



Modifications of Loan Documentation



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Invariably, over the course of a loan, it may need to be modified. This primer will address various issues that arise when a loan is modified in a non-workout scenario. For purposes of this article, we will assume that the loan has aged a bit and is not being modified within a few days or weeks after the initial closing. In addition, the complexities of the modification may also impact the extent of the diligence and documentation which may be required.

Modifications within a Short Time after Closing

When there are modifications within a few days of a closing, most often these are not treated as formal modifications and are typically handled through “slip page” or “changed pages” being inserted to replace the modified page. If documents which are being recorded need to be changed and the “slip page” can be replaced prior to recordation, then there should be no need for a formal modification and, in addition, title coverage would not be impacted.

Formal Modification

When loan documentation is the subject of a formal modification, whether it be titled as an amendment or merely a letter agreement, various considerations should be addressed. Any formal modification should be viewed as a closing unto itself, and the formalities should be considered and, in many cases, implemented. In addition to the operational document which modifies the loan agreement, the balance of the loan documents should be reviewed to ascertain if there is any need to modify same. At a minimum, the modification document should contain a ratification of the loan documents, an omnibus provision that the loan should now constitute the loan “as modified,” certain standard representations, warranties and estoppels and, in many cases, a release of the lender to the date of the modification.

While most guarantees have boilerplate provisions confirming that no modification of the underlying loan being guaranteed will impact the viability of the guarantee, it is common practice and highly recommended that a guarantor ratify its guaranty and vitiate any claims that its obligation was discharged by the modification. Some

may argue that this is merely “belts and suspenders,” that is, redundant lawyering, but the benefit of a simple ratification cannot be underestimated. At a minimum, any claim or defense of the guarantor has been eliminated and, when analyzing remedies for a lender, not having to litigate a claim of this sort can't be stressed enough.

Mortgage priority and title insurance are seminal issues in any mortgage financing, and due regard for these issues should not be overlooked when entering into a modification. If a title endorsement can be obtained for a nominal or no charge, it should be. Unfortunately, in many jurisdictions, this type of coverage is either unavailable or cost-prohibitive. The alternative is that a title search should always be obtained and reviewed to confirm that there are no new surprises of record, which could be an intervening lien. The issue on title priority is that if there are junior liens at the time of the modification, and the modification is deemed to be a “material modification,” then a court in hindsight might give the junior lienor priority over the mortgage, “as modified,” in that the junior lienor was only junior to the mortgage, did not consent to the modification, and thereby was harmed through no fault of its own. The way to mitigate this risk is to get title insurance, and regardless of the availability of the insurance, to confirm that there are no junior liens which could potentially prime the mortgage and to record a simple mortgage modification which now puts future junior lienors on notice that the lien they are junior to has been modified.

As with every closing, due consideration should be given to “corporate formalities” and due diligence. As to the first, authorizing documents, consents, resolutions, officer's certificates and the like should be obtained but in abbreviated form when possible, such as a certificate of no change for delivery of organizational documents. Good standing certificates should be obtained and when possible, legal opinions should be rendered. When legal opinions are appropriate, such as when the modifications are significant, due consideration should be given to the opinion being rendered on the documentation “as modified” rather than solely an opinion on just a modification document. As to due diligence, in addition to title searches described above, consideration should be given as to the need for typical searches of borrower, guarantor and any other relevant loan party. While this may seem like a big “ask,” it would be quite embarrassing if after a significant modification, a significant litigation or UCC filing which was unanticipated was discovered.

While all of the foregoing may be appropriate when the modification being implemented is significant, the foregoing is not an exhaustive list, and many of these items may not be practical when the modification is not as significant. As always, it is prudent to outline the laundry list of options and then agree upon what is appropriate given the specifics of the transaction at hand.