

IT'S A STRANGE NEW WORLD: SELECTED UNDERWRITING ISSUES

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LOAN MODIFICATIONS & POLICY COVERAGE

Economic impact of COVID-19

- Temporary closures**
- Reduced consumer spending**
- Decline in tourism**
- Late rental payments**
- Renegotiation of lease terms**
- Rising vacancies**

Financial difficulties for owners/borrowers

- Lack of cash flow**
- Missing or late loan payments**

Resulting in loan workouts and mortgage modifications

Modification: Policy limitations

- **Exclusion 3(a) Act of the Insured**
- **Exclusion 3(d) Post Policy**
- **Condition 1d (vi,vii,viii) - Indebtedness only includes advances to protect lien**
- **Modification as Novation: Condition 9(c) – No liability if insured settles claim without Company consent and Condition 10(b) – release of mortgage terminates policy**

Priority and Prejudice:

Modifications

- **Increase in principal amount**
- **Change (increase) in the interest rate**
- **Extension of Maturity date**
- **Deferral of interest**
- **Reduction in amount of loan**
- **Require additional security/collateral**
- **Change or postpone payment dates, or amount of payment**

Material Modification

- **Adversely affects (or “prejudices”) subordinate lienholder**

Priority and Prejudice cont'd:

Obtain date down of title

- **Disclosing new matters**
- **Intervening liens**

Priority of lien lost to the extent

- **Subordinate lienholders are prejudiced or**
- **Security is impaired**

Unless subordinate lienholder

- **Consents**
- **Formally subordinates**

Bankruptcy Concerns

- **Modification as Preferential Transfer or Fraudulent Conveyance, See *In Re Western Motel* 67 BR 777 (Bank, M.D. Fla 1986)**
- **Interest Rate Increase**
- **Lender Participation**
- **Increased Debt**

Mechanics Lien Concerns

- **Loss of Priority issues**
- **Status of construction**
- **Indemnity**
- **Escrow**
- **Lien waiver audit**

Guidelines & Issues for Insuring Loan Modifications:

- **Title Search**
- **Tax and Assessment Search**
- **Modification Agreements**
- **Leasehold Mortgage**
- **Bankruptcy**
- **Mechanics Liens**
- **Survey coverage**
- **Original Policy/Endorsement Coverage**
- **Subordinate Matters**
- **Intervening Liens**

Guidelines for preparing a Commitment or Pro Forma:

- **Loan Modification Agreement for review**
- **Review original Mortgage**
- **Payment of taxes, charges and assessments**
- **Title Affidavit & any other required documentation**
- **Review of Authority Documents**
- **Recording of Modification Document**

NOTE: Company must be notified of any construction or recently completed construction.

ALTA 11 SERIES ENDORSEMENTS



Created to insure Lender that modification of Insured Mortgage does not impair the validity, enforceability or priority of the Insured Mortgage as of the Date of Endorsement



In addition to the coverage under the ALTA 11-06, the 11.1-06 insures against loss based upon specific matter not being subordinate to the lien of the Insured Mortgage as modified.



The 11.2-06 is designed for use when the lender modifies the existing Insured Mortgage to increase the indebtedness and requests additional insurance under the existing policy.

ALTA 11 SERIES ENDORSEMENTS

Does not amend any specific sections of 2006 Loan Policy

Does not extend Date of Policy so it does not address post-policy events across the board.

Contains “Creditor’s Rights” Exception

This covers situations where original policy included creditor’s rights coverage based on terms of original mortgage and structure of original transaction.

Additional Coverage

With respect to validity, enforceability or priority of Insured Mortgage as modified by the Modification.

Endorsement to Insure recorded Mortgage Extension/Modification Agreement:

- **Use of a Blank Endorsement to insure Modification Agreement**
- **Recording of Modification Agreement**
- **Continuation of title through the date of recording of the agreement**
- **Exceptions for any intervening matters**
- **Title Affidavits & any other required documentation to extend existing coverage**
- **Calculation of Premium (*See pages 180 & 183-184 of online AL Underwriting Practices Manual*)**

Underwriting Practices Resource

[BACK TO AGENT SERVICES MAIN PAGE](#)

The Underwriting Practices Resource is maintained by Old Republic Title for the use of its employees and agents to assist in issuance of title insurance products of Old Republic Title. Agents should use this information as a guide. This information should not be viewed as overriding any specific information you have pertaining to any particular transaction on which you are asked to provide a title insurance product or services which is inconsistent with the guidelines provided here. Old Republic Title does not guarantee that the information contained herein is comprehensive, accurate, adequate or current nor does it make any express or implied warranties regarding the information or its suitability for any particular purpose. Old Republic Title is not providing this information as legal, accounting, or other professional advice or service. Old Republic Title's Underwriting Staff is available for additional assistance. Agents, as used in this site, means duly appointed policy-issuing representatives of Old Republic National Title Insurance Company.

Tools & Resources

-  Exceptions
-  Instructions for Forms and Policies
-  Federal & State Government Law, Regulation & Programs
-  Underwriting Bulletins
-  Legal Education
-  Underwriting Manual

Flash Webinar recordings can be found in StarsLink under Legal Education in the Underwriting Practices Resource Page: <https://starslink.com/legal-education.html>

FORECLOSURES & DEEDS IN LIEU OF FORECLOSURE

Current Moratoriums on Foreclosures (CARES Act)

- Provides moratorium on residential foreclosures for borrowers with federally backed 1-4 family mortgage loans**
- Addresses rights of homeowners to request a forbearance from payment on federally backed 1-4 family mortgage loans & on certain federally backed multi-family mortgages**
- Requirements apply only to federally backed mortgages- loans insured or guaranteed by FHA, VA, USDA or loans owned or scrutinized by Fannie Mae or Freddie Mac**
- Moratorium does not apply to vacant or abandoned property or private bank loans**

Obtain approval from a Company Underwriter to insure title or issue a policy based on a foreclosure action.

Rights of Redemption on “Homestead Property” subject to Ala. Code § 6-5-248(h)

- **Applies only to foreclosure sales of homestead property, as defined by Act No. 2015-79, made pursuant to mortgages dated on or after January 1, 2016**
- **Shortens the redemption period on residential properties on which a homestead exemption was claimed in the tax year during which the foreclosure sale occurred from 1 year to 180 days from the date of foreclosure, if notice as required by the Act is provided**
- **The redemption period for all other properties remains 1 year**
- **Notice of the right of redemption and other rights in the substance as set out in the Act must now be mailed to the mortgagor(s) at the address of the property to be foreclosed at least 30 days prior to the foreclosure by certified mail with proof of mailing, AND the required wording must be included in the published notice required under § 35-10-13, Code of Alabama, 1975.**
- **Effects of failure to provide the required Notices (See page 214 in online AL Underwriting Practices Manual)**

Review of Foreclosure Deeds & Foreclosed Mortgages

- All titleholders properly executed mortgage with correct legal description**
- Recordation of mortgage in correct county**
 - In general - Ala. Code §35-4-62(a).**
 - When there is more than one courthouse in the county - Ala. Code § 35-4-62(b)**
- Review of foreclosure deed for proper execution and for the correct legal description**
- Strict Compliance with Statutes & Mortgage Provisions**
- Check the foreclosure deed against the mortgage to ensure the terms and conditions of sale, and notice provisions of the mortgage were complied with. Count the days from the date that the first publication ran to the date of the actual sale to make sure the publication complies with §§ 6-8-61 and 6-8-62. Remember, you do not count the day that it first ran in the newspaper in the total days**

Notice Requirements/Recent Cases

- **Rosser v. Fannie Mae, 2020 Ala. Civ. App. LEXIS 134 (October 30, 2020)**
- **Barnes v. U.S. Bank N.A., 2020 Ala. Civ. App. LEXIS 80, 2020 WL 3477603 (June 26, 2020)**

Junior Federal Interests- Federal Tax Liens

Judicial Foreclosure

- **Governed by 28 USC § 2410 & 26 USC § 7425(a).**
- **The United States named as a party defendant**
- **Foreclosure by superior lienholder extinguishes the FTL**

Non-judicial Foreclosure

- **Governed by 26 USC § 7425(b)**
- **Notice of the sale given as prescribed**
- **Foreclosure by superior lienholder extinguishes the FTL**

Right to Redeem

The greater of 120 days or period allowed under state law. *See* 28 USC § 2410(c)

Junior Federal Interests- SBA Mortgages

Judicial Foreclosure

- Governed by 28 USC § 2410
- must seek judicial sale
- The United States named as a party defendant
- Foreclosure by superior lienholder extinguishes the lien

Non-judicial Foreclosure

It is the Company's underwriting position that an SBA mortgage cannot be extinguished by a non-judicial foreclosure

Right to Redeem

One Year. See 28 USC § 2410(c)

Pre-foreclosure Mourning for Deceased Service Members & the Servicemembers Civil Relief Act

- Ala. Code § 35-10-71 bars foreclosures against the surviving family of active military who are killed in action overseas for 180 days provided written notice is given to the mortgagee**
- If proper notice is given, and the mortgagee proceeds with foreclosure, the sale is invalid, and the mortgagee is subject to a civil fine.**
- The Servicemembers Civil Relief Act (“SCRA”) subject to certain exceptions, prohibits a non-judicial foreclosure of a mortgage when the mortgagor is in active military.**
- The website to determine whether the mortgagor is in active military duty is <https://scra.dmdc.osd.mil/>.**

Title Insurance Exception

- An exception for redemption rights must be included in title insurance commitments and policies issued on foreclosed property subject to rights of redemption**
- This exception must not be removed during the redemption period under any circumstances**

Providing Affirmative Coverage Over Rights of Redemption

- Not available on Owner's Policies**
- May be provided to institutional lenders in Loan Policies under certain circumstances:**
 - Bid amount at foreclosure sale exceeds resale price and new loan amount, or**
 - Acceptable Bond, Escrow & Indemnity/Indemnity is furnished to Company**

Deeds in Lieu of Foreclosure - Issues

- **Merger. See §35-10-51(2) & (4), Ala. Code (1975)**
- **Junior Interests. See §§ 35-10-50 & 51 Ala. Code (1975)**
- **Bankruptcy**
- **Lack of or unfairness of consideration**
- **Recharacterization/Equitable Mortgage**
- **Clogging Right of Redemption**

Deeds in Lieu of Foreclosure – Underwriting

Schedule B-I Requirements to insure Deed in Lieu - current transaction:

- **Proposed DIL to be furnished to company for review & approval**
- **Estoppel Affidavit to be properly executed and furnished to Company for review & approval, which must include language that:**
 - **DIL is an absolute conveyance with no right of borrower/owner to lease, repurchase or redeem**
 - **Conveyance is for adequate consideration**
 - **Personal liability of borrower/owner for underlying debt is released**
 - **Mortgage will be satisfied of record**
 - **Possession is or will be completely surrendered by vested owner/borrower**
- **Any other written agreement between borrower and lender relating to deed in lieu to be furnished to Company for review & approval**
- **Any pending foreclosure proceeding must be dismissed**
- **Unreleased liens must be released of record or remain on title as exceptions in Schedule B**
- **Underlying mortgage must be released of record or remain on title as a Schedule B exception**

Deeds in Lieu of Foreclosure – Underwriting

If DIL in chain of title - requirements & reservations:

- May need to add Creditor’s Right Exception**
- Company must be furnished any information on the outstanding balance of the debt recently released and current sales price**
- Bankruptcy records must be searched to confirm borrower/owner has not filed bankruptcy**
- If our search discloses a bankruptcy, the Company reserves the right to make further exceptions and requirements.**

ALABAMA POWERS OF ATTORNEY- THE UNIFORM ACT

Applicability

- **The Alabama Uniform Power of Attorney Act codified in Section 26-1A-101, et seq., Ala. Code 1975, applies to all POAs executed on or after January 1, 2012**
- **POAs executed before January 1, 2012 are governed by the prior law in effect at the time of execution**
- **For a detailed overview of the Act, please refer to Alabama Uniform Power of Attorney Act Bulletin dated February 12, 2012 on MVT Website-AL-Underwriting Bulletins**

Creation & Use of POAs – General Provisions and Default Rules

- Durability
- Execution
- Validity
- Meaning & Effect
- Incapacity
- Effective Date (watch out for “springing” POAs)
- Co-Agents & Successor Agents
- Termination
- Acknowledged POAs – Reliance On & Refusal to Accept
 - *See Forbes v. Platinum Mortgage, Inc. 2020 Ala. LEXIS 29, 301 So. 3d 819 (February 14, 2020)*

Authority – Default Statutory Construction

- General Authority**
- Express Authority Required**
- Self-Dealing – Statutorily Prescribed Default Rules**

Optional Forms

- Power of Attorney**
- Agent's Certification**

Underwriting Considerations

- **Proper Acknowledgment & Recordation of original POA**
- **Recordation of Agent's Certification**
- **Use of the Agent's Certification form to be recorded to address the issues created by Ala. Code § 30-4-17 (Divorce or Annulment) and by Section 110(b)(3) of the Alabama Uniform Power of Attorney Act**
- **Ala. Code § 30-4-17 (Divorce or Annulment) and its effect on revocable nominations made by a divorced individual in a governing instrument (such as a POA) prior to the divorce or annulment, nominating the divorced individual's former spouse or a relative of the former spouse to serve in any representative or fiduciary capacity, such as an Agent under a Power of Attorney (See pages 207-209 in online AI Underwriting Practices Manual)**

Underwriting Considerations cont'd

- **Review the POA**
 - **for authority and limitations on authority of Agent**
 - **for due execution and proper acknowledgment**
 - **for durability**
 - **for validity and governing law**
 - **carefully review POA and governing law for meaning & effect if created under other laws**
- **Find out why the POA is being used for proposed transaction**
 - **if principal is now incompetent, determine competency on date of execution of POA and if POA is durable – may need affidavit from attending physician**
- **Independently verify due execution of POA secured and brought to you by an interested party**

Underwriting Considerations cont'd

- Read Closing Instructions carefully**
 - lender may prohibit use of a POA**
 - lender may require prior review & approval of the POA**
 - lenders typically require the POA to be specific to the loan transaction**

When is a General POA too general?

Can a Specific POA be too specific?