

Mitigating Record-Delay Risks For Title Insurance Cos.

By **Nicole Ament and Elaine Bailey** (April 2, 2020)

With the continuing spread of COVID-19, many clerk and recorder's offices have announced closures. Some offices are closed to the public, while still allowing mail-in and/or e-filing, and others are closed for all filings. Additionally, some offices that initially closed entirely have reopened for e-recording and/or mail-in recording.

Since every office is different regarding their current status and the types of recordings they accept, it is essential to confirm the status of the individual office where documents are to be recorded prior to the closing.



Nicole Ament

The Problem

The inability to record documents or a delay in timely recording documents can lead to two primary issues with title insurance coverage. The first concern is with regard to the title company's ability to obtain updated title searches. Delays in recording have made it so that the title company searches can be a few days out of date. Depending on the length of the closure at the recording office, this could extend to searches being weeks out of date.



Elaine Bailey

This can make it so that title companies are less willing to provide insurance as of the date of closing, as they are not able to confirm what has been recorded against the property in the days or weeks prior to closing. The longer offices are closed, the more risk the title insurance company is taking on with regard to additional documents being recorded between the date they can search through and the date of the recording of the final closing documents.

Second, often clients request, and the title companies provide, gap coverage whereby the title company agrees to provide insurance for any documents not listed in the exceptions section to the policy from the date of closing, rather than the date of recording. This coverage is commonly known as gap coverage. Typically, the time between closing and recording is minimal as e-recording can happen during hours and sometimes minutes of closing. In-person recordings under normal circumstances still usually occur the day of closing or the next day.

The Current Solution

At this point in time, title insurance companies are willing to continue to provide insurance when they are able to e-record the documents. Most are also willing to provide coverage if they can submit the document for recording, even if they are not actually able to record at this time.

The most common solution that title companies have come up with, in order to limit their potential liability while still providing coverage, is to require additional affidavits and indemnities. The affidavits required are generally similar to owner's affidavits, but also include an acknowledgement regarding the uncertainty for the timing of recording.

Title companies are also requiring that the seller, or borrower in the case of a refinance,

make an affirmative statement that they will not record any other documents and indemnify the title company for any losses that the title company may experience due to the recording of a document against the property between the date they are able to search through and the date of recording. The title companies are requiring a financially viable entity to provide the indemnity. Lenders must also accept that it is not clear when recording offices will reopen and documents will be recorded.

Some title companies have added into the requirements section of the commitment the right to raise additional exceptions and requirements or not issue a policy at all based on their ability to record documents and perform title searches due to the closure of clerk and recorder's offices. If this expands to more title companies, it could lead to greater uncertainty with the closing. This is because the closing could happen and then the title company could come back and say that they are not able to issue a policy or that they are going to add in additional exceptions to coverage that were not contemplated prior to closing.

Under many purchase-and-sale agreements there is a right to terminate if there is an additional unacceptable exception added after the initial due diligence deadline, which the seller is unable to remove. It is untested how this would work in the case of an additional exception being added after closing. However, in our experience, these same title companies have subsequently agreed to remove this additional language from their commitments so long as the parties are willing to enter into gap affidavits and indemnities similar to those mentioned above.

Things to Watch Out For

Title companies are assessing their willingness to provide gap coverage on a case-by-case basis, and the policies of individual title companies are changing as the situation continues to develop. Any atypical things in a closing such as nontraditional financing, a seller who is in financial distress or the inability to obtain payoff information will make it less likely that the title company will provide gap insurance.

The amount of coverage can also affect the ability to receive gap coverage at this time. Additionally, if recorder's offices fall even further behind with regard to recording, it is possible that title companies could move away from relying on affidavits and indemnities and instead rely more heavily on additional exceptions and/or requirements in order to issue a policy.

Due to the risk of recording priority, at least one major title company is not insuring construction loans at this time. Another will still consider providing gap insurance for construction loans based on the timing of the closing. Closings that are imminent may be delayed due to the additional underwriting approval required.

Closings scheduled to occur further out in time are more likely to receive gap insurance, at least for counties with the ability to still record documents electronically, as title companies are expecting recording times to return to normal.

Any buyers looking to quickly resell the property or refinance the property should be aware that they likely will not be able to do so until the deed is recorded, as they will not be shown as the owner of record.

Conclusion

Ultimately, the underwriting on gap coverage varies on a case-by-case basis and for each title company; however, at this time closings are generally able to proceed with title companies providing gap coverage for any recording delays.

Nicole Ament is a shareholder and Elaine Bailey is an associate at Brownstein Hyatt Farber Schreck LLP.

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