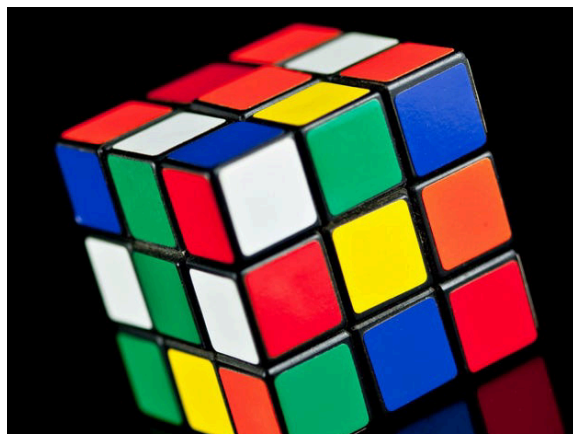




FUNDAMENTALS OF TITLE AND CLOSING

Christina Taylor, Esq.



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Christina Taylor is the Speaker and Education Specialist for Fidelity National Financial based in Maitland, Florida. She currently travels throughout Florida teaching FNF agents by means of engaging and thought provoking training presentations. She has extensive public speaking experience, specializing in subjects relating to the title industry and real estate law, as well as topics with professional development and motivational themes. Christina's responsibilities also include research, development, and presentation of these presentations. Prior to her training role, she served as Underwriting Counsel, providing underwriting support to agents and working to resolve issues associated with commercial and residential real estate closings. She has been with FNF since 2000.

Before joining FNF, Christina practiced real estate law with a prominent law firm in Orlando. She earned her law degree from the University of Florida College of Law and her undergraduate degree from Palm Beach Atlantic University in West Palm Beach, Florida. Christina is currently a member of The Florida Bar. She is certified as an instructor for numerous accrediting agencies in Florida, including The Florida Bar and The Florida Department of Financial Services. In addition to speaking at FNF events, Christina gives presentations to numerous title industry associations and organizations throughout Florida.

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The First Steps

The Real Estate Contract

A contract is an agreement between two or more parties for the doing or not doing of some specific thing, and it creates legal obligations which are enforceable at law. More specifically for the real estate industry, a sale is a transfer of real property for a fixed value as agreed upon by the seller and buyer. In Florida, that sale of real property is not enforceable unless there is a written contract signed by the party to be charged.¹ The written contract is evidence of the parties' agreement. Each person holding an interest in the real property is a necessary party to the contract to convey the property. To be binding, the contract must be definite and certain in its essential terms. For example, a description of the land to be conveyed and the price to be paid by the buyer are both essential to the real estate contract.

The real estate contract serves many purposes. It is a binding agreement between the parties, containing important details about the transaction, but it also serves as instructions and timelines for the closing to the seller, buyer, Title Agent and Closing Agent. For example, the contract sets forth which party will pay for certain services; in essence, instructions to the Closing Agent for allocating expenses on The Closing Disclosure or Settlement/Closing Statement. Also, if certain events do not occur within the required time, then a party may claim a breach of the contract. If it appears that the seller or buyer will not be ready, willing and able to close on the closing date specified in the contract, through no fault of the Closing Agent, then the contract should be extended in writing by both parties. If the contract has not been extended, then the Closing Agent should not close the transaction, and may consider providing written notice to all parties stating the Closing Agent's ability to close prior to the closing date and requesting a written extension of the contract.

As the Title Agent and Closing Agent, you should retain a copy of the fully executed Real Estate Contract, including any amendments or extensions, as part of your title and closing file.

In Florida, the most frequently used real estate contract is the Florida Realtors® and the Florida Bar Residential Contract for Sale and Purchase, which will be revised and updated effective November 1, 2021. Below we have highlighted certain portions of the FR/BAR Contract which you, acting as the Title Agent, the Closing Agent and (when applicable) the Escrow Agent, should be familiar.

FR/BAR HIGHLIGHTS	
Lines 1 and 2, Sales Clause	Parties Seller and Buyer designation, sales clause
Paragraph 1	Property Description Address, Legal Description, Personal Property
Paragraph 2	Purchase Price Purchase price, designation of Escrow Agent, deposit amount, financing amount, balance to close amount
Paragraph 3	Effective Date The date from which calculation of time periods begins
Paragraph 4	Closing; Closing Date
Paragraph 9	Financing
Paragraph 9	Closing Costs; Title Insurance; Survey Costs to be paid by Seller/Buyer, Title Evidence Deadline (title commitment and policy), who pays for title insurance, Buyer's option to purchase survey, Seller's obligation to provide prior survey, payment for special assessments
Paragraph 10	Disclosures (g) Homeowners' Association Disclosure, (i) Seller's duty, if foreign, to inform Buyer (FIRPTA)

¹ Known as the Statute of Frauds, which states that an action on a contract for the sale of real property may not be brought unless the contract is in writing and signed by the party to be charged. § 725.01, Fla. Stat.

Paragraph 13	Escrow Agent Receipt of deposit, conflicting demand for disbursement, ability to interplead funds
Paragraph 18	Standards for Real Estate Transactions: A. Title Evidence and Title Examination (i) Title evidence delivered to Buyer, title defects, marketable title (ii) Title examination, Buyer to notify Seller of defects, Seller's right to cure title defects within Cure Period, Contract termination if title defects cannot be cured B. Survey Encroachments C. Ingress and Egress Seller's representation that there is insurable ingress and egress D. Lease Information Seller obligated to provide tenant information (Estoppel Letters) E. Liens Seller's affidavit attesting to no liens and no improvements 90 days prior to Closing Date H. Conveyance Seller's obligation to convey marketable title by warranty deed I. Closing Location; Documents; and Procedure (i) Closing Agent designated by party paying for Owner's Policy, ability for closing to be conducted by mail or electronically (ii) Delivery of Seller's closing documents, Buyer's documents (iii) FinCEN reporting obligation of Closing Agent J. Escrow Closing Procedure K. Prorations; Credits V. FIRPTA Tax Withholding
Signature Lines	Buyer and Seller signatures and addresses, Broker signatures

The Title Order

The information found in the contract is the basis for the title order and is usually provided to you by the Realtor® in a purchase/sale transaction. If your transaction involves a loan secured by a mortgage, then the lender may also provide additional information to you in the Loan Estimate, The Closing Disclosure² or other financing documents.

It is helpful to provide the following information to the title examiner when placing your title order:

- parties' full names,
- type of transaction (purchase/sale or refinance),
- type of property (residential or commercial),
- complete legal description (not just the property address or tax identification number),
- purchase price,
- financing amount (if applicable),
- type of policy(ies) being issued,
- requests for endorsements to the policy,

² Any residential loan originated on or after October 3, 2015, is subject to the rules and forms set forth by the Consumer Financial Protection Bureau. These rules cover all closed-end residential mortgages if the money, property or service is used primarily for personal, family or household purposes and the debt is secured by a closed-end transaction secured by real property; in other words, most consumer mortgages. These transactions include the following loans: purchase money, refinance, 25 acres or less, vacant land, timeshare, construction-only and construction-to-permanent, but does not include reverse mortgages or home equity lines of credit. Commercial transactions are exempt if the loan is primarily for business, commercial or agricultural purposes. RESPA Regulation X and TILA Regulation Z.

- a copy of the prior Owner's Policy, and
- a copy of a prior survey (if available).

The Title Search

The title search is the process where the title examiner searches the public records in the Florida county where the property is located. This search will disclose the legal status of the property, including who owns the property and whether there are any liens or encumbrances affecting the title. Specifically, the search will disclose deeds, mortgages, judgment liens, easements, restrictive covenants, and other documents recorded in the public records which affect title to the property. In order to issue a title commitment, and eventually a title policy, a title search must be performed.³ The document evidencing the search is referred to as a Title Search Report or "TSR," which includes the reference to the recording information of the documents affecting title, along with copies of each of the recorded documents. The TSR is the foundation for the title commitment.

Preparing the Title Insurance Commitment

The title insurance commitment is just that, a commitment to insure the property and issue a title insurance policy once the commitment requirements are met.⁴ In fact, the Company requires a title commitment to be issued in order to issue a title policy. In Florida, the commitment is a promulgated form, approved by the Florida Office of Insurance Regulation.⁵ As a promulgated form, the Jacket may not be modified.

Primary Title Services & Determining Insurability

The commitment imposes certain obligations and liabilities on both the title insurer (that's us, the Underwriter or Insurer) and the Title Agent (that's you), which results in benefits for the Insured (that's your customer).⁶ In order to issue a commitment, and eventually a policy, the title search must be evaluated to determine insurability using sound underwriting practices.⁷ This is what is referred to in the statutes as "primary title services" - determining insurability using sound underwriting practices based upon evaluation of a reasonable title search. In order to charge and collect premium for issuing a title policy, you must perform primary title services.⁸

More specifically, primary title services include determining and clearing underwriting objections and requirements to eliminate risk, preparing and issuing the commitment with the requirements to insure, and preparing and issuing the title policy.⁹ For example, title examination should include:

- Review of the deed by which the current Seller obtained title,
- Review of documents relevant to the requirements (Schedule B-1) of the commitment, which entails:
 - Determining the course of action for each requirement in Schedule B-1,
 - Adding requirements based on your review of the initial requirements,
 - Before closing, reviewing requirements to confirm all will be met at closing; if a requirement cannot be met, then disclose in writing to the Buyer and/or Lender that it will be shown as an exception in the final policy.

³ § 627.7845, Fla. Stat.

⁴ "The Company commits to issue the Policy according to the terms and provisions of this Commitment." Commitment to Issue Policy, Page 1 of the ALTA Commitment with Florida Modifications (8/1/16).

⁵ § 627.777, Fla. Stat.

⁶ §69O-186.003(7), Fla. Admin. Code.

⁷ § 627.7845, Fla. Stat.

⁸ § 627.7711(2), Fla. Stat. In addition, your Issuing Agent Contract (appointing you as a Title Agent for and FNF Underwriter), includes your duties to base each policy upon a determination of insurability of title which includes a search of the public records and an examination of all documents affecting title.

⁹ § 627.7711(1)(b), Fla. Stat. NOTE: primary title services do not include closing services or title searches, for which a separate charge may be made.

- Review of documents relevant to the exceptions (Schedule B-2) of the commitment, which involves:
 - Becoming familiar with the provisions in each document listed as an exception to confirm no additional requirements are set forth therein (ex: CCRs contain a right of refusal that must be released),
 - Providing a copy of Schedule B-2 documents to the surveyor to locate or note that it does not affect the property.
- Determine whether each of those requirements and exceptions affect the property;
- Deletion of certain requirements and exceptions based on underwriting guidelines.

As a reminder, the contract requires the commitment to be furnished to the buyer by a certain agreed upon date. If you do not do so, then you may be in breach of the contract.

The commitment is valid for a period of six months.¹⁰ If closing does not occur within the six-month period, the commitment is no longer valid. To extend the commitment's effective date, the commitment must be properly updated.

Preparing for the Closing

As the Title Agent and the Closing Agent, you must perform the closing in accordance with several different sets of instructions: the Contract, the Title Commitment, the Loan Estimate and Closing Disclosure, and possibly additional miscellaneous agreements, such as an Escrow Agreement. As part of your title and settlement procedures, you should collect and review all sets of closing instructions, not only to abide by those instructions, but also to confirm that none of the instructions conflict.

Title Documents

In order to close and insure the property, numerous title documents must be executed and either recorded or retained in the transaction file. Of most importance are the documents that create the interests that will be insured, namely the deed and the mortgage. In addition, certain existing liens and encumbrances, such as outstanding mortgages and judgment liens, must be released or satisfied in writing and recorded. You must also ensure that certain underwriting requirements are met by the use of affidavits; for example, the parties in possession standard exception in the commitment must be removed if the owner/borrower signs an affidavit (referred to as the Seller's Affidavit or the Borrower's Affidavit) certifying there is no person in possession of the property or with a claim of possession to the property except the owner/borrower.¹¹

Ethical Considerations: Relationship between the Title Insurer and Title Agent

In order to become an Agent authorized to issue a title insurance commitment, policy and/or endorsement on behalf of the underwriter, the Title Agent or Attorney must enter into a contractual relationship with the Underwriter (or the Company), where the Underwriter appoints the Title Agent as a policy issuing Title Agent. This Issuing Agency Contract is sometimes referred to as your Agency Agreement, which sets forth the duties of both the Underwriter and the Agent.

Under the Agency Agreement, we, as your Underwriter, will furnish you with all the forms for transacting the title business and with guidelines and instructions for your title transactions. We will also resolve all risk assumption questions you have.

¹⁰ "If all of the Schedule B, Part 1 Requirements have not been met within 6 months after the Commitment Date, this Commitment terminates and the Company's liability and obligation end." Commitment to Issue Policy, Page 1 of the ALTA Commitment with Florida Modifications (8/1/16).

¹¹ § 627.7842(1)(b), Fla. Stat.

In return, you as the Title Agent agree to perform certain duties relating to title documents, such as:

- processing applications for title insurance in a timely, prudent and ethical manner with due regard to recognized title insurance underwriting practices and in accordance with the Company's bulletins, manuals and other instructions;
- determining insurability, as discussed above;
- creating a separate title file for each transaction, including copies of all documents relating to the Title Agent's determination of insurability;
- complying with the Company's written underwriting bulletins, manuals and other underwriting instructions;
- contacting underwriting counsel for guidance and approval if any reasonable doubt exists as to insurability or marketability of title or as to any extraordinary particular risk;
- timely furnishing the insured with the title policy.

Lender Documents

Ethical Considerations: Relationship between the Title Agent and the Lender

If you are handling the loan closing for an institutional lender, you will receive instructions on how to close the loan and the documents to be executed by the borrower. If any set of instructions conflict, as a best practice, you must obtain in writing from all affected parties, consent to correct the conflicting matters prior to closing. For example, the loan instructions require deletion of certain exceptions in the title policy, which the underwriter is not willing to delete. In such cases, the loan instructions must be modified in writing prior to closing and issuance of the policy. Also, if you become aware of something that is incorrect or must be modified after you have received the loan closing package, you must obtain written approval to make changes to the lender's instructions or to a loan document; accepting modified instructions over the phone could be a violation of your closing duties.

Finally, you should be aware of the interaction between your underwriting title requirements and guidelines in relation to the lender's instructions. For example, you must ensure that the proper parties execute the mortgage. You should also confirm that any person acting in a representative capacity has authority to execute the mortgage and other loan documents.

The Closing Protection Letter

The closing protection letter ("CPL"), sometimes referred to as an insured closing letter, is a form approved by the Office of Insurance Regulation.¹² A CPL is written and issued by the underwriter to the lender, which indemnifies the lender for certain acts of the Closing Agent in conducting the closing.

When you act in the capacity of a Title Agent by issuing a title insurance policy, you are acting at the behest of the Title Insurer/Underwriter. That means you are acting as that Insurer's Agent for the purpose of issuing that policy. However, you also perform additional, separate and distinct duties related to the closing. When you conduct the closing, you are not acting as an agent of the title insurance Underwriter.¹³ Sometimes these unique responsibilities are referred to as the agent "wearing two different hats:" the agent is acting (1) as a policy issuing Title Agent of the Title Insurer/Underwriter and (2) as an independent Closing Agent responsible for the settlement of a real estate transaction.¹⁴ A CPL works with the title policy, but they each have two distinct purposes. The title policy provides protection for matters of title, whilst the CPL protects the lender from certain

¹²§ 627.777, Fla. Stat. As an approved form, it may not be altered by the agent.

¹³ As stated in the Issuing Agency Contract, aka Agency Agreement (as discussed in more detail below).

¹⁴ The Issuing Agent is the Company's (Underwriter's) agent for the limited purpose of issuing policies. The Issuing Agent is not the Company's agent for purposes of providing closing or settlement services. The Company's liability for the lender's loss arising from closing or settlement services is strictly limited to the contractual protection expressly provided in this letter. Paragraph 9, Closing Protection Letter.

losses resulting from the closing process. As such, a CPL can only be issued in conjunction with a title policy and must be provided by the same Underwriter issuing the title policy.¹⁵

Because of the disparity between the actions taken by the Agent in these two different capacities, the CPL is valuable to the lender. The CPL creates the limited instances which the title underwriter will accept liability for the acts or omissions of its Title Agents relating to the closing, thus offering protection to the funding lender.

More specifically, under the terms of the CPL, the title insurer agrees to indemnify the lender for actual loss solely caused by:

1. the failure of the Issuing Agent to comply with the lender's written closing instructions that relate to
 - a. the disbursement of funds necessary to establish title or the validity, enforceability or priority of the lien of the mortgage; or
 - b. the obtaining of any document, required by the Issuing Agent, to the extent that the failure to obtain that document affects the status of title or the lien of the mortgage;
- or
2. fraud, theft, dishonesty or misappropriation of the Issuing Agent in handling the lender's funds in connection with closing, but only to the extent it relates to the status of title or the lien of the mortgage.

Closing

Closing Agent v. Title Agent

As discussed above, your actions as a Closing Agent are distinct and separate from your actions as a Title Agent. Let's explore in more detail the differences between the two.

Closing Services

It is common practice to refer to the person who handles a real estate transaction as the Closing Agent or Settlement Agent. Although this general term "Closing Agent" is not defined by Florida law, the statutes do provide a definition for the phrase "Closing Services," presumably the services provided by a Closing Agent.¹⁶ Basically, Closing Services are the services you perform as a Title Agent, including "preparing documents necessary to close the transaction, conducting the closing, or handling the disbursing of funds related to the closing in a real estate closing transaction in which a title insurance commitment or policy is to be issued."¹⁷ A more detailed list of what services may be provided by a Closing Agent include:

- Charging and collecting all taxes and fees against the property to be paid at closing;
- Supervising the parties' execution of documents at closing;
- Presiding over the transfer of documents and funds;
- Recording title documents.¹⁸

Conducting the Closing in a Reasonably Prudent Manner

One Florida court elaborated on the Closing Agent's service of supervising the closing, stating that even though the Agent did not make a specific charge for this service, supervision of the closing was an "inducement to the purchase of title insurance."¹⁹ The court further set out a standard for Closing Agents when undertaking to

¹⁵ The Company agrees to indemnify the lender for actual loss of funds "provided the Company issues or is contractually obligated to issue a policy...in connection with the closing of the real estate transaction." Paragraph A, Closing Protection Letter.

¹⁶ § 627.7711, Fla. Stat.

¹⁷ § 627.7711(1)(a), Fla. Stat.

¹⁸ Title Insurance Law, §20:2, Joyce D. Palomar (August 2016, ed.)

¹⁹ *Fla. S. Abstract & Title Co. v. Bjellos*, 346 So.2d 635 (Fla. 2d DCA 1977).

supervise a closing, i.e., in “a reasonably prudent manner.” The court ultimately held that the Closing Agent breached a legal duty to the buyers in “failing to properly carry out its responsibility as Closing Agent.”

In finding no breach of the title insurance policy, another court found that a cause of action may still exist against the Closing Agent.²⁰ In this case, the buyer was allowed to make a claim against the Closing Agent for breach of its duty by closing a transaction without assuring that the buyer would have direct access to a road (as required by the contract) and for insuring the property with an exception for access.

In addition, your Agency Agreement further clarifies that “Agent is not an agent of Principal (Underwriter) for purposes of conducting a Closing, and Agent agrees that it will not hold itself out to the public in such a manner as to suggest that it is the agent of the Principal for Closings.” The Agency Agreement further states that the Agent is liable for improper Closings, including failure to disburse properly or to close in accordance with escrow or lender’s instructions. Therefore, it is your responsibility as the Closing Agent to conduct the closing process in accordance with Florida statutes, rules, cases, ethical opinions and your obligations under your Agency Agreement.

Fiduciary Duty to All Parties

As a Closing Agent, you are an unbiased, neutral third party charged with closing a transaction in accordance with the written instructions from the principals and the lender. For example, when you agree to take funds into escrow, you additionally become the Escrow Agent. Regardless of your relationship to the parties in the transaction (the seller, the buyer/borrower), by undertaking to act as an Escrow Agent, you establish a new legal relationship to the parties.²¹ This new relationship gives rise to additional duties and responsibilities, with corresponding potential liability, by way of the escrow agreement and by operation of law.

Notarization

Prevention of Fraud and Forgery

“The basic role of a notary public in our legal system and in the world of commerce is to prevent fraud. Notaries deter fraud when they perform their duties with diligence and obey the laws governing their duties.”²² For real estate transactions in particular, notarization is the fraud-deterrent process that assures the parties to a transaction that a document is authentic and can be trusted. The central value of notarization lies in the notary’s impartial screening of a signer for identity, willingness and awareness. This screening detects and deters document fraud and helps protect the personal rights and property of private citizens from forgers, identity thieves and exploiters of the vulnerable. In Florida, the process of notarization prevents countless forged, coerced and incompetent signings that would otherwise overwhelm our court system and dissolve the network of trust allowing our civil society to function.²³

Purpose of Acknowledgement

In Florida, a conveyance must be in writing, signed, witnessed and acknowledged.²⁴ In order for an instrument concerning real property to be recorded in Florida, the execution must be *acknowledged* by the party signing it and authenticated by a civil-law notary or notary public (an *oath* is not appropriate for this purpose).²⁵ An “acknowledgment” is a means of authenticating an instrument by showing that the instrument was the act of the person executing it. It is a formal declaration made by someone who signs a document and confirms that the signature is authentic. Thus, the acknowledgment serves as verification of the fact of execution.²⁶

By authenticating a signature on a real estate document, the notary public acts to prevent real estate fraud. Irregularities and discrepancies in an acknowledgement could be evidence of a fraudulent transfer. Notaries and

²⁰ *Phrazer Co. Inc. v. Lawyers Title Ins. Corp.*, 508 So.2d 731 (Fla. 5th DCA 1987).

²¹ *The Florida Bar v. Joy*, 679 So.2d 1165 (Fla. 1996).

²² Florida Governor’s Reference Manual for Notaries, November 1, 2001 version.

²³ Hillsborough County Clerk of Court & Comptroller Cindy Stuart, <https://www.hillsclerk.com/Additional-Services/notary>.

²⁴ § 698.01, Fla. Stat.; § 698.04, Fla. Stat.

²⁵ § 695.03, Fla. Stat.

²⁶ Fla. Jur. 2d, Acknowledgements, § 1

Title Agents should be on the lookout for some of the methods fraudsters use to undermine the protections provided by a proper acknowledgement.

A larger purpose of the acknowledgment process is to enhance the reliability of recorded instruments and to encourage the public to rely on the validity of publicly recorded documents. An acknowledgment gives solemnity to the execution of an instrument and provides protection against the recording of false instruments.²⁷

Florida law requires that the acknowledgment or jurat contains certain elements, including the presence requirement.²⁸

Presence Requirement

The most basic requirement for performing a notarization is the presence requirement. In Florida, the acknowledgement must contain a statement that the signer personally appeared before the notary at the time of notarization.²⁹ Stated another way, a notary public may not notarize a signature on a document if the person whose signature is being notarized is not in the presence of the notary public at the time the signature is notarized.³⁰ Effective January 1, 2020, the definition of presence was expanded to include not only physical presence, but also presence by means of audio-visual technology to authorize remote online notarization.³¹ As a result of the statutory change, all Florida acknowledgments must include the following verbiage: "by means of ☐ physical presence or ☐ online notarization." As mentioned above, the purpose of this requirement is to provide confidence in the authenticity of a signature.

Agents should be reminded that failure to adhere to these statutory requirements may result in criminal and civil sanctions for the notary, as well as disciplinary proceedings for an attorney who supervises the notary. If you are a notary public, you must adhere to the statutory presence requirement. If you are a manager or attorney who supervises the actions of a notary public, you should remind the notary of the statutory presence requirement and authorize them to decline notarization if this requirement is not met.

Post-Closing

Recording the Title and Closing Documents

Recording Requirements

In Florida, for a conveyance or mortgage to be good and effectual against creditors or subsequent purchasers for valuable consideration and without notice, it must be recorded.³² Because the statute makes it clear that the recording of the documents is the determining factor in its effectiveness against claims brought by subsequent purchasers or creditors, it is imperative that Title Agents record closing documents as soon as possible, ideally within one to three days after closing. Despite the instrument being valid between the parties, if there is a delay in the recording of documents, any matters occurring between the date of closing and the date of recording (usually referred to as "intervening matters"), may take priority over the recorded documents.³³ The title policy insures against loss or damage by reason of "any defect in or lien or encumbrance on the Title" including insurance against loss from "a document not properly filed, recorded or indexed in the Public Records including failure to perform those acts by electronic means authorized by law."³⁴ Therefore, a delay in recording could result in a claim under the title insurance policy.

²⁷ Am. Jur. 2d, Acknowledgements, § 2.

²⁸ § 117.05, Fla. Stat.

²⁹ § 117.105(4)(c), Fla. Stat.

³⁰ § 117.107(9), Fla. Stat.

³¹ § 117.107(9), Fla. Stat.

³² § 695.01, Fla. Stat.

³³ Uniform Title Standard 16.2.

³⁴ Covered Risk 2(a)(vi).

Because of the importance of recording in a timely manner, *ALTA Best Practices Pillar 4 Settlement Policies and Procedures* recommends that Agents consider:

- their contractual and legal requirements for recording documents;
- whether e-recording is available and can streamline your recording process;
- who will be responsible for tracking the recording of documents; and
- establishing procedures for handling documents rejected from recording.

Under the Best Practices, your company should also have written policies and procedures relating to recording. FNF has numerous helpful tools to assist you in developing best practices for your office relating to recording in our Best Practices Portfolio Builder.³⁵

Ethical Duty to Promptly Record

The “gap” is a term used to define the time period between the effective date of the commitment and the date of recording the documents creating the estate or interest to be insured, i.e., the deed and the mortgage.³⁶ Florida law requires insuring against the possible existence of adverse matters or defects in title recorded during that time period if you, as the Closing Agent, disburse closing funds. Although the statute makes it mandatory to insure the “gap” if you disburse at closing, the risk may be minimized when you perform a pre-closing update and record promptly after closing.

The “gap” between the pre-closing update and the recording of closing documents should be kept to a minimum to reduce the likelihood of an adverse document being recorded in the time period. Therefore, the Company requires you as the Issuing Title Agent and Closing Agent to update the title within three business days prior to closing. To clarify further, the effective date or “through date” of the update need not be within three business days; it is only necessary that the search be done within three days. For example, an update performed on September 27 for a September 30 closing would be sufficient even if the update only showed the state of title through September 20. Additionally, prior to disbursing the closing funds, you should have custody of the executed closing documents and should be in a position to record no later than three business days after disbursing the funds.

Issuing the Final Title Policy

Agreement between the Title Insurer and the Insured; Coverage by Indemnification

The title insurance policy is a contract between the Insured (either the owner or the lender) and the Company (the title insurance Underwriter/Title Insurer),³⁷ where the Title Insurer insures against loss or damage sustained by the Insured by reason of a Covered Risk, such as a defect in or lien or encumbrance on the title or unmarketability of title.³⁸ In other words, title insurance insures the validity and priority of the interests of the Insureds by indemnifying the Insured against loss caused by defects in title arising from events that occurred *prior* to the date of policy, i.e., that were in existence at the time the Insured takes title. This action of compensating for loss or damage sustained is called indemnification.³⁹ Despite this indemnification, title insurance is *not* a guarantee that no title defects exist; in fact, title insurance assumes that some defects in title do exist. However, as stated at the beginning of these materials, the Title Insurer seeks to minimize that risk by performing a title search of the public records prior to issuing a policy.⁴⁰ In addition to indemnifying the Insured against loss or damage by reason of the Covered Risks, the Title Insurer is also obligated to defend at its own cost the Insured

³⁵ <https://www.fnfflorida.com/education/training-resources/alta-best-practices-resources/>

³⁶ § 627.7841, Fla. Stat.

³⁷ Paragraph 15, Owner’s Policy Conditions; Paragraph 14, Loan Policy Conditions.

³⁸ See Covered Risks 1-10 in the 2006 ALTA Owner’s Policy with Florida modifications and Covered Risks 1-14 in the 2006 ALTA Loan Policy with Florida modifications.

³⁹ See Black’s Law Dictionary, 11th ed., 2019.

⁴⁰ Before issuing a title insurance commitment or policy, a title search must be performed and evaluated to determine insurability. See Fla. Stat. 627.7845.

in litigation where a third party asserts a claim covered under the policy adverse to the Insured.⁴¹ It should also be noted that only the Insured, as defined the Policy, can make a claim.⁴²

Prompt Issuance of the Title Policy

Although there is no longer a statute or regulation requiring that the title policy be issued within a certain time period after closing, the Title Agent is expected to issue the policy promptly after the insured deed and/or mortgage is recorded and the commitment requirements have been satisfied. You should be reminded that Florida law and your Agency Agreement requires that the Agent report and remit premiums on a monthly basis.⁴³

⁴¹ The Insured must make this request in writing. See Condition 5, Defense and Prosecution of Actions in the 2006 ALTA Owner's Policy with Florida modifications and Covered Risks 1-14 in the 2006 ALTA Loan Policy with Florida modifications.

⁴² Insured is a defined term in the Owner's Policy which also includes successors to the Title of the Insured by operation of law, as distinguished from purchase, including heirs, devisees, survivors, personal representatives, next of kin; successors to the Insured by dissolution, merger, consolidation, distribution, or reorganization; successors to the Insured by conversion; and others. Paragraph 1(d), Owner's Policy Conditions. The definition of Insured in the Loan Policy includes the owner of the Indebtedness and each successor in ownership; successors to the Insured by dissolution, merger, consolidation, distribution or reorganization; successors to the Insured by conversion, and others. Paragraph 1(e), Loan Policy Conditions.

⁴³ §69O-186.003(9), Fla. Admin. Code.



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