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TitleTRACK

The mutual indemnification agreement in NYS

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Finding a solution to an exception to title, which probably was disposed of when a prior title insurance policy on the same property was issued, used to be an arduous process, sometimes commenced in a frenzied rush near closing.

The previous title insurance company or agent would receive a written request for proof of how an exception was dealt with and then have to locate its file in order to respond. If the prior company was an agent and the file was either not found or the proof was not adequate, the agent would have to request from its underwriter a formal letter of indemnification that would run to the new underwriter. This proved to be a time consuming and inefficient process for enabling the closing to take place.

On July 22, 2003, seven title insurance companies in New York followed insurers in Alabama and Florida and signed a mutual indemnification agreement for the purpose of streamlining the process of clearing prior title issues. This agreement was expanded effective April 1, 2005, with the execution of the first amended and restated mutual indemnification agreement and it was further amended effective April 1, 2006, by the signing of the second amended and restated mutual indemnification agreement. Sixteen title insurers licensed in New York were parties to the second restated agreement.

The procedure that a title company or agent must follow under the agreement is simple and straight forward. If an exception to title is a "covered risk," as defined in the second restated agreement, the title insurer to be indemnified has a copy of either the title insurance policy issued by the prior title insurer or a copy of the indemnitor's marked-up title report, and the covered risk is not listed as an exception to title in the indemnitor's title policy or marked-up report, the indemnitor is deemed to indemnify the new insurer without further action on the part of either company.

If the covered risk was excepted but language was included in the policy that only insured against collection or enforcement, the indemnitee is indemnified by the prior title insurer, provided that the new title insurer similarly excepts but insures against collection or enforcement.

For this scenario to work, the indemnitor must have issued either an owner's policy insuring the current record owner; a loan policy when it's insured, which transfers its interest in the property, has acquired title by a foreclosure of the insured mortgage or by a deed-in-lieu; or a loan policy when the new proposed insured (other than the lender) is acquiring title as the successful bidder in the foreclosure of the previously insured mortgage.

For a title policy issued by an indemnitee after April 1, 2005, mortgages and judgments (including New York state and New York City tax warrants, money judgments, New York City Parking Violation Bureau judgments, Environmental Control Board liens and Transit Adjudication Bureau judgments), and common charge liens filed by condominium boards of managers (the liens of which have not expired by operation of law, against persons or entities out of title, each in an amount not exceeding $500,000) can each be a covered risk- provided that no execution has been made or action commenced to foreclose or otherwise enforce the lien in question on the issue date of the indemnitee's policy. For federal tax liens the limit is $250,000 for each lien, which was also the case for mortgages and money judgments against a person or entity out of title for policies issued prior to April 1, 2005.

For a title policy issued by an indemnitee on and after April 1, 2006, a mortgage in the original principal amount that does not exceed $750,000 is a covered risk — provided no action has been commenced to foreclose or to otherwise enforce the mortgage on the date the indemnitee issues its policy. The mortgage amount for this covered risk was increased to $750,000 by the second restated agreement. Other covered risks are:

- Proof of the death of a prior owner, devolution of title, and federal and New York estate taxes regarding the estate of a prior owner where there has been a recorded conveyance for consideration to a bona fide purchaser.

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• If corporation has been in the chain of title in the past 10 years, then proof of incorporation, New York State Corporate Franchise tax and New York City General Business tax, provided that no execution has been made or action commenced to foreclose.

• Errors in the description of the property insured in a deed that was executed prior to the deed insured by the indemnitor under an owner's policy, provided the current deed to be insured contains the correct description.

• New York City Sidewalk Violations.

For title issues that are not covered risks under this agreement, the title agent must obtain curatives and proofs along with formal letters of indemnification from the prior title agent and its insurer. The mutual indemnification agreement does not preclude a title agent or insurer from requesting a letter of indemnity as outlined in the Recommended Practices of the New York State Land Title Association.

As a result of this agreement, the title clearance process has been simplified for closings in New York state. Title agents can clear title exceptions more effectively without having to request letters of indemnification and title insurance companies aren't inundated with these requests.

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