REAL ESTATE CLOSINGS DURING THE COVID-19 PANDEMIC: TITLE INSURANCE GAP COVERAGE

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To mitigate the spread of COVID-19, many clerk and recorder's offices have announced closures. Some offices are closed to the public, while still allowing mail-in and electronic filing, and others are closed for all filings. The inability to record documents or a delay in timely recording documents can lead to disruptions to the recording process and issues with title insurance coverage. Title companies have offered guidelines as to how they will handle real estate closings and insuring title.

Title insurance companies are willing to continue to provide insurance if (i) the county recording office is updating their records so they have the ability to search title and (ii) the county recorder is accepting paper documents or the closing documents can be recorded electronically. Most title insurance companies are also willing to provide coverage if they can submit the documents for recording, even if they are not actually able to record at this time. However, this raises issues with respect to gap insurance coverage whereby the title company covers the gap and potential exposure to a title claim between the time of closing and the time that the documents are recorded.

To continue providing gap coverage, title companies are requesting a gap affidavit and indemnity from the seller and buyer. The affidavits required are generally like closing affidavits, but also include an acknowledgment regarding the uncertainty for the timing of recording. Title companies are also requiring that the seller to make an affirmative statement that they will not record any other documents and indemnify the title company for any losses that the title company may experience due to the recording of a document against the property. Lenders must also accept that it is not clear when recording offices will reopen and documents will be recorded.

Title companies are assessing their willingness to provide gap coverage on a case-by-case basis. Factors that are being considered include the amount of insurance coverage, non-traditional financing, the financial strength of the seller, and the ability to obtain payoff information.

Due to the risk of recording priority, at least one major title company is currently not insuring construction loans. Others are still considering providing gap insurance for construction loans based on the timing of the closing. Note that closings may be delayed due to the additional underwriting approval requirements. Closings scheduled to occur further out in time are more likely to receive gap insurance, at least for counties with the ability to still record documents electronically.

Any buyers looking to quickly resell the property or refinance the property should be aware that they likely will not be able to do so until the deed is recorded, as the public records will not reflect the correct owner of record.

In sum, the underwriting on gap insurance varies on a case-by-case basis and for each title company; however, at this time closings are generally able to proceed with title companies providing gap insurance for

any recording delays with the required affidavit and indemnity.

The COVID-19 pandemic is creating rapidly-changing issues for businesses, and government aid processes and measures designed to assist businesses may also change materially from when this post is issued. We therefore encourage you to monitor our website, review our future posts and generally remain alert for additional updates or modifications to laws and regulations.

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