

A MIXED BAG

UNDERWRITING QUESTIONS AND ANSWERS



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FORECLOSURE

Rights of Redemption On “Homestead” Property



A 2016 mortgage on homestead property is foreclosed. Actual notice of the foreclosure is sent via certified mail to the homeowner on August 3, 2017 prior to the foreclosure sale which took place on August 31, 2017. You are asked to insure a new transaction post-foreclosure in March of 2018.

Should an exception for rights of redemption appear in your title commitment and title policies? If so, at what point in time would it be safe to remove this exception from your title policies or to insure a future transaction without an exception for rights of redemption?

FORECLOSURE

❑ Right of Redemption on “Homestead Property”

- Act No. 2018-126 became effective on 2-22-2018.
 - ❖ Provides that under no circumstances may a right of redemption be exercised later than one year after the date of foreclosure.
 - ❖ Possession or production of the proof of mailing of required notice shall constitute an affirmative defense to any action related to the notice requirement.
 - ❖ All actions related to the notice requirements must be brought within one(1) year after the date of foreclosure or the action shall be barred.

ALABAMA UNDERWRITING PRACTICES MANUAL

ARTICLE III – UNDERWRITING TOPICS - FORECLOSURE

Right of Redemption on All Properties except for Homestead Property Subject to Section 6-5-248 (h) of the Code of Alabama

Foreclosure of a mortgage on all properties except for homestead property subject to the above referenced code section gives rise to a one (1) year statutory right of redemption.

Right of Redemption on “Homestead Property”

January 1, 2016 through February 21, 2018

Act No. 2015-79 became effective on January 1, 2016, and applies to foreclosure sales of homestead property, as defined in the Act, made pursuant to mortgages dated on or after January 1, 2016. The Act amends Sections 6-5-248, 6-5-252 and 8-1-172, and 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.

ALABAMA UNDERWRITING PRACTICES MANUAL (con't.)

ARTICLE III – UNDERWRITING TOPICS - FORECLOSURE

As to such homestead property, actual notice to the mortgagor is now required and additional language must be added to the notice by publication already required under other statutes. 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. Failure to give the notices required under the Act, or a defective notice, does not affect the validity of the foreclosure, including the transfer of title to the property. Furthermore, there is a two year time period after the date of the foreclosure to bring an action related to the notice requirements, or the action is barred. Nevertheless, fulfillment of the notice requirements of the Act is critical. **The reduced period to redeem of 180 days does not begin to run until these newly required notices are given, and failure to provide the required notices could extend the period to redeem to up to two years, or beyond two years under certain circumstances.**

ALABAMA UNDERWRITING PRACTICES MANUAL (con't.)

ARTICLE III – UNDERWRITING TOPICS - FORECLOSURE

On and after February 22, 2018

Act No. 2018-126 became effective on February 22, 2018 and was enacted to amend Section 6-5-248, Code of Alabama 1975 relating to the right of redemption on residential property to provide as follows:

- **Provides that under no circumstances may a right of redemption be exercised later than one year after the date of foreclosure;**
- Possession or production of the proof of mailing of required notice shall constitute an affirmative defense to any action related to the notice requirement; and
- All actions related to the notice requirements must be brought within one (1) year after the date of foreclosure or the action shall be barred.

ALABAMA UNDERWRITING PRACTICES MANUAL (con't.)

ARTICLE III – UNDERWRITING TOPICS - FORECLOSURE

When dealing with foreclosed homestead property subject to this Act, prior to underwriting as if the redemption period is 180 days from the date of foreclosure:

1. Verify that the foreclosed mortgage is dated on or after January 1, 2016;
2. Verify that the foreclosed property was assessed as homestead property during the tax year in which the foreclosure occurred; and
3. Require satisfactory proof that notice in substance as set out in the Act was mailed to the mortgagor(s) at least 30 days prior to foreclosure at the property address of the foreclosed property by certified mail with proof of mailing, and that the required language was included in the publication of notice required under § 35-10-13, Code of Alabama, 1975.

ALABAMA UNDERWRITING PRACTICES MANUAL (con't.)

ARTICLE III – UNDERWRITING TOPICS - FORECLOSURE

If you are unable to verify that the required notices were given, or have reason to believe that the notice requirements were not complied with, contact Underwriting Counsel for guidance.

LLC REQUIREMENTS

You have been asked to issue an owner's policy and a loan policy in connection with the purchase of property by TEM, LLC. The seller of the property is GKM, LLC. The current members of both LLC's are disclosed with the title request. The purchasing LLC has two members, a corporation and an LLC. The selling LLC has a single member, an LLC.

What should you require in your title commitment?



LLC REQUIREMENTS - SAMPLE

As to _____, LLC, we must be furnished with the following:

- A. Certified copy of Certificate of Formation /Articles of Organization for _____, LLC;
- B. Certified copy of Written Company Agreement / Operating Agreement and all Amendments thereto;
 - i. Certification should state that there are no other company agreements in place, either written, oral or implied.
- C. Current Membership Roster of _____, LLC
- D. Certificate of Compliance; and
- E. Proper resolution signed by all members of _____, LLC, authorizing the _____ transaction and naming the authorized signatories that will execute the closing documents on behalf of the LLC.

NOTE: We reserve the right to make additional requirements and/or exceptions based upon our receipt and review of the above documents required herein.



You have been asked to insure a deed from an Alabama Series LLC to a Purchaser.

What should you do first?

SERIES LLC'S

IN GENERAL

Set forth below is a portion of ORT's internal bulletin on Series LLC's: A Series LLC is a unique form of LLC which, when legally formed, allows a master limited liability company to provide for segregation of its assets and liabilities into one or more "series", all operating under the umbrella of a master limited liability company. Series LLCs are created by statute and, without sufficient enabling legislation, cannot hold an interest in real property. Only natural persons and those business entities with explicit statutory authority may hold title to real property.

SERIES LLC'S

IN GENERAL (con't.)

A close review of the statutes governing Series LLCs is therefore required to determine if such an entity is:

- a) legally authorized to hold and convey real property interests in the state of its formation; and
- b) if the transaction involves a series operating in a foreign state, the statutes of the foreign state specifically provide that a non-domestic Series LLC is legally capable of holding and conveying real property interests.

SERIES LLC'S

IN GENERAL (con't.)

To be properly created, unless statutorily authorized by other means, a master series LLC must be filed with the Secretary of State for the state in which the LLC has been formed. Simply registering a Series LLC does not mean the Series LLC is a separate entity or otherwise legally capable of holding a real property interest. A thorough analysis of the pertinent state statutes, for both the state of the LLC's formation and the state where the insured property is located, is required and must be provided to the Corporate Legal Department for review.

SERIES LLC'S

IN GENERAL (con't.)

For a Series LLC to hold an insurable interest in real property, the following minimum conditions must be met:

- 1) The state where Series LLC is purported to be organized (Domestic State) must authorize the creation and use of a Series LLC;
- 2) The Domestic State statutes must provide that a Series LLC is capable of holding title to real property;
- 3) The Series LLC must be registered in the Domestic State's Secretary of State office, unless the Domestic State's statutes specifically provide for its formation by other means;

SERIES LLC'S

IN GENERAL (con't.)

- 4) If the state where the property is located is not the state of formation, the foreign state's statutes must clearly authorize a non-domestic Series LLC to do business in that state; and

- 5) If the state where the property is located is not the state of formation, the foreign state's statutes must specifically allow a non-domestic Series LLC to hold title to real property.

SERIES LLC'S

IN GENERAL (con't.)

A Series LLC may be difficult to recognize by its name alone. LLCs are often formed with the same name and distinguished by a sequential numbering system and Series LLCs are typically numbered in the same way. Consequently, an LLC with a number or Roman numeral in its name should prompt further inquiry into the status of the entity as a Series.

SERIES LLC'S

IN ALABAMA

The Alabama Uniform LLC statute authorizes domestic Series LLC's if they are provided for in the Certificate of Formation of the master LLC, and the statute provides that domestic Series LLC's can hold title to real property in Alabama. However, there are more underwriting issues involved with insuring title to Alabama property held by a domestic Series LLC than just the threshold determination of whether or not the certificate of formation for the master LLC provides for Series LLC's.

A couple of issues that immediately come to mind are:

SERIES LLC'S

IN ALABAMA (con't.)

- 1) the need to review the written company agreement of the master LLC, the separate written company agreement for the Series LLC, and any other documents pertaining to the Series LLC for all terms, conditions, limitations, prohibitions, etc.... regarding the creation and operation of the Series LLC and its ability to hold title to real property; and
- 2) title to the real property to be insured must be conveyed into a properly created and identifiable domestic Series LLC by a recorded deed. The master LLC should be referenced somewhere in the body of the deed conveying title to the domestic Series LLC.

SERIES LLC'S

CODE OF ALABAMA **Section 10A-5A-1.04**

- (a) A limited liability company is a separate legal entity. A limited liability company's status for tax purposes shall not affect its status as a separate legal entity formed under this chapter.
- (b) A limited liability company shall possess and may exercise all the powers and privileges granted and enumerated by Chapter 1 or by any other law or by its limited liability company agreement, together with any powers incidental thereto, including those powers and privileges necessary or convenient to the conduct, promotion, or attainment of the business, purposes, or activities and affairs of the limited liability company.

SERIES LLC'S

CODE OF ALABAMA (cont.)

Section 10A-5A-1.04 (cont.)

- (c) A limited liability company may carry on any lawful activity, whether or not for profit.
- (d) A series established under this chapter has the power and capacity, in the series' own name, to:
- (1) sue and be sued;
 - (2) contract;
 - (3) hold and convey title to assets of the series, including real property, personal property, and intangible property; and
 - (4) grant liens and security interests in assets of the series.

SUBDIVISION COVENANTS AND HOA LIENS

You have been asked to issue a Short Form Residential Loan Policy on a Lot in a Subdivision which has Covenants that give/appear to give HOA Liens priority over first mortgages. You are also required to issue a PUD Endorsement and a Comprehensive Endorsement.

Should you commit to issue or issue the requested Policy? What about the required Endorsements?



PERTINENT COVERAGE PROVIDED

SHORT FORM RESIDENTIAL LOAN POLICY (MXSF POLICY)

- Schedule B

Covenants, conditions, or restrictions, if any, appearing in the Public Records; however, this policy insures against loss or damage arising from:

- a. the violation of those covenants, conditions or restrictions on or prior to Date of Policy;
- b. a forfeiture or reversion of Title from a future violation of those covenants, conditions, or restrictions, including those relating to environmental protection; and
- c. any provisions in those covenants, conditions, or restrictions, including those relating to environmental protection, under which the lien of the insured Mortgage can be extinguished, subordinated or impaired.

DO NOT ISSUE

PERTINENT COVERAGE PROVIDED (con't)

ALTA 9-06 Endorsement

- Provides coverage against:

A violation of a Covenant that divests, extinguishes or subordinates the lien of the insured Mortgage, renders the lien of an insured Mortgage unenforceable, or causes a loss of an insured lender's title after foreclosure (Item 3.a.).

DO NOT ISSUE

PERTINENT COVERAGE PROVIDED (con't)

PLANNED UNIT DEVELOPMENT ENDORSEMENTS (ALTA 5-06 AND 5.1-06)

- ❑ The ALTA 5-06 and 5.1-06 provide the same coverage, except:
 - The ALTA 5-06 insures against loss if the insured Mortgage does not have priority over any lien for charges and assessments provided by any document listed in Schedule B.
 - The ALTA 5.1-06 only insures against loss if those charges and assessments are due and unpaid at Date of Policy.
 - Call your underwriter before issuing a 5.1-06.

DO NOT ISSUE THE 5-06

REVOCABLE TRUST and SURVIVORSHIP DEED

You are asked to issue an Owner's Policy and a Loan Policy in connection with the purchase of property by June Smith, as Trustee of the Jim Smith Revocable Living Trust, dated September 13, 2012. June Smith has delegated her fiduciary duties to Sally Smith under a POA and Sally is going to execute the mortgage for the Trust. The seller is Joe Jones, the surviving grantee of a Survivorship Deed between him and Lisa Jones, deceased.

What issues should you address with your title requirements and in the documents to be recorded?



ALABAMA UNDERWRITING PRACTICES MANUAL

ARTICLE III – UNDERWRITING TOPICS

TRUSTS

- Delegation of Trustee's Duties
- Certification of Trust
- General Underwriting Guidelines

DIVORCE/DISSOLUTION OF MARRIAGE

- Effect of Ala. Code § 30-4-17 on Certain Transferable Property Rights
- Effect of Ala. Code § 30-4-17 on Survivorship Deeds

CONSIDERATION

David White and wife, Kathy White, convey property to their son, Donald White. The granting clause of the deed recites as consideration “Ten Dollars (\$10.00) and other good and valuable consideration for love and care for us in our old age”. Donald subsequently conveys the property to he and his wife in survivorship and decides to build a house on the property. You are asked to issue a Construction Loan Policy by your bank client.

What do you tell the Bank?



SECTION 8-9-12

REALTY CONVEYANCE WHERE IN GRANTEE AGREES TO SUPPORT GRANTOR DURING LIFE VOIDABLE; EXCEPTIONS.

Any conveyance of realty wherein a material part of the consideration is the agreement of the grantee to support the grantor during life is void at the option of the grantor, except as to bona fide purchasers for value, lienees, and mortgagees without notice, if, during the life of the grantor, he takes proceedings to annul such conveyance.

(Code 1923, §8046; Code 1940, T.20, §15.)

Does the Alabama Data Breach Notification Act of 2018 apply to you?



ALABAMA DATA BREACH NOTIFICATION ACT OF 2018

SECTION 2: SELECTED DEFINITIONS

Breach of Security or Breach – Unauthorized acquisition of data in electronic form containing sensitive personally identifying information.

Data in Electronic Form – Any data stored electronically or digitally on any computer system or other database, including, but not limited to, recordable tapes and other mass storage devices.

Covered Entity – A person or entity that acquires or uses sensitive personally identifying information.

Individual – Any Alabama resident whose sensitive personally identifying information was, or the covered entity reasonably believes to have been, accessed as a result of the breach.

Third-Party Agent – An entity that has been contracted to maintain, store, process, or is otherwise permitted to access sensitive personally identifying information in connection with providing services to a covered entity.

SECTION 3: REASONABLE SECURITY MEASURES

- Requires covered entities to establish reasonable security measures and provides guidance for doing so.
- Reasonable measures means security measures practicable for the covered entity
- Section 3 does not trigger an enforcement mechanism. Penalties are imposed by the Act only for violations of the required Notice Provisions.

SECTION 4: GOOD FAITH INVESTIGATION OF A BREACH

- Requires a covered entity that has or may have suffered a breach to conduct a “good faith and prompt investigation” to include whether the breached information is reasonably likely to cause substantial harm to the individuals whose information was lost.
- Provides factors to consider in determining whether the breach is “reasonably likely to cause substantial harm”.

SECTION 5: NOTICE TO INDIVIDUALS

Requires a Covered Entity that has determined it has suffered a breach of information that is “reasonably likely to cause substantial harm” to give notice of the breach to the affected individuals “as expeditiously as possible and without unreasonable delay”. Except as provided in subsection (c), a covered entity must provide written notice including the factors set forth in Section 5 within 45 days of its receipt of Notice from a third party agent that a breach has occurred, or upon the covered entity’s determination that a breach has occurred and is “reasonably likely to cause substantial harm”.

ALABAMA DATA BREACH NOTIFICATION ACT OF 2018 (con't.)

SECTION 5: NOTICE TO INDIVIDUALS (con't.)

- **Direct Notice** is required to be sent to the mailing addresses of the affected individuals in the records of the covered entity, or by email notice sent to the email addresses of the individuals in the records of the covered entity.

ALABAMA DATA BREACH NOTIFICATION ACT OF 2018 (con't.)

SECTION 5: NOTICE TO INDIVIDUALS (con't.)

- **Substitute Notice** may be provided if direct notice to affected individuals is not feasible because of excessive cost, lack of sufficient contact information for affected individuals, or where the affected individuals exceed 100,000 persons. Substitute Notice must include both a conspicuous notice on the Internet website of the covered entity for a period of thirty (30) days, and notice in print and in broadcast media where the affected individuals reside. An alternative form of Substitute Notice may be used with the approval of the Attorney General.

SECTION 5(f): RETENTION OF RECORDS OF INVESTIGATION AND DECISION

Requires an entity that determines that Notice is not required because the information breached is not “reasonably likely to cause substantial harm” to document its determination in writing and to retain those records for at least five(5) years.

ALABAMA DATA BREACH NOTIFICATION ACT OF 2018 (con't.)

SECTION 6: NOTICE TO THE ATTORNEY GENERAL

- Requires written notice to the Attorney General as expeditiously as possible and without unreasonable delay if the breach of information affects more than 1,000 persons.
- Notice is required within forty-five(45) days of the covered entity's receipt of Notice from a third party agent that a breach has occurred, or upon entity's determination that a breach has occurred and is "reasonably likely to cause substantial harm".

SECTION 7: NOTICE TO CONSUMER REPORTING AGENCIES

Requires a covered entity that suffers a breach affecting more than 1,000 persons to also notify "all consumer reporting agencies".

SECTION 8: BREACH OF A THIRD PARTY AGENT

- Requires a third-party agent that suffers a breach to notify the covered entity of the breach within ten(10) days of the determination of the breach or reason to believe the breach occurred.
- After receiving notice from a third-party agent, the covered entity must provide notices to affected individuals, the Attorney General and consumer credit reporting agencies as set forth in Sections 5, 6 and 7 of the Act.
- A covered entity may enter into a contractual agreement with a third-party agent whereby the third-party agent agrees to handle the notifications required by the Act.

ALABAMA DATA BREACH NOTIFICATION ACT OF 2018 (con't.)

SECTION 9: PENALTIES AND ENFORCEMENT

- Provides that a violation of this Act is a violation of the Alabama Deceptive Trade Practices Act (DTPA), but is not a criminal offense under the DTPA.
- Provides that a violation of this Act does not create a private cause of action under the DTPA. (See however Section 9 (b) (2) below)
- Under Section 9 (a), if a failure to notify under this Act is done “willfully or with reckless disregard”, the penalty provisions under the DTPA will apply. However, civil penalties assessed under Section 8-9-11 Code of Alabama 1975, shall not exceed \$500,000 per breach.

ALABAMA DATA BREACH NOTIFICATION ACT OF 2018 (con't.)

SECTION 9: PENALTIES AND ENFORCEMENT (con't.)

- Additionally, under Section 9 (b) an entity that continues to fail to take reasonable action to comply with the notice provisions of this Act can be fined up to \$5,000 per day.
- Section 9 (b)(2) allows the Attorney General to bring an action on behalf of affected individuals but only for actual damages. This provision may allow the Attorney General to pursue an action against an entity for the breach itself – rather than for a failure to notify. However, damages again are limited in such an action to “actual damages”.

SECTION 10: DISPOSAL OF SENSITIVE RECORDS

- Requires an entity to take “all reasonable measures” to properly dispose of sensitive records containing personally identifying information.
- Section 10 does not trigger an enforcement mechanism. Penalties are imposed by the Act only for violations of the required Notice Provisions.

SECTION 11: EXEMPTION OF ENTITIES COVERED BY FEDERAL STANDARDS

An entity covered by federal data breach laws, rules, regulations, procedures and guidelines is exempt from this Act provided it maintains procedures pursuant to these federal standards, provides Notice to affected individuals pursuant to said standards, and timely provides a copy of the Notice to the Attorney General when the number of individuals the entity notified exceeds 1,000.

ALABAMA DATA BREACH NOTIFICATION ACT OF 2018 (con't.)

SECTION 12: EXEMPTION OF ENTITIES COVERED BY STATE STANDARDS

Entities covered by state laws, rules, regulations, procedures or guidelines that are at least as thorough as the notice requirements of this Act are exempt from this Act on the same basis as entities covered by federal standards are exempted under Section 11 above.

EFFECTIVE DATE

June 11, 2018

**I'M
DONE...**



YOUR TURN!

