

ALABAMA SUPREME COURT HOLDS LENDER NOT REQUIRED TO OWN MORTGAGE WHEN FORECLOSURE INITIATED

The Alabama Supreme Court recently addressed whether a lender must own a mortgage when it initiates foreclosure proceedings and, if not, whether that would invalidate the ownership rights in the property that the lender obtained through foreclosure. This article addresses the rights a lender must possess when it initiates a foreclosure pursuant to a mortgage.

When a lender forecloses, it generally does so under the mortgage's "power of sale" provision, which allows it to foreclose without court involvement. Section 35-10-1 of the Alabama Code addresses the power of sale provision and in pertinent part provides:

Where a power to sell lands is given to the grantee in any mortgage, . . . the power is part of the security, and may be executed by any person, or the personal representative of any person who, by assignment or otherwise, becomes entitled to the money thus secured; and a conveyance of the lands sold under such power of sale to the purchaser at the sale, executed by the mortgagee, any assignee or other person entitled to the money thus secured, . . . vests the legal title thereto in such purchaser.

In *Reginald A. Patterson and Diana V. Patterson v. GMAC Mortgage, LLC*, the Alabama Supreme Court addressed the rights of a lender that owns a mortgage and related debt at the time of the actual foreclosure but *not* when the foreclosure proceedings are initiated. In the case, the borrowers originally obtained a loan from their lender, Option One Mortgage Corporation. The loan was secured by a mortgage on the borrowers' home. When the borrowers defaulted on the loan, GMAC provided them notice of default and notice of the upcoming foreclosure sale, as required by statute. GMAC foreclosed on the property on August 7, 2007, but Option One didn't actually assign the mortgage to GMAC until August 6, the day before the foreclosure.

The trial court ruled that GMAC's foreclosure was proper and that title to the property vested in GMAC. However, the Alabama Court of Appeals reversed, stating "GMAC Mortgage lacked authority to foreclose the mortgage when it initiated the foreclosure proceedings, and, therefore, the foreclosure and the foreclosure deed upon which GMAC based its ejectment

claim are invalid.” The Alabama Supreme Court agreed to review the appellate court’s decision and decide exactly when a lender must own the mortgage in order to foreclose.

The Alabama Supreme Court agreed with the trial court’s decision and ruled in favor of GMAC. The Alabama Supreme Court based its decision in favor of GMAC on several factors. First, the court recognized that case law in Alabama has never required that a lender own a mortgage before foreclosure proceedings are initiated. Although a recent case in Alabama found to the contrary, the Alabama Supreme Court ruled that the finding was misplaced, as Alabama law only requires the mortgage holder to own the mortgage when actual foreclosure takes place.

The court’s review of applicable statutory law led to the same result. Specifically, the Alabama Supreme Court recognized that Section 35-10-1 of the Alabama Code does not require a lender to own the mortgage *until* the power of sale takes place—that is, at foreclosure. Nothing in the section applies to the time at which the foreclosure proceeding was initiated. In fact, the court recognized that since a mortgagor has the right to satisfy his debt at any time prior to the property being foreclosed, a foreclosure cannot be deemed to have taken place until the foreclosure deed is granted; otherwise, actions such as providing notice would terminate the right of a mortgagor to pay the debt in order to stop the foreclosure.

Based on these reasons, the Alabama Supreme Court held that notices of default and publication of an upcoming foreclosure do not constitute the act of foreclosure. Rather, a foreclosure is accomplished only by the execution and delivery of the foreclosure deed at the time of foreclosure. GMAC had the full right to exercise the power of sale on the date of foreclosure, even if only by one day. Thus, the foreclosure was proper, and title vested in GMAC by virtue of the foreclosure deed.

By addressing exactly when a lender must own a mortgage for a foreclosure to be valid, the Alabama Supreme Court has provided clarity for lenders when deciding whether to foreclose. Further, this decision will preserve judicial time and resources, as courts will not be called upon to require foreclosure proceedings to restart based on a technicality or to determine if the correct party sent out the required notice of default and notice of foreclosure.