



# Title Insurance and the Foreclosure Crisis

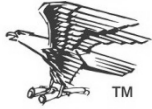
November 15, 2010

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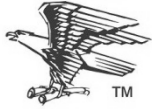
# US Property Transfer System

- ▶ What is Title?
  
- ▶ Private contract–Public notice
  - No government guarantee
  - Public recording of documents
  
- ▶ Main documents
  - Deed (recorded)
  - Mortgage (recorded)
  - Promissory Note (not recorded)



# The Need for Land Title Services

- ▶ Disinterested 3<sup>rd</sup> Party
- ▶ Examine and Establish Chain of Title
- ▶ Curative Actions
- ▶ Fix Mistakes in the Public Records



# What is Title Insurance?

- ▶ Confidence
  
- ▶ Insurance
  
- ▶ Two types of policies
  - Owner's—protects consumers
  - Loan—protects lender's mortgage interest
  
- ▶ Scope

**OWNER'S POLICY OF TITLE INSURANCE**

Issued by

**BLANK TITLE INSURANCE COMPANY**

**Any notice of claim and any other notice or statement in writing required to be given to the Company under this Policy must be given to the Company at the address shown in Section 18 of the Conditions.**

**COVERED RISKS**

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation (the "Company") insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from
  - (a) A defect in the Title caused by
    - (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
    - (ii) failure of any person or Entity to have authorized a transfer or conveyance;
    - (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
    - (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
    - (v) a document executed under a falsified, expired, or otherwise invalid power of attorney;
    - (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
    - (vii) a defective judicial or administrative proceeding.
  - (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
  - (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.
3. Unmarketable Title.
4. No right of access to and from the Land.
5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
  - (a) the occupancy, use, or enjoyment of the Land;

- (b) the character, dimensions, or location of any improvement erected on the Land;
- (c) the subdivision of land; or
- (d) environmental protection

if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.

An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.

- 6. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.
- 7. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.
- 9. Title being vested other than as stated in Schedule A or being defective
  - (a) as a result of the avoidance in whole or in part, or from a court order providing an alternative remedy, of a transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction vesting Title as shown in Schedule A because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws; or
  - (b) because the instrument of transfer vesting Title as shown in Schedule A constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws by reason of the failure of its recording in the Public Records
    - (i) to be timely, or
    - (ii) to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.
- 10. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 9 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.

The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

[Witness clause optional]

**BLANK TITLE INSURANCE COMPANY**

**BY: PRESIDENT**

**BY: SECRETARY**

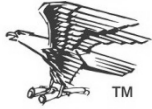




# Title Process

- ▶ Search
- ▶ Abstract
- ▶ Underwriting
- ▶ Closing
- ▶ Insurance





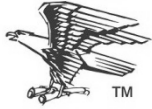
# Judicial vs. Non-Judicial States

- ▶ Steps in a Judicial Foreclosure
  - Prove Standing
  - Evidence of Default
  - Borrower's Right to Challenge and Cure
  - Final Judicial Order
  - Sheriff's Sale
  
- ▶ Steps in a Non-Judicial Foreclosure
  - Notice of Default
  - Right to Cure
  - Notice of Sale
  - Trustee's Auction



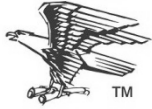
# Recent Controversy

- ▶ **Improper documentation**
  - Lender must prove standing
  - Lost note affidavits
  - Robo-signers
  
- ▶ **Due Process Problem**
  - Borrower's delinquent on payments
  - Failure to abide by legally required process



# How a Foreclosure Affects the Title Process

- ▶ Title Search
  - Final Judgment of foreclosure (Judicial)
    - Force of Law
  - Sheriff/Trustee's Deed
  
- ▶ Does not show
  - Latent defects with the underlying foreclosure documents
  - The knowledge of the signer or notary irregularities
  - Not a check and balance on a court



# Legal Protections for Buyers

- ▶ Title Insurance Policy
  - Obligation to defend policyholders if their title is challenged
  
- ▶ Bona fide purchaser for value without notice
  - BFP takes good title despite competing claims if they don't have notice and they record their conveyance
  - Actual or public record notice required—media reports are not enough
  
- ▶ Court Rescission of sale
  - Court puts everyone in the same position they were in before the foreclosure
  - Title goes back to borrower, purchase price back to buyer, mortgage back to lender



# Legal Protections for Buyers Cont'd

- ▶ **Before foreclosure judgment/sale**
  - Lender can go back and redo the paperwork and get the judgment recertified
  - Possible settlements with borrowers to prevent future claims
  
- ▶ **After sale**
  - With Owner's Title Policy
    - The Title Company covers any loss and legal fees with defending the innocent owners title
  - No Owner's Title Policy
    - Owner self insures the risk



# Actions by Major Lenders and Servicers

- ▶ *GMAC Mortgage (owned by Ally Financial)*. Publically announced in late Sept they would halt foreclosures in the 23 judicial-foreclosure states, then resumed foreclosures in mid-Oct
- ▶ *Bank of America*. Began a review of their processes on Sept 22. Implemented fifty-state freeze in early Oct; announced on Oct 18 it would resume foreclosures in the 23 judicial-foreclosure states
- ▶ *J.P. Morgan Chase*. Froze foreclosures on Sept 29 in the 23 judicial-foreclosure states. Will resume foreclosures in the coming weeks
- ▶ *PNC Financial Services Group*. Announced a freeze in early Oct in the 23 judicial-foreclosure states
- ▶ *Litton Loan Servicing (servicing arm of Goldman Sachs)*. Announced on Oct 8 they would partially halt foreclosures to review procedures
- ▶ *Wells Fargo*. Announced on Oct 20 that their foreclosure procedures were sound, but later said they were planning to review foreclosure documents but will not halt foreclosures



# Attachments

- ▶ ALTA October 1, 2010 Press Release
- ▶ ALTA October 14, 2010 Press Release
- ▶ ALTA November 2, 2010 Press Release
- ▶ FHFA October 13, 2010 Four Point Policy Framework



# ALTA NEWS

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**AMERICAN  
LAND TITLE  
ASSOCIATION**

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**\*\* Immediate Release \*\***

## **American Land Title Association Comments on Recent Announcements Regarding the Foreclosure Process**

**Washington, D.C., Oct. 1, 2010** — The [American Land Title Association](#) (ALTA) has issued the following statement regarding title insurance on foreclosed properties:

Several lenders have halted foreclosures and the sale of real estate owned (REO) properties due to possible flaws in documentation used in the foreclosure process. This has, in turn, raised questions about the validity of title to properties that have already been foreclosed, resold and on which a title insurance policy has been issued. ALTA believes these questionable foreclosures will ultimately have little adverse impact on the new owners of REO properties or on the title insurance claims.

“If a new homeowner’s title is challenged because of a faulty foreclosure, the title insurer may have an obligation to defend the challenge,” said Kurt Pfothenauer, chief executive officer of ALTA. “However, it is unlikely that a court will take property from an innocent current homeowner and return it to a previous homeowner who failed to make payments on the loan subject to the foreclosure.”

Though laws may vary on a state by state basis, in general, the buyer of a property that has been through foreclosure has numerous defenses available to assure their continued ownership.

- The alleged deficiency in the foreclosure process may not be accurate.
- The alleged deficiency in the foreclosure process may not have harmed the previous owner.
- The foreclosure judgment is a final court order. It is likely too late for a technical objection to the foreclosure process to be raised by the previous owner.
- Because the new owner purchased in good faith, they may be protected under the law.

These same legal defenses should significantly limit the title industry's claims exposure. And in the event that a court does set aside a foreclosure due to a defect in documentation, the foreclosing lender would be required to return to the new homeowner all funds obtained from them, resulting in no loss under the title insurance policy.

"ALTA will be asking lenders to acknowledge that all appropriate procedures have been followed by the lending community before foreclosed properties are resold on the market," Pfotenhauer said. "On foreclosures, it is especially important that all documentation is in order. Commitment to accuracy and quality assurance is the foundation of title insurance. This commitment ensures fewer problems for homeowners and lenders, and should give shareholders confidence in their investment."

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### **About ALTA**

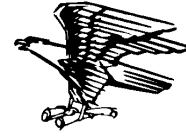
The [American Land Title Association](#), founded in 1907, is a national trade association representing more than 3,800 title insurance companies, title agents, independent abstractors, title searchers, and attorneys. With offices throughout the United States, ALTA members conduct title searches, examinations, closings, and issue title insurance that protects real property owners and mortgage lenders against losses from defects in titles.

# ALTA NEWS

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**\*\* Immediate Release \*\***

## **American Land Title Association Supports FHFA's Policy Framework for Resolving Potential Foreclosure Process Deficiencies**

**Washington, D.C., Oct. 14, 2010** — The [American Land Title Association](#) (ALTA) supports the Federal Housing Finance Agency's (FHFA) four-point policy framework for resolving potential foreclosure process deficiencies.

This framework will assist the land title industry to continue insuring Real Estate Owned (REO) properties based upon companies' individual risk assessments.

"ALTA supports FHFA's outline for an orderly and expeditious resolution of foreclosure process issues that will provide greater certainty to homeowners, markets and other stakeholders," said Kurt Pfothenhauer, chief executive officer of ALTA.

With respect to the clearing of title for REO properties, FHFA's blueprint requires mortgage servicers to review their processes and procedures and verify that their documents, including affidavits and verifications, are completed according to legal requirements. When a foreclosure process deficiency is identified, it should be remediated. FHFA directs mortgage servicers to address any issue and take actions as may be required to ensure that title insurance is available to the purchaser of the property.

"Title insurers are looking to lenders to provide appropriate indemnities," Pfothenhauer said. "We will continue to work with federal and state regulators, Fannie Mae, Freddie Mac and lenders to bring certainty to the marketplace, and we will continue to offer the title industry's perspective on this issue."

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### **About ALTA**

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# ALTA NEWS

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**\*\* Immediate Release \*\***

## **American Land Title Association Says Owner's Policy Protects Homeowners Who Purchased Foreclosed Properties**

**Washington, D.C., November 2, 2010** — The [American Land Title Association](http://www.alta.org) (ALTA) reminds homeowners of a previously foreclosed property that they will be protected if ownership issues arise because of a lender's foreclosure documentation practices if they purchased an owner's title insurance policy when they bought their home.

Reports that lenders improperly documented paperwork in the foreclosure process raised questions about the validity of title to foreclosed properties that have been resold, sparking fear that homeowners who purchased in good faith could lose their home.

"An owner's policy provides assurance that your title company will stand behind you if a covered title problem arises after you buy your home," said Kurt Pfothenauer, chief executive officer of ALTA. "The bottom line is that your title company will be there to pay valid claims and cover the costs of defending an attack on your title."

For a one-time fee, an owner's title insurance policy provides protection for as long as a homeowner or heirs own interest in the property. Only an owner's policy fully protects the buyer should a covered title problem arise that was not found during a title search, including ownership challenges. Other possible hidden title problems can include errors or omissions in deeds, mistakes in examining records, forgery and undisclosed heirs.

Homeowners who have any questions or concerns about their rights should notify the title insurance company that issued their owner's policy. Look for your owner's title policy in documents you received after your closing from your title company. Consumers are encouraged to learn more about the value of title insurance at [www.homeclosing101.org](http://www.homeclosing101.org).

"When property changes hands in our country, it is through a private contract that is recorded in the public record," Pfothenauer said. "No matter the type of purchase, but especially a foreclosure, it is important that all documentation is in order. Commitment to accuracy and quality assurance is the foundation of title insurance. This commitment ensures fewer problems for homeowners and provides assurance that they won't lose their investment."

# # #

### **About ALTA**

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# FEDERAL HOUSING FINANCE AGENCY



## STATEMENT

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For Immediate Release  
October 13, 2010

**Contact:** Corinne Russell (202) 414-6921  
Stefanie Mullin (202) 414-6376

### **Statement By FHFA Acting Director Edward J. DeMarco On Servicer Financial Affidavit Issues**

“On October 1, FHFA announced that Fannie Mae and Freddie Mac are working with their respective servicers to identify foreclosure process deficiencies and that where deficiencies are identified, will work together with FHFA to develop a consistent approach to address the problems. Since then, additional mortgage servicers have disclosed shortcomings in their processes and public concern has increased.

Today, I am directing the Enterprises to implement a four-point policy framework detailing FHFA’s plan, including guidance for consistent remediation of identified foreclosure process deficiencies. This framework envisions an orderly and expeditious resolution of foreclosure process issues that will provide greater certainty to homeowners, lenders, investors, and communities alike.

In developing this framework, FHFA has benefitted from close consultation with the Administration and other federal financial regulators.

The country’s housing finance system remains fragile and I intend to maintain our focus on addressing this issue in a manner that is fair to delinquent households, but also fair to servicers, mortgage investors, neighborhoods and most of all, is in the best interest of taxpayers and housing markets.”

(Attachment follows)

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*The Federal Housing Finance Agency regulates Fannie Mae, Freddie Mac and the 12 Federal Home Loan Banks. These government-sponsored enterprises provide more than \$5.9 trillion in funding for the U.S. mortgage markets and financial institutions.*



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# FEDERAL HOUSING FINANCE AGENCY



## Four-Point Policy Framework For Dealing with Possible Foreclosure Process Deficiencies

1. **Verify Process** -- Mortgage servicers must review their processes and procedures and verify that all documents, including affidavits and verifications, are completed in compliance with legal requirements. Requests for such reviews have already been made by FHFA, the Enterprises, the Federal Housing Administration, and the Office of the Comptroller of the Currency, among others. In the event a servicer's review reveals deficiencies, the servicer must take immediate corrective action as described below.
  
2. **Remediate Actual Problems** -- When a servicer identifies a foreclosure process deficiency, it must be remediated in an appropriate and timely way and be sustainable. In particular, when a servicer identifies shortcomings with foreclosure affidavits, whether due to affidavits signed without appropriate knowledge and review of the documents, or improperly notarized, the following steps should be taken, as appropriate to the particular mortgage:
  - a. **Pre-judgment foreclosure actions:** Servicers must review any filed affidavits to ensure that the information contained in the affidavits was correct and that the affidavits were completed in compliance with applicable law. If the servicer's review indicates either (a) that the information in a previously filed affidavit was not correct or (b) that the affidavit was not completed in compliance with applicable law, the servicer must work with foreclosure counsel to take appropriate remedial actions, which may include preparing and filing a properly prepared and executed replacement affidavit before proceeding to judgment.
  
  - b. **Post-judgment foreclosure actions (prior to foreclosure sale):** Before a foreclosure sale can proceed, servicers must review any affidavits relied upon in the proceedings to ensure that the information contained in the affidavits was correct and that the affidavits were completed in compliance with applicable law. If the servicer's review indicates either (a) that the information in a previously filed affidavit was not correct or (b) that the affidavit was not completed in compliance with applicable law, the servicer must work with foreclosure counsel to address the issue consistent with local procedures. Potential remedial measures could include filing an appropriate motion to substitute a properly completed replacement affidavit with the court and to ratify or amend the foreclosure judgment.

c. **Post-foreclosure sale (Enterprise owns the property):**

- **Eviction actions:** Before an eviction can proceed, servicers with deficiencies must confirm that the information contained in any affidavits relied upon in the foreclosure proceeding was correct and that the affidavits were completed in compliance with applicable law. If the servicer's review indicates either (a) that the information in a previously filed affidavit was not correct or (b) that the affidavit was not completed in compliance with applicable law, the servicer must work with foreclosure counsel to address the issue consistent with local procedures before the eviction proceeds. Potential remedial measures could include seeking an order to substitute a properly prepared affidavit and to ratify the foreclosure judgment and/or confirm the foreclosure sale.
- **Real Estate Owned (REO):** With respect to the clearing of title for REO properties, servicers must confirm that the information contained in any affidavits relied upon in the foreclosure proceeding was correct and that the affidavits were completed in compliance with applicable law. If the servicer's review indicates either (a) that the information in a previously filed affidavit was not correct or (b) that the affidavit was not completed in compliance with applicable law, the servicer must work with foreclosure counsel to address the issue consistent with local procedures and take actions as may be required to ensure that title insurance is available to the purchaser for the subject property in light of the facts surrounding the foreclosure actions.

d. **Bankruptcy Cases:** Servicers must review any filed affidavits in pending cases to ensure that the information contained in the affidavits was correct and that the affidavits were completed in compliance with applicable law. If the servicer's review indicates either (a) that the information in a previously filed affidavit was not correct or (b) that the affidavit was not completed in compliance with applicable law, the servicer must work with bankruptcy counsel to take appropriate remedial actions.

3. ***Refer Suspicion of Fraudulent Activity*** -- Servicers are reminded that in any foreclosure processing situation involving possible fraudulent activity, they should meet applicable legal reporting obligations.

4. ***Avoid Delay*** -- In the absence of identified process problems, foreclosures on mortgages for which the borrower has stopped payment, and for which foreclosure alternatives have been unsuccessful, should proceed without delay. Delays in foreclosures add cost and other burdens for communities, investors, and taxpayers. For Enterprise loans, delay means that taxpayers must continue to support the Enterprises' financing of mortgages without the benefit of payment and neighborhoods are left with more vacant properties. Therefore, a servicer that has identified no deficiencies in its foreclosure processes should not postpone its foreclosure activities.

FHFA will provide additional guidance should it become necessary.