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# Loan Modification & Your Title Policy

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# Title Insurance 101

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- Title Insurance
  - “...a contract... agreeing to indemnify the insured up to a specified amount against loss caused by encumbrances upon or defects in the title to real property in which the insured has an interest”
    - Joyce D. Palomar, *Title Insurance Law §1.7*



# Title Insurance 101

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Policy Jacket

ALTA 2006

*Exclusion from Coverage*

**3(a) ...matters *created, suffered assumed or agreed to by the Insured Claimant***

**3(d)...attached or created *subsequent* to the Date of the Policy...**



# Title Insurance 101

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Why is this Important to remember those basic  
Principals when contemplating a Modification?



# Title Insurance 101

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Because your modifications is  
*“Created” by the insured (the Bank)...and*  
*“Subsequent to the Date of Policy”.*

Therefore, the modification would not be  
covered by the original Loan Policy.



# Effects of Modifications

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Biggest Fear for a Lender undertaking a modification should be **Loss of Priority**

Scariest word for a Lender to hear is  
**NOVATION**



# Effects of Modifications

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- [N]ovation is defined as a mutual agreement among all parties concerned for discharge of a valid existing obligation by the **substitution** of a new valid obligation on the part of the debtor or another.

Dere v. Montgomery Ward & Co., Inc., 224 Va. 277, 280, 295 S.E.2d 794, 795 (1982)



# Effects of Modifications

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Novation +  
Lenders Policy

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**NO COVERAGE**

Why?



# Effects of Modifications

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See 2006 Loan Policy Jacket  
Conditions 10(b)

“The voluntary satisfaction (*discharge*) or release of the Insured Mortgage shall terminate all liability of the Company...”



# Effects of Modifications

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If not a Novation then what is it?

Continuation

How do we know if priority is secured?

“Does the modification materially prejudice the interest of junior lienholders?”

*See Sackadorf v. JLM Grp. Ltd. P'ship, 250 Va. 321, 332, 462 S.E.2d 64, 70 (1995)*



# Effects of Modifications

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Common Modifications and are they  
Materially Prejudicial?

1. *Maturity Date Extension*
  2. *Additional Funds*
    - Not the same as a Future Advance Deed of Trust
  3. *Interest Rate Change*
  4. *Principal Reduction*
  5. *Additional Property as Security*
  6. *Modifications with Cross Collateralize Loans*
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# Effects of Modifications

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If materially prejudicial, how does this effect Priority?

- Generally, the portion of the debt under the modified terms is limited in priority as to the date of the recordation of the modification.



# Effects of Modifications

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## Note Regarding Restatement of Property § 7.3 (c)

(c) If the mortgagor and mortgagee reserve the right in a mortgage to modify the mortgage or the obligation it secures, the mortgage as modified retains priority even if the modification is materially prejudicial to the holders of junior interests in the real estate, except as provided in Subsection (d).

*Restatement (Third) of Property (Mortgages) § 7.3 (c) (1997)*



# Effects of Modifications

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Note Regarding Restatement of Property § 7.3(c)

- This is not future advance language; and
- There is very little judicial authority concerning the enforceability of this reserved right and how it effects any junior lienholders.



# Endorsements

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What can we do to insure that the modification  
are covered by the Loan Policy?

ENDORSEMENTS

ALTA 14 Series

ALTA 11 Series



# Endorsements

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Alta 14-06

**Future Advance Priority**

Residential & Commercial

Includes Variable Rate coverage



# Endorsements

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Alta 14.1-06

**Future Advance with Knowledge**

ALTA 14.2-06

**Future Advance – Letter of Credit**

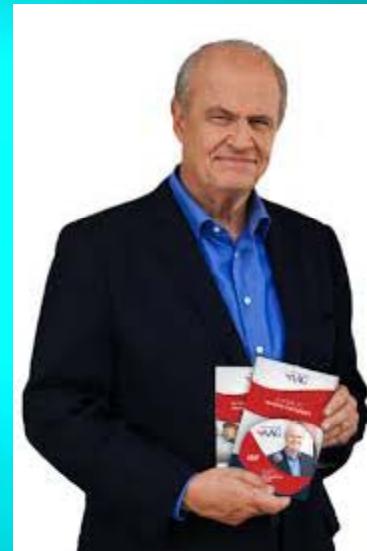


# Endorsements

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ALTA 14.3-06

Future Advance – Reverse Mortgage



# Endorsements

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Alta 11-06

## Mortgage Modification

- Insures Lender against loss or damage due to the invalidity of the insured mortgage due to the modification; and
- Insures Lender against loss or damage due to the lack of priority of the insured mortgage



# Endorsements

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Alta 11.1-06

## Mortgage Modification – with Subordination

- Similar to the Alta 11-06 and provides additional coverage for loss or damage by reason of an intervening lien that has purportedly been subordinated by recorded agreement in connection with the modification.



# Endorsements

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Alta 11.2-06

## **Mortgage Modification with Additional Amount of Insurance**

- Similar to the Alta 11-06 and provides for an increase in the amount of insurance.



# Endorsements

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What will your friendly title company ask for:

1. Recording information for the modification
  2. Validation that the current owner and lender are parties to the modification.
  3. No full or partial reconveyance of the mortgage and no intervening liens or encumbrances
    - If a search reflects any intervening matters, these either must be subordinated or an exception would be taken on the policy for this matter.
  4. Proof that the taxes for the current tax year have been paid
  5. Verification of the current parties in possession
  6. Executed Affidavit Regarding Liens/Seller Borrower
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# Keys to Modifications

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1. Continuation not Novation
2. Don't Prejudice Junior Lienholders
3. If Junior Lienholders consider a subordination to the modification
4. Endorsements to alleviate risk
5. Discuss with Lender's Counsel
6. Discuss with your Title Agency Staff



# Contact Information

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Please feel free to contact me should you have any additional questions.

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