

PUBLICATION

Summary of Southeastern States Foreclosure and Right of Redemption

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Alabama law provides a relatively simple and lender friendly foreclosure procedure. The ease of foreclosure is balanced by a one-year statutory right of redemption in favor of certain parties. The right of redemption is, in our experience, often a topic of discussion but rarely exercised.

Foreclosure Under Alabama Law

Alabama law provides for nonjudicial foreclosure by the power of sale clause contained within a mortgage. Ala. Code §§ 35-10-11 *et. seq.* It is important to verify that the power of sale is contained in the mortgage. The Alabama foreclosure statutes require publication of the notice of foreclosure once a week for three weeks in a newspaper published in the county where the real property is located. Ala. Code § 35-10-13. Direct notice to the debtor is not required by Alabama law, though it is standard practice to provide it. A foreclosure sale in Alabama is held at the main door of the courthouse in the county (and division, if applicable) where the property is located between the hours of 11 a.m. and 4 p.m. Ala. Code § 35-10-14.

The amount of the credit bid is generally within the discretion of the lender or servicer (collectively, the "Holder"). The Alabama Supreme Court observes the general rule that "where the price realized at the foreclosure sale is so inadequate as to shock the conscience, it may itself raise a presumption of fraud, trickery, unfairness, or culpable mismanagement and therefore be sufficient ground for setting the sale aside." *Mt. Carmel Estates, Inc. v. Regions Bank*, 853 So. 2d 160 (Ala. 2002). In *Mt. Carmel Estates*, the Alabama Supreme Court held that a foreclosure credit bid by the lender which was 80% of the appraised value of the real property and 77% of the indebtedness was not so low as to shock the conscience of the court to raise a presumption of fraud, trickery, unfairness or culpable mismanagement.

Our experience indicates that the typical practice by Holders is to credit bid the full amount of the lesser of either the recently appraised value or the indebtedness. Some Holders may credit bid a lower amount to increase any potential recovery by deficiency, but the lower the credit bid below both the amount of indebtedness or the appraised value, keeping in view the ranges approved in *Mt. Carmel Estates*, the more open the foreclosure is to attack. The true measure of whether a foreclosure may be set aside is whether it was the product of fraud, trickery, unfairness or culpable mismanagement. Failing the "shock the conscience" test raises that presumption, but courts may find the foreclosure was a product of fraud, trickery, unfairness or culpable mismanagement by other investigations into the conduct of the foreclosure.

The sale price received at foreclosure (including any credit bid made by Holder) is applied to and reduces the amount of indebtedness owed, or reduces the amount of any potential deficiency, or reduces the amount that may be collected on any outstanding judgment. If the foreclosing Holder/purchaser sells the property during the one year redemption period, all profits from the sale must be applied to reduce the debt (and the deficiency). Any amounts received in excess of the indebtedness must be paid to the borrower/mortgagor.

The Right of Redemption After Foreclosure

Pursuant to Alabama law, a statutory one year right of redemption exists from the date of the foreclosure. Ala. Code § 6-5-248(a). The statutory right of redemption "must be exercised in the mode and manner prescribed by statute and may not be waived in a deed of trust, judgment, or mortgage, or in any agreement *before* foreclosure or execution sale." Ala. Code § 6-5-250 (emphasis added). The foregoing statute thus denies waiver of the statutory right of redemption prior to foreclosure, but does not prevent its waiver post-foreclosure. The statutory right can also be lost by a debtor who fails to deliver the premises to the foreclosure purchaser within 10 days after written demand for possession has been made. Ala. Code § 6-5-251(a), (c).

Anyone desiring to redeem must pay to the purchaser (or his transferee) the purchase price paid at the sale, with interest at the rate allowed by statute (currently 12% per annum) and all other lawful charges (including permanent improvements, taxes paid or assessed, all insurance premiums paid by the purchaser, any other liens or encumbrances, and if redeemed from a purchaser who held the debt at the time of the foreclosure, the balance due on the debt with interest). Ala. Code § 6-5-253.

For convenience, we have included a list of frequently asked questions and answers regarding the Alabama right of redemption at the end of this memorandum.

Conclusion

A mortgage holder must provide publication notice of the foreclosure for three successive weeks in the local newspaper, and the foreclosure must take place on the date provided in the foreclosure notice at the applicable County courthouse steps between the hours of 11 a.m. and 4 p.m.

The statutory one year right of redemption will exist from the date of the foreclosure. In the event that someone seeks to redeem the property, it must pay the Holder (or any subsequent purchaser) the purchase price paid at the foreclosure, plus the interest allowed by statute (currently 12%). The impact of the right of redemption is that it sometimes causes delays in marketing and selling foreclosed properties in Alabama. The right of redemption is noted as an exception on all title commitments/title policies for foreclosed properties.

Baker Donelson also has offices in Georgia, Louisiana, Mississippi and Tennessee. We have included a brief summary of each state's foreclosure process at the end of this memorandum following the Frequently Asked Questions.

FREQUENTLY ASKED QUESTIONS

Under Alabama law who has a statutory right of redemption?

Under Alabama law how much must a redeeming party pay in order to redeem?

Under Alabama law to whom must a redeeming party pay the redemption amount?

Under Alabama law what is the effect of statutory redemption on previously recorded mortgages and liens?

Under Alabama law how can a purchaser at a foreclosure sale protect itself from the possibility of statutory redemption?

Short Answers

Virtually anyone, by assignment or transfer, can eventually possess the statutory right of redemption for a particular piece of real property during the one-year period subject to the statutory right of redemption. Any debtor, mortgagor, guarantor, junior mortgagee, judgment creditor, immediate family of a debtor or mortgagor or any transferee of a debtor or mortgagor may redeem.

The amount to redeem is the amount paid by the purchaser at the foreclosure sale, with interest at the rate allowed by statute, and all other lawful charges at the same interest rate allowed by statute. Lawful charges are permanent improvements, taxes, insurance premiums and the amount of unpaid debt (if owned at the time of the attempted redemption), all with interest.

The redemption amount is paid to whomever owns the property at the time of redemption, whether it be the foreclosure sale purchaser or his successor.

Upon redemption, previously recorded mortgages and liens are revived against the real estate redeemed and against the redeeming party.

The foreclosure sale purchaser can protect itself against the statutory right of redemption by: (i) bargaining with the holders of the right of redemption to assign their rights to redeem to the foreclosure sale purchaser, so as to eliminate the possibility of redemption; (ii) eliminate the right to redeem of any lienholder, junior mortgagee or recorded judgment by satisfying the underlying debt; (iii) demand possession of the property sold at foreclosure sale, and if possession is not delivered 10 days from demand, the debtor's (or the debtor's transferee's) right to redeem is forfeited.

Discussion

Under Alabama law who has a statutory right of redemption?

By statute, the following are entitled to redeem: (i) any debtor on the underlying obligation secured by the mortgage; (ii) any guarantor; (iii) any mortgagor (regardless if the mortgagor is personally liable for the underlying obligation); (iv) any junior mortgagee or its transferee; (v) any judgment creditor or its transferee; (vi) any transferee of the interest of a debtor on the underlying obligation before or after the sale; (vii) any transferee of the interest of a mortgagor before or after the sale; (viii) a spouse of a debtor, mortgagor or transferee of any interest of the debtor or mortgagor, who are spouses on the day of the foreclosure sale; and (ix) children, heirs or devisees of any debtor or mortgagor.¹

The enabling of transferees to redeem results in a virtually limitless number of different parties who could potentially possess the right to redeem within the one-year redemption period. As there does not appear to be any recordation requirement of any such assignment of the statutory right of redemption, determining exactly who holds a right to redeem may prove difficult.

Under Alabama law how much must a redeeming party pay in order to redeem?

Generally, the amount to redeem is equal to the amount paid by the purchaser at the foreclosure sale,² and the balance of the debt if it is owned at the time of redemption by the party against whom the property is redeemed.³ Interest must also be paid at the rate found within the underlying contract on the sums provided for in the contract;⁴ if no rate is to be found in the underlying contract, then interest is applied at the statutory rate, currently 12%.⁵

In addition to paying the amount paid by the purchaser at the foreclosure sale, the redemptioner must also pay for lawful charges, also with interest as described above. "Lawful charges" is a statutorily defined term that

means:⁶ (i) permanent improvements; (ii) taxes paid or assessed; (iii) all insurance premiums paid or owed by the purchaser; (iv) any valid lien or encumbrance paid or owned by purchaser (or his transferee); (v) all senior, recorded mortgages, liens and judgments revived by Alabama Code Section 6-5-248(c), if the redeeming party is a judgment creditor or junior mortgagee or a transferee thereof (including the mortgage foreclosed giving rise to the right of redemption);⁷ (vi) the balance due on the debt (plus interest) if redemption is made from a person, who at the time of the redemption, owns the underlying debt securing the real property that was foreclosed; and (vii) all mortgages made by the foreclosure sale purchaser or his transferees to the extent of the purchase price.

Item (vi)⁸ is critically important. A foreclosure sale purchaser, or his successor, will be entitled not only to the foreclosure sale price, but also the balance of the debt of the underlying mortgage that was foreclosed as part of the lawful charges if, at the time of the attempted redemption, the foreclosure purchaser, or his successor, also owned the debt.

This point is reinforced by case law. The cases hold that, if the foreclosure purchaser, or his successor, owns the mortgage debt at the time of the attempted redemption, one seeking to redeem from a mortgage must pay the full amount of the mortgage debt.⁹ More particularly, when the mortgagee buys at foreclosure sale, the amount of the debt secured by the mortgage is treated as the purchase price rather than the amount bid.¹⁰ If the foreclosure purchaser (or his successor) owns the debt for which the property was sold, then the party seeking to redeem must pay the balance of the debt to redeem.¹¹

The redeeming party may not have to pay the balance of the debt if, at the time of redemption, the foreclosure purchaser, or his successor, does not own the debt or only conditionally owns the debt.¹²

Practically, this means that if a potential successor to a foreclosure sale purchaser wishes to be paid the balance of the debt for any redemption, the foreclosure purchaser should simultaneously assign the debt to that potential successor along with the property conveyance. This compliance with Alabama statutory law will ensure that the redemptioner does not benefit from a windfall by being able to redeem the property from a successor of the foreclosure sale purchaser for merely the foreclosure sale purchase price without paying the balance of the underlying debt.

The redemption amount will include the balance of the debt, in all instances except when the foreclosure purchaser, or his successor, does not also own the debt at the time of attempted redemption.

Under Alabama law to whom must a redeeming party pay the redemption amount?

The redeeming party must pay the redemption amounts to the purchaser at the foreclosure sale or his successor.¹⁴

Under Alabama law what is the effect of statutory redemption on previously recorded mortgages and liens?

Upon redemption by a debtor or his transferee, a mortgagor or his transferee, or the spouse, children, heirs or devisees of a debtor or mortgagor, all previously recorded mortgages and liens are revived against the real estate redeemed and against the redeeming party.¹⁵

Upon redemption by a junior mortgagee or his transferee, or a judgment creditor or his transferee, all higher-priority recorded mortgages and liens existing at the time of the foreclosure sale are revived.¹⁶

Under Alabama law how can a purchaser at a foreclosure sale protect itself from the possibility of statutory redemption?

As mentioned above, the redemption amount may be sufficiently high so that it in itself discourages potential redemptioners. Notwithstanding a potential redemptioner's decision not to redeem, the foreclosure sale purchaser can attempt to protect itself against the statutory right of redemption through a number of methods.

First, as the statutory right of redemption is freely assignable,¹⁷ a foreclosure sale purchaser can bargain with the holders of the right of redemption to assign their rights to redeem to the foreclosure sale purchaser, so as to eliminate the possibility of redemption. This may prove difficult in both tracking down all of the parties entitled to redeem and in negotiating the assignment of the right.

Second, a foreclosure sale purchaser can eliminate the right to redeem of any lienholder, junior mortgagee or recorded judgment creditors by satisfying the underlying debts (with interest) to those potential redemptioners.¹⁸ While it may prove easier in tracking down all of these parties entitled to redeem, the costs of satisfying the underlying debts may be prohibitive.

Third, the right of a debtor or mortgagor or their transferee to redeem is forfeited if the debtor does not deliver possession of the property sold at the foreclosure sale within 10 days of demand for possession of the property.¹⁹ While it seems unlikely a represented debtor or mortgagor would be so derelict as to fail to deliver possession, making demand for possession is essentially a risk-free and cost-free attempt to eliminate the right of redemption of the debtor or mortgagor.

FORECLOSURE SUMMARIES – OTHER SOUTHEASTERN STATES

Georgia

Georgia law allows both judicial and non-judicial foreclosures. To conduct a non-judicial foreclosure, a Holder is required to publish an advertisement for four consecutive weeks in the County's legal paper during the month immediately preceding the foreclosure date. Foreclosures are conducted on the courthouse steps between the hours of 10:00 a.m. and 4:00 p.m. on the first Tuesday of each month. There is no statutory right of redemption under Georgia law. Although there are no minimum bid requirements at a foreclosure sale in Georgia, a lender cannot collect a deficiency balance from the obligor or guarantor of the secured debt after exercising its right of non-judicial foreclosure unless the foreclosure sale is confirmed by a court of competent jurisdiction.

Louisiana

Louisiana is a particularly unforgiving state for borrowers. To commence a foreclosure action in Louisiana the creditor may elect for the "ordinary" litigation process or the "executory" process, a harsh expedited foreclosure action process. Under the "ordinary" process the foreclosure action follows the procedure of a traditional lawsuit with the borrower being served as a regular defendant in a law suit. To use "executory" process, the mortgage must be in authentic form (notary and two witnesses to the instrument) and contain, among other requirements, a provision which acts as a "confession of judgment," whereby borrower accepts the obligations of the loan. Once the lender files for a foreclosure action and the court issues an order for executory process, the borrower is served with a demand for payment and must come up with the full amount of the debt within three days. (This three-day period may be waived by the borrower in the mortgage instrument.) If the borrower does not come up with the full amount, a writ of seizure is issued, and the borrower is notified of such. The property is then advertised twice, the first at least 30 days before being auctioned. (A judicial sale is the only legally permissible method of enforcing a security interest in Louisiana real estate.) In order to preserve a

deficiency judgment, the property must first be offered with benefit of appraisal. At the first sale, the property is offered at two-thirds of the appraised value. If no bids are received, a second auction is notice at which there is no minimum bid. Sheriff's commission on real property is 3% of the value. Additionally there is no right to redemption in Louisiana, and deficiency judgments are permitted if the sale is conducted with benefit of appraisal. See La. C.C.P. Art. 2631, *et. seq.*, LA R.S. 13:4101, *et. seq.* See also La. Civil Code Arts. 2293, 2338, 2631, 2639, 2701, 2721, and La. Rev. Stat. 13:3852.

Mississippi

Mississippi law permits both judicial and non-judicial foreclosure actions, with non-judicial under the power of sale provisions of a Deed of Trust security instrument being by far the most common. Judicial foreclosure is rarely utilized and, typically, only in situations where defects exist in the Deed of Trust, where it is anticipated that borrower would challenge the validity of a non-judicial foreclosure, and/or where lender wishes to combine the foreclosure with an action seeking a deficiency judgment. Judicial foreclosure proceeds like other litigation, with notice to the borrower and an opportunity to respond to the lender's allegations, discovery, pre-trial motion practice, etc. Judicial foreclosures often raise issues of material fact, causing delay and requiring the expense of a trial (non-jury) prior to the court adjudicating the parties' rights. Non-judicial foreclosure is controlled by the contractual terms of the security instrument (i.e. Deed of Trust), within the general notice and procedural framework provided by statute. Mississippi law does not require that the lender give the borrower notice of defaults or that foreclosure is being commenced (although such notice requirements are often found, contractually, in the loan documents). Regardless, it is considered good practice to provide the borrower with 30 days notice prior to conducting the foreclosure sale. By statute the foreclosure sale notice must be posted at the county courthouse where the real property is located. Additionally, the sale must be published in a newspaper of general circulation in the county where the real property is located for at least three consecutive weeks prior to the sale. Due to nuances in the statutory notice requirements, it is most common for the notice of sale to be published for four consecutive weeks prior to the foreclosure sale date (a practice which affords lender some flexibility in scheduling the sale date). Mississippi does not recognize a post-foreclosure right of redemption. Mississippi does afford the borrower a statutory right to reinstate a defaulted loan at any time prior to the foreclosure sale, by tendering all past-due regularly scheduled payments plus the costs of foreclosure then incurred by lender. Miss. Code. Ann. §§ 11-5-93 (judicial foreclosure), 89-1-55 (non-judicial foreclosure), 89-1-59 (reinstatement of accelerated debt); 28 U.S.C. § 7425 (IRS 120 day right of redemption).

Tennessee

Tennessee permits both judicial and non-judicial foreclosures, but the non-judicial method is preferred. The minimum requirements for non-judicial foreclosure are control by statute; however, any additional requirements set forth in the deed of trust must also be followed. The statute requires publication notice be run at least three times in a local newspaper of general circulation with the first notice being not less than 20 days prior to the sale. Tennessee does recognize a right to redemption whereby a borrower may redeem his or her property by paying the full sum of the unpaid loan plus costs within two years. However, this right may be waived in the loan documents. There is a 120-day right of redemption for state or federal taxing authorities if there is a tax lien. Additionally, Tennessee permits deficiency judgments. See Tenn. Code Ann. § 21-1-803 (2009).

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1. Ala. Code § 6-5-248(a).
2. Ala. Code § 6-5-253(a); *Pitts v. Gangi*, 896 So. 2d 433 (Ala. 2004).
3. Ala. Code § 6-5-253(a)(4).
4. Ala. Code § 6-5-253(a).
5. Ala. Code § 8-8-10; *Southeast Enters., Inc. v. Byrd*, 720 So. 2d 873 (Ala. 1998).
6. Ala. Code § 6-5-253(a).
7. Ala. Code § 6-5-253(a); *Southeast Enters., Inc. v. Byrd*, 720 So. 2d 873, 874-75 (Ala. 1998).
8. Ala. Code § 6-5-253(a)(4).
9. *Costa & Head, Ltd. v. National Bank of Commerce*, 569 So. 2d 360, 363 (Ala. 1990).
10. *Garvich v. Associates Financial Servs. Co.*, 435 So. 2d 30 (Ala. 1983); *Costa & Head, Ltd. v. National Bank of Commerce*, 569 So. 2d 360, 364 (Ala. 1990). See also *Garris v. Federal Land Bank*, 584 So. 2d 791, 793 (Ala. 1991).
11. *Nnaife v. Pitt*, 883 So. 2d 682, 688 (Ala. Civ. App. 2003); *Malone v. Gray*, 160 So. 331 (Ala. 1935).
12. *Lavretta v. L. Hammel Dry Goods Co.*, 8 So. 2d 264 (Ala. 1942).
13. Ala. Code § 6-5-253(a)(4).
14. Ala. Code § 6-5-253(a). See also *Thompson v. Brown*, 76 So. 298 (Ala. 1917); *Smith v. Jack*, 96 So. 419 (Ala. 1923).
15. Ala. Code § 6-5-248(d).
16. Ala. Code § 6-5-248(c).
17. Ala. Code § 6-5-248; *Garvich v. Associates Financial Servs. Co.*, 435 So. 2d 30, 32 (Ala. 1983).
18. Ala. Code § 6-5-248(c).
19. Ala. Code § 6-5-251.