

## **ALTA Best Practice #6 – Just Because “Stuff Happens”**

When Law Property Assurance and Trust Society issued the first title insurance policy in Pennsylvania in 1876, there was a need to protect a consumer’s investment in real estate because “stuff happens.” Some refer to this explanation for bad things happening to good people for no particular reason as “*Así es la vida*,” “*C’est la vie*” or “*Que Sera Sera*.” Others observe that life is full of unpredictable events and some of them bad by referencing Murphy’s Fourth Law of Thermodynamics. (The irony lies in the fact that there are only three laws of thermodynamics.) Simply put, we know Murphy’s Law to state: “If anything can go wrong, it probably will.” Try as we might, the fickle finger of fate will catch up with us all. So what do we do to guard against “stuff happening” to us or our clients? We buy insurance.

To cover the eventuality that “stuff happens” to our real estate clients, we recommend that they purchase title insurance. Title insurance covers a number of things that are symptomatic of the recording system in the United States, such as unknown legitimate claims to title that were not discoverable in the public record. In most transactions today, lender’s coverage is mandatory. In addition, a title insurance underwriter or state law may require additional forms of insurance, such as Errors and Omissions Professional Liability Insurance, Fidelity Coverage, Surety Coverage, or Cyber Theft and Fraud Coverage. In the case of ALTA Best Practice #6, the standard is simple – you must carry whatever your title underwriter or state law requires.

### **ALTA Best Practice #6 :**

#### **Maintain appropriate professional liability insurance and fidelity coverage.**

**Purpose:** Appropriate levels of professional liability insurance or errors and omissions insurance help ensure title agencies and settlement companies maintain the financial capacity to stand behind their professional services. In addition, state law and title insurance underwriting agreements may require a company to maintain professional liability insurance or errors and omissions insurance, fidelity coverage or surety bonds.

### **Errors and Omissions Insurance.**

Errors and Omissions Insurance is for professionals who provide advice or service to clients. It protects the attorney and the client in the event a negligent act of the firm causes financial harm to the client. In the context of a real estate transaction, while the client would have a claim against the attorney certifying title when an error is made, the errors and omissions insurance would step in and protect their insured attorney by paying the client the financial loss. In short, professional errors and omissions insurance protects the certifying real estate attorney when “stuff happens.”

### **Other Relevant Forms of Insurance**

While professional errors and omissions insurance is required by nearly every title insurance underwriter, there are other types of insurance that may be required or you may wish to have, just in case “stuff happens” to you.

#### **Fidelity Bond.**

A fidelity bond is an insurance policy that protects you from the fraudulent acts of specified individuals. In particular, you might purchase this insurance and/or bond to

protect you from the malfeasance or dishonesty of your employees. These acts could include many things, including, theft, fraud, or forgery. A review of the terms of the policy would reveal the exact coverage limitations. A fidelity bond is significantly different from a professional errors and omissions policy because it protects you for wrongful acts and not mere negligence. Some might refer to a fidelity bond as a type of “crime insurance” policy. A fidelity bond will certainly protect you when “stuff happens,” but, in this instance, it is not a case of bad things happening to good people. It is rather a case of bad things happening because of bad people.

At present, ALTA Best Practice #6 only requires a fidelity bond if it is required by your title underwriter or the prevailing laws of your jurisdiction. You should consult your title underwriter for the requirements in this regard.

### **Surety Bond.**

There are many types of surety bonds, but they are all generally three-party agreements. The surety bond protects a second party in the event that the first party fails to meet a certain obligation. The type of surety bond that is applicable in the context of a real estate closing would be a fiduciary obligation to monitor the funds held in trust. In other words, a surety bond is in place to make sure that attorney or principal does not steal the money. A surety bond would be in place to protect the funds from disappearing due to YOUR malfeasance. If it sounds odd to buy an insurance policy to make sure that you do not steal, it is; however, in some instances, this may be a level of assurance required by a party that cannot be achieved another way.

At present, ALTA Best Practice #6 only requires a surety bond if it is required by your title underwriter or the prevailing laws of your jurisdiction. You should consult your title underwriter for the requirements in this regard.

### **Cyber Fraud and Cyber Theft Insurance.**

Cyber fraud and cyber theft insurance is currently NOT required by ALTA Best Practice #6. We cannot, however, have a complete conversation about insurance without mentioning this growing area of the insurance marketplace. Twenty years ago, when assessing the risk for theft from our entrusted funds in the trust account, we looked to our employees, our partners, and our clients. Today, we have to consider threats that did not exist last week, let alone twenty years ago.

The advent of online banking has provided crooks in a foreign land an avenue to potentially rob your trust account. This is a new threat that has to be carefully examined to make sure that the trust that has been placed in your firm is warranted. The next time you sit down at your computer to perform an online banking function, consider that a criminal half way around the world could potentially do anything at that terminal that you can do. If that mere rudimentary self-examination does not make you consider this type of protection, I am not sure what will. As you compare this type of coverage to the coverage offered by a fidelity bond, please consider that you at least have the opportunity to interview an employee before they sit at your computer with access to online banking. In both instances, you may be the victim to theft due to the malfeasance of another. Purchasing cyber fraud and cyber theft insurance is not a substitute for appropriate risk management measures regarding your online banking; it is a complement to those efforts in case “stuff happens.”

At present, ALTA Best Practice #6 does not require cyber fraud or cyber theft insurance. Additionally, it does not appear that any title underwriter has taken the affirmative step to require this coverage; however, a complete conversation about insurance must include a discussion of this form of protection.

## **Conclusion**

There are many types of insurance out there to protect you and your clients in the event that “stuff happens” to you. At the end of the day, the different forms of insurance are not a substitute for professional policies, procedures, and practices. Title insurance is not a substitute for a complete and thorough title examination. Errors and omissions insurance is not a substitute for adhering to standards of professionalism. Fidelity insurance is not a substitute for a background check and interview of potential employees. Cyber fraud and cyber theft insurance is not a substitute for a firewall and virus protection software to protect online communications. Try as we might to guard against all of these risks that are present in our everyday professional responsibilities, “stuff happens.” The insurance that we purchase, some required by our title underwriter and some required by state law, is merely a safety net so that we can continue to provide professional service to another client and avoid that fickle finger of fate that is searching for us all.