

UNDERSTANDING AVAILABLE (AND NECESSARY)
ENDORSEMENTS IN COMMERCIAL
TITLE INSURANCE POLICIES

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Introduction

Title insurance is no longer an oddity in commercial real estate conveyancing. It has become something that a number of us use on a regular basis. Using it effectively is an important skill and there are a number of roles that a lawyer must play to do that effectively.

The first decision the lawyer must make is whether or not to use title insurance at all. In a commercial transaction, a lawyer should understand the circumstances where title insurance may help to protect a client's interest. I have found that there are five factors that often make title insurance an appropriate option:

- (1) to save due diligence costs;
- (2) to facilitate a large closing with multiple locations;
- (3) to insure over existing title defects;
- (4) to satisfy the requirements of mortgage lenders; and
- (5) to reflect the US/international aspects of a transaction.

In those five circumstances, the use of title insurance is recommended. A lawyer should be alert to the existence of one or more of these factors when the file is first brought to him, so that service can be provided to the client in the most cost effective way by taking advantage of title insurance at an early stage.

The second role that the lawyer will play in a commercial title-insured transaction is the selection of the insurer. The lawyer should take advantage of the competitive nature of the industry and obtain quotes and information from more than one title insurer.

The third role of the lawyer is to handle the transactional aspects of the acquisition or financing to ensure that the conveyance or financing is properly carried out and the client's interests are adequately protected.

Fourth, if there is a lender involved in the transaction, the lawyer should determine the lender's title insurance needs and standards, the title insurer it prefers to work with, preferred endorsements and other matters as early as possible so that the lawyer can integrate them with the client's needs.

Fifth, the lawyer has an obligation to understand and explain to clients both the policy exclusions and the exceptions to title recorded in Schedule B of the title insurance policy.

Sixth, the lawyer should ensure that Schedule A is completed properly, that issues such as amount of insurance, date of policy and name of insured are properly handled.

A final area where a lawyer maintains a fundamental role in the commercial transaction is with respect to endorsements. The lawyer needs to obtain the correct endorsements to protect the client's interests and ensure that they are properly adjusted to ensure that the client can carry out its business activities on the property going forward. After reviewing and explaining the exclusions and exceptions and completing Schedule A, the lawyer may need to deal with certain areas of concern by endorsement. In the third section of this paper, I list a number of possible questions the lawyer should ask the client to determine what endorsements should be requested and obtained.

As you can see from both of the above sections, the real estate lawyer does not disappear from any real estate transaction simply because title insurance is purchased. The lawyer continues to play a fundamental role to ensure that the client takes advantage of the product in the most effective way possible. One of the key areas of contribution is in the area of endorsements. They will be discussed later in this paper.

Adjusting coverages to meet your client's needs: Extras to the basic title policy

While the presentation will run through this quickly, to put endorsements in the proper context it is necessary to understand how the elements of a title insurance policy work and how endorsements are fundamental to the insurance product.

There are eight basic components to a standard title insurance policy, which are common to all of the policies that are available in Ontario. They are:

1. Coverage Statement;
2. Covered Title Risks;
3. Duty to Defend;
4. Schedule A, which sets out the basic policy terms;
5. Schedule B, which sets out the Exceptions from Coverage;
6. Exclusions from Coverage;
7. Conditions and Stipulations; and
8. Endorsements.

Coverage Statement

The coverage statement is located at the top of the first page of the policy jacket. It says something like:

“Subject to the exclusions from coverage, and the exceptions from coverage and the conditions and stipulations, the title insurer insures, as of date of policy, as against loss or damage, not exceeding the amount of insurance, caused by:”

Covered Title Risks

Then, after the words in the Coverage Statement “loss caused by”, you come to the heart of the policy - the Covered Title Risks. There are four basic owner's coverages:

- (1) Title being held other than as stated in the policy;

- (2) Any defect in, charge, lien or encumbrance on the title;
- (3) Unmarketability of the title; and
- (4) Lack of a right of access.

That is a simple, but pretty complete, title statement – “you own the property, free and clear, you can get to it and you can sell it”. Title insurance coverage in an owner’s policy lasts as long as that party owns the property.

In the commercial loan policy, there are four additional coverages offered:

- (5) The invalidity or unenforceability of the mortgage;
- (6) The priority of any lien or encumbrance over the mortgage;
- (7) Lack of priority of the mortgage to a construction lien; and
- (8) The invalidity or unenforceability of any assignment of the mortgage.

Again, three of the four are pretty basic, but pretty complete. The mortgage and any prior assignment of it is valid and enforceable in the priority stated in the policy. The coverage dealing with construction liens is more complicated. It apparently covers the mortgage against any construction liens. However, there are a series of exclusions and conditions in the policy which result in the construction lien coverage being available only for prior liens or work to be paid for by the mortgagee.

Since the title insurance coverage in the loan policy insures the mortgage itself, not the lender, its coverage remains in place as long as the loan is outstanding. It "runs with" the loan. This is a major advantage over a lawyer's opinion given to a lender which is not transferable. The fact that the title insurance benefits assignees of the loan and the importance of the secondary mortgage market in the United States, where local banks assign their mortgages to owners of mortgage pools like Fanny Mae or Freddie Mac, is a primary reason why title insurance developed in that country.

Duty to Defend

Another clear advantage of title insurance (and potentially a very useful tool for your client) follows the list of specific coverages and uses words like; "the company will also pay the costs, legal fees and the expenses incurred in defence of the title as insured." This is the third component - the "Duty to Defend". However, as an indemnity insurance policy, even without this statement there is a common law obligation on the insurer to defend what is insured – the title - against claims and to protect that title against acts inconsistent with the title insured.

Schedule A

The next component of the policy, Schedule A, sets out the policy number, the amount of insurance and the date of the policy. It also indicates the name of the insured, the interest covered by the policy, a statement as to who holds, or has been vested with the title and a description of the land. These all need to be reviewed closely to ensure that they are accurate, complete and whether they meet your client's needs.

Schedule A, Schedule B and the endorsements are the ways in which the lawyer “negotiates” coverage for the client. Consideration needs to be given to who should be the named insured, particularly in more complex commercial transactions where there may be a number of parties that want to receive the benefit of the coverage, even though they may not be the registered owner of the property.

From a legal standpoint, the amount of insurance is a crucial item that is one of the major distinctions between the coverage provided under a lawyer's opinion and the coverage provided by a title insurance policy. Other than the duty to defend, the policy's coverage is limited to the dollar amount on the face of the policy, unless there is an additional inflation coverage or a specific endorsement negotiated. There is usually a co-insurance provision contained in an owner's policy which limits the coverage if the policy amount is not determined accurately in the first place, or if improvements are constructed on the property.

The date of the policy is also a vital term which, except in the case of the extended coverage policies, determines the liability of the insurer throughout. On the commercial side, defects in

the insured title that arise after the date of the policy are not insured. On the other hand, certain liens, such as construction liens, “relate back” to prior to the date of the policy, and certain kinds of coverage, relating to conditions existing at the date of the policy, such as an illegal improvement, may not result in a claim until a much later time.

Exceptions - Schedule B

The next category is the exceptions to title, which are set out in Schedule B. Again these are a key area of negotiation for the lawyer seeking to protect his insured client. A simple way to have an insurer cover a title risk is for it not to be listed as an exception on Schedule B. Alternatively, it can be listed, and yet positive assurances can be added to Schedule B or in an endorsement.

At the current time, in addition to property-specific exceptions like registered mortgages or known survey defects, the following items are often standard exceptions in the various policies.

1. reservations and restrictions in original crown patent;
2. mining claims;
3. native land claims;
4. taxes or assessments not shown as existing liens;
5. unregistered easements or rights of way which would have been disclosed by an up-to-date survey;
6. facts that could be ascertained by an inspection or survey; and
7. survey defects.

Exclusions

The four standard exclusions in the owner policies are government power, expropriation, the general exclusion and insolvency.

Government power excludes the development process, building and zoning matters and environmental concerns. The basic title insurance policy covers only title, subdivision control and those government actions registered on title.

Expropriation is straightforward.

The third exclusion is a general one and excludes items caused by the insured or known by the insured and not disclosed. Also excluded are items that have not resulted in any loss or damage, that attached or were created after the date of policy, or that would not have happened had the insured paid value for the property.

The insolvency exclusion is the fourth in the owner's policies. This exclusion has been the subject of much amendment in the United States over the past fifteen years and there is a wide variation in the coverages offered.

In the loan policies three additional exclusions are added (as exclusions 4, 5 and 6 with insolvency moved to exclusion 8). The fourth is failure of the lender to comply with applicable "doing business" laws. Fifth is compliance with consumer protection laws. The sixth is the construction lien exclusion which narrows the broad coverage as discussed under covered title risks.

Conditions and Stipulations

The next part of the policy is the conditions and stipulations. They are a series of detailed provisions outlining the terms and conditions of the policy, the definitions and other matters. In large measure, the content of the Conditions and Stipulations:

- define the insured property, public records and other terms;
- describe the basic provisions of the policy;
- outline the continuation of insurance;
- talk about how claims can be made, should be defended or prosecuted;
- outline the scope of the insurer's options;
- deal with the extent of liability and co-insurance;
- provide for limitations of liability;
- set out the insurer's right of subrogation; and
- set out arbitration or dispute settlement mechanisms.

Endorsements

If we go back to the coverage statement, it refers to seven of those eight elements, but does not refer to the other basic element of a particular policy - any endorsements issued. Endorsements

modify the coverage offered and can substantially change the impact of certain provisions. These are the way in which title insurance responds to all kinds of specific, property focused issues. Endorsements allow policies to meet the special requirements of various insureds, particularly lenders, which develop standard endorsement packages that they require. Endorsements are not referred to in the Coverage Statement, but rather in one of the last Conditions and Stipulations in the pre-printed forms, the “Entire Contract” provision:

15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT.

(a) This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

A general description of endorsements and their role in title insurance is set out in Joyce Dickey Palomar’s *Title Insurance Law* (Clark Boardman Callaghan (1994)):

An endorsement... is a statement of coverage extending the basic coverage of the policy for matters of special concern to the insured. Sometimes, it requires an additional search of the public records, often going into records not usually and customarily searched by abstractors in the locale. Usually it requires an extra premium and some negotiation with the insurer. Sometimes, where a regulatory statute does not forbid the practice of “insuring over” an unsearched risk, it involves insurance against a known risk on an actuarial basis....

...An endorsement as extended or additional coverage is different from its use in other forms of insurance, where an “endorsement” may modify, reduce, or add to the coverage in the basic policy. As used here, an endorsement is an affirmative agreement by the insurer to bear the risk of certain described events. If this language is unambiguous, there is no need to refer back to the basic policy to understand its coverage.

The endorsement represents the manner in which title insurance coverage meets the specific needs of a commercial transaction. D. Barlow Burke Jr., in his *Law Of Title Insurance*, Section Edition (Little, Brown and Company (1993)), says:

It also is possible to negotiate for endorsements tailored to fit the particular circumstances of the transaction being insured title insurers' willingness to agree to various endorsements will depend on the risks involved and underwriting considerations. New endorsements are being created continually to insure risks not addressed by standard insurance policy forms. Underwriters vary in terms of the endorsements they are willing to provide and the fees they charge. Title insurers reportedly are more willing to furnish extended coverages to mortgagees than to purchasers of real property. Mortgagee insurance is deemed less risky because the policy is effective only during the mortgage term, the policy amount is less than the full value of the land, and claims are not likely unless the insured is required to foreclose on the mortgage.

As you can see from that comment, in the United States it is common for title insurers to charge additional premiums for endorsements. That is often because additional searches must be undertaken or risks assumed. However, because title insurance rates in the United States are regulated in many states, with the prices charged for specific policy types legislated, legal writers in those jurisdictions encourage insureds to pay something for any endorsements requested so that no argument can be made by a title insurer that there is a lack of consideration for the coverage obtained. We are an "unregulated jurisdiction" in Canada – policy premiums are set in a competitive manner, not specified by an agency, so there is clearly consideration paid for each policy and any endorsements.

While endorsements can also be individually drafted to suit the needs of a particular transaction, in the United States, because title insurance is regulated in various states and because the insurance product is used by many parties in their syndicated loan transactions, there are very definite standard endorsements. The Forms Committee of the ALTA (American Land Title Association) drafts and publishes policy forms and endorsements to provide that standard. Similarly, there are a number of state organizations, the largest of which is the CLTA (California Land Title Association) which do the same thing. Accordingly, you will often find forms with an ALTA or CLTA number. That standardization is supported and encouraged by the main players in the secondary mortgage market – Fannie Mae and Freddie Mac. Title insurance has

its roots in those entities wanting to have a standard they could rely upon across the United States, as opposed to being subject to local title variations.

In Canada, that has not occurred, as there is currently no equivalent to ALTA, CLTA, Fannie Mae or Freddie Mac. But the demands of major lenders, particularly those with American business experience and the competitive nature of the title insurance industry have led to much standardization. I have been retained on several occasions to review policy endorsements for financial institutions, and comparison of the endorsements to what the institution has previously accepted from one title insurer is a crucial approach taken. Given our relatively limited number of national banks, that greatly promotes uniformity.

Endorsements generally available for loan and owner's policies

In the commercial context, there are a wide variety of endorsements available in Canada, and there is also a some variation in the specific terms, there they include the ones described on the following pages. The following is a list of many endorsements that I have seen used in Canada. These endorsements come from a variety of title insurers in a variety of transactions. However, the specific terms used will vary from title insurer to title insurer and it is important to read and understand each individual endorsement until standard forms of endorsements are formally adopted in Canada.

This section of the material is also to be published in a slightly different format in the title insurance paragraphs authored by the writer under the Mortgages and Title Conveyancing tabs of CCH Canadian Limited's Ontario Real Estate Law Guide. The permission of CCH Canadian Limited for its use in this paper has been given.

Access Endorsement (General and Specific)

Where specific access to a particular street is important to an owner or lender, this endorsement is obtained. The Access Endorsement will provide:

The Company hereby insures the insured that the land described in Schedule A of the policy has legal pedestrian and vehicular access to and egress from such land via the primary existing access which is a physically open public street and the Company hereby insures said insured against loss or damage which said insured shall sustain in the event said assurances here shall prove to be incorrect.

The Access Endorsement is an improvement over the general access coverage in a title insurance policy which will say something like: *“Lack of a right to access to and from the land”*, and that only insures that ‘some’ access exists, not that the primary existing access can be used. In fact, in many circumstances access to a specific road is important for the financial viability of a particular property. For example, the KFC site located on Mount Pleasant, just south of Davisville, would be much less valuable if access was only available from the side street, Balliol, not Mount Pleasant Avenue itself. In such circumstances, the access endorsement might be amended to specify that particular access as follows:

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of the land described in Schedule A of the policy not having pedestrian and vehicular access to a public highway known as _____

Additional Insured Endorsement (General and Specific)

Schedule A to the title insurance policy has a line which indicates the named insured. It is generally intended that the names of the registered owner(s) in the owner’s policy or the initial registered mortgagee in the loan policy will be set out. In the loan policy, since the coverage “follows the loan, not the lender” the named insured isn’t much of an issue. The “insured”, as defined in the loan policy’s Conditions and Stipulations, includes *“each successor in ownership of the indebtedness”*.

The owner’s policy is different. In that policy “insured” is defined as follows:

(a) “insured”: the insured named in Schedule A, and, subject to any rights or defenses the Company would have had against the named insured, those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs or survivors.

Accordingly, in the owner’s policy title insurance is tied to the owner and his successors. As a result, the coverage can be lost whenever title is transferred, not just on a traditional sale to a third party.

In a commercial transaction, the new owner is often purchasing because it believes that it can make changes to enhance the value of what it is acquiring. Coverage could be lost by virtue of a corporate reorganization or restructuring, conveyances to or from shareholders, the creation or dissolution of partnerships, revising arrangements with franchisees, licensors or operators - something that is part of the business acquisition plan of the new owner. It is important to think

about that and negotiate an endorsement to cover the same, doing such things as: (1) listing as named insureds all of the names of the companies in the corporate group; (2) adding the right to assign to franchisees, licensees or operators; and (3) having the right to carry out a business plan and amend the policy before an agreed-upon later date.

The Additional Insured Endorsement is a generic way of doing that to cover circumstances most likely to arise. It will typically provide:

The Company agrees that the definition of insured contained in paragraph 1(a) of the Conditions and Stipulations of the policy shall include any of the following successors in interest to the named insured of the estate or interest described in Schedule A as of the date of the policy, (and subject to any defences against a prior Insured under this policy), to the following:

- (a) successor(s) by change of name;*
- (b) successor(s) by dissolution, amalgamation, plan of arrangement, merger, consolidation or reorganization;*
- (c) any corporate grantee of the Insured under a deed describing the land herein, the shares of which corporate grantee are wholly owned by the insured, or any affiliated company of the Insured;*
- (d) any partner(s) in the Insured or any entity in which any partner(s) is a partner, participant, joint venturer or shareholder if such transfer is without valuable consideration;*
- (e) the shareholders of a corporation which is a partner(s) in the Insured in the event that such corporate partner distributed the land described herein to such shareholders;*
- (f) the distributees of an estate of an Insured;*

You should read any endorsement carefully, mostly because endorsements are usually based on American precedents. For example, some of the specific successors noted above are already covered by Ontario law (for example, neither a successor by change of name or by amalgamation would constitute a new insured in Ontario). However, the endorsement is a good outline of a standard kind of way in which this problem can be dealt with and is an excellent way to start when the new owner is likely to make these kinds of changes.

Address Endorsement

This endorsement insures that the building with the municipal address listed is located on the property covered by the policy. This is a standard endorsement in the various extended coverage residential policies. It is particularly useful in a loan policy to ensure that the building that was

appraised when authorizing the loan is actually the building located on the property charged. It is routinely included in the extended coverage residential policies now issued in Canada. It will provide:

The Company hereby insures the insured against loss or damage which said insured shall sustain by reason of the failure of the description of building known as municipal address, to be located on the land at Date of Policy.

Aggregation and Tie-In (Owners) Endorsement

In many circumstances, the insured is acquiring or lending money on a number of pieces of property and the purchase price or loan amount has been negotiated on an aggregate basis. This is common where the insured is buying or financing all of the assets of a company or a division or all the shares of a company. In those cases you will have a total value, but you will not have an individual value for each location. As well, in such transactions the calculation of the total value is often based on something other than the market value of each piece of property. The purchase price may be calculated based upon the total sales or total profits from all of the locations. Certainly, in most cases with multiple properties, the purchase financing is usually calculated and advanced on an overall basis and the security (and total loan obligation) applies to all of the real properties.

However, an owner's title insurance policy is, by its nature, a very property-specific document. Each policy lists the property, the owner and the purchase price, and sets out the specific exceptions to coverage affecting that specific title. Like a homeowner's casualty policy, it relates to the one property and the coverage provided is limited to the policy amount, generally the purchase price of the property. Each owner's policy (other than those issued by Stewart Title) also contains a co-insurance provision to protect the insurer, so that if the coverage purchased is materially under-valued, the insured contributes part of the loss. This prevents an insured, knowing that most of the title problems will be quite small, from deciding to buy title insurance for less than a property's fair market value, then relying on the insurer to pay all smaller claims and all costs of defending the title. This is just like a homeowner's casualty policy – if an insured doesn't purchase enough fire insurance – a portion of any risk will be self insured.

Section 7 of the Conditions and Stipulations in the owner's policy, entitled "DETERMINATION, EXTENT OF LIABILITY AND COINSURANCE" provides:

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) *The liability of the Company under this policy shall not exceed the least of:*

(i) *the Amount of Insurance stated in Schedule A; or,*

(ii) *the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.*

(b) *In the event the Amount of Insurance stated in Schedule A at the Date of Policy is less than 80 percent of the value of the insured estate or interest or the full consideration paid for the land, whichever is less, or if subsequent to the Date of Policy an improvement is erected on the land which increases the value of the insured estate or interest by at least 20 percent over the Amount of Insurance stated in Schedule A, then this Policy is subject to the following:*

(i) *where no subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that the amount of insurance at Date of Policy bears to the total value of the insured estate or interest at Date of Policy; or*

(ii) *where a subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that 120 percent of the Amount of Insurance stated in Schedule A bears to the sum of the Amount of Insurance stated in Schedule A and the amount expended for the improvement.*

The provisions of this paragraph shall not apply to costs, legal fees and expenses for which the Company is liable under this policy, and shall only apply to that portion of any loss which exceeds, in the aggregate, 10 percent of the Amount of Insurance stated in Schedule A.

Thus, the insured becomes a co-insurer if enough title insurance is not purchased initially or if material improvements are later made to the properties. The insured should obtain enough coverage at the outset and, if planning to construct improvements, should consider increasing policy limits when the insurance is purchased and obtaining a Future Improvements Endorsement to permit that increase. Of course, an owner could always later request an Amend Policy Amount Endorsement and in most cases a title insurer will be happy to accept more premium and increase coverage at a later date. However, if some prior title problem becomes known before the change is requested, the amendment won't be available.

In the multiple site situation, it is necessary to allocate a coverage amount to each individual title insurance policy, but the arbitrarily chosen figure may be inappropriate. An example is the multiple restaurant acquisition. The purchase price may well be determined based on sales, but the allocation on that basis may not relate at all to land costs, construction costs or current market conditions. The Aggregation/Tie-In Endorsement solves that problem by having the coverage limit increased to the total of each of the policy amounts for each site and eliminating the co-insurance provisions in the following manner:

This policy is issued in connection with the following policies:

<i>Policy Number:</i>	<i>Province:</i>	<i>Amount:</i>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Notwithstanding the provisions in Paragraph 7 (a)(i) of the Conditions and Stipulations of this Policy, the insurance coverage afforded in this Policy is aggregated with the insurance coverage of the policies identified above so the effective insurance coverage is \$ _____ and said amount shall be available for any loss or losses with respect to the property covered by this Policy and the policies listed above. The total liability of the Company under this and all policies identified above shall not exceed such aggregate amount but the Company's liability under this Policy for the land described in Schedule A remains limited by the provisions of Paragraph 7 (a)(ii) of the Conditions and Stipulations of this Policy. Any payment by the company on this or any of the Policies listed above shall reduce aggregate liability of Company under all of said policies.

In the multiple site situation, this endorsement is of great value.

Aggregation and Tie-In (Loan) Endorsement

There is no co-insurance provision in a loan policy. What is insured is the amount loaned, and it is up to the lender to determine that there is sufficient equity in the property to repay the loan. The first portion of Section 7 of the Conditions and Stipulations in a loan policy, entitled "DETERMINATION AND EXTENT OF LIABILITY", provides:

- (a) The liability of the Company under this policy shall not exceed the least of:*
 - (i) the amount of insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in Section 2(c) of these Conditions and Stipulations;*

(ii) *the amount of unpaid principal indebtedness as defined in 2(c)(ii) secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; or*

(iii) *the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.*

If the lender loaned two million dollars on a property worth one million dollars and purchased a two million dollar title insurance loan policy, while 7(a)(i) and 7(a)(ii) would allow full recovery, 7(a)(iii) would limit the lender’s recovery to one million dollars even if there was a total title loss – say the mortgage was not registered. The difference between the value of the insured interest subject to the defect (nil) and the value of the interest insured without a defect could never exceed the value of the property (one million dollars).

However, as in the owner’s policy, if a lender is lending money on a number of properties and the loan has been negotiated on an aggregate basis, this endorsement could be useful. This is very common in the context of a financing on all the assets of a company or a division. In those cases, you have a total value, but you do not have an individual value for each location. The calculation of the financing is often based on something other than the market value of each property – say the sales at each location. The endorsement is virtually identical to the endorsement in the owner’s policy. However, another solution exists. Since there is no co-insurance provision in the loan policy, it is possible to simply issue a single policy for the aggregate loan amount, listing the descriptions and exceptions for all of the sites. The title insurance policy is no longer a property-specific document, and the coverage is already aggregated.

A loan policy endorsement is very similar to the owners and reads:

The Company acknowledges that the land described in Schedule A of this Policy is part of the security for an indebtedness in the amount of \$ _____ from _____ to the insured which indebtedness is also secured by mortgages which are insured concurrently by the following policies:

<i>Policy Number:</i>	<i>Province/State:</i>	<i>Amount:</i>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Notwithstanding the provisions in Paragraph 7 (a)(i) of the Conditions and Stipulations of this Policy, the insurance coverage afforded in this Policy is aggregated with the insurance coverage of the policies identified above so the effective insurance coverage is \$_____ and said amount shall be available for any loss or losses with respect to the property covered by this Policy and the policies listed above. The total liability of the Company under this and all policies identified above shall not exceed such aggregate amount but the Company's liability under this Policy for the land described in Schedule A remains limited by the provisions of Paragraph 7 (a)(ii) and (a)(iii) of the Conditions and Stipulations of this Policy. Any payment by the Company on this or any of the policies listed above shall reduce the aggregate liability of the Company under all of said policies.

Amend Insured Endorsement

This endorsement is used, not at the time a policy is issued, but rather at some later date when the existing policy is amended to change the insured but not the date of the policy. That means that any title defect that has arisen since the original date would not be covered. The form will provide something like:

The policy is hereby amended by adding as a named insured therein from _____ to _____.

This endorsement does not extend the coverage of the policy to any later date than Date of Policy, nor does it impose any liability on the Company for loss or damage resulting from (1) failure of such added insured to acquire an insurable estate or interest in the land, or (2) any defect, lien or encumbrance attaching by reason of the acquisition of an estate or interest in the land by such added insured.

In the United States, this kind of later endorsement is often called an Additional Insured Endorsement, but it is not added to the policy at the original date of policy. The following are typical situations in which this endorsement may be requested and granted by a title insurer:

- A gift (including one made to establish a trust);
- An partnership dissolving and transferring to its partners;
- A partnership acquiring from a partner;
- A 100% shareholder transferring to its wholly-owned corporation;
- A corporation transferring to its sole shareholder;
- A corporation transferring to a wholly-owned subsidiary; and
- A wholly-owned subsidiary transferring to its parent.

It should be remembered that this kind of endorsement is going to be subject to the underwriting practices of the title insurer in place at that later date. As you can see, the above list of circumstances where this endorsement will be willingly given is limited to circumstances where there is no new consideration given. Greater flexibility may well be required and the Additional Insured Endorsement discussed and obtained at the outset (which the title insurer is obliged to provide the insured without additional charge) outlined above is much more valuable.

Amend Policy Endorsement

This is also an endorsement obtained subsequently, where the existing policy is amended to change some aspect of coverage but not to change the date of the policy. Obviously, the wording of this endorsement will depend upon the specific provision to be amended and care should be taken to ensure that the amendment tracks appropriately through the Covered Title Risks, Exclusions and Conditions and Stipulations in the Policy. The basic endorsement will provide:

The above policy is hereby amended by: (followed by the appropriate amendments)

Again, this kind of endorsement is going to be subject to the underwriting practices of the title insurer in place at the time a request is made.

Arbitration-Deletion Endorsement

Paragraph 13 of the Conditions and Stipulations provides for arbitration, in some cases arbitration under the Title Insurance Arbitration Rules of the American Arbitration Association. The arbitration provision is not identical in the policies of the various title insurers. It is unclear exactly how an arbitration process will work in Canada. On one hand, arbitration is well suited to title insurance policy review and the arbitrators will be expert. On the other hand, a U.S. arbitration will not be carried out in accordance with Canadian laws and procedures. That fact should be reviewed with your client and an endorsement deleting the same considered. It would provide:

This policy is amended by deleting paragraph 13 from the Conditions and Stipulations

This leaves your client with the policy terms and with recourse to the Canadian courts.

An alternative approach taken by another title insurer is:

The Company hereby assures the Insured that Paragraph 13 of the Conditions and Stipulations of the Policy is hereby amended to read as follows:

Unless prohibited by applicable law, arbitration, pursuant to the Title Insurance Arbitration rules of the American Arbitration, may be used if agreed to by both the Company and the Insured. Arbitrable matters may include, but are not limited to, any controversy or claim between the Insured and the Company arising out of or related to the policy, any service of the Company in connection with its issuance or breach of a policy provision or other obligation.

Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the Insured, the Rules in effect at Date of Policy, shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the may be entered in any court having jurisdiction thereof.

The law of the province of the land shall apply to an arbitration under the Title Insurance Arbitration Rules. A copy of the Rules may be obtained from the Company upon request.

The arbitration provision and approach of your client should be considered in each case.

Assignment of Mortgage Endorsement

While I described previously how the loan coverage remains "with the loan" and provides coverage to subsequent assignees of the loan, that coverage does not insure the validity of such subsequent assignment. To provide that coverage, the following is another endorsement that can be obtained at a later date:

1. *The name of the insured is amended to read:*
2. *The Company insures the insured against loss or damage sustained by reason of:*

(a) The failure of the following assignment to vest title to the insured mortgage in the insured:

(b) Any modification, partial or full reconveyance, release, or discharge of the lien of the insured mortgage recorded on or prior to Date of Endorsement in the public records other than those shown in the policy or a prior endorsement.

This endorsement shall be effective provided that the note or notes secured by the lien of the insured mortgage have been properly endorsed and delivered to the insured at the Date of Endorsement.

Assignment of Rentals Endorsement

This endorsement deals with the execution and priority of an assignment of rents (or lessor's interest in leases) contained in a separate document given as additional security for a loan. There

is a potential difficulty in relying upon title insurance to cover the lender for defects of a loss in priority of the assignment of rents without an additional endorsement, because it is questionable whether the assignment is an interest in land, given the conditional nature of most assignments. It provides:

The Company hereby insures the Insured against loss which the Insured shall sustain by reason of:

(a) any defect in the execution of the document registered on _____ as Instrument No. _____, and

(b) the existence of any prior assignment of the lessor's interest in the lease or leases specified in such document, including any assignments of rents thereunder, unless excepted in Schedule B.

I have seen a number of insured loans where the assignment was collateral to a charge or mortgage, and where this endorsement was not requested. As borrower's solicitor, we were giving an enforceability opinion about the documents so it was not needed. The use of this endorsement seems to vary with the lending practices of each particular lender, but should be considered.

Co-Insurance Endorsement

This endorsement removes the co-insurance provisions in the policy where the insurer is comfortable that the Fair Market Value of the property is being insured. It eliminates the concern for the insured owner that it will need to be a co-insurer, unless it constructs improvements on the property. It provides:

The Company acknowledges and agrees that only for the purpose of the Company applying Paragraph 7(b)(i) of the Conditions and Stipulations of the Policy (co-insurance - no subsequent improvement), the Insured has purchased a sufficient amount of insurance evidenced by the policy so that co-insurance under Paragraph 7(b)(i) does not apply.

This endorsement is neither to be construed as insuring the value of the land nor insuring that the amount of insurance in Schedule A is equal to 80 percent or more of the value of the Insured estate or interest or the full consideration paid for the land, whichever is less.

Commercial Inflation Endorsement

This endorsement allows an owner to increase coverage at a later date and binds the insurer to provide that coverage:

The effect of inflation on real estate values and the need of an insured owner to be able to obtain an additional amount of title insurance, hereby agrees as follows:

Provided the land is presently improved by a structure other than a one-two-four family residence, the Company, upon request and payment of the applicable premium within five years of the Date of Policy, will increase the Amount of Insurance, as stated in Schedule A, to an amount not exceeding one hundred and fifty percent (150%) of the stated Amount of Insurance. Any such increase in the Amount of Insurance will not be applicable on the amount of liability the Company might have for any claim under the policy which the insured has filed or has knowledge of at the time the request for such increase is made.

The premium for such additional insurance shall be calculated at the rate of-

This agreement is subject to the availability, as a rate not exceeding that set forth above, of reinsurance or co-insurance of any portion of the requested additional insurance, if such reinsurance or co-insurance is required by the insured, by any governmental law or regulation, or by the Company because the requested additional insurance exceeds the Company's self-imposed retention limits (which at the date of policy is _____)

Comprehensive Endorsement

Some title insurers call their Restrictions, Encroachments and Minerals Endorsement to be their "Comprehensive Endorsement". I will outline it in that section.

Condominium Endorsement

This endorsement adapts a standard commercial loan policy for the commercial condominium situation and insures the priority of the loan over condominium charges and assessments. The following is one condominium endorsement offered to lenders:

The Company hereby insures against loss or damage by reason of:

- (1) The failure of the unit identified in Schedule A and its common elements to be part of a condominium within the meaning of the condominium statutes of the jurisdiction in which the unit and its common elements are located.*
- (2) The failure of the documents required by said condominium statutes to comply with the requirements of said statutes to the extent that such failure affects the title to the unit and its common elements.*
- (3) Present violations of any restrictive covenants which restrict the use of the unit and its common elements and which are contained in the condominium documents. Said restrictive covenants do not contain any provisions which will cause a forfeiture or reversion of title.*
- (4) The priority of any lien for charges and assessments provided for in the condominium statutes and condominium documents over the lien of any insured mortgage identified in Schedule A.*
- (5) The failure of the unit and its common elements to be entitled by law to be assessed for real property taxes as a separate parcel.*

(6) *Any obligation to remove any improvements which exist at date of policy because of any present encroachment or because of any future unintentional encroachment of the common elements upon any unit or of any unit upon the common elements or another unit.*

(7) *The failure of title by reason of a right of first refusal to purchase the unit and its common elements which was exercised or could have been exercised at date of policy.*

No coverage is provided under this endorsement as to any covenant, condition, restriction or other provision relating to environmental protection.

The following are two simpler provisions offered by another title insurer, the first on smaller loan policies and the second on larger loans and to owners:

The Company hereby insures the insured against loss or damage (including without limitation loss or damage in the form of an increase in the monthly common expenses payable for the unit or in the form of a special assessment imposed on the unit), which the insured shall sustain by reason of:

- 1. The failure of the land to be a part of a condominium within the meaning of the condominium statutes of the jurisdiction in which the land and its common elements are located.*
- 2. The priority of any lien for charges and assessments at Date of Policy provided for in the condominium statutes and condominium documents over the lien of any insured mortgage identified in Schedule A.*
- 3. The failure of the documents required by said condominium statutes to comply with the requirements of said statutes to the extent that such failure affects the title to the land.*

and

The Company hereby insures the insured against loss or damage (including without limitation loss or damage in the form of an increase in the monthly common expenses payable for the unit or in the form of a special assessment imposed on the unit), which the insured shall sustain by reason of:

- 1. The failure of the Condominium Corporation governing the condominium on the land, to disclose in the Status Certificate obtained in this transaction, any situation that would give rise to its right to levy an increase in monthly common expenses or a special assessment against the unit. Provided, however, that this coverage shall not extend to loss or damage sustained by the insured as a result of the Condominium Corporation's failure to disclose any such situation identified in a completed, pending, ongoing or future reserve fund study required by the Condominium Act, 1998 (Ontario).*
- 2. The failure of the land to be a part of a condominium within the meaning of the condominium statutes of the jurisdiction in which the land and its common elements are located.*
- 3. The failure of the documents required by said condominium statutes to comply with the requirements of said statutes to the extent that such failure affects the title to the land.*

Construction (Loan) Endorsement

This endorsement deals with the issues that arise from the application of the Construction Lien Act when subsequent advances are made under a construction loan. The standard construction lien coverage (Paragraph 7) is quite broad and seems to cover most lien risks. However, the combination of two exclusions and Condition and Stipulation 8(d)(ii) means that construction lien coverage only applies to work contracted for or commenced prior to the date of the policy or financed by the insured indebtedness. Due to the implications of the Construction Lien Act (Ontario), as part of the underwriting process title insurers determine if work will be carried out using the loan proceeds and impose a much more restricted routine unless they are very comfortable with the lending practices and procedures of the lender and the loan is very routine. The following is a typical approach:

Provided the Insured has confirmed that, as at the date of each advance under the insured Mortgage, no claims for lien have been registered against Title to the Land, the Insured has not received notice of a claim for lien, and the provisions contained in the applicable lien legislation have been complied with, and there have been no other changes to title, the Company hereby:

- 1. insures the Insured against loss which the insured shall sustain as a result of any loss in priority of its Mortgage to any claim for liens (whether now existing or hereafter arising) with respect to any improvement of the Land;*
- 2. Amends the Date of Policy to be the date of such advance.*

This lets an insured lender be covered for future advances as long as it follows a safe procedure at the time of each advance, complying with holdback requirements, doing a sub-search and executions search at the time of each advance, checking taxes and not having received notice of a claim for lien.

Contiguity Endorsement

This endorsement ensures that all parts of an assembled parcel are contiguous. It is not often needed under the modern reference plan/land titles approach in Ontario. However, due to the variety of land assembly systems in the United States, it is often requested by American lenders or purchasers as a matter of course. It should be obtained whenever there is any land assembly or consolidation in the history of the property.

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of the land described in Schedule A, not forming a single parcel of land free of any gaps separating any portion thereof from any other portion.

Covenants, Conditions and Restrictions, Violations Endorsement

This is insurance against judicial enforcement of covenants, conditions and restrictions, based on a present violation thereof. It is issued by a title insurer that believes that there are no present violations. It provides:

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of present violations on the land of the covenants, conditions and restrictions referred to in paragraph __ of Schedule B.

Wherever in this endorsement the words "covenants, conditions or restriction" appear, they shall not be deemed to refer to or include the terms, covenants, conditions or limitations contained in an instrument creating a lease.

For purposes of this endorsement, the words "covenants," "conditions" or "restrictions" shall not be deemed to refer to or include any covenants, conditions or restrictions relating to environmental protection, except to the extent that a notice of a violation or alleged violation affecting the land has been registered in the public records at Date of Policy and is not excepted in Schedule B.

Creditor's Rights-Amendment Endorsement

This is an amendment of the creditor's rights exclusion to make it less limiting in scope. There are two different approaches taken by title insurers relating to the creditor's rights exclusion (usually Exclusion 7). To a great extent the approaches vary, depending upon the date the policy was issued in Canada, due to the American history of this provision in the U.S. In 1990, the ALTA standard loan policy contained a simple exclusion which excluded bankruptcy, insolvency and creditors' rights laws. That was logical, as it was felt that these were not 'title' issues that the title insurers or their agents could search for. This exclusion was used by First Canadian (and is still used) in its commercial loan policies here in Canada. It provides:

7. Any claim, which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal or provincial bankruptcy, insolvency or similar creditors' rights laws.

In the United States, the commercial lending industry objected to the breadth of the exclusion because it also excluded those mechanical, conveyancing kinds of risks that a title insurer should

be discovering with its searches and inquiries, such as whether the trustee or receiver was validly appointed, and whether the deed was executed and registered. In 1992, the ALTA exclusion and to be limited to fraudulent or preferential transactions and equitable subordinations.

The Canadian exception that is most similar to the 1992 ALTA exclusion is Land Canada's, which provides:

7. Any claim, which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal or provincial bankruptcy, insolvency or similar creditors rights laws in Canada, that is based on:

(a) the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer; or

(b) the subordination of the interest of the insured mortgagee as a result of the application of the doctrine of equitable subordination or postponement; or

(c) the transaction creating the interest of the insured mortgagee being deemed a preferential transfer except where the preferential transfer results from the failure:

(i) to timely register or record the instrument or transfer; or

(ii) of such registration or recordation to impart notice to a purchaser for value or a judgment or lien creditor.

The other commercial title insurers match the 1992 ALTA endorsement with simpler language. Accordingly, First Canadian makes available the following endorsement to match the commercial loan coverage offered by the other title insurers:

The policy is hereby amended by deleting paragraph 7 from the Exclusions From Coverage and replacing it with the following:

7. Any claim, which arises out of the transaction vesting in the insured the estate or interest insured by this policy and which is based on such transaction being deemed a fraudulent conveyance, fraudulent transfer, or a preferential or voidable transfer by reason of the operation of federal or provincial bankruptcy, insolvency, or similar creditors' rights laws.

For owner's coverage First Canadian offers:

The policy is hereby amended by deleting paragraph 4 from the Exclusions From Coverage and replacing it with the following:

4. Any claim, which arises out of the transaction vesting in the insured the estate or interest insured by this policy, by reason of the operation of federal or provincial bankruptcy, insolvency, or similar creditors' rights laws, that is based on:

(a) the transaction creating the estate or interest insured by this policy being deemed a fraudulent conveyance or fraudulent transfer; or

(b) the transaction creating the estate or interest insured by this policy being deemed a preferential transfer except where the preferential transfer results from the failure:

(i) to timely register or record the instrument of transfer; or

(ii) of such registration or recordation to impart notice to a purchaser for value or adequate consideration or a judgment or lien creditor.

Creditor's Rights-Deletion Endorsement

In certain circumstances, after suitable due diligence a title insurer could even decide to provide coverage by deleting the exclusion altogether in a loan policy. That endorsement would provide:

The policy is hereby amended by deleting paragraph 7 from the Exclusions From Coverage.

Cross Default Endorsement

This endorsement provides coverage that the charge is not invalid, unenforceable or does not affect title to the lands by reason of the cross-default provisions of the credit documents. It provides:

The Company hereby insures the Insured against loss or damage sustained or incurred by the Insured by reason of a final non-appealable judgment or decree of a court of competent jurisdiction which holds, based on the law in existence as at the Date of Policy:

1. *That the cross-default provisions contained in the insured mortgage, the guarantee*, the note* and the Loan Agreement, as defined in or referred to in the insured mortgage render the lien of the insured mortgage invalid or unenforceable; and*

2. *That, because of the cross-default provisions contained in the insured mortgage, the guarantee, the note and the Loan Agreement, as defined in or referred to in the insured mortgage, the insured mortgage does not provide a valid and enforceable lien on the title to the land for the obligations stated in the insured mortgage.*

Defence Endorsement

This is an endorsement, negotiated by a specific lender, which appears to attempt to expand the areas in which the title insurer must provide a defence (although I personally believe the standard

provision imposes the same obligation) and deletes the right of the title insurer to select counsel. I suspect that it relates to some incident in the history of the particular lender, more than a general suggestion that should be made to lenders. It provides:

Section 4(a) of the Conditions and Stipulations is hereby deleted in its entirety and the following is substituted therefor:

Upon written request by the Insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defence of an Insured in litigation in which a claim adverse to the title or interest as insured is asserted, or a defence, restraining order or injunction is interposed against a foreclosure of the insured mortgage, or a defence is interposed against an insured in an action to enforce a contract for a sale of the indebtedness secured by the insured mortgage, or a sale of the estate or interest in the said land, but only to the extent that such litigation is founded upon or the stated cause of action, an alleged defect, lien, encumbrance or other matter insured against by this policy.

Doing Business (Loan) Endorsement

This endorsement is a deletion of Exclusion 4 in the loan policy where the insurer is satisfied the lender is in existence and the loans are lawful. It states:

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of the entry of any court order or judgment which constitutes a final determination and denies the right to enforce the mortgage referred to in Schedule A on the ground that making the loan secured thereby constituted violation of the "doing business" laws of Canada and the jurisdiction in which the land is located.

A Canadian lender will usually feel comfortable with its practices and not be troubled by this exclusion. However, an American lender may want this protection.

Due Execution Endorsement

This is another endorsement, negotiated by a specific lender, which seems to relate to some historic event rather than a policy deficiency. The policy insures loss or damage arising from invalidity or unenforceability of the mortgage, a broad obligation that certainly includes its execution. The endorsement provides:

The Company hereby insures the insured against loss or damage which the insured shall sustain by reason of:

a) any deficiency in the execution of the document entitled _____ executed by the registered owner, and registered as a mortgage against the subject lands, particulars of which are outlined on Schedule A to the policy.

Easement, Existing Encroachment Endorsement

This endorsement provides coverage that an existing encroachment on an easement will not have to be removed. It states:

*The Company hereby insures the insured against loss or damage sustained or incurred by the insured in the event that the owner of the easement referred to in paragraph *____ of Schedule B shall, for the purpose of exercising the right of use or maintenance of said easement, compel the removal of any portion of the improvements on the land which encroach upon said easement.*

Easement, Damage – Use or Maintenance Endorsement

This endorsement provides coverage that the use or maintenance of an existing easement will not result in damages to an insured.

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of any exercise of the right of use or maintenance of the easement referred to in paragraph ____ of Schedule B over or through the land.

Environmental Liens Endorsement

This endorsement is available on commercial loan transactions only. Its coverage is quite limited. It provides coverage for environmental liens if they (a) were registered on title, but not noted as an exception on Schedule B; or (b) arise under a statute other than the primary environmental statutes listed. This is title insurance, not environmental insurance, so either Paragraph 9b) is deleted or the title insurer will attempt to list all federal or provincial environmental lien statutes.

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of lack of priority of the insured mortgage over:

- (a) any environmental protection lien or order which, at Date of Policy, is registered in the public records, except as set forth in Schedule B; or*
- (b) any environmental protection lien provided for by any provincial or federal statute in effect at Date of Policy, except environmental protection liens provided for by the following statutes: (will list all federal or provincial environmental lien statutes)*

I have seen this used by American lenders who find it comforting because of their concern with American “super priority” environmental liens, even though its scope is quite limited in Canada.

Fairway Endorsement

In most states in the United States a partnership is considered a distinct entity, having a separate existence from its partners. While that is often the case for certain tax aspects of a partnership, in Canada a partnership is simply the way that the partners carry on business and title is taken in the names of the partners, “carrying on business in partnership as...”. Due to the ‘separate entity’ approach in the United States, the title insurance world was surprised when a 1985 case, *Fairway Development Co. v. Title Ins. Co. of Minn.*, 621 F. Supp. 120 (N.D. Ohio 1985), held that when certain partners in an existing general partnership sold and transferred their interests and a new partnership agreement was entered into with the same partnership name, the original partnership was dissolved and there was no ability to claim under the title insurance policy held by the partnership. This led to a “Fairway” Endorsement, which allows partnerships to change their members or interests without losing coverage. It provides:

The Company hereby assures the insured partnership that this Policy and the coverage provided to the insured partnership hereunder shall not be deemed to have lapsed, or to have been forfeited, or to have terminated because of the occurrence, subsequent to the Date of Policy, of either of the following events (provided that the insured partnership has not been dissolved or discontinued by reason of the following events pursuant to applicable state law):

- a) the admission or withdrawal of any individual or entity as a partner in the insured partnership, or*
- b) a change in any partner's interest in capital or profits of, or as limited or general partner in, the insured partnership.*

Nothing contained herein shall be deemed to be a waiver of any rights the Company may otherwise have under this Policy.

In Canada, the same issue would not arise for a partnership, although care must be taken to have identified the parties to be insured. Usually they are either a title-holding entity or the general partner of a limited partnership. Care must be taken to ensure that the insured will actually suffer the loss claimed. Despite this difference in Canadian law, I am aware of cases where American insureds want this endorsement (once even a single entity lending to a limited partnership) and it is available. The following is the Fairway/Successor Insured Endorsement provided in one transaction:

If and to the extent the Insured is a partnership, the Company hereby insures the insured partnership that this policy and the coverage provided to the insured partnership hereunder shall not be deemed to have lapsed, or to have been forfeited, or to have terminated because of the occurrence, subsequent to the Date of Policy, of either of the following events (provided that, subject to the next paragraph, the insured partnership has not been dissolved or discontinued by reason of the following events pursuant to applicable state law):

- a) the admission or withdrawal of any individual or entity as a partner in the insured partnership, or*
- b) a change in any partner's interest in capital or profits of, or as limited or general partner in, the insured partnership.*

The Company hereby further agrees that the definition of Insured contained in paragraph 1(a) of the Conditions and Stipulation of the policy shall include the following successors in interest to the named insured of the estate or interest described in Schedule A (reserving, however, all rights and defenses as to any successor that the Company would have had against the named insured):

- a) any grantee of the named Insured which is an owner of a partnership interest (a "Grantee Partner") in the named insured partnership which receives title to the land described in Schedule A of the policy as a result of the dissolution of the named insured partnership; or*
- b) any corporate successor to a Grantee Partner who becomes a successor by operation of law (as opposed to purchase) by reason of dissolution, merger, consolidation or corporate reorganization; or*
- c) any corporate grantee of a Grantee Partner, or of a corporate successor covered under (b) above which receives title to the land described in Schedule A of the policy, provided the corporate grantee is either a wholly owned subsidiary of the corporate successor or of its parent corporation.*

The Company also agrees that this policy applies to the subsequent borrowings referred to in the Credit Agreement provided that such subsequent borrowings continue to be secured at the time of their advance, by a first charge under the insured mortgage set out in Schedule A.

This endorsement is not to be construed as extending the coverage of the policy to any later date than the Date of Policy shown in Schedule A, nor does it impose any liability on the Company for loss or damage resulting from (i) failure of an successor referred to above to acquire an insurable estate or interest in the land, or (ii) any defect, lien or encumbrance attaching by reason of the acquisition of an estate of interest in the land by the successor.

In Canada, as there will be changes in the partners and partnership interests from time to time, care must be taken that those changes will not affect coverage of an owner. Accordingly, a Successor Insured Endorsement (see below) is appropriate when a partnership is title insured.

First Loss Payable (Loan) Endorsement

This endorsement is used on multiple properties and provides that the title insurer will be liable for a defect, lien, encumbrance or other matter which creates a loss to the insured, without requiring the insured to sell the other properties not affected by the title defect or pursue remedies against any other collateral. It expands the loan coverage so that it becomes similar to owner's coverage:

In the event a defect, lien, encumbrance or other matter insured against by this policy creates a loss or series of losses which exceed in the aggregate ten percent (10 %) of the amount of insurance shown in Schedule A of this Policy, the amount which the Company shall be liable to pay shall be determined without requiring maturity of the indebtedness secured by the insured mortgage shown in Paragraph 4 of Schedule A by acceleration or otherwise, and as to such determination, without requiring the insured to pursue its remedies against other collateral securing the indebtedness which is also secured by the insured mortgage. Provided, however, that nothing in this endorsement shall affect or impair the Company's right of subrogation with respect to the affected collateral. The Company agrees that its right of subrogation shall be subordinate to the rights and remedies which any claimant insured by this Policy has or may have against the affected collateral.

The liability of the Company under this policy shall in no case exceed the least of:

- (i) the amount of insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in paragraph 2(c) of the conditions and stipulations; or*
- (ii) the amount of the indebtedness secured by the insured mortgage as determined under paragraph 9 of the conditions and stipulations, at the time the loss or damage insured against hereunder occurs, together with interest thereon; or*
- (iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien, encumbrance or other matters insured against by this policy.*

Future Advances Endorsement

This endorsement is intended to deal with circumstances where there will be later advances made pursuant to a deed of trust that will, if properly handled, ensure their priority:

The Company hereby insures the insured, subject to the limitations hereafter set forth, that advances made under and in strict conformity with the terms and provisions of the insured deed of trust after the date of this policy and after the date and time of recording of the insured deed of trust (hereafter called "Qualified Future Advances") shall be included within the coverage of this policy, provided that the vestee is the owner of the estate or interest covered by this policy on the date the Qualified Future Advances are made.

The Company further insures the insured against loss or damage, not exceeding the amount of insurance stated on Schedule A, and cost, attorney's fees, and expenses which the Company may become obligated to pay under this Policy, sustained or incurred by the Insured by reason of any inaccuracy in the following assurances:

a. all Qualified Future Advances shall have the same priority as if all such Qualified Future Advances had been made at the time of recording of the insured Deed of Trust; and

b. payments made by the Insured subsequent to the date of the policy for fire and extended coverage insurance, taxes, assessments, and other necessary expenditures for the preservation of the insured premises (all hereafter called "Exempt Future Advances"): (i) are secured by the insured Deed of Trust; (ii) have the same priority as if such payments had been made at the date and time of recording the insured Deed of Trust; and shall not be considered in computing the maximum principal amount of which may be secured by the insured Deed of Trust.

Provided, however, the foregoing assurances shall not apply to: (i) any Qualified Future Advances; or (ii) any Exempt Future Advance, made after the filing of any bankruptcy proceeding affecting the estate or interest of the vestee in the insured premises. In addition, this endorsement does not insure against loss or damage based upon:

a. any consumer credit protection or truth-in-lending law; or b. environment protection liens.

The total liability of the Company under the policy and any endorsements therein shall not exceed, in the aggregate the face amount of the policy and costs which the Company is obligated under the conditions and stipulations thereof to

Future Improvements Endorsement

This endorsement is intended to ensure that the amount of insurance will increase once certain improvements are constructed:

The Company assures the Insured that, on payment of a premium at then current premium rates, Company will issue:

(a) an endorsement to this Owner's Policy increasing the Amount of Insurance to an amount equal to the fair market value of the land as then improved, or

(b) its Owner's Policy to a lessee or purchaser from Insured in an amount of the fair market value of the leasehold or fee simple interest, or

(c) its Mortgagee's Policy to a mortgagee of insured in the amount of any mortgage loans for refinancing or constructing future improvements on the land,

subject only to defects, liens or encumbrances shown on Schedule B of this policy, or arising subsequent to Date of Policy and including the affirmative insurance(s) affecting Items on Schedule B hereof.

The obligation of the Company hereunder to issue a Mortgagee's Policy in any amount in excess of the Amount of Insurance of this policy or any Owner's Policy or any endorsement to this Owner's Policy is conditioned upon the presentation of an affidavit from the Insured at the time that any such policy or endorsement is issued, stating that:

(a) no natural person, legal entity or unincorporated association has made a claim which could result in any loss to the Company in excess of the limits of this policy, and

(b) the Insured does not know of any natural person, legal entity or unincorporated association that would have a reasonable basis for making a claim adverse to the interest of the Insured in the estate insured herein, which would result in any loss to the Company in excess of the Amount of Insurance in this policy,

and that the Company be able to obtain reinsurance, at no cost to Company, for all of its risk in excess of \$25,000,000.00 or such amount less than \$25,000,000.00 as shall be required by law or required by the proposed insured.

The issuance of any policy or endorsement by Company pursuant to the foregoing will be based upon insured's representation of the fair market value of the land, and shall not be deemed to be an assurance or guarantee of such value by Company, nor shall it constitute acceptance by Company of such value, in the event that a claim is made under its Policy.

(This agreement by the Company hereinabove stated shall remain in effect for a period of ten years from the effective date of the policy.)

Future Insurance Endorsement

This endorsement is intended to ensure that the will be obliged to continue to insure the property at a later date:

The Company agrees that if, within ___ years after the date of this policy, application is made to issue a new policy, it will issue additional title insurance policies, or increase the face amount of this policy insuring such title or interest as may then exist in the insured or a purchaser of title from the insured. The amount of insurance to be issued will not exceed the amount of the mortgage to be placed on the land nor the fair market value of the land and improvements therein at the date of the application. In the event a claim has been made or is pending against the Company, or a defect in title has been discovered, the Company shall not be required to issue insurance for an amount greater than the face amount of this policy as to the defect discovered or resulting in said claim. Upon receipt of the application to issue a subsequent policy or increase the face amount of this policy, the Company will extend its examination of the title to the then current date, and will then issue its policy or increase the face amount of this policy, subject to such matters created, first appearing in the public records, attaching subsequent to the effective date of this policy, or which have become known to either the Insured or the Company.

The insurance to be issued shall be subject to rules, regulations and rates in effect at the date the subsequent insurance coverage is issued. The Company shall not be obliged to issue additional insurance coverage which would exceed the amount of the usual reinsurance retention of the Company if, after the exercise of reasonable effort, the Company is unable to obtain reinsurance or co-insurance as may be required in order for it to issue the full amount of additional insurance for which application is made.

The total liability of the Company under said policy, including this endorsement, shall not exceed, in the aggregate, the face amount of said policy and costs which the Company is obliged to pay under the Conditions and Stipulations.

Gap Endorsement

A fundamental advantage of title insurance is its ability to assist in the management of large and complicated closings. Title insurers have had great experience in insuring over the “gap” which arises due to the fact that many American registration systems are not as simple and effective as Canadian systems. It is not uncommon for there to be material, even several weeks, delay in recording title in some states. As a result, it has been common for title insurers to have to deal with the inevitable gap produced.

The basic coverage statement in a title insurance policy provides that the policy provides coverage against loss or damage “as of Date of Policy shown in Schedule A”. Exclusion 3(d) specifically excludes coverage for “defects, liens, encumbrances, adverse claims or other matters attaching or created subsequent to Date of Policy”. Accordingly, it is vital that the “Date of Policy” be on or after the final closing. The title insurer actually needs to cover two gaps. The first is the time period between the time the last search was carried out and the time of closing. Relying on representations of the owner and having the ability to claim for willful acts of the owner, direct frauds etc., the title insurer is usually ready to cover that time period. In a commercial context, title insurers will often be prepared to rely on searches done up to 30 days prior to closing. The second gap deals with the time period from closing until registration and the Gap Endorsement covers that.

Often, this “gap” in an American closing is handled by the issuance of a title insurance commitment – the promise that a policy will be issued after certain pre-conditions take place, such as completion of searches, registration etc. The commitment is what is available on closing and the policy is issued at a later date, with the date of policy being the registration date.

In Canada, the tradition of relying upon commitments on closing is still developing and often the policies themselves are delivered on closing. The gap is handled by a Gap Endorsement (below) which is added to the policy and provides coverage for title matters created between the Date of Policy and the date of registration. The endorsement provides unambiguous positive coverage -

“hereby insures” - and can be read alone. As a result, based on insurance policy interpretation rules, it overrides Exclusion 3(d).

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of any liens, encumbrances or other adverse interests affecting the title to the land arising or created between the date of this policy and the registration of the instruments creating the interest insured pursuant to this policy.

With the Gap Endorsement a loan transaction can close and the money be advanced even if the registrations have not yet taken place.

Going Concern Endorsement

In many circumstances locating a business on a specific piece of property is very important to its value. A key example is a retail or restaurant location where the income derived from sales at the location will affect the land value. In such circumstances, obtaining a Going Concern Endorsement would be useful:

The Company hereby assures the Insured that in the event the insured is dispossessed of all or a part of the land by reason of any matters insured against by this policy, the Company will consider, in computing loss or damage compensable under the policy, the diminution in value of the going concern located on the land caused by the dispossession.

Another way of arriving at the same kind of result is the Special Measure of Damages Endorsement (see below), which focuses on the use or uses of the land.

Government Work Order Endorsement

This endorsement is used to insure over any work orders issues by a governmental authority (not environmental).

The Company insures the insured against loss or damage sustained or incurred by the insured by reason of any governmental or quasi-governmental work orders outstanding against the land on the Date of Policy.

Nothing herein provides coverage for matters relating to environmental protection and conservation as described in exclusion 1(a) of the policy jacket.

When used in this endorsement: "governmental or quasi-governmental authority" shall mean any department or division of the Government of Canada or of the town, city, county, regional municipality or province in which the land is located, and over which such department or division has jurisdiction with respect to the matter mentioned in the statement.

Guarantee Endorsement

This endorsement confirms that a Canadian policy covers all of the insured risks that would have been covered by a named ALTA policy.

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of any matter that is not insured against under (name of Canadian policy) but would have been insured against at Date of Policy in the Company's ALTA (name of ALTA policy).

This is the kind of provision that an American entity would like to include because it is unsure of the Canadian policy terms.

Increase Insurance Endorsement

This is similar to the Amend Policy Endorsement but specifically increases the Amount of Insurance without changing the date of the policy.

The above policy is hereby amended to increase the Amount of Insurance on Schedule A from \$____ to \$____. The effective date of this increase will be _____.

Again, this is a later endorsement that will be subject to the underwriting practices of the insurer at that time.

Land Abuts Street Endorsement

This endorsement ensures that the lands abut a specific street.

The Company hereby insures the insured against loss or damage which the insured shall sustain by reason of the failure of the land to abut upon a physically open street known as:

Last Dollar Endorsement

Under a loan policy, the amount of coverage reduces as the debt is repaid. Often a loan made by a lender will include both real and personal property as security. The mortgage will be for an amount equal to the full amount of the loan, and be secured by both a mortgage and a security agreement. The title insurance policy will be written for the value of the real property security only, and will often be less than the amount shown on the mortgage. The lender does not want payments made on the loan to reduce the title insurer's liability under the title insurance policy until the loan is paid down to the policy liability amount. The portion of the loan secured by the

real property described in the policy would be treated as the last paid off, permitting the title insurance to remain in effect until the entire loan amount has been paid in full. This endorsement is designed for use with the ALTA loan policy.

The following endorsement has a series of conditions and limitations which are probably not strictly necessary because of the 'knowledge or known' exclusion, but seem to be included for greater clarity:

By the issuance of this loan policy in the amount of \$_____, which is less than the face amount of the mortgage insured and described in Schedule A, the Company agrees that, notwithstanding paragraph 9 of the Conditions and Stipulations and provided that the Insured has not released or substituted the personal liability of any debtor or guarantor, or extended or otherwise modified the terms of payment or released any portion of the land from the lien of the insured mortgage, until such time as the aggregate indebtedness outstanding is reduced to the sum of \$_____, the amount of coverage afforded under this policy will not be reduced. Any payments which would have the effect of reducing the indebtedness below the sum of \$_____ will concurrently reduce the coverage under this policy by \$1.00 for each \$1.00 of reduction of the indebtedness thereafter made.

Leasehold (Owner's) Endorsement

These endorsements are designed to provide title insurance coverage for leasehold estates. They convert an owner's policy so that it can be used to protect a leasehold estate. Despite their availability for more than 25 years in the United States, they have not been widely used. This has been due to both the relatively small number of loans secured on leasehold interests and a general failure of tenants to appreciate the need for protection of their financial investment in the lease. While a number of more sophisticated or conservative clients view their leasehold interests as important assets, conduct title searches to determine ownership, access and encumbrances, and then carefully protect themselves by registering non-disturbance agreements from any prior encumbrancers, this is not a widespread practice.

The reasons for considering insurance of the leasehold estate are similar to those in respect of a freehold estate. The most fundamental issue is whether the party granting the interest (in this case, the landlord rather than a transferor) has good and marketable title to grant. Similarly, the encumbrances against title are relevant. For example, there may be covenants or restrictions affecting the title that impact the ability of the tenant to carry on its activities in accordance with the use contemplated in the lease. The existence of easements may also impact upon the tenant's

plans. There can be issues of access, visibility of signage and other matters specifically related to the proposed commercial use of the site.

There are also priority issues in the leasehold situation. For example, the tenant's possession under the lease could be disturbed by present or future mortgagees exercising remedies against the property. A search of title will disclose the existing mortgages and indicate where non-disturbance agreements are required. Title insurance can provide coverage for all these matters.

Tenants may not appreciate the potential risks at the time they enter into their lease. Leasehold market rates and market conditions can fluctuate greatly. For example, there was a great deal more case law in the mid-nineties about the relationship between holders of prior interests who had enforced upon their security or other rights and tenants holding subsequently granted leasehold rights that had not been protected by non-disturbance agreements. In some cases, such as Goodyear Canada Inc. v. Burnhamthorpe Square Inc. 41 O.R. (3d) 321 (Ont. C.A.), a tenant was able to terminate an uneconomical lease. In others, like Toronto Harbour Commissioners v. T.H.C. Parking Inc. 28 R.P.R. (3d) 9 (Ont. S. C.), a sublease was terminated by the head landlord. Tenants often do not value sufficiently the cost of the leasehold improvements made by them or the cost of identifying, negotiating for, and moving to new leased premises.

Until 2001, coverage was provided for both the difference between the rent paid and the then current fair market rental and a number of additional costs. The rental comparison was comfortable coverage where there were either no improvements or the improvements were supplied by the landlord and reflected in the rent. But, where improvements were made by the tenant, there were legitimate questions about the scope of coverage provided and compensation that might be received.

In an attempt to clarify and improve coverage and have a more widely accepted product, ALTA (American Land Title Association) adopted a new Leasehold Owner's Endorsement and Lender's Endorsement in October 2001. This coverage is now offered by title insurers in Canada. That endorsement provides:

1. *As used in this endorsement, the following terms shall mean:*
 - a. *"Evicted" or "Eviction": (a) the lawful deprivation, in whole or in part, of the right of possession insured by this policy, contrary to the terms of the Lease or (b) the lawful prevention of the use of the land or*

the Tenant Leasehold Improvements for the purposes permitted by the Lease, in either case, as a result of a matter covered by this policy.

- b. "Lease": the lease agreement described in Schedule A.*
- c. "Leasehold Estate": the right of possession for the Lease Term.*
- d. "Lease Term": the duration of the Leasehold Estate, including any renewal or extended term if a valid option to renew or extend is contained in the Lease.*
- e. "Personal Property": chattels located on the land and property which, because of their character and manner of affixation to the land, can be severed from the land without causing appreciable damage to themselves or to the land to which they are affixed.*
- f. "Remaining Lease Term": the portion of the Lease Term remaining after the insured has been Evicted as a result of a matter covered by this policy.*
- g. "Tenant Leasehold Improvements": Those improvements, including landscaping, required or permitted to be built on the land by the Lease that have been built at the insured's expense or in which the insured has an interest greater than the right to possession during the Lease Term.*

2. The provisions of subsection (b) of Section 7 of the Conditions and Stipulations shall not apply to any Leasehold Estate covered by this policy.

3. Valuation of Estate or Interest Insured

If, in computing loss or damage, it becomes necessary to value the estates or interests of the insured as the result of a covered matter that results in an Eviction, then that value shall consist of the value for the Remaining Lease Term of the Leasehold Estate and any Tenant Leasehold Improvements existing on the date of the Eviction. The insured claimant shall have the right to have the Leasehold Estate and the Tenant Leasehold Improvements valued either as a whole or separately. In either event, this determination of value shall take into account rent no longer required to be paid for the Remaining Lease Term.

4. Additional items of loss covered by this endorsement:

If the insured is Evicted, the following items of loss, if applicable, shall be included in computing loss or damage incurred by the insured, but not to the extent that the same are included in the valuation of the estates or interests insured by this policy.

- a. The reasonable cost of removing and relocating any Personal Property that the insured has the right to remove and relocate, situated on the land at the time of Eviction, the cost of transportation of that Personal Property for the initial one hundred miles incurred in connection with the relocation, and the reasonable cost of repairing the Personal Property damaged by reason of the removal and relocation.*

- b. Rent or damages for use and occupancy of the land prior to the Eviction which the insured as owner of the Leasehold Estate is obligated to pay to any person having paramount title to that of the lessor in the Lease.*
- c. The amount of rent that, by the terms of the Lease, the insured must continue to pay to the lessor after Eviction with respect to the portion of the Leasehold Estate and Tenant Leasehold Improvements from which the insured has been Evicted.*
- d. The fair market value, at the time of the Eviction, of the estate or interest of the insured in any lease or sublease made by the insured as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements.*
- e. Damages that the insured is obligated to pay to lessees or sublessees on account of the breach of any lease or sublease made by the insured as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements caused by the Eviction.*
- f. Reasonable costs incurred by the insured to secure a replacement leasehold equivalent to the Leasehold Estate.*
- g. If Tenant Leasehold Improvements are not substantially completed at the time of Eviction, the actual cost incurred by the insured, less the salvage value, for the Tenant Leasehold Improvements up to the time of Eviction. Those costs include costs incurred to obtain land use, zoning, building and occupancy permits, architectural and engineering fees, construction management fees, costs of environmental testing and reviews, landscaping costs and fees, costs and interest on loans for the acquisition and construction.*

The most fundamental difference between leasehold coverage and the owner's policy is the description of the estate insured. The Leasehold Endorsement will state that the estate or interest insured is a Leasehold Estate and will be specific to a listed Lease. The Leasehold Estate will be defined as being the right of possession for the Lease Term which, in turn, is defined with reference to the rights to renew or extend set out in the Lease.

When the Leasehold Endorsement is added to a standard owner's policy, leasehold coverage insures against the same group of title defects, liens, encumbrances, adverse claims, unmarketability, lack of access and other matters as does an owner's policy. The coverage compensates an insured after an eviction. The terms "Evicted" or "Eviction" in Section 1 of the endorsement, clearly include both the loss of a right of possession and the loss of the right to use the premises and leasehold improvements for the purpose set out in the lease. Care should be taken to co-ordinate the drafting of the use provision in the lease with a leasehold Endorsement so that all appropriate claims are available.

The validity and enforceability of other lease terms are not covered by the policy. For example, the lease may have a number of operational covenants on the part of the landlord with respect to the repair and replacement of the leased premises and/or the operation, maintenance and management of the project of which the leased premises forms a part. The title insurance policy would not cover any losses arising as a result of the breach of these covenants by the landlord, and the insurer could not be called upon to litigate the enforcement of any such provisions.

In addition, the right to claim under the policy is subject to any provisions contained in the lease which cause such eviction. For example, the tenant's possession will be subject to its obligation to pay rent. If the tenant does not pay rent, the title insurance will not protect its right of possession. This would apply equally to any other default by the tenant that leads to a remedy that puts the tenant out of possession.

Leasehold Endorsements compensate for the "value for the Remaining Lease Term" (the time that the tenant could have stayed in occupancy under the Lease) and the value of any tenant's leasehold improvements. They permit the value of the leasehold estate and tenant's leasehold improvements to be made, at the insured's option, either separately or together. In either case, the valuation takes into account "rent no longer required to be paid for the Remaining Lease Term." In addition, one of the items of "Miscellaneous Items of Loss" (see below) allows for compensation for "reasonable costs incurred by the insured to secure a replacement leasehold equivalent to the Leasehold Estate". It would appear that arguments can now be properly made for all of the "special" aspects of value associated with a particular lease – for example the sales revenue generated at a particular retail location.

Essentially, the value for the remaining lease term is to be determined based on the fair market value of the lease at the time of the loss, less the rent provided for in the lease. There is little American case law (and no Canadian) on these valuation issues, but the factors discussed below should be kept in mind.

In determining the fair market value of the leasehold interest, the most relevant factor would likely be the current rent that the premises would bring if placed on the market at the time of the loss. If market rents have risen since the tenant entered into the lease, the leasehold interest becomes more valuable and more expensive to replace. If market rents have fallen, the leasehold interest may have no value as it can be replaced at the same or lower rent.

Other factors may also affect the fair market value of the leasehold estate. For example, the tenant may have added value by obtaining a minor variance or other land use approvals. An insured should be able to successfully argue that such factors should be considered in any determination of the fair market value of the leasehold estate.

In considering any valuation issues, it should be remembered that, as with all title insurance policies, in some circumstances the leasehold coverage will require the insurer to protect the insured by defending the claim or removing the defect in title, rather than by paying out for the loss.

The second factor set out in Section 3 of Leasehold Endorsement is the addition of the “Tenant’s Leasehold Improvements” to the “Leasehold Estate” that is to be valued. This makes it clear that leasehold improvements that are either paid for by the insured tenant or in which the insured tenant has rights beyond use during the lease term are to be compensated for. This is new to the recent ALTA endorsements and removes one of the biggest concerns about the old approach, which covered the value of the leasehold estate alone. The ability of the insured to elect whether the values of the Leasehold Estate and the Tenant’s Leasehold Improvements are calculated separately or together gives the insured more flexibility and thus comfort with the valuation process. There is also a further provision added in clause (g) of the list of additional items of loss (see below) to deal with uncompleted improvements.

Section 4 of the Leasehold Endorsement adds a list of miscellaneous items of loss to the conditions and stipulations. The following is the list:

- a) relocation costs (up to 100 miles);
- b) rent or damages for the use of the property owed to the rightful owner;
- c) rent after eviction;
- d) the value of any lease or sublease;
- e) damages payable to any lessee or sublessee;
- f) the cost of finding replacement premises;
- g) the lost value of uncompleted leasehold improvements.

This is a fairly complete list of the likely losses and damages to be faced. There are some losses that will not be covered by a title insurance policy, such as consequential damages that are more appropriately insured against under a business-interruption policy. However, the changes made to this ALTA endorsement virtually eliminate the concerns that formerly existed.

As with any title insurance policy, the amount of damages paid to the policyholder will be limited by the amount of insurance purchased. Accordingly, no matter what endorsements or other items or losses are covered, the amount of the insurance will represent the maximum claim. The policy limit does not limit coverage under the duty to defend which, as noted above, is often the most significant aspect to the client.

Notwithstanding the importance of the amount of the insurance, it appears that no custom or standard method has developed for determining the amount of leasehold insurance in the United States. One method that has been used is a rent multiplier, such as five times the current annual rent. A similar method would be to take the aggregate annual rent payable for the next five or six years. Using a rent multiplier or other similar method has no specific basis. Rather, it seems to have developed due to its simplicity and the lack of any widely-accepted competing methods.

In determining the amount of insurance, the value of leasehold improvements that a tenant has constructed itself (and for which amortization is not included in the rent) or to which the tenant holds title, should be insured to their full value. Also, the amount of the development cost that might be subject to a special provision in the endorsement (as discussed above) should also be considered. The concerns of an insured about this calculation problem are relieved, to a great extent, by Section 2 of the Leasehold Endorsement to the extent that it relates to the value of the Leasehold Estate. That section provides that the co-insurance provision in the title insurance policy does not apply to any Leasehold Estate. It should be noted that the co-insurance provision continues to apply to the value of the Tenant Leasehold Improvements, which value is easily ascertained.

Leasehold (Loan) Endorsement

The endorsement for amending the loan policy achieves the same coverages for a lender. It provides:

1. *As used in this endorsement, the following terms shall mean:*

- a. *"Evicted" or "Eviction": (a) the lawful deprivation, in whole or in part, of the right of possession insured by this policy, contrary to the terms of the Lease or (b) the lawful prevention of the use of the land or the Tenant Leasehold Improvements for the purposes permitted by the Lease, in either case, as a result of a matter covered by this policy.*
- b. *"Lease": the lease agreement described in Schedule A.*
- c. *"Leasehold Estate": the right of possession for the Lease Term.*
- d. *"Lease Term": the duration of the Leasehold Estate, including any renewal or extended term if a valid option to renew or extend is contained in the Lease.*
- e. *"Personal Property": chattels located on the land and property which, because of their character and manner of affixation to the land, can be severed from the land without causing appreciable damage to themselves or to the land to which they are affixed.*
- f. *"Remaining Lease Term": the portion of the Lease Term remaining after the insured has been Evicted as a result of a matter covered by this policy.*
- g. *"Tenant": the tenant under the Lease and, after acquisition of all or any part of the estate or interest in the land described in Schedule A in accordance with the provisions of Section 2(a) of the Conditions and Stipulations of this policy, the insured claimant.*
- h. *"Tenant Leasehold Improvements": Those improvements, including landscaping, required or permitted to be built on the land by the Lease that have been built at the insured's expense or in which the insured has an interest greater than the right to possession during the Lease Term.*

2. *Valuation of Estate or Interest Insured*

If, in computing loss or damage, it becomes necessary to value the estates or interests insured by this policy as the result of a covered matter that results in an Eviction of the Tenant, then that value shall consist of the value for the Remaining Lease Term of the Leasehold Estate and any Tenant Leasehold Improvements existing on the date of the Eviction. The insured claimant shall have the right to have the Leasehold Estate and the Tenant Leasehold Improvements valued either as a whole or separately. In either event, this determination of value shall take into account rent no longer required to be paid for the Remaining Lease Term.

3. *Additional items of loss covered by this endorsement:*

If the insured acquires all or any part of the estate or interest in the land described in Schedule A in accordance with the provisions of Section 2(a) of the Conditions and Stipulations of this policy and thereafter is Evicted, the following items of loss, if applicable, shall be included in computing loss or damage incurred by the insured, but not to the extent that the same are included in the valuation of the estates or interests insured by this policy.

- a. *The reasonable cost of removing and relocating any Personal Property that the insured has the right to remove and relocate, situated on the land at the time of Eviction, the cost of transportation of that Personal Property for the initial one hundred miles incurred in connection with the relocation, and the reasonable cost of repairing the Personal Property damaged by reason of the removal and relocation.*
- b. *Rent or damages for use and occupancy of the land prior to the Eviction which the insured as owner of the Leasehold Estate may be obligated to pay to any person having paramount title to that of the lessor in the Lease.*
- c. *The amount of rent that, by the terms of the Lease, the insured must continue to pay to the lessor after Eviction with respect to the portion of the Leasehold Estate and Tenant Leasehold Improvements from which the insured has been Evicted.*
- d. *The fair market value, at the time of the Eviction, of the estate or interest of the insured in any lease or sublease made by Tenant as lessor of all or part of the Leasehold Estate or the Tenant Leasehold.*
- e. *Damages that the insured is obligated to pay to lessees or sublessees on account of the breach of any lease or sublease made by the Tenant as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements caused by the Eviction.*
- f. *Reasonable costs incurred by the insured to secure a replacement leasehold equivalent to the Leasehold Estate.*
- g. *If Tenant Leasehold Improvements are not substantially completed at the time of Eviction, the actual cost incurred by the insured, less the salvage value, for the Tenant Leasehold Improvements up to the time of Eviction. Those costs include costs incurred to obtain land use, zoning, building and occupancy permits, architectural and engineering fees, construction management fees, costs of environmental testing and reviews, and landscaping costs.*

There are still concerns that a lender will not be covered for losses where it has loaned the tenant the funds to construct leasehold improvements. The typical situation, in a modern Canadian lease, is that a tenant constructs leasehold improvements and all of the leasehold improvements except tenant's unique trade fixtures become the property of the landlord when affixed. While there may still be obligations upon the tenant to remove the improvements if requested by the landlord at the end of the term, a tenant rarely has rights beyond possession during the term. To protect a lender who has advanced on the security of that lease, the definition of "Tenant's Leasehold Improvements" in the Leasehold-Loan endorsement should be amended to refer to improvements "built at the tenant's and/or insured's expense" rather than just the "insured's".

Leasehold Improvements Endorsement

In some cases, a material part of the value of a property could be in the leasehold improvements located thereon. An example is a ground leased property where the material improvements become the property of the land owner at the end of the term. In such circumstances, the limitation on the value of the property would be inappropriate for the owner and it would be wise to increase the policy limits to include the value of the improvements and obtain an endorsement providing:

The Company hereby assures the insured that, in the event of a loss otherwise insured against by this policy, such loss shall include the interest of the insured in any improvements located on the land which would, except for the provisions of the lease referred to in Schedule B be included in the "land" as defined in this policy.

Letter of Credit Endorsement

This endorsement provides coverage over certain loan transactions involving a letter of credit related to reimbursement obligations. It provides:

The Company hereby affirmatively insures the Insured that Reimbursement Obligations (as defined in the Credit Agreement) in respect to Letter of Credit issued pursuant to the Credit Agreement will be secured by the insured Deed of Trust; that such Reimbursement Obligations shall take their lien priority from the date of this Policy; and that the insured Deed of Trust to the extent of any such Reimbursement Obligations shall be prior to all encumbrances and other matters affecting the land described in Schedule A except for those matters which are shown in Schedule B of this Policy to have priority over the insured Deed of Trust.

Obviously this coverage is very focused on the specific terms of the loan.

Limited Marketability Endorsement

This endorsement insures over a specific known risk, and the insurer promises to issue title insurance coverage over that matter to a subsequent lender/owner. The title insurer has identified a problem but has provided insurance coverage during the period of ownership or term of the loan. In addition, the insurer will promise to provide the same coverage to a subsequent owner, lender or tenant. It provides:

Notwithstanding exception nos. _____ set out on Schedule B hereto, the Company hereby insures the insured against loss or damage sustained or incurred by the insured at any time during the insured's period of ownership of the land by reason of: [any party asserting a right or interest in the land as a result of [insert

particulars describing the right or interest that might be excepted] or the insured being [forced to] [prevented from] as a result of .

The Company hereby agrees that, provided application is made to issue a policy to mortgagees, grantees or lessees of the insured under this policy, as may be designated by the Insured, then the Company will issue additional title insurance coverage insuring the title and/or interest as may then exist in the others designated by the insured in and to the land containing all of the coverages and endorsements contained in this policy. The policy or policies shall be issued in an amount not to exceed the value of the land and the improvements constructed thereon on the date of the application. The Company will not take exception for matters not set forth as exceptions in this policy; provided, however, that the Company may extend its examination of the title to the then current date and issue the additional insurance subject to those matters not otherwise insured against by this policy, which were created, first appeared in the public records or otherwise, or attached subsequent to the effective date of this policy. The Company's obligations hereunder are subject to receipt by the Company of payment of the Company's usual charges for insurance in the amount specified, based upon its then applicable rates.

Marketability Endorsement

This is an endorsement that will likely become more common in Canada as time goes on. It is used where there is a title defect which the insurer “insures over” if, deleting it from Schedule B. This provides coverage to the lender or owner and is more complete than to Limited Marketability Coverage. The title insurer also provides the same coverage to any subsequent lender, owner or tenant on the same basis. The insured agrees to accept that to satisfy the marketability obligation. As title insurance becomes more widely accepted this endorsement will be reasonable for an insured to accept. It provides:

Notwithstanding paragraph 3 (11 for owner's) of Covered Title Risks of the Policy (unmarketability of the title), the Company is not liable for loss or damage sustained by the Insured, based upon a claim of unmarketability of the title, if the Company is ready, willing and able to issue its policy, for the rates then in effect, in form and coverage substantially the same as this policy, to the Insured's purchaser or lender covering the estate or interest described in this policy.

The Company hereby agrees that, provided application is made to issue a policy to mortgagees, grantees or lessees of the Insured under this policy, as may be designated by the insured, then the Company will issue additional title insurance coverage insuring the title and/or interest as may then exist in the others designated by the Insured in and to the land and the policy then issued shall include the endorsements issued with this policy. The policy or policies shall be issued in an amount not to exceed the value of the land and the improvements constructed thereon on the date of the application. The Company will not take exception for matters not set forth as exceptions in this policy; provided, however, that the Company may extend its examination of the title to the then current

date and issue the additional insurance subject to those matters not otherwise insured against by this policy, which were created, first appearing in the public records or otherwise, or attached subsequent to the effective date of this policy. The Company's obligations hereunder are subject to receipt by the Company of payment of the Company's usual charges for insurance in the amount specified, based upon its then rates.

Multiple Foreclosure Endorsement

This endorsement deals with risks of multiple mortgages on the same property. It provides:

The Company hereby insures the Insured against loss or damage which the Insured may sustain by reason of the entry of a final order, judgment or decree by a court of competent jurisdiction which holds that the mortgage described in Schedule A is unenforceable in whole or in part as security for the portion of the original indebtedness still not paid, or otherwise satisfied at the date of said order, judgment or decree because of the enforcement (other than by judicial foreclosure of the equity of redemption) including enforcement by judicial or private sale or taking of possession or by action for payment of the indebtedness secured under any one or more other mortgages or trust deeds which also secure said indebtedness on the date hereof.

This endorsement does not insure against loss or damage sustained or incurred by the insured:

- 1. If such loss or damage is the result of the procedures adopted in the enforcement of the insured mortgage, or any other mortgages securing the Indebtedness, if other procedures were available under applicable law for the effective enforcement or foreclosure thereof: or*
- 2. If any final order of foreclosure of the equity of redemption establishes that the value of any portion of the land acquired by the insured in any of the previous foreclosures equals or exceeds the Indebtedness secured by the insured mortgage or the assertion of any equitable principles of marshaling of assets.*

Non-Imputation Endorsement

Exclusions 3(a) and 3(b) of a title insurance policy properly protect an insurer from the acts of the insured. If an owner, for example, is aware of an encroachment onto his property and doesn't tell the insurer, it is wrong that he is later entitled to claim damages from a title insurer for such encroachment. The provisions exclude coverage for:

3. Defects, liens, encumbrances, adverse claims or other matters:
 - (a) created, suffered, assumed or agreed to by the insured claimant;
 - (b) not known to the Company, not registered in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the

insured claimant prior to the date the insured claimant became an insured under this policy;

Simply put, an insured does not have coverage over matters that the insured created or knows about when the insurance is purchased. This exclusion is clearly appropriate in situations like the one above. However, sometimes knowledge of such matters can be “obtained” in other ways. An endorsement called a Non-Imputation Endorsement has developed in the United States to deal with people acquiring a partnership interest in real property. In those circumstances, the action of one partner can bind the partnership and the knowledge of one partner can be imputed to the other partners. An endorsement was needed in order to provide that the individual partner insuring his interest is not imputed to have the knowledge of the others and can rely on the title insurance policy. Coverage will not be excluded under 3(a) or 3(b) on that basis.

The circumstances in which a Non-Imputation Endorsement is useful in Canada occur in share acquisitions, and the form below is offered by title insurers in Canada for that purpose. When shares are acquired, most of the employees often remain and the acquired company (the insured) has a great deal of historical knowledge through those ongoing officers, directors and employees. The insured may well have knowledge of the encroachment in the above example, but the new shareholder does not. It is not possible in any due diligence process to examine in detail every record and interview every employee. Accordingly, it is important that the acquiring shareholder not be denied coverage because of some pre-existing knowledge of the company. The following is an example of a generic form of Non-Imputation Endorsement. However, when protecting your insured client you should consider making it much broader – to apply to any officer, director or shareholder. It should also be extended to information imputed by operation of law “or otherwise”.

The Company hereby insures the insured [registered owner] that in the event of actual monetary loss or damage insured against under the terms of said policy, the Company will not deny its liability thereunder on the grounds that the insured had knowledge of any matter solely by reason of notice thereof imputed to it through _____ [name of selling shareholder and/or names of former directors and officers] by operation of law.

Recharacterization Endorsement

This is a broad heading which covers a variety of endorsements that should be considered when there is a particular structure to a loan transaction that could result in the lender and borrower being considered to be partners or joint venturers. Such structures would include participating mortgages, convertible mortgages and sale-leaseback or synthetic lease transactions. In such circumstances, a court could hold the mortgage invalid or unenforceable. The risk of recharacterization is excluded from coverage under the policy exclusions in any event because it is a matter “created, suffered, assumed or agreed to” by the insured, or a “defect, lien, encumbrance, adverse claim or other matter. . . attaching to or created subsequent to Date of Policy” (based on the conduct of the parties after the transaction has closed), as set forth in Exclusions 3(a) and 3(d).

A lender that is concerned about such risk would ask the title insurer to provide the following type of endorsement:

The Company hereby insures the Insured against loss or damage which the Insured shall sustain by reason of a final order, judgment or decree of a court of competent jurisdiction holding that the insured mortgage is invalid and/or unenforceable in whole or in part as a result of a finding that the relationship that exists between the Insured and the Lenders (as defined in the Loan Agreement as defined in the insured mortgage), collectively as lenders, and the Insured, as borrower and others as evidenced by the Loan Agreement is that of partners or joint venturers rather than that of lenders and a borrower.

Restrictions, Encroachments and Minerals (Loan) Endorsement

This is sometimes called the “comprehensive” endorsement, as it extends coverage to insure against the problems that may occur as the result of the violation of covenants, encroachments, surface rights to enter for mineral development, and other specified matters. Certain Canadian title insurers use that term to describe it. This is ALTA Form 9 and is commonly used in loan policies in the United States. The REM Endorsement often provides:

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of:

- 1. There being, at Date of Policy, covenants conditions or restrictions under which the charge against title created by the mortgage referred to in Schedule A of the policy can be divested, subordinated or extinguished, or its validity, priority or enforceability impaired.*
- 2. Unless expressly excepted in Schedule B of the policy:*

(a) *There being, at Date of Policy, present violations on the land of any enforceable covenants, conditions or restrictions, or violations of any building setback requirements of any applicable zoning by-law.*

(b) *There being, at Date of Policy, any instrument referred to in Schedule B of the policy as containing covenants, conditions or restrictions on the land which, in addition, (i) establish an easement on the land; (ii) provide a lien for liquidated damages, (iii) provide for a private charge or assessment; (iv) provide for an option to purchase a right of first refusal or the prior approval of a future purchaser or occupant.*

(c) *There being, at Date of Policy, any encroachment of existing improvements located on the land onto adjoining land, and any encroachment onto the land of existing improvements located on adjoining land.*

(d) *There being, at Date of Policy, any encroachment of existing improvements located on the land onto that portion of the land subject to any registered easement, even though such easement is shown in Schedule B.*

(e) *There being, at Date of Policy, any notices of violation of covenants, conditions or restrictions relating to environmental protection registered in public records.*

3. *Any future violation on the land of any existing covenants, conditions or restrictions occurring prior to the acquisition of title to the estate or interest in the land by the insured, provided the violation results in:*

(a) *invalidity, loss of priority or unenforceability of the insured mortgage; or*

(b) *loss of title to the estate or interest in the land if the insured shall acquire title in satisfaction of the indebtedness secured by the insured mortgage.*

4. *Damage to existing improvements, including lawns, shrubbery or trees:*

(a) *which are located on or encroach upon that portion of the land subject to any easement excepted in Schedule B of the policy, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved.*

(b) *resulting from the future exercise of any right to use the surface of the land for the extraction or development of minerals excepted from the description of the land or excepted in Schedule B of the policy.*

5. *Any final court order or judgment requiring the removal from any land adjoining the land of any encroachment excepted in Schedule B of the policy.*

6. *Any final court order or judgment denying the right to maintain any existing improvements on the land because of any violation of covenants, conditions or restrictions or building setback requirements of the applicable zoning by-law.*

Wherever in this endorsement the words "covenants, conditions or restriction" appear, they shall not be deemed to refer to or include the terms, covenants, conditions or limitations contained in an instrument creating a lease.

No coverage is provided under this endorsement as to any covenant, condition, restriction or other provisions relating to environmental protection.

This endorsement is quite broad for a lender insuring against loss or damage if:

1. the covenants, conditions or restrictions (other than those related to environmental protection) (“CCRs”) fundamentally impact the mortgage;
2. there are existing violations of the CCRs or they impact setback requirements;
3. the CCRs provide easements, charges or certain fundamental rights;
4. there are encroachments onto easements or onto or from adjoining lands;
5. there are no environmental notices registered;
6. future violations of CCRs resulting in loss of the insured mortgage or the lands after enforcement;
7. damage to material existing improvements from the future use of easements or mineral rights;
8. forced removal of an excepted encroachment onto adjoining lands; or
9. forced removal of existing improvements due to CCR’s or bylaw infractions.

It must be remembered that this endorsement is only available in a loan policy because: 1) the loan has a limited term; 2) there is always some equity in the property which is increased as the loan is repaid or the property rises in value and these items are likely to have a small cost to remedy; and 3) there is no right to claim unless the borrower defaults on the loan. Accordingly, the coverage in this endorsement is very broad to a lender. That should be contrasted with the endorsements available to a purchaser.

Restrictions, Encroachments and Minerals (Owner) Endorsement

On the owner’s side, the coverages are less extensive and the underwriting requirements much higher. There are often wide variations in forms and different standards for unimproved and improved land. An owner’s REM Endorsement will typically say:

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of:

1. *The existence of present violations on the land of any enforceable covenants, conditions or restrictions unless any such violation is specifically excepted in Schedule B.*

2. *Except as shown on Schedule B, the presence of existing encroachments of buildings, structures, or improvements located on the land onto adjoining lands, and any encroachments onto the land of buildings, structures or improvements located on adjoining lands but does not include encroachments by retaining walls, boundary walls or fences.*
3. *Unmarketability of the title to the estate or interest by reason of any violations on the land, occurring prior to acquisition of title to the estate or interest by the insured, of any covenants, conditions or restrictions.*
4. *Damage to existing building improvements,*
 - (a) *which are located or encroach upon the portion of the land subject to any easement shown on Schedule B, which damage results from the exercise of the right to use or maintain the easement for the purposes for which the same was granted or reserved;*
 - (b) *resulting from the exercise of any right to use the surface of the land for the extraction or development of the minerals excepted from the description of the land or shown as a reservation in Schedule B.*
5. *Any final court order or judgment requiring removal from any land adjoining the land of any encroachment shown in Schedule B.*

Wherever in this endorsement the words "covenants, conditions or restriction" appear, they shall not be deemed to refer to or include the terms, covenants, conditions or limitations contained in an instrument creating a lease.

No coverage is provided under this endorsement as to any covenant, condition, restriction or other provision relating to environmental protection.

Only part of Sections 2, 3 and 4 and all of Sections 7 and 8 are included from the lender's REM Endorsement. This endorsement is much less extensive than the lender's endorsement.

Revolving Credit Endorsement

This endorsement is used where the loan documents provide that the borrower can borrow and repay, and then re-borrow, an amount up to the original amount of the loan. It is common in any 'line of credit' situation where a company has an ability to borrow to meet its ongoing operational needs.

This endorsement will usually include exceptions for federal tax liens, liens or encumbrances known to the insured at the date of the advance, bankruptcies, and environmental protection liens. It is interesting, if you look at the specific endorsement set out below, that it only excludes 'known' liens where the loan is in default. Clearly, each endorsement and its terms must be negotiated carefully in the light of the specific loan transaction.

1. *The Company hereby insures the insured that advances made subsequent to the Date of Policy, which are secured by the insured mortgage, shall be included within the coverage of this Policy not to exceed the face amount of the policy, notwithstanding that the amounts secured by the insured mortgage may have been advanced, repaid and subsequently re-advanced subject to the provisions of the insured mortgage and the limitations hereinafter set forth.*

2. *The Company further insures the insured that the subsequent advances which are secured by the insured mortgage shall have the same priority over liens, encumbrances and other matters disclosed by the public records as do advances secured by the insured mortgage as of the Date of Policy, except for the following matters, if any:*

(a) *Realty tax arrears,*

(b) *Liens, encumbrances or other matters, the existence of which are actually known to the insured prior to date of the advances if the advances are made subsequent to the occurrence of the event of default under the terms of the insured mortgage and prior to a cure of the default;*

(c) *Bankruptcies affecting the estate or interest of the borrower or its nominee prior to date of the advances, or*

(d) *Environmental protection liens.*

Special Measure of Damages Endorsement

Like the Going Concern Endorsement, this is an endorsement focusing on the value of the land arising from the specific use to include, in calculating the loss after dispossession of the insured, the diminution in value of the land as a result of such dispossession:

The Company hereby agrees that, in the event the insured is dispossessed of all or part of the land [by reason of a final and unappealable court judgment or order by an ultimate court of competent jurisdiction] with respect to matters insured against by this policy, the Company will consider, in computing loss or damage compensable under this policy, the diminution in value of the insured estate or interest caused by the dispossession, measured by the use or uses of the land at the time of the loss.

Note the words in square brackets, which are sometimes found in endorsements and sometimes not. In either case, the policy terms themselves permit the insurer to dispute the dispossession and not be held liable until such final order.

Subdivision Endorsement

This endorsement deals with a lender's risks related to subdivision procedures and agreements. It provides:

Notwithstanding any of the provisions, terms, conditions, limitations, stipulations, exceptions and exclusions contained or arising under the policy or any endorsement thereto, the Company hereby insures the insured against loss or damage resulting from any violation of any subdivision requirement (as defined below), including, without limitation, any violation of the subdivision requirements caused by the present owner's or its predecessors' acquisition of the land, the size and configuration of the land, or the present uses of the land. "Subdivision requirements" refers to any laws, ordinances, resolutions, regulations or rules relating to or governing (i) subdivision, (ii) separation of ownership of any parcel or parcels of which the land is or was a part or (iii) any change in the area or dimensions of any parcel or parcels of which the land is or was a part.

Further, the Company hereby insures against loss or damage which the insured shall sustain in the assurance that in the event of the foreclosure of the insured mortgage, any deed by a sheriff or other judicial officer as result of a sale pursuant to a decree entered in such foreclosure shall not be rejected for recording on the basis of any violation of the subdivision requirements noted above.

Subsequent Insurance Endorsement

This is a way of dealing with the risks of dealing with changed underwriting approaches of a title insurer when additional insurance is required at a later date. It provides:

The Company agrees that, subject to the conditions set forth in the paragraph below and provided that application is made by the Insured not later than five (5) years after the Date of Policy, the Company will increase the Amount of Insurance of the policy or issue a new policy to the Insured or the Insured's designee, insuring such title or interest as may then exist in the Insured or the Insured's designee, up to the then fair market value of the land and any improvements then constructed on the land, but in no event greater than one hundred fifty percent (150%) of the Amount of Insurance stated in Schedule A.

The Company's obligations under this endorsement are subject to the following:

- 1. Receipt by the Company from the Insured of a written application for additional' insurance and payment of the Company's usual charge for insurance in the amount applied for based upon its then existing rates.*
- 2. At the time the application for additional insurance is received by the Company, neither the Company nor the Insured has knowledge of an unresolved claim against the Company under the policy, whether or not notice of the claim has been filed with the Company.*

3. *Reinsurance in an amount satisfactory to the Company being obtained at the then prevailing rates as to any portion of the additional insurance applied for which exceeds the Company's usual unreinsured retention.*
4. *If the date of the policy is required to be extended beyond the Date of Policy stated in Schedule A, the Company will extend its examination of title to the then current date and will increase the Amount of Insurance or issue a new policy subject to exception for such matters created, first appearing in the public records or attaching subsequent to the Date of Policy.*
5. *The insurance to be issued pursuant to this endorsement shall be subject to rules, regulations and rates in effect at the date the application for additional insurance is made.*

Successor Insured Endorsement

The section above describing the Fairway Endorsement outlined the title insurance problem that arises in the United States in dealing with partnerships that are considered separate entities in law. While a Fairway Endorsement is not required in Canada, it is useful to have a Successor Insured Endorsement with language similar to the following, to deal with partnership changes over time:

The Company hereby agrees that the definition of insured contained in paragraph 1(a) of the Conditions and Stipulations of the policy shall include any of the following successors in interest to the named insured of the estate or interest described in Schedule A (reserving; however, all rights and defenses as to any successor that the Company would have had against the named insured):

- a) any grantee of the named insured which is an owner of a partnership interest (a "Grantee Partner") in the named insured partnership which receives title to the land described in Schedule A of the policy as a result of the dissolution of the named insured partnership; or*
- b) any corporate successor to a Grantee Partner who becomes a successor by operation of law (as opposed to purchase) by reason of dissolution, merger, consolidation or corporate reorganization; or*
- c) any corporate grantee of a Grantee Partner, or of a corporate successor covered under (b) above which receives title to the land described in Schedule A of the policy, provided the corporate grantee is either a wholly owned subsidiary of the corporate successor or of its parent corporation.*

This endorsement is not to be construed as extending the coverage of the policy to any later date than the Date of Policy shown in Schedule A, nor does it impose any liability on the Company for loss or damage resulting from (i) failure of an successor referred to above to acquire an insurable estate or interest in the land, or (ii) any defect, lien or encumbrance attaching by reason of the acquisition of an estate or interest in the land by the successor.

Street Assessment Endorsement

There is an American concern about lenders losing priority because of assessments for street improvements. That is like our local improvement charges, but has never been a material issue on Canadian loans I have handled. You may find this endorsement requested by an American lender:

The Company insures the owner of the indebtedness secured by the insured mortgage against loss or damage sustained by reason of any assessments for street improvements under construction or completed at Date of Policy not excepted in Schedule B which now have gained or hereafter may gain priority over the lien of the insured mortgage.

Suffered Endorsement

There is much American case law on exclusion 3 and the word "suffered" means roughly what is set out in the endorsement below. However, as there is a variety of case law and I have seen the requested by a lender:

The Company hereby confirms that for the purposes of this Policy, the term "suffered" as used in clause 3(a) of the Exclusions From Coverage will be defined as follows: "To allow, to admit, to permit, to consent or to approve an act to be done or a condition to exist, and not to hinder it"

Survey Endorsement

This endorsement provides coverage over matters which might have been revealed by an up-to-date survey. It is an endorsement which is always provided in loan coverage for large loans, with the survey exception deleted.

The Company hereby insures the insured against loss or damage by reason of any violation, variation, encroachment or adverse circumstance affecting the title that is or would have been disclosed by an accurate survey, including violation of any building setback requirements of any applicable zoning by-law.

With owner's policies the survey coverage is more limited.

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of the failure of the land to be the same as that delineated on the plan of survey made by _____, on _____, 19____, other than with respect to boundary walls and fences.

or

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of the existence at date of policy of adverse matters that would have been disclosed by an up to date survey including without limitation:

- (a) a violation of setback provisions of an applicable zoning by-law;*
- (b) encroachments by existing structures onto adjoining land or onto any easement and encroachments onto the land of existing structures located on adjoining land, but not including any encroachment by retaining walls, boundary walls or fences.*

Survey-Forced Removal, Limited Marketability Endorsement

This endorsement provides specific insurance over the obligation to remove an existing encroachment, by-law infraction etc., and the insurer promises to issue title insurance coverage on the same basis to a subsequent lender or tenant. It states:

Notwithstanding exception No. 5 set out on Schedule "B" hereto, the Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of the enforced removal of the existing structure, or any part of it, other than a boundary wall or fence, provided that loss or damage shall not extend to a claim for loss of use, income or profits, because:

- (c) it violates setback provisions of an existing zoning by-law;*
- (d) it extends or is located onto adjoining land or onto any easement.*

The Company hereby agrees that, provided application is made to issue a policy to mortgagees, grantees or lessees of the insured under this policy, as may be designated by the Insured, then the Company will issue additional title insurance coverage insuring the title and/or interest as may then exist in the others designated by the insured in and to the land containing all of the coverages and endorsements contained in this policy. The policy or policies shall be issued in an amount not to exceed the value of the land and the improvements constructed thereon on the date of the application. The Company will not take exception for matters not set forth as exceptions in this policy; provided, however, that the Company may extend its examination of the title to the then current date and issue the additional insurance subject to those matters not otherwise insured against by this policy, which were created, first appeared in the public records or otherwise, or attached subsequent to the effective date of this policy. The Company's obligations hereunder are subject to receipt by the Company of payment of the Company's usual charges for insurance in the amount specified, based upon its then applicable rates.

Tax Lot Endorsement

While offered in Canada, this endorsement is usually only requested by American insureds that, in the United States, want coverage over the fact that the lands insured may be in more than one "tax lot" or may have other properties included in their "tax lot". It provides:

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of the land referred to in Schedule A not consisting of a separately assessed tax lot or lots without inclusion of any other land.

Usury (Loan) Endorsement

Again, this is an American concern because some states have usury laws with interest rates set at lower levels than the Canadian Criminal Code, which prohibits interest rates in excess of 60% per annum. It provides:

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of the entry of any court order or judgment, which constitutes a final determination and adjudges that the mortgage referred to in Schedule A is invalid or unenforceable as to the principal and interest due thereunder, said interest being computed in accordance with the provisions of such mortgage, on the grounds that the loan evidenced by the said mortgage is usurious under the laws of Canada and the jurisdiction in which the land is located.

Utility Facility Endorsement

This endorsement deals with the right to receive utility services. It provides:

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of any inaccuracies in the following assurances:

Water, gas, electric, sanitary sewer and telephone exist either over, under or upon public rights of way directly adjacent to the land described in Schedule A, or over, under or upon an easement (not terminable by the grantor thereof or by his heirs, personal representatives, successors or assigns) or the benefit of said land that connects to public rights of way.

Value Exclusion Endorsement

Exclusion 3(e) deals with the "pay value" exclusion and should be deleted in circumstances where the property is received in another manner – like a gift. It states:

Clause 3(e) of the Exclusions from Coverage, relating to value paid, is hereby deleted.

Variable Rate (Loan) Endorsement

This endorsement insures against losses where the mortgage is considered invalid, unenforceable or loses priority due to changes in interest rates permitted by the mortgage. It provides:

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of:

1. *The invalidity or unenforceability of the insured mortgage upon the title resulting from the provisions therein which provide for changes in the rate of interest.*
2. *Loss of priority of the insured mortgage as security for the unpaid principal balance of the loan, together with interest as changed in accordance with the provisions of the insured mortgage, which loss of priority is caused by the changes in the rate of interest..*

"Changes in the rate of interest", as used in this endorsement, shall mean only those changes in the rate of interest calculated pursuant to the formula provided in the insured mortgage at Date of Policy.

This endorsement does not insure against loss or damage based upon:

- (a) *usury, or*
- (b) *any consumer protection or truth in lending law.*

Water Rights, Surface Damage Endorsement

This endorsement is of use in circumstances where there is a right to remove water from the land.

It provides:

The Company hereby insures the insured against loss which the insured shall sustain by reason of damage to existing improvements, including lawns, shrubbery or trees, resulting from the exercise of any right to use the surface of the land for the extraction or development of water excepted from the description of the land or shown as an exception in Schedule B.

Zoning - as to use (Loan) Endorsement

This endorsement provides coverage over zoning uses lender on land that can include unimproved land. It provides:

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of the failure, at the Date of Policy of:

1. *the land to be classified Zone _____ according to the applicable zoning by-law; or*
2. *that classification to allow the following use or uses: _____ (insert current use or uses).*

There shall be no liability under this endorsement based on:

- (a) *lack of compliance with any conditions, restrictions, or requirements contained in the zoning by-law, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses.*

(b) the invalidity of the zoning by-law until after a final judgement or order of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit use or uses.

Zoning - Completed Structure (Loan) Endorsement

This endorsement provides a Zoning Endorsement to a lender where the building has been constructed. This is the most complete of the zoning endorsements provided.

1. The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of the failure, at the Date of Policy of:

(a) the land to be classified Zone _____ according to the applicable zoning by-law; or

(b) that classification to allow the following use or uses: _____ (insert current use or uses).

There shall be no liability under this paragraph 1(b) if the use or uses are not allowed as a result of any lack of compliance with any conditions, restrictions, or requirements contained in the zoning by-law, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses.

[for lower value loans 1. is replaced by:

1. The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of the failure of the use of the land at Date of Policy to be a permitted use under applicable zoning bylaws.

There shall be no liability if the use or uses are not allowed as a result of any lack of compliance with any conditions, restrictions, or requirements contained in the zoning by-law, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses.]

2. The Company further insures the insured against loss or damage arising from a final judgment or order of a court of competent jurisdiction:

(a) prohibiting the use of the land, with any structure presently located thereon, as specified in paragraph 1(b); or

(b) requiring the removal or alteration of the structure on the basis that, at Date of Policy, the municipal zoning by-law has been violated with respect to any of the following matters:

(i) Area, width or depth of the land as a building site for the structure;

(ii) Floor space area of the structure;

(iii) Setback of the structure from the property lines of the land;

(iv) Height of the structure; or

(v) Number of parking spaces.

There shall be no liability under this endorsement based on the invalidity of the zoning by-law until after a final judgment or order of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit the use or uses.

Zoning - as to use (Owner's) Endorsement

This endorsement provides a Zoning Endorsement for an owner of land including improved land where the title insurer is very comfortable with the zoning.

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of the failure, at the Date of Policy of:

1. *the land to be classified Zone _____ according to the applicable zoning by-law; or*
2. *that classification to allow the following use or uses: _____(insert current use or uses).*

[this is replaced by the following on lower valued properties:

The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of the failure of the use of the land at Date of Policy to be a permitted use under applicable zoning bylaws.]

There shall be no liability under this endorsement based on:

(a) lack of compliance with any conditions, restrictions, or requirements contained in the zoning by-law, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses.

(b) the invalidity of the zoning by-law until after a final judgement or order of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit use or uses.

Loss or damage as to the matters insured against by this endorsement shall not include loss or damage sustained or incurred by reason of the refusal of any person to purchase, lease or lend money on the estate or interest covered by this policy.

Contrast the limitation on liability with the broader coverage in the loan endorsements.

Zoning - Completed Structure (Owner's) Endorsement

This endorsement provides a Zoning Endorsement to a owner where the building has been constructed. This not quite as complete as the Completed Structure (Loan) endorsement as parking is not standardly covered.

1. The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of the failure, at the Date of Policy of:

- (a) the land to be classified Zone _____ according to the applicable zoning by-law; or*
- (b) that classification to allow the following use or uses: _____ (insert current use or uses).*

There shall be no liability under this paragraph 1(b) if the use or uses are not allowed as a result of any lack of compliance with any conditions, restrictions, or requirements contained in the zoning by-law,

including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses.

[This is replaced for lower valued properties with:

1. The Company hereby insures the insured against loss or damage sustained or incurred by the insured by reason of the failure of the use of the land at Date of Policy to be a permitted use under applicable zoning bylaws.

There shall be no liability if the use or uses are not allowed as a result of any lack of compliance with any conditions, restrictions, or requirements contained in the zoning by-law, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses.]

2. The Company further insures the insured against loss or damage arising from a final judgment or order of a court of competent jurisdiction:

a) prohibiting the use of the land, with any structure presently located thereon, as specified in paragraph 1(b); or

(b) requiring the removal or alteration of the structure on the basis that, at Date of Policy, the municipal zoning by-law has been violated with respect to any of the following matters:

(i) Area, width or depth of the land as a building site for the structure;

(ii) Floor space area of the structure;

(iii) Setback of the structure from the property lines of the land; or

(iv) Height of the structure.

There shall be no liability under this endorsement based on the invalidity of the zoning by-law until after a final judgment or order of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit the use or uses.

Questions to ask yourself or your client to determine the endorsements needed

1. LOCATION & SERVICES

What is the municipal address of the property? (**Schedule A**)

What is the legal description of the property? (**Schedule A**)

Is the connection to a given municipal roadway important? (**Land Abut Streets Endorsement**)

Is access route important to the value of the property? (**Access Endorsement (standard)**)

Is specific access route important to the value of the property? (**Access Endorsement (specific)**)

Has the property been assembled or consolidated in its development history? (**Contiguity Endorsement**)

Is there any question or confusion as to the identity of the building on the property? (**Address Endorsement**)

Are the suppliers of particular utilities and services important to the functional use of the property? (**Utility Facility Endorsement**)

Is the land being acquired or financed to have a particular building or structure constructed on it? (**Zoning – Completed Structure (Loan) Endorsement**) and (**Zoning – Completed Structure (Owner's) Endorsement**)

Does the value of the land being acquired or financed relate to a particular use of the land? (**Zoning – as to use (Loan) Endorsement**) and (**Zoning – as to use (Owner's) Endorsement**)

Will the client wish to change the description in the existing title insurance policy at a later date? (**Amend Policy Endorsement**)

2. NAMED INSURED

What is the name of the insured? (**Schedule A**)

What is the estate or interest covered? (**Schedule A**)

What entity holds title to the estate or interest? (**Schedule A**)

Does the owner contemplate an internal corporate reorganization or restructuring (**Additional Insured Endorsement - General**)

Does the owner contemplate an external reorganization, limited partnership or disposition of real property assets? (**Additional Insured Endorsement - Specific**)

Does the owner contemplate conveying any properties to franchisees, licensees or operators? (**Additional Insured Endorsement - Specific**)

Is the insured a partnership? (**Successor Insured Endorsement**)

Is the insured a partnership or has a principal acquired shares in the company? (**Non-Imputation Endorsement**)

Has there been some kind of restructuring pursuant to which your client would like to amend the insured in an existing title policy? (**Amend Insured Endorsement**)

Does the client wish to change a provision in the existing title insurance policy? (**Amend Policy Endorsement**)

3. VALUE

How is the value of each real property being determined - is the purchase price or loan amount set on some basis other than the real property's fair market value? (**Schedule A**)

Is there any intent to develop or improve the insured property? (**Schedule A**)

Might there later be any question as to the value of the property being acquired under the co-insurance provision? (**Co-Insurance Endorsement**)

Will the client be constructing improvements on a property that would increase its value? (**Future Improvements Endorsement**)

Does the owner client want to have the ability to acquire additional title insurance at a later date to reflect an increase in the value of a property? (**Commercial Inflation Endorsement**)

Would the insured like to increase the amount of coverage under the existing policy at a later date? (**Increased Insurance Endorsement**)

Is there something that may change the value of the property, such as constructing an improvement, increasing loan, etc.? (**Subsequent Insurance Endorsement**)

Does specific use of the property enhance its value in a material way? (**Special Measure of Damages Endorsement**)

Is the property particularly valuable because it is a strong location for a particular type of business carried out thereon? (**Going Concern Endorsement**)

Are there leasehold improvements of material value located on the property? (**Leasehold Improvement Endorsement**)

Is the loan secured against multiple properties? (**Single Policy - Schedule A**)

Are there multiple locations? (**Aggregation/Tie-In Endorsement**)

Is the purchase price or loan amount set on some basis other than individual real property values? (**Aggregation/Tie-In Endorsement**)

Does the client wish to change a provision in the existing title insurance policy? (**Amend Policy Endorsement**)

4. LOAN POLICY

Is there an assignment of rentals and other security? (**Assignment of Rentals Endorsement**)

Is it a construction loan with advances as improvements are constructed? (**Construction Loan Endorsement**)

Are there cross-default provisions in the lending documents? (**Cross Default Endorsement**)

Is this a loan on multiple properties? (**First Loss Payable Endorsement**)

Does the loan structure call for future advances under a trust deed? (**Future Advances Endorsement**)

Is there property, other than real property, which forms part of the security? (**Last Dollar Endorsement**)

Does the loan structure involve a letter of credit and reimbursement obligations? (**Letter of Credit Endorsement**)

Does the loan involve a participating mortgage, convertible mortgage, sale and lease back or synthetic lease transaction where the lender and borrower could be considered partners or joint venturers? (**Recharacterization Endorsement**)

Is the loan a revolving line of credit or similar structure? (**Revolving Credit Endorsement**)

Is the loan a variable rate loan? (**Variable Rate Endorsement**)

Are there any restrictions or encroachments? (basically any loan transaction) (**Restrictions, Encroachments and Minerals (Loan) Endorsement**)

Is the owner of the property contemplating the construction of additional improvements? (**Future Improvements Endorsement**)

Are there a variety of mortgages or charges against the property? (**Multiple Foreclosure Endorsement**)

Is there something unusual in the nature or structure of the loan, participating mortgage etc., where criminal code usury issues could be relevant? (**Usury Endorsement**)?

Does the client wish to obtain specific coverage over a prior assignment of the insured loan? (**Assignment of Mortgage Endorsement**)

Does the client wish to change a provision in the existing title insurance policy? (**Amend Policy Endorsement**)

5. TITLE/PROPERTY PROBLEMS

What are the general exceptions listed? (**Schedule B**)

Should coverage be obtained for patent, mining claims or native land claims? (**Schedule B**)

Is there a general survey exception? (**Schedule B & Survey**)

Is there a title defect that the title insurer will be asked to insure over? (**Specific Endorsement**)

Is there a title defect that the title insurer will be asked to insure over? (**Marketability Endorsement**)

Is there a title defect that the title insurer will be asked to insure over? (**Limited Marketability Endorsement**)

Are there any restrictions or encroachments? (basically any loan transaction) (**Restrictions, Encroachments and Minerals (Loan) Endorsement**)

Are there any existing improvements on an owned property? (**Restrictions, Encroachments and Minerals (Owner's) Endorsement**)

Are there a concern about present violations of covenants, conditions or restrictions? (**Covenants, Conditions and Restrictions - Violations Endorsement**)

Is there an easement affecting the property? (**Easement Damage Use for Maintenance Endorsement**)

Is there an encroachment (on an easement) on the property? (**Easement Existing Encroachment Endorsement**)

Are there potential issues with the development of a subdivision or terms of the subdivision agreement? (**Subdivision Endorsement**)

Is there no up-to-date survey of the property? (**Survey Endorsement**)

Does the survey indicate a particular infraction, encroachment or other problem (**Survey - Forced Removal, Limited Marketability Endorsement**)

Is there something unusual or complicated about the municipal taxation structure affecting the property? (**Tax Lot Endorsement**)?

Are there any repair rights, wells or rights of access in connection with water? (**Water Rights, Surface Damage Endorsement**)

Are there any work orders outstanding? (**Work Order Endorsement**)

Is there a particular reason why your client might be concerned about the ability of a purchaser/lender to obtain title insurance in the future?(**Future Insurance Endorsement**)

Does the client wish to change a provision in the existing title insurance policy? (**Amend Policy Endorsement**)

6. POLICY ISSUES

Is your client comfortable with the arbitration provision of the policy? (**Arbitration Deletion Endorsement**)

Has your lender client reviewed and understood and accepted the creditors rights provision? (**Creditors Rights Endorsement**)

Is your lender client willing to accept the creditor's rights exclusion? (**Creditor's Rights Deletion Endorsement**)

Is the Co-insurance provision inappropriate for this transaction? (**Co-Insurance Endorsement**)

Has a property been acquired other than pursuant to a third party purchase at fair market value? (**Value Exclusion Endorsement**)

Is your lender client unfamiliar with “doing business” laws of Canada or does it wish to delete this exclusion? (**Doing Business Endorsement**)

Is the purchaser or insurer concerned about environmental liens in Canada? (**Environmental Liens Endorsement**)

Is there a particular reason why your American client might be concerned about the ability of a purchaser/lender to obtain title insurance in the future?(**Future Insurance Endorsement**)

Is there something unusual or complicated about the municipal taxation structure affecting the property? (**Tax Lot Endorsement**)?

Does your client have particular concern about the duty to defend? (**Defence Endorsement**)

Does the client wish to have the title insurer responsible for founding work orders and other related matters?(**Government Work Order Endorsement**)

Does the client wish to change a provision in the existing title insurance policy? (**Amend Policy Endorsement**)

7. AMERICAN INSUREDS

Has your client reviewed and compared the creditor's rights provision to the current ALTA standard? **(Creditor's Rights Endorsement)**

Is the American lender or owner familiar with the municipal taxation structure affecting the property? **(Tax Lot Endorsement)**

Is the lender an American lender which has concerns about estate usury laws? **(Usury Endorsement)**

Does an American client have particular concern with the wording of Exclusion 3 of the policy? **(Suffered Endorsement)**

Is the lender or purchaser an American entity unfamiliar with Canadian title insurance forms? **(Guarantee Endorsement)**

Is the insured a partnership and the lender/owner is American? **(Fairway Endorsement)**

Does your American client have particular concerns about execution of documents? **(Due Execution Endorsement)**

Is your American lender client unfamiliar with "doing business" laws of Canada or does it wish to delete this exclusion? **(Doing Business Endorsement)**

Is your American lender client concerned about street assessment charges? **(Street Assessment Endorsement)**

8. MISCELLANEOUS

Is this a complicated transaction with multiple locations or closings in different jurisdictions? **(Gap Endorsement)**

Is there a particular concern over the closing timing or loan advance? **(Gap Endorsement)**

Is money being lent to a tenant? **(Leasehold Loan Endorsement)**

Is the insured a tenant of real property? **(Leasehold Owner's Endorsement)**

Is the property a commercial condominium? **(Condominium Endorsement)**

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