New England Regional Midweek Update
7/9/2025

Dear Stewart Partners,

We hope you all enjoyed the Independence Day festivities with your friends and families. In this week's update, we provide a primer on the subject of Letters of Indemnification in the context of title insurance, as well as a review of mortgage discharges in Massachusetts. We also remind you of a few upcoming educational events we think you may enjoy.

Letters of Indemnity in Title Insurance By: Zachary I. Greenfield, Esq. Maine State Counsel

In the context of title insurance, a letter of indemnity ("LOI") is an instrument whereby one underwriter (the "Indemnitor") agrees to indemnify another underwriter (the "Indemnitee") against specified policy liability caused by a purported title defect (the "Indemnified Matter"). LOIs serve many important functions, the most significant of which may be to allow parties to proceed with real estate transactions without the necessary delays associated with the making of, and resolution of, title insurance claims.

There are two basic types of LOIs, "without undertaking" and "with undertaking."

LOIs Without Undertaking

In an LOI without undertaking, the Indemnitor agrees to indemnify the Indemnitee against certain policy losses caused by a potential title defect for which the Indemnitor has current potential policy liability, while not undertaking to resolve the potential title defect. For an example in which an LOI without undertaking might be appropriate, assume Agent A issued the Smiths an owner's policy of title insurance underwritten by Underwriter A. Unbeknownst to Agent A, an undischarged 45-year-old mortgage without a stated maturity date encumbered the subject property at the time of policy issuance. As such, Agent A neither called for a discharge of the mortgage nor included an exception for the mortgage in the Smiths' owners' policy. Under Maine's Title Standards, absent unusual circumstances, title examiners are authorized to treat this mortgage as no longer encumbering the property 50 years after the date of the mortgage. The Smiths agree to sell the property to the Joneses four and one-half years after they purchased it, at which time the mortgage is 49.5 years old, and just six months from no longer being an encumbrance according to Maine's Title Standards. Agent B, who issues title insurance policies for Underwriter B, identifies the mortgage in its title search. Under these circumstances, Underwriter A is likely to indemnify Underwriter B against loss caused by the mortgage if Underwriter B authorizes Agent B to issue a title insurance policy to the Joneses without exception for the mortgage. Likewise,

Underwriter B is likely to accept the LOI and so authorize Agent B, even if Underwriter A does not agree to take action to obtain a discharge of the mortgage. In other words, the indemnification itself, even without any agreement to undertake a cure of the title defect, should be sufficient because the mortgage will no longer encumber the property in just six months.

LOIs With Undertaking

An LOI with undertaking includes the Indemnitor's agreement to indemnify the Indemnitee against certain policy losses caused by a potential title defect for which the Indemnitor has current policy liability, while also agreeing to take action to resolve the title defect. Consider the above example, but instead of the mortgage being just six months from not being an encumbrance, the mortgage was signed and recorded just one month before the Smiths purchased the property. In this scenario, the mortgage presents a material risk. Not only could it encumber the property for decades, the potential that its holder will foreclose is a real concern. Here, Underwriter B is only likely to accept an LOI and authorize Agent B to insure the Joneses without exception for the mortgage if Underwriter A not only agrees to indemnify Underwriter B, but also agrees to undertake to obtain a discharge of the mortgage. Another common example of a scenario in which an LOI with undertaking is sometimes used is when one underwriter has insured an owner without exception for a relatively recent mortgage that was discharged improperly. The Indemnitor would indemnify the Indemnitee against loss caused by the mortgage and then undertake to obtain a corrective discharge or missing assignment that would render the mortgage properly discharged.

Limitation of Indemnification

The indemnification provided by an LOI is generally limited to the lesser of the amount of the Indemnitor's existing policy liability or the Indemnitee's proposed policy liability. For this reason, an underwriter is unlikely to accept an LOI and authorize its agent to issue a policy without exception for the indemnified matter if the loss threatened by the indemnified matter will likely exceed the amount of the Indemnitor's policy, and thus the amount of indemnification provided by the LOI. For example, if Agent A issued a $100,000.00 owner's policy to Smith without exception for a recent $200,000.00 execution lien encumbering the subject property, Underwriter B is unlikely to accept an LOI from Underwriter A because the amount of indemnification is likely insufficient to resolve the indemnified matter.

Policy Type

Underwriters are generally unable to issue LOIs if its policy liability only exists in connection with a loan policy of title insurance as opposed to an owner's policy, because the underwriter would only have liability under its loan policy if the property was being foreclosed.

Forms of LOI

The American Land Title Association ("ALTA") has promulgated a form of LOI that is accepted by most underwriters. Stewart Title Guaranty Company's excellent resource, Virtual Underwriter, contains sample LOIs both with and without undertaking in the forms as promulgated by ALTA. You may view those forms by following these links:

- LOI Without Undertaking: ALTA Single Transaction Indemnity Letter (02/03/10)
- LOI With Undertaking: ALTA Single Transaction Indemnity With Performance Letter (02/03/10)

However, some underwriters have their own requirements for the form of LOI they will accept. For this reason, allowing the underwriters to communicate directly with each other at the outset is usually the best practice.

Procedures for Requesting LOI Approval

Situations in which an LOI may be used can be complex. As such, we encourage you to reach out to your Stewart Title Guaranty Company underwriter whenever presented with a situation in which you think an LOI may be appropriate. Stewart or the other underwriter who issued the policy may request a copy of the current title commitment identifying the resolution of the purported defect as a Schedule B Requirement. This is particularly true when the issue to be resolved is an undischarged or incorrectly discharged mortgage; many of the curative vendors the underwriters use to resolve these matters require a copy of the title commitment showing the defect in order to proceed.

If you are in receipt of an LOI from another title insurance company, please make sure that your Stewart underwriting counsel has approved the issuance of a new policy without exception prior to proceeding with your closing.

Massachusetts Mortgage Discharges when there is more than one Mortgagee By: Mark A. Jones, Esq. Massachusetts Underwriting Counsel

Typically, when we are reviewing a recorded mortgage that will be paid off during the closing process we expect to see an institutional lender or similar entity that is the mortgagee. In that case, we can accept a discharge pursuant to MGL c. 183, §54B, which states an instrument executed "by a person purporting to hold the position of president, vice president, treasurer, clerk, secretary, cashier, loan representative, principal, investment, mortgage or other officer, agent, asset manager, or other similar office or position, including assistant to any such office or position, of the entity holding such mortgage, **or otherwise purporting to be an authorized signatory** for such entity, or acting under such power of attorney on behalf of such entity, acting in its own capacity or as a general partner or co-venturer of the entity holding such mortgage, shall be binding upon such entity and shall be entitled to be recorded, and no vote of the entity affirming such authority shall be required to permit recording." Basically, this allows us to rely on any signatory purporting to have authority for the entity holding the mortgage. This is very helpful for conveyancers as we're not as concerned about the authority of the person signing a release of a mortgage on behalf of the entity as much as we are when an entity is conveying property by a deed.

Occasionally you may see a mortgage where individuals are the mortgagees. In that case, we need to get a discharge from all mortgagees, correct? Not necessarily. Pursuant to MGL c. 184, §7: "a conveyance or devise of land to two or more persons or to husband and wife, **except a mortgage** or a devise or conveyance in trust, shall create an estate in

common and not in joint tenancy." By default, for a mortgage granted to multiple mortgagees, those mortgagees hold as **joint tenants** and not tenants in common. What this means is that a mortgage may be discharged by the holder of record **or any one of the joint** holders of record. This is an extremely helpful rule when we have deceased mortgagees. There will be no need to probate the estate of a mortgagee provided there is at least one mortgagee that can sign the discharge.

Of course there are always exceptions to every rule. A mortgage given to mortgagees that hold as tenants by the entirety will typically require both tenants by the entirety to execute the mortgage discharge. Fortunately, this is not a common situation.

Another uncommon situation is when the mortgage is specifically granted to the mortgagees as tenants in common. If the mortgagees hold as tenants in common, all must join in the discharge. But remember, this is only the case if the mortgage is specifically granted to them as tenants in common; if the mortgage is silent the mortgagees are presumed to hold as joint tenants. See MGL c.184, § 7.

I hope this information was helpful in connection with getting mortgages released of record. Feel free to reach out to our underwriters with any questions you may have.

Upcoming Education

Our Massachusetts Underwriters Talk Title Series – Upcoming July Webinar

Join us for our monthly webinar coming up today, July 9, 2025 at 11:00 A.M. that will focus on Shortened Title Searches. Rhonda Duddy, Massachusetts and New Hampshire Underwriting Counsel, will be discussing the requirements, benefits and potential risks of not performing a full 50-year title search. To register for this or any of our upcoming Talk Title webinars, follow this link: Register Here

REBA Webinar – Title Traps for the Unwary: Claim Avoidance Strategies

Tracie Kester, Associate Senior Underwriting Counsel at Stewart, will be presenting a webinar on behalf of REBA's Residential Conveyancing Section on Friday, July 11, 2025 at noon entitled "Title Traps for the Unwary: Claim Avoidance Strategies." The webinar will cover divorce, probate and bankruptcy related title issues; common traps involving tenancies, trusts and POAs; and best practices to clear titles and avoid claims. The webinar is free to REBA members. To register, contact Matt Zarrella at Zarrella@REBA.net.

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