapter 159), which:

- Set out registration and licensing requirements for small wrap loan lenders.
- Require certain disclosures to purchasers and grant them the right of rescission based on the timing of the disclosure.
- Provide that a lien securing a wrap loan on residential real property is void unless the wrap mortgage loan and conveyance of the real estate are closed by an attorney or title company.

1. Underwriting a New Wraparound Mortgage

Any Title Policy issued on a transaction involving a wraparound mortgage must:

- Take exception to the existing liens and the newly created wraparound mortgage;

- Take exception to the due on sale clause by adding the following language after the exception for each existing deed of trust lien: ". . . Company makes no representation and provides no insurance coverage regarding whether said Deed of trust is, or is not, subject to a due on sale clause, which may cause it to be in default upon closing this transaction.";
- If any portion of the wraparound mortgage is used to fund the purchase price, the following exception must be added, "Any right of rescission or claim arising because of any violation of the provisions of Chapter 159 of the Texas Finance Code, or Title 7, Chapter 78, of the Texas Administrative Code."

Underwriting approval is required if the loan being wrapped is in default at the time of closing.

2. Paying off an Existing Wraparound Mortgage

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.

A Wraparound Mortgage requires two Release of Liens, one for the underlying "wrapped" deed of trust and one for the "wrapping" deed of trust.

CCC. 1031 Exchange

A 1031 exchange is a real estate investing tool that allows investors to swap out an investment property for another and defer capital gains or losses or capital gains tax that they otherwise would have to pay at the time of sale.

This method is popular with investors looking to upgrade properties without being charged taxes for the proceeds.

You'll also hear 1031 exchanges referred to as a like-kind exchange or a Starker exchange. Section 1031 applies to property beyond real estate, but many 1031 cases also deal with buildings and land.

1. Types Of 1031 Exchanges

There are three major types of 1031 exchanges - delayed exchanges, reverse exchanges, and build-to-suit exchanges:

A. Delayed Exchange
A delayed exchange is the most common exchange format; it offers the flexibility of up to a maximum of 180 days to purchase a replacement property. If the relinquished property is sold before the investor acquires the replacement property, the sale proceeds go to the qualified intermediary. The qualified intermediary holds the money until the investor acquires the replacement property, and the qualified intermediary will deliver funds to the closing agent.

B. Reverse Exchange
A reverse exchange, or forward exchange, involves closing on the purchase of the replacement property before the sale of the relinquished property. This option is used to get a desirable replacement property when it is a seller's market.

When a replacement property is purchased before the sale of the relinquished property, again, the property must be transferred through an exchange accommodation titleholder – the qualified intermediary.

C. Built-To-Suit Exchange
A built-to-suit exchange, also known as a construction exchange or improvement exchange, is an exchange that allows the deferred tax dollars to be used towards renovations of the replacement property. The improvements must be completed within the 180-day period.

2. Qualified Intermediary

A 1031 Exchange is a complicated process due to the strict requirements and timelines. It is important that the investor has a qualified intermediary to facilitate the 1031 exchange and ensure that the transaction is completed with IRS guidelines in mind. A title agent cannot be a qualified intermediary. National Investors has an affiliated company, Investors Title Exchange Corporation, which may be able to assist the title agent's customer as a qualified intermediary.

3. P-63. Policy Issued to Qualified Intermediary under IRS Code 1031

When a qualified intermediary under Internal Revenue Code §1031 takes title on behalf of the ultimate owner (the person making the exchange and receiving the tax benefit), Schedule A of the policy should be prepared as follows:

Owner's Policy of Title Insurance

1. Name of Insured:
   (Alternative 1) John Doe
   (Alternative 2) Jane Smith, (insert "trustee", "on behalf of", "qualified intermediary" or other designation of capacity as approved by the underwriter, based on the wording of the applicable deed), and John Doe, as their interests may appear.
2. Title to the estate or interest in the land is insured as vested in: Jane Smith, (insert exact designation of capacity as shown in deed).

Texas Residential Owner's Policy of Title Insurance

Name of Insured: Jane Smith, (insert "trustee", "on behalf of", "qualified intermediary" or other designation of capacity as approved by the underwriter, based on the wording of the applicable deed), and John Doe, as their interests may appear.

An issued policy should not be altered or endorsed after the deed from the intermediary to the ultimate owner, to change the insured to reflect the name of the ultimate owner.