IT'S A STRANGE NEW WORLD: SELECTED UNDERWRITING ISSUES

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LOAN MODIFICATIONS & POLICY COVERAGE
Economic impact of COVID-19
- Temporary closures
- Reduced consumer spending
- Decline in tourism
- Late rental payments
- Renegotiation of lease terms
- Rising vacancies

Financial difficulties for owners/borrowers
- Lack of cash flow
- Missing or late loan payments

Resulting in loan workouts and mortgage modifications
Modification: Policy limitations

- Exclusion 3(a) Act of the Insured

- Exclusion 3(d) Post Policy

- Condition 1d (vi, vii, viii) - Indebtedness only includes advances to protect lien

- Modification as Novation: Condition 9(c) – No liability if insured settles claim without Company consent and Condition 10(b) – release of mortgage terminates policy
Priority and Prejudice:

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

Material Modification
- Adversely affects (or “prejudices”) subordinate lienholder
Priority and Prejudice cont’d:

Obtain date down of title
- Disclosing new matters
- Intervening liens

Priority of lien lost to the extent
- Subordinate lienholders are prejudiced or
- Security is impaired

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

Mechanics Lien Concerns
- Loss of Priority issues
- Status of construction
- Indemnity
- Escrow
- Lien waiver audit
Guidelines & Issues for Insuring Loan Modifications:

- Title Search
- Tax and Assessment Search
- Modification Agreements
- Leasehold Mortgage
- Bankruptcy
- Mechanics Liens
- Survey coverage
- Original Policy/Endorsement Coverage
- Subordinate Matters
- Intervening Liens
Guidelines for preparing a Commitment or Pro Forma:

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

NOTE: Company must be notified of any construction or recently completed construction.
ALTA 11 SERIES ENDORSEMENTS

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

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

The 11.2-06 is designed for use when the lender modifies the existing Insured Mortgage to increase the indebtedness and requests additional insurance under the existing policy.
ALTA 11 SERIES ENDORSEMENTS

- Does not amend any specific sections of 2006 Loan Policy
- Contains “Creditor’s Rights” Exception
  - This covers situations where original policy included creditor’s rights coverage based on terms of original mortgage and structure of original transaction.
- Additional Coverage
  - With respect to validity, enforceability or priority of Insured Mortgage as modified by the Modification.
Endorsement to Insure recorded Mortgage Extension/Modification Agreement:

- Use of a Blank Endorsement to insure Modification Agreement
- Recording of Modification Agreement
- Continuation of title through the date of recording of the agreement
- Exceptions for any intervening matters
- Title Affidavits & any other required documentation to extend existing coverage
- Calculation of Premium (See pages 180 & 183-184 of online AL Underwriting Practices Manual)
Flash Webinar recordings can be found in StarsLink under Legal Education in the Underwriting Practices Resource Page: [https://starslink.com/legal-education.html](https://starslink.com/legal-education.html)
FORECLOSURES & DEEDS IN LIEU OF FORECLOSURE
Current Moratoriums on Foreclosures (CARES Act)

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

Obtain approval from a Company Underwriter to insure title or issue a policy based on a foreclosure action.
Rights of Redemption on “Homestead Property” subject to Ala. Code § 6-5-248(h)

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

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


Junior Federal Interests- Federal Tax Liens

Judicial Foreclosure
– The United States named as a party defendant
– Foreclosure by superior lienholder extinguishes the FTL

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

Right to Redeem
The greater of 120 days or period allowed under state law. See 28 USC § 2410(c)
Junior Federal Interests- SBA Mortgages

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

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

Right to Redeem
One Year. See 28 USC § 2410(c)
Pre-foreclosure Mourning for Deceased Service Members & the Servicemembers Civil Relief Act

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

– An exception for redemption rights must be included in title insurance commitments and policies issued on foreclosed property subject to rights of redemption

– This exception must not be removed during the redemption period under any circumstances
Providing Affirmative Coverage Over Rights of Redemption

– Not available on Owner’s Policies

– May be provided to institutional lenders in Loan Policies under certain circumstances:

  • Bid amount at foreclosure sale exceeds resale price and new loan amount, or
  • Acceptable Bond, Escrow & Indemnity/Indemnity is furnished to Company
Deeds in Lieu of Foreclosure - Issues

– Merger. See §35-10-51(2) & (4), Ala. Code (1975)
– Bankruptcy
– Lack of or unfairness of consideration
– Recharacterization/Equitable Mortgage
– Clogging Right of Redemption
Deeds in Lieu of Foreclosure – Underwriting

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

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

*If DIL in chain of title - requirements & reservations:*

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


– POAs executed before January 1, 2012 are governed by the prior law in effect at the time of execution

– For a detailed overview of the Act, please refer to Alabama Uniform Power of Attorney Act Bulletin dated February 12, 2012 on MVT Website-AL-Underwriting Bulletins
Creation & Use of POAs – General Provisions and Default Rules

– Durability
– Execution
– Validity
– Meaning & Effect
– Incapacity
– Effective Date (watch out for “springing” POAs)
– Co-Agents & Successor Agents
– Termination
– Acknowledged POAs – Reliance On & Refusal to Accept

• See Forbes v. Platinum Mortgage, Inc. 2020 Ala. LEXIS 29, 301 So. 3d 819 (February 14, 2020)
Authority – Default Statutory Construction

– General Authority

– Express Authority Required

– Self-Dealing – Statutorily Prescribed Default Rules
Optional Forms

– Power of Attorney

– Agent’s Certification
Underwriting Considerations

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

– Review the POA
  • for authority and limitations on authority of Agent
  • for due execution and proper acknowledgment
  • for durability
  • for validity and governing law
  • carefully review POA and governing law for meaning & effect if created under other laws

– Find out why the POA is being used for proposed transaction
  • if principal is now incompetent, determine competency on date of execution of POA and if POA is durable – may need affidavit from attending physician

– Independently verify due execution of POA secured and brought to you by an interested party
Underwriting Considerations cont’d

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

When is a General POA too general?

Can a Specific POA be too specific?