

UNDERWRITING BULLETIN

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NY000278

Date: April 26, 2006

To: All New York State Office Counsel, Managers and Agents

From: John L. Killea, Senior Vice President and General Counsel

Re: Revision to Mutual Indemnification Agreement

Effective for policies written on or after April 1, 2006, the Second Amended and Restate Mutual Indemnification Agreement has made the following change:

The amount of the mortgage under a covered risk is now \$750,000.00.

There has been a clarification of issues that are NOT covered risks:

1. An option to purchase or a right of first refusal in a lease even if the policy insures that a tenant does not have an option or right of first refusal, or excepts the rights of tenants as tenants only.
2. Matters that arise during the gap period between policy date and date of recording.

As a reminder, the following companies are participants in the Mutual Indemnification Agreement:

Chicago; Commonwealth; Fidelity; First American; Lawyers; Old Republic;
Ticor; Ticor of Florida; UGT; Washington.

A copy of the memorandum of the Second Amended and Restated Mutual Indemnification Agreement is included.

References:

Related Bulletins: NY000209, NY000210, NY000249, NY000250, NY000260, NY000262

**SECOND AMENDED AND RESTATED MEMORANDUM
ON MUTUAL INDEMNIFICATION AGREEMENT**

The Companies that have affixed or shall hereafter affix their signatures hereto have entered into a Mutual Indemnification Agreement, which Agreement has been last amended and restated by a Second Amended and Restated Mutual Indemnification Agreement effective as of April 1, 2006 (collectively the "Agreement"). The purpose of the Agreement is to expedite the clearance of certain types of title exceptions and limit the need to obtain individual letters of indemnity or performance. The Agreement applies not only to new clearance requests but also to those that remain outstanding. Other title insurance companies may subsequently enter into this Agreement and notice of their participation will be provided. This Memorandum explains how the Agreement is to be applied.

There are five scenarios in which the Mutual Indemnification Agreement can be relied upon:

1. When an Owner's policy has been issued -

A title insurer (the "Indemnitor"), directly or through an Agent, having issued an Owner's Policy in which it omitted a "Covered Defect" (as set forth in Exhibit A hereto), or insured against its collection or enforcement, is deemed to indemnify the new title insurer (the "Indemnitee") so long as the Indemnitee, in either its Owner's policy or Loan policy, in the same manner, omits the exception for the Covered Defect or insures against its collection or enforcement.

The Indemnitor under an Owner's policy has liability to an Indemnitee if the Indemnitor's insured is still in title. However, for purposes of the Agreement, the provisions for continuation of liability under the old NYBTU Rate Manual and the TIRSA Rate Manual, as applicable, are to apply. An agent is to consult with its underwriter before relying upon the continuation of liability provisions applicable to an Owner's policy.

A list of Covered Defects under the Agreement is annexed as Exhibit A to this Bulletin.

2. When a Loan policy has been issued, regardless of whether there is a change in the ownership of the estate or interest in the land that was mortgaged, and the insured mortgage is being further insured, either individually or as consolidated -

A title insurer (the Indemnitor), directly or through an Agent, having issued a Loan Policy insuring a mortgage in which the Indemnitor omitted a Covered Defect, or insured against its enforcement or collection, is deemed to indemnify the new title insurer (the Indemnitee) insuring the same mortgage (individually or as consolidated), when the Indemnitee, in the same manner, omits the exception for the Covered Defect or insures against its collection or enforcement. In this scenario, for

the prior title insurer to be an Indemnitor, the Covered Defect must have arisen prior to the date the mortgagor of the mortgage insured by the Indemnitor acquired title to the property as a bona fide purchaser for value. In this scenario, the Mutual Indemnification Agreement does not cover liens and other defects created, suffered or assumed by the Mortgagor.

3. When a Loan policy has been issued, and by reason of a deed in lieu of foreclosure or by a referee's deed in a mortgage foreclosure action of the insured mortgage, the insured lender is now the transferor or mortgagor of the property -

A title insurer (the Indemnitor) is deemed to indemnify the new title insurer (the Indemnitee) as to a Covered Defect which the Indemnitor omitted, or insured against enforcement or collection, in a Loan Policy when the transferor or mortgagor in the transaction to be insured by the Indemnitee is the Indemnitor's insured which has acquired title by a referee's deed in an action to foreclose the insured mortgage or by a deed in lieu of foreclosure of the insured mortgage. The Indemnitee must omit the exception for the Covered Defect or insure against its collection or enforcement in the same manner as was done in the Indemnitor's Policy.

4. When a Loan policy has been issued, and a referee is conveying the property in an action to foreclose the insured mortgage -

A title insurer (the Indemnitor) is deemed to indemnify the new title insurer (the Indemnitee) as to a Covered Defect which the Indemnitor omitted, or insured against enforcement or collection, in a Loan Policy when the Seller in the transaction to be insured by the Indemnitee is the referee in an action to foreclose the mortgage insured by the Indemnitor. The Indemnitee must omit the exception for the Covered Defect or insure against its collection or enforcement in the same manner as was done in the Indemnitor's Policy.

5. When a Loan policy has been issued, and a mortgage in the principal amount of \$750,000 or less (effective April 1, 2006) made by the current record owner of the estate or interest being insured, was not excepted in the Loan Policy -

A title insurer (the Indemnitor) is deemed to indemnify the new title insurer (the Indemnitee) as to a mortgage in such a case provided that the Indemnitee obtains a copy of (i) the payoff letter for that mortgage, (ii) the certified, bank or attorney's escrow account check(s) issued for payment of the amount stated in the payoff letter as due, and (iii) the letter with which payment was sent to the holder of the mortgage or its representative as stated in the payoff letter.

In this instance, however, the Indemnitor is not obligated to discharge of record the Mortgage or to pay the cost incurred by Indemnitee in obtaining the discharge. This does not, however, limit the Indemnitor's obligation to indemnify the Indemnitee for

any payments made by Indemnitee to the holder of the Mortgage to satisfy and discharge the Mortgage of record.

To rely on the Agreement, the Indemnitee, or its Agent, **MUST** in each of the five scenarios above obtain either: (i) a copy of the Indemnitor's title policy; or (ii) a copy of the Indemnitor's marked-up title report.

Under the terms of the Mutual Indemnification Agreement, you are still required to get a letter of indemnity for any matter that is not listed as a Covered Defect. In addition, while the purpose of the Mutual Indemnification Agreement is to reduce the need to request and to write letters of indemnity, you are still permitted to request a letter of indemnity for a Covered Defect.

YOU ARE REQUIRED TO OBTAIN A LETTER OF INDEMNITY FOR ALL MATTERS, EVEN FOR "COVERED DEFECTS", WHEN THE PRIOR INSURER IS NOT A PARTY TO THE MUTUAL INDEMNIFICATION AGREEMENT AS SET FORTH ABOVE.

You will be notified if an underwriter that is now, or may hereafter become, a party to the Agreement is no longer participating. An underwriter is required to give thirty calendar days advance written notice of its intention to withdraw from the Agreement. Withdrawal from the Agreement does not effect any then outstanding indemnity obligations.

A memorandum, in substantially similar form and substance, is also being issued by the other parties to the Agreement to their underwriters and agents.

If you have any questions concerning the implementation of the Mutual Indemnification Agreement, please call counsel at Stewart Title Insurance Company (insert name of your company).

Dated as of April 1, 2006

EXHIBIT A

COVERED DEFECTS

The following matters, if neither satisfied, released, or disposed of in the Public Records (as defined in the Conditions and Stipulations of the Indemnitor's Policy) from the Land to be insured by the Indemnitee at the time that it issues a policy of title insurance, are Covered Defects under this Agreement:

- (a) (i) As to title policies issued by an Indemnitee prior to April 1, 2005: (a) mortgages; and (b) New York State and New York City Tax warrants, money judgments, New York City Parking Violation Bureau judgments, Environmental Control Board liens, and Transit Adjudication Bureau judgments (collectively "Judgments") and federal tax liens, (each federal tax lien or Judgment is individually a "Lien") filed or docketed against a person or entity out of title, the lien of which has not expired by operation of law, provided no execution has been made, or action commenced to foreclose or to otherwise enforce the mortgage or Lien on the Date of Policy of Indemnitee's policy, and the amount of the mortgage or Lien does not exceed \$250,000. In the event that any such mortgage or Lien exceeds \$250,000 and a separate letter of indemnity is obtained, then this Agreement shall remain valid as to each other mortgage and Lien not exceeding \$250,000 provided for in this paragraph.
- (ii) As to title policies issued by an Indemnitee on and after April 1, 2005: New York State and New York City Tax warrants, money judgments, New York City Parking Violation Bureau judgments, Environmental Control Board liens, and Transit Adjudication Bureau judgments (collectively "Judgments" and each Judgment individually a "Lien") (but not including federal tax liens) filed or docketed against a person or entity out of title, the lien of which has not expired by operation of law, provided no execution has been made, or action commenced to foreclose or to otherwise enforce the mortgage or Lien on the Date of Policy of Indemnitee's policy, and the amount of the mortgage or Lien does not exceed \$500,000. In the event that any such mortgage or Lien exceeds \$500,000 and a separate letter of indemnity is obtained, then this Agreement shall remain valid as to each other mortgage and Lien not exceeding \$500,000 provided for in this paragraph.

(iii) As to title policies issued by an Indemnatee on and after April 1, 2005: Federal tax liens filed or docketed against a person or entity out of title, the lien of which has not expired by operation of law, provided no execution has been made, or action commenced to foreclose or to otherwise enforce the federal tax lien on the Date of Policy of Indemnatee's policy, and the amount of the federal tax lien does not exceed \$250,000.

(iv) As to title policies issued by an Indemnatee: (a) on and after April 1, 2005 but prior to April 1, 2006, mortgages provided no action has been commenced to foreclose or to otherwise enforce the mortgage on the Date of Policy of Indemnatee's policy and the amount of the mortgage does not exceed \$500,000. In the event that any such mortgage exceeds \$500,000 and a separate letter of indemnity is obtained as provided in the second full paragraph on page "3" of this Agreement, then this Agreement shall remain valid as to each other mortgage not exceeding \$500,000 provided for in this paragraph; (b) on and after April 1, 2006: mortgages provided no action has been commenced to foreclose or to otherwise enforce the mortgage on the Date of Policy of Indemnatee's policy and the amount of the mortgage does not exceed \$750,000. In the event that any such mortgage exceeds \$750,000 and a separate letter of indemnity is obtained as provided in the second full paragraph on page "3" of this Agreement, then this Agreement shall remain valid as to each other mortgage not exceeding \$750,000 provided for in this paragraph.

- (b) Proof of Death, devolution of title, and federal and New York State estate taxes regarding the estate of a prior owner, when there has been recorded a conveyance for consideration to a bona fide purchaser.
- (c) Matters relating to the devolution of title, other than those relating to a matter covered by "(b)", above, arising prior to an Indemnitor's policy, including, without limitation, (i) errors in the recitation of names of the parties to recorded instruments, (ii) conveyances from an entity when title was last conveyed to a different named entity, (iii) execution of a deed by the purchaser at a foreclosure sale when there is no deed of record out of the referee in the foreclosure, provided that a referee's report of sale, confirming the transfer of title to said purchaser is on file in the foreclosure action, (iv) the absence of a termination or surrender of a life estate, (v) a leasehold interest not excepted in the Indemnitor's policy where the lease has expired by its terms and there is no recorded termination or surrender agreement, and (vi) outstanding fractional interests of record held by a joint tenant or a tenant in common, (vii) an outstanding interest of a tenant by the entirety. For items (vi and (vii)) to be Covered Defects, the

property must be improved and all interests in the property must be held of record by a purchaser(s) for value (other than one of the joint tenants, tenants in common, or tenants by the entirety in question) for not less than the last immediately preceding ten years.

- (d) Proof that as of the date of the death of a tenant by the entirety, the then surviving spouse and the deceased were married and not subject to the terms of a separation agreement when there has been recorded a conveyance for consideration from the surviving spouse, or from the fiduciaries of the estate of the surviving spouse, or from the distributes or devisees of the surviving spouse, to a bona fide purchaser.
- (e) As to a corporation in the chain of title to the property within the immediately prior ten years, proof of due incorporation, New York State Corporate Franchise tax, and New York City General Business tax, provided no execution has been made or action commenced to foreclose or to otherwise enforce the lien thereof.
- (f) Errors in description of the property insured in a deed or conveyance (other than a mortgage) executed prior to the deed or conveyance insured by the Indemnitor under an Owner's policy provided that the deed insured by the Indemnitor under an Owner's policy contains the correct description.
- (g) New York City Sidewalk Violations, but only when the Indemnitor's Policy is an ALTA policy.
- (h) A mortgage in the original principal amount of (i) \$500,000 or less when an Indemnitee's policy is issued on and after April 1, 2005 and before April 1, 2006 or (ii) \$750,000 or less when an Indemnitee's policy is issued on or after April 1, 2006, open of record, made by the current record owner, and not excepted in the Indemnitor's Loan Policy, when the proceeds of the mortgage insured under the Indemnitor's Loan Policy were used to pay in full said open mortgage. The Indemnitee must obtain a copy of (i) the payoff letter for that open mortgage, (ii) the certified, bank or attorney's escrow account check(s) issued for payment of the amount stated in the payoff letter as due, and (iii) the letter with which payment was sent to the holder of the mortgage or its representative as stated in the payoff letter. This Covered Defect applies when the Indemnitee's policy is either an Owner's Policy or a Loan Policy and it applies to title policies issued by an Indemnitee on and after April 1, 2005.

**DEFECTS NOT COVERED BY
MUTUAL INDEMNIFICATION AGREEMENT**

- 1. Mechanic's liens**
- 2. Notices of Pendency and underlying actions**
- 3. Real estate taxes and tax liens**
- 4. Unrecorded closing instruments**
- 5. Any federal tax lien in an amount greater than \$250,000.00**
- 6. When the Indemnitee's policy is issued prior to April 1, 2005, any mortgage, New York State and New York City Tax warrant, money judgment, New York City Parking Violation Bureau judgment, Environmental Control Board lien, and Transit Adjudication Bureau judgment in an amount greater than \$250,000.00.**
- 7. When the Indemnitee's policy is issued on or after April 1, 2005, any New York State and New York City Tax warrant, money judgment, New York City Parking Violation Bureau judgment, Environmental Control Board lien, and Transit Adjudication Bureau judgment in an amount greater than \$500,000.00.**
- 8. When the Indemnitee's policy is issued on and after April 1, 2005 but before April 1, 2006, any mortgage in an amount greater than \$500,000.00.**
- 9. When the Indemnitee's policy is issued on and after April 1, 2006, any mortgage in an amount greater than \$750,000.**
- 10. An option to purchase or a right of first refusal to purchase contained in a lease even though a policy excepts rights of tenants as tenants only or otherwise insures that a tenant does not have, or no tenants have, an option to purchase or a right of first refusal to purchase.**
- 11. Matters insured against under a Standard New York Endorsement first appearing of record in the period between the Date of Policy as show in the Indemnitor's policy and the date of the recording of the instrument(s) insured by that policy.**
- 12. Other defects in titles that are not Covered Defects under the Mutual Indemnification Agreement.**