



Mind the Gap!¹

What's this "gap" you keep hearing about - in plain English

In Massachusetts, agents who handle primarily residential transactions rarely deal with so-called "gap" coverage. With the recent Registry closings caused by the COVID-19 virus, title insurers have offered to insure over the gap in certain situations so that closings aren't unnecessarily delayed. Understandably, our agents have questions about this, and so we've put together a list of the most frequent questions we received in the past few days. We hope this helps, and if you have any other questions or concerns, please reach out to us at massuwing@stewart.com.

FAQs on the GAP

- 1. Q:** Typically, I record documents and then issue my title policies as of the date and time of recording. The registry is closed due to COVID-19, I can't get my documents on record and the bank wants me to disburse and issue a policy, but we don't do that here in Massachusetts! What's going on here?

A: In the interest of enabling closings to occur despite the recent disruption of registry services caused by the COVID-19 virus, agents are now authorized to issue the title insurance policy as of the date and time they have run title through prior to disbursing, even though the Registry is closed and is not accepting any documents for recording (in person or electronically). There are of course certain requirements, all of which are set forth in our [national bulletin](#) and our [local supplement](#). As always, you must have all of the documents necessary for the closing in hand, and you must be in possession of good funds. In addition, we require the seller (or borrower in a refinance transaction) sign the Title Insurance Affidavit / Gap Indemnity document. You would update your title using the Registry and Probate Court websites, and provided there are no new documents of record which affect title, you would disburse funds and issue the policy as of the date and time of disbursement. As soon as possible after the registry re-opens or begins accepting documents for e-recording, you must record the appropriate closing documents and update the title through the date and time of recording. If an intervening document, for example an execution or tax lien appears on your title update, please contact us immediately at massuwing@stewart.com. Otherwise, nothing further needs to be done.

- 2. Q:** As the closing attorney, how do I know that no new liens against the property will be recorded prior to my documents getting on record?

A: There is no way to know whether something might get recorded prior to the time your closing documents get recorded. However, there are some situations in which it's more prudent to hold off on closing rather than taking a chance. For example, if there are significant outstanding taxes, active construction, or several liens filed against your seller, please contact us before you close. Also, one of the best ways to minimize the risk of an intervening lien being

¹ The phrase "Mind the Gap" is a familiar one to anyone who has ever traveled on the London Underground. It's a warning to passengers to be cognizant of the space between the train and the subway platform (a/k/a the "gap").

recorded is to record your documents as soon as the registry re-opens. As an additional precaution, sellers (in a sale transaction) and borrowers (in a refinance transaction) must sign the Affidavit/Gap Indemnity.

You should also make sure the buyers understand the risks involved in not being able to record documents immediately. Although there is coverage for the gap in the owner's policy of title insurance, they are not covered if they do not purchase the policy. As with any closing, if the owner declines to purchase a policy, they are required to sign the Availability of Owner's Title Insurance form. In addition, we encourage you to inform the owners, in writing, that until documents are recorded at the registry of deeds other documents may be recorded which would affect the status of their title and disclaiming liability for any such documents. Finally, as set forth in the Stewart Underwriting Bulletin concerning COVID-19, you must have the buyer acknowledge, in writing, that recording and return of the original deed and mortgage will be delayed until the county or other recording office is open.

3. Q: Who signs the Modified Title Affidavit/Gap Indemnity?

A: In a sale transaction the seller signs. If there is more than one seller, all sellers should sign one or more originals. In a refinance transaction, all borrowers must sign. We encourage seller's attorneys to reach out to buyer's attorneys for the correct form of affidavit, and we recommend that buyer's attorneys be proactive about sending out forms to sellers.

4. Q: Can an attorney sign the indemnity under the limited power of attorney for closing?

A: This is not preferred and may be problematic given the standard form of the power of attorney document. Usually the POAs that are given are limited POAs and do not include the ability of the agent to bind the principal on an indemnity. If there is a particular situation with unusual circumstances, contact a Stewart underwriter.

5. Q: The lender tells me I have to attach a gap endorsement to my title policy. Is an endorsement required in order for the lender to have coverage over the gap?

A: No. Gap coverage is provided by virtue of the Date of Policy and the following language in the policy jacket:

Covered Risk 14 (standard loan policy): "Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 13 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 Insured Mortgage in the Public Records."

Covered Risk 28 (Enhanced loan policy): "Any defect in or lien or encumbrance on the Title or other matter insured against by this policy 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 Insured Mortgage in the Public Records."

An example may be helpful here. Let's say you're handling a closing and the Registry is not accepting recordings in person or electronically. You have the appropriate closing documents (including the Title Insurance Affidavit /Gap Indemnity) and are fully funded on Thursday, March 20, 2020. You've updated the title through the last day the Registry accepted documents for

recording, which was Friday, March 13, 2020 at 4:00 PM and nothing new appeared. You disburse funds and issue your title insurance policies on March 20 at 11:00 AM. The lender receives a loan policy showing the Date of Policy in Schedule A is March 20, 2020 at 11:00 AM. The Registry begins to accept electronic recordings on Wednesday, March 25, and the deed and mortgage are accepted for recording as of 1:00 PM that day. Unfortunately, because of the long queue and delay in indexing you later discover that on March 25 at 9:30 AM the IRS recorded a tax lien against seller, prior to the deed and mortgage.

The lender is covered by virtue of the quoted language above contained in the loan policy jacket. It essentially says that there is coverage for something that goes on record between the date of the policy and the recording of the mortgage. In our example, the loan policy is dated 3/20/20 at 11:00 AM. There is an IRS lien recorded on 3/25/20 at 9:30 AM, before the mortgage recorded on 3/25/20 at 1:00 PM. The IRS lien was recorded after "Date of Policy" but before recording of the insured mortgage and is therefore covered in the policy. Because of this language in the jacket, no additional endorsement is required for the lender to have coverage over the IRS lien.

Note that insured owners also have this coverage in their policies. However, we anticipate that most of the questions you receive will be from lenders. If you are looking for the owner's gap coverage it can be found in Covered Risk 14 of the basic owner's policy and in the definition of Policy Date in the enhanced owner's policy.

If you find that your lender clients are insisting on an endorsement, please reach out to massuw@stewart.com and we will work with you to address the lender's concerns.

6. **Q:** This is all pretty new. Seller's attorney sent me the closing documents but didn't include the Title Insurance Affidavit /Gap Indemnity. Am I out of luck?

A: No, all is not lost! You can email the Affidavit / Gap Indemnity to seller or seller's attorney, have the seller sign and return it electronically to you. In these circumstances, we will waive the requirement that the affidavit be signed in the presence of a Notary Public. Going forward, however, please include the Affidavit / Gap Indemnity in the documents you have signed by seller prior to or at closing in the presence of a Notary.

7. **Q:** So I don't need to add any additional language to the policy or title commitment?

A: No additional language is required in the title policy for the insured to have so-called "gap coverage." However, we do require that going forward you add the following requirements to Schedule B, Section 1 of your title commitments:

- Receipt of a properly executed Modified Title Insurance Affidavit on this Company's form.

8. **Q:** That covers the title policy. Is there anything else I should be thinking about?

A: There are a few other things to keep in mind:

- If you are sending mortgage, tax, or other lien payoffs by FedEx, UPS or other delivery service, you should confirm that the office you're sending to is physically open and

staffed. As always, if you are wiring funds, make sure you confirm that you have the correct account information.

- If the Registry of Probate is closed, examiners may not be able to complete their title work. Attorneys can access some documents online through the masscourts.org website, but generally only recent filings are available to view. Alternatively, you may be able to obtain copies of these documents from an attorney who did the probate or a prior closing. You may also be able to rely on a prior policy of title insurance – check with a Stewart underwriter for solutions to a particular issue.
- Many municipalities are closing or limiting services. This means you may not be able to get smoke detector certificates or municipal lien information, which may lead to a delay in closing. Some attorneys are adding provisions to purchase and sale agreements to deal with delays due to COVID-19. REBA has circulated a “Provisional P & S Form Relating to Coronavirus” containing suggested language.
- Fraudsters will likely attempt to take advantage of this situation to try to divert funds. Continue to follow best practices if you’re being asked to wire funds or re-issue checks, even if the request uses COVID-19 as the reason for the changed instructions.
- If you’re representing a seller, caution them that they may not want to cancel their homeowner’s insurance policy if the deed has not been recorded.
- While the title insurance policy addresses the recording gap, at this time your obligations to provide a Certificate of Title under MGL c. 93, s. 70 have not changed. The statute requires the certificate to “include a statement that *at the time of recording the said mortgage*, the mortgagor holds good and sufficient record title to the mortgaged premises free from all encumbrances” Therefore, we urge you to use caution before issuing a certificate of title without the documents having been recorded.
- Please take precautions to keep you, your staff and your clients safe. Many organizations, including ALTA, have offered suggestions on how to minimize the risk of contracting and spreading COVID-19.

This list will likely grow longer. We are fortunate that the members of the real estate community in Massachusetts work together in times of crisis, and we will try to keep our agents updated as we hear of new developments. If you have any questions or concerns about the gap coverage or other recent developments, please contact a member of our underwriting staff.