FIDELITY NATIONAL

DEEDS IN LIEU OF FORECLOSURE

Generally

A deed in lieu of foreclosure (“DIL”) is an instrument by which a debtor conveys title to the lender holding the mortgage in satisfaction of settlement of the debt or obligation secured by the mortgage.

Such an instrument can pose creditors’ rights issues and concerns as to whether the deed was intended as an absolute conveyance.

Underwriting Principles & Exception Language

A. Creditors’ Rights

In the 2006 ALTA Title policies, Covered Risk 9 (Owner’s) or 13 (Loan) can provide coverage relating to creditors’ rights for transactions in the back chain. If we are asked to insure the buyer from the lender who took a DIL, that prior DIL may be challenged or set aside for lack of equivalent value or preference.

For **RESIDENTIAL** properties, where the borrower has vacated the property, and there is no evidence of record of a pending bankruptcy or bankruptcy challenge to the DIL on behalf of the borrower, you may insure without exception to the above issue.

For **COMMERCIAL** properties, there must be a review of the transaction for sales by the lender occurring within 6 months of the DIL. Please contact the State Office so that we may review with you the current sales price, especially if it exceeds the face amount of the indebtedness of the original loan to the borrower/grantor on the DIL.

B. Absolute Conveyance

In order to insure the interest of a lender acquired by a DIL, the deed must be an absolute conveyance in consideration of the cancellation of debt secured by the Deed to Secure Debt and not a mortgage or security interest of any kind. This intent should be expressed in recitals in the DIL or in an estoppel affidavit.

Recent trends for DIL transactions evidence the possibility that the structure of the transaction may not be an absolute conveyance. Examples of transactions that may not be considered an absolute conveyance:

1. The lender forgives the debt evidenced by the original note, but requires the borrower and/or guarantors to execute new unsecured notes.
2. If the borrower does not comply with the terms of the DIL transaction, then the original loan documents are reinstated.
3. The borrower is permitted to remain in possession of the premises, or in some management capacity on the property (construction manager, broker to sell the property).

Typical language for a recital in the deed or estoppel affidavit should read:

> "This Deed is given at the request of the Grantor under no pressure or duress from the Grantee, and is an absolute conveyance of title. The Grantor having sold said land to Grantee for fair and adequate consideration, such consideration being full satisfaction of all obligations secured by that certain Deed to Secure Debt (list recording information), and is not intended to be further security for the aforementioned indebtedness or any other indebtedness of Grantor to Grantee."

In the event the proposed DIL transaction reveals information that indicates that the conveyance may not be an absolute conveyance the following exception must appear in the title policy:

> "Any assertion that the conveyance or Deed In Lieu of Foreclosure vesting title in the Insured is part of a loan transaction, including an assertion that it constitutes a mortgage or other security device."

C. Surrender of Premises

You must ascertain that the lender is in possession of the premises and that the prior owner/borrower has vacated and surrendered the premises.

D. Debtor's Representation as to Value and Fairness

The deed or estoppel affidavit should contain a recital that the owner/borrower conveyed the land to the lender for fair and adequate consideration, which would be the satisfaction of the indebtedness secured by the Deed to Secure Debt, that the conveyance was freely and fairly made, and that the owner/borrower is fully aware of the consequences of the execution and delivery of the DIL.

E. Evidence of Authority

If the DIL is given by a corporation, LLC, or partnership, you must ascertain that the representative for the seller has the authority to do so. A DIL is an unusual occurrence and great care should be exercised in determining the authority of the signers.

F. Other Liens and Encumbrances

Exceptions must be raised to other liens or encumbrances affecting title to the property. A DIL does not extinguish other liens and encumbrances in the same manner as a foreclosure.

PRESERVATION OF THE DEED TO SECURE DEBT-MERGER

Generally speaking a court of equity will look to the intent of the parties in a DIL transaction to determine if the interest conveyed under the Deed to Secure Debt merges with the interest conveyed in the DIL. It is important that recitals appear in the DIL to confirm the parties' intent. Typical non-merger language should read:

> "It is the intent and express desire of the parties hereto that all of the loan documents pertaining to the indebtedness secured by that certain Deed to Secure Debt (list recording information) shall remain in full force and effect after the execution and delivery of this Deed In Lieu of Foreclosure, and that there shall be no merger of the fee interest obtained by Grantee hereby with or unto Grantee's prior security interest on the property under the above-referenced Security Deed."

Please contact the State Office with any questions or comments.