OLD REPUBLIC TITLE

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IN THIS ISSUE

The Contract Nature of Title Insurance — What Agents Need to Know

By James C. Russick, Esq.

A TITLE INSURANCE POLICY **IS A CONTRACT** BETWEEN THE UNDERWRITER AND THE INSURED.

More specifically, it is a contract of indemnity, one that undertakes to protect the Insured from certain enumerated risks subject to certain terms, specifically the Conditions, Exclusions and Exceptions of the policy. The Commitment is the underwriter's offer to so insure. Neither the Commitment nor any resulting policy is an information product with open ended liability.

The new ALTA 2016 Commitment was designed to emphasize the contractual nature of our business relationship. I know because I am a member of the ALTA Forms Committee and co-chaired the drafting effort. The 2016 Commitment was developed to ward off unwarranted claims for negligence, misrepresentation, and fraud liability.

The new Commitment is designed to equally protect the issuing agent to the extent that the agent is acting within the scope of their agency. All actions undertaken by the agent to search and examine title, clear underwriting objections, and prepare the policy fall solely within the terms of the policy contract.

The Proposed Insured Should be Included — "TBD" Should Not Be Used

The agent plays a critical part in this process as they complete the Commitment by filling in the essential contract terms of the offer. Specifically, the Commitment reads,

> *"This Commitment is effective as of the Commitment Date shown in Schedule A for each Policy described in Schedule A,* ***only when the Company has entered in Schedule A both the specified dollar amount as the Proposed Policy Amount and the name of the Proposed Insured."*** *(emphasis added).*

When this was written, the drafters were well aware that many Commitments have been published over the years with "To Be Determined" or "TBD" filled in for either the name of a Proposed Insured or for the Proposed Policy Amount and that these new requirements would be a sea change within our businesses.

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The requirement for actual names of any proposed insured and actual policy amounts is necessary because these are essential contract terms. This is the only way that agents and underwriters can control and manage their exposure. Because there are no limits to liability for allegations of negligence, misrepresentation, and fraud, we must be careful to conduct our business of insuring strictly in terms of contract.

You will be confronted with a variety of scenarios. For instance, it is not unusual for a purchaser with commercial intent to create a single purpose entity (SPE) specifically for a given transaction. Often that entity has not been named or created at the time a Commitment is published. Rather than show the Proposed Insured as "TBD", insert the name of the principal and amend the Commitment later. This protects both the interested ultimate Proposed Insured, the issuing agent, and Old Republic Title.

THE PROPOSED POLICY AMOUNT

In a similar vein, you will be asked to issue a Commitment when the final policy amount is unknown because of pending negotiations between a borrower and a lender. TBD is not appropriate in such a case. Insert in a nominal amount certain such as $1000 until the parties settle on the actual liability. Again this will protect both the issuing agent and Old Republic Title.

Please contact underwriting if you wish us to consider any specific fact situation and how best to address it.

Insurable Interests

By Eric R. Tomchin, Esq.

Section 624.608, Florida Statutes, provides that "Title insurance is insurance of owners of real property or others having an interest in real property or contractual interest derived therefrom, or liens or encumbrances on real property, against loss by encumbrance, or defective titles, or invalidity or adverse claim to title." As provided by the foregoing statute, title insurance is an insurance product that is designed to insure an interest or lien in real property, subject to enumerated exceptions, as of a stated effective date set forth in such policy. Fee simple ownership interests, mortgage liens, leasehold interests, and appurtenant beneficial easements, are the most common interests which are insured and these do not generally require an analysis of insurability.

Certain interests, however, may comprise part of a sale or financing transaction but their insurability under a title insurance policy may be questionable. For example, the purchase or transfer of interests in a limited liability company, corporation, limited partnership or general partnership are not interests which would be insurable under a title insurance policy as these are interests in personal, rather than real property. If a limited liability company owns real property, an Owners Title insurance policy may be issued naming the limited liability company as the insured based on its ownership of such real property. In contrast, the transfer of a membership interest, evidencing an ownership interest in the limited liability company itself, involves the transfer of personal property rather than real property and therefore the transferee of such interest should not be named as an insured under a title insurance policy. Loans secured solely by shares, membership interests and general or limited partnership interests, commonly referred to as mezzanine loans, are also not insurable under title insurance policies since these loans are secured by liens on personal property rather than real property.

Cooperative units are another area where it is important to determine the nature of the ownership interest in order to determine insurability. An interest in a cooperative unit may consist of a leasehold interest, an interest in an entity or both. As previously stated, a leasehold interest is insurable as an interest in real property whereas ownership of shares, membership interests, or general or limited partnership interests are considered personal property. As a result, an interest in a cooperative unit may be insured if such interest is derived as a tenant under lease rather than solely as a holder of shares. If both a leasehold interest and shareholder interest are part of the cooperative unit then only the leasehold interest may be insured.

Another area where it is important to determine the interest being insured is in the context of easements. Appurtenant easements benefitting an insured parcel are generally insurable whereas easements in gross, also referred to as licenses, are not insurable.

Insurable Interests Cont.

An easement grants an interest in land whereas a license merely provides permission for one to do a particular act on another's land. As an interest in land, an easement must comply with the statute of frauds and be contained in a written instrument whereas a license can be created orally. In analyzing whether a particular right is an easement or a license, the following factors should be considered: 1) does the written instrument contain language and reflect an intent to create an interest in land 2) is the interest created for the benefit of another tract of land or is the interest personal; 3) is the interest perpetual and does it run with the other tract of land (i.e contains language that it runs with the land and benefits the successor and assigns of the owner); and 4) is the interest revocable and non-assignable. If a written instrument contains language evidencing an intent to create an interest in land for the benefit of another tract of land, is perpetual and runs with the benefitted land and does not contain revocation powers then these factors are characteristic of an appurtenant easement that may be insurable. If however there is no written agreement or if the agreement appears to confer a personal benefit to a person rather than a tract of land and is not assignable, not perpetual and contains a power to revoke, then these factors tend to indicate that the right may be a license. The following example illustrates the difference between an appurtenant easement and a license.

If a recorded instrument contains language granting a perpetual, non-revocable right for the owner of Parcel A to drive across Parcel B to a public right of way, and said right runs with the land and inures to the successors and assigns of Parcel A, then such interest would be considered an appurtenant easement that would be insurable. In contrast, if the owner of Parcel B gives permission to John Doe to fish on Parcel B and there is no reference to this right being given in connection with other lands then this right appears to be personal in nature and therefore is a non- insurable license.

Mobile homes can present difficulties with regard to whether they can be insured under a policy of title insurance. Unlike a deed to real property, the title to a mobile home will be filed with the Department of Motor Vehicles and will contain VIN numbers just like an automobile. Unlike automobiles however, a mobile home, under certain circumstances, may be insurable in a title insurance policy provided certain requirements are met. Generally, if such mobile home is permanently affixed to real property and is taxed as real property (RP stickers) or if the title at the Department of Motor Vehicles is retired, then the mobile home may be included as part of the insured property under a title insurance policy. The specific requirements for insuring a mobile home under a title insurance policy are beyond the scope of this article but agents should be aware of the issues presented by these types of homes.

Although the issue of insurability is not a frequent issue for most transactions, the distinction between what is and is not insurable is significant when it arises. Insuring interests, other than real property interests, could subject the Company to substantial risks. Liens, judgments and other interests which may adversely affect a personal property interest may be filed and perfected outside the official public records and may not be discoverable in the ordinary course of a title search. In addition, insuring personal property interests could subject the Company to additional liability outside the scope of the title insurance policy. As a result of the foregoing risks, it is important that you be cognizant of the role of title insurance in a real estate transaction.

Minor Issues

By: James Usery, Esq.

It's common knowledge you have to be eighteen to enter into an enforceable contract, which includes executing deeds. It may be less well known that marriage or a circuit court order can also remove the "disability" of minority. Although a minor can own real property, a deed from a minor usually cannot be insured because, under most circumstances, it can be cancelled by the minor even after they reach adulthood.

So what do you do if the chain of title includes a deed from a minor? If the minor is now an adult, have them ratify the deed. For insuring purposes, we want a recorded document executed by the former minor that clearly confirms the prior instrument. Other methods of ratification, such as ratification by conduct, should be discussed with underwriting. But what if the minor who executed the deed hasn't turned eighteen or you've been asked to insure the sale of property currently owned by a minor?

Whether married or divorced, both parents usually have joint custody of their children and both would need to act as natural guardians.

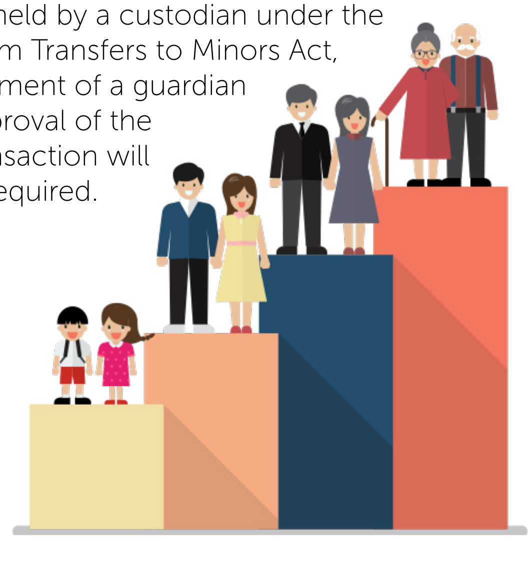
One possibility, if the net value of everything owned by the minor isn't more than $15,000, is to have the natural guardian(s) convey for the minor. A natural guardian is a parent who has legal custody of the minor. Whether married or divorced, both parents usually have joint custody of their children and both would need to act as natural guardians. A parent granted sole custody, or the mother of a child born out of wedlock, unless a court ordered otherwise, is the sole natural guardian. If one parent is deceased the remaining parent is the natural guardian. If both parents are deceased, other family members, even if they have legal custody, cannot act as natural guardians unless they adopt the minor. A deed from the parent(s) as natural guardian(s) of the minor can be insured when accompanied by an affidavit establishing the relationship to the minor, the age of the minor, the market value of the property, the amount of any encumbrances, and the net value of the minor's interest.

Alternatively, you may find title was conveyed or devised to one named adult or trust company "as custodian for [one named minor] under the Florida Uniform Transfers to Minors Act." An attempted transfer to more than one custodian or for the benefit of more than one minor would be invalid and title would vest in the minor(s). Substitute or successor custodians, however, can be named to serve if the first custodian cannot or will not serve. A deed to a custodian or trustee for a named minor, without citing to the Act or a specific trust agreement and without granting powers in the deed, would also vest title in the minor. With a properly created custodianship under the Act, a custodian has the same rights, powers, and authority over custodial property that unmarried adult owners have over their own property.

A custodianship terminates and the property becomes part of the probate estate if the minor dies. A custodianship created by gift or devise terminates when the minor turns twenty-one unless the transferor chose to have it terminate at age twenty-five. A custodianship created by a personal representative or trustee terminates when the minor turns eighteen. Determining the termination age can be tricky so any questions should be discussed with underwriting. Upon termination of the custodianship, the custodian should convey to the former minor.

If the custodianship has terminated and the custodian hasn't conveyed to the former minor, for insuring purposes we would need deeds from both the custodian "as custodian for [named minor] under the Florida Uniform Transfers to Minors Act" and from the former minor. If the custodianship has not terminated, a deed from the custodian "as custodian for [named minor] under the Florida Uniform Transfers to Minors Act" can be insured when accompanied by an affidavit establishing age of the minor and that the minor is still alive.

If a deed from the natural guardians isn't an option, and title isn't held by a custodian under the Florida Uniform Transfers to Minors Act, court appointment of a guardian and court approval of the proposed transaction will probably be required.



The Sunshine State is Keeping PACE with Clean Energy

By: Trish Ladan, Esq.

We live in Florida AKA the "Sunshine State," where the weather is sunny, tropical and prone to hurricanes. Given these typical weather conditions, Florida is a great state for harnessing solar energy, wind power and protection against it. Consequently, many Floridians are beginning to take advantage of certain qualified energy efficiency improvements to their homes and businesses via Property Assessed Clean Energy ("PACE") financing loans.

WHAT IS PACE FINANCING?

PACE financing programs first evolved in California back in 2008. They provide long-term private financing for qualified energy efficient upgrades to both residential and commercial properties. These upgrades include energy efficiency, renewable energy and wind resistance.

While PACE enabling legislation has been passed in 33 states, plus D.C., it is currently only active/operational in 19 states plus D.C. Florida's enabling legislation, HB 7179, was passed in the 2010 legislative session and served to amend Chapter 163, Florida Statutes, creating §163.08, Florida Statutes, Florida's PACE Act.

HOW DO PACE LOANS DIFFER FROM OTHER LOANS TO IMPROVE REAL PROPERTY?

PACE loans, unlike other loans or mortgages are repaid through an on-going assessment added to a subject property's non-ad valorem annual property tax bill in accordance with §197.3632, Florida Statutes. Similar to other loans or mortgages, the property owner contracts directly with qualified private contractors for their energy improvements, so the owner is in control of whether to make the improvements and how to finance it, either using PACE financing or some other traditional form of financing, such as a home equity loan.

An owner might choose PACE financing over other traditional private financing options because a PACE program can make energy efficiency improvements more affordable by spreading the cost of the improvements over a long period of time, with no up-front costs which typically may not be recovered if the property is sold before the improvements are paid off. In addition, the PACE loans are not personal in nature and may be passed on/assumed by future owners.

IF PACE FINANCING IS USED, WHO PAYS THE UP-FRONT FUNDING?

Local municipalities and counties provide the up-front funding of PACE loans through the issuance of bonds that are repaid through non-ad valorem taxes on the property owner's annual tax bill.

WHAT IS THE LIEN PRIORITY OF PACE FINANCING LIENS?

Since PACE financing loans are added to the property owner's non-ad valorem property tax assessments, they have super-priority over other liens, including purchase money mortgages, tantamount to regular ad valorem property taxes. As you can imagine, this presented an issue with institutional lenders, and ultimately resulted in lawsuits being filed in federal courts in California, Florida and New York challenging the constitutionality of these PACE liens. The litigation in Florida is now resolved in favor of allowing the PACE financing liens so we expect to start seeing more of these as owners become aware of them.

WHAT ARE SOME PACE LOAN CONSIDERATIONS FOR PURPOSES OF HANDLING CLOSINGS AND INSURING TITLE TO FLORIDA REAL PROPERTY?

1. **Notice of a PACE financing assessment must be recorded** in the public records of the County where the subject property is located within five days after execution of a PACE financing agreement, pursuant to §163.08(8), Florida Statutes.

2. **PACE financing liens have equal priority to county property taxes** and assessments from the date that they are recorded, pursuant to §163.08(8), Florida Statutes.

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The Sunshine State is Keeping PACE with Clean Energy Cont.

3. **PACE loans, subject to local government ordinance or resolution, may be collected as non-ad valorem assessment, collected pursuant to §197.3632, Florida Statutes,** pursuant to §163.08(4), Florida Statutes.

4. **Seller is required to provide notice to a buyer regarding the existence of levied (PACE) non-ad valorem assessment at or before the time that the buyer executes a contract for sale and purchase of the subject real property.** The following written disclosure notice must either be included in the contract or set forth in a separate writing:

   QUALIFYING IMPROVEMENTS FOR ENERGY EFFICIENCY, RENEWABLE ENERGY, OR WIND RESISTENCE. — The property purchased is located within the jurisdiction of a local government that has placed an assessment on the property pursuant to §163.08, Florida Statutes. The assessment is for a qualifying improvement to the property related to energy efficiency, renewable energy, or wind resistance, and is not based on the value of the property. You are encouraged to contact the county property appraiser's office to learn more about this and other assessments that may be provided by law.

5. **PACE financing assessments may be taken over by an owner's grantee,** and need not be paid off, provided that all of the parties agree. The new owner would take over the PACE tax obligation as part of the property's annual tax obligation.

6. **Fannie Mae and Freddie Mac may require that PACE related assessments be paid in full.**

7. **Florida real property subject to a PACE financing related assessment will require the following special exception in the title policy:**

   Terms and conditions contained in the (Insert name of document imparting constructive notice of PACE financing lien), recorded on (Insert date of recordation), in (Insert recording information for document), and any related assessments, including non-ad valorem assessments.

For more information regarding PACE financing, please review §163.08, Florida Statutes, and contact Underwriting with any questions or concerns.

Florida LEARNING ★ CENTER

People and Resources Empowering Your Success

Look for upcoming emails to register for our seminars and webinars!

Thursday, February 22, 2018
Judgments & Liens Webinar
1 Hour of CE/CLE Ethics Credit

Thursday, March 8, 2018
What's the Matter of Ethics Part I: Decision Making Webinar
1 Hour of CE/CLE Ethics Credit

Friday, April 20, 2018
Continuing Education Seminar
Westshore Grande – Tampa, FL
3 Hours of CE/CLER Credit
1 Hour of CE/CLER Ethics Credit

Thursday, May 10, 2018
Continuing Education Seminar
Hilton Orlando/Altamonte Springs – North Orlando
3 Hours of CE/CLER Credit
1 Hour of CE/CLER Ethics Credit

Thursday, May 17, 2018
Continuing Education Seminar
Embassy Suites Lk Buena Vista South – South Orlando
3 Hours of CE/CLER Credit
1 Hour of CE/CLER Ethics Credit

Friday, May 25, 2018
Continuing Education Seminar
Hyatt Regency – Bonita Springs, FL
3 Hours of CE/CLER Credit
1 Hour of CE/CLER Ethics Credit

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OLD REPUBLIC EXCHANGE

YOUR SOURCE FOR UP-TO-DATE 1031 EXCHANGE NEWS

1031 Exchange Update

By Janet L. Schaum

You've probably heard by now about recent tax reform, however, how does that affect the 1031 Exchange?

Well, the bad news is, that as of January 1, 2018, personal property exchanges have been eliminated from IRC section 1031 Tax Treatment. Which brings the question, "What if I have a client who started a personal property exchange in 2017, is all hope lost?" Not to worry, there's good news! If an exchanger sold personal property in 2017, as part of a 1031 Exchange, that exchanger is still entitled to complete the exchange in 2018, so your client is not in jeopardy of losing out on that all-important deferment of capital gains tax.

Another question you may be asking yourself, "Has recent tax reform created changes with exchanges of Real Estate, are they still allowable under IRC section 1031?" Yes, exchanges of Real Estate have been preserved under IRC section 1031 and no immediate changes to the process have been announced. But what happens if you started an exchange of Real Estate in 2017, but didn't complete your acquisition of replacement property? If an exchanger closed on replacement property between October 20, 2017 and December 31, 2017, the normal exchange period of 180 days is shortened.

Treasury Reg. § 1.1031(k)-1(b) (ii) - provides in part:

(ii) The exchange period begins on the date the taxpayer transfers the relinquished property and ends at midnight on the earlier of the 180th day thereafter or the due date (including extensions) for the taxpayer's return of the tax for the taxable year, in which the transfer of the relinquished property occurs.

Therefore, if an exchanger's 180-day exchange period is shortened, they have until April 17, 2018 to file an extension to protect their full exchange period, otherwise, they are in danger of losing out on the full 180-day exchange period.

Janet L. Schaum *is the Assistant Vice President / Sales and Marketing Associate for Old Republic Exchange Company's (ORE) Regional Sales Office in Tampa, Florida. For questions about this article or general inquiries regarding the 1031 Exchange Process, please contact Janet via email:* ***jschaum@orexco1031.com*** *or by phone* ***813-849-2816****. You can also visit ORE on the web at* ***www.orexco1031.com****.*

Old Republic Exchange does not provide tax or legal advice; therefore, exchangers are encouraged to seek out the advice of a CPA or legal advisor to see if they are eligible for an extension to their exchange period or if they are contemplating doing a 1031 Exchange.

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