

The Lender's Loan Policy and the Role of Title Endorsements

A Crucial Element in CRE Transactions

Real-estate assets differ from transaction to transaction. In many cases, the standard American Land Title Association ("ALTA") lender's title insurance policy ("Lender's Policy") is not sufficient to keep lenders adequately protected. Though ALTA's Lender's Policy provides basic coverage designed to address common title insurance needs, lenders should consider the issuance of title "endorsements" as a way to protect the value of their collateral when the standard Lender's Policy terms are not enough.

There are numerous endorsements that have been adopted by ALTA, though some are not available in all states. Lenders may even create their own endorsements to fit the deal. This article focuses on the more common endorsements, including the Same-as-Survey Endorsement, the ALTA 9, the Zoning Endorsement, the Future Advances Endorsement and the Contiguity Endorsement.

The Nuts and Bolts of a Lender's Policy

Title insurance is generally defined as insurance against loss by reason of liens and encumbrances upon property, undisclosed defects in the title to property, and other matters affecting title to or the right to use and enjoy it. A Lender's Policy goes one step further and insures the lender's security interest as to the priority, validity and enforceability of the Lender's lien.

An "endorsement" is a rider attached to the Lender's Policy which expands the policy coverage or modifies the policy provisions. In other words, endorsements allow an insured lender to receive insurance against loss or damage by reason of a particular matter that is beyond the coverage otherwise afforded under the policy. An additional fee is usually charged for the issuance of an endorsement and additional underwriting may be required. The amount of the fee depends on the type of endorsement and may differ between insurers. In essence, title insurance is designed for "standard" real estate transactions and the use of endorsements allows one to expand the policy to meet the lender's particular needs.

One of the most frequently requested endorsements is the Same-As-Survey Endorsement. This endorsement insures that the property description

Continued on Reverse>>



SHAPIRO
SHER
GUINOT &
SANDLER

About the Firm

In 2012 Shapiro Sher Guinot & Sandler was named the top medium-size law firm in Maryland for "Business & Transactions" by Super Lawyers, a division of Thomson Reuters. The firm represents clients in numerous practice areas, including banking, bankruptcy, corporate, real estate, tax, and commercial litigation.

The firm's banking lawyers provide experienced counsel in connection with all aspects of commercial loans. Chaired by **Scott W. Foley**, the firm's **Banking & Financial Services Group** represents regional and community banks, credit unions, finance companies, pension funds, and other financial institutions in Maryland and throughout the Mid Atlantic.

The banking group advises financial institutions in commercial lending transactions; it also advocates for financial institutions in commercial loan workouts, restructurings, and bankruptcy proceedings. Because the group has extensive experience in the origination of loans and in workout situations, it is prepared to provide efficient representation at every stage in the commercial lending process. With decades of experience in the banking industry, Mr. Foley and the firm's other seasoned banking attorneys appreciate the potential hazards facing clients in the commercial loan process, and strive to protect lenders' interests throughout the lifecycle of the loan.

For more information, contact Mr. Foley at SWF@ShapiroSher.com.

contained in the Lender's Policy is the same as that shown on a survey referenced in the Lender's Policy. This endorsement is normally requested when the legal description contained in the security instrument being insured differs from the legal description in the survey (this is a common occurrence when the legal description being insured is coming from a prior conveyance or older survey and there is a new survey of the property). Because legal descriptions may read differently, even when describing the same property, the Same-as-Survey Endorsement provides a lender with necessary protection when the property described in the Lender's Policy is different from what is shown on the related survey.

Other Common Endorsements

Another commonly seen endorsement is the Restrictions, Encroachments & Minerals Endorsement, commonly referred to as the "ALTA 9." The ALTA 9 gives a lender affirmative coverage that the lender will not suffer any loss due to (1) present and future violations of existing covenants, conditions and restrictions, (2) encroachments of improvements across setback lines, servitudes (like easement areas) or adjoining property, and (3) surface use of the land resulting from mineral rights. This endorsement is highly recommended for any collateral that is subject to covenants, conditions and restrictions, easements, or mineral rights.

A Lender's Policy contains automatic exclusions to coverage for governmental regulations, including building and zoning ordinances. The Zoning Endorsement is designed to give the lender additional comfort regarding the zoning classification for the insured property and permitted uses within that classification. The endorsement also provides coverage in the event that there is a final court order prohibiting use of the covered property, or requiring the removal or alteration of any buildings because a zoning ordinance has been violated with respect to various matters (e.g. floor space, setbacks, height, etc.). Without a Zoning Endorsement, adverse zoning rulings could significantly affect the value of a lender's collateral and leave the lender under-secured.

The Future Advances Endorsement is essential in credit facility transactions involving revolving lines of credit or future advance loans. The Future Advances Endorsement insures the lender that the validity and enforceability of its security lien will not be adversely affected because the security instrument contains a future advances provision. This endorsement also insures against any loss of priority of the security instrument caused by future advances of principal, provided no other adverse matters affecting title arise subsequent to the date of the policy.

In real estate transactions involving numerous tracts of land, the Contiguity Endorsement insures against loss or damage if certain tracts of land are not contiguous to each other. This endorsement is commonly utilized when a borrower acquires land adjacent to land it already owns, or acquires multiple tracts of land which are adjacent, and intends for the two parcels to be used together. In this situation, ownership by a third party of a strip of land between the two parcels could become problematic and hinder the proposed use. While this would not necessarily require the title insurer to indemnify a lender under a standard Lender's Policy, the overall effect of the parcels being separated will likely severely decrease the value of the collateral. By obtaining a Contiguity Endorsement, the lender is protected from potential loss.

These endorsements are just a few of the many available to lenders. A prudent lender making a loan secured by real property should discuss with counsel the appropriate endorsements to its Lender's Policy to ensure that the loans it makes are properly protected.

Maryland Senate Bill 1043

The Maryland Senate recently heard a bill that would prohibit certain consumer loan and credit agreements, including those secured by residential real property, from containing acceleration clauses under which any part of the unpaid and unmatured balance may be accelerated based solely on the death of a borrower or guarantor. The bill, SB1043, has been referred to the Senate Finance Committee for consideration. As proposed, the bill does not obligate lenders to extend additional credit to the borrower's estate or any person assuming the borrower's obligations. Shapiro Sher Guinot & Sandler will continue tracking the legislation. Contact Scott W. Foley at swf@shapirosher.com with any questions you may have about the bill.