



Alabama: Changes are A-Coming



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As Bob Dylan famously sang "The Times They Are A-Changin'," the laws

governing manufactured housing in the State of Alabama are indeed changing, and for the better. Alabama is in the process of re-writing the state's manufactured home title law. A task force, on which I serve, was convened to develop a draft bill on the subject. Representatives from the Alabama Department of Revenue Motor Vehicle Division, lenders that originate manufactured housing loans in Alabama, and the Alabama Manufactured Housing Institute met earlier this year to form the Manufactured Housing Title Task Force.

Many of you know that interpreting the rules and regulations of the Department of Motor Vehicles (DMV) to secure a certificate of title (COT) to manufactured housing can be daunting. Currently in Alabama, laws for both manufactured housing title and automobile title are codified together. The task force's goal is to streamline the title process. We are attempting to carve out the manufactured housing titling laws from existing law in order to better secure a replacement COT.

Based on an internal review of its operations, the DMV in October 2006 notified its designated agents that securing a replacement COT under a three-year surety bond was no longer available. The change in policy was specifically intended for secured parties in which the manufactured house had never been properly titled, or instances when the existing COT reflected that the last-known owner of record did not match the creditor's foreclosed debtor. In most

occurrences, the lender did not have physical possession of the original COT. The lender was forced to secure a declaratory judgment order from the circuit court where the manufactured house was situated, whereby the court proclaimed that the lender was the lawful owner of the manufactured house and directed the DMV to simultaneously issue and cancel the COT. The net effect of the DMV's rule change meant that lenders faced substantial cost increases and time delays while the litigation worked itself through the Alabama court system.

Come Senators, Congressmen

The proposed title law legislation is essentially a return to the old system. If a manufactured house is affixed to real property, the lender may apply for a COT or a certificate of cancellation of the manufacturer's certificate of origin by doing the following:

1. Providing an original or duplicate manufacturer's certificate of origin or the certificate of title;
2. Posting a three-year surety bond for one-and-a-half times the value of the manufactured house as determined by the DMV;
3. Submitting a lien release from any existing lien holder that no longer has an interest in the manufactured house; and
4. Obtaining written verification from the probate judge where the manufactured house is situated that the manufactured house has been recorded and permanently affixed to the real estate in that county.

In Alabama, most manufacturers will issue a duplicate manufacturer's certificate of origin if the requesting lender will sign a hold harmless agreement in favor of the manufacturer. Once the proposed law goes into effect, the DMV has indicated that the documentation process for securing the COT under a bond will be less stringent. Essentially, the lender will provide a limited chain of title to prove ownership. (The lender rarely has a security agreement specifically

reflecting that the manufactured house was a part of the underlying consideration.) The lender may need to record a transfer deed in its name detailing the year, make, and vehicle identification number of the manufactured house to satisfy the local probate judge that the manufactured house has been "recorded" in his county. The judge will send an inspector to confirm that the manufactured house is physically situated in his county. Normally, the premium associated with a three-year surety bond costs approximately \$400 to \$900. The entire process, provided the county probate judge cooperates in a timely manner, should take two to three months from the time the manufactured house is determined to be on the property and the client determines that it does not have possession of the COT.

Another new provision of the pending law is that manufactured houses deemed 20 years or older will be exempt from titling laws. Currently, any manufactured house manufactured prior to or during 1989 does not require a COT; the only means to convey one's interest in the personal property is by a bill of sale. While the proposed law will not provide immediate relief for older manufactured houses, certain older models will be exempt from titling requirements in coming years. For example, in the year 2015, any manufactured house manufactured prior to 1996 will no longer require a COT. This will not invalidate existing security interests held by a lienholder for those older-model manufactured houses with a remaining balance on an existing loan. It simply means that when the loan is satisfied, the owner will not be required to re-title at that point.

Heed the Call

The proposed bill was expected to be introduced concurrently in the Alabama House and Senate in the second week of the general session, which was the week of March 13. It wasn't, and introduction was pushed back until late April/early May. Currently,

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Third Party's Remedy

This past December, the Oregon Court of Appeals issued its opinion in *Staffordshire Investments Inc. v. Cal-Western Reconveyance Corporation*, 209 Or. App. 528, 149 P.3d 150 (2006). The main issues in *Staffordshire* were whether a forbearance agreement entered into with the borrower just prior to the postponed nonjudicial foreclosure sale date deprived the foreclosure trustee of the power of sale and whether the foreclosure sale that occurred was void, entitling the third-party purchaser only to the return of its bid funds plus interest. In *Staffordshire*, the forbearance agreement included a provision wherein the parties stated that the default continued to exist until the agreement was fully and completely performed. The purchaser argued that the forbearance agreement provided that the default continue until the performance of the forbearance agreement was completed and, therefore, that all statutory prerequisites to the foreclosure sale were present, entitling the purchaser to receive delivery of the trustee's deed.

The beneficiary, on the other hand, argued that the forbearance agreement had the effect of depriving the trustee of the power of sale because there was no default at the time of the sale. The court agreed and held that the foreclosure trustee lacked the statutory power of sale, interpreting O.R.S. 86.735(2) to mean that a present default by the grantor is a necessary precondition to the trustee's exercise of the power of sale. The court reasoned that discovery of the forbearance agreement and the agreement to postpone the sale before the execution of the trustee's deed renders any purported contract void, and the third-party purchaser's remedy is limited to the return of the purchaser funds and interest. This result properly restores the parties to the positions that they would have occupied had the wrongful foreclosure sale not occurred.

Another Void Sale

Though factually different from the wrongful foreclosure cases discussed above, a recent

Washington decision may be useful in defending a wrongful foreclosure claim. The Court of Appeals in *Udall v. T.D. Escrow Services, Inc.*, 132 Wash. App. 290, 130 P.3d 908 (2006), was asked to address whether common law contracts apply to nonjudicial foreclosure sales. In *Udall*, a nonjudicial foreclosure sale was held in which the auctioneer mistakenly accepted a bid that was \$100,000 below the authorized price. The purchaser argued that common law contract principles obligated the trustee to deliver the deed. The court held that the common law of contracts is inapplicable to nonjudicial foreclosure sales, which are instead guided by Washington's Deeds of Trust Act. Without delivery of the trustee's deed, the court reasoned, the mere acceptance of an unauthorized auction bid at a nonjudicial foreclosure sale will not create any property rights under the Deeds of Trust Act. Further, the court held that the act should be interpreted to provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Thus, the court held that the sale was void, as the auctioneer did not possess the authority to auction the property for \$100,000 less than the trustee and servicer had authorized.

Best Practice

Certainly, the best practice is to ensure that there are clear lines of communication between a servicer's foreclosure and loss mitigation departments, as well as between those departments and the foreclosure trustee such that a communication may be timely made in order to cancel a pending sale due to a loss mitigation agreement. Though the cases covered here are from western states, counsel in all states that conduct nonjudicial sales should closely review the applicable state statutes to see if the discussed theories may be used to limit the liability of servicers in defending and settling these types of matters with third-party purchasers.

Editor's note: The author's firm handled the Residential Capital case and the Staffordshire Investments case for the servicers at the trial and appellate levels. ■

we know of no opposition to the bill and are optimistic that it will pass and be signed into law by Governor Riley. If so, the law would become effective January 1, 2008.

In other news affecting a lender's ability to secure a COT in a timely fashion, the DMV is testing an online application platform called "ETAPS." Pilot tests for automobile applications are currently underway. The DMV plans to implement ETAPS for manufactured housing applications in the second half of 2008, provided the new law discussed here passes.

A large percentage of applications made to the DMV are currently being rejected due to clerical errors. ETAPS prevents the designated agent from printing the application if all fields do not adhere to DMV specifications. This increases the likelihood that the application will not be rejected for clerical reasons and that the first application will be accepted.

Harkening back to Dylan, if your time is worth a-savin', the proposed developments at Alabama's DMV should make securing title to a manufactured home a little less daunting. ■

