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The title insurance aspects of commercial mortgage modifications

February 24, 2010 - Front Section

When lenders and borrowers agree to modify the terms of a commercial mortgage, they often ask the title insurance company that originally insured the lien of the mortgage to endorse the original title insurance policy to reflect that the mortgage has been modified. The purpose of this article is to provide a brief overview of the modification process and of the coverage provided by the standard mortgage modification endorsement.

As soon as a lender decides to modify a commercial loan, it is a good idea for the lender, or its counsel, to order a title search of the land records where the mortgaged property is located to determine whether there have been any changes in ownership by the borrower and whether any new liens or encumbrances have been recorded since the date that the mortgage was initially recorded. The title search report will also disclose the status of municipal real estate taxes and assessments and the existence of any bankruptcies, court proceedings, judgment liens, mechanic's liens and other matters that may affect the title to the mortgaged property. The results of the title search report will be used by the lender's counsel to determine whether the borrower will need to obtain releases or subordinations from other lien creditors in order to insure that the proposed mortgage modification will not cause a loss of priority of the mortgage lien.

If the lender or its counsel decides to record the mortgage modification on the land records, they often ask the title insurance company to endorse the original title insurance policy to reflect that the mortgage has been modified. The standard form of endorsement that is used by the title insurance industry in most states to insure mortgage modifications is the American Land Title Association (ALTA) Endorsement 11-06 (Mortgage Modification.) That endorsement insures the lender against loss or damage that it may sustain by reason of:

- (1) the invalidity or unenforceability of the lien of the insured mortgage upon the title at the date of the endorsement as a result of the recording of the mortgage modification; and
- (2) the lack of priority of the lien of the insured mortgage, at the date of the endorsement, over defects in or liens or encumbrances on the title, except for those shown in the original policy or any prior endorsements and those which may have arisen between the date of the recording of the original mortgage and the date of the recording of the mortgage modification which have not been released or subordinated to the lien of the mortgage as modified.

In states where the ALTA Endorsement 11-06 is not available, title companies usually issue a new policy that is dated as of the recording of the mortgage modification agreement and insures the title to the mortgage as modified.

Since it takes time to conduct an updated title search and to obtain releases or subordinations from other parties who may have mortgages or other liens that were recorded after the original mortgage was recorded, it is suggested that lenders or their attorneys who are involved in mortgage

modifications contact their title insurance company as soon as the decision is made to modify the loan.

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