
Loan Modification & Your Title Policy

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Title Insurance 101

- Title Insurance
 - “...a contract... agreeing to indemnify the insured up to a specified amount against loss caused by encumbrances upon or defects in the title to real property in which the insured has an interest”
 - Joyce D. Palomar, *Title Insurance Law* §1.7



Title Insurance 101

Policy Jacket

ALTA 2006

Exclusion from Coverage

3(a) ...matters created, suffered assumed or agreed to by the Insured Claimant

3(d)...attached or created subsequent to the Date of the Policy...



Title Insurance 101

Why is this Important to remember those basic Principals when contemplating a Modification?



Title Insurance 101

Because your modifications is
***“Created” by the insured (the Bank)...and
“Subsequent to the Date of Policy”.***

Therefore, the modification would not be covered by the original Loan Policy.



Effects of Modifications

Biggest Fear for a Lender undertaking a modification should be **Loss of Priority**

Scariest word for a Lender to hear is
NOVATION



Effects of Modifications

- [N]ovation is defined as a mutual agreement among all parties concerned for discharge of a valid existing obligation by the **substitution** of a new valid obligation on the part of the debtor or another.

Dere v. Montgomery Ward & Co., Inc., 224 Va. 277, 280, 295 S.E.2d 794, 795 (1982)



Effects of Modifications

Novation +
Lenders Policy
=
NO COVERAGE

Why?



Effects of Modifications

See 2006 Loan Policy Jacket
Conditions 10(b)

“The voluntary satisfaction (*discharge*) or release of the Insured Mortgage shall terminate all liability of the Company...”



Effects of Modifications

If not a Novation then what is it?

Continuation

How do we know if priority is secured?

“Does the modification materially prejudice the interest of junior lienholders?”

See Sackadorf v. JLM Grp. Ltd. P'ship, 250 Va. 321, 332, 462 S.E.2d 64, 70 (1995)



Effects of Modifications

Common Modifications and are they
Materially Prejudicial?

1. *Maturity Date Extension*
2. *Additional Funds*
 - *Not the same as a Future Advance Deed of Trust*
3. *Interest Rate Change*
4. *Principal Reduction*
5. *Additional Property as Security*
6. *Modifications with Cross Collateralize Loans*



Effects of Modifications

If materially prejudicial, how does this effect
Priority?

- Generally, the portion of the debt under the modified terms is limited in priority as to the date of the recordation of the modification.



Effects of Modifications

Note Regarding Restatement of Property § 7.3 (c)

(c) If the mortgagor and mortgagee reserve the right in a mortgage to modify the mortgage or the obligation it secures, the mortgage as modified retains priority even if the modification is materially prejudicial to the holders of junior interests in the real estate, except as provided in Subsection (d).

Restatement (Third) of Property (Mortgages) § 7.3 (c) (1997)



Effects of Modifications

Note Regarding Restatement of Property § 7.3(c)

- This is not future advance language; and
- There is very little judicial authority concerning the enforceability of this reserved right and how it effects any junior lienholders.



Endorsements

What can we do to insure that the modifications are covered by the Loan Policy?

ENDORSEMENTS

ALTA 14 Series

ALTA 11 Series



Endorsements

Alta 14-06

Future Advance Priority

Residential & Commercial

Includes Variable Rate coverage



Endorsements

Alta 14.1-06

Future Advance with Knowledge

ALTA 14.2-06

Future Advance – Letter of Credit



Endorsements

ALTA 14.3-06

Future Advance – Reverse Mortgage



Endorsements

Alta 11-06

Mortgage Modification

- Insures Lender against loss or damage due to the invalidity of the insured mortgage due to the modification; and
- Insures Lender against loss or damage due to the lack of priority of the insured mortgage



Endorsements

Alta 11.1-06

Mortgage Modification – with Subordination

- Similar to the Alta 11-06 and provides additional coverage for loss or damage by reason of an intervening lien that has purportedly been subordinated by recorded agreement in connection with the modification.



Endorsements

Alta 11.2-06

Mortgage Modification with Additional Amount of Insurance

- Similar to the Alta 11-06 and provides for an increase in the amount of insurance.



Endorsements

What will your friendly title company ask for:

1. Recording information for the modification
2. Validation that the current owner and lender are parties to the modification.
3. No full or partial reconveyance of the mortgage and no intervening liens or encumbrances
 - If a search reflects any intervening matters, these either must be subordinated or an exception would be taken on the policy for this matter.
4. Proof that the taxes for the current tax year have been paid
5. Verification of the current parties in possession
6. Executed Affidavit Regarding Liens/Seller Borrower



Keys to Modifications

1. Continuation not Novation
2. Don't Prejudice Junior Lienholders
3. If Junior Lienholders consider a subordination to the modification
4. Endorsements to alleviate risk
5. Discuss with Lender's Counsel
6. Discuss with your Title Agency Staff



Contact Information

Please feel free to contact me should you have any additional questions.

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