



### **There's a New Kid in Town! Well, sort of...**

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In the past, if there was a defect in a chain of title then the determination of whether to insure without exception for that defect, or to "insure over" the defect, was made using somewhat of a one size fits all type of approach. The title company completed its risk analysis and if the risk of loss for that matter was deemed palatable, then the policy was issued without an exception. Another approach would be for the policy to include an exception for the defect but be followed with affirmative language providing coverage for a specific loss related to the risk (e.g. against the enforced removal of an encroachment). There were no real options for a middle ground approach.

There is still a time and place for "insuring over" certain defects without a policy exception and providing affirmative coverage over specific loss from the risk. However, there's a new(er) kid in town who is a big fan of providing coverage that satisfies the insureds, certifying attorneys, and the title companies-the American Land Title Association (ALTA) 34 endorsement.

By way of introduction, this endorsement is formally known as the ALTA Endorsement 34-06 (Identified Risk Coverage), but you can just call him ALTA 34. The ALTA 34 may be appropriate "when there is a defect, lien, or encumbrance on the title which is unenforceable, but which is unreleased in the Public Records...; or there is a monetary lien for which you have satisfactory indemnification or security but which remains technically unreleased in the Public Records." *First American Endorsement Guide, 2017*. Some examples include, but are not limited to, an uncancelled deed of trust, a lien which has been bonded off but remains of record, or an agreement with obligations affecting the property. The ALTA 34 "provides a modified form of 'Unmarketable Title' coverage against loss or damage resulting from the release of a prospective purchaser, tenant, or lender from its obligation to buy, lease, or lend as a result of the Identified Risk due to the violation of a contractual condition to deliver marketable title, but only if neither the Company nor any other title insurer will insure over the Identified Risk on the same conditions as set forth in the endorsement." *First American Endorsement Guide, 2017*.

This all sounds well and good, but what does this mean for you as the closing attorney and your clients? How does it really work? The ALTA 34 provides a term of art for the defect by calling it an "Identified Risk" and defines this term as a "title defect, restriction, encumbrance or other matter." So, it is a very broad definition with great flexibility. Once the Identified Risk is determined and the risk assessment is completed by the title company, then the ALTA 34 may be issued in scenarios where the title company is comfortable insuring for loss resulting from the Identified Risk, but only with a modification of the policy terms on unmarketability.

For example, let's say that there is an uncancelled deed of trust that remains of record with 8 years remaining in the statutory expiration period and for which evidence of payment has been submitted. The attorney submits her title opinion and requests affirmative coverage over this title defect. The

uncancelled deed of trust becomes the Identified Risk. The title company completes its risk review and determines it is comfortable insuring a new buyer and lender against loss resulting from the Identified Risk. However, because the deed of trust is still shown on public record, the title company feels more comfortable providing coverage via an ALTA 34 instead of insuring without exception.

The owner and lender policies will include an exception for the uncancelled deed of trust and then provide coverage via the ALTA 34. The ALTA 34 will reference the Schedule B exception number containing the Identified Risk. The endorsement then goes on to provide that “The Company insures against loss or damage sustained by the Insured by reason of: **a.** A final order or decree enforcing the Identified Risk in favor of an adverse party; or **b.** the release of a prospective purchaser or lessee of the Title or lender on the Title from the obligation to purchase, lease, or lend as a result of the Identified Risk, but only if *i.* there is a contractual condition requiring the delivery of marketable title, and *ii.* Neither the Company nor any other title insurance company is willing to insure over the Identified Risk with the same conditions as in this endorsement.” (Emphasis added)

In a nutshell, the ALTA 34 provides coverage for the Identified Risk if a final order is issued enforcing the Risks, or if one of the named prospective parties is released from an obligation to “purchase, lease or lend” because of the Identified Risk in regard to “delivery of marketable title” and the refusal of a title insurer to continue insuring in the same manner (the unmarketability modification previously referenced).

The ALTA 34 also provides coverage for defense costs related to the Identified Risk, but it *does not* require the insurer to take action to clear the title of, or remove, the Identified Risk. However, the endorsement goes on to state that if “the Company does establish the Title free of the Identified Risk or removes it, Section 9(a) of the Conditions applies” (which is a return to the standard policy provisions on marketability).

Additionally, the ALTA 34 is available for owner and loan policies; improved and unimproved property; and commercial or residential transactions. *First American Endorsement Guide, 2017*. And while the packaging may look a little different, there is still a lot of familiar coverage packed inside the ALTA 34. If you have specific questions or would just like to learn more about this new(er) kid on the block, we are happy to make the introduction for you. Please reach out to your local Attorneys Title counsel because we’re here to help!

## ENDORSEMENT

Attached to Policy No.

Issued by

### FIRST AMERICAN TITLE INSURANCE COMPANY

1. As used in this endorsement "Identified Risk" means: described in Exception(s) of Schedule B.
2. The Company insures against loss or damage sustained by the Insured by reason of:
  - a. A final order or decree enforcing the Identified Risk in favor of an adverse party; or
  - b. The release of a prospective purchaser or lessee of the Title or lender on the Title from the obligation to purchase, lease, or lend as a result of the Identified Risk, but only if
    - i. there is a contractual condition requiring the delivery of marketable title, and
    - ii. neither the Company nor any other title insurance company is willing to insure over the Identified Risk with the same conditions as in this endorsement.
3. The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of the Title by reason of the Identified Risk insured against by Paragraph 2 of this endorsement, but only to the extent provided in the Conditions.
4. This endorsement does not obligate the Company to establish the Title free of the Identified Risk or to remove the Identified Risk, but if the Company does establish the Title free of the Identified Risk or removes it, Section 9(a) of the Conditions applies.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

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