

## Title Insurance - Title Insurance Policy Endorsements Add Value

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When an insured mortgagee is the successful bidder on the foreclosure of its lien and obtains a deed from a referee, its fee title is deemed insured under the previously issued mortgage policy as of the date of that prior policy. The insurer's potential maximum liability to the mortgagee as fee owner cannot exceed, however, the amount of the unpaid principal balance secured by the mortgage at the time of the change in the interest insured.

Relying on the continuation of liability under the mortgage policy only, no insurance is afforded as to liens such as real estate taxes encumbrances or defects in title arising after the date of that policy. Coverage is not afforded as to the regularity of the foreclosure proceeding, its effect upon other adverse interests, or the sufficiency of the deed pursuant to which fee title is conveyed to the mortgagee. Relying solely on a foreclosure certification issued by a title insurer or its agent only gives guidance as to recorded interests which need to be served with process and, as to those assurances, liability is limited.

Obtaining a current policy to insure the mortgagee's fee title will, under most circumstances, provide coverage as to the above factors. Further, in the preparation of a title commitment in advance of the referee's deed, title defects and adverse interests in need of resolution and deficiencies in the foreclosure which may impact the fee title and its marketability will be highlighted. Problems can be dealt with before closing. A lender may determine not to foreclose if recorded matters, such as notices concerning hazardous waste disposal sites, are reported. If not set forth in the commitment, there may be recourse to a title insurer; if not set forth in a foreclosure certificate, an insurer has only a limited liability.

A current policy is also recommended when a mortgagee takes title through a deed in lieu of foreclosure or when its mortgage is modified as part of a workout. The fee estate acquired by a deed in lieu is subject to all liens, encumbrances and title defects affecting the premises in question. A change in mortgage terms (other than a mere extension of the term) can render a formerly senior lien subject to later recorded or filed interests. Assurance that the priority of a lien has not been adversely impacted is significant. In particular, assurance should be obtained in either instance that all real estate taxes entered against the premises in question have been paid to date.

In addition, numerous workouts afford the lender a right to receive such so-called "equity-kickers" as shared appreciation or a right to cash flow. Affirmative insurance insuring that these benefits, if defined as "Additional Interest", are enforceable and have the same priority of lien as the principal indebtedness secured can be afforded, subject to bankruptcy considerations.



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A current title policy insuring a deed in lieu of foreclosure or a mortgage modified in a workout also protects against any allegation that there are any interested parties, such as partners or shareholders, whose consent to the deed in lieu or modification was required but not obtained. This risk is properly for the title insurer to assume through its issuance of a policy which insures the lender as of the date on which its fee interest is acquired or its mortgage restructured.

While the grantee of a deed in lieu of foreclosure is insured under its mortgagee policy, liability is only as of the original date of that policy and there is no coverage as to the sufficiency of the deed pursuant to which fee title is conveyed to the mortgagee.

When a mortgagee obtains fee title pursuant to a bankruptcy court order in a "pre-packaged" reorganization there is no continuation of policy liability. Title insurance should be obtained to protect against attacks on the regularity of that proceeding, to be assured that all secured creditors were taken into account, and to defend against the assertion of liens and encumbrances purportedly disposed of by court order.



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