

I. INTRODUCTION

A title commitment obligates the title company to issue a final policy upon the closing of the transaction. Among other things, the title commitment provides information about items that need to be satisfied at or before the closing. The Commitment form discussed in this chapter may be used whether the final policy will be a Mortgagee Policy, Owner Policy, or both. The title commitment consists of three main parts: the commitment cover, Schedule A and Schedule B. The three parts of the commitment will be discussed separately below. At the end of this chapter there is a sample of Attorneys' Title Guaranty Fund, Inc.'s ("ATG") Commitment for Title Insurance (OMC) in its entirety. *See Exhibit 3-1: ATG Commitment to Insure Title.* Throughout this chapter, language from the title commitment will be in italics.

II. ALTA COMMITMENT FOR TITLE INSURANCE: A PROMISE TO INSURE

The title commitment cover contains four paragraphs that explain the purpose of the title commitment and provides information about when the title commitment is effective and binding. These four paragraphs encompass what the title company promises to the proposed Insured(s). The numbers that precede the insuring provisions below (e.g., Paragraph 1) correspond to the order in which the paragraphs appear on the commitment cover.

A. Paragraph 1

Attorneys' Title Guaranty Fund, Inc., an Illinois corporation, herein called ATG, 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, upon payment of the premiums and charges therefor; all subject to the provisions of Schedules A and B and to the Conditions and Stipulations, and the Exceptions on Schedule B contained in the policy or policies issued pursuant to this Commitment. Copies of policy forms may be obtained prior to closing on request.

Paragraph 1 outlines who the commitment is for and what the title company is agreeing to do. The promise is made only to the proposed Insured and not to the seller or any third party. Neither the seller nor a third party has any rights under the commitment or under the final policies.

B. Paragraph 2

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 ATG, either at the time of issuance of this Commitment or by subsequent endorsement.

1. Only the title company or its agent may insert the name of the proposed Insured and the Amount of Insurance.
2. The title company must perform a judgment and lien search on the proposed Insured and, depending on the entity (estate, corporation, partnership, etc.), raise various relevant underwriting concerns.
3. The Amount of Insurance in part determines the amount of the title company's potential exposure. For an owner, the Amount of Insurance is typically the sales price. For the mortgagee, the Amount of Insurance is typically the amount of the mortgage. The proposed insured must determine the Amount of Insurance requested; the title company should not provide instruction on how much insurance to purchase. It is important to

know the Amount of Insurance because it may affect any underwriting decisions that are made.

C. Paragraph 3

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 ATG.

A commitment, when issued, remains in effect for a period of six months from the effective date. The date the search is done will not be the effective date due to the time the counties require to update the indexes that are searched. The effective date is the date through which the public records have been posted. The amount of time the commitment is valid may be extended for additional periods of six months by issuance of a Date Down Endorsement 1 (ATG Form 2016) and performance of a later date search. *See Exhibit 10-8.* A later date search searches from the effective date of the commitment through the current effective date of the public records.

D. Paragraph 4

This policy shall become effective and binding when Schedule A and Schedule B, and any endorsements, are signed by a title insurance agent, or other authorized signatory, of ATG.

Unless the title commitment is signed, the title company has no obligation to issue a policy.

III. THE PROMISE IS SUBJECT TO THE CONDITIONS AND STIPULATIONS

Following the first four paragraphs on the commitment cover are four Conditions and Stipulations. The Conditions and Stipulations provide a definition and set an understanding of the terms of the title company's promise to insure contained in the first four paragraphs of the commitment cover.

A. Conditions and Stipulations No. 1

The term "mortgage," when used herein, shall include deed of trust, trust deed, or other security instrument.

The definition of mortgage is provided because security instruments are commonly referred to by different terms. Anytime the term mortgage is used it encompasses deeds of trust, trust deeds and other security instruments.

B. Conditions and Stipulations No. 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 ATG in writing, ATG shall be relieved from liability for any loss or damage resulting from any act of reliance hereon to the extent ATG is prejudiced by failure to so disclose such knowledge. If the proposed Insured shall disclose such knowledge to ATG, or if ATG otherwise acquires actual knowledge of any such defect, lien, encumbrance, adverse claim, or other matter, ATG at its option may amend Schedule B of this Commitment accordingly, but such amendment shall not relieve ATG from liability previously incurred pursuant to paragraph 3 of these Conditions and Stipulations.

1. In the event the proposed Insured is aware of a title defect that is not disclosed on the title commitment, the Insured must inform the title company of the defect. If the Insured knew of but did not disclose a defect, the Insured's coverage will be limited to take into account any harm that has been caused to the title company because the title company learned of the defect later than when the Insured initially became aware of the defect. The

title company also has the right upon discovery of the defect to amend the commitment to make it subject to the defect. This obligation on the Insured is limited to actual knowledge and does not encompass constructive knowledge. The disclosure duty of the Insured is a continuing duty.

2. *Weir v. City Title Insurance Company* held that the purchaser's attorney who learned of a dispute over title to a portion of land to be insured had a duty to disclose the information to the title company. 308 A.2d 357 (N.J. Super. Ct. App. Div. 1973).

C. Condition and Stipulation Number 3

Liability of ATG 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 part of this Commitment except as expressly modified herein.

Condition and Stipulation Number 3 limits the title company's liability in three areas. The first area limits to whom the title company is liable. The second area limits the matters for which the title company is liable. The third area limits the amount of the title company's liability.

1. To whom the title company is liable
 - a. The title company's liability is specifically limited to the proposed Insureds. It is important to note that the title company is liable neither to the seller nor to a third party not named as a proposed Insured who relies on the title commitment.
 - b. In *Warrington v. Transamerica Title Insurance Company*, the court held that no one other than the proposed insured, to whom a title policy is issued, can maintain a cause of action against a title company for representations contained in the title commitment. In *Warrington*, a title commitment was prepared in connection with a transaction; among other problems the commitment did not contain an exception for an outstanding unrecorded mortgage. Warrington, an individual who subsequently acquired an interest in the property, was shown a copy of the title commitment during the negotiations between Warrington and the owners in a different transaction. Warrington filed a complaint against the title company who issued the commitment for the previous transaction on several bases including negligent misrepresentation. The court held that the title company had no liability to Warrington because Warrington was not a proposed insured. *Warrington v. Transamerica Title Ins. Co.*, 596 P.2d 627 (Or. Ct. App. 1979).
2. Matters for which the title company is liable

Any right or cause of action against the title company by the proposed Insured will be determined with reference to the commitment. Title insurance, including the promise to insure, is a contract to indemnify; not a guarantee of title.
3. Amount for which the title company is liable
 - a. The title company's liability does not exceed the amount of the insurance and is limited to actual loss.

- b. The use of the term “actual loss” is important. In *Jarchow v. Transamerica Title Insurance Company*, a title company was held liable for damages for the negligent infliction of emotional distress in connection with a claim. The claim arose out a neighbor’s assertion of an easement for ingress and egress over the insured property. *Jarchow v. Transamerica Title Ins. Co.*, 122 Cal. Rptr. 470 (Cal. Ct. App. 1975). The use of the term actual loss in the title company’s commitment prevents recovery for damages similar to those awarded in the *Jarchow* case.

D. Conditions and Stipulation No. 4

Any action or actions or rights of action that the proposed Insured may have or may bring against ATG 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.

1. The title company is not undertaking abstractor liability when it issues a title commitment. The purpose of the title commitment is not to provide the state of title but rather to bind the title company to issue a policy that is consistent with the commitment.
2. *First Midwest Bank, N.A., v. Stewart Title Guaranty Company* contains a discussion on whether a title commitment exposes a title company to liability for omissions on the commitment. First Midwest Bank lent money to purchasers based on the understanding that the collateral property would be used for residential and business purposes. First Midwest Bank obtained a title commitment prior to lending the money. The commitment did not contain an exception for a recorded restrictive covenant that provided that the property could not be used for business purposes. First Midwest Bank released the loan that was insured by the title commitment prior to learning of the restrictive covenant. One issue before the court was whether the title company was liable to First Midwest Bank for negligent misrepresentation. The court held that the title company was not liable to First Midwest Bank. The court stated that title companies are not in the business of supplying information and a title commitment is not a guaranty of title. *First Midwest Bank, N.A., v. Stewart Title Guar. Co., et al.*, No. 100162 (Ill. Jan. 20, 2006).

IV. SCHEDULE A

Schedule A provides the particulars of the property and transaction to be insured, including the effective date of the commitment, the proposed Insureds, the policies to be issued, the proposed Amount of Insurance, who title is vested in as of the effective date, and the legal description of the property to be insured.

The effective date of the commitment will be the last date on which documents were posted in the Recorder’s Office when the search was conducted. The commitment commits to a policy that provides coverage for title defects created before the effective date.

For information on how to prepare a commitment, see chapter 4, Commitment Preparation.

V. SCHEDULE B: STANDARD EXCEPTIONS

Schedule B of the commitment begins with the Standard Exceptions from coverage. These exceptions are matters that affect every property and cannot be readily discovered by a search of the public records. All of ATG’s commitments contain the Standard Exceptions. Unless provisions are made to waive the Standard Exceptions, they will appear in exactly the same form on the policy(ies). For information on how to waive the Standard Exceptions, please see Chapter 4: Commitment Preparation.

A. Standard Exception Number 1

Rights or claims of parties in possession not shown by the public records.

This exception includes all forms of possession, including leases, encroachments, easements, and other types of uses.

B. Standard Exception Number 2

Encroachments, overlaps, boundary line disputes, and any matters that would be disclosed by an accurate survey and inspection of the premises.

The exception for encroachments includes improvements encroaching over a setback line, onto an easement or over a property line. Property line encroachments may encroach either from the insured property onto a neighbor, or from adjoining property onto the insured property.

C. Standard Exception Number 3

Easements, or claims of easements, not shown by the public records.

This easement exception includes any public utility equipment that is located on the land, but not contained within a recorded easement, as well as any unrecorded use as a roadway.

D. Standard Exception Number 4

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; and

This exception is for unrecorded mechanics' liens. A mechanics' lien is a lien for materials supplied or work performed to improve the property but not paid for. This exception is necessary because mechanics' liens can have priority ahead of the date the claim for a mechanics' lien is recorded. At the time of closing the property could be free of mechanics' lien claims, and after the deed and mortgage are recorded, a mechanics' lien claim could be recorded that takes priority over both the deed and mortgage. This exception excludes coverage for such mechanics' lien claims. For more information on mechanics' liens, please see the *ATG Basic Underwriting Handbook*.

E. Standard Exception Number 5

Taxes or special assessments that are not shown as existing liens by the public records.

Certain types of taxes or special assessments may be unrecorded, but imposed on owners of the property. This exception excludes coverage in such cases.

VI. SCHEDULE B: PRE-PRINTED SPECIAL EXCEPTIONS

In addition to the applicable Standard Exceptions (above), Schedule B contains four pre-printed Special Exceptions that are always the first four Special Exceptions on Schedule B of the commitment. In the event that they are not waived, they will also be the first four Special Exceptions on Schedule B of the policy(ies).

A. Special Exception Number 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.

1. This period of time is referred to as "the gap." Since title insurance is retrospective, not prospective, it insures only against matters that occur prior to the Effective Date. There is a difference between a missed defect, lien, or encumbrance (possible coverage) and such a problem that occurs after the Effective Date of the commitment but before the deed and mortgage are recorded (no coverage).
2. Title companies can waive this exception, to provide insurance for title defects arising during the gap period, upon request, which coverage is known as "gap coverage." To

provide gap coverage, most title companies conduct an additional search before closing and collect affidavits from the parties.

B. Special Exception No. 2

Any loan policy issued pursuant to this Commitment will be subject to the following exceptions (a) and (b), in the absence of the production of the data and other matters contained in the ATG ALTA Statement form or equivalent form:

(a) 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;

(b) Consequences of the failure of the lender to pay out properly the whole or any part of the loan secured by the mortgage described in Schedule A, as affecting: (i) the validity of the lien of said mortgage; and (ii) the priority of the lien over any other right, claim, lien, or encumbrance that has or may become superior to the lien of said mortgage before the disbursement of the entire proceeds of the loan.

1. To clear the above exceptions, the parties must provide the title company with assurances that the following two conditions have been met.
 - a. The first assurance needed is that nothing has been done that may give rise to a mechanics' lien. The title company must be assured that there have been no improvements or repairs or any other work performed on the property or structures on the property, which have not been paid for. The title company must be assured that any materials delivered to the property have been paid for. The title company must be assured that no contract has been executed by the parties for such labor or service to be done on the property and that no other act has been done by the parties that may give rise to a mechanics' lien. An ALTA Statement (ATG Form 3004), executed by the seller(s) and purchaser(s), will provide this information.
 - b. Second, the title company needs assurance that the lender disbursed the entire proceeds at the closing. The Lender's Disbursement Statement on the bottom of the ALTA Statement will provide this information.
2. In some cases (e.g., new construction) mechanics' lien waivers need to be produced along with affidavits from the owner, general contractor and, possibly, sub-contractors. When Final Lien Waivers are not available, cash or other securities must be provided for adequate assurance and held in escrow pending receipt of Final Lien Waivers.
3. In cases where the assurances for mechanics' liens are not satisfactory to the title company, or where the title company is unsure whether proper disbursement occurred, an exception for mechanics' liens or disbursement failures will appear on the final policy.

C. Special Exception No. 3

Payment of the full consideration to, or for the account of, the grantors or mortgagors for the estate or interest to be insured.

This exception is meant to cover transactions where there is no consideration or less than full consideration is paid for the property. An example would be if the transfer of property is a gift from the vested owner on the commitment to the proposed Insured. This exception is raised because the title company will be unable to avail itself of the bona fide purchaser defense if there has not been full consideration as a part of the transaction. If full consideration is not paid, this exception will be raised on Schedule B of the owner and/or mortgagee policy.

D. Special Exception No. 4

Recordation or registration of duly executed and delivered instruments sufficient to create the estate or interest to be insured.

1. If the title company is not responsible for recording the documents, and the documents are not properly handled by the lender or the closer, then the title company will not be responsible for any loss arising from such failure.
2. The Insured must perform any inspections, obtain water certifications, pay any tax stamps, and perform any other tasks necessary to have the deed or mortgage recorded. Up to date transfer tax information is available on ATG's website: www.atgf.com.

VII. SCHEDULE B: SPECIFIC EXCEPTIONS

Additional exceptions to coverage or requirements for closing, based upon the particular property and transaction, appear on Schedule B following the Standard Exceptions and pre-printed Special Exceptions.

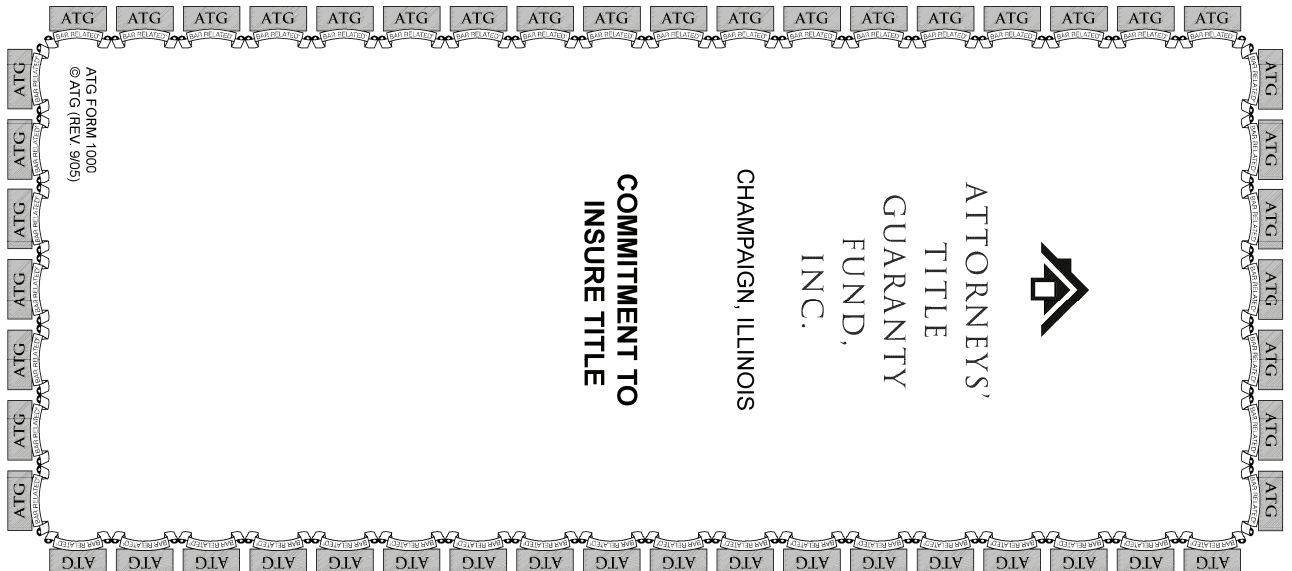
The parties and their attorneys must review the Commitment before closing. Often, exceptions listed will require circumstances to be investigated or documents to be obtained for the title company to waive the exceptions at closing.

[THIS PAGE INTENTIONALLY LEFT BLANK]

SAMPLE

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 ATG in writing, ATG shall be relieved from liability for any loss or damage resulting from any act of reliance hereon to the extent ATG is prejudiced by failure to so disclose such knowledge. If the proposed Insured shall disclose such knowledge to ATG, or if ATG otherwise acquires actual knowledge of any such defect, lien, encumbrance, adverse claim, or other matter, ATG at its option may amend Schedule B of this Commitment accordingly, but such amendment shall not relieve ATG from liability previously incurred pursuant to paragraph 3 of these Conditions and Stipulations.
3. Liability of ATG 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 ATG 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.



[THIS PAGE INTENTIONALLY LEFT BLANK]

EXHIBIT 3-2: COMMITMENT FORM SCHEDULE A – ATG® FORM 1001

SAMPLE

ATTORNEYS' TITLE GUARANTY FUND, INC.

ATG® COMMITMENT FORM - SCHEDULE A

Commitment No.:

Date of Policy:

State Issued:

File Name:

1. Policy or policies to be issued:

Proposed Amount of Insurance:

OWNER:

\$

Proposed Insured:

MORTGAGEE:

\$

Proposed Insured:

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:

3. The land referred to in the policy is described as follows:

ISSUED BY

ATG FORM 1001
© ATG (REV. 7/99)

Member No.

Signature of Member or Authorized Signatory

FOR USE IN: ALL STATES

[THIS PAGE INTENTIONALLY LEFT BLANK]

SAMPLE

ATTORNEYS' TITLE GUARANTY FUND, INC.

ATG® COMMITMENT FORM - SCHEDULE B

Commitment No.:

Effective Date:

State Issued:

File Name:

EXCEPTIONS

Schedule B of the policy or policies to be issued will contain the following Standard Exceptions and Special Exceptions unless the same are disposed of to the satisfaction of ATG:

Standard Exceptions

1. Rights or claims of parties in possession not shown by the public records.
2. Encroachments, overlaps, boundary line disputes, and any matters that would be disclosed by an accurate survey and inspection of the premises.
3. Easements, or claims of easements, not shown by the public records.
4. 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; and
5. Taxes or special assessments that are not shown as existing liens by the public records.

Special Exceptions

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 loan policy issued pursuant to this Commitment will be subject to the following exceptions (a) and (b), in the absence of the production of the data and other matters contained in the ATG ALTA Statement form or an equivalent form:
 - a. 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;
 - b. Consequences of the failure of the lender to pay out properly the whole or any part of the loan secured by the mortgage described in Schedule A, as affecting: (i) the validity of the lien of said mortgage; and (ii) the priority of the lien over any other right, claim, lien, or encumbrance that has or may become superior to the lien of said mortgage before the disbursement of the entire proceeds of the loan.
3. Payment of the full consideration to, or for the account of, the grantors or mortgagors for the estate or interest to be insured.
4. Recordation or registration of duly executed and delivered instruments sufficient to create the estate or interest to be insured.
5. The lien of taxes for the year _____ and thereafter.

ISSUED BY