

Understand the title insurance commitment before you put it in the file

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AUGUST 10, 2023

Let's say that you represent a party in a real estate transaction, such as a real estate agent, lender or buyer. The title insurance company hands you a title insurance commitment for the property involved in your transaction, as part of the due diligence process. Do you just say, "Great, title is good," and check the box on your checklist under "Title" and move on to the next issue?

Hopefully not. Remember that the title insurance commitment is not the title policy itself. It is a promise to issue the title policy later, subject to certain limitations and restrictions. You need to study those limitations and restrictions before you can be confident that the title is "good."

Schedule B, Part I of the title insurance commitment contains the Requirements. These are the things that must be achieved before the insurance will go into effect or before the coverages that you need will apply.

This step is easy to overlook or to bypass on the assumption that if the title company is willing to issue a commitment for title insurance, that must mean the title is acceptable. But, like any insurance product, the title insurance commitment gives in some places and takes away in others. You need to know what areas are taken away. Look at it this way: At the stage of the title commitment, the title company is warning you about what is wrong with the title, which the title company will not cover once the policy is issued. That is why it needs careful review, just like the roofing report and the environmental assessment and the soils report.

You don't have to be a title insurance expert. You just need to know what to look for. This article reviews three basic areas that require attention from parties and their lawyers; they are the "Requirements" and the "Exceptions." Also, there are "Endorsements" that are available to fill in some of the gaps, so we will discuss those, too.

Requirements

Schedule B, Part I of the title insurance commitment contains the Requirements. These are the things that must be achieved before the insurance will go into effect or before the coverages that you need will apply. In other words, these are problems or issues that may be resolvable, but until they are addressed, they pose problems for the title.

Some of the Requirements are standard and routine, such as payment of the current year's taxes and receipt of a corporate (or LLC or partnership) resolution. The standard Requirements are usually pre-printed on the commitment form. In Louisiana, for instance, they comprise the first 14 or so Requirements listed on Schedule B, Part I.

You want to go beyond the standard Requirements to take note of the Requirements that have been specifically added by the title insurance company. Those will be the Requirements that are particular to the property that is the subject of your transaction that may not be so routine, and involve a more complex, costly or time-consuming resolution.

You are looking for things like the following:

- Subordination of prior, recorded agreements in favor of the new mortgage to be placed on the property, to ensure that the mortgage has first priority.
- Completion of probate proceedings and issuance of a Judgment authorizing the sale of the property out of an estate or granting title to the heirs or legatees who will then sell or mortgage the property.
- Execution and filing of a timely "no work" affidavit or other state-law device to ensure priority against construction liens that could be generated because of upcoming improvements. This would apply to a situation where construction is imminent. The title company would require that the applicable state-law procedures be followed, and if they are not, the title company will not be responsible for construction liens filed as a result of the upcoming job.
- Outstanding or adverse ownership interests in the property.
- Liens not anticipated beyond the current owner's mortgage. Was there recent construction that generated liens filed against

the property? Are there liens filed against the property by local, municipal or state agencies for things like unpaid taxes or grass-cutting charges? All of these will continue to bear against the property even though it is sold or mortgaged, and could present problems later when the lien claimant tries to seize and sell the property to satisfy the lien.

Exceptions

The Exceptions are things that are problems and cannot be cured (these are listed in Schedule B, Part II). They are burdens against the property that cannot be removed and therefore present problems that the title insurance company will not cover. That is why they must be studied carefully. If they cause problems later, the title insurance company will not be responsible.

Again, there are “standard” Exceptions, such as the potential lien for taxes not yet due and payable. As with the Requirements, often these are pre-printed. In Louisiana, for instance, they comprise the first several Exceptions on Schedule B, Part II. As with the Requirements, you want to study the Exceptions that are not “standard,” because those are the ones that specifically encumber or restrict the property at hand.

Some examples include:

- Easements or servitudes that are recorded against the property. Does the local water company have an easement that runs down the middle of the property and would prevent construction of a building over the underground water line?
- Encroachments. Does the building on the property encroach on the neighbor? This would lead to a potential situation where the neighbor could demand the removal of the encroachment.
- Boundary Agreements. Does a boundary agreement between two adjoining property owners alter the size or shape of the property in a way that adversely affects development or value?

Endorsements

Some items that simply are not covered by a standard title insurance policy are listed in the fine print as “exclusions” from coverage. And, as discussed above, there may also be specific Exceptions that the title company refuses to insure. In some cases, there are Endorsements that are available to provide coverage on some of these issues. In other words, the Endorsements fill in some of the gaps that would otherwise be present in the insurance coverage. The Endorsements are added to the title insurance policy at the time that it is issued – if you arrange for them in advance.

At the stage of the transaction where the title insurance commitment is being reviewed, the agent or prospective buyer or lender should talk to the title insurance company about the Endorsements that are needed or recommended. It is important to find out what steps need to be followed in order for the title insurance company to issue those Endorsements. However, not all Endorsements are available or appropriate for every type of title insurance policy, depending upon whether an owner’s or loan policy is to be issued.

Some of the more common and important Endorsements are:

- The Contiguity Endorsement. This Endorsement ensures that there are no gaps between adjacent parcels. Without this endorsement, two adjacent parcels are insured according to their specific descriptions, but there is no assurance that there are no gaps between them.
- The Restrictions, Easements and Minerals (REM) Endorsements. In oversimplified terms, these comprise a suite of Endorsements that provide insurance covering points that would otherwise be excluded, namely encroachments by which the improvements on the insured property encroach onto previously-recorded servitudes; easements benefitting the insured property or extending onto adjoining property; and possible violation of recorded building restrictions and setback lines established by local codes. These REM Endorsements are quite complex, and they differ according to the circumstances of the transaction (vacant land, improved land or land under development, for example). But, if you want protection against issues like these, you will get it only through the appropriate REM Endorsements.
- Access and Entry Endorsements. These Endorsements provide title insurance to cover issues such as whether the property has actual pedestrian and vehicular access to and from a public street; whether the street is physically open and publicly maintained; and whether the property has the right to use existing curb cuts to the public street.

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There are also a number of Endorsements available specifically to lenders for otherwise-uninsured issues relating to their mortgages.

These Endorsements provide insurance that the lender’s mortgage will not lose priority or be invalidated by the following reasons:

- variable interest rates that change during the term of the mortgage loan;
- mortgage loans that involve future advances, such as revolving lines of credit;
- local usury laws.

Lenders will want to arrange in advance for the issuance of these Endorsements.

Pay attention to the Requirements, Exceptions and Endorsements

In other areas of life, it is commonplace to expect the insurance product to contain exclusions and exceptions that cause the insured not to receive insurance coverage. Property and casualty policies have exceptions for terrorism or mold, for example. So, it should come as no surprise that title insurance policies contain fine print that result in the absence of insurance under certain circumstances.

That is why it is important to pay attention to the Exceptions and Requirements in the title insurance commitment and to address these issues before the policy is handed out at closing. It is also why it is important to arrange for the issuance of Endorsements at the same time, so that they will be included in the title policy that is issued at closing.

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About the author



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This article was first published on Reuters Legal News and Westlaw Today on August 10, 2023.