



*The Guarantee*



*Before and After*



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# Who Issues It?

- ◆ National Company? Do you see it?
- ◆ For everything or just trustee's sales?
- ◆ For everyone or just national banks?
- ◆ What product are they using?
- ◆ Is it filed?
- ◆ What promises are made?
- ◆ Who is liable for mistakes? Are you stuck with it?

# Information for the Assured

- ◆ Does it say that information is provided?
- ◆ Or is it a “commitment” – promising a policy no matter what?
- ◆ Is there a Federal tax lien date down?
- ◆ Does it address Service Member Relief Act?

# "Reports"

- ◆ A "Report" is not underwritten
  - ◆ Branch - abstractor's liability
  - ◆ Agent - abstractor's liability & *your sole* responsibility
    - ◆ Filed insurance product?

# Guarantees

- ◆ It's a *contract*
- ◆ It's underwritten
- ◆ Mitigates against abstractor's liability claim



# Guarantees

Used for:

- ◆ Trustee's sales
- ◆ Judicial mortgage foreclosures
- ◆ General litigation
- ◆ Contract forfeitures

# Deed of Trust

Method of  
foreclosure is *not*  
“insured”

in policy or guarantee

# Guarantee

Result of foreclosure  
not "guaranteed"

in a guarantee

(it's not a promise to insure)



# Guarantees

*Could be used for:*

- ◆ Tax foreclosures
- ◆ Labor or material liens
- ◆ HOA assessment lien foreclosures
- ◆ Drug seizures
- ◆ Distraint sales
- ◆ Quiet title actions

# Later Insurance

## BUT:

Don't want to insure after  
foreclosure of

*involuntary* liens

# Guarantees

## A GUARANTEE IS NOT:

- ◆ A commitment to insure
- ◆ An abstract
- ◆ Based on search of the “public records”
- ◆ Careful what you say
- ◆ Careful what you imply
- ◆ What does national product say or imply?

# Exceptions in Guarantees

- ◆ List on from *your records* - no inspection
- ◆ Don't specify "interested parties"
- ◆ "Capacity" OK
- ◆ No assurance of priority (even it it's in prior policy)
- ◆ Don't show publication requirements

# Extended Coverage

◆ That means:

- ◆ no inspection
- ◆ no "general" or "standard" exceptions
- ◆ no endorsements



# Affirmative Coverage

- ◆ That means:

- ◆ No priority coverage

- ◆ no mechanic's lien coverage

- ◆ no encroachment coverage

- ◆ no CCR coverage

*even if the prior policy included it*

# PROBLEMS, PROBLEMS

Whether at time  
of guarantee or

When insuring  
after a  
foreclosure



# PROBLEMS

- ◆ *Mobile homes*
- ◆ *Bankruptcy*
- ◆ *Legal description/subdivision violation*
- ◆ *Advance/modification*
- ◆ *Defect in security document*
- ◆ *Deed in lieu*



# PROBLEMS

- ◆ *Reacquisition by borrower*
- ◆ *Reinstatement of borrower*
- ◆ *Subordinations*
- ◆ *HOA assessments*
- ◆ *HOA liens*
- ◆ *Financing statements*
- ◆ *Contract forfeitures (bankruptcy)*

# Mobile Home

- ◆ Included in loan (*and guarantee*) coverage with endorsement, but
- ◆ Maybe even without policy endorsement, unless:
  - ◆ excepted from legal description
  - ◆ policy liability amount reduced

# Mobile Home

Except it from the legal description  
in a *policy & guarantee* unless title  
eliminated



# Bankruptcy

- ◆ *STOPS* everything!
- ◆ But what if you don't know about it?
- ◆ No matter - when you find out - *SHOW IT*

# Bankruptcy

In general:

- ◆ Stay must be lifted, *or*
- ◆ Property declared exempt, *or*
- ◆ Property must be abandoned, *or*
- ◆ Bankruptcy must be dismissed or closed

*May have to redo foreclosure*

# Bankruptcy

## Non-judicial action:

- ◆ Must lift stay
- ◆ Lender can give shortened notice
- ◆ Requires underwriter approval

# Bankruptcy

- ◆ *Judicial mortgage foreclosure*
  - ◆ resume after stay lifted
- ◆ *Judicial contract "foreclosure"*
  - ◆ Resume after stay lifted
- ◆ *Non-judicial contract forfeiture*
  - ◆ **MUST START FROM SCRATCH**

# Bankruptcy

## Real Estate Contract

Real estate contract can't be eliminated by vendee's "free and clear" order from bankruptcy court

Need a deed from the vendor



# Defective Security Document

- ◆ Execution
- ◆ Acknowledgment
- ◆ Legal description
- ◆ Statutory Requirements



# Deed of Trust

- ◆ Qualified trustee
- ◆ Successor trustee -  
resignation? Appointment?
- ◆ Different beneficiary
- ◆ No power of sale
- ◆ Agricultural clause

# Legal Description

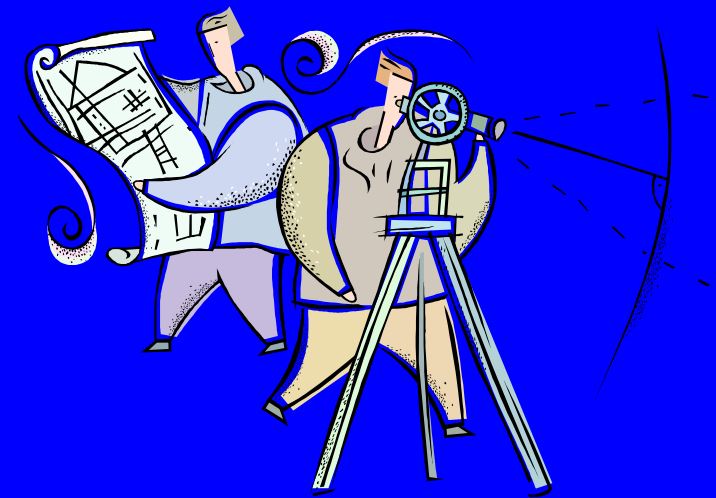
- ◆ Use from document
- ◆ Caution if error
- ◆ Caution if borrower owns more
- ◆ Caution if borrower conveyed some
- ◆ Caution if partial release
- ◆ Caution if later plat

# Legal Description

- ◆ Subdivision violation?
- ◆ Boundary line adjustments
- ◆ Partial releases
- ◆ Additional land - "after-acquired title"

# Subdivision Violations

- ◆ Excluded from coverage - BUT:
- ◆ May need an exception or note



# Advance/Modification

- ◆ Intervening matters have priority:
  - ◆ Over new money
  - ◆ Over any modification

*NOVATION*

# Advance/Modification

- ◆ No representation in guarantee as to priority
- ◆ BUT - Watch for such matters when asked to insure later

# Homeowner Association Liens

- ◆ If the association forecloses:
  - ◆ Do not conduct the sale as “trustee”
  - ◆ Do not insure after foreclosure
  - ◆ Do not assume it eliminates all liens



# Homeowner Association Liens

- ◆ If a lender forecloses:
  - ◆ Do not ignore assessments
  - ◆ Do not ignore recorded HOA lien
  - ◆ Do not “take sides”

# "Erroneous" Reconveyance

- ◆ Trustee error?
- ◆ Lender error?
- ◆ No authority for trustee or beneficiary to unilaterally "reinstate" even if in error
- ◆ Borrower must join in
- ◆ Priority probably lost

# Erroneous Reconveyance

- ◆ Show the DT *and* the reconveyance *and* the “rescission” of the recon -  
*May need note that judicial foreclosure needed*
- ◆ *If you did it, also* contact your claims department
- ◆ Show intervening matters

# Reinstatement of Lien

- ◆ “*OOPS*” by the lender?
- ◆ Old policy still good? New policy?

Unless recorded

- ◆ modification, or
- ◆ new deed of trust or contract  
*Then - insure as new -  
show intervening matters*

# Deed in Lieu

- ◆ Practical *if no* intervening matters
- ◆ Later insurance - show intervening matters
- ◆ Need estoppel affidavit
- ◆ If REC - can ignore contract
- ◆ If DT or Mortgage - also may need release (merger or not?)

# Advance Deed in Lieu

- ◆ DON'T DO THEM IN ESCROW!!
- ◆ Void - at inception - not just voidable
  - ◆ Clogs equity of redemption
  - ◆ Recharacterization
- ◆ Need exceptions if you see one

# Subsequent Insurance

## Suggested paragraph:

Right of any interested party to sue or petition to have set aside, modified or contest a judicial or non-judicial foreclosure or forfeiture, or any deed pursuant thereto, through which title to the land described herein is derived, provided the cause for such suit or petition is occasioned by acts or omissions of the foreclosing party not specifically otherwise insured against in the policy.

# Trustee's Sales

- ◆ Don't eliminate:
  - ◆ IRS liens - 120 day right of redemption
  - ◆ Financing Statements - fixtures



# Trustee's Sales

- ◆ Borrower re-acquisition
- ◆ All matters re-attach
- ◆ Watch for related parties
- ◆ *BUT* - Caution in
  - ◆ what you say
  - ◆ how you say it

# Subordinations

- ◆ If multiple mortgages - extra caution
- ◆ Recording sequence
- ◆ Subordinations
- ◆ Circuity of liens

# Subordinations

- ◆ Do not rely on recording sequence
- ◆ All *contemporaneous* mortgages have equal priority
- ◆ At least that's what the "junior" lender will argue

# Multiple Beneficiaries

## Fractional Interests

## Collateral Assignment

- ◆ Who has possession of note?
- ◆ Who has right to foreclose?

# General Rules about insuring after a mortgage foreclosure:

- ❖ Don't insure the purchaser at the foreclosure sale (who is not a BFP for value)
- ❖ Unless exception shown for "rights of interested parties to sue or set aside..."

## The risk is lessened if:

- ❖ A later BFP purchaser is insured, and
- ❖ The borrower is no longer in possession



FOR  
LEASE

FOR  
SALE  
Closure

FOR  
SALE