



Title Insurance Issues Relating to COVID-19: Lender Recommendations

This memorandum is in regard to some of the changes we are seeing in the title insurance industry due to COVID-19. While the issues and impact may vary slightly by county and by title company, this memorandum addresses the following three (3) recurring concerns:

- Delays in recording and delay affidavits;
- The requirement of a gap indemnity agreement to be signed at closing; and
- Exceptions to title related to COVID-19.

Our assessment of the foregoing issues and our related recommendations are provided below.

1. **Delays in Recording/Delay Affidavits:** Given the closure of many governmental offices, and the limited personnel at title companies as a result of COVID-19, there are some counties where recording of instruments may be delayed. Generally, title companies should submit the recordable documents to a queue for recording, then report back when recording has occurred. Given the delays, some title companies are requiring a delay affidavit to be signed by borrower and lender acknowledging that such delays may occur.
 - a. Recommendation: While delay affidavits are generally acceptable since they typically only acknowledge the existence of the delay, we recommend having them reviewed by counsel prior to execution to verify the protection of lender.
2. **Gap Indemnity:** Again, due to the closure of many government offices, the gap period (the period between the effective date of the commitment and the date the security instrument is actually recorded) is often longer than normal. As a

result, most title companies are seeking a gap indemnity agreement from the borrower and sometimes the lender. The effect appears to be that the title company WILL cover the gap pursuant to the terms of the commitment, but will then seek indemnification against the indemnifying parties for any issues that may arise.

a. Recommendations:

- i. Lenders should resist signing these affidavits. This is particularly the case where the lender has a pre-existing security instrument on file that would establish lien priority. Even in situations where the lender does not have a pre-existing security instrument on file, lender should push back on any title company that is requiring it to indemnify them for the gap.
- ii. Verify that the gap indemnity does not include language about future policies. Certain title companies are inserting language that would require the indemnitor to cover the gap not only for the transaction at hand, but for all transaction between this title company and this borrower.
- iii. If the gap period is less than a week, the title company should not require any party to execute a gap indemnity.
- iv. If the effective date on the commitment is over thirty (30) days old, the title company should update the effective date of the commitment prior to closing.

3. **Exceptions to Title:** Some title companies have started adding COVID-19 exceptions to the title commitment that would effectively remove gap coverage. An example of such an exception is as follows:

"The Company reserves the right to make exceptions and requirements prior to and following closing for issuance of a title policy(ies) based upon the specifics of the transaction, the review of the closing documents, and changes in recording and title searching capabilities resulting from the consequences of the COVID-19 pandemic and business and government office closures."

- a. Recommendation: Object to any such exception and require its removal prior to closing.

Please note that the effect of COVID-19 on title insurance matters is changing rapidly. The recommendations provided herein are general in nature and may require modification on a deal-by-deal basis and as the effect of COVID-19 on title insurance continues to evolve.

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