

UNDERWRITING SNAPSHOTS PAST, PRESENT & FUTURE

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Remote Online Notarizations (RON)



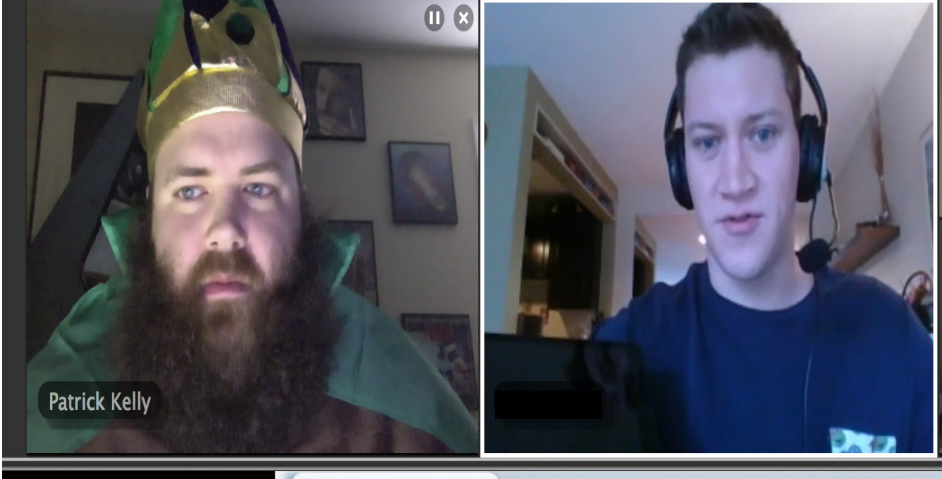


BRINGING REMOTE ONLINE NOTARY INTO FOCUS

Types of Notary

- ✓ **Traditional** - Wet sign on paper conducted in person
- ❑ **eNotary** – Electronic signature on an electronic document conducted in person
- ❑ **Remote Online Notary (RON)** – Electronic signature on an electronic document conducted via two-way audio visual communication.

Electronic vs Remote Online Notary



Types of Closings

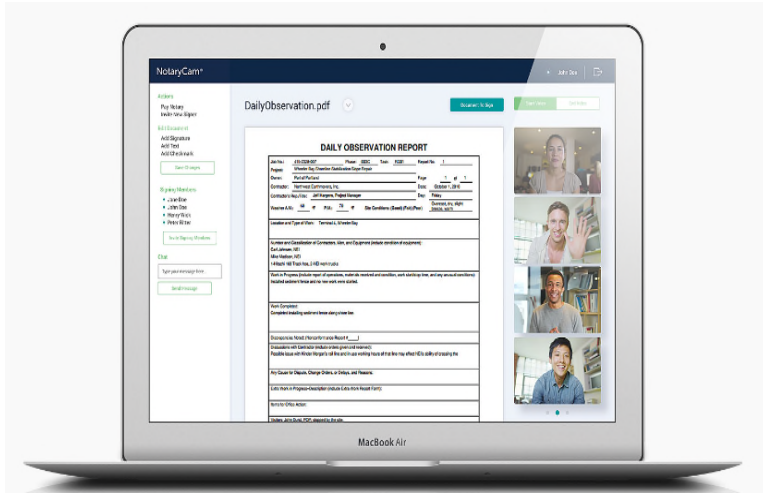
Traditional Wet Signing	eClosing: “Hybrid Closing”
<ul style="list-style-type: none">• In-person• 100% paper documents with wet signatures• In-office, “mobile notary”, or “mail away”	<ul style="list-style-type: none">• In-person• Some paper documents• Some digital documents with eSignatures• In-office or “mobile notary”
eClosing: “In Person Digital” <i>(a.k.a. “In Person eClosing”)</i>	eClosing: “Online Notary” <i>(a.k.a. “Webcam”, “Remote”)</i>
<ul style="list-style-type: none">• In-person, face-to-face• 100% digital documents with eSignatures• In-office or “mobile notary”	<ul style="list-style-type: none">• <u>NOT</u> in person• Notary public appears before signer via webcam• 100% digital documents with eSignatures

RON or eNotary can be part of an eMortgage

eMortgage: An eMortgage is a loan where loan documents are created, executed, transferred and ultimately stored electronically.

**If the digital closing process includes an electronically signed (eSigned) Note, the eClosing process results in an eMortgage.*

It's Not Just Skype or Facetime



- Login Process
- Identify Verification
 - Credential Analysis
 - KBA
- Real-Time, Continuous Audio-Visual Communication
- Shared Screen for Uploaded Documents
- Electronic Signatures and Stamp/Certificate
- Acknowledgement Recording

3-Ways to Prove Your Identity

- ✓ **What you have:** a government issued identification card such as a passport or drivers license
- ✓ **What you know:** answers to questions about you
- ✓ **Who you are:** biometric data



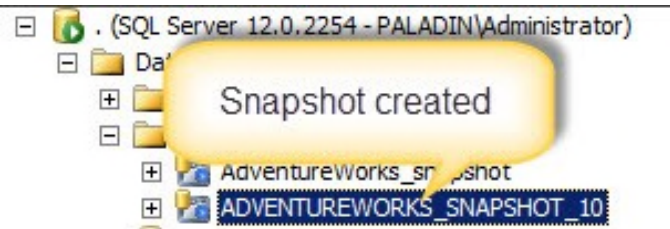
Multi-Factor Authentication = Passing 2 of 3 Identity Proofing Measures

✓ Third Party Credential Analysis

✓ Knowledge-Based Authentication

✓ Biometrics





Checklist for Conforming Laws Related to Remote Online Notarization (“RON”)

PURPOSE

The purpose of this checklist is to assist state land title associations, state mortgage bankers’ associations, and other interested organizations and persons in reviewing any proposed legislation for remote online notarization. Although RON legislation can take many forms, there are certain essential concepts and features that should be present in order to be consistent with the MBA-ALTA Model Legislation for Remote Online Notarization. The provisions of the Model Legislation should be referred to when you use this checklist in reviewing any proposed legislation. To assist in your review and comparison, the specific sections of the Model Legislation that correspond to this checklist are shown **in bold** where applicable below.

THREE PRIMARY QUESTIONS

Although the Model Legislation carefully covers many important concepts in its interlocking provisions, the following three considerations are of primary importance. Unless the proposed law under review answers “yes” to all three questions, it is not consistent with the MBA-ALTA Model Legislation.

1. *Mandatory Disclosure*: Does the proposed legislation require disclosure of the fact of remote online notarization in the notarial certificate? **Sec. 8(4)**.

2. *Multifactor Authentication*: Does the proposed legislation require identity to be verified through the following processes using public and private/proprietary data sources? **Sec. 8(2)(b)**.

1. Remote presentation of a government-issued credential
2. Credential analysis
3. Identity proofing

3. *Audio-Video Recording*: Does the proposed legislation require the creation and retention of an audio-video recording of the notarial act? **Sec. 6(2) through (4)**.

KEY DEFINITIONS

Look for the following definitions in the proposed legislation.

- ❓ “Communication technology” or “Audio-video communications”. **Sec. 1(2).**
- ❓ “Credential analysis”. **Sec. 1(3).**
- ❓ “Electronic document” or “Electronic record”. **Sec. 1(5).**
- ❓ “Electronic seal”. **Sec. 1(6).**
- ❓ “Electronic signature”. **Sec. 1(7).**
- ❓ “Identity proofing”. **Sec. 1(8).**
- ❓ “Remote online notarial certificate” or “Electronic notarial certificate”. **Sec. 1(12).**
- ❓ “Remote presentation”. **Sec. 1(15).**

Personal appearance and physical location.

- The law needs to be clear that, for notarial acts performed under the state’s authorizing RON statute, personal appearance includes both physical appearance and remote online appearance. Sec. 1(1) and Sec. 8(5).
 - *Example:* “As defined in this (Chapter), ‘appear before,’ ‘personally appear’ or ‘in the presence of’ means either being in the notarial officer’s physical presence or interacting with the notarial officer by means of audio-video communication technology.”
 - *Example:* “A remote online notarial act meeting the requirements of this (Chapter) and any rules adopted hereunder satisfies the requirement of any law of this state requiring an individual to appear before or in the presence of a notarial officer during the performance of a notarial act.”

- **The law must require the notary to be physically located within the state while performing RON. Sec. 1(2) and Sec. 5.**
 - *Example:* The definition of “communication technology” applies to “a notary public physically located in this state.”
 - *Example:* “A remote online notary may perform an online notarization if the notary is physically located in this state at the time of the notarial act.”
- **The law should allow the principal whose signature is being notarized to be located outside the state at the time of the RON. Special considerations may apply if the principal is physically outside the United States because the act may be forbidden under the laws of the foreign state where the principal is located. Sec. 5(2) and (3) and Sec. 8(1).**
 - *Example:* “A remote online notary public may perform a remote online notarization that meets the requirements of this (Chapter) and rules promulgated under this (Chapter) regardless of whether the principal is physically located in this state at the time of the remote online

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 - *Example:* “A remote online notary public may perform a remote online notarization that meets the requirements of this (Chapter) and rules promulgated under this (Chapter) regardless of whether the principal is physically located in this state at the time of the remote online notarization

➤ *Example:* “A remote online notary public may perform a remote online notarial act using communication technology for a remotely located individual who is physically located:

a. in this State;

b. outside this State but within the United States;

c. outside the United States if:

- (i) the record is to be filed with or relates to a matter before a court, governmental entity, public official, or other entity under the jurisdiction of the United States, or involves property located in the territorial jurisdiction of the United States, or a transaction substantially connected to the United States; and
- (ii) the act of making the statement or signing the record is not prohibited by the foreign state in which the remotely located individual is located.”

Tamper-evident technology.

- **The law should require use of tamper-evident technology to assure the integrity of an electronic document notarized remotely online. Sec. 7(2).**
 - *Example:* “A remote online notary public shall attach an electronic signature and seal to the electronic notarial certificate in a manner that renders any subsequent change or modification to the electronic document to be evident.”
 - *Example:* “A notary must select one or more tamper-evident technologies to perform notarial acts with respect to electronic records.”
 - *See the National Association of Secretaries of State (NASS) requirements for reliability of the remote notary public's electronic signature and electronic seal as a guide.*

Adequate safeguards to protect the public and the parties relying on notarization from identity theft, forgery, undue influence, and fraud.

- **Multifactor authentication should identify the signer through at least two of the following three forms of authentication: (1) what the signer possesses (credentials, e.g., driver's license, passport, military ID card, etc.); (2) what the signer knows (knowledge-based authentication, e.g., questions based on the signer's personal knowledge); and (3) who the signer is (recognition of behavioral and biological characteristics, e.g., facial or fingerprint recognition, retinal scan).**
 - *Recommended Authentication Process:* The MBA-ALTA Model Legislation requires three steps:
Sec. 8(2)
 - Remote presentation of a government-issued identity credential (something the signer possesses)
 - Credential analysis of that credential
 - Identity proofing by means of knowledge based authentication (something the signer knows) or biometric factors (something the signer is)
 - *Note on Biometric Factors:* Biometric comparison as a future option in statute is not objectionable.

➤ *Caution: Legislation without clear multifactor authentication:* Several versions of the Revised Uniform Law on Notarial Acts (RULONA) and other draft legislation in circulation do not expressly require the use of two or more identity verification methods or delegate the number and types of verification to a regulator without clear statutory guidance. The ALTA Taskforce for RON therefore strongly recommends the three-step process of the MBA-ALTA Model Legislation described above.

➤ *Caution: Examples of “identity proofing”:* The following may be acceptable examples of “identity proofing” but are NOT appropriate as stand-alone substitutes for the multifactor authentication process described above:

- Dynamic knowledge-based authentication (KBA)
- Use of public key infrastructure (PKI) technology
- Analysis of biometric data

- Remote presentation and credential analysis should require acceptable government-issued identification containing a photograph and signature of the individual, to have its layout, format and security features compared against those expected for a credential of that type.
- The law should NOT allow authentication solely by means of the notary examining an identification credential over the internet through audio-video communication technology or without use of third party credential analysis.

- Each RON transaction must be recorded (audio and video). The Model Legislation only requires a recording of the “notarial act” but does not prohibit other portions of the notarial process from being recorded. Rules and regulations may require additional parts of the process to be recorded, such as the signer’s consent to RON and use of electronic signatures, and the credential analysis of the signer’s government-issued identification. While not a complete protection against fraud, recording the RON transaction serves as evidence of attribution (e.g. as a “security procedure” under § 9 of UETA) and as a deterrence of those who may see RON as an opportunity for criminal activity.
- The audio-video recording and electronic journal must be retained defined period. The Model Legislation recommends a 10-year retention requirement. **Sec. 6(4)**. Some states have adopted shorter timeframes (e.g. 5 years in Texas and Virginia; 7 years in Nevada).

Mandatory disclosure in notarial certificate.

- The certificate of acknowledgment must indicate that the document was notarized remotely online and/or through the use of audio-video communication technology. Sec. 8(4). The Secretary of State (or commissioning official) may be given rulemaking authority to provide for modified forms of notarial certificates.
 - *Example:* “The acknowledgment form provided by this chapter must include a space for a remote online notarization as defined by Section __, to indicate by which method described by Subsection __ the acknowledging person appeared before the officer.”
 - *Example:* “The certificate of notarial act for a record executed by a remotely located individual must indicate that the individual was remotely located. A form is sufficient if it is in the form provided by Section __ and substantially states: ‘This notarial act involved a statement made in or a signature executed on a record by a remotely located individual using communication technology’.”
 - *Example:* “The [Secretary of State] may promulgate regulations to . . . provide acceptable forms of notarial certificates for any notarial act that is a remote online notarization.”

Recordability of electronically notarized documents.

- The law should provide confidence that an electronic document notarized using RON is recordable in the official land records and that, once recorded, the document will serve as effective constructive notice upon which the public can rely; this includes the ability to record an electronically notarized (including RON) document in the official land records regardless of the capability to receive electronic recordings. **See provisions from URPERA and regarding Recordation of Electronic Records in Tangible Form, referenced on pp. 17 and 18-21 of the Model Legislation.**
- It is desirable to include a “papering-out” provision that allows an electronically notarized document to be recordable if printed-out and certified by a notary to be a true and complete copy of an electronic original. Such a provision would allow recordation of electronic documents in jurisdictions that do not currently accept electronic recordings. **See provisions for Recordation of Electronic Records in Tangible Form on pp. 18–21 of the Model Legislation.**

- Conclusive evidence and constructive notice when “papering-out”. The law should include provisions that any document which conveys or encumbers an interest in real property will impart constructive notice to third parties and be effective upon recording even if the acknowledgment or notarial act is defective, and that a completed notarial certificate is conclusive evidence that the required procedures were followed. **See subsections (g) and (h) on p. 20 of the Model Legislation.**

➤ *Example:* “If a [notarial] certificate is completed with the information required by subsection __ and is attached to or made a part of a paper document, the certificate shall be conclusive evidence that the requirements of subsection __ have been satisfied with respect to the document.”

➤ *Example:* “A document purporting to convey or encumber real property or any interest therein that has, by inadvertence or excusable neglect, been recorded by a [recorder] for the jurisdiction in which the real property is located, although the document may not have been certified in accordance with the provisions of this section, shall impart the same notice to third persons and be effective, from the time of recording, as if the document had been certified in accordance with the provisions of this section.”

Rulemaking and Standards for RON.

- The law should provide rulemaking authority for the appropriate commissioning official to implement RON. Some states will require a detailed and express delegation of authority listing each area of rulemaking authority; other states may prefer broader grants of authority to the implementing official. **Sec. 2**
 - *Example:* “The Secretary of State (or commissioning official) shall [may] adopt rules necessary to implement this subchapter, including rules to facilitate online notarizations.”
- ☐ The law should also allow the appropriate commissioning official to adopt and maintain technical standards for RON. **Sec. 3(1)**
 - *Example:* “The Secretary of State (or commissioning official) by rule shall develop and maintain standards for online notarization in accordance with this subchapter, including standards for credential analysis and identity proofing.”

- **The law should also allow the appropriate commissioning official to adopt and maintain technical standards for RON. Sec. 3(1)**

- *Example:* “The Secretary of State (or commissioning official) by rule shall develop and maintain standards for online notarization in accordance with this subchapter, including standards for credential analysis and identity proofing.”

- ☐ The law may allow the commissioning official to confer with other state agencies and appropriate outside bodies in developing and promulgating rules and standards. **Sec. 3(2).**

- *Example:* “In developing standards, the Secretary of State (or commissioning official) shall review and consider standards established by the National Association Secretaries of State (NASS), standards established by national standard-setting bodies such as the Mortgage Industry Standards and Maintenance Organization (MISMO), the standards and practices of other jurisdictions, and the views of other governmental officials and entities and other interested persons.”

- *Optional:* The law may confer various specific areas of rulemaking authority on the commissioning official. Such rules may address:
 - Application, qualifications and authority of remote online notaries.
 - Electronic journal. This requirement protects against fraud and other legal challenges; the law should require the notary to use only electronic records (instead of a traditional paper journal) for RON.
 - Any required notice regarding performance of notarial act.
 - Standards for the performance of the notarial act by means of audio-visual communication technology.
 - Approval of audio-visual communication technology, credential analysis technology, and third-person identity proofing technology.

- Procedures for RON including remote presentation, credential analysis, third-person identity verification and identity proofing.
- Requirements or procedures to approve providers of communication technology, credential analysis technology, or third-person identity proofing technology.
- Fees for the remote online notary public application; permissible fees to be charged by the notary for RON.
- Acceptable forms of notarial certificates for any notarial act that is a RON.
- Procedures and requirements for the termination of remote online notary commission.
- Record retention procedures and requirements.
- Standards for the third-party repositories for the retention of the audio-video recording of the notarial act.

Other considerations.

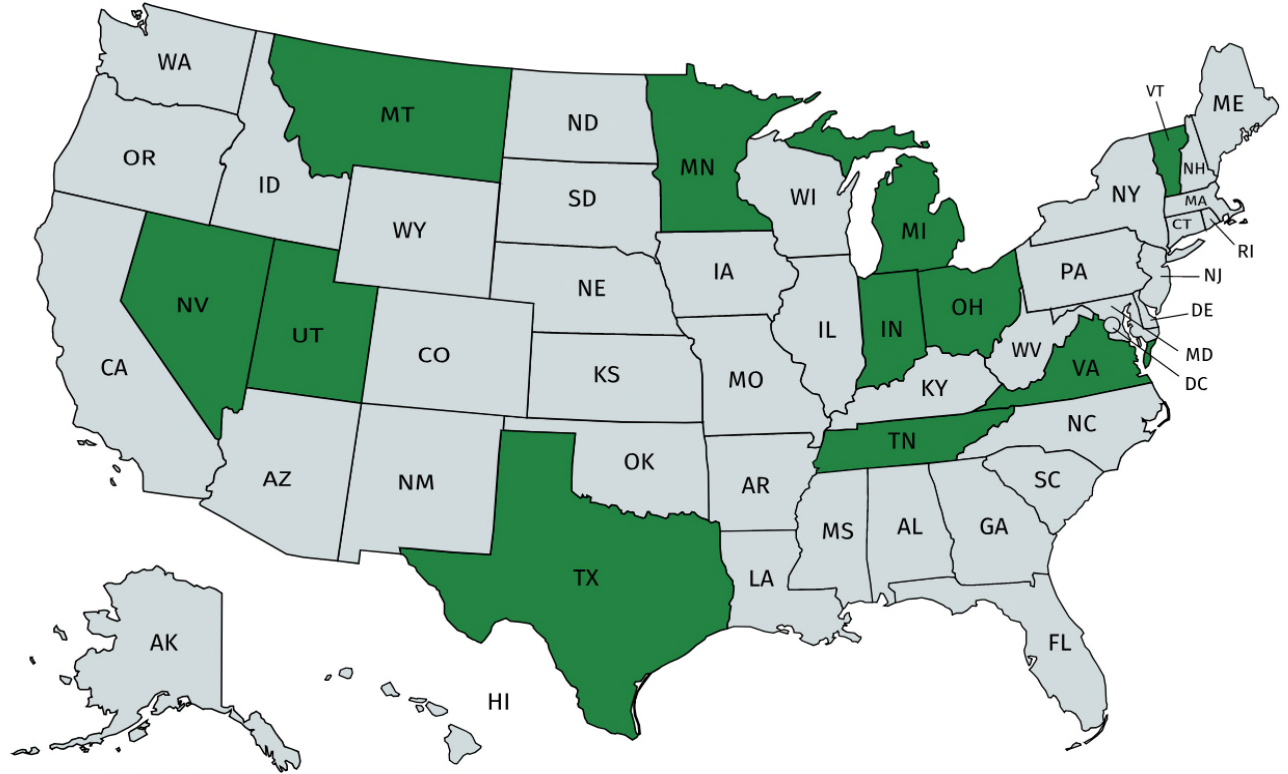
- Witnesses required under state law? If witnesses are required for the validity of certain instruments, the law should provide clarity and consistency with any statutes that require the use of both notaries and witnesses.
 - ❖ It should give guidance as to whether the witness must be in physical proximity to the signer or whether the witness may be remote.
 - ❖ If remote witnessing is permitted, it may set standards for the identification of those witnesses similar to those required of the signer.
 - ❖ If remote witnessing is permitted, it should define what it means to witness an electronic signature. As there is not a physical act (like moving a pen) that will be visible across an audio-video connection focused on the signer's face, consider defining the act of remotely witnessing as hearing the signer make a statement to the effect that the signer has signed the electronic records.

- Unauthorized access. Access to electronic notarial records, electronic signatures and seal should be kept secure from unauthorized access or use. **Sec. 6(3), Sec. 7(1) and (3).** Notaries public and RON technology vendors should be required to take reasonable precautions in the preparation and transmission of electronic records. **Sec. 8(3).** The law may consider granting access to the records to a title agent, settlement agent, or title insurer that has engaged the notary for purposes of a real estate transaction.
- Repository and custodian provisions. Notaries should be allowed to designate a third-party repository or custodian to hold the recording and electronic journal on their behalf. **Sec. 6(4)(a).**
 - *Example:* “The remote online notary public may designate as a custodian of the recording and electronic journal (i) the employer of the remote online notary public if evidenced by a record signed by the remote online notary public and the employer, or (ii) a repository meeting the standards established by the Secretary of State (or commissioning official).”

➤ *Example:* “The remote online notary public, a guardian of an incapacitated remote online notary public, or the personal representative of a deceased remote online notary public, may, by contract with a secure repository in accordance with rules established under this Chapter, delegate to the repository the remote online notary public’s duty to retain the required recordings of audio-video communications

Remote Online Notary Statutes

- ✓ Virginia (2011)
- ✓ Montana (2015)
- ✓ Texas (2017)
- ✓ Nevada (2017)
- ✓ Indiana (2018)
- ✓ Michigan (2018)
- ✓ Minnesota (2018)
- ✓ Ohio (2018)
- ✓ Tennessee (2018)
- ✓ Vermont (2018)
- ✓ Utah (2019)



Virginia & Montana RON Bills



2011

First in the nation bill authorizing Remote Online Notary (RON) passed in Virginia in 2011. In 2015, Montana approved the use of RON for transactions involving real estate located in the state.

Texas & Nevada RON Bills



2015

During 2017, 16 states introduced Virginia-style RON bills. An industry compromise was reached in Texas and emulated in Nevada. Bills passed during 2017 in Ohio & Florida are repealed and vetoed.

ALTA Leads



ALTA launched RON Taskforce comprised of agent and underwriter section members. Using the Texas legislative compromise as a starting point, ALTA & MBA released a model bill for RON adhering to key industry principles.

2017

RON Takes Center Stage In 2018



2018

During 2018, Indiana, Michigan, Minnesota, Ohio, Tennessee & Vermont passed RON bills. Texas & Nevada released RON regulations. NASS approved RON standards, ULC added RON to RULONA, MISMO drafted RON regulations & Treasury released eclosing report.

2019 Legislative Sessions



RON bills possible in states including: AL, AK, AZ, CA, CO, FL, HI, IA, ID, IL, KS, KY, LA, MD, MO, NE, NJ, ND, OK, OR, PA, SC, SD, UT, WA & WI. Updates to existing law possible in: IN, MT, OH & TX.

2019

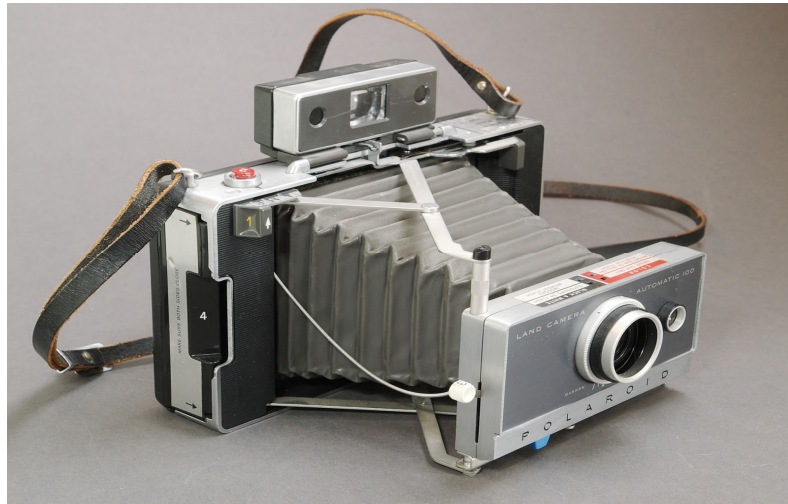


Laws for Remote Online Notary (RON)

	MBA ALTA Model (2017)	UJC Amended RULONA (2018)	Virginia (2011)	Montana (2015)	Texas (2017)	Nevada (2017)	Indiana (2018)	Tennessee (2018)	Minnesota (2018)	Vermont (2018)	Michigan (2018)	Ohio (2-018)	Utah (2019)
Delineation/Indication of RON	Yes	Yes	No	No	Yes	Yes	Yes	Yes	Yes	?	Yes	Yes	Yes
Multifactor Identification	Yes	Yes	No	No	Yes	Yes	Yes	Yes	Yes	?	Yes	Yes	Yes
AV Recording Requirement	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	?	Yes	Yes	Yes
Data Retention Requirement Language	10 Years	10 Years; variable by rule	5 Years	10 Years	5 Years	7 Years	5 Years (Journal); not specified (Recording)	5 Years	10 Years	?	10 Years	Variable	5 years
Rule Making Requirement	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No (Regulations in statute)	Yes	Yes	Yes	Yes
Notary Location Requirement	Yes	Yes	No	Yes	No	Yes	Yes	Yes	Yes	?	No	Yes	Yes
Papering Out Option	Yes/Optional	Yes	No	No	No	No	No	Papering Out language previously passed	Yes	?	? - Commission to Adpot	? - Language under review	No
Fees Regulated by Statute	No	No	No	\$10	\$25	\$25	\$15	\$25	\$25	?	\$10	\$25	\$25

ALABAMA DATA BREACH NOTIFICATION ACT OF 2018

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



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”.

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.

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.

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.**

SECTION 9: PENALTIES AND ENFORCEMENT

- **Section 9(a) 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. Only violations of Section 5, 6, and 7 of the Act (the notice provisions only) are considered violations of the DTPA.**
- **Provides that a violation of this Act does not create a private cause of action under the DTPA. However, this section also states that “nothing in this Act may otherwise be construed to affect any right a person may have at common law, by statute or otherwise.” (See also Section 9 (b) (2) below.)**

SECTION 9: PENALTIES AND ENFORCEMENT (cont.)

- **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.**

SECTION 9: PENALTIES AND ENFORCEMENT (cont.)

- 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.

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



SERIES LLC'S



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

What should you do first?

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 LLC's 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.

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.**

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.

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;**

- 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.**

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.

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:

- 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.**

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.**

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.



Hemp Vs Marijuana

The changing landscape

Agriculture Improvement Act 2018

- Aka the 2018 Farm Bill.
- Signed into law by the President.
 - Under prior law the production of hemp (a type of cannabis) was treated the same as Heroin.
 - The new law changes everything for the production of hemp



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Key is in the definitions!

- “The term ‘hemp’ means the plant *Cannabis sativa* L. and any part of the plant, ... and all derivatives, extracts, cannabinoids...whether growing or not, with a delta 9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.”
- What does it mean?
 - Cannabis that will give you a headache before you could possibly get high.
 - Includes CBD oil.

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The Devil is in the Detail

- Under the new law, land that is being used to grow hemp must be registered for a period of 3 years.
- The hemp, or hemp product, must be tested annually to make sure that the levels of THC are at 3% or lower.
- There also must be a procedure to dispose of product that violates the law.

Violations of the Law

- Negligent violations: Not a crime.
 - Producer will be given a date to correct the violation.
 - Requirement for periodic reports on compliance for at least 2 years.
- Repeat negligent violations (3 times in 5 years).
 - Ineligible to produce hemp for 5 years.
- Above and beyond Negligence:
 - Reported to the Attorney General and the chief law enforcement officer of the State.

What does this all mean for the title industry?

- Each company will make a determination on how they will handle “hemp” transactions.
 - See § 10113
 - <https://www.congress.gov/bill/115th-congress/house-bill/2/text>



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LET'S GET CROWDED:

INSURING CROWDED TRANSACTIONS





CROWDFUNDING



Introduction

- **Define it**

Growth and Statistics

- **Globally**
- **Nationally**
- **2012 Jobs Act**

Categories

- ❖ **Donation Based**
- ❖ **Reward Based**
 - i. PBS**
 - ii. Pak-a-Yak**
- ❖ **Loan or Debt Based**
- ❖ **Equity Based**

Advantages and Disadvantages

- a. Fast way to raise cash with little or no upfront fees**
 - b. Development of a client base**
 - c. Potentially a lower interest rate**
 - d. Higher rate of return**
 - e. May not reach targeted amount**
 - f. Can take longer than going through a traditional lender**
 - g. Greater risks for investors**
- SEC and/or State enforcement actions**

Laws and Regulations

a. 2012 Jobs Act

- i. Encourage funding of small businesses

b. SEC tasked with developing regulations

- i. Further purpose of the JOBS Act; and
- ii. Protect Investors

c. SEC Regulations

- i. Developed three different investment platforms
 1. Accredited Investors
 2. Regulation Crowdfunding – Non-accredited investors
 3. Regulation A+ Crowdfunding

3. Regulation A+ Crowdfunding

a. Two tiers

- i. \$20 million
- ii. \$50 million

d. State Laws

- i. Intrastate transactions

Title Risks

a. If Crowdfunding component is unknown

- i. Not substantially different that a normal non-crowdfunded transaction
 1. Is lender validly organized and capable of holding title
 2. Are the funds readily available?
 - a. Placeholder mortgage
 3. Mechanic's Lien situations
 - a. Sufficient funds to complete project
 - b. How will disbursements be handled
 - c. Are disbursements obligatory

4. Is the transaction properly authorized under the operating agreement?
5. Was an SPE created for the transaction and, if so, does that create any Creditors' Rights issues?
6. Are we being asked to issue an Owner's in Possession policy or a non-imputation endorsement

- ii. Underwrite as always
- iii. Maintain our 3(a) and 3(b) defenses

b. If Crowdfunding component is known

- i. Risk of losing 3(a) and 3(b) defenses
- ii. Insert an exception for any matters alleging invalidity due to a violation of any state of federal securities laws;

- iii. Review solicitation materials for compliance with state and federal requirements;
 - 1. Look specifically for any title insurance representations
- iv. Get an indemnity form from the offering platform;
- v. Request an Opinion of Counsel as to the validity of the offering

c. Be careful of over involvement

- i. At what point does our involvement go from just a title company to an active participant in the crowdfunding solicitation
 - a. Hold the escrow
 - b. Act as the liaison with the investors

- d. No enforcement actions by SEC or any state that pertain to a title company's involvement.**
- e. No enforcement actions by SEC or any state, to completely unwind a transaction and invalidate an insured instrument**
 - i. Could result in a complete failure of a lender's interest or possible liability under a UCC policy if a mezzanine loan is insured

Conclusion

Area is still growing and developing. Need to be mindful of state or federal enforcement actions or trend



ACCESS

ACCESS

Right of Access to a Public Road

Covered Risk 4 in 2006 ALTA Policy Provides “[n]o right of access to and from the land”

1. Confirm that the plat shows the subject property touching a public road.
If the Plat does not show that the subject property touches a public road, confirm there is an easement that connects the subject property to a public road.
2. If the subject property is accessed by easement, perform a full title search of the burdened estate to check for third party actions that might terminate or extinguish the easement . (Example: tax sales, foreclosure, eminent domain)
3. If the subject property does not have direct or indirect access, add an exception for lack of access.

ACCESS

Exception for Lack of a Right of Access to Public Road

- **FOR COMMITMENT:**
 - Type under Schedule B:
 - “Possible lack of access to and from the premises described in Schedule A above. In order to insure access, we must be provided with satisfactory evidence that there is access to a public street or road.”
- **FOR FINAL POLICY:**
 - Type under Schedule B:
 - “Lack of a right of access to and from the premises described in Schedule A above. Covered Risk No. 4 is hereby deleted.”
 - Or, “This policy does not insure the right of access to and from the Land.”

ACCESS

Access Endorsements (ALTA 17-06; AND 17.2-06)

- Covered Risk 4 of the Loan Policy and Owner's Policy insures against the loss if there is no right of access to and from the Land

This provision only insures the Insured has a legal right of access.

- The ALTA 17 Endorsement series expands the coverage given under traditional access Endorsements by giving an assurance of both vehicular and pedestrian access. They also give assurance with respect to the right to use existing curb cuts or other entries along that portion of the public right of way abutting the property insured or the access easement

ACCESS

HOMEOWNER'S POLICY OF TITLE INSURANCE (EHP POLICY)

- ACCESS: (Covered Risk 11) Insures against loss if there is not actual access to the land by both vehicles and pedestrians.
- LACK OF ACCESS: If you are furnished a survey which does not show that there is access to and from the land, or if you discover lack of access from an examination of maps, plats, the EHP/ERCA/ESCA Policy Affidavit, or otherwise, make an exception for lack of access as follows:
 - Item 4. This policy does not insure the right of actual vehicular and pedestrian access to and from the land, whether or not based on a legal right.

15 MOST FREQUENTLY ASKED BANKRUPTCY QUESTIONS



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Q. How many types of bankruptcies are there and what are the differences?

A. The Bankruptcy Code is comprised of 9 chapters.

The first 3 chapters are the administrative provisions that are applicable to the rest of the Code. The remaining six chapters relate to the specific types of bankruptcy.

ANSWER – CONTINUED

- Chapter 7 – Complete Liquidation – Collection, liquidation and distribution of non-exempt estate assets;**
- Chapter 9 – Adjustment of Municipality Debts;**
- Chapter 11 – Reorganization – Generally for business bankruptcies but also available for those high individuals that fall outside the Chapter 13 debt limits (\$1,257,850 in secured debt and \$419,275.00 in unsecured debt);**
- Chapter 12 – Adjustment of Debts of a Family Farmer or Fisherman with Regular Annual Income**

ANSWER – CONTINUED

Chapter 13 – Adjustment of Debts of an Individual with regular Income

Chapter 15 – Ancillary and Other Cross – Border cases - Access of Foreign Representatives & Creditors to the Court; Recognition of a foreign proceeding and relief; Cooperation with foreign courts and foreign representatives.

Q - What is a Chapter 20 Bankruptcy?

A. This is not an official Bankruptcy Chapter but refers to filing a Chapter 13 within 4 years after having filed a Chapter 7.

Q. What is the difference between property of the estate and property of the debtor and why does it matter?

A. The distinction is important as it determines who has the ability to transfer an interest in the title.

Property of the Estate

Is all the debtor's legal and equitable real or personal property interests that exists at the moment the petition is filed, PLUS certain interests acquired after the commencement of the case such as:

- 1. A bequest, devise, or inheritance;**
- 2. Real or personal property received in a divorce or settlement agreement;**
- 3. As beneficiary of a life insurance policy;**
- 4. Proceeds, rents or profits obtained from property of the estate; and**
- 5. Property recovered for the estate by the trustee.**

Answer - Continued

Property of the Debtor

Is all property acquired after the petition is filed and not otherwise classified as Property of the Estate. It also includes:

- 1. Property that is exempt under §522;**
- 2. Property that is abandoned under §554;**
- 3. Property that has re-vested upon plan confirmation under §§ 1129 & 1141 or 1325 & 1327; and**
- 4. Property that never becomes part of the estate such as the debtor's beneficial interest in a spendthrift trust.**

Q. A debtor received a Chapter 7 discharge 3 years ago and wants to sell property, that although owned at the time, was not listed in his petition. Does that create any issues?

A. Yes! Even though a Discharge was obtained, since the property was not included in the Bankruptcy, it is considered “property of the estate” since it could not be administered.

Q. How long is the automatic stay in effect and are there any exceptions to the application of the stay?

A. The automatic stay, unless lifted or modified by an order of the court, remains in effect until the property is no longer part of the bankruptcy estate or the case has been dismissed or closed.

Although a discharge also lifts the stay as to the underlying debt, it is replaced on a permanent basis by the provisions of 11 U.S.C. §524 which gives the debtor the ultimate relief sought in bankruptcy.

Answer – Continued

11 U.S.C. §362(b) lists 28 types of actions that are expressly excluded from the effects of the automatic stay, most of which fall into two broad categories: Government interests and family law matters. Nevertheless, there are a few real estate related exemptions included in the set of 28 exclusions.

The most common ones that are likely to be encountered are as follows:

**An act to perfect or to continue perfection of an interest in property. §362(b)(3);
Foreclosure actions by the Secretary of HUD to foreclose a mortgage or deed of trust insured under the National Housing Act and covering five or more living units. §362(b)(8);**

Answer - Continued

The creation or perfection of a statutory lien for ad valorem property tax if such tax comes due post-petition. §362(b)(18); and

An act to enforce a lien on real estate if, within the past two years, a bankruptcy court found the debtor took part in a scheme to defraud creditors by transferring the real estate in question without creditor consent or by multiple bankruptcy filings. §362(b)(20)

Q. Is an act in violation of the automatic stay void or simply voidable and what happens if a technical violation of the automatic stay results in no harm and/or no equity transfer to the creditor?

A. The U.S. Supreme Court determined in 1940 that such actions were void (see, Kalb v. Feuerstein, 308 U.S. 433, 60 S.Ct. 343 (1940)).

Permissible actions against co-debtor violated automatic stay as it was a “substantial step” toward furthering the creditor’s claim against the bankrupt debtor thus voiding all subsequent actions. (See, *In re Ebadi*, 448 B.R. 308 (Bankr. E.D.N.Y. 2011)).

Answer – Continued

From an underwriting standpoint, either result creates a problem that must be addressed either through curative action or declining to insure the transaction.

NOTE: The creditor's subjective good faith in proceeding with the foreclosure (due to lack of notice or actual knowledge of the bankruptcy filings) DOES NOT cure the violation.

Q - A foreclosing lender claims the automatic stay was only in effect for 30 days or that the stay never went into effect, is that possible and, if so, what needs to be done to verify the claim?

A. - Yes, if the filed bankruptcy petition falls into one of the two following exceptions:

- 1. If a second bankruptcy is filed within one year of a previously filed and dismissed bankruptcy, the automatic stay will terminate 30 days after the date the second petition is filed (11 U.S.C. §362(c)(3)); or**
- 2. If there were two petitions filed within the previous year, the automatic stay never goes into effect. (11 U.S.C. §362(c)(4)).**

Answer - Continued

How to Underwrite:

When a second bankruptcy is filed within one year (11 U.S.C. §362(c)(3)):

- 1. Independently verify that another bankruptcy proceeding was dismissed within the one-year period immediately preceding the current filing; and**
- 2. Review the docket of the current bankruptcy proceeding to determine that no action to extend the stay was filed within 30 days of the date the current petition was filed.**

Answer – Continued

When two petitions are filed within one year (11 U.S.C. §362(c)(4)):

- 1. Independently verify that two bankruptcy proceeding were dismissed within the one-year period immediately preceding the current filing; and**
- 2. Ask for an Order. Although not required, upon the request of a party, which is typically the creditor, the Court will enter an Order specifying that the stay never went into effect.**

Q. Does the automatic stay protect a co-debtor?

A. General Rule

The protections of the automatic stay DO NOT extend to co-debtors.

Exception: The collection of a co-debtor's consumer debts in a Chapter 12 or 13
(See, §§ 1201 and 1301, respectively)

NOTE: Only lasts until lifted or modified or until case is closed, dismissed or converted to Chapter 7; and

11 U.S.C. §524(e) prevents the extension of the bankrupt debtor's discharge to the co-debtor.

Q. What happens to a foreclosure proceeding once a bankruptcy petition has been filed and does it make a difference if the foreclosing creditor did not know a petition was filed?

A. The foreclosure procedure is stopped at the moment the petition is filed and any actions taken after the petition is filed are invalid, regardless of the creditor's knowledge.

Actual knowledge of the filing of the bankruptcy petition is irrelevant.

Q - If the debtor receives a discharge, does that also wipe out a pre-bankruptcy judgment lien?

A. - No, absent some other action by the Bankruptcy Court, pre-petition liens affecting the Debtor's pre-petition interests in property "ride-through" bankruptcy unless specific action is taken to void, avoid, or remove those liens from the title to the real property.

The Debtor's Discharge alone does not extinguish valid, pre-petition liens. A Discharge only extinguishes the Debtor's personal liability. An action to enforce the lien post-discharge is considered *in rem* and not *in personam*.

The pre-petition lien is enforceable and will still need to be released or satisfied in order to clear the title.

Q - Does a pre-bankruptcy judgment lien attach to property acquired by the debtor after the debtor has received a discharge?

- A. Notwithstanding the survival of the lien *in rem*, a prepetition judgment or lien which is not voided in the bankruptcy will not attach to property acquired after bankruptcy, if it arises from a prepetition debt discharged in bankruptcy. A prepetition judgment that has been made void as to the personal liability of the debtor by discharge cannot be the basis for a creditor obtaining a lien on property that was not subject to its lien before bankruptcy.

Q. What happens to liens that were removed from the property if the bankruptcy is dismissed?

A. Liens that have been removed from the title to the property as a result of a judicial lien avoidance (11 U.S.C. §522) or a through lien stripping action (11 U.S.C. §§506 and 1332) are reinstated as of their original priority date. These liens cannot be removed from the title and must continue to be shown as Schedule B exceptions until such time as the Discharge has been granted. In a Chapter 13 case this could be as long as 5 years.

Q. What is the appeal period for a Bankruptcy Order?

A. The typical appeal period is 14 days. However, except for sales free and clear of liens under 11 U.S.C. §363, this time period may be extended for up to an additional 21 days.

The request for extension must be submitted within the original 14-day appeal period.

Q. If the Court authorizes or orders the immediate sale of property, can the 14-day appeal period be ignored?

A. Yes, but be careful! Always consult your underwriter before insuring.

Although under 11 U.S.C. §363(m), if a stay pending an appeal has not been obtained, the sale of the property renders an appeal moot, part of the sale may still be reversed. See, Clear Channel Outdoor, Inc. v. Knupfer, 391 B.R. 25 (B.A.P. 9th Cir. 2008).

****Underwriting Tip:** Unless the sale will generate enough sale proceeds to fully pay all the secured creditors or releases are obtained, do not insure the property until the 14-day period has run.

Q. An Order to Sell Property Free and Clear of Liens has been obtained, what needs to be done to underwrite the transaction?

- A.**
- 1. Review Commitment to determine Parties with liens on real property;**
 - 2. Review Bankruptcy Matrix to determine if all parties with liens on real property have been listed as creditors;**
 - 3. Determine if all lien holders were given Notice of Motion;**
 - 4. Does the Order for Sale specifically reference the 11 U.S.C. § 363(f) provision which allows the property to be sold free and clear of liens;**

ANSWER - CONTINUED

- 5. Does the Order for Sale reference a business purpose and/or necessity to sell the property prior to a Confirmed Plan;**
- 6. Determine if the Order for Sale specifically identifies the property being sold;**
- 7. Determine if the Order for Sale establishes a reserve for mechanic's liens (if needed);**
- 8. Determine if the Sale Price is sufficient to fully compensate all secured creditors;**
- 9. Determine if the 14 Day Appeal Period has run from the date of the Order with no appeals having been filed;**

ANSWER - CONTINUED

10. If an Appeal has been filed, determine if a Stay of the Order Pending the Appeal has been entered;

Note: If Appeal has been filed but no Stay Pending Appeal – this creates a 9th Circuit Clear Channel issue and an appropriate exception must be taken.

11. Collect all necessary Transfer Taxes. Unless State law specifically authorizes otherwise, payment of transfer taxes is required in a Pre-Confirmation Sale. (See, Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc. 554 U.S. 33, 128 S.Ct. 326); and

12. Obtain a certified copy of the Order for Sale and record it along with all other necessary transactional documents.

Available Resources

- **StarsLink**
- **National Bulletins**
- **Bankruptcy Primer**
- **Webinars**
- **Handouts**
- **Pacer.gov**
- **Law.Cornell.edu**
- **Dirt@listserv.umkc.edu**