

# PUBLICATION

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## Get Your Ducks in a Row: Thoughts on Foreclosure of Securitized Debt in Alabama

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**Alabama remains one of the simplest jurisdictions in the country for commercial foreclosure. Nevertheless, foreclosure in Alabama can quickly become expensive if a lender does not carefully follow the letter of the law and strictly adhere to the terms of the loan documents.**

Generally, assuming a commercial lender's documents are in order, all that is required to foreclose is that an appropriate notice be published for three consecutive weeks in a local newspaper in the county where the property is located, followed by an appropriately conducted (and commercially reasonable) sale on the courthouse steps. Barring title issues or borrower push-back, foreclosure can typically be accomplished in about thirty days. Recent caselaw from Alabama's highest courts have reinforced the state's easy foreclosure reputation for holders of securitized debt.

In *Thomas v. Wells Fargo Bank, N.A., as Trustee for the Certificate holders of Certain Asset-Back Certificates*, 2012 WL 3764729 (Ala. Civ. App. 2012), the holder initiated a post-foreclosure ejectment action to force the mortgagors from the foreclosed property. The lower court entered summary judgment in favor of the holder and the mortgagors appealed. On appeal, the mortgagors asserted that the holder was not authorized to foreclose under the relevant pooling and servicing agreement ("PSA") due to, among other things, the manner in which the collateral instruments were conveyed to the trust. The holder responded that the mortgagors did not have standing to seek enforcement of the PSA. In summary, the Alabama Court of Civil Appeals held that, notwithstanding technical defects in the manner in which the collateral instruments were conveyed *under the PSA*, they were appropriately transferred under Alabama law and the holder had authority to exercise the power of sale contained in the mortgage. Moreover, the mortgagors did not have standing to challenge the holder's actions under the PSA because the mortgagors were not parties to the PSA.

In *Jackson v. Wells Fargo Bank, N.A.*, 90 So. 3d 168 (Ala. 2012), the mortgagors sued the servicer of securitized debt for wrongful foreclosure for failing to give proper notice of acceleration prior to accelerating the indebtedness as required under the relevant mortgage instrument. The servicer and holder responded, in a motion for summary judgment, that the mortgagors had no basis to contest the validity of the foreclosure. The lower court granted summary judgment and the mortgagors appealed. The Alabama Supreme Court partially affirmed the lower court's grant of summary judgment, holding that the mortgagors could not maintain a wrongful foreclosure action because they could not show that the foreclosure was conducted for a reason other than to secure the debt owed by them. (The court, however, did find that a possible breach of contract claim existed and remanded that issue to the lower court.)

In short, recent Alabama caselaw bolsters the position of holders of securitized debt. However, it remains essential for holders to have their ducks in a row prior to initiating foreclosure. Holders of securitized debt scored victories in *Thomas* and *Jackson*, but if the holder in *Thomas* had simply ensured proper conveyancing of the collateral instruments or if the servicer in *Jackson* had ensured proper acceleration of the debt, they would have significantly reduced their legal expenses. Commercial foreclosure in Alabama is simple, but proper diligence on the front-end of foreclosure will save headaches and mounting legal fees on the back-end.