

Make sure your mortgage advance is secure – check your Standard Charge Terms

As a lender, you want to be sure that your documents are properly drafted and are providing you with the security that you expect on each mortgage loan. If you are taking collateral mortgages as security for lines of credit, for example, and the terms of your mortgages are not properly drafted, you may **lose** the mortgage security at some point.

The problem arises specifically with line-of-credit mortgage loans due to the way that funds are advanced and repaid. Unlike traditional mortgage loan situations, where funds are advanced in one lump sum and then repaid in blended monthly payments of principal and interest over the term of the loan, with a line-of-credit mortgage, funds may not be initially advanced at all. When funds are advanced, they may be paid back in full one day and re-advanced the next.

Some lenders still use mortgage terms that can, in some cases, completely void the mortgage. For example, consider the following payment provision in the context of a line-of-credit mortgage:

PROVIDED this mortgage to be void upon payment of the sum of x DOLLARS (\$x.xx) in lawful money of Canada together with interest ...

Let's assume that this provision is in one of your mortgages. If the amount secured under the mortgage is \$100,000.00 and the full amount is advanced on day 1 and repaid (with interest) on day 2, your mortgage may be void and you **may not have security** going forward for this line-of-credit.

This is not to say that your borrower is not obligated to repay the money borrowed, but if the money is not repaid and you choose to enforce, the risk is that you may have lost your rights under the mortgage (for example, power-of-sale rights). You may only be able to sue your borrower as an unsecured creditor. This is not the position you want to be in when you need to enforce.

Does the fact that you still have a registered mortgage on the borrower's property put you in a better position than an unsecured creditor? From a practical perspective it is useful, but ultimately it may not save the day. Once a mortgage has become void, it cannot normally be reinvigorated. If you were to try to enforce through the use of your power-of-sale rights under the mortgage, the

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Types of properties that qualify for TitlePLUS® coverage

TitlePLUS title insurance is available across Canada for purchases or refinances of new or resale residential properties, including properties containing up to 4 units, rural properties and condominiums. TitlePLUS coverage is also available for commercial and farm properties in Ontario, and for leasehold properties in Ontario and Nunavut.

Standard Charge Terms (continued)

borrower could potentially argue that any attempt to do so would be of no effect given that your rights under the mortgage were extinguished when it became void. In fact, it is arguable that your borrower might be successful in having your mortgage deleted from title to the property as it no longer binds the property.

At this point you may be wondering why any lender would have such wording in its mortgage terms. The answer is that it is a historical remnant. It likely goes back to a time when all mortgages were conventional mortgages with funds being advanced in full and then repaid over time. Lenders could not permanently bind a borrower's property if the borrower fully repaid all amounts owing, and mortgage terms reflected this situation.

Since this wording does not work in the context of collateral mortgages securing a revolving credit facility, it is problematic that it still appears in some lenders' mortgage terms today. If this type of wording still appears in any of your collateral mortgage documents, consideration should be given to having it changed. Raise the issue with your legal department, as your lawyers may suggest that your documents provide expressly that a zero balance does **not** void the security provided by the mortgage for subsequent advances.

Fortunately, this issue is something that is often covered by title insurance. Under a TitlePLUS policy, an Endorsement for Collateral/Line of Credit Mortgages provides coverage for actual losses as a result of the invalidity, unenforceability or lack of priority of the mortgage regarding advances made after the policy date.¹ So, if you cannot

enforce your mortgage because it has become void due to the type of wording discussed above, you could make a claim under your TitlePLUS policy.

As a result of these issues and others related to maintaining mortgage priority, and prior to offering coverage for subsequent advances to a lender for the first time, we review the lender's mortgage documents to ensure that the necessary wording appears. The result is that **lenders obtaining TitlePLUS coverage are doubly protected** for these issues: by the wording of their own mortgage terms and by the coverage in a TitlePLUS policy.

¹ Please refer to the TitlePLUS policy and endorsements for full details, including actual terms and conditions.

How you can become a TitlePLUS Confirmed Lender

All you need to do is sign a simple letter agreement with the TitlePLUS Department. Then we notify our subscribing lawyers and publish your requirements on our websites. For more details and a copy of the agreement, contact Mark Farrish at mark.farrish@lawpro.ca, 1-800-410-1013 or 416-598-5866.

Our Confirmed Lenders' list consists of numerous lenders with local and national presence. We would be pleased to put you on the list too.

