Foreclosure

Who, What, When, Where, Why… and HOW!

by:

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I. Who?

MORTGAGOR: An owner of an interest in mortgaged property, also known as the borrower. Alabama Code §35-10-50.

MORTGAGEE: All mortgagees, grantees or creditors in any mortgages, any trustees under deeds of trust, or any persons entitled to the money secured by any instrument intended to secure the payment of money such as an instrument which includes a vendor's lien §35-10-11; or

The owner of the Debt secured by a Mortgage, also known as the lender. Ala. Code §35-10-50.

II. What?

FORECLOSURE: A legal proceeding to terminate a mortgagor's interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property. *Black's Law Dictionary, Seventh Edition.*

POWER OF SALE FORECLOSURE: a foreclosure process by which, according to the mortgage instrument and state statute, the mortgaged property is sold at a nonjudicial public sale by a public official, the mortgagee, or a trustee, without the stringent notice requirements, burdens, or delays of a judicial foreclosure. *Black's Law Dictionary, Seventh Edition.*

JUDICIAL FORECLOSURE: Even though judicial foreclosure is the best way to ascertain the rights of the parties and produce marketable title, it is a costly and time-consuming foreclosure method by which the mortgaged property is sold through a court proceeding requiring many standard legal steps such as the filing of a complaint, service of process, notice, and a hearing. *Black's Law Dictionary, Seventh Edition.* (This is available in all states and is the exclusive method in at least 20 states – luckily, not ours.)

MORTGAGE: The transfer of an interest in land as security for the repayment of a loan or the performance of another obligation. Any mortgage, deed of trust, or any other instrument intended to secure the payment of money, such as an instrument which includes a vendor's lien. Ala. Code §35-10-11.

DEED IN LIEU OF FORECLOSURE: Any instrument, however denominated, whereby a mortgagor transfers to a mortgagee the mortgagor's rights in mortgaged property. Ala. Code §35-10-50.

EQUITY OF REDEMPTION: The interest the mortgagor has in the mortgaged property. Ala. Code §35-10-50.

JUNIOR MORTGAGE: Any mortgage, deed of trust, or any other instrument intended to secure the payment of money by the transfer of an interest in real property, such as a conveyance which includes a vendor's lien, which are lower in priority than the foreclosed mortgage or lien. Ala. Code §6-5-247.

SALE: Any execution, judgment, or foreclosure sale, whether the sale is made under any power of sale in any mortgage or deed of trust or statutory power of sale, or by virtue of any judgment in any court of competent jurisdiction. Ala. Code §6-5-247.

III. When?

A Mortgagee may initiate foreclosure upon default under a valid mortgage containing a power of sale clause.

The foreclosure sale may be conducted 18 days after the first of three required publications of the notice. Ala. Code § 6-8-62. It must be between the legal hours of sale 11:00 a.m. to 4:00 p.m. Ala. Code § 35-10-14.

IV. Where?

Notice of foreclosure should be published in a paper of general circulation in the county where the property is located. Ala. Code § 35-10-8. If the property is located in more than one county, notice should be published in a paper of general circulation in each. If there is no paper of general circulation in the county where the property is located, notice may be published in a paper of general circulation in an adjoining county. Ala. Code § 35-10-13.

The foreclosure sale should be conducted at the front or main door to the Courthouse in the county where the land is located. (In a county with more than one courthouse, the sale should be conducted in the division where the land lies.) If the land is located in more than one county or division thereof, the mortgagee may choose which courthouse to conduct the sale.

V. Why?

The purpose of foreclosure is to extinguish the mortgagor's equity of redemption, allowing the mortgagee to obtain full ownership and possession of the property or apply the sale proceeds to reduce the balance owing.

VI. How?

Follow the guidelines set out in the Code of Alabama §35-10-11 through §35-10-16 (or §35-10-1 through §35-10-10 for mortgages executed prior to January 1, 1989.)

A. Procedure:

1. Prior to Sale

a. What constitutes default?

Typically the note and the mortgage will contain default provisions. The provisions of both should recognize that default under any of the provisions of either document constitute a default of both and will allow the mortgagee to utilize any of the remedies provided, including foreclosure. Common default provisions include failure to pay installments as they become due, failure to keep property insured, failure to pay taxes on the property, etc… Be careful, some mortgages contain notice provisions

requiring specific steps and/or additional notice before the balance can be accelerated and the power of sale clause triggered.

b. Do the Mortgage provisions allow a foreclosure by power of sale?

This is of utmost importance for mortgages executed after December 31, 1988. Mortgages executed prior to January 1, 1989 do not require specific language containing a power of sale in order to exercise this option. The power of sale is provided by statutory authority for these mortgages by Ala. Code §35-10-3. Accordingly, a pre-1989 mortgage with no power of sale clause may be foreclosed either judicially or after publishing notice of the time, place, terms, and purpose of the sale for four consecutive weeks.

However, mortgages executed after December 31, 1988 must contain a power of sale clause including the place and terms of sale in order to utilize the power of sale foreclosure process. Ala. Code §35-10-12 If the language is omitted or defective, the mortgagee's only remedy is judicial foreclosure.

c. **Preparation for foreclosure.**

Before foreclosure proceedings are initiated, the attorney should review the loan documentation including the note, mortgage, and any title policy or survey available. The attorney will review the terms of the note and mortgage to ensure that debtor is in default and that the mortgagee is entitled to accelerate the balance and initiate foreclosure proceedings.

Before initiating those proceedings, the attorney will obtain a current title policy on the property. If a title search was performed at the time the loan was made, the mortgagee should be aware of any superior liens on the property. If superior liens exist, it is important to contact the lienholder to ensure that your lien is protected and sufficient equity exists to warrant foreclosure of the mortgage. It is suggested that notice be sent to all inferior lienholders and judgment creditors along with an initial notice to the debtor (although not required by statute), as they will be interested in protecting their interest and may be willing to pay off the foreclosing mortgage.

It is important that a current title report is obtained within thirty days of foreclosure in order to determine the existence of any federal tax liens. Even if inferior, these liens will not be cut off by foreclosure unless the requirements for notice set out in §7425 of the Internal Revenue Code are followed. The code requires notice to be delivered to the District Director of

the IRS for the district in which the sale is to occur. The notice must be delivered at least 25 days before the sale date and must contain the following information: name and address of person submitting notice; copy of Federal Tax Form 668; detailed description of the property including legal description and street address; date, time, place, and terms of sale; and an explanation of the balance due on the mortgage debt plus attorney's fees and expenses. The IRS should provide you with written consent to the sale and will likely request that you provide them with the details of the sale after it is conducted. The IRS will retain a right of redemption in the property during the longer of 120 days from the date of sale or the statutory redemption period, which is one year in Alabama. 26 U.S.C.A. §7425.

The attorney should also check title for federal anti-terrorism liens (similar to federal tax liens) and consult 18 U.S.C.A. §3613 before proceeding with foreclosure if such a lien should appear.

2. Notice

a. <u>Written notice to debtor, mortgagor(s), junior lienholders, judgment creditors.</u>

Written notice should be sent to the mortgagor, debtor, and any junior lienholders and judgment creditors. If the note does not contain an

acceleration clause providing that upon default the mortgagee has the right to declare the entire indebtedness due and payable immediately without notice to debtor, it will be necessary to give notice of default to debtor before noticing the foreclosure. In Redman v. Federal Home Loan Mortgage Corp., 765 So. 2d 630 (Ala. 1999), the court held that a homeowner had sufficient notice of default and the resulting foreclosure sale when lender had sent copies of the notices by registered and certified mail, the homeowner knew of the arrearage on the loan, and homeowner was responsible for knowledge of the status of the account. See also Burns v. United States Bank, N.A., 2013 U.S. Dist. LEXIS 12441, 2013 WL 360658 (M.D. Ala. 2013) denying lender's summary judgment motion where no written notice was given to borrower and mortgage provided "Lender shall give notice to Borrower prior to acceleration following Borrower's default."

The notice of sale must give the time, place and terms of said sale, together with a description of the property. Ala. Code §35-10-13.

b. Publication.

Alabama Code §35-10-13 provides that notice of sale must be given in the county where the land is located by publication once a week for three successive weeks in a newspaper published in the county where the property

is located. If the property is located in more than one county, publication is to be made in all counties where the property is located. If no newspaper is published in the county where the lands are located, publication is to be made in a newspaper published in an adjoining county.

For pre-1989 mortgages that are silent as to the place or terms of sale, the sale may be conducted after 30 days' notice of the time, place and terms of sale by publishing such notice once a week for four consecutive weeks. §35-10-2.

The notice of foreclosure sale being published should contain the time, place, and terms of the sale along with a description of the property. Ala. Code §6-8-62 provides that if the notice is to be published for three weeks, the first insertion must be at least 18 days before the date of sale. However, if the mortgage contains additional requirements, such as four weeks' notice or 21 days, you must follow the requirements in the mortgage.

3. Sale

a. <u>Specifics.</u>

The Foreclosure Sale must be conducted at the front or main door to the Courthouse in the county where the land is located. §35-10-14. The sale

is to be held between the legal hours of sale, 11:00 a.m. to 4:00 p.m. If the sale is initiated prior to 4:00 p.m., you may continue with it as long as you conclude prior to 5:00 p.m. §6-8-41. If the property is located in more than one county, the land may be sold at the courthouse door of any county where the land is located. Ala. Code §35-10-4. (The notice of foreclosure should specify at which courthouse the sale will be conducted.)

The mortgagee should inspect property immediately prior to the sale to confirm there has been no fire or other damage to the mortgaged property prior to sale. Foreclosing the property after occurrence of such damage may act to preclude the mortgagee from collecting insurance proceeds that they may have been entitled to prior to the sale or from making a claim for waste to the property. The "foreclosure after loss rule" established by the Alabama Supreme Court in Aetna Ins. Co. v. Baldwin County Bldg. & Loan Ass'n, 231 Ala. 102, 163 So. 604 (1935), provides that a foreclosure sale that occurs after a loss or damage, resulting in a full satisfaction of the balance owing, forfeits the Mortgagee's claim to any insurance proceeds from the property. If the sale does not full satisfy the debt, the mortgagee may able to claim the policy proceeds up to the amount of the remaining deficiency. See American Fire & Indem. Co. v. Weeks, 693 So. 2d 1386, 1997 Ala. Civ. App. LEXIS 390 (Ala. Civ. App. 1997).

b. Auction.

Any person, or their representative, entitled to the money secured by the mortgage may conduct the actual sale of the property. Ala. Code §35-10-12. The auction is typically conducted by the attorney for the mortgagee after reading the notice of foreclosure. There are no specific statutory requirements governing the conducting of the sale (such as what words should be used.) Our procedure is to read the entire advertisement at the time of the sale and then make a specific offering of the property to bids, even if there are no bidders other than the mortgagee.

After the notice is read, the property is offered for bids. Unless otherwise stipulated, the sale is always for cash. Farmer's Savings Bank v. Murphree, 76 So. 932 (Ala. 1917). The Mortgagee typically makes the first (and often only) bid at the auction. The mortgagee can bid up to the amount of the sale price required to satisfy the debt without producing any cash; thus the mortgagee is almost always the highest bidder at a foreclosure auction. The attorney conducting the sale should discuss bidding strategy with his client prior to the sale, keeping in mind that a full-balance bid will eliminate the possibility of collecting any deficiency at a later date.

The mortgagee owes a duty to the mortgagor to act fairly and with good faith in conducting the foreclosure sale and may not act in a way that is calculated to discourage free, competitive bidding at the sale. Brabham v. American National Bank, 689 So. 2d 82 (Ala. Civ. App. 1996). Any improper use of the power of sale under a mortgage for the purpose of oppressing the mortgagor or serving the purposes of others will be considered a fraud in the exercise of power. Johnson v. Shirley, 539 So. 2d 165 (Ala. 1988). In fact, the court in Reeves v. First American, 607 So. 2d 180 (Ala. 1992), provides that a mortgagor has an action for wrongful foreclosure whenever a mortgage uses the power of sale for any purpose other than securing the debt owed.

Ala. Code §35-10-15 allows a mortgagee to conduct successive sales of property conveyed by mortgage, giving them the power to sell the mortgaged property from time to time in separate lots or parcels so long as the indebtedness remains unsatisfied. In Ames v. Pardue, 389 So. 2d 927 (Ala. 1980), the court held that offering the mortgaged property for sale by individual parcels is required in order to obtain the highest possible price, to possibly satisfy the mortgage debt by selling less than all of the property, and to allow the mortgagor the opportunity to retain or redeem at least some of the property. The auctioneer should thus offer any property readily

divisible into separate parcels for bids both individually and as a whole in order to obtain the highest recovery.

c. Delivery of funds by purchaser.

As stated previously, unless otherwise stipulated the sale is always for cash. Farmer's Savings Bank, 76 So. 932 (Ala. 1917). Our typical policy is to require the purchaser of the property, if other than the mortgagee, to present cash or certified funds (or funds via wire transfer) by the end of the business day when the sale occurs. You may condition a sale so that if the purchaser fails to present the funds by the deadline, the property is sold to the next highest bidder.

4. Transfer by Deed.

a. Drafting foreclosure deed.

According to Ala. Code §35-10-12, the mortgagee, their agent, attorney, or any person conducting the sale may convey legal title to the

lands sold at the auction to the purchaser through execution of a foreclosure deed. This should be done immediately upon receipt of the sale proceeds.

b. Recording in Probate Court.

Following the transfer of the property, the foreclosure deed should be recorded in the Probate Court of the county where the property is located. The Probate judge will index the foreclosure deed by the name of the original grantor and grantee in the mortgage and also by the names of the grantor and grantee in the foreclosure deed. Ala. Code §35-10-12. Note that the filing of the deed in Probate court puts all others on notice of the recording through constructive notice.

5. Redemption.

a. What is the right of redemption?

Under Alabama law, the mortgagor/debtor as well as other parties including junior lienholders hold a statutory right of redemption. This right allows those who hold it to redeem and take back title to the property after foreclosure.

The statutory right of redemption is a mere personal privilege and not property or property rights and must be exercised in the mode and manner

prescribed by statute. The right of redemption may not be waived in a deed of trust, judgment, or mortgage, or in any agreement before foreclosure or execution sale. It is not subject to levy and sale under execution or attachment nor is it subject to alienation except as provided by statute. Ala. Code §6-5-250.

b. <u>Who can exercise it?</u>

Alabama Code §6-5-248 sets out who may redeem property after a foreclosure sale. Those who are entitled to redeem include:

(1) Any debtor, including any surety or guarantor.

(2) Any mortgagor, even if such mortgagor is not personally liable for payment of a debt.

(3) Any junior mortgagee, or its transferee.

(4) Judgment creditor, or its transferee.

(5) Any transferee of the interests of the debtor or mortgagor, either before or after the sale. A transfer of any kind made by the debtor or mortgagor will accomplish a transfer of the interests of that party.

(6) The respective spouses of all debtors, mortgagors, or transferees of any interest of the debtor or mortgagor, who are spouses on the day of the execution, judgment, or foreclosure sale.

(7) Children, heirs, or devisees of any debtor or mortgagor.

§6-5-249 provides that the right of redemption is extended to the executor or administrator of any debtor or mortgagor, their transferee, assignee, or vendee, or their heirs and devisees along with the executor or administrator of any junior mortgagee or judgment creditor or their transferee. Conversely, the right of redemption may be exercised against the executor or administrator of any purchaser, junior mortgagee, or judgment creditor or their transferees or assignees.

c. <u>When can they exercise their right of redemption?</u>

A right of redemption must be exercised within one year of the date of the foreclosure sale. Ala. Code §6-5-248.

The right of redemption may be forfeited if the debtor or mortgagor or their tenant refuses to vacate the premises within ten days after written demand for possession by the purchaser or their agent. Ala. Code §6-5-251.

d. How is it exercised?

A party exercises the right of redemption by paying to the purchaser or his transferee the purchase price paid at the sale, along with interest at the statutory rate and all lawful charges. Ala. Code §6-5-253. According to §6-5-252, a party desiring to redeem must make written demand of the purchaser at the foreclosure sale or his transferee for a written statement of the debt and all lawful charges. The purchaser or transferee must then provide a written itemized statement of the redemption price and all lawful charges claimed within 10 days of receipt of the demand. If the purchaser fails to respond or the redeemer disputes the charges, the redeemer is entitled to file an action with the Circuit Court to enforce his rights.

Lawful charges include permanent improvements as prescribed herein, taxes paid or assessed, insurance premiums paid or owed by the purchaser, and any other valid lien or encumbrance paid or owned by purchaser or his or her transferee. If the redeeming party is a judgment creditor or junior mortgagee or any transferee thereof, then all recorded judgments, recorded mortgages and recorded liens having a higher priority at the time of sale which are revived under Section 6-5-248(c) are lawful charges that must be paid. If the redemption is made from a person who at the time of redemption owned the debt for which the property was sold, the

redemptioner must also pay any balance due on the debt with interest. These junior mortgages and liens are not lawful charges required to be paid at redemption, however, if the redeeming party is the debtor, mortgagor, or their spouses, children, heirs, or devisees. §6-5-253.

The purchaser is entitled to all rents paid or accrued including oil and gas or mineral agreement rentals to the date of the redemption. The purchaser also has the right to harvest and gather any crops grown by them on the property for the year in which the redemption is made, but is required to pay rent for the lands for the portion of the year to which redemptioner may be entitled. §6-5-253(c).

Any one redeeming foreclosed property is granted a credit against the amount of money required to be paid for redemption for timber cut or sold on the land by the purchaser, for any oil and gas, minerals, sand, or gravel taken from the land or sold, and for the amount the value of the property is diminished when any structures or buildings are changed, removed, demolished, or destroyed by the purchaser or his or her transferees during the statutory period of redemption. §6-5-253(d).

e. <u>What is the effect of exercising the statutory right of redemption?</u>

When a debtor, mortgagor, transferee, spouse, child, heir, or devisee redeems, all recorded judgments, liens, and mortgages in existence at the time of sale are revived. After redemption by any of the above, further redemption by other parties is precluded. §6-5-248(d).

When a junior lienholder or judgment creditor redeems, all recorded judgments, liens, and mortgages having a higher recording priority at the time of sale are revived and shall become lawful charges to the redeeming party. Any junior lienholder or judgment creditor with a lower recorded priority than the redeeming lienholder retains the right to redeem from that lienholder through the remainder of the one-year period. §6-5-2489(c).

6. Pursuit of Deficiency

a. <u>Property sold to third party.</u>

If the bid price at the foreclosure sale is less than the total indebtedness plus expenses and attorney's fees, then a deficiency is created for which the debtor will remain liable. The mortgagee can then take whatever action is necessary to collect the deficiency, including filing an action against the mortgagor or anyone else liable for the debt for a money judgment. (You may want to consider that the filing of a deficiency action sometimes leads to a counterclaim by the mortgagor contesting the

foreclosure.)If the bid price equals or exceeds the total indebtedness plus fees expenses, then the debt is completely extinguished.

b. Property purchased by Mortgagee.

If the property is purchased at the foreclosure sale by the mortgagee, the bid amount less expenses and attorney's fees must still be deducted from the total indebtedness to determine the deficiency. If, however, the mortgagee/purchaser sells the property during the one-year statutory redemption period for a profit (after deducting expenses incurred by mortgagee), that profit must also be deducted from the deficiency balance. Springer v. Baldwin County Federal Savings Bank, 562 So. 2d 138 (Ala.1990) ("Springer I") and 597 So. 2d 677 (Ala.1992) ("Springer II".)

7. Surplus

What happens when there is money left over?

If the property is sold at the foreclosure sale (or by the mortgagee during the redemption period) for an amount in excess of the balance due to the mortgagee plus attorney's fees and expenses, then a surplus is created.

The mortgagee is obligated to pay the surplus over to junior lienholders in descending order and then to the debtor if funds remain. If the mortgagee is unsure as to whom the surplus is to be paid, they may file an interpleader action with the Circuit Court. Davis v. Huntsville Production Credit Association, 481 So. 2d 1103 (Ala. 1985.)

VII. Deeds in Lieu of Foreclosure

A. Definition and Effect

The mortgagee may accept a deed to the mortgaged property from the mortgagor rather than proceeding with foreclosure. A deed in lieu of foreclosure has been defined as, "Any instrument, however denominated, whereby a mortgagor transfers to a mortgagee the mortgagor's rights in mortgaged property." Ala. Code § 35-10-50. Importantly, "A deed in lieu of foreclosure is a means of enforcing the mortgage by simply terminating the mortgagor's right of redemption." 1 The Law of Debtors and Creditors § 8:18. These deeds often arise when "borrowers ask lenders to accept voluntary conveyances of the real property securing their loans in return for the release of all personal liability or monetary or other comparable

consideration." John C. Murray, Deeds in Lieu of Foreclosure: Practical and Legal Considerations, 26 Real Prop. Prob. & Tr. J. 459, 460 (1991).

This Deed in Lieu of Foreclosure has significantly different consequences than a foreclosure as provided under §35-10-51. A deed in lieu of foreclosure has the following effects, it:

(1) Transfers to the mortgagee all right, title and interest of the mortgagor in the mortgaged property, including but not limited to all rights of redemption, statutory or equitable, unless expressly otherwise provided therein;

(2) Does not effect a foreclosure of the mortgage covering the mortgaged property;

(3) Does not give rise to a statutory right of redemption in the mortgagor or in any other person;

(4) Does not result in a merger of the mortgagee's rights with the mortgagor's equity of redemption for any purpose; and

(5) Does not affect the rights or interests of any person or entity other than the mortgagor in the mortgaged property.

A party contemplating accepting a deed in lieu should consider all of the above in deciding whether to accept such an offer, especially if junior liens or encumbrances exist.

B. Basic Elements

1. Written Offer from the Mortgagor.

Generally, a mortgagor should submit a written offer to the mortgagee offering to deed the property and stating the reasons for the offer.

2. Response Letter from the Mortgagee.

The lender should generally respond to the offer with a letter. If agreeable to the proposal, in this letter the mortgagee should specify they have no obligation to accept the property until all of the required documentation is executed and all consideration is paid, delivered, or both.

3. Settlement Agreement.

All terms and conditions of the voluntary conveyance by deed in lieu, including waivers, estoppels, warranties, representations, and express recitals of consideration, should be set out in a written agreement between

the mortgagor and mortgage. The Settlement Agreement should be sure to state that mortagee retains their rights against guarantors and any other parties secondarily liable for repayment of the loan, unless those are released as conditions to the deed in lieu.

The agreement should also contain a provision to prevent merger. Under the doctrine of merger, the mortgage debt can be extinguished. The result is that "once the mortgage lien has been extinguished, the lender has no mechanism for foreclosing against subsequent creditors (e.g., junior lienholders and inchoate mechanics' liens)." Francie Cohen Spahn, Deeds in Lieu of Foreclosure the Difficult Part Is Understanding Deeds in Lieu from Both Sides of the Fence, Prac. Real Est. Law., July 2010, at 47, 53. To prevent merger, "the settlement agreement should not provide that the mortgage is extinguished or cancelled, or that the borrower is released or held harmless from the underlying debt." Id. Instead, the agreement should state the mortgage agrees not to bring a personal action against the borrower and/or guarantors for the deficiency balance.

Alabama statutes, however, expressly state that a deed in lieu of foreclosure "does not result in a merger of the mortgagee's rights with the mortgagor's equity of redemption for any purpose." Ala. Code § 35-10-51.

An anti-merger clause thus may not be crucial in Alabama but is still prudent.

4. Consideration.

The Settlement Agreement should recite actual and adequate consideration. The amount of debt canceled and/or any cash consideration given by the mortgagee should normally equal or exceed the fair market value of the property. You may want to state in the Settlement Agreement that both the mortgagor and mortgageee acknowledge that the value of the property is equal to or less than the outstanding indebtedness.

5. Covenant not to Sue.

The typical stated consideration in the agreement consists of forgiving the personal indebtedness of the borrower and waiving the right to immediately foreclose against the property and exercise all other remedies. Instead of a statement in the statement releasing the borrower from personal liability, the lender should specifically covenant not to sue. A release might be construed as forgiving the underlying indebtedness and thus the mortgage, even though the lender does not intend to release the mortgage lien. The agreement should not release the borrower or guarantor from any obligations, including covenants and warranties, contained in the agreement or the deed. A separate

covenant not to sue that is unambiguous and clearly states the intention of the parties is recommended.

6. Waiver.

The mortgage should require the mortgagor to waive any right to control the manner of use, development, or disposition of the property after the conveyance. If the mortgage subsequently leases the property to the borrower, the rental should be set at or near the market rate.

7. Closing Documents.

A mortgagee should consider obtaining the following documents prior to the closing, if applicable: original executed copies of all leases and contracts affecting the property; all prepaid rent and security deposits; cancellation of all unwanted leases and contracts; warranty bill of sale covering all personal property; a warranty, special warranty, or quit claim deed from the borrower conveying title to the real property; and a title insurance which would insure over creditor's rights, such as bankruptcy, state insolvency, equitable subordination if available.

C. Comparison of Deed in Lieu and Foreclosure Deed

The main difference between a deed in lieu of foreclosure and a foreclosure deed is that a foreclosure deed cuts off interest of any junior lienholders and is subject to the statutory right of redemption. See Alabama Law of Damages § 33:8 (5th ed.) ("The foreclosure sale conveys legal title with the purchaser entitled to the deed immediately upon purchase, subject only to the right of redemption."). This right of redemption "entitles certain persons, including 'debtors,' to obtain title to foreclosed property within one year of the foreclosure sale by tendering the price paid at the sale plus interest and other lawful charges." In re Poe, 477 F.3d 1317, 1319 (11th Cir. 2007). Conversely, a deed in lieu of foreclosure eliminates the right of redemption. See 1 The Law of Debtors and Creditors § 8:18. ("A deed in lieu of foreclosure is a means of enforcing the mortgage by simply terminating the mortgagor's right of redemption."); Halstead v. Windsor, 662 So. 2d 1124, 1126 (Ala. 1995) ("[A]ny right of redemption was extinguished by the deed in lieu of foreclosure.").

It is important to weigh the benefit of obtaining the deed in lieu with no statutory right of redemption against the potential detriment of accepting the property with any junior liens or mortgages intact. Accepting a deed in lieu is comparable to taking a warranty deed from a third party, conveying the property with all of the "baggage" that attached to the property prior to

the transfer. The statutory foreclosure process, whether judicial or non-judicial, cuts off these interests and provides each holder of such interest with the statutory one year right of redemption. Since accepting a deed in lieu does not affect a foreclosure, these junior interests are unaffected.

VIII. Forbearance Agreements

A. Definition and Purpose

The forbearance agreement is an agreement between creditor and debtor "whereby the creditor agrees to forbear[1] from foreclosing, suing, and/or taking other action against the debtor or guarantor" so long as the debtor satisfies a previously agreed upon set of conditions. *Norton Creditors' Rights Handbook § 6:7 (2010)*. While these conditions are both numerous and widely variable, some examples include maintenance of financial covenants, time limitations upon liquidation of assets, agreements to obtain outside financing, and granting of deeds in lieu of foreclosure. These agreements often substitute the restructuring of loan transactions on a short-term basis and serve as useful, remedial tools to avoid costly legal action that

[1] "Forbear" is defined as "[t]he act of refraining from enforcing a right, obligation, or debt." *Black's Law Dictionary* 656 (7th ed. 1999).

often delays repayment and has the potential to destroy otherwise viable businesses. 15 BUS. TRANSACTIONS SOLUTIONS § 75:48 (2011).

It is important to note that the forbearance agreement does not necessarily (and should not, from a creditor's perspective) waive existing defaults. Rather, the creditor agrees to forbear from accelerating obligations or exercising rights it might otherwise have as a result of the existing defaults. When entering into forbearance agreements it is common for lenders to require new appraisals, financial reports, additional collateral, and the remedying of any problems with existing collateral. This situation may provide the lender with the opportunity to revisit previously unanswered questions and add favorable provisions that were excluded from prior documentation.

As a general rule, an agreement by a creditor to extend the time of payment on a debt, and to forbear to enforce its rights, constitutes sufficient consideration for a contract, such as an undertaking on a note or a guaranty of an obligation. *See* 17A Am. Jur. 2d *Contracts* § 147 (2011); 10 C.J.S. *Bills and Notes* § 76 (2011); 38A C.J.S. *Guaranty* § 23 (2011). An agreement of forbearance should be for a fixed and definite time. However, a promise to forbear without

specifying a particular time has been held to be valid because the law presumes that the forbearance will be for a reasonable time. 38A C.J.S. *Guaranty* § 23. The mere forbearance without an agreement to that effect, or the mere act of forbearance if not given for a promise, does not constitute the consideration necessary to enforce an asserted obligation to forbear. 17A Am. Jur. 2d *Contracts* § 146.

B. Statutory References

The only statute specifically referencing a forbearance agreement in Alabama is the statute of frauds. Alabama's statute of frauds renders void "every agreement or commitment to lend money, delay or *forebear repayment thereof* or to modify the provisions of such an agreement or commitment except for consumer loans with a principal amount financed less than $25,000" unless that agreement is in writing and subscribed by the party to be charged. Ala. Code § 8-9-2(7).

C. Alabama and 11th Circuit Case Law

- Rogers v. First Nat'l Bank of Birmingham, 211 So. 2d 796, 798-99 (Ala. 1968) – A promise to forbear from suit or give further time for the payment of debt, if followed by actual forbearance for a time, is

valid consideration for a promise to pay that debt by a person other than the debtor.

- First Nat'l Bank v. Johnston, 11 So. 655, 661-62 (Ala. 1892) – In order to constitute sufficient consideration there must be an agreement to forbear; mere forbearance, without the obligation to forbear, is not sufficient.

- Vision Bank v. Kaiser, No. 1:10-CV-00392, 2011 WL 2110004, at *1 (S.D. Ala. May 26, 2011) – Alleged forbearance agreement consisting of two e-mails was void as a violation of the statute of frauds because it was not "subscribed by the party to be charged," and it was not a consumer loan under $25,000.

- Wachovia Bank v. Ghavamian, No. 1:08-CV-00452, 2008 WL 5428060, at *1 (S.D. Ala. Dec. 30, 2008) – Jury trial waiver clause in forbearance agreement was upheld where the waiver was knowing and voluntary, thus overcoming the reasonable presumption against contractual waiver of a right to jury trial.

- Ex parte Cupps, 782 So. 2d 772 (Ala. 2000) – Jury-waiver clause in a forbearance agreement, which waived bank and debtor's right to jury trial for disputes arising under the forbearance agreement or loan documents, did not contractually waive debtor's right to jury trial for claims against bank alleging fraudulent inducement, suppression, and tortious interference with contractual relations. However, the waiver clause did waive debtor's right to jury trial regarding breach of the forbearance agreement.

- In re Turner, 195 B.R. 476, 484 n.15 (Bankr. N.D. Ala. 1996) – Forbearance agreements do not toll the running of the seven-year period required as a condition for discharge of student loan debt under 42 U.S.C. § 292f(g)(1).

- In re Installation Servs., Inc., 101 B.R. 282, 285 (Bankr. N.D. Ala. 1989) – Forbearance in collection of debt does not qualify as "new value" for purposes of 11 U.S.C. § 547(c)(1) so as to preclude avoidance of otherwise preferential transfers.

D. Structure of Forbearance Agreement

As a general guide, a comprehensive forbearance agreement should include the following:

1. A description of the amount of credit available to the borrower under any credit agreement and the current balance and status of all obligations owing from the borrower to the lender;

2. A description of the specific events that have caused the borrower to be in default under the terms of the loans;

3. A description of general terms of the requested forbearance including the amount of time ("forbearance period") that the lenders are willing to provide the borrower to remedy the defaults and/or find a new lender willing to provide replacement financing to satisfy indefeasibly the entire amount of the obligations owing to the lenders under the loans;

4. A description of any modifications to the terms of the loans that will apply during the forbearance period including any reduction in the amount of any credit line and any increase in the interest rate on outstanding borrowings;

5. A description of the events that will terminate the forbearance period prior to the originally agreed date including a breach by

the borrower of any of the covenants or representations included in the forbearance agreement;

6. A description of the various conditions to the forbearance such as:

- delivery of additional security, including guaranties from the principals of the borrower;
- delivery of a commitment letter from a new lender by a specified date;
- pursuit of sales of specified assets to generate additional cash that can be used to repay a portion of the amount owed to the lenders;
- engagement of financial consultants;
- preparation and delivery of reports regarding the operational activities of the company and the company's financial condition;
- minimum accounts and inventory levels;
- cash infusions from the principals of the borrower; and restrictions on certain activities and transactions that are outside of the ordinary course of business.

7. A description of the conditions precedent to the effectiveness of the forbearance agreement including delivery of documents (e.g., resolutions, consents from third parties and legal opinions), reimbursement of the costs and expenses incurred by the lenders and payment of a forbearance fee;

8. Basic representations and warranties from the borrower to the lenders with respect to:

- the accuracy of representations in the forbearance agreement and the loan agreements and related documents;
- the non-occurrence of any other events of default;
- the borrower's title to the collateral that is securing payment of the loans to the lenders;
- the borrower's good standing and authority to enter into the forbearance agreement; and
- the adequacy and accuracy of the financial information regarding the borrower that has been supplied to the lenders.

9. The borrower's release of the lenders from any liability for claims that the borrower might otherwise be able to assert

against the lenders with respect to the loan agreement or the forbearance agreement.

15 Bus. Transactions Solutions § 75:48 (2011).

Three example forbearance agreements are attached for your reference.

IX. Foreclosure Initiation

A. Effect on the Mortgage Assignee

Ex parte GMAC Mortg., LLC, 2013 Ala. Lexis 111 *1; WL 4873071 (Ala. 2013)

The Pattersons mortgaged their house with One Mortgage Corporation who transferred the mortgage to GMAC Mortgage. GMAC Mortgage later foreclosed the mortgage on August 7, 2007. Id. at 2. GMAC became the owner of the house by virtue of the foreclosure sale and made a written demand for possession of the house in accordance with § 6-5-251(a), Ala. Code 1975. Id. The Court of Civil Appeals vacated the trial court judgment in favor of GMAC on the grounds that GMAC lacked authority to foreclose

the mortgage when the foreclosure proceedings were initiated as they had not yet been assigned the mortgage. Id. at 4.

The Supreme Court held that there is nothing in the Alabama statutes that address the concept of "initiation of a foreclosure," nor does the publication of a notice of foreclosure auction constitute a foreclosure. Id. at 10. The "foreclosure" of a mortgagor's right does not occur until the "end," when a deed divesting the mortgagor of its right is signed and delivered to a purchaser. Id. at 17. Therefore, it does not matter that GMAC did not initiate the foreclosure and was not assigned the mortgage at the time of initiation, the foreclosure does not occur until the sale of the property, at that time GMAC had the full power to exercise the power of sale so as to foreclose the mortgagor's rights in the land and convey those right to itself or to another. Id. 16-17.

B. Other Issues Regarding Foreclosure Initiation

Ex parte Bac Home Loans Serv., LP., 159 So. 3d 31 (Ala. 2013)

On the same day as GMAC, two similar cases involving the timeline of when the foreclosure was initiated versus when it was completed were decided with the Court ruling in similar fashion. Ex parte Bac can be differentiated as the appeal was to overturn a summary judgment motion

against the mortgagee who foreclosed Id. at 34. The Court held that the trial court had subject matter jurisdiction as the plaintiff had purchased the property at a foreclosure sale and now had title to the property, this is sufficient to have the case go to trial, what is important is who had the right to foreclose when it occurred, not when initiated. Id. at 42.

Harris v. Deutsche Bank Nat'l Trust Co., 141 So. 3d 482 (Ala. 2013)

Harris held that "It is the execution and delivery of a deed that 'forecloses' the mortgagor's rights and vests the foreclosure purchaser with legal title sufficient to support an ejectment action under § 6-6-280(b)." Id. at n.4. However, this case can be differentiated as the mortgage was assigned by the lender "solely as a nominee for Lender and Lender's successors and assigns" and did not entitle them to the money secured by the mortgage. Id. at 490. The trustee initiated foreclosure proceeding in its own name, not on behalf of the lender, and "an agent of such holder to whom the mortgage is delivered merely for the purpose of foreclosure, having no ownership of the debt, is not authorized to foreclose in his own name, and execute a deed in his name to the purchaser." Id. at 491. The Court held there were issues of fact determining whether the trustee was assigned to

receive the money secured by the note, as such, summary judgment the was improper. Id. at 492.

X. Recent Developments

First United Sec. Bank v. McCollum, 2014 Ala. Lexis 141 (Ala. 2014)

First United Security Bank (Bank) held a mortgage on property owned by Wayne Allen Russel, Jr. In May, 2010, two parcels of the land were sold, subject to the Bank's mortgage at a tax sale due to unpaid property taxes. Id. at 2. The Bank assigned its foreclosure bid rights to Paty Holdings, LLC (a wholly owned subsidiary of the Bank) who was the highest bidder at the foreclosure sale; a bid that equaled Russell's indebtedness to the bank. Id. at 3. Tuscaloosa County informed the Bank they must pay the excess bids in order to redeem the property taxes but they would not be entitled to a refund of the excess bids at the tax sale. Id. The trial court ruled that the Bank was not entitled to the excess proceeds from the tax sale and that the excess proceeds should go to Russell who was the owner at the time of the tax sale (but before distribution of the funds). Id. at 5. Affirmed by the Court of Civil Appeals. Id. at 1.

The Supreme Court held that the Alabama statutes do not define "owner" and do not, by their terms, impose any limitation on when an owner must have acquired its interest in the property in order to be eligible to receive the excess proceeds from a tax sale of the property. Id. at 6. Limiting the term "owner" to the owner in whose name the taxes were assessed at the time of the tax sale often would lead to inequitable results. Id. at 11. For example, the assessed owner may not be the owner at the time of the tax sale as it was sold between the assessment and the tax sale, or because the assessment was not changed after a sale to reflect the name of the new owner. Id. There is severe injustice when the current owner paid the excess proceeds in order to redeem the property, but the excess proceeds are then returned to the assessed owner, who did not pay the taxes and no longer has any interest in the property. Id. The Court therefore ruled that the Bank was entitled to the excess proceeds and reversed the judgment of the Court of Civil Appeals. Id.

Ex parte Rhodes, 144 So. 3d 316 (Ala. 2013)

The Supreme Court would not consider a petition for a writ of mandamus to prevent an ejectment action for the same reason it would not grant a dismissal motion in BAC. Id. at 318. Whether the foreclosure sale

and the foreclosure deed were invalid goes to the merits of an ejectment claim, it does not go to the plaintiff's standing to bring the action. Id. The only basis upon which the Rhodeses seek interlocutory mandamus relief from the order of the trial court denying their motion to dismiss is an alleged lack of standing. Id. at 319. The problem alleged does not implicate subject-matter jurisdiction, there is no basis to consider the petition for a writ of mandamus. Id.

Givianpoour v. Curtain, 2014 Ala. Lexis 173 (Ala. 2014)

Request for redemption of a foreclosed mortgage was wrongfully dismissed as there was a genuine issue of fact as to whether the rental charge assessed was a "lawful charge." Id. The disagreement over the charge was a valid excuse for failure to tender the redemption amount or to pay it into court. Id. The Court held that the redemptioner need not always tender the redemption amount into court if there is a good faith disagreement over the redemption amount, even though the amount in dispute is easily calculable (it does not need to be an uncertain amount). Id. at 24. When the statement of lawful charges for redemption includes illegal demands, or if the redemptioner acting in good faith cannot reasonably ascertain the amount, no tender need be made before filing a bill to redeem. Id. at 25. The Court

concluded that the rent charge on the statement was an unlawful charge as it was not in the list of charges under Ala. Code §6-5-253(a) or §6-5-253(c). Id. at 30. Such an unlawful charge, over which there is a bona fide disagreement, constitutes a valid excuse for failure to tender the redemption amount. Id. Further, payment of the amount not in dispute is not required to invoke the jurisdiction of the circuit court to settle the disputed amount. Id.