

# **TERTIARY FACULTATIVE REINSURANCE AGREEMENT (TYPE II)**

## **(FORM T-21.2)**

These facultative reinsurance provisions, including Schedule 1, constitute the Tertiary Facultative Reinsurance Agreement entered into by and between Ceder and each Reinsurer shown in Schedule 1.

### **PROVISIONS**

WHEREAS, Ceder has assumed a title insurance risk pursuant to a Reinsurance Agreement reinsuring the policy or policies shown in Schedule 1, herein collectively called the Policy; and

WHEREAS, Ceder desires to retain, unceded, a portion of the Secondary Loss Risk under the Reinsurance Agreement and to cede and reinsure all or a part of the balance of the Secondary Loss Risk (herein called the Tertiary Loss Risk) with the Tertiary Reinsurers in the amounts and proportionate shares shown in Schedule 1; and

WHEREAS, Ceder and Reinsurer desire to arrange for the allocation of protection to the party entitled to the protection of the Policy, herein called the Insured; and

WHEREAS, Reinsurer desires to assume its share of Tertiary Loss Risk shown in Schedule 1.

NOW, THEREFORE, it is mutually agreed between Ceder and each Reinsurer as follows:

#### **1. Ceder's Cession and Warranty**

Ceder, to induce Reinsurer to accept the offer of reinsurance, represents and warrants that Ceder has made disclosure of (a) the Policy being reinsured, and (b) any extra hazardous risk of which Ceder has actual knowledge. Ceder shall immediately upon issuance of the Policy forward a conformed copy to Reinsurer and pay its premium for reinsurance.

Ceder cedes to Reinsurer the Reinsurer's coordinate and proportionate share of the Tertiary Loss Risk shown in Schedule 1 and Ceder shall retain without reinsurance hereunder the entire amount of the Secondary Loss Risk shown in Schedule 1, and any unceded portion of the Tertiary Loss Risk.

#### **2. Reinsurer's Assumption**

Reinsurer assumes its coordinate and proportionate share of Tertiary Loss Risk shown in Schedule 1 and not the coordinate and proportionate share, if any, of Ceder or of any other Reinsurer.

The liability of Reinsurer shall begin simultaneously with that of Ceder under the Policy, without notice of the issuance of its Policy or payment of the reinsurance premium.

The liability of Reinsurer and any loss payable by Reinsurer under this Agreement shall be limited to expressed contractual liability of Ceder under the Policy, not including punitive or exemplary damages, and does not include any other contractual or any noncontractual liability of Ceder.

#### **3. Direct Access**

Provided Insured shall give to Reinsurer notice of any claim under the Policy within a reasonable time after notice of the claim is given to or received by Ceder and is pursuing its remedies under the Policy against Ceder unless prevented by law or regulation, then in the event that under the terms of the Policy Insured has sustained a loss or losses which, in the aggregate, exceeds Ceder's Primary Loss Risk, the liability of Reinsurer under this Agreement shall be extended to and in favor of Insured. Failure to so notify as provided in this paragraph shall not defeat the rights of the Insured hereunder unless Reinsurer shall establish that it was actually prejudiced by the failure, and then only to the extent of the prejudice. Thereafter, if Insured requests payment of Reinsurer's liability under this Agreement directly to Insured, then this Agreement may be enforced by Insured directly against Reinsurer to the extent of Reinsurer's liability to Ceder hereunder, without diminution, defense, set off or counterclaim which Reinsurer may have against Ceder. Any defense to liability which Ceder has against Insured shall inure to Reinsurer.

Reinsurer agrees that Insured shall have the right to commence a legal action to enforce this Agreement against it in the state in which the land is located or in any state where Reinsurer is qualified to do business, provided that when any service of process is made in any action, a copy is sent by Registered or Certified Mail to Reinsurer at its address set forth in Schedule 1.

#### **4. Notices, Investigation and Settlement of Claims**

Ceder shall have full charge of the investigation, negotiation, litigation and settlement of all claims under the Policy. Upon receipt of notice from Insured of a claim under the Policy or upon learning of a potential claim thereunder, Ceder shall notify Reinsurer of the claim or potential claim. Ceder shall notify Reinsurer of any proposed substantial payments or settlement of such claim and shall give Reinsurer reasonable opportunity to investigate the claim at its own expense. Failure to so notify as provided in this paragraph shall not defeat the rights of Ceder hereunder unless Reinsurer shall be actually prejudiced by the failure, and then only to the extent of the prejudice.

Reinsurer shall have the right, but shall not be obligated, to join in any action brought by or against Ceder under the Policy. Reinsurer shall have the right, through such representatives as it may designate, to inspect and copy, at any reasonable time at the office of Ceder, any and all searches, abstracts, certificates, correspondence, attorneys' opinions, intra-company communications and other documents and records relating to the Policy. This right is and shall continue to be a right in rem and shall follow and attach to said documents and records regardless of changes in ownership or possession.

Unless Insured has given Reinsurer notice that Insured intends to enforce this Agreement directly against Reinsurer and requests payment of Reinsurer's liability under this Agreement directly to Insured, as provided in Section 3 of this Agreement, Reinsurer shall pay the amount of its liability determined hereunder to Ceder within fifteen days after notice and demand by Ceder. Each payment by Reinsurer to Ceder shall satisfy pro tanto the amount of Reinsurer's liability hereunder to Insured and Ceder. The payment shall be received by Ceder, if not by way of reimbursement, in trust to be paid to or for the account of Insured, together with all other amounts similarly applicable, in satisfaction of Ceder's liability under the Policy.

If Insured shall give notice to Reinsurer that Insured intends to enforce this Agreement directly against Reinsurer and requests payment of Reinsurer's liability under this Agreement directly to Insured, as provided in Section 3 of this Agreement, no payment to Ceder of any part of Reinsurer's liability to Insured shall be made without the written consent of Insured. Any payment by Reinsurer of its liability to Insured shall discharge Ceder's and Reinsurer's liability to Insured pro tanto. If Reinsurer makes direct payments directly to Insured as required by this Agreement, Reinsurer's liability to Ceder shall be reduced pro tanto.

#### **5. Payment of Losses**

Any loss or aggregate of losses sustained and payable by Ceder under the Policy, including costs, attorneys' fees and expenses, which do not exceed the amount of Primary Loss Risk retained by Ceder shall be sustained and paid by Ceder without recourse to Reinsurer. Reinsurer's liability and any loss or aggregate of losses payable by Reinsurer under Section 2 of this Agreement, including costs, attorneys' fees and expenses, shall be the amount of Reinsurer's proportionate share of the Secondary Loss Risk or Tertiary Loss Risk as shown in Schedule I that exceeds the Primary Loss Risk retained by Ceder.

If the loss or aggregate of all losses under the Policy exceeds the amount thereof, Ceder shall pay that portion of the excess as the proportion of its retained Loss Risk, both Primary, Secondary, and Tertiary, bears to the amount of the Policy, and the balance of the excess shall be divided among the Reinsurers in the proportions that the amount assumed by each bears to the amount of the Policy.

Notwithstanding anything stated in this Section, Ceder's retained Loss Risk, whether Primary, Secondary, Tertiary, or according to the preceding paragraph, shall not be reduced and Reinsurer's liability shall not be increased by the payment of any loss not assumed by Reinsurer under Section 2.

#### **6. Insolvency of Ceder**

The reinsurance under this Agreement shall be payable by Reinsurer on the basis of the liability of Reinsurer under this Agreement without diminution because of the insolvency of Ceder.

In the event of insolvency of Ceder, the liquidator, receiver or statutory successor of Ceder shall give written notice to Reinsurer of the pendency of a claim against Ceder on the Policy within a reasonable time after the claim is filed in the insolvency proceeding. During the pendency of the claim, Reinsurer may investigate the claim and interpose, at its own expense, in the proceeding where the claim is to be adjudicated, any defense or defenses which it may deem available to Ceder or its liquidator, receiver or statutory successor. The expense so incurred by Reinsurer shall be charged against the insolvent company as part of the expense of liquidation.

In the event that two or more Reinsurers are involved in the same claim, and a majority in interest elects to interpose a defense to the claim, the expense shall be apportioned in accordance with the terms of this Agreement as though the expense had been incurred by Ceder.

In the event of the insolvency of Ceder, the reinsurance under this Agreement shall be payable by Reinsurer directly to Ceder, pursuant to Section 4 or to its liquidator, receiver or statutory successor, except when the direct access provisions of Section 3 and the notice provisions of Section 4 have been implemented, in which case, it shall be paid directly to Insured.

#### **7. Recoupment and Subrogation**

After payment of any loss or losses hereunder by Reinsurer, it shall be the duty of Ceder, by its right of subrogation or otherwise, to proceed diligently to recoup the losses paid. The net amount, after expenses of collection of any recoupment or salvage, shall be distributed and paid first to the Tertiary Reinsurers in the fractional proportions set forth on Schedule 1. Any surplus, after full recoupment of losses sustained on the Tertiary Loss Risk, shall be distributed and paid to the Ceder in the fractional proportions set forth on Schedule 1 in reduction of the loss or losses paid on the Secondary Loss Risk. Any further surplus, after full recoupment of losses sustained on the Tertiary and Secondary Loss Risks shall be paid to primary ceder in reduction of loss or losses paid on its Primary Loss Risk.

In addition to the right of subrogation, which is secured to Ceder by the Conditions of the Reinsurance Agreement, Ceder will retain all the rights secured to it thereby unaffected by this Agreement. In the event, however, of the temporary or permanent discontinuance of business by Ceder, or if Ceder becomes insolvent, or if Ceder fails to proceed to recoup any loss or losses paid as aforesaid, Reinsurer shall be and is hereby subrogated to all rights of Ceder to recoup any losses paid by it hereunder.

#### **8. Rights of Insured Not Prejudiced**

Ceder is authorized to furnish Insured with a duplicate original or conformed copy of this Agreement.

Neither this Agreement nor any modification thereof shall prejudice the rights of Insured under the Policy or conferred upon Insured under this Agreement.

#### **9. Laws Applicable**

The provisions of this Agreement shall be governed by the laws of the situs of the real property described in the Policy.

#### **10. Actions By or On Behalf of Ceder**

In the event Reinsurer is not licensed or accredited in the state of domicile of Ceder, Reinsurer agrees: (1) that, in the event of the failure of Reinsurer to perform its obligations under the terms of this Agreement, Reinsurer, at the request of Ceder, shall submit to the jurisdiction of an alternative dispute resolution panel or court of competent jurisdiction in any state of the United States, will comply with all requirements necessary to give such panel or court jurisdiction, and will abide by the final decision of such panel or court or of any appellate court in the event of an appeal; and (2) to designate the appropriate insurance regulatory authority or an attorney in fact as its true and lawful agent for the purpose of service of any lawful process in any action, suit or proceeding instituted by or on behalf of the ceding company.

#### **11. Severability**

In the event any provision of this Agreement is held invalid or unenforceable under applicable law, the Agreement shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

**12. Notices - Where Sent**

Any notice given hereunder shall be addressed to the party to receive the notice at its mailing address set forth in Schedule 1.

**13. Effective Date**

This Agreement shall be in effect between Ceder and Reinsurer from the time a counterpart of Schedule 1 is executed by Reinsurer notwithstanding that other counterparts are not executed by other reinsurers.

**Tertiary Facultative Reinsurance Agreement (Type II) (Form T-21.2)**

**SCHEDULE 1**

1. The parties hereto are:
  - (a) \_\_\_\_\_, a corporation of the State of \_\_\_\_\_, having its principal office at \_\_\_\_\_, as Ceder, and
  - (b) Each Reinsurer named in 3(b) hereof.
  
2. Ceder's reinsurance risk, pursuant to the Reinsurance Agreement, on the Policy identified herein, issued by \_\_\_\_\_, is in the aggregate amount of \$\_\_\_\_\_. The land described in the Policy is located in: \_\_\_\_\_.

<b>POLICY NO.</b>	<b>INSURED</b>	<b>TYPE OF POLICY</b>	<b>POLICY AMOUNT</b>
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3. The distribution of the title insurance risk is:

	<b>SECONDARY LOSS RISK</b>		<b>TERTIARY LOSS RISK</b>	
	<b>Amount</b>	<b>Share</b>	<b>Amount</b>	<b>Share</b>
(a) Retained by Ceder	\$		\$	
(b) Ceded to, Reinsured with, and Assumed by				

**Reinsurer**

**State of Incorporation**

4. This Schedule 1 is part of and incorporates by reference the provisions of the Tertiary Facultative Reinsurance Agreement (Type II) (Form T-21.2).

**IN WITNESS WHEREOF**, the undersigned each has caused this Agreement to be executed as of the date set forth below:

\_\_\_\_\_  
(Ceder)

\_\_\_\_\_  
(Reinsurer)

By \_\_\_\_\_

By \_\_\_\_\_

Mailing Address:

Mailing Address:

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

Date of Execution: \_\_\_\_\_

Date of Execution: \_\_\_\_\_

Reins. File No.: \_\_\_\_\_

Reins. File No.: \_\_\_\_\_