

A faint, light gray background graphic of a Native American headdress, possibly a Sioux feather headdress, is centered on the page. The headdress features a large circular band at the top, a central feather, and several long, curved feathers extending downwards and outwards.

DAKOTA HOMESTEAD AGENT EDUCATIONAL

November 5, 2012
Sioux Falls, SD

COLLATERAL REAL ESTATE MORTGAGES

NEW DH UNDERWRITING REQUIREMENTS RE RECORDED CREMS!

As a result of these recent changes to 44-8-26 and as apparently confirmed by the recent *Highmark v Wells Fargo* 2012 SDSC Opinion...

In ALL cases --- You must now show all unreleased CREMs as an exception to title and require that they be properly released of record -- just like you would do for any other unreleased real estate mortgage of record!

(You now can and should disregard in total the previous law / requirement that the lender needed to timely file an Addendum to continue the existence of its lien beyond the 5 year 60 days SOL! That now only applies to advances made after that 5 year 60 days and nothing that came before that time. For our purposes, we now just need to treat ALL CREMs as regulate mortgages, show them as an exception to title, and require they be released of record.)

Discussion Notes:

CREMs – What They Are and New Developments

Keith A. Gauer – Davenport, Evans, Hurwitz & Smith, L.L.P. - Debtor Creditor Committee

If you are a new practitioner to South Dakota, you may be unfamiliar with the term “CREM.” If you Google the term, you won’t have much luck. A quick Google search of “CREM” brings up “Crem International” (a Swedish company offering coffee and espresso machines), various references to the CREM Gene (some sort of human protein), and the EPA’s Council for Regulatory Environmental Modeling.

In South Dakota, however, a CREM is an acronym for a Collateral Real Estate Mortgage, a statutorily created form of mortgage providing lenders with a flexible alternative to traditional mortgages. A CREM meeting the requirements of SDCL 44-8-26 can be utilized to grant a creditor a mortgage up to a set dollar amount set forth in the mortgage. The CREM continues to act as a lien against the property notwithstanding the fact that the actual amount of the indebtedness owed by the borrower may fluctuate, and even be reduced to zero, during the term of the mortgage. The CREM will, however, continue to take priority as of the date the mortgage was recorded. CREMs are commonly used to secure indebtedness owed to creditors where the actual amount of the indebtedness varies over time, including lines of credit to secure annual crop inputs, inventory lines, personal lines of credit, and other similar debts.

In a 2012 decision (*Highmark v. Wells Fargo*), the South Dakota Supreme Court upheld the priority of a filed CREM over a subsequently filed mortgage, even though the proceeds of the subsequent mortgage had been used to pay off the then-current balance of the CREM. The bank filing the second mortgage had intended to pay off the CREM and take a first position lien on the property, but neither the borrower nor the bank demanded that the CREM be satisfied at the time of the refinance. After the CREM lender made additional advances to the borrower and filed a foreclosure action, the South Dakota Supreme Court upheld the first position lien of the CREM.

The statute authorizing CREMs in South Dakota was initially adopted back in 1981. The law requires the lender-mortgagee to file an “Addendum” to continue the effectiveness of a CREM every five years. The legislature likely selected the five year renewal period to match the similar five-year renewal requirement for financing statements under Article 9 of the UCC. In its current form, the statute provides that a CREM will be effective for five years from the date of its filing and thereafter for a period of sixty days.

Previous versions of the statute directed that a CREM would lapse, and no longer operate as security for the indebtedness, if the lender-mortgagee failed to file the Addendum within the required five-year timeframe. Revisions to the statute completed in 2009 and 2011, however, clarified the requirements relating to the filing of Addenda and modified the ramifications if a lender-mortgagee fails to file by the required date. Following the revisions, a lender-mortgagee’s failure to file the Addendum will only result in the lender’s inability to claim that the CREM secures new sums advanced to the borrower after expiration of the time to file the Addendum. As such, a lender who forgets to file the Addendum will still retain its priority position as to all debt outstanding on the last day to file an Addendum.

Executive Suites Available

West side Rapid City office suites with two conference rooms available, break room, signage, handicap access and offstreet parking, on high-volume street with great views.
Contact Daniel Pahlke, 1010 Soo San Dr. Suite 205,
Rapid City, SD 57702
(605) 341-4646

Office Space Available

Upscale professional office in a great Rapid City downtown location available for short or long term sub-lease. Starting at \$350 per month with amenities available. Close to courthouse. Large conference room and kitchen area. Please contact 605-721-7619 with any inquiries.

Professional Office Space

Downtown Sioux Falls, one block away from courthouse.
Contact: 271-1819
400 N Main Ave. #205
Sioux Falls, SD 57501

ONLINE RESOURCES RELATED TO TITLE EXAM AND INSURANCE

Except for the UJS, which you folks have substantial practice knowledge and experience of and which I do not, I routinely utilize the following online resources in connection with answering agent questions and case specific research.

I have placed a shortcut on my computer desktop for these sites and resources for quick access. I recommend that do as well.

(1) Dakota Homestead website.

Dakota Homestead's home page may be accessed online at <http://www.dakotahomestead.com/>.

Underwriting guidelines, forms, endorsements, rates, links – just a ton of information and resources are available on the DH website.

I have to admit I use other underwriters websites all of the time too.

(2) South Dakota Title Standards.

The South Dakota Title Standards may be accessed online at <http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=43-30S>.

The South Dakota Title Standards are an appendix to SDCL 43-30 MARKETABLE TITLE TO REAL ESTATE. Unfortunately, the South Dakota Title Standards as provided by / on the South Dakota Legislature website do not contain the authority on which each Title Standard is based.

You should be referring to the South Dakota Title Standards on a regular basis.

(3) South Dakota Codified Laws.

The SDCL may be accessed online at <http://legis.state.sd.us/statutes/index.aspx>.

My routine is to access the “Title List” option, usually because I know what Chapter I am after and even if I do not, the Chapter titles provided usually steer me in the right direction.

The following are the main Chapters (aka Titles) that are associated with real estate and title, though, unfortunately, relevant statutes are peppered throughout the Code (my notes follow some of the cited Chapter titles).

| <u>Title Number</u> | <u>Title Name</u> |
|----------------------------|--|
| <u>6</u> | LOCAL GOVERNMENT GENERALLY (<i>self explanatory</i>) |
| <u>7</u> | COUNTIES (<i>self explanatory</i>) |
| <u>8</u> | TOWNSHIPS (<i>self explanatory</i>) |
| <u>9</u> | MUNICIPAL GOVERNMENT (<i>self explanatory</i>) |
| <u>11</u> | PLANNING, ZONING AND HOUSING PROGRAMS (<i>plats, vacation, zoning</i>) |

| | |
|---------------------|--|
| 15 | CIVIL PROCEDURE (<i>lis pendens, complaints, notice, judgments, UJS, etc.</i>) |
| 18 | OATHS AND ACKNOWLEDGMENTS (<i>proof of ID, acknowledgments, notary</i>) |
| 21 | JUDICIAL REMEDIES (<i>foreclosure, redemption, quiet title, etc.</i>) |
| 25 | DOMESTIC RELATIONS (<i>marriage, divorce, children, etc.</i>) |
| 28 | PUBLIC WELFARE AND ASSISTANCE (<i>county aid liens, DSS, etc.</i>) |
| 29A | UNIFORM PROBATE CODE (<i>current SD probate Code, Conservatives, etc.</i>) |
| 31 | HIGHWAYS AND BRIDGES (<i>Location, Change And Vacation Of Highways</i>) |
| 32 | MOTOR VEHICLES (<i>mobile and manufactured homes</i>) |
| 41 | GAME, FISH, PARKS AND FORESTRY (<i>State / Federal Conservation easements</i>) |
| 43 | PROPERTY (<i>conveyances, recording, marketable title acts, homestead, minerals</i>) |
| 44 | LIENS (<i>mortgage, mechanic's, vendor's, state tax, etc. "liens"</i>) |
| 45 | MINING, OIL AND GAS (<i>minerals and mineral leases</i>) |
| 46 | WATER RIGHTS (<i>self explanatory</i>) |
| 47 | CORPORATIONS (<i>self explanatory</i>) |
| 48 | PARTNERSHIPS (<i>self explanatory</i>) |
| 55 | FIDUCIARIES AND TRUSTS (<i>trusts, certificate of trustee</i>) |

One of the problems with using the SDCL as provided by / on the South Dakota Legislature website is that only the bare bone statutes are provided.

Case notes / law and other authorities that have reviewed and interpreted those statutes and their meaning are not provided under the SDCL sections / statutes on the South Dakota Legislature website. Case notes / law and other authorities are provided in the actual statute books and are also available on such research engines as Westlaw.

(4) South Dakota Secretary of State – Business Entity Search.

South Dakota business entity searches may be accessed online at <http://sdsos.gov/business/search.aspx>.

Domestic (those business entities that are legally formed/incorporated in South Dakota) as well as foreign (those business entities that are legally formed in/incorporated in another state but have registered in South Dakota to do business) corporations, LLCs, LPs, and LLPs may be searched, located and researched on this site.

Please be advised that all states have similar online business entity search engines available on their secretary of state's (or equivalent) website.

You should be utilizing these online business entity searches on a regular basis.

(5) PACER.

The Logon to *Public Access to Court Electronic Records* ("PACER") may be accessed online at: <https://pacer.login.uscourts.gov/cgi-bin/login.pl?appurl=https://pcl.uscourts.gov/search>.

Agents of Dakota Homestead are welcome to use DH's Logon and Password to access Pacer. That information is as follows:

PACER Logon: dh0228

Password: 7roosup7

** It is NOT necessary to fill anything in at the "Client Code" box.**

PACER includes case and docket information for all FEDERAL district, bankruptcy, and appellate courts, including civil and criminal cases.

Thus, in addition to bankruptcies, PACER may be used to research federal civil actions, from foreclosures to environmental violation proceedings.

You should be utilizing PACER on a regular basis. Please, however, keep your searches "tight", as \$0.10 per downloaded page will be charged to Dakota Homestead. You should save downloaded documents to file as opposed to going back and forth to review documents while in PACER.

(6) MERS.

The Mortgage Electronic Registration System ("MERS") may be accessed online at <http://www.mersinc.org/>.

The MERS website, among other things, may be used to identify the servicer of a MERS mortgage for purposes of payoff or administration and to establish the MERS status of a MERS Mortgage via the use of the 18-digit MERS min number associated with the MERS mortgage.

Everything in MERS revolves around the 18-digit MERS min number located on the face of the mortgage at origination or as contained on a Mortgage Assignment to MERS if the mortgage did not originate with MERS.

(7) Wikipedia – Updated List of bank mergers and acquisitions in the United States.

I use Wikipedia all the time as an online initial search tool to find general information on all sorts of subjects. Please be advised, I ALWAYS MAKE SURE I CONFIRM WHATEVER Wikipedia PURPORTS TO DISCLOSE WITH AT LEAST ONE OTHER SOURCE before assuming I have found reliable information / facts.

I primarily use the following specific site on Wikipedia entitled "List of bank mergers in the United States" in connection with attempting to establish the identity of or the relationship between lenders of record http://en.wikipedia.org/wiki/List_of_bank_mergers_in_the_United_States.

If I cannot find specifically what I am looking for, this site usually gets me pointed in the right direction using other specific searches in Wikipedia or Google.

(8) ALTA.

The American Land Title Association (“ALTA”) may be accessed online at <http://www.alta.org/>.

I believe all Dakota Homestead issuing agents are ALTA members, and thus have a unique Login Name and Password, which is required to access the substantive materials and information provided on the ALTA website.

ALTA membership offers Patriot Act searches, Policy forms, a Membership Directory, Errors and Omissions Insurance resources, Advocacy for the title industry and education, among other resources.

(9) SDLTA.

The South Dakota Land Title Association (“SDLTA”) may be accessed online at <http://sdlta.org/>.

The SDLTA website offers listings of membership, officers, committees, city and county listings, SDLTA by-laws, the minutes from the most-recent SDLTA meetings, and links to following websites: American Land Title Association, South Dakota Abstracters’ Board of Examiners, STATE BAR OF SOUTH DAKOTA 2002 TITLE STANDARDS, South Dakota Secretary of State, and South Dakota Codified Laws.

(10) South Dakota Abstracters’ Board of Examiners.

The South Dakota Abstracters’ Board of Examiners (“SDABE”) may be accessed online at http://dlr.sd.gov/bdcomm/abstracters/land_title_guide.aspx.

The SDABE website offers a list of board members, information of how to file a complaint, a page of “Frequently Asked Questions”, fee schedules including countersignature fees, forms, regulations, licensing requirements and useful links, among other things.

OTHER USEFUL ONLINE SITES / DISCUSSION NOTES:

TAX DEEDS = UNMARKETABLE TITLE (PERIOD)

AND WHAT SOUTH DAKOTA LAW REQUIRES TO CURE THAT UNMARKETABILITY

Please be advised that it does not matter if all statutory notices, procedures, actions and requirements associated with a county's taking of land through tax deed proceedings as a result of the owner's failure to pay real estate taxes were completed flawlessly.

The bottom line is that though county tax deeds convey title, county tax deeds simply do not convey marketable title! **Tax deed = unmarketable title.**

26-02. Effect of tax deed.

A valid tax deed clothes the grantee with a new and complete title under an independent grant from the sovereign authority of the state, extinguishing all prior titles.

Authority: SDCL Ch. 10-25.

Note: *The tax deed does not convey marketable title.*

Why is title derived from a tax deed unmarketable? The answer lies in the following SD title standard, which also contains the accepted methods under SD law relative to curing the unmarketability of title derived from tax deed issuance.

26-01. Tax title.

Neither a tax deed issued pursuant to any of the provisions of [SDCL 10-25-12](#), nor any combination of such deeds, terminates the rights of the **owner** who owned it prior to its sale for taxes, unless there is:

- (a) A judgment in a quiet title action;
- (b) A marketable Record Title Affidavit pursuant to [SDCL 43-30-7](#) (using as a "root of title" the tax deed from the county);
- (c) A deed conveying the prior owner's interest.

Authority: SDCL ch. 21-42, 10-25-12 and 43-30-7.

Note: Under [SDCL 10-25-13](#), the issuance of a tax deed to the county constitutes *prima facie* evidence of the regularity of the proceedings leading up to the issuance of the deed, including the expiration of the period for redemption. Under [SDCL 10-25-18](#), the expiration of the redemption period cuts off all of the prior owner's rights in the property and results in a waiver of all errors in the tax sales proceedings except jurisdictional defects.

There is no way of knowing what the courts will consider to be a jurisdictional defect, but historically they have been exceedingly stringent in requiring exact and precise compliance with all of the statutory steps in the tax sales proceedings. Moreover, [SDCL 21-42-1](#) specifically contemplates and authorizes a quiet title action by a prior owner against the tax deed grantee of the county, which seemingly indicates a legislative lack of confidence in the regularity of tax sales proceedings. For those and other reasons, tax titles are considered inherently suspect in the absence of some curative action or occurrence--such as appropriate use of the provision of the Marketable Record Title Act--to extinguish the title of the party or persons who owned the real property prior to its being lost for unpaid taxes.

Beyond all of this, however, (except in the rather rare case when a third party and not the county is the purchaser at the original tax sale), the prior owner and other persons have various statutory

rights of re-purchase or preemptive purchase under [SDCL 21-42-10](#) as long as the property remains in the hands of the county. In theory the sale of the property by the county to a third party should terminate these statutory rights, but again historically the courts have been lenient in allowing the holders of such rights to attack the title of purchasers from the county.

Therefore, the unmarketability of tax deed title is in regard to the possible continuing and surviving rights in the land held by the prior owner who lost the land for failure to pay county real estate taxes as a result of potential and unknown jurisdictional defects combined with a legislative lack of confidence in the regularity of tax sales proceedings generally.

Simply, the Courts and Legislatures have historically given prior owners wiggle room / a second chance to re-acquire property lost to tax sale deeds because of Constitutional, due process and related concerns. After all, our founders and the framers of the Constitution were primarily concerned with protecting individuals, and their right to own property, from the tyranny of government.

Commitment considerations. In the event your examination of title of the proposed insured property discloses title based upon a tax deed, you must make the following special exception and requirements in the Commitment:

Exception:

Any claims or liabilities arising from the unmarketability of title to the proposed insured land derived from Treasurer / County tax deed to _____ dated _____ and recorded _____ in Book _____, Page _____, _____ County, SD public land records.

Requirement:

In order to cure the unmarketability of title derived from the issuance of the Treasurer / County tax deed described in special exception ____, the Company requires compliance with any of the following actions:

- (a) A judgment in a quiet title action against _____, being the prior owner(s) of the subject property before it was sold by the County for failure to pay county real estate taxes, and any other relevant parties;
- (b) A marketable Record Title Affidavit pursuant to [SDCL 43-30-7](#) (using as a “root of title” the tax deed from the county), if applicable; or
- (c) A deed from the prior owner(s) of the subject property before it was sold by the County for failure to pay county real estate taxes.

NOTE regarding use of Affidavit of Possession to cure tax title defect.

Please be advised, and as SD title standard 26-01 states, the required 23-year unbroken chain of title required for effective use of an Affidavit of Possession will commence only upon the County’s deed (tax deed or otherwise) of the tax sale property to a private person or entity (and not upon the Treasurer’s deed to the County, which is a regular occurrence).

As long as the property remains “in the hands of the County” (Treasurer specifically or County generally), the “root of title” necessary for the recording of an Affidavit of Possession will remain elusive. Root of title in this case must be derived from title derived from the party who acquired it from the Treasurer or County.

CONTRACTS FOR DEED

Insuring the Contract Vendee Estate

***** PLEASE BE ADVISED that in all cases - you must obtain a complete copy of the contract to be insured for the reasons stated below!!! *****

In order to issue any policy of title insurance relative to the vendee's interest in a Contract for Deed, it is important to review the document to determine that it complies with the minimum writing and execution requirements set forth in South Dakota Codified Law § 53-8-2 (Contracts required to be in writing and signed by the parties thereto = *Statute of Frauds*).

SDCL 53-8-2. Contracts required to be in writing -- Statute of frauds. The following contracts are not enforceable by action unless the contract or some memorandum thereof is in writing and subscribed by the party to be charged or his agent, as authorized in writing:

- (1) **An agreement that by its terms is not to be performed within a year from the making thereof;**
- (2) An agreement made upon consideration of marriage, other than a mutual promise to marry;
- (3) **An agreement for sale of real estate or an interest therein, or lease of the same, for a period longer than one year. However, this does not abridge the power of any court to compel specific performance of any agreement for sale of real estate in case of part performance thereof; and**
- (4) An agreement for a loan of money or for an extension of credit, which agreement may be enforced by a beneficiary for whom the agreement was made, including, but not limited to, vendors of agricultural goods, services or products. A loan or an extension of credit made pursuant to § 51A-12-12 or chapter 54-11 is specifically exempt from the provisions of this section.

Requirement to Record at least a Memo of Contract.

Dakota Homestead does not require the originally executed Contract for Deed to be recorded in its entirety (although that is preferred), but **ALWAYS** requires that a Memorandum of the contract or "short form" of the contract, at the very least, be recorded in order to insure the contract. It is not possible to insure an unrecorded Contract for Deed or Memorandum thereof.

Full Contract required for Review and for File.

Although Dakota Homestead does not require the original executed Contract for Deed to be recorded in its entirety, Dakota Homestead does require the Title Company to require, receive, review, and include in its file, a copy of the fully executed and entire original Contract for Deed. *Please be advised that any terms, conditions, easements, reservations or other matters present in the full contract which may affect title, but may not be shown / described in the Memo of Contract, need to be shown as exceptions from coverage in Schedule B-II of all Commitments / Policies.*

OWNER & LENDER COMMITMENTS - SCHEDULE A CONSIDERATIONS

1. The effective date of the Commitment will be the date of your title search. In the event the Contract or Memorandum thereof is recorded in the land records at the time of the Commitment,

and you will only be issuing an Owner's policy, the effective date of the Commitment will be the date the Contract / Memo was recorded in the land records.

2. The Policy to be issued at Item 2 a. will likely be an "ALTA Owner's Policy" – "Standard Coverage" (likely), and the Proposed Insured stating the name(s) of the buyer(s) under the contract, the contract vendee(s).

Item 2 b. may also be an "ALTA Loan Policy" – "Extended or Standard Coverage", and the Proposed Insured stating the name of the mortgagee (that holds /will hold the insured mortgage against the Contract Vendee estate).

3. Item 3 of Schedule A, stating "*the estate or interest in the land described or referred to in this commitment...*" should be answered by stating:

The vendee's interest under a Contract for Deed, to be produced.

Note:

If the Contract / Memo is already of record at the time of the Commitment, then Item 3 of Schedule A should be answered:

The vendee's interest under Contract for Deed between _____ and _____ dated _____ and Recorded _____.

4. Item 4 of Schedule A that states "*Title to the FEE SIMPLE estate or interest in said (change this "said" to "the" if you can) land is at effective date hereof vested in:*" should be answered, in all cases, as follows:

Name(s) of Fee Simple Owner(s) / Contract Seller(s).

5. Item 5 of Schedule A. should describe the insured land as contained in the order for title insurance, as described in the unexecuted to be insured Contract, or as described in the recorded Contract. If the land is not described by a proper (insurable) legal description, you must make an appropriate exception in Schedule B of the Commitment/Policy as you would normally do in any other case. (You may require the property to be surveyed or platted if necessary.)

OWNER & LENDER COMMITMENTS - SCHEDULE B CONSIDERATIONS

In addition to routine Owner & Lender Schedule B considerations ...

6. The fee simple owner / vendor must execute and submit an affidavit ("Seller's Affidavit") wherein he states that there are no other outstanding title matters pertaining to this parcel of real estate that remain unrecorded. Make this a requirement in the Commitment.
7. The title of the subject property must be examined to make certain that the Contract vendor (owner) holds/held fee simple title to the land at the time the Contract was or will be entered into.
8. In addition, all matters affecting fee simple title to the subject property (Seller's real estate taxes, open mortgages, easements, liens) must be shown as exceptions and required to be released or subordinated if necessary.

9. Like always, the buyer / contract vendee must also be required to complete a “Buyer’s / Owner’s Affidavit” and must also be searched relative to judgments and liens and such matters, if any, should be excepted from coverage.
10. You must require to receive a complete copy of the fully executed Contract for review and to be kept in the title file. Any matters purporting to affect title under the full Contract (which may not be disclosed in the Memo) must be excepted from coverage (grants of easement, reservations, etc. and so on.)
11. The policies will only insure the vendee has a valid and enforceable interest in the real property having a given priority OR that the lender has a valid mortgage lien against the vendee’s estate having a given priority. No coverage is afforded to the insured that the vendor will perform his obligations under the Contract or will deliver a deed upon the completion of the Contract for Deed. Therefore, the following exception must appear in Schedule B of the commitment:

The policy will not insure the Insured against loss or damage as a result of the failure of the vendor to perform its obligations under the terms of the Contract or to deliver a properly executed deed to the real property described in Schedule A hereof in completion of the Contract.

This same exception would appear in all Policies too.

12. Also a Contract for Deed is an “executory agreement” by definition; therefore it is subject to disaffirmance in certain cases under the Bankruptcy Act. It is necessary that the following exception appear in Schedule B of the commitment:

The Policy will not insure consequences of attack of the estate insured herein, under any creditor’s rights laws, state insolvency laws or federal bankruptcy law.

This same exception would appear in all Policies too.

13. Finally, the policies will not insure the performance of either party of the duties and obligations of their contractual agreement. Therefore, the following exception must appear in Schedule B:

The Policy will not insure terms and conditions of the subject Contract for Deed. Further, the Policy will not insure against loss or damage resulting from the termination or forfeiture of the vendee’s interest by reason of his non-compliance with any of the duties or obligations imposed upon him by the subject Contract for Deed.

This same exception would appear in all Policies too.

OWNER’S & LENDER’S POLICY - SCHEDULE A CONSIDERATIONS

The *effective date of the Owner’s Policy* will be the date the Contract or Memorandum thereof is recorded in the land records.

The *effective date of the Lender’s Policy* will be the date the insured Mortgage encumbering the

contract vendee estate is recorded in the land records.

1. Item 1 of the Owner's Policy "*Name of the Insured*" should state ***the name(s) of the Contract Vendee(s).***

Item 1 of the Lender's Policy "*Name of the Insured*" should state ***the name of the Lender that holds the insured mortgage against the contract vendee's estate.***

2. Item 2 of the Owner's Policy "*The estate or interest in the Land which is covered by this policy is:*" should be answered:

The vendee's interest under Contract for Deed between _____ and _____ dated _____ and Recorded _____.

Likewise, Item 2 of the Lender's Policy "*The estate or interest in the Land that is encumbered by the Insured Mortgage is:*" should be answered:

The vendee's interest under Contract for Deed between _____ and _____ dated _____ and Recorded _____.

3. Item 3 of the Owner's & Lender's Policies, which generally states something like "*Title is vested in:*" should be modified, if necessary, to:

Title to the vendee's estate or interest in land covered by this policy is vested in:

And answered:

Names(s) of Contract Vendee(s).

4. Item 4 of the Lender's Policy "*The Insured Mortgage and its assignments, if any, are described as follows:*" should be answered like normal by giving the applicable party, date and recording information of the insured mortgage:

Real Estate Mortgage from _____ to _____ in the principal sum of _____ dated _____ and Recorded _____.

5. Item 4 of the Owner's Policy and Item 5 of the Lender's Policy stating "*The Land referred to in this policy is described as follows:*" should be answered by stating the legal description of the property as contained in the contract and/or as duplicated in the insured mortgage.

Please make sure that the legal description of the land in the mortgage is the same as the legal description of the land as it appears in the Contract. Take exception in Schedule B to any discrepancies or errors occurring in the legal description in the mortgage as compared to the legal description in the Contract.

OWNER'S & LENDER'S POLICY - SCHEDULE B CONSIDERATIONS

6. Take exception to all matters still affecting title to the Fee Simple / Owner Estate that were prior to the Contract and/or insured Mortgage.
7. Take exception to all matters still affecting title to the Contract Vendee Estate, including the insured Mortgage, if any.
8. Take exception(s) to any terms, conditions, easements, reservations or other matters present in the complete Contract which may affect title, and which may not be shown / described in the recorded Memo of Contract.
9. As contained in the Commitment, place the following additional exceptions in all policies:

The policy will not insure the Insured against loss or damage as a result of the failure of the vendor to perform its obligations under the terms of the Contract or to deliver a properly executed deed to the real property described in Schedule A hereof in completion of the Contract.

The Policy will not insure consequences of attack of the estate insured herein, under any creditor's rights laws, state insolvency laws or federal bankruptcy law.

The Policy will not insure terms and conditions of the subject Contract for Deed. Further, the Policy will not insure against loss or damage resulting from the termination or forfeiture of the vendee's interest by reason of his non-compliance with any of the duties or obligations imposed upon him by the subject Contract for Deed.

BUSINESS ENTITY REVIEW

When dealing with legally formed (incorporated or filed) businesses entities for profit, being:

1. Corporations
2. Limited Liability Companies
3. Limited Partnerships and Limited Liability Partnerships

(NOTE: Sole proprietorships and general partnerships are not covered in this handout but will be discussed at this educational);

two (2) title considerations must be raised and resolved in connection with that business entity's sale, purchase or mortgage of South Dakota real property:

- (1) LEGAL EXISTENCE, and**
- (2) AUTHORITY TO ACT**

Of these, and because a conveyance or encumbrance of real property to / from a non-existent person or entity is *VOID*, the legal existence of such a business entity is the most important for purposes of title insurance.

LEGAL EXISTENCE:

Please remember that incorporation means that a corporation / LLC / LP has formed and legally created itself or come into legal existence by filing Articles of Incorporation, or the equivalent, along with other required documents and fees, with its home state's Secretary of State (or equivalent). When a legal business entity incorporates in SD, it is known as a "domestic corporation / LLC / LP".

A corporation / LLC / LP that incorporates in a state other than SD is known as a "foreign corporation / LLC / LP". Thus, a foreign corporation / LLC / LP does not file with the SD Secretary of State to exist or to obtain legal capacity to contract (it obtains those things through its state of organization). Rather, a foreign corporation / LLC / LP *may* file with the SD Secretary of State in order to obtain the right to transact business in South Dakota (obtain a Certificate of Authority from the SD Secretary of State as a foreign entity licensed to do business in SD).

You must, therefore, search the SD Secretary of State's website in order to determine that a SD domestic corporation / LLC / LP has properly incorporated and obtained legal existence before insuring any transaction of that SD domestic business entity.

You must also search the Secretary of State's website of the state of which the foreign business entity has incorporated and obtained legal existence before insuring any transaction of that foreign business entity. If you do not know which state the foreign business entity has incorporated, request it provide you with a current "Certificate of Existence" or the equivalent.

Note on Foreign Business Entities. Please be advised that is NOT necessary, for purposes of title insurance, that a foreign business entity obtain a Certificate of Authority from the SD Secretary of State as a foreign entity licensed to do business in SD. It is only relevant that foreign business entity be properly incorporated in its state of domicile and that it be in GOOD ACTIVE STANDING in its state of domicile.

LEGAL STATUS.

DOMESTIC - Because of SD state law, SD domestic corporation's / LLC's / LP's legal status may be *in good standing, delinquent, or inactive* if they are SELLING SD real property. If they are selling SD land, their legal status doesn't really matter.

If the SD corporation / LLC / LP, however, is buying or mortgaging SD real estate, their status must be *in good standing* in order to insure such a transaction.

FOREIGN - It is necessary in all cases that a foreign business entity be in GOOD ACTIVE STANDING in its state of domicile regardless if it is selling, buying or mortgaging SD real property.

AUTHORITY TO ACT.

While there are multiple ways to establish and ensure the corporation / LLC / LP has the necessary consents and authority to engage in the proposed transaction, to keep things as easy as possible, just require the following in all instances:

Corporations:

The Company requires ABC, Inc. to submit a copy of the a resolution from its Board of Director's that authorizes the proposed transaction and designates the applicable officer(s) authorized to sign all title related documents on behalf of the Corporation.

In addition, the Company requires the proposed insured deed / mortgage be properly executed the applicable officer(s) in his / her capacity as officer(s) of ABC, Inc. and that the deed / mortgage contain a proper corporate acknowledgement.

LLCs:

The Company requires ABC, LLC to submit a written statement, in the form of a resolution, that authorizes the proposed transaction and designates the applicable member(s) or manager(s) authorized to sign all documents on behalf of the LLC. The Company requires the written statement to be signed by all of the members of the LLC.

In addition, the Company requires the proposed insured deed / mortgage be properly executed by the applicable member(s) or manager(s) in his / her capacity as member(s) or manager(s) of ABC, LLC and that the deed / mortgage contain a proper limited liability acknowledgement.

Partnerships (General, LPs, LLPs):

The Company requires ABC, LP to submit a written statement, in the form of a resolution, that authorizes the proposed transaction and designates the applicable General Partner(s) to sign all documents on behalf of the LP. The Company requires the written statement to be signed by all General Partners of the LP.

In addition, the Company requires the proposed insured deed / mortgage be properly executed by the applicable General Partner(s) in his / her capacity as General Partner of ABC, LP and that the deed / mortgage contain a proper partnership acknowledgement.

What if we do not get that “Resolution”? Well, the SD is on our side, which is implied via use of the 2nd requirements shown above and is based upon the following SD law / title standards that are “on our side” in this regard:

5-27. Corporate deed.

The corporate seal or corporate acknowledgment of any corporation attached to a deed, mortgage, assignment of mortgage, release of mortgage or other instruments is prima face evidence that an officer was duly authorized to execute the instrument in behalf of the corporation and that the person has authority. **Authority:** [SDCL 43-25-21](#).

5-33. Conveyance--limited liability company, authority presumed.

Any instrument duly executed and acknowledged by an authorized person of a limited liability company may be presumed to be within the authority and duly authorized by the limited liability company. **Note:** "Manager" includes any one of the following: President, Vice President, Secretary, Treasurer or Manager of a limited liability company.

5-34. Execution--corporate or limited liability company.

A title examiner may presume the power and authority of any officer of a corporation, except a bank, if a corporate acknowledgement or corporate seal is made a part of the document. Upon review of the Articles of Organization, a title examiner may presume the power and authority of any manager of a manager-managed limited liability company or member of a member-managed limited liability company to execute and acknowledge a document affecting property, unless the Articles of Organization limit the authority.

Authority: [SDCL 43-25-21](#) and [47-34A-301](#).

4-06. Conveyances by partnership--when proof of authority not required.

In the absence of knowledge or notification to the contrary, no affirmative proof of authority need be required of a general partner apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership.

Authority: UPA Sec. 301. Former Law [SDCL 48-2-1](#) and [48-2-2](#).

Caveat: UPA Sec. 303 provides for the recording of a statement of partnership authority. Recording of this statement in the office of the register of deeds of the appropriate county provides constructive notice of authority, or lack thereof, under the act. UPA 303(e.).