

PUBLICATION

Major Title Insurance Companies Decline to Issue Creditors' Rights Endorsements

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Many major national title insurance companies have just announced they will no longer provide "creditors' rights" coverage in connection with new policies of title insurance. Therefore, commercial real estate lenders and purchasers will now bear certain insolvency risks that were often covered by title insurance endorsements in the past.

In the context of a policy of title insurance, "creditors' rights coverage" has historically referred to coverage provided by a title insurance company, typically by way of endorsement, against challenges to the transfer of title by way of fraudulent conveyance, fraudulent transfer, preferential transfer or certain other federal and state bankruptcy and insolvency laws.

In the past, obtaining creditors' rights coverage was fairly common and easy to obtain. With the downturn in the economy, however, obtaining creditors' rights coverage in the last 18 months generally required the payment of an additional and substantial title endorsement premium on top of the standard title insurance premium. It also required additional underwriting processes related to the transaction.

Because of the economic downturn and several recent bankruptcy court decisions, title insurers, their re-insurers, and state regulators are nervous about the ongoing provision of creditors' rights coverage. In response to those concerns, on February 3, 2010, the board of the American Land Title Association (ALTA) voted to officially withdraw the creditors' rights endorsement (ALTA Form 21/21-06) from use, effective March 8, 2010. The California Land Title Association followed suit.

The national title insurance companies have taken related actions in quick order. On February 5, 2010, Lawyers Title Insurance Corporation and Commonwealth Land Title Insurance Company issued a joint memorandum to their customers advising that they and their related companies in the Fidelity National Title Group (Lawyers Title, Commonwealth Land Title, Chicago Title, Ticor Title, Fidelity Title and Alamo Title) would no longer provide a creditors' rights endorsement or other forms of creditors' rights coverage. On February 8, 2010, First American Title Insurance Company issued its Home Office National Bulletin Case No. 275 and a related letter to its customers declaring that it would no longer provide a creditors' rights endorsement or other creditors' rights coverage, effective immediately. However, it may be possible to obtain the coverage on pending orders where a title company has already agreed to provide it.

A number of state regulatory agencies are now taking action to prevent title insurers from issuing creditors' rights endorsements or providing other forms of creditors' rights coverage. It is expected that many other states will also prohibit title insurers from providing such coverage in the future.

For more information on the information presented in this alert, please contact any attorney in Baker Donelson's Real Estate and Finance Group.