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**“New” Evidence of Property Insurance—Off the Table?**

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In closing a commercial loan secured by real property, the lender always needs to know that the borrower has adequate commercial property insurance on which the lender or borrower can collect if the collateral “goes up in smoke.” A Delaware statute requires a mortgagee to accept as evidence of insurance a written “binder” issued by any authorized insurer or its agent; however, nearly ninety percent of U.S. property and casualty carriers and their agents issue in addition to or in lieu of the binder a standard ACORD “Evidence of Commercial Property Insurance” form. As of November 3, 2003 the non-profit insurance industry agency “ACORD” developed in conjunction with the Mortgage Bankers Association a new form numbered ACORD 28, which only came into common use in Delaware within the past two year. Banks prudently started seeking properly completed ACORD 28 forms in all closings involving real estate, instead of the ACORD 27 form it replaced or the useless ACORD 24 “Certificate of Property Insurance” (which does not give the lender any substantial rights). There was also a “new” ACORD 27 form developed at the same time, but this form is now used for evidence of personal property insurance instead.

The form ACORD 25 Certificate of Liability Insurance was not improved in 2003 and, much like the old ACORD 24 form, states in several ways that the bank can not rely on it. The ACORD 25-S is intended to reflect the liability coverage in place at the instant it is issued; but it does not require notice to the lender of any changes. Moreover, if it reflects incorrect information then by its terms it does not amend the actual policy.

However, suddenly and without proper notice or fanfare, in response to insurance industry pressures, ACORD revised the ACORD 28 form in mid-2006, adding in the features of the ACORD 25 Certificate of Liability Insurance form discussed above that prevent reliance on the form. There is again a seeming lag in Delaware regarding the use of updated forms, so the '03 version of the ACORD 28 can still be obtained in many instances. Currently, securitized lenders with considerable clout are pressuring the industry to revert back to the 2003 ACORD 28 form, though whether ACORD officially changes the ACORD 28 again remains to be seen.

Both the '03 version of the ACORD 28 form and the current version make it easier for banks to close loans by including a “coverage information” section with a laundry list of types of coverages and exclusions, followed by “yes” and “no” columns to be checked, with “limit” and “deductible” columns to be filled in if the answer to the specific coverage question is “yes.” The old ACORD 27 form required the loan closer to think through what questions the lender needed answered about the insurance coverage, and then actually convince the insurance agent to type in acceptable answers in the blank “remarks” section, using non-standard language. ACORD did a good job in developing form 28’s coverage information section, which tells the lender, among

other things, whether or not the insurance is issued for replacement cost, there is an agreed amount endorsement, there is terrorism coverage (and the type of terrorism coverage if provided), there is a "law and ordinance" endorsement, and the policy waives subrogation. Every bank's mortgage will state requirements for most or all of these coverages. There is a separate section to describe the property covered, and there is still a remarks section to address any specific lending concerns.

The ACORD 28 in its 2003 version should still be sought by lenders, and should be used to show coverages for commercial property insurance, business income/rental value insurance, and flood insurance. Unless the insurance agent can be convinced to include information regarding liability coverage in the "remarks" section of the ACORD 28, the insurer will instead issue the ACORD 25-S Certificate of Liability Insurance form. Due to the limitations of the current ACORD 25-S and ACORD 28, the lender really has to receive a copy of each insurance policy itself with the declarations to be sure of the coverage (which has rarely been common practice but really). Following up after closing with such copies should be on every lender's checklist.