

Multiple Indebtedness Deeds of Trust – What’s that?

By Kenneth Farmer

Most Mississippians have never seen or heard the phrase “multiple indebtedness mortgage.” For those that have, it is often glossed over without a second thought. However, the words “multiple indebtedness” should be a RED FLAG. Stop, do not proceed. Do not pass go ... and whatever you do ... do not issue a commitment or policy insuring one.

To understand why, we must take a look at this unique creation of Louisiana law.

Louisiana Mortgage Law

Real estate mortgages in Louisiana are subject to the “Mortgage” articles of the Louisiana Civil Code (La. Civ. Code arts. 3278, et seq.). There are three different forms of contractual or “conventional” real estate mortgages recognized in Louisiana:

- ordinary conventional real estate mortgages;
- collateral real estate mortgages; and
- multiple indebtedness mortgages.

Louisiana does not recognize deeds of trust.

An **ordinary conventional mortgage** may effectively secure only a single one-time extension of credit evidenced by a promissory mortgage note. An ordinary conventional mortgage will not effectively secure multiple loans or other extensions of credit on a cross-collateralization basis, nor will an ordinary conventional mortgage effectively secure multiple loan advances on a revolving line of credit basis.

A **collateral mortgage** is a special type of conventional real estate mortgage that has traditionally been used to secure multiple extensions of credit on a cross-collateralized basis, multiple loan advances extended on a revolving line of credit basis, as well as single one-time extensions of credit (La. R.S. §§ 9:5550, et seq.). Collateral mortgages are widely used in Louisiana, even in connection with single one-time extensions of credit when it may otherwise be appropriate to use an ordinary conventional real estate mortgage.

Multiple indebtedness mortgages (a “MIM”) serve the same purpose as collateral real estate mortgages. However, unlike a collateral mortgage, a MIM may secure multiple extensions of credit on a cross-collateralization basis. A MIM may also secure multiple loan advances under a secured revolving line of credit (La. Civ. Code art. 3298). A MIM differs from a collateral mortgage in that **there is no need for a collateral mortgage note or for a collateral pledge agreement**. In other words, a MIM may be recorded in Louisiana prior to a debt actually coming into existence. A MIM directly secures multiple extensions of credit or multiple loan advances **on a line of credit basis**. MIMs are widely used in Louisiana, even in connection with single one-time extensions of credit when it may otherwise be appropriate to use an ordinary conventional real estate mortgage.

Specific Requirements for Creating and Enforcing a MIM

Louisiana Civil Code expressly authorizes MIMs – i.e., mortgages that secure obligations that may arise in the future. See LSA–C.C. art. 3298(A). Louisiana is a civil code state. MIMs are not recognized under common law.¹ Rather, they are creatures of Louisiana’s civil code.

Under the hypothecary system of Louisiana, mortgages may be given to secure debts **having no legal existence at the date of the mortgage**. It is not essential in such a mortgage, even with respect to third persons, that it should express on its face that it was executed to secure future debts. It may be described as a security for existing debts, and yet used to protect those which, in the contemplation of the parties, are to be *created at a future time*. Pickersgill v. Brown, 7 La. Ann. 297 (1852); Commercial-Germania Trust & Sav. Bank v. White, 4 Pelt. 378 (La. Ct. App. 1921).

Because MIMs are a creature of statute, Louisiana courts have held that for a MIM to be validly created, the MIM must: (1) be granted in favor a specific mortgagee; (2) **expressly provide** that it secures the mortgagor’s present and future indebtedness to that mortgagee; (3) include in its definition of “Indebtedness” both **present** and **future** debt; (4) provide a specific, maximum indebtedness amount; (5) **specifically reference** La. Civ. Code art. 3298; and (6) provide the **methods for canceling** the MIM. See In re Hari Aum, LLC, 714 F.3d 274, 284–85 (5th Cir. 2013) (emphasis added).

Mississippi has neither a statute nor case law recognizing or authorizing MIMs.² Therefore, MIMs should not be used in Mississippi. This does not mean that all previously recorded MIMs are invalid. What it means is that the concept of a MIM is foreign to Mississippi law. Because MIMs are a special security instrument created and expressly authorized by statute in Louisiana, and because Louisiana courts have held that in order for a MIM to be valid, the MIM must reflect on its face 6 key elements, this type of security instrument should NOT be used in Mississippi.

Louisiana Title Insurance Statistical Services Organization (LATISSO) Endorsement for MIM

To further illustrate the uniqueness of a MIM, a special endorsement is generally issued with a loan policy insuring an MIM, which is known as the LATISSO 101 Multiple Indebtedness Mortgage Endorsement. This Louisiana specific endorsement **modifies the standard 2006 Policy language** to insure all advances made under the multiple indebtedness mortgage. Because these endorsements are not available in Mississippi, any title policy issued for a MIM recorded in Mississippi would not include the coverage provided by the LATISSO 101.

Key Points to Dealing With a MIM

Because Mississippi does not have a statute expressly authorizing the “multiple indebtedness” concept, and because of the number of unanswered questions associated with the same, you should encourage a lender using instruments titled as “multiple indebtedness deeds of trust” to switch to standard Mississippi deeds of trust. This helps ensure that there is no confusion regarding the necessity of the existence of indebtedness at the time the deed of trust is executed.

For those deeds of trust that don’t reference the “multiple indebtedness” concept, but do indicate they “may secure multiple notes,” then you should ensure that the instrument states on its face that it secures a line

¹ Unless it secures an obligation, a mortgage is a nullity. See Restatement (Third) of Property (Mortgages) § 1.1 (1997). The existence of a debt or obligation is essential since the deed of trust is incident to and is measured by the repayment of the debt or performance of the obligation secured by it. § 51:6.Necessity for debt or obligation, 6 MS Prac. Encyclopedia MS Law § 51:6 (2d ed.). See also Hendrie v. Hendrie, 94 F.2d 534 (C.C.A. 5th Cir. 1938) (“[A] mortgage securing the note falls with it, as there can be no lien without a debt.”); Harris v. Kemp, 451 So. 2d 1362, 1365 (Miss. 1984) (when a debt has been extinguished by agreement of the parties, by the execution of a conveyance, and the mortgagor has the privilege of refunding and to a reconveyance, it is a conditional sale).

² A UCC financing statement can be filed before an indebtedness is incurred. Miss. Code Ann. Section 75-9-502(d) and Comment 1. A financing statement is only a notice that a lender may have a security interest, unlike a deed or deed of trust, which is the instrument of transfer itself, so these are apples and oranges.

of credit.³ This should help ensure that the instrument isn't satisfied when the original note is paid in full and instead remains open to secure any future notes.

In any event, when a deed of trust shows an amount for the current note and a different maximum obligation, then the proposed policy amount should be the amount reflected as the "maximum obligation" and not just the amount of the initial note(s) referenced in the deed of trust.

Example of MIM

Below is an example of a "multiple indebtedness" deed of trust. Some of the key phrases to look for are:

1. "Multiple Indebtedness" in the title.
2. Reference to "may secure multiple promissory notes, some of which may be executed at a later date."
3. Reference to "the final maturity date of this security instrument may be different and later than the final payment date set forth in any promissory note specifically referenced here."
4. Showing a "maximum obligation" way in excess of the request for a commitment.

Those that routinely work with Louisiana lender should have a discussion with those lenders and make sure that they use a standard Mississippi deed of trust. If you have questions regarding the insurability of a MIM, please contact your underwriter.

³ Where an obligation secured by a deed of trust is paid in full or otherwise satisfied, then the deed of trust is extinguished as a matter of law. See Miss. Code Ann. § 89-1-49. This statute has no application to a mortgage or deed of trust which states on its face that it secures a line of credit.

INDEXING INSTRUCTIONS:



MULTIPLE INDEBTEDNESS REAL ESTATE DEED OF TRUST

This Security Instrument may secure multiple promissory notes
This Security Instrument secures a Line of Credit as defined in Miss. Code Ann. § 89-5-21 (1972, as amended)



1. **DATE AND PARTIES.** The date of this Deed of Trust (Security Instrument) is [REDACTED] and the parties, their addresses and tax identification numbers, if required, are as follows:

GRANTOR:

If checked, refer to the attached Addendum incorporated herein, for additional Grantors, their signatures and acknowledgments.

TRUSTEE: [REDACTED]

LENDER: [REDACTED], for itself and as agent/nominee for others, being a federally chartered instrumentality of the United States whose address is [REDACTED]

2. **CONVEYANCE.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debt (defined below) and Grantor's performance under this Security Instrument, Grantor irrevocably grants, bargains and sells to Trustee, in trust for the benefit of Lender, with power of sale, the following described property:

See Attached Exhibit "A"

This property is located in [REDACTED], Mississippi.

Together with all rights, easements, appurtenances, royalties, surface, subsurface and/or mineral rights, now owned or after-acquired, oil and gas rights, crops, timber, all diversion payments or third party payments made to crop producers, all water and riparian rights, wells, ditches, reservoirs, and water stock and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described above (all referred to as "Property").

Notwithstanding any other provision, reservation or exception contained herein or on any exhibit hereto, the lien created hereby shall cover all of Grantor's water rights including, but not limited to, rights to surface water, groundwater, underground water, percolating waters, rights to any water from lakes, streams or other bodies of water, adjudicated or permitted water rights, riparian and other water rights which are now owned or which are hereafter acquired by Grantor whether or not expressly excepted from the description of the Property.

3. **MAXIMUM OBLIGATION LIMIT.** The total principal amount secured by this Security Instrument at any one time shall not exceed \$ [REDACTED]. This limitation of amount does not include interest and other fees and charges validly

Loan No.: [REDACTED]
Branch: [REDACTED]

made pursuant to this Security Instrument. Also, this limitation does not apply to advances made under the terms of this Security Instrument to protect Lender's security and to perform any of the covenants contained in this Security Instrument.

4. SECURED DEBT AND FUTURE ADVANCES. The term "Secured Debt" is defined as follows:

- A. Debt incurred under the terms of all promissory note(s), contract(s), guaranty(ies) or other evidence of debt described below and all their extensions, renewals, modifications, reamortizations, or substitutions.

One certain promissory note in the original principal sum of \$ [REDACTED], executed by [REDACTED] in favor of Lender, with principal and interest payable as provided therein and with a final contractual maturity date of [REDACTED], which is identified as Loan No. [REDACTED]

One promissory note in the original principal sum of \$ [REDACTED], executed by [REDACTED] in favor of Lender dated [REDACTED], with principal and interest payable as provided therein and with a final contractual maturity date of [REDACTED], which is identified as Loan No. [REDACTED]

One promissory note in the original principal sum of \$ [REDACTED], executed by [REDACTED] in favor of Lender dated [REDACTED], with principal and interest payable as provided therein with a final contractual maturity date of [REDACTED], which is identified as Loan No. [REDACTED]

One promissory note in the original principal sum of \$ [REDACTED], executed by [REDACTED] in favor of Lender dated [REDACTED], with principal and interest payable as provided therein with a final contractual maturity date of [REDACTED], which is identified as Loan No. [REDACTED]

- B. All future advances from Lender to Grantor or other future obligations of Grantor to Lender under any promissory note, contract, guaranty, or other evidence of debt existing now or executed after this Security Instrument whether or not this Security Instrument is specifically referenced and whether or not such future advances or future obligations are incurred for any purpose that was related or unrelated to the purposes of the debt. Grantor, and each of them if more than one, agrees that this Security Instrument will secure all future advances and future obligations that are given to or incurred by any one or more Grantor, or any one or more Grantor and others. All future advances and other future obligations are secured by this Security Instrument even though all or part may not yet be advanced. All future advances and other future obligations are secured as if made on the date of this Security Instrument. Nothing in this Security Instrument shall constitute a commitment to make additional or future loans or advances in any amount. Any such commitment shall be agreed to in a separate writing.

C. **Final Maturity Date.** It is hereby agreed by the parties that this security instrument may secure multiple promissory notes, some of which may be executed at a later date. Therefore the final maturity date of this security instrument may be different and later than the final payment date set forth in any promissory note specifically referenced herein. Further, it is agreed by the undersigned that this security instrument shall be a line of credit instrument as contemplated by Miss. Code § 89-5-21 (1972, as amended), notwithstanding the fact that the additional or future advances as described herein are conditional and not absolute. Therefore, the final maturity date of this instrument shall be [REDACTED].

- D. All obligations Grantor owes to Lender, which now exist or may later arise, to the extent not prohibited by law, including, but not limited to, liabilities for overdrafts relating to any account agreement between Grantor and Lender.
- E. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Security Instrument.
- F. Secondary to the payment of A., B., C., D., and E. above, all or any part of the indebtedness, obligations and liabilities of any type whatsoever owed by any Grantor named herein or any maker named in the note to any of Lender's affiliated, or subsidiary institutions, including but not limited to [REDACTED], or their respective successors or assigns (the "Affiliates"). Any lien created hereby for the benefit of an Affiliate or subsidiary upon the Property described herein shall be inferior and secondary to any lien created for the benefit of the Lender against the Property described herein.

All such debts, obligations and liabilities are secured by the Property regardless of whether they are due or to become due, are now or hereafter existing in favor of Lender or any of its Affiliates or subsidiaries, are direct or indirect, primary, secondary, joint, several, joint and several, fixed or contingent, and regardless of whether such debts, obligations and liabilities were originally owing to Lender or were acquired by Lender or its assignees from any third party. It is contemplated that Lender and/or its Affiliates or subsidiaries may make future advances to Grantor or to the maker of the note, and/or may transfer the note from one Affiliate or subsidiary to another and that this Deed of Trust shall further secure the payment to Lender and/or an Affiliate or subsidiary of any and all such future advances and other obligations.

Default in payment of such loans and advances or performance of such obligations shall constitute default under this Deed of Trust, and the holder herein shall be entitled to all rights and remedies provided in this Deed of Trust in the event of default.

5. PAYMENTS. Grantor agrees that all payments under the Secured Debt will be paid when due and in accordance with the terms of the Secured Debt and this Security Instrument.

6. WARRANTY OF TITLE. Grantor warrants that Grantor is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to irrevocably grant, bargain and sell the Property to Trustee, in trust, with power of sale. Grantor also warrants that the Property is unencumbered, except for encumbrances of record.

Loan No.: [REDACTED]
Branch: [REDACTED]

VERY IMPORTANT

THIS DOCUMENT SECURES FUTURE ADVANCES. READ THE FOLLOWING CAREFULLY.

This security instrument may secure future advances to any of the undersigned, whether you individually have actual knowledge of such advance or not. This security instrument may also secure future advances of funds previously repaid under the terms of a promissory note secured hereby and later re-advanced. By signing below, you hereby agree that you have read and understood these provisions. Further, by signing below you acknowledge that the final maturity date of this instrument may be beyond the final maturity date of the initial note secured hereunder, and that this instrument is intended to be a "line of credit" instrument within the meaning of Miss. Code Ann. § 89-5-21 (1972, as amended.) and it will remain effective till such final maturity date regardless of whether there is an outstanding balance owed unless you request its cancellation in writing from the current holder.

SIGNATURES: By signing below, Grantor agrees to the terms and covenants contained in this Security Instrument and any attachments. Grantor also acknowledges receipt of a copy of this Security Instrument on the date stated on page 1.

[REDACTED]

[REDACTED]

STATE OF _____
COUNTY OF _____

Personally appeared before me, the undersigned authority in and for the said county and state, on this _____ day of _____, 20____, within my jurisdiction, the within named [REDACTED], who acknowledged that he/she/they executed the above and foregoing instrument.

My commission expires: _____
(Notary Public)

(Seal)

STATE OF _____
COUNTY OF _____

Personally appeared before me, the undersigned authority in and for the said county and state, on this _____ day of _____, 20____, within my jurisdiction, the within named [REDACTED], who acknowledged that he/she/they executed the above and foregoing instrument.

My commission expires: _____
(Notary Public)

(Seal)

[REDACTED]
NMLS ID: [REDACTED]
[REDACTED]
NMLS ID: [REDACTED]

SAMPLE

ENDORSEMENT LA101 (Multiple Indebtedness Mortgage)

Attached to Policy No.

Issued by

[UNDERWRITER]

File No: _____

1. The insurance for Advances added by Section 2 of this endorsement is subject to the exclusions in Section 3 of this endorsement and the Exclusions from Coverage in the policy, except Exclusion 3(d), the provisions of the Conditions, and the exceptions contained in Schedule B.

a. "Advances," as used in this endorsement, shall mean only those advances of principal indebtedness made after Date of Policy (including such advances used to pay accrued interest) secured by the Insured Mortgage including advances to pay expenses of foreclosure, taxes and insurance, assure compliance with laws, or to protect the lien of the Insured Mortgage before the time of acquisition of the Title, and reasonable amounts expended to prevent deterioration of improvements, together with interest on those advances.

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

a. The invalidity or unenforceability of the lien of the Insured Mortgage as security for each Advance.

b. The priority of any lien or encumbrance over the lien of the Insured Mortgage as security for each Advance.

c. The invalidity or unenforceability or loss of priority of the lien of the Insured Mortgage as security for the Indebtedness and Advances resulting from (i) re-Advances and repayments of Indebtedness, (ii) lack of outstanding Indebtedness before an Advance, or (iii) the failure of the Insured Mortgage to comply with the requirements of state law of the state in which the Land is located to secure Advances.

3. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

a. Advances made after a Petition for Relief under the Bankruptcy Code (11 U.S.C) has been filed by or on behalf of the mortgagor.

b. The loss of priority of the lien of the Insured Mortgage, as security for Advances, to the lien of real estate taxes or assessments on the Title imposed by governmental authority arising after Date of Policy.

c. The loss of priority of the lien of the Insured Mortgage as security for any Advance, to a federal tax lien, which Advance is made after the earlier of (i) Knowledge of the Insured that a federal tax lien was filed against the mortgagor, or (ii) the expiration of more than forty-five days after notice of a federal tax lien filed against the mortgagor.

d. The loss of priority of the lien of the Insured Mortgage as security for Advances to any federal or state environmental protection lien.

e. Usury, or any consumer credit protection or truth-in-lending law.

4. Regardless of the face amount of the stated maximum amount of indebtedness secured by the Insured Mortgage, the Amount of Insurance is based upon the maximum anticipated principal indebtedness to be secured by the Insured Mortgage as represented by the Insured (including Advances); and the Amount of Insurance may not be increased except by endorsement after compliance with such additional requirements as the Company may impose, including payment of an additional premium.

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.

Countersigned by: