

**MLTA 2023 Fall Education Seminar
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Presentation Outline

Title 71, Chapter 3, Part 5, of the Montana Code governs the rights of persons to lien real property for which they have furnished labor, materials, and services. The construction lien secures the claimant's right to payment for the price or value of work performed or materials furnished. It has priority over any mortgage secured to pay for such work or materials. Title agents who insure against construction liens on mortgages with a construction loan component, or on mortgages in conjunction with a construction loan, are subject to heightened risk in Montana. A review of basic construction lien law and priority concerns in Montana reveals the risks that agents encounter when issuing title insurance policies that insure against construction liens. This presentation helps agents to limit their exposure to this risk by underwriting construction loans using incremental coverage for construction liens via the ALTA 32, 33 series construction loan endorsements.

A DISCUSSION OF INCREMENTAL LIEN COVERAGE UNDERWRITING AND THE ALTA 32 33 SERIES ENDORSEMENTS

- 1. Montana construction lien – scope and definition (MCA §§ 71-3-521, 71-3-522)**
 - a. Commencement Contract Price
 - b. Contracting Owner
 - c. Original Contactor
 - d. Real Estate Improvement Contract

- 2. Who may file a construction lien and for what may they be filed? (MCA §§ 71-3-523, 524)**

- 3. Extent and amount of construction (MCA §§ 71-3-525, 526)**

- 4. Priority of a construction lien (MCA §§ 71-3-541, 71-3-542)**
 - a. Set by date of first visible work; there is equal priority among contractors who contribute to the same project, regardless of the date on which each contractor first contributed.

 - b. A construction lien has priority over any mortgage, or encumbrance that is filed before the construction lien attaches if that mortgage or encumbrance was used to pay for the project to which the lien was attached.

5. ALTA title policy coverages (2006/2021)

- a. Covered Risk 2

- b. Covered Risk 10 (loan only)

- c. Covered Risk 11a (loan only)

6. Title insurance industry response to construction liens

- a. Construction Lien Standard Exception (Owner/Lender)
 - i 2006

 - ii 2021 modified

- b. Upfront Coverage – Deletion of Schedule B Exception for Construction Lien (Owner)
 - i Administrative Rule of Montana 6.6.2201(3)(d) sets forth provisions that agents must comply with in order to issue a policy without taking exception to inchoate liens arising from improvements that have priority over an interest being insured (*i.e.* deleting the standard ML exception)
 - A. Sufficient Indemnity; or

 - B. Collected or cleared funds have been deposited with the insurer or its agent to assure ultimate payment and release of such liens

7. Incremental Coverage (Lender Policy)

- a. ALTA 32-06 – Form Endorsement - Generally
 - i Date of Policy vs Date of Coverage (liens)

 - ii Scope of lien coverage afforded on the Date of Coverage

 - iii Alternative Schedule B exception when priority of insured construction mortgage cannot be obtained (e.g., Montana)

- b. ALTA 32-06 – Construction Loan
 - i Provides coverage only if the charges for the services, labor, materials, or equipment giving rise to the mechanics' lien were designated for payment in documents supporting a construction Loan Advance disbursed by or on behalf of the Insured

- c. ALTA 32.1-06 – Construction Loan-Direct Payment
 - i Provides coverage only if the mechanics' lien claimant was paid directly by the Company, or by the Insured with the Company's written approval

- d. ALTA 32.2-06 – Construction Loan-Insured's Direct Payment
 - i Provides coverage only if the mechanics' lien claimant was paid directly by the Insured or by another person on the Insured's behalf

- e. Best practices – Assess Financial Viability, Creditworthiness of Indemnitors
 - i Review of budget, timeline, construction contract, sources and uses, etc.

 - ii Review loan agreement, promissory note, deed of trust

 - iii Understanding creditworthiness for each indemnitor

 - iv Assess business reputation of contractor, history of business relationship.

 - v Discussion of recording (lienable off-site work)
 - A. Site Inspection

 - B. Certified Statement of Work from general contractor

 - C. Payoffs at closing, indemnities

 - D. Performance Bond

8. Underwriting Protocols for Construction Disbursement

- a. ALTA 33-06 – Disbursement
 - i Brings forward the Date of Coverage, not the Date of Policy
 - A. Current disbursement

 - B. Aggregate disbursement

 - C. (a. and b. optional)

- ii Identifies changes in Schedule A, if any

- iii Identifies changes in Schedule B if any

- b. Best construction disbursement draw-request review practices
 - i Who is disbursing? (agent, lender)

 - ii Review of loan agreement re the construction-draw process
 - A. AIA form, attorney drafted, agent form

 - iii Monthly draw review
 - A. Collect invoices to be paid, receipts or cashed checks of previously paid

 - B. Lien waivers (unconditional), progress payment (conditional)

 - iv Physical site inspection; progress report; photographs; affidavit

 - v title date down