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POTENTIAL DANGERS TO REALTORS® IN A TITLE COMMITMENT

A. PREFACE.

This article will discuss the "hidden title defects" that can be found in a title insurance commitment. These hidden title defects pose a serious danger to you, as the selling Realtor®, because a buyer harmed by these defects can seek to sue you and your broker to recover the buyer's losses from the defect.

A "title defect" is a lien, encumbrance, restriction, reservation, or encroachment on land, or a deficiency or imperfection in the land's chain of title that makes the land unmarketable, unsaleable, or unable to be mortgaged. A true title defect is often unknown to the owner, and it can be difficult or time consuming to remove from the title. (Liens and encumbrances that are customarily removed in the course of a closing by payment of monies – such as the seller's mortgage or a known judgment that will be paid off and satisfied at closing – are not true title defects.)

There are ***two ways to protect yourself*** from the lawsuits that can result from true, hidden title defects. The ***first protection is the best*** and the simplest – ***advise and, if possible, convince the buyer to have an attorney review the title insurance commitment*** to ensure that the buyer will receive, and have insurance for, good and marketable title to the property that the buyer is purchasing, free and clear of all "hidden title defects."

We know, however, that many buyers will not want to pay for an attorney, and sometimes there is not enough time for an attorney to review the title commitment prior to closing. We are also aware that you may be reluctant to involve an attorney out of a concern that the attorney may simply scare buyers by exaggerating the impact of matters in the title commitment that, in a practical sense, are solvable or are not that serious, and are therefore not truly title defects.

If you or your buyer do not want to involve an attorney, this article describes your ***second best protection*** – a way to review and analyze a title commitment to find, if present, the most obvious "hidden title defects." ***Bear in mind, however, this article cannot and will not give you a foolproof method to identify all title matters in a commitment that are detrimental to a buyer***, since (1) time constraints will probably prevent you from reviewing the documents that are referenced in the commitment, (2) you will not have access to some of those documents, (3) you have not been trained to be a title examiner or attorney, and (4) you are not being paid to fully review and analyze the matters set forth in the commitment. You should therefore *always* advise your buyer not to rely on *your* review or to look to *you* for assurances on the status of the property's

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title. ***Again, the best way to protect yourself—and your buyer—is to advise and, if possible, convince your buyer to have an attorney review the commitment.***

B. WHY YOU AS A SELLING AGENT SHOULD REVIEW THE TITLE COMMITMENT.

1. HIDDEN TITLE DEFECTS CAN LURK IN THE COMMITMENT.

At Barnes Walker, as a closing and title agent for both seller and buyer and as attorneys, we have an ethical obligation to be truthful and honest with both sellers and buyers, whether they are clients or non-clients. If we discover any title defects that will be listed as exceptions to coverage in the title commitment, we always bring these defects to the attention of sellers and buyers before closing.

Unfortunately, we have found that not all title companies and closing agents (called "closing title agents" in this article) bring title defects to the attention of sellers or, more importantly, of buyers. They simply deliver the title insurance commitment to the buyer, often not until closing, with the defect listed as an exception to coverage and close the deal without discussing the defect, *unless* the buyer (1) looks at the commitment *and* (2) knows to object. A closing title agent's failure to call attention to a defect may be due to the agent's apathy or the agent's knowledge that making such a disclosure could create more work or expense for the agent, delay the closing, or even cancel the closing and therefore cause the agent not to be paid at all. Whatever the reason, if the buyer does not object, the buyer unknowingly receives title to the property *with* the title defect and *without* title insurance coverage for the defect, since it was listed as an exception to coverage.

2. THERE IS A DIFFERENCE BETWEEN A HIDDEN TITLE DEFECT AND AN UNDISCLOSED DEFECT.

A "hidden title defect," as that term is used in this article, occurs when: (1) the defect is actually listed as an exception to title insurance coverage in the title insurance commitment, (2) the commitment does not contain a requirement to remedy it at or before closing (typically because it is too complex or costly or even impossible to correct, at least before closing), *and* (3) the closing title agent does not call the buyer's attention to it.

In contrast, an "undisclosed title defect" is one that is <u>not</u> listed as an exception to coverage in the commitment, whether by accidental omission or because the closing title agent missed the defect in the course of conducting the title search or reviewing it. A buyer is protected from having to pay for remedying an *undisclosed* title defect. This is because, unlike a *hidden* title defect, it was not listed as an exception to coverage in the commitment, so it *is* covered by the final title insurance policy. (In the title insurance industry, by the way, a commitment is a legally binding preliminary promise by the title insurance company to issue a final title insurance policy insuring the property being sold and purchased, provided that the closing and other requirements listed in the commitment are performed.)

3. HIDDEN DEFECTS CAN COME TO LIGHT IN UNPLEASANT WAYS.

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As you know, most buyers have neither the knowledge of what constitutes a title defect nor an inclination to read what they are handed at closing. Therefore, unless a buyer is represented by the buyer's own attorney, the buyer is usually unaware of a hidden title defect and does not object. In such a case, the buyer, as the new owner of the property, typically does not become aware of the title defect until some time after closing, when that awareness can come in a number of different and unpleasant ways. For example:

a. The buyer decides to refinance or sell the property, and the new closing title agent discovers the title defect by reviewing the buyer's title policy in the course of its own title search and review. The new closing title agent will then have to insert the title defect into the new title commitment. Even if the new closing title agent does not disclose the problem as it should, the new buyer's attorney or the attorney for the new buyer's mortgage lender will probably discover the problem and require the original buyer to fix it.

b. A lienholder may send a demand letter or file a lawsuit against the buyer to foreclose on the property. The lienholder could be a mortgage lender owed money by the seller, the holder of a judgment against the seller or a prior owner, the county tax collector or the IRS, or the local code enforcement board for building or zoning code violations.

c. If a building or zoning code inspector visits the property because the buyer applies for a permit to renovate the property's improvements, or if the inspector randomly drives by the property or reviews an aerial of the property, the inspector may discover an encroachment of the property's improvements or the neighboring property's improvements over a boundary, utility easement, or setback line. As a result, the buyer receives a code violation notice.

d. If the buyer's property does not adjoin a public right-of-way or have an ingress/egress easement to provide access between the property and the nearest public right-of-way, an uncooperative neighbor can decide to put a fence across the buyer's access way.

e. A mining or drilling company notifies the buyer that the company has decided to drill for oil or gas or mine for minerals on the buyer's property. Not only must the buyer vacate the property, but the buyer must also tear down all the improvements on the property, including the buyer's home.

4. SOME ACTUAL EXAMPLES & EFFECTS OF HIDDEN TITLE DEFECTS.

In the fourteen years of Barnes Walker's experience reviewing clients' title insurance policies, *we have, in fact, found* clients who took title to their properties subject to the following title defects that were *actually referenced in their policies*:

a. A reference to the prior owner's mortgage loan with no title insurance coverage for removing or paying off the mortgage. As you are aware, the amount necessary to pay off a mortgage loan can be quite high.

b. A reference to an encroachment of the property's improvements or the neighboring property's improvements over a boundary, utility easement, or setback line with no title insurance coverage to pay for the cost of: (i) moving the encroachment away from the property's boundary, easement, or setback line; (ii) forcing a neighbor to move his or her

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encroachment; or (iii) obtaining a variance from the government for the encroachment. Moving an encroachment can range from the relatively cheap movement of a fence to the extremely expensive movement of an entire house.

c. A reference to "Public rights-of-way across the insured property, if any," with no title insurance coverage for vacating or removing the rights-of-way. Determining if these rights-of-way exist and where they are located can be very difficult, since many rights-of-way are referenced only in old, undetailed county subdivision plats or old, unrecorded city, county, or state road maps, and not all legal rights-of-way are improved with any type of dirt, shell, or asphalt roadway. Further, legal rights-of-way that do have physical roads on them have often been widened over the years, and their widenings are reflected, if at all, only on those old, unrecorded road maps. None of the difficulties in locating or delineating these rights-of-way, however, eliminates the government's ownership of them, and if a legal right-of-way runs through, say, the middle of the property and the house on it, that is a big title issue.

d. A reference to no access for the insured property with no title insurance coverage to obtain or pay for such access. This means that the property neither adjoins a public road nor has an easement to a public road. (An easement is one party's recorded, legal right to use another party's land for a specific use such as access.) Further, this means that the adjoining owners can prevent the buyer from traveling to and from the buyer's property or running utility lines to the property, unless the buyer goes to court. Florida law entitles landlocked property owners to an easement, but the buyer may have to pay a neighboring owner for it, will not be able to dictate its route, and will unfortunately have to pay attorney's fees to get it.

e. A reference to "Oil, gas, and mineral rights and reservations [collectively referred to in this article as 'mineral rights'] over the insured property, *if any*," with no title insurance coverage for buying back these rights or reservations. This title issue has many problematical aspects to it:

i. If in fact these rights do exist, a third party, such as a mining or drilling company, owns all or a part of the property's mineral rights – i.e., the rights to the profits from any drilling or mining of minerals. Worse, if the company also has a "*right of entry*," then the company has a right to enter the property to explore and extract the oil, gas, phosphate, or other minerals. The buyer cannot object, *and* the company can typically force the buyer to remove any home or other improvements that are located where the company wishes to explore, drill, or mine.

ii. Even if a mineral rights owner does not have the right of entry, if the buyer mines or drills or allows someone else to do so, the mineral rights owner is entitled to that buyer's share of the profits derived from the mining or drilling.

iii. If the buyer wants, and is contractually entitled to, ownership of any mineral rights, then the closing title agent must conduct a title search *all the way back to 1845*, the year Florida became a state, to determine if these mineral rights even exist and, if so, who owns them. This is an extremely difficult and time-consuming type of search. If the mineral rights do exist and are owned by a party other than the landowner, a deed from the mineral rights owner must be obtained.

iv. If the buyer does not care about owning the mineral rights (e.g., because the parcel is too small to mine effectively, is within a residential subdivision, or is not

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otherwise zoned for mining), a determination must still be made as to whether the mineral rights owner has the *right of entry* with all the potential, attendant harm to the buyer referenced above. Sometimes that right of entry is statutorily terminated if not used or if the parcel is too small. Otherwise, the mineral rights owner must be paid for a termination of this right. Once the right of entry is terminated, the buyer has control because the buyer must agree before a mineral rights owner may explore, mine, or drill on the property.

Regardless of the buyer's situation, the ownership, value, and potential detriment from the mining of mineral rights should never be underestimated.

5. THERE ARE CONSEQUENCES TO YOU AS A SELLING AGENT WHEN A HIDDEN TITLE DEFECT COMES TO LIGHT.

Once the hidden title defect creates a problem for the buyer (now the owner), the buyer is very likely to blame you as a Realtor® and your broker for not discovering the problem and for allowing the buyer to purchase the property. Once the title insurance company advises the buyer that there is no insurance coverage – because the defect was listed as an exception to coverage in the title commitment – that blame typically turns into a lawsuit against you, your broker, the seller, and the closing title agent.

In responding to the lawsuit, the seller will often argue that the seller has no liability because: (a) the seller was not aware of the issue (whether true or untrue), (b) the seller does not understand the legalities of title commitments, and (c) since the buyer closed, the buyer waived the buyer's right to object and accepted the property with the title defect.

The closing title agent will argue, in addition to waiver and acceptance, that the title defect was disclosed in writing in the title insurance commitment, and the closing title agent was not, after all, the buyer's attorney and therefore had no obligation to draw further attention to the defect. Also, because of something in Florida law called "the doctrine of merger," the closing title agent can argue that, despite the facts that: (a) the defect was not disclosed in the contract, and (b) the buyer did not agree to accept the property subject to the defect in the contract, the contract was in effect merged into and *replaced* by the closing documents. The closing documents, of course, included the title insurance commitment that made reference to the defect to which the buyer did not object at closing.

If these arguments are successful, they leave only two parties who did have responsibilities to the buyer, and those two parties are you and your broker. What are your responsibilities that make you liable? After all, you are not an attorney or responsible for identifying legal issues or problems. As a Realtor®, however, you and your broker are deemed by the law to have a certain expertise regarding all aspects of the purchase and sale of real estate, including some legal issues and problems, particularly those that may commonly arise or would obviously have an adverse monetary impact on the buyer or on property's value. As you know, part of the state's licensing test for Realtors® concerns legal issues. As a licensed professional, you are expected to use this expertise diligently on behalf of sellers and buyers. Therefore, you run a substantial risk of being liable to your buyer for failing to advise the buyer to have an attorney review the title commitment, and, if no attorney was used, for failing to point out any "hidden title defects" that were disclosed in the title commitment and that you could have recognized as such by reviewing the commitment.

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C. How to Review a Title Commitment.

A title insurance commitment has four parts: (1) Schedule A, which lists the parties to the real estate transaction, the amount of the insurance coverage, and the legal description of the property that is the subject of the transaction; (2) Schedule B-I, which lists the requirements that must be satisfied before the issuance of the final title insurance policy; (3) Schedule B-II, which lists the exceptions to title insurance coverage; and (4) the front cover page and inside back cover page, which you do not need to review since the language on these pages is standardized for all title insurance commitments under Florida Department of Insurance regulations. For your convenience and as an example, a sample title insurance commitment is attached to this article for you to refer to as you read the following sections on how to review a title commitment.

1. Reviewing Schedule A.

For your purposes as a selling Realtor®, you really need to review only the names of the buyer(s) in Paragraph 1 in the space for the proposed insured owners. The closing title agent typically takes the buyer's name(s) from the real estate contract. If, after execution of the contract by one spouse, both spouses desire to become buyers and owners, the closer may not be aware of this desire, so you should advise the closer to change the name of the proposed insured to include the names of both spouses. Similarly, if the buyer decides to form a corporation, a limited liability company ("LLC"), or a trust to hold the property, the name of the new entity should be substituted in this section of Schedule A in place of the original buyer's name. Not only is it important to ensure that the proper parties are insured, but the names of the parties to the commitment will also be used in all of the subsequent closing documents, so it is important to make certain the change is made to have correct closing documents.

Please also advise the closing title agent if you see other obvious errors to Schedule A, such as the buyer's insurance amount being different from the sales price or a lot, unit, block, subdivision, or condominium name being incorrect in the legal description.

2. Reviewing Schedule B-I.

Schedule B-I is a list of the legal requirements necessary to: (1) pass good, marketable title to the property from the seller to the buyer, such as preparing, filing, and recording deeds, easements, lease assignments, co-op documents, mobile home titles, and powers of attorney; (2) create a valid mortgage lien for the buyer's lender by preparing, filing, and/or recording mortgages, assignments of leases, UCC financing statements, limitations on future mortgage advances, and notices of commencement; (3) pay off and satisfy all mortgages, judgments, tax liens, and other liens against the seller attaching to the property; (4) pay off and satisfy all judgments, tax liens, and other liens against the buyer (this is necessary because the buyer's lender will require that its mortgage have first priority for repayment); (5) obtain all necessary approvals and consents from condominium and homeowner associations; (6) obtain all necessary documentation and authorizations for the transaction from corporations, LLCs, partnerships, estates, guardianships, and trusts if these entities are parties to the transaction; and (7) obtain documents or take actions to remedy any title defects, as applicable.

All of the preceding legal requirements are the responsibility of the closing title agent. As long as the buyer attends closing, signs all the documents required at closing, and pays all monies

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due at closing pursuant to the contract (assuming, of course, that the seller performs all of the seller's duties at closing, and that the buyer's lender provides all loan monies and documents at closing), the buyer is entitled to a final title insurance policy. This is true even if the closing title agent fails to perform, meet, or satisfy all of the requirements. Therefore, there is very little for a selling Realtor® to review or worry about on Schedule B-I.

One exception – if the property is part of a homeowners' or condominium association, you may wish to ensure: (1) that there is a reference to approval of the buyer by the association (if the association has the authority to disapprove a buyer or a right of first refusal to purchase from the seller), and (2) that the buyer actually gets approved by closing. It is true that the closing title agent bears responsibility for ensuring that the buyer has the required approval, if any, and the buyer will have title insurance coverage if the closing title agent fails to do so. However, since a title insurance company normally solves problems by paying for them and this issue cannot be solved by making a payment to the association, it is prudent for you as the Realtor® to ensure that the buyer does receive approval.

3. REVIEWING SCHEDULE B-II.

Schedule B-II is, by far, the most important of the three schedules that you, as a selling Realtor®, should review. It contains the list of matters and issues that are *exceptions* to the buyer's title insurance coverage. If a title issue is excepted from coverage, the buyer will not be reimbursed if the issue becomes a problem or costs the buyer money.

Some words of caution: First, please bear in mind as you review a commitment's Schedule B-II that most commitments' schedules do contain numerous exceptions, which are common, normal, and not harmful to the buyer. In fact, both of the most common residential real estate contracts—the one created by the Florida Association of Realtors® ("FAR"), and the one created by a joint committee of the Florida Association of Realtors® and The Florida Bar ("FAR/BAR")—require the buyer to take title to the property subject to the following exceptions to title insurance coverage:

- Comprehensive land use plans, zoning, restrictions, prohibitions and other requirements imposed by governmental authority;
- Restrictions and matters appearing on the plat or otherwise common to the subdivision;
- Outstanding oil, gas, and mineral rights of record without right of entry;[1]
- Unplatted public utility easements of record (not more than 10 feet in width along the rear or front lot lines and not more than 7½ feet in width along the side lot lines);[2]
- Taxes for the year of closing and subsequent years; and
- Assumed mortgages and purchase money mortgages, if any.

[1] Remember, as discussed on Page 4, above, if your buyer plans to conduct mining operations on the property, this mineral rights exception can cause problems even if the right of entry *is* barred. If your buyer does not want to take the property subject to *any* mineral rights, regardless of the right of entry, you should line through this provision in the contract. The FAR Vacant Land Contract also requires buyers to take title subject to mineral rights where right of entry has been barred, unless the provision is lined through. Only the FAR Commercial Contract, as drafted, allows a buyer to treat mineral rights as a title defect regardless of right of entry, though the buyer must still comply with the Contract's requirements on giving the seller notice of the title defect and an opportunity to cure it.

[2] This reference to public utility easements is included in the FAR/BAR contract, but not in the FAR contract.

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Next, please be aware that this article can provide only an abridged, summary, and limited overview of the exceptions in a Schedule B-II. Thus, you will typically be able to find only the most *obvious* title defects. You will not be able to identify those defects that require training as a title examiner or attorney or the review of the documents referenced in the exception. On the other hand, the good news is that a judge should not hold you responsible for finding such *non-obvious* defects. And, again, the purpose of this article is to help *you*, as a Realtor®, to avoid liability for hidden defects, and *not* to make you your buyers' personal title expert.

The best way to explain how you, as a selling Realtor®, should perform a summary review of the exceptions in a commitment's Schedule B-II is to examine and analyze the Schedule B-II of the attached sample title insurance commitment. A lot of these exceptions are normal *types* of exceptions, based upon the way they are described in the Schedule. Please note, however, that one of the limitations of this sort of summary overview is that an actual review of the *specific document(s)* referenced in an exception could reveal unusual provisions that are detrimental to the buyer, despite the *general type* of exception being normal.

Following now is a review of the exceptions of Schedule B-II of the attached commitment. The comments for each exception are numbered to correspond with the number of that exception:

1. "Gap" Exception. Exception 1 states that the policy will not cover matters that appear in the Public Records in the "gap" period between the date of the commitment and the day of closing. Since the seller always signs an affidavit at closing (the "closing affidavit") stating that none of these matters has occurred, this exception will be deleted from the final title insurance policy, so you should not have to worry about it.

2. Standard Exceptions. Exception 2 refers to the "standard exceptions" set out in the title commitment's jacket:

a. "taxes for the year of the effective date of this Commitment and taxes or special assessments which are not shown as existing liens by the public records";

b. "rights or claims of parties in possession not shown by the public records";

c. "encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises";

d. "easements, or claims of easements, not shown by the public records"; and

e. "any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records."

When the seller signs a closing affidavit, the closing title agent is able to delete the standard exceptions labeled "b" & "e," above. If the buyer obtains a survey (which is a lender requirement if the buyer is borrowing money to purchase the property), or if the seller provides an old survey along with an affidavit that nothing has changed on the property since the time of that survey, the closing title agent can delete the standard exceptions labeled "c" & "d," above, from the final title insurance policy.

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Regarding standard exception "a," real estate taxes that are not liens are okay. Taxes for the current year are not a lien if the closing occurs in January – October. In November and December, current year taxes are a lien, as are any unpaid taxes for prior years. These tax liens and all special assessments are "hidden title defects," *unless* there is a requirement in Schedule B-I to pay them, in which case they will not be an exception in the final title policy. Thus, real estate taxes and special assessments are the only matters that a Realtor® should be concerned about within Exception 2.

3. Sovereignty Lands Exception. This exception applies only if the insured property adjoins or contains a natural body of water or if the insured property used to be part of a natural body of water. If the exception does not apply, having it in the commitment and the final policy will not hurt anything. If the exception does apply, it cannot be deleted or changed except by obtaining a deed from the State of Florida, which very rarely happens anymore. Therefore, you as a Realtor® typically do not need to worry about this exception.

4. Property Tax Exception. This is a repetition of Exception 2.a, above, and the same analysis applies. The buyer will be responsible for paying these taxes when they become due. The closing title agent should, however, collect from the seller at closing the seller's prorated share of the taxes for the portion of the tax year that the seller owned the property.

5. Personal Property Exception. No title insurance policy insures personal property, so this exception is fine.

6. Plat Exception. This exception will show up in all title insurance commitments for properties located in subdivisions and condominiums. It is normal and required, and you need not be concerned with it.

7. Declaration Exception. An exception for the Declaration of Condominium appears in all title insurance commitments for condominium units. The Declaration creates the condominium development and sets forth many of the restrictions and rules of the condominium and the powers and procedures of its association. Typically, this exception lists all amendments, addendums, revisions, and restatements of the Declaration.

The counterpart in subdivisions is an exception for the Declaration of Protective Covenants, which establishes the restrictions and rules of the subdivision and the powers and procedures of its homeowners' association.

In both condominiums and subdivisions, this exception is normal and required, and you need not be concerned with it. Your buyer should, however, review any Declarations of Condominium or Protective Covenants, as these documents will contain important information about the rules and regulations of the community, and about the buyer's rights within it.

If the property is in neither a subdivision nor a condominium, there is no comparable exception.

8.-11. Easement Exceptions. Easements on properties are fairly common. (Remember, an easement is generally a right, recorded in the land records, of one party to use, for a specific use or uses, a portion of the land of another party.) As noted above, the typical real estate contract requires the buyer to accept platted easements. The easements referenced in Exceptions 8-11 in our sample

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are all *un*platted utility easements, which are also typically not treated as title defects, as long as they are located along the property's boundaries.

In the perfect world, the title insurance commitment is issued before the survey is conducted. This allows the surveyor to depict the easements and their location on the survey, so you should strive to ensure that your buyer's commitment is delivered to the surveyor in time. Having the easements depicted on the survey allows you and the buyer to see if the easements are located harmlessly along the property's boundaries, or if they lie along the interior where they would interfere with the property's use and constitute a title defect. Generally, most easements are appropriately located and are not title defects.

12. Sewer & Septic Exceptions. The agreement to remain connected to the Manatee County sewer system referenced in our sample exception is not a title defect. Similarly, an Agreement for a Temporary Septic Tank Permit is not a title defect. In this latter document, an owner of a property (typically rural) agrees to connect to the county sewer system and abandon the owner's septic tank when the county installs a sewer main along the public right-of-way adjoining the owner's property.

13. Mineral Rights Exception. As discussed above, for most buyers, mineral rights that are completely or partly owned by a third party are not title defects *as long as the right of entry is barred*. But, if you see this exception, verify with your buyers that they do not want or expect to own the mineral rights themselves. This is especially true on larger, more rural properties.

14.-19. Water Exceptions. These exceptions, along with Exception 3, above, deal with water rights. The law of Florida and the United States regarding water bodies adjoining land is that the waters and bottoms of the Atlantic Ocean, the Gulf of Mexico, the bays, the rivers, the lakes, and the creeks and streams, as those waters and bottoms existed in 1845 (the year Florida became a state), are: (a) owned by the State of Florida, (b) subject to the right of the public to travel over and enjoy them (unless restricted by state law), and (c) also subject to the rights of the United States to control, and ensure the continuation of, the waters' navigability.

The boundary of those waters and bottoms, or submerged lands, is the mean (average) high water mark of water bodies with tides (i.e., the Atlantic, Gulf, bays, and intracoastal waterways) and the ordinary high water mark for non-tidally influenced water bodies (i.e., rivers, lakes, streams, and creeks). In addition, the law of Florida allows the public the right to use the beaches and banks along these waters, *provided* that the public has legal access to them from public rights-of-way or other public lands.

So, these "water exceptions," along with Exception 3, above, are simply removing from the buyer's title insurance coverage the ownership rights of the State of Florida, the navigability rights of the United States, and/or the rights of the public. It is almost impossible for a private citizen to obtain ownership of water and submerged lands, since the Trustees of the Internal Improvement Trust Fund of the State of Florida must deed the lands to the citizen (the Trustees are the Governor of Florida and the members of the Florida Cabinet), and the U.S. Army Corps of Engineers must release the navigability rights of the United States. In almost all cases, these "water exceptions" are appropriate and not title defects.

Note: Even though a condominium unit, like many of those in the Mount Vernon condominium development (used in our sample), does not adjoin a water body, these water

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exceptions must still be inserted if the overall condominium development adjoins a water body. The reason for this is that when a person buys a condominium unit (e.g., one unit in a 100-unit condominium development), the person also buys an undivided proportionate share in the common elements of the condominium development (in our example, 1/100th of the common elements). If the common elements of a condominium development border on a water body, and, by definition, an undivided share of the common elements is owned by each unit owner, the water exceptions have to be inserted in a condominium unit buyer's title insurance commitment.

20. Cable Television Service Agreement Exception. These Agreements, like the one referenced in our exception, are often seen in condominium title insurance commitments and are not title defects, since they simply document the right of the cable company to provide cable television services and the obligation of the condominium association to pay for those services.

21. Dedication Exception. A dedication of streets to a city, a county, or the state, like the one referenced in this exception, is actually a conveyance of ownership of the land underlying the streets to the governmental body, and therefore any portion of the property that has been conveyed cannot be insured. This dedication is not a title defect unless the conveyance made the rest of the property too small to occupy, in which case the governmental body is legally obligated to purchase the entire property. In such a case, the property would not be the subject of a sale between private parties.

22. Architectural Review Exception. Condominium developments and newer subdivisions typically have detailed restrictions on the construction of buildings and other improvements and their exterior appearance. Any new construction or changes to existing improvements must be approved in advance by an architectural review committee or like body. These restrictions and approval procedures typically appear in the Declaration of Condominium for condominium developments or the Declaration of Protective Covenants for new subdivisions. Courts have typically found these requirements to be valid restrictions on property, and thus they are not title defects. Again, however, your buyer should be aware of them and of the impact they will have on any construction or alteration plans the buyer may have for the property.

23.-24. Lien Exceptions. The seller's mortgage lien and judgment lien *are both title defects unless Schedule B-I calls for their payment and satisfaction*. In this case, you will see that our sample Schedule B-I does have a requirement regarding satisfaction of the mortgage, so this is not a title defect.

However, Schedule B-I does *not* have a requirement regarding satisfaction of the judgment (Exception 24). If the buyer takes no action, the judgment *will be* a title defect in the buyer's title. Further, because the judgment is listed as an exception to coverage in Schedule B-II, it constitutes a *hidden* title defect, and the buyer will not have title insurance to cover it. To avoid this, the buyer must speak up and insist that the closing title agent add a requirement to Schedule B-I stating that the judgment must be paid off and satisfied at closing.

D. WHAT TO DO AFTER YOU REVIEW.

After reviewing a title commitment, if you have any questions or concerns about its contents, first, do not jump to conclusions. Seek the advice of a knowledgeable real estate attorney who has experience dealing with title issues and defects and with solving the problems that result from them. An attorney with skill and experience in these matters will firmly insist that the title

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defect be solved or corrected no later than closing. The attorney can also offer practical solutions, where available, but should not exaggerate its seriousness or the risks, cost, time, or difficulties involved in correcting the problem. If the matter is a title defect, then you should insist that your buyer retain an attorney. There are many different aspects to the problems title defects cause, and some corrective actions are more like temporary legal patches than permanent legal solutions.

Also, beware of some title insurance companies who offer to "insure over" the problem. If the problem truly is a title defect, "insuring over" is illegal. Plus, it puts you in the position of recommending to the buyer that the buyer purchase a property with a known problem simply because there is allegedly insurance to cover it. That is the same as encouraging a buyer to purchase a car that is known to be a "lemon" simply because it is still under warranty. Our experience with insurance companies and car dealers alike is that often you must struggle to force them to remedy the problem. This is stressful, time-consuming, frustrating, and costly, and buyers often find that they must retain an attorney to force compliance with the terms of both title insurance policies and car warranties.

Once an attorney is involved, he or she will invoke the seller's duty and obligation under both the FAR contract (Paragraph 10(b)) and the FAR/BAR contract (Standard A) to use good faith efforts and diligence to solve or remedy the title defect at the seller's expense. The attorney can also press a reluctant seller to comply with these obligations. Paragraph 10(b) of the FAR contract automatically extends the closing date by up to 40 days from the day that the seller receives notice of the problem, and Standard A of the FAR/BAR contract automatically extends the closing date by up to 160 days from the day that the seller receives notice. The FAR and FAR/BAR contracts respectively require the seller to devote either 30 days or 150 days to remedying the defect. The parties can also agree to extend the curative period and closing date for an even longer time. So, the discovery of a title defect does not necessarily mean the transaction will not close or that you will lose your commission.

In the worst case scenario, if the title defect cannot be solved within the applicable time periods, buyers have the choice of taking the property with the title defect or canceling the contract and getting their deposit(s) back. In this latter case, of course, you would receive no commission, but we would argue that no commission is far less expensive to you than the cost of the buyers closing and taking ownership of the property subject to a hidden title defect *that will be excepted from the title insurance coverage*. When the buyers later discover that the hidden title defect prevents them from improving, selling, or refinancing the property – and that they will incur substantial costs, expenses, and delays to correct the defect – all of these problems will make you and your broker two of the defendants in the lawsuit that the buyer will invariably file.

We hope that this article will help you avoid these dangers. If you have any questions about "hidden title defects" or reviewing title commitments in general, please do not hesitate to call any of Barnes Walker's attorneys at 741-8224.

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COMMITMENT

Attorneys' Title Insurance Fund, Inc.

ORLANDO, FLORIDA

Commitment To Insure Title

ATTORNEYS' TITLE INSURANCE FUND, INC., a Florida corporation, herein called THE FUND, for a valuable consideration, hereby commits to issue its policy or policies of title insurance, as identified in Schedule A, in favor of the proposed Insured named in Schedule A, as owner or mortgagee of the estate or interest covered hereby in the land described or referred to in Schedule A; subject to the provisions of Schedules A and B and to the Conditions and Stipulations hereof.

This Commitment shall be effective only when the identity of the proposed Insured and the amount of the policy or policies committed for have been inserted in Schedule A hereof by THE FUND, either at the time of issuance of this Commitment or by subsequent endorsement.

This Commitment is preliminary to the issuance of such policy or policies of title insurance and all liability and obligations hereunder shall cease and terminate six months after the effective date hereof or when the policy or policies committed for shall issue, whichever first occurs, provided that the failure to issue such policy or policies is not the fault of THE FUND.

In Witness Whereof, ATTORNEYS' TITLE INSURANCE FUND, INC. has caused this Commitment to be signed and sealed as of the effective date of Commitment shown in Schedule A, the Commitment to become valid when countersigned by an authorized signatory.

Attorneys' Title Insurance Fund, Inc.
By

Charles J. Kovaleski
President

SERIAL

FUND FORM C (rev. 1/96)
File Number: 51951.000.09.01

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Attorneys' Title Insurance Fund, Inc.

COMMITMENT FORM

Schedule A

Commitment No.:	Effective Date: @	Agent's File Reference: Practice-Refi

1. Policy or Policies to be issued: — Proposed Amount of Insurance:

   OWNER'S: ALTA Owner's Policy (10/17/92). (If other, specify.) — $3,000,000,000.00

   Proposed Insured: Bob Buyer and Betty Buyer

   MORTGAGEE: ALTA Loan Policy (10/17/92). (If other, specify.) — $2,400,000,000.00

   Proposed Insured: First Lender & Loan, its successors and/or assigns as their interests may appear

2. The estate or interest in the land described or referred to in this commitment is a fee simple (if other, specify same) and title thereto is at the effective date hereof vested in:

   Sam Seller and Sheila Seller

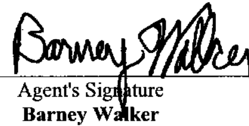
3. The land referred to in this commitment is described as follows:

   Unit 999 on Mt. Vernon Drive of MOUNT VERNON, a condominium under the Declaration of Condominium recorded in O.R. Book 768, Page 49, and amendments thereto; and as per plat thereof recorded in Condominium Book 6, Pages 55 through 57, and amended in Condominium Book 11, Pages 153 through 166, of the Public Records of Manatee County, Florida.

Issuing Agent:

BARNES WALKER TITLE, INC.
3119 Manatee Avenue West
Bradenton, FL 34205

Agent No.: **22465**



Agent's Signature
Barney Walker

Form C-SCH. A
(rev. 1/98)

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Attorneys' Title Insurance Fund, Inc.

COMMITMENT FORM

Schedule B-I

Commitment No.:

Agent's File Reference:
Practice-Refi

I. The following are the requirements to be complied with:

1. Payment of the full consideration to, or for the account of, the grantors or mortgagors.
2. Instruments creating the estate or interest to be insured which must be executed, delivered and filed for record:
   A. Warranty Deed from Sam Seller and Sheila Seller, husband and wife, to Bob Buyer and Betty Buyer, husband and wife.
   B. Mortgage from Bob Buyer and Betty Buyer, husband and wife, to First Lender & Loan, its successors and/or assigns, in the amount of $2,400,000,000.00.
   C. Pay off and satisfaction of that Mortgage referenced in Schedule B-II (23), in the original principal amount of $2 Bizillion.
3. Written consent of the Board of Directors of Mount Vernon Condominium Association, Inc., must be obtained and recorded with respect to the sale of the subject property to the proposed insured purchaser(s).
4. Condominium estoppel letter must be furnished showing that the maintenance assessments are current and that there are no unpaid special assessments.

Form C-SCH. B-I
(rev. 5/94)

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Attorneys' Title Insurance Fund, Inc.

COMMITMENT FORM

Schedule B-II

Commitment No.:

Agent's File Reference:
Practice-Refi

II. Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of The Underwriter:

1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed Insured acquires for value of record the estate or interest or mortgage thereon covered by this commitment.
2. Any owner and mortgagee policies issued pursuant hereto will contain under Schedule B the standard exceptions set forth at the inside cover hereof unless an affidavit of possession and a satisfactory current survey are submitted, an inspection of the premises is made, it is determined the current year's taxes or special assessments have been paid, and it is determined there is nothing of record which would give rise to construction liens which could take priority over the interest(s) insured hereunder (where the liens would otherwise take priority, submission of waivers is necessary).
3. Any owner policy issued pursuant hereto will contain under Schedule B the following exception: *Any adverse ownership claim by the State of Florida by right of sovereignty to any portion of the lands insured hereunder, including submerged, filled and artificially exposed lands, and lands accreted to such lands.*
4. The lien of all taxes for the year 2009 and thereafter, which are not yet due and payable.
5. Personal property is neither guaranteed nor insured. (AS TO OWNERS POLICY ONLY)
6. Restrictions, conditions, reservations, easements, and other matters contained on the plats of Mount Vernon as recorded in Condominium Book 6, Pgs 55 - 57; Condominium Book 8, Pgs 38 - 40; and Condominium Book 11, Pgs 153 - 166, all of the Public Records of Manatee County, Florida.
7. The covenants, conditions, restrictions, liens, terms and other provisions in the Declaration of Condominium and other condominium instruments of Mount Vernon as recorded in OR Book 768, Page 49, and amended in O.R. Book 798, Pages 110-112; O.R. Book 824, Pages 387-391; O.R. Book 838, Pages 467- 471; O.R. Book 890, Pages 1845-1855; O.R. Book 902, Pages 1455-1461; O.R. Book 907, Pages 1530-1538; O.R. Book 912, Pages 568-579; O.R. Book 913, Pages 1700-1707; O.R. Book 916, Pages 1821-1822; O.R. Book 998, Page 1784; O.R. Book 1004, Pages 250-251; O.R. Book 1005, Pages 206; O.R. Book 1020, Pages 3755-3756; O.R. Book 1042, Pages 3591-3593; O.R. Book 1042, Pages 3594-3595; O.R. Book 1077, Pages 1173-1176; O.R. Book 1118, Pages 3948-3950; O.R. Book 1258, Pages 1723-1725; O.R. Book 1258, Pages 1726-1728; O.R. Book 1258, Pages 1729-1732; O.R. Book 1300, Page 2914; O.R. Book 1313, Page 3409; O.R. Book 1341, Page 3545; O.R. Book 1382, Pages 525-527; O.R. Book 1484, Pages 2347-2351; O.R. Book 1488, Pages 1024-1025; O.R. Book 1514, Pages 862-863; O.R. Book 1635, Page 6640; O.R. Book 1740, Page 2305; O.R. Book 2019, Page 2522; O.R. Book 2252, Page 573 and O.R. Book 2252, Page 575, all of the Public Records of Manatee County, Florida.
8. Easement granted to Cortez Public Service Company, as recorded in O.R. Book 382, Page 18, of said records.
9. Easement granted to Florida Power & Light Company, as recorded in O.R. Book 772, Page 513, of said records.
10. Easement granted to Florida Power & Light Company, as recorded in O.R. Book 772, Page 514; Subordination of Utility Interests recorded in O.R. Book 1346, Page 3771, of said records.
11. Easement granted to Manatee County, as recorded in O.R. Book 882, Page 570, of said records.
12. Subject to any agreement to remain connected to Manatee County Utilities Systems sewer lines, as recorded in O.R. Book 681, Page 262, of said records.
13. Recitals in deeds from Trustees of the Internal Improvement Trust Fund filed in O.R. Book 888, Page 1983; O.R. Book 922, Page 559; O.R. Book 933, Page 1887, of said records, viz: "Saving and reserving unto the Trustees of the Internal Improvement Fund of the State of Florida and their successors and assigns an undivided 3/4 interest in and title to an undivided 3/4 interest in all the phosphate, minerals, and metals that are or may be in, on or under the said above described land and an undivided 1/2 interest in and title in and to an undivided 1/2 interest in all the petroleum that is or may be in or under the said described land, with the privilege to mine and develop the same." The right of entry associated with this reservation has been released pursuant to Section 270.11 F.S.

Form C-SCH. B-II
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Attorneys' Title Insurance Fund, Inc.
COMMITMENT FORM
Schedule B-II (Continued)

Commitment No.:

Agent's File Reference:
Practice-Refi

14. Those portions of the property herein described being artificially filled in land in what was formerly navigable waters, are subject to the right of the United States Government arising by reason of the United States Government control over navigable waters in the interest of navigation and commerce.
15. Riparian and littoral rights are not insured.
16. This policy does not insure any portion of the insured parcel lying waterward of the ordinary high water mark of the lake.
17. Title to the beds or bottoms of lakes, rivers or other bodies of water located on or within the subject property.
18. Rights of others to use the waters of the lake shown on the plat of Mount Vernon, Condominium Book 11, Pages 153 - 166, of said records.
19. The rights, if any, of the public to use as a public beach or recreation area any part of the land lying between the body of water of Sarasota Bay and the natural line of vegetation, bluff, extreme high water line or other apparent boundary line separating the alleged publicly used area from the uplands.
20. CATV Service Agreement recorded in O.R. Book 1173, Page 1109, of said records.
21. Dedication of Streets as recorded in O.R. Book 1427, Page 2639, of said records.
22. Approval of Architectural Change and Acceptance as recorded in O.R. Book BB, Page PP, of said records.
23. First Mortgage dated June 31, 2007, given by Sam Seller and Sheila Seller, husband and wife, to Dan-Dan, the Lending Man, and recorded at O.R. Book WW, Page XX, of said records.
24. Final Judgment dated February 30, 2008, against Sam Seller and Sheila Seller, held by Ax C. Dent & Vic Timm, and recorded at O.R. Book YY, Page ZZ, of said records.

Form C-SCH. B-II (Continued)
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Standard Exceptions

The owner policy will be subject to the mortgage, if any, noted under item two of Section I of Schedule B hereof. All policies will be subject to the following exceptions: (1) taxes for the year of the effective date of this Commitment and taxes or special assessments which are not shown as existing liens by the public records; (2) rights or claims of parties in possession not shown by the public records; (3) encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises; (4) easements, or claims of easements, not shown by the public records; (5) any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records.

Conditions and Stipulations

1. The term "mortgage," when used herein, shall include deed of trust, trust deed, or other security instrument.
2. If the proposed Insured has or acquires actual knowledge of any defect, lien, encumbrance, adverse claim or other matter affecting the estate or interest or mortgage thereon covered by this Commitment other than those shown in Schedule B hereof, and shall fail to disclose such knowledge to THE FUND in writing, THE FUND shall be relieved from liability for any loss or damage resulting from any act of reliance hereon to the extent THE FUND is prejudiced by failure to so disclose such knowledge. If the proposed Insured shall disclose such knowledge to THE FUND, or if THE FUND otherwise acquires actual knowledge of any such defect, lien, encumbrance, adverse claim or other matter, THE FUND at its option may amend Schedule B of this Commitment accordingly, but such amendment shall not relieve THE FUND from liability previously incurred pursuant to paragraph 3 of these Conditions and Stipulations.
3. Liability of THE FUND under this Commitment shall be only to the named proposed Insured and such parties included under the definition of Insured in the form of policy or policies committed for and only for actual loss incurred in reliance hereon in undertaking in good faith (a) to comply with the requirements hereof, or (b) to eliminate exceptions shown in Schedule B, or (c) to acquire or create the estate or interest or mortgage thereon covered by this Commitment. In no event shall such liability exceed the amount stated in Schedule A for the policy or policies committed for and such liability is subject to the insuring provisions, the Exclusions from Coverage and the Conditions and Stipulations of the form of policy or policies committed for in favor of the proposed Insured which are hereby incorporated by reference and are made a part of this Commitment except as expressly modified herein.
4. Any action or actions or rights of action that the proposed Insured may have or may bring against THE FUND arising out of the status of the title to the estate or interest or the status of the mortgage thereon covered by this Commitment must be based on and are subject to the provisions of this Commitment.

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