UNDERWRITING ISSUES

EVERYDAY A NEW QUESTION!

A Webinar
By

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SURVEYS

Case 1 T-47 Affidavit for use with prior survey – Who can sign?

Discussion

Good morning. I have attached an existing survey that our customers would like to use at closing. The seller was foreclosed on so their credit union now owns the property. Will you allow the survey to be used with a T-47?

Yes, but who is going to sign the T-47 that has actual knowledge of what has or has not changed on the ground?

I was wondering about that. We closed the file when the seller purchased however they have been foreclosed on. I am not sure who we could get to sign the T-47. Any suggestions?

Maybe a neighbor that's lived there for a long time. Maybe even the original loan officer or other lender person that dealt with the foreclosure and knows what is and is not out on the property.

The buyers lender just called me and proposed the following in reference to the T-47:

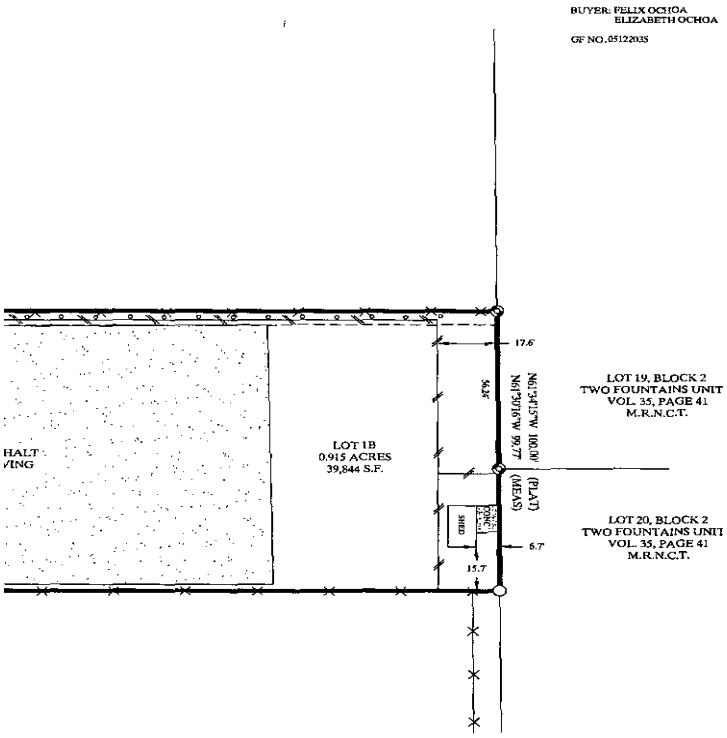
"Will we allow the processor for the current loan that the buyer is obtaining to drive out to the property with a copy of the existing survey and compare it to the actual property?" This is the first time that I have ever been asked this question. What are your thoughts on this?

Sorry, no. That is not an acceptable procedure or person to complete the affidavit.

Case 2 Fence & slab encroachment – possible adverse possession

Discussion

Just talked to the agent and he says that the owner of Lot 1C is the same person that is purchasing Lot 1B (I'll confirm by getting a copy of the deed) He's more concerned with the owners of Lots 19 & 20 who have fenced out about 20' of this property. Lot 20 has built a shed with a concrete slab……what do we do in this scenario?



Is there going to be a loan and a loan policy?

Cash deal.

Yeah!. You just except in the OTP to the party wall with adjacent lot and common roof and you except to "rights of adjoining land owners on the northeast side of land lying between the fence and the property line along with the shed and concrete located therein as shown on survey dated January 18, 2012 by _____, RPLS." If this is not acceptable to buy he and seller will have to renegotiate their deal or get boundary line agreement with those parties that loan lots 19 and 20 and we will then probably have to except to those boundary line agreements.

Foreclosure

Case 3 Subsequent loan to buyer at foreclosure

Discussion

Jose & Nelda Espinoza purchased the subject property on 7/06 and executed a first and second lien. The first lien was foreclosed on 12/6/2011 of which I have attached a copy of the Substitute Trustees Deed. Douglas D. purchased the property at the foreclose sale and is now borrowing money against the property. I am not sure if he purchased title insurance at the time of foreclosure. Can we insure this transaction? There is also an AJ (copy attached) against Jose Espinosa that I found and it was before Jose & Nelda Espinoza purchased the property in 2006. The Espinoza's filed bankruptcy in 2007 but I did not see anything listed in the schedules from Charles Spivey, the plaintiff in the AJ. I'm not sure if the Jose Espinosa in the AJ and the Jose Espinoza from the foreclosure are one and the same. If we can insure do I need a release of the AJ? Please advise?

How much is he trying to borrow on the property? Do you know why he is borrowing money? Does D. have complete possession of the property? Have the Espinosa's left the property? Do you or your company know D. and his reputation?

The loan amount is for $118,500. I do not know why he is borrowing the money or if the Espinoza's have vacated the property. This is the first file for Mr. D. that we have. The order came from a new loan officer at local bank.

I am not interested in insuring a cash out loan on a foreclosure barely one month old. Sorry. Bruce.

Case 4 Deed in Lieu & subsequent sale by Lender

Discussion

We have a transaction where Broadway Bank is selling a lot that was recently conveyed to them by a builder by Deed in lieu of Foreclosure. It is our understanding that the property is currently vacant and unimproved. Does NITIC require an Estoppel Affidavit from the prior owner in this instance? Please advise.

Probably not. Does the Deed in Lieu look "lawyered?" How long ago was it filed? If we do it within 4 years of filing, Broadway Bank must give a GWD or we won't insure.

It includes the standard language and was just done in December.

How much is the sale now?

$52,500

OK with GWD.

Guaranty Fee

Case 5 Only on Owner's and Loan Policies

Discussion

Am I reading this rule correctly? Are the agents supposed to be charging the guaranty fee on endorsements and Binders?

P-30. Guaranty Assessment Recoupment Charge.

Whenever an assessment has been made by the Commissioner upon title insurance companies (the "Assessed Companies") pursuant to Section 7 of Article 9.48, Insurance Code, and the Board has promulgated a special additional charge of up to 1% of a subsequent year's premium rates, pursuant to Section 15 of Article 9.48, to permit the Assessed Companies to recoup a portion of such assessment, the special additional charge shall be collected, distributed and accounted for in the following manner: (1) The special additional charge (hereinafter referred to as the "Guaranty Assessment Recoupment Charge" or "Recoupment Charge") shall be collected upon every title insurance policy, whether issued separately or simultaneously, and every other title insurance insuring form for which a premium is charged, including, but not limited to, endorsements and construction loan binders. It shall be collected directly from the persons paying the premiums for the policies and forms by all title insurance agents (including all insurers' direct operations and all title attorneys as defined in Section 2(d), Article 9.56, Insurance Code) and shall be remitted by such agents to the Texas Title Insurance Guaranty Association (the "Association") quarterly, along with the agent's remittance form, in accordance with the following schedule:

(a) those funds collected during the first calendar quarter

shall be remitted on or before the next May 1;

(b) those funds collected during the second calendar quarter shall be remitted on or before the next August 1;

(c) those funds collected during the third calendar quarter shall be remitted on or before the next November 1; and,

(d) those funds collected during the fourth calendar quarter shall be remitted on or before the next February 1.

You are reading the rule correctly, BUT you have the wrong rule. You are looking at P-30 which is the rule for a "Guaranty Assessment Recoupment Charge." There is no such "Recoupment charge" currently in effect at this time. That only happens after there has been a failed underwriter (remember Title USA in the late 1980s).

Our current assessment is a "Guaranty fee" not a recoupment. The current fee is charge to build up the Guaranty Fund which is used to fund state auditors and oversight of failed agents and to insure escrow funds. P-30 is currently not applicable. There is no Procedural Rule that addressed the current fee.

See Section 2602.151 Payment of Fee, of the Texas Insurance Code, which states:

Sec. 2602.151. PAYMENT OF FEE. (a) An agent or, if there is no agent, the title insurance company shall pay the association a quarterly guaranty fee for each owner or mortgagee title insurance policy that the agent or company is required to report on its statistical report to the department.

Construction

Case 6 Spec. home – Binder vs. Loan Policy

Discussion

Lender asks, "Can we buy an Interim Construction Binder since LRM is building this as a spec house to sell?"

Is Les Maley the actual contractor or will someone else be doing the work?

LRM Realty and Restoration, which is a DBA of Les Maley is the builder/contractor and owner of the property.

See P-16 **Mortgagee Title Policy Binder on Interim Construction Loan (Interim Binder)**---The Mortgagee Title Policy Binder on Interim Construction Loan (Interim Binder) shall be used only with respect to interim construction loans in which it is contemplated in good faith that the Company issuing the Interim binder shall be asked to issue its Mortgagee Policy or Policies; issued simultaneously with Owner Policy or Policies of Title Insurance or at the basic rate, on a permanent loan or loans covering the identical property (in one or more parcels) when improvements are completed, but which permanent loan or loans may be made by a mortgagee or mortgagees other than the mortgagee named in the Interim binder. The use of such Interim Binder shall be limited solely to interim construction loans and pledges of the interim construction notes and liens wherein: (i) the obligor on the indebtedness is an original contractor who is also the record owner of the land upon which improvements are to be constructed; and, (ii) the security document for the indebtedness is not in the form of a Mechanic's Lien Contract.

Construction loans may include sums advanced for acquisition of land and/or to take up, renew or satisfy prior existing liens on land upon which construction is to occur.

Interim Binder shall not be issued on vacant lots or tracts, except in connection with the immediate construction of improvements thereon, nor shall such Interim Binder be issued after completion of improvements to which it relates, but this does not prohibit the issuance of Extensions after

completion of improvements. In all cases not specifically enumerated in this rule, a Mortgagee Policy shall be used.

The Company shall be required to show all subordinate liens in Schedule B-Part 2 of the Interim Binder, but a statement may be made therein that such lien(s) is subordinate.

Yes, this is the correct application for use of a Binder.

Case 7 Builder refuses to sign All Bills Paid Affidavit

Discussion

We have a builder that has expressed reservation when signing the Affidavit as to Debts and Lien in that if he just completed the house and the buyers are closing immediately, then there is no way for him to have received all the invoices and thus certify that all bills are paid – he does not want to lie when signing the form and has asked if there is any other document that we could substitute for the Affidavit.

Please review and advise.

No, and while I appreciate and respect his desire to be honest and truthful, in fact he must actually get every invoice, determine everyone who worked on the project and get them paid and with a lien waiver, or provide the information to closer and have the subs and suppliers paid at closing. That's the law. IF they are not paid, they have a lien and we have liability under the policies to the buyer and their lender. If the builder has good records, this should be no issue. If he doesn't have good records, we really don't want to be in a rush to close this one.

Probate/Marital Property

Case 8 Co-Executors – action by only one – Probate Code limitation

Discussion

This is a Probate. 2 brothers were appointed Co-Independent Executors and Co-Trustee's of any Trusts set out in the Estate. I'm being told that one of the brothers may have dementia, so the other brother thinks he can sign everything because he's an "independent" Executor. What would the procedure be if one of the brother's isn't able to sign? There are 4 living sons, but just two were appointed Co-Independent Executors. There was a Codicil that stated that if either of them shall fail or cease to serve for any reason, the other shall serve as sole Trustee. It also states in the Codicil the same thing about the Independent Executor, so I just need to know what we need to do.

When did the person die that created the independent executors? Is there still a need for estate administration? Have they actually been operating under the trusts?

The person died October of 2011. I really don't know how they're operating, except the Earnest Money Contract came in as the Estate of Ellis Johnson and one son signed as Independent Executor. I should be talking to him later today, so let me know what I need to ask. Since it mentions in the Codicil to the Will that if one can't

serve, the other can serve solely, would we be able to have just one of them sign?

The Codicil doesn't control once they are appointed by the court. Does the Ct Order appointing them as "co-independent executors" say anything about them operating independent of each other?

It says in the Codicil if one can't serve or ceases to serve, than the other can serve solely. I don't know how they worded it when they took the oath, but I doubt it was mentioned that they could act independently.

See Probate code section 240 immediately below. Either co-executor can act on behalf of the estate, BUT not as to sale of real property. So if one can't act, he either needs to be removed or the court needs to give specific authority to just the one.

TEX Probate CODE ANN. § 240: Texas Statutes - Section 240: JOINT EXECUTORS OR ADMINISTRATORS

Should there be more than one executor or administrator of the same estate at the same time, the acts of one of them as such executor or administrator shall be as valid as if all had acted jointly; and, in case of the death, resignation or removal of an executor or administrator, if there be a co-executor or co-administrator of such estate, he shall proceed with the administration as if no such death, resignation or removal had occurred. Provided, however, that this Section shall not be construed to authorize one of several executors or administrators to convey real estate, but in such case all the executors or administrators who have qualified as such and are acting as such shall join in

the conveyance, unless the court, after due hearing, authorizes less than all to act.

Case 9 Intestate Succession – Community vs. Separate Property

Discussion

I just want to make sure that I'm thinking correctly on this file as far as vesting is concerned…

Mom and son buy property. Son marries and has no children. Mom dies and leaves her half to son. Son's wife dies first and leaves her interest to 5 nieces and nephews. Later son dies and leaves his interest to 11 nieces and nephews (5 in common with wife, plus 6 more from his side only). Son's wife's estate is closed, as she died several years ago. Son's estate is still open.

Am I correct that Son's Estate owns an UD ¾ interest and the 5 nieces and nephews (from the son's wife's estate) own an UD ¼ interest?

Fyi: This file has been in this office since March of last year and the sales price is only $25,000… : (

Based on your facts, I assume that Mom had a will and that it was probated and that it specifically left this or perhaps all her property to son. IS that correct?

Yes

Then Son's wife never had anything to give to her nieces and nephews because the property was his only as separate property obtained (as to Mom's half) by gift, intestacy, or devise (in this case devise by her Will), unless there is some evidence that Son deeded an interest to his Wife. You didn't mention that there is any deed of record, so I am assuming there is no indication otherwise of a deed from Son to Wife. His marriage to Wife did not give Wife any community interest in the property, nor did his mother's devise to him give W any interest in the property.

So complete disposition of the property went thru Son's Will and probate, so it ends up in same devisees, all 11 with an equal share, unless Will specified otherwise.

POA

Case 10 Correct signature format/Notary Certificate

Discussion

General question: when we have had a principal sign using a POA we have them sign their name above their signature line and then on the other signature line we have them sign the person's name they are using the POA for (not their name again). We have the attorney in fact language on both lines. (yyy,

Individually and as AIF for xxx // xxx by and through my AIF, yyy)

We have a customer now that has signed HIS name TWICE . While I understand this is acceptable, which is the "correct" way?

There is no correct or incorrect way in Texas. As long as the attorney in fact either signs the principals name and then his is preprinted or he signs his own also or if he only signs his own with all else pre typed, all are OK. The biggest issue is that the Notary Certificate is both accurate as to who actually appeared before the notary and that the language of the notary tracks the signature format shown on the signature line.

Homestead

Case 11 Who must sign the Deed of Trust?

Discussion

Mortgage lender says - Attached is our request for title work on the above referenced property. Son and his wife are purchasing the house. Please note that the mother and father want to be on the title even though they are not on the loan. See comments on the attached request.

Closer asks - Just want to make sure the parents will also be signing the Deed of Trust, correct?

Mortgage lender replies - They will not be signing the deed of trust. I verified this with my closer.

Closer replies - My attorney is telling me that they MUST sign the Deed of Trust to perfect their interest in title.

Closer to underwriter – The parents are giving the buyers the down payment and just want to be on title.

If they are "on title" then the only way to create a valid lien is for them to sign the DT.

Closer questions further - **Okay, I thought I remembered our chief title officer telling me that it wasn't us needing them to sign the DT, but that it was the lender. So if the lender still insists they don't want to put them on the DT, are we still okay with insuring the loan?**

No, if the parents are on title, they must sign the DT or the lien can't be foreclosed against their interest in title.

Case 12 Release of AJ by Affidavit

Discussion

Please see attached title commitment and copy of the deed of trust.

Are we concerned about the possible abstract of judgments listing on schedule C # 6 when John Wilson only signed the deed of trust pro forma??

He is not vested in title.

Are they married?

Yes, they are married.

Then unfortunately, they didn't accomplish anything by just putting it in her name when they purchased because if they were married at the time she acquired the property, then it was community property and none of those documents assert that it was her separate property. So his AJs are an issue and must be released as to this property. Since it is homestead (I think), usually a letter to AJ holder claiming that AJ is clouding the title to homestead and require a Release of Lien will get it. There is also a "self help" RL on homestead but they will need to get an atty to help them on that.

See Property Code Sec. 52.0012 Release of Record of Lien on Homestead Property.

Case 13 Lender wants H added to title for construction loan

Discussion

I have a construction loan that I'm working on for a local bank. They want me to add the husband to title, but he has an AJ filed against him. There will be no cash out to the borrowers. Can I proceed without taking exception to the AJ?

Is this homestead already, and if so how?
Is wife already in title?

Yes. It is homestead. She purchased the property years ago with a previous husband. She remarried within the last 2 years and they are now doing some home improvements. (he moved in with her)

The AJ was originally filed in 2001, but it was recently re-filed (by another local bank).

It would be very troublesome to add him to title and would require the Tarrant Bank/ lien removal procedure by affidavit to insure without excepting to that AJ. See if you can inform lender that he can sign DT only with statement acknowledging that property is the separate property of wife and that he's signing only to establish validity of the lien against his homestead interest. That sure would be a better way to handle it.

I will. It could sure create problems for the owners down the road also.

Miscellaneous

Case 14 Trust taking title

Discussion

We are closing and insuring a sale to a Trust. We normally have the Warranty Deed prepared to name the grantee as "John Smith, Trustee of the John Smith Trust." However, the buyer of the property wants the name of the grantee to be just the name of the Trust. He says he owns property in

Colorado and Texas, and they have always just used the Trust as the grantee in the Warranty Deed.

I was asked to check with you as to your opinion on how Trusts should take title to property, and of course, the buyer wants to know why.

Your normal way of putting the title in the trustee of the trust is the only correct and insurable way for title to be put in a trust. Why??? – in Texas, a trust is not an entity like a corporation or partnership. Since it is not an entity, it cannot hold title, essentially because it doesn't really exist. It is a legal fiction that allows title be held by a named trustee(s) on behalf of someone else or some other entity. (to hold something "in trust" is a separate concept of law from the laws creating and affecting business entities)

Case 15 ICL (to be known in future as Insure Protection Letter – IPL) and Successors and Assigns language

Discussion

The mortgage lender wants the ICL to be made to Sterling Bank with Successor and Assigns language.

Please add Sterling Bank, and each successor in ownership of the indebtedness secured by the insured mortgage, except a successor who is an obligor under the provisions of Section 12(c) of the CONDITIONS AND STIPULATIONS.

This is what they want.

Let me know if there is a problem.

Bruce we are being asked to use the above language on an ICL. I know that other underwriters have approved this. What do you think?

TDI does not allow and most if not all underwriters withdrew authorization to add any successors and assigns language to an ICL around 2006/2007. The ICL form itself was changed around that time and the new language of the form itself says that whatever entity/lender actually supplies the funds to the title company is covered, thus negating any need or benefit in adding the successors and assigns language.

Note: P-7 was changed in the last 2 years to allow successors and assigns language to be put in the "COMMITMENT" and not just a policy. This is what may be causing confusion in the application.

Case 16 Insuring Rollback Taxes in Loan Policy

Discussion

Is there a new regulation regarding ag exemption with regard to the policy?

Yes and No. Procedural Rule P-20 has been and remains the main rule entitled, "Standard Exception Relating to Taxes." However in the last completed Rule Hearing (I think officially known as the 2008 hearing) Section B was added to the rule and significantly changes how we can insure for a lender in a Loan Policy against rollback taxes.

P-20 B(2) - A Company may not insure against rollback taxes unless:
a. The Company has satisfactory evidence in its file that the assessed taxes for the current year are not based on an agriculture or open-space valuation; or

b. (i) The rollback taxes have been assessed by all of the taxing authorities;
(ii) The rollback taxes are collected at closing by the Company, and
(iii) The Company will pay the roll back taxes in the ordinary course of business.

Remember that there is never a roll back amendment (deletion) in an Owner's Policy. It is only a lender coverage.

Case 17 Entities and Foreign Buyers

Discussion

Do we care if a Mexican Corporation takes title to a piece of property? And then my next question is, what happens when it goes to sell???

In itself, it is not a problem but you will have to investigate questions as to whether the corporation has been properly formed in Mexico, qualifies to do business in Texas, and whether its articles/bylaws allow the corporation to own U.S. property. All of this may involve translations and perhaps a US attorney's opinion as to the validity of the corporation.

There also may be FIRPTA issues to be addressed in a resale by the Mexican Corporation. If the Earnest Money Contract is a TREC form, closer should immediate inquire of Seller as to whether Seller will be able to comply with the requirement of furnishing Buyer with a Non Foreign Status Affidavit. Closer should immediately inform Buyer of Seller's reply.

Case 18 New procedures for correction of documents

Discussion

I have a question about correction of a document. We've read the bulletins, etc. and know we can correct the spelling of a name, etc….however….I did a closing wherein the lender changed the borrowers loan amount…prior to closing but after the Warranty Deed with Vendor's Lien had been prepared.

This was one of THOSE closings…straight from as far down south as well…HELL. IT WAS THE CLOSING FROM HELL!

It took all week….anyway….The Deed of Trust was recorded with the correct loan amount but the WDVL was not. Can I make the correction and re-record without having to get the sellers re-sign?

There is no definitive answer to your question in the terminology of the new law on correcting docs. I would be of the opinion that the numerical mistake is a "clerical" mistake that is non-material when looked at with all docs signed, that being a note that disagrees in amount, and therefore correctable by

you "a person with personal knowledge of the correct amount." But remember, even if you make the correction without signatures of the parties to the instruments, you still have to provide each party to that instrument and the lender, with notice that you have filed such correction.

AWESOME! THANKS!!!

Case 19 Property Code determination of Lease with Option is a Contract for Deed

Discussion

I have a file they want to close today. We are issuing a Leasehold policy. The purchaser is doing a 3 year option to purchase.

Is this commercial property? Or could it be homestead?

Here is the option agreement combined with a three year lease, which we discussed. It appears to come under Section 5.062 (a) (2) and (f) of the Texas Property Code. I don't think it complies with the statutory requirements since this is residential property. The question is whether or not you think that creates an underwriting issue. The policy to be issued would be a leasehold policy for $40,000.00. There are two underlying purchase money mortgages on the property, created by the seller.

Thanks for you help.

These are some of the terms of the "Option to Purchase Real Estate:

a. Seller does hereby grant to Purchaser the option to purchase the Property,
b. Purchaser shall pay to Seller the monthly sum of _____ by payment of _____ to Seller's first lien mortgagor and _____ to Seller's second lien mortgagor.
c. As additional consideration, Purchaser shall also be liable for all property taxes accruing during term of Option.
d. Purchaser shall also pay Seller the sum of $4,000 as additional consideration for the at-issue option to buy.
e. The term of the option shall be 36 months.
f. Upon exercise of the Option, this Agreement shall constitute an agreement of purchase and sale.
g. This Agreement shall be construed pursuant to the laws of Virginia.

Texas Property Code

§ 5.062. APPLICABILITY. (a) This subchapter applies only to a transaction involving an executory contract for conveyance of real property used or to be used as the purchaser's residence or as the residence of a person related to the purchaser within the second degree by consanguinity or affinity, as determined under Chapter 573, Government Code. For purposes of this subchapter, and only for the purposes of this subchapter:

(1) a lot measuring one acre or less is presumed to be residential property; and

(2) an option to purchase real property that includes or is combined or executed concurrently with a residential lease agreement, together with the lease, is considered an executory contract for conveyance of real property.

(f) Notwithstanding any other provision of this subchapter, only the following sections apply to an executory contract described by Subsection (a)(2) if the term of the contract is three years or less and the purchaser and seller, or the purchaser's or seller's assignee, agent, or affiliate, have not been parties to an executory contract to purchase the property covered by the executory contract for longer than three year:

(1) Sections 5.063-5.065;

(2) Section 5.073, except for Section 5.073(a)(2); and

(3) Sections 5.083 and 5.085.

I too believe that this option contract comes under the provisions of the Property Code section cited above and

therefore raises an issue as to the validity of the lease as well as the option. I know we would not be insuring the option, but the severity of the penalties with non compliance with the Contract for Deed provisions make me unwilling to insure a leasehold policy to buyer based on this agreement. Additionally the Virginia form is problematic. If they want coverage, they need to consult a Texas attorney and have a lease contract that contains insurable terms and removes the "option" from converting this to a Contact for Deed.

Case 20 Underwriter's portion of the premium

Discussion

Bruce do you know of anything in the title manual that says that an Agent does not have to pay the underwriter the 15% split on an additional chain charge collected under Rate Rule R-9?

NO.

So they do have to pay that percentage to the underwriter?

Yes, it is just part of the overall premium collected in that particular transaction and subject to the underwriter percentage established by TDI. If title insurance premium is collected for issuance of any title insurance form, there is no "exception" where the underwriter is not entitled to 15% of such premium collected. There are two exceptions that deal with allocating the agents's portion of the premium (85%) to only the agent that completed the title work in the county where the property is located. (R-25 and R-26)

THE END!