

**New Mexico Bankers Association  
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**Glitches and Gotchas to Avoid in Title Insurance**

**Orlando Lucero, Esq.**

**Vice-President/New Mexico State Underwriting Counsel**

**Fidelity National Title Group**

**8500 Menaul Blvd., NE, Suite A-110A**

**Albuquerque, NM 87112**

**505-332-6291**

**[orlando.lucero@fnf.com](mailto:orlando.lucero@fnf.com)**



## Survey Coverage

One of the standard exceptions found in New Mexico title commitments and title policies is standard exception 3, which excepts from coverage under the policy:

“(3) Encroachments, overlaps, conflicts in boundary lines, shortages in area, or other matter which would be disclosed by an accurate survey and inspection of the premises.”

This is known as the survey exception. The exception may be deleted or modified only in accordance with the New Mexico title insurance regulations. 13.14.6.14 NMAC. In order to delete or modify the exception, the title company must be furnished with a recent survey of the insured property and must pay the additional premium. The cost of survey coverage in a lender’s policy is \$0 and the cost in an owner’s policy is 15% of the basic policy premium

A recent survey is one acceptable to the title company and may be an existing survey or a new survey done specifically for the insured transaction. The type of survey may be an improvement location report (ILR), boundary survey, or ALTA/NSPS survey. What constitutes an acceptable recent survey may vary from one title company to another and may depend on many factors, including: the amount of insurance, whether the transaction is residential or commercial, whether the property is platted, and whether the property has been surveyed recently.

The New Mexico title insurance regulations allow a title company to delete all of standard exception 3, thereby giving full survey coverage, or delete all but the words “shortages in area.” If the shortages in area language is retained in the exception, then there is no coverage against shortages in area.

Even if the buyer or lender get survey coverage, any adverse matters shown on the survey of the property generally will be included as specific Schedule B exceptions. For example, if the survey shows an encroachment onto the insured property, that encroachment will be listed in Schedule B as an exception.

You should communicate early in the process with the title company to understand what kind of survey will be required for your particular transaction in order to get survey coverage.

## **Mortgage Modification Endorsements**

Among other things, a lender's title insurance policy insures the validity, enforceability and priority of the lender's mortgage. During the life of a mortgage loan the lender and borrower may agree to amend or modify the insured mortgage. These modifications may take many different forms. Typically, a lender will request a mortgage modification endorsement to its lender's title policy in order to get assurance that the modification is valid and enforceable and that the modification does not affect the existing priority of the insured mortgage.

New Mexico has three forms of Mortgage Modification Endorsements (copies of which are attached to these materials):

### **NM 80 – Mortgage Modification Endorsement**

This endorsement insures the lender that (1) the modification of mortgage does not result in invalidity or unenforceability of the insured mortgage; and (2) the mortgage, as modified, has priority over defects, liens, and encumbrances, except those in the policy and prior endorsements and except those set forth in this endorsement. The endorsement does not insure against creditors' rights issues arising out of the modification.

### **NM 80.1 – Mortgage Modification with Subordination Endorsement**

Like the NM 80 this endorsement insures the lender that (1) the modification of mortgage does not result in invalidity or unenforceability of the insured mortgage; and, (2) the mortgage, as modified, has priority over defects, liens, and encumbrances, except those in the policy and prior endorsements and except those set forth in this endorsement. This endorsement, however, is designed for issuance in connection with a mortgage modification where an intervening lien is expressly subordinated by agreement to the modified mortgage.

### **NM 80.2 – Mortgage Modification with Additional Amount of Insurance Endorsement**

Like the two other endorsements endorsement insures the lender that (1) the modification of mortgage does not result in invalidity or unenforceability of the insured mortgage; and, (2) the mortgage, as modified, has priority over defects, liens, and encumbrances, except those in the policy and prior endorsements and except those set forth in this endorsement. This endorsement, however, is designed for issuance in connection with a mortgage modification where an additional amount of insurance is requested.

Each title company will have its own underwriting guidelines for each of these endorsements, but most guidelines will include:

- A current search of the public records from the date of policy of the lender's policy.

- All current owners must join in the modification instrument, and if the mortgage encumbers a leasehold, then the consent of the landlord or an estoppel affidavit may be required.
- If intervening matters are found, those are listed as additional exceptions in the endorsement, unless there are subordinations.
- The modification instrument must be recorded.
- The modification must not create a novation. A novation is the substitution of a new obligation for a prior obligation. Whether or not a novation occurs will depend on a variety of circumstances. In New Mexico a novation requires: 1) an existing and valid contract; 2) an agreement to the new contract by all the parties; 3) a new valid contract; and 4) an extinguishment of the old contract by the new one. *Sims v. Craig*, 96 N.M. 33, 627 P.2d 875 (N.M. 1981). Most title companies require underwriter approval to issue a mortgage modification endorsement because the underwriters want to evaluate the modification and ascertain the risk that the modification would be considered a novation.
- Payment of the premium. The NM 80 and 80.1 each cost \$65. The NM 80.2 costs \$65 plus the premium for the additional coverage.

Particularly for commercial lenders and their legal counsel, you are well advised to speak with your title company who insured the mortgage loan early in the loan modification process to try to ensure that there are no last minute surprises with the modification. The title company's legal counsel can work with lender's counsel on document structures that help avoid a novation.

**NM Form 80 Mortgage Modification Endorsement (ALTA 11-06)**

**Mortgage Modification Endorsement**

**Attached to Policy No. \_\_\_\_\_  
Issued By**

**CHICAGO TITLE INSURANCE COMPANY**

The Company insures against loss or damage sustained by the Insured by reason of:

1. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title at Date of Endorsement as a result of the agreement dated \_\_\_\_\_ recorded \_\_\_\_\_ ("Modification"); and
2. The lack of priority of the lien of the Insured Mortgage, at Date of Endorsement, over defects in or liens or encumbrances on the Title, except for those shown in the policy or any prior endorsement and except: [Specify exceptions, if any]

This endorsement does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses, by reason of any claim that arises out of the transaction creating the Modification by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws that is based on:

1. the Modification being deemed a fraudulent conveyance or fraudulent transfer; or
2. the Modification being deemed a preferential transfer except where the preferential transfer results from the failure
  - a. to timely record the instrument of transfer; or
  - b. of such recordation to impart notice to a purchaser for value or to a judgment or Lien creditor.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

Dated: \_\_\_\_\_

**CHICAGO TITLE INSURANCE COMPANY**

Authorized signatory \_\_\_\_\_

**NM Form 80.1 Mortgage Modification with Subordination Endorsement (ALTA 11.1-06)**

**Mortgage Modification with Subordination Endorsement**

**Attached to Policy No. \_\_\_\_\_  
Issued by**

**CHICAGO TITLE INSURANCE COMPANY**

The Company insures against loss or damage sustained by the Insured by reason of:

1. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title at Date of Endorsement as a result of the agreement dated \_\_\_\_\_, recorded \_\_\_\_\_ ("Modification"); and

2. The lack of priority of the lien of the Insured Mortgage, at Date of Endorsement, over defects in or liens or encumbrances on the Title, except for those shown in the policy or any prior endorsement and except: [Specify exceptions, if any]

3. The following matters not being subordinate to the lien of the Insured Mortgage: [Specify subordinate matters, if any]

This endorsement does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses, by reason of any claim that arises out of the transaction creating the Modification by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws that is based on:

1. the Modification being deemed a fraudulent conveyance or fraudulent transfer; or
2. the Modification being deemed a preferential transfer except where the preferential transfer results from the failure
  - a. to timely record the instrument of transfer; or
  - b. of such recordation to impart notice to a purchaser for value or to a judgment or lien creditor.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Date of Endorsement: \_\_\_\_\_

[Witness clause optional]

**CHICAGO TITLE INSURANCE COMPANY**

Authorized Signatory

**NM Form 80.2 Mortgage Modification with Additional Amount of Title Insurance Endorsement  
(ALTA Form 11.2-06, 12-2-13)**

**Mortgage Modification with Additional Amount of Title Insurance Endorsement**

**Attached to Policy No. \_\_\_\_\_  
Issued by**

**CHICAGO TITLE INSURANCE COMPANY**

1. For purposes of this endorsement only:

a. "Modification" means the agreement between \_\_\_\_\_ and \_\_\_\_\_ dated \_\_\_\_\_ [and recorded \_\_\_\_\_ as document number] \_\_\_\_\_.

b. "Date of Endorsement" means \_\_\_\_\_.

2. The Amount of Insurance is increased to \$\_\_\_\_\_.

3. Subject to the exclusions in Section[s] 4 [and 5] of this endorsement, the Exclusions from Coverage, the Exceptions contained in Schedule B, and the Conditions contained in the policy, and any exclusion or exception in any prior endorsement, the Company insures as of Date of Endorsement against loss or damage sustained by the Insured by reason of any of the following:

a. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title as a result of the Modification;

b. The lack of priority of the lien of the Insured Mortgage over defects in or liens or encumbrances on the Title, except: [*Specify additional exceptions, if any*];

c. The failure of the following matters to be subordinate to the lien of the Insured Mortgage: [*Specify matters to be insured as subordinate, if any*].

4. This endorsement does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses, by reason of any claim that arises out of the transaction creating the Modification by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws that is based on:

a. the Modification being deemed a fraudulent conveyance or fraudulent transfer; or

b. the Modification being deemed a preferential transfer except where the preferential transfer results from the failure

i. to timely record the instrument of transfer; or



ii. of such recordation to impart notice to a purchaser for value or to a judgment or lien creditor.

[5. This endorsement does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses, by reason of *the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage because all applicable mortgage recording or similar intangible taxes were not paid* at time of recording of the Modification].

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Date of Endorsement: \_\_\_\_\_

[Witness clause optional]

**CHICAGO TITLE INSURANCE COMPANY**

Authorized Signatory

## **SOME COMMON COMMERCIAL ENDORSEMENTS**

Endorsements are amendments to title policies; they address specific issues related to the transaction and typically they enhance coverage under the policy. Only the endorsement forms promulgated for use in New Mexico by the Office of the Superintendent of Insurance may be issued in New Mexico (see attached list of all promulgated forms in New Mexico). The forms of the endorsements cannot be modified except in the very limited instances allowed by the New Mexico title insurance regulations. Each endorsement has its own premium charge, which can vary from \$25 to 23% of the basic premium amount.

Some common commercial endorsements for lender's policies include the following:

### **Comprehensive Endorsements (copies of these are attached):**

**NM 50 Restrictions, Encroachments, Minerals - Loan Policy Endorsement**

**NM 50.1 Restrictions, Encroachments, Minerals - Loan Policy Endorsement**

These endorsements insure against violations of restrictions, encroachments over easements, building lines or property lines, and damage by reason of mineral development. They are sometimes called the "comprehensive endorsements." These may not be issued on one-to-four family property. This endorsement may be issued only if the policy also includes survey coverage. If there are minerals severed from the property, in order to provide the minerals coverage, the holders of the severed minerals must waive their rights to use the surface of the property. These endorsements cost 10% of the basic premium amount.

### **Zoning Endorsements (copies of these are not attached):**

**NM 64 Zoning – Unimproved Land Endorsement**

**NM 64.1 Zoning – Unimproved Land – No Applicable Zoning Ordinances Endorsement**

**NM 65 Zoning – Completed Structure Endorsement**

**NM 65.1 Zoning – Land Under Development Endorsement**

**NM 65.2 Zoning – Completed Structure – No Applicable Zoning Ordinances Endorsement**

The NM 64 series endorsements are used for vacant land and generally insure the zoning classification of the property. The NM 64.1 insures that there are no applicable zoning ordinances with respect to the property. The NM 65 series endorsements are used for improved property or property to be improved. In addition to insuring the zoning classification of the property, these endorsements insure that the property as-built complies or as-to-be-built will comply with the insured zoning classification. In order to issue any of these endorsement, the title company relies on zoning letters and zoning reports, as well as surveys of the property. The NM 64 series costs 15% of the basic premium amount and the NM 65 series costs 23% of the basic premium amount.

**Survey Related Endorsements (copies of these are not attached):** All of the following endorsements will typically require a survey acceptable to the title company as a condition of issuing the endorsement.

**NM 51 Land Abuts Street Endorsement.** This insures that the insured property is contiguous to a public right of way.

**NM 52 Location Endorsement.** This insures that the named improvements are located on the land and that the improvements are identified by an address.

**NM 67 Access and Entry Endorsement.** This insures that the property has actual physical access to a public right of way (as a title insurance policy only insures legal access, not actual access).

**NM 69 Utility Access Endorsement.** This insures against loss if there is a lack of right of access to specific utilities due to gaps or gores or the termination of easement rights.

**NM 78 Same as Survey Endorsement.** This insures that insured land is the same land shown on the survey.

**Other Endorsements (copies of these are not attached):**

**NM 14 Variable Rate Mortgage Endorsement.** This insures against invalidity, unenforceability or loss of priority because the loan has a variable rate.

**NM 17 Revolving Credit Endorsement.** This insures that the amount of insurance will vary depending on the outstanding balance of the loan and insures the priority of all advances under the loan.

**NM 25 Additional Advance Endorsement.** This insures the validity and priority of additional advances under an open end mortgage.

**NM 62 Assignment of Rents or Leases Endorsement.** This insures that there are no defects in the execution of an assignment of lessor's interest in a particular lease or rents and no prior assignments of record. The cost is \$100.

**NM 70 Commercial Environmental Lien Endorsement.** This insures against existing recorded federal or state environmental protection liens.

**NM Form 50 Restrictions, Encroachments, Minerals - Loan Policy Endorsement (ALTA Form 9-06, Rev. 2006)**

**Restrictions, Encroachments, Minerals - Loan Policy Endorsement (NM 50)**

Attached to Policy No. \_\_\_\_\_  
Issued by

**CHICAGO TITLE INSURANCE COMPANY**

The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

**1. The existence, at Date of Policy, of any of the following:**

**a. Covenants, conditions or restrictions under which the lien of the Insured Mortgage can be divested, subordinated, or extinguished, or its validity, priority, or enforceability impaired.**

**b. Unless expressly excepted in Schedule B**

**(i) Present violations on the Land of any enforceable covenants, conditions, or restrictions, and any existing improvements on the land described in Schedule A that violate any building setback lines shown on a plat of subdivision recorded or filed in the Public Records.**

**(ii) Any instrument referred to in Schedule B as containing covenants, conditions, or restrictions on the Land that, in addition, (A) establishes an easement on the Land; (B) provide a lien for liquidated damages; (C) provides for a private charge or assessment; (D) provides for an option to purchase, a right of first refusal, or the prior approval of a future purchaser or occupant.**

**(iii) Any encroachment of existing improvements located on the Land onto adjoining land, or any encroachment onto the Land of existing improvements located on adjoining land.**

**(iv) Any encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.**

**(v) Any notices of violation of covenants, conditions or restrictions, relating to environmental protection recorded or filed in the Public Records.**

**2. Any future violation on the Land of any existing covenants, conditions, or restrictions occurring prior to the acquisition of title to the estate or interest in the Land by the Insured, provided the violation results in**

**a. the invalidity, loss of priority, or unenforceability of the lien of the Insured Mortgage; or**

**b. the loss of Title if the Insured shall acquire Title in satisfaction of the Indebtedness secured by the Insured Mortgage.**

3. Damage to existing improvements, including lawns, shrubbery or trees:

**a. that are located on or encroach upon that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved.**

**b. resulting from the future exercise of any right to use the surface of the Land for the extraction or development of minerals excepted from the description of the Land or excepted in Schedule B.**

4. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment excepted in Schedule B.

5. Any final court order or judgment denying the right to maintain any existing improvements on the Land because of any violation of covenants, conditions or restrictions, or building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

Wherever in this endorsement the words "covenants, conditions or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants, conditions, or limitations contained in an instrument creating a lease.

As used in paragraphs 1.b(i) and 5, the words "covenants, conditions, or restrictions" do not include any covenants, conditions, or restrictions (a) relating to obligations of any type to perform maintenance, repair, or remediation on the Land, or (b) pertaining to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances, except to the extent that a notice of a violation or alleged violation affecting the Land has been recorded or filed in the Public Records at Date of Policy and is not excepted in Schedule B.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

CHICAGO TITLE INSURANCE COMPANY

**NM Form 50.1 Restrictions, Encroachments, Minerals - Loan Policy Endorsement (ALTA Form 9.3-06, Rev. 2006)**

**Restrictions, Encroachments, Minerals - Loan Policy Endorsement (NM 50.1)**

**Attached to Policy No. \_\_\_\_\_**

**Issued By**

**CHICAGO TITLE INSURANCE COMPANY**

The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

1. The existence at Date of Policy of any of the following:

**a. Covenants, conditions, or restrictions under which the lien of the insured mortgage can be divested, subordinated or extinguished, or its validity, priority or enforceability impaired.**

**b. Unless expressly excepted in Schedule B:**

**(i) Present violations on the land of any enforceable covenants, conditions, or restrictions, and any existing improvements on the land which violate any building setback lines shown on a plat of subdivision recorded or filed in the public records.**

**(ii) Any instrument referred to in Schedule B as containing covenants, conditions, or restrictions on the land that, in addition, (A) establishes an easement on the land; (B) provides a lien for liquidated damages; (C) provides for a private charge or assessment; (D) provides for an option to purchase, a right of first refusal, or the prior approval of a future purchaser or occupant.**

**(iii) Any encroachment of existing improvements located on the land onto adjoining land, or any encroachment onto the land of existing improvements located on adjoining land.**

**(iv) Any encroachment of existing improvements located on the land onto that portion of the land subject to any easement excepted in Schedule B.**

**(v) Any notices of violation of covenants, conditions, or restrictions relating to environmental protection recorded or filed in the public records.**

2. Any future violation on the land of any existing covenants, conditions, or restrictions occurring prior to the acquisition of title by the Insured, provided the violation results in

**(a) invalidity, loss of priority, or unenforceability of the lien of the insured mortgage; or**

**(b) loss of Title if the Insured shall acquire title in satisfaction of the indebtedness.**

3. Damage to existing improvements, including lawns, shrubbery, or trees, located or encroaching on that portion of the land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved.

4. Damage to improvements, including lawns, shrubbery, or trees, located on the land on or after Date of Policy resulting from the future exercise of any right to use the surface of the land for the extraction or development of minerals excepted from the description of the land or excepted in Schedule B.

5. Any final court order or judgment requiring the removal from any land adjoining the land of any encroachment excepted in Schedule B.

6. Any final court order or judgment denying the right to maintain any existing improvements on the land because of any violation of covenants, conditions, or restrictions, or building setback lines shown on a plat of subdivision recorded or filed in the public records.

Wherever in this endorsement the words "covenants, conditions, or restrictions" appear, they do not include the terms, covenants, conditions, or limitations contained in an instrument creating a lease.

As used in paragraphs 1.b(1) and 6, the words "covenants, conditions or restrictions" do not include any covenants, conditions, or restrictions (a) relating to obligations of any type to perform maintenance, repair or remediation on the land, or (b) pertaining to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances, except to the extent that a notice of a violation or alleged violation affecting the land has been recorded or filed in the public records at Date of Policy and is not excepted in Schedule B.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

**CHICAGO TITLE INSURANCE COMPANY**

Authorized Signatory