6th Edition

TRIGILD

DESKBOOK

GUIDE TO RECEIVERSHIP & FORECLOSURE

The Trigild Deskbook is a comprehensive resource directory for lenders, servicers and attorneys who deal with non-performing commercial loans. Covering all 50 states, it summarizes the basic rules associated with foreclosure and receivership.

DESKBOOK- 6th Edition

Guide to Receivership & Foreclosure

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Trigild Deskbook

Welcome to the latest edition of the Trigild Deskbook, a comprehensive resource for financial, legal and real estate professionals who deal with creditors' rights and related issues, with a focus on commercial real estate. For each edition of the Deskbook we enlist the aid of attorneys in every state to cover the basics of foreclosure and receivership, and Triglid's lawyers, paralegals, asset managers, brokers and staff work to achieve a tone of plain language.

The Deskbook is not intended to be an exhaustive study of any one state's rules, procedures and legal intricacies. We try to focus on the "nuts and bolts". Complex analyses are not included and citations to case law or code sections are usually limited to references at the end of each section.

Our thanks to our lawyer-friends who often supplied far more material than we could include here, and may have been edited for brevity and simplicity. Any errors or omissions are solely our won, and we expect and encourage you to consult your own legal counsel for questions on any specific matter.

We continue to update and revise the Deskbook on a periodic basis and we welcome and solicit corrections, additions, clarifications and comments from the legal, financial and commercial real estate communities.

William J. Hoffman
Chairman & CEO

Foreclosure

States are generally classified as either *mortgage* states, where the lender holds title to the real property until the loan is paid, or *trust deed* states where title is held by a trustee for the borrower until the lender is paid.

Most states' foreclosure procedures fall into one or both categories of *judicial* or *non-judicial*. A judicial foreclosure can be broadly described as a lawsuit for non-payment that allows the lender to pursue a deficiency judgment for any amount not recovered in a sale of the property. A non-judicial foreclosure generally allows the lender to take the property as payment in full. Generally, the non-judicial action will be typically quicker and cheaper and most used whe no additional recourse is sought.

You will find that the terms *cure*, *reinstatement* and *redemption* are sometimes used interchangeably and have different meanings in different states. *Redemption* is used most often to refer to a right of a borrower to redeem a property during a specific period after it has been foreclosed, ranging from a few months to a year. The possibility of a borrower redeeming the property after a foreclosure has an obvious chilling effect on a sale during that period. *(Note: A lender may seek the appointment of a receiver during the redemption period to protect its security.)*

Reinstatement or *Cure* generally refer to the ability of a borrower to pay any defaulted amount prior to a foreclosure or trustee's sale and retain the property.

Another way to avoid a foreclosure is for the borrower to simply surrender the property to the lender by offering a *"Deed in Lieu of Foreclosure"* which grants a title to lender as the new owner. In recent years the Deed-in-Lieu seems to be in less favor. One reason is that title can burden the new owner (lender) to with any existing environmental liability or other obligations.

Receivership

The general public, and even some professionals often confuse receivership with bankruptcy. In fact, receivership was recognized long before bankruptcy. We often explain the difference in (overly) simple terms: Bankruptcy is used to protect borrowers from lenders and Receivership is used to protect lenders from borrowers.

More importantly, bankruptcy actions are brought in a court of *Law*, while receivership matters are heard in courts of *Equity*. While the same judge may sit in the same courtroom with the same staff, he/she is serving in a *different* court with far different rules. A court of law must apply very specific rules based on past cases or written codes. A court of equity has very broad latitude to do what that court deems to be best for all interested parties.

Most states have no specific qualifications for receivers other than that they are a disinterested third party. Some jurisdictions prefer local receivers, but such limitations can be overcome with specific facts. A very few jurisdictions may still have a list of "approved receivers," but this is fairly rare. Requirements that a Receiver be a citizen of that state are now uncommon, and can usually be waived for specific reasons.

A court issues an Order Appointing Receiver, and usually the Receiver must file an oath and bond prior to commencing his/her duties. The oath assures that the Receiver will act responsibly as an agent of the court and not on behalf of either party. The bond protects the parties in case of any malfeasance by that Receiver. In some cases the lender/plaintiff may also be required to file a bond, most often when the appointment was *ex parte* (see below).

A Receiver's authority and responsibility is governed by the Order Appointing Receiver, and any additional instructions or orders. It is important that the Order include powers to cover all anticipated circumstances, and your lawyer will usually talk with the proposed Receiver for this purpose.

Authority for the Receivers to sell assets in the receivership estate, rather than the lender having to wait and sell after foreclosure, is being sought more often recently, particularly by CMBS servicers. Some states specifically allow such sales, some prohibit them, and many are silent on the issue.

In the case of an emergency (which is determined by each court) lender's counsel may seek an *ex parte* hearing, which shortens the notice period, sometimes to 24 hours. When not available, the hearing will be held according to statutory notice rules and according to the court's calendar.

Most courts distinguish between receivers appointed to take over an entire business entity (often called a *General Assets Receiver* or an *Equity Receiver*) and one appointed to take possession of specific assets which secure the loan and any income generated by those assets (usually called a *Rents-and-Profits* Receiver). Parties, lawyers and judges often confuse the two. Also note that the specific identity of the defendant/borrower in the case heading does not necessarily mean that particular party will be in receivership. Most often the order applies to specific assets which are the lender's security.

A Receiver may also be appointed by way of a *stipulation* between the parties, which makes the court's action more predictable. A stipulated appointment often occurs when the borrower is willing to walk away and the lender does not want a deed in lieu of foreclosure, or to ever take title, for whatever reason.

Following is a discussion and update on the status of the

UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT

Our sincere thanks to Thomas S. Hemmendinger, Chair of the Committee which drafted this Model Act, approved and recommended for enactment in all the states.

Uniform Commercial Real Estate Receivership Act: Summary and Legislative Update

Background:
While receivership is an effective remedy for secured creditors and property owners, most states have little or no statutory receivership law. As a result, the remedy is underutilized. To solve this problem, in 2011 the Uniform Law Commission (ULC)[1] began a four-year nationwide study and drafting process, culminating in the "Uniform Commercial Real Estate Receivership Act" (UCRERA) in 2015.

UCRERA provides much-needed guidance to courts and litigants to maximize value for creditors and property owners. It is also is faithful to the principle that receivership should be a flexible remedy rather than rigid insolvency proceeding.

Summary of UCRERA[2]:
One of UCRERA's most significant features is its clear rules on when a receiver can sell real estate and on the effect of the sale on liens. For a sale outside the ordinary course of business, the receiver must obtain court approval after notice and opportunity for hearing. However, the Act does not prescribe any particular marketing method or sale structure. Therefore, the receiver can tailor marketing plans and due diligence opportunities to buyers to the particular property and its market, with the goal of maximizing the net recovery for creditors.

The Act protects the interests of lienholders in any sale:

[1]The ULC is a non-profit association of the 50 States, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Since 1892, the ULC has promoted "uniformity in state law on all subjects where uniformity is desirable and practicable."

[2]For further details, the Official Text of UCRERA, along with its Prefatory Note and Official Comments, is available at www.uniformlaws.org.

- The court can order a sale free and clear of the lien of the party who obtained appointment of the receiver and free and clear of any subordinate lien. However, unless a senior lienholder consents, the court cannot sell the property free of the senior lien. This prevents a junior lienholder from forcing a sale on a senior mortgagee and protects the tax-advantages status of senior mortgages held in real estate mortgage investment conduits (REMIC).
- To the extent a sale is free and clear of liens, each extinguished lien automatically attaches to the proceeds of sale "with the same validity, perfection, and priority the lien had on the property immediately before the transfer, even if the proceeds are not sufficient to satisfy all obligations secured by the lien."

The Official Comments to UCRERA contain a number of useful examples illustrating how the sale rules work in practice.

The Act allows the holder of a valid lien the right to credit bid, as long as the lienholder pays the reasonable expenses of sale plus any senior lien that is extinguished by the sale.

Further, the Act provides stronger protections for good faith buyers than does the Bankruptcy Code. This safe harbor applies not only to appeals from the sale order, but also to motions to modify or reconsider the order. It also prohibits the court from reviving an extinguished lien if the appeal is successful. This legislatively overrules the Clear Channel case that has troubled title insurance companies.

The Act provides clear grounds for the appointment of a receiver at the request of a mortgagee if any of the following is established:

- Appointment of a receiver is necessary to protect the property from waste, loss, transfer, dissipation, or impairment.
- The mortgagor agreed in writing to the appointment of a receiver on default (often in the form of a "receivership

clause" in the mortgage).

- The owner agreed, after default and in writing, to appointment of a receiver.
- The collateral is not sufficient to satisfy the secured obligation.
- The owner fails to turn over proceeds or rents that the mortgagee was entitled to collect.
- The holder of a subordinate lien obtains appointment of a receiver.

In some states, a receivership clause entitles the mortgagee to appointment of a receiver. In other states, the clause is merely a factor in whether the court exercises its discretion to appoint a receiver. UCRERA offers alternative language for state legislatures to choose from on this point.

The Act clearly defines the routine powers of a receiver and additional powers that require specific court approval.

Receivership affects many types of third parties, including tenants and counterparties to pre-receivership contracts. UCRERA provides clear rules on the rights of these parties. For example:

- Consistent with traditional receivership law, UCRERA gives the receiver a reasonable time to evaluate whether an executory contract (including a lease) relating to receivership property is beneficial or burdensome. During this process, the receiver must perform the current obligations under the contract.
- If the receiver rejects an executory contract, the receiver's right to possess or use receivership property under that contract terminates.
- A receiver may assign an executory contract only if applicable non-receivership law would allow the owner to assign it.
- UCRERA includes special rules for a buyer under a sale contract where the buyer is in possession of the property and for a buyer of a timeshare.

UCRERA also provides special protections for tenants of the receivership property. For example, the receiver cannot reject a residential lease of an individual's primary residence. Nor can the receiver reject a lease if the receiver was appointed at the request of a person other than a mortgagee. Even if a mortgagee obtains the appointment of a receiver, the receiver cannot reject a tenant's lease in these situations:

- The lease is superior to the mortgage lien.
- The tenant has an enforceable subordination, non-disturbance and attornment agreement (SNDA).
- The mortgagee consented to the lease.
- The terms of the lease were commercially reasonable when made, and the tenant did not know or have reason to know that the lease violated the mortgage.

The Act also provides clear guidance for dealing with property located in multiple states. Because receivership is a state-law remedy, administration of property located outside the forum state requires the appointment of an ancillary receiver in the other state. UCRERA specifically authorizes the court to appoint an ancillary receiver and can afford the ancillary receiver the same rights, powers and duties as a receiver appointed under UCRERA. UCRERA also allows the court to issue an order giving effect to an order entered in another state's receivership proceeding without the need to appoint an ancillary receiver.

Legislative Update:

UCRERA represents a significant contribution to receivership law. In the states that enact it, the Act provides many direct benefits for distressed commercial real estate. It preserves property and keeps it productive. It enables cost-effective and orderly sale of property at better prices than a foreclosure generally produces, and enables a receiver to pass marketable and insurable title to a court-approved buyer.

The Act has been well-received in the state legislatures. In the 2017 legislative season, Utah, Nevada and Oregon adopted versions of the Act, and the Act is pending in Michigan.

Utah was the first to adopt UCRERA, and the law took effect on May 9, 2017.[3] The Utah statute largely mirrors the official version of UCRERA. Utah adopted the optional provision that gives a mortgagee the right to appointment of a receiver if the mortgagee establishes one of the statutory grounds for appointment. In addition, to address some old but potentially troublesome Utah case law, the statute specifies that most court orders issued in a receivership are final, appealable orders.

Nevada also closely follows the official version of UCRERA.[4] It goes into effect on October 1, 2017. Nevada adopted the alternative that entitles a mortgagee to appointment of a receiver. The Nevada Act also provides for the Nevada Supreme Court to adopt rules on the ethics and independence of receivers and on prevention of self-dealing by receivers.

Oregon chose to expand the scope of UCRERA to include all businesses and business assets, even if there is no real estate involved.[5] Otherwise, this "Oregon Receivership Code" closely follows the core provisions of UCRERA. Oregon chose to make a "receivership clause" a factor in whether the court appoints a receiver, rather than entitling the mortgagee to a receiver. The Oregon law goes into effect on January 1, 2018.

A UCRERA bill is pending in ***Michigan***,[6] and the ULC anticipates more adoptions in 2018.

Thomas S. Hemmendinger[7]

[3] Utah Code Ann. § 78B-21-101 *et seq.*
[4] 2017 Nev. Pub. Law chapter 232.
[5] 2017 Ore. Laws chapter 358.
[6] Mich. H.B. 4471.
[7] Chairperson of the ULC's Drafting Committee for UCRERA, and of counsel with Brennan, Recupero, Cascione, Scungio & McAllister, LLP, 362 Broadway, Providence, RI 02909, www.brcsm.com.

State Court Receivership Basics

Through the appointment of a neutral third party to preserve, manage and/or liquidate a business or particular assets of a debtor -- pending a court's resolution of the claims in the underlying lawsuit -- receiverships offer interest holders and creditors a means of preserving and maximizing the value of their interests. A receiver can be appointed for a broad, general purpose, such as operating and liquidating a business, or for a narrow, more specific reason -- such as preserving real estate or personal property pending a foreclosure sale. Both federal and state courts have powers to appoint and manage receivers. This chapter discusses the procedural and substantive requirements, and related practical considerations commonly encountered in state court receiverships.

State Court Jurisdiction and Venue

A state court's jurisdiction is confined to the territorial boundaries of that state. The primary issue is not whether the court has general subject matter jurisdiction to appoint a receiver, but over what property the court, and thereby the receiver, can exert control. In addition, state venue statutes further govern where the lawsuit for which a receiver will be sought can be filed. For example, many states require that any foreclosure of a secured creditor's interest in real property be maintained in the county or counties in which the property or properties are located.

Procedure and Basis for Appointment of Receiver

The procedure and basis on which many state courts appoint receivers is analogous to what is required to obtain injunctive relief. A receiver can be appointed only as an *ancillary* remedy to the primary claims brought in the underlying lawsuit. As a result, the initial complaint is typically filed asserting primary claims for relief, such as breach of contract and foreclosure, and a separate motion is filed seeking appointment of a receiver. As

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with other ancillary motions, a motion to appoint a receiver should be supported by an affidavit verifying the facts and legal basis for the relief sought. It is also advisable to support a motion to appoint a receiver with an affidavit identifying the proposed receiver's qualifications. The moving party should also file, or attach as an exhibit, a proposed order appointing receiver that clearly identifies the proposed receiver's role and responsibilities.

Statutory or Equitable Relief

State courts will apply state statutes and common law equitable principles when determining whether to appoint a receiver. Wide discretion is often provided to the court in deciding the form and evidence required to support an appointment. The statutory guidance provided to the court is also often very broad.

For example, Missouri's general receivership statute provides that:

> The court . . . shall have power to appoint a receiver . . . to keep and preserve any money or other thing deposited in court. . . and to keep and preserve all property and protect any business or business interest entrusted to him pending any legal or equitable proceeding concerning the same, subject to the order of the court.

The factors referenced by many courts when deciding whether to appoint a receiver include: 1) the fraudulent conduct on the part of defendant; 2) any imminent danger of the property being lost, concealed, injured, diminished in value, or squandered; 3) the inadequacy of available remedies; 4) the probability that harm to plaintiff by denial of appointment would be greater than injury to parties opposing appointment; 5) the plaintiff's probable success in the lawsuit and the possibility of irreparable injury to any parties' interests in the property; and 6) whether the interest of the party seeking appointment of a receiver will be protected by the receivership. Given the discretion granted to state court judges and the broad range of circumstances which determine

the need to appoint a receiver, the facts of each case will dictate whether certain factors weigh more heavily than others.

Contractual Right to Appointment of Receiver

Most commercial loan security documents -- especially real property mortgages/deeds of trust and related assignments of rents -- grant the secured creditor the absolute right to appoint a receiver upon default by the debtor. Some state courts will simply appoint a receiver based on the parties' contract, while others will merely take the contract into account as a factor that favors appointing a receiver. Some states find that contractual consent to appointment of a receiver serves as a waiver of the defendant's right to challenge the appointment of a receiver.

General Role of Receiver and Who May and Should Act as Receiver

Most states identify few, if any, requirements for qualification to act as a receiver other than that the receiver be neutral and capable. A receiver is an officer of the court and not the representative of any party to the suit, including the party seeking the appointment. As an impartial third party, the receiver is not appointed for the benefit of any person or entity, but simply to protect property interests in specific assets. The court has discretion in whom to appoint as receiver. If there is no strong reason suggesting that the receiver is not appropriate, courts will often appoint a receiver proposed by the moving party. Some courts or judges, however, may have personal preferences -- or an approved list of receivers. It is important, therefore, that the moving party and its attorneys know whether a given court or judge has specific preferences.

Rights and Responsibilities of the Receiver

Order Appointing Receiver
The substantive rights, duties, and liabilities of the receiver are granted, defined, and limited by the order of the court appointing the receiver – an all-important guide and rulebook. Most state

statutes provide broad rights, without specific enumerations, with regard to the powers that may be granted a receiver. A draft order appointing receiver should be submitted with the motion seeking appointment of the receiver, and the order should carefully define the assets of the receivership estate, including identification of the real and personal property in the receivership estate. The order should also carefully identify the rights of the receiver. A non-inclusive list of rights that should be considered for the order appointing receiver includes empowering the receiver with the right to:

- access the receivership property, including changing any locks, and the right to seek the sheriff's assistance to gain access;
- operate any business included in the receivership property;
- collect, maintain, protect, insure, sell, liquidate or otherwise dispose of receivership property in the ordinary course of business;
- take possession of bank and other accounts necessary for operation of any business included in the receivership property, and to open, transfer, and change all such accounts into the name of the receivership estate;
- hire professionals and employees to assist the receiver;
- take possession of licenses, permits, or other government issued documents necessary for the continued operation of any business included in the receivership property;
- enter into contracts in the name of the receivership estate necessary to effectuate the needs of the receivership--including contracts to store and protect property and contracts relating to the operation of any business included in the receivership property;
- borrow money from the moving party or other person or entities required to effectuate the needs of the receivership;
- collect any rents or profits relating to the receivership property;

- bring and prosecute all proper actions for the collection of rents, accounts receivable, and contract rights relating to the receivership property;

The order should also identify how expenses are to be paid and what authority or discretion the receiver has with regard to payment of pre-receivership expenses. Additionally, it should include injunctive language precluding the parties or third parties from interfering with the receiver or receivership estate. The order should also identify the receiver's reporting requirements and direct the receiver what to do if a bankruptcy is filed.

It is important to note that a receiver does not generally "step into the shoes of the property owner" -- except for the purposes of protecting and preserving the specific assets covered in the order. Other general obligations and liabilities of the property owner may not be included in the receivership.

Real and Personal Property Sales by Receivers in State Court

Because they have the right to take possession of and preserve a receivership property, courts also have the power to authorize a receiver to market and sell property in the receivership estate. Unless otherwise ordered by the court, the receiver can only sell the right, title and interest of the owner of the property. Note that the sale of goods and inventories as part of the ordinary course of business (as in retailing) do not require special approval. Because a receiver is an officer of the court, a receiver's sale is a judicial sale, and all parties with an interest in the property to be sold must be brought in as notice or defendant parties or otherwise consent to the sale. As with other aspects of the receivership, the court has broad discretion in determining the manner of disposition of the receivership property. In order to provide proper notice, opportunity to be heard, and an effective time, place, and manner for the sale, a state court may look to the state's statutes relating to the judicial sale of property -- either by judicial foreclosure or post-judgment judicial execution. As with other judicial sales, a receiver's sale

generally requires confirmation by the state court before the purchaser acquires rights pursuant to such sale.

Sales by Receiver Free and Clear of Liens and Encumbrances

The majority of state courts have held that courts, in the proper circumstances, have the inherent power to authorize the sale of property in its control free and clear of liens. When the court authorizes that receivership property be sold free and clear of liens, the rights of the parties who are lienholders are preserved and transferred from the property sold to the proceeds of the sale -- with the same rank that such rights or liens bore to the original property. Some courts, however, will exercise the discretion to authorize a receiver sale of property free and clear of liens only in limited circumstances, such as only when the property will be sold for more than the amount of the debt owed on the liens on the property. Also, some state statutes empower the appointing court to order a receiver to sell property free and clear of liens if the encumbering liens are disputed and the property is at risk of deteriorating in value pending the lawsuit. State laws and court's attitudes regarding receiver sales free and clear of liens vary, so it is important that a party seeking appointment of a receiver for the ultimate purpose of selling property free and clear of liens know the legal landscape -- as well as the attitudes of any parties holding interests in the property to be sold.

Multi-State Receivership Issues for State Courts

Utilizing a state court to gain control over and manage property located in multiple states presents special challenges. The jurisdiction of a state court is confined to the territory of the state. When a receiver is appointed by a state court, therefore, the receiver is able to take control of the receivership assets only in that state. No uniform law exists through which a secured creditor, by direction of a state court, can gain jurisdiction and control over property located in another state. For this reason,

multi-state jurisdiction and control is usually obtained by filing ancillary receivership lawsuits.

To obtain control over property located in a state other than the appointing state, a lawsuit must be first filed in the state in which the property is located. Each court in which a lawsuit is filed and appointment of a receiver sought independently exercises its jurisdiction and may use its state's law and practice. As a matter of comity, state courts often recognize the existence of other primary and ancillary receiverships and cooperate to maximize the management of the collective receivership estate.

Effect of Bankruptcy Filing on Receivership

Under the bankruptcy code, once a bankruptcy petition is filed, all actions involving the debtor or its property are stayed. To protect the exclusive jurisdiction of the bankruptcy court, a receiver with knowledge of the bankruptcy filing must not take any further action with regard to the property of the bankruptcy estate other than to preserve such property. The receiver shall also turn over the property of the bankruptcy estate and file an accounting relating to such property. The bankruptcy court can excuse the receiver from these requirements if this is in the best interests of the creditors of the bankruptcy debtor's estate, but will be cautious in disrupting the debtor in possession's right to possession and administration of property.

Advantages and Disadvantages of Receiverships v. Bankruptcy

One advantage of seeking the appointment of a receiver is the flexibility afforded by receivership law, which is less defined than bankruptcy law and allows the moving party leeway in crafting the scope and course of the receivership. A disadvantage, however, is that bankruptcy law, since it is clearly defined, is more predictable.

Another advantage of receiverships is a greater ability to define and manage the scope of the receivership. A receiver may be

appointed to manage all aspects of a defendant's business, to preserve a single piece of property -- or for all things in between. The property to be included in the receivership estate, therefore, can vary depending on the needs of the receivership. The estate created by a bankruptcy case, however, is specific and includes "all legal or equitable interests of the debtor in property as of the commencement of the case."

Another benefit of receivership: a single interest holder or creditor can seek the appointment of a receiver, while the bankruptcy code requires three unsecured creditors to commence an involuntary bankruptcy. Additionally, receiverships offer the moving party more control over the management and administration of the at-issue property. In a Chapter 11, the debtor usually remains in possession, custody and control of the property of the bankruptcy estate, including the right to operate the business of the debtor. However in receivership actions, the moving party has the ability to recommend a receiver with the practical business experience and skills necessary for the receivership. Finally, in those states that recognize the contractual right to appoint a receiver, a receiver can be appointed as a matter of contract.

Bankruptcy has advantages in certain situations as well. In addition to the above-mentioned predictability, bankruptcy law affords other rights that may not be available in receivership. For example, bankruptcy law expressly states when property of the estate can be sold free and clear of interests in the property to be sold, while receivership law is less clear in this regard. Also, the receivership law in many states does not allow a receiver the right to each of the avoidance actions available in bankruptcy. State courts routinely appoint receivers when property is directly at-issue in the case, a suitable receiver is recommended, and the moving party is able to show that the receiver is needed to preserve the property sought to be included in the receivership estate.

If federal jurisdiction does not exist, state court jurisdictional limits will present particular challenges if the property to be included in the bankruptcy estate is located in multiple states.

Additionally, even if a receiver is appointed, the defendant holds the bankruptcy trump card for subsequent use, although the filing may trigger personal guarantees on what would otherwise be deemed non-recourse debt.

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Federal Receivership Basics

For secured creditors, a federal receivership can offer the quickest and most cost effective method of gaining control over the collateral upon default. A federal receivership maintains the value of the collateral by allowing the business to continue to operate. The Receiver will preserve and protect the collateral as well as the financial integrity of the business as a going concern. In addition, the Receiver may be able to stabilize the operations to mitigate further potential losses.

Foreclosure actions are generally brought in the county in which the property is located, while state receivership actions are brought in the state in which the property is located. These remedies present logistical issues when collateral is located in multiple counties or states. Federal receivership actions may be commenced in the federal district of the state where the property is located or in the state of the borrower's principal place of business, and the Court will have jurisdiction over the borrower's property no matter where it is located.

Although federal receiverships are grounded in federal common law, there are several federal statutes governing such receiverships.

Appointment of a Receiver

Federal Jurisdiction
In order to initiate an action in the federal court, the federal court must have jurisdiction. Because a secured creditor's enforcement of its rights is not usually based upon a federal question (although federal district courts may appoint receivers in cases initiated by governmental entities for violation of federal laws), diversity and the minimum amount in controversy under Title 28 of the U.S. Code §1332 must exist in order to invoke the jurisdiction of a federal district court.

This means that the citizenship of the secured creditor must be different than the citizenship of each and every borrower and guarantor, if applicable, named in the action. If jurisdiction cannot be obtained, State receivership may be an alternative. If jurisdiction is established, the federal district court then has ancillary jurisdiction to appoint a Receiver, as well as ancillary subject matter jurisdiction over every suit the Receiver may subsequently initiate.

Procedurally, to have a Receiver appointed, the secured creditor will first file suit against the borrower for breach of contract. If there is a personal guaranty of the borrower's obligations to the secured creditor, the guarantor may be included in the complaint as well. Once the breach of contract suit is filed, the secured creditor will then file a motion to appoint a Receiver, supported by an affidavit alleging the basis for the relief requested. In many states, including Michigan, a suit for breach of contract cannot be combined with a count for foreclosure; the secured creditor must decide whether to initiate the suit or begin foreclosure.

The act of appointing a Receiver is analogous to the entry of an injunction; it is an extraordinary remedy that lies in the discretion of the court and should be employed with the utmost caution and granted only in cases in which there is a clear necessity to protect a plaintiff's interest in property.

The following factors are usually weighed by the court to determine whether a Receiver should be appointed:

- the existence of a valid claim by the moving party;
- fraudulent conduct on the part of the defendant;
- imminent danger that property may be lost, concealed, injured, diminished in value, or squandered;
- an inadequacy of the available legal remedies;
- the probability that harm to plaintiff by denial of the appointment is greater than the injury to the parties opposing appointment;
- plaintiff's probable success in the action; and
- possibility of irreparable injury to plaintiff's interest in the property.

Role of the Receiver
Once the Receiver is appointed by the federal court, he/she becomes an officer of the court who manages and operates the property according to the laws of the state where the property is located.

In addition, the Receiver may be sued with respect to any of the acts taken or transactions engaged in while carrying on the business as a Receiver, according to 28 U.S.C §959(a). An action for possession of property held by the Receiver, however, is outside the scope of the section. Generally, the decision of whether to allow a third party action to be brought in a separate action is within the discretion of the court appointing the Receiver.

The court has broad powers and wide discretion to determine appropriate relief in an equity receivership. These broad powers enable the court to effectively supervise a receivership and protect the interests of its beneficiaries. As a court of equity, it has the authority in appropriate circumstances to impose broad stays of all actions against the entities in receivership, except by leave of the receivership court. There is no inherent limitation in receivership law regarding the amount of control that a Receiver may wield over that which the Receiver was appointed. The Receiver may be appointed over an entity or specific collateral.

Effect of Appointment of a Receiver
Control over receivership property. Once appointed, the Receiver is required to post a bond, which vests the Receiver with complete jurisdiction and of all property, personal and real, with the right to take possession of all property over which the Receiver is appointed. The secured creditor will usually request to have Receiver appointed only with respect to its collateral.

Jurisdiction by courts not appointing the Receiver. 28 U.S.C. § 1692 allows nationwide service in a federal receivership, and the territorial jurisdiction of the appointing court extends to any

judicial district in which receivership property is found. At least one court has held that 28 U.S.C. §754 is broad enough to include actions initiated by a Receiver appointed outside the United States.

Filing Requirements for Extra Territorial Jurisdiction.
28 U.S.C. §754 states that within 10 days after entry of the appointment order, a Receiver must file a copy of the complaint and the order appointing the Receiver in the district for each district in which property is located. The statute further provides that failure to file such copies in any district divests the Receiver of jurisdiction and control over all of the property in that district. The Court of Appeals for the Ninth Circuit, in S.E.C. v American Capital Investments, Inc., 98 F.3d 1133, 1143 (9th Cir. 1996), has held that a separate 10-day period for filing the complaint and order appointing the Receiver runs from each date on which (a) an interim Receiver is appointed, and (b) a permanent Receiver is appointed.

The majority of courts considering §754, however, have held that failure of a Receiver to timely file the required documents is not fatal and does not divest the court of jurisdiction once the documents are properly filed.

Sales of Assets by a Receiver

The sales of assets by a Receiver are governed by 28 U.S.C. §§ 2001, 2002, 2004. The statutory provisions governing the sale of assets are very specific with respect to certain requirements (e.g. notice provisions, appraisals), but vague with respect to the procedures to be employed in the sales, thereby allowing for flexibility and creativity. In addition, under federal law, there is no right of redemption from judicial sales under 28 U.S.C §2001(b).

Sale of Real Property
A Receiver may use a public sale or a private sale to sell real property. A public sale must occur in the district where the Receiver was appointed, or in some other district, if the court so

orders. In addition, the terms and conditions of the sale will be as directed by the court. Notice of a public sale must be approved by the court, and published at least once a week for four weeks prior to the sale, in at least one newspaper in general circulation in the county, state or judicial district where the property is located. A private sale may occur if the court determines that it is in the best interest of the estate. As with a public sale, the terms and conditions of the sale will be as directed by the court. In a private sale, however, the court must appoint three disinterested appraisers to appraise each parcel of property. The originally proposed offer will not be confirmed by the court unless the sales price is two-thirds of the appraised value, or if another offer of at least 10 percent over the original offer is received. Notice of the private sale must also be approved by the court and published in a newspaper of general circulation at least ten days prior to the hearing on the confirmation of the sale.

Sale of Personal Property
The sale of personal property is governed by the same rules as that for the sale of real property, unless the court orders otherwise. 28 U.S.C. §2004 gives the district court discretion as to whether appraisals are required to sell personal property.

Application of the Statutes by the Courts
Courts are generally liberal with respect to receivership sales. Courts have stated that a judicial sale made with notice and in the manner prescribed by law will not be denied confirmation or be set aside for mere inadequacy in price unless the price is so gross as to shock the conscience of the court, coupled with slight additional circumstances indicating unfairness such as chilled bidding.

Receiver's Responsibilities

The role of the Receiver must be defined in the order appointing the Receiver. The order will usually contain provisions relating to, among other things:

- the type and frequency of financial reporting;
- the manner and amount that the Receiver will be paid;

- actions that may be taken by the Receiver without court authority;
- a requirement that utility companies continue to provide service; and
- authorization for the Receiver to take complete possession and control of all books and records as well as cash and cash equivalents.

The Receiver's ability to pursue certain causes of action on behalf of the receivership estate also needs to be considered. Although there is no federal authority for a Receiver to avoid and recover preferential transfers, or avoid unperfected liens, receivers have standing to assert state fraudulent conveyance theories to recover property for the receivership estate. In addition, a Receiver may be able to bring certain actions against third parties that a bankruptcy trustee, debtor in possession or committee cannot.

Contrast to State Receiverships

State court receiverships are governed by state law, under a particular statute, rule or general equitable authority. The state court and/or the governing statute and/or rules prescribe the procedures for initiating the action, the role of the Receiver, the priority of claims and distribution of proceeds in the receivership. The remedy may be invoked not only to oversee the liquidation of an insolvent debtor, but to resolve shareholder disputes and management deadlocks. State court receivers may be granted the authority to operate a business, although more typically, they are empowered only to liquidate assets and distribute proceeds.

Alabama

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes (Rare)
Non-Judicial	Yes
Initial Public Notice	Publication
Time Frame	Varies by process; 30-60 Days
Redemption Period	Yes-12 Months
Deficiency	Allowed

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes
Approximate Time for Appointment	10-30 Days
Who or What can act as Receiver	No Restrictions Given
Specific Receiver Requirements	No
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

Ala. Code § 35-10-1 (1991) et seq. governs foreclosures in Alabama.

II. Judicial Foreclosure Basics:

Alabama permits judicial foreclosures, though this remedy is rarely used.

III. Non-Judicial Foreclosure Basics:

This is the primary foreclosure remedy practiced in Alabama. The non-judicial foreclosure is used when a power of sale clause exists in a mortgage or deed of trust.

IV. Guidelines for Power of Sale:

See sections X through XI below.

V. Power of Sale Guidelines as Represented in the Security:

Where a power to sell lands is given to the grantee in any mortgage, or other conveyance intended to secure the payment of money, 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, his agent or attorney, or the auctioneer making the sale, vests the legal title thereto in such purchaser. Probate judges shall index foreclosure deeds by the names of the original grantor and grantee in the mortgage, and also by the names of the grantor and grantee in the foreclosure deeds.

VI. No Power of Sale Foreclosure Guidelines:

Standard practice is to file a judicial foreclosure practice if no power of sale is granted in the mortgage.

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VII. Foreclosure when Instrument Contains No Power of Sale:

If no power of sale is contained in a mortgage or deed of trust, the grantee or any assignee thereof, at his option, after condition broken, may foreclose same either in a court having jurisdiction of the subject matter, or by selling for cash at the courthouse door of the county where the property is situated, to the highest bidder, the lands embraced in said mortgage or deed of trust, after notice of the time, place, terms and purpose of such sale has been given by four consecutive weekly insertions of such notice in some newspaper published in the county wherein said lands, or a portion thereof are situated.

VIII. Additional Satisfaction Permitted Under Continuing Power of Sale:

The sale of any part of the property conveyed by mortgage, deed of trust, or other instruments intended to secure the payment of money, either under a power of sale contained in a mortgage, or by a judicial foreclosure, shall operate as a foreclosure of the mortgage only as to the property sold, and if the mortgage indebtedness is not thereby satisfied in full, the other property contained in the mortgage continues as security for the mortgage debt and there may be a further foreclosure of the mortgage, either by sale under power of sale or by foreclosure.

Every power of sale contained in mortgages unless otherwise expressly provided therein, is held to give a continuing power of sale authorizing the mortgagee or his assignee after default, to sell the mortgaged property from time to time in separate lots or parcels.

IX. Sale Under Power where Instrument is Silent as to the Place or Terms of Sale:

If a deed of trust or mortgage, with power of sale, is silent as to the place or terms of sale, or as to the character or mode of notice, a sale may be made at the courthouse door of the county wherein the land is situated, after condition broken, for cash to the highest bidder, after 30 days' notice of the time, place and terms of sale by publishing such notice once a week for four

consecutive weeks in a newspaper published in the county wherein said lands or property in said mortgage or deed of trust are situated.

X. Notice of Sale and How Notice is Given:

Notice of said sale shall be given in the manner provided in such mortgage or deed of trust or in this Code in the county where the mortgagor resides and the land, or a part thereof, is located; but, if said mortgagor does not reside in the county where the land or any part thereof is located, then such notice must be published in the county where said land, or any material part thereof, is located; provided, that notice of all sales under powers of sale contained in mortgages and deeds of trust executed after July 1, 1936, where the amount secured is $500.00 or more, shall be given by publication once a week for three successive weeks in some newspaper published in the county in which such land or any portion thereof is situated, and said notice of sale must give the time, place and terms of said sale, together with a description of the property to be sold.

For all mortgages executed after December 31, 1988: Notice of said sale shall be given in the county where said land is located. Notice of all sales under this article shall be given by publication once a week for three successive weeks in a newspaper published in the county or counties in which such land is located. If there is land under the mortgage in more than one county the publication is to be made in all counties where the land is located. The notice of sale must give the time, place and terms of said sale, together with a description of the property. If no newspaper is published in the county where the lands are located, the notice shall be placed in a newspaper published in an adjoining county. The notice shall be published in said adjoining county for three successive weeks.

XI. Place and Time for Conducting Foreclosure by Power of Sale:

All sales of real estate, under powers of sale contained in mortgages and deeds of trust shall be held in the county where all or part of said real estate is situated. For mortgages executed

after December 31, 1988, the power to sell lands must be exercised at the appropriate courthouse door considered the front or main door to the courthouse, of the county where the mortgaged land or a substantial and material part thereof, is located. The sale shall be held between the hours of 11 A.M. and 4 P.M. on the day designated for the exercise of the power to sell the land.

Relevant Codes, Statutes, and Case Law:
Alabama Code § 6-5-230; Alabama Code § 35-10-1 through Alabama Code § 35-10-3 (1991); Alabama Code § 35-10-6 through Alabama Code § 35-10-8 (1991); Alabama Code § 35-10-13 through Alabama Code § 35-10-16 (1991).

Receivership:

I. General Information:

Alabama Code provides that a Receiver may be appointed by the circuit court judge and by the register or clerk in the absence of the judge, upon application in writing. The applicant must post a bond in an amount decided by the judge. Any person who is damaged by the appointment of the Receiver may recover by an action on the bond if the court later vacates the appointment.

A court cannot appoint a Receiver unless a suit is pending. The purpose of a Receivership is intended to prevent injury, waste, or destruction of the property of all parties. Three requirements must be met before a court may appoint a Receiver: (1) a clear legal right to be protected; (2) no other adequate remedy; and (3) a showing that the complainants will otherwise sustain irrevocable damage. The petition for a Receiver will be granted only if there is the reasonable probability that the plaintiff will ultimately succeed in obtaining the general relief sought by his lawsuit.

II. Appointing the Receiver:

A. The Basics:

The party seeking appointment of a Receiver should file a complaint, including a count for the appointment of a Receiver and a separate motion for the appointment of a Receiver. Depending on the circumstances of the matter, it may also be advisable to file a motion for expedited hearing. Courts will

generally grant the motion for expedited hearing and direct that service of the motion for appointment of a Receiver be made with the complaint.

A motion for appointment of a Receiver can be filed in conjunction with the complaint.

B. Time Frame for Appointment:

Depending on whether a motion for expedited hearing is filed, generally, anywhere from 10 to 30 days.

C. Can you go in Ex Parte?

A Receiver may be appointed through an Ex Parte motion with the show of good cause. The applicant must convey a strong case of pressing emergency and peril or that giving notice of the hearing to appoint the Receiver would jeopardize the property.

III. Loans and Advances:

Alabama case law recognizes that a Receiver may borrow money pursuant to court order. Though it is not necessary to secure such advances to a Receiver, Alabama law does recognize the use Receivership certificates for such indebtedness.

Although case law recognizes that a Receiver may borrow money, it is advisable to include a provision in the order that states the Receiver is authorized to do so and that it be secured by a first priority lien on the Receivership property.

IV. Sales During the Receivership:

Alabama has no specific statute governing the sale of property by a receiver. Depending on the specific state court, it is possible to have a sale provision included in the receivership order. Another option is to file receivership actions in federal court and follow the federal procedures governing for public or private receiver sales. *See* 28 U.S.C. §§ 2001-2002. Pursuant to these statutory provisions, the receiver would have to petition the court for approval of the sale and the sale procedures.

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V. Liens Against Receivership Property:

A. General Information:

Under Alabama law, a receiver's sale is in the nature of a judicial sale, and property sold by such means is generally subject to the liens of record.

In order to properly be "of record," the lien must comply with the statutory requirements provided in Title 35, Chapter 11, Article 5 of the Code of Alabama (1975).

Notwithstanding the foregoing, Alabama Code § 6-6-624 provides, in relevant part, that the appointment of a receiver works to invalidate liens attaching to the receivership property within sixty (60) days prior to such appointment. While this statute has not been the subject of recent litigation, the Alabama Supreme Court has interpreted and applied this statute literally.

B. Dealing with Liens during Receivership:

Alabama law governing the impact of a receiver's sale on liens is not entirely clear. While there is no guarantee that a receiver's sale would be free and clear of liens, a receiver may move for the sale to be free and clear of all liens (although this may result in objections from the junior lien holders). A receiver may also use Ala. Code §6-6-624 as a basis to dissolve liens that attached within the sixty-day time frame prior to his appointment.

Also, federal courts have held that "one having no lien when a receiver was appointed cannot acquire one after the appointment on property in the hands of the receiver, and thus obtain a preference, and this is the rule, even though the right to acquire the lien existed before the appointment."

Thus, provided that federal law applies, a receiver may move to dissolve liens attaching during the receivership.

VI. Owners Associations:

There is no specific Alabama case law or statute dealing with the interaction between receiverships and owners' associations.

VII. Construction Related to Receivership Property:

There is no specific Alabama case law or statute dealing with the ability of receivers to initiate or continue construction on receivership property. In moving to have a receiver appointed, the movant should expressly seek to have the receiver vested with such power, and should also ensure that the order appointing the receiver includes a provision governing the terms of the receiver's construction efforts, including, for example, considerations for construction budgets and/or performance goals.

VIII. Ending the Receivership:

In our experience, the better practice is to file a motion to close out the Receivership as opposed to adding language in the Order Appointing Receiver allowing it to close itself out once the deed has been filed. This way a court order will formally end the Receivership. Also, the court will usually require a final accounting from the Receiver.

IX. Miscellaneous:

A. It is advisable to include a provision that the Receiver is authorized to market and sell Receivership property subject to prior court approval. We also generally request indemnity provisions for the Receiver in the order.

B. The commencement of proceedings for appointment of a Receiver of a corporation or partnership dissolves all uncompleted attachments and levies of execution made within the proceeding sixty days. (appointment of Receiver for corporation in federal court within sixty days after levy of attachment in state court proceeding dissolved attachment).

Relevant Codes, Statutes, and Case Law:
Ala. Code § 6-6-620 through Ala. Code § 6-6-628; Ala. Code § 35-11-210 through Ala. Code § 35-11-218.

Brooks v. Everett, 124 So. 2d 100, 105 (Ala. 1960); C.E. Dev. Co. v. Kitchens, 264 So. 2d 510 (1972); Carter v. State ex rel. Bullock County, 393 So. 2d 1368 (Ala. 1981); Ex parte Goodwyn, 149 So. 216 (1933); Grand Lodge, K.P. v. Shorter, 122 So. 36 (1929); Hunter v. Parkman, 34 So. 2d 221 (Ala. 1948); Martin Oil Co., Inc. v. Clokey, 277

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So.2d 343 (Ala. 1973); Preuit v. Wallace, 189 So. 887 (1939); Stallworth v. Andalusia Hospital, 470 So. 2d 1158 (Ala. 1985); Dependable Ins. Co. v. Kirkpatrick, 514 So.2d 804, 806 (Ala. 1984) (citing *Barber v. Beckett*, 39 So.2d 17, 19 (Ala. 1949))*; See Pratt v. Deepwater Coal & Iron Co., 134 So. 854, 855 (Ala. 1931) (appointment of receiver for corporation in federal court within sixty days after levy of attachment in state court proceeding dissolved the attachment of the receivership property); Lehman v. Heberle, 9 F. Supp. 100, 101 (D.C. N.Y. 1934); see also U.S. v. Houston, 1977 WL 1295 (E.D. Wis. 1977); Quinn v. Bancroft-Jones Corp., 12 F.2d 958 (W.D.N.Y.1926).*

Alaska

Foreclosure Summary

Security Instrument	Deed of Trust or Mortgage
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Notice of Sale
Time Frame	7 Months
Redemption Period	No redemption after a non-judicial foreclosure of a deed of trust. After the confirmation of a judicial sale the judgment debtor has a one year redemption period; junior lienors have sixty days.
Deficiency	May collect on a deficiency after judicial foreclosure through normal judicial remedies

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes
Approximate Time for Appointment	Depends on the Court
Who or What can act as Receiver	No Restrictions Given
Specific Receiver Requirements	No
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. Non-Judicial Foreclosure Summary:

Non-judicial foreclosure is available only under a deed of trust that grants a power of sale to the trustee. A Notice of Default (NOD) is recorded after the deed of trust is thirty days or more in default. Within ten days, a copy of the NOD must be sent by certified mail to all parties with an interest in the property and posted on the property. All such parties, including junior lienors, may have the right to cure after the NOD and beneficiary has duty to seasonably provide a cure amount to such parties. The trustee has a duty to exercise due diligence to determine the last known address of an affected party and failure to do so can cause a sale to be set aside. A Notice of Sale must be posted in three public places and published once a week for four consecutive weeks. Sale is by outcry auction not less than ninety days after the NOD was recorded. Notice of a postponement need only be given at the place and time of sale unless the sale is postponed more than six months. A court has the power to set aside a properly conducted sale on equitable grounds.

II. Judicial Foreclosure Summary:

Judicial foreclosure of a deed of trust or mortgage proceeds as a regular civil lawsuit, beginning with filing and service of a summons and complaint and culminating in a money judgment and a decree of foreclosure and order for sale of the property. Notice of the sale is posted and published as with non-judicial foreclosures, but the sale must be confirmed by the court.

III. Deficiencies:

No further "action or proceeding" to collect a deficiency is allowed after a non-judicial foreclosure except for certain federal agencies with national loan programs, although other collateral pledged to secure the same debt may be realized only if this can be done non-judicially. The foreclosing beneficiary or mortgagee may collect on a deficiency after a judicial foreclosure through normal judicial remedies, although no separate deficiency judgment is entered

Receivership:

I. General Information:

A receiver may only be appointed in connection with an underlying action. Alaska Statute § 09.40.240 provides that a receiver generally may be appointed by a court in connection with any type of action, except an action for the recovery of specific personal property. A receiver may not be appointed where another remedy exists. Note that nearly all Alaska cases involving receivers predate statehood, in many cases by a considerable number of years.

II. Appointing the Receiver:

A. The Basics:

A receiver may be appointed in any action, except in an action for the recovery of specific personal property:

1. provisionally before judgment when a party's right to the property that is the subject of the action and is in the possession of an adverse party is probable and where it is shown that the property or its profits are in danger of being lost or materially injured;

2. after judgment, to carry the judgment into effect;

3. after judgment to dispose of the property according to the judgment, to preserve it during the pendency of an appeal, or when an execution has not been satisfied and the judgment debtor refuses to apply its property to satisfy the judgment;

4. when a corporation is insolvent or is in imminent danger of being insolvent, has been dissolved, or has forfeited its corporate rights;

5. when a debtor has been declared insolvent; and

6. in a partnership, to receive distributions that will become due to a judgment debtor in respect of the

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partnership and to take all other actions the judgment debtor may have taken or that may be required.

B. Time Frame for Appointment:

This varies by the practice of the particular court and judge. A hearing on the appointment of a receiver is on such notice as the court may prescribe.

C. Can you go in Ex Parte?

Ex parte orders appear to be authorized; however, they are limited in use.

III. Loans and Advances:

No statutes or rules govern loans or advances and the Order of Appointment will govern the receiver's authority to obtain loans or issue advances.

IV. Sales During the Receivership:

There are no statutes or case law related to sales during the receivership.

V. Liens Against Receivership Property:

There are no statutes or case law related to liens against receivership property.

VI. Owners Associations:

There are no statutes or case law related to owners associations.

VII. Construction Related to Receivership Property:

If completion of construction is contemplated, the terms should be delineated in the order appointing the receiver.

VIII. Ending the Receivership:

Pursuant to Alaska's rules of civil procedure an action where a receiver has been appointed cannot be terminated except by order of the court. In addition, prior to the court's discharge of the receiver, the receiver will conduct a final accounting of the receivership property and the court will approve that accounting.

IX. Miscellaneous:

Orders granting or denying the appointment or discharge of a receiver are immediately appealable. In appropriate circumstances, the party requesting the receiver may be liable for the receiver's fees if there is no other source to pay them.

Relevant Codes, Statutes or Case Law:
Statutes: Alaska Statutes §§ 09.35, 09.40.240-09.40.250, 09.45.170-09.45.220, and 34.20

Cases: *Farmer v. Alaska USA Title Agency, Inc.,* 336 P.3d 160 (Alaska 2014);
Young v. Embley, 143 P.3d 936 (Alaska 2006);
Sourdough Dev. Services Inc. v. Riley, 85 P.3d 463 (Alaska 2004);
Bauman v. Day, 892 P.2d 817 (Alaska 1995);
Rosenberg v. Smidt, 727 P.2d 778 (Alaska 1986); *Hagberg v. Alaska Nat. Bank,* 585 P.2d 559 (Alaska 1978);
Mathis v. Meyers, 574 P.2d 447 (Alaska 1978);
United States v. Gish, 559 F.2d 572 (9th Cir. 1977);
First Bank Nat'l of Fairbanks v. Dual, 392 P.2d 463 (Alaska 1964)

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Arizona

Foreclosure Summary

Security Instrument	Trust Deed/ Mortgage
Judicial	Yes (Sometimes)
Non-Judicial	Yes
Initial Public Notice	Notice of Sale
Time Frame	Minimum 91 days; typically 120 days
Redemption Period	No
Deficiency	Varies

Receivership Summary

Ancillary Remedy Necessary	No
Ex-Parte	Yes
Approximate Time for Appointment	2- 4 weeks unless ex parte relief is warranted
Who or What can act as Receiver	Corporate/ Individual
Specific Receiver Requirements	Receiver must post bond prior to commencing Duties
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

Deeds of trust are the primary form of security instrument used in Arizona. Unlike mortgages, which may only be foreclosed judicially by civil action (judicial foreclosure), deeds of trust may be foreclosed judicially or by exercising the trustee's power of sale (non-judicial foreclosure). Foreclosure is an available remedy in the event of a monetary or non-monetary default regardless of the form of security instrument.

In addition to the applicable statutory foreclosure process, the loan documents may provide additional notice and cure rights to the borrower and other parties. In particular, especially with larger, multi-property portfolio loans and some multi-family loans, mezzanine lenders, ground lessors and limited partners may be afforded special notice and cure rights under the loan documents.

II. Judicial Foreclosure Basics:

A judicial foreclosure is a civil suit to obtain a court order to foreclose on the collateral. Despite several advantages associated with judicial foreclosures, including the ability to enforce acceleration of the indebtedness, establishing the validity of the security instrument and the underlying indebtedness, and establishing lien priorities, judicial foreclosures are rarely used because they are expensive, time consuming (typically 9-11 months), and lack finality since the mortgagor or trustor and junior lien holders have the right to redeem the property during a period of up to six months after the sheriff's sale.

III. Non-Judicial Foreclosure Basics:

A non-judicial foreclosure is conducted by the trustee and may be held as early as 91 days after recording the notice of sale. Non-judicial foreclosure is relatively inexpensive, eliminates liens junior to the security instrument being foreclosed, and the trustee's sale is not followed by a statutory redemption period. Some of the disadvantages of a non-judicial foreclosure are that there is no judicial determination of lien priority and the secured

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indebtedness cannot truly be accelerated since a deed of trust may be reinstated by the trustor and junior lien holders at any time up to 5 p.m. mountain standard time on the last business day before the trustee's sale. Reinstatement does not require the payment of principal amounts that would not have been due had no default occurred even though the loan was accelerated.

IV. Power of Power of Sale Foreclosure Guidelines:

A trustee's sale guaranty (TSG) is obtained from a title insurance company prior to recording the notice of sale. The TSG provides a schedule of title exceptions as well as the information that is needed for the trustee to prepare the notice of sale and otherwise comply with the statutory notice requirements (e.g. the names and addresses of the parties that are entitled to receive notice of the sale and the names of newspapers of general circulation). The TSG is not a title insurance policy and is meant merely for purposes of the trustee's sale. The premium for the TSG is based upon the unpaid principal balance of the loan and is due when the TSG is issued.

The notice of sale sets the sale date, time and location of the sale and identifies the property to be sold by the trustee by its legal description, tax parcel number and street address. The sale shall be no sooner than 91 calendar days after the notice was recorded, excluding weekends and holidays. The notice of sale must include the following: (1) the date, time, and place of the sale, (2) the legal description of the trust property, (3) the street address or identifiable location of the trust property, (4) the county assessor's tax parcel number of the trust property, (5) the original principal balance of the obligation as shown in the deed of trust, and (6) names and addresses of the beneficiary, trustee and original trustor. The notice of sale must also be signed by the trustee and include the basis for trustee's qualification and the telephone number of trustee.

The notice of sale is recorded in each county where the real property is located and mailed, along with a statement of breach, to the trustor, beneficiary, and other parties with an interest in the property or who have requested notice. The notice of sale is also published in a newspaper of general circulation and posted on the property and at the courthouse. The sale may be postponed for successive periods of up to 90 days without the need to record a new notice of sale or repeat the pre-sale notice requirements.

The property is sold at public auction for cash to the highest bidder. The beneficiary may credit bid up to the full amount due under the loan documents. Payment in full is due from the winning bidder by 5:00 p.m. mountain standard time on the next day other than a Saturday or legal holiday. After the sale and payment of bid, the trustee will deliver a trustee's deed upon sale to the winning bidder within 7 business days. If the trustee's deed is properly recorded within 15 days after the date of the sale, the trustee's sale is deemed perfected at the appointed date and time of the sale. Any action for a deficiency judgment must be brought within 90 days of the sale.

In many cases, title coverage under an existing lender's policy continues in favor of the lender, or a subsidiary of the lender, who acquires the property by foreclosure. The coverage is as of the date of the lender's title policy and is usually limited to actual losses or damages not exceeding the lesser of the stated coverage amount and the balance of the secured debt plus interest, foreclosure expenses and protective advances. The lender's policy continues to be subject to the loss rules of the policy, which essentially require the lender to establish an impairment of its security as a result of the claimed title defect.
A lender may elect to purchase a new owner's policy following a trustee's sale if (1) the lender wishes to update the effective date of the coverage, (2) the foreclosure is complicated and/or bankruptcy filings or other events raise questions as to whether a particular title issue affects the property, (3) the issuer of the lender's policy no longer exists or is not sufficiently

creditworthy to handle a claim in the amount of the lender's exposure to the property, or (4) the lender takes title to the property in an affiliate that does not fall within the affiliate coverage provisions of the lender's policy. Forty percent of the cost of the TSG is applied as a discount to the premium charged for the issuance of an owner's policy if the owner's policy is issued within one year of the trustee's sale. If the lender sells the property within five years of the issuance of the owner's policy a reduced premium is charged for the owner's policy issued in connection with that transfer. Currently the reissue rate in Arizona is 25% of the premium charged for the first owner's policy.

While the trustee or beneficiary may file and maintain an action to foreclose the deed of trust at any time before the property has been sold under the power of sale, a sale of the property under the power of sale may not be held after an action to foreclose the deed of trust has been filed unless the foreclosure action has been dismissed.

V. Power of Sale Constitutes Part of Security:

A power of sale is conferred upon the trustee of a deed of trust by virtue of the trustee's position and that power may be exercised by the trustee without expressly detailing such power in the deed of trust.

Regardless of any language in a mortgage permitting foreclosure by power of sale, a mortgage must be foreclosed judicially.

VI. No Power of Sale Foreclosure Guidelines:

All mortgages must be foreclosed judicially by civil action that is subject to the Rules of Civil Procedure as well as the statutory foreclosure requirements. Competing liens should be identified before preparing the foreclosure complaint. This is accomplished by purchasing a foreclosure title report from a title company. Before filing a foreclosure action, the lender must first comply with all notice and cure requirements under the loan

documents and then provide written notice to the debtor that the debt has been accelerated. Although a written acceleration notice may not be required under the loan documents, it is good practice to provide such a notice to the debtor before filing the complaint.

At the time the complaint is filed with the court, a *lis pendens* is filed in the county where the property is located to give notice to subsequent encumbrancers and purchasers of the pending foreclosure action. The foreclosure action should be brought in the county where the real property is located and include all necessary and proper parties (e.g. any person with an interest that was recorded before the notice of *lis pendens* was recorded and that is junior to the security instrument to be foreclosed).

When a security instrument is foreclosed, the court gives judgment for the entire amount due, and directs the mortgaged property, or as much thereof as is necessary to satisfy the judgment, to be sold. A writ of special execution is issued to the sheriff ordering the sale of the property. The sheriff delivers and posts notices of sale identifying the time and place of the sale. The property is sold at the sale for cash to the highest bidder. The lender may credit bid up to the full amount due under the loan documents. Payment of the bid price plus statutory fees is due from the winning bidder within five working days after the sale. The judgment debtor (i.e. the mortgagor or trustor) and junior lien holders have the right to redeem the property during a period of up to six months after the sheriff's sale. The redemption period for the judgment debtor and its successors in interest may be reduced to 30 days if the court determined, as part of its judgment under which the sale was made, that the property was both abandoned and not used primarily for agricultural or grazing purposes. If the judgment debtor or its successor does not redeem the property then, within five days after the expiration of such redemption period, the senior creditor having a lien upon the property may redeem the property, and, failing such, each subsequent lien holder, in the order of its lien priority, may redeem the property within five days after the

expiration of the redemption period of the immediately preceding lien holder. If the property is not redeemed, the sheriff will deliver to the purchaser a deed to the property after the expiration of applicable redemption periods.

VII. Foreclosure when Instrument Contains No Power of Sale:

A power of sale is conferred upon the trustee of a deed of trust by virtue of the trustee's position and that power may be exercised by the trustee without expressly detailing such power in the deed of trust.

VIII. Sale Under Power where Instrument Silent as to Place or Terms of Sale:

By statute, the sale must be held between 9:00 a.m. and 5:00 p.m. mountain standard time at a specified placed on the trust property, at a specified place at any building that serves as a location of the superior court or at a specified place of business of the trustee, in any county in which part of the property to be sold is situated.

IX. Notice of Sale and How Notice is Given:

The notice of sale is recorded in each county where the real property is located and mailed, along with a statement of breach, to the trustor, beneficiary, and other parties with an interest in the property or who have requested notice. The notice of sale is also published in a newspaper of general circulation and posted on the property and at the courthouse.

X. Place and Time for Conducting Foreclosure by Power of Sale:

By statute, the sale must be held between 9:00 a.m. and 5:00 p.m. mountain standard time at a specified placed on the trust property, at a specified place at any building that serves as a location of the superior court or at a specified place of business of the trustee, in any county in which part of the property to be sold is situated.

Relevant Codes, Statutes or Case Law:
A.R.S. § 1-301; A.R.S. § 12-1281 *et seq.*; A.R.S. § 12-1621 *et seq.*; A.R.S. 33-721 et seq.; A.R.S. 33-801, A.R.S. 33-807 et seq.;

Receivership Section:

I. General Information:

Arizona Revised Statutes (A.R.S.) § 33-702(B) provides that a security instrument may include an assignment of rents. After a default under the security instrument or any contract secured thereby, the assignment of rents may be enforced without regard to the adequacy of the security or the solvency of the mortgagor or trustor by the appointment of a receiver. A.R.S. § 33-807(C) provides that the trustee may file an action for the appointment of a receiver. The right to appointment of a receiver is independent of, and may precede, the exercise of any other right or remedy. The superior court may appoint a receiver to protect and preserve property or the rights of parties even if the action includes no other claim for relief (A.R.S. 12-1241).

II. Appointment Process:

A. The Basics:

Appointment of a receiver is statutorily authorized, but the loan documents may add to (or lessen) the authorization and scope of permitted powers and duties of the receiver. A receivership action is independent of foreclosure and is commenced by filing a verified complaint and an application for appointment of receiver with the superior court. An order to show cause hearing is usually set for a date that is two to four weeks after the complaint is filed, unless emergency or *ex parte* relief is requested.

There are no express statutory qualification requirements for receivers. A receiver may be an individual or a corporate entity. Except in cases where a court finds that the property has been abandoned, a receiver may not be an officer or employee of the lender or borrower, an attorney for the lender or borrower, or a person interested in the action.

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and Lorna Banister of Ballard Sphar

B. Time Frame for Appointment:

An order to show cause is usually entered within two to three days after the complaint is filed and the date of the hearing is typically scheduled for a date that is two to four weeks after the complaint is filed.

A receiver can typically be appointed within two to four weeks if the appointment is uncontested. If the appointment is contested, the time period may be two to three months or more, depending on the need for discovery and the court's trial calendar.

A certificate of appointment is not issued by the clerk of the court until both an oath and bond are filed with the court. The receiver's bond protects interested parties from receiver mismanagement and/or malfeasance. There is no required formula for calculation of the bond amount, but courts generally require a bond in an amount approximately equal to one month's rent or one month's debt service.

C. Can you go in Ex Parte?

In extraordinary situations a receiver may be appointed without notice to the borrower. This typically requires some form of irreparable harm.

D. Receiver's Action and Reporting:

The receiver may, subject to the control of the court, commence and defend actions. The order may also require that the receiver obtain lender approval prior to commencing and defending actions.

A receivership may be terminated upon motion served with at least ten days' notice upon all parties who have appeared in the proceedings. The court in the notice of hearing may require that a final account and report be filed and served, and may require the filing of written objections.

III. Order Appointing Receiver:

There is no standard court form and the form order is proposed by lender's counsel. The order should be broad to address common and property specific issues, but should be balanced with court and/or lender approval rights for major actions.

Arizona Revised Statutes and Rules of Civil Procedure authorizing appointment of a receiver do not limit the range of powers a court may grant a receiver.

IV. Loans and Advances:

The Arizona Revised Statutes, Arizona Rules of Civil Procedure, and Arizona case law provide only a basic framework for the appointment and powers of a receiver. In general, these sources do not deal with specific powers such as incurring debt and obtaining advances. However, courts routinely approve orders that empower receivers to incur debt and/or obtain secured advances from the lender seeking appointment, subject to court and lender approval. As a result, if the need to obtain credit is anticipated, the party seeking appointment should include such powers in the order appointing the receiver.

The local practice for obtaining secured advances from the lender is for the receiver to issue receivership certificates to the lender reflecting the amount and priority of the receivership advances. These advances can be added to the lender's secured debt.

V. Sales During the Receivership:

The appointment may permit the receiver to market and sell the property. The right to market and sell the property should be subject to the lender's approval. Any sale of the property should be conditioned on Court approval by motion served upon the borrower and other interested parties. Borrower consent is preferable, but not always required by the court or title

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underwriter. There are no express statutes or reported Arizona case law[1] permitting or prohibiting receivership sales, and title insurance has generally been available after expiration of the appeal period applicable to the order approving the sale.

Currently there are no appellate cases in Arizona that expressly allow or prohibit a sale of the property by the receiver.

Presently, title underwriting standards are fluid with respect to sales by receivers. It is important to involve underwriting in the sales process to approve the proposed sale order and to confirm underwriting requirements. Certain title companies request that the borrower's members (in addition the borrower, the borrower's counsel and the borrower's statutory agent) be served with a copy of the motion to approve the sale. Obtaining written consent from the borrower, and its members, where possible, will accelerate the underwriting process and likely remove any requirements by the title company for appeal periods to expire.

VI. Liens Against Receivership Property:

The order may permit the receiver to satisfy or contest liens on the property. Absent such authority, the receiver may ask the court for permission to satisfy or contest liens.

If construction has been performed on the property a title report should be purchased. If there are any recorded or anticipated mechanics' liens, the order can be drafted to include authority for the receiver to satisfy or contest those liens.

VII. Owners Associations:

A receiver is permitted to collect rents and pay the expenses of operating the property including ongoing association fees. The

[1] There are unreported superior court cases upholding a receiver's power to sell the property of the estate.

order may provide that payment of association fees that accrued prior to the appointment of the receiver is discretionary.

VIII. Construction Related to Receivership Property:

The order may include the rights necessary for a receiver to authorize, oversee and supervise any ongoing or future construction, maintenance or repair of the property. Absent such authority, the receiver may ask the court for permission to engage in such activities.

IX. Ending the Receivership:

Upon the foreclosure or other disposition of the property, or satisfaction of the underlying loan, the receiver must request discharge and may be required to file a final report and accounting.

The receiver must request discharge and may be required to file a final report and accounting.

Relevant codes, Statutes or Case Law:
Arizona Rules of Civil Procedure 41(a) and 66; A.R.S. § 12-1241; A.R.S. § 33-702; A.R.S. § 33-807

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Arkansas

Foreclosure Summary

Security Instrument	Deed of Trust, Mortgage
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Complaint
Time Frame	Typically 120 Days
Redemption Period	Varies
Deficiency	Varies

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Rare
Approximate Time for Appointment	48 hours – multiple weeks
Who or What can act as Receiver	No Restrictions Given
Specific Receiver Requirements	No Restrictions Given
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

Arkansas has both judicial and non-judicial foreclosure available to foreclose mortgages and deeds of trust, though non-judicial foreclosure is not widely used. After a default under the security instrument, the mortgagee or trustee may either seek judicial foreclosure or non-judicial foreclosure, but not both.

II. Judicial Foreclosure Basics:

In the judicial foreclosure process, the mortgagee brings a suit, and all interested persons must be made parties. If the court issues a decree of foreclosure of the mortgage or deed of trust, the property must be sold under Arkansas law.

Before the sale, notice must be published in a newspaper generally circulated in the county in which the property is situated at least ten days before the sale.

There is no minimum bid for a judicial foreclosure. Traditionally, if the bid "shocks the conscious of the court," it is too low.

Arkansas has a statutory right of redemption for one year after for judicial foreclosures, but that is rarely an issue, as the right of redemption can be waived in the security instrument, so essentially every mortgage and deed of trust signed in the state of Arkansas contains a clause wherein the mortgagor waives his right to redemption.

III. Non-Judicial Foreclosure Basics:

The non-judicial foreclosure statutes are strictly construed, so the statutes should be carefully reviewed and followed. Additionally, several of the Arkansas laws governing non-judicial foreclosures were amended in 2011, so some pre-2011 sources outlining non-judicial foreclosure requirements could be out of date.

Non-judicial foreclosure is only available when the mortgagee is a mortgage company, bank, or savings and loan.

IV. Power of Sale Foreclosure Guidelines:

Before the mortgagee can sell the property, the mortgage must be filed in the county where the trust property is situated, and there has to be a default under the security instrument. At least ten days before initiating the foreclosure, the mortgagee must mail to the mortgagor at the property address a copy of the note and mortgage, the name of the holder and location of the original note, information about the availability of loan modification or assistance programs, and, if the default is because of a missed payment, a payment history showing the date of default. Guidelines related to notice required and place and time of sale are listed below.

V. Power of Sale Constitutes Part of Security:

Under Ark. Code Ann. § 18-50-115, as long as the instrument is recorded, a power of sale is implied. Arkansas statutes provide the guidelines for conducting a non-judicial foreclosure, as indicated below.

VI. No Power of Sale Foreclosure Guidelines:

Under Ark. Code Ann. § 18-50-115, as long as the instrument is recorded, a power of sale is implied. Arkansas statutes provide the guidelines for conducting a non-judicial foreclosure, as indicated below.

VII. Foreclosure when Instrument Contains No Power of Sale:

Under Ark. Code Ann. § 18-50-115, as long as the instrument is recorded, a power of sale is implied. Arkansas statutes provide the guidelines for conducting a non-judicial foreclosure, as indicated below.

VIII. Additional Satisfaction Permitted Under Continuing Power of Sale:

Under Ark. Code Ann. § 18-50-115, as long as the instrument is recorded, a power of sale is implied. Arkansas statutes provide the guidelines for conducting a non-judicial foreclosure, as indicated below.

IX. Sale Under Power where Instrument Silent as to Place or Terms of Sale:

Under Ark. Code Ann. § 18-50-115, as long as the instrument is recorded, a power of sale is implied. Arkansas statutes provide the guidelines for conducting a non-judicial foreclosure, as indicated below.

X. Notice of Sale and How Sale is Given:

Ark. Code Ann. § 18-50-104 describes the contents of the notice and who must receive notice. The mortgagee must file notice of default and intent to sell in the county where the property is located. After recording the notice, the trustee must wait sixty days before selling the property. If applicable, the mortgagee has to certify that the mortgagors who applied for loan modification or forbearance does not qualify under any program offered by the mortgagee or a government agency (if the mortgagee participates in such a program).

At least ten days before the sale, the notice of default and intent to sell must be sent to the property address or mailing address of the mortgagor by certified and first class mail.

The notice of default and intention to sell must include the names of the parties to the mortgage or deed of trust, the legal description and street address of the trust property, the recording information for the mortgage or deed of trust, the default, a statement that the mortgagee intends to sell the property, the time, date and place of sale, and the name and contact information of the party initiating the foreclosure. The notice must also include a conspicuous warning as follows: "YOU MAY LOSE YOUR PROPERTY IF YOU DO NOT TAKE IMMEDIATE ACTION."

Within thirty days of recording the notice of default and intent to sell, the mortgagee must mail the notice to the mortgagor, any successor in interest if the successor's interest is recorded or if the mortgagee has actual notice, any lienholder subsequent to the interest of the mortgagee, when recorded or when the mortgagee

has actual notice, and anyone who has properly requested notice under Arkansas law.

The notice must be posted in the newspaper (once a week for four consecutive weeks, but the final publication cannot be more than ten days before the sale), at the county courthouse, and on the internet.

XI. Place and Time for Conducting Foreclosure by Power of Sale:

Ark. Code Ann. § 18-50-107 governs the manner of sale. The sale has to take place on the same date and at the same time and place indicated on the notice of default and intent to sell. The sale must be between 9:00 a.m. and 4:00 p.m. on a weekday and non-holiday. The sale can take place either at the trust property or the front door of the county courthouse of the county in which the trust party is situated.

Any person may bid at the sale. The sale has to be conducted by a third party licensed to sell real estate and to act as an auctioneer under Arkansas law. The minimum bid has to be at least 2/3 of the indebtedness.

Relevant Codes, Statutes or Case Law:
Ark. Code Ann. §§ 18-49-101 et seq. govern judicial foreclosure.
Ark. Code Ann. §§ 18-50-101 et seq. govern statutory foreclosure.

Receivership:

I. General Information:

Arkansas receivership law is governed by Arkansas Rule of Civil Procedure 66.

II. Appointing the Receiver:

A. The Basics:

Under Arkansas law, a receiver is appointed for traditional equitable purposes, and a receiver can be appointed for any lawful purpose. Traditional equitable grounds include appointing a receiver when necessary to save property or money from being lost, removed, or materially damaged. The court has broad discretion in deciding whether a receiver should be appointed.

B. Time Frame for Appointment:

In the circumstance of appointing a receiver when foreclosing a mortgage, the request for receiver is often filed with the complaint, but a separate motion to appoint a receiver can be filed as well. The appointment of a receiver is rarely a means in itself, but it is not a requirement that the appointment of a receiver be ancillary to another cause of action. The request to appoint a receiver must include grounds for appointment. There has to be a prima facie showing that a receiver is required because of a danger that the property will be lost or materially injured, but the court does not have to hold an evidentiary hearing.

The time it takes for a receiver to be appointed varies and depends on the court's schedule. In an emergency situation, it is possible to file an emergency motion to appoint a receiver, and there can be a turnaround as quickly as 24-48 hours.

C. Can you go in Ex Parte?

In rare circumstances, a court may appoint a receiver ex parte. The party asking the court to do so must demonstrate that the circumstances are "exceptional."

D. Receiver's Action and Reporting:

The powers of the receiver do not begin until the receiver takes an oath to faithfully perform his duties and posts the bond.

A receiver may bring and defend actions, take and keep possession of property, receive rents, collect debts, and other actions as authorized by the court.

Under Rule 66(b), the receiver must make a report of his proceedings and actions and make an accounting for receivership money and property every six (6) months or at such other times as directed by the court. Any money or property collected by the receiver must be accounted for and deposited into court or otherwise be subject to the orders of the court. In Arkansas, a receiver is a fiduciary representing the court and all parties in interest.

III. Loans and Advances:

There aren't specific statutes dealing with these issues, but the order appointing the receivers can outline a receiver's ability to do these things.

IV. Sales During the Receivership:

There aren't specific statutes dealing with these issues, but the order appointing the receivers can outline a receiver's ability to do these things.

V. Liens Against Receivership Property:

A receiver takes property subject the owner's liabilities. Appointment of a receiver does not destroy a judgment or execution lien.

VI. Owners Associations:

No information provided.

VII. Construction Related to Receivership Property:

There aren't specific statutes dealing with these issues, but the order appointing the receivers can outline a receiver's ability to do these things.

VIII. Ending the Receivership:

A receiver may be removed for good cause, and the court may appoint a substitute receiver in that case. A receivership may be terminated at the court's discretion when the factual situation that necessitated the creation of a receivership no longer exists.

To end the receivership, the party should file a motion to discharge the receiver and the court can issue and order discharging a receiver.

Relevant Codes, Statutes or Case Law:

Relevant codes: Receivership is covered by Arkansas Rule of Civil Procedure 66. Ark. Code Ann. § 16-117-201 et seq. covers receivers but has been superseded by Rule 66.

There are many Arkansas cases addressing receivers. The list below is a selection of these cases:

Chapin v. Stuckey, 286 Ark. 359, 692 S.W.2d 609 (1985) (Rule 66 superseded statutes; appointment does not have to be ancillary to another cause of action).

California

Foreclosure Summary

Security Instrument	Trust Deed
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Judicial – complaint; Non-judicial – statutory notice of default
Time Frame	Judicial – 1 year or more; Non-judicial – 3 months and 20 days (minimum)
Redemption Period	Judicial – unless deficiency is waived, up to 1 year; Non-judicial – none
Deficiency	Judicial – yes; Non-judicial – no against borrower/trustor, but yes against guarantor

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes
Approximate Time for Appointment	At least 16 court days for noticed hearing; at least 1 court day for ex parte
Who or What can Act as Receiver	Individuals
Specific Receiver Requirements	Oath and bond must be filed before receiver commences duties
Is there any Approval List for Receivers	Generally no
Out of State Receivers Allowed	Not prohibited

Foreclosure:

I. General Information:

In California, a defaulted real estate loan may be enforced by two types of foreclosure proceedings: (1) a judicial foreclosure action; and (2) a non-judicial foreclosure sale (also called a "trustee's sale"). For purposes of this discussion, we will assume that the borrower under the loan is also the trustor (the grantor) under the deed of trust securing the loan and that the property covered by the deed of trust is a commercial property.

A judicial foreclosure action, as the name implies, is a lawsuit that the lender files against the borrower in order to enforce its loan. A non-judicial foreclosure sale, which is authorized by the "power of sale" clause typically contained in the lender's deed of trust, is a mechanism that the lender uses to enforce its loan outside of court.

In California, non-judicial foreclosure is pursued to completion much more often than judicial foreclosure because, among other things, (i) a non-judicial foreclosure is generally quicker and less expensive to complete than a judicial foreclosure and (ii) there is no post-sale right of redemption following a non-judicial foreclosure as there usually is following a judicial foreclosure. That said, it is not uncommon for a lender to launch both types of foreclosure simultaneously (known as "dual tracking"), using the judicial foreclosure action as a vehicle to obtain a receiver and/or proceed against the guarantor while relying on the non-judicial foreclosure process as the means by which the property is ultimately sold.

II. Judicial Foreclosure Basics:

A judicial foreclosure action is a lawsuit that the lender files against the borrower in order to enforce a defaulted real estate loan. Under California's one-action rule, a judicial foreclosure action is generally the only type of "action" (*i.e.*, court proceeding) that a lender may bring to recover on its secured loan. Unless one of several statutory exceptions applies, a lender's failure to observe this rule may subject the lender to

very serious consequences, including in the worst case the loss of the lender's real property security.

A judicial foreclosure action is commenced by the filing and serving of a complaint against the borrower. In many cases, other persons (*e.g.*, certain junior lienholders) will also need to be named in the complaint and served if their interests in the property are to be extinguished or otherwise affected by the action. Failure to do so may result in these persons' interests being unaffected by the judicial foreclosure action.

In a judicial foreclosure action, the lender seeks to have the court determine that the loan is in default and order that the property be sold to satisfy the loan balance. In most cases, the lender will also seek to have the court (i) declare that the borrower is liable for any deficiency resulting from the foreclosure sale, (ii) hold a "fair value" hearing to determine the amount of the deficiency and (iii) enter a deficiency judgment against the borrower. Once a deficiency judgment has been entered, the lender may proceed against the borrower's other assets in accordance with the law governing enforcement of judgments generally.

Unless a deficiency judgment against the borrower is waived or prohibited, following the judicial foreclosure sale the borrower will generally have a period of one year in which to redeem the property for a redemption price equal to the purchase price at the sale subject to certain adjustments specified by statute. In the unusual circumstance that the proceeds of the judicial foreclosure sale are sufficient to satisfy the loan (including interest thereon) and certain other costs, the applicable redemption period is reduced from one year to three months.

Although judicial foreclosure actions are frequently commenced in California, they are rarely prosecuted to completion. One reason is that such foreclosures are time-consuming (often lasting one year or more) and expensive (at least when compared to non-judicial foreclosures). Another reason is that the borrower's post-sale redemption right makes the property less attractive to third-party purchasers, resulting in lower sale prices.

On the other hand, sometimes there are compelling reasons to pursue a judicial foreclosure action to completion. If the borrower has significant other assets that are not security for the loan, the only way for the lender to reach these assets is through a judicial foreclosure action. In other cases, loan document defects (*e.g.*, a guaranty that might be deemed a "sham guaranty" under California case law) may make foreclosing through a judicial foreclosure action mandatory if the lender wishes to pursue the guarantor afterwards. Whether any of these special situations applies in a particular case is something that the lender should discuss with experienced local counsel.

III. Non-Judicial Foreclosure Basics:

In California, a non-judicial foreclosure, which is done under a "power of sale" in the deed of trust, is a two-stage process. Stage 1 begins with the recording of a statutory notice of default and continues for approximately three months. Stage 2 starts with the recording and other disposition (*e.g.*, posting, publishing and mailing) of the statutory notice of sale and continues through completion of the sale (which, by law, cannot take place earlier than three months and twenty days after the recording of the statutory notice of default) and delivery of the trustee's deed to the purchaser.

Most non-judicial foreclosure sales in California are handled by trustee companies (including, in some cases, units within title companies) that specialize in providing non-judicial foreclosure services. As a general rule, the company selected to handle the non-judicial foreclosure should be substituted as trustee under the deed of trust prior to commencing the non-judicial foreclosure.

IV. Guidelines for Power of Sale:

In California, a non-judicial foreclosure starts when the trustee records a statutory notice of default (NOD) in the office of the recorder of the county in which the property is situated. To be effective, the NOD must contain certain information specified by law. If the loan has been accelerated by reason of one or more payment defaults and not by reason of one or more other defaults

(*e.g.*, a prohibited transfer), the NOD must also contain a rather lengthy statement in a particular form and format. After recording the NOD, the trustee must mail copies of the NOD (with the recording date shown) to the borrower and various other persons specified by law (*e.g.*, certain junior lienholders) within 10 business days for some persons and one month for other persons. In unusual cases, the trustee must also publish or post the NOD.

To continue the non-judicial foreclosure, approximately three months after recording the NOD, the trustee will record a statutory notice of sale (NOS) in the same county recorder's office where it recorded the NOD. Among other things, the NOS must specify the time and place of the foreclosure sale and describe the property to be sold. If the foreclosure sale is intended to be a "unified sale" in which some or all of the personal property and fixtures that constitute security for the loan are to be sold together with the land, improvements and other real property security, the NOS must also describe such personal property and fixtures in the manner prescribed by law. The trustee must record the NOS at least 20 days prior to the sale date. In addition, the trustee must publish, post and mail copies of the NOS in the manner and/or to the persons prescribed by law at least 20 days prior to the sale date.

In California, a non-judicial foreclosure sale is deemed final when the sale is held and the last and highest bid is accepted. Provided that the successful bidder pays the full amount bid for the property and a trustee's deed is delivered, the sale is deemed perfected as of 8:00 a.m. on the sale date if the trustee's deed is recorded in a timely fashion (generally within 15 days after the sale).

V. Power of Sale Guidelines for Mixed and Multiple Security:

Generally, if a loan is secured both by real property and by personal property or fixtures, the lender may use the non-judicial foreclosure process to conduct a "unified sale" of both the real property and some or all of the personal property or fixtures.

Alternatively, the lender may foreclose on some or all of the personal property or fixtures by following the rules set forth in the California Commercial Code (California's version of the Uniform Commercial Code). If the lender wishes to pursue the latter approach, the lender should discuss with experienced local counsel the impact of California's one-action and antideficiency rules on that approach.

If the loan is secured by two or more deeds of trust and the lender initially forecloses on one of the deeds of trust by means of non-judicial foreclosure, the lender may foreclose on the other deeds of trust by means of non-judicial foreclosure until the lender's loan (including, for this purpose, the lender's attorneys' fees and other recoverable costs) are fully repaid.

VI. Foreclosure when Instrument Contains No Power of Sale:

In the unusual event that the deed of trust securing a real estate loan does not contain a power of sale clause, the lender must foreclose judicially.

VII. Additional Satisfaction Permitted Under Continuing Power of Sale:

Under California law, the lender may not obtain a deficiency judgment against the borrower following a non-judicial foreclosure sale of the real property security for the loan. The lender may, however, obtain a deficiency judgment against the guarantor if the guaranty is not a "sham" guaranty and the guaranty contains appropriate waivers. (As noted below, there is extensive – and complicated – California case law applicable to these issues.) In addition, as discussed in part V above, the lender may realize on other security for the loan following a non-judicial foreclosure sale of the property securing the loan, albeit subject to certain limitations.

VIII. Sale under Power of Sale where Instrument Silent as to Place or Terms of Sale:

In California, a deed of trust typically does not specify the place or the terms of any non-judicial foreclosure sale involving the

encumbered property. Instead, that information will be set forth in the NOS.

IX. Notice of Sale and How Notice is Given:

In a non-judicial foreclosure, the NOS must specify the time and place of the foreclosure sale and describe the property to be sold. The NOS must also contain, among other items of information, a statement of the entire unpaid balance of the loan and the lender's reasonably estimated costs, expenses and advances at the time of initial publication of the NOS. In addition, if the foreclosure sale is intended to be a "unified sale" in which some or all of the personal property and fixtures that constitute security for the loan are to be sold together with the land, improvements and other real property security, the NOS must also describe such personal property and fixtures in the manner prescribed by law (which manner will vary depending on whether some or all of the personal property or fixtures will be included in the sale).

The trustee must record the NOS at least 20 days prior to the sale date. In addition, the trustee must publish, post and mail copies of the NOS in the manner and/or to the persons prescribed by law at least 20 days prior to the sale date.

X. Place and Time for Conducting Foreclosure by Power of Sale:

By law, a non-judicial foreclosure sale must be held between the hours of 9:00 a.m. and 5:00 p.m. on any business day, Monday through Friday, in the county where the property is situated. As noted above, this information will be set forth in the NOS.

Relevant Codes, Statutes or Case Law:
California Civil Code §§ 2924-2924k; California Civil Procedure Code §§ 580a, 580b, 580d, 726 & 729.010-729.090; California Commercial Code § 9604.

Receivership:

I. General Information:

To obtain appointment of a receiver under California law, a lender seeking to enforce a defaulted real estate loan must do several things. *First*, the lender must commence a civil action. Unless a civil action is pending, a receiver cannot be appointed.

Second, the civil action must be one of the types of cases in which a court is permitted by law to appoint a receiver. Under Section 564 of the California Civil Procedure Code, these types of cases include (1) a judicial foreclosure action and (2) an action by the lender for specific performance of an assignment of rents provision in a deed of trust or a separate assignment document. *Finally*, the lender must satisfy any additional conditions imposed by law. For example, in a judicial foreclosure action the lender must also establish either (a) that the property is in danger of being lost, removed or materially injured or (b) that the condition of the deed of trust has not been performed and the property is probably insufficient to discharge the debt secured by the deed of trust. Significantly, any action by a lender to appoint a receiver pursuant to Section 564 of the California Civil Procedure Code does not constitute an "action" within the meaning of California's one-action rule.

II. Appointing the Receiver:

A. The Basics:

Historically, the most common procedural vehicle used by a lender to secure appointment of a receiver is a noticed motion brought within an action for judicial foreclosure or for specific performance of an assignment of rents. In some cases, however, appointment of a receiver may be secured on an *ex parte* basis within such an action. In those cases, a showing of "irreparable injury" (among other things) is typically required.

B. Time Frame for Appointment:

As noted above, a lender may apply for appointment of a receiver on either a noticed motion basis or an *ex parte* basis. For an application made by noticed motion, generally at least 16 court days' notice is required. For an application made on an *ex parte* basis, courts generally require that the borrower and any other parties be given notice not later than 10:00 a.m. at least one court day before the *ex parte* appearance. In addition, the lender must serve the *ex parte* application on all other appearing parties at the first reasonable opportunity. Absent exceptional circumstances, no hearing may be held unless such service has been made.

C. Can you Appoint Ex Parte?

In California, a lender may secure appointment of a receiver on an *ex parte* basis. To do so, the lender must show in detail, by verified complaint or declaration, (1) the nature of the emergency requiring appointment of a receiver and (2) the reasons why irreparable injury would be suffered by the lender during the time necessary for a hearing on regular notice. Additional showings are also required. If the application for appointment of a receiver *ex parte* is granted, a hearing must be held within 15 (or, in some cases, 22) days to determine why the appointment should not be confirmed.

D. Are There Specific Requirements for Receivers?

By law, the receiver must take an oath and post a bond before the receiver commences his or her duties. The amount of the bond will be set by the court.

E. Is There an Approval List for Receivers?

In California, there is no "panel" of approved receivers from which a court selects a receiver in any given case. Instead, each party appearing at the hearing of an application for appointment of a receiver is entitled to suggest one or more persons for appointment as receiver. Any such suggestion must be made in writing and state the reasons why the person suggested should be appointed. As a practical matter, courts are more inclined to consider for appointment as receiver persons with relevant experience.

F. Is California Friendly to Outside Receivers?

There is no legal prohibition against citizens or residents of other states being appointed as receivers.

III. Order Appointing Receiver:

A. Specific Language for Order Appointing Receiver:

A well-drafted appointment order should contain provisions that specify the receiver's fees, costs and other compensation and that address practical considerations, such as bank accounts, mail, utilities, insurance and other matters affecting the day-to-day operation of the property. In addition, if the lender desires that

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the receiver have the power to market and sell the property, the appointment order should so provide and should also address important related issues, such as the treatment of liens upon a sale of the property and the distribution of sale proceeds.

B. Do Any Courts Have Specific Requirements for Orders Appointing Receiver?

Some courts prefer that the forms of order submitted to the court be on judicial council forms. In those cases, it will generally be advisable to supplement the provisions of those forms with attachments that address issues which are not fully addressed by the forms. The specific content of these attachments will vary from case to case and from asset type to asset type.

C. Other Information of Interest Regarding Orders Appointing Receiver:

Although the provisions of the California Civil Procedure Code governing a receiver's powers and duties appear to be broadly phrased, these provisions also make it clear that the receiver is operating under the court's ultimate supervision and control. Accordingly, it makes sense for the appointment order to be as specific as reasonably practicable in describing the receiver's power and authority over the property and any rents or other revenues derived therefrom.

IV. Receiver's Action and Reporting:

A. Are There Any Specific Rules Imposed by California Governing a Receiver's Actions or Reporting?

In California, there are a number of specific rules that govern a receiver's actions or reporting. These rules include, for example, (i) rules that limit the types of agreements, understandings or arrangements that a receiver and a lender nominating the receiver for appointment may enter into, (ii) rules that require a receiver to obtain court approval before hiring counsel and (iii) rules that require the receiver to provide monthly reports to the parties in the case.

B. Are There Any Local Court Rules that a Receiver Should Understand?

In California, civil trial courts are called "superior courts" and are organized on a county-by-county basis. The local rules adopted by California's superior courts vary considerably from one court to another. For example, under the Los Angeles Superior Court Local Rules, an application for appointment of a receiver in a case filed in the central district of that court will be heard by certain "writs and receivers" judges who deal with these sorts of matters on a daily basis, while an application for appointment of a receiver in a case filed in another district of that court will typically be heard by the same judge who is assigned to the case generally. Before commencing an action to enforce its loan and applying for the appointment of a receiver, the lender should consult with counsel regarding the impact, if any, of the local rules on its litigation strategy (including, in certain instances, the decision of where to file the case).

V. Additional Instructions and Orders:

Because the receiver is an agent of the court and not of any party and operates under the supervision and control of the court, the receiver should request further instructions and, if necessary, orders from the court before taking any action not reasonably within the scope of the receiver's appointment order.

VI. Loans and Advances:

If the property covered by the receivership does not generate sufficient rents or other revenues to preserve and manage the property, with the court's approval the receiver may borrow money for those purposes. With the court's approval, the receiver may also issue receivership certificates as security for the borrowing. These certificates are secured by liens on the receivership estate and may, to the extent a court order so provides, have priority over other liens. As a practical matter, it would be very unusual for a receiver to borrow money from anyone other than the lender.

VII. Sales During the Receivership:

Although California's case law in this area is not yet fully developed and is subject to change, Section 568.5 of the California Civil Procedure Code generally allows a receiver to sell property that is collateral for a loan, provided that appropriate court orders are first obtained. Courts frequently approve such sales if the borrower and guarantor agree.

If they do not agree, however, the court should still have the ability to order such a sale. But the law is not quite settled: there is a possible conflict between California's one-action and antideficiency rules and its receivership laws. Although the California receivership statute expressly provides that an action to appoint a receiver is an exception to the state's one-action rule, it does not expressly state that the receiver has the right to sell mortgaged real property belonging to the current owner to an assuming buyer, while leaving the existing loan and its lien in place.

In the case of the loan is secured by real property, the authors believe that so long as the lender waives any deficiency against the borrower and follows certain other technical steps, including getting appropriate orders from the court, a receiver should be able to sell the real property securing a loan subject to the existing lien. This would allow the existing loan to be modified and assumed by the new buyer of the real property. In the past, the authors have persuaded certain national title insurers to insure the resulting buyer's, and the lenders, respective titles for such transactions. This theory, its risks and the technical legal requirements for accomplishing such a sale and assumption through receivership are discussed in detail in M. O'Connor and J. Cochran, "Enforcing Defaulted CMBS Loans through Receivership Sales: Risks and Rewards of the Modification, Sale and Assumption Transaction under California's 'One Action' Rule," *CRE Finance World* (January 2011). That said, the policies of national title insurers in this area change from time to time. Accordingly, whether such insurers would be willing to cover future receivership sales is uncertain at best.

VIII. Liens Against Receivership Property:

Under the California Commercial Code, a receiver is treated as a lien creditor for purposes of determining lien priority in any personal property or fixtures included in the receivership estate. As for the real property included in the receivership estate, the extent to which a receiver has a lien superior to that of any subsequent lienholder is governed by court order.

IX. Owners Associations:

The receiver's power and authority with respect to any homeowners' or property owners' association of which the property may be a part is something that should be delineated in the appointment order.

X. Construction Related to Receivership Property:

If the receiver takes possession of an unfinished construction project, the receiver's power and authority to finish construction of the project is likewise something that should be delineated in the appointment order.

XI. Ending the Receivership:

To wind up the receivership, the receiver must present, by noticed motion or stipulation of all parties, the following items for court approval: (a) a final account and report; (b) a request for a discharge; and (c) a request for exoneration of the receiver's surety. If any further compensation for the receiver or its counsel is claimed, additional information must be provided.

XII. Miscellaneous:

California law has two statutes not previously discussed that may impact the lender's decision of whether to pursue appointment of a receiver in a case or how long the receivership might last. These statutes, Sections 2924c and 2856 of the California Civil Code, are briefly discussed below.

Right to reinstate the loan. Provided that the default for which the loan has been accelerated is curable, a borrower who has defaulted under a loan repaid in installments secured by

California real property has the right to "reinstate" the accelerated loan. (For example, a borrower has no right to reinstate a loan that has reached its maturity date.)

To reinstate the loan, the borrower must pay to the beneficiary all missed installments, allowable costs and attorneys' fees (both of which are limited by statute), and must cure all other defaults required under the deed of trust and allowed by statute (including, for example, recurring tax and insurance payments). Reinstatement does not require payoff of the entire loan. Once a loan is reinstated, it is "de-accelerated" and returns to its original installment payment status. A borrower (or a junior lienholder) may reinstate the borrower's loan until 5 business days before the date of sale stated in the NOS or, if the sale date is postponed, until 5 business days before the rescheduled date of sale.

Enforcement of guaranties. The extent to which guarantors are protected, as borrowers are, by the procedural protections detailed in California's one-action and antideficiency rules has been hotly debated in the courts for years. The enactment of Section 2856 of the California Civil Code, which codified the so-called "Gradsky" waivers, brought some clarity to the issue. It generally allows lenders to pursue guarantors after a nonjudicial foreclosure of the real property securing the borrower's loan if their guaranties contain certain waivers described in the statute. (In the absence of such waivers, the lender's rights against the guarantor would be eliminated after a nonjudicial foreclosure, though they could be enforced instead through the longer and more expensive judicial foreclosure action.)

Although Section 2856 provides "safe harbor" language for some of the waivers it allows, it does not provide "safe harbor" language for all of the waivers it allows. Moreover, under certain factual scenarios, the guarantor may be deemed to benefit from the same antideficiency and one-action protections afforded the borrower under California law. Because the application of the one-action and antideficiency rules is based not only on the language of the relevant statutes, but also on the extensive case

law in which California courts have heavily interpreted the one-action and antideficiency rules, it is prudent to have experienced California real estate counsel review any and all guaranties prior to initiating foreclosure. A misstep in applying these highly technical laws could result in sanctions, including loss of the lien on the real property collateral for the loan or losing the ability to pursue solvent guarantors.

Relevant Codes, Statutes or Case Law:
California Civil Procedure Code §§ 564-570; California Rules of Court 3.1175-3.1184, 3.1200-3.1207 & 3.1300-3.1312; California Civil Code §§ 2924c & 2856.

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Colorado

Foreclosure Summary

Security Instrument	Trust Deed/Mortgage
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Notice of Default
Time Frame	1.5 to 10 months
Redemption Period	110 to 230 days to cure; 8 days post-sale to redeem, more if multiple lienors
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	No
Ex-Parte	Yes
Specific Requirements	Must file Oath & Bond prior to commencing duties
Approximate Time for Appointment	1 day to several weeks
Who or What can act as Receiver	No Restrictions Given
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

Colorado law provides for both judicial and non-judicial foreclosure. The Colorado General Assembly significantly revised Colorado's foreclosure statutes between 2007 and 2016. In general, the revisions have eased certain aspects of the foreclosure process for the borrower by combining the owner's pre-sale cure period and post-sale redemption period, increasing regulation of investors who purchase residential property during foreclosure, adding notice requirements for mortgage servicers and others, increasing borrowers' access to educational materials regarding the foreclosure process, and declining to extend the state's four-year-old program allowing for the expedited sale of residential property within as few as forty-five days. The revisions also repealed the state's foreclosure deferment program and added provisions for the sale of foreclosed properties via electronic media, thereby streamlining the process.

II. Judicial Foreclosure Basics:

Judicial foreclosure is conducted as any other civil litigation, following the Colorado Rules of Civil Procedure. Judicial foreclosure is governed by Colo. Rev. Stat. §§ 38-38-100.3 to -705 (2016) and by Colo. R. Civ. P. 105.

III. Non-Judicial Foreclosure Basics:

Non-judicial foreclosure may be commenced with the Public Trustee in the county where the property being foreclosed is located. Non-judicial foreclosures are governed by Colo. Rev. Stat. §§ 38-38-100.3 to -705 (2016) and by Colo. R. Civ. P. 120.

IV. Guidelines for Power of Sale:

A power of sale foreclosure is commenced by filing:

A. a Notice of Election and Demand ("NED");

B. the original evidence of debt, a certified copy of the evidence of debt from a qualified holder, a certified copy of a court judgment, or a lost instrument bond;

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C. the original, or a certified or verified copy, of the recorded deed of trust, and all modifications, amendments, or partial releases thereto;

D. a combined Notice of Sale and Notice of Cure and Redemption Rights ("Combined Notice"), unless provided by the Office of the Public Trustee;

E. a mailing list for notification;

F. the affidavit of the holder regarding the identity of the current owner of the property at issue; and

G. the applicable fee.

Those entitled to cure during foreclosure include the property owner; the owner's heirs, guardian, or personal representative if the owner is deceased or incapacitated; certain transferees of the property; any person liable on the evidence of debt; a surety or guarantor of the evidence of debt; or junior lien holders. Colorado has a single pre-sale cure period of between 110 and 125 calendar days after the date of recording the NED (for non-agricultural property) or between 215 and 230 calendar days after the date of recording the NED (for agricultural property). A party entitled to cure must file a notice of intent to cure with the Public Trustee no later than fifteen calendar days prior to the date of sale.

The Public Trustee cannot sell real property without an Order Authorizing Sale from the District Court. The foreclosing party must file with the appropriate District Court, mail, and post at the Clerk's office a copy of the deed of trust containing the power of sale, together with a verified motion and notice that describes (1) the instrument containing the power of sale, (2) the property to be sold, and (3) the default or facts giving rise to the invocation of the power of sale clause. The court clerk sets a hearing date not less than twenty-one nor more than thirty-five days after filing. A notice of such hearing must be posted on the subject property no later than fourteen days before the hearing.

The motion for Order Authorizing Sale must be filed with the court to allow sufficient time for the court to hold a hearing or enter the Order Authorizing Sale no later than sixteen days prior to the date of sale—*i.e.*, one day prior to the last day a notice of intent to cure can be filed. As a guideline, the statutory timeframe requires filing the motion for Order Authorizing Sale no less than fifty-one days prior to the date of sale, although allowing additional time is advisable.

The court will hold a hearing if a response is filed no later than seven days before the date set for the hearing. Otherwise, the court will examine the motion, and, if satisfied that venue is proper and that the moving party is entitled to the requested relief, the court will enter an Order Authorizing Sale without a hearing. A copy of the Order Authorizing Sale must be provided to the Public Trustee no later than 12:00 noon on the second business day prior to the date of sale. Following sale, a Return of Sale must be filed with the court, and the court will enter an Order Approving Sale to close the action.

V. Power of Sale Guidelines as Represented in the Security:

Colorado law defines "deed of trust" as "a security instrument containing a grant to a public trustee together with a power of sale."

VI. Guidelines for Foreclosure when there is No Power of Sale:

A judicial foreclosure action is commenced by filing a civil complaint naming all parties with an interest in the property, those in actual possession of the property, and those entitled to notice of foreclosure. The complaint should be filed in the District Court situated in the county where the property, or a substantial part of the property, is located. The collateral (including real property, water rights, mineral rights, or personal property) should be fully described in the complaint by legal description. A Notice of *Lis Pendens* containing the full case caption, nature of the claim, and legal description of the property should be recorded in each county in which any part of the

property is located. The court must authorize service by publication on verified motion; service is completed by publishing the summons in a local newspaper, pursuant to Colo. Rev. Stat. §§ 24-70-103 and -109. The foreclosing party may move for entry of default judgment and entry of a Decree of Foreclosure if no response is filed after thirty-five days of completion of service by publication. Most courts do not require a hearing on a motion for default judgment. If summary judgment motions or trial are required, the Colorado Rules of Civil Procedure will apply to the action. Once a Decree of Foreclosure is obtained, execution is stayed for fourteen days, after which the foreclosing party may deliver the Decree of Foreclosure and a mailing list to the sheriff to begin the sale process.

VII. Foreclosure when Instrument Contains No Power of Sale:

When an instrument contains no power of sale provision, Colorado provides only for foreclosure through a judicial foreclosure action described in the preceding section.

VIII. Any Additional Satisfaction Permitted Under Continuing Power of Sale:

Deficiency judgments are permitted. A party may foreclose on a portion of the property without affecting the lien or power of sale as to the remaining property only if the portion is encumbered as a separate and distinct parcel or lot. A partial release of a deed of trust may occur while foreclosure is in progress.

IX. Sale by Power of Sale when the Instrument is Silent as to the Place or Terms of Sale:

Colorado law provides that a deed of trust containing a power of sale, but lacking provisions regarding the manner in which the power of sale is to be exercised, is neither void nor voidable, and that the deed of trust may be foreclosed either as a public trustee sale or through judicial foreclosure.

X. Notice of Sale and How Notice is Given:

For residential property, at least thirty days after default, and at least thirty days before filing the NED, a holder of the evidence of debt must notify the debtor of the telephone numbers for the Colorado Foreclosure Hotline and the holder's loss mitigation representative.

The Combined Notice must contain the information listed in the state statutes, including all information required by the state statutes, statutory advisements regarding cure and redemption, contact information for every attorney representing the foreclosing party, place and date of sale, and complete copies of the statutes listed in the state statutes.

The Public Trustee must record the NED within ten business days after receiving it, and the NED must be made available for public inspection. Within twenty days after recording the NED, the Public Trustee must mail the Combined Notice to those persons and addresses identified by the foreclosing party in the mailing list. The Combined Notice must be mailed again no more than sixty days, and no fewer than forty-five days, prior to the actual sale date. The foreclosing party must provide an updated mailing list as needed. (For judicial foreclosures, the Sheriff must mail a Combined Notice to the mailing list no more than thirty days, and no fewer than sixteen days, after the Sheriff receives the mailing list and a decree of foreclosure or writ of execution.) The Combined Notice must also be published for four weeks (once each week for five consecutive weeks) beginning no greater than sixty days, and no fewer than forty-five days prior to the sale date.

XI. Place and Time for Conducting Foreclosure by Power of Sale:

The place of sale must be the location designated in the Combined Notice, which must be the entrance to, or any room within, the courthouse, or the office of the county Clerk and Recorder, Public Trustee, or Sheriff, unless the sale is conducted by means of the Internet or other electronic media pursuant to all notice requirements outlined in Colo. Rev. Stat. § 38-38-

103(4)(a)(VII). The time of sale depends upon whether the property is agricultural or non-agricultural. If non-agricultural: (1) pursuant to a power of sale, between 110 and 125 days after the date of recording the NED; (2) judicial foreclosure, no less than 110 days after the date of recording the Notice of *Lis Pendens*. If agricultural: (1) pursuant to a power of sale, between 215 and 230 days after the date of recording the NED; (2) judicial foreclosure, no less than 215 days after the date of recording the Notice of *Lis Pendens*.

Relevant Codes, Statutes or Case Law:
Colo. Rev. Stat. §§ 24-70-103, 24-70-109, 38-35-110, 38-38-100.3 to -705 (2016); Colo. R. Civ. P. 12, 62, 98(a), 105, 120; 2014 Colo. Sess. Laws 552 (House Bill 14-1312); 2012 Colo. Sess. Laws 314 (Senate Bill 12-030); 2010 Colo. Sess. Laws 649 (House Bill 10-1249); 2007 Colo. Sess. Laws 1830 (House Bill 07-1157); 2006 Colo. Sess. Laws 1330 (Senate Bill 06-071); 2006 Colo. Sess. Laws 1434 (House Bill 06-1387).

Receivership:

I. General Information:

In Colorado, there are three grounds for the appointment of a Receiver. Colorado law provides for court appointment of a Receiver before, by, or after a judgment to protect property, both real and personal. The receivership may be the sole claim for relief. In addition, a Receiver may be appointed to protect property during the foreclosure process. Lastly, parties may provide for receiverships by contract.

II. Appointing the Receiver:

A. The Basics:

Any party that can establish a *prima facie* right or interest in the subject property may apply to the court for appointment of a Receiver when an adverse party possesses the property, and (1) danger exists that the property or its rents or profits (a) may be lost, (b) removed from the court's jurisdiction, or (c) materially injured; (2) when the court seeks to dispose of the property at or after judgment or preserve it during appellate proceedings; or (3) as other circumstances require under principles of equity. Prior to assuming its duties, the Receiver must swear an oath to execute faithfully its duties, and the Receiver must post a bond. The Receiver's powers are defined and limited by the court's Order of Appointment.

Additionally, if an owner abandons property prior to a foreclosure sale, and the circumstances would warrant appointment of a Receiver but none is petitioned for, the foreclosing party may take possession of the property until the sale, subject to all of the duties and liabilities of a Receiver.

B. Time Frame for Appointment:

Time periods for appointment vary, depending upon the judge, from as little as one day to several weeks.

C. Can you go in Ex Parte?

A court may appoint a Receiver *ex parte* only if: (a) an express clause in the instrument upon which the action is based allows *ex parte* appointment; or (b) the moving party demonstrates the existence of exigent circumstances.

III. Loans and Advances:

No statutes or rules govern loans or advances, and the Order of Appointment will govern the Receiver's authority to obtain loans or to issue advances.

IV. Sales During the Receivership:

A. General Process:

No Colorado statutes set forth a general procedure for receiver property sales. In Colorado, a receiver has only those powers specifically conferred upon it by statute or by the court's order or decree. Thus, the Order of Appointment will determine any applicable process for receiver sales. Such sale must be conducted fairly and impartially by the receiver as an officer and representative of the court, and because there are no statutory restrictions as to time, manner, terms, or notice of sale, such matters are determined in the court's discretion.

While the foreclosure process is generally appropriate to sell property, Colorado statutes specifically authorize receivers appointed in certain types of proceedings, such as those brought to dissolve an entity, to dispose of all or part of the entity's

property at a public or private sale upon authorization from the court.

V. Liens Against Receivership Property:

In the context of receiver sales, a purchaser acquires no better title than the receiver possesses. In the context of foreclosure, lienors possess statutory redemption rights.

VI. Owners Associations:

There is no reported Colorado case law specifically addressing special considerations applied to owners associations.

VII. Construction Related to Receivership Property:

No Colorado statute or case law specifies a process for completion of construction in the context of a receivership. Colorado courts do routinely grant receivers the power to manage the property and to hire management and other professionals as necessary. Thus, in an appropriate case, the Order of Appointment will determine any applicable process for construction activity.

VIII. Ending the Receivership:

An action in which the court has appointed a Receiver may not be dismissed except by court order. Thus, the Receiver or another party files a motion to terminate. The movant must send notice to all parties, attorneys of record, and any third parties that might be harmed by the termination. Upon termination, the Receiver should file a final accounting and a motion to discharge the Receiver and the Receiver's bond. The Receiver must give notice to the same parties who received notice of the motion for termination. All receivership monies must be paid out prior to discharge.

IX. Miscellaneous:

A.

Nearly all Colorado District Courts require that proposed orders be electronically filed in an editable format.

B.

Orders granting or denying the appointment or discharge of a Receiver are immediately appealable. However, trial courts are given broad discretion over appointment of a Receiver, and the trial court's decision will not be reversed absent a clear abuse of discretion. If a party obtaining appointment of a Receiver is found on appeal not to have been entitled to the appointment of a Receiver, the debtor is entitled to an award of the costs and fees associated with the receivership.

Relevant Codes, Statutes or Case Law:

Colo. Rev. Stat. §§ 38-38-301 to -306, -601 to -602, 7-56-716, 7-80-812, 7-114-303, 7-134-303 (2016) (outlining the duties and responsibilities of a receiver in the dissolution of a cooperative, limited liability company, corporation, and nonprofit corporation, respectively); Colo. R. Civ. P. 66; Colo. R. App. P. 1(a)(4); *Rossi v. Colo. Pulp & Paper Co.*, 299 P. 19, 22 (Colo. 1931) (finding authority for receiver to borrow money as well as manage the time, manner, terms, and notice of sale for any sale of receivership property); *Hendrie & Bolthoff Mfg. Co. v. Parry*, 86 P. 113, 116 (1906) (describing an order of appointment as "the measure and the limit of [a receiver's] power"); *GE Life & Annuity Assurance Co. v. Fort Collins Assemblage, Ltd.*, 53 P.3d 703, 705-06 (Colo. App. 2001); *Bank of Am. Nat'l Trust & Sav. Assoc. v. Denver Hotel Assoc.*, 830 P.2d 1138, 1139 (Colo. App. 1992) (finding authority for receiver to manage the property in question); *Four Strong Winds, Inc. Lyngholm*, 826 P.2d 414, 417 (Colo. App. 1992) (setting forth requirements for receiver discharge—decided under former Colo. Rev. Stat. § 38-39-112); *Zeligman v. Juergens*, 762 P.2d 783, 785 (Colo. App. 1988) (ascribing to a receiver only that power that is articulated in the order of appointment and finding therein authority for receiver to advance money); *Albertson Ranches, Inc. v. Cuddy*, 525 P.2d 1190, 1192 (Colo. App. 1974) (holding that the purchaser of land at a judicial sale acquires no better title than that the receiver possessed); 13 Debra Knapp, Colorado Civil Procedure Forms & Commentary, §§ 66.7 to 66.16 (2d ed. 2017).

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Connecticut

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	No
Initial Public Notice	Complaint
Time Frame	Typically 60 days; 60-150 days
Redemption Period	Dependent upon whether case proceeds as Strict Foreclosure or Foreclosure by Sale
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes
Approximate Time for Appointment	Upon motion at any time during the action
Who or What can act as Receiver	Individual or Company
Specific Receiver Requirements	Receiver must file bond with court before carrying out duties
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

Connecticut law does not provide for any form of non-judicial foreclosure procedure. The Superior Court exercises exclusive jurisdiction over foreclosure actions, as it does for all causes of action, except for those actions over which probate courts are given statutory jurisdiction. The common plaintiff is the party named as holder of the mortgage note and grantee on the mortgage deed, or, in the case of a lien, the named creditor. The owner of the equity is usually the first defendant. Guarantors, co-obligors, mortgagees, collateral assignees, creditors, lien holders, lessees, trustees in bankruptcy, life tenants, and the original maker of the note when the present owner assumed, but the original owner had not been released, should also be listed as defendants.

II. Judicial Foreclosure Basics:

Foreclosure can be either strict foreclosure or foreclosure by sale. Connecticut law grants the court discretion as to entering a judgment of foreclosure by sale or through strict foreclosure. In all foreclosure actions, a motion for judgment must be filed thirty (30) days after the return date (a return date, or the date when a motion is "returnable," refers to the date the moving party designates the motion to be heard by the court). Strict foreclosure is typically the preferred judgment in proceedings where the subject premises contains equity. In proceedings where the value of the lien by the mortgagee or creditor upon the subject premises is greater than, or close to, the value of the mortgaged property, a judgment of foreclosure by sale is generally ordered by the court. There is also a tertiary judgment the court can decide to enter, if agreed to by both parties, namely, a foreclosure by market sale. Instead of a committee being marshalled to sell the mortgaged premises, as is the case with foreclosures by sale, a licensed broker can be listed to sell the property and procure buyers that are willing and able to compete within current market conditions and submit a contract for sale to the court.

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III. Strict Foreclosure Guidelines:

In Connecticut the plaintiff must complete a Foreclosure Worksheet (also known as Form JD-CV-77) to obtain a final judgment of foreclosure, whether it be by strict foreclosure or foreclosure by sale. The Worksheet requires the plaintiff to provide the following information at the judgment hearing: fair market value of the premises based on an appraisal report, along with an oath and affidavit of appraiser, dated within 120 days of the judgment; updated debt; total encumbrances prior to the plaintiff's lien; equity in the property; whether the U.S. is a party; whether the owner of the equity is in possession of the property; and whether the owner of the equity is a non-appearing party.

If the court decides that strict foreclosure is appropriate, it only needs to set the Law Day. Generally, the Law Date is proposed in the motion for judgment of strict foreclosure, and a list of subsequent Law Dates are assigned to other creditors/parties to the action. The Law Day establishes a date by which the borrower can satisfy the outstanding debt and 'redeem' his rights of equity. Subsequent Law Days, if applicable, are designated for subordinate lien holders or creditors by manner of priority (the oldest lien recorded until the latest recorded lien). If the debt is not satisfied by the last, or only, Law Day, the plaintiff receives full legal title to the property.

The elements of a judgment of foreclosure by sale are directed by statute which requires that a person be appointed to have complete responsibility for the implementation of the judgment (known as the Committee). The court sets the date and time for the sale, and also directs whether the property will be sold in parcels or as a whole.

IV. Foreclosure by Sale:

The sale is made by public auction at the subject premises. The court typically orders the high bidder to put down a deposit at the time of the auction (usually set at about 10% of the appraised value). The deposit should be endorsed over to the Clerk of Superior Court and delivered to the clerk's office as soon as

possible. The court appoints a committee to implement the judgment of foreclosure and acts as an arm of the court. The Committee is required to file a motion to approve the sale by the Wednesday following the sale at auction.

The Committee is responsible for: reviewing the appraisal, ordering a title search, filing an appearance, reviewing the land records, advertising the sale, obtaining liability insurance for the date of sale, procuring the foreclosure sign, responding to inquiries, preparing all documents, managing expenses, conducting the sale, and obtaining timely approval of the sale by the court. A Bar Date is generally set as 45 days prior to the date of sale ordered by the court. The Bar Date initiates the time when the Committee must fulfill certain duties, e.g., paying fees, advertising and posting a foreclosure sign. The Committee must also file a committee report to the court prior to seeking approval of the sale. The Committee also executes the Committee Deed before asking for the court's approval. If the court approves the sale, the Committee schedules a closing with the buyers and must take place within 30 days of the sale.

If the sale is not approved, the court may either order a new sale or order a strict foreclosure. If the sale is approved, the Bond for Deed requires that a transfer of title takes place within #0 days of the date of approval of the sale by the court. The committee must adhere to the guidelines in the Uniform Procedures for Foreclosure by Sale Matters (also known as Form JD-CV-81) and must use court approved forms where applicable. The Committee must pay into the court all proceeds from the sale, and the Committee's function officially ends when all proceeds have been paid into court.

V. Non-Judicial Foreclosure Basics:

Non-Judicial Foreclosures are not available in Connecticut.

VI. Guidelines for Power of Sale:

Power of Sale is not available in Connecticut.

VII. Notice of Sale and How Notice is Given:

The sale is uniformly conducted by public auction, although this is not required by any law. The advertising varies depending on the size and substance of the property. Residential properties usually receive two to three notices in a newspaper of general circulation, from an approved list of the court, in the area of the subject property. The newspaper advertisement must be on 2 separate dates and should only specify: the docket number, case number, property address and type, date of sale, and the Committee's name and contact information. The Committee must also post an ad on the Judicial Website, after the Bar Date, and run the ad until the day after the sale. The Committee must also post a sign, as notification of the foreclosure sale, at the subject premises, not less than 20 days nor more than 30 days before the sale.

In general, in order to foreclose on an interest in the subject property, the party must be joined as a defendant in the judicial foreclosure and thereby receives notice of every development in the foreclosure action, including date, time and place of the foreclosure sale.

VIII. Deficiency:

If the proceeds of the sale are not sufficient to pay the full amount of the mortgage or lien, thereby foreclosed, a motion for Deficiency Judgment can be heard by the court if filed within 30 days of the redemption period (the Law Day in a strict foreclosure, or the ordered date of sale in a foreclosure by sale), and any deficiency will be determined. In a foreclosure by sale, recovery of money owed after the sale, proves difficult, if there is shortage from the proceeds. If a deficiency is estimated before the sale, based upon a subsequent appraisal, say, a motion for Deficiency Judgment could aid in recovering additional money. By Connecticut Statute, if the property sells for an amount below the appraised value, one-half of the difference between the appraised value and the selling price can be credited to the debt as of the date of sale. For example, if a mortgage is owed in the amount of $300,000, and the appraised value of the mortgaged property is $280,000, but the property sold for $250,000 at the

auction, there is a $30,000 difference between the amounts of the property appraised and sold. One-half of the difference between the appraised value, and the sale amount ($15,000), is then credited to the original deficiency claim ($300,000 - $280,000 = $20,000 deficiency) thereby allowing for a total $35,000 deficiency judgment, if awarded.

Relevant Codes, Statutes or Case Law:
C.G.S. § 49-24 through § 49-30
CT P.B. § 17-33; and § 23-16 through §23-19

Receivership:

I. General Information:

The most recent Connecticut Practice Book establishes the extent to which the Court may exercise control over and supervise a Receiver's actions. A mortgagee usually seeks the appointment of a Receiver when there is certain or threatened deficiency. The Receiver holds rents as an arm of the court, and not as an agent for the plaintiff.

Plaintiff is not entitled to a Receiver as a matter of right and usually has to show that there is a great likelihood of a deficiency resulting as well as threatened waste being committed at the property.

II. Appointing the Receiver:

A. The Basics:

In order to get a Receiver appointed, an application is made to the judge before whom the foreclosure action is pending. If the court before which the action is pending is not in session, the application may be made to a judge in chambers after notice to the parties in interest, unless exigencies of the situation dictate otherwise. With the exception of rent Receivers, all appointments not made after notice to interested parties are temporary appointments. No Receiver, temporary or permanent, is qualified to act until it files with either the clerk of the court or the appointing judge, a bond in an amount set by the court. Banks and trust companies, however, are exempt from this bond filing requirement.

B. Time Frame for Appointment:

This is dependent upon the length of time the motion to appoint the Receiver is placed on the court's calendar by the clerk of the court and a hearing is held on the motion. All appointments are temporary unless made after the return day of the action. Assuming the motion is granted, the Receiver would be notified by the court and then would have to qualify to act in its capacity.

C. Can you go in Ex Parte?

Yes. If the exigencies of the situation so require, the court may appoint a Receiver on an ex parte basis. With respect to Receivers other than rent Receivers, notice of not less than six days of hearing for confirmation of the appointment must be given be mail to all interested parties. Upon the hearing, the court may confirm the appointed, temporary Receiver, or appoint a new Receiver. The appointment of a temporary receiver continues until a permanent Receiver is appointed.

III. Loans and Advances:

There are no pre-set laws on loans or advances during a receivership.

IV. Sales During the Receivership:

No information provided.

V. Liens Against Receivership Property:

No information provided.

VI. Owners Associations:

No information provided.

VII. Construction Related to Receivership Property:

No information provided.

VIII. Ending the Receivership:

In general, any party may move at any time for the removal of a Receiver. The court may also remove the Receiver at its pleasure. Usually the receiver moves itself for discharge after

filing the final report. Included in the motion for discharge, is the request for an allowance for the Receiver's Fee, an order directing the Receiver to pay the money he is holding over to creditors and may also ask the court to release the Receiver from his bond.

IX. Miscellaneous:

A. Each order appointing a permanent Receiver (except for rent Receivers) must contain a limitation on the time for the presentation of claims against the estate and direct that the Receiver forthwith give notice thereof, to all creditors, that any claims not presented within such time will be barred.

B. Each such receiver shall, during the first week in April and in October in each year, sign, swear to, and file, with the clerk of the court, a full and detailed account of his actions as receiver for the preceding six months, together with a statement of all orders of court passed during the six months and the present condition and prospects of the property in his charge. The Receiver must place a motion to approve the report filed, and to be placed on the short calendar to be heard before the court.

C. Unless the plaintiff can establish that the amount of its debt is greater than the amount which plaintiff will realize from a sale of the property, rent collected be a rent Receiver will ultimately be disbursed by the Receiver to subsequent lien holders and encumbrances. On the other hand, rents collected by a plaintiff pursuant to the terms of loan documents which give the mortgagee the right to collect rents are applied by the plaintiff to the debt.

Relevant Codes, Statutes or Case Law:
Connecticut's General Statutes § 52-504 through § 52-514; Chapter 21 to Connecticut's Practice Book

There are hundreds of Connecticut cases dealing with all aspects of receiverships and foreclosures. *See, e.g., Barclays Bank of New York v. Ivler 20 Conn. App. 163, 166, 565 A.2d 252, JP Morgan Chase Bank v. Gianopoulos et al., 131 Conn. App. 15, 21-22, 30 A.3d 697, 701 (2011), Hartford Federal Savings & Loan Assn. v. Tucker, 196 Conn. 172 (1985)*
Webster Bank, N.A. v. Belinda Company, 2006 WL 538155 (Conn. Super. 2006)

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Delaware

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	No
Initial Public Notice	Complaint
Time Frame	Approximately six months plus 30 days for court confirmation; longer if contested
Redemption Period	No statutory authority, but a borrower likely possesses an equity of redemption until the foreclosure sale rather than the end of the 30-day confirmation period
Deficiency	

Receivership Summary

Ancillary Remedy Necessary	No Restriction Given
Ex-Parte	No Rule or Law
Approximate Time for Appointment	Varies
Who or What can act as Receiver	No Restrictions Given
Specific Receiver Requirements	No Restrictions Given
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Can be appointed but there is a rule that states Receiver must be Delaware Citizens

Foreclosure:

I. Description of Procedure:

Typically the method of foreclosure is a suit at law. A writ of *scire facias* sur mortgage is filed in the county in which the mortgaged property is located, which commences upon the filing of a praecipe and complaint with the Prothonotary of the Superior Court. The issuance of the writ is then served and returned just as an original summons is, and the case proceeds like any other civil action. Once judgment is obtained, a writ is directed to the appropriate officer, who subjects the mortgaged property to public sale. Uncontested actions will take approximately six months, plus an additional thirty days after the sale for Superior Court confirmation, upon which the purchaser may take title.

II. Redemption:

There is no statutory authority under Delaware law. However, a borrower is considered as having a right of redemption during which the property can be redeemed by payment of principal, interests, and costs due under the mortgage.

III. Deficiencies:

Again, there are no applicable statutes regarding deficiencies, but one may be recovered by an independent proceeding on the debt instrument that was secured by the mortgage.

IV. Leases:

Leases prior to the recording of the mortgage are not affected by foreclosure sale (absent subordination). Leases subsequent to the recording of the mortgage (or otherwise subordinated) are discharged by a foreclosure sale.

Receivership:

I. General Information:

As a general rule, under Delaware law, receivers may be appointed by statute for a dissolved corporation, pursuant to Section 279 of the Delaware General Corporation Law (the "DGCL"), or for an insolvent corporation, pursuant to Section 291 of the DGCL. In addition, Delaware courts have the

inherent equitable power to appoint receivers for solvent entities in certain, limited, situations. In this summary, we will focus on insolvency receiverships and, to a lesser extent, equity receiverships.

Court rules provide that a Receiver cannot be appointed unless he or she is a resident of the State of Delaware. However the Court rules also provide that the Court has enormous flexibility and may relieve the Receivers from complying with all or any of the duties and procedures set in specified rules.

Court Rules require all monies in the Receiver's hands to be deposited into a banking institution in the State of Delaware

A. Receivers for Insolvent Entities – When Authorized:

In order to be placed into receivership in Delaware under Section 291 of the DGCL, an entity must be insolvent. Insolvency in this context means "either:

1. 'a deficiency of assets below liabilities with no reasonable prospect that the business can be successfully continued in the face thereof,' or

2. an inability to meet maturing obligations as they fall due in the ordinary course of business.'" Even where the debtor is insolvent, however, the appointment of a Receiver is only granted where urgent circumstances are present other than the mere collection of a debt and where some truly beneficial purpose will be served by the Receivership proceeding. Insolvency must be shown by clear and convincing evidence.

B. Receivers for Solvent Entities – When Authorized:

When the relevant entity is solvent, the standard for appointing a receiver is a very strict. Particularly, in such instances, the "Court may order the dissolution of a solvent company and the appointment of a custodian or receiver 'only upon a showing of gross mismanagement, positive misconduct by corporate

officers, breach of trust, or extreme circumstances showing imminent danger of great loss to the corporation which, otherwise, cannot be prevented.

Courts show great restraint in appointing receivers for solvent entities and only do so under the most extreme circumstances and the appointment of a receiver for a solvent entity is "normally a remedy of an auxiliary nature incidental to primary relief bottomed upon fraud or inequitable conduct under the given circumstances, and the appointment of a receiver should not be the sole object of a suit.

Finally, DGCL 226(a) permits the appointment of a custodian or receiver where the corporation is suffering or threatened with irreparable injury because the directors are so divided respecting the management of the corporation that a required vote for action cannot be obtained.

C. Receivers for Entities that Refuse to Obey Court Orders:

In addition the Delaware Court of Chancery has the power to appoint a receiver under section 322 of the DGCL, which provides:

> Whenever any corporation shall refuse, fail or neglect to obey any order or decree of any court of this State within the time fixed by the court for its observance, such refusal, failure or neglect shall be sufficient ground for the appointment of a receiver of the corporation by the Court of Chancery. . . .

When a court appoints a receiver under DGCL section 322, that receiver can be granted powers that are co-extensive with the powers that can be granted to and exercised by a receiver appointed for an insolvent corporation. In order to appoint a receiver under section 322 gross mismanagement and fraud standards may also have to be shown.

II. Appointing the Receiver:

A. The Basics:

The procedural aspects of a Receivership proceeding are governed primarily by Rules 148 through 168 of the Delaware Court of Chancery Rules (the "Court of Chancery Rules").

B. Time Frame for Appointment:

This would depend greatly on whether the debtor entity contests the relief sought in the complaint and whether it can interpose a reasonable defense to the complaint. One benefit of proceeding in Delaware's Court of Chancery, however, is that the court will often hear these matters on an expedited basis.

If a court believes the corporation is suffering, or is in danger of suffering irreparable harm, it will consider conducting an expedited hearing on the appointment of a receiver.

C. Can you go in Ex Parte?

The Delaware Receivership rules are silent on this point. If you are unable to obtain the appointment of a Receiver ex parte, the plaintiff may be able to obtain an expedited hearing on whether the court should appoint a Receiver *pendent lite* (pending the outcome of the litigation to appoint a Receiver) or enter other injunctive relief to prevent the debtor from participating in certain allegedly wrongful or harmful conduct while the Receivership proceeding is adjudicated. In addition, the court can, at any time, issue an order for the defendant entity to show cause as to why a Receiver *pendent lite* should not be appointed.

III. Loans and Advances:

There do not appear to be any such laws prohibiting loans or advances. Nonetheless, a Receiver should be very careful to obtain court approval to obtain the same. In addition, the Receiver must make it very clear that the Receiver is not personally liable for any loan that he or she receives on behalf of the entity in Receivership.

IV. Reporting:

As noted above, the Delaware Court of Chancery has the power to narrow or expand the scope of its rules depending upon the nature of the case – in other words, it can tailor the procedural rules to the realities of the case. That having been said, absent a modification of the rules, the court will generally require a certain level of reporting, including the following:

1. Under Court of Chancery Rule 161, within three months of appointment, the receiver must report to the court the state of affairs of the company and must submit a similar report at the end of each year of the receivership.

2. Under Court of Chancery Rule 151, the receiver has to file inventories of assets, lists of creditors (and the debts owed and their addresses) and shareholders (and their addresses).

3. Under Rule 162, the receiver is required to file reports, under oath, that are similar to monthly operating reports in bankruptcy. These reports show monies received, gains or losses on sales, and information on payments made (including information on to whom and for what purpose they were made).

4. Court of Chancery Rules 153 through 157 describe the claims filing and claims objection processes. Generally speaking, the clerk's office provides notice to creditors within fifteen (15) days after the list of creditors is filed. Creditors typically have sixty (60) days to file their claims. Exceptions (objections) to claims are generally filed within thirty (30) days after the claims filing deadline and are heard on a schedule determined by the Court. Several of these deadlines may be extended by the Court.

V. Sales During the Receivership/Liens Against Receivership Property:

Receiver May Have an Expanded Power to Sell Assets Free and Clear of Liens - It is clear that, where a property is encumbered by a lien that is subject to dispute and the property subject to the lien is of the type that will deteriorate in value, the Receiver has the power to sell property free and clear of all liens and pay the proceeds to the court. (Apparently, the net proceeds of sale are then paid to the lien holder if its underlying lien and claim are deemed to be valid). Although the Receivership laws do not address whether the Receiver generally has the right to sell property free and clear of liens, statutes arguably seem to imply as much.

VI. Owners Associations:

No information provided.

VII. Construction Related to Receivership Property:

No information provided.

VIII. Ending the Receivership:

Generally speaking, under Court of Chancery Rule 165-168, there is a procedure for filing final accounts and obtaining a discharge of the Receiver in the case. Under this procedure, the Register in Chancery sends out a notice to creditors giving them an opportunity to object to the final accounting within a time period fixed by the Court. While, theoretically, it is possible to obtain a waiver of these requirements, it is sound practice for the receiver to obtain approval of some type of final accounting and a formal discharge.

It is also noteworthy that the termination of the receivership should occur when, in the discretion of the court, the purpose of the receivership has been fulfilled and courts are reluctant to terminate receivership at the request of interested parties who may have ulterior motives. Furthermore, can either be appointed long after the corporation has completed its mandatory three-year wind-down period under section 278 of the DGCL. Court

directs appointment of a receiver for dissolved Delaware corporation to defend liability suit and, if liable, access contingent asset in the form of insurance policy proceeds arising from such liability.

IX. Miscellaneous:

A. The Delaware statute, on its face, generally gives the Receiver broad power to take charge of the company and its business, collect and defend claims and otherwise take various actions. However, certain case law suggests that the Receiver should be careful in not exercising such powers broadly absent approval from the Court. Furthermore, Court of Chancery Rule 158 requires that fifteen (15) days' notice is needed before corporate assets may be sold – it is a good idea to provide such notice and also obtain court approval for such sales (particularly those sales that are not in the ordinary course of business).

B. The level of formality of the proceeding may vary depending upon which Chancellor (judge) hears the case. In any event, one can be assured that, if a difficult, time-sensitive or nuanced issue arises, the Chancellor appointed will likely be an experienced and sophisticated jurist and will generally be amenable to hearing and deciding the matter quickly. Delaware courts tend to take care of business quickly and in a highly competent manner.

C. Delaware Receivership law and practice does have a number of attractive features, including the following:

1. Flexibility – Delaware's rules and procedures are extremely flexible, allowing the parties and the court to tailor the procedural requirements of the law to the realities of the case.

2. Outstanding Judiciary and Ready Venue – Delaware's Court of Chancery is the premier venue in the country for resolving corporate disputes and these disputes are generally adjudicated quickly and in an expert manner. Furthermore, the Court of Chancery will have jurisdiction over any entity that

is incorporated in Delaware, as so many entities are. Thus, Delaware likely has jurisdiction over a broad array of cases (note that the court has jurisdiction over all personal property of the entity in Receivership and all real property located in Delaware – if real property is located elsewhere, it must be administered in some other jurisdiction and/or proceeding).

3. Receiver's Ability to Reject/Disavow Executory Contracts - It appears that a Receiver has the power to disavow (or, in bankruptcy parlance, "reject") executory contracts. This is an important power that, typically, may only be exercised in a bankruptcy proceeding. It is good practice to seek an order of the Court allowing such a rejection (or approving a procedure by which rejections shall be accomplished) on notice to the contract counterparty.

Relevant Codes, Statutes or Case Law:
Production Resources Group, L.L.C. v. NCT Group, Inc., 863 A.2d 772, 782 (Del. Ch. 2004)
Production Resources, 863 A.2d at 784
Carlson v. Hallinah, 925 A.2d 506, 543 (Del. Ch. 2006)
Dupont v. Standard Arms Co., 81 A. 1089 (Del. Ch. 1912); Conover v. Sterling Stores Co., 120 A. 740 (Del. Ch. 1923); 8 Del. C. § 279; 8 Del. C. § 291-303

Washington D.C.

Foreclosure Summary

Security Instrument	Deed of Trust
Judicial	Yes, but rare
Non-Judicial	Yes
Initial Public Notice	Publication Notice Required
Time Frame	Est. Minimum of 90 days
Redemption Period	No
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Possible, but not preferred
Approximate Time for Appointment	2 days - 6 weeks
Who or What can act as Receiver	No Restrictions Given
Specific Receiver Requirements	Must post bond to prior to commencing duties
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes, Case by Case Basis

Foreclosure:

I. General Information:

Judicial foreclosures are allowed in D.C. but are rare. The more common way to foreclose is through the non-judicial foreclosure process.

II. Judicial Foreclosure Basics:

Yes, but more commonly by power of sale granted in deed of trust. If sold by judicial foreclosure, the court may also enter a judgment in the same action for a deficiency.

III. Non-Judicial Foreclosure Basics:

In order to foreclose, a lien instrument must have been properly recorded and there must be uncured defaults existing beyond any grace period to cure default. Every deed of trust or mortgage encumbering residential real property must be recorded with an information form attached to it, unless note owner has elected to foreclose by judicial foreclosure rather than power of sale foreclosure, and attaches certification to that effect. Notice of Commencement of Foreclosure under Power of Sale shall be on form promulgated by Mayor, recorded within appropriate time limits (30 days), mailed to every borrower and owner within same time limits, mailed to every subordinate interest holder within same time limits, and served upon owner at least 30 days in advance of foreclosure sale auction.

IV. Guidelines for Power of Sale:

There are no official guidelines, but the following is a checklist which covers common practice in D.C.:

A. Review loan documents carefully to determine the following:

1. Notice requirements (including method notice is to be given);
2. Applicable notice and cure periods; and
3. Other special requirements with respect to FNMA/FHLMC, FHA, or VA loans.

B. Prepare and send notice of default to borrower and any guarantors.

C. Prepare and send notice of acceleration to borrower and any guarantors.

D. Appoint substitute trustee(s).

E. Order title report/commitment for the property.

F. Arrange date of sale with lender, auctioneer, and trustee.

G. Prepare 30-day notice of sale (on current Recorder of Deeds form):

1. Send to borrower (and any guarantors) by certified mail and first-class mail.
2. File with the D.C. Recorder of Deeds (retain recordation receipt).
3. Send to all other persons with a record interest in the property by certified mail and first-class mail.

H. If necessary, provide notice of the sale to the Internal Revenue Service of foreclosure sale in accordance with the instructions contained in IRS Publication 796 (notice to be provided no later than 25 days prior to sale date for liens filed 30 days before the sale).

I. Prepare foreclosure advertisement (to be published in a newspaper of general circulation at least five times within the 10 business days prior to the sale).

J. Proof foreclosure advertisement prior to publication. Obtain all issues to ensure that the advertisement actually appears on the dates requested.

K. Order title bring-down to be performed immediately prior to the sale.

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L. Check Bankruptcy Court for filing by property owner.

M. Ensure that trustee will attend the sale.

N. Attend auction sale:

1. Qualify and register all bidders.
2. Trustee makes any announcements regarding the property or the sale. Ask whether anyone has questions.
3. Auctioneer reads foreclosure advertisement.
4. Property is sold to the highest bidder.
5. Trustee executes contract with purchaser.

O. At settlement, prepare trustee's deed and, if necessary, seek the release of the IRS's right to redeem.

V. Power of Sale Guidelines as Represented in the Security:

Courts have said: The mortgagee has no title or estate in land, but only a lien for the security of the debt. Under D.C. law, a mortgagor's equity is considered to be the real and beneficial estate. Deed of Trust on realty was equivalent of a mortgage and conveyed legal title to trustees with equitable title remaining in the grantors. Trustee under a deed of trust owes duties both to the note holder and to the borrower. Where mortgage provides that upon default trustees are empowered to sell premises, default gives rise to right in holder to demand sale.

VI. Guidelines for Foreclosure when there is No Power of Sale:

Must commence an action in D.C. courts, which is rarely done.

VII. Foreclosure when Instrument Contains No Power of Sale:

Available, but rarely done.

VIII. Any Additional Satisfaction Permitted Under Continuing Power of Sale:

No case law directly on point. But see Looney v. Quill, 14 D.C. 51 (D.C. Sup. 1883) it discusses different parcels of land subject to a common encumbrance are conveyed to successive purchasers at different dates, the proceeds of the land must be applied in the inverse order of alienation to satisfy the common encumbrance.

IX. Sale by Power of Sale when the Instrument is Silent as to the Place or Terms of Sale:

Must apply to Court for direction.

X. Notice of Sale and How Notice is Given:

See above. Form available on the website of the Recorder of Deeds in PDF format.

Typically notice is handled by auctioneer, although a copy must also be given to Mayor or designee. Copies must be served on owner at current as well as property address. Neither statutory law nor court decisions require notice on junior lienholders.

XI. Place and Time for Conducting Foreclosure by Power of Sale:

Sale governed by provisions of deed of trust, custom and practice in the District of Columbia codes.

Relevant Codes, Statutes or Case Law:

D.C. Code § 42-815 through 42-818; 2 D.C. Practice Manual Ch. 23 Real Property, at p. 23-84 (16th ed. 2007).

Vowell v. Thompson, 3 D.C. 428 (1829); In re 5028 Wisconsin Ave. Associates L. P., 167 B.R. 699 (Bankr. D.D.C. 1994); Barbour v. Baltz, 146 A.2d 905 (D.C. Mun. App. 1958); S&G Inv. Inc. v. Home Fed. Sav. & Loan Ass'n, 505 F.2d 370 (D.C. Cir. 1974). Maynard v. Sutherland, 313 F.2d 560 (D.C. Cir. 1962); Jackson v. Finance Corp. of Washington, 41 F.2d 103 (App. D.C. 1930); Pappas v. Eastern Sav. Bank, 911 A.2d 1230 (D.C. Cir. 2006)

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Receivership:

I. General Information:

Receiverships in DC are governed by statutory and general equitable principals. Pursuant to the DC Statute, a Receiver may be appointed to take possession of:

A. property which has been attached;

B. assets of a bank that has discontinued operations for 60 days or is in liquidation;

C. assets on dissolution of corporations; and

D. rents for master metered apartment buildings when utility payments are delinquent. A Receiver may also be appointed under certain conditions to operate a nursing home or other similar facility in order to safeguard rights of its residents. Until a Receiver has given a bond as required by the terms of his appointment, he cannot dispossess a party in possession.

II. Appointing the Receiver:

A. The Basics:

The Receiver can be sought after a default. The process is similar to Federal Rule of Civil Procedure 66. Courts have equitable power to appoint Receiver for good cause. Appointments made in a commercial context on a case by case basis.

B. Time Frame for Appointment:

Absent a genuine emergency, a hearing can vary from a few days to a few weeks.

C. Can you go in Ex Parte?

Although possible, most judges refuse ex parte appointment of a Receiver unless a genuine emergency exists and there is a good reason for not providing notice. Ex parte orders are subject to swift review and reversal.

III. Loans and Advances:

Generally, loans should be approved by the Court. Any order on funding should include protections similar to those available to Section 364 of the Bankruptcy Code. The use of future advance provisions in loan documents may provide additional protection.

IV. Sales During the Receivership:

The process is to seek the court's permission, which can be sought in connection with the petition to appoint the receiver or by a separate motion. Applications and orders to sell property should be modeled on those typically submitted pursuant to Section 363 of the Bankruptcy Code. Counsel should be consulted to determine whether an exercise of a power of sale or other foreclosure would be a better strategic option than a sale out of the receivership estate, particularly for commercial property.

There is no statutory authority. Courts will consider applications to sell property on a case by case basis.

V. Liens Against Receivership Property:

Lien issues and priorities can be complicated and counsel should be consulted. A lien search should be conducted early in a matter to help determine priorities and identify any potential issues. Appointment of a receiver does not modify liens or change lien priorities.

VI. Owners Associations:

The receivership does not alter the liens or rights established/obtained by an owners association. Such rights are handled in accordance with applicable state law.

VII. Construction Related to Receivership Property:

In either the original petition for appointment of a receiver or a subsequent application, the party(ies) should seek approval from the court. Such a request would likely include relief modeled after Sections 363 and 364 of the Bankruptcy Code. The use of

future advance or other provisions in loan documents may provide additional authority and/or protection.

VIII. Ending the Receivership:

There is no set procedure, but the Receiver shall not be dismissed except by order of the court.

IX. Miscellaneous:

A. D.C. Courts may look to surrounding jurisdictions for authority when none exists in D.C.

B. A Receiver may sue to set aside fraudulent transactions.

Relevant Codes, Statutes or Case Law:
D.C. Code §§ 16-518, 26-103, 28:3-103 through 3-107, 42-3303, 44-1002.02 through 44-1002.10;
Federal Rule of Civil Procedure 66; Sup. Ct. Civ. R. 66.
Phillips v. Smoot, 12 D.C. 478 (1882); Grant v. Phoenix Mut. Life Ins. Co., 121 U.S. 105 (1887); Cake v. Woodbury, 3 App. D.C. 60 (1894); Wood v. Grayson, 16 App. D.C. 174 (1900); Barley v. Gittings, 15 App. D.C. 427 (1899); Camp v. Canelacos, 131 F.2d 236 (D.C. Cir. 1942).

Florida

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	No
Initial Public Notice	Complaint
Time Frame	180-360
Redemption Period	Yes-brief and subject to court procedure
Deficiency	Yes – no one action rule

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes
Approximate Time for Appointment	2 days to 4 weeks
Who or What can act as Receiver	An Individual or non-corporation business entity
Specific Receiver Requirements	No restrictions – except must be neutral, impartial, and cannot be a corporation
Is there any approval list for Receivers	Generally no, but yes with some particular judges
Out of State Receivers Allowed	Depends on the Judge

Foreclosure:

I. General Information:

Florida law does not provide for any form of non-judicial foreclosure procedure. All mortgage foreclosures in Florida must be filed and prosecuted as civil law suits, usually in Florida's circuit courts, which are the state trial courts with general jurisdiction in disputes where the amount in controversy exceeds $15,000.00. However, if diversity of citizenship is present and the amount in controversy is in excess of $75,000.00, the action can be prosecuted in federal district court. In general, a mortgage foreclosure suit is treated no differently than any other type of civil suit, and is subject to the same rules governing discovery, including depositions, motion practice, affirmative defenses, counterclaims, trial, and rights of appeal as any other civil action. A hotly contested mortgage foreclosure in Florida can conceivably take more than a year to resolve, not including any subsequent appeal.

II. Judicial Foreclosure Basics:

All foreclosures in Florida are judicial. The plaintiff in a Florida mortgage foreclosure is either the holder of the mortgage and the underlying promissory note or other debt obligation secured by the mortgage, or a nonholder in possession who has the rights of a holder, or someone not in possession of the note and mortgage who is authorized to enforce the note pursuant to Article 3 of the Uniform Commercial Code. The defendants to the foreclosure suit must include the owner(s) of the property, and usually also include the borrower(s), if different from the owner(s), any guarantors, all junior lienholders, and those tenants with leasehold or possessory interests arising after perfection of the mortgage lien whose interests the plaintiff wishes to eliminate.

The identities of the parties-defendant to the suit are determined by a title search, typically called a foreclosure title commitment, obtained from a title insurance agency. The commitment identifies all of the parties to be named as defendants in the foreclosure suit. If the identified defendants are named and served, and the foreclosure is prosecuted to judgment in accordance with Florida law, the title insurance company

providing the commitment will then issue a title policy in accordance with the commitment to the plaintiff, or the plaintiff's assignee, if the plaintiff is the winning bidder at the foreclosure sale.

A notice of *lis pendens* is recorded at the outset of the suit in the public records of the county or counties in which the real property is located. Any interest arising after the recording of the notice of *lis pendens*, whether an ownership interest, a possessory interest, or a lien interest, and any unrecorded, non-possessory interest arising at any time, is automatically foreclosed unless the party asserting the interest affirmatively intervenes in the pending foreclosure suit within thirty (30) days of the recording of the notice of *lis pendens*.

III. Non-Judicial Foreclosure Basics:

Non-Judicial Foreclosures are not available in Florida.

IV. Guidelines for Power of Sale:

Power of Sale is not available in Florida.

V. Notice of Sale and How Notice is Given:

A typical judicial foreclosure sale in Florida state court is governed by Section 45.031, Florida Statutes. Per that statute, the date, time and place of the foreclosure sale are generally set in the Final Judgment of Foreclosure. Thereafter, a Notice of Sale is published once a week for two consecutive weeks in a general circulation periodical in the county in which the subject real property is located. The last publication of the Notice of Sale must be at least five days before the foreclosure sale. The foreclosure sales are generally public auctions, usually held at the county courthouse, and conducted by a Clerk of the Circuit Court.

Section 45.031 provides that the winning bidder must deposit 5% of the winning bid immediately upon closing of the bidding. Most Clerks require by local administrative order that the remaining 95% of the bid amount be paid in cash or cashier's

check later that same day, usually at either 2:00 p.m., 4:00 p.m., or 5:00 p.m., depending on the county involved.

The foreclosure sale is automatically confirmed, and the Certificate of Title, the operative deed instrument, is issued by the Clerk to the winning bidder on the eleventh day after the foreclosure sale if no objections to the sale have been filed. If objections are filed within ten (10) days after the foreclosure sale, the Certificate of Title is not issued until the objections are considered and overruled by the Court.

If the foreclosure action is prosecuted in federal court, consultation with a title company is recommended so that the foreclosure sale procedure is such that a title company is willing to insure title upon conclusion of the process. Foreclosure sales in federal court in Florida are usually conducted by the U.S. Marshal, or by a special master or receiver appointed by the court, and not by the Clerk of the Court. A federal foreclosure judgment in Florida probably needs to address in great detail how and where the sale will be advertised, who will conduct the foreclosure sale, where and when the sale will be held, what the bidding and payment procedure will be, how objections will be dealt with, how the title will be transferred, and how and when the sale will be confirmed by the court.

In general, in order to foreclose an interest of a party in the subject property, the party must be joined as a defendant in the judicial foreclosure, and thereby receives notice of every development in the foreclosure action, including the date, time and place of the foreclosure sale. The primary exception to this requirement that a party be joined in order to eliminate their interest is for parties whose interests are automatically eliminated by operation of the notice of lis pendens, as discussed above.

Receivership:

I. General Information:

Perhaps the most important thing to understand about Florida receivership law is that the creditor has NO absolute right to the

appointment of a receiver, NO right to select the receiver in the event the court determines that a receiver should be appointed, and NO right to determine the powers and duties of the receiver once appointed. The appointment of a receiver, the selection of the receiver, and the powers and duties of the receiver are all within the sound discretion of the court. There is no list in statute or in case law of a Florida receiver's customary powers, duties and obligations. The receiver's powers, duties and obligations must be specified in the order appointing the receiver on a case-by-case basis.

Other than the provisions of Rule 1.620 of the Florida Rules of Civil Procedure – providing that the receiver is required to conduct an initial inventory of the receivership property, and subsequent inventories every 3 months unless the court orders otherwise, and Section 660.41, Florida Statutes, which provides in part that a corporation cannot act as a receiver, unless the corporation is a bank or association and trust company incorporated under the laws of Florida, the appointment of receivers in Florida is a creature of common law.

II. Appointing the Receiver:

A. The Basics:

The appointment of a receiver is typically sought via a motion for appointment filed with the court and heard by the judge to whom the underlying foreclosure or other case is assigned. The motion spells out the grounds for appointment. The primary focus of the court is on whether the appointment of the receiver will prevent the subject property from being wasted or subjected to a serious risk of loss. The court has great discretion over whether to appoint a receiver, but the case law generally holds that the mortgagee must show that the secured property is being wasted or subjected to a serious risk of loss, or that rents or revenues from the property are being diverted and the value of the property is less than the mortgage debt. Two grounds for appointment of a receiver often used in other states - (a) the contract / loan / mortgage contains a clause giving the creditor an absolute, unfettered right to appointment of a receiver, and (b) the loan is in default, or matured - carry little with Florida courts.

Instead, the focus in Florida is on whether the appointment of the receiver will prevent the subject property from being wasted or subjected to a serious risk of loss.

If appointed, the receiver's powers and duties, beyond those specified in Rule 1.620 above, are spelled out in the court's order of appointment.

Not only does the court have vast discretion over the appointment of a receiver, but also over the specific receiver to be appointed. The court is under no obligation to select the receiver nominated by the moving plaintiff.

The receiver is required to post a cash or surety bond to insure performance of his / her duties. The amount of the bond is discretionary with the court. While not a hard and fast rule, many courts will tie the amount of the bond to the monthly gross cash flow of the property in receivership, or some multiple thereof.

While not common, the court also has discretion to require the plaintiff seeking the receiver to post a cash or surety bond conditioned on the payment of damages to the defendant if the appointment of the receiver is ultimately determined to have been improper. The amount of this bond, when required at all, is discretionary with the court.

B. Time Frame for Appointment:

In general, the time to obtain the hearing on a motion for appointment of receiver is dependent on the schedule of the judge assigned to the underlying foreclosure case. In true emergencies, an expedited hearing can usually be obtained within 24 to 48 hours. Absent a true emergency, the time to obtain a hearing may vary from a few days to a few weeks.

C. Can you go in *Ex Parte*?

Yes, *ex parte* appointment is possible. But most judges refuse *ex parte* appointment of a receiver unless a genuine emergency exists and there is good reason for not providing the other parties

to the suit with reasonable notice. *Ex parte* appointments are subject to swift review and reversal, and may also occasion the court to order a larger bond than would be required with an appointment with notice.

III. Loans and Advances:

There are no preset laws or codes so it is important to include such language in the Order Appointing the Receiver. It is common for an order appointing a receiver to allow the receiver to raise money by either issuing receiver certificates, or borrowing directly from the plaintiff or others.

IV. Sales During the Receivership:

In Florida, sales by receivers in real property foreclosures are not the norm. However, because of the degree of discretion afforded courts in appointing receivers, a Florida court can authorize a receiver to sell property during a receivership. There is no specified statutory or common law process for sales of property by receivers. Thus, the process to be followed is determined on a case-by-case basis and is typically spelled out in detail in the order authorizing the receiver sale.

In a real estate foreclosure, as a practical matter, a court is much more likely to allow a sale by the receiver if there are no actively objecting defendants. Thus, if the borrower is agreeable to the process, it is probably more likely to be permitted by the court.

There is some case law, but no real statutory authority, permitting receivers to sell property during the receivership. The court has virtually unlimited discretion in determining whether, and how, to permit the receiver to sell the property. In particular, there is no Florida state law version of a sale free and clear of liens of the type permitted under Section 363 of the Bankruptcy Code.

Within the last 5 years, several title insurance companies in Florida have disseminated bulletins expressing a general reluctance to insure titles obtained via state court receiver sales in lieu of more traditional foreclosure sales. However, it is still

possible in some instances to conduct foreclosure sales via receiver, particularly if the borrower consents.

V. Liens Against Receivership Property:

Because Florida does not have a state statutory version of Section 363 of the Bankruptcy Code, an order authorizing a sale of property, especially real property, by a receiver should specifically address how the sale will affect liens. It is a good practice to run a proposed order authorizing a sale of real property by a receiver past the appropriate title insurance company to make sure that the contemplated sale procedure will pass muster with the title company, i.e., that the resulting sale will pass clean and insurable title to the purchaser. Typically, in considering the insurability of a receiver sale of real property in lieu of a more traditional foreclosure sale, the title insurance company will consider, among other things:

A. Whether and how the sale process provides for notice of the sale to junior lienholders, borrowers and guarantors;

B. Whether and how the sale process provides the various defendants an opportunity to object to the sale;

C. Whether and how the sale process provides for the rights of redemption of junior lienholders, the owner and the borrower to be preserved;

D. How the sale process provides for the passage of title to the property to be documented and evidenced in the public records;

E. Whether the order for sale provides for an acceptable confirmation procedure by which the court will enter a post-sale order confirming that the sale was valid and passed good title to the purchaser; and

F. Whether the owner has consented to the sale.

VI. Owners Associations:

A. General Information about Associations and Receivership:

There are no particular statutes regarding the interaction of the receiver with condominium or homeowners' associations. However, in the sub-section below are described a few statutes which are implicated when a receiver is appointed in certain circumstances there enumerated.

B. Dealing with Owners Associations during the Receivership:

It is dealt with on a case-by-case, property-by-property basis. The order appointing the receiver should spell out in detail how the associations are to be dealt with. If the association is developer-controlled, the receiver is typically given more power over the association than if it is controlled by owners of individual units.

Section 718.127, Florida Statutes provides that upon the appointment of a receiver by a court for any reason relating to a condominium association, the court shall direct the receiver to provide to all unit owners written notice of his or her appointment as receiver. Such notice shall be mailed or delivered within 10 days after the appointment. Notice by mail to a unit owner shall be sent to the address used by the county property appraiser for notice to the unit owner.

Section 718.301(1), Florida Statutes provides that when unit owners other than the developer own 15 percent or more of the units in a condominium that will be operated ultimately by an association, the unit owners other than the developer shall be entitled to elect no less than one-third of the members of the board of administration of the association. Unit owners other than the developer are entitled to elect not less than a majority of the members of the board of administration of an association when a receiver for the developer is appointed by a circuit court and is not discharged within 30 days after such appointment.

Section 720.313, Florida Statutes provides that upon the appointment of a receiver by a court for any reason relating to a homeowners' association, the court shall direct the receiver to provide to all members written notice of his or her appointment as receiver. Such notice shall be mailed or delivered within 10 days after the appointment. Notice by mail to a member shall be sent to the address used by the county property appraiser for notice to the owner of the property.

VII. Construction Related to Receivership Property:

This is dealt with on a case-by-case, property-by-property basis. The order appointing the receiver should spell out in detail the procedure, protocol and logistics for the receiver to complete construction.

VIII. Ending the Receivership:

It depends on the order appointing Receiver. Typically an order terminating the Receivership and providing for the dissolution of the Receiver's bond is entered.

Relevant Codes, Statutes or Case Law:

Rule 1.620, Florida Rules of Civil Procedure; Section 660.41, Florida Statutes

Florida has hundreds of cases governing virtually every facet of receivership law. That is because the appointment, maintenance and dissolution of receiverships are largely a creature of common law. This is one of the reasons that receivers often employ counsel in Florida.

Georgia

Foreclosure Summary

Security Instrument	Security Deed/ Mortgage
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Publication
Time Frame	90 days
Redemption Period	No
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes
Approximate Time for Appointment	10 days
Who or What can act as Receiver	Individual or Entity
Specific Receiver Requirements	None
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

The laws of the State of Georgia provide for both judicial foreclosure and non-judicial foreclosure (by a power of sale). Non-judicial foreclosures by power of sale are the most common form of foreclosure in Georgia.

II. Judicial Foreclosure Basics:

The basic forms of judicial foreclosure available in Georgia are:

A. foreclosure in equity (for mortgages, deeds to secure debt or mortgage substitutes deemed to be "equitable mortgages"),

B. statutory foreclosure of a mortgage, and

C. foreclosure of a deed to secure debt by execution and levy of a judgment.

III. Non-Judicial Foreclosure Basics:

Non-judicial foreclosure is available in Georgia, provided that a power of sale is granted by the debtor to the creditor in the subject security instrument. Judicial confirmation of a non-judicial foreclosure by power of sale is not required unless the creditor seeks a deficiency judgment against the debtor.

IV. Guidelines for Power of Sale:

Subject to any contractual agreements between the creditor and debtor to the contrary (except for anything to the contrary with respect to the requirements for the notice of sale to the debtor, the advertisement of the sale, the time, place and manner of the sale and the method of transferring title), creditors must comply with the rules governing the following subjects in a foreclosure by power of sale:

A. The timing, form, content and method of delivery of the notice of the sale to be provided to the debtor,

B. The manner of advertising the sale and the content of such advertisement,

C. The date, time and place of the sale,

D. That the sale must be conducted fairly and in good faith, and

E. The method of transferring title to the property. There is no post-foreclosure statutory right of redemption provided to the debtor.

V. Power of Sale Guidelines as Represented in the Security Instrument:

A power of sale is a power that the creditor has to help it exercise rights and remedies against the security for the loan. It is not security for the loan, though. Foreclosure by power of sale is conducted largely pursuant to the terms of the underlying security instrument and is primarily governed by contract law. Courts give strong judicial deference to the parties' intentions so long as the power is fairly exercised. The parties have great latitude to structure the foreclosure sale, but the sale must comply with statutory conditions that require the sale to be conducted in the same time, place, and manner as sherriff's sales and that proper notice be given to the owner of the property.

VI. Guidelines for Foreclosure when there is No Power of Sale:

A creditor may petition a court in the county in which the debtor resides for the foreclosure in equity of the property pursuant to the court's inherent equitable powers. The holder of any mortgage may foreclose the mortgage in equity or at law. A personal judgment may be awarded against the debtor as part of a foreclosure in equity.

A creditor may file a petition in the superior court of the county in which the property is located in order to foreclose a mortgage at law. The court grants a rule nisi requiring that principal, interest and costs be paid. The rule can either be published twice a month for two (2) months or be served on the debtor thirty (30) days or more before the date payment is to be made. The court may not grant a personal judgment against the debtor unless the debtor receives personal service. The debtor may respond to the

rule by raising defenses at law or in equity, after which time a jury trial will be available. When the court grants a judgment in favor of the creditor, the creditor will enforce the judgment through execution and levy.

Judicial foreclosure of a deed to secure debt involves obtaining a judgment from a court of a suit on the note, followed by sheriff's execution and levy of the judgment.

All foreclosure sales conducted by judicially appointed Receivers are subject to confirmation. The debtor and junior lienholders must be made parties to all judicial foreclosure proceedings.

VII. Foreclosure when Instrument Contains No Power of Sale:

The creditor could pursue a judicial foreclosure.

VIII. Any Additional Satisfaction Permitted Under Continuing Power of Sale:

A creditor can pursue a deficiency judgment against a debtor after having conducted a power of sale foreclosure to obtain the difference between the outstanding indebtedness under the loan and the amount of the highest and successful bid at the foreclosure sale. This requires filing a confirmation proceeding following a non-judicial foreclosure in which proceeding the creditor must establish that the price realized at the foreclosure sale is at least equal to the fair market value of the property at the time of the sale and that the notice, advertisement, and regularity of the sale satisfy the legal standards.

IX. Sale by Power of Sale when the Instrument is Silent as to the Place or Terms of Sale:

In any foreclosure by power of sale, the creditor must conduct the sale fairly and in good faith. This obligation to conduct the sale fairly is owed to the debtor as well as junior lienholders that have an interest at stake.

To satisfy the fairness and good faith requirement, the creditor must ensure that nothing is done to chill the bidding, which is ultimately a question of fact for a jury to determine based on many considerations. Additionally, there is no requirement that the sale price be at least equal to the fair market value of the property, unless the creditor pursues a deficiency judgment against the debtor. Breaching the duty to conduct the sale fairly and in good faith creates a basis to set aside the foreclosure sale as well as a cause of action for the debtor for damages.

There is no inherent prohibition preventing the creditor from purchasing the property at the foreclosure sale. The creditor may purchase the property at the foreclosure sale as long as the security instrument provides such authorization. Permitting the creditor to purchase the property does not violate the creditor's obligation to conduct the sale fairly and in good faith. Similarly, nothing prevents the current owner from purchasing the property at the foreclosure sale.

The security instrument governs how the power of sale foreclosure proceeds are distributed. If the security instrument is silent as to the application of surplus funds, then equity requires that such funds be paid to the debtor.

The place of the sale, whether or not specified in the security instrument, is required to be the courthouse of the county where the property is located.

X. Notice of Sale and How Notice is Given:

The advertisement of the sale must state the date, time and place of the sale, and a full and complete description of the property to be sold, including a legal description for the real property and a description of any personal property that is collateral pursuant to the security instrument. It is advisable to identify the grantor of the security deed and the current owner of the property. Any person who may be in possession of the property must be identified. If the creditor consents to an assumption of the property, then the new owner must also be identified in the advertisement. Any liens that will continue to encumber the

property after the foreclosure sale must also be identified in the notice of sale.

In addition to any contractual requirements between the creditor and debtor regarding the notice of sale, in order to foreclose on either a residential or non-residential loan, the foreclosing creditor must publish an advertisement in the official publication of the county where the subject property is located at least once a week for four (4) consecutive weeks immediately prior to the sale. The Secretary of State of Georgia maintains a list of the official publication for each county in Georgia where the advertisement must be published.

The foreclosing creditor must also provide written notice of the foreclosure to the debtor at least thirty (30) days prior to the foreclosure sale, subject to the waiver of notice by the debtor, which waiver cannot be set forth in the security instrument or be executed contemporaneously with the security instrument. Such notice must include the name, address and telephone number of the person or entity that has the authority to negotiate an amendment to or modification of the security instrument, must contain a copy of the advertisement of sale, and must be sent by registered or certified mail or statutory overnight delivery, return receipt requested to either the property address or to the address(es) designated by the debtor. Actual notice is not required. For "high-cost" residential loans, a creditor must provide notice to the debtor of its intent to foreclose at least fourteen (14) days prior to the publication of the foreclosure advertisement. Also, for such "high-cost" residential loans, an additional notice of default with a thirty (30) day right to cure period is also required to be provided at least thirty (30) days prior to the date on which the creditor intends to accelerate and initiate foreclosure proceedings or other actions to seize the residence.

Notice must also be provided to a guarantor if the creditor seeks to recover attorney's fees in either residential or non-residential circumstances.

XI. Place and Time for Conducting Foreclosure by Power of Sale:

A foreclosure by power of sale must occur between 10:00 a.m. and 4:00 p.m. on the first Tuesday of the month at the county courthouse in which the property is located.

Relevant Codes, Statutes or Case Law:
O.C.G.A. § 7-6A-5(11) and (13); O.C.G.A. § 9-13-140; O.C.G.A. § 9-13-142; O.C.G.A. § 23-2-114; O.C.G.A. § 23-4-35; O.C.G.A. § 44-14-49; O.C.G.A. § 44-14-161; O.C.G.A. § 44-14-162; O.C.G.A. § 44-14-162.1; O.C.G.A. § 44-14-162.2; O.C.G.A. § 44-14-162.3; O.C.G.A. § 44-14-180(1); O.C.G.A. § 44-14-187.

Cadwell v. Swift & Co., 174 Ga. 313, 162 S.E. 814 (Ga. 1932); You v. JP Morgan Chase Bank, 293 Ga. 67, 743 S.E.2d 428 (Ga. 2013); CML-GA Smyrna, LLC v. Atlanta Real Estate Investments, LLC, 294 Ga. 787, 756 S.E.2d 504 (Ga. 2014).

Receivership:

I. General Information:

The Official Code of Georgia Sections 9-8-1 through 9-8-14 provide for the appointment of a Receiver in a variety of circumstances, and those of most interest to a lender or servicer can be summarized as follows:

A. A Receiver may be appointed to take possession of and hold any assets charged with the payment of debts where there is manifest danger of loss, destruction, or material injury to those interested.

B. A Receiver may be appointed when there is a fund or property with no effective management.

II. Appointing the Receiver:

A. The Basics:

A verified complaint and motion would be filed after the default or action requiring the appointment of a Receiver has occurred. Usually, this process is done with notice to the borrower having charge of the assets, and the other party is able to respond. All persons that seek equitable remedies against receivership property must become parties to the proceedings through intervention.

The terms on which a receiver is appointed are in the discretion of the court, and large discretion is vested in the trial judge in granting interlocutory injunctions and appointing Receivers to maintain the status until final hearing. A bond may be required in the discretion of the court. The appointment of a Receiver will prevent a creditor from unilaterally exercising its power of sale.

Receivers may be appointed only in clear and urgent cases. For example, insolvency of the debtor combined with inadequacy of the security to cover the debt will warrant appointment of a Receiver.

A Receiver is an officer of the court and must discharge his duties according to the orders and decrees of the appointing court at all times.

B. Time Frame for Appointment:

A Receiver's appointment is subject to the court's schedule. Generally, a Receiver is appointed within 10 days of the hearing on the motion to appoint.

C. Can you go in Ex Parte?

Yes. Under extraordinary circumstances, the court may appoint a Receiver before and without notice to the borrower if there is a showing that the collateral is in jeopardy.

III. Loans and Advances:

There are no pre-set laws, codes or case law on such matters.

IV. Sales During the Receivership:

The Receiver can sell property if authorized by a court order. A sale during a receivership must be confirmed by the trial court. Unless otherwise provided in the sale order, liens held by parties to the proceeding will be eliminated by a Receiver's sale and transferred to the funds received by the sale.

V. Liens Against Receivership Property:

There are no specific statutes that deal with liens during the receivership and liens are dealt with on a case by case basis.

VI. Owners Associations:

There are no specific statutes that deal with Owners Associations during the receivership and issues involving Owners Associations are dealt with on a case by case basis.

VII. Construction Related to Receivership Property:

The Receiver would need a court order to permit construction and financing of construction.

VIII. Ending the Receivership:

The order of the court will determine the process to close the receivership. The Receiver is at all times subject to the court's orders and may be brought to account and removed at its pleasure. The Receiver needs to present a final report and there must be an order discharging the Receiver from his duties, unless the court's order allows otherwise.

Relevant Codes, Statutes or Case Law:

Adams v. Blalock, 136 S.E. 146 (Ga. 1926) (affirming appointment of Receiver to manage real estate and collect rents where maker of note was in default of obligations to make payments and was insolvent.) See also Ramey v. McCoy, 189 S.E. 44 (Ga. 1936) ("it is proper to appoint a Receiver to protect property sold on installment payments, the installments not paid, the interest and taxes accumulating.").
Sheffield v. Sheffield, 170 S.E. 83, 84 (Ga. 1933).
Blumenfeld v. Citizens' Bank & Trust Co., 168 Ga. 327, 147 S.E. 581 (Ga. 1929).
Wicks v. Cmty. Loan & Inv. Corp., 189 Ga. 620, 7 S.E.2d 385 (Ga. 1940).
Richardson v. Roland, 267 Ga. 34, 472 S.E.2d 301 (Ga. 1996).
O.C.G.A. § 9-8-6 and § 23-4-25.

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Hawai'i

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice Judicial	Compl
Initial Public Notice Non-Judicial	Recorded notice of
Time Frame Judicial	1 - 3 years
Time Frame Non-Judicial	6 months - 2 years
Redemption Period Judicial	Prior to foreclosure decree
Redemption Period Non-Judicial	3 business days before
Deficiency Judgment Judicial	Yes
Deficiency Judgment Non-Judicial	No

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte Allowed	Yes
Approximate Time for Appointment	7-35 days, depending on whether court shortens time for hearing
Who or What can act as Receiver	Individual or Company
Specific Receiver Requirements	No required credentials or bond payment necessary
Approval List for Receivers	No
Out of State Receivers Allowed	Yes; but out of state entities should register to transact business in Hawai`i
Absolute Immunity for Receivers	Yes

Foreclosure:

I. General Information:

Hawai`i is a lien theory mortgage state. While both judicial and non-judicial foreclosure remedies are available, lenders have relied solely on the judicial process since 2012. This shift is due to 2012 amendments to the non-judicial foreclosure statute and more recently, to a string of negative decisions by the Hawai`i Supreme Court arising from past non-judicial foreclosure practices.

Until recently, Hawai`i Homeowners Associations ("HOA's") and Associations of Apartment Owners ("AOAO's") had been primarily utilizing the non-judicial foreclosure statute. They, however, have also recently changed course due largely to recent class action suits challenging HOA or AOAO non-judicial foreclosure practices.

Hawai`i is unique in that it employs the Torrens system of land titles (Land Court) in addition to the modern abstract system (Bureau of Conveyances) for recording of conveyance documents.

II. Judicial Foreclosure Basics:

After default of more than 120 days, the of-record mortgagee must notify the mortgagor(s) of the default in writing, typically by certified mail. 12 CFR Part 1024.41(f)(1). The notice must disclose the amount necessary to cure the default and explain the right of the defaulting borrower(s) to cure. Hawai`i follows the lien theory of mortgages (HRS § 506-1) and, as such, the equitable right of redemption is terminated upon the entry of the decree of foreclosure.

To initiate the foreclosure action, the mortgagee files a complaint seeking foreclosure of the lien and appointment of a commissioner to market and sell the property. The mortgagee may consider bringing other derivative claims including, but not limited to, enforcement of guaranties, assignment of rents, and appointment of a receiver. The complaint is typically filed in the same judicial circuit in which the property is located.

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While Hawai`i is a notice pleading state (HRCP 8(a); *In re Genesys Data Techs., Inc.*, 95 Hawai`i 33, 41, 18 P.3d 895, 903-04 (2001)), a foreclosing mortgagee seeking a decree of foreclosure is now required to establish that it was entitled to enforce the promissory note at the time the complaint was filed. *Bank of Am., N.A. v. Reyes-Toledo*, 139 Hawai`i 361, 390 P.3d 1248 (2017).

The complaint must name the borrower(s) and all parties with any interest in the property, such as second mortgages and other junior lienholders. A title search should be completed prior to filing the complaint in order to properly name all interested parties. Where appropriate, the complaint should assert that the mortgage to be foreclosed is superior to the rights of all such junior lienholders. The complaint will typically seek not only an *in rem* judgment against the property in the foreclosure action, but also a personal judgment against the mortgagor(s) and/or guarantor(s) for any deficiency.

Pursuant to HRS § 667-5.5, the complaint must be served on the mortgagor(s) and any prior or junior creditors with a recorded lien. There are additional notice requirements for properties within planned communities, condominiums, and cooperative housing projects, even if a lien has not been recorded against the property. The foreclosing party must serve the complaint by personal service on the board of directors of the relevant association at the time proceedings are initiated. HRS § 634-21.5

Hawai`i also requires the attorney initiating the foreclosure to affirm, to the best of his or her knowledge and information, that the allegations in the complaint are supported by evidence and warranted by existing law. HRS § 667-18.

Most residential mortgage foreclosures are disposed of by summary judgment motion, resulting in the entry of findings of fact, conclusions of law, an order granting the motion, and a decree of foreclosure. The order will also identify the court-appointed commissioner tasked with inspection of the property, holding open houses, and noticing and conducting the

foreclosure auction. A decree of foreclosure is an appealable order. HRS § 667-51. A notice of appeal does not stay a foreclosure action, however, unless a bond, the amount of which is determined by the court, is posted. HRCP 62(d).

Recently, in *U.S. Bank N.A. v. Mattos*, No. SCWC-14-0001134, 2017 WL 2439437 (Haw. June 6, 2017), the Hawai`i Supreme Court raised the bar for declarations authenticating records of another entity (*e.g.*, a loan servicer authenticating records of a bank/trustee). To establish a declarant as a "qualified witness" under the hearsay exception, the declarant must now: (1) indicate that the other entity's business records were received and incorporated into the declarant's records, and (2) establish the declarant is familiar with the other business' record-keeping system.

Upon completion of the foreclosure auction, the commissioner files his/her report with the court. The attorney representing the mortgagee then moves for confirmation of the foreclosure sale. Following entry of the order confirming the sale of the property to the winning bidder, a commissioner's deed transferring title of the property to the party confirmed by the court is drafted and recorded. The order confirming sale is also a separately appealable order. Again, however, a notice of appeal of the Order does not stay the foreclosure action absent posting of a bond.

III. Non-Judicial Foreclosure Basics:

The power of sale foreclosure process is available as an alternative to foreclosure by action only when a mortgage contract includes a power of sale clause. Non-judicial foreclosures are governed by HRS §§ 667-21 through 41.

In a non-judicial proceeding, a notice of default and the intention to foreclose must be served on the borrower(s) and mortgagor(s), any prior or junior creditors with a recorded lien, and all other entities as required by HRS § 667-22. The mortgagor may also elect to convert the foreclosure to judicial action.

The default notice must state: the requirements to cure the default, the date by which the default must be cured (which must be at least 60 days after the date of the notice of default), that the mortgagee may publish public notice of the public sale if default is not cured, and contact information for a Hawai`i licensed attorney representing the mortgagee, a copy of the recorded mortgage, any subsequent mortgage agreements or assignments, a copy of the promissory note signed by the borrower, any endorsements and/or allonges on the note, and any documents that change the terms of the original mortgage agreement that were signed by the original parties or successors in interest.

The power of sale clause in a mortgage allows the foreclosure to be completed through public sale, however there remain strict requirements on the date and place of the sale, the publication of notice, and in a manner which is fair, reasonably diligent, and in good faith to obtain an adequate price. Before the deadline set in the notice, it must be recorded (in a manner similar to recording notices of pendency of action under HRS §§ 501-151 or 634-51). After recordation, any later purchaser or encumbrance of the property is deemed to have constructive notice of the foreclosure and is bound by its effects.

Publication must be made once each week for three consecutive weeks in the classified section of a newspaper of general circulation in the county in which the property is located. The sale can then take place no sooner than fourteen days after the date of the third publication of the Notice of Intent. Alternatively, publication can be made on a state website no less than twenty-nine days before the date of the public sale.

The borrower may cure the default no later than three business days before the published date of the public sale by paying the entire amount which would be owed to the foreclosing mortgagee if the payments under the mortgage agreement had not been accelerated. In addition, the borrower must pay the foreclosing mortgagee's attorney's fees and costs and all other fees and costs incurred by the foreclosing mortgagee related to the default, unless otherwise agreed to between the foreclosing

mortgagee and the borrower(s). There is no right to cure the default or any right of redemption after that time. If the default is timely cured, the public sale must be canceled.

IV. Power of Sale Foreclosure Guidelines:

See non-judicial foreclosure basics above. Non-judicial foreclosures are no longer being utilized by any party seeking to foreclose in Hawai`i.

V. Power of Sale Constitutes Part of Security:

Same as § IV above.

VI. No Power Foreclosure Guidelines:

Same as §§ IV and V above.

VII. Foreclosure when Instrument Contains No Power of Sale:

See § II, Judicial Foreclosure above.

VIII. Additional Satisfaction Permitted Under Continuing Power of Sale:

Same as §§ IV - VI above.

IX. Sale Under Power where Instrument Silent as to Place or Terms of Sale:

HRS § 667-25 regulates the time and place of the public sale of property. The sale must take place at the later of (1) at least sixty days after the public notice of the public sale is distributed under HRS § 667-27; or (2) at least fourteen days after the date of the publication of the third public notice advertisement under HRS § 667-27. The time periods are calculated by excluding the first date and including the last.

The sale must be held in the county where the property is located, on grounds or at facilities under the administration of the State. HRS § 667-25 lists the specific locations which are acceptable in each county. The sale must take place during business hours and on a business day at the time and place described in the public notice.

X. Notice of Sale and How Notice is Given:

See also § IX above as to timing and methods of publication. At least fourteen days before the date of public sale, a copy of the public notice must be posted on the property or on other real property which the mortgaged property is a part, and it must be mailed or delivered to the mortgagor, or any other person entitled to receive notice.

If the date of sale is postponed, the mortgagee is required to publish a notice of sale for each postponed date. This requires announcing the new date, time, and place at the scheduled public sale, providing notice to any person who is entitled to receive the notice of default under section 667-22, posting notice on the property, and republishing the new public sale information. The new published notice must be made once in the same format (HRS § 667-27), and state that it is notice of a postponed sale. The new public sale date must be no sooner than fourteen days after the date of the publication. If the sale is postponed four times, and every fourth time, the full public notices requirement of HRS § 667-27 must be followed.

XI. Place and Time for Conducting Foreclosure by Power of Sale:

See § IX above.

XII. Foreclosure and Owners' Associations:

A condominium association's lien for a unit owner's unpaid share of common assessments has priority over other liens, except for real property tax liens and sums due under a mortgage recorded before the recordation of the association's lien. *Haw.Rev. Stat. § 514B-146(a).* An association foreclosing on a lien for unpaid common expenses is entitled to obtain a reasonable rental payment for the unit from the unit owner.

In the mortgage foreclosure context, whether judicial or nonjudicial, the association board may specially assess up to six months of unpaid monthly common assessments against a mortgagee or other purchaser of a delinquent unit. The mortgagee or other purchaser has the right to require the

association to provide a notice of the association's intent to claim a lien against the delinquent unit for the amount of the special assessment before acquisition of title to the delinquent unit. The notice must state the amount of the special assessment, how it was calculated and a legal description of the unit. *Id., § 514B-146(g), (h).*

Relevant Codes, Statutes or Case Law:
HRS §§ 501-151; 506-1; 514B-146, 634-51; 667-1.5- 667-41; *U.S. Bank N.A. v. Mattos*, No. SCWC-14-0001134, 2017 WL 2439437 (Haw. June 6, 2017); *Bank of Am., N.A. v. Reyes-Toledo*, 139 Haw. 361, 390 P.3d 1248 (2017); *Hungate v. Law Office of David B. Rosen*, 139 Haw. 394, 391 P.3d 1 (2017); *Kondaur Capital Corp. v. Matsuyoshi*, 136 Haw. 227, 361 P.3d 454 (2015); *Bank of New York Mellon v. Lemay*, 137 Haw. 30, 31, 364 P.3d 928, 929 (Ct. App. 2015); *Bank of Honolulu N.A. v. Anderson*, 3 Haw. App. 545, 551, 654 P.2d 1370, 1375 (1982).

Receivership:

I. General Information:

A receiver may be appointed to prevent injury and to preserve the property, income or business interests in controversy where such appointment would serve a useful purpose during the course of litigation. The receiver represents the interests of all parties, not merely the party seeking appointment of a receiver, and the receiver's powers are granted by order of the court, which has broad discretion under principles of equity.

II. Appointing the Receiver:

A. The Basics:

The power of the court to appoint a receiver is not dependent upon any statute, but is instead a branch of a court's equity jurisdiction. *Hawai`i Ventures, LLC v. Otaka, Inc.,* 114 Hawai`i 438, 456, 164 P.3d 696, 714 (2007). "A receivership is equitable in nature and the court's extraordinary broad remedial powers and wide discretion to appoint receivers derive from its inherent powers of equity to fashion relief." *Id.* The authority of a receiver is entirely derivative from the court, and orders can be molded based on the circumstances of the case "to conserve the equities of the parties", *id.*, but are generally broad in nature.

Appointment of a receiver is appropriate in circumstances in which there is a pending court action involving business or property, income being generated from such assets and danger

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that the assets will be insufficient security for the debt, or the assets are depreciating in value, or waste is occurring. *Id., 114 Hawai`i, at 458.* The appointment of a receiver pending a foreclosure action is a well-recognized and well established remedy in Hawai`i. A party seeking to appoint a receiver must file a motion, which should detail (a) the estimated value of the property or business, or the amount at risk with respect to income-generating properties, and (b) evidence that the business or property is at risk of neglect, waste or mismanagement. While ex parte motions may be filed in an emergency situation, Hawai`i courts normally hold a hearing to consider appointment of a receiver. While not mandatory, courts may also require a bond to be posted in an amount determined by the court.

The costs and expenses of a receivership incurred in preserving receivership assets are treated as administrative expenses, chargeable to the assets of the receivership. *Miller v. Leadership Housing Systems, Inc.*, 57 Haw. 321, 555 P.2d 864 (1976).

B. Time Frame for Appointment:

There is no statute in Hawai`i governing the time period for appointing a receiver. While a court may decide to appoint a receiver on an ex parte motion (see § II(C) below), generally a party is given a reasonable time to oppose a motion for the appointment of a receiver based on usual court practices. In state court, where most foreclosure suits are filed, a hearing must be set at least 18 days after a motion is filed but the court will entertain an ex parte motion to shorten time. *Cir. Ct R. 7.1, Rules of the Circuit Courts of the State of Hawai`i.* In federal court for the District of Hawai`i, a hearing must be set at least 35 days after a motion is filed and served, but the court will entertain an ex parte motion to shorten time. *LR 7.2, Rules of the United States District Court for the District of Hawai`i.*

C. Can you go in Ex Parte?

A party may file an ex parte motion for the appointment of a receiver, and under appropriate circumstances, a court may grant

such a motion. The court will take into consideration whether the other party has previously consented to the appointment of a receiver as well as other factors such as the immediacy of the harm and whether the movant has attempted to notify other parties to the proceeding.

III. Loans and Advances:

Receivership orders are drafted broadly, and allow for a receiver to do what is necessary in the interest of preservation, including making loans if necessary, to be paid back from the available assets. A typical receivership order expressly allows for a receiver to manage contractual obligations, including terminating existing contracts or entering into new ones, and to obtain loans with the consent of the lender.

IV. Sales During the Receivership:

A typical receivership order will grant the receiver the power to liquidate the assets being managed, or sell off the property in receivership, although with limitation. A receiver will normally seek court authority to market and sell specific assets under receivership. Under HRS § 414D-254(1)(A), a receiver appointed to dissolve a corporation, for example, may "dispose of all or any part of the assets of the corporation . . . if authorized by the court." Courts in Hawai`i have also used their equity powers to appoint a special master for various purposes in a receivership, such as reviewing the final report of a Receiver where it has been challenged or conducting specific projects, such as performing an accounting.

V. Receiver's Immunity:

A receiver is an officer of the court, and in most receivership orders, language is included which protects the Receiver from liability. The Hawai`i Supreme Court has held that a receiver cannot be personally liable for a negligent violation of receivership duties imposed by court order. *Hawaii Ventures, LLC v. Otaka, Inc.*, 114 Hawai`i at 485, 164 P.3d 696. Like court-appointed psychiatrists, receivers are entitled to absolute judicial immunity based on their status as an officer of the court. *Id., at 486.*

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A receiver may expose himself or herself to personal liability, however, where he or she steps outside the scope of the court-ordered responsibilities of the receivership and engages, for instance, in bad faith or fraud. Even under such circumstances, receivers are granted a broad scope of discretionary powers, and acts of the receiver that may fall under the general nature of conduct authorized by the court will be protected by judicial immunity.

VI. Liens Against Receivership Property:

The receivership order in a mortgage foreclosure case should provide that the receiver is not required to pay any liens which are junior or subordinate to the senior mortgage.

VII. Owners Associations:

A condominium owners' association foreclosing on a lien for a unit owner's unpaid share of common expenses is entitled to appointment of a receiver to collect rents from the unit owner or his/her tenant. If the association is the plaintiff in a foreclosure suit, it may request appointment of its managing agent as receiver. *Haw.Rev. Stat. § 514B-146(a).*

Typically, a receiver will pay the association dues on a going-forward basis after the receiver is appointed.

VIII. Construction Related to Receivership Property:

Receivership orders may contain a provision granting authority to the receiver to incur construction and other improvement-related expenses, so long as the work is necessary to preserve receivership assets. It is within the court's discretion to authorize the receiver to complete construction projects that were initiated before the receivership. *Miller v. Leadership Housing Systems, Inc.*, 57 Haw. 321, 555 P.2d 864 (1976). The cost of such improvements would ordinarily be treated as administrative expenses of the receivership, chargeable against all the assets of the receivership. *Id.* However, if the improvements benefit only a particular piece of property, the court has discretion to charge the expenses against only that particular property. *Id.*

IX. Ending the Receivership:

HRCP Rule 66 provides that a receiver "shall not be dismissed except by order of the court." The termination process is initiated by a motion seeking termination of the receivership and dismissal of the receiver. The receiver usually files a final report in support of the termination request.

Relevant Codes, Statutes or Case Law:

H.R.S. §§ 414D-254; 514B-146; 651-14; *Haw. R. Civ. P. Rule 66; Cir. Ct. R. 7.2; LR 7.2*; *Hawaii Ventures, LLC v. Otaka, Inc.*, 114 Hawai`i 438, 164 P.3d 696 (2007); *Miller v. Leadership Housing Systems, Inc.*, 57 Haw. 321, 555 P.2d 864 (1976).

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Idaho

Foreclosure Summary

Security Instrument	Trust Deed
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Notice of Default
Time Frame	Typically 120-180 days
Redemption Period	If 20 acres or less, six months. If more than 20 acres, one year
Deficiency	Yes, but limited to difference between mortgaged debt and reasonable value of property

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes, but required to post bond in an amount determined by the court to cover all damages defendant may suffer (Idaho Code 8-603)
Approximate Time for Appointment	14-45days
Who or What can act as Receiver	No party, attorney or person interested in an action, except with written consent of the parties (Idaho Code 8-603)
Specific Receiver Requirements	No
Is there any approval list for receivers	No
Out of State Receivers Allowed	Depends on the type of property

Foreclosure:

I. General Information:

Under Idaho law, both judicial and non-judicial foreclosures are available. Idaho Code § 6-101 *et seq.* is generally applicable to the judicial foreclosure process and Idaho § 45-1502 *et seq.* is generally applicable to the non-judicial foreclosure of trust deeds. Under Idaho law, a mortgage may only be foreclosed judicially. A land sale contract may be foreclosed judicially or enforced as a contract.

II. Judicial Foreclosure Basics:

The judicial foreclosure process under Idaho law is relatively quick and streamlined in comparison to many states. All parties with an interest in the property and all issues involved therein may be dealt with in one action. This may include appointing a receiver, resolving boundary disputes, conflicting priority claims, deficiencies and other factual or legal matters that make non-judicial foreclosure inadvisable. Although Idaho's state court system is friendly to the process of judicial foreclosure, it is certainly more expensive and time consuming than a non-judicial approach if that is available. As a result, judicial foreclosure is still typically only utilized when no other alternative exists or where there are legal or factual disputes such as priority issues. Another reason that non-judicial foreclosure is preferred is that the right of redemption exists after the sale of the property in a judicial foreclosure

Idaho Code governs jurisdiction in state court and governs venue. Venue is proper in any county in which a portion of the at-issue property is located. In the instance in which the property spans multiple counties or the property is cross-collateralized and part of the same loan package, the foreclosing party may choose the preferred county for venue.

Idaho law adheres to the common one action rule. (Idaho Code 6-101.) As such, all parties with an interest in the property must be joined as parties to the foreclosure action. Senior lien holders, including governmental entities with liens for taxes and

assessments are not necessary parties, however, we recommend joining senior lien holders.

Idaho adheres to notice pleadings, however, with regard to foreclosure complaints, the courts do, as a matter of application, require a certain level of formality, including the assertion of a note and mortgage, property description, the alleged default, the total amounts due, and that no other suit is pending for collection of the debt. If there is a prepayment premium at issue, this element should be pleaded separately and citation to the specific agreement clause is advisable. The complaint should always request attorney fees and costs, including the cost of the title report.

Deficiency judgments are available under Idaho law following a judicial foreclosure. (Idaho Code 6-108.) State statute limits this remedy to "the difference between the mortgage indebtedness, as determined by the decree, plus costs of foreclosure and sale, and the reasonable value of the mortgaged property, to be determined by the court in the decree upon the taking of evidence of such value." (Idaho Code 6-108.) Following the sale if the amount of the indebtedness plus costs exceeds the greater of (1) the fair market value or (2) the proceeds of the sale, at that time the lender should seek a deficiency by motion to the court.

Following a judicial foreclosure, the redemption period for property of more than twenty acres is one year. For smaller tracts, the applicable period is six months. (Idaho Code 11-402.)

III. Non-Judicial Foreclosure Basics:

A deed of trust may be foreclosed non-judicially by advertisement and sale following compliance with certain requirements contained with the Idaho statutes. Generally, this is a cost effective and timely approach if it is available. In Idaho we can typically complete the non-judicial sale within 150 days. However, reinstatement may be accomplished if the borrower cures an unaccelerated default within 115 days. (Idaho Code 45-1506(2).) Delay is significantly limited in this process since no right of redemption exists following a nonjudicial foreclosure.

(Idaho Code 45-1508.) Further, legal defenses to this process are presented via an injunction which is rarely instituted and even more rarely granted. However, if multiple lien holders are involved, the non-judicial process becomes cumbersome and subject to delay.

It is our practice to utilize the judicial process if priority issues are uncovered via the title report. Some of the common mistakes in the process include failure to assure that the deed of trust is properly recorded, failure to have a default that properly correlates to a power of sale provision, non-compliant notice of default and violations of the one action rule (i.e. an action on the debt is pending).

IV. Foreclosure When Instrument Contains No Power of Sale:

Idaho law will require use of the judicial process when no power of sale is available.

V. Notice of Sale and How Notice is Given:

A notice of sale must include the names of the grantor, name of the beneficiary, name of the trustee, property description, citation to the mortgage records for the county recorder (i.e book, page, instrument number), the default, the amounts owed, and the date, time, and place of sale. (Idaho Code 45-1506(4).)

The sale must comply with the information on the notice and must occur between 9:00 a.m. and 4:00 p.m. (Idaho Code 45-1506(4)(f).) The sale must be conducted at a designated place in the county in which the property is located (Idaho Code 45-1506(4)(f), and is almost always conducted at the county courthouse or at a title company office.

Notice of the sale must be given 120 days prior to the sale at the last known address of the grantor, any person that formally requested notice, the grantor's successor in interest and any lienholder. (Idaho Code 45-1506(2).) State law allows service of the notice on any adult occupant at the property. Three attempts must be made of service on the occupant and a copy of the notice must be posted each time. The attempted service must

also take place at least thirty days prior to the sale date. (Idaho Code 45-1506(5).)

Relevant Codes, Statutes or Case Law:
I.C. 11-*410* et seq; Idaho Code § 1-705; Idaho Code § 5-401; Idaho Code § 5-505 is applicable to lis pendens; Idaho Code § 6-108; Idaho Code § 11-401 et seq; Idaho Code § 45-1506

Receivership:

I. General Information:

In practice, Idaho courts do not favor the appointment of a receiver. It is viewed as a remedy similar to a preliminary injunction and requires the presentation of significant evidence justifying the need. The Idaho bench generally sees the receivership process as being invasive of private property rights that should not be allowed until the proper conditions or proof is met to allow foreclosure.

A receiver may be appointed by the court in which an action for foreclosure is pending "where it appears that the mortgaged property is in danger of being lost, removed or materially injured . . . ." (Idaho Code 8-601), and may be appointed pending a nonjudicial foreclosure (Idaho code 8-601A).

II. Appointing the Receiver:

A. The Basics:

The appointment of a receiver varies from court to court. Typically with the filing of a motion for the appointment of a receiver we recommend a particular person that has the appropriate qualifications for the particular case at issue. We typically file an affidavit of the proposed receiver with a CV or resume and discuss why the individual is appropriate for the matter. The selection of receiver, once one is determined to be needed, is very much discretionary with the court and often comes via agreement of the parties.

B. Time Frame for Appointment:

Under normal circumstances and depending on the court's calendar, a motion can be filed and heard within fourteen days. However, the judges tend to take receiver motions under

advisement. If that occurs, it could be 30 to 45 days between filing the motion and obtaining an order.

C. Can you go in Ex Parte?

It is possible to seek appointment of a receiver on an expedited basis. However, this process will have an even higher burden in practice. The waste or injury must be very significant and there must be moving evidence along the same lines. We do not suggest this approach except in the most compelling circumstances.

III. Loans and Advances:

No statutes or rules govern loans or advances, and the Order of Appointment will govern the receiver's authority to obtain loans or to issue advances. (Cf. Idaho Code 8-605.)

IV. Sales During the Receivership:

The court may grant a receiver authority to sell receivership property. (Idaho Code 8-601, 8-601A, and 8-605.) See *Cox v. Snow*, 47 Idaho 229, 273 P 933 (1929). *See also, In re Receivership of Great Western Beet Sugar Co.*, 22 Idaho 328, 125 P. 799 (1912); *Wright v. Spencer*, 38 Idaho 447, 221 P 846 (1923); and *Idaho Trust Bank v. Christian*, 154 Idaho 657, 301 P3d 1275 (2013).

V. Liens Against Receivership Property:

The court has authority to decree that the costs of the receivership are secured by a lien against the property of the receivership. *Hewitt v. Great Western Beet Sugar Co.*, 1911, 20 Idaho 235, 118 P. 296.

VI. Owners Associations:

No information provided.

VII. Construction Related to Receivership Property:

A receiver may be appointed to take over and complete an unfinished construction project. *In re San Vicente Medical*

Partners LTD v. American Principals Holding, Inc., 962 F2d 1402 (9th Cir 2016);

VIII. Ending the Receivership:

A simple motion and order from the court is the appropriate mechanism. It is usually a stipulated motion and no hearing is needed.

IX. Miscellaneous:

Receivership orders in Idaho are somewhat rare and tend to be specifically tailored to the case at issue. It is recommended that the order specifically discuss the fees and mechanism for payment for the receiver.

Relevant Codes, Statutes or Case Law:

Idaho Code § 8-601 et seq. There is very limited and rather unhelpful case law on receivership under Idaho law.

Kelly v. Steele, 9 Idaho 141, 72 P. 887, 888 (1903). *See also* Idaho Code §§ 8-601 and 8-601A (appointment of receiver is appropriate where mortgaged property is in danger of injury; or where corporation is insolvent or is in danger of insolvency; or where income from property is in danger of being lost)

Jones v. Quayle, 3 Idaho 640, 32 P. 1134, 1134 (1893) (Where a party has under his control property in which another party has an interest, and he allows it to depreciate in value, or wrongfully disposes of the same, it is proper for the court to appoint a receiver).

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Illinois

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	No
Initial Public Notice	Complaint
Time Frame	210 days
Redemption Period	Yes, limited
Deficiency	Varies

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Rare
Approximate Time for Appointment	1 day – few weeks
Who or What can act as Receiver	Individual
Specific Receiver Requirements	Bond
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Generally Yes

Foreclosure:

I. General Information:

The remedy of foreclosure is available in Illinois to enforce the obligations secured by a mortgage upon maturity or default. All foreclosure in Illinois is judicial.

II. Judicial Foreclosure Basics:

A. General:

The interest in the mortgaged real estate of all persons made a party in such foreclosure and all non-record claimants given proper notice is terminated by the judicial sale of the property.

B. Reinstatement:

In any foreclosure of a mortgage executed after July 21, 1959, a mortgagor may reinstate the mortgage within 90 days of service of the foreclosure action by curing all defaults, other than payment of the principal amount which was accelerated, including costs and expenses. Upon reinstatement, the foreclosure action shall be dismissed and the mortgage documents shall remain in full effect as if no acceleration or default had occurred. If the court expressly finds that reinstatement has occurred, the mortgagor cannot attempt another reinstatement for five years after dismissal of the foreclosure. The court may enter a judgment of foreclosure prior to the expiration of this period, subject to the right of the mortgagor to reinstate the mortgage.

C. Redemption:

Only an owner of redemption may redeem from the foreclosure and only during the redemption period and only if the right of redemption has not been validly waived. In that regard, an owner of non-residential real property can validly waive its right to redeem expressly in the mortgage or by other written, recorded agreement.

The redemption period for residential real property, ends on the later of 7 months after the mortgagor has been served with the summons or otherwise submitted to jurisdiction of the court and 3 months after the judgment of foreclosure is entered. For all other foreclosures, the redemption period ends on the later of 6

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months after the mortgagor has been served with the summons or otherwise submitted to jurisdiction of the court and 3 months after the judgment of foreclosure is entered.

The amount required to redeem is the amount specified in the judgment of foreclosure and the amount of other expenses authorized by the court which the mortgagee reasonably incurs between the date of judgment and the date of redemption.

Notice of a party's intent to redeem must be given at least 15 days before the redemption period ends and by written notice to the mortgagee's attorney of record. Proof of such notice must be filed with the court.

III. Judicial Foreclosure Guidelines:

A. Notice of Foreclosure:

At least 30 days prior to the entry of a judgment of foreclosure, any person identified in the complaint as a defendant must be given notice of the foreclosure.

A notice of foreclosure is constructive notice of the pendency of the foreclosure to every person claiming an interest in the property if it is recorded in the county where the property is located and it includes:

1. the names of all plaintiffs and the case number
2. the court in which the action was brought
3. the names of title holders of record
4. a legal description of the real estate
5. a common address or description of the location of real estate, and
6. identification of the mortgage sought to be foreclosed

B. Pleadings and Service:

A foreclosure complaint must contain the statements and allegations called for by the form set forth in Illinois code.

C. Real Estate Subject to Senior Liens:

During a foreclosure, and any time prior to sale, a mortgagee or any other lienor may pay obligations on any senior mortgage when due, including real estate taxes. With court approval, a mortgagee or any other lienor may pay any other amounts in connection with other liens, encumbers or interests reasonably necessary to preserve the status of title and may add such amounts to the debt secured by the mortgage.

D. Judgment:

Upon the entry of a judgment of foreclosure, all rights of a party in the foreclosure against the mortgagor are secured by a lien on the property, which has the same priority as the claim to which the judgment relates. The lien is terminated upon confirmation of a judicial sale.

IV. Judicial Sale:

Upon entry of a judgment of foreclosure, the property shall be sold at a judicial sale in accordance with the statute and on such terms and conditions as specified by the court in the judgment of foreclosure. The purchaser at the sale will receive a receipt of sale. Upon payment in full of the sale price, the purchaser will receive a certificate of sale. Such certification will be subject to the court's confirmation of the sale. After the sale is confirmed, the purchaser will receive a deed to the property.

V. No Power of Sale Foreclosure Guidelines:

No real estate in Illinois may be sold by virtue of any power of sale contained in a mortgage or any other agreement, and mortgages may only be foreclosed in accordance with the Illinois Foreclosure Act.

VI. Notice of Sale and How Notice is Given:

The mortgagee or other party designated by the court shall give public notice of the sale as follows. The notice of sale shall include:

a. the name, address and phone number of the person to contact for information regarding the property;

b. the common address and other common description of the property;
c. a legal description of the property sufficient to identify it with reasonable certainty;
d. a description of the improvements on the property;
e. the times specified in the judgment, if any, when the real estate may be inspected prior to sale;
f. the time and place of the sale;
g. the terms of the sale;
h. the case title, case number and the court in which the foreclosure was filed; and
i. such other information ordered by the court.

The notice of sale must be published at least 3 consecutive calendar weeks, once in each week; the first such notice to be published not more than 45 days prior to the sale, the last such notice to be published not less than 7 days prior to the sale. It must be published by advertisements in a newspaper of general circulation in the county where the property is located in the section where public notices are listed and in any section where real estate sales are listed. Notice of sale must also be provided to parties that have appeared in the foreclosure case. Notice of any sale adjourned for more than 60 days must also be given.

VII. Other Types of Foreclosure:

A. Deed in Lieu of Foreclosure:

Rather than foreclosing on the property, the mortgagor and mortgagee may agree to terminate the mortgagor's interest in the property after a default in exchange for a deed from the mortgagor. Acceptance of a deed in lieu of foreclosure relieves all personal liability of persons who would otherwise owe payment or performance of other obligations secured by the mortgage unless they agree otherwise at the same time the deed in lieu of foreclosure is given.

B. Consent Foreclosure:

In a foreclosure, the court will enter a judgment satisfying the mortgage indebtedness by vesting absolute title to the property in the mortgagee free and clear of all claims and liens, except

liens of the US government that cannot be foreclosed without judicial sale, if, before the sale:

1. the mortgagee offers to waive any and all rights to a personal judgment for deficiency against mortgagor and any other persons liable on the debt;
2. the offer is made either in the foreclosure complaint or by motion upon notice to all parties not in default;
3. all mortgagors who then have an interest in the property, by response to the complaint or stipulation filed with the court, expressly consent to the entry of such judgment;
4. no other party objects to the entry of such judgment within the proper time for objection; and
5. upon notice to all parties not in default for failure to appear, answer or otherwise plead.

If a party other than mortgagor who has interest in the mortgaged property objects to the entry of the consent judgment, the court, after a hearing, must enter an order providing either:

1. that for good cause shown, the judgment by consent will not be allowed;
2. that good cause not having been shown by the objecting party, title to the mortgaged property is vested in the mortgagee as requested by the mortgagee and consented to by the mortgagor; or
3. that the objecting party has agreed to pay the amount owed on the mortgaged property and will pay that amount within 30 days after entry of the order and upon payment, title to the property will vest in the objecting party.

VIII. Place and Time for Conducting Foreclosure by Power of Sale:

The judgment will provide the terms for conducting the sale. It may be conducted by any judge or sheriff.

Relevant Codes, Statutes or Case Law:
ILP, p. 238.; 7351LCS 5/15-140lth rough 1402; 7351LCS 5/15-1404 through 1405; 735 ILCS 5/1 5-1502 through 1507; 735 JLCS 5115•1602 through 1603

Receivership:

I. General Information:

In general, a receivership in Illinois is not governed by statute but rather by equity practice, as Illinois still has separate courts of law and equity (chancery). Receivership is a remedy to protect, preserve and administer property pending some other form of relief. Accordingly, courts in Illinois will not hear an action solely to appoint a Receiver.

Ordinarily, a party seeking appointment of a Receiver must have some right, claim or interest in the specific property for which receivership is sought.

II. Appointing the Receiver:

A. The Basics:

To request a Receiver, the movant must file an application or motion for relief. It should set forth the particular facts and circumstances that constitute the ground for the appointment of the Receiver and contain a clear statement that the defendant has some particular property or thing in his possession. The request for an appointment of a Receiver does not have as stringent pleading requirements as the requirements for the pleading to commence the suit, but the requestor still must provide facts either in the pleading or at the hearing to warrant the appointment of a Receiver. The motion for appointment of a Receiver should be verified and, if an application for a Receiver is based on allegations of a complaint, the complaint should be sworn to. A receiver shall be appointed for good cause, which means that the mortgagee's loan documents provide for appointment of a receiver upon a default and a default has occurred.

B. Time Frame for Appointment:

Once a complaint is filed, a motion to appoint a Receiver can be filed anytime thereafter. Ordinarily a motion can be heard on at least 4 days' notice by mail and 1 day notice by facsimile. A Receiver may be appointed temporarily pending a final determination of the motion. The court has discretion to set the hearing date, which is requested from the court. Requests for

emergency hearings usually result in hearings within one business day.

C. Can you go in Ex Parte?

Ordinarily, the court should not appoint a Receiver on an ex parte application, but under exceptional circumstances, it may do so even though no notice has been given to the adverse party. Appointment of a Receiver on an ex parte application is only proper where there is real danger that the property will be wasted or removed from the jurisdiction, or in other exceptional cases.

D. Designation of Receiver

The Mortgagee has the right to designate the receiver. The court may disallow the mortgagee's selection for good cause; in which case the mortgagee can designate a different receiver.

III. Loans and Advances:

A Receiver has no power to pledge the trust estate for borrowed money in the absence of leave of court, and all persons extending credit to a Receiver do so at their peril.

IV. Sales During the Receivership:

Real estate may not be sold by virtue of a power of sale contained in a mortgage or other agreement. Some judges will allow receivers to sell property if the mortgagor does not object.

V. Liens Against Receivership Property:

No information provided.

VI. Construction Related to Receivership Property:

No information provided.

VII. Ending the Receivership:

When the Receiver has disposed of the property in receivership according to the court order, his liability and responsibility as Receiver to that property ceases, and the receivership is terminated.

VIII. Miscellaneous:

A Receiver is entitled to compensation for his services up to the time of his discharge. The amount of compensation is at the discretion of the court. The receivership property bears primary liability for the compensation and expenses of the Receiver.

Relevant Codes, Statutes or Case Law:

Receivership is generally a matter of common law in Illinois. The relevant statutes include 735 I LCS 5/2-41 5 (Appointment of and actions against Receivers); 65 ILCS 511 I -31-2; 205 I LCS I 0511 Q-1.

Indiana

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	No
Initial Public Notice	Complaint
Time Frame	5-6 months
Redemption Period	Up to Sheriff's Sale
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Typically No
Approximate Time for Appointment	Varies depending on the judge
Who or What can act as Receiver	Disinterested Party; May Be Person or Corporate Entity
Specific Receiver Requirements	Before commencing duties Receiver must file Oath & Bond
Is there any approval list for Receivers?	Typically no, but judges have discretion on whom to appoint
Out of State Receivers Allowed	No Statute Prohibits, But Depends on the Judge

Foreclosure:

I. General Information:

A. All foreclosure sales in Indiana are done by judicial action, as there is no power of sale provision in the Indiana Code.

B. Indiana has a right to pre-sale redemption. Pre-sale redemption occurs between the time the complaint is filed and the date the real estate is sold at sheriff's sale.

C. Indiana recognizes and enforces assignments of rents and leases.

II. Judicial Foreclosure Basics:

A. The foreclosure complaint is filed where the real estate is located.

1. For non-commercial foreclosures, the lender must first send a "presuit notice" to the borrower not less than 30 days before filing the complaint. The presuit notice must contain certain statutorily required information.
2. The foreclosure complaint must name parties with an interest in the real estate as necessary parties, including holders or junior liens and other interests.
3. A request for appointment of a receiver can be made in connection with the foreclosure complaint, or by separate motion.
4. A count for foreclosure may be combined with counts for enforcement of a note and guaranties.
5. A count for foreclosure of real estate can be combined with a count for foreclosure of personal property.
6. A notice of lis pendens may be filed with the clerk at the same time as filing the complaint. If one is filing a foreclosure complaint on a lien other than a first mortgage, the plaintiff must file a notice of lis pendens with the clerk.

B. After service of process and dispositive motion (default or summary judgment), the court will issue a judgment and decree of foreclosure.

C. After entry of a judgment and decree of foreclosure, the sheriff's sale process is initiated by filing a praecipe with the clerk, and the clerk certifying the judgment and decree of foreclosure to the sheriff. However, this process may not issue until at least three (3) months after filing of a foreclosure complaint. The owner of the real estate may, at its option, waive this time, which will result in a waiver and release of the deficiency judgment by the judgment holder.

D. The plaintiff must pay all delinquent real estate taxes prior to the date of the sheriff's sale.

E. The will sheriff schedule and conduct the sale.
   1. The sheriff's sale must be scheduled within 120 days after the judgment and decree of foreclosure is certified to the sheriff.
   2. If the lender desires to postpone the sale, another praecipe must be filed, and notices re-served and republished.
   3. The sheriff must publish the notice of sale once a week for three (3) weeks in a local newspaper. The first notice must be published at least 30 days before the date of the sale.
   4. The sheriff must also post written notice of the sale at the county courthouse.
   5. The owner of the property must be served with the notice of the sheriff's sale by the sheriff at the time the first notice is published.
   6. There is no minimum bid. The sheriff need only sell property, "in a manner that is reasonably likely to bring the highest net proceeds after deducting the expenses of the offer and sale."

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F. The owner of the real estate retains all possessory rights to the real estate, rent free, until the sheriff's sale, unless displaced by a receiver.

G. The successful purchaser at the sheriff's sale is entitled to a sheriff's deed and immediate possession of the real estate following the sheriff's sale. The completion of the sheriff's sale extinguishes the mortgagor's redemption rights.

H. State statute permits, under certain limited circumstances, the sheriff's sale to be conducted by a private auctioneer on the civil sheriff's behalf.

I. Indiana law requires all expenses of sale to be paid first from sale proceeds.

III. Non-Judicial Foreclosure Basics:

Non-Judicial Foreclosures are not available in Indiana.

IV. Guidelines for Power of Sale:

The Indiana Code does not contain a power of sale provision. All sales are by judicial action.

Relevant Codes, Statutes or Case Law:
I.C. 32-29-7 ; I.C. 32-30-10-4

Receivership:

I. General Information:

Indiana's receivership statute governs the appointment of a receiver.

A receiver may be appointed in the following cases:

A. To vacate a fraudulent purchase of property.

B. In actions between partners or persons jointly interested in any property or fund.

C. In all actions in which property, fund or rent and profits in controversy are in danger of being lost, removed, or materially injured.

D. In actions in which a mortgagee seeks to foreclose a mortgage. However, the court shall appoint a receiver if, at the time the motion is filed, the property is not occupied as the owner's principal residence and:

1. it appears the property is in danger of being lost, removed, or materially injured;
2. it appears the property may not be sufficient to discharge the mortgaged debt;
3. either the mortgagor or the owner of the property has agreed in the mortgage or in some other writing to the appointment of a receiver;
4. a person not personally liable for the debt secured by the mortgage has, or is entitled to, possession of all or a portion of the property;
5. the owner of the property is not personally liable for the debt secured by the mortgage; or
6. the property is being, or is intended to be, leased for any purpose.

E. When a corporation has been dissolved, is insolvent, is in imminent danger of insolvency or has forfeited its corporate rights.

F. To protect or preserve the property during the time allowed for redemption and to secure rents and profits.

G. In other cases as may be provided by law or where, in the discretion of the court, it may be necessary to secure ample justice to the parties.

II. Appointing the Receiver:

A. The Basics:

Receivers are appointed by motion, supported by affidavit and other relevant documents. Receivers may not be appointed in any case until the adverse party has appeared or has had

reasonable notice of the application for the appointment, except upon sufficient cause show by affidavit.

B. Time Frame for Appointment:

This varies greatly by the practice of the particular court and judge.

C. Can you go in Ex Parte?

Typically not, but you may if exigent circumstances are shown by affidavit.

III. Loans and Advances:

There are no set laws or procedures for Indiana.

IV. Sales During the Receivership:

IC 32-30-5-7(5) specifically permits a receiver to sell property in his own name. However, a receiver may not sell real estate free and clear of a mortgagor's right of redemption without the mortgagor's consent. *Wells Fargo Bank, N.A. v. Tippecanoe Associates, LLC*, 923 N.E.2d (Ind.App. 2010). Draft a broad order for appointment of receiver which permits the receiver to sell, lease, or otherwise dispose of property. A sale may be either private or public, and it is necessary to obtain court confirmation of the sale after it has occurred for the receiver's protection.

V. Liens Against Receivership Property:

There are no specific statutes relating to the effect of liens upon a receiver. Generally, a receiver will take any property subject to existing liens.

VI. Owners' Associations:

There are no specific provisions relating to owners' associations and a receiver.

VII. Construction Related to Receivership Property:

The order appointing receiver should be broad enough to permit the receiver to commence or complete construction, and direct third persons to deliver all plans and specifications to the receiver. The order should also provide for the receiver ‘s ability to borrow any amounts necessary to complete construction.

VIII. Reporting:

Reporting requirements are fixed by the court. The statute gives creditors, shareholders, and interested parties 30 days within which to file written objections or exceptions to a report. Any objections or exceptions not filed within the 30-day period are forever barred.

IX. Ending the Receivership:

The appointing court may end a receivership at any time. The receiver must file the final report before discharge. The court’s approval of the receiver’s report releases and discharges the receiver and its surety.

X. Miscellaneous:

A. The receiver’s powers are defined by statute, and include bringing and defending actions; taking and keeping possession of property; receiving rents; collecting debts; selling property; and generally doing other acts respecting the property as the court may authorize.

B. Indiana permits an appeal of an order appointing, or refusing the appointment of a receiver within ten (10) days after the court’s decision, without awaiting the final determination of the case.

Relevant Codes, Statutes or Case Law:
I.C. 32-29-7-11; I.C. 30-32-5-1 through 32-30-5-22; *Wells Fargo Bank, N.A. v. Tippecanoe Associates, LLC*, 923 N.E.2d (Ind.App. 2010)

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Iowa

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	Yes (under certain circumstances)
Initial Public Notice	Petition
Time Frame	160 days
Redemption Period	Yes, subject to foreclosure without redemption procedure
Deficiency	Yes (with certain exceptions)

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes (in emergency only)
Approximate Time for Appointment	10-30 days
Who or What can act as Receiver	No Restrictions Given
Specific Receiver Requirements	Need to File oath and post a bond
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

There are numerous procedures for the foreclosure of mortgages in Iowa. The procedures vary depending on the type of borrower, the type of property encumbered by a mortgage and whether the lender is willing to waive a deficiency. If the borrower is cooperative, there is a procedure for foreclosing out junior lienholders pursuant to a deed in lieu of foreclosure.

II. Judicial Foreclosure Basics:

In general, mortgages must be foreclosed judicially in Iowa. The foreclosure action must be commenced in the county where the subject real property is situated. Separate actions on a note and mortgage may not be prosecuted in the same county at the same time. If separate actions are brought on the note and the mortgage, the lender must elect which to prosecute and the other must be discontinued at lender's cost. The foreclosure petition and an original notice must be served personally on the defendants. Copies of the loan documents should be attached to the foreclosure petition.

A. Residential:

If the subject real property is the residence of the borrower and is a one-family or two-family dwelling ("Residential Property"), the creditor must provide the borrower with a notice of the right to cure the existing default at least thirty days prior to commencing a foreclosure action or otherwise seeking to enforce the debt. A borrower has a right to cure the default unless the lender has already provided the borrower with a cure notice with respect to a prior default within the preceding three hundred sixty-five days. The lender can, however, accept a voluntary surrender of the subject real property during the cure period.

The borrower has a right to cure the default within thirty days from the date the creditor gives the cure notice by tendering either the amount of all unpaid installments due at the time of tender, without acceleration, or the amount stated in the cure notice, whichever is less, or by tendering the performance necessary to cure a default as described in the cure notice.

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B. Agricultural:

If the property encumbered by the mortgage is agricultural land used in a farming operation ("Agricultural Property") and the debt is $20,000 or more, the lender must not only provide the borrower with a cure notice, but must also obtain a "mediation release" signed by a mediator selected by the farm mediation service. The requirement of a "mediation release" can be waived if a court determines, after notice and hearing, that the time delay required for the mediation would cause the lender to suffer irreparable harm. The "mediation release" (or its waiver by court order) is a jurisdictional requirement to commencing a juridical foreclosure action.

The borrower under a mortgage of Agricultural Property has a right to cure a default unless (a) the lender has given the borrower a cure notice with respect to two prior defaults on the same obligation, (b) the borrower has surrendered the subject real property and the lender has accepted the surrender in full payment of the debt, or (c) the lender has given the borrower a cure notice with respect to a prior default within twelve months prior to the existing default. The cure notice should be sent to such a borrower by certified mail.

If the borrower of an obligation secured by a mortgage Agricultural Property has a right to cure the default, the Borrower may tender a cure within forty-five days after the cure notice is given. The time period for requesting a mediation runs concurrently with the cure period. The borrower can cure the default by paying (a) the amount of all unpaid installments due at the time of payment, without acceleration, plus a delinquency charge of the annual interest rate plus five percent per annum between the giving of the cure notice and the payment; (b) paying the amount set forth in the Cure Notice, whichever is less; or (c) tendering the performance described in the cure notice.

In order to secure a meditation release, the lender must file a request for mediation with the farm mediation service. The farm

mediation service is required to send an initial mediation notice within twenty-one days after it receives a mediation request and the initial mediation is required to be held within twenty-one days after the initial mediation notice is sent. If the borrower fails to attend the mediation, waives mediation or the parties fail to reach an agreement at the initial mediation, the mediator must provide the lender with a mediation release. However, if the lender fails to attend the initial mediation or participate in all mediation meetings, a mediation release may not be given.

C. Non-Agricultural Foreclosure—Redemption/Sale:

If the subject real property is not Agricultural Property, the lender can choose to foreclose without redemption rights. In order to elect foreclosure without redemption, the lender must include a notice on the first page of the foreclosure petition, the form of which is set forth in the Iowa Code. If foreclosure without redemption is elected, the borrower may file a demand to delay the foreclosure sale at any time prior to entry of judgment. If such a demand is filed, the sale generally is held promptly after the expiration of two months from entry of judgment. However, if the subject real property is Residential Property (and the Petition does not waive a deficiency judgment) the sale shall be held after the expiration of twelve months. The sale shall be held after six months if the petition includes a waiver of a deficiency judgment. If no demand is filed, the sale may be held promptly after judgment. If the lender elects foreclosure without redemption and does not include a waiver of a deficiency judgment, the subject real property is Residential Property and the borrower does not file a demand for the delay of the sale, then the lender is not permitted to seek a deficiency judgment. After the sale where a lender has elected foreclosure without redemption, neither the borrower nor any junior lienholder may redeem the property.

Upon entry of judgment, a special execution issues directing the sale of the property by the county sheriff.

D. Redemption Rights:

If the lender does not elect foreclosure without redemption and the property is Agricultural Property or Residential Property, then the borrower may redeem the property at any time within one year from the date of sale and is entitled to possession during the redemption period. The borrower has the exclusive right to redeem the property for the first six months of the twelve month redemption period. Other creditors may redeem the property within nine months of the sale. However, a party that has stayed execution on the judgment is not entitled to redeem.

If the lender does not elect foreclosure without redemption, the lender has not waived a deficiency judgment and the property is not Agricultural Property or Residential Property, the redemption period is one hundred eighty days after the sale. In that situation, the borrower has an exclusive right of redemption for ninety days and creditors may redeem within one hundred thirty-five days.

If the lender has not elected foreclosure without redemption, the lender has waived a deficiency judgment and the property is not Agricultural Property or Residential Property, the redemption period is ninety days after the sale. In that situation, the borrower has an exclusive redemption of thirty days after the sale and creditors may redeem within sixty days after the sale.

If the subject real property is less than ten acres in size, the borrower and lender may agree in the mortgage to reduce the redemption period to six months after the sale if the lender waives a deficiency judgment in the foreclosure proceeding. In that situation, the borrower may remain in possession of the property during the redemption period and the borrower has an exclusive redemption period of three months after the sale. Creditors may redeem the property for a period of four months after the sale.

If the subject real property is less than ten acres in size, the borrower and lender may also agree in the mortgage that if the lender waives a deficiency judgment in the foreclosure

proceedings and if the court finds in the foreclosure decree that the owner of the subject real property and those parties personally liable for the debt have abandoned the subject real property at the time of the foreclosure, then the redemption period is reduced to sixty days. In that situation, the borrower has an exclusive period to redeem for the first thirty days after the sale and creditors may redeem for a period of forty days after the sale. If the borrower enters an appearance in the foreclosure, however, there is a presumption that the property is not abandoned.

III. Non-Judicial Foreclosure Basics:

There are two separate methods for the non-judicial foreclosure of a mortgage in Iowa.

A. Non Judicial Foreclosure:

The first method is only available if the subject real property is not Agricultural Property. The lender initiates the process by personally serving a notice (the "Non-Judicial Foreclosure Notice") on the borrower, any parties in possession of the subject real property and all junior lienholders. The Non-Judicial Foreclosure Notice must (a) identify the mortgage, including recording information, and provide a legal description of the subject real property, (b) specify the terms of the mortgage with which the borrower has failed to comply, (c) indicate that the mortgage will be foreclosed unless within thirty days of service of the notice the borrower cures the default or files a rejection of the Non-Judicial Foreclosure Notice (the "Rejection") with the county recorder where the subject property is situated and serves a copy of the rejection upon the mortgagee. The Non-Judicial Foreclosure Notice must also contain certain language set forth in the Iowa Code.

If the borrower files a Rejection with the county recorder together with proofs of service that the rejection has been served on the mortgagee, then the Non-Judicial Foreclosure Notice is of no force or effect and the lender must foreclose the mortgage judicially. If the borrower does not file a Rejection, then the lender automatically succeeds to all interest of the borrower in

the subject real property, all junior liens are foreclosed and the debt is extinguished, i.e. there is no possibility for a deficiency.

B. Deed in Lieu:

A mortgage may also be foreclosed by deed in lieu of foreclosure. In this procedure, the borrower conveys to the lender all interest in the subject real property and the lender must accept the conveyance and waive any deficiency. The borrower and lender must also record a jointly executed agreement (the "Deed in Lieu Agreement") with the county recorder of the county in which the subject real property is situated. The Deed in Lieu Agreement must indicate that the borrower and lender have elected to follow the alternative voluntary foreclosure procedures of the Iowa Code. At the time the Deed in Lieu Agreement is executed, the lender must provide the borrower with the form set forth in the Iowa Code. The form provides the borrower with an opportunity to cancel the Deed in Lieu Agreement within five business days from the date of the agreement.

A lender that agrees to a foreclosure pursuant to these procedures cannot report to a credit bureau that the borrower is delinquent on the mortgage, but may report that the foreclosure procedure was used.

IV. Notice:

The lender must also send by certified mail notice of the election to follow such procedures to all junior lienholders, which notice must advise the junior lienholders that they have thirty days from the date of mailing of the notice to exercise any rights of redemption. If a junior lienholder does not redeem, its lien is automatically removed from the property.

Receivership:

I. General Information:

A receivership is ancillary to the main action in Iowa and therefore must be combined with another cause of action involving the property that the Receiver is to take possession.

II. Appointing the Receiver:

A. The Basics:

The appointment of a Receiver can be sought either in a petition or through a motion. The party seeking the appointment must show (a) a probable right to, or interest in, the property that is the subject of the controversy, (b) that the property, or its rents or profits, is in danger of being lost or materially injured or impaired, (c) that the appointment will promote the interests of one or more parties to the action, and (d) that the appointment will not unduly infringe upon the rights of any of the parties. In order to qualify, the Receiver must take an oath to faithfully discharge the Receiver's trust and must file a bond with the clerk of court in an amount fixed by the court.

B. Time Frame for Appointment:

A hearing on the appointment is set on such notice to the other parties as the court may prescribe. Thus, it is entirely within the discretion of the court as to when a hearing on the appointment will be held. Generally, it should take ten to thirty days, depending on the court's calendar.

C. Can you go in Ex Parte?

State law provides that the hearing on appointment will be held on such notice to the other parties as the court shall prescribe. However, the court may exercise discretion to appoint a Receiver without notice in an emergency or unusual circumstance.

III. Loans and Advances:

Under Iowa law, a Receiver has the power to bring and defend actions, to take and keep possession of property, to collect debts, to receive the rents and profits of real property, and, generally, to do such acts in respect to the property committed to the Receiver as may be authorized by law or ordered by the court. The Iowa statutes, however, do not speak directly to the Receiver's authority to obtain loans or issue advances. This may be addressed within the Order of Appointment.

IV. Sales During the Receivership:

No statutory or caselaw precedent exists.

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V. Liens Against Receivership Property:

If there is a contest as to the priority of liens upon the property placed in the hands of a Receiver, the matter should be submitted to the court to determine their priority.

VI. Owners Associations:

No statutory or caselaw precedent exists.

VII. Construction Related to Receivership Property:

No statutory or caselaw precedent exists.

VIII. Ending the Receivership:

There are no specific requirements regarding the closing of the receivership. The closing of the receivership should be addressed in the Order of Appointment.

Relevant Codes, Statutes or Case Law:

Iowa Code §§ 628.1-628.29 (redemption); Iowa Code §§ 654.1-654.17B (foreclosure of real estate mortgages); Iowa Code §§ 654.18- 654.26 (alternative foreclosure procedures); Iowa Code §§ 655A.1-655A.9 (non-judicial foreclosure of non-agricultural mortgages); and Iowa Code §§ 680.1-680.11(receivership)

Wolf v. Murrane, 199 N.W.2d 90 (Iowa 1972); *Citizens State Bank v. Beucher*, 294 N.W. 717 (Iowa 1940); *Jarl v. Pritchett*, 179 N.W. 945 (Iowa 1920)

Kansas

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	No
Initial Public Notice	Complaint
Time Frame	120 Days
Redemption Period	Yes 3-12 months
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes
Approximate Time for Appointment	10 days
Who or What can act as Receiver	Individual or Company
Specific Receiver Requirements	The receiver must comply with the oath and bond requirements of K.S.A. 60-1302
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

Kansas is a mortgage state that requires judicial foreclosure. Non-judicial foreclosure is not available in Kansas.

II. Judicial Foreclosure Basics:

Upon default under the note, mortgage or other loan documents, the lender may foreclose its real estate mortgaged interest judicially. Most commonly, the lender file a lawsuit and assert claims for breach of note and foreclosure of its mortgage interest. The lender must also include any other claims against the borrower, including any tort claims, and any claims for specific performance under the mortgage and assignment of rents, including collection of rents and appointment of a receiver. All parties with an interest in the real estate to be foreclosed upon must be named as parties to the lawsuit, including the borrower/mortgagor, junior lienholders, mechanic's lienholders, judgment lienholders and other non-consensual lienholders (IRS tax lien). A title search prior to filing the petition is essential to properly name all of the parties. If the real estate is occupied by tenants, the lender should review if any non-disturbance and attornment agreements exist and if lender has the right to foreclose tenant interests that may negatively impact the value of the real estate. The lender may also include money judgment claims against non-borrower parties, including a claim for breach of guaranty, but these claims may also be pursued by a separate lawsuit.

A mortgage foreclosure lawsuit must be filed the county in which the real estate to be foreclosed is located and is commenced by filing a petition asserting all claims. Recitals in the petition normally include identification of the parties and the basis for jurisdiction and venue, identification of the loan documents, including attaching the loan documents as exhibits, identification of the borrower's defaults, acceleration of the loan (if applicable) and amounts currently owed and unpaid, as well as stating each claim asserted. Most Kansas mortgages include a security interest not only in the real estate, but also in personal property. Kansas has a statute that specifically relates to

foreclosure of personal property security interests, K.S.A. 60-1006, and the best practice is to include a separate claim for foreclosure of the personal property security interests stated in the mortgage. Most commonly, a mortgage foreclosure lawsuit will include claims for breach of note, real estate mortgage foreclosure, personal property security interest foreclosure, breach of guaranty (if applicable) and appointment of a receiver (if desired).

Kansas allows service by personal service, residential service and certified mail. The best practice is to also serve any unknown parties with an interest in the real estate to be foreclosed by publication. Once all parties are served and have answered or defaulted, the lender will proceed to judgment by default, summary judgment or adjudication after trial. The lender must wait 14 days after obtaining a foreclosure judgment to proceed to a sheriff's sale, which requires the court issuing an order of sale upon lender's motion. After proper publication and personal notice of sale, the sheriff will announce and complete the foreclosure sale at the county courthouse. The lender may credit bid, and all other interested buyers must pay cash or other readily available funds. The lender's credit bill will typically be influenced by the judgment amount and the value of the mortgaged real estate. Other considerations include the likelihood of collection against the borrower and/or guarantors of any deficiency amount and whether there is a creditor redemption period, as well as the likelihood of any junior lien holders to redeem the property). Following the sheriff’s sale, the sheriff will file a return on the foreclosure sale with the court, which will identify the purchaser and the purchase price. Upon request, the sheriff will typically provide a certificate of purchase to the purchase identifying that a Sheriff's Deed will be issued upon confirmation of the sale by the court and expiration of any redemption period without redemption.

All sheriff's sales must be confirmed by the court, which occurs upon lender's motion. If the court finds the proceedings to be “regular and in conformity with law and equity, it shall confirm the same, direct the clerk to make such entry upon the journal and order the sheriff to make to the purchase the certificate of

sale or deed and provided for in this article" . The court also has discretion to determine the bid is substantially inadequate and to order a resale, including if the purchase price at the sale does not approximate the fair value of the property. If a deficiency remains after crediting the purchase price at the sale, a deficiency judgment will be entered by the court.

Both the borrower/mortgagor and junior lienholders have a statutory right of redemption. The Kansas statute is fairly detailed as to the time period for redemption, which varies based upon certain circumstances. The general rule is that the borrower's redemption period is 12 months, but the period is reduced to 3 months if less than 1/3 of the original indebtedness secured by the mortgage has been repaid to the lender. The redemption period may be waived or shortened in the mortgage. K.S.A. 60-2414(a) provides that "(e)xcept or mortgages covering agricultural lands or single or two-family dwellings owned by or held in trust for natural persons, the mortgagor may agree in the mortgage instrument to a shorter period of redemption than 12 months or may wholly waive the period of redemption." Nearly all commercial mortgages include a waiver of the redemption right, which is enforceable as noted above. Junior lienholder's generally have a 3 month right of redemption, which typically will not have been waived. The sheriff will issue a Sheriff's Deed to the purchaser after the redemption period has expired without redemption and the sale has been confirmed by the court. The purchaser should obtain an owner's policy of title insurance upon issuance of the sheriff's deed.

III. Non-Judicial Foreclosure Basics:

Not available in Kansas.

IV. Power of Sale Foreclosure Guidelines:

As noted above, Kansas is a judicial foreclosure state, so there is no separate "power of sale" under Kansas law.

V. Power of Sale Constitutes Part of Security:

Same as above.

VI. No Power of Sale Foreclosure Guidelines:
Same as above - Kansas is a judicial foreclosure state.

VII. Foreclosure when Instrument Contains no Power of Sale:
Same as above- Kansas is a judicial foreclosure state.

VIII. Additional Satisfaction Permitted Under Continuing Power of Sale:
Same as above- Kansas is a judicial foreclosure state.

IX. Sale Under Power where Instrument Silent as to Place or Terms of Sale:
Same as above - Kansas is a judicial foreclosure state.

X. Notice of Sale and How Notice is Given:
The foreclosure judgment typically sets forth lien priorities and redemption rights (if any). A foreclosure judgment is stayed for a period of 14 days to allow the borrower/mortgagor an opportunity to pay the indebtedness owed as adjudicated in the judgment. If the borrower fails to pay the judgment in full within such 14-day period, then the lender will obtain an order of sale from the court, which order will direct the sheriff to advertise and sell the property pursuant to a sheriff's sale. The sheriff must advertise a notice of sale for 3 consecutive weeks, and personal notice must be provided to all parties in the lawsuit (which must be delivered to the borrower within 5 days after the initial publication).

Once the court confirms the sheriff's sale, the sheriff will issue a certificate of purchase to the successful bidder. After the expiration of the redemption period, if any, the sheriff will issue a sheriff's deed to the successful bidder and title will then vest in the purchaser.

Relevant Codes, Statutes or Case Law:
K.S.A. 60-2401; K.S.A. 2406; K.S.A. 60-2410; K.S.A. 60-2414; K.S.A. 60-2415; K.S.A. 60-2416; K.S.A. 60-206; K.S.A. 60-208; K.S.A. 60-303; K.S.A. 60-262; K.S.A. 60-1006.

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Receivership:

I. General Information:

Kansas has a generally applicable receivership statute, but not a comprehensive statutory receivership scheme. Receiverships in Kansas are most guided by K.S.A. 60-1301, which provides that a receiver may be appointed when deemed necessary by the court, which receiver's "duty it shall be to keep, preserve, and manage all property and protect any business or business interest entrusted to the receiver pending the determination of any proceeding in which such property or interest may be affected by the final judgment."

II. Appointing the Receiver:

A. The Basics:

K.S.A. 60-1304 provides that a receiver shall not be appointed unless (a) the petition or application for appointment specifies the general character and probable value of the property or business (and, if real estate, estimated income generated) and (b) notice and an opportunity to be heard (except as to ex parte appointments referenced below).

Most loan documents (typically in the mortgage or in the assignment of leases and rents) provide for the appointment of a receiver. A comprehensive review of the loan documents regarding the contractual provisions for appointment of a receiver is important. However, even absent such provisions, a lender can still point to the Kansas statutes in seeking such appointment if in the best interest of the asset.

A party in interest may seek the appointment of a receiver by motion to the court. Receivers are appointed by order issued by the court.

B. Time Frame for Appointment:

The notice period for a receivership varies based upon local rules and availability of the assigned judge, but the typical notice period is 10 days. As is further noted below, it is possible to obtain the appointment of a receiver without notice.

Typically judges will rule on motions seeking the appointment of a receiver from the bench, especially if the lender has provided a form order appointing receiver with its motion seeking appointment of a receiver. Therefore, the typical time period is dependent upon the notice period required, which is addressed in the previous and next sub-sections.

C. Can you go in Ex Parte?

Yes. Kansas statute provides that the judge may "after the introduction of evidence and a record of the proceeding is made, make a finding that immediate and irreparable injury is likely to result, and shall set forth in the order the probably nature of such immediate and irreparable injury."

Most loan documents provide for the appointment of an ex parte receiver upon default. Our experience is that courts will put some weight to the borrower's consent to such ex parte appointment of a receiver in the loan documents when determining whether or not to hold a receivership hearing. The best argument is to show waste and other irreparable harm to the property in seeking ex parte appointment (which is typically supported by an affidavit by the lender and with a structural condition report or other evidence of waste). Courts will also consider financial harm to the property (misappropriation, fraud, mistreatment of tenants, etc.) as a means to appointment the receiver on an ex parte basis. We have found that the courts are more apt to appoint a receiver on an ex parte basis now than they were a few years ago. Of course, this varies on a case-by-case basis, not only on the facts and circumstances surrounding the property and the debt, but also on the individual judge's preferences (as such determination is completely discretionary).

D. Specific Requirements for the Receiver:

The receiver must comply with the oath and bond requirements of K.S.A. 60-1302. As noted by statute, the amount of the bond is somewhat discretionary - "on such conditions and in such sum as the judge shall direct." The receiver need only be impartial, and need not be a resident of Kansas. A property such as a

nursing home or assisted living facility may have separate licensure requirements

E. Use of Outside Receivers:

Our general experience is that the courts have been receptive to outside receivers and have not provided extra burdens or requirements on outside receivers. Individual receivers have differing preferences. For example, have seen receiverships where the judge appointed co-receivers on a hotel project (one of which was local), where the national hotel receiver managed the asset and the local receiver oversaw the accounting. This is atypical, however.

III. Loans and Advances:

Kansas typically includes language in the receivership order which allows receivers to borrow funds on a non-recourse basis if in the best interest of the asset and used for the management and operation of the asset.

IV. Sales During the Receivership:

The Kansas statutes do not specifically provide for the sale of property by a receiver. As mentioned above, K.S.A. 60-1303 provides that a receiver may "perform such acts…as the judge may authorize." Because of that language, we typically include the receiver's power of sale in the receivership order. At times, we have been able to get this language approved. Other times, we have had the court strike the language as enforceable and overreaching under Kansas law or have had borrowers object to this language. Even when we have included this language in a receivership order, we have not had a receiver try to sell property within the receivership period. We have had receivers market the property for sale (to get an indication of the market), but to not try and sell the property until after foreclosure. The ability for a receiver to sell property under Kansas law is still an open issue. Our position has been to continue to seek to include this language in the order and wait for the right circumstance to try and enforce it. As mentioned above, some judges have already said that this was enforceable and overreaching, but there has

been no case law or statutory law to support this position adopted in Kansas yet.

Kansas also has the practical issue of whether a title company would insure over a sale by a receiver under Kansas law, even if that right is in the receivership order. The title company may try to require the borrower to consent to the sale by a receiver in order to insure "clean" title.

V. Liens Against Receivership Property:

As noted in the foreclosure section above, the rights of second mortgage holder and junior lien creditors are wiped out and extinguished upon foreclosure (after the applicable creditor's redemption period).

The receivership order should provide that the receiver is not required to pay any liens which are junior or subordinate to the senior mortgage.

VI. Owners Associations:

No separate statutory or case law authority in Kansas. A review of the title work should determine whether or not the liens created under the declaration for the owners association is prior to or subordinate to the senior mortgage. If prior to, then the receiver would have the ability to pay out of the income generated at the property. If subordinate, then the receiver would not need to pay them, as they will be wiped out and extinguished at the foreclosure sale.

Typically, the receiver will pay the association dues on a go-forward basis after the receiver is appointed and the prior unpaid association dues are wiped out at foreclosure.

VII. Construction Related to Receivership Property:

The receivership order should address whether or not the receiver is entitled to complete construction, which may include securing funds to do so. There is no separate Kansas statutory law addressing this issue.

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VIII. Ending the Receivership:

The Kansas case law provides that a receivership should be discharged when the sale is confirmed. Despite the Howard case, we have had some courts keep the receiver in place until the redemption period has expired. The receiver will then submit a final accounting for approval by the court and an order discharging the receiver. Again, the Kansas statute is not specific as to how a receiver gets discharged, but we typically notice up the court, provide the final accounting for approval by the court, ask for an order terminating the receivership and returning the receivership bond. This hearing and order is completed as soon as possible after the receiver prepares its final accounting.

As noted above, a final accounting is provided and a hearing with the court to approve the termination of the receivership (and return of the receivership bond). The receiver recovers its compensation out of the income generated at the property.

Relevant Codes, Statutes or Case Law:
K.S.A. 60-1301-1305, et seq.; K.S.A. 60-711 (appointment of receiver for attachments); K.S.A. 58-2343 (assignment of rents of real property; lien; action upon default).

Kentucky

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	NA
Initial Public Notice	Unknown
Time Frame	6 Months
Redemption Period	6 Months
Deficiency	Yes, but with Restrictions

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes
Approximate Time for Appointment	One day to Three weeks
Who or What can act as Receiver	Parties or interested persons may not serve
Specific Receiver Requirements	None
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

Foreclosure actions in Kentucky are in effect suits in equity to enforce a lien against property to satisfy a debt. A lien enforcement action, therefore, is in the nature of a quiet title action resulting in a judicial sale, usually conducted by the master commissioner of the circuit court of the county in which the action is brought.

II. Judicial Foreclosure Basics:

Any party with a right to, title to, an interest in, a claim against, or a lien on the property should be named a defendant in the complaint because the interests of any such parties not named in the complaint will not be affected by the judgment and will remain attached to the property after the judicial sale.

The circuit courts have jurisdiction over lien enforcement actions against real property, and the suit must be brought in the circuit court of the county in which the real property is located.

When the mortgage covers both real property and personal property, secured party may foreclose its interest in both real and personal property under state real property law, or separately, as to the personal property under Article 9, and as to the real property under state real property law.

A notice of *Lis Pendens* must be filed in the county clerk's office upon the filing of the complaint.

The master commissioner of the circuit court conducts hearings when necessary in a disputed foreclosure, reviews motions for judgments and orders of sale, and makes recommendations to the circuit judge regarding judgments and orders of sale. The master commissioner also conducts the judicial sales, and may be appointed by the court to act as a receiver. A licensed auctioneer may also be employed at the request of the mortgage holder to conduct the judicial sale under supervision of the Master Commissioner's office.

III. Non-Judicial Foreclosure Basics:

Non-judicial foreclosure is not available in Kentucky.

Relevant Codes, Statutes or Case Law:
KRS 134.420; KRS 360.040; KRS 382.330; KRS 424.130; KRS 24.140; KRS 424.150; KRS 425.600; KRS 426.006; KRS 426.520; KRS 426.522; KRS 426.525; KRS 426.530; KRS 426.540; KRS 426.571; KRS 426.574; KRS 426.575; KRS 426.576; KRS 426.685; KRS 426.690; KRS 426.700; KRS 426.705; KRS 541.170; KRS 451.180; KRS 451.190

Receivership:

I. Appointing the Receiver:

A. The Basics:

The circuit court, on the request of the plaintiff or other appropriate party supported by affidavit, may enter an order in the case appointing a receiver to preserve the property. The plaintiff's right to request the appointment is based in each of "two separate and distinct" sources: the equitable right now codified in KRS 425.600, and by virtue of a provision to that effect in the loan documents.

The order appointing receiver should be drafted broadly to allow the receiver maximum flexibility to preserve, manage, lease and operate the property, including provision for the receiver to borrow from the plaintiff when necessary to sustain operations. The order should also contain a prohibition against anyone filing suit against the receiver without a prior order of the court granting permission to do so. The order should also limit personal claims against the receiver and professionals to those stemming from misappropriation of funds coming into the hands of the receiver, gross negligence, gross or willful misconduct, malicious acts, or the failure to comply with the court's orders.

An order granting or denying the appointment of a receiver is a final order for purposes of appeal, but may not be superseded.

B. Time Frame for Appointment:

The appointment is effective as of the date specified in the order appointing the receiver – usually immediately upon entry of the order.

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C. Can you go in Ex Parte?

Yes, (a) where the lender is contractually entitled to appointment of a receiver without notice, or (b) even without the contractual right, where there is threat of irreparable injury to the property or fund at issue.

II. Loans and Advances:

There are no specific statutes regarding loans and advances to the receiver, but provision for the receiver to borrow from the plaintiff when necessary to sustain operations may be included in the order appointing the receiver, including receivership certificates to evidence and establish the security and priority for repayment of such loans.

III. Sales During the Receivership:

In certain circumstances, responsibility for the facilitation of the foreclosure sale, usually conducted by the Master Commissioner after the entry by the Court of a final judgment and order of sale, may be delegated to a receiver. It is not clear under current law whether the power of sale can be delegated to a receiver without a final judgment.

IV. Liens Against Receivership Property:

There are no specific statutes regarding liens against property held in receivership. Receivers take possession subject to the liens outstanding against the property.

V. Owners Associations:

There are no specific statutes regarding owners associations in connection with property held in receivership.

VI. Construction Related to Receivership Property:

By provisions in the order appointing the receiver and defining the duties of the receiver during the receivership.

VII. Ending the Receivership:

The receivership is terminated according to the terms of the order appointing the receiver. Typically such a provision includes terminations (a) automatically (unless the court rules otherwise) thirty (30) days after the filing with the court and the receiver of a written demand for removal by plaintiff's counsel; or (b) in the court's discretion upon a motion for cause or upon the courts own motion.

VIII. Miscellaneous:

No party to the action or his attorney or any person with an interest in the action may be appointed receiver. The receiver must take an oath to perform his duties faithfully and must post a bond or present proof of acceptable insurance in lieu of a bond.

Relevant Codes, Statutes or Case Law:

KRS 425.600; KRS 31A.080; KRS 381.420;
Elkhorn Hazard Coal Co. v. Fairchild, et. al., 191 Ky. 276; 230 S.W. 61 (1921); G.B. Brassfield & Son v. Northwestern Mutual Life Insurance Co., 233 Ky. 94; 25 S.W.2d 72 (1930); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935); Monin v. Monin, 156 S.W.3d 309 (Ky. Ct. App. 2004); National Bank of Kentucky v. Kentucky River Coal Corporation, 20 S.W.2d 724 (Ky. 1929); Rosenbalm v. Commercial Bank of Middlesboro, 838 S.W.2d 423 (Ky. Ct. App. 1992); Wakenva Coal Co., Inc. v. Johnson, 234 Ky. 558; 28 S.W.2d 737 (Ky. 1930); Wilson v. Jonas, 8 Ky. L. Rptr. 510 (Ky. 1886);. See National Bank of Kentucky v. Kentucky River Coal Corporation, 20 S.W.2d 724 (Ky. 1929); Wakenva Coal Co., Inc. v. Johnson, 234 Ky. 558, 565 (Ky. 1930); see also, Wilson v. Jonas, 8 Ky. L. Rptr. 510, 512 (Ky. 1886).
In Wakenva Coal Company v. Johnson, 28 S.W.2d 737 (Ky. 1930).; Thompson v. BB&T (unpublished) 2009 Ky. App. Unpub LEXIS 369.

Contributed By: James R. Williamson of Stites &Harbison PLLC

Louisiana

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	By Executory Process
Initial Public Notice	Petition
Time Frame	4-12 months but it varies by parish
Redemption Period	No
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes, if mortgage provides
Approximate Time for Appointment	1-30 days
Who or What can act as Receiver	See La. 9:5136 et seq.
Specific Receiver Requirements	A bond may be required
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

There are essentially two methods to enforce the security rights of a seizing creditor under Louisiana law – ordinary process with pre-judgment sequestration, and executory process.

II. Judicial Foreclosure Basics:

To enforce a mortgage by ordinary process, the seizing creditor would file a petition in the parish where the mortgaged property is located seeking a personal judgment against the borrower/mortgagor, and recognition of the lien of the mortgage. The seizing creditor may also ask that the property affected by the mortgage be seized immediately under a writ of sequestration and that a keeper be appointed, if it is within the power of the borrower/mortgagor to waste the property or the revenue therefrom. The creditor would have to furnish security for a writ of sequestration in an amount to be determined by the court.

There are the usual legal delays for the filing of responsive pleadings. Assuming no requests for injunctive relief, exceptions or bankruptcy proceedings are filed by the borrower/mortgagor, generally a period of thirty to forty-five days will elapse before the answer is filed.

The borrower/mortgagor would be entitled to a trial on the merits which, under present docket conditions, may not be fixed for a year or so after the answer is filed. It might be possible to obtain a summary judgment without much delay, if there were no genuine issues as to material facts. In addition, judgment by default may be obtained quickly against the borrower/mortgagor, if service has been obtained and the borrower/mortgagor fails to file an answer.

Upon obtaining a judgment against the borrower/mortgagor and waiting the necessary delays for application for a new trial, the seizing creditor would proceed to have the mortgaged property seized and sold at public auction by the civil sheriff pursuant to a writ of *fieri facias.* At this stage, the writ of sequestration is dissolved and seizure of the collateral is continued under the writ

of *fieri facias*. The keeper (the Louisiana equivalent of a receiver) would remain in place pending the judicial sale. Written notice of seizure of the mortgaged property under the new writ for a judicial sale to satisfy the judgment must be served on the borrower/mortgagor to give him the opportunity to enjoin the sale if he can show that the seizure or judgment is defective, or to reduce the seizure if the borrower/mortgagor can show that the value of the collateral exceeds what is reasonably necessary to satisfy the judgment. Third parties may also intervene in the proceeding at this time to claim a privilege or lien superior to that of the mortgage.

Following seizure, the sheriff publishes two notices of the sale in a local newspaper, the first notice being 30 days prior to the sale, and the second notice being 7 days before the sale. The mortgaged property must be appraised prior to the sale, and the borrower/mortgagor and the seizing creditor each have the right to appoint an appraiser.

The seizing creditor must be careful to give notice of the judicial sale to any parties at interest of record under the Mennonite decision.

At the sale, the mortgaged property will not be sold if the highest bid does not exceed two-thirds of the appraised value. In such case, the sheriff must re-advertise for a second sale, at which time the mortgaged property will be sold for cash for whatever price it will bring. The judicial sale of the mortgaged property is subject to superior liens, encumbrances and leases; all inferior liens, encumbrances and leases are cancelled.

The sheriff's commission for the judicial sale is 3% of the adjudication price for real property and 6% of the adjudication price for personal property unless otherwise negotiated by and between the sheriff and the seizing creditor, with court approval. The policy of sheriffs concerning the negotiation of commissions varies from parish to parish and can change in each parish from time to time depending on politics and economics.

There is no right of redemption of mortgaged property adjudicated at a judicial sale.

III. Non-Judicial Foreclosure Basics:

In executory process, the mortgaged property can be seized and sold through an *ex parte* proceeding without a personal judgment against the borrower/mortgagor.

A prerequisite to executory process is that the mortgage be in proper form and contain a confession of judgment by the borrower/mortgagor for the full amount of the indebtedness, including attorney's fees.

To enforce a mortgage by executory process, assuming all of the technical requirements for executory process are satisfied, the seizing creditor would file a verified petition naming the borrower/mortgagor as debtor, alleging the default on the mortgage or note secured thereby, and requesting the seizure and sale of the mortgaged property and the appointment of a keeper pending such sale. The customary form of Louisiana mortgage contains provisions for the appointment of a keeper pursuant to the keeper act discussed more fully below. Certain of the loan documents must be filed with the petition for inspection by the court to verify that the documents are in proper form and satisfy the technical requirements with respect thereto.

After the verified petition and documents are presented to and approved by the court, the court will order the issuance of a writ of seizure and sale. A keeper will be appointed in the order, without the requirement of a bond, if the mortgage contains the appropriate provisions for the appointment of a keeper pending the judicial sale of the collateral. Otherwise, an application must be filed with the court for the appointment of a keeper and a bond will be required in an amount determined by the court.

Upon seizure of the mortgaged property by the sheriff, but prior to the sale thereof, a written notice of the seizure must be served on the borrower/mortgagor. The notice of seizure, which cannot be waived by the borrower/mortgagor, gives the

borrower/mortgagor an opportunity to assert certain defenses to the seizure, such as the extinguishment of the mortgage, the legal enforceability of the mortgage, or the lack of sufficient authentic evidence to entitle the seizing creditor to executory process. Defenses to the seizure can be asserted only in an injunction proceeding to arrest the seizure and sale or by a suspensive appeal from the order directing issuance of the seizure and sale.

Following a seizure of the mortgaged property, the sheriff proceeds to advertise and sell the collateral following the same procedure as discussed above in connection with ordinary process, except that an appraisal is not necessary if it has been waived by the borrower/mortgagor in the mortgage. If, however, the seizing creditor intends to pursue the borrower/mortgagor for a deficiency judgment to collect any deficiency, the sale must be made with the benefit of appraisal. The rules for the appointment of a keeper, the sheriff's commission and the sale of the property with the benefit of appraisal are also the same as for ordinary process. Likewise, the seizing creditor must be careful to give notice of the judicial sale to any parties at interest of record under the Mennonite decision.

If the judicial sale does not yield sufficient revenue to satisfy the seizing creditor's claims, the seizing creditor may, by converting the executory proceeding to an ordinary proceeding or by separate suit, obtain a deficiency judgment against borrower/mortgagor for the balance owed, but, as indicated above, only if the mortgaged property has been sold with benefit of appraisal. It should be noted that while the borrower/mortgagor may defend against the action for deficiency judgment on the ground that the appraisal procedure was not followed closely, the borrower/mortgagor is estopped from bringing an action to set aside the judicial sale of the mortgaged property for defects in the executory proceedings once the sheriff's deed is filed for registry.

As in a judicial sale under ordinary process, there is no right of redemption of the mortgaged property adjudicated at the judicial sale under executory process.

IV. Notice of Sale and How Notice is Given:

The sheriff must advertise the sale of the seized property at least twice: the first advertisement must be published 30 days before the sale and the second no earlier than 7 days and no later than one day before the sale.

After the filing of the petition with appropriate exhibits (original note, certified copy of the mortgage and certified copy of borrower's authorization to execute the mortgage) in the proper jurisdiction, the court will issue a writ of seizure and sale ordering the sheriff to seize the mortgaged property. A notice of seizure will contain the legal description of the property as well as the sale date and must be served upon borrower as well as filed in the mortgage records.

A certified mortgage certificate will provide the lender with all interested parties to whom notices must be served after seizure of the property at least 10 days prior to the judicial sale. If a federal tax lien has been filed against the property, notice must be given to the IRS at least 25 days before judicial sale.

Receivership:

I. General Information:

State law dictates that when property is seized pursuant to executory or ordinary process, the parties to a mortgage may designate a keeper (the Louisiana equivalent of a Receiver) of the property. The keeper may be the seizing creditor or its agent, and the parties shall also specify the method by which a keeper is to be selected.

II. Appointing the Receiver:

A. The Basics:

A keeper will be appointed in the order, without the requirement of a bond, if the mortgage contains the appropriate provisions for the appointment of a keeper pending the judicial sale of the collateral. Otherwise, an application must be filed with the court for the appointment of a keeper, and a bond will be required in an amount determined by the court.

B. Time Frame for Appointment:

Appointments occur typically within two weeks, if the keeper is designated in the mortgage, but time periods vary if the keeper is appointed in a summary proceeding.

C. Can you go in Ex Parte?

Yes, if so authorized in the mortgage.

III. Loans and Advances:

No statutes or rules govern loans or advances, and the Order of Appointment will govern the receiver's authority to obtain loans or to issue advances.

IV. Sales During the Receivership:

La. R. S. 9:5138(A) provides that the keeper shall perform his duties as a prudent administrator with full powers of management and administration of the property and may operate the property sized in the ordinary course of business. Typically, the keeper would not engage in sales of the property. If, however, at any time during its administration, the keeper is of the opinion that some action beyond the ordinary course of the administration or management of the property is required to preserve or protect the property, the keeper may apply to the court before whom proceedings are pending for instructions as to the proper course that should be taken by the keeper.

V. Liens Against Receivership Property:

No information provided.

VI. Owners Associations:

See IV above.

VII. Construction Related to Receivership Property:

See IV above.

VIII. Ending the Receivership:

The keeper renders a final accounting and no further action is needed.

IX. Miscellaneous:

The sheriff or other officer seizing property shall have no responsibility for the property seized or the actions of the keeper after custody of the property has been delivered to the keeper and shall not be entitled to receive any commission on the rents, revenues, or other fruits of the property delivered to the keeper.

Relevant Codes, Statutes or Case Law:
La. R. S. 9:5136 *et seq*.

Maine

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Notice of Sale/Clerk's Certificate
Time Frame	75 days/18 months
Redemption Period	None/90 days
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	No
Approximate Time for Appointment	21 to 30 days
Who or What can Act as Receiver	Individual or Corporation
Specific Receiver Requirements	Receiver must be authorized to transact business in Maine
Is there any Approval List for Receivers	No
Out of State Receivers Allowed	Yes, but must be authorized to transact business in Maine

Foreclosure:

I. General Information:

14 M.R.S. §§ 6101 – 6325 address both judicial and non-judicial foreclosure proceedings.

II. Judicial Foreclosure Basics:

Mortgages securing a loan for personal, family or household use may only be foreclosed by using the judicial foreclosure process. Sections 6111 and 6321-6324 of Title 14 of the Maine Revised Statutes are the specific relevant statutory provisions.

After the mortgagor's default and prior to commencement of a judicial foreclosure action, the mortgagee must provide the mortgagor with notice of the mortgagee's right to cure the default by payment of all amounts then due, including interest and late charges as well as reasonable attorney fees, within 35 days of the notice. 14 M.R.S. § 6111(1). The notice must include, among other things, an itemization of all past due amounts causing the loan to be in default and the total amount due to cure the default, and an itemization of any other charges that must be paid in order to cure the default. *Id.* at § 6111(1-A), (B), (C). During the 35-day cure period, the amount necessary for the mortgagor to reinstate the loan is essentially frozen, and if the mortgagor pays that amount, the mortgagor is reinstated to all rights under the mortgage as if the default had not occurred, even if additional amounts due have accrued in the meantime. *See id.* at § 6111(1); *Bank of America v. Greenleaf*, 96 A.3d 700, 713 (Me. 2014); *JPMorgan Chase Bank, N.A. v. Lowell*, 156 A.3d 727, 731-32 (Me. 2017). Section 6111 sets out additional specific items to be included in the notice of right to cure and the precise procedure for mailing the notice, including how to calculate the running of the 35-day period. 14 M.R.S. § 6111(1-A), (3). Within three days of providing the § 6111 written notice, the mortgagee must file certain information with the Maine Department of Professional and Financial Regulation, Bureau of Consumer Credit Protection. *Id.* at § 6111(3-A). Mortgagees must strictly comply with the Section 6111 notice provisions or a judgment of foreclosure may be denied. *See Greenleaf, supra*, 96 A.3d at 713; *Lowell*, 156 A.3d at 734. Only

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after the mortgagee fails to cure the default after the statutory notice period has run may the mortgagee accelerate the loan and commence foreclosure proceedings. 14 M.R.S. § 6111(1).

The mortgagee commences a judicial foreclosure by filing a complaint in the Superior or District Court in the division in which the mortgaged premises are located. 14 M.R.S. § 6321. In the complaint, the mortgagee must certify proof of ownership of the mortgage note and produce evidence of the mortgage note, mortgage, and any and all assignments and endorsements of the note and mortgage. *Id.* The Maine Supreme Judicial Court sitting as the Law Court has held that to "certify proof of ownership" requires the plaintiff to identify the owner or economic beneficiary of the note, and, if the plaintiff is not the owner, to indicate the basis for the plaintiff's authority to enforce the note pursuant to Article 3-A of Maine's Uniform Commercial Code. *Bank of America, N.A. v. Cloutier,* 61 A.3d 1242, 1246 (Me. 2013); *see* 11 M.R.S. § 3A-1301.

In addition to the defendant, the complaint must name all "parties in interest" reflected in the registry of deeds affecting the mortgaged premises at the commencement of the action, including other mortgagees, lessees pursuant to recorded leases, lienors, and attaching creditors. 14 M.R.S. § 6321. The failure to include parties in interest does not invalidate the foreclosure action, but the foreclosing mortgagee (or buyer at the foreclosure sale) takes title subject to the interests of such parties in interest. *See id.*

Municipal tax liens and sewer liens have priority over all other recorded liens, including mortgages. *See* 36 M.R.S. § 943 (municipal tax liens); 38 M.R.S. § 1258(2), 3(D) (sewer liens). Foreclosing mortgagees must pay these liens or they are not eliminated by the completion of the foreclosure action. These liens automatically foreclose within eighteen months of recording, vesting title in the relevant lienholder. *See id.*

The foreclosure action must be commenced in accordance with the Maine Rules of Civil Procedure, and within 60 days of commencing the action, the mortgagee must record a copy of the complaint or a clerk's certificate of foreclosure in the registry of deeds in the county in which the mortgage is recorded. 14 M.R.S. § 6321. Any party having a claim to the mortgaged premises that has not recorded notice of the claim with the registry of deeds as of the time of recording of the complaint or the clerk's certificate need not be joined in the foreclosure action, and any such party has no claim against the real estate after completion of the foreclosure sale, unless that party moves to intervene in the foreclosure action. *Id.* The interests of parties with senior liens are not affected by the foreclosure, but the mortgagee must notify priority parties in interest of the action by sending a copy of the complaint to such parties by certified mail. *Id.*

The acceptance, before the expiration of the right of redemption and after the commencement of the foreclosure action, by the mortgagee of any payment by the mortgagor constitutes a waiver of the foreclosure unless there is a written agreement to the contrary or unless the mortgagee returns the payment to the mortgagor within ten days of receipt. *Id.*

A defendant in an action foreclosing a mortgage on owner-occupied residential property with no more than four units, which property is the primary residence of the owner-occupant, is entitled to mediation. 14 M.R.S. § 6321-A(3); *see* M.R. Civ. P. 93(a)(3). Plaintiffs in residential mortgage foreclosure actions must attach to the complaint a one-page form notice to the defendant, developed by the Department of Professional and Financial Regulation, Bureau of Consumer Credit Protection, which explains, among other things, that the defendant may be entitled to mediation. 14 M.R.S. § 6321-A(2). The court will schedule mediation whenever the defendant returns the form response to complaint, otherwise requests mediation or makes an appearance in a foreclosure action. 14 M.R.S. § 6321-A(6); *see* M.R. Civ. P. 93(c)(1).

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When mediation has been scheduled, the plaintiff may not file dispositive motions or requests for admissions until after mediation has been completed and the mediator has filed a final report with the court. M.R. Civ. P. 93(d)(1). Parties to the mediation session include the mediator, a representative of the mortgagee who has authority to agree to a proposed settlement, loan modification or dismissal, who may appear by telephone, the defendant and the defendant's counsel, if any, and counsel for the plaintiff. 14 M.R.S. § 6321-A(11).

Mediation is intended to address all issues of foreclosure, including without limitation reinstatement of the mortgage, modification of the loan, and restructuring of the mortgage debt. 14 M.R.S. § 6321-A(3). Rule 93(g) of the Maine Rules of Civil Procedure also sets forth issues that must be addressed at mediation, including calculation of the sums due on the note for principal, interest, and any costs or fees; reinstatement; and restructuring of the debt. M.R. Civ. P. 93(g). The court may impose sanctions for failure to attend and make a good faith effort to mediate. 14 M.R.S. § 6321-A(12). The mediator must file a report of each session, stating whether an agreement was reached. *Id.*; M.R. Civ. P. 93(n)(4).

After mediation has been completed, or if no mediation has occurred, the mortgagee may wish to file a motion for summary judgment. In order to obtain summary judgment in a foreclosure action in Maine, the mortgagee must strictly comply with all provisions of the foreclosure statute and rules *See Camden National Bank v. Peterson*, 948 A.2d 1251, 1257 (Me. 2008); M.R. Civ. P. 56(j). Rule 56 of the Maine Rules of Civil Procedure states:

> Foreclosure Actions. No summary judgment shall be entered in a foreclosure action filed pursuant to Title 14, Chapter 713 of the Maine Revised Statutes except after review by the court and determination that (i) the service and notice

> requirements of 14 M.R.S. § 6111 and these rules have been strictly performed; (ii) the plaintiff has properly certified proof of ownership of the mortgage note and produced evidence of the mortgage note, the mortgage, and all assignments and endorsements of the mortgage note and the mortgage; and (iii) mediation, when required, has been completed or has been waived ort eh defendant, after property service and notice, has failed to appear or respond and has been defaulted or is subject to default.

In a plaintiff's statement of material facts in support of a motion for summary judgment, the plaintiff must, at a minimum, establish the following facts supported by evidence of a quality that could be admissible at trial:

> • the existence of the mortgage, including the book and page number of the mortgage, and an adequate description of the mortgaged premises, including the street address, if any;
>
> • properly presented proof of ownership of the mortgage note and the mortgage, including any and all assignments and endorsements of the note and the mortgage;
>
> • a breach of condition in the mortgage;
>
> • the amount due on the mortgage note, including any reasonable attorney fees and court costs;
>
> • the order of priority and any amounts that may be due to other parties in interest, including any public utility easements;
>
> • evidence of properly served notice of default and mortgagor's right to cure in compliance with statutory requirements;

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> • after January 1, 2010, proof of completed mediation (or waiver or default of mediation), when required, pursuant to the statewide foreclosure mediation program rules; and
>
> • if the homeowner has not appeared in the proceeding, a statement, with a supporting affidavit, as to whether or not the defendant is in military service in accordance with the Servicemembers Civil Relief Act, *see* 50 U.S.C.S. app. § 521.

Chase Home Finance LLC v. Higgins, 985 A.2d 508, 510-11 (Me. 2009).

The mortgagee in a foreclosure action must also show that it was either the original mortgage holder or had been assigned the mortgage, contrary to the general rule in other states that the right to enforce the mortgage follows the right to enforce the note. *See Bank of America, N.A. v. Greenleaf*, 96 A.3d 700 (Me. 2014). In *Greenleaf*, the mortgage at issue named Mortgage Electronic Registrations Systems, Inc. ("MERS") as the nominee for the lender, and stated that, for purposes of recording the mortgage, MERS was the mortgagee of record. *Greenleaf*, 96 A.3d at 706-07. The Maine Law Court found that MERS therefore did not have the power to assign the mortgage, so the plaintiff, Bank of America, as the purported ultimate assignee of the mortgage, did not have standing to foreclose the mortgage. *Id.* at 708.[1]

Plaintiffs in a foreclosure action may request an expedited final hearing in cases in which mediation was conducted but did not

[1] The Maine legislature responded to the *Greenleaf* decision by enacting 33 M.R.S. § 508, which provides a statutory resolution to title problems created by the *Greenleaf* decision for discharges or partial releases of mortgages and for assignments affecting title to a mortgaged property that is the subject of a foreclosure judgment completed prior to the effective date of the section.

result in the settlement or dismissal of the case and all parties consent to the expedited final hearing, or the defendant has not appeared in the case and all other parties agree. 14 M.R.S. § 6321-B(1). Upon request, the court must set the expedited final hearing not less than 45 days after the request is filed, "as the interests of justice permit." *Id.* at § 6321-B(3).

To attempt to get to a foreclosure sale more quickly in an uncontested case, mortgagees may present evidence that the mortgagor has abandoned the mortgaged premises. *See* 14 M.R.S. § 6326(1). The mortgagee must submit evidence of abandonment showing that the mortgaged premises are vacant and that the occupant has no intent to return, which evidence includes without limitation boarded up doors and windows, accumulated trash or debris, absence of furnishings and personal property, reports of trespassers or vandalism, and other reasonable indicia of abandonment. *See id.* at § 6326(2). Upon the court's determination of abandonment based on clear and convincing evidence, the foreclosure action may be advanced on the docket and receive priority over other cases as the interests of justice require, and the period of redemption is reduced from 90 days to 45 days. *Id.* at § 6326(3), (4).

Upon a court's determination that a breach of the mortgage exists, a judgment of foreclosure and sale issues, which includes the amount due on the mortgage, including reasonable attorney fees and court costs, the order of priority and the amounts, if any, due to parties in interest, and whether any public utility easements held by a party in interest survive the proceedings. 14 M.R.S. § 6322.

If a mortgagee knows or should know by the exercise of due diligence that the mortgaged premises are occupied as a residential rental unit, the mortgagee must provide written notice to the residential tenant of the foreclosure proceedings. 14 M.R.S. § 6322-A. After entry of final judgment, the mortgagee must provide a copy of the foreclosure judgment to any residential tenant of the mortgaged premises, which may be

provided by mail only after the mortgagee has made two good faith efforts to provide notice to the tenant in person. *Id.* A residential tenant may only be evicted by the mortgagee by filing an action for forcible entry and detainer pursuant to 14 M.R.S. § 6001 *et seq.*, after the expiration of the 90-day redemption period. *Id.* Maine's forcible entry and detainer action states that a bona fide tenancy in a property that is subject to foreclosure may be terminated only pursuant to the provisions of the federal Protecting Tenants at Foreclosure Act of 2009, 12 U.S.C. § 5201 *et seq.*, which provides for a 90-day notice period. This Act expired on December 31, 2014; however, it is unclear whether the Maine legislature's intent is to follow the expired federal act so the better practice is to provide the 90-day notice.

After the court enters a judgment of foreclosure, there is a 90-day period (the "redemption period") during which the mortgagor may pay the full amount due pursuant to the foreclosure judgment. 14 M.R.S. § 6322. If the mortgagor redeems the mortgage during this redemption period, then the mortgagee must discharge the mortgage and dismiss the action. *Id.* Upon expiration of the redemption period, if the mortgagor has not redeemed the mortgage, the mortgagee must publish its notice of the foreclosure sale within 90 days after the expiration of the redemption period, for three consecutive weeks, in a newspaper of general circulation in the county in which the mortgaged premises are located. *Id.* at § 6323. The notice of sale must state the date, time, place, and terms of sale. *Id.* The public sale must be held not less than 30 days nor more than 45 days after the first date of the publication of the notice of sale, and the sale need not take place in the county in which the mortgaged premises are located. *Id.*

After deducting the expenses incurred in making the sale, the mortgagee disburses the proceeds of the sale in accordance with the provisions of the judgment. 14 M.R.S. § 6324. After the sale, the mortgagee must file a report of the sale and the

disbursement of the proceeds of the sale with the court. *Id.* The mortgagor or any party in interest may contest the accounting within 30 days of receipt of the report. *Id.* Any such challenge does not affect title to the property and may be for money only. *Id.* To execute on the deficiency, the mortgagee must generally file a motion for assessment of deficiency and, once granted, the court will issue a writ of execution for the deficiency amount.

III. Non-Judicial Foreclosure Basics:

A holder of a mortgage on real estate that is granted by a corporation, partnership, limited liability company or trustee of a trust and that contains a power of sale as described in 33 M.R.S. § 501-A may conduct a power of sale foreclosure. 14 M.R.S. § 6203-A(1). The power of sale may not be used to foreclose a mortgage deed granted by a trustee of a trust if, at the time the mortgage deed is given, the real estate is used exclusively for residential purposes, the real estate has four or fewer residential units, and one of the units is the principal residence of the owner of at least half of the beneficial interest in the trust. 33 M.R.S. § 501-A. If the mortgage contains a statement that, at the time the mortgage deed is given, the real estate encumbered by the mortgage deed is not used exclusively for residential purposes, that the real estate has more than four residential units or that none of the residential units is the principal residence of the owner of at least half of the beneficial interest in the trust, the statement conclusively establishes these facts and the mortgage deed may be foreclosed by the power of sale process. *Id.*

To effectively conduct a power of sale foreclosure, the mortgagee must, prior to the sale, publish notice once in each of three successive weeks, the first publication not less than 21 days before the day of the sale, in a newspaper of general circulation in the town where the mortgaged property is located. 14 M.R.S. § 6203-A(1). The notice must identify the mortgagee, the mortgagor, the terms of the public sale, the location, date, and time of the sale, the street address of the mortgaged property, and include a description of the mortgaged real estate, which

may be incorporated by reference to the book and page number of an instrument of record containing an adequate legal description of the real estate, and the book and page number of the mortgage. *Id.* at § 6203-A(3). The statute provides a form of notice that may be used and that may be altered as required. *Id.*

The mortgagee must also record the foreclosure notice of sale at least 21 days before the sale date in each registry of deeds in which the mortgage is recorded. *Id.* at 6203-A(2-A.). In addition, the mortgagee must provide copies of the foreclosure notice to any residential tenants if the mortgagee knows or should know by the exercise of due diligence that the property is occupied as a rental unit. *Id.* at § 6203(2). Residential tenants may only be evicted by a forcible entry and detainer action pursuant to 14 M.R.S. § §§ 6001 *et seq.*, at least 21 days after the mortgagee has served the notice on the tenant.

At least 21 days before the sale, the mortgagee must also send a copy of the foreclosure notice to the mortgagor by registered or certified mail, and must send a copy of the notice by first-class mail to all other parties in interest, meaning those parties having a claim to the real estate recorded in the registry of deeds as of the time of recording the notice of foreclosure, other than parties having a superior priority. 14 M.R.S. § 6203-A(1-A). Failure to notify any party in interest, other than the mortgagor, does not invalidate the foreclosure as to other parties in interest who were given notice. *Id.*

A foreclosure notice published in accordance with the statute together with such other notice required by the mortgage along with the notice to the mortgagor and parties in interest whose interests appear of record at the time that the foreclosure notice is recorded constitutes sufficient notice of the sale. 14 M.R.S. § 6203-A(4). The property may be sold either as a whole or in parcels, by a public sale on or near the premises, or at such place as may be designated in the mortgage. 33 M.R.S. § 501-A.

At the sale, the foreclosing mortgagee executes a purchase and sale agreement with the highest bidder, which may be assigned. 14 M.R.S. § 6203-A(5). If the highest bidder fails to perform, the foreclosing mortgagee may execute a purchase and sale agreement with the next highest bidder. *Id.* If the foreclosing mortgagee is the highest bidder, a purchase and sale agreement need not be executed. *Id.* Excess proceeds from the sale must be used to satisfy the claims of parties in interest, and, if any excess then remains, such excess is paid to the mortgagor. *Id.* A public sale may be adjourned, for any time not exceeding 30 days and from time to time until a sale is made, by announcement to those present at each adjournment. *Id.* at §6203-A(6).

Within 30 days after the date of delivery of the deed to the purchaser, the mortgagee or its agent must record in the relevant registry of deeds an affidavit stating the mortgagee's acts, together with a copy of the foreclosure notice as published. 14 M.R.S. § 6203-B. The affidavit must identify the mortgagee and mortgagor; the street address of the mortgaged real estate; a description of the real estate, which may be incorporated by reference to a document of record; the book and page of the mortgage; the dates of publication and the name of the publishing entity; the recipients and mailing or service dates of the notices to the mortgagor and the parties in interest; the final purchase; and the date of delivery of the deed. *Id.*

If the mortgagee desires to preserve its right to pursue a deficiency against the mortgagor, then, at least 21 days before the sale, the mortgagee must send a notice of intention to foreclose and a statement of the mortgagor's liability for the deficiency. 14 M.R.S. § 6203-E. The notice must be served on the mortgagor or sent by registered or certified mail with return receipt requested. *Id.* The statute provides a form of such notice. *Id.* The mortgagee must sign and swear to an affidavit, within 30 days after the date of the delivery of the deed to the purchaser at the sale, of the mailing of such notice. *Id.*

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To pursue a deficiency thereafter, the mortgagee must file a complaint with the Superior Court with jurisdiction and venue over such an action.

IV. Power of Sale Foreclosure Guidelines:

14 M.R.S. §§ 6203-A – 6203-E provide the procedure for a non-judicial foreclosure, and are discussed in greater detail in Section III, above.

V. Power of Sale Constitutes Part of Security:

As indicated above, the subject mortgage must contain specific statutory power of sale language, including that the mortgage is given primarily for a business, commercial or agricultural purpose. *See* M.R.S. § 501-A; 14 M.R.S. § 6203-A(1).

VI. No Power of Sale Foreclosure Guidelines:

If the mortgage does not include the statutory power of sale language, then the mortgagee must foreclose through the judicial foreclosure process discussed in Section II above. *See* 14 M.R.S. § 6203-A(1).

VII. Foreclosure when Instrument Contains no Power of Sale

If the mortgage does not include the statutory power of sale language, then the mortgagee must foreclose through the judicial foreclosure process discussed in Section II above. *See* 14 M.R.S. § 6203-A(1).

VIII. Additional Satisfaction Permitted Under Continuing Power of Sale

If the subject mortgage is secured by more than one parcel of property, then the parcels may be sold separately. 33 M.R.S. § 501-A.

IX. Sale Under Power where Instrument Silent as To Place or Terms of Sale

The foreclosure sale must occur on or near the mortgaged premises. 33 M.R.S. § 501-A.

X. Notice of Sale and How Notice is Given

14 M.R.S. § 6203-B provides the procedure for notice and how it is given in a non-judicial foreclosure, and is discussed in detail in Section III above. 14 M.R.S. § 6323 provides the procedure for notice and how it is given in a judicial foreclosure, and is discussed in detail in Section II above.

XI. Place and Time for Conducting Foreclosure by Power of Sale

The sale must occur on or near the mortgaged premises unless otherwise provided for in the mortgage. 33 M.R.S. § 501-A.

Relevant Codes, Statutes or Case Law:
14 M.R.S. §§ 6101 – 6325; 33 M.R.S. § 501-A.

Receivership:

I. General Information:

Unlike many other states, Maine has no generally-applicable receivership act or statute. Accordingly, a creditor seeking the appointment of a receiver must either attempt to fit within one of the specific statutes listed below or rely on the provisions of its loan documents with a borrower which provide for the appointment of a receiver. Fortunately for creditors that have such provisions in their loan documents, the rule is well settled in Maine that such provisions are valid and enforceable in arms-length commercial transactions. *See Fleet Bank of Maine v. Zimelman*, 575 A.2d 731, 734 (Me. 1990) ("The defendants make no claim that their mortgage contract with the Bank was anything other than a commercial loan agreement negotiated at arm's length between knowledgeable business persons . . . . Accordingly, there is no reason not to enforce the unambiguous language of the mortgage, entitling the Bank to the appointment of a receiver.").

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Where a loan document does not specifically provide for the appointment of a receiver, there are certain Maine statutes that allow a creditor to seek the appointment of a receiver in specific situations. *See* 13-B M.R.S. § 1105(2) (providing for creditor to seek dissolution of non-profit corporation); 13-B M.R.S. § 1106(2) (providing for court to appoint receiver in judicial proceeding to liquidate assets and activities of non-profit corporation) 13-C M.R.S. § 1430(3) (providing for creditor to seek judicial dissolution of corporation under specific circumstances); 13-C M.R.S. § 1432 (providing for court to appoint receiver in judicial proceeding brought to dissolve corporation); 14 M.R.S. § 3578 (providing for creditor to seek judicial appointment of receiver to take charge of assets fraudulently transferred); 31 M.R.S. §§ 1054 (providing for a court to appoint a receiver on application by judgment creditor when judgment debtor is partner of partnership); and 31 M.R.S. § 1383 (providing for court to appoint receiver on application by judgment creditor when judgment debtor is partner of limited partnership).

From a creditor's perspective, the most useful of these statutory provisions is likely to be 13-C M.R.S. § 1430(3), which provides that a corporation may be dissolved by judicial dissolution in a proceeding initiated by a creditor, if the creditor can establish:

1. The creditor's claim has been reduced to judgment, the execution on the judgment has been returned unsatisfied and the corporation is insolvent; or

2. The corporation has admitted in writing that the creditor's claim is due and owing and the corporation is insolvent.

In such a judicial proceeding to dissolve a corporation, the court may "appoint one or more receivers to manage and to wind up and liquidate the business and affairs of the corporation." 13-C

M.R.S. § 1432. The court holds a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver. The court appointing a receiver has jurisdiction over the corporation and all of the corporation's property, wherever located. 13-C M.R.S. § 1432(2)–(4) sets forth provisions relating to the need for the receiver to post a bond, the receiver's powers and duties, and the receiver and receiver's counsel's compensation and reimbursement for expenses.

The Maine Business Corporation Act also provides shareholders with the ability to seek the appointment of a receiver for a corporation through a judicial proceeding upon establishing that:

1. The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock and irreparable injury to the corporation is threatened or being suffered; or

2. The directors or those in control of the corporation are acting fraudulently and irreparable injury to the corporation is threatened or being suffered.

13-C M.R.S. § 781. 13-C M.R.S. § 781(4) provides the receiver with the power to "dispose of all or any part of the assets of the corporation, wherever, located, at a public or private sale, if authorized by the court . . . [and] sue and defend in the receiver's own name as receiver in all courts of [Maine]."

For a non-profit corporation, a creditor may seek dissolution:

1. When the claim of the creditor has been reduced to judgment and an execution thereon has been returned unsatisfied and it is established that the corporation is insolvent; or

2. When the corporation has admitted in writing that the claim of the creditor is due and owing and it is established that the corporation is insolvent.

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13-B M.R.S. § 1105(2). 13-B M.R.S. § 1106(1) provides that a court "shall have the power to . . . appoint a receiver or receivers pendente lite, with such powers and duties as the court, from time to time, may direct" in proceedings to liquidate the assets and activities of a non-profit corporation. Additionally, 13-B M.R.S. § 1106(2) provides:

After a hearing and upon such notice as the court may direct to be given to all parties to the proceedings and to any other parties in interest designated by the court, the court may appoint a liquidating receiver or receivers with authority to collect the assets of the corporation. Such liquidating receiver or receivers shall have authority, subject to the order of the court, to sell, convey and dispose of all or any part of the assets of the corporation wherever situated, either at public or private sale. The order appointing such liquidating receiver or receivers shall state their powers and duties. Such powers and duties may be increased or diminished at any time during the proceedings.

13-B M.R.S. § 1106(2). 13-B M.R.S. § 1106(3)–(6) are provisions relating to standards for how to distribute non-profit corporate property, the receiver and receiver's counsel's compensation and reimbursement for expenses, the receiver's power to sue and defend, and the requirement that a receiver be a United States citizen.

Regarding partnerships, 31 M.R.S. § 1054 provides the exclusive remedy for how a judgment creditor "of a partner or partner's transferee may satisfy a judgment out of the judgment debtor's transferable interest in the partnership." 31 M.R.S. § 1054(5). 31 M.R.S. § 1054(1) provides:

On application by a judgment creditor of a partner or of a partner's transferee, a court having jurisdiction may charge the transferable interest of the judgment debtor to satisfy the

judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership and make all other orders, directions, accounts and inquiries the judgment debtor might have made or that the circumstances of the case may require.

31 M.R.S. § 1054(1). 31 M.R.S. § 1383(1) is a similar provision applicable to limited partnerships.

Finally, under a theory of fraudulent transfer of assets, 14 M.R.S. § 3578 provides that one of the remedies that may be sought by a creditor in a judicial proceeding is the appointment of a receiver to take charge of the assets fraudulently transferred or of other property of the transferee.

There is scant authority for a plaintiff to seek the appointment of a receiver based on common law. However, the Maine Law Court has held that, although a court will not wind up the affairs of a corporation at the request of a creditor without statutory or other authority, it can exercise equitable powers to appoint a receiver to recover corporate property "where corporate property has been abandoned and is exposed to certain injury or loss, or where the corporation has no officers to care for its property . . . or, where by acts of the directors the corporate property is exposed to imminent peril . . . or, where the directors have been guilty of a breach of trust, and the property is in danger of future injury or waste, unless withdrawn from the reach of danger." *See Pride v. Pride Lumber Co.*, 109 Me. 452, 84 A. 989, 992 (1912) (internal citations omitted); *see also Craughwell v. Mousam River Tr. Co.*, 113 Me. 531, 95 A. 221, 222 (1915) ("under its general chancery powers the court has jurisdiction at the suit of creditors or minority stockholder's to appoint receivers for a business corporation, and afford other redress when through fraud or breach of trust of the managers its property is exposed to imminent peril, or is in danger of future injury and waste.").

II. Appointing the Receiver:

A. The Basics:

In a typical case, the plaintiff/creditor files a motion for appointment of receiver with the court along with the complaint. The plaintiff should support the motion with one or more affidavits, and the motion and affidavit(s) should detail the specific grounds demonstrating the basis and need for the appointment of a receiver. In the motion, the plaintiff is allowed to specify the name of the desired receiver. The receiver's fee schedule should also be included. The motion should also describe the specific functions that the plaintiff seeks the receiver to perform, which should also be included in the proposed order submitted with the motion. In cases where the receiver is expected to have broad powers and authority, it is not unusual for the proposed order to be several pages long.

Unless the plaintiff moves for expedited or emergency treatment of the motion, the court will hold a hearing on the motion generally within twenty-one to thirty days after the motion is filed, after all parties to the proceeding and any interested persons designated by the court are notified. The appointment of a receiver can be hastened by requesting an expedited or emergency hearing on the motion, especially where the plaintiff can allege that the value of the security is being harmed by waste, improper maintenance, and the like, or where the defendant consents to the appointment. The court may decide not to hold a hearing if the plaintiff is pursuing appointment of a receiver based on the express provisions of its loan documents, and no timely objections are made to the motion.

In its order appointing a receiver, the court will specify the powers and duties of the receiver. The order may be amended from time to time, as necessary. Receivers often employ counsel in Maine, and the order should address this issue if it is contemplated that the receiver will have counsel.

If the court appoints a receiver, some Maine statutes provide, in specific circumstances, that the court may require the receiver to post a bond, with or without sureties, in an amount the court directs. Receivers often serve without posting a bond. The order should also address this issue in any event.

B. Time Frame for Appointment:

There is no set time limit within which a court must act on a motion to appoint a receiver. The Maine Rules of Civil Procedure provide that, once a motion is filed and properly served, interested parties have twenty to twenty-one days to file a memorandum in opposition, depending on the timing of the filing of the motion providing that (1) any party opposing a motion that was filed prior to or simultaneously with the filing of the complaint shall file a memorandum in opposition no later than the time permitted for filing an answer, which is twenty days after service of the summons and complaint and (2) any party opposing a motion made at any other time shall file a memorandum in opposition not later than twenty one days after the filing of the motion. Thereafter, if a memorandum in opposition is filed, the plaintiff has 7 days to file a reply.

Depending on the extent of any opposition to the motion and the corresponding time allotted for the filing of memoranda, a court may act on a motion for appointment of a receiver within twenty-one to thirty days of the filing of the motion.

C. Can you go in Ex Parte?

No.

III. Loans and Advances:

There is no specific guidance provided by Maine statutes, case law or court rule for a receiver seeking or making loans and advances. The order appointing the receiver should address this issue if it is contemplated to arise.

Contributed By: Fred W. Bopp III, Julianne C. Ray and Emily T. White of Perkins Thompson

IV. Sales During the Receivership:

The court can authorize a receiver to sell property during a receivership. There is no specified statutory or common law process in Maine for sales of property by receivers. The process to be followed is determined on a case-by-case basis and is typically spelled out in detail in either the order appointing the receiver or a subsequent order authorizing the receiver to conduct a sale. Also, there is no Maine state law version of a sale free and clear of liens of the type permitted under § 363 of the United States Bankruptcy Code.

In Maine, it has been established that, at least in statutory proceedings for the dissolution of corporations, the decree of appointment ipso facto vests the title of the corporation's real estate in the receiver. However, by statute and common law, receivers are required to seek court approval of any sale of property. In at least one case, a receiver petitioned a court both for the authority to sell certain assets of the corporation and to approve the sale.

An order of the court confirming a sale by the receiver is a final and appealable order. Therefore, by operation of M.R. Civ. P. 62(a), it is not stayed "[u]nless otherwise ordered by the court." Accordingly, if an appeal of an order confirming a receiver's sale is sought, but a stay of the order from the court is not granted, the appeal is subject to dismissal as being moot if the judicial sale is untainted by fraud, unfairness, collusion or mistake.

V. Liens Against Receivership Property:

At the time a complaint is filed that seeks to wind up the business of a corporation and distribute its assets pursuant to applicable Maine statutory law, the entire property of the corporation is considered in *custodia legis* and the property from that point on is not subject to seizure or sale on execution.

Furthermore, a recovery of judgment against the corporation in receivership "does not create a lien upon any of the firm property or funds in [the receiver's] hands, and [accordingly,] such property or funds cannot be levied upon by execution or reached by garnishment, because it is already in custodia legis." *Chalmers v. Littlefield*, 103 Me. 271, 69 A. 100, 104 (1907).

[Instead,] [a]fter the receiver has taken possession any person claiming the property, or any interest therein, may present his claim to the court that appointed the receiver. He may be made a party to the suit in order to establish his claim. Or he may petition to have it heard before a master. Or he may, by express permission of the court, bring a suit for the possession, care being taken to protect the receiver. But the receiver will not be ordered to deliver the property to a claimant until his right is established in one of these modes. Nor can any claimant bring a suit against the receiver, except by leave of court, without being liable for contempt, if the property is a part of the subject matter in controversy.*Id*. at 105; s*ee also Bisbee v. Mt. Battie Mfg. Co.*, 107 Me. 185, 77 A. 778, 779 (1910) ("[T]he rights of priority of creditors, existing at the time a bill is filed, are not destroyed by statutory proceedings for winding up a corporation and sequestrating its assets. The statutory lien by previous attachment is preserved. The enforcement of it, however, in the usual way, is suspended. Lien creditors must apply to the court, which will give effect to liens which existed when the property passed into the custody of the law."); *Hazzard v. Westview Golf Club, Inc.*, 217 A.2d 217, 223 (Me. 1966) ("A receiver appointed by a court of equity is an officer thereof and property in his possession which constitutes a part of the estate that is the subject of the receivership is in custodia legis until it is disposed of by the receiver in compliance with an order of that court.") (internal citations and quotations omitted).

In the specific and unusual situation when a non-creditor party sues the receiver in his or her individual capacity, at least one case has found the non-creditor party is not required to seek approval or consent by the court that appointed the receiver prior to instituting litigation against the receiver. *Downeast Ventures,*

Ltd. v. Washington Cty., No. CIV. 05-87-B-W, 2005 WL 3409483, at *13 (D. Me. Dec. 12, 2005), *aff'd*, No. CV-05-87-B-W, 2006 WL 377976 (D. Me. Feb. 16, 2006) ("Downeast Ventures is not a 'creditor' of the estate and is not seeking to seize or sell on execution any of the estate's assets. It is, instead, attempting to vindicate [the receivers'] alleged violations of federal rights and state tort duties committed in concert with the other defendants, while acting under color of state law but beyond the scope of the authority bestowed by the Superior Court, in their individual capacities, not in their official capacity as 'the Receiver' . . . . I am ultimately not persuaded that the common law pertaining to receivers somehow prevents this lawsuit from going forward or requires that the Superior Court pre-approve this litigation against [the receivers].").

Additionally, in relation to liens, in Maine, a "[r]eceiver of a corporation holds the property coming into his hands by the same right and title as the corporation, and is subject to all equities, including the right of set-off, which existed at the time of his appointment and could have been successfully invoked against the corporation." *Cooper v. Fidelity Trust Co.*, 132 Me. 260, 170 A. 726, 730 (1934).

VI. Owners Associations:

Maine has only one statutory provision relating to receivers and owners associations. In the context of unit ownership, the statute provides that if an association forecloses upon a lien it has for sums assessed against one of its unit owners, "the unit owner shall be required to pay a reasonable rental for the unit, if so provided in the bylaws and the plaintiff in such foreclosure shall be entitled to the appointment of a receiver to collect the same." 33 M.R.S. § 581. Other than this one example, there are no particular statutes regarding the interaction of a receiver with condominium or homeowners' associations. If applicable, the order appointing the receiver should spell out in detail how any issues related to owners associations are to be addressed.

VII. Construction Related to Receivership Property:

There is no specific guidance provided by Maine statutes, case law or court rule for a receiver completing construction. The order appointing the receiver should address any relevant issues.

VIII. Ending the Receivership:

M.R. Civ. P. 41(a)(1) requires a plaintiff to seek an order of the court in order to voluntarily dismiss an action in which a receiver has been appointed. There is no other court rule, statute or case law that requires a specific process for ending a receivership. The order appointing the receiver should specify how the receivership is to be terminated. Typically, the plaintiff will want to obtain (and the court will usually require) an order terminating the receivership.

IX. Miscellaneous

In addition to other specific powers that are outlined in the court's appointing order, by statute, a receiver appointed in a proceeding to dissolve a Maine corporation may:

1. Dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court;
2. Sue and defend in the receiver's own name as receiver of the corporation in all courts of this State; and
3. Exercise all of the powers of the corporation, through or in place of its board of directors, to the extent necessary

   to manage the affairs of the corporation in the best interests of its shareholders and creditors.

13-C M.R.S. § 1432(3)(A)–(C).

Receivers of non-profit corporations are given similar authority by statute, except that they are not granted the authority to exercise all the powers of the non-profit corporation. *See* 13-B M.R.S. § 1106(2) ("Such liquidating receiver or receivers shall

have authority, subject to the order of the court, to sell, convey and dispose of all or any part of the assets of the corporation wherever situated, either at public or private sale."); *id*. at § 1106(5) ("A receiver of a corporation appointed under the provisions of this section shall have authority to sue and defend in all courts in his own name as receiver of such corporation.").

Relevant Codes, Statutes or Case Law:

M.R. Civ. P. 4; M.R. Civ. P. 41(a)(1); M.R. Civ. P. 56; M.R. Civ. P. 62(a); M.R. Civ. P. 66(d)(3). 13-B M.R.S. §§ 1105, 1106; 13-C M.R.S. §§ 781, 1430, 1432; 14 M.R.S. § 3578; 31 M.R.S. §§ 1054, 1383; 33 M.R.S. § 581. *Morrill v. Noyes*, 56 Me. 458 (1863); *Chalmers v. Littlefield*, 103 Me. 271, 69 A. 100 (1907); *Cobb v. Camden Savings Bank*, 106 Me. 178, 76 A. 667 (1909); *Bisbee v. Mt. Battie Mfg. Co*., 107 Me. 185, 77 A. 778 (1910); *Pride v. Pride Lumber Co.*, 109 Me. 452, 84 A. 989 (1912); *Craughwell v. Mousam River Tr. Co.*, 113 Me. 531, 95 A. 221 (1915); *Glidden v. Rines*, 124 Me. 286, 126 A. 4 (1925); *Cooper v. Fidelity Trust Co.*, 132 Me. 260, 170 A. 726 (1934); *Hazzard v. Westview Golf Club, Inc*., 217 A.2d 217 (1966); *Fleet Bank of Me. v. Zimelman*, 575 A.2d 731 (Me. 1990); *Downeast Ventures, Ltd. v. Washington Cty*., No. CIV. 05-87-B-W, 2005 WL 3409483, at *13 (D. Me. Dec. 12, 2005), *aff'd*, No. CV-05-87-B-W, 2006 WL 377976 (D. Me. Feb. 16, 2006).

Maryland

Foreclosure Summary

Security Instrument	Deed of Trust/ Mortgage
Judicial	Yes, but rare
Non-Judicial	Yes
Initial Public Notice	Publication notice required under MD Rules
Time Frame	Min. of 90 days (more time for residential property)
Redemption Period	No
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Not required, but not unusual
Ex-Parte	Possible, but not preferred
Approximate Time for Appointment	2-45 days
Who or What can act as Receiver	An Individual
Specific Receiver Requirements	See Restrictions under MD Rules
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes, case by case basis

Foreclosure:

I. General Information:

Mortgages of real property in Maryland may be foreclosed under:

A. power of sale, i.e., clause in mortgage authorizing mortgagee or any other person named therein to sell mortgaged property, or

B. assent to decree, i.e., provision in mortgage whereby mortgagor assents to passing of decree for sale of property.

In each case, record holders of at least 25% of mortgage debt must consent or make application for sale, and process, answer or hearing is not required.

All purchasers at foreclosure sale have the same rights and remedies against tenants of mortgagor as mortgagor had, and said tenants have the same rights and remedies against a purchaser as against the mortgagor on the date the mortgage was recorded. If a mortgage so authorizes and required advertisement of sale discloses, a foreclosure sale is subject to tenancies entered into after recording of mortgage. Any lease so continuing shall be unaffected by sale, except that purchaser shall become landlord, as of date of sale, on ratification of sale.

Emergency legislation signed by the Governor on April 3, 2008, effective on all residential foreclosures filed on and after April 4, 2008, provides protections to individual homeowners in the foreclosure process. More time and notice are required before and after a foreclosure sale. Additional regulations are contemplated and were not yet implemented at the time of publication of this guide. Consult a local attorney if residential property is part of your collateral.

II. Judicial Foreclosure Basics:

Mortgages may also be foreclosed by judicial foreclosure where there is neither power of sale nor assent to decree, in same manner as mortgage containing assent to decree, except that (1) process, answer and hearing are required, (2) 25% requirement is inapplicable, and (3) court, under certain circumstances, may

order sale before final decree. Action to foreclose mortgage under power of sale may only be instituted by natural person authorized to exercise power.

III. Non-Judicial Foreclosure Basics:

A. Assent To Decree

Where foreclosure is under assent to decree, procedure is substantially the same. Mortgagee files petition to foreclose and files verified statement of mortgage debt together with mortgage or certified copy as exhibit. If default has occurred, the court will enter decree ordering that the property be sold forthwith and appointing trustee or trustees to make the sale. Trustee must give bond and sell property pursuant to the terms, including notice, fixed by court. Sale must be ratified by court.

B. Deed of Trust

Deed of Trust may be foreclosed in same manner as mortgage, except that foreclosure to be made by trustee appointed by deed or successor and the 25% rule is inapplicable.

IV. Guidelines for Power of Sale:

Case law makes it clear that the power of sale must be given to a natural person, not a corporation. Further, that person can be an attorney. The power can be assigned. Where foreclosure is under power of sale, person named in mortgage to conduct sale must do so for county or Baltimore city where property lies. Such person must: (1) docket suit in appropriate court and file verified statement of mortgage debt together with mortgage or certified copy as exhibit; (2) give bond approved by clerk or court and publish notice of time, place and terms of sale; and (3) not less than ten nor more than 30 days before sale (*but see reference above regarding residential foreclosures*), send notice by certified mail, return receipt requested, bearing U.S. Postal Service postmark to mortgagor, present record owner and holder of subordinate mortgage, deed of trust, judgment or other subordinate recorded or filed interest who has filed appropriate request to receive notice. Sale must be ratified and confirmed by court. Failure to give notice to record owner or subordinate mortgagee does not invalidate title of purchaser; failure to give

notice to mortgagor does not invalidate sale if person conducting sale gives affidavit or return receipt that such notice to mortgagor has been given prior to ratification by court.

V. Power of Sale Guidelines as Represented in the Security:

Courts have said: "It has repeatedly been held by this court, that a power of sale in a mortgage, conferred on the mortgagee, is a power coupled with an interest and so being, is appurtenant to the estate, and passes to the executors, administrators or assigns, and is not lost by the death or insanity of the mortgagor."

"But where the power is conferred upon a third person, who has no interest in the estate, it is a collateral power."

VI. Guidelines for Foreclosure when there is No Power of Sale:

Follow judicial sale process described above.

VII. Foreclosure when Instrument Contains No Power of Sale:

Follow judicial sale process described above.

VIII. Any Additional Satisfaction Permitted Under Continuing Power of Sale:

Power of sale survives partial satisfaction of debt if additional collateral remains.

IX. Sale by Power of Sale when the Instrument is Silent as to the Place or Terms of Sale:

If instrument is silent, sale must be on "reasonable terms." Terms of sale should be disclosed in advertisement.

X. Notice of Sale and How Notice is Given:

Perhaps the most important, and controversial, topic of foreclosure is notice. Must provide notice of the foreclosure sale to those parties whose interests are about to be foreclosed, including:

A. The holder of a recorded subordinate mortgage, (at least 10 days)

B. Local governments, (at least 15 days)

C. Special Procedures, Internal Revenue Service, (at least 25 days)

D. The holder of any other recorded subordinate interest,

E. The holder or beneficiary of an unrecorded interest where the existence and location of the interest and the holder is reasonably ascertainable.

These groups have an interest in the property which is constitutionally and statutorily entitled to some type of notice. It is no longer necessary that the holder of a recorded inferior interest file a request for notification at the courthouse.

Publish a Notice of Sale in a newspaper of general circulation in the county where the action is pending, at least once a week for three successive weeks. A notice of sale must be given to holders of an interest in the property not less than 15 days before sale and last publication of notice must not be more than 1 week before sale.

XI. Place and Time for Conducting Foreclosure by Power of Sale:

As specified in advertisement and notices.

Relevant Codes, Statutes or Case Law:
MD. Code Ann., Real Property § 7-105; Maryland Rules 14-201 through 14-210; Maryland Rules 14-301 - 14-306.
Powell v. Hopkins, 38 Md. 1, 11-12 (1873); Reid v. Gordon, 35 Md. 174 (1872); Berry v. Skinner, 30 Md. 567 (1869); Dill v. Satterfield, 34 Md. 52 (1871); Harnickell v. Orndorff, 35 Md. 341 (1872); Mackubin v. Boarman, 54 Md. 387 (1880).

Receivership:

I. General Information:

The appointment of a Receiver is not guaranteed. The proposed order should be reviewed by the proposed Receiver.

II. Appointing the Receiver:

A. The Basics:

Appointment is procured by petition to court. Upon default, mortgagee has the right to ask for appointment of Receiver. Receiver and each attorney, accountant or appraiser he desires to employ must inform the court whether he has had certain relationships with or interests in debtor or secured creditor.

B. Time Frame for Appointment:

Absent a genuine emergency, the time for a hearing on a request to appoint a Receiver can vary from a few days to a few weeks.

C. Can you go in Ex Parte?

Ex parte appointment is possible, but most judges refuse ex parte appointment of a Receiver unless a genuine emergency exists and there is good reason for not providing the other parties to the suit with reasonable notice. Ex parte appointments are subject to swift review and reversal.

III. Loans and Advances:

Needs to be approved by the Court. Order should include protections similar to those available to Section 364 of the Bankruptcy Code. The use of future advance provisions in loan documents may provide additional protection.

IV. Sales During the Receivership:

There is no established process other than seeking the court's permission, which should be sought in connection with the petition for the receiver or a separate application.

There is also no statutory authority or well established case law precedent. Courts will consider applications to sell property on a case by case basis.

However, Applications and orders to sell property should be modeled on those typically submitted pursuant to Section 363 of the Bankruptcy Code. Counsel should be consulted to determine whether an exercise of a power of sale or other foreclosure

would be a better strategic option than a sale out of the receivership estate, particularly for commercial property.

V. Liens Against Receivership Property:

Lien issues and priorities can be complicated and counsel should be consulted. A lien search should be conducted early in a matter to help determine priorities and identify any potential issues. The appointment of a receiver does not modify liens or change lien priorities.

VI. Owners Associations:

The receivership does not alter the liens or rights established/obtained by an owners association. Thus, associations' rights are handled in accordance with applicable state law.

VII. Construction Related to Receivership Property:

In either the original petition for appointment of a receiver or a subsequent application, the party(ies) should seek approval from the court. Such a request would likely include relief modeled after Sections 363 and 364 of the Bankruptcy Code. The use of future advance or other provisions in loan documents may provide additional authority and/or protection.

VIII. Ending the Receivership:

Removal of Receiver or ending receivership may only be accomplished by application to the Court.

IX. Miscellaneous:

Some courts refuse to appoint a Receiver in all but a few commercial situations.

Relevant Codes, Statutes or Case Law:

Maryland Rules 13-101 through 13-707. Gaither v. Stockbridge, 67 Md. 222 (1887); County Corp. v. Semmes, 169 Md. 501 (1935); Johnston v. Lippert, 96 Md. 584 (1903); Southern Maryland Agriculture Ass'n v. Magruder, 198 Md. 274 (1951).

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Massachusetts

Foreclosure Summary

Security Instrument	Deed of Trust, Mortgage
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Notice of Sale
Time Frame	75
Redemption Period	None
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Generally, No
Approximate Time for Appointment	1 Week at the Minimum
Who or What can act as Receiver	No Restrictions Given
Specific Receiver Requirements	To be on the Approved list
Is there any approval list for Receivers	Yes
Out of State Receivers Allowed	Upon a showing of need

Foreclosure:

I. General Information:

Mass. Gen. Laws c. 244 governs foreclosures in Massachusetts.

II. Judicial Foreclosure Basics:

Mass. Gen. Laws c. 244 §§ 1-13 govern judicial foreclosure. However, mortgage holders rarely use this procedure.

III. Non-Judicial Foreclosure Basics:

Non-judicial foreclosure is the primary method whereby mortgage holders affect foreclosure in Massachusetts. The subject mortgage must contain statutory power of sale language in order to foreclose in this manner.

One complicating factor in Massachusetts is that a prerequisite to foreclosure against property owned by an individual or series of individuals, including a general partnership of which at least one member is an individual, is a judgment from either Massachusetts Land Court or Superior Court declaring that the individual is not a soldier or sailor as defined by the Service Members Civil Relief Act. The process adds time and expense to the non-judicial foreclosure process.

IV. Guidelines for Power of Sale:

Mass. Gen. Laws c. 183 §21 sets forth the statutory power of sale and Mass. Gen. Laws c. 244 §§ 11-17 further regulate power of sale, and is discussed in greater detail in Section X, below.

V. Power of Sale Guidelines as Represented in the Security:

Assignees may exercise the power of sale in the same manner as original mortgagees.

VI. Guidelines for Foreclosure when there is No Power of Sale:

Mortgage holders must foreclose either through the judicial foreclosure process or through peaceable entry if the mortgage lacks statutory power of sale language. Mass. Gen. Laws c. 244 § 1 permits foreclosure by entry after breach of a mortgage if

entry is not opposed by the mortgagor or other person claiming it. There must be two witnesses to the entry, and the entry itself must be made by the lender through one of the Lender's officers or by the lender's agent by way of a power of attorney. Continuous peaceful possession for three years from the date of the recording forecloses the right of redemption. A memorandum of the entry must be made on the mortgage deed and signed by the mortgagor or person claiming under him and it must be recorded in the registry of deeds for the county or district where the land is located.

VII. Foreclosure when Instrument Contains No Power of Sale:

Mortgage holders must file an action to foreclose in the Superior Court of the county in which the subject realty lies or exercise peaceable entry. In the absence of power of sale language, the Superior Court will only grant a writ of possession for the collateral realty, and not a sale.

VIII. Sale by Power of Sale when the Instrument is Silent as to the Place or Terms of Sale:

The foreclosure sale occurs on or near the property that is the subject of the sale.

IX. Notice of Sale and How Notice is Given:

Massachusetts General Laws c. 244 § 14 governs the Notice of Sale. That statutory section requires Notice of Sale by publication at least once a week for three consecutive weeks before the sale, with the first publication occurring at least twenty-one days before the date of sale. That notice must include: an identification of the mortgage by the names of the parties, date, and recording reference; time, date, and place of the sale; description of the property; identification of all encumbrances and of any partial releases; the terms of the sale, including the amount if any to be paid in cash; and the statement that "other terms to be announced at the sale."

Notice of the sale must also be given at least fourteen days prior to the sale to all interest holders that are on title at least thirty

days prior to the sale by registered mail. The notice requirement must be strictly adhered to because failure to comply with §14 renders a foreclosure void.

In order to preserve a deficiency claim, Mass. Gen. Laws c. 244 § 17B requires the mortgagee to send a written notice of liability for the deficiency by registered sale at least twenty-one days before the sale by registered mail with preparation of an affidavit as to the mailing of the notice completed no later than thirty days after the sale. A suit for deficiency must be brought within two years of the sale.

The Mortgagee must prepare an affidavit of sale, which establishes that the requirements of §14 have been met by stating that: there has been a breach of the mortgage terms; the mortgagee published notice in accordance with the notice requirements discussed above specifying where the notice was issued; notices of sale were mailed to the appropriate persons and in the proper manner; the sale took place at the specified time and date; the auctioneer sold the property to the specified person for the specified price.

The mortgagee must prepare a post-sale *Eaton* affidavit that there was been no change in the note holder status and no revocation of authority took place between the execution date of the affidavit previously recorded pursuant to §35C(b) and §14 and the date of the foreclosure auction. Title insurers require this affidavit to be recorded after sale.

The mortgagee must attest to compliance with the notice provisions of the mortgage contract or, in the alternative, must state that the mortgage contained no notice provisions that might be considered conditions precedent to the initiation of foreclosure.

Lastly, §15A required a mortgagee conveying title to a mortgaged premises to notify all residential tenants of the premises within thirty days of taking possession or conveying title. However, the Massachusetts Supreme Judicial Court

recently held that failure to send this notice will not void a foreclosure.

X. Place and Time for Conducting Foreclosure by Power of Sale:

The foreclosure sale must take place on or near the premises then subject to the mortgage or at such place as may be designated for that purpose in the mortgage.

Receivership:

I. General Information:

Receivers for distressed commercial properties are available but not commonplace in Massachusetts. There is no specific statute that allows for the appointment of a receiver in this context; the Superior Court's general equitable power and Rule of Civil Procedure 66 govern.

II. Appointing the Receiver:

A. The Basics:

The request for appointment of a receiver is brought by way of a Petition for Appointment of Receiver, which is filed with the Superior Court in the county where the subject property lies. The Petition should contain specific factual bases demonstrating the need for a receiver. The petitioner should file a Motion for Short Order of Notice, which will likely expedite the assignment of the matter for hearing.

The court exercises broad discretion as whether to appoint a receiver or not. Depending on the judge, a default and a concomitant contractual right to the appointment of a receiver may not be sufficient to support appointment without other extenuating circumstances.

B. Time Frame for Appointment:

The court may appoint a temporary receiver within as little as one to three weeks after filing and service of the Petition, depending on the county wherein the matter is pending. However, there is no set time limit within which a court must act on a Petition to Appoint a Receiver.

C. Can you go in Ex Parte?

Generally, no.

III. Loans and Advances:

No information provided.

IV. Sales During the Receivership:

Generally, receivers do not have the power to sell property.

V. Liens Against Receivership Property:

Receivers generally cannot avoid liens.

VI. Owners Associations:

No information provided.

VII. Construction Related to Receivership Property:

No information provided.

VIII. Ending the Receivership:

A receivership is terminated through a Motion to Discharge after a final accounting has been submitted and approved by the Court. Mass. Sup. Ct. R. 66(e).

IX. Miscellaneous:

A. In most instances, the court will draft the order appointing the receiver.
B. In theory, receivers must be on the court-approved receivers list maintained in each county. In practice, the receiver lists are often not up to date and sometimes lack attorneys who have expertise in distressed realty. The Court consequently will sometimes appoint someone who is not on the receiver list upon a showing of need.

Relevant Codes, Statutes or Case law: Mass. Sup. Ct. R. 66(e); Massachusetts Rule of Civil Procedure 66; Altman v. Vogue Int'l, 366 Mass. 176, 180 (1974); Hampden Nat'l Bank v. Hampden R.R. Corp., 246 Mass. 404, 407 (1923) Mass. Gen. Laws Ann. ch. 244, § 1 *et seq.*; U.S. Bank Nat. Ass'n v. Ibanez, 458 Mass. 637, 639, 941 N.E.2d 40, 45 (2011); Eaton v. Fed. Nat. Mortg. Ass'n, 462 Mass. 569, 573, 969 N.E.2d 1118, 1122 (2012); Pinti v. Emigrant Mortg. Co., 472 Mass. 226, 227, 33 N.E.3d 1213, 1214 (2015).

Michigan

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Publication
Time Frame	60 days
Redemption Period	Judicial- 6 months Non Judicial 6 or 12 months
Deficiency	Varies, case by case

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Typically No
Approximate Time for Appointment	1 day to 2 weeks
Who or What can act as Receiver	Company or Individual
Specific Receiver Requirements	Qualifications are set forth in MCR 2.622.
Is there any approval list for receivers	Some Judges have a short list, but should defer to the petitioning party
Out of State Receivers Allowed	Yes.
Model Receivership Act	Introduced in the Michigan House in 2017 and referred to Committee

Foreclosure:

I. General Information:

A. Michigan allows for both Judicial and Non-Judicial, or by advertisement, Foreclosure.

B. Michigan also allows for the right of Redemption. However, the mortgagor can waive redemption, but only in writing after default.

C. Michigan enforces assignments of rent. However, if mortgagee bids full amount of debt (or amount bid by a third party is sufficient to satisfy the debt), the debt is deemed satisfied as of the time of the sale, and the assignment of rents terminates. Pursuant to *Town Center Flats*, 855 F.3d 721 (6th Cir. 2016), once the creditor has exercised an assignment of rents, the rents no longer are property of the debtor.

D. Foreclosure will terminate junior lien holders, including in certain circumstances leases of tenants.

II. Judicial Foreclosure Basics:

A. Complaint to foreclose

1. Need to name Mortgagor and all parties with liens junior to mortgage being foreclosed.
2. Can request appointment of Receiver in connection with a foreclosure sale.
3. Can be combined with suit on note and on guaranties.
4. Can be combined with foreclosure of personal property.
5. However, must conduct the foreclosure sale before enforcing money judgment on deficiency.

B. Cannot start to advertise foreclosure sale until the latter of entry of judgment of foreclosure or six months after filing suit.

C. Must advertise the sale for 6 weeks, with sale on the following, or 7th, week. May adjourn sale on a week to week basis through posting.

D. Court may set a minimum bid amount.

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Miller, Canfield, Paddock and Stone

E. Must seek confirmation of sale.
F. Entitled to a judgment on any deficiency.

G. Mortgagor and all parties claiming under mortgagor has right to redeem for six months following sale. Redemption amount equals the amount bid, plus interest, plus any property taxes paid or insurance paid.

III. Non-Judicial Foreclosure Basics:

A. Mortgage must contain a power of sale.

B. Election of remedies:
- **1.** Cannot foreclosure by advertisement if filed suit on the debt unless:
  - **a.** Suit has been discontinued.
  - **b.** Judgment entered and execution has been issued and returned unsatisfied.
- **2.** May file suit against guarantors and foreclose by advertisement at same time.

C. Post property and advertise for 4 weeks.

D. Not required to "serve" mortgagor.

E. Not required to "serve" or otherwise notify junior lien holders.

F. Sale in fifth week.

G. May adjourn on a week to week basis by posting.

H. Required to bid the lesser of the debt or fair value of the property.

I. Can be combined with foreclosure of personal property and similar collateral.

J. Redemption is 6 or 12 months, with most commercial properties being 6 months.

K. Following sale, may file suit for a deficiency.

IV. Guidelines for Power of Sale:

The mortgage instrument must contain a power of sale to permit a non-judicial foreclosure.

V. Power of Sale Guidelines as Represented in the Security:

If the mortgage instrument does not contain a power of sale, mortgagee may foreclose judicially, only.

VI. Guidelines for Foreclosure when there is No Power of Sale:

Foreclose judicially.

VII. Foreclosure when Instrument Contains No Power of Sale:

The power of sale needs to be in the mortgage.

VIII. Any Additional Satisfaction Permitted Under Continuing Power of Sale:

If mortgage covers more than one parcel, mortgagee must sell by lots until debt is satisfied, unless the mortgage provides that a sale of the whole is permitted.

IX. Sale by Power of Sale when the Instrument is Silent as to the Place or Terms of Sale:

A. Non-Judicial Sales:

1. Must be held in county where mortgaged property is located.
2. Mortgagee may “credit” bid, all others must pay cash on day of sale.

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B. Judicial Sales:

1. Suit must be filed where property is located, unless more than one mortgage in more than one county secures the debt.
2. Mortgagee may "credit" bid, all others must pay cash on day of sale.

X. Notice of Sale and How Notice is Given:

A. Date and time of sale.
B. Set forth amount owed.
C. Identify the mortgagor, the mortgagee, and any assignee.
D. Identify the mortgage.
E. Identify the mortgaged property.
F. Set forth period of redemption.
G. Judicial Foreclosure:

1. Must serve mortgagor and junior lien holders with summons and complaint.
2. Must post notice of sale at property.
3. Must advertise in newspaper with circulation in the county where property is located (typically a weekly or daily legal newspaper).

H. Non-judicial Foreclosure:

1. Must post notice of sale at property.
2. Must advertise in newspaper with circulation in the county where property is located (typically a weekly or daily legal newspaper).
3. Not required to "serve" mortgagor or junior lien holders – unless the state or federal taxing authorities have filed a lien.

XI. Place and Time for Conducting Foreclosure by Power of Sale:

Sales are held in county where property is located. Typically, the sheriff will conduct the sale in the county courthouse in the mid-morning, once a week. This will vary from county to county.

Relevant Codes, Statutes or Case Law:
MCL 440.9607 (UCC Article 9, Section 607); MCL 600.3101, *et seq;* MCL 600.3240; MCL 600.3280.
Town Center Flats, 855 F.3d 721 (6th Cir. 2016)

Receivership:

I. General information:

A. Circuit Judges may appoint Receivers where allowed by law.

1. To enforce assignment of rents.
2. To prevent waste.
3. Due to non-payment of taxes and insurance, if so provided in the mortgage.
4. Construction lien foreclosures

B. There is no independent remedy for appointment of Receiver, but rather as ancillary relief.

C. Motion to appoint a Receiver is ancillary to judicial foreclosure action.

II. Appointing the Receiver:

A. The Basics:

Receivers are typically appointed by motion, supported by affidavit and documents. However, Courts may appoint receivers on the court's own initiative. Typically, the Court will enter an order to show cause requested by an ex parte motion for show cause, with a hearing within 2 weeks. The Court has discretion to appoint a receiver. If the Court decides to appoint a receiver, the Court should defer to the petitioning party's proposed receiver. As a result, the petitioning party should address the factors set forth in MCR 2.622, and provide an affidavit from the proposed receiver to demonstrate that there are no conflicts of interest listed in MCR. 2.622(B)(6). If the court decided to appoint a different receiver, the court must state its rationale for doing so in accordance with the standards set forth in MCR 2.622.

B. Time Frame for Appointment:

This varies by the practice of the particular court and judge. Notice can be as short as a day, or longer than 2 weeks.

C. Can you go in Ex Parte?

Typically not.

III. Loans and Advances:

A. Borrowing money should be covered in the Order Appointing the Receiver, especially terms of the method and process for such advances.

B. If not in the Order, typically will need an order from the court and then borrow under a Receiver certificate.

IV. Sales During the Receivership:

In Michigan a receiver is expressly authorized to sell real property post judgment pursuant to order of the Court pursuant to MCR 2.622 and MCL 600.6104. The Court can authorize a receiver to sell real property before judgment pursuant to a separate order of the Court. Once the receiver obtains a purchase agreement for the property, the receiver and Plaintiff file a motion seeking court approval of the sale. Most title companies will require that the closing not occur until the appeal period has run (21 days) following the approval of the sale. Title companies will require a certified copy of the order appointing receiver, order empowering a receiver to sell real property, and order approving the specific sale. It is important to note that receivers may not distribute funds from the estate to any creditors without court approval. This approval can be in the order appointing receiver.

V. Liens Against Receivership Property:

A. General Information:

In Michigan, parties that supply labor and materials to a development can claim a lien for monies owed. Liens must be filed within 90 days of last providing labor or materials. An action to foreclose the construction lien must be filed within one year of recording the lien. All construction liens can trace their priority back to the date of the first physical improvement to the property. First physical improvement is broadly construed to include any physical work done on the property that would give notice to an outsider that development has commenced. Construction liens that predate the recording of a mortgage are senior liens. That is, if the site was cleared of grass and trees on

day one, all contractors including a contractor that performed the electrical work on day 300 can claim a senior lien over a mortgage on the property recorded any time after day one.

B. How have lien issues been dealt with when a Receiver is appointed?

The Construction Lien Act, MCL 570.1101 et seq, provides for the appointment of a receiver with the power to sell real property free and clear of construction liens with the liens attaching to sale proceeds to be distributed in accordance of priority as determined by the court. However, the court must approve the sale free and clear of the liens. The Construction Lien Act provides the courts with authority to enter orders for sale of property free and clear of liens as well, and some trial courts will do so.

VI. Owners Associations:

There are no specific statutes that deal with owners associations. Association dues continue to accrue and therefore may be an expense of the receivership. If the owner association is not self-sustaining, the receiver may be required to operate the owners association and the lender may be required to fund any shortfall in the operation income.

VII. Construction Related to Receivership Property:

A receiver in Michigan, by order of the Court, may be empowered to complete construction. Typically contracts for construction are subject to Court approval.

VIII. Ending the Receivership:

To wind up the Receivership a Motion and hearing and Order Releasing the Receiver are required, following final accounting.

IX. Miscellaneous:

A.

In certain circumstances, the Court may permit the Receiver to sell real property.

B.

In certain circumstances, the Court may permit the sale of real property free and clear of liens.

X. Uniform Commercial Real Estate Receivership Act

The Michigan House of Representatives has introduced House Bill No. 4471 and has been referred to the Committee on Judiciary. This bill closely replicates the language of the "Uniform Commercial Real Estate Receivership Act" that was drafted by the Uniform Law Commission (ULC), also known as the National Conference of Commissioners on Uniform State Laws (NCCUSL), adopted in 2015 at the ULC's Annual Conference.

Relevant Codes, Statutes or Case Law:

MCLA 600.2926 through 600.2927, and annotations; MCR 2.622
Boucher v Boucher, 34 Mich App 213 (1971);
Carr v Carr, Nos. 326782, 331699, 2016 WL 3912169 (Mich Ct App July 19, 2016)
Casa Bella Landscaping, LLC v Lee, 315 Mich App 506, 890 NW2d 875 (2016)
In re Forfeiture of 19203 Albany, 210 Mich App 337 (1995).
Michigan Midwest-Bank v DJ Raynaert, Inc, 165 Mich App 630 (1988);
National Lumberman v Lake Shore Machinery Co, 260 Mich 440, 245 NW 494 (1932)
Smith v Mut Benefit Life Ins Co, 362 Mich 114; 106 NW2d 515 (1960)
Stock Bldg Supply, LLC v Crosswinds Communities, Inc, 317 Mich App 189, 893 NW2d 165 (2016)
Wayne County Jail Inmates v McNamera, 178 Mich App 634, 444 NW2d 549 (1989)

Minnesota

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Publication
Time Frame	Varies
Redemption Period	Varies
Deficiency	In some situations

Receivership Summary

Ancillary Remedy Necessary	Not Necessarily
Ex-Parte	Yes
Approximate Time for Appointment	Few Weeks (Can Be Faster for Appointment on Temporary Basis)
Who or What can act as Receiver	Qualified and Independent Person or Entity
Specific Receiver Requirements	Provide a Bond; Give Notice to Creditors and Others; Prepare and Retain Records; File Final Report
Is there any approval list for Receivers?	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. Foreclosure Procedures:

A. Foreclosure by Advertisement:

Foreclosures by advertisement are governed by Minnesota Statutes Chapter 580. In order to foreclose by advertisement, the mortgage must contain a power of sale. Additionally, a default must have occurred and there can be no action pending on the debt or any part thereof. The mortgage and any and all assignments must be recorded. A notice of the pendency of the foreclosure and power of attorney to foreclose mortgage must be recorded before the first publication of the statutory form of Notice of Foreclosure. The statutory form of Notice of Foreclosure must be published for at least six weeks preceding the sheriff's sale. Occupants of the mortgaged property must also be served with the notice of sale four weeks prior to the sale. In addition, Minnesota law provides additional protections – such as notices of redemption rights and loss mitigation options – for owners of single family residences going through foreclosure.

B. Foreclosure by Action:

Foreclosures by action are conducted like ordinary civil suits, with some additional requirements imposed by Minnesota Statutes Chapter 581. At the conclusion of a foreclosure by action, a judgment is entered for the amount due and the sheriff is ordered to sell the mortgaged premises or some part thereof to satisfy the judgment. Additionally, the sale must be confirmed by the Court.

C. Voluntary Foreclosure:

For a mortgage executed after August 1993, in default for at least one month, and the property is not classified as agricultural or homestead, the mortgagor and mortgagee may enter into a written agreement for the voluntary foreclosure of the mortgage. The procedures for a voluntary foreclosure are set forth in Minnesota Statutes Section 582.32. In a voluntary foreclosure, the mortgagor's redemption period is reduced to two months, the mortgagee waives any right to deficiency or other claim for personal liability against the mortgagor, the mortgagor waives

any right to surplus sale proceeds and to contest the foreclosure and waives any right to rents and occupancy during the period from the date of the agreement through the redemption period. The mortgagee must record the voluntary foreclosure agreement, or a memorandum of the agreement, within seven days of its effective date.

II. Length of Procedure:

Foreclosure by advertisement can take from eight to fifteen months, consisting of two weeks to draft the foreclosure notice and arrange for publication, six to eight weeks to publish the notice of foreclosure, and six or twelve month for the redemption period. Foreclosure by action typically takes a year or more depending on the applicable redemption period and whether the mortgagor answers the foreclosure complaint and actively defends the litigation. Historically, the majority of mortgages in Minnesota have been foreclosed by advertisement. Some recent case law indicating that foreclosures by advertisement may be invalidated by technical mistakes in the foreclosure process has caused some lenders to choose foreclosure by action as a more reliable option.

III. Redemption:

Except for voluntary foreclosures, Minnesota has a six or twelve month redemption period. By statute, a mortgagee can seek a court order reducing the redemption period to five weeks if the mortgaged premises is a nonagricultural, residential dwelling that has been abandoned.

A twelve month period of redemption exists for mortgages in 6 specific circumstances as follows:

(i) the mortgage was executed prior to July 1, 1967
(ii) less than 2/3 of the original principal remains owing
(iii) the mortgage was executed before July 1, 1987 and is greater than ten acres
(iv) the mortgage was executed before August 1, 1994 and the premises exceed ten acres but was less than forty acres and was in agricultural use

(v) the premises exceed forty acres
(vi) the premises exceed ten acres but is less than forty acres and was in agricultural use when the mortgage was executed and the mortgage was executed on or after August 1, 1994.

If the foreclosure is not a voluntary foreclosure, the mortgagee has not obtained a court order reducing the redemption period to five weeks, and none of the above circumstances apply, the redemption period is six months.

IV. Deficiencies:

A deficiency judgment is not allowed against the mortgagor if a mortgage is foreclosed by advertisement and has a redemption period of six months or if the redemption period is reduced to five weeks. Also, if a mortgagee forecloses by voluntary foreclosure, the mortgagee waives any right to a deficiency. However, the mortgagee is not precluded from reaching an agreement with the mortgagor regarding additional payment. Minnesota's anti-deficiency statute does not apply to an agreement between a guarantor and a mortgagee.

Receivership:

A revised statute became effective in 2012 to codify the power of the court in appointing receivers and to clarify the types of receiverships (limited or general) and the corresponding powers and duties of receivers in each. Chapter 576. Any receivership that is based upon the enforcement of an assignment of rents or leases, or the foreclosure of a mortgage lien, mechanic's lien, or other lien pursuant to which the respondent or any holder of a lien would have a statutory right of redemption, shall be a limited receivership. §576.24. If the order appointing the receiver does not specify the type of receivership, the statutory default is a limited receivership. *Id.*

A receiver may be appointed under § 576 whether or not the motion for appointment of a receiver is combined with, or is ancillary to, an action seeking a money judgment. § 576.25. A limited receiver may be appointed before judgment to protect

any party to an action who demonstrates an apparent right to property that is the subject of the action and is in the possession of an adverse party, and that the property or its rents and profits are in danger of loss or material impairment. *Id.*

The court may appoint a receiver upon a motion with notice to the respondent, to all other parties in the action, and to parties in interest and other persons as the court may require. *Id.* A receiver can be appointed ex parte or on shortened notice on a temporary basis if it is clearly shown that an emergency exists requiring the immediate appointment. *Id.*

§576.26 sets out requirements related to eligibility of a receiver. Any person, whether or not a resident of Minnesota, may serve as a receiver, provided that the court makes written conclusions based in the record that the person proposed as receiver is qualified to serve as receiver and officer of the court, and is independent as to the parties and the underlying dispute. The new statute specifically states that the order appointing the receiver does not create a trust. § 576.25.

As a codification of the common law doctrine of *custodia legis*, the statute provides that all actions—with certain identified exceptions—against receivership property are stayed in both limited and general receiverships. § 576.42. In addition to that limited stay, there is an additional 30-day stay in general receiverships of any proceedings against the respondent or receiver, or to recover a claim. *Id.* The court may enlarge, restrict, or modify the stay, or order additional stays. *Id.*

A receiver succeeds to the rights and duties of the respondent's contracts, such that a receiver may assign contract rights to third parties, but only if the respondent would have been permitted to do so under the terms of the contract and applicable law. § 576.45. In addition, in general receiverships, receivership property may be sold free and clear of all liens and redemption rights of junior lien holders and of the respondent, except for certain types of liens such as those for unpaid real estate taxes and federal liens. § 576.46.

Related Chapter 577 addresses court-supervised assignments for the benefit of creditors, and incorporates by reference various provisions of the receivership statute.

Mississippi

Foreclosure Summary

Security Instrument	Deed of Trust
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Publication and Posting
Time Frame	60 days
Redemption Period	None
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes
Approximate Time for Appointment	24 hours - weeks
Who or What can act as Receiver	Individual is preferred but the Judge can approve a corporation
Specific Receiver Requirements	Best practice is to request the appointment of an individual as receiver and request that the receiver be given the authority to hire a management company
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

Mississippi is by custom and practice a power of sale jurisdiction for foreclosures. Generally, the first action in a foreclosure is to obtain a substitution of trustee unless the original trustee is available and willing to serve. The substitution must appear of record prior to the first publication of the notice of sale. To avoid power, authority and doing business issues, an individual is the most common choice for a trustee. Although notice to junior lienors is not a statutory requirement, most lawyers will provide notice to any lien holder affected by the foreclosure sale. A title bring to date from the mortgagee title insurance policy (if available) or full title report is always needed.

II. Judicial Foreclosure Basics:

Judicial foreclosures in Mississippi are rare and are typically used only in the event of an error in the deed of trust or a defect in title. The suit is filed in the Chancery Court of the county or judicial district in which the property is located. The time involved depends on the court docket and the chancellor. Upon entering a judgment of foreclosure, the chancellor will appoint a special commissioner to hold the sale. The terms of the sale will be dictated by the chancellor, but the sale is typically held in the same manner as a power of sale foreclosure, except that the special commissioner will report the sale results back to the court for judicial confirmation. The suit is a civil suit, subject to the same delays and appeals as any other civil court case.

III. Non-Judicial Foreclosure Basics:

A non-judicial foreclosure is governed by statute, and the statute, as well as any requirements of the loan documents, should be carefully followed. Section 89-1-55 of the Mississippi Code of 1972, as amended, contains the general provisions for a foreclosure sale.

IV. Power of Sale Foreclosure Guidelines:

The trustee or substitute trustee should hold the sale between the legal hours of 11:00 a.m. and 4:00 p.m. at the location where such sales are generally held at the courthouse of the county or

judicial district in which the land is located. The notice is read in full and bids are made. The lender typically makes the opening bid. The sale is made to the highest bidder, which is often the lender. The trustee or substitute trustee will execute a Trustee's Deed, without warranty of title, to the purchaser. Excess funds, if any, are payable to junior lien holders and any balance to the debtor. A deficiency judgment may be available based on the difference between the debt and the fair market value of the property foreclosed as of the date of the sale.

V. Power of Sale Constitutes Part of Security:

A properly drafted deed of trust will contain provisions governing a power of sale. Such a provision should follow the statutory guidelines, but may include other non-inconsistent provisions.

VI. No Power of Sale Foreclosure Guidelines:

In accordance with Section 89-1-57 of the Mississippi Code of 1972, as amended, if the document is silent as to the place and terms of sale and mode of advertising, the foreclosure sale is held in the same manner as a sheriff's sale. The provisions for a sheriff's sale of land in Section 13-3-63 of the Mississippi Code of 1972, as amended, are essentially the same as for a typical power of sale foreclosure.

VII. Foreclosure when Instrument Contains No Power of Sale:

If the instrument contains no provision for foreclosure, then an argument can be made that the beneficiary of the deed of trust did not bargain for a power of sale and the grantor did not grant such a right. The foreclosure must proceed as a judicial sale.

VIII. Additional Satisfaction Permitted Under Continuing Power of Sale:

The lien of the deed of trust would not be discharged until the full indebtedness is paid, and the power of sale would continue to be valid as to any lands remaining subject to the lien of the deed of trust.

IX. Sale Under Power where Instrument Silent as to Place or Terms of Sale:

As stated in Paragraph VI above, the sale would proceed in the same manner as a sheriff's sale.

X. Notice of Sale and How Notice is Given:

The sale is advertised in a newspaper published in the county where the land is located, or if no paper is published in the county, publication is made in some paper having a general circulation therein. The notice contains the name of the grantor(s), the trustee or substitute trustee, recording data for the deed of trust and any assignments as well as for a substitution of trustee, if applicable, the identity of the note holder, the fact of default, a description of the property being foreclosed, notice of the date and times of the sale (between 11:00 a.m. and 4:00 p.m.), and the location of the sale. The notice is signed by the trustee or substitute trustee. A copy of the notice is also posted in the courthouse of the county or judicial district in which the sale is held. The notice of sale must be published and posted for three consecutive weeks preceding the date of the sale. Most lawyers publish the notice once each week for four weeks. In that case, the sale may be held on any day within one week of the final publication.

XI. Place and Time for Conducting Foreclosure by Power of Sale:

The sale is held after expiration of three consecutive weeks of publication of a notice of sale (generally, once each week for four consecutive weeks) between the legal hours of 11:00 a.m. and 4:00 p.m. at the appropriate door (for example, the north front door of the courthouse) of the courthouse for the county or judicial district in which the land is located. The individual holding the sale should confirm the customary location for sales by contacting the applicable Chancery Clerk.

Relevant Codes, Statutes or Case Law:
Sections 89-1-43; 89-1-49; 89-1-53; 89-1-55; 89-1-57; 89-1-59; 89-1-63 and 13-3-163, Mississippi Code of 1972, as amended.

Receivership:

I. General Information:

Miss. Code Ann. §§ 11-5-151 through 11-5-167 set forth the general receivership provisions under Mississippi law. The statutes provide little guidance as to the circumstances justifying a receivership, the powers that may be granted to a receiver or the structure of the receivership. Therefore, such issues must be developed by judicial interpretations of the statutes. As the Mississippi Court of Appeals has noted, however, "there is little Mississippi case law interpreting the receivership statutes."

II. Appointing the Receiver:

A. The Basics:

A receivership is an ancillary remedy that supports some other claim for substantive relief, such as a judicial foreclosure, damages for breach of contract, or reformation of instruments. Because a receivership is an ancillary remedy, it is usually requested initially as one count of a multi-count complaint. As a general rule, all entities with interests of record should be joined as parties.

The party seeking to have a receiver appointed must demonstrate a clear legal or equitable right to that relief. One example of such a right is a lien upon property coupled with danger of neglect, waste, misconduct or insolvency of the defendant. Additionally, the party seeking that relief must show a reasonable probability of success on the merits.

There is no absolute right to the appointment of a receiver. Whether a receiver is to be appointed (as well as who the receiver will be) is subject to the chancellor's discretion. Nevertheless, there is no prohibition against the plaintiff recommending in the Complaint a particular receiver and requesting that the receiver have specified powers. Unless a defendant challenges the receiver's credentials and/or the proposed scope of authority, the chancellor will often accept the plaintiff's recommendation.

A defendant may avoid appointment of a receiver by posting a bond, subject to the discretion of the chancellor. If a receiver is

appointed, the receiver is not authorized to act until posting a bond payable to the state in an amount determined by the chancellor. The receiver's bond is subject to being reduced, cancelled or replaced upon petition heard on at least five days' notice if the chancellor finds that the bond is in excess of the value of the receivership estate and, therefore, is an unnecessary expense, or for other sufficient cause. The receiver's compensation and estate expenses are subject to court approval and are secured by a lien on assets of the receivership estate. A receiver must follow the orders of the court and may seek modification of prior orders. A receiver may be removed upon appropriate notice.

B. Time Frame for Appointment:

A receiver may not be appointed except upon at least five days notice to the opposing party. However, Mississippi's receivership statutes are antiquated. It is unclear how much of the statutory procedure is supplanted by the Mississippi Rules of Civil Procedure, which give a defendant 30 days from service of process to file a responsive pleading. Miss. R. Civ. Proc. 81 provides that the Rules apply to "all civil proceedings but are subject to limited applicability in the following actions which are generally governed by statutory procedures … proceedings brought under … sections 11-5-151 through 11-5-167 …, Mississippi Code of 1972." The comments to Rule 81 provide that the Rules govern where the "controlling statutes are silent as to a procedure…" However, the practitioner may well face difficult decisions as to how the statutes and the Rules may mesh in a given instance. In light of this uncertainty, plaintiffs seeking receiverships often include a count for a receivership in the complaint but contemporaneously with the filing of the complaint also file an emergency motion seeking appointment of receiver and injunctive relief under Miss. R. Civ. Proc. 65 to support the receiver. This kind of motion may include as an alternative form of relief a request for an interim receiver pending a full adjudication of the issues. Typically, the motion will mirror the receivership and injunction counts of the complaint and will set forth specific grounds justifying the appointment of a receiver and injunctive relief, a resume of the

proposed receiver and a detailed recitation of the proposed scope of the receiver's powers. It is best practice for the motion to be verified by the plaintiff under oath.

C. Receiver's Action and Reporting:

Where a receivership is expected to last a long time, quarterly or annual reports may be required by the court. Where the receivership is expected to be of short duration, a final report may be all that is required. Where reports are required, they usually are filed with the clerk of the court.

D. Can you go in Ex Parte?

A receiver may be appointed without notice to the opposing party, but only for good cause shown.

III. Loans and Advances:

No. Any such matters must be addressed in court orders.

IV. Sales During the Receivership:

No specific guidance is provided. Sales of property and the procedures for same must be spelled out in the order. Care should be taken to prevent the order from setting forth a procedure that violates due process rights of creditors. For example, the order should not permit the receiver to sell property without notice to creditors with liens on the property to be sold.

V. Liens Against Receivership Property:

No. This must be addressed in the order. If there is a priority dispute among secured creditors or a challenge to proper perfection of a lien, the receiver may file an ancillary action asking the court to declare the rights of the parties or for other relief.

VI. Owners Associations:

No. Such matters must be addressed in a court order.

VII. Construction Related to Receivership Property:

This would have to be spelled out in the order.

VIII. Ending the Receivership:

Typically, an order is submitted by the receiver or plaintiff's counsel attaching the receiver's final accounting. The proposed order should ratify the receiver's actions, terminate the bond, and close the receivership estate.

IX. Miscellaneous:

It is best practice to record in the land records immediately after the filing of the complaint a *lis pendens* notice. The purpose of this notice is to place any subsequent interest holders on notice that they need to intervene in the receivership action or run the risk of their interest being adversely affected by the receiver.

Most foreclosures in Mississippi are handled non-judicially, and the time-period for such procedures is short. Because the non-judicial foreclosure process is quick, most lenders do not seek a receiver pending foreclosure unless there are extraordinary circumstances (such as the need to capture a large amount of rent) or there is a need to judicially foreclosure or reform instruments (which can take months or years to bring to conclusion).

Because a receivership is a drastic remedy, some Mississippi courts require extensive testimony as to the grounds justifying a receivership and the qualifications of the proposed receiver – even if the defendant fails to appear and contest the relief requested.

Relevant Codes, Statutes or Case Law:

Miss. Code Ann. §§ 11-5-151 through 11-5-167; Miss. Code Ann. §9-5-103; Spectrum Oil, LLC v. West, 34 So.3d 1213, P18 (Miss. Ct. App. 2010); Engleburg v. Tonkel, 106 So. 447 (Miss. 1925); Clark v. Fleming, 94 So. 458 (Miss. 1923); Tishomingo Sav. Inst. V. Allen, 23 So. 305 (Miss. 1898); Perry Mason Shoe Co. v. Sykes, 17 So. 171 (Miss. 1895); Miss. R. Civ. Proc. 81.

Missouri

Foreclosure Summary

Security Instrument	Deed of Trust
Judicial	Yes (rarely utilized)
Non-Judicial	Yes
Initial Public Notice	Publication
Time Frame	45 Days
Redemption Period	Yes (but very limited)
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	No
Ex-Parte	No
Approximate Time for Appointment	7-14 Days
Who or What can act as Receiver	No Restrictions
Specific Receiver Requirements	No Restrictions
Is there any approval list for receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

In Missouri, non-judicial foreclosure is the standard method of foreclosure. A three party deed of trust with power of sale is the common method of creating a lien on real property. A non-judicial foreclosure can be completed within 30-45 days. Missouri law does not require written notice of default prior to foreclosure of a commercial loan, unless the loan documents require such notice. But it is recommended that the lender provide written notice of default and acceleration to the appropriate parties. (Notice of default is statutorily required where the loan was made primarily for personal, family or household purposes, prior to the lender being able to accelerate and foreclose its secured interest).

Missouri does not have a one-action rule or anti-deficiency statute. Missouri does grant borrower redemption rights, but the procedures for a borrower to redeem are impracticable given that the borrower whose property is being foreclosed is usually in financial distress. In order to exercise such redemption rights, either at the sale or within ten days before the sale, the borrower must provide written notice of borrower's intent to redeem and must, within 20 days from the date of the sale, give security to the circuit court in an amount that is not less than the costs, taxes, and interest that will accrue on the mortgage loan over the course of the one year immediately following the sale. Such security is often in the form of a redemption bond. Only if the borrower meets these requirements does the borrower have a one-year redemption period after the sale, and even then, the redemption right is contingent on the foreclosing lender being the purchaser at the sale. Redemption is very rarely exercised by borrowers in Missouri.

II. Judicial Foreclosure Basics:

A mortgage may be foreclosed by suit in Missouri, but judicial foreclosure is rarely used. The majority of real property in Missouri is secured by a three party deed of trust with power of sale. In those rare instances where real property is foreclosed judicially, the lender files suit and then seeks summary judgment

against the borrower, which judgment will direct the sheriff of the county to foreclose the property.

III. Non-Judicial Foreclosure Basics:

Non-judicial foreclosure provides the lender with a relatively inexpensive and effective process to foreclose its lien without the need to file suit or seek court approval. A court only becomes involved if the borrower challenges the foreclosure and seeks court intervention or if the borrower seeks to redeem and post a redemption bond. Non-judicial foreclosure does, however, require strict compliance with the law. A foreclosure sale may be set aside if the action taken by lender was not exercised with regularity, statutory conformity, or procedural fairness. The trustee under the deed of trust sends out a notice of trustee's sale 20 days prior to the foreclosure sale to the grantor, the current owner (as of 40 days prior to the sale), and others who record a request for notification of the sale. If there is an IRS lien, notice to the IRS must be provided 25 days prior to the sale. Notice of the sale is published in a newspaper in the county where the property to be foreclosed is located. The notice must be published in a newspaper for 21 consecutive days or four consecutive weeks, depending upon the size of the county and the regularity of publication of the paper in which advertisement is to be made. The property is then sold at the foreclosure sale and the trustee records a trustee's deed.

IV. Power of Sale Foreclosure Guidelines:

A. The foreclosing lender should confirm that the deed of trust includes a power of sale.

B. The lender should identify the trustee. If it is more convenient to have someone different serve as trustee, the lender can sign a short form document appointing a successor trustee and have it recorded with the office of the recorder of deeds for the county in which the land is located. This must be done before written notice of the sale is sent out and before advertisement commences.

C. Provide written notice of foreclosure sale to required parties under the statute.

D. Publish notice of foreclosure sale as required by statute.

E. Conduct foreclosure sale. There is no "sale confirmation" process in Missouri. The foreclosing lender should take care throughout the process to have title work that is as updated as much as possible. The lender should also remain in contact with its title company through the sale process and obtain a commitment to insure, free of every exception possible, once the sale is completed in accordance with the statutory requirements.

V. Power of Sale Constitutes Part of Security

Generally, no. However, for lenders who consider selling their loans, there is no doubt that the loan asset itself will have far more value if the lender's deed of trust includes a power of sale than if the lender's deed of trust does not.

VI. No Power of Sale Foreclosure Guidelines:

File petition to foreclose security interest in the circuit court where the real property is located and obtain a judgment whereby the court sets forth the details of the sale process, including ordering the sheriff or another authorized person or entity to conduct the sale.

VII. Foreclosure when Instrument Contains No Power of Sale:

See above.

VIII. Additional Satisfaction Permitted Under Continuing Power of Sale:

Missouri has no clear case law regarding whether a power of sale is "exhausted" once exercised or whether it may be exercised more than once (in the case of error in connection with the initial sale or if a portion of the real estate secured by the deed of trust mistakenly was not included in the initial sale). Traditionally, lenders seeking to foreclose further, after having exercised their power of sale, have utilized judicial foreclosure to do so – one of the rare examples of when foreclosing lenders in Missouri opt for judicial foreclosure.

IX. Sale Under Power where Instrument Silent as to Place or Terms of Sale:

At the main door or door designated by statute of the county courthouse in the county where the real property to be foreclosed is located.

X. Notice of Sale and How Notice is Given:

The notice of sale must include:

- **A.** the date the deed of trust was given;
- **B.** the book and page or instrument number of record of the deed of trust;
- **C.** the names of the grantors;
- **D.** the time of sale;
- **E.** the terms of sale;
- **F.** the place of sale; and
- **G.** a description of the property to be sold.

A written notice of foreclosure sale is sent to the appropriate parties, including the original borrowers, the owner of the property as shown by the records in the office of the county recorder of deeds as of 40 days before the sale, and any party who has filed a request for notice of sale in the prescribed form at least 40 days before the sale, by certified or registered mail at least 20 days prior to the foreclosure sale. If there is an IRS lien, notice must be provided to the IRS 25 days prior to the sale. A notice must also be published in a newspaper for 21 consecutive days or for four consecutive weeks, depending upon the size of the county and the regularity of newspaper publications within the county.

XI. Place and Time for Conducting Foreclosure by Power of Sale:

The place of the foreclosure sale will be determined by the language in the deed of trust. Otherwise, the trustee's sale shall occur at the front door of the county courthouse in the county where the property to be foreclosed is located, which is usually the place identified in the deed of trust. A trustee's sale may be

held between the hours of 9 a.m. and 5 p.m. The trustee may adjourn the sale up to one week without consent of the borrower. The borrower must approve in writing any longer extension for the extension to be valid. Otherwise, the foreclosing lender must recommence the notice and publication process anew.

Receivership

I. General Information:

In 2016, Missouri enacted a comprehensive Commercial Receivership Act (the "**Receivership Act**"). The Receivership Act gives the court power to appoint a receiver whenever such appointment shall be deemed necessary. The receiver's duty shall be to keep and preserve all property and protect any business or business interest entrusted to him or her pending any legal or equitable proceeding concerning the same, subject to the order of the court. The Receivership Act specifically provides for the appointment of a receiver where the person or entity seeking the receiver has a lien on property or the rents or other proceeds from property. A receiver should be appointed when the court is satisfied that: the appointment will promote the interests of one or both parties; it will prevent manifest wrong, imminently impending; and, the injury resulting will not be greater than the injury sought to be averted.

II. Appointing the Receiver:

A. The Basics:

The Receivership Act provides for two types of receivers: general and limited. A general receiver is one who takes possession of substantially all of a debtor's property and has the power to liquidate all of that property. A limited receiver is one who takes possession of only specific property, whether to preserve or liquidate that property. Where a receiver is sought for property on which the applicant has a lien, and such property constitutes all or substantially all of the debtor's property, the receiver may be general or limited.

The process begins with the filing of a petition in the circuit court, because it is essential to the appointment of a receiver that the applicant show the existence of the grounds for appointment

set forth in the Receivership Act, including that the applicant has a lien on the subject debtor's property. Missouri law no longer requires that a receiver be sought as ancillary relief; the Receivership Act permits an independent action for appointment of a receiver. As such, a count for a suit on the note or guarantee is not necessary. Additionally, a foreclosure count is not necessary, since foreclosure in Missouri is typically non-judicial, and nothing precludes simultaneous prosecution of an action for a receiver, or on the debt, while conducting a trustee's sale. A proposed order appointing a receiver is filed together with the petition seeking appointment of a receiver (among any other relief sought).

Due to the recent passage of the Receivership Act, a body of guiding case law has not yet developed. While the Receivership Act itself sets forth relatively specific requirements for appointment of a receiver, pre- Receivership Act case law may remain instructive. The pre- Receivership Act case law explains that the party seeking appointment of a receiver in a foreclosure context must show three things:

1. Immediate danger to the property;
2. A reasonable probability that the lender will prevail on the merits; and,
3. Insolvency of the borrower.

Other pre- Receivership Act cases state that a receiver should not be appointed if a less drastic remedy can be invoked. Some cases interpreting the general statute have held that the courts have the power to appoint receivers to preserve property pending legal or equitable proceedings concerning the same, and the exercise of this power rests "within the sound discretion of the court." It can reasonably be expected that Missouri courts will look to prior cases for guidance when appointing receivers under the Receivership Act.

B. Time Frame for Appointment:

7-14 days.

C. Can you go in Ex Parte?

The Receivership Act requires that the debtor and other parties to the action be given 7 days' notice of any application for appointment of a receiver. While the court can shorten (or expand) the notice period for good cause shown, the Receivership Act does not permit waiver of the notice requirement.

Note that pre-Receivership Act Missouri courts had the authority to appoint a receiver ex parte under the right circumstances; however, it was unusual for the court to appoint a receiver ex parte, and the court would need to be convinced that some affirmative harm would result by informing the borrower or its counsel in advance of the motion. A court would historically appoint a receiver ex parte only when there was an emergency and to prevent irreparable injury. An ex parte hearing, much like a temporary restraining order, would then be followed by a hearing conducted after notice to the adverse party. It is unclear whether this procedure is still available under the Receivership Act.

III. Loans and Advances:

The Receivership Act permits a receiver to obtain unsecured credit in the ordinary course of business without court approval. Further, the Receivership Act permits the Court, after notice and a hearing, to authorize a receiver to obtain credit other than in the ordinary course of business. Historically, this was routinely dealt with in the order appointing the receiver, so as to render it a non-issue at the time the lender and receiver decide that the receiver will borrow from the lender.

IV. Sales During the Receivership:

The Receivership Act specifically permits both a general and a limited receiver to sell receivership property.

V. Liens Against Receivership Property:

The Receivership Act permits the Court, after notice and a hearing, to permit the receiver to incur liens against receivership property.

VI. Owners Associations:

No statutes or case law on the issue.

VII. Construction Related to Receivership Property:

No statutes or case law on the issue.

VIII. Ending the Receivership:

A motion for discharge must be made, notice of which should be given to all parties. The motion for discharge should be accompanied by a final accounting of the receivership estate by the receiver.

Relevant Codes, Statutes or Case Law:

Mo. Rev. Stat. Chapter 515: Referees and Receiver; Mo. Rev. Stat. § 515.510; Appointment of receiver, when…; Mo. Rev. Stat. § 515.525: Receiver, qualifications; Mo. Rev. Stat. § 515.570: General receiver and limited receiver, report requirements; Mo Rev. Stat. § 521.545: Receiver powers, authority, and duty; Mo Rev. Stat. § 521.590: Operation of business, obtaining credit or incurred debt – court may order, when; Mo Rev. Stat. § 521.660: Motion to discharge..

Montana

Foreclosure Summary

Security Instrument	Trust Deed/ Mortgage
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Notice of Sale
Time Frame	60 days to 6 months
Redemption Period	One year for financial disclosure
Deficiency	Only if Judicial

Receivership Summary

Ancillary Remedy Necessary	
Ex-Parte	Yes
Approximate Time for Appointment	Within 30 days
Who or What can act as Receiver	Individual or Company
Specific Receiver Requirements	No party, attorney, or person interested in an action can be appointed receiver therein without the written consent of the parties, filed with the clerk.
Is there any approval list for Receivers	Unknown
Out of State Receivers Allowed	Unknown

Foreclosure:

I. General Information:

There is only one action for the recovery of debt or the enforcement of any right secured by a mortgage upon real estate.

II. Judicial Foreclosure Basics:

An injunction may be obtained to restrain the party in possession from injuring the property during foreclosure proceedings.

In an action to foreclose a mortgage of real property, the court must allow as a part of the costs a reasonable attorney's fee, which shall be fixed by the court, notwithstanding any stipulation in the instrument or any agreement between the parties to the contrary.

The purchaser of land at mortgage foreclosure is not entitled to the possession of the land as against the execution debtor during the period of redemption allowed by law while the execution debtor personally occupies the land as a home for the execution debtor and the debtor's family. It is unlawful to insert in any mortgage of real estate any provision intended to constitute a waiver by the owner of real estate personally occupying land as a home for the owner and the owner's family of the provision of this section or any provision intended to give the mortgagee possession of the land or premises prior to foreclosure upon default of tax, principal, or interest payments. The intention of which is to ensure to the owner the possession of the land prior to foreclosure and during the year of redemption.

Redemption period is one year. Written notice of redemption must be given to the sheriff and a duplicate filed with the county clerk

III. Non-Judicial Foreclosure Basics:

Non-judicial foreclosure is found in the Small Tract Financing Act of Montana Trust. Indentures are authorized for property not exceeding 40 acres to secure the performance of the grantor in the indenture to the beneficiary. A power of sale is conferred on the trustee be exercised after a breach of the obligation for which

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the transfer is security. A trust indenture may be foreclosed by advertisement or by juridical foreclosure. A power of sale may be exercised even without an express provision in the indenture.

A trust indenture is deemed a mortgage and the grantor is deemed the mortgagor and the beneficiary is deemed the mortgagee.

The trustee must be an attorney licensed to practice in Montana, a bank, trust company, or savings and loan association authorized to do business in Montana, or a title insurer or title insurance producer or agency authorized to do business in Montana.

The foreclosure of a trust indenture by advertisement and sale or by judicial procedure shall be commenced within the time, including extensions, provided by law for the foreclosure of a mortgage on real property.

In order to foreclose the trust indenture by advertisement, the indenture must be recorded and there must be a default by the grantor. The notice of sale must be recorded and must contain the names of the grantor, trustee and beneficiary, a description of the property, the book page where the indenture is recorded, the default, the sum owing on the obligation, the trustee or beneficiary's election to sell the property, the date of sale, which shall not be less than 120 days subsequent to the date on which the notice of sale is filed for record, and the time of sale, which shall be between the hours of 9 a.m. and 4 p.m., mountain standard time, and the place of sale which shall be at the courthouse of the county or one of the counties where the property is situated or at the location of the property or at the trustee's usual place of business if within the county or one of the counties where the property is situated.
On the date and time designated for the sale, the trustee must sell the property to the highest bidder. The property may be sold in one or separate parcels and the beneficiary can bid but the trustee cannot.

The proceeds of the trustee sale are applied first to the costs and expenses of exercising the power of sale and of the sale, including reasonable trustee's fees and attorney fees, then to the obligation secured by the trust indenture. Any surplus can be given to the person entitled to it or deposited with the clerk.

No deficiency judgment is allowed for a trust indenture if it is foreclosed by advertisement and sale.

IV. Power of Sale Foreclosure Guidelines:

Must advertise the real estate for sale at least 30 days before the date fixed for such sale, in a newspaper in the county in which such real estate is situated. Posting the notice of sale is also permitted if no newspaper is available. Notice of sale must be served personally at least 30 days before the date fixed for such sale upon the occupant of the property so advertised for sale and upon the mortgagor if within the state of Montana and upon every person or persons having or claiming an interest of record in the real estate so advertised for sale who may be found within the state of Montana.

Surplus may be paid to the person entitled to it and in the meantime, deposited with the court.

Same redemption rights as judicial foreclosure. Redemption period is 1 year.

V. Power of Sale Constitutes Part of Security:

Yes, for small tract financing.

VI. Notice of Sale and How Notice is Given:

Notice of sale must be given at least 120 days before the date fixed for the sale and a copy of the notice of sale must be mailed by certified mail to the grantor, each person designated in the indenture to received notice, any person who has filed a request for a copy of the notice of sale, any successor in interest to the grantor whose interest and address appear of record, and any person with a lien or interest whose lien or interest and address appear of record.

At least 20 days before the date fixed for the trustee's sale, a copy of the recorded notice of sale must be posted in some conspicuous place on the property to be sold. A copy of the notice of sale must be published in a newspaper of general circulation published in any county in which the property or some part of the property is situated, at least once each week for 3 successive weeks. On or before the date of sale, there must be recorded in the office of the clerk and recorder of each county where the property or some part of the property is situated, affidavits of mailing, posting, and publication showing compliance with the requirements of this section.

Relevant Codes, Statutes or Case Law:
MCA 71-1-101 et seq. Mortgages – General Provisions
MCA 71-1-201 et seq. Mortgages of Real Property
MCA 71-1-301 et seq. Small Tract Financing
MCA 25-13-801 et seq. Redemption of Real Property

Receivership:

I. General Information:

In general, Montana has few statutes or case law on receivership. Each case is unique and the order for receivership should take into account the specific needs of that case.

A receiver may be appointed by the court in which an action is pending when the action is: (1) by a vendor to vacate a fraudulent purchase of property; (2) by a creditor to subject any property or fund to the creditor's claim; (3) between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff or of any party whose right to or interest in the property or fund or the proceeds of the property or fund is probable and when it is shown that the property or fund is in danger of being lost, removed, or materially injured; (4) by a mortgagee for the foreclosure of the mortgagee's mortgage and sale of the mortgaged property and when it is shown that the mortgaged property is in danger of being lost, removed, or materially injured or that the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt; (5) after judgment, to carry the

judgment into effect; (6) after judgment, to dispose of the property according to the judgment or to preserve it during the pendency of an appeal; or (7) for proceedings in aid of execution, when an execution has been returned unsatisfied or when the judgment debtor refuses to apply the judgment debtor's property in satisfaction of the judgment.

II. Appointment Process:

Notice of an application for the appointment of a receiver in an action before judgment in the action must be given to the adverse party unless the party has failed to appear in the action and the time limited for the party's appearance has expired or unless it appears to the court that there is immediate danger that the property or fund will be removed beyond the jurisdiction of the court or lost, materially injured, destroyed, or unlawfully disposed of.

III. Receiver's Action and Reporting:

A receiver cannot begin his duties until an oath and undertaking are performed.

The receiver has, under the control of the court, the power to: bring and defend actions in the receiver's own name, as receiver; take and keep possession of the property; receive rents, collect debts, and compound for and compromise the rents and debts; make transfers; and generally do acts respecting the property that the court may authorize.

IV. Loans and Advances:

The receiver has the power to do acts respecting the property that the court may authorize.

V. Sales During the Receivership

The receiver has the power to do acts respecting the property that the court may authorize. The order will control.

VI. Liens Against Receivership Property:

The receiver has the power to do acts respecting the property that the court may authorize. The order will control.

VII. Owners Associations:

No information provided.

VIII. Construction Related to Receivership Property:

N/A

IX. Ending the Receivership:

The court can remove the receiver at any time. Generally the order will control. It may require a motion and hearing to terminate receivership.

Relevant Codes, Statutes or Case Law:
MCA Chapter 27-20 Receivers

Nebraska

Foreclosure Summary

Security Instrument	Mortgage/Deed of Trust
Judicial	Yes
Non-Judicial	Yes, if power of sale is expressly provided for in deed of trust
Initial Public Notice	Petition for Judicial/Notice of Sale for Non-Judicial
Time Frame	180 days for Judicial; 80-90 days for Non-Judicial
Redemption Period	Yes, any time prior to confirmation of sale
Deficiency	Yes, in action separate from foreclosure proceeding

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	No
Approximate Time for Appointment	Minimum 5 days
Who or What can act as Receiver	Any person who is not a party, solicitor, counsel, or in any manner interested in the suit subject to objection by opposing party
Specific Receiver Requirements	Bond
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. Non-Judicial Foreclosure Basics:

Foreclosures in Nebraska may be accomplished non-judicially, if the deed of trust contains a power of sale upon default of an obligation for which the trust property is conveyed as security. Mortgages and deeds of trust without a power of sale cannot be foreclosed non-judicially. The non-judicial foreclosure process takes less time than a judicial foreclosure process and a non-judicial sale is made without a right of redemption. In order to commence a non-judicial foreclosure, the trustee must file a notice of default with the register of deeds. The notice of default provides the borrower with a 30 day right to cure the payments in arrears (without regard to acceleration). If the defaults are not timely cured, at least one month after the initial notice is filed (two months if farm property), the trustee must give written notice of the time and place of sale by publishing such notice, at least five times, once a week for five consecutive weeks. The beneficiary of the deed of trust must commence an action to recover any deficiency within three months after the sale of the property. A beneficiary of a deed of trust with a power of sale also may elect to proceed by the judicial foreclosure process, if necessary (for example, if the deed of trust needs to be reformed in some manner).

II. Judicial Foreclosure Basics:

An action to foreclose a mortgage in Nebraska is commenced by the filing of a complaint and a praecipe (a praecipe directs the clerk of the court to prepare or issue something and at the commencement of the case the praecipe should direct the clerk to prepare the necessary summons). The complaint should be filed in the district court in the county where the real property encumbered by the mortgage or deed of trust is situated. Service of the complaint and summons by certified mail is permitted in Nebraska. Although not absolutely necessary, it is good practice to attach copies of the core loan documents to the complaint. The complaint also should allege that no action at law has been had for the recovery of the debt secured by the mortgage or deed of trust.

Upon commencement of the foreclosure action, a lis pendens notice should be recorded with the register of deeds for the applicable county. The lis pendens should include the names of the parties, the object of the action, a legal description of the subject real property, the date of the mortgage, the parties to the mortgage and the recording information.

Within twenty (20) days after entry of a foreclosure decree, the owner of the subject real property can file with the court a request for a stay of a foreclosure sale (tenants and junior lien holders cannot request a stay). The stay is granted automatically and is generally for a period of nine (9) months. If the subject real property is residential real property of less than three (3) acres in size and the maturity date of the loan is more than twenty years from the date the foreclosure complaint was filed, the stay period is three (3) months; the stay period is six (6) months if the maturity date of such a loan is between 10 and 20 years from the date the foreclosure complaint is filed. Only the owner of the real property can request a stay. A request for stay waives any right to claim errors in the foreclosure proceedings that may have occurred prior to the request for stay.

After expiration of the stay period, or twenty days after entry of the foreclosure decree, if no request for stay is filed, the plaintiff may file a praecipe for entry of an order of sale. Sales of real estate pursuant to an order of sale are conducted by the county sheriff, and the plaintiff's counsel should work closely with the sheriff's office in scheduling and publishing the notice of the sale. Notice of the sale must be published once a week for four consecutive weeks in a newspaper of general circulation within the county where the real property is situated. Notice also should be sent to all parties and an affidavit of mailing should be filed with the clerk of court's office.

Upon completion of the sale, the sheriff will file a return of sale with the court. Once the return is filed, the plaintiff or the winning bidder can file a motion to confirm the sale. If the sale is confirmed, the sale proceeds will be disbursed in conformity with the confirmation order.

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At any time prior to confirmation of the sale, the owner may redeem the property by paying the amount of liens found due in the foreclosure decree plus interest thereon and costs and twelve (12) percent interest on the sheriff's sale purchase price from the date of the sale to the date of redemption if the plaintiff was not the purchaser at the sale. Redemption is limited to the owner of the subject real estate.

A separate action must be commenced for proceeding against the borrower on any deficiency.

Receivership:

I. General Information:

A receivership is ancillary to the main action in Nebraska and therefore must be combined with another cause of action, such as a mortgage foreclosure. An exception exists, however, for receiverships in connection with non-judicial foreclosures; Nebraska state law provides that a Receiver can be appointed in connection with the exercise of the power of sale in a deed of trust after the filing of a notice of default. Because a receivership is an equitable remedy, the action must be filed in a Nebraska District Court, as opposed to the Nebraska County Courts which do not have equity jurisdiction.

II. Appointing the Receiver:

A. The Basics:

The plaintiff may seek appointment of a Receiver by complaint or through a motion. If the plaintiff wants the appointment of a Receiver when the action is commenced, the request for appointment of a Receiver should be included in the complaint. If the grounds for a Receiver arise after the complaint has been filed, appointment of a Receiver can be requested through a motion. Nebraska state law provides for the appointment of a Receiver, among other circumstances, in an action for the foreclosure of a mortgage or deed of trust and in connection with the exercise of the power of sale under a trust deed where the property subject to the trust deed is in danger of being lost, removed or materially injured or is probably insufficient to

discharge the mortgage debt secured by the mortgage or trust deed.

Notice of the application for appointment of a Receiver must be served on the adverse party at least five days prior to the hearing concerning such application.

B. Time Frame for Appointment:

A receiver only may be appointed within the context of a pending suit. Although Nebraska law requires a minimum of five days notice of a receiver application prior to the hearing, the time frame for the hearing largely will depend upon the court's calendar. It generally will be a shorter time period if the case is pending in the greater Omaha area (Douglas or Sarpy Counties) or in Lincoln (Lancaster County) than in rural areas where judges are responsible for multiple counties.

C. Can you go in Ex Parte?

The appointment of a Receiver ex parte (or without notice) is prohibited under Nebraska law and any order appointing a receiver without notice is void. However, according to state law, the court may direct the county sheriff to take temporary possession of property pending the hearing on the application for appointment of a Receiver if the five-day notice period prior to a hearing is "hazardous to the rights of any party."

III. Loans and Advances:

The Nebraska statutes do not speak directly to the requirements for loans or advances. The Order of Appointment, however, will generally contain special directions with respect to a Receiver's powers and duties and may speak to the Receiver's authority to obtain loans or to issue advances.

IV. Sales During the Receivership:

No statutory or caselaw precedent exists.

V. Liens Against Receivership Property:

No statutory or caselaw precedent exists.

Contributed By: Jeffery Wegner
of Kutak Rock

VI. Owners Associations:

No statutory or caselaw precedent exists.

VII. Construction Related to Receivership Property:

No statutory or caselaw precedent exists.

VIII. Ending the Receivership:

There are no specific requirements regarding the closing of the receivership. The procedure for closing of the receivership ideally is expressly addressed in the order appointing the receiver.

Relevant Codes, Statutes or Case Law:

Neb. Rev. Stat. §§ 25-1081-25-1090 (receivership); Neb. Rev. Stat. §§ 76-1001-76-1018 (Nebraska Trust Deeds Act); Neb. Rev. Stat. §§ 25-1527-25-1531 (execution of foreclosure sale); Neb. Rev. Stat. §§25-2137-25-2155 (foreclosure process); Nev. Rev. Stat. §§ 25-1505-25-1514 (stay of execution)

Nevada

Foreclosure Summary

Security Instrument	Trust Deed
Judicial	Rarely
Non-Judicial	Yes
Initial Public Notice	Notice of Default
Time Frame	Approximately Four Months
Redemption Period	Trustee's Sale: No Judicial F/C: One Year
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	No
Ex-Parte	Yes
Approximate Time for Appointment	2-5 Weeks
Who or What can act as Receiver	Individual/Company
Specific Receiver Requirements	Yes
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes, but local presence helpful

Foreclosure:

I. General Information:

Deeds of trust may be foreclosed by judicial or non-judicial means. Although rarely used, mortgages may only be foreclosed judicially. Mortgages are governed by chapter 106 of the Nevada Revised Statutes ("NRS"). Deeds of trust are governed by NRS chapter 107.

Nearly all foreclosure sales in Nevada are non-judicial foreclosure sales because they are generally less expensive and faster than judicial foreclosure sales. In contrast to judicial foreclosure sales, borrowers do not have a right of redemption following a non-judicial foreclosure sale. Unless otherwise stated, the information set forth in this section relates to non-judicial foreclosures via the exercise of a trustee's power of sale under a deed of trust.

II. Judicial Foreclosure Basics:

Judicial foreclosure is governed by NRS 40.430 through 40.450. Judicial foreclosure is rarely used, but is the exclusive method available to foreclose a mortgage. Nevada's form of the "one-action" rule is set forth in NRS 40.430. A judicial foreclosure is initiated by filing and serving a complaint upon the borrower and all other parties with an interest in or lien on the property. A complaint for judicial foreclosure results in a monetary judgment owing to the lender with a decree from the court directing a sheriff's sale of the property. Following the sheriff's sale, the borrower and certain other secured lienholders, have a one-year right of redemption in which to purchase the property by paying the amount bid for the property and other costs and charges, and, in certain instances, the amount owed to satisfy the lien of the foreclosing lienholder.

III. Non-Judicial Foreclosure Basics:

Non-judicial foreclosures are accomplished by the exercise of a trustee's power of sale under a deed to trust pursuant to NRS 107.080. If the loan is secured by both real and personal property, the lender may, under certain circumstances, use the non-judicial foreclosure process to conduct a unified sale of the

real and personal property collateral. Generally, a non-judicial foreclosure can be completed within four months.

IV. Guidelines for Power of Sale:

A. Perfection of Interest in the Deed of Trust and Appointment of Trustee:

All assignments of the deed of trust must be recorded before the current holder can commence foreclosure. Further, any appointment of a new trustee is not effective until a substitution of trustee is recorded. The beneficiary under the deed of trust may not act as the trustee for purposes of exercising the power of sale.

B. The Notice of Default and Election to Sell:

A non-judicial foreclosure is commenced by recording a notice of default and election to sell (NOD) in the office of the county recorder in which the property is located and by service of the NOD upon the parties identified below. The NOD must specify the event of default, and, if permitted by the underlying loan documents, may declare the lender's intent to accelerate the debt if the event of default is not cured within the period prescribed by statute.

For residential foreclosure, an affidavit executed by the lender must be attached to and recorded with the NOD. This affidavit must attest to the lender's authority to exercise the power of sale, and state, among other items: (1) the name and address of the current trustee, the current holder of the debt and beneficiary of the deed of trust, and any loan servicers; (2) the name and last known address of any prior beneficiary of the deed of trust; (3) the date and recording information for every assignment of the deed of trust; and (4) the amount in default, the outstanding principal balance, and a good faith estimate all fees and charges to be imposed on the borrower as a result of the default. This affidavit is not required for commercial foreclosure.

The NOD must be sent via certified mail to the borrower, the record owner of the property, junior lienholders, guarantors, and other parties with an interest in the property or who have

otherwise required notice. Additional notice requirements apply with respect to residential properties and certain licensed medical facilities.

C. Cure Period:

The borrower, the record owner of the property, a beneficiary under a subordinate deed of trust, or any other person who has a subordinate lien or encumbrance of record on the property, has 35 days from the date the NOD is recorded and mailed in which to cure the default set forth in the NOD. If cure is not made within this period, there is no further statutory right to cure.

D. Notice of Sale:

The notice of trustee's sale (NOS) will set the sale date, time and location, and describe the real property and personal property, where permitted, to be sold by the trustee. Once three months have elapsed from the date of the recordation of the NOD, the trustee may record the NOS and must provide notice of the sale by: (1) mailing a copy of the NOS by registered or certified mail to the borrower and all other persons entitled to receive notice, as identified above, (2) posting a copy of the NOS for 20 consecutive days, in a public place in the township or city in which the property is located, and (3) publishing a copy of the NOS three times, once a week for three consecutive weeks, in a newspaper of general circulation in the county in which the property is located. Again, additional notice requirements apply with respect to residential properties and certain licensed medical facilities.

E. Sale Date and Payment:

Non-judicial foreclosure sales are conducted as public auctions to the highest bidder. The sale must be held between 9:00 a.m. and 5:00 p.m. at a public location in the county in which the property is located that is designated by the governing body of the county for that purpose. The sale may be postponed three times by oral proclamation to a later date at the same time before a new NOS must be recorded, mailed, posted and published. The property is to be sold to the highest bidder. The beneficiary may credit-bid. The trustee generally has 30 days from the sale

date in which to record the trustee's deed upon sale. Real property transfer tax is due at the time of recording the deed, even where the property reverts to the beneficiary.

F. Deficiency Judgment:

Any action for a deficiency judgment must be brought within six months of the foreclosure sale, and would include a private sale via receivership.

G. Special Local Considerations:

The Cities of Las Vegas and North Las Vegas require, among other things, lenders foreclosing on vacant real property to register with the city in which the property is located and to inspect and maintain the property until the foreclosure sale. The City of Henderson has a similar requirement for residential property only.

Relevant Codes, Statutes or Case Law:
NRS Chapter 40; NRS Chapter 106; NRS
Chapter 107; City of Las Vegas Code of Ordinances Chapter 16.33 et seq.; City of North Las Vegas Code of Ordinances Chapter 15.33 et seq.; City of Henderson Code of Ordinances Chapter 15.13 et seq.

Receivership:

I. General Information:

Effective October 1, 2017, Nevada has enacted the Uniform Commercial Real Estate Receivership Act (the "Act"). It applies to both judicial and non-judicial foreclosures, and provides that a receiver may be appointed in a variety of circumstances. The discussion below pertains to receivers appointed over real property (and related personal property) in connection with a borrower's default in the performance of an obligation secured by that real property. A receiver over property that is subject to execution post judgment, and a receiver over a business entity may have additional powers and limitations not addressed below.

A. Receiver in Connection with Foreclosure:

In connection with a judicial or non-judicial foreclosure, foreclosure, a receiver may be appointed if the appointment is necessary to protect the property, the mortgagor agreed in

writing to the appointment of a receiver upon default, the property and other collateral held by the mortgagee is insufficient to satisfy the secured obligation, the owner fails to turn over proceeds or rents derived from the property that the mortgagee is entitled to collect, or if a junior lienholder obtains the appointment of fa receiver over the property. The Act applies to other instances, for example, preserving property that is subject to a judgment pending an appeal, and for traditionally recognized grounds, such as the property being in danger of waste, dissipation, or impairment.

New to Nevada law, the Act requires that a receiver submit a statement, under penalty of perjury, that the proposed receiver is not disqualified from being a receiver by virtue of being an affiliate of a party, having an interest materially adverse to the interest of a party, having a material financial interest in the outcome aside from compensation allowed by the court, by having a debtor-creditor relationship with a party, or by having an equity interest in a party that is not a noncontrolling interest in a publicly held company.

B. Uniform Assignment of Rents Act:

In addition, appointment of a receiver may be sought pursuant to the Uniform Assignment of Rents Act, adopted as NRS chapter 107A. Specifically, NRS 107A.260 provides that a lender-assignee under an assignment of rents (including an assignment of rents granted in a deed of trust) is entitled to the appointment of a receiver upon the borrower-assignor's default in the performance of its obligations under the loan documents where, among other things, one or more of the following has taken place: (1) the borrower has agreed in a signed document to the appointment of a receiver in the event of its default; (2) it appears likely that the real property may not be sufficient to satisfy the secured obligation; and/or (3) the borrower has failed to turn over to the assigned proceeds that the lender is entitled to collect. Notably, the appointment of a receiver under NRS ch. 107A does not require the commencement of a judicial or non-judicial foreclosure.

C. Other Grounds:

A lender may also seek the appointment of a receiver where the property is affected by the presence of a hazardous substance. Other equitable grounds may also support the appointment of a receiver.

II. Appointing the Receiver:

A. The Basics:

The party seeking appointment must file a complaint and a motion setting forth sufficient facts in support of the appointment. Among other salient facts, the party seeking appointment will want to make specific reference to the factors outlined in state statutes, as applicable, in its motion for appointment of a receiver. The Act requires a receiver to post a bond. The receiver will be paid through the income generated by the receivership estate and by the lender to the extent that income from the property is insufficient. The form of Orders under the Act are yet to be seen, but are likely to mirror those issued in the past, subject to specific statutory requirements, such as allowing the Receiver to make ordinary course expenditures, to be paid through receivership assets or the person who sought appointment of the receiver, being able to reject executory contracts, and allowing them to remit excess cash flow to the lender based on the lender's priority to payment under state law.

B. Time Frame for Appointment:

Generally, it takes between two and five weeks to appoint a receiver in order to provide the borrower with notice and an opportunity to be heard. A borrower may also stipulate to the appointment of a receiver.

C. *Ex Parte* Appointments:

Depending on the exigency of the situation, a receiver may be appointed on an *ex parte* basis in less than one week. After such an appointment, further hearing will likely be required in order to provide the borrower with notice and an opportunity to be heard. Under the Act, the court may condition the ex parte appointment of a receiver upon the posting of a bond by the party seeking the appointment of a receiver to cover the fees and

costs incurred by the party subject to receivership should the court later find the receivership to have been unjustified.

III. Loans and Advances:

If the receivership estate does not generate sufficient money to pay the receiver and to fund operating expenses, an Order can be issued permitting the lender to provide advances to the receiver to fund operating expenses not otherwise covered by the rents and other income generated by the property. Without court approval, a receiver can incur unsecured debts in the ordinary course of business of preserving receivership property. With court approval, a receiver can incur debts outside the ordinary course of business.

IV. Sales During the Receivership:

The Act codifies the formerly common practice of courts granting to a receiver a power of sale or other disposition of the property. A receivership sale under the Act will result in the property being sold free and clear of liens, and the Act allows for both a public auction of the property and the private sale of the property as long as the sale is approved by the court. This includes allowing a lienholder to acquire the property via a hybrid credit bid process by which the lienholder may offset from the purchase price part of all of the amount secured by its lien as long as that creditor tenders funds sufficient to satisfy the reasonable expenses of the transfer and the obligations secured by any senior liens that would be extinguished by the transfer.

In the past, the ability of the prospective buyer to obtain title insurance was a driving factor in a private sale through receivership, and given the Act is new, a proposed title insurer should be consulted early in order to determine any unique underwriting requirements.

V. Liens Against Receivership Property:

A. General Information:

The Act provides a comprehensive framework for handling liens and other claims against receivership property. In sum, upon the appointment of a receiver under the Act, the order of

appointment operates as a stay is issued against enforcement all liens and other claims against the receivership property.

B. Dealing with Liens on Receivership Property:

The receiver must provide notice to creditors, and allow claims to be made within a specified time period of at least 90 days after the receiver gave notice. After claims have been received, the receiver may object to claims, and after claims have ben adjudicated, they must be paid in order of priority as established by other state law governing liens and unsecured creditors. If there are insufficient funds to pay all claims in order of their respective priority, the court may order that notice be given only to certain creditors. Depending on the scope of the appointment order, may have the power to compromise lien claims and other litigation affecting the receivership estate.

VI. Owners Associations:

The Act requires a receiver to maintain and operate the receivership property, which includes paying association fees out of any rents collected or other income of the receivership estate. While not addressed by the Act, to the extent the borrower is the "declarant" under the governing documents of the association, the appointment request and order should address any rights of the receiver to act in such capacity. As noted above, because of the stay imposed via the appointment of a receiver under the Act, an association will need court approval to foreclose an association lien secured by property included as part of the receivership estate.

VII. Construction Related to Receivership Property:

Depending on the nature of the project, the appointment request and proposed order should be broad enough to meet a receiver's anticipated functions, including any necessary construction duties.

VIII. Ending the Receivership:

The rules of civil procedure require a court order to dismiss any action where a receiver has been appointed. Under the Act, upon

completion of the receiver's duties, the receiver must file a final report that identifies all the receiver's activities in connection with the receivership and a list of receivership property and any disbursements or dispositions of receivership property. If the final report is approved and the receiver had distributed all receivership property, the receivership is automatically terminated under Act. Nonetheless, a motion to terminate the receivership should still be filed to comply with the state court rules of civil procedure. In federal court, the applicable rules provide that a receiver shall not be dismissed except by leave of court and upon notice to all parties.

Relevant Codes, Statutes or Case Law:
NRS chapter 32; NRS chapter 40; NRS chapter 106; NRS chapter 107; NRS chapter 107A, Nevada Rules of Civil Procedure, Rule 66 (Receivers); Federal Rules of Civil Procedure, Rule 66 (Receivers); Local Rules of Practice for the United States District Court for the District of Nevada, LR 66-1 (Receivers)

New Hampshire

Foreclosure Summary

Security Instrument	Mortgage/ Trust Deed
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Notice of Sale
Time Frame	Varies by process; 60 days
Redemption Period	No
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	No
Ex-Parte	Yes
Approximate Time for Appointment	10-30days
Who or What can act as Receiver	Individual or trust Company
Specific Receiver Requirements	Must file a bond prior to commencing duties
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes but you will need an in state agent for service of process

Foreclosure:

I. General Information:

New Hampshire is a "title" state, similar to what others states describe as trust deed, i.e., a deed of property immediately conveys title subject to performance of all obligations in the loan documents. Upon performance, the mortgage becomes void. While a breach can be cured prior to foreclosure, once the foreclosure is complete the borrower has no further right of redemption. The lender has several foreclosure options upon a default, although as a practical matter the power of sale option is used almost exclusively.

II. Judicial Foreclosure Basics:

New Hampshire has no statutory procedure for judicial foreclosure outside the context of a power of sale. If the mortgage instrument contains a power of sale, a court will, upon request of the mortgagee, declare that the property be sold subject to the power, after such notice and other acts as the court's ruling may require. Since the requirements of an extra-judicial sale under the power are not onerous, as a practical matter few mortgages avail themselves of the judicial decree procedure.

III. Non-Judicial Foreclosure Basics:

Apart from power of sale, New Hampshire allows foreclosure by entry and continued possession for one year. If the entry cannot be peaceably accomplished, it may be accomplished under process of law. If entry can be peaceably accomplished, a notice stating the time at which possession commenced must be accompanied by publication in some newspaper printed in the county or an adjoining county, for three consecutive weeks.

IV. Guidelines for Power of Sale:

New Hampshire has statutory guidelines for exercise of the power of sale, described below. If the mortgage instrument contains any mandatory provision concerning the conduct of, notice of, or other acts effecting a sale under the power, they must be followed unless inconsistent with a statutory requirement.

V. Power of Sale Guidelines as Represented in the Security:

A mortgage may be sold or assigned to a third party, and the sale or assignment carries with it any power of sale in the instrument.

VI. Foreclosure when Instrument Contains No Power of Sale:

Absent the words "statutory power of sale," the mortgage can only be foreclosed by entry and possession for one year.

VII. Any Additional Satisfaction Permitted Under Continuing Power of Sale:

Deficiency judgments are permitted in New Hampshire.

VIII. Sale by Power of Sale when the Instrument is Silent as to the Place or Terms of Sale:

If the instrument designates a place other than the mortgaged premises for conducting the sale, the designated place governs – but if the instrument is silent, the mortgaged premises must be the location of the sale. If the instrument recites no terms of the sale, the mortgagee is free to include any commercially reasonable terms.

IX. Notice of Sale and How Notice is Given:

A notice is sufficient if it sets forth:

A. the date, time and place of sale;

B. the location of the mortgages premises by street number and town;

C. the date of the mortgage and the volume and page of its recording at the registry of deeds in the county in which it lies;

D. the location where the original mortgage instrument may be examined; and

E. the terms of the sale (deposit amount, form of deposit, closing date).

It must also include the following language: "You are hereby notified that you have a right to petition the superior court for the county in which the mortgaged premises are situated, with

service upon the mortgagee, and upon such bond as the court may require, to enjoin the scheduled foreclosure sale."

At least 25 days before the sale, the notice of sale must be sent by registered or certified mail to the mortgagor(s) and to each lienholder whose interest was on record thirty days prior to the scheduled sale date. It must also be published in a newspaper of statewide circulation or of general circulation within the town, once a week for three consecutive weeks, with the first publication at least 20 days prior to sale.

X. Place and Time for Conducting Foreclosure by Power of Sale:

Unless the mortgage instrument designates a place other than the mortgaged premises as the location for a foreclosure sale, it must be held at the mortgaged premises (or, if more than one parcel has been mortgaged and is being sold together, on either parcel specified in the notice). The designated date may be any date beyond 21 days after the notice is sent to all those entitled to same.

Relevant Codes, Statutes and Case Law:
N.H. RSA 479:6; N.H. RSA 479:18; N.H. RSA 479:19; N.H. RSA 479:22; N.H. RSA 479:25

Receivership:

I. General Information:

The appointment of a Receiver is clearly within the equitable powers of the Superior Court. The appointment of a Receiver should be considered in a situation where immediate control of the property is necessary to preserve the collateral value and the borrower is not cooperating with a request to yield control and possession to the mortgagor. The appointment of a third party Receiver also has the advantage of protecting the lender from a lender liability claim based on unreasonable control exercised by the lender. The lender in bringing such a petition would need to identify a willing and able Receiver.

II. Appointing the Receiver:

A. The Basics:

New Hampshire process: If for a pending case, a party to the case seeking appointment of a Receiver does so by filing a Motion for Appointment of a Receiver. If there is no pending case, any person who can establish a legal or equitable interest in the property may file a Petition for Appointment of a Receiver. If the requested appointment is by Motion, a copy must be sent to the opposing party as well as filed with the court. If the appointment is by Petition, the same is filed with the court and a Order of Notice obtained, following which the same is served on the opponent. In addition, although third parties who may have possession of, or an interest in, the property to be seized need not be made parties to the case, they must be served with a copy of the motion or petition, and given notice of the time set for hearing.

The Motion or Petition is typically supported by sworn affidavits or is a verified petition with respect to each and every fact set forth. If the applicant wishes to suggest a particular person for the office of Receiver, this may be done, but the permission of the person as so sought for the appointment should be first obtained, and the Motion or Petition must so state that the person has so agreed to serve if appointed.

The court will always hold a hearing on the motion or petition to appoint a Receiver. The issues at the hearing will be: the need for a Receiver and the possibility of accomplishing the desired purpose by an alternative remedy; the scope of the Receiver's authority; the precise identity and location of the property to be taken and held; and the suitability of the person for the post. The decision to appoint or refuse to appoint a Receiver is discretionary on the part of the court. If the court decides to appoint a Receiver, this is done by a written commission in the form of an Order directed at the Receiver. The Order will specify the duties; term of office; and the property to be taken and held; the size of the bond required and any conditions to the time for posting same; the specification of any duties to account if different from the statutory periods for the same; and any other

conditions the court deems appropriate. The Receiver will be sworn in and will assume duties immediately, without regard to whether there may be appeal filed to the Supreme Court.

B. Time Frame for Appointment:

This varies considerably, based substantially upon the requirement that there is a hearing, and the court's calendar. If by Motion, the opposing party must make objection within 10 days. If by Petition, the period for filing an Appearance and Answer by opposing party, is as set by the court in the Order of Notice, typically 30 days.

C. Can you go in Ex Parte?

The court may hear and grant the request for appointment of a Receiver on an ex parte basis, but when it does, the court will follow the procedures and guidelines established for temporary restraining orders.

III. Loans and Advances:

Allowed as ancillary proceedings, with court issuing same as supplemental orders; and the same may be obtained ex parte in an appropriate case.

IV. Sales During the Receivership:

No information provided.

V. Liens Against Receivership Property:

No information provided.

VI. Owners Associations:

No information provided.

VII. Construction Related to Receivership Property:

No information provided.

VIII. Ending the Receivership:

Upon completion, the Receivership is terminated by a Motion to Terminate Receivership. This motion typically requires supporting affidavits, and may be objected to by any other party within 10 days. The court will hold a hearing on the Motion to Terminate Receivership, and will at that time issue Orders returning the property to the original owners or distributed to such other persons as the court determines have a greater right to same, subject to all obligations incurred by the Receiver during the period of his appointment.

Relevant Codes, Statutes or Case Law:

NH RSA 401-B:11; NH RSA 498:1, RSA 498:12, NH Superior Court Rule 165, Ladd v. Harvey, 21 N.H. 514 (1850), Eastman v. Sav. Bank, 58 N.H. 421 (1878), Standard Oil Co. v. Nashua St. R.R., 88 N.H. 342 (1937), Munsey v. G.H. Tilton & Son Co. 91 N.H. 51 (1940), Petition of Keyser, 98 N.H. 198 (1953).

New Jersey

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	No
Initial Public Notice	Complaint
Time Frame	8-24 Months, depending on a variety of factors including county of venue and whether or not it is contested
Redemption Period	Limited to 10 days after the sale
Deficiency	Yes, restricted

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	No
Approximate Time for Appointment	If motion granted, 30-60 days after filing
Who or What can act as Receiver	No restrictions
Specific Receiver Requirements	No
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Rare

Foreclosure:

I. General Information:

In New Jersey, foreclosures are accomplished only by the judicial foreclosure process. "Power of sale" clauses, which would otherwise authorize lenders to sell the mortgaged property if the borrower defaults on the subject loan, are not permitted. Instead, the lender must commence an action against the borrower before the Chancery Court in the county in which the property is located. Upon receiving a docket number and filing date, the plaintiff should promptly file a notice of *lis pendens* in the appropriate county office where real estate documents are recorded.

In 1995, the Legislature enacted the "Fair Foreclosure Act". The Act governs residential foreclosure practice, and establishes uniform procedures with respect to the conduct of a sheriff's sale. In sum, the Act requires residential mortgage lenders to provide the mortgagor with at least 30 days' notice prior to accelerating the maturity of a residential mortgage or taking any legal action for foreclosure or possession. The Act sets forth with particularity the required content of the notice. The Act also gives mortgagors the right to cure a default by paying all sums due (including attorney fees and costs). The Act also requires that the complaint allege compliance with the Act.

II. Judicial Foreclosure Basics:

Prior to commencing a judicial foreclosure action, a lender must be able to demonstrate that it has legal standing to foreclose the mortgage. A lender has standing as the owner of the note and mortgage where it owns or controls the underlying debt, demonstrated by possession of the original note or proper assignment of the loan, prior to the commencement of the action.

In addition, in order to foreclose all junior interests to the mortgaged premises, the lender should obtain a foreclosure search of the mortgaged premises. Counsel to the lender will then prepare the initial pleadings, naming as party defendants the mortgagor, any other owners of the mortgaged premises, and all subordinate lienholders.

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A mortgagee commences judicial foreclosure by filing a summons and foreclosure complaint with the Superior Court Clerk's Office, located in Trenton, but venue of the action is based upon the county in which the property is situated. After the filing of the complaint, the plaintiff must file a *lis pendens* in the office of the county clerk where the mortgaged premises is located.

Absent court permission, a New Jersey foreclosure complaint may only assert "germane claims", that is, claims which affect the validity or invalidity of the mortgage itself. Thus, "non-germane claims" including claims under the mortgage note or guaranty are prohibited and will not be entertained by the Chancery Court as part of the foreclosure action. Typically, such claims are brought in a separate action pending in the Law Division. Similarly, unless the court orders otherwise, a defendant may only assert germane counterclaims and cross-claims in a foreclosure action.

In response to the foreclosure complaint, defendants can serve a contesting answer, a non-contesting answer, or a motion to dismiss the complaint. If a defendant fails to respond within the prescribed time, it will be deemed to have defaulted.

If the foreclosure action is uncontested, the foreclosing mortgagee may proceed immediately to entry of the final judgment of foreclosure. If the action is contested, as soon as the defendants' time to respond has lapsed and in compliance with any other court-issued case management orders, the plaintiff may file a motion for summary judgment seeking to have defendants' contesting answers deemed stricken and having the action referred back to the Office of Foreclosure for entry of final judgment.

To obtain a Final Judgment of Foreclosure, the plaintiff shall file a motion for final judgment, on notice to all parties who appeared in the action, by filing the following: notice of motion for final judgment; certification of amount due; certification regarding non-military status; certification authenticating

documents, annexing true copies of the original note, mortgage, and assignments thereof; certification of costs and search fees; a proposed form of final judgment; a proposed form of writ of execution; any other orders required to be entered by the Office of Foreclosure; and, if applicable, any other notices and certifications required pursuant to the Fair Foreclosure Act.

If a defendant has a valid objection to the amount due as stated in the plaintiff's motion for final judgment, he or she may submit it to the court within ten (10) days of receiving the motion, and the Office of Foreclosure will transfer the case back to the vicinage judge, who will make a final determination on the matter, and transfer the case back to the Office of Foreclosure. Otherwise, the Office of Foreclosure will review the motion and the proposed calculation of the amount due, and may contact plaintiff's counsel if there are any revisions to the calculation in accordance with New Jersey law.

The Office of Foreclosure issues the Final Judgment, fixing the amount due to plaintiff, including interest, late charges, taxed costs and attorney fees. Late charges cannot be charged after the date of the filing of the complaint. Attorney fees are set by statute, and are a percentage, set on a sliding scale, of the amount adjudged to be owed to the plaintiff, subject to statutory maximums. Simultaneously, the Office of Foreclosure issues the Writ of Execution, instructing the sheriff to sell the property.

The plaintiff submits to the sheriff of the county in which the property lies, the Final Judgment, Writ, an Affidavit of Consideration, the legal description for the property, and a check for any required fees. The sheriff is required to schedule an auction sale of the property within 120 days of receipt of the Writ. The borrower is entitled to two (2) two-week extensions of the sale date.

The sheriff conducts a public auction sale of the mortgaged premises, and the property will be sold to the highest bidder. The borrower has a 10-day period following the foreclosure sale to redeem, for the full amount of the mortgage indebtedness plus costs of foreclosure, fees, costs of sale, and interest from the date

of the sale. If the plaintiff is the successful bidder, upon expiration of the redemption period, the sheriff will prepare and issue the deed, which will be delivered within approximately 30 days of the sale, following payment of the sheriff's commissions. The sheriff is entitled to a fee and commission, calculated as a percentage of the struck off purchase price, and payable by the plaintiff even if the full purchase price is less than the entire indebtedness. The sheriff is also entitled to receive one-half of the statutory fee in the event the execution is settled without an actual sale.

A lawsuit for a deficiency must be filed within three (3) months from the date of the foreclosure sale. The deficiency is a personal judgment against the borrower for the remaining balance on the loan after a foreclosure sale.

III. Non-Judicial Foreclosure Basics:

Not applicable.

IV. Power of Sale Foreclosure Guidelines:

Not applicable.

V. Power of Sale Constitutes Part of Security:

Not applicable.

VI. No Power of Sale Foreclosure Guidelines:

Not applicable.

VII. Foreclosure when Instrument Contains No Power of Sale:

Not applicable.

VIII. Additional Satisfaction Permitted Under Continuing Power of Sale:

Not applicable.

IX. Sale Under Power where Instrument Silent as to Place or Terms of Sale:

Not applicable.

X. Notice of Sale and How Notice is Given:

Notice of the sale by publication and advertisement is typically handled by the sheriff who will be conducting the sale. The notice of sale must be posted on the property as well as in the office of the sheriff of the county where the property is located at least three (3) weeks before the date of the sale. In addition, the notice of sale must be published in two (2) local newspapers for four (4) consecutive weeks. One of these publications must be in either the largest municipality in the county or the county seat.

Notice of the sale must also be served by the mortgagee or party who obtained the order or writ, at least ten (10) days prior to the scheduled sale, to: (1) every party who has appeared in the action giving rise to the order or writ and (2) the owner of record of the property as of the date of commencement of the action whether or not appearing in the action. Such notice must be served by registered or certified mail, return receipt requested.

The contents of the notice of sale must include the date, time, and place of the sale, and either a full legal description, or a concise statement or diagram that also states where the full legal description can be found. The concise statement includes the municipality, the street or road on which the premises are located and street number, the tax lot and block, the number of feet to the nearest cross street, and the dimensions of the premises. The notice of sale shall also include notice that there may be surplus money and the procedure for claiming it.

XI. Place and Time for Conducting Foreclosure by Power of Sale:

Not applicable.

Relevant Codes, Statutes or Case Law:

N.J.S.A. 2A:50-1 et seq.; N.J.S.A. 2A:50-13; N.J.S.A. 2A:50-31; N.J.S.A. 2A:50-53 et seq.; N.J.S.A. 2A:15-8; N.J.S.A. 2A:15-9; N.J.S.A. 14A:12-7; N.J.S.A. 14A-14; N.J.S.A. 54:5-123; R. 4:42-10; R. 4:46-1; R. 4:46-2; R. 4:64-1 et seq.; R. 4:64-5; R. 4:65-5; R. 4:3-2; R. 4:53-1; R. 4:87-1 et seq.; Crest Sav. and Loan Ass'n v. Mason, 243 N.J. Super 646, 650 (Ch. Div. 1990); Wells Fargo Bank, N.A. v. Ford, 418 N.J.Super. 592, 597–600 (App.Div.2011); Bank of N.Y. v. Raftogianis, 418 N.J.Super. 323, 327–28 (Ch. Div.2010); U.S. Bank Nat. Ass'n v. Riley, 2016 WL 2888952 (N.J. Super. Ct. App. Div. 2016); U.S. Bank Nat. Ass'n v. Garofalo, 2016 WL 3063758 (N.J. Super. Ct. App. Div. 2016).

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Receivership:

I. General Information:

In New Jersey, the appointment of a rent receiver lies within the sound discretion of the Chancery Court, and a receiver will typically be appointed only upon a showing that there is a real danger of impairment of the lender's security and that the collateral is in a precarious or uncertain position. Courts will be less inclined to appoint a receiver if the borrower demonstrates that the security is more than adequate to meet the mortgage debt without sequestration of rents or that the land is worth more than the amount owed under the mortgage.

While the presence of a provision in the mortgage authorizing the immediate appointment of a receiver upon the borrower's default is to be considered by a judge in determining whether to appoint a receiver, such contractual language is not dispositive of the issue.

II. Appointing the Receiver:

A. The Basics:

A foreclosing mortgagee seeking the appointment of a receiver will set forth the request in a separate count of the complaint, and file a separate motion for the appointment of a rent receiver.

The determination of whether to appoint a receiver is factual and there is no single factor relied upon by the court in determining whether the lender's security is in jeopardy. Rather, the court will consider a number of factors, including: inadequacy of the property to satisfy the outstanding debt; inability of mortgagor to respond for deficiency; failure by mortgagor to pay real estate taxes and water rents; failure by mortgagor to keep property in good repair; failure by mortgagor to insure property; the commission of waste; misappropriation of rents; decline in property value; and the presence of stipulations in the mortgage document consenting to the appointment of a rent receiver or the assignment of rents to the mortgagee upon default.

In addition to authorizing the receiver to forthwith take charge and enter into possession of the premises and collect rents and

maintain the premises, typical receivership orders contain provisions empowering the Receiver to: commence, prosecute, defend and compromise all legal proceedings necessary for the protection and preservation of the mortgaged property; rent or lease any part of the mortgaged property; keep the mortgaged property insured; pay all taxes, sewer and water charges; make necessary repairs; otherwise to do all things necessary for the due care and proper management of the mortgaged property; and to employ such firms and persons, other than attorneys, as he deems necessary.

B. Time Frame for Appointment:

The lender may file a motion for the appointment of a receiver at any time. Typically, the lender will seek appointment of a receiver by motion on notice. Applications made by motion on notice must be filed and served at least 16 days prior to the anticipated return date. Hearing dates will be set by the Court and can be determined by checking the applicable Chancery Judge's motion schedule.

If the lender proceeds by order to show cause, the appointment a receiver could occur with 5-10 days. If the lender moves by notice of motion, it could take in excess of 30 days.

C. Can you go in Ex Parte?

No order appointing a custodial rent receiver under the general equity power of the court will be granted without consent of or notice to the adverse party, unless it appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable damage will result to the applicant before notice can be served and a hearing had thereon.

III. Receiver's Action and Reporting:

The order of appointment typically requires the receiver to issue a monthly report, and at the conclusion of the foreclosure action, the receiver must render an accounting to the court in connection with his or her discharge.

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IV. Loans and Advances:

Loans and advances are typically addressed in the receivership order.

V. Sales During the Receivership:

New Jersey has a seldom-used sale *pendente lite* statute, that provides for the sale of mortgaged property, upon application of an interested party, through a receiver or a sheriff prior to the obtainment of a final judgment of foreclosure, when the property is likely to decrease in value, and the continuing preservation of the property is not feasible, given the diminishing potential return on the property. This is a drastic remedy and a powerful showing of danger to, or deterioration of, the collateral is necessary.

In accordance with the statute, any party to a foreclosure action may make an application for a *pendente lite* sale of the mortgaged premises prior to sheriff's sale. The statute provides that a *pendente lite* sale can occur if the property is likely to deteriorate in value or to make its care or preservation difficult or expensive pending the determination of the action. However, there is no set standard as to when the court will allow the sale of the property prior to sheriff's sale. Rather, the court must determine each application for a *pendente lite* sale on a case-by-case basis. Courts look at the totality of the circumstances and apply the facts of that specific case to determine whether it meets the purpose of the statute.

An application to sell the mortgaged property *pendente lite* can be accomplished by first seeking the appointment of a receiver to effectuate the *pendente lite* sale or by seeking to have the sheriff's office sell the property by court order prior to the final judgment of foreclosure.

The *pendente lite* sale remedy is provided for by N.J.S.A. 2A:50-31 as follows: When, in an action for the foreclosure or satisfaction of a mortgage covering real or personal property, or both, the property mortgaged is of such a character or so situated as to make it liable to deteriorate in value or to make its care or

preservation difficult or expensive pending the determination of the action, the Superior Court may, before judgment, upon the application of any party to the action, order a sale of the mortgaged property to be made at public or private sale through a receiver, sheriff, or otherwise, as the court may direct.

Only a handful of courts have applied this statute in the last 50 years. and even fewer opinions exist in which the court grant *pendente lite* sale relief. See Mortgage Electronic Registration Systems, Inc. v. Rothman, 2005 WL 280321 (N.J. Super. Ch. Div. January 12, 2005) (Unpublished) (noting that there were only three reported cases respecting the pendente lite sale statute); Valley Nat. Bank v. Tru Med Properties, LLC, 2011 WL 3176615 (N.J. Super. Ct. App. Div. 2011); Corestates/New Jersey Nat. Bank v. Chas. Schaefer Sons, Inc., 1995 WL 17875639 (N.J. Super. Ct. Ch. Div. 1995).

VI. Liens Against Receivership Property:

Nothing specific to New Jersey regarding liens.

VII. Owners Associations:

Although condominium association liens are generally subordinate to prior recorded mortgages and other liens, N.J.S.A. 46:8B-21 provides that they can enjoy some limited priority over a prior recorded mortgage in limited circumstances.

VIII. Construction Related to Receivership Property:

Construction issues, including the payment of construction expenses, should be provided for and addressed in the receivership order incurred by the receiver.

IX. Ending the Receivership:

A receivership does not automatically terminate at the end of the foreclosure action, but instead is discharged by court order, typically obtained on motion by the lender. A hearing on the motion, however, may be waived if no parties object to the discharge.

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The receiver must be discharged by formal court order discharging the receiver and cancelling the surety bond. The motion typically also seeks approval of the receiver's accounting and proposed distributions, and authority to cancel the receiver's bond.

X. Miscellaneous

A receiver will not be entitled to employ separate counsel, absent application to the court showing such employment is necessary to the proper conservation and administration of the mortgaged property.

Relevant Codes, Statutes or Case Law:

N.J.S.A. 14A:12-7; N.J.S.A. 14A-14; N.J.S.A. 54:5-123; N.J.S.A. 2A:50-31; N.J.S.A. 2A:15-8; N.J.S.A. 46:8B-21; R. 4:42-10; R. 4:46-1; R. 4:46-2; R. 4:64-1; R. 4:64-5; R. 4:3-2; R. 4:53-1; R. 4:87; R. 4:53-3; R. 1:6-3(a); C.J.S. Receivers § 118; Barclays Bank, P.L.C. v. Davidson Ave. Associates, Ltd., 274 N.J. Super. 519, 644 A.2d 685 (App. Div. 1994); Mortgage Electronic Registration Systems, Inc. v. Rothman, 2005 WL 280321 (N.J. Super. Ch. Div. January 12, 2005) (Unpublished); Valley Nat. Bank v. Tru Med Properties, LLC, 2011 WL 3176615 (N.J. Super. Ct. App. Div. 2011) (Unpublished); Corestates/New Jersey Nat. Bank v. Chas. Schaefer Sons, Inc., 1995 WL 17875639 (N.J. Super. Ct. Ch. Div. 1995) (Unpublished).

New Mexico

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	Yes, but rarely if ever used.
Initial Public Notice	Complaint
Time Frame	90-120 days unless contested
Redemption Period	Yes, limited One month if provided in document, 9 months if not.
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	No
Approximate Time for Appointment	2 Weeks
Who or What can act as Receiver	Not limited
Specific Receiver Requirements	Oath
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

Although New Mexico has a Deed of Trust Act, it is essentially never used. As a result, it has not been tested. Although deeds of trust specifically referencing the Deed of Trust Act may use the power of sale, no sale may occur sooner than 180 days after the notice of sale is recorded. During that time, the borrower can bring an action to delay the sale, assert lender liability claims, etc., causing all the delay of a judicial foreclosure. People simply do not use the cumbersome provisions of the Deed of Trust Act.

II. Judicial Foreclosure Basics:

Judicial foreclosure is the standard procedure. An answer is due 30 days after service. If contested, the normal summary judgment or trial procedures follow. The time involved depends on the schedule of the judge and the amount the borrower fights. Timing once judgment is obtained is that a sale may be held no sooner than one month after judgment. There is a 9 month redemption time which can be and usually is reduced to one month by a term in the mortgage/deed of trust.

A deficiency judgment is permitted, and foreclosure does not waive rights against other assets or guarantors to the extent the debt is not satisfied by the amount bid at foreclosure sale.

III. Non-Judicial Foreclosure Basics:

Non-Judicial Foreclosure is rarely ever used in the state of New Mexico.

IV. Notice of Sale and How Notice is Given:

For judicial foreclosure, notice must be publicized for 4 weeks after entry of judgment. Sale cannot occur sooner than one month after judgment.

Relevant Codes, Statutes or Case Law:
§ 48-10-1 et seq.

Receivership:

I. General Iinformation:

The New Mexico Statutes Annotated provides general guidelines for the appointment of a Receiver. Generally the legal support is as is provided in the mortgage. A showing of actual need, such as diverted cash, necessary repairs and/or other basis is useful if the receivership is contested.

II. Appointing the Receiver:

A. The Basics:

You will need to file a motion for appointment upon the filing of the complaint for foreclosure.

B. Time Frame for Appointment:

Generally the court will hold a hearing within a week or so after the motion has been filed.

C. Can you go in Ex Parte?

An ex parte hearing to appoint a receiver may be held without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified application that immediate and irreparable injury, loss or damage will result to the applicant or others before adverse party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts that have been made to give notice and the reasons notice should not be required.

III. Loans and Advances:

No statutes or rules govern loans or advances, and the Order of Appointment will govern the Receiver's authority to obtain loans or to issue advances.

IV. Sales During the Receivership:

Subject to prior order of the district court, New Mexico law provides the receiver power to engage and retain attorneys, accountants, brokers or any other persons and pay their compensation or fees, sell or mortgage property of the receivership estate, borrow money, and make distributions of

receivership proceeds to any party or pay compensation to the receiver. §44-8-7 (H).

Recently Receivers have become more aggressive in seeking to obtain and receiving court authority to sell receivership assets including real estate. Someone contemplating doing so should have advance discussions with the title insurance company.

V. Liens Against Receivership Property:

The rights of all holders of liens (including the mortgage holder) will be adjudicated in the final judgment and the proceeds of the special master sale will be paid to lienholders in their order of priority. Typically the foreclosing mortgage holder will not bid enough at the foreclosure sale to pay junior lienholders but will pay off any liens found to be senior.

VI. Owners Associations:

There are no codes, statues or case law relating to the Receiver and an owners association related to the property in the receivership estate.

VII. Construction Related to Receivership Property:

The power of the receiver to complete construction would be subject to the Order appointing the receiver. The argument would be that in order to protect the existing value of the property, the construction must be completed. The financing arrangement (presumably with the foreclosing creditor) would be subject to court approval.

VIII. Ending the Receivership:

There should be a final report and order approving the same and discharging the receiver to close out the receivership.

Relevant Codes, Statutes or Case Law:
§ 44-8-1 et seq., Rules 1-041.F.(1), 1-066, very little case law; § 44-8-1 et seq.

New York

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	Repealed in 2009
Initial Public Notice	Complaint
Time Frame	12-18 Months
Redemption Period	No
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes
Approximate Time for Appointment	5-14 days
Who or What can act as Receiver	Individual
Specific Receiver Requirements	Yes
Is there any approval list for Receivers	Yes, but the court for good cause may appoint someone who is not on the list
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

In New York, foreclosure is accomplished by judicial foreclosure, with the commencement of an action in equity where the mortgaged premises is sold and the sale proceeds are distributed according to New York's Real Property Actions and Proceedings Law (RPAPL). In rare and exceptional circumstances, a purchaser or mortgagee may alternatively commence an action for strict foreclosure, seeking a judgment that he or she is the absolute owner of the mortgaged premises.

II. Judicial Foreclosure Basics:

Prior to commencing a judicial foreclosure action, a plaintiff must be able to demonstrate that it has legal standing to foreclose the mortgage. A plaintiff has standing as the owner of the note and mortgage where it is either the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced. This is typically established by showing possession of the original note and recorded written assignments of the mortgage in favor of the mortgagee.

In addition, in order to foreclose all junior interests to the mortgaged premises, the plaintiff should obtain a foreclosure search of the mortgaged premises. Counsel to the plaintiff will then prepare the initial pleadings, naming each borrower, guarantor, and subordinate lienholder as a defendant in the action. The interests of tenants who are not named as defendants are not foreclosed.

Judicial foreclosure is commenced by the filing of the Summons, Complaint, and Notice of Pendency. The defendants' time to respond is triggered by service of process, which must be accomplished as prescribed under New York's Civil Practice Law and Rules (CPLR). There are specific personal service requirements which must be met in order to obtain a deficiency judgment. In response to the complaint, a defendant may serve a notice of appearance and waiver, a general notice of appearance, an answer, or a motion to dismiss the complaint. If a defendant

fails to respond within the prescribed time, the plaintiff may move for default.

Upon expiration of a defendant's time to answer or upon service of defendant's responsive pleading, the plaintiff moves for summary judgment and an order of reference seeking the appointment of a referee to determine the amount due on the mortgage. The plaintiff submits to the referee proof of the amount due on the mortgage, together with expenses incurred in protecting the lien, such as real estate taxes. Typically, plaintiff's counsel will prepare a referee's oath and report of amount due, to be completed, signed, and filed by the referee. Statutorily, a referee's hearing on the amount due may be required, but the formality of a hearing is frequently waived.

Once the referee has filed his oath and report of amount due, the plaintiff moves to confirm the report and for entry of a Judgment of Foreclosure and Sale. The Judgment will include the appointment of a referee to sell the premises within ninety days of the date of the judgment, any award of legal fees to the foreclosing party, and a determination of whether a defendant will be liable for any deficiency remaining after the sale. The Notice of Pendency, which is typically filed at the commencement of the foreclosure action, and expires after 3 years, must be filed and in effect at least 20 days prior to entry of the Judgment of Foreclosure and Sale. The Notice of Pendency may be extended during the 3 year period and successive notices of pendency may be filed in the foreclosure action unlike other actions.

Prior to any sale, notice of the sale must be published and posted, fulfilling all statutory advertising requirements. Then, the referee conducts a public auction sale of the mortgaged premises, often at the courthouse of the county in which the premises lies. The successful bidder must deposit the amount as set forth in the terms of sale (usually 10%) with the referee, unless it is the plaintiff, in which case he may credit bid up to the amount due pursuant to the Judgment of Foreclosure and Sale. After the sale, the referee executes a deed to the winning bidder. The mortgagor

has no right of redemption following the auction. After the deed is conveyed, a report of sale must be filed within 30 days. The report of sale is confirmed by motion, at which time, plaintiff must seek any deficiency judgment against defendants. There are specific time requirements for confirmation motions set forth in the RPAPL and a motion for deficiency judgment must be made within 90 days after conveyance of the deed.

III. Non-Judicial Foreclosure Basics:

Non-judicial foreclosure, or Foreclosure by Power of Sale, is no longer available in New York. Power of Sale mortgage foreclosure became statutorily effective in 1998, but was repealed on July 1, 2009, by its own terms when it was not renewed. Non-judicial foreclosures that were commenced prior to July 1, 2009 may proceed to conclusion, but unless the New York legislature acts to reinstate this remedy, mortgagees will be required to foreclose under the available methods of judicial foreclosure or strict foreclosure.

IV. Power of Sale Foreclosure Guidelines:

Not applicable.

V. Power of Sale Constitutes Part of Security:

Not applicable.

VI. No Power of Sale Foreclosure Guidelines:

Not applicable.

VII. Foreclosure when Instrument Contains No Power of Sale:

Not applicable; see discussion of judicial foreclosure.

VIII. Additional Satisfaction Permitted Under Continuing Power of Sale:

Not applicable; see discussion of judicial foreclosure.

IX. Sale Under Power where Instrument Silent as to Place or Terms of Sale:

Not applicable.

X. Notice of Sale and How Notice is Given:

Not applicable; see discussion of judicial foreclosure.

XI. Place and Time for Conducting Foreclosure by Power of Sale:

Not applicable.

Relevant Codes, Statutes or Case Law:
CPLR §§ 308, 311, 316, 507, 1006, 1007, 1012, 1013, 5011, 5015, 6501, 6511-6513, 6516; RPL § 254, 275; RPAPL §§ 231, 241, 1301(1), 1311, 1331, 1341, 1351, 1353, 1354(1)-(4), 1355(1)-(2), 1361(1)-(2), 1371(1)-(3), 1401-1408, 1410, 1411(3), 1414, 1415, 1417-1421; *US Bank, N.A. v. Faruque*, 120 A.D.3d 575, 991 N.Y.S.2d 630 (2nd Dep't 2014); *Kondaur Capital Corp. v. McCary*, 115 AD3d 649, 981 N.Y.S.2d 547 (2nd Dep't 2014); *Rodgers v. County of Monroe* (*In re: Rodgers*), 333 F.3d 64 (2d Cir. 2003).

Receivership:

I. General Information:

The appointment of a receiver in a New York foreclosure action is generally governed by RPAPL § 1325(1) and N.Y. Real Property Law (RPL) § 254(10), which recognize the enforceability of mortgage provisions providing for the appointment of a receiver upon default without notice and without regard as to the adequacy of the mortgagee's security.

While ex parte relief is permissible, for strategic reasons, a plaintiff may wish to proceed on an expedited basis on notice to the defendant pursuant to an order to show cause because, in some counties, proceeding by order to show cause often results in the appointment of a receiver on a more expedited basis than by seeking ex parte relief.

In the absence of a contractual right to a receiver under the mortgage, a plaintiff may resort to CPLR § 6401 which provides for the appointment of a receiver upon motion of "a person having an apparent interest in property which is the subject of an action in the supreme or a county court . . . where there is danger that the property will be removed from the state, or lost, materially injured or destroyed."

II. Appointing the Receiver:

A. The Basics:

The plaintiff may seek the appointment of a receiver by: (1) notice of motion, which would require a minimum of 8 days statutory notice (13 days if service is accomplished by mail), but in all likelihood would probably not be heard for at least 30 days; (2) order to show cause, which is New York's equivalent of a motion to shorten notice, and which could result in a hearing being held in approximately 5-10 days and interim relief; or (3) ex parte motion, to the extent provided for in the loan documents.

The appointment of a receiver is accomplished by the filing of a motion with the court following the commencement of the foreclosure action. Motion papers typically consist of: (1) an affidavit of a representative of the plaintiff describing the loan and loan documents, including provisions governing the appointment of a receiver, the defendant's default, and the rent roll at the property; (2) an attorney affirmation setting forth the procedural history of the case (i.e., commencement of the action and filing of a notice of pendency); (3) a memorandum of law in support of the motion; (4) a proposed order appointing the receiver; and (5) a request for judicial intervention, if this is the first motion filed in the case.

If the plaintiff is proceeding by order to show cause, the supporting papers must also state: (1) the reasons why the plaintiff needs expedited relief and is proceeding by order to show cause, rather than by notice of motion; and (ii) that no prior motion seeking the same or similar relief has been previously made to any court. An allegation that expedited relief is necessary to protect rents from being misapplied or misappropriated is generally sufficient cause for an expedited hearing on a motion to appoint a receiver.

In addition to authorizing the receiver to forthwith take charge and enter into possession of the premises and collect rents and maintain the premises, typical receivership orders contain these

provisions:

(i) authorizing the receiver to institute and maintain legal proceedings and to take such actions and effect such measures necessary for the protection of the premises;

(ii) authorizing the receiver to commence eviction proceedings against tenants;

(iii) directing the defendant to deliver and turn over to the receiver, all keys to the premises, the proceeds and control of all bank accounts containing tenant security deposits, rental payments and other funds relating to the premises, possession of any and all documents, books, records and property which relate to construction upon the premises, including all leases, service, maintenance, and other contracts and agreements, all lists of vendors and records of transactions with vendors, all books of account, payroll records, accounts' receivable and accounts' payable lists, budgets and other financial records, all monies on deposit with vendors, service companies, utility companies or others, employment and union agreements and records relating to past and present employees, and all permits and licenses necessary for the operation of the premises;

(iv) directing the defendant to cooperate with the receiver;

(v) directing all tenants to attorn to the receiver;

(vi) authorizing the receiver to rent or lease vacant units at the premises at the prevailing market rates and for terms not exceeding two (2) years,

but only with the written consent of the plaintiff; and,

(vii) providing that the receiver shall not retain professionals or make secondary appointments without prior court authorization on notice to the plaintiff.

The receivership order is required to contain these provisions: (1) requiring the receiver to promptly deposit funds collected by the receiver into a checking account or an interest-bearing account designated by the court; (2) providing that no funds may be withdrawn from the receiver's account unless directed by court order or the check is counter-signed by the receiver's surety. In addition, some courts require a provision that the receiver shall comply with Section 35-a of the Judiciary Law and 22 NYCRR Part 36, as well as a provision that plaintiff shall reimburse the receiver for fees, costs, and expenses, if the income generated from the property is insufficient to cover such amounts.

B. Time Frame for Appointment:

The plaintiff may file a motion for the appointment of a receiver at any time but typically this is done at the beginning of a foreclosure action, and sometimes simultaneously with the filing of the complaint. Moving for the appointment of a receiver by notice of motion is rare in commercial foreclosure cases because most commercial loan documents contain the requisite provisions allowing the mortgagee to seek appointment of a receiver on an ex parte basis. While CPLR provides that motions may be made on 8 days' notice (13 days if served by mail), a hearing on such motion may not be held for at least 30 days depending on the rules of the court in the county or the individual practices of the judge that is assigned.

By contrast, when proceeding by order to show cause, the Clerk's office will appoint a judge upon the filing of the motion, and will generally submit the papers to Chambers on the date of filing. Typically, the Court will sign the order to show cause

within 2 days and will schedule a hearing on an expedited basis, usually within 5-10 days after filing of the motion.

While ex parte relief may be permissible under the loan documents, if the ex parte application is submitted to an Ex Parte Motion office, it may take up to 30 days for the ex parte motion to be ruled upon by a judge. This is especially true in New York City and the surrounding counties. Thus, in New York City and the surrounding counties, proceeding by order to show cause is sometimes more expeditious than proceeding on an ex parte basis.

If the plaintiff moves by notice of motion, the appointment of a receiver may take in excess of 30 days. If the plaintiff proceeds by order to show cause, the appointment of a receiver could occur within 5-10 days. If the plaintiff moves on an ex parte basis, the time frame may be the same as moving by order to show cause, with the exception of New York City and the surrounding counties.

C. Can you go in Ex Parte?

As set forth above, the ex parte appointment of a receiver is permissible to the extent provided in the mortgage.

D. Specific requirements for the Receiver:

Receivers are typically selected by the judge that signs the order of appointment, from a list of qualified receivers in the county of venue, which is maintained by the Chief Administrator. In order to qualify for this list, the appointee may not be: (1) a full-time or part-time judge or housing judge or relative or related by marriage to a full-time or part-time judge or housing judge; (2) a full-time or part-time employee of the Unified Court System; (3) the spouse, brother/sister, parent or child of a full-time or part-time employee of the Unified Court System at or above a salary grade JG24, or its equivalent in the judicial district in which such appointment is sought, or in a statewide district; (4) a person who currently or within the last two years has served as chair, executive director or the equivalent of a state or county political

party, or the spouse, brother/sister, parent or child of such political party official, or an associate, counsel or employee of a law firm or entity with which such political party official is currently associated; (5) a former judge or housing judge who left office within the last two years and is seeking appointment in the district in which he presided, or the spouse, brother/sister, parent or child of such former judge; (6) a judicial hearing officer who is seeking appointment in the district where he serves; (7) an attorney who is currently disbarred or suspended in any jurisdiction; (8) a convicted felon for whom no certificate of relief from disabilities has been received; (9) a person convicted of a misdemeanor for which a sentence was imposed within the last five years and for which no certificate of relief from disabilities has been received, or waived by the Chief Administrator; and (10) a person who has been removed from an appointment list of the Chief Administrator for unsatisfactory performance or conduct incompatible with appointment. Additionally, in order to qualify to be appointed to the list, an applicant must complete a certified training course. In limited situations, a court may appoint a receiver that is not on the list of qualified receivers, but this is rate, and good cause must be shown.

E. Receiver's Action and Reporting:

Before taking any action, the receiver must qualify by signing and filing an oath, and posting a bond in an amount fixed by the order appointing the receiver. The receiver shall file an accounting with the Court "at least once a year." All monies received by the receiver are to be deposited into an account in the receiver's name, which shall also show the name of the case. No monies may be withdrawn from such account except as authorized by the Court, or the check is counter-signed by the receiver's surety. Orders typically require monthly reporting to the plaintiff.

III. Loans and Advances:

Loans and advances are governed by the order appointing the receiver. The order typically provides that the receiver shall not obtain loans or make advances beyond certain monetary

limitations unless approved by the Court pursuant to a motion on notice to the parties.

IV. Sales During the Receivership:

A receiver is not permitted to sell property under New York law.

V. Liens Against Receivership Property:

Nothing specific to New York regarding liens.

VI. Owners Associations:

No provisions in New York relating to owners associations and a receiver.

VII. Construction Related to Receivership Property:

A receiver is not bound by the defendant's contracts concerning construction. Construction issues, including the payment of construction expenses, should be provided for and addressed in the receivership order.

VIII. Ending the Receivership:

A receivership is terminated by entry of an order authorizing such termination. The motion will seek approval of the receiver's accounting and proposed distributions, and authority to cancel the receiver's bond. In the alternative to a motion, the Court may approve a stipulation executed by all parties approving the receiver's accounting and proposed distribution, terminating the receivership and authorizing the cancellation of the receiver's bond.

Relevant Codes, Statutes or Case Law:

NY RPAPL § 1325; NY Real Property Law § 254; NY CPLR § 6401; Rules of the Chief Judge § 36.2, Uniform Rules for the New York State Trial Court § 202.52; 22 NYCRR Part 36; *Meyer v. Indian Hill Farm, Inc.*, 258 F.2d 287 (2d Cir. 1958) (where mortgage provides for appointment of receiver upon default, "[p]roof of the inadequacy of the security and of the probability of success of the action is not required"); *Union Chelsea Nat'l Bank v. Rumican 190 Corp.*, 228 A.D.2d 279, 643 N.Y.S.2d 586 (1st Dep't 1996) (affirming ex parte appointment of receiver pursuant to mortgage); *In the Matter of Lowenthal*, 199 A.D. 39, 191 N.Y.S. 282 (1st Dep't 1921) ("The receiver is not bound to adopt the contracts of the defendant"); *Charles v. Charles*, 22 Misc. 3d 1130A, 881 N.Y.S.2d 362, 2009 WL 580754 (Queens Cty. Sup. Ct. Feb. 27, 2009) ("A temporary receiver cannot be empowered to sell property to which the receiver has no title.").

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North Carolina

Foreclosure Summary

Security Instrument	Deed of Trust, Mortgage
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Notice of Sale
Time Frame	90-120 days
Redemption Period	10 Days
Deficiency	Varies

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes
Approximate Time for Appointment	Varies county to county
Who or What can act as Receiver	None Given
Specific Receiver Requirements	Bond must be filed prior to Receiver commencing duties
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. Judicial Foreclosure Basics:

Judicial foreclosure is available and can be used when there is no power of sale clause in the security instrument or where there may be some defect in the security instrument that would preclude a non-judicial foreclosure.

II. Non-Judicial Foreclosure Basics:

Non-judicial foreclosure is available pursuant to N.C.G.S. §45-21.1 *et seq*., provided that a power of sale is granted by the debtor to the creditor in the deed of trust.

III. Guidelines for Power of Sale:

Any foreclosure by power of sale should begin with a review of the loan documents and a title examination to ensure compliance with the loan documents and that the necessary parties receive notice. Even in the non-judicial foreclosures a hearing must be held before the clerk of court before any power of sale can be exercised. At the hearing, the party moving for foreclosure must show:

A. the party seeking foreclosure is the holder of a valid debt, see: In re David A. Simpson, P.C., 711 S.E.2d 165 (N.C. App. 2011);

B. default;

C. right to foreclosure under the instrument;

D. notice of the hearing was provided pursuant to all statutory and contractual requirements;

E. the loan is not a home loan (as defined by statute, or if it is a home loan, all statutory notice requirements specific to foreclosing a home loan have been satisfied); and

F. the sale is not barred by N.C.G.S. §45-21-12A, regarding a debtor in the military service.

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Once approved by the clerk, the creditor may proceed with the sale and should make sure to follow requirements for contents, posting and publishing of the notice of sale. Upset bids are possible within ten (10) days after the initial sale and any other upset bid. The clerk of court will issue an order of possession after completion of the sale and all applicable upset and notice periods. Confirmation of the sale is not required.

IV. Guidelines for Foreclosure when there is No Power of Sale:

Regardless of the presence or absence of any guidelines in the security instrument, the statutory requirements must be complied. However, the guidelines in the instrument can certainly add requirements (notices, publication requirements, etc.).

V. Foreclosure when Instrument Contains No Power of Sale:

Without a power of sale, judicial foreclosure must be used.

VI. Any Additional Satisfaction Permitted Under Continuing Power of Sale:

A deficiency judgment is available unless prohibited by the loan documents. The debtor may rebut the evidence for the deficiency by showing that the fair market value at the time of the sale was equal to the debt, or that the amount bid was substantially less than the true value of the property. Deficiency judgments are not available if the mortgage represents part of the purchase price pursuant to a seller financing transaction.

VII. Sale by Power of Sale when the Instrument is Silent as to the Place or Terms of Sale:

When the deed of trust contains a power of sale provision, but is silent as to the place or terms of sale, the place and terms of the sale are set by the statutory requirements and are provided in the notice of sale.

VIII. Notice of Sale and How Notice is Given:

The notice of sale must comply with N.C.G.S. §45-21.16A and should describe:

A. the instrument pursuant to which the sale is to held, with recording data;
B. the date hour and place of sale;
C. the real property to be sold;
D. terms of the sale;
E. any requirements provided by the instrument;
F. if the property is being sold subject to taxes, subordinate rights, or other interests.

Pursuant to N.C.G.S. §45-21.17, the notice should be posted in the area designated for posting by the clerk for at least 20 days immediately preceding the sale and published at least once a week for two consecutive weeks in a newspaper in the county where the property is located.

IX. Place and Time for Conducting Foreclosure by Power of Sale:

Time and place of sale may be designated in the notice of sale. Pursuant to N.C.G.S. §45-21.23, the sale must occur within an hour of the time designated in the notice of sale and must be between 10:00 A.M. and 4:00 P.M. on any day other than Sunday or a legal holiday.

Relevant Codes, Statutes or Case Law:
N.C.G.S. §45-21.1 *et seq*.; N.C.G.S. §1-339.1 *et seq*.; : In re David A. Simpson, P.C., 711 S.E.2d 165 (N.C. App. 2011)

Receivership:

I. General Information:

A receiver may be appointed in North Carolina before judgment in order to protect the property pending litigation or post-judgment in order to carry the judgment into effect or dispose of designated property. A receiver may also be appointed pending a sale via power of sale pursuant to N.C.G.S. §45-21.35.

II. Appointing the Receiver:

A. The Basics:

The holder of the debt will file a civil action in the county where the property is located seeking the appointment of a receiver in a proceeding that is ancillary to the non-judicial foreclosure. The

receivership will typically remain pending until the property is conveyed pursuant to a foreclosure sale, a receiver's sale, or a deed-in-lieu of foreclosure.

B. Time Frame for Appointment:

This will vary from county to county depending on the access to a judge.

III. Loans and Advances:

There are no specific statutes or case law.

IV. Sales During the Receivership:

N.C.G.S. §1-505 provides for sale of the property by a receiver.

V. Liens Against Receivership Property:

No information provided.

VI. Owners Associations:

No information provided.

VII. Construction Related to Receivership Property:

No information provided.

VIII. Ending the Receivership:

The receivership can be closed as is specified in the order appointing the receiver. This could be upon sale or foreclosure of the property. However, typically a motion to discharge the receiver is filed and the court specifically approves the discharge.

Relevant Codes, Statutes or Case Law:

N.C.G.S. § 1-501 – 1-507

Cases: Lowder v. All Star Mills, Inc., 273 SE2d 247 (1981); In re Penny, 10 F.Supp. 638 (1935); Wachovia Bank and Trust Co., N.A., v. Carrington Development Associates, 495 SE2d 17 (1995); Barnes v. Kochhar, 633 SE2d 474 (2006); Woodall v. North Carolina Joint Stock Land Bank of Durham, 201 NC 428 (1931); Williams v. Liggett, 440 SE2d 331 (1994)

North Dakota

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	No
Initial Public Notice	Complaint
Time Frame	90 days
Redemption Period	12 Months
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	No
Ex-Parte	Yes
Approximate Time for Appointment	No information provided
Who or What can act as Receiver	No restrictions
Specific Receiver Requirements	No restrictions
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

North Dakota is a judicial, non-deficiency (for the most part) state. Foreclosures are filed in District Courts in the civil section and are treated as normal civil cases.

II. Judicial Foreclosure Basics:

All foreclosures in North Dakota are judicial with the exception of foreclosures by the state of North Dakota itself. North Dakota is rare in one sense. Statute requires that a "Notice Before Foreclosure" (NBF) be personally served on the record-title owner prior to commencing the action. It must be served thirty days prior to the filing the summons and complaint, and at least one defendant must be served within ninety days of service of the NBF.

The plaintiff in North Dakota foreclosures is the holder of the note and mortgage. A clear chain of title to the note and mortgage holder must be shown by the time of filing the summons and complaint. The defendants in North Dakota foreclosures are any person who may claim an interest in the property. The defendants typically include the owner of the property, the borrower, any other junior lien holders, and any person in possession of the property.

The interest holders are identified by a title commitment. The title commitment specifies any exceptions to the final title policy, which insures clear title to the Plaintiff, by listing any interest holders as exceptions. All exceptions must be met in order for the Plaintiff to obtain the final title policy. These exceptions are cured by listing all interest holders in the foreclosure action as defendants.

The judgment will provide that the property foreclosed on is to be sold at a Sheriff's Sale in the county where the property lies. Following the sale of the property there is a 60 day redemption period in which the borrower may redeem the property. After the redemption period has expired, a Sheriffs deed is issued to the highest bidder at the sale. If a foreclosure action has properly cured these exceptions to the final title policy (which is done so

by listing the interest holders as defendants), the title company will issue a final title policy to the plaintiff insuring that the plaintiff has clear title.

X. Notice of Sale and How Notice is Given:

The judgment of the foreclosure must have an order for sale included in the language. A sale date is set after the judgment is entered. The sale is conducted by the sheriff of the county where the property lies. The notice of the sale must be delivered to all defendants as well as published in the local newspaper for three consecutive weeks.

Relevant Codes, Statutes or Case Law:
N.D.C.C. 32-19-01 through N.D.C.C.32-19-41; N.D.C.C. 28-24-01;N.D.C.C. 28-24-02; N.D.C.C. 28-24-04

Receivership:

I. General Information:

Receivers can be appointed for a few different reasons, but the most important to the lender would be when it appears that the mortgaged property is in danger of being lost, removed, or materially injured or if the property is insufficient to discharge the mortgage debt. Because North Dakota is typically a non-deficiency state, receivers are rarely used in regards to foreclosure actions. Receivers are appointed at the discretion of the court.

II. Appointing the Receiver:

A. The Basics:

Receivers in North Dakota are appointed upon a Motion to the court where the action is pending or by the judge.

B. Time Frame for Appointment:

No information provided.

C. Can you go in Ex Parte?

Receivers can be appointed Ex Parte; however, the court may require the party to undertake sureties in an amount fixed by the court. These sureties are paid to the defendant if the defendant is damaged by the appointment of the receiver and the applicant

procured the appointment wrongfully, maliciously, or without sufficient cause.

III. Receiver's Action and Reporting:

There are no specific rules for the receiver, other than it must obey all court orders. Rules pertaining to reporting are explained in the next section.

North Dakota Rules of Court, Rule 8.1 gives a few rules with regards to reports of Receivers. The first rule is in regard to timelines of reports. Receivers must file an annual report. The court may require special reports, and a final report must be completed at the termination for the receivership. The second rule is a very general rule which states that the court may prescribe a specific form for the reporting. The final rule in regards to reporting has to do with fees. Fees may only be applied for at the time the receiver files its report with the court.

IV. Loans and Advances:

In North Dakota there are a limited number of statutes and rules governing Receivers none of which specifically address loans and advances. No specific case law could be found regarding the same.

V. Sales During the Receivership:

No information provided.

VI. Liens Against Receivership Property:

No information provided.

VII. Owners Associations:

No information provided.

VIII. Construction Related to Receivership Property:

No information provided.

IX. Ending the Receivership:

Pursuant to North Dakota Rules of Civil Procedure, rule 66 states that in any action where a receiver has been appointed, a receiver may only be dismissed upon a court order.

The receiver must file a final report pursuant to North Dakota Rules of Court, Rule 8.1 and an order to dismiss the receiver must be entered by the court.

Relevant Codes, Statutes or Case Law:
N.D.C.C. 32-10-01 through N.D.C.C. 32-10-05
North Dakota Rules of Court, Rule 8.1
North Dakota Rules of Civil Procedure, Rule 66
North Dakota has hundreds of cases regarding receivers.

Ohio

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	No
Initial Public Notice	Complaint
Time Frame	150 days or more
Redemption Period	Until filing of confirmation order
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes, if, in mortgage, mortgagor consents to appoint of receiver and waives hearing requirement
Approximate Time for Appointment	Several weeks
Who or What can act as Receiver	The receiver must be an individual, not an entity
Specific Receiver Requirements	The receiver must be an Ohio resident unless cause is established for appointment of non-resident
Is there any approval list for Receivers	Some judges make appointment from their own lists
Out of State Receivers Allowed	Yes, when cause is established

Foreclosure:

I. General Information:

To enforce the mortgage lien as to an Ohio real property interest, the mortgagee as plaintiff must file a court action, typically a complaint asserting claims seeking judicial foreclosure of the equity of redemption of the mortgagor/owner and incidental relief; unlike some other states, there is no out-of-court power of sale procedure. If the mortgagee is a named defendant in a court action commenced by another lienholder, that defendant mortgagee may also file a counterclaim/cross-claim. For the purposes of this discussion, it is assumed that the mortgagee files a court action as a plaintiff.

The Ohio General Assembly revised the foreclosure statutes, effective in 2016, as they relate to vacant and abandoned residential property. Residential property is property on which four or fewer dwelling units are situated. Such properties can now be sold in an expedited fashion. For purposes of this summary, however, it is assumed the property in question is commercial or residential with more than four units.

A. Judicial Foreclosure Basics:

Ohio statutory procedures and rules, common law rules and other local court rules set forth the required foreclosure procedures. This discussion focuses on Ohio statutory procedures and common law rules; therefore, before commencing a foreclosure action, plaintiff's attorney also needs to review and follow any local court rules that modify or supplement such statutory procedures and rules. Note, however, that certain of the statutory requirements applicable to foreclosures may be bypassed through a sale of real property by a receiver.

B. The Complaint Phase:

1. Title review. To comply with statutory requirements, to identify all lienholders and to determine if there are any peculiar title issues that must be addressed as part of the foreclosure proceeding, the mortgagee must order a title report in the form of a title commitment or a preliminary judicial report.

2. Court of filing. The court action is typically filed in the general division of an Ohio trial court (or, occasionally, if diversity requirements are satisfied, in a federal district court) in the county (or district) where the subject real property is situated. If the court action involves properties located in more than one county, the court action for all properties can be filed in one county so long as a certified copy of the complaint is filed in the clerk's offices of each other relevant county.

3. The plaintiff. The named plaintiff in a foreclosure action must have standing requiring, at a minimum, that the plaintiff is the proper party to enforce the underlying secured obligation. The local rules of a number of Ohio districts require any assignment of mortgage to the plaintiff be recorded prior to the filing of the complaint. Other Ohio courts, considering the standing requirements, do not require that the assignment be recorded prior to suit. Regardless of the district, the plaintiff must be entitled to enforce the underlying obligation at or before the time the suit is filed.

4. The defendants. The named defendants typically include (a) each non-released obligor and any guarantor as necessary to recover a money judgment; (b) each property owner and spouse (to subject dower interest to sale); (c) lienholders perfected as of the date of the filing of the complaint (but if the plaintiff is a junior lienholder, a senior lienholder is only joined as a defendant if it consents to a sale free and clear of its lien); and (d) any tenants in possession prior to the recording of plaintiff's mortgage. Lienholders that perfect liens after the filing of the foreclosure complaint do not become part of the foreclosure proceeding because, by virtue of the lis pendens doctrine, such liens do not attach to the real property being foreclosed.

5. Confession of judgment/cognovit note. Ohio is one of only a few states which permits an accelerated proceeding to obtain an immediate judgment -- without the necessity of service, the filing of an answer, or adjudication on

the merits -- upon the filing of an action on a promissory note or guaranty that contains a confession of judgment within the note. The requirements for obtaining such a judgment are strictly followed and consist of:

(1) defendant signed the note or guaranty in connection with a commercial transaction that contains a provision whereby such person designates any attorney to confess judgment on behalf of the borrower or guarantor; (2) the instrument contains a conspicuous and precisely worded statutory notice appearing immediately adjacent to the signature of the defendant;(3) the funds lent were for non-consumer purposes; and(4) the defendant was an Ohio resident or executed the instrument in Ohio at the time of the signing

In addition courts have interpreted the cognovit procedures to require that the original note be submitted to the court at the time judgment is requested. Since most lenders are reluctant to part with the original note, it is good practice to submit an affidavit from a person with knowledge that holds the original note. Whether the original or a copy of the note is furnished to the court, an affidavit stating the amount due the plaintiff should also be submitted. As a consequence of obvious due process concerns, Ohio courts will generally set aside the judgment if the defendant files a timely motion and asserts any facially viable defenses.

6. Recovery of attorney fees. If a note, guaranty and/or mortgage includes a provision requiring the obligor, guarantor or mortgagor to pay attorney fees that the mortgagee incurs to collect the indebtedness and if the indebtedness is $100,000 or more, the complaint may also include a claim to recover such fees.

7. Certification. Some local court rules require a certification as part of the complaint that acknowledges that the party seeking relief has examined the public records to determine property ownership and the parties claiming interests therein. The certification also typically opines that all parties

claiming such an interest (except the named excluded parties) are joined in the action. Other localities may require that the legal description of the subject property be first certified by the county engineer.

8. Mediation. At any stage of the foreclosure proceeding (typically prior to entry of a foreclosure decree), the court may require the parties to participate in mediation.

9. Filing title evidence. Within 14 days after the filing of the complaint, the plaintiff must file with the court action the title commitment or preliminary judicial report that contains statutory required information and that is dated no more than 14 days before the complaint filing date. In addition, before filing the decree, the plaintiff must also file a final judicial title report that describes any activity through the complaint filing date.

10. Service of defendants. The complaint and summons must be served in accordance with the Ohio Rules of Civil Procedure.

C. The Decree Phase:

1. The form of decree. In due course, if the plaintiff is entitled to relief, the court will enter a foreclosure decree in the form of (a) a default judgment if the mortgagor does not file an answer to the complaint; (b) a summary judgment if the mortgagor does file an answer but plaintiff files a summary judgment motion and establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law; or (c) a judgment after a trial of any contested issues.

2. Contents of decree. The filed decree will typically (a) include a money judgment (if the court has not previously awarded a cognovit judgment); (b) declare the validity and priority of all liens; (c) authorize foreclosure of the mortgagor's equity of redemption; (d) authorize the sheriff of

each county where the real property is located to appraise, advertise and sell the subject property interest; (e) direct the property to be sold as a whole or in separate parcels and either free and clear of all liens or subject to senior liens, as applicable; and (f) also address unique issues raised.

D. The Judicial Sale Phase:

1. Property appraisal. Once directed by the plaintiff's attorney, the sheriff shall initiate the judicial sale phase by directing three disinterested property owners that are residents of the county where the property is located to actually view that property so as to determine its value.

2. Notices. Following appraisal, the sheriff will then set a sale date and publicly advertise sale terms in accordance with timing and other statutory requirements. In addition, at least seven days before the sale date, the plaintiff's attorney must send a written notice to each non-defaulting defendant advising each such party of the date, time, and place of the sale. The plaintiff's attorney must then file a copy of that notice with the clerk of courts with proof of service.

3. Governmental inspection. The municipal corporation or township where the subject real property is located may inspect such property prior to the judicial sale.

4. Open house. When the subject real property is abandoned, the sheriff may hold an open house. The date and time of this open house may be included as part of the public advertisement.

5. Cancelling the sale. If the plaintiff's attorney decides to cancel the scheduled sale, that attorney will typically file a motion (which in some counties require a showing of "cause") and the courts generally grant that motion.

6. The sale. The sheriff conducts the sale at the courthouse or other designated location in the county where the action is proceeding. The opening bid must be in an

amount at least two-thirds of the appraised value; provided, however, if the property interest being sold is subject to a senior lien, the opening bid must be an amount equal to two-thirds of the difference between the appraised value of the interest and the unpaid amount of the prior lien. If there is active bidding, the property interest must be sold to the highest bidder. A lienholder may credit bid its lien amount. If the successful bidder is not the mortgagee, such bidder, at the time of sale, typically must pay the sheriff a required deposit as required by local court rules or by custom in a particular county. The successful bidder may thereafter assign its bid to someone else.

7. Effect of no bid/no sale. If there is no bidding at the initial sale ("no bid/no sale"), the plaintiff may seek a second order of sale that directs a new appraisal, advertisement and sale. Alternatively, the motion may seek a second order of sale that fixes the amount as to which the property can be sold and that allows payment to be one-third cash at the time of sale, one-third nine months after such sale and one-third 18 months after such sale, with the deferred payments drawing interest at the rate of 6% per annum and secured by a mortgage as to the purchased property.

8. Sheriff surrogate. The court has the discretion to authorize a licensed auctioneer to step into the shoes of the sheriff and to carry out the sale steps in accordance with Ohio law. For an agreed-upon charge and a commission based on a percent of the sale proceeds, the auctioneer/broker will actively market the sale (and not just advertise in a newspaper of general circulation) and will typically conduct the auction at the property site; as a result, the surrogate procedure often results in higher sale prices. In addition, the auctioneer will be able to complete the sale process faster than the sheriff. Sales of residential property with four or less units utilizing an auctioneer are subject to certain statutory requirements and procedures not addressed here.

9. Purchaser information. After the sale, the successful bidder is required to provide certain information to the sheriff. If this does not occur, the court will set aside the sale upon motion of an interested party.

E. The Sale Confirmation Phase

1. Bidder's opportunity to examine title. Some local court rules allow a successful bidder a period of time after the sale date to examine title. If the examination discloses title or procedural deficiencies, the local court rules then permit the successful bidder to file a motion within such examination period seeking to set aside the sale. In response, the court may allow additional time to correct the defects. The successful bidder may waive this examination period by signing the confirmation order.

2. Stay of confirmation of sale. The court may stay the confirmation of the sale to permit the property owner more time to redeem the property or for any other appropriate reason.

3. Confirmation of sale. After a completed sale, the sheriff must file its writ of execution reporting the sale. Within 30 days thereafter, if the court concludes that the sale conforms to statutory law, the court will direct the clerk of courts to make a journal entry stating that the court is satisfied with the legality of the sale and that the attorney must now prepare a deed to convey the property to the purchaser. The plaintiff's attorney typically initiates this confirmation step by filing a motion seeking entry of a confirmation order. Absent an objection or some irregularity in the proceedings, the court will then sign a confirmation order that typically finalizes the sale, extinguishes the mortgagor's equity of redemption, determines lien priorities as required, cancels liens or, when appropriate, indicates that the transfer is subject to certain senior liens, directs the plaintiff's attorney to prepare and deliver to the sheriff a deed that will convey the property to the purchaser, directs the sheriff to distribute the sale proceeds and includes other conventional requirements.

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4. Owner's exercise of redemption rights. The court will not enter a confirmation order and will instead terminate the proceedings if, prior to the filing of the confirmation order, the mortgagor exercises its right of redemption by fully paying the obligation owed to plaintiff, plus court costs, sheriff's fees and interest from the sale date to the redemption date.

5. Delivery of deed. Within seven days after the confirmation order is filed, the plaintiff's attorney shall deliver to the sheriff the deed to convey the subject real property to the purchaser.

6. Purchaser's payment of balance due. Within 30 days after the confirmation order is filed, the third party purchaser must pay to the sheriff the balance of the bid price. If the plaintiff, as a result of its credit bid, is the successful bidder, it must pay to the sheriff the amount necessary to satisfy liens senior to the plaintiff's position – the tax liens and any other senior liens that will be cancelled because the sale is free of clear of all liens, together with all court costs and sheriff's fees. If the purchaser does not timely make the required payment, the plaintiff has the right to seek an order of contempt. If the purchaser is found in contempt, that purchaser may forfeit the deposit paid at the conclusion of the sale to the extent that the mortgagee has sustained damages and the plaintiff may then initiate a second sale.

7. Property conveyed by deed; liens released; proceeds distributed. Within 14 days after the purchaser pays the required payment, the sheriff shall record the deed; the clerk of courts shall cause release of all liens as such liens affect the foreclosed property; and the sheriff shall distribute the sale proceeds in the order of priority. At the time of the sale, some counties also require a payment of a statutory conveyance fee (now up to $4.00 per $1,000 of bid price), while other counties treat the conveyance as exempt. The plaintiff should consult with the county auditor to determine whether the transaction is considered exempt.

8. Collection of the deficiency judgment. If there is a deficiency judgment, the mortgagee typically attempts to collect that deficiency from any non-released obligor and/or guarantor.

Relevant Codes, Statutes or Case Law:
Ohio Rev. Code §§ 2329.01 et seq., § 2703.26; § 2103.041; § 2323.13; § 1301.21; § 2703.141; § 2323.06; § 2335.021.
Rules 3F, 4, 4.1 and 4.6, Ohio Rules of Civil Procedure

Receivership:

I. General Information:

1. Types of receiverships. Depending on the statutory provisions by which a receiver is appointed, a receiver may be appointed to manage particular property that is the subject of a proceeding (a "Specific Property Receivership"), or may be appointed to manage all the affairs of a corporation, limited liability company, partnership, limited partnership or other entity (a "General Receivership").

2. Legal and equitable grounds. There are seven statutory grounds for the appointment of a receiver: (1) in an action by a vendor to vacate a fraudulent transfer of the property or by a creditor seeking to subject certain property or a fund to the claim of the creditor where the property or fund in question is in danger of being lost, destroyed or injured, such a vendor or creditor may have a Specific Property Receivership established; (2) in a foreclosure action by a mortgagee where (a) the property is in danger of being lost, destroyed or injured or the condition of the mortgage has not been performed; and (b) the value of the property is probably insufficient to discharge the debt or the mortgagor consented in writing to the appointment of a receiver (such consent may be evidenced by the terms of the mortgage itself); in such an action, a Specific Property Receivership may be established; (3) to enforce a contractual assignment of rents, the assignee may be entitled to a Specific Property Receivership; (4) after judgment, to carry the judgment into effect, a judgment creditor may have either a Specific Property Receivership or General Receivership established, depending on which remedy is appropriate in the discretion of

the court; (5) after judgment, to dispose of or preserve property wrongfully withheld by the judgment debtor, a Specific Property Receivership may be established; (6) when a corporation, limited liability company, partnership or other entity has been dissolved, is insolvent, in imminent danger of insolvency, or has forfeited its corporate rights, a General Receivership may be established; (7) in all other cases in which receivers have been appointed by the "usages of equity," a Specific Property Receivership or General Receivership may be established, depending on which remedy is appropriate in the discretion of the court; Prior to the amendments to the receivership statute in 2015, this final category was generally interpreted to mean that the court had the discretion to appoint a receiver when, as part of the mortgage, the mortgagor consents to such appointment even if the evidence does not otherwise establish material injury and insufficient value to discharge indebtedness. However, since the 2015 amendments, the specific provisions described above leave receivership remedies in this "catch-all" category limited to instances where conversion, fraudulent transfers, or other inequitable conduct establish the need for court oversight of property or a corporate body.

3. Ancillary to main action.

A judge will only appoint a receiver incident or ancillary to another action.

4. Receiver qualifications.

a. Residency requirement.

Local court rules typically provide that the receiver must be a resident of Ohio or of the county where the property is located. However, some local rules do provide an exception for "cause." This exception enables the judge to appoint a non-resident if the judge is satisfied that this person will be able to perform the receivership duties, typically through a locally retained agent/employee and if the circumstances justify such an appointment, taking into consideration factors such as project size and specialized property use.

The 2015 amendments to the receivership statute refined these requirements. The receiver for General Receivership must be an Ohio resident. The appointing court is instructed by the statute

to give "priority consideration" to the plaintiff's proposed receiver, but the nomination is not binding on the court.

b. Disinterestedness requirement. The receiver must be disinterested unless the parties otherwise consent.

II. Appointing the Receiver:

A. The Basics:

A. Motion. To seek appointment of a receiver, the plaintiff will typically file a motion at the time of the filing of the foreclosure action seeking an order that approves such appointment. Ideally, the motion will include a copy of the mortgage authenticated by an affidavit of the movant.

B. Hearing requirements. Local court rules typically require that a hearing be set. However, judges will not require a hearing if the mortgage provides that the mortgagor consents to the appointment of a receiver upon default (or similar condition) and waives its right to a hearing. In such a circumstance, sufficient evidence should be in the record of the terms of the mortgage through, for example, the affidavit filed with the motion for appointment or in the form of a verified complaint. A hearing may also be waived if doing so is necessary to prevent irreparable loss. Despite this, some judges may still require a notice and a hearing. At such a hearing, the judge (and parties, with court permission) may inquire, formally or informally, on the receiver's qualifications and, consequently, the proposed receiver should be present at such a hearing. If the grounds for appointment of a receiver is not through a mortgage provision, evidence should be introduced at the hearing that establishes such grounds.

C. Selection of receiver. Some judges will only permit the appointment of a receiver that appears on the judge's approved list; other judges will defer to the plaintiff, particularly when the mortgagor does not object. Under the 2015 amendments, courts are required to give the plaintiff's choice of a qualified receiver priority consideration, although ultimate discretion resides with the court.

D. Timing. Depending on the caseload of the court, when the court requires a hearing, such hearing may be scheduled anywhere from several days to several weeks after the filing of the motion for the appointment.

E. Receiver order. Consistent with statutory provisions, the order appointing the receiver empowers a receiver to "take and keep possession of property, receive rents, collect, compound for and compromise demands, make transfers, and generally do such acts respecting the property as the court authorizes." The receiver order is frequently prepared by the party moving, and is the product of negotiation between the movant and the proposed receiver. The terms of the order typically grant more specific authority to a receiver and frequently include related provisions to address specific issues related to receivership income and expenses.

F. When receivership effective. The receivership is effective once the judge signs and files the receiver order and once the receiver complies with statutory requirements – i.e., the signing of an oath promising to faithfully perform his/her duties and to obey court orders and the posting of a bond in an amount that complies with any local court rule or the amount which the judge sets in his/her discretion. In lieu of requiring a bond, some courts allow substitution of a rider to the receiver's fidelity bond.

G. Restraint of creditor action. Typically the order of appointment will create a bar to creditors initiating actions or seizing property in the hands of the receiver as an exercise of the court's in rem jurisdiction. Property located outside of the state, however, will require additional proceedings in the state where that property is located. In addition, under Ohio law, the appointment of a receiver cannot preclude certain regulated utilities from discontinuing services on account of unpaid pre-receivership obligations or requiring a deposit from the receiver if such requirements exist in a Public Utility Commission-approved tariff. Accordingly, while some orders may purport to restrain such action, Ohio appellate courts have held such restrictions on the enforcement of commission-

approved tariffs inappropriate. It may, therefore, be appropriate to include provisions in the order of appointment that authorize the receiver to make payment on account of pre-receivership expenses in his/her discretion.

III. Receiver Powers:

The scope of an Ohio receiver's authority is detailed in the order of appointment. In all instances, the receiver acts as an "arm" of the court and is thus responsible to the court. The statutory authorities expressly recognized are: (1) to bring and defend actions in the name of the receiver; (2) to take and keep possession of real and personal property; (3) to collect rents and receivables and compromise demands; (4) to enter into contracts, including contracts to sell or lease property; (5) to enter into contracts for construction or completion of construction work so long as existing lien rights will not be impacted; (6) to execute deeds and other instruments to transfer interests in receivership property; and (7) to open and maintain deposit accounts. The plaintiff should negotiate specific terms for the disposition or collection of personal property that may be subject to the plaintiff's lien such that court approval is required where appropriate. Ohio law provides that a receiver is able to sell property free and clear of all liens, as discussed in greater detail below.

IV. Post-Order Requirements:

A. Local court rule requirements.

Local court rules typically impose additional receiver requirements, such as the filing of periodic reports as part of the court proceedings. These reports generally detail receiver actions, income received and expenses incurred and paid, other financial information, condition of the premises and other relevant information.

B. Receiver loans and advances.

There is no Ohio statutory law that regulates loan advances; however, the order appointing receiver may address this issue.

V. Receiver Sale Of Subject Real Property:

With court authority, a receiver can sell the subject real property. To sell the property free and clear of all liens, the better view is that all lienholders must consent, particularly when any lienholder will not be fully paid. However, in a minority of jurisdictions, the court may grant a motion for the receiver's sale of property free and clear of liens over the objection of a junior lienholder if exigent circumstances are present.

VI. Concluding The Receivership:

In Ohio, the receivership does not terminate automatically. To terminate the receivership, the attorney for the receiver will typically file a motion that (a) seeks termination of the receivership; (b) releases the receiver from any liability for performance of his/her services; (c) approves all compensation paid to the receiver; and (d) approves the receiver's final report (which the receiver submits concurrently with the filing of the motion).

V. Note On Potential Amendments To Ohio's Receivership Statute:

At the time of this publication, the Ohio legislature is contemplating a major overhaul to Ohio's receivership statute, which would provide clarification of certain authorities that Ohio courts may provide to a receiver, including the sale of property free and clear of liens. The proposed legislation also would modify the circumstances under which receivers may be appointed and the qualifications an individual must have to act as receiver. The version of the bill to amend the receivership statute passed by the House may be found at http://www.legislature.state.oh.us/bills.cfm?ID=130_HB_9

Relevant Codes, Statutes or Case Law:
Ohio Revised Code §§ 2735.02-.

Oklahoma

Foreclosure Summary

Security Instrument	Mortgage/Trust Deed
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Complaint
Time Frame	90 days
Redemption Period	None
Deficiency	Yes, with time limitations on filing

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes, but in limited circumstances
Approximate Time for Appointment	24 hours to three weeks
Who or What can act as Receiver	Individual
Specific Receiver Requirements	No restrictions
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

Mortgages are the primary instrument used to obtain a lien against real property in Oklahoma and are provided for in Title 16 of the Oklahoma Statutes. Both deeds of trust and contracts for deed are construed as mortgages in Oklahoma and are subject to the rules of mortgage foreclosures. Mortgages may be foreclosed through judicial foreclosure or through non-judicial power of sale foreclosure if the power of sale is granted to the mortgagee in the mortgage instrument itself. The majority of foreclosures in Oklahoma continue to be accomplished through the judicial foreclosure process.

II. Judicial Foreclosure Basics:

Judicial foreclosure is governed statutorily by various provisions in Title 12 of the Oklahoma Statutes, which is the civil procedure title of Oklahoma. The judicial foreclosure process is subject to the same procedural statutes and rules as any other civil action in Oklahoma. A judicial foreclosure may be completed in four to five months if the action is uncontested. If the action is contested, the judicial foreclosure process could carry on for six months or longer.

III. Non-Judicial Foreclosure Basics:

Non-judicial foreclosure by power of sale is permitted in Oklahoma, but must conform to the Oklahoma Power of Sale Mortgage Foreclosure Act set out by Okla. Stat. tit. 46, §§ 40-49. The power of sale must be expressly granted to the mortgagee in the mortgage instrument itself. Additionally, in order for the power of sale to be enforceable, the mortgage must include a statement in bold and underlined type containing substantially the following language:

"A power of sale has been granted in this mortgage. A power of sale may allow the mortgagee to take the mortgaged property and sell it without going to court in a foreclosure action upon default by the mortgagor under this mortgage."

Assuming the required notice can be served upon all interested parties in a timely manner, a non-judicial foreclosure by power of sale may be completed in three months. If the property is the mortgagor's homestead, certain additional statutory rights are granted to the mortgagor, including the right to elect (1) to avoid a deficiency judgment upon foreclosure by power of sale, or (2) to require judicial foreclosure. Because of the ease by which a residential mortgagor can derail the non-judicial foreclosure process, thus causing further delay, its use is generally only recommended on commercial foreclosures.

IV. Power of Sale Foreclosure Guidelines:

Prior to exercising a right to foreclose a mortgage by power of sale, the mortgagee must send the mortgagor, each guarantor and any other party obligated for payment or performance of the obligation secured by the mortgage written notice by certified mail of its intent to foreclose the mortgage by power of sale. The notice of intention to foreclose by power of sale must state: (1) the name and address of the mortgagee; (2) the nature of the claimed default with reasonable specificity; (3) that the mortgagor has 35 days to cure such default and reinstate the mortgage; (4) the amount of money or action necessary to effect the cure; (5) that if the default is not cured then the mortgagee may accelerate the debt and foreclose the mortgage; and (6) that the notice contains important information concerning legal rights under Oklahoma law and that the mortgagor should consult an attorney promptly if it has questions. The notice cannot be waived under Oklahoma law and must be provided prior to giving the notice of sale required under the Power of Sale Mortgage Foreclosure Act.

After the expiration of the 35-day cure period in the notice of intention to foreclose by power of sale, the mortgagee must provide a written notice of sale to the mortgagor, any holders of prior mortgages or liens on record, and all other parties whose interests in the mortgaged premises are to be foreclosed by the power of sale. The notice of sale must state the occurrence and general nature of the default, the election to use the power of sale, the date, time and place when the property will be sold, and

the legal description of the property as it appears in the mortgage along with any street address of the property. The notice of sale must also advise the mortgagor and other interest holders of certain rights as set forth in the Power of Sale Mortgage Foreclosure Act, and must include an affidavit stating that the notice of intention to foreclose was properly sent. The notice of sale is to be personally served in the same manner as process in civil cases at least thirty days prior to the date of the sale. Additionally, the notice of sale must be published in a newspaper one day a week for four consecutive weeks, with the first publication occurring at least 30 days prior to the date of sale. The sale can be at any place in the county in which the mortgaged premises are located and at any time between 9:00 a.m. and 5:00 p.m. on any day other than a Sunday or legal holiday.

No minimum bids are required at the sale. Any person may bid, including both the mortgagee and the mortgagor. The mortgagee conveys title to the mortgaged premises by a deed executed by the mortgagee, without warranty, and such conveyance will be absolute and clear of all liens, claims or other interests as long as the proper parties were notified or served with appropriate process. The conveyance of the property by the mortgagee's deed terminates the mortgagor's right of redemption.

V. Power of Sale Constitutes Part of Security:

The power of sale must be expressly granted to the mortgagee in the mortgage instrument itself.

VI. No Power of Sale Foreclosure Guidelines:

An action to judicially foreclose a mortgage in Oklahoma is commenced by the filing of a petition in the state district court of the county in which the mortgaged premises are located and is prosecuted under the same rules as other civil actions. A *lis pendens* should also be filed in the office of the County Clerk of that county. Upon obtaining a judgment, the mortgagee may apply to the Court Clerk to issue a writ of special execution and order of sale covering the mortgaged premises directing the sheriff of the county in which the mortgaged premises are

located to advertise and sell the mortgaged premises at public auction within 60 days after the issuance of the writ of special execution. The mortgagee must have a written notice of sale executed by the sheriff containing the legal description and the date, time and place of sale mailed to the mortgagor and any other interest holder of record whose interest will be extinguished by the sale. Additionally, the mortgagee must cause public notice of the date, time and place of the sale published for two successive weeks in a newspaper in the county in which the property is located, and the sale may not occur less than 30 days after the date of first publication.

The foreclosure sale can occur with or without appraisement. Standard practice in Oklahoma is for the mortgage instrument to include a provision allowing the mortgagee to elect to sell the property with or without appraisement at the time judgment is entered in the foreclosure proceeding. If the foreclosure sale occurs subject to appraisement, then the sheriff will select three individuals from a pre-approved list to appraise the property, and the appraisal provided by these individuals will serve as the appraised value of the property for the purpose of setting the minimum bidding requirements. The appraised value will also constitute evidence of fair market value for determining any deficiency. If the mortgagee elects to sell the property with appraisement, then it must be sold for not less than two-thirds of the appraised value. If the mortgagee elects to waive appraisement, then the two-thirds minimum bid requirement will not apply to the sale. However, the writ of special execution and the order of sale cannot be issued until six months following the entry of judgment in the foreclosure action.

Any person may bid at the sheriff's sale. If the high bidder is someone other than the mortgagee and the high bidder fails to post cash or certified funds with the Court Clerk in an amount equal to ten percent of the amount bid within 24 hours after the sale, or otherwise fails to complete the sale, then the sheriff is authorized to accept the next highest bid. The mortgagee must file a motion with the court to confirm the sale and, upon confirmation, the sheriff will execute a foreclosure deed. The

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mortgagor may redeem the property from foreclosure by delivering payment in full of the judgment debt until entry of the order confirming the sale and the sheriff's deed, at which time the mortgagor's equity of redemption is extinguished.

The mortgagee may only obtain a deficiency judgment if it files a motion and notice within 90 days after date of the sheriff's sale. The deficiency will be determined by taking the amount of judgment with interest, plus costs and disbursements of action and amount owing on all prior liens and encumbrances with interest, less the market value as determined by the court or the sale price of the property, whichever is higher.

VII. Foreclosure when Instrument Contains No Power of Sale:

If the mortgage does not grant the mortgagee a power of sale, then the mortgage must be foreclosed through the judicial foreclosure process described above.

VIII. Additional Satisfaction Permitted Under Continuing Power of Sale:

To determine the highest bidder for property sold under a power of sale, any mortgagor present at the sale may suggest in writing the known lots, parcels, or divisions of the property in which the property should be sold. The mortgagee shall conditionally sell the property under each suggestion, and if the mortgagor offers no suggestion, then in such lots, parcels or divisions, or as a whole, may be determined by the mortgagee. The mortgagee shall determine which conditional sale or sales result in the highest total price bid for all of the property. The mortgagee may also postpone or continue the sale to another date and location by providing notice at the sale or by publication at least ten days prior to the new date of sale.

Additionally, the mortgagee may seek a deficiency against the mortgagor and any guarantors by commencing a judicial action for a deficiency judgment within 90 days of the sale date. In such action the mortgagor may establish that the fair market value of the mortgaged premises on the date of sale exceeded the

sale price, which would reduce the amount of the deficiency accordingly.

IX. Sale Under Power where Instrument Silent as to Place or Terms of Sale:

The foreclosure sale by power of sale may be held at any place in any county where part of the property to be sold is situated, on any day other than a Sunday or legal holiday, at any time between the hours of 9:00 a.m. and 5:00 p.m. The mortgagee can require that a successful bidder post at least ten percent of the purchase price within 24 hours and that the sale be completed within ten days or such longer reasonable time as agreed to by the mortgagee.

X. Notice of Sale and How Notice is Given:

In a non-judicial foreclosure by power of sale, the mortgagee must provide a written notice of sale to the mortgagor, any holders of prior mortgages or liens on record, and all other parties whose interests in the mortgaged premises are to be foreclosed by the power of sale. The contents required in the notice of sale are described in the guidelines above. The notice of sale is to be personally served in the same manner as process in civil cases at least thirty days prior to the date of the sale. Additionally, the notice of sale must be published in a newspaper one day a week for four consecutive weeks, with the first publication occurring at least 30 days prior to the date of sale.

In a judicial foreclosure, the mortgagee must have a written notice of sale executed by the sheriff containing the legal description and the date, time and place of sale mailed to the mortgagor and any other interest holder of record whose interest will be extinguished by the sale. Additionally, the mortgagee must cause public notice of the date, time and place of the sale published for two successive weeks in a newspaper in the county in which the property is located, and the sale may not occur less than 30 days after the date of first publication.

XI. Place and Time for Conducting Foreclosure by Power of Sale:

The foreclosure sale by power of sale may be held at any place in any county where part of the property to be sold is situated, on any day other than a Sunday or legal holiday, at any time between the hours of 9:00 a.m. and 5:00 p.m.

Relevant Codes, Statutes or Case Law:
Okla. Stat. tit. 12, §§ 131, 686, 760-775; Okla. Stat. tit. 46, §§ 1, 1.1, 4, 40-49; Okla. Stat. tit. 16, § 11A.

Receivership:

I. General Information:

Receiverships in Oklahoma are governed generally by Okla. Stat. tit. 12, §§ 1551-1559, but additional specific statutes governing receivers can also be found in Title 12 of the Oklahoma Statutes and scattered throughout other titles as well. Section 1551 provides for the appointment of a receiver in certain situations, including:

(1) In an action by a creditor to subject any property or fund to his claim where it is shown that the property or fund is in danger of being lost, removed or materially injured;

(2) In an action by a mortgagee for judicial foreclosure or in connection with a non-judicial foreclosure by power of sale under the Oklahoma Power of Sale Mortgage Foreclosure Act (a) where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or (b) that a condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt, or (c) that a condition of the mortgage has not been performed and the mortgage instrument provides for the appointment of a receiver;

(3) After judgment, to carry the judgment into effect;

(4) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceeding in aid of execution, when an execution

has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

(5) In the cases provided by statute when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; or

(6) In all other cases where receivers have previously been appointed by courts of equity.

II. Appointing the Receiver:

A. The Basics:

The appointment of a receiver is governed by statute and may be obtained in an action ancillary to both judicial and non-judicial foreclosure of a mortgage. The appointment of a receiver must be ancillary to an existing action and a pleading solely requesting such remedy will not invoke the court's jurisdiction. While the appointment of a receiver may be requested in the foreclosure petition, the mortgagee must also file a motion seeking an order appointing the receiver and should include a brief in support and a proposed order. Notice of the motion should be provided to all parties named in the underlying action by the same means as any other motion, and generally will be served on the appropriate parties with the petition when the motion is filed contemporaneously.

If the court deems the appointment of a receiver to be an appropriate remedy, the selection of the person to serve as receiver is made at the court's discretion. In practice, however, the party seeking appointment of a receiver will nominate a person to serve as receiver in its motion and, if the court finds that such person is qualified, then the nominee is usually appointed. Upon entry of the order appointing the receiver, the receiver must post a bond and swear an oath with the court that the receiver will faithfully perform the duties set forth in the order. The amount of the bond will be based on the revenues to be managed by the receiver, and the bond premium and other receivership expenses may be recovered as a cost of the foreclosure proceeding.

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The swearing of the oath and execution of the bond are mandatory prerequisites to appointment and must occur prior to the receiver commencing any duties under the order. The order appointing the receiver will establish the reporting requirements of the receiver. The receiver must file a final report prior to discharge.

B. Time Frame for Appointment:

A motion seeking the appointment of a receiver may be filed contemporaneously with the petition seeking foreclosure of the mortgage. Generally, notice of the appointment of a receiver is required to be provided to all interested parties. However, a receiver may be appointed without notice under circumstances establishing an emergency. In an emergency circumstance, the receivership hearing may be heard the same day as the filing of the petition and motion, subject to court availability, but more often the hearing can be held within days of the filing of the motion when the circumstances so justify an emergency. When no emergency is present, receivership hearings are set on a regular motion docket requiring 18 days in which the opposing party may have an opportunity to respond.

C. Can you go in Ex Parte?

In limited circumstances a receiver may be appointed on an emergency temporary basis, by standards akin to those required for a Temporary Restraining Order. However, those appointments are meant to be temporary and should remain only until an evidentiary hearing may be held.

D. Appeal of Receiver.

Okla. Stat. tit. 12, § 993(C) allows for an immediate appeal of the appointment of a receiver and upon the appellant filing an appeal bond in an amount equal to the bond amount required of the receiver, to provide for the payment of all costs or damages that may accrue during the appeal, "the authority of the receiver shall be suspended until the final determination of the appeal, and if the receiver has taken possession of any property, real or personal, it shall be returned and surrender to the appellant upon the filing and approval of the bonds."

III. Loans and Advances:

There is no Oklahoma statute specifically addressing loans in receivership. Under Oklahoma law, a receiver is given the power to bring and defend actions in his or her own name, to take possession of property, receive rent, collect debts, compromise debts, make transfers, and do any other acts with respect to the property which is in receivership as the court may authorize. In the event the receiver determines that obtaining a loan or advance is necessary for the preservation of the property or to otherwise carry out its duties, the receiver should seek the court's authorization by filing an application for approval of borrowing and issuance of a receiver's certificate, and a lien securing such indebtedness may be made a "priming" lien senior to the interests of the other secured creditors. A receiver should be cognizant of the interests of the secured creditors and the impact his or her actions may have on those interests. Specifically, the receiver must be careful not to take steps that cause a drop or diminution in the corpus of the receivership estate. The incurrence of any debt or other obligation must be accompanied by an increase in the value of the property by at least that same amount.

IV. Sales During the Receivership:

If authorized by the court, a receiver may sell property during the receivership. The receiver should seek an order from the court permitting the sale of the property. If authorized, the sale of the property must be conducted in all respects in the same manner as is provided for the sale of property upon execution. Prior to execution of the deed, the receiver must seek confirmation of the sale from the court.

V. Liens Against Receivership Property:

Liens against property subject to the receivership are not treated any differently than they would be outside of the receivership, and any issues related to priority or enforcement will be resolved as a part of the underlying action. Please note, however, that the costs and expenses of the receivership, including compensation for the receiver, counsel fees, and obligations incurred by the receiver in the discharge of its duties, will constitute a first

charge against the property or funds in receivership. The court may authorize the sale of the property free and clear of any liens subject to court approval and notice to all parties in interest similar to a sale process under Section 363 of the Bankruptcy Code.

VI. Owners Associations:

There are no specific statutes with respect to receiverships and owners' associations. Liens valid under the owners' association statutes are entitled to the same treatment irrespective of the existence of a receivership.

VII. Construction Related to Receivership Property:

A receiver must obtain authorization of the court to complete construction.

VIII. Ending the Receivership:

The receiver should prepare a final report and file a motion seeking discharge of the receiver, release of the bond, allowance of the receiver's fee, and a release from any further liability or obligation to the court or any other parties. The receivership is terminated by entry of a court order Approving Report, Allowing Fee and Discharging Receiver.

IX. Miscellaneous

No party, attorney or person interested in an action may be appointed receiver except by consent of all parties. Additionally, a corporation cannot be a receiver in Oklahoma, with the exception of state banks and national banking associations in Oklahoma having trust powers, trust companies incorporated in Oklahoma having trust powers, and national banks and state banks and trust companies having trust powers located in states which reciprocally allow similar Oklahoma institutions to exercise trust and fiduciary powers therein under no greater restrictions than those imposed by Oklahoma.

Relevant Codes, Statutes or Case Law:
Okla. Stat. tit. 12, §§ 852-856, 861, 993, 1224-1227, 1551-1559; Okla. Stat. tit. 6, § 1002.

Ontario Canada

Foreclosure Summary

Security Instrument	
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	None
Time Frame	1-6 months
Redemption Period	Yes
Deficiency	

Receivership Summary

Ancillary Remedy Necessary	No
Ex-Parte	Generally, No
Approximate Time for Appointment	No Restrictions Given
Who or What can act as Receiver	No Restrictions Given
Specific Receiver Requirements	No Restrictions Given
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

A. Ontario has two methods to enforce mortgages in default.
1. Foreclosure Action.
2. Power of Sale.

B. A Foreclosure Action seeks recovery of the mortgaged property, not the underlying debt and Mortgagor is released once foreclosure is completed.

C. A Power of Sale action is an action that seeks recovery of the debt and Mortgagor remains liable for any deficiency.

D. A Foreclosure Action may be converted to a sale action by a Defendant who wishes a sale but does not want to defend the action. Request for Sale must be served on mortgagor in the time stipulated for the delivery of a defence. The motion of any party made to the Court before Judgment will also convert a Foreclosure Action to a Power of Sale proceeding.

E. A Mortgagor has a right of redemption which must be served on the Mortgagee within the time prescribed for filing a Defence.

F. Where a request to redeem has been filed, the Mortgagee may require a reference where after the Registrar will sign Judgment; or a Mortgagee may elect not to have a reference, where after the Registrar will determine amounts due, priorities, and sign Judgment.

II. Judicial Foreclosure Basics:

A. Search Title.
1. Determine the identity of the current owner.
2. Ascertain details of all subsequent encumbrances who must be named as Defendants.

3. Conduct execution searches as against the owner to ascertain details of all subsequent encumbrances that must be named as Defendants.

B. Issue a Statement of Claim and serve.

C. Once the time for delivery of a Defence has elapsed, note Defendants in default (if applicable) and proceed to obtain Judgment.

D. If a request to redeem has been filed,
1. Where no reference is required regarding subsequent encumbrancers, attend upon the Registrar, take accounts, determine priorities and obtain Judgment.
2. Where a reference is required regarding subsequent encumbrancers, attend before a Referee to determine priorities and sign Judgment.

E. Reference.
1. Prepare solicitor's affidavit as to title, subsequent encumbrancers, and executions.
2. Prepare a draft Notice of Reference to be served on all Defendants and subsequent encumbrancers, once approved by the Referee.
3. Attend on the Referee, who is either a Judge or Master of the Superior Court, first to approve the draft Notice, and then to have accounts taken, fix costs, ascertain parties entitled to redeem, and fix a date, if any, for redemption.
4. Report on the reference summarizing the amount and priorities of parties in attendance that proved their claims. Circulate to interested parties.
5. Re-attend on the reference to have the report signed.
6. Serve, file and enter the report in Court upon confirmation.
7. Upon the report, where no redemption was made in the time fixed, move for a final Order of Foreclosure.

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8. The redeeming party in the time fixed may attend for a final order of foreclosure upon proof of payment into Court.
9. Enter the final Order of Foreclosure and register same on title to the property, calculate and pay land transfer tax.

F. Where a request for sale is filed.

1. If Defendants are noted in default, sign Judgment for immediate sale and other relief claimed, other than foreclosure.
2. If the Defendants are noted in default, and a subsequent encumbrancer converts the foreclosure to a sale, sign Judgment conditional on the subsequent encumbrancer's proof of claim.
3. If the Defendants are noted in default in a sale action and no request to redeem has been filed, sign Judgment for immediate sale and relief sought except foreclosure.
4. If the Defendants are noted in default in a sale action and a request to redeem has been filed, sign Judgment with a redemption period and relief sought, except foreclosure and a Reference.

III. Guidelines for Power of Sale:

A. If no payment is made in the redemption period, apply for a final Order for Sale.
B. Prepare draft Notices of Reference for approval by the Referee.
C. Attend upon Referee to have the notices signed.
D. Serve the Notice of Reference and Judgment on all Defendants.
E. Prepare draft conditions of sale.
F. Obtain an appraisal. Prepare Affidavit of appraiser for submission on a Reference.
G. Attend on the Reference to settle the conditions of sale, method of sale and sale price or reserve.
H. Arrange for sale as settled on Reference.

I. Attend on the Reference with a draft interim report regarding the sale and proceeds having been circulated to all entitled parties, to settle the interim report.
J. Serve a copy of the interim report on all entitled parties. Enter the report at the Court office.
K. Following the sale, serve notice and attend on the Referee to fix costs, take accounts and settle the final report on sale.
L. Obtain confirmation of the final report, serve and file.
M. Apply to the Court for an Order paying the sale proceeds out of Court.

IV. Power of Sale Guidelines as Represented in the Security:

A. Search title and executions.
B. After the mortgage has been in default for at least 15 clear days, serve a Notice of Sale under Charge.
    1. During the notice period (45 days next), take no further proceedings under the mortgage without a Court Order.
    2. After expiry of the Notice of Sale, prepare statutory declarations of default, service of notice.
    3. If the property is vacant, take possession and preserve mortgaged property.
    4. If there is a tenant in possession, attorn rents and manage the property.
    5. If the mortgagor is in possession and vacant possession will not be surrendered, begin an action for possession in the Superior Court of Justice. Include a claim for payment under the mortgage.
    6. Follow the claim procedures set out in rules.

C. Claim for possession and payment.
    1. Prior to serving the Notice of Sale or following a lack of cooperation regarding vacant possession, commence an action for collection and possession under the mortgage.
    2. Subsequent encumbrancers need not be named.
    3. Serve the claim.

4. If no Defence is filed in the required time, note default and proceed to Judgment.
5. Upon obtaining Judgment, move without notice for a Writ of Possession.
6. File the Writ of Possession with the Sheriff, complete an eviction form and pay the fee.
7. Upon notice from the Sheriff, attend and take vacant possession of the mortgaged property.

D. Selling the Mortgaged Property.
1. Obtain an appraisal.
2. Select a method of sale.
3. Any Agreement of Purchase and Sale must reflect that the property is sold under Power of Sale.
4. Complete the sale transaction in the ordinary course.

E. Account for the sale proceedings.
1. Prepare a full account of the sale proceeds and proposed distribution.
2. Where there is question regarding the priority of claims, pay money into Court. Attend on a motion before the Superior Court for a determination of priorities and distribution.

F. Where there is a shortfall in proceeds of sale, commence an action in Superior Court. Where an action was pursued (see section III "C", *supra*), follow ordinary Judgment enforcement procedures: Garnishment, Writ of Seizure and Sale, and Judgment Debtor Examination.

Relevant Codes, Statutes or Case Law:
s. 35 of the *Mortgages Act*, R.S.O. 1990 c.M40.

Receivership:

I. General Information:

A. Federal Bankruptcy Laws and Provincial Secured Transaction laws in Canada govern receivership in the province of Ontario.
B. Liquidations are considered in receivership;

C. Restructurings are discussed in Canadian Federal Statutes. The statutes allow an insolvent company to rearrange its affairs and compromise claim, thereby allowing it to continue as a going concern.
D. If a Receiver is appointed, typically a corporation's business would stop immediately and the Receiver would merely collect the receivables and sell inventory and other assets with a view towards the expeditious liquidation of the corporation's property, assets and undertakings, although the Receiver can choose to operate the business if it wants to effect a going concern sale.
E. The recognition of a Receiver appointed by a foreign court will be granted as a matter of comity provided that three general criteria are met:
    1. Any relevant charge given by the debtor is enforceable in the jurisdiction where the property is situate;
    2. Foreign court was competent to make the appointment;
    3. Sufficient connection between the debtor and the jurisdiction in which the foreign Receiver was appointed to justify recognition of the foreign court's order outside the foreign court's jurisdiction.

II. Appointing the Receiver:

A. The Basics:

Receivers are appointed by application to a judge of the Superior Court or pursuant to security documentation to take possession or control of all or substantially all inventory, accounts receivable, or the other property of an insolvent person or bankrupt that was acquired for, or is used in relation to a business carried on by the insolvent person or bankrupt.

1. This appointment may occur by:
    a. Court Order
    b. Private Appointment

2. Immediately on appointment, a Receiver should give notice of its appointment to the debtor, so that the debtor can provide the Receiver with the names and addresses of all creditors as required by law.
3. No later than 10 days following its appointment, a Receiver must give notice of its appointment to the Superintendent as well as to the bankruptcy trustee (if debtor is also a bankrupt), and all interested parties/creditors that the Receiver has been able to ascertain after making all reasonable efforts.
4. After taking possession or control, (whichever comes first) of the property of an insolvent person or bankrupt, Receiver must also send a notice containing the name of each creditor, the amount owed to each creditor and the total amount owing to the creditors, the list of assets in the possession or under the control of the Receiver and the book value of each asset and the intended plan of action of the Receiver during the receivership to the extent that such a plan has been determined.
5. Interim reports made at least every six months

B. Time Frame for Appointment:

There are no prescribed time periods.

C. Can you go in Ex Parte?

Generally not unless can show threat of assets dissipating.

III. Loans and Advances:

Normally provided for pursuant to Court Order. There are no statutory provisions but Court Order usually provides for priority and borrowing limits.

IV. Sales During the Receivership:

A receiver has the authority to sell in the ordinary course up to amounts set out in the Court Order. Sales out of the ordinary course require Court Order, normally with support of first ranking secured creditor. The steps in the process of the sale include:

A. The receiver should use his or her discretion to determine if the property in receivership should be sold as this power is discretionary;
B. The duty of the receiver in selling the property in receivership is broader than selling the property at the best price;
C. The receiver should determine the best manner in which to sell the property;
D. The receiver should strive to obtain a fair market value for the property keeping market condition and individual circumstances in mind;
E. The sale should be expeditious as possible;
F. So long as the proper efforts to obtain offers have been made there is no reason for the receiver to reject a reasonable offer that is made;
G. The receiver may seek instruction from the court if he or she is unsure of what the proper process to follow in the sale of the property.

V. Liens Against Receivership Property:

There are no specific statutes relating to liens and the receivership. A lien holder is a creditor that has the right to realize on his or her security unless the receiver takes steps to postpone the realization of the security. A receiver may consider if there may be a realization on the security in excess of the amount owed to the secured creditor. A receiver has the ability to obtain more information regarding the security and to decide if better to redeem the security

VI. Owners Associations:

Although there is no statutory obligation, it is practical for the receiver/manager to consult with the owner's association, particularly when their interests may be affected.

VII. Construction Related to Receivership Property:

The receiver may complete a construction project if the construction project is in the normal course of business of the debtor. There is no obligation on them to do so. However, if the

receiver and/or manager deem that it is in the best interest of the creditors then the receiver may take steps to complete the construction project.

VIII. Ending the Receivership:

In a court appointed receivership by court order, however in the case of a private appointment by way of submitting a final accounting and report to the Official Receiver. Motion and hearing required following a final accounting if the Official Receiver raises a concern in the case of a private appointment.

IX. Miscellaneous:

A.

A Receiver appointed through a security agreement ensures that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. Statutory duty to act in a commercially reasonable manner.

B.

A more widely utilized approach to the liquidation of assets is through the enforcement by a secured creditor of its security.

Relevant Codes, Statutes or Case Law:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B.3; *Companies' Creditors Arrangement Act, R.S., c. C-2;*

Provincial:
Courts of Justice Act, R.S.O. 1990, c. C. 43; *Personal Property Security Act*, R.S.O. 1990, c. P.10; *Ontario Court of Justice Act, R.S.O. 1990, c. C.43*

Oregon

Foreclosure Summary

Security Instrument	Trust Deed/ Mortgage
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Notice of Default
Time Frame	120-180 days
Redemption Period	180 days for judgment debtor and 60 days for other lien claimants following judicial foreclosure
Deficiency	Yes, but only with judicial foreclosure

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	No
Approximate Time for Appointment	5-10 Days
Who or What can act as Receiver	Individual
Specific Receiver Requirements	Bond
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

The nature of the loan instruments will determine the remedies that are available to a lender. In Oregon you have three methods for recovery: (i) an action on the note, (ii) judicial foreclosure, and (iii) non judicial foreclosure. The third option is not available with mortgages.

II. Judicial Foreclosure Basics:

A. Personal Property:

One significant consideration on what foreclosure process to employ is the personal property. Is the personal property essential to the value of the real estate or merely incidental thereto? If the personal property to be foreclosed is significant, it would be prudent to foreclose judicially. Pursuant to ORS 79.0604(1), a party with a security interest in both real and personal property may proceed as to both the real and personal property in accordance with the rights with respect to the real property; however, it is not clear whether this allows a creditor to foreclose a security interest in personal property nonjudicially.

B. Real Property:

All mortgages must be foreclosed judicially. With a purchase money mortgage (see above), no deficiency judgment will be available. With all other mortgages, including a nonpurchase money mortgage on residential property, a deficiency is available. In contrast, a deficiency judgment is not available following the nonjudicial foreclosure of a trust deed.

Caveat: With a purchase money mortgage, an action on the note will result in waiver of the collateral and a foreclosure will bar recovery of a deficiency. Specifically, a deficiency will not be allowed following foreclosure of a mortgage given to (a) a seller to secure the unpaid balance of the purchase price of the real property, or (b) a person other than a seller to secure not more than $50,000 of the unpaid balance of the purchase price of real property used by a purchaser as a primary or secondary, single-family residence of the purchaser. (ORS 88.103.) The loss of collateral caused by an action on the note alone does not apply to

trust deeds. Thus, except with purchase money mortgages, it is possible to sue on the note and to later sue to foreclose the collateral. Any foreclosure after obtaining a judgment on the note or a guaranty should be judicial.

The drawbacks to a mortgage foreclosure are:

a. the time required to complete the process is generally longer than the time required for completing a nonjudicial foreclosure;
b. the judicial forum offers the borrower a greater opportunity to assert defenses and counterclaims, and to delay the process; and
c. the redemption rights following a sheriff's sale of 180 days for the judgment debtor and 60 days for junior creditors (ORS 18.964), which are not available following a nonjudicial foreclosure..

C. Issues with Redemption:

Redemption rights impair the marketability of the property. Until the redemption rights expire, a sheriff's deed is not available and title insurance of a fee interest in the property cannot be obtained. Moreover, during the redemption period, even though the buyer at the sale is entitled to possession, it cannot recover any costs of improvements it may make, except perhaps to prevent waste (ORS 18.966(3)), and this precludes the purchaser from making improvements during the redemption period in order to increase the marketability of the property. Because the lender is usually the successful bidder at the foreclosure sale, redemption rights therefore increase significantly the time it takes for a lender to realize on its collateral. Time lost to redemption rights is not only lost money for a lender, it is also an additional opportunity for the borrower to file bankruptcy and delay the process a bit more. In bankruptcy the right to redeem will expire the later of either the scheduled expiration date or 60 days after bankruptcy is filed. (Bankruptcy Code Section 108(b).)

D. Trust Deed:

The judicial foreclosure of a trust deed is identical to that of a mortgage and a deficiency judgment is available, except in residential cases. (ORS 87.797(3).) Although a judicial foreclosure is an opportunity to garner a deficiency judgment, it also results in redemption rights.

III. Non-Judicial Foreclosure Basics:

This process requires recordation, mailing, service and publication of notices with particular information within particular time frames.

Barring a bankruptcy filing or title issues that delay the process, a non-judicial foreclosure is typically completed within 130 to 150 days. The minimum time for notices to the grantor of the trust deed and those with an interest shown on title is 120 days. There are no redemption rights available, except for the IRS. Thus the process is swift and because the lender is not in court seeking relief, there is no open invitation to the borrower to respond with defenses and counterclaims. The burden is on the borrower to file an action or bankruptcy if it wishes to delay the process.

One disadvantage to the non-judicial process is that the lender may not recover a deficiency, except to foreclose other collateral. This means that the lender will be precluded from pursuing individuals on guarantees if there is a deficiency, except that lender may pursue collateral given for a guarantee.

Another significant disadvantage to the non-judicial process is that the borrower has up to five days before sale to reinstate the loan. Some borrowers take advantage of this right by reinstating five days before the foreclosure sale, but then immediately allowing the loan to go back into default. These borrowers operate as if they are on a semiannual payment plan. This problem can be avoided by accelerating the loan and foreclosing judicially. In some instances, the lender will choose the disadvantages of the judicial process simply to end the

borrower's abuse of its reinstatement right under the non-judicial foreclosure statutes.

IV. Comparison of Judicial & Non Judicial

	Advantages	**Disadvantages**
Judicial	1) Deficiency judgment 2) No right to reinstate	1) Time - redemption rights - bankruptcy opportunity - slower process - invitation to claims 2) Cost
Non-judicial	1) Time - no redemption rights - no invitation to claims - faster process 2) Cost	1) No deficiency 2) Right to reinstate

V. The Foreclosure Process:

A. Personal Property:

Personal property may be foreclosed either judicially or by a non-judicial Uniform Commercial Code (UCC) process. Judicial foreclosure of the personal property is easily combined with a judicial foreclosure of the real estate. On the other hand, in a non-judicial foreclosure of the real estate, a separate judicial or non-judicial sale of the personal property is advisable. This is because Oregon's trust deed and forfeiture statutes, ORS 86.705, *et seq.*, and ORS 93.905, *et seq.*, do not clearly provide for a unified non-judicial foreclosure of real and personal property.

B. Judicial Foreclosure of Real Property:

The lender will need to retain an attorney to file an action in state court. The process is instituted with the filing a complaint and recordation of a *lis pendens*. Often the proceedings include claims to foreclose both real and personal property and for damages against the guarantors. If a Receiver is sought, at or shortly after the filing of the complaint, the lender's counsel will file a motion requesting the appointment of Receiver.

C. Non-Judicial Foreclosure of Real Property:

The following is a checklist available from the Oregon State Bar Continuing Legal Education materials:

Number of Days before Sale by Trustee		Action
	1.	Order and examine trustee's sale guaranty; prepare and record substitution of lender's attorney for trustee.
140	2.	Fix date, time and place of sale; prepare and record notice of default and election to sell.
	3.	Order and examine supplemental sale guaranty to cover date of recording notice of default.
130	4.	Mail or serve notices of sale on parties listed in ORS 86.764 (120 days' notice required).
130	5.	Personally serve notice of sale on occupants (when required) (120 days' notice required). ORS 86.774(1).
60	6.	Commence publication of notice of sale (four weeks). ORS 86.774(2).
30	7.	Recheck for federal tax liens and mail notices to occupant to vacate after foreclosure.
10	8.	Record affidavits showing proof of: •Mailing or service on each party entitled to notice under ORS 86.764. •Service on occupant(s) or nonoccupancy of property •Publication of notice of sale •Mailing notice of non-judicial sale to District Director of IRS (if applicable). ORS 87.774(3).
5	9.	Prepare statement of amount due on sale; last day for reinstatement of loan – five days before sale.
0	10.	Sale of property by trustee and payment to trustee of amount bid by purchaser.
	11.	Prepare trustee's deed and deliver to purchaser within 10 days (ORS 87.782(3); record certificate of nonmilitary service.

Note that typically the attorney for the lender is also the trustee and conducts the sale in the county where the real property is located, often on the courthouse steps.

Relevant Codes, Statutes or Case Law:
Beckhuson v. Frank, 97 Or App 347, 349, 775 P2d 923 (1989); ORS 88.040 ORS 23.560 and ORS 23.540; IRC § 7425(d); ORS 86.770; ORS 88.075; 11 USCA § 108(b) (1993); ORS 86.705, *et seq;* ORS 86.770; ORS 86.753(8)

Receivership:[1]

I. General Information:

Oregon Statute Provides for two types of Receiverships that would be relevant to lenders: Corporate and General

A. Corporate Receivership: To wind up and liquidate the business and affairs of a corporation through a judicial dissolution process.

1. Process: Show cause process with five days' notice.
2. Qualifications: Receiver must be authorized to transact business in Oregon and court may require bond.
3. Powers and authority: Very broad—to dispose of assets at public or private sale, sue and defend, exercise all powers of corporation either through or in place of the board and officers in the best interests of the shareholders and creditors.

B. General Receivership: To protect cash collateral, complete construction, prevent waste, sell property, and resolve partnership, divorce or other dissolution disputes. Most commonly used by a secured lender:

1. Real Property: Covers all properties - apartments, retail, residential, etc.
2. Businesses: Assisted care or nursing home facilities, golf courses and hotels; provided lender holds a security interest in the business and its income, not just the hard assets.

[1] Oregon's 2017 legislature passed and the Governor signed into law a new Oregon Receivership Code, which goes into effect January 1, 2018. That Code is extensive and is not covered in this update.

Contributed By: Kenneth (Kip) Childs of Stoel Rives

II. Appointing the Receiver:

A. The Basics:

A formal complaint for the appointment of a Receiver is required together with a motion seeking the appointment of a Receiver. Alternatively, a Receiver may be sought in a pending action by the filing of a motion and asking that the affected parties appear before the court to show cause why a Receiver should not be appointed.

Generally a notice of the hearing must be served at least 5 days prior to the date scheduled for the show cause hearing (ORCP 80C).

B. Time Frame for Appointment:

Depending on the court's calendar, it can generally take 5 to 10 days to get a receiver appointed. Expedited consideration is possible with as little as 2 days notice, but the circumstances need to be extreme and the court's calendar open.

C. Can you go in Ex Parte?

Generally, an order appointing a receiver will not be granted at an ex parte hearing. In an emergency situation, the court has authority to schedule a show cause hearing on appointment of a receiver on less than 5 days' notice to the opposing party. (ORCP 80C.)

III. Loans and Advances:

Advances may be obtained without notice if the order so provides, but Receivers typically send notice to all interested parties regardless of an anticipated need. Alternatively, if the order does not provide for lender advances, the lender may file a motion with the court requesting that it be permitted to loan money to the Receiver with the loan to be added to the debt balance and secured by its collateral.

IV. Sales During the Receivership:

Except in a corporate receivership, Oregon law does not provide authority for a receiver to dispose of real property. [2] Such a sale without consent of all interested parties would circumvent redemption rights and likely not be insurable.

V. Liens Against Receivership Property:

A receiver's fees and costs are preferred claims which are entitled to be treated as a first lien on the receivership property with priority over any pre-existing liens. *Parks v. Central Door & Lumber Co.*, 164 Or 363, 102 P2d 706 (1940); and *Stacey v. McNicholas*, 76 Or 167 (1915).

VI. Owners Associations:

If the "turnover" has not been completed, the receiver may find that he or she is in control of the homeowners' association.

VII. Construction Related to Receivership Property:

If a court order provides authority for a receiver to complete improvements, then the receiver may proceed accordingly. The order should provide for advances. See above.

VIII. Ending the Receivership:

A receivership may be terminated only upon the filing of a motion with 10 days notice. Typically a final accounting is submitted with the request. If approved, the court will enter an order terminating the receivership duties and exonerating the bond.

Relevant Codes, Statutes or Case Law:
ORCP 80; *Investors Syndicate v. Smith*, 105 F2d 611(9 Cir. 1939); ORS 60.667.
See ORCP 80; ORS 60.667; ORCP 80 (B) 6 and 7; ORS 86.010

[2] The Oregon Receivership Code, which goes into effect January 1, 2018, authorizes receivers to sell real property.

Pennsylvania

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	No
Initial Public Notice	Complaint
Time Frame	6 to 9 months
Redemption Period	No
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	No
Approximate Time for Appointment	15-30 days
Who or What can act as Receiver	No Restrictions Given
Specific Receiver Requirements	No Restrictions Given
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

Pennsylvania is a judicial foreclosure state. Sales are conducted by a Sheriff. There are two ways to complete the foreclosure:

A. a complaint for foreclosure, or
B. entry of a confession of judgment followed by execution proceedings.

Trustee sales pursuant to a deed of trust do not discharge junior liens. Hence, deeds of trust are rarely seen in Pennsylvania. Pennsylvania is not an election of remedies state. Borrowers have no right of redemption after the Sheriff's Sale.

If the mortgaged premises are residential property, certain notices must be sent to the borrower before the commencement of foreclosure.

II. Judicial Foreclosure Basics:

A. Complaint for Foreclosure:

A judicial foreclosure may begin in Pennsylvania with the filing and service of a complaint. Most counties limit the complaint to one count in foreclosure which means generally a mortgagee cannot foreclose multiple mortgages in one action. The only necessary parties are the mortgagee, mortgagor and property owner (if different from the mortgagor). Subordinate lienholders are not named as parties.

Only a Sheriff may serve the complaint on Pennsylvania residents and entities. Non-Pennsylvania residents and entities may be served by certified mail or a process server.

Depending on the existence and form of any opposition, judgment is entered by default, summary judgment or judgment after a trial. After judgment is entered, the sale process begins. The Prothonotary (equivalent to a county clerk) issues a Writ of Execution. The date of the Writ of Execution ("Writ") is important because (i) all lienholders as of the date of the Writ must receive notice of the sale, and (ii) lienholders subsequent to

the date of the Writ are barred from claiming an interest in the premises.

A Sheriff conducts the sale and is paid poundage of 2% to 3% of the bid price. In major counties, sales are conducted monthly. Sheriffs in rural counties hold sales less frequently. Lienholders as of the date of a Writ must receive a Sale Notice at least 30 days prior to the sale. The Sheriff has 30 days after the sale to post a schedule of distributions. Sheriffs usually issue a deed within 30 to 60 days after a sale. Depending on the county, an uncontested foreclosure should be completed in 6 to 9 months.

In most counties, a mortgagee does not pay transfer taxes if the mortgagee is the successful bidder. However, if the mortgagee assigns its bid to a special purpose entity after the Sheriff's Sale and the special purpose entity takes title, the mortgagee must pay a transfer tax.

B. Confessions of Judgment:

Foreclosure through a confession of judgment is the preferred process because it usually takes less time. If the loan documents contain a confession of judgment clause, the mortgagee simply enters judgment *ex parte* upon commencement of the action. The mortgagee then sends the mortgagor a Notice of Intention to Execute upon Confessed Judgment. The mortgagor then has the burden to, within 30 days, petition to strike or open the judgment. If the judgment remains undisturbed, the mortgagee obtains a Writ, and follows the process set forth in Section II above. Depending on the county, the entire process should be completed within 3 to 5 months.

C. Deficiency Judgments:

To obtain a deficiency judgment the mortgagee must file a Petition to Fix Fair Market Value of Real Property within 6 months after the Sheriff issues a deed.

III. Non-Judicial Foreclosure Basics:

Non-Judicial Foreclosure is not available in Pennsylvania.

Receivership:

I. General Information:

Pennsylvania permits the appointment of a real estate Receiver pursuant to:

A. clear language in the loan documents which authorizes the appointment, or in the alternative;
B. based on principles of equity.

It goes without saying that to avoid a litigation quagmire, it is best to proceed based on loan documents if that is possible.

II. Appointing the Receiver:

A mortgagee must seek the appointment of a Receiver on notice to the borrower. The mortgagee typically files the motion on an emergency basis and usually receives a hearing date within a week to ten days.

III. Loans and Advances:

Pennsylvania does not have any pre-set laws, codes or case law on such matters. Loans and advances are possible with court approval.

IV. Sales During the Receivership:

Yes, with a court order.

V. Liens Against Receivership Property:

Not applicable.

VI. Owners Associations:

Not applicable.

VII. Construction Related to Receivership Property:

Yes, with a court order.

VIII. Ending the Receivership:

The receivership does not terminate automatically in Pennsylvania upon a Sheriff's sale. The mortgagee will need to obtain an order terminating the receivership.

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Relevant Codes, Statutes or Case Law:
Metropolitan Life Ins. Co. v. Liberty Center Venture, 437 Pa.Super. 544, 650 A.2d 887 (1994) (court may appoint a Receiver upon the occurrence of a default without the necessity of equitable reasons for the appointment; also, the Receiver may make distributions to the mortgagee in excess of the amounts deemed necessary by the Receiver for the ongoing operations of the mortgaged property).
Pa. R.C.P. 1533 (permits a court to appoint a Receiver "if required by the exigencies of the case").
Pa. R.C.P. 3118(a)(3) and (6) (permits a court to enter an order directing the defendant or any other party to take such action as the court may direct to preserve a security interest or granting other necessary relief).

Rhode Island

Foreclosure Summary

Security Instrument	Mortgage/ Trust Deed
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Legal Advertisement
Time Frame	Typically 60 Days
Redemption Period	No
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes
Approximate Time for Appointment	1-60 days
Who or What can act as Receiver	Generally drawn from approved receiver list
Specific Receiver Requirements	No Restrictions Given
Is there any approval list for Receivers	Yes
Out of State Receivers Allowed	No

Foreclosure:

I. General Information:

Rhode Island General Laws § 42-27-1 *et seq*. governs foreclosures in Rhode Island.

II. Judicial Foreclosure Basics:

Rhode Island General Laws § 34-27-1 permits judicial foreclosure by an action for ejectment or by peaceable and open entry in the presence of two witnesses. However, mortgage holders rarely use this procedure.

III. Non-Judicial Foreclosure Basics:

Non-judicial foreclosure is the primary method whereby mortgage holders affect foreclosure in Rhode Island. The subject mortgage must contain statutory power of sale language in order to foreclose in this manner.

IV. Guidelines for Power of Sale:

Rhode Island General Laws § 34-27-4 provides the procedure for non-judicial foreclosure, and is discussed in greater detail in Sections X-XI, below.

V. Power of Sale Guidelines as Represented in the Security:

Assignees may exercise the power of sale in the same manner as original mortgagees.

VI. Guidelines for Foreclosure when there is No Power of Sale:

Mortgage holders must foreclose through the judicial foreclosure process if the mortgage lacks statutory power of sale language.

VII. Foreclosure when Instrument Contains No Power of Sale:

Mortgage holders must file a Complaint to Foreclose in the Superior Court of the county in which the subject realty lies in order to foreclose in the absence of statutory power of sale language. Rhode Island General Laws § 34-27-1 governs judicial foreclosure.

VIII. Any Additional Satisfaction Permitted Under Continuing Power of Sale:

The terms of the mortgage control whether additional satisfaction is permitted. If the mortgage contains language allowing the mortgagee to foreclose on its collateral in whole or in party without waiver of its foreclosure rights as to other collateral, the mortgagee may foreclosure at a later date on collateral unaffected by an earlier partial foreclosure. In the absence of such language, sale of some but not all of the encumbered property may waive the right of the mortgagee to seek foreclosure of additional encumbered property.

IX. Sale by Power of Sale when the Instrument is Silent as to the Place or Terms of Sale:

The foreclosure sale occurs at the property that is the subject of the sale.

X. Notice of Sale and How Notice is Given:

Rhode Island General Laws § 34-27-4 governs the Notice of Sale. That statutory section requires Notice of Sale by publication in a public newspaper at least once a week for three consecutive weeks before the sale, with the first publication occurring at least twenty-one days before the date of sale. The notice must contain the date and time of sale and a description of the property consistent with the requirement of Rhode Island General Laws § 34-27-5.

Notice must also be given to the mortgagor by certified mail at least twenty days before the date of publication of the first legal notice, in the case of a mortgagor other than an individual consumer mortgagor, and at least thirty days prior to the first legal notice with respect to an individual consumer mortgagor. The notice must contain the time and date of the foreclosure sale.

Notice must also be given to each bona fide tenant by first-class mail, at least one business day prior to the first publication of the notice, stating: (1) that the real estate is scheduled to be sold at foreclosure; (2) the date, time, and place initially scheduled for

the sale; (3) informing of the availability and advisability of counseling and information services; (4) the address and telephone number of the Rhode Island housing help center and the United Way 2-1-1 center; (5) that the recipient is to continue paying rent to the landlord until the foreclosure sale occurs; and (6) that this notice is not an eviction notice.

Rhode Island General Laws § 34-27-3.2 provides that the mortgagee must provide to the mortgagor written notice that the mortgagee may not foreclose on the mortgaged property without first participating in a mediation conference. A written mediation notice must be given in English, Portuguese and Spanish before foreclosure is initiated on first lien 1-4 unit residential mortgage whose property is owner-occupied, excluding reverse mortgages. Penalties of $1,000 per month apply to the lender's failure to send the required notices. If the homeowner does not participate or fails to respond after two attempts to schedule mediation, the lender may proceed with foreclosure. A person challenging foreclosure based on noncompliance with the mediation law must do so within one year from the date the first notice of foreclosure was published.

XI. Place and Time for Conducting Foreclosure by Power of Sale:

The foreclosure sale may occur at the subject property at any commercially reasonable time but no later than fourteen (14) days from the date the third notice has been published.

Receivership:

I. General Information:

Receivers for distressed commercial properties are available by two means: (1) petition for a receiver for the collateral property (and not the borrower) pursuant to the terms and conditions of the loan documents; or (2) petition for a receiver of the borrower entity (so long as the borrower is not an individual) under the applicable Rhode Island receivership statutes.

The availability of former method turns on the specific language of the mortgage. So long as the mortgage provides for

appointment of receiver as one of the remedies upon default, the court will likely appoint a receiver for the operation and management of the collateral property. However, the mortgage will define the extent of the receiver's power. For instance, the receiver will not be able to exercise the power of sale for the property without additional court permission if the mortgage does not contain sufficient language for the receiver to do so.

The other option is to petition the borrower entity into receivership based upon its insolvency. Creditors regularly use Rhode Island state court receiverships to liquidate or reorganize failing debtors. There are few rules guiding the conduct of receiverships. Equitable considerations, recognized local practice, and the use of bankruptcy principles as persuasive precedent consequently govern most receiverships.

II. Appointing the Receiver:

A. The Basics:

The procedure for appointment of a receiver is straightforward. A creditor files a petition for receivership and assigns the matter for hearing for appointment of a temporary receiver. That assignment may be made with as little as one day notice. The petitioning party may suggest a receiver to the Court from the receivership list; however, the Court retains the right to select whatever receiver the Court deems appropriate for a given matter.

The order appointing the temporary receiver stays collection of all debts of the entity or property subject to the receivership. A hearing on appointment of a permanent receiver must occur within twenty-one days of the appointment of the temporary receiver.

B. Time Frame for Appointment:

The court may appoint a temporary receiver with as little as one day notice; the hearing on appointment of a permanent receiver will occur within twenty-one days of the appointment of the temporary receiver unless extended by the court upon a showing of good cause.

C. Can you go in Ex Parte?

Under limited circumstances, a party may seek a temporary receive on an *ex parte* basis upon the showing that Rhode Island Superior Court Rule 66(b) requires, including the need for maintenance of the status quo until such a time as notice can be provided to interested parties. In practice, the petitioner must generally demonstrate why it was unable to provide notice prior to seeking an *ex parte* appointment.

III. Loans and Advances:

No information provided.

IV. Sales During the Receivership:

The receiver has the ability to sell property in any manner that will capture the maximum reasonable value in the receiver's best business judgment, subject to court approval. The prevailing method is for the receiver to engage in a competitive bidding process. The receiver must seek court approval of the sale through filing a Petition to Sell Free and Clear of Liens, with notice to all creditors.

Rhode Island General Laws § 7-1.2-1316 allows a corporate receiver to liquidate corporate assets, including realty, as part of the corporate dissolution process subject to court supervision and approval. There are no statutes that govern the sale of property wherein a receiver is appointed for the property only.

V. Liens Against Receivership Property:

The receiver may generally sell property free and clear of liens, with the exception of government liens.

VI. Owners Associations:

No information provided.

VII. Construction Related to Receivership Property:

No information provided.

VIII. Ending the Receivership:

A receivership may only be discharged upon court order after notice and hearing.

IX. Miscellaneous:

A.

Rule 66(e) requires receivership reports once every thirty (30) days. This requirement is generally waived, and receivers file their reports at their discretion.

B.

There is a standard form of order for appointment of temporary and permanent receivers.

C.

With respect to an order appointing a receiver to take control of collateral property, the order must track the mortgage language regarding the powers of the receiver.

Relevant Codes, Statutes or Case Law:

Rhode Island General Laws § 7-1.2-1314 *et seq.*; Rhode Island Superior Court Rule of Civil Procedure 66; Reynolds v. E&C Assoc., 693 A.2d 278 (R.I. 1997); Leonard Levin Co. v. Star Jewelry Co., 175 A. 651 (R.I. 1934).

Contributed By: Armando Batastini of Nixon Peabody

South Carolina

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	No
Initial Public Notice	Lis Pendens
Time Frame	90-180 days
Redemption Period	No
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Unlikely
Approximate Time for Appointment	10-45 days
Who or What can act as Receiver	Impartial, Capable Individual or Company
Specific Receiver Requirements	None
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. Judicial Foreclosure Basics:

A. Commencement; Multi-County Foreclosure:

A foreclosure action is commenced by filing a Summons and Complaint in the circuit court of the county where the mortgaged property is located. A lis pendens should also be filed. If the mortgage encumbers properties in multiple counties, the foreclosure action may be filed and prosecuted in one of those counties although a lis pendens should be filed in each applicable county.

B. Proper Defendants:

Any parties having a subordinate, record interest in the mortgaged property should be joined as defendants. As a precaution, the lender should join as defendants any condominium, homeowners or other property owners associations or any other party that has the authority to make assessments secured by a lien against the mortgaged property. Parties with senior liens or encumbrances are not required to be named. Guarantors may, but are not required to, be joined as defendants.

C. Reference of Case; Foreclosure Hearing:

By rule, foreclosure actions are usually referred by the circuit court to a master-in-equity or a special referee. The master or special referee will hold a foreclosure hearing at which the lender must prove the ownership and existence of a debt and the mortgagor's default thereon. Lender's counsel will often prove its case by affidavit and written testimony, particularly where the foreclosure is uncontested. The relevant loan documents are ordinarily attached as exhibits to the written testimony. If the lender meets its burden, the court will enter an order granting foreclosure of the mortgage and ordering a foreclosure sale.

D. Deficiency Judgments:

The court may grant a deficiency judgment against the mortgagor and if applicable, the guarantor, when the foreclosure order is entered or following the foreclosure sale. The

deficiency judgment amount may be limited through a statutory appraisal process following the foreclosure sale. However, statutory appraisal rights may be waived by the mortgagor and if applicable, the guarantor, if they "are notified in writing before the transaction that a waiver of appraisal rights will be required" and then sign a written waiver "during the transaction".

The lender may waive its right to a deficiency judgment prior to the foreclosure sale. A lender's waiver will expedite the foreclosure and eliminate the re-opening of bidding after the initial sale.

E. Redemption Period:

No redemption period exists in South Carolina except for the redemption right allowed to the United States of America.

F. Foreclosure Sale:

Foreclosure sales are handled by the court pursuant to public auction. In most counties, foreclosure sales are held once per month on the first Monday of the month. A sale notice must be published in a local newspaper for three consecutive weeks prior to the sale date. If the lender has waived deficiency judgment, the sale will be final on the sale date and the lender may competitively bid at the foreclosure sale (in the event of competing bidders). If deficiency judgment is not waived, the sale will not be concluded at the initial sale date and the court will re-open bidding 30 days after the initial sale date. However, when the bidding is re-opened the lender is not permitted to submit bids, even if new bids are entered.

II. Non-Judicial Foreclosure Basics:

Non-judicial foreclosure is not an available foreclosure method in South Carolina.

Relevant Codes, Statutes or Case Law:

S.C. Code Ann. §§ 12-24-40, 14-11-85, 14-11-110, 15-7-10, 15-11-10 through 15-11-30, 15-29-60; 15-39-630, 15-39-635, 15-39-680 through 15-39-700, 15-39-720 15-39-760, 27-31-210, 29-3-100, 29-3-620 through 29-3-800, and 36-9-601(a)(1).

Receivership:

I. General Information:

A receiver may be appointed in South Carolina before judgment when a party establishes (i) "an apparent right to property which is the subject of the action and which is in the possession of an adverse party" and (ii) that "the property, or its rents and profits, are in danger of being lost or materially injured or impaired." A lender has an apparent right to mortgaged property if it holds an assignment of the leases and rents of the mortgaged property. Additionally, Lenders often rely on the express language contained in the parties' loan documents to seek the appointment of a receiver by enforcement of such provisions when favorable to the lender. Ultimately, a factual inquiry by the court may be determining factor as to the court's decision in regards to a receivership.

II. Appointing the Receiver:

A. The Basics:

A motion for the appointment of a receiver should be filed. There is sparse case law indicating that appointment can be on an *ex parte* basis, but the statutory scheme regarding receivers requires that at least four days' notice be provided, unless the court orders a shorter time period. South Carolina civil procedure rules typically require that ten days' notice of a motion be provided, and the better practice in many situations may be to adhere to this time period since courts are more familiar with the ten day notice. The party seeking the appointment of a receiver will ordinarily support its motion with affidavits. Although no statute sets forth who may be appointed as receiver, case law directs that the appointee be impartial and capable to serve.

Appointment of a receiver rests solely in the court's discretion. The court may order the posting of a bond although one is not statutorily required. Unless earlier terminated, a receivership usually remains pending until the mortgaged property is conveyed pursuant to a foreclosure sale, a receiver's sale or a deed-in-lieu of foreclosure.

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B. Time Frame for Appointment:

Appointment often takes between ten and forty-five days, with the time frame varying from county to county depending on the access to a judge and perceived urgency of the request.

III. Loans and Advances:

There is no related statute. Under applicable case law, a receiver's authority derives solely from the court; therefore, a receiver only has powers given to it by the order of appointment. Accordingly, a receiver's authority, if any, to borrow or advance funds is determined by reference to the order of appointment. Certain case law indicates that upon motion and a hearing, the court may authorize a receiver to issue receiver's certificates for the purpose of making necessary repairs.

IV. Sales During the Receivership:

A court can direct or authorize a receiver to sell by private sale the real estate and other property of a party whose assets are in the receiver's custody. The court may determine the terms and conditions of the sale in advance and set a minimum price.

V. Liens Against Receivership Property:

No information provided.

VI. Owners Associations:

No information provided.

VII. Construction Related to Receivership Property:

A receiver's authority, if any, to commence or commission such construction is determined by reference to the order of appointment

VIII. Ending the Receivership:

The order of appointment may specify how or when the receiver may be discharged. Typically a motion to discharge the receiver is filed following the transfer of title to the mortgaged property (via a foreclosure sale, receiver's sale, or deed-in-lieu of foreclosure) and the receiver's filing of a final accounting.

Relevant Codes, Statutes or Case Law:
S.C. Code Ann. §§ 15-65-10(1), 15-65-20, 15-65-30, and 15-65-50.

Cases:
Andrick Development Corp. v. Maccaro, 280 S.C. 103, 311 S.E.2d 95 (S.C. App. 1984).
De Walt v. Kinard, 19 S.C. 286 (S.C. 1883).
Hannon v. Mechanics Bldg. & Loan Ass'n, 177 S. C. 153, 180 S. E. 873 (S.C. 1935).
Jeffcoat v. Morris, 300 S. C. 526, 389 S.E 2d 159 (S.C. App. 1989).
Kirven v. Lawrence, 244 S.C. 572, 137 S.E.2d 764 (S.C. 1964).
Koester v. Citizens' Pub. Co, 154 S.C. 154, 151 S.E. 452 (S.C. 1930).
Truesdell v Johnson, 144 SC 188, 142 S.E. 343 (S.C. 1928).

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South Dakota

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Complaint
Time Frame	1 month for non-judicial/ 9 months from service of Complaint to sale if contested
Redemption Period	One year; 180 days in some cases
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes
Approximate Time for Appointment	Typically 30 days; 1 to 2 days for ex parte
Who or What can act as Receiver	No restrictions given
Specific Receiver Requirements	Oath must be filed prior to commencing duties
Is there any approval list for Receivers	No
Out of State Receivers Allowed	No restrictions given

Foreclosure:

I. General Information:

All foreclosure sales must be made in the county where the property is situated.

Jurisdiction is appropriate in the circuit court for the county where the property or some portion is situated. Service by publication is allowed for nonresidents or residents that cannot be found after due diligence.

A judicial foreclosure action, including a short-term redemption mortgage foreclosure, is complete extinguishment, satisfaction and payment of the debt secured by the mortgage, unless the mortgage holder is granted a deficiency judgment. A foreclosure action is not considered satisfaction of an assignment of rents agreement under the mortgage.

The owner, mortgagor, judgment debtor, or the successors of either, having any interest in the property sold and the holders of any lien, legal or equitable, subsequent and junior to that from which redemption is to be made, on the property sold, or any part thereof, or any share or interest therein, shall have the right of redemption.

Redemption period is 1 year except under 180-day redemption mortgages.

II. Judicial Foreclosure Basics:

In an action for foreclosure, the complaint must state whether any proceedings have been had for the recovery of the debt and if so, whether any and what part has been collected. If a judgment has been obtained for the moneys demanded in the complaint, no proceedings can be had unless an execution against the property of the defendant is unsatisfied and the defendant has no property to satisfy the execution. Once a foreclosure action is commenced and pending, no other proceedings for the recovery of the debt can be had.

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The defendant can cure the default and the complaint must be dismissed if the defendant brings into court before entry of judgment the principal and interest due, with costs and disbursements. However, the cure statute does not apply to 180-day redemption mortgages. The defendant can also cure by paying the principal and interest, with costs and disbursements, before the sale which will stay the proceedings until a further default occurs. If a subsequent default occurs, the court may enforce by order the collection of the subsequent installment due.

If the property can be sold in parcels without injury to the interests of the parties, only so much of the property can be sold which will be sufficient to pay the amount due with costs. The judgment will remain as security for any subsequent default at which time the court can direct the sale of so much of the property to sufficient to satisfy the subsequent default using the first judgment. If the property is such that sale of the whole property will be most beneficial to the parties, the judgment must be entered for the sale of the whole premises.

The mortgage holder can bid on the property at the foreclosure sale so long as he bids fairly and in good faith. In no event will the mortgage holder be required to bid a sum in excess of the debt adjudged by the court to be due with costs and disbursements taxed in the action and costs and expenses of the sale. If the mortgage holder is not willing to bid the full amount of the judgment debt, he must establish at trial the fair and reasonable value of the property and the court shall determine the same in its decree. The court can find the fair and reasonable value to be less than the balance due and authorize the mortgage holder to bid that amount. If a deficiency remains after the sale, the mortgage holder is entitled to a general execution for the deficiency only upon application to the court in which the judgment was entered.

The proceeds of the sale of the property must be applied first to payment of the costs and expenses of the sale, then to the payment of costs and disbursements taxed in the foreclosure action, and then to discharge the debt adjudged by the court to be due. If there is a surplus, it shall be paid into the court for the

use of the defendant or person entitled thereto subject to the order of the court. If the surplus remains in the court for three months without being applied for, the court may direct the surplus to be put out at interest for the benefit of the defendant, his representatives or assigns subject to the order of the court.

The person making the sale must give the purchaser a certificate of sale which must contain a recital of the sale, the legal description of the property, the price bid for each parcel and the whole price paid.

If no redemption is made within the redemption period, a deed must be transferred to the purchaser. If crops have been sown before the issuance of the sheriff's deed, the mortgagor is entitled to the crops and has the right to enter the property to harvest the crops after the issuance of the deed. However, the lien priority of a secured party in crops shall be determined by South Dakota's uniform commercial code.

III. Non-Judicial Foreclosure Basics:

Non-judicial voluntary foreclosure may be done by written agreement between mortgagor and mortgagee. A non-judicial foreclosure may be done by doing all of the following: The mortgagor must convey to the mortgagee all interest in the property subject to the mortgage and the mortgagee must accept the conveyance and waive any rights to a deficiency judgment. The mortgagee must receive immediate possession of the property. The mortgagor and mortgagee must file a jointly executed document with the register of deeds stating they have elected to follow the voluntary foreclosure procedures. The mortgagee must send by certified mail a notice of the election to all junior lien holders stating that the junior lien holders have 60 days to exercise any rights of redemption and the sum necessary to redeem.

On the same day of the written agreement, the mortgagee must furnish a "Disclosure and Notice of Cancellation" which must advise the mortgagor that he is waiving his right to redemption by voluntarily foreclosing; that the mortgagor will not be liable for any deficiency but is also forfeiting any surplus; that the

voluntary foreclosure may be canceled without penalty or obligation within 5 business days from the date of the agreement; that the agreement is entirely voluntary and that the mortgagor is not required to sign the agreement; that the agreement will become final unless the mortgagor signs and delivers the notice of cancellation before midnight on the proper date (which date is to be provided in the form); and a place to sign for cancellation.

A junior lien holder may redeem the property by paying the purchase price plus any other amounts paid by the purchaser to protect his interest within 60 days from the notice of election of voluntary foreclosure. If a junior lien holder fails to redeem, his lien is released.

The mortgagee possesses the property until the completion of the foreclosure subject to the liens of record at the time of the conveyance from the mortgagor. The mortgagee's lien is prior to any junior liens at the time of the conveyance.

IV. Power of Sale Foreclosure Guidelines:

Power of sale foreclosure is referred to as "foreclosure by advertisement" in South Dakota.

If the mortgage contains the power of sale, the mortgage can be foreclosed by advertisement upon default. A mortgage containing a power of sale must be duly recorded in the county where the property is situated for the power of sale to be effective. The power of sale does not become operative until a default in the condition of the mortgage has accrued. Without a default, there is no entitlement to foreclosure by advertisement. A foreclosure by advertisement is not allowed if an action has been instituted to recover the debt, unless the action has been discontinued or the execution of judgment returned unsatisfied.

If the mortgagee has commenced foreclosure by advertisement, the mortgagor or any other lien holder may require the mortgagee to foreclose by action by presenting to the court an application for such. Upon such application, the court shall enjoin the mortgagee from foreclosing by advertisement and direct all further proceedings be had in circuit court.

If the property consists of distinct farms, tracts or lots, only such lots can be sold as necessary to satisfy the amount due.

The mortgagee can, fairly and in good faith, purchase the property. If the mortgagee purchases the property and then requests a deficiency judgment, he must prove to the court that the amount he paid for the property was at or above market value. If the purchase price was less than the market value, the difference between market value and the purchase price is deducted from any deficiency judgment. A party foreclosing by advertisement is entitled to costs, disbursements and attorney fees out of the proceeds of the sale.

Like a foreclosure by action, the proceeds of the sale of the property must be applied first to payment of the costs and expenses of the sale, then to the payment of costs and disbursements taxed in the foreclosure action, and then to discharge the debt adjudged by the court to be due. Any surplus is paid to the clerk of court and notice is given to the mortgagor and junior lien holders of the surplus deposit.

The certificate of sale must contain a recital of the fact of the sale, stating the time and place and name of purchaser; a particular description of the property sold; the price bid for each distinct lot or parcel; and the whole price paid. The certificate of sale must be recorded within 10 days from the date of sale. A sheriff's deed is given to the purchaser if the property is not redeemed during the redemption period. Crops sown before the issuance of the sheriff's deed belong to the mortgagor who has the right to enter the property and harvest the crop.

V. Power of Sale Constitutes Part of Security:

Yes

VI. No Power of Sale Foreclosure Guidelines:

No information provided.

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VII. Foreclosure when Instrument Contains No Power of Sale:
No information provided.

VIII. Additional Satisfaction Permitted Under Continuing Power of Sale:
No information provided.

IX. Sale Under Power where Instrument Silent as to Place or Terms of Sale:
No information provided.

X. Notice of Sale and How Notice is Given:
Notice must be published at least once per week for four successive weeks specifying the names of the mortgagor and mortgagees; the date of the mortgage; the amount claimed due at the date of the notice; a description of the mortgage premises which conforms substantially to that contained in the mortgage; the time and place of sale; a description of the default; that the mortgagor can apply for foreclosure by advertisement; and the name and address of all persons claiming a lien, encumbrance or other recorded ownership interest in the property.

The foreclosing creditor must serve a written copy of the notice of foreclosure sale at least 21 days before the sale on the mortgagor and any other lien holder whose interest in the property being foreclosed would be affected by the foreclosure.

XI. Place and Time for Conducting Foreclosure by Power of Sale:
A sale for foreclosure by advertisement must be made at a public auction between 9 a.m. and 5 p.m. in the county where the property is situated by the sheriff or his deputy and sold to the highest bidder. The sale can be postponed by inserting a notice of the postponement in the newspaper in which the original notice was published and continuing to be published until the postponed sale date at the expense of the party requesting postponement.

XII. Short-Term Redemption Mortgages (aka 180 Day Redemption Mortgage)

A mortgage on property not more than 40 acres which contains a power of sale can, upon default, be foreclosed as a "short-term redemption mortgage" as an alternative to foreclosing by action or by advertisement. In order to foreclose as a short-term redemption mortgage, the mortgage must contain in capital letters: "THE PARTIES AGREE THAT THE PROVISIONS OF THE ONE HUNDRED EIGHTY DAY REDEMPTION MORTGAGE ACT GOVERN THIS MORTGAGE" and must be titled "MORTGAGE-ONE HUNDRED EIGHTY DAY REDEMPTION". The mortgage cannot contain a provision excluding the mortgagor from the property during the redemption period.

A short-term redemption mortgage can contain terms advantageous to the mortgage holder such as allowing the mortgage holder to recover attorney fees and disbursements actually incurred; allowing the parties to agree that taxes and insurance will be collected in installment payments and held in escrow, in an account with the mortgagee, until the due dates; allowing the mortgagor to assign all his rights and interest to income from the property during the redemption period; requiring the mortgagor to pay the difference between the net proceeds of the sale and total debt due; allowing the mortgagor to call the entire balance due within 60 days if the property is sold without its consent; in a foreclosure by action, the purchaser may apply to the court for a reduction of the redemption period of the property has been abandoned by the mortgagor.

A real estate mortgage in any form is authorized to be a short-term redemption mortgage.

If the mortgage debt is secured by other evidence of debt of any other person other than the mortgagor, the plaintiff may make such other persons a party to the action and the court may render judgment for the balance of such debt and enforce it. As with foreclosure by action, the complaint must state whether any proceedings have been held for the recovery of the debt and if

so, whether any part has been collected. If a judgment has been obtained for the debt, no proceedings can be commenced unless an execution has been returned unsatisfied and the defendant has no other property to satisfy the execution. Once the foreclosure action is commenced, no other proceedings can be had for the recovery of the debt while the action is pending.

A defendant must answer within 30 days after service of the summons.

A notice of sale of the property must be published a least once a week for two successive weeks in the county where the property is located and must specify the name of the mortgagor, the amount claimed to be due, the date of the mortgage, a description of the property as described in the mortgage and the time, manner and place of sale.

The mortgage holder can purchase the property at the foreclosure sale if he bids the full amount of the judgment less the sum of the balance due on any prior liens. In no event will the mortgage holder be required to bid a sum in excess of the debt adjudged due plus costs of the action and costs of the sale.

Court may restrain commission of waste upon application of the purchaser or judgment creditor during the period for redemption.

The judgment debtor or junior lien holder have the right to redeem the property during the redemption period by paying the purchaser the purchase price plus any sums paid by the purchaser to protect his interest in the property such as taxes or insurance with interest. The redemption period is 180 days from the recording of the certificate of sale or 60 days if the property is abandoned. Redemption may not be extended beyond 180 consecutive days.

A written notice of redemption must be served on the purchaser and the person making the sale and recorded with the register of deeds. Upon redemption, the person making the sale must

execute and deliver to the redeemer a certificate of redemption which must be recorded with the register of deeds.

Relevant Codes, Statutes or Case Law:
SDCL Ch. 21-47 Foreclosure by Action
SDCL Ch. 21-48 Foreclosure by Advertisement
SDCL Ch. 21-48A Nonjudicial Voluntary Foreclosure
SDCL 21-49 Short-Term Redemption Mortgages
SDCL Ch. 21-52 Redemption

Receivership:

I. General Information:

In general, South Dakota has few statutes and case law on receivership. Each case is unique and the order for receivership should take into account the specific needs of that case.

A receiver may be appointed by the court when an action is pending in any of the following actions: (1) by a vendor to vacate a fraudulent purchase of property; (2) by a creditor to subject any property or fund to his claim; (3) between partners or others jointly owning or interested in any property or fund; or (4) by a mortgagee for the foreclosure of his mortgage where it appears that the property is in danger of being lost, removed, materially injured or the property is insufficient to discharge the debt; (5) where a corporation has been dissolved or is insolvent, in imminent danger of insolvency, has forfeited its corporate rights or is unable to exercise its corporate functions because of continued dissension between or neglect by its shareholders, directors and officers.

A receiver may be appointed after judgment (1) to carry the judgment into effect; (2) to dispose of property according to the judgment or to preserve it during the pendency of an appeal; (3) in proceedings to aid an execution when the execution has been returned unsatisfied; or (5) when the judgment debtor refuses to apply his property in satisfaction of the judgment.

A short-term mortgage may include a provision that in the case of foreclosure, the mortgage holder can appoint a receiver to take possession of the property if the property has been abandoned.

II. Appointing the Receiver:

A. The Basics:

Applicant makes a motion for the appointment of a receiver

B. Time Frame for Appointment:

It all depends on the court's calendar. Generally, the motion could be heard and appointment made within 30 days. An ex parte appointment could be made within 1-2 days.

Notice and filing is controlled by general rules of civil procedure. A written motion must be served no later than 10 days before the time specified for the hearing. A response is due 5 days before the hearing and a reply is due 2 days before the hearing.

C. Can you go in Ex Parte?

Yes. The court may require an undertaking from the ex parte applicant.

III. Loans and Advances:

The receiver can do such acts respecting the property as the court may authorize.

IV. Sales During the Receivership:

The receiver has the power to do such acts respecting the property as the court may authorize. SDCL § 21-21-9. Likely the order would provide the authority to sell the property if necessary.

There is no statutory process for sales during the receivership.

V. Liens Against Receivership Property:

No information provided.

VI. Owners Associations:

No information provided.

VII. Construction Related to Receivership Property:

No information provided.

VIII. Ending the Receivership:

Generally the order will indicate how the receivership is ended.

Relevant Codes, Statutes or Case Law:
SDCL Ch. 21-21 Receivership

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Tennessee

Foreclosure Summary

Security Instrument	Trust Deed/ Mortgage
Judicial	Yes (Rare)
Non-Judicial	Yes
Initial Public Notice	Publication
Time Frame	60 days
Redemption Period	Yes- for non judicial foreclosure
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	No
Approximate Time for Appointment	45 days
Who or What can act as Receiver	No Restrictions Given
Specific Receiver Requirements	Receiver will need to post a bond
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Typically No

Foreclosure:

I. General Information:

Tennessee allows for both Judicial and Non-Judicial Foreclosure.

II. Judicial Foreclosure Basics:

While allowed for in a mortgage or a deed of trust, because Tennessee law permits foreclosure by power of sale and the process is simple and quick, judicial foreclosures are rarely done; therefore, the judicial process will not be reviewed here.

III. Non-Judicial Foreclosure Basics:

Non-judicial proceedings are almost always preferred because they can be completed in less time than is allowed for answering a complaint in a judicial proceeding and there can be a significant cost advantage. The mortgagee may have to bear the cost of a judicial foreclosure if it chooses this method over a power of sale.

IV. Guidelines for Power of Sale:

ALL OF THE FOLLOWING PROCEDURES ARE SUBJECT TO OTHER ADDITIONAL REQUIREMENTS AS CONTAINED IN THE DEED OF TRUST.

A. Order foreclosure reference or abstract.

B. Determine if any tax liens have been filed on the property and, if so, send out appropriate notices to applicable tax authority at least (25) days prior to the sale.

C. Conduct appraisal and environmental audit. [Not required, but often done.]

D. Determine if the Deed of Trust provides for the appointment of a substitute trustee for the purpose of exercising the power of sale under the instrument.

E. The appointment of successor trustees should be filed for recording before the first date of publication. If the name of the

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substitute trustee is not included in the first publication check with the statute on what should be done.

F. If the trustee is not a resident of the state of Tennessee, the notice shall include the name and address of a registered agent of the substitute trustee who is located in the state of Tennessee. The mailing of this notice is evidenced by the substitute trustee recording an affidavit to that effect prior to the recording of the deed evidencing the sale or by recitation on the substitute trustee's deed.

G. Note that the deed of trust may contain its own provisions regarding substitution of trustee and if the deed of trust has more stringent requirements than the statute, those requirements should be followed.

H. Please note that if the loan is a "home loan"* as defined by the Home Loan Act, notice is different.

I. Notify the insurance company prior to the initiation of foreclosure proceeding.

J. Prior to the first publication of the notice of foreclosure sale, send notice of the foreclosure sale to debtor and any co-debtor.

K. While not required by the statute, also send notice to any holder of a junior lien or encumbrance.

L. After sending notice to debtor, any co-debtor and holder of prior liens, advertise three (3) times with the first advertisement to appear at least twenty (20) days before the sale. Place three advertisements in a newspaper published in the county where the sale is to be made. When the advertisement cannot be made in a newspaper thirty (30) days' written notice posted in at least five (5) public places (including the courthouse door, the neighborhood of the defendant, and, if realty, in the civil district where the land lies). If the property is subject to a tax lien, special language identifying the lien must be included in

the notice. State statue tells us that the notice must give the names of the plaintiff, defendant and other parties interested; describe the land in brief terms, including the street address; mention the time and place of the sale; identify each lien or claimed lien of the United States and/or of the state of Tennessee; and, for each lien, affirmatively state that the notice has been timely given according to applicable law, stating that for each such lien the sale of land thus advertised will be subject to the right of the United States to redeem.

V. Power of Sale Guidelines as Represented in the Security:

In Tennessee, the power of sale is constituted as part of the security.

VI. Guidelines for Foreclosure when there is No Power of Sale:

If debtor executes a mortgage, rather than a deed of trust, where there are no power of sale provisions and no trustee, while there is no case on point, we doubt that it could be enforced as a deed of trust.

VII. Any Additional Satisfaction Permitted Under Continuing Power of Sale:

If additional satisfaction is needed, then we suggest a suit for judgment for deficiency balance remaining on note be brought after foreclosure under power of sale.

Even if there is no evidence of irregularity, misconduct, fraud or unfairness on the part of the mortgage (beneficiary) in a suit for the deficiency, the debtor can still challenge the presumption that the value of the property at the time the foreclosure was equal to the sale price by proving the sale price was grossly inadequate. There are no specific limitations based on method of foreclosure (judicial versus nonjudicial), type of collateral (residence versus commercial), or type of loan.

VIII. Sale by Power of Sale when the Instrument is Silent as to the Place or Terms of Sale:

No reported cases to discuss.

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IX. Notice of Sale and How Notice is Given:

Notice must be sent to the debtor and any co-debtor on or before the first date of publication of the notice of foreclosure sale by certified mail at least thirty (30) days prior to the first publication date. State statue details the exact process. Note that, if deed of trust imposes additional requirements, these must be followed.

XI. Place and Time for Conducting Foreclosure by Power of Sale:

Absent more stringent requirements in the deed of trust, can be accomplished within 45 to 60 days.

Relevant Codes, Statutes or Case Law:

See Franklin v. The Duncan, 133 Tenn. 472, 182 S.W. 230 (1915); *Foster v. Harle*, 166 Tenn. 576 (1933); *Irvin v. Shrum*, 97 Tenn. 259, 36 S.W. 1089 (1896); *Clark v. Jones*, 93 Tenn. 639, 27 S.W. 1009 (1894); *Commercial Bank, Inc. v. Lacy*, 371 S.W.3d 121 (2012); *Duke v. Daniels*, 660 S.W.2d 793 (Tenn. App. 1983); *U.S. Bank, N.A., as servicer for Tennessee Housing Development Agency, v. Tennessee Farmers Mutual Insurance Company*, 410 S.W.3d 820 (2012); *Lost Mountain v. King*, 2006 WL 3740791 (Tenn. Ct. App. 2006) ("*Lost Mountain*").

26 U.S.C. § 7425(b); Tenn. Code Ann. § 67-1-1433(b)(1); Tenn. Code Ann. § 35-5-114; Tenn. Code Ann. § 66-8-101(3)

Receivership:

I. General Information:

Grounds for the appointment of a Receiver are:

A. if the property is being so misused, wasted, or neglected by the defendant that it is greatly endangered and likely to be lost or rendered inadequate, especially if the debtor fails to keep taxes paid;

B. if the defendant has abandoned the property;

C. if the defendant is insolvent or if the mortgage debt is overdue and the land mortgaged is inadequate security.

A court of equity will appoint a Receiver where there is danger of the property upon which the petitioner has a lien being misused or some injury done to it.

II. Appointing the Receiver:

A. The Basics:

File an application in chancery court. The defendant is entitled to notice and a hearing before the appointment. On an emergency basis, the hearing can be held as part of a "show cause." The standard to be met on a “show cause” basis is the same as obtaining an injunction.

B. Time Frame for Appointment:

If uncontested, forty-five (45) days unless emergency justifies a "show cause" proceeding.

C. Can you go in Ex Parte?

No.

III. Loans and Advances:

Tennessee does not have any preset laws, code or case law regarding loans and advances during a receivership.

IV. Sales During the Receivership:

No information provided.

V. Liens Against Receivership Property:

No information provided.

VI. Owners Associations:

No information provided.

VII. Construction Related to Receivership Property:

No information provided.

VIII. Ending the Receivership:

Tennessee requires a motion and hearing to end a receivership.

Relevant Codes, Statutes or Case Law:

Tennessee Code Annotated ("T.C.A.") § 29-1-103, § 29-1-104 and § 29-6-140
Cumberland Trust Co. v. Bart, 15 Tenn. App. 138 (1932); *Bidwell v. Paul*, 64 Tenn. 693 (1875); *Pugh v. Burton*, 166 S.W.2d 624 (Tenn. App. 1942).

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Texas

Foreclosure Summary

Security Instrument	Deed of Trust/ Mortgage
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Publication
Time Frame	41 days from Notice of Default to foreclosure; process typically begins 60 - 90 days after default
Redemption Period	No
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes
Approximate Time for Appointment	Few days
Who or What can act as Receiver	Individual or Texas Corporation
Specific Receiver Requirements	Must be a citizen of Texas and maintain a residence
Is there any approval list for receivers	No
Out of State Receivers Allowed	In some cases

Foreclosure:

I. General Information:

Real Property foreclosures in Texas are outlined under Section 51.002 of the Texas Property Code (the "Code") and a properly prepared deed of trust or mortgage.

Texas courts have adopted a "lien theory" as opposed to a "title theory" of mortgages. In Texas, a Deed of Trust is customarily utilized to secure the payment of the indebtedness and the timely performance of ancillary obligations. A Deed of Trust does not pass legal title to Trustee; equitable title is conveyed to a beneficiary and the legal title is retained by the grantor. In addition, the beneficiary is not entitled to rentals or profits from the mortgaged property unless grantor has executed a properly-crafted assignment of leases and rents (see Tex. Prop. Code § 64, et. al.). If the proper assignment has been executed, beneficiaries can generally take possession of rentals and profits after default if all statutory notice requirements are satisfied. In Texas, a Deed of Trust has the legal effect of a mortgage with the power to sell upon default.

II. Judicial Foreclosure Basics:

A judicial foreclosure proceeding in Texas is conducted in a court having jurisdiction over the mortgaged property. While judicial foreclosure is available in Texas, few lenders utilize it in light of the comparatively expedited non-judicial foreclosure procedures. The filing of a suit and entry of an order directing foreclosure may be more desirable if problems exist with conducting a non-judicial foreclosure or with respect to foreclosure of certain property specifically governed by statutory procedures. Judicial foreclosure may be preferable to non-judicial foreclosure if there is a question as to the occurrence of an event of default under the loan documents, or if there are issues related to notice, the organization of grantor, or authorization of grantor's signatories. If the existence of an event of default is contested, a judicial determination of default prevents a later suit for damages or rescission for wrongful foreclosure. If the mortgaged property is not subject to dissipation or loss and is of a value sufficient to satisfy a

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judgment for principal, interest, and attorneys' fees, the longer and more elaborate judicial procedure may be advisable. If dissipation or loss of the mortgaged property is feared during pendency of the suit, relief enjoining any sale or disposition of the mortgaged property is available until a final and non-appealable judgment in entered. A lender initiates either action by the service of legal pleadings upon:

A. all parties having a fee interest in the mortgaged property;

B. all parties having an interest of record in the real property; and

C. all parties in possession of the property, under leases or otherwise.

III. Non-Judicial Foreclosure Basics:

If an event of default remains uncured beyond the applicable cure period(s) contained in the loan documents, and the mortgagee opts to exercise its right to non-judicially foreclose under the power of sale clause in the deed of trust, the date, time and place of the foreclosure sale are governed by Section 51.002 of the Code. The mortgagee may cause the property to be sold at public auction to the highest bidder, between 10:00 a.m. and 4:00 p.m. on the first Tuesday of any month after default, or, if the first Tuesday of the month occurs on January 1 or July 4, then on the first Wednesday of the month following default. Notice of the time, terms and place of such sale and the property to be sold must be posted in such places and in such manner as so designated in the deed of trust, at least twenty-one (21) days prior to the sale.

A senior lienholder is not required under Texas law to notify junior lienholders of a foreclosure of its lien unless an agreement between the parties dictates otherwise. Absent an agreement, following the valid foreclosure of a senior lien, junior lienholders do not have a right of redemption, and their liens, if not satisfied from the proceeds of the sale, are extinguished. But if a notice of a federal tax lien has been filed more than thirty (30) days before the proposed sale, a notice in compliance with Section 7425(c)(1) of the U.S. Tax Code must be given to the Internal

Revenue Service ("IRS") at least twenty-five (25) days prior to the date of the foreclosure or the foreclosure will transfer the foreclosed property subject to any federal tax lien filed against grantor (in the county where the mortgaged property is located). The IRS takes the position that the twenty-five (25) day period commences to run on the date the IRS receives the notice. Pursuant to Section 7425(d)(1) of the Tax Code, if proper notice is given, the IRS has one hundred twenty (120) days after the date of the foreclosure sale to redeem the property upon payment of the bid price to the purchaser.

IV. Guidelines for Power of Sale:

A. Default:

Before the mortgagee may exercise its remedies, including, without limitation, foreclosure, it must be determined that the mortgagor is in default. "In the absence of default of the debt owed mortgagee, there can be no foreclosure of the lien." Neither the Uniform Commercial Code nor the Code defines the term "default;" provided, however, recently added Section 51.0011 of the Code prohibits the mortgagee from declaring a mortgagor in default under a residential mortgage due to a delinquent payment of ad valorem taxes if the mortgagor has entered into an installment plan and noticed the mortgagee. To determine whether the mortgagor is in default, one must consult the loan documents entered into between the parties. For example, the note, the deed of trust or mortgage and/or the security agreement will contain defined events of default (which may or may not be subject to notice and cure periods in favor of mortgagor); such loan documents will also provide the mortgagee with remedies in the event of default by mortgagor and outline the procedures required to be followed by mortgagee in exercising such rights and remedies. Once it has been determined that an event of default has in fact occurred, it is imperative to examine the underlying agreements to ensure compliance with the applicable cure periods, demand and/or notice provisions contained therein. It is also important to determine whether a mortgagee has forfeited its rights to foreclose or exercise other remedies by waiving such rights due to simultaneous or subsequent oral modifications of the operative

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documents. It is also possible for a mortgagee to be estopped from exercising its rights at law or under the deed of trust if actions of mortgagee and mortgagor subsequent to the default indicate modification of the operative documents.

B. Demand and Acceleration:

While the deed of trust may contain provisions waiving any notice of default and/or acceleration, it is prudent practice for the mortgagee to give twenty (20) days (prior to acceleration and posting for foreclosure) notice of default and intent to accelerate and to provide mortgagor with an opportunity to cure the default during this twenty (20) day period. Upon expiration of the twenty (20) day notice period, the mortgagor should then give notice that the debt has been accelerated. The notice of acceleration can be provided simultaneously with the notice of foreclosure; therefore, it must be given at least twenty-one (21) days prior to the date of the sale.

C. Procedures to Follow Prior to Foreclosure:

A mortgagee planning a foreclosure sale should follow the following procedures prior to proceeding with the sale:

1. Title and Survey Review:

Once provided with a title down date and an updated survey showing items of record subsequent to the filing of the deed of trust, it is necessary to determine the effects of such new items on the property;

2. State Tax Lien Search:

General tax liens are subordinate to a secured first lien deed of trust, while ad valorem taxes have priority to almost all preexisting liens; therefore a state tax lien search should be conducted;

3. Federal Tax Lien:

If a federal tax lien is filed more than thirty (30) days before the proposed foreclosure sale, then the notice must be given, by certified mail, at least twenty-five (25) days prior to the foreclosure sale to the IRS. If this notice is properly given, the IRS has one hundred twenty (120) days following the foreclosure sale to redeem the property. This can be avoided, however, by obtaining formal consent from the IRS to the

foreclosure sale free of the tax lien (*e.g.*, the equity is not in excess of the secured debt). Note, however, that if the Notice is not properly given, the tax lien survives. Mortgagee should send its Notice to*:

Northern Texas:	Southern Texas:
IRS, Attn: Collection	IRS, Attn: Collection Advisory
Advisory Group Manager	Group Manager
1100 Commerce Street	300 E. Eight Street
Mail Code 5028 DAL	MS 5021 AUS
Dallas, Texas 75242	Austin, Texas 78701
214-413-5349 - telephone	512-499-5241 - telephone
214-413-5654 - fax	512-499-5993 - fax

*See IRS Publication 4235.

4. Appraisal and Bid Price:

An updated appraisal on the property is necessary to assist in constructing the bid price. As for the bid price at the foreclosure sale, the "reasonably equivalent value" for the foreclosed property is the price in fact received at the sale, so long as the foreclosing party has complied with the requirements of the state's foreclosure laws.

5. Administration of Foreclosure:

A mortgage servicer may administer the foreclosure of property on behalf of a mortgagee if the mortgage servicer and the mortgagee have entered into an agreement granting the current mortgage servicer authority to service the mortgage; and the default and foreclosure notices disclose (i) that the mortgage servicer is representing the mortgagee under a servicing agreement, (ii) the name of the mortgagee and (iii) the address of the mortgagee or the address of the mortgage servicer.

6. Trustee; Appointment of Substitute Trustee:

After notice of default and demand of payment, notice of intent to accelerate and subsequent acceleration and notice of foreclosure, as applicable, in accordance with the previous subsection of this paper, the mortgagee must again look to the deed of trust to determine the identity of the party who is to foreclose — either the trustee named in the deed of trust or a substitute trustee. Although the deed of trust typically provides the method by which such party is appointed if the trustee is not

available to conduct the foreclosure sale, recently added Section 51.0076 of the Code provides that the appointment or authorization of a trustee or a substitute trustee made in a notice of sale is effective if the notice complies with Code Sections 51.002 and 51.0075(e), is signed by an attorney or agent of the mortgagee or mortgage servicer, and contains the following statement: "This instrument appoints the substitute trustee(s) identified to sell the property described in the security instrument identified in this notice of sale the person signing this notice is the attorney or authorized agent of the mortgage or mortgage servicer."

7. Conducting the Sale

On the first Tuesday of the month in which the foreclosure sale is to occur, the trustee or substitute trustee should conduct the foreclosure sale in the area designated for foreclosures of the county courthouse in the county in which the subject property is located. If there is not such a designated area in the county courthouse, the Statutory Notice must state the area of the courthouse, or such other location a commissioners court of the county may designate for conducting foreclosures, where the sale covered by the Statutory Notice will take place, and on the date of the sale, the sale must occur in the place so designated in the Statutory Notice. The trustee or substitute trustee will commence by reading the Statutory Notice and presenting a foreclosure speech that states the terms of the sale, including, without limitation, recitals describing the deed of trust and its terms and mortgagor's default thereunder. Bidding is open to the public, and the trustee or substitute trustee shall give the highest bidder a reasonable amount of time to obtain cash in the amount of the purchase price. Texas law permits the mortgagee to "credit bid" for the property and take the property as a credit to the indebtedness. The mortgagee also has the right to seek a deficiency judgment against the mortgagor and/or any full recourse guarantors, as discussed below.

After conducting the sale and executing a Trustee's Deed or Substitute Trustee's Deed in favor of the highest bidder at the public auction and same is filed with the office of the county clerk in the county in which the property is located, to provide

evidence that the sale was in compliance with the deed of trust and the Code, it is advisable to file an Affidavit of Foreclosure, which describes the sale in detail, with the office of the county clerk in the county in which the property is located.

V. Power of Sale Constitutes Part of Security

A typical grant clause will read: "For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the _____ of _____:"

VI. Guidelines for Foreclosure when there is No Power of Sale:

When no power-of-sale clause is included in the mortgage or deed of trust, judicial foreclosure is the only method available.

VII. Foreclosure When Instrument Contains No Power of Sale:

The foreclosure is administered by the court. The lender files suit against the borrower to obtain a court order to foreclose on the property. Once the court orders a foreclosure, the property is scheduled for public sale.

VIII. Any Additional Satisfaction Permitted Under Continuing Power of Sale:

Deficiency Judgments: Lenders may obtain deficiency judgments, but they are limited to the difference between the sale price of the property and the balance of the loan in default. After a non-judicial foreclosure sale, suit must be filed recover a deficiency against the borrower or a full-recourse guarantor. The person against whom the judgment is sought is entitled to present evidence of the fair market value of the property; if the court finds that the fair market value is greater than the sales price, then the amount of the deficiency will be reduced accordingly. There is a 2-year statute of limitations that does not apply to deficiencies remaining after repossession and sale of personal property unless the personal property was sold incidentally to a real estate foreclosure sale.

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IX. Notice of Sale and How Notice is Given:

Notice of the sale ("Statutory Notice") must be given twenty-one (21) days prior to conducting the public foreclosure sale. The Statutory Notice must include a statement of the earliest time the sale will begin, and the sale must, in fact, commence at that time or within three (3) hours thereof. The Statutory Notice should be posted at the courthouse door of each county in which the property is located, filed in the office of the county clerk of each county in which the property is located, and a copy of the notice should be sent by certified mail to each debtor who is obligated to pay the debt to which the power of sale is related. In addition to the statutory requirements, it is imperative that the mortgagee look to the deed of trust to determine whether any additional notice requirements exist (*i.e.*, advertising notice in the public notice section of the newspaper that services the county in which the subject property is located). It is also necessary for the mortgagee to look to the deed of trust for guidance regarding any other parties to whom notice of default and/or foreclosure is required.

The Statutory Notice must also include:

A. description of the deed of trust lien, matured debt, and property to be sold (attach legal description);

B. statement that an event of default exists;

C. statement that the holder of the secured debt has authorized enforcement of the power of sale granted in the deed of trust;

D. statement of the date and location of the sale;

E. statement that the property will be sold at public auction to the highest bidder for cash;

F. statement that such notice of sale is not intended to violate any stay in bankruptcy; and

G. contain a statement that is conspicuous, printed in boldface or underlined type, and substantially similar to the following: "Assert and protect your rights as a member of the armed forces of the United States. If you are or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of

another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to the sender of this notice immediately."

In addition to the above, the mortgagee should consult the deed of trust regarding the notice to be provided to ensure that mortgagee is not required to include any additional items in the Statutory Notice.

After posting and filing the Statutory Notice, the party who conducted the posting and filing should execute an Affidavit of Posting that should be filed of record in the office of the county clerk in each county in which the property is located. In addition, subsequent to mailing the Statutory Notice, the trustee, substitute trustee or other party who caused the Statutory Notice to be mailed should execute an Affidavit of Mailing and such Affidavit of Mailing should be filed of record in the office of the county clerk in each county in which the property is located. These two affidavits will serve as proof of compliance with the Code in the event that the foreclosure sale is contested at a later date. Note that if a county maintains an Internet website, the county must post a notice of sale filed with the county clerk on the website on a page that is publicly available for viewing without charge or registration.

Relevant Codes, Statutes or Case Law:
Chapter 64 and Sections 51.0001, 51.002, and 51.003 of the Code

Receivership:

I. General Information:

Texas has multiple statutes that allow for the appointment of a Receiver.

Chapter 64 of Texas's Civil Practice & Remedies Code (the "CPRC") contains the general provisions governing receivership.

Sections 11.403 and 11.404 of the Texas Business Organizations Code (the "TBOC") allows a court to appoint a Receiver for

property of corporations, limited liability companies, limited partnerships, and certain other entities.

Those situations in which a Receiver may be appointed, under Chapter 64 of the CPRC or Sections 11.403 and 11.404 of the TBOC, likely to be of most interest to a lender include:

A. in an action by a creditor to subject any property or fund to his claim;

B. in an action by a mortgagee for the foreclosure of the mortgage and sale of the mortgaged property; or

C. for a corporation that is insolvent, is in imminent danger of insolvency, has been dissolved, or has forfeited its corporate rights.

Section 11.410 of the TBOC allows a court to appoint a Receiver for all property, in and outside of Texas and its business in Texas and its business if the court determines, in accordance with ordinary usages of equity that circumstances exist that necessitate the appointment of a Receiver.

Under Section 31.002(b)(3) of the CPRC, a court may, in the aid of execution of a judgment, appoint a Receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.

II. Appointing the Receiver:

A. The Basics:

The party seeking the receivership must file an action in a court of competent jurisdiction seeking appointment of a receivership.

B. Time Frame for Appointment:

Time to appoint would depend on the facts of the case and degree of emergency. In an appropriate case, a Texas court would give expedited consideration to a motion for appointment of a Receiver, possibly within a few days.

C. Can you go in Ex Parte?

Texas civil procedure requires that at least three days notice for the hearing be given for a Receiver to be appointed to take charge of property which is fixed and immovable.

Otherwise, a Receiver may be appointed *ex parte* only in "exceptional and extreme cases." Also, *ex parte* appointment should occur "only where the right thereto Receiver is clearly shown, and then in exercise of great caution by the court."

III. Loans and Advances:

There are no set laws but one statute does reference it.

IV. Sales During the Receivership:

Sales may occur during the Receivership if authorized by the Court.

V. Liens Against Receivership Property:

No information provided.

VI. Owners Associations:

No information provided.

VII. Construction Related to Receivership Property:

No information provided.

VIII. Ending the Receivership:

Under Texas law, the duration of the receivership and its termination are normally within the sound judicial discretion of the appointing court; however, Section 11.403(d) of the TBOC states that if the condition necessitating the appointment of a receiver under this section is remedied, the receivership shall be terminated immediately, and the receiver shall redeliver to the domestic entity all of the property remaining in receivership. Receiverships generally end upon a motion. However, Texas's Civil Practice & Remedies Code limits corporate receiverships to three (3) years, although the court may extend the receivership to

up to five (5) years beyond the original three (3) years if (a) litigation prevents the court from winding up the affairs of the corporation or (b) the Receiver is operating the corporation as a going concern.

The following steps will typically be pursued to wind up the receivership:

A. A final accounting submitted by the Receiver and approved by the court and the filing of the amount of the Receiver's fees and ordering them paid.

B. Restoration of the property held by the Receiver to the owner of the property.

C. An order entered by the trial court discharging the Receiver.

IX. Miscellaneous:

A.

Texas courts are generally protective of creditor rights.

B.

Under Chapter 64 of Texas's Civil Practice and Remedies Code:

Section 64.021 of Texas's Civil Practice & Remedies Code requires that a Receiver: (1) be a citizen and qualified voter of Texas at the time of appointment, (2) not be a party, attorney or other person interested in the action for appointment of a Receiver, and (3) maintain actual residence in Texas during the receivership. But under the provisions of the TBOC, the requirement that a Receiver be a citizen of Texas may not apply.

Section 11.406(a) of the TBOC requires that a Receiver for a corporation: (1) be (a) a citizen of the United States or (b) a corporation or other entity authorized to act as Receiver, which corporation may be a domestic corporation or a foreign corporation authorized to transact business in this State, and (2) give such bond as the court may direct with such sureties as the court may require.

Relevant Codes, Statutes or Case Law:
Chapter 64 and Section 31.002(b)(3) of the Civil Practices and Remedies Code; Texas Business Organization Code §§ 11.403, 11.404; Texas Rules of Civil Procedure 695, 695a; Texas Fam. Code § 6.502(a)(5), 6.709(a)(3)

Case Law
Associated Bankers Credit Co. v. Meis, 456 S.W. 2d 744, 750 (Tex. App. -- Corpus Christi 1970, no writ); *North Side Bank v. Wachendorfer*, 585 S.W.2d 789 (Civ. App.--Houston [1st Dist.] 1979, no writ); *Wilkenfeld v. State*, 189 S.W.2d 80 (Civ. App.--Galveston 1945, no writ); *Krumnow v. Krumnow*, 174 S.W. 3d 820, 829 (Tex. App --Waco 2005, pet. denied); *Gilles v. Yarbrough*, 224 S.W.2d 720 (Civ. App.--Fort Worth 1949, no writ)
Hammond v. Hammond, 216 S.W.2d 630 (Civ. App.--Forth Worth 1948, no writ)
Humble Exploration Co., v. Walker, 641 S.W.2d 941, 945 (Tex. App.--Dallas 1982, orig. proceeding).

Utah

Foreclosure Summary

Security Instrument	Trust Deed/ Mortgage
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Notice of Default
Time Frame	Typically about 120 days from Notice of Default if by trust deed foreclosure; varies if by judicial foreclosure
Redemption Period	Yes (6 mos from sale) if judicial foreclosure; No if trust deed foreclosure
Deficiency	Yes for difference between decree and sale price, if judicial foreclosure; Yes for difference between debt and greater of FMV or bid amount, if sold at trust deed sale

Receivership Summary[1]

Ancillary Remedy Necessary	No
Ex-Parte	Possible, w/ cause; otherwise after notice
Approximate Time for Appointment	15 – 30 days
Who or What can act as Receiver	Individual or entity
Specific Receiver Requirements	Must swear oath before performing duties; bond
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

[1] Effective May 9, 2017, the Utah Uniform Commercial Real Estate Receivership Act, §78B-21-101 et seq. UCA ("UUCRERA"), became effective. The UUCRERA preempts prior receivership law for all commercial real estate receivership proceedings that are commenced on or after the effective date. UUCRERA is modeled after the Uniform Commercial Real Estate Receivership Act that was adopted by the Uniform Laws Commission in July 2015.

Contributed By: David Leta of Snell & Wilmer, with assistance from Scott Manning

Foreclosure:

I. General Information:

Utah permits the foreclosure of an interest in real property by either a judicial foreclosure or by private sale, if the security is in the form of a Deed of Trust, but requires a judicial foreclosure if the security is a mortgage. Mortgages are rarely used in modern commercial lending practice in Utah, and virtually all security agreements on land are Deeds of Trust.

II. Judicial Foreclosure Basics:

Judicial foreclosure provides a forum for resolution of any disputes about the nature, validity and priority of liens and claims, provides a forum for the borrower to assert defenses and affirmative claims, and provides a forum for resolution of all claims. It can also be used as a vehicle for obtaining equitable remedies, such as injunctions or appointment of a receiver.

The sale procedures after entry of Decree of Foreclosure and following required notices and posting involve an auction by a Sheriff, who will sell only enough of the real property to satisfy the judgment. The defendant may direct the order in which the property is to be sold. The Sheriff delivers the Certificate of sale to the buyer.

A right of redemption exists for 180 days after the sale, and applies to all real property, except unexpired leasehold of less than 2 years. The borrower / defendant or any junior lienholder may redeem. If the defendant redeems, the effect of the sale is terminated and defendant is restored to the original ownership estate.

In general, the price to redeem is the sale price plus 6%, and subsequent redemptions are at the redemption price plus 3%. Taxes, assessments, insurance, maintenance, repairs or other liens paid by holder, plus 6% or 3% as applicable.

Special rules apply for rents, profits, and waste.

An automatic deficiency judgment is issued for any difference between the Decree and the sale amount.

III. Non-Judicial Foreclosure Basics:

If the obligation is secured by a Deed of Trust and not by a mortgage, the alternative remedy of a private trustee sale is available. A Deed of Trust also can be foreclosed judicially as if it was a mortgage, but a mortgage cannot be foreclosed by private sale as if it was a Deed of Trust.

The defendant has the opportunity to cure the default for a period of three months after the filing and recording of a Notice of Default.

In 2012, the Utah legislature made notable statutory changes to trust deed foreclosure laws that establish certain notice and procedural requirements. The following four paragraphs highlight those changes.

Before a Notice of Default is filed, the beneficiary (lender) under the Deed of Trust must provide written notice to the default trustor (borrower) of the beneficiary's intention to file a Notice of Default and allow the trustor 30 days to cure the default. This written notice must provide the nature of the default, an itemized breakdown of the amount required to cure the default, and a date, no less than 30 days after notice is sent, by which the default trustor must pay the amount required to cure the default and avoid the filing of a Notice of Default. UCA § 57-1-24.3(2)(a)(ii), (2)(b)(ii)(B), (2)(b)(ii)(C).

The beneficiary also must provide the trustor a single point of contact to act as the beneficiary's designated representative to the trustor. This single point of contact is authorized to coordinate and ensure effective communication throughout the proceedings and make available to the trustor any foreclosure relief for which the default trustor may apply, if the beneficiary provides any such relief. UCA § 57-1-24.3(1)(i)(i), (2)(a)(i), (5)(a).

At any time within three months after the filing and recording of a Notice of Default, the trustor may apply directly with the single point of contact for any available foreclosure relief, such as a mortgage modification program. The trustor must provide the single point of contact with all information requested by the beneficiary to determine whether foreclosure relief is available. The beneficiary has sole discretion to decide whether the default trustor qualifies for foreclosure relief and whether to enter a written agreement with the trustor to implement any relief for which the trustor qualifies. The single point of contact must undertake reasonable and good faith efforts to consider the default trustor for foreclosure relief for which the trustor is eligible. If the trustor applies for foreclosure relief, the notice of trustee's sale may not be provided until the single point of contact provides notice by mail to the trustor of the beneficiary's decision regarding the foreclosure relief for which the trustor applied. The beneficiary may postpone a sale of the trust property in order to allow further time for negotiations relating to foreclosure relief. UCA § 57-1-24.3(3), (1)(e), (4) (6), (7), (11), (8)(a).

The Beneficiary must take reasonable measures to ensure that its foreclosure practices comply with federal and state fair lending statutes and treat default trustors appropriately. UCA § 57-1-24.3(11)(a), (b).

Following failure to cure, and the required notice and posting requirements, a public auction is scheduled, and is conducted by the trustee, successor trustee or attorney for the trustee. A substitution of trustee, if not previously recorded, must be filed concurrently with the Notice of Default. In situations involving condominium or community associations, a unit owner can demand a judicial foreclosure. The borrower may direct the order in which the trust property is sold if the property consists of several known lots or parcels which can be sold separately. The trustee conducting the auction must sell the property to the highest bidder. UCA § 57-1-27(1)(a).

The Beneficiary (lender) under the Deed of Trust may credit bid at the sale up to the unpaid amount of principal, accrued interest, expenses (taxes, insurance, maintenance, etc.), costs, trustee's fees and attorney's fees. This credit bid amount does not restrict the total amount the beneficiary may bid at auction. *Capri Sunshine, LLC v. E & C Fox Investments*, LLC, 366 P.3d 1214, 1218 (Utah Ct. App. 2015). The conveyance to the purchaser is by a Trustee's Deed and is without any right of redemption.
Once a trustee sale is completed, it will only be set aside in cases which reach unjust extremes. There are three categories of Trustee's Deeds: void, voidable, and valid. A void deed carries no title on which a bona fide purchaser may rely. Utah courts have only found a deed void when it violates public policy. A voidable deed is valid against all but the injured party, who has standing to ask the court to set it aside. A deed is voidable when the interests of the debtor are sacrificed or there was some attendant fraud or unfair dealing in the proceedings. A deed is valid if it results from only inconsequential errors that do not affect the validity of the sale. Thus, to challenge a trust deed sale based on failure to comply with notice or procedural requirements, the trustor must prove some resulting prejudice. *Bank of America v. Adamson*, 391 P.3d 196, 203 (Utah 2017).

Utah has a One Action Rule that applies to both mortgages and Deeds of Trust. It requires that, where a debt is secured solely by a mortgage or Deed of Trust, the lender must first foreclose before pursuing the borrower for a deficiency. The One Action Rule does not apply to an association or unit owners' judicial or non-judicial foreclosure of a unit. Since guarantors are entitled to the protections of the limited deficiency rule with respect to private sales under Deeds of Trust (see below), they indirectly also are protected somewhat by the One Action rule.

IV. Deficiency Actions:

In a judicial foreclosure action, the amount of the deficiency is the difference between the amount of the debt specified in the court's decree of foreclosure and the sale price. In a private sale under a Deed of Trust, the deficiency is the difference between the greater of the "fair market value" of the property on the date

of sale or the sale price, and the amount of the debt on such date. Guarantors are entitled to the protections of the limited deficiency rule with respect to private sales under Deeds of Trust. The purpose of this rule is to prevent the lender from obtaining a double recovery in a non-judicial foreclosure where there is no right of redemption, i.e. a creditor otherwise could purchase the property for a low credit bid at a private sale, sue the debtor for a large deficiency, and then resell the property for a higher price, thus collecting part of the deficiency from both the property and the debtor.

This limited deficiency rule does not apply to a "sold-out" junior lienholder which loses the collateral as a result of a sale by a senior lender. In such a situation the sold-out junior creditor is not pursuing a "deficiency judgment" but a direct action on the underlying obligation. The value of the property on the date of the private sale, therefore, is not relevant to a sold-out junior lien creditor.

An action to recover a deficiency must be brought within 3 months after any sale of the property under a Deed of Trust. The suit must set forth the amount of the indebtedness, the sale price, and the alleged fair market value on the date of sale.

Relevant Codes, Statutes or Case Law:
§ 57-1-19 to -44 UCA § 57-8-48 ti 8a-303 UCA § 78-37-1, UCA, Rule 69, URCP
George v. Simon, 5 Cal. Rptr. 2d 428 (Cal. Ct. App. 1992
G. Adams, Ltd. v. Durbano, 782 P.2d 962 (Utah 1989); First Security Bank of Utah, N.A. v. Felger, 658 F.Supp. 175, 181-84 (D. Utah 1987); First Southwestern Financial Services v. Sessions, 875 P.2d 553, 555 (Utah 1994).; APS v. Briggs, 927 P.2d 670, 673 (Utah App. 1996).; City Consumer Services, Inc. v. Peters, 815 P.2d 234, 236 (Utah 1991).

Receivership:

I. General Information:

With regard to commercial real estate, and related personal property, receivership proceedings filed on or after May 9, 2017, are governed by UUCRERA, §78B-21-101 et seq. UCA. A general discussion of UUCRERA follows in section X below. Accordingly, the following discussion in sections I – IX only applies to all ***other*** receivership proceedings.

There are very few published decisions in Utah on receivership proceedings, and those cases that have been published generally recognize the broad, equitable power of the trial court to structure appropriate relief in a wide variety of situations.
Grounds for appointment of a receiver:

A. When a property is in danger of being lost, removed, damaged or insufficient to satisfy a judgment, order or claim;
B. To carry a judgment into effect, dispose of property according to the judgment and to preserve property during the pendency of an appeal;
C. Upon a writ of execution which has been returned unsatisfied or when the judgment debtor refuses to apply property in satisfaction of the judgment;
D. When a corporation has been dissolved, insolvent, in imminent danger of insolvency, or has forfeited its corporate rights;
E. In all other cases in which receivers have been appointed by courts of equity

Courts in Utah also have appointed receivers in situations where misappropriation of corporate assets by insiders is asserted, or at the request of stockholders, suing individually or derivatively, to protect the company's assets.

II. Appointing the Receiver:

A. The Basics:

There are no rules or official forms governing the appointment process. Typically, a plaintiff will file a separate action seeking the appointment, or seek the appointment as a separate claim in an action that also seeks other forms of relief, i.e. judicial foreclosure of a lien. The Plaintiff typically files a separate motion, with a supporting memorandum, declaration and a proposed form of order, obtains a hearing date from the court, and serves the Complaint, Summons, Motion, Memorandum, Declaration, Proposed Order and Notice of Hearing on the defendant.

Powers of a receiver (determined by the scope of the order):

1. Bring and defend actions;
2. Seize property;
3. Collect, pay and compromise debts;
4. Invest funds;
5. Make transfers and "take other actions as the court authorizes."

B. Time Frame for Appointment:

Plaintiff also may file a separate ex parte motion for a separate "procedures order" shortening times for the filing of opposing memoranda and declarations, and fixing the hearing date, both of which also would be served on the defendant with the other papers. Usually special circumstances, or "cause" must be shown to obtain ex parte relief. Absent such an ex parte motion and order, the matter may be set on the normal motion calendar, in which case opposing memoranda are due in 10 business days, plus 3 additional calendar days, if the pleadings are served by mail.

If the appointment is sought without notice to the defendant, then the applicable procedures for granting temporary injunctive relief without notice will govern. Usually a showing of the 4 tests for injunctive relief will be required:

1. Sufficient legal basis
2. Irreparable injury
3. A balance of harm in favor of the plaintiff
4. Absence of a public injury or interest

In addition, for orders without notice the plaintiff also must make a clear showing that some immediate and irreparable injury, loss, or damage is likely to occur before notice can be given to the plaintiff. Courts are reluctant to appoint receivers without notice in a commercial context, unless there are egregious circumstances, i.e. evidence the waste, destruction or improper disposition of collateral is in process. In addition, courts are more likely to require a plaintiff's bond when relief is sought without notice. Thus, it is more common for plaintiffs to

seek an expedited hearing, than to seek appointment of a receiver without notice.

A. Can you go in Ex Parte?

Yes.

III. Loans and Advances:

No information provided.

IV. Sales During the Receivership:

No information provided.

V. Liens Against Receivership Property:

No information provided.

VI. Owners Associations:

No information provided.

VII. Construction Related to Receivership Property:

No information provided.

VIII. Ending the Receivership:

No information provided.

IX. Miscellaneous:

A. Security

The court may require security from a receiver in connection with pre and post-judgment writs of attachment, replevin, garnishment and execution, in an amount the court deems adequate.

The court also may relieve a party of the necessity to provide security if it appears that none of the parties will incur damages, costs or attorney fees as a result of the receiver being wrongfully obtained. The amount of security does not establish or limit the amount of damages, costs or attorney fees recoverable if the appointment is wrongfully obtained.

The court may consider objections to the nature or amount of any proposed security or surety, and proceedings on objections are expedited.

B. Payment of taxes.
Before the receiver may sell, transfer or pledge personal property, the receiver shall pay applicable taxes and shall file receipts showing payment of taxes. If there are insufficient assets to pay the taxes, the court may authorize the sale, transfer or pledge with the proceeds to be used to pay taxes.

C. Real Property.
Before a receiver is vested with real property, the receiver must file a certified copy of the appointment order in the office of the county recorder of the county in which the real property is located.

X. Utah Uniform Commercial Real Estate Receivership Act - §78B-21-101 et seq. UCA

Definitions: §78B-21-102

For the most part, the definitions in the UUCRERA are helpful, but not remarkable. In general, these definitions are *similar* to the definitions for like terms in the Bankruptcy Code (11 U.S.C. §101) and in the Utah Uniform Commercial Code (§70A-1a-201; -2-103-106, and -9a-102). There are some differences, however. For instance, the definition of "affiliate" is much broader than that found in 11 U.S.C §101(2). Some defined terms, such as "companion," "executory contract," "owner," "proceeds" and "rents," have no corresponding definitions in the Bankruptcy Code. On the other hand, some terms in the statute are not defined, such as the term "dwelling unit," which is used to *exclude* certain real property from the scope of the law. See, §78B-21-104(2), and discussion below. In this regard, practitioners will find the comments and examples in UCRERA to be instructive in interpreting the statute. See, e.g., Comment No. 2 to Section 4 of UCRERA, which mirrors §78B-21-104.

Notice and Opportunity for Hearing: §78B-21-103

Under the UUCRERA, the court may enter orders only after such notice and opportunity for a hearing as is appropriate under the circumstances. The court, however, may issue an

order without an actual hearing if no interested party timely requests a hearing or if the particular circumstances require an order before a hearing can be held. This is a significant improvement over Rule 66, which does not contain any requirements for notice of the receivership case, with the exception that a receiver must file a certified copy of the appointment order in the office of the county recorder where receivership real property is located before the receiver can be vested with an interest in the property. See, Rule 66(g). This type of limited "record notice" is only effective for those searching the title records of the subject property. The notice provisions of §78B-21-103, on the other hand, are designed around the principles of due process and fairness in judicial administration. They require that persons affected by the particular receivership order be given actual notice and an opportunity to be heard before a final determination of their legal rights and responsibilities is made by the court. At the same time, §103 is flexible in allowing the court to fashion notice that is "appropriate" in the particular circumstances.

Scope and Exclusions: §78B-21-104

The UUCRERA applies to all receiverships for *real property*, as well as *related* personal property, *except* where the real property is improved by one to four "dwelling units", *unless* (a) the dwelling units are used for agricultural, commercial, industrial, or mineral extraction purposes that are not incidental uses by an owner occupying the property as a primary residence; (b) the dwelling units secure an obligation incurred when the property was used or planned for use for such commercial purposes; (c) the owner planned or is planning to develop the property with one or more dwelling units to be sold or leased in the ordinary course of the owner's business, or (d) the owner collects rents or other income from an unrelated tenant or other occupier. The UUCRERA also does *not* apply to a receivership authorized by the laws of Utah in which the receiver is a governmental unit or an individual acting in an official capacity on behalf of the governmental unit. Furthermore, the UUCRERA does *not* apply to receiverships that do not primarily

involve *real property*. Finally, unless there is a specific provision of the UUCRERA that provides otherwise, the statute can be supplemented by general principles of law and equity.

Power of the Court: §78B-21-105

The District Courts of Utah have *exclusive* jurisdiction of receivership proceedings brought under the statute. The UUCRERA, however, does not contain any special venue provisions. So, with regard to the venue of a receivership case, the provisions of §78B-3-301 will govern.

Appointment: §78B-21-106

The UUCRERA establishes standards under which a court may appoint a receiver in the exercise of its equitable discretion. These standards include circumstances both before and after judgment. Before judgment a receiver may be appointed to protect a party that demonstrates an apparent right, title or interest in the subject real estate, if that property, or its revenue-producing potential, is subject to, or in danger of, waste, loss, dissipation, or impairment, or is the subject of a voidable transaction. After judgment, a receiver may be appointed to carry the judgment into effect, preserve nonexempt property pending appeal, or where the owner refuses to apply the property in satisfaction of the judgment. In addition, the statute contains broad authority to appoint a receiver "on equitable grounds." It also allows for appointment "during the time allowed for redemption to preserve a property sold in an execution or foreclosure sale" and to secure the rents during such time. The UUCRERA establishes standards under which a petitioning mortgage lienholder is entitled to appointment of a receiver, either as a matter of right or as a matter of the court's discretion, in connection with a foreclosure. In particular, the statute expressly recognizes the right of a mortgagee to have a receiver appointed (a) if necessary to protect the property; (b) if, before default, the mortgagor agreed in a signed record to such an appointment on default; (c) if, after default, the mortgagor so agreed in writing, (d) if the collateral is insufficient to satisfy the debt; or (e) if the owner fails to turn over the proceeds or rents

that the mortgagee is entitled to collect. Where the court appoints a receiver on an *ex parte* basis, the court may require the party seeking appointment to post security for any damages, attorney's fees and costs incurred by a person injured if the appointment is later determined to have been unjustified.

Identity and Independence of Receiver: §78B-21-107

The UUCRERA requires that the receiver provide sworn evidence of the receiver's independence. With respect to disinterestedness, the statute contains broad prohibitions against appointment of persons who are affiliates of a party, have a material interest in the property, have a financial interest in the outcome of the proceeding, are a debtor or creditor of a party, or hold an equity interest in a party, other than a non-controlling interest in a publicly-traded company. Certain types of relationships are excluded from these broad categories, however, such as, being appointed as a receiver, or being owed money in connection with, another unrelated receivership case involving a party, being obligated to pay a debt that is not in default and is for personal, family or household purposes, or maintaining a deposit account with a party. Furthermore, while a party seeking appointment of a receiver may nominate someone, the court is not bound by any such nomination.

Receiver's Bond: §78B-21-108

Every receiver *must* post a bond that is conditioned on the faithful discharge of the receiver's duties, is in an amount specified by the court and is effective upon appointment. Where required by the circumstances, the court may authorize the receiver to act before the bond is posted. The statute does not authorize the court to waive the bond requirement, however. The court also may approve alternative forms of security, such a letters of credit or deposit of funds, but receivership property may not be used as security. Interest earned on any deposited funds posted for the bond must be paid to the receiver upon the receiver's discharge. And, any claim against the receiver's bond must be made not later than one (1) year after the date the receiver is discharged.

Effect of Appointment; Receiver as Lien Creditor: §78B-21-109

On appointment, and with respect to personal property, a receiver has the status and priority of a lien creditor under Chapter 9a of the Utah Uniform Commercial Code. With respect to real property, a receiver has a similar status under Chapter 9 of the Marketable Record Title statute.

Effect on After-Acquired Property: §78B-21-110

Appointment of a receiver does not affect the validity of a pre-receivership security interest in receivership property. Any property acquired by the receiver after appointment is subject to any pre-receivership security agreement to the same extent as if no receiver had been appointed.

Collection and Turnover of Receivership Property: §78B-21-111

On appointment, persons having possession, custody or control of receivership property must turn over the property to the receiver, and persons owing debts that constitute receivership property must pay those debts to the receiver. A person with notice of the receivership and that owes a debt that is receivership property may not satisfy the debt by paying the owner. Doing so exposes such a person to the possibility of paying the debt twice. The court also may sanction as civil contempt a person's failure to turn over property when required, unless there is a bona fide dispute about the receiver's right to possession, custody or control of the property. The only exception to this broad turnover principle is if a debt is subject to setoff or recoupment or if continued possession, custody, or control of the receivership property is necessary for the person to maintain a lien against the property. In such cases, the person can retain possession until the court orders adequate protection.

Powers and Duties of Receiver: §78B-21-112

The UUCRERA grants a receiver very broad presumptive powers, unless limited by court order or other applicable state law. These powers include the right to (a) collect, manage, control, conserve and protect the receivership property; (b) operate a business constituting receivership property in the ordinary course; (c) incur debt and pay expenses in the ordinary course of business; (d) bring lawsuits and assert claims; and (e) issue subpoenas for examinations and documents. In addition, the statute specifies certain powers that the receiver may exercise *only with court approval*, such as (a) incurring debt outside the ordinary course of business; (b) making improvements to the property; (c) transferring property outside the ordinary course of business; (d) adopting or rejecting executory contracts made by the owner; (e) paying compensation to himself/herself or to retained professionals; (f) recommending allowance or disallowance of claims; and (g) distributing receivership property. The UUCRERA also sets forth the performance and reporting duties of the receiver. The court may expand, modify or limit all of these powers and duties.

Duties of Owner: §78B-21-113

The statute places duties of cooperation and turnover on owners of receivership property. If the owner is not an "individual," then these duties apply to *each* officer, director, manager, member, partner, trustee, or other person exercising or having the power to exercise control over the affairs of the owner. The owner must assist and cooperate with the receiver, preserve and turnover property, identify and provide access to records and other information, and submit to examination, under subpoena. A knowing failure of *a person* to perform these duties can subject the person to payment of the receiver's resulting actual damages, reasonable attorney's fees and costs, together with possible civil contempt sanctions.

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Automatic Stay; Injunctions: §78B-21-114

Entry of the order of appointment affects a stay, applicable to all persons, of any act to obtain possession of, exercise control over, or enforce a judgment against receivership property. It also stays any act to enforce a lien against receivership property. In appropriate situations, the court can expand the scope of the stay and also grant relief from the stay. For policy reasons, certain actions are excluded from this stay, including actions to foreclose or enforce a mortgage by the person seeking appointment of the receiver, an act to perfect, or maintain perfection, of an interest in receivership property, a criminal proceeding and actions by governmental units to enforce police or regulatory powers, including assessment of taxes. The Court may void an act that violates this stay, suggesting that such violations are not void *ab initio*. The statute also addresses the consequences of a violation of the stay, and allows the court to award actual damages caused by the violation, including reasonable attorney's fees, costs and civil contempt sanctions.

Engagement and Compensation of Professionals: §78B-21-115

The Act authorizes the receiver to engage and pay professionals to assist in the administration of the receivership. A professional is not disqualified from being hired solely because of the person's engagement by, representation of or other relationship with the receiver, a creditor or a party. This is a much less rigorous qualification standard than the "disinterestedness" test typically applied in cases under the Bankruptcy Code. In addition, the statute does not prevent the receiver from serving in the receivership as an attorney, accountant, auctioneer, or broker "when authorized by law." Both receivers and their retained professionals must file itemized statements of their time spent, work performed, billing rates and expenses incurred, and can only be paid upon court approval.

Use, Sale, Lease, License, or Other Transfer of Receivership Property Other than in Ordinary Course: §78B-21-116

With court approval, the UUCRERA permits the receiver to use, sell, lease, license, exchange or otherwise transfer receivership property, other than in the ordinary course of business. Unless the agreement of transfer provides otherwise, the transfer is free and clear of a lien of the person that obtained appointment of the receiver, any subordinate lien, and any rights of redemption, but such a sale is subject to liens that are senior to the lien of the person who obtained the receiver's appointment. Liens extinguished by the receiver's sale attach to proceeds with the same validity, perfection, and priority as they had with respect to the property sold, even if the proceeds are not sufficient to satisfy all obligations secured by the liens. The sale may be conducted as either a public auction or a private sale. Creditors with valid secured claims may credit bid in connection with any proposed sale, but only if the creditor tenders funds sufficient to satisfy, in full, the reasonable expenses of transfer and the obligations secured by any senior liens extinguished by the transfer. The Act also provides a safe harbor for good faith purchasers in case a party objects to the sale but fails to obtain a stay of the sale order.

Executory Contracts and Unexpired Leases: §78B-21-117

With court approval, a receiver may adopt or reject an executory contract of the owner relating to the receivership property. If, under applicable Utah law, the owner could assign the contract, then the receiver also may assign the contract with court approval. Performance of a contract by a receiver prior to adoption is not an implied adoption of the contract, nor does it preclude a subsequent rejection. The UUCRERA specifies the mechanics for adoption, assignment or rejection of executory contracts, and the resulting consequences. For instance, the court may condition the receiver's adoption and continued performance of the contract. Importantly, if the receiver does not request approval to adopt or reject an executory contract

"within a reasonable time after the receiver's appointment," then the receiver is "deemed to have rejected the executory contract." There is no definition of "reasonable time" in the statute. Furthermore, a provision in a contract that requires or permits a forfeiture, modification, or termination of the contract because of the appointment of a receiver or the financial condition of the owner does not affect a receiver's power to adopt the executory contract. The UUCRERA also contains protections for purchasers in possession of real property or real property timeshare interests that are analogous to those contained in the Bankruptcy Code. Finally, the Act limits the receiver's ability to reject the unexpired lease of a tenant, permitting rejection of the lease only in very limited situations.

Immunity of Receiver: §78B-21-118

Consistent with the receiver's status as an officer of the court, the statute provides the receiver with immunity for acts or omissions within the scope of the receiver's appointment. As such, the UUCRERA incorporates the *Barton* doctrine (see, *Barton v. Barbour*, 104 U.S. 126, 129, 26 L.Ed. 672 (1881)) and provides that a receiver cannot be sued personally for an act or omission in administering receivership property, except with the approval of the appointing court.

Claims: §78B-21-120

The UUCRERA requires the receiver to notify "creditors of the owner" of the appointment of the receiver unless the court orders otherwise, and prescribes the content of the notice and the manner in which it must be given. The notice must advise creditors of their right to file a claim and must specify the date by which such claims are to be filed. Unless the court orders otherwise, a claim that is not submitted timely is not entitled to a distribution from the receivership. The UUCRERA specifies the information that must be included with a claim and permits the receiver to recommend disallowance of claims. The statute also authorizes the court to forgo the filing of unsecured claims

where the receivership property is likely to be insufficient to satisfy secured claims against the property.

Receiver's Reports; Discharge: §78B-21-119 & 123

The receiver may file, and, if ordered by the court, must file, interim reports that contain certain specified information. On completion of the receiver's duties, the receiver also must file a final report that, again, contains certain prescribed information. Once the court approves the receiver's final report, and the receiver has distributed all of the receivership property, the receiver is discharged.

Receiver's Fees and Expenses: §78B-21-121

The court may award a receiver from receivership property the reasonable and necessary fees and expenses of performing the duties of the receiver and exercising the powers of the receiver. In addition, the court may order the person that requested the appointment to pay such fees and expenses if the receivership does not produce sufficient funds to pay the same. The court also may order payment of the receiver's fees and expenses from a person whose conduct justified or would have justified the appointment under subsection 106(1)(a) (i.e. a situation involving waste, loss, dissipation, or impairment of receivership property or a voidable transaction).

Removal or Replacement of Receiver; Termination: §78B-21-122

The court may remove a receiver "for cause" and may replace a receiver that dies, resigns or is removed. The statute does not define "cause," but leaves the determination of whether "cause" exists to the courts on a case-by-case basis. Certainly, cause would include the receiver's refusal or failure to carry out duties. If the prior receiver fully and faithfully accounts and turns over property to the successor receiver, then the prior receiver, or his/her estate, is discharged. The court also may discharge a receiver and terminate administration of receivership property if it finds that the appointment was "improvident" or

that the circumstances no longer warrant continuation of the receivership. Moreover, if the court finds that the appointment was sought "wrongfully or in bad faith," the court may assess fees, expenses and actual damages, including reasonable attorney fees and costs, against the person that sought the appointment.

Ancillary Receivership: §78B-21-124

Where a receiver has been appointed by another state, the UUCRERA authorizes the court to appoint that person or its designee as an ancillary receiver for the purpose of obtaining possession, custody and control of receivership property located within Utah. The statute also permits the Utah court to enter any order necessary to effectuate an order of a court in another state appointing or directing a receiver. Once an ancillary receiver is appointed by the Utah court, that receiver has all of the rights, powers and duties of an original receiver appointed under the statute, unless the court orders otherwise.

Receivership in Context of Mortgage Enforcement; Anti-deficiency Rules: §78B-21-125

The UUCRERA makes clear that the appointment of a receiver on request of a mortgagee or assignee of rents, and actions taken by the receiver, do not make the mortgagee or assignee a "mortgagee in possession," do not constitute an election of remedies, do not make the secured obligation unenforceable, and do not constitute an "action" within the meaning of Utah's one-action" rule (see, §78B-6-901). Importantly, where a Utah receiver conducts a sale of receivership property free and clear of a lien, Utah's anti-deficiency rules will apply to any person that held a lien extinguished by the sale to the same extent that those rules would have applied after a foreclosure sale not governed by the UUCRERA. It will be left to the courts to determine if such a receivership sale is more like a judicial foreclosure, where the deficiency is determined by the difference between the debt and the sale price, or by a trust deed sale, where the deficiency is determined by the difference between the debt and the greater of the sale price or the fair market value of the property. This issue,

however, would not involve the receivership court but, instead, would be an issue for a separate court to decide in a separate collection action brought by the creditor against the owner or guarantor. In any event, the sale by the receiver would be free and clear of any rights of redemption (see, subsection 116) and, in this regard, would be more like a trust deed sale under §57-1-19 et seq.

Finality of Receivership Orders: §78B-21-129

Prior to the UUCRERA, there was uncertainty about when an order entered by a court in a receivership proceeding was "final" for purposes of appeal. The statute now eliminates that ambiguity by expressly providing that an order is final for purposes of Rule 54(a), U.R.Civ.P., if it resolves a discrete factual dispute or legal issue, unless the court expressly states otherwise in the order. This section of the UUCRERA is unique to Utah and is not contained in UCRERA.

Relevant Codes, Statutes or Case Law:
Rule 66, URCP, Rule 7, URCP 65, URCP
§78B-21-101 et seq. UCA
Interlake Co. vs. Von Hake, 697 P.2d 238
Shaw vs. Robinson, 537 P.2d 487 (Utah 1975),
Inland Empire Insurance Co. vs. Freed, 239 F.2d 289 (10th Cir. 1956)
Pusey & Jones Co. vs. Hanssen, 261 U.S. 491
Jau-Fei Chen vs. Jau-Hwa Stewart, 100 P.3d 1177 (Utah 2004),

Vermont

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes – Strict Foreclosure or Foreclosure by Judicial Sale
Non-Judicial	Yes
Initial Public Notice	Complaint
Time Frame	90 - 270 Days
Redemption Period	Yes
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Rare
Approximate Time for Appointment	15-30 days
Who or What can act as Receiver	No Restrictions Given
Specific Receiver Requirements	No Restrictions Given
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Will most likely favor in state Receiver

Foreclosure:

I. General Information:

Vermont has three mortgage foreclosure procedures, each of which are available by statute: Strict Foreclosure; Foreclosure by Judicial Sale, and Foreclosure by Nonjudicial Sale.

II. Judicial Foreclosure Basics:

Vermont judicial foreclosures take the form of civil suits in equity in Superior Court. The foreclosing party files an action to foreclose a mortgage in the Civil Division of the Superior Court for the county where the land lies, or, if the land described in the mortgage lies in more than one county, then in one of the counties in which the land lies. The foreclosing party serves a civil summons and complaint on the mortgagor and junior encumbrancers. Any of these defendants may plead facts in defense. All proceedings shall be before the Superior judge alone, and trial shall be without jury. Upon entry of a decree of judicial sale foreclosure, the court shall order that the mortgaged property be sold at a public sale if it is not redeemed within the time period allowed by the court. The public sale shall be conducted on or before six months from the expiration of the last redemption date set forth in the decree unless extended by the court or stayed by a bankruptcy filing. The time and manner of the sale shall be specified in the notice of sale required by statute. There is no post-sale redemption; once approved by the court and not appealed from, the sale is final.

III. Non-Judicial Foreclosure Basics:

Non-judicial foreclosure is available for all properties except for farms and private residences. The mortgagee may, upon breach of mortgage condition, foreclose upon the property without first commencing a foreclosure action or obtaining a foreclosure decree by complying with the terms of the statute. In order for a sale under nonjudicial power to be valid, the conditions of the statute must be strictly complied with. At least 30 days prior to service of a notice of sale, notice of intention to foreclose in a writing complying with this section shall be sent to the mortgagor by registered or certified mail at his or her last known address.

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IV. Guidelines for Power of Sale:

The procedure and forms for non-judicial power-of-sale and judicial power-of-sale foreclosures are detailed in applicable statute.

V. Power of Sale Guidelines as Represented in the Security:

Vermont is a title theory state. This means that a mortgage conveys legal title to the mortgagee at the time the mortgage is granted. In other words, all that the mortgagor holds while the mortgage debt on the property is outstanding is a defeasible equitable interest known as the 'equity of redemption.'

VI. Guidelines for Foreclosure when there is No Power of Sale:

Vermont statutes explicitly provide that even if the mortgage deed lacks a power-of-sale clause, the court in a judicial foreclosure proceeding may direct a sale instead of strict foreclosure.

VII. Notice of Sale and How Notice is Given:

Vermont has a form for the notice of sale that can be altered as circumstances require.

A. Judicial Foreclosure: A copy of the notice of sale shall be mailed by first class mail, postage prepaid, to all parties who appeared in the foreclosure action or to their attorneys of record. The notice of sale shall include the specific date, time, and location of the sale and shall be mailed after the last date of redemption in the decree but no fewer than 30 days before the date of the sale. Notice of sale shall be published once in each of three successive weeks in a newspaper of general circulation in the town where the land lies, the first publication to be no fewer than 21 days before the day of sale.

B. Non-Judicial Foreclosure: The mortgagee shall record the notice of sale in the land records of the town or city where the land lies not less than 60 days prior to the sale. Notice of a sale conducted pursuant to the Nonjudicial Foreclosure

procedures shall be published once in each of three successive weeks, in a newspaper of general circulation in the town where the land lies, the first publication to be not less than 21 days before the day of sale.

VIII. Place and Time for Conducting Foreclosure by Power of Sale:

The sale shall be held at the mortgaged property unless another place for sale is directed by the court. At the sale, the mortgaged property shall be sold to the highest bidder in conformance with the terms of sale set forth in the notice of sale. The public sale may be adjourned one or more times for a total time not exceeding 30 days, without further court order, and without publication or service of a new notice of sale, by announcement of the new sale date to those present at each adjournment or by posting notice of the adjournment in a conspicuous place at the location of the sale. Notice of the new sale date shall also be sent by first class mail, postage prepaid, to the mortgagor at the mortgagor's last known address at least five days before the new sale date.

IX. Procedures Following Sale:

Following the sale, the plaintiff shall file with the court a report on oath of the sale, together with a request for confirmation of the sale, which shall include an accounting of the sale proceeds, and a proposed order confirming the sale. The confirmation order shall be recorded in the land records of the town where the mortgaged property is located and shall transfer title to the mortgaged property to the purchaser upon recording. The plaintiff may request a deficiency judgment in the foreclosure complaint.

X. Attorneys' Fees:

When a mortgage contains an agreement on the part of the mortgagor to pay the mortgage, in the event of foreclosure, the attorney's fees incurred as a result of the default and foreclosure proceedings, and claim is made for such fees in the complaint, the court in which the complaint is brought shall allow such fee as is just.

Relevant Codes, Statutes or Case Law:
Title 12 VSA Sec. 4931-4970.

Receivership:

I. General Information:

As part of its inherent powers, the court has equitable jurisdiction to appoint a Receiver to hold, secure, and maintain property. As described by the Vermont Supreme Court, a Receiver is a ministerial officer appointed by the court to take possession of and preserve the fund or property in litigation. Various statutes provide for the appointment of Receivers by the courts, but none applies specifically to lenders or servicers. The remedy is however clearly available in the secured-lending context.

II. Appointing the Receiver:

A. The Basics:

A court, on its own initiative or upon application of a party to the civil action, may appoint a Receiver. Prudence dictates that the Receiver obtain a clear recitation of all duties, responsibilities, and powers upon appointment. The Receiver should seek court approval of any action outside such clear recitation.

B. Time Frame for Appointment:

If requested in the complaint that commences the action, the answer is due within 20 days of service; the relief may be granted by default after that if no defense has been pleaded. If the relief is requested by later motion, the response time is 15 days. If a party opposes the relief, a hearing will be necessary, adding up to several weeks to the process.

C. Can you go in Ex Parte?

Vermont courts will hear motions *ex parte* in compelling circumstances only (*e.g.*, a rapidly wasting asset). A lender may take control of an abandoned property as mortgagee in possession without court approval, but it takes certain risks and lacks the powers of a court officer in that case.

III. Sales During the Receivership:

There is no procedure specified by rule or statute in Vermont. The Receiver must apply to the Court for permission to sell. However, the Receiver may enter into contracts (presumably including sales contracts) regarding the property, but only with court permission.

IV. Liens Against Receivership Property:

A Receiver takes subject to vested liens.

Existing, perfected liens are undisturbed by receivership. No reported cases deal with post-receivership liens, but Vermont courts generally regard the receiver as standing in the shoes of the legal owner, and therefore subject to that owner's obligations regarding the property.

V. Construction Related to Receivership Property:

The Receiver must apply for and obtain the appointing court's permission to proceed.

VI. Ending the Receivership:

The court has the power to act on its own, but will ordinarily expect a motion by a party. Decision on the motion will be without a hearing if there is no objection.

Relevant Codes, Statutes or Case Law:

Vermont Rule of Civil Procedure 66; *Munty v. Allen*, 71 Vt. 377 (1899); *Underhill v. Rutland RR Co.*, 90 Vt. 462 (1916); *Clifford v. W. Hartford Creamery Co.*, 103 Vt. 229; 153 A. 205 (1931); *Baldwin v. Spear Bros.*, 79 Vt. 43; 64 A. 235 (1906).

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Virginia

Foreclosure Summary

Security Instrument	Trust Deed / Mortgage
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Publication
Time Frame	60 days
Redemption Period	Varies
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Yes
Approximate Time for Appointment	No Restrictions Given
Who or What can act as Receiver	No Restrictions Given
Specific Receiver Requirements	Must post a bond before performing duties
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

While mortgage instruments are allowed in Virginia, the primary means of obtaining a lien against real estate is the deed of trust. A deed of trust conveys legal title to the real estate to a trustee, in trust, to secure the noteholder's indebtedness. The lender, upon default of the loan and the occurrence of any applicable conditions precedent to foreclosure contained in the deed of trust, can utilize non-judicial foreclosure under the deed of trust to instruct the trustee to sell the property.

II. Judicial Foreclosure Basics:

There is no requirement for judicial foreclosure of deeds of trust. Most frequently, judicial involvement in the foreclosure process under the deed of trust is limited to the review and approval of the trustee's account of sale by the commissioner of accounts. Judges also become involved when an owner or other interested party seeks to enjoin a scheduled foreclosure. Judicial foreclosures are used when no power of sale is present in the deed of trust or mortgage.

III. Non-Judicial Foreclosure Basics:

Non-judicial foreclosure of the deed of trust is the common way for a lender to address a default on a loan secured by real estate in Virginia. Prior to the trustee taking possession of the property, the trustee must be informed of the default and must be requested by the trust beneficiary to initiate foreclosure. In many situations, a substitute trustee is appointed to perform the actual foreclosure process. Virginia statute requires that trustees and substitute trustees be residents of the Commonwealth. *See* Va. Code § 55-59(9). Similarly, corporate trustees must be chartered under the laws of the Commonwealth or the laws of the United States and have their principal office within the Commonwealth.

IV. Guidelines for Power of Sale:

Upon default or violation of any covenant in the deed of trust by the borrower, and after receiving foreclosure instructions from the beneficiary of the deed of trust, the trustee may take

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possession and sell the property at auction to satisfy the borrower's debts after expiration of any cure or reinstatement rights provided for by the deed of trust. Such a sale must meet certain minimum notice requirements under Virginia statutory law. In practice, it is rare for a trustee to take possession of the property in connection with the foreclosure process.

V. Power of Sale Guidelines as Represented in the Security:

By statute, deeds of trust are construed to confer upon the trustee the power to sell in the event of default and request by the beneficiary. A trustee has no vested contract right in the enforcement of the deed of trust.

VI. Foreclosure when Instrument Contains No Power of Sale:

If there is no provision for power of sale in the deed of trust, the lienholders may file a bill of complaint with any court with jurisdiction over the subject property to decree a sale of the property, if they can show that such action will promote their interests and that such sale will not violate the interests of other lienholders. All others claiming an interest or lien on the property shall be named and served as defendants to insure that their interests will not be violated.

If the bill of complaint statutory procedure is not followed, and a trustee sells the property or makes any other conveyance, the subject transfer will be deemed valid after a period of thirty years has lapsed if the transfer is properly recorded and there are no adverse claims during that time.

VII. Any Additional Satisfaction Permitted Under Continuing Power of Sale:

Within six months after the foreclosure sale, the trustee is required to make an account of sale to the commissioner of accounts of the circuit court where the instrument was first recorded. On the account of sale, the trustee should indicate any amount remaining due on the indebtedness after the foreclosure sale. The deficiency amount may be recovered through personal judgment against the debtor. The action on the debt can be

brought independent of the foreclosure remedy before the foreclosure is completed.

VII. Place and Terms for Conducting Foreclosure by Power of Sale:

A. Generally:

The place and terms of sale are determined by the terms of the deed of trust.

B. When Instrument is Silent to Place or Terms:

If the deed of trust does not otherwise provide for a place of sale, the trustee may choose from a list of potential locations. The sale may take place on the premises of the property, in front of the circuit court building or at such other place in the city or county where the property is located, or in the corporate limits of any city surrounded by or immediately bordering the county where the property is located. If the land on which the property sits has been annexed, the sale may also take place in the county where the land was formerly located.

As to the terms of sale, the trustee is given broad discretion with respect to deposit requirements imposed upon bidders, whether to recess the sale or postpone the sale (postponement requires a new advertisement, but not a new notice) and whether to sell on cash or credit terms, absent a contrary provision in the deed of trust. The Virginia Code does not provide requirements for time of sale, but it is a generally accepted practice that the sale should occur during normal business hours.

VIII. Notice of Sale and How Notice is Given:

The trustee or the lender shall provide written notice of the foreclosure to six defined parties: the present property owner, any subordinate lienholder holding a note against the property secured by a deed of trust recorded at least 30 days prior to the sale, any assignee of the subordinate lienholder whose assignment was likewise recorded within 30 days prior to the sale, and to the extent that a lien is filed in their favor, any condominium owners' association, any property owners' association, and any proprietary lessees' association. A

condominium owners' association, property owners' association, and proprietary lessees' association must have established their note or lien against the deed of trust 30 days before the proposed sale. The notice must include the time, date, and place of the sale, and also certain documentation regarding the appointment of the trustee or substitute trustee. The notice must be delivered to the owner 14 days prior to the sale by certified or registered mail to the last known address of the person required to pay the instrument.; the other defined parties may receive the notice by ordinary mail at least 14 days prior to the sale. Notice is not required for guarantors or tenants. When written notice is properly issued, it creates a rebuttable presumption that the lienholder has complied with the requirement to provide notice of default contained in the deed of trust.

The trustee or the lender must comply with any specific condition precedents under the deed of trust (e.g., notice and providing an opportunity to cure) prior to the noticing the foreclosure sale in order to acquire the right of acceleration. The failure to properly serve notice will not invalidate a foreclosure sale. Virginia courts have strictly enforced the provisions of the deed of trust

IX. Advertising Requirements:

The trustee shall place an advertisement in a newspaper having general circulation in the city or county where the property is sold, subject to additional statutory provisions. Among other things, the provisions provide that if the deed of trust is silent to number of newspaper advertisements, then the trustee shall advertise once a week for four successive weeks. Even if the deed of trust addresses this issue, advertisements must be published not less than once per week for two weeks, or once a day for three days. The advertisement must be placed in the section of the newspaper where legal notices appear or where the type of property being sold is generally advertised for sale. Like the notices of sale, the advertisements must include the time, date, and place of sale, along with information regarding the property to be sold. If a trustee fails to comply with the

requirements for advertisement, the sale of the property is voidable. *See* Va. Code § 55-59.3

Relevant Codes, Statutes or Case Law:

Va. Code § 64.2-1206 (2012); § 64.2-1308; Va. Code § 55-58.1(2); Va. Code § 55-59(7), (9); Va. Code §§ 55-59.1 to -59.4; Va. Code § 55-61.
Paul K. Campsen et al., Basics of Foreclosure Seminar 43 (Virginia CLE 2006).
Mathews v. PHH Mortg. Corp., 283 Va. 723, 730, 724 S.E.2d 196, 1999 (Va. 2012)
Bayview Loan Servicing, LLC v. Simmons, 275 Va. 114, 121, 654 S.E.2d 898, 901 (Va. 2008)
Pollack v. Allen, 266 Va. 118, 122, 581 S.E.2d 198, 200 (Va. 2003)
Gallant v. Deutsche Bank Nat'l Trust Co., 766 F. Supp. 2d 714 (W.D. Va. 2011)
Squire v. Virginia Housing Development Authority, 287 Va. 507, 758 S.E.2d 55 (Va. 2014)

Receivership:

I. General Information:

Virginia has two types of receivers: general receivers and special receivers. A general receiver, who may be the clerk of court, may be appointed by any circuit court. The duty of a general receiver is "to receive, take charge of and hold all moneys paid under any judgment, order or decree of the court, and also to pay out or dispose of same as the court orders or decrees." A special receiver, on the other hand, is appointed based on the necessity of a particular situation. Generally, receivers are appointed to oversee the liquidation or dissolution of an entity.

II. Appointing the Receiver:

A. The Basics:

A party requesting a receiver should set out in its initial pleadings why the appointment is necessary and proper. The requesting party must show some potential for loss or misappropriation of the property. Courts are directed to use great caution in appointing a receiver and should only do so when there is a strong showing of necessity. In practice, a contractual provision in a loan document providing for the appointment of a receiver in the event of default is generally enforced by courts in Virginia. In some circumstances, federal courts will require a more substantial showing by the requesting party beyond just showing a default under a contract providing for appointment upon default.

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B. Time Frame for Appointment:

In normal, non-emergency situations, the court is required to designate the time and place for a hearing on the receivership application, and must provide enough time for "reasonable notice thereof to be given to the defendant, and to all other parties having a substantial interest, either as owners of or lienors of record and lienors known to the plaintiff, in the subject matter." Failure to disclose fully all material information relating to such inquiry, may be a basis for a finding of contempt of court. *See* Va Code § 8.01-591. Thus, the time period between filing the application and holding a hearing on the application is court driven. It is incumbent on the party requesting a receiver to provide the court with material information relating to parties having a substantial interest in the subject property.

C. Can You Go in Ex Parte?

Ex parte motions for the appointment of receivers will be granted in emergency situations where the appointment is necessary to preserve the property. The emergency appointment will not last longer than 30 days. During those 30 days, notice must be given to all parties having a substantial interest in the subject matter concerning any request to extend the receivership beyond the emergency period. On *ex parte* applications, there is a bond requirement for the applicant to protect and save harmless the owners, lienors and creditors of the subject property.

III. Loans and Advances:

Under Virginia law, a special receiver should first obtain authority from the court to enter into loans or to draw down on loans secured by the subject property.

IV. Sales During the Receivership:

No information provided.

V. Liens Against Receivership Property:

After the appointment of the receiver, all property is sequestered by the court. The receiver, acting on behalf of the court, administers the estate in the best interest and for the protection of all parties in interest.

The appointment of the receiver does not affect vested rights or the order of existing liens.

VI. Owners Associations:

No information provided.

VII. Construction Related to Receivership Property:

No information provided.

VIII. Ending the Receivership:

While there does not appear to be a requirement for a motion to terminate the receivership, the better practice is to make such a motion to clarify the termination of the receivership. Thus, the receivership can end when the receiver's office terminates by necessity, by motion, upon removal by the court, or if the order appointing the receiver is wholly reversed on appeal.

IX. Miscellaneous:

A. Once appointed, the receiver is required to prepare a list of all of the creditors with an interest in the subject property. This list is then used to notify each of the creditors that a receiver has been appointed. A court shall not order the sale of any assets under receivership until all the creditors on this list have been notified by mailing.

B. The receiver must provide a bond and security for the faithful discharge of her duties. This bond requirement may be excused by some judges in state courts. Likewise, there are provisions for the keeping of accounts and confirmation of this accounting by the court or an appointed commissioner in chancery. The receiver must present an accurate copy of all receipts and disbursements to the commissioner in chancery within four months of distributing the receivership's assets, unless the court provides otherwise.

Relevant Codes, Statutes or Case Law:
Va. Code § 8.01-582 (2012), Va. Code § 8.01-588, §§ 8.01-591 to -599, § 8.01-617
C.F. Trust, Inc. v. First Flight LP, 140 F. Supp. 2d 628 (E.D. Va. 2001).
S. W. Rawls, Inc. v. Forrest, 224 Va. 264, 295 S.E.2d 791 (1982).
15 Michie's Jurisprudence of Virginia and West Virginia, Receivers (1998 & Supp. 2007).

Washington

Foreclosure Summary

Security Instrument	Deed of Trust
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Notice of Trustee's Sale
Time Frame	Typically 120-180 days
Redemption Period	8 months for nonagricultural property, if creditor has waived the right to a deficiency; otherwise, 1 year
Deficiency	Yes

Receivership Summary

Ancillary Remedy Necessary	No (RCW 7.60.25(1)(a)
Ex-Parte	No
Approximate Time for Appointment	7-10 days
Who or What can act as Receiver	Individual or Corporation (RCW 7.60.35)
Specific Receiver Requirements	Bond (RCW 7.60.045)
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes (RCW 7.60.35)

Foreclosure:

I. General Information:

Washington is a "lien-theory" state, and, therefore, mortgages and deeds of trust do not convey title or possession to the holder. They instead only create a lien on the property they encumber. Once recorded, they preserve a holder's priority over all other unrecorded and subsequently recorded liens, deeds of trust and mortgages. To this end, these instruments secure the payment of a debt or performance of some other obligation that can be reduced to a money judgment. When a debtor defaults on the obligation secured by one of these instruments, a creditor may seek to enforce the available rights by foreclosure and sale.

II. Judicial Foreclosure Basics:

All foreclosures in Washington are governed by statute. Chapter 61.12 of the Revised Code of Washington provides the primary source of substantive law applicable to judicial foreclosure proceedings.

The remedy of foreclosure is limited to the property mortgaged in the absence of any agreement to the contrary. (RCW 61.12.050.)

A judicial foreclosure action commences with the filing of a complaint in the superior court. Upon filing, a mortgagee may record a *lis pendens* in the county auditor's office where the subject property, or a part of it, is located. (RCW 4.28.320.) Any defendant who defaults forfeits the opportunity to contest the foreclosure action on its merits. Following the entry of a default, the plaintiff mortgagee may move for an order and subsequently a default judgment.

Once a final judgment of foreclosure is entered, the creditor may schedule a sale and proceed to execute. The execution documents are transmitted to the sheriff of the county where the property or a part of it is located, and the sheriff then schedules and conducts an auction sale of the mortgaged property. Following the sale, the sheriff issues to the successful bidder a certificate of sale, which is subject to redemption rights. The successful bidder must then seek judicial confirmation of the

sale. Following confirmation and the expiration of any applicable redemption rights, the sheriff conducting the auction will issue a "Sheriff's Deed" to the successful bidder.

III. Non-Judicial Foreclosure Basics:

RCW Chapter 61.24 provides the primary source of substantive law applicable to "non-judicial" foreclosures of statutory deeds of trust. To obtain priority and to facilitate any foreclosure rights, a deed of trust must be recorded in each county where real property or any portion of it is located. (RCW 6.24.030(5).) The deed of trust must contain a power of sale and state that the property is not used principally for agricultural purposes. (RCW 6.24.030(1) and (2).)

A non-judicial foreclosure is commenced by sending a notice of default to the borrower. (RCW 61.24.030(8).)

IV. Guidelines for Power of Sale:

Judicial foreclosure is the exclusive method of foreclosing upon a straight mortgage. Statutory deeds of trust, containing a power of sale, may be foreclosed either non-judicially through a trustee's sale or, alternatively, through the judicial foreclosure process.

A default by the grantor or the grantor's assignee is a prerequisite to the non-judicial foreclosure process. That default renders the trust deed's power of sale operative. (RCW 61.24.030(3).)

A. Notice of Default:

Following at default, the beneficiary or trustee must prepare and serve a Notice of Default upon the grantor or the grantor's assignee. Once service of the Notice of Default is completed, the grantor or the grantor's assignee has thirty (30) days to cure the default. The Notice of Default must disclose the sums necessary to cure the default.

B. No Concurrent Debt Recovery Actions:

Similar to mortgage law principles, the beneficiary may not maintain a separate action to satisfy any obligation secured by a deed of trust. (RCW 61.24.030(4).) This provision, however, does not apply to any action to enforce other liens or other security interests on commercial property, secured by a deed of trust. Neither does it apply to actions to appoint a receiver.

C. Notice of Sale/Notice of Foreclosure:

If the debtor fails to cure the default within 30 days, then, at least 90 days prior to any scheduled sale, the trustee may record and mail a Notice of Sale. The trustee must include with the notice of sale that is sent to the grantor, a Notice of Foreclosure. (RCW 61.24.040(2).)

D. Cure of Default Prior to Trustee's Sale:

After delivery of the Notice of Trustee's Sale, any eligible person may halt or discontinue the trustee's sale by curing the default up eleven (11) days before the sale. RCW 61.24.090. Persons eligible to cure the default include: (a) the grantor or the grantor's assignee; (b) the beneficiary of any subordinate deed of trust; or (c) the holder of any subordinate lien, mortgage or other recorded encumbrance. This cure requires paying the trustee the entire amount then due, excluding any accelerated portion of the debt, as well as the trustee's actual expenses and attorneys' fees.

E. Stays of Sale Proceedings:

A trustee's sale will automatically be stayed by the U.S. Bankruptcy Court in the event the grantor files bankruptcy. In addition, the Washington Superior Court has authority to stay a trustee's sale in certain circumstances. (RCW 61.24.130; *Plein v. Lackey*, 149 Wash 2d 214, 226, 67 P3d 1061 (2003) (quoting *Cox v. Helenius*, 103 Wash2d 383, 388, 693 P2d 683 (1985)).

F. Purchaser's Interest at the Trustee's Sale:

The successful bidder at the sale must immediately pay the purchase price to the trustee in cash or by certified or cashier's check. The trustee then provides the purchaser a deed, which, while without warranties, recites the pertinent facts pertaining to

the Notice of Trustee's Sale and that the sale was conducted in accord with the statute. The trustee's deed will not cut off the interest of any individual or entity to which the trustee did not provide notice of the sale. The successful bidder is entitled to possession of the property purchased within twenty ("20") days after the trustee's sale and the payment of purchase price. Following the twentieth ("20th") day after a foreclosure sale, the purchaser has the right to evict the grantor and any occupants claiming through him by commencing unlawful detainer proceedings.

G. Distribution of Proceeds from the Trustee's Sale:

Washington's non-judicial foreclosure statutes provide the framework for the distribution of proceeds from the trustee's sale. Following the sale, the proceeds are paid, first, to cover the sale expense, and then to satisfy the obligation secured by the deed of trust. Any remaining funds are paid to the clerk of the superior court for the county where the property is located, together with copies of the notices that the trustee earlier prepared and served on all interested parties. This act is somewhat analogous to an interpleaded action. The trustee serves notice of the deposit upon all interested parties, the deposit is indexed on the records of the court and the trustee receives a discharge from the court. This discharge terminates the trustee's responsibilities for the surplus. Any person or entity claiming an interest in the surplus may then file a noticed motion with evidentiary support for its claim to the surplus.

H. Recission of Trustee's Sale:

Up to 11 days following a trustee's sale, the trustee, beneficiary, or the beneficiary's authorized agent may declare the trustee's sale and deed void for limited reasons: (i) error with the trustee's foreclosure process, (ii) there was an agreement to postpone or discontinue the sale, or (iii) the beneficiary accepted payment that fully reinstated or satisfied the loan. (RCW 61.24.050.)

V. Power of Sale Guidelines as Represented in the Security:

Deeds of trust are a relatively recent creation of law in Washington and have existed in statutory form since 1965. Upon an obligor's default and consistent with statute, a trustee has power to foreclose upon the encumbered real property by a nonjudicial sale.

VI. Guidelines for Foreclosure when there is No Power of Sale:

See section below.

VII. Foreclosure when Instrument Contains No Power of Sale:

Judicial foreclosure actions are subject to the same rules of civil procedure applicable to all other civil lawsuits. Unlike other civil actions, however, a mortgagee as a foreclosure plaintiff cannot concurrently prosecute any other action on the same obligation.

A. Mortgage Default:

A mortgagee may commence a judicial foreclosure action only upon a mortgagor's default in the performance of any condition contained in a mortgage.

B. Action Commencement:

A judicial foreclosure action is commenced by filing an action in the County Superior Court where the land or portion of that land is located. (RCW 61.12.040.)

C. Parties to Action:

The complaint initiating the foreclosure action should name all parties necessary to afford complete relief to the mortgagee.

D. Service of Process:

Following service of process, the named defendants must appear and respond to the complaint within 20 days. (CR 12(a)(1).)

E. Stay of Foreclosure Proceedings:

Any party to a judicial foreclosure action may seek to stay or enjoin the foreclosure proceedings or sale both before and after entry of judgment, and may seek to set aside a foreclosure judgment on the grounds listed in CR 60(a) or (b), or on various equitable or common law grounds, as recognized by CR 60(c).

F. Acceleration:

While RCW § 61.12.130 allows a mortgagor to cure any payment defaults prior to entry of a judgment by paying all past-due installments of principal and interest, together with costs, it does not prevent the enforceability of an acceleration clause. *Knisell v. Brunet*, 60 Wash. 610, 111 P 894 (1910). Hence, if the mortgage obligation has been accelerated as part of the foreclosure action, RCW § 61.12.130 does not permit the mortgagor to cure the payment defaults and stop the foreclosure by paying only the past-due installments.

G. Concurrent Actions and Alternative Remedies:

Pursuant to Washington's single-action rule, foreclosure proceedings are prohibited where a mortgagee is concurrently pursuing any other action for the same debt or matter secured by the mortgage in question. (RCW 61.12.120.)

H. Deficiency Claims:

Deficiency judgments are enforced in the same manner as any other money judgment, after the foreclosure sale. However, that right may be waived if the mortgagee's complaint does not specifically seek a deficiency judgment.

I. Judgment:

In ordering a sale, the court may, "in its discretion, take judicial notice of economic conditions, and after a proper hearing, fix a minimum or upset price to which the mortgaged premises must be bid or sold before confirmation of the sale." (RCW 61.12.060.) The foreclosure judgment should state whether a deficiency will be allowed and define any redemption period, and should also declare whether the property should be sold as a whole or in parcels.

J. Foreclosure Sale - In General:

After a judgment of foreclosure has been entered, the mortgagee must obtain from the court an order of sale, which is valid for a period of sixty (60) days. The order is then delivered to the sheriff, together with whatever fees, bonds or instructions the sheriff may require, and the sheriff then proceeds with scheduling and conducting a foreclosure sale.

K. Post Judgment Payments:

Even after entry of a foreclosure judgment, the mortgagor may satisfy the judgment prior to a court-ordered sale by the paying the judgment amount. This is known as the "equity of redemption." *Fidelity Mutual Savings Bank v. Mark*, 112 Wash2d 47 (1989).

L. Conduct of Sale:

Foreclosure sales are conducted by the sheriff, at public auction occurring during regular business hours, at the front door of the courthouse in the county where the property is located. The sheriff sells the property to the highest bidder. The sheriff is empowered with the discretion to postpone auction sales. The auction may be postponed in one-week increments, where the sheriff deems that there are too few bidders present or for other sufficient reason. With written consent of the plaintiff, now judgment creditor, the sheriff may also postpone the sale from time to time, not to exceed 30-days. (RCW 6.21.050.)

Prior to conducting the sale, the judgment creditor must serve upon the judgment debtor a written notice and must mail a copy of the notice to the judgment debtor's attorney, if any, and the sheriff must post the notice of sale at the property and at the courthouse, and must publish the notice once a week for four weeks. (RCW 6.21.030.)

M. Terms of Sale:

Upon application by the judgment creditor and following a hearing on that application, the court in ordering the sale may set a minimum or upset price to which the mortgaged premises must be bid or sold. Sale terms may additionally be set subsequent to

the sale, where a court has not previously set a minimum or upset price to which the property must be bid or sold before confirmation of sale. (RCW 61.12.060.) If the court's fair value, when applied to the mortgage debt, discharges it, a judgment creditor may not receive a deficiency judgment.

N. Report of Sale:

Following the sale, tender of the purchase price and all applicable fees, the sheriff delivers a certificate of sale to the successful purchaser, with a copy to court clerk. (RCW 6.21.100.) The certificate describes the sale particulars, including the bid price and the property description. The clerk of the court issuing the judgment enters a record of the sale and provides notice of the sale to all parties appearing. At any time after twenty days from the mailing of the notice of filing the sheriff's return, the successful bidder is entitled to an order confirming the sale and commencing the running of the redemption period from the date of the sale, and interested parties then have 20 days within which to file objections to confirmation. Following a hearing on the requested confirmation, if the court determines that no irregularities occurred in connection with the sale, the court will confirm the sale. (RCW 6.21.110(2).)

O. Redemption:

After the sale, Washington law affords eligible persons a limited period of time to redeem the property from the purchaser. Only two groups have redemption rights. Group One consists of the borrower and his, her or its assignee. Group Two consists of "redemptioners," who are creditors who have a legally recognizable interest in the subject property, or their assignees, who hold liens subsequent in priority to that being foreclosed.

During this period, the purchaser or any subsequent redemptioner is entitled to possession. The redemption period is one year, unless the judgment creditor has in the complaint waived any right to a deficiency, in which case the redemption period is eight months. (RCW 6.23.020(1).)

P. Conveyance:

After the applicable redemption period expires, a successful bidder receives a "sheriff's deed." (RCW 6.23.060.) Once the sheriff's deed is delivered and recorded, the judicial foreclosure process is complete.

Q. Satisfaction of Deficiency Judgment:

The successful bid amount or "upset price" (if an "upset price" was established in the judgment), is subtracted from the total judgment, yielding the amount of the deficiency. (RCW 61.12.070.) Once a deficiency is established, the balance due may be satisfied from any property of the judgment debtor. In this regard, satisfaction of a deficiency judgment is similar in all respects to the recovery of any judgment.

R. Disposition of Proceeds of Sale:

Sale proceeds are paid to the judgment creditor on the principal, interest and costs due on the judgment.

S. Surplus Money Proceedings:

If there is any surplus following satisfaction of the foreclosed mortgage debt and the properly adjudicated debt of junior encumbrances, the judgment debtor is entitled to any surplus. (RCW 6.21.110(5)(a).)

VIII. Any Additional Satisfaction Permitted Under Continuing Power of Sale:

A trustee's non-judicial foreclosure satisfies the obligation secured by the deed of trust. No deficiency decree or other judgment may be obtained on that obligation, though in limited circumstances, a deficiency may be pursued against a guarantor of a commercial debt. (RCW 61.24.100.)

IX. Sale by Power of Sale when the Instrument is Silent as to the Place or Terms of Sale:

Under Washington law, the notice of trustee's sale must disclose the location of the sale. The trustee is free to sell the property in gross or in parcels as the trustee may deem the most advantageous. Though the trustee's sale is a non-judicial

foreclosure, it is a public auction sale to the highest bidder. While the trustee may announce the foreclosing creditor's opening bid, the trustee may not bid at the auction.

X. Notice of Sale and How Notice is Given:

See section above.

XI. Place and Time for Conducting Foreclosure by Power of Sale:

The trustee's sale must be conducted at the courthouse door between 9:00 a.m. and 4:00 p.m. on a Friday, unless Friday is a legal holiday, in which case the sale may be held on the next regular business day. (RCW 6.21.050.)

Relevant Codes, Statutes or Case Law:
Chapter 61.12 RCW & RCW § 61.24.040
American Federal Savings and Loan v. McCaffrey, 107 Wash. 2d at 181, 728 P. 2d at 155. Ameresco Independence Funding, Inc. v. SPS Properties, LLC, 129 Wash. App. 532, 119 P. 3d 884 (2005). Beal Bank, SSB v. Sarich, 161 Wash. 2d 544, 167 P. 3d 555 (2007). Cox v. Helenius, 103 Wash. 2d 383, 693 P. 2d 683 (1985), Donovick v. Seattle-First National Bank, 111 Wash. 2d 413, 757 P. 2d 1378 (1988). Koegel v. Prudential Mut. Savings Bank, 51 Wash. App. 108, 752 P. 2d 385 (1988). People's National Bank v. Ostrander 6. Wash. App. 28, 491 P. 2d 1058 (1971). Seattle Medical Center v. Cameo Corporation, 54 Wash. 2d 188, 194-195, 339 P. 2d 93, 97-98 (1959). Steward v. Good, 51 Wash. App. 509, 754 P. 2d 150 (1988); Washington Mutual Savings Bank v. United States, 115 Wash. 2d 52, 58, 793 P. 2d 969, 972, as clarified by 800 P. 2d 1124 (1990).

Receivership:

I. General Information:

Receivership law is a vital part of Washington jurisprudence. In 2004 the Washington legislature repealed all prior state statutes regarding receiverships, and, in their place, enacted a new comprehensive set of receivership statutes to create a more streamlined and cost-effective set of procedures applicable to proceedings in which the property of a person is administered by Washington courts for the benefit of creditors and persons having an interest in that property. (RCW 7.60.005 *et seq.*)

Washington's all-embracing statutory scheme covers the field of receivership topics ranging from, but not limited to, the appointment of receivers, receiver bonds, reports, powers, duties, automatic stays, utility service, financing, personal liability,

receiver's actions, claim allowance and rejection, priorities, property dispositions, interest on claims and receivership terminations.

Under Washington law, the appointment of a receiver is a provisional remedy. Receivers are appointed only upon a finding by the court that the appointment is reasonably necessary and that other available remedies are either not available or inadequate. (RCW 7.60.025(1).) Under the Receivership Act, a receiver may be appointed in various circumstances, including for the purpose of collecting rents and profits and preserving property during the pendency of a judicial or non-judicial foreclosure. (RCW 7.60.025(1)(b).)

II. Appointing the Receiver:

A. The Basics:

As a predicate to the presentation of a valid application for the appointment of a receiver, the applicant must possess an interest in the subject property in dispute. The application may take the form of a noticed motion, or an *ex parte* application with a corresponding application for an order to show cause.

In addition to the written notice, which will be provided to the subject property's owner and all parties to the action, an applicant's moving papers should contain a memorandum of points and authorities, a proposed order and supporting affidavits or declarations setting forth factual matters, including: (1) facts demonstrating the court's jurisdiction over the property; (2) the basis for the moving party's probable right or interest in the subject property; (3) that the subject property is in the possession of an adverse party; and (4) that the subject property or its income-producing potential is in danger of being lost or materially injured or impaired. The moving party's supporting affidavits should also demonstrate that the receiver's appointment is reasonably necessary and that any other remedy is inadequate or not available.

In preparing an appointment application, consideration should be given to whether the retention of professionals such as outside

counsel will be necessary. Court approval is required before a receiver may retain any professionals. If it is known at the outset that legal counsel will be required, for example, the application for appointment of a receiver should state this fact, identify the qualifying professional sought to be retained, identifying the facts pertaining to the proposed retention, including the fees charged by the professional, and request specific authority to retain the professional identified.

Where the request for the appointment of a receiver is to be made in connection with the filing of a lawsuit, the facts supporting the appointment of a receiver should be set forth in the body of the proposed complaint. This document should be concurrently filed with the receiver appointment application. Among the relevant facts to be included in the proposed complaint are the bases for the appointment, whether statutory or contractual. If contractual, then the proposed complaint should also identify the specific contractual right, together with a description of those documents containing that right. If no such contractual right exists, then the complaint should describe those facts demonstrating the applicant's right to the appointment of a receiver. The proposed complaint should also include in the prayer for relief a request for the appointment of a receiver and an articulation of the appropriate powers sought for the receiver, as well as a description of the property over which the receiver is to take charge.

B. Time Frame for Appointment:

A party moving for appointment of a receiver must provide the owner of the property to be subject to the receivership and all other interested parties at least 7 days' notice of any application. (RCW 7.60.025(3).) The 7-day notice period may be shortened or expanded upon good cause shown. (RCW 7.60.25(3), and RCW 7.60.55(2).)

C. Can you go in Ex Parte?

While Washington courts may appoint a receiver on *ex parte* application and without notice where an emergency is shown, such an order is only temporarily valid as an emergency order

until the defendants can be notified to appear and show cause why a receiver should not be appointed. *Libert v. Unfried*, 47 Wash 182 (1907); *State v. Superior Court of Pierce County*, 34 Wash. 123 (1904).

III. Loans and Advances:

Washington receivership law contemplates that receivers may seek two types of financing in relation to the receivership estate. In the ordinary course of business, receivers are authorized to seek without leave of court, unsecured credit and incur unsecured debt to operate the business as an administrative expense of the receiver. (RCW 7.60.140(1).) For indebtedness other than in the ordinary course of business, after notice to all interested persons and a hearing on the matter, the court may allow the receiver to mortgage, pledge, hypothecate or otherwise encumber receivership property for the repayment of any indebtedness that the receiver may incur. (7.60.140(2).)

IV. Sales During the Receivership:

Washington's Receivership Act provides for two types of receivers - a general receiver and a custodial receiver. A general receiver has authority to liquidate the property over which the receiver is given control. A custodial receiver does not have such authority. (RCW 7.60.015.)

V. Liens Against Receivership Property:

Unless ordered otherwise by the court, an order appointing a receiver operates as a stay of, among other things, all action by any creditors to create, perfect or enforce a lien against property of the receivership. (RCW 7.60.110(1)(d).)

VI. Owners Associations:

No information provided.

VII. Construction Related to Receivership Property:

No information provided.

VIII. Ending the Receivership:

The receiver is required to distribute all of the property of the estate and to submit a final report, at which point the receiver may move to be discharged upon notice and a hearing. (RCW 7.60.290(1) and (2).) Following approval of the final report, the court shall discharge the receiver. (RCW 7.60.290(3).) The court's power to discharge the receiver and terminate the court's administration of the property may be terminated upon motion of any party or upon the court's own motion. (RCW 7.60.290(5).)

Relevant Codes, Statutes or Case Law:

Washington Laws, 2004 c. 165 § 1. , Wash. Rev. Code § 7.60.005. RCW 7.60.015 RCW 7.60.025, RCW 7.60.035, RCW 7.60.045, RCW 7.60.055, RCW 7.60.060, RCW 7.60.070, RCW 7.60.080, RCW 7.60.090, RCW 7.60.100, RCW 7.60.110, RCW 7.60.120, RCW 7.60.130, RCW 7.60.140, RCW 7.60.150, RCW 7.60.160, RCW 7.60.170, RCW 7.60.180, RCW 7.60.190, RCW 7.60.200, RCW 7.60.210, RCW 7.60.220, RCW 7.60.230, RCW 7.60.240, RCW 7.60.250, RCW 7.60.260, RCW 7.60.270, RCW 7.60.280, RCW 7.60.290, RCW 7.60.300,

West Virginia

Foreclosure Summary

Security Instrument	Deed of Trust
Judicial	Yes (uncommon)
Non-Judicial	Yes (common)
Initial Public Notice	20 days
Time Frame	30 days
Redemption Period	No
Deficiency	Yes, but no deficiency statute

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	No Restrictions Given
Approximate Time for Appointment	No Restrictions Given
Who or What can act as Receiver	No Restrictions Given
Specific Receiver Requirements	No
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

West Virginia allows for both judicial and non-judicial foreclosure, but non-judicial foreclosure is more common.

II. Judicial Foreclosure Basics:

A judicial foreclosure is initiated by filing a complaint for defaulting on the loan. Before the lender may proceed with foreclosure, the court has to confirm the default and issue an order at which time the property is sold by public auction.

Judicial foreclosure is only used when the underlying loan documents do not include a "Power of Sale" clause, pursuant to which a lender is entitled to pursue non-judicial foreclosure.

III. Non-Judicial Foreclosure Basics:

If the underlying loan documents include a "Power of Sale" clause, the lender is authorized to sell the property, pursuant to an event of default, out of court, through the trustee referenced in the deed of trust or a substitute trustee. A trustee may be substituted with a simple filing with the clerk.

IV. Guidelines for Power of Sale:

Power of sale foreclosure guidelines follow terms of deed of trust.

V. Power of Sale Guidelines as Represented in the Security:

If no terms are prescribed in the deed of trust, the following guidelines apply:

A. A Notice of Sale must be served on the borrower and all lien holders at least 20 days before the sale. The Notice of Sale must also be posted at the courthouse in the county where the property is located, at the property and two other public places in the same county. The notice must contain

1. the date, time and place of the sale;
2. parties to the deed;
3. date the deed was signed and recording information;

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4. property description;
5. terms of the foreclosure sale

B. The Notice of Sale must be advertised in the newspaper once a week for at least four weeks prior to the sale.

C. The sale must take place at the time listed in the notice. Winning bidder is required to pay 1/3 of the bid in cash at the time of the sale, unless the deed of trust specifies otherwise.

D. Bid price must not "shock the conscience." A bid of 80% of the appraised value is probably a safe harbor.

VI. Foreclosure when Instrument Contains No Power of Sale:

If there is no power of sale, then the lender must follow judicial foreclosure procedures.

VII. Any Additional Satisfaction Permitted Under Continuing Power of Sale:

West Virginia permits a lender to recover a deficiency. There is no deficiency judgment statute. The mortgagee needs to commence a civil action and credit the loan balance by the greater of the fair market value of the property at the time of the trustee sale or the highest bid at the sale. Sostaric v. Marshall, 234 W.Va. 449, 766 S.E.2d 396 (2014).

VIII. Notice of Sale and How Notice is Given:

Under West Virginia Code 38-1-4, the Notice of Sale must contain:

A. the date, time and place of the sale;
B. parties to the deed;
C. date the deed was signed and recording information;
D. property description;
E. terms of the foreclosure sale

Notice of sale must be served on the borrower and all lien holders at least 10 days before the sale date by certified mail,

return receipt requested. Notice of sale must also be posted at the courthouse located in the county where the property sits, at the property and at two other public places in the county.

Notice of Sale must also be advertised once a week for at least four weeks prior to the sale.

IV. Place and Time for Conducting Foreclosure by Power of Sale:

Public auction is scheduled by the trustee authorized to conduct the sale.

Relevant Codes, Statutes or Case Law:
West Virginia Code Chapter 38 Section 1 (Trust Deed Liens)

Receivership:

I. General Information:

West Virginia permits the appointment of a real estate Receiver pursuant to West Virginia Code §53-6-1 by a court of equity in a pending case upon a showing that there is a danger of loss or misappropriation of the subject property, including any rents or profits to which Mortgagee may be entitled. The petitioner must show a clear right to the property or a lien on such property, i.e. must be secured.

II. Appointing the Receiver:

A. The Basics:

A Mortgagee must file an application for appointment of Receiver with the court. West Virginia requires that the borrower/mortgagor receive notice of the application.

The application must contain a specific prayer that a receiver be appointed.

B. Time Frame for Appointment:

Typically 30 days.

C. Can you go in Ex Parte?

No.

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III. Loans and Advances:

Yes, with court approval.

IV. Sales During the Receivership:

The court may appoint a receiver and direct the sale of the property.

V. Liens Against Receivership Property:

Not applicable.

VI. Owners Associations:

Not applicable.

VII. Construction Related to Receivership Property:

Yes, with court approval.

VIII. Ending the Receivership:

A Mortgagee is required to obtain an order terminating the receivership.

Relevant Codes, Statutes or Case Law:

West Virginia Code Section 53-6-1

A receiver may be appointed to protect a party's interest "if there is danger of loss or damage to property, or of the dissipation of rents and profits." State ex rel. Shenandoah Val. Nat. Bank v. Hiett, 127 W. Va. 381, 32 S.E.2d 869, 873 (1945). The trial court has broad discretion to appoint a receiver where, from the pleadings and the proof, or from the pleadings along with the absence of proof, there appears a likelihood of loss affecting the property. Ward v. Ward, 119 W. Va. 527, 194 S.E. 769, 770 (1937).

Wisconsin

Foreclosure Summary

Security Instrument	Mortgage/ Trust Deed
Judicial	Yes
Non-Judicial	No
Initial Public Notice	Complaint
Time Frame	Varies (90 days - 12 months)
Redemption Period	Yes, but it would be considered a Cure Period in other states
Deficiency	Yes, unless waived

Receivership Summary

Ancillary Remedy Necessary	Yes
Ex-Parte	Court's Discretion
Approximate Time for Appointment	10-21 days unless expedited
Who or What can act as Receiver	Company or Individual
Specific Receiver Requirements	Generally required to post Bond but this can be waived
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure:

I. General Information:

A non-judicial, power of sale, foreclosure action has been statutorily abolished. Judicial foreclosure is available with respect to either monetary or non-monetary defaults.

II. Judicial Foreclosure Basics:

A judicial foreclosure action is commenced in a Circuit Court for the County in which the real property is located. Prior to commencing suit, a title report or foreclosure title policy is obtained to determine what junior liens, if any, are filed against the property so that those lien claimants may be named as parties in order to clear title. Most foreclosures proceed on a default basis following expiration of a 20-day period for answering the complaint. Default foreclosure hearings may be held "on affidavit", i.e., without formal hearing, depending on each Circuit Court's practices. Where a commercial property is generating rents (e.g., apartment buildings, shopping centers), a Receiver may be appointed to collect the rents and manage the property.

Upon entry of foreclosure judgment, a statutory redemption period begins to run, the length of which is determined by the type of property. A foreclosure sale cannot be held until the redemption period has expired.

For example, commercial properties have a 6-month redemption period, while single-family residential properties have a 12-month redemption period. In either case, if the parties expressly so elect in the mortgage, the mortgage holder may shorten the redemption period by one half if it waives any deficiency claim against the borrower. That election is made by an allegation in the complaint, and is quite common, especially where the borrower/mortgagor has no other assets. Waiver of a deficiency against the borrower does not affect the liability of a guarantee of payment.

There is a two month redemption period if the mortgage holder can demonstrate that the property has been "abandoned" within

the meaning of the statute. Note that Wisconsin foreclosure procedure differs from that in some other states where the redemption period begins to run after the sale is held.

A Notice of Foreclosure Sale must be published in a local newspaper for three consecutive weeks and the publication may commence within two months prior to the expiration of the redemption period. The notice of foreclosure sale is also posted in public places, locally and on any county or town website by the county Sheriff.

A foreclosure sale is conducted by a Sheriff's Deputy and the mortgage holder is usually permitted to enter a bid by mail. If a deficiency is waived, the mortgage holder frequently bids the full amount owing. A third party bidder is required to deposit 10% of the bid in cash at the sale. The foreclosing creditor is typically the only bidder at the foreclosure sale and may credit bid some or all of the amount owing.

Transfer of title is by Sheriff's Deed following confirmation of the foreclosure sale by the Court, which typically occurs ten days to two weeks after sale, and upon notice to the parties. In addition to confirming the sale, the confirmation order may award a deficiency judgment, if that claim is reserved, and approve a Receiver's Report and discharge the Receiver.

The Court may confirm a foreclosure sale if it determines that the bid was for "fair value." This value is determined usually with reference to appraisals (if available), tax assessment information, or realtor estimates of value, or a combination. The standard is not "fair market value" since the Court considers that the property is being liquidated in a forced sale where prices are usually depressed from what the fair market value might otherwise be. As a rule of thumb, bids within 70% of a relatively current "fair market" appraisal will be confirmed. If a third party is a successful bidder, it is required to pay the balance of the amount bid within 10 days of confirmation of sale, failing which, the deposit is forfeited and another sale is scheduled following with new publication and posting of the Notice.

If the Court refuses to confirm the sale, it has the options of requiring a new sale, or setting an amount that it determines to be "fair value" which would be credited against the loan secured by the mortgage.

III. Non-Judicial Foreclosure Basics:

Wisconsin does not allow for non-judicial foreclosures.

Receivership:

I. General Information:

Receivers may be appointed under a variety of circumstances and under several different sections of the Wisconsin Statutes. A "Supplementary Receiver" may be appointed in connection with enforcing remedies supplementary to execution. Unlike the § 813.16 Receiver and the Chapter 128 Receiver, a § 816.04 Receiver may be appointed by a judicial court commissioner rather than a judge.

The § 813.16 Receiver is typically appointed where there is an interest in property and the property or its rents and profits are in danger of being lost or materially impaired (e.g., in a foreclosure context).

Other grounds include an appointment by or after a judgment to carry it into effect or to dispose of property according to the judgment, or when a corporation has been dissolved or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights.

A Chap. 128 Receiver may be appointed involuntarily, in a proceeding commenced under Chapter 128, Wis. Stats. (entitled "Creditors' Actions"). Grounds for appointment include when an execution against a judgment debtor is returned unsatisfied in whole or in part, or when a corporation has been dissolved or is insolvent or is in imminent danger of insolvency, or has forfeited its corporate rights.

II. Appointing the Receiver:

A. The Basics:

A Receiver can only be appointed upon motion. A motion for appointment of a Receiver may be sought on an expedited basis and there is no specific outside deadline for having a Receiver appointed. A motion for appointment of a Receiver is typically filed immediately following the filing of the complaint.

B. Time Frame for Appointment:

The time period between filing a motion for appointment of a Receiver and obtaining an Order, generally depends on the calendar of the judge to whom the case is assigned. If the motion is to be heard on less than seven days' notice, evidence must be presented to the Court, usually in affidavit form, justifying expedited treatment (e.g., the property is in immediate danger of loss or other dissipation). In the absence of a showing of urgency, a hearing may typically be held within ten days to three weeks of filing.

C. Can you go in Ex Parte?

There is no express prohibition against the *ex parte* appointment of a Receiver, however most courts will require some type of notice to the opposing parties, even where a motion is to be heard on an expedited basis.

III. Loans and Advances:

No statutes or rules govern loans or advances, and the Order of Appointment will govern the receiver's authority to obtain loans or to issue advances.

IV. Sales During the Receivership:

A Chapter 128 Receiver must get permission from the Court approving sales of property. A § 813.16 Receiver must obtain similar permission. In virtually all types of receivership in Wisconsin, the Receiver must apply to the court and obtain authorization to sell property.

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V. Liens Against Receivership Property:

Liens are dealt with based on priority irrespective of whether a receivership is in place. A Receiver is subject to prior liens. A Chapter 128 Receiver has the power to avoid liens as preferential transfers.

VI. Owners Associations:

This issue has not been dealt with in any reportable fashion and there are no statutes relating to the issue.

VII. Construction Related to Receivership Property:

A Receiver would have to get permission from the court to complete construction, usually in the order appointing the Receiver.

VIII. Ending the Receivership:

A Receiver can be discharged only upon motion and hearing, unless by stipulation of opposing parties, following submission of the Receiver's final account.

Relevant Codes, Statutes or Case Law:
Chapter 846 Wis. Stats. § 128.08, Wis. Stats; § 813.16, Wis. Stats; § 816.04, Wis. Stats.

Walworth Bank v. Abbey Springs Ass'n, 368 Wis. 2d 72, 878 N.W.2d 170 (2016)
Bank Mutual v. S.S. Boyer Constr., 326 Wis. 2d 521, 785 N.W.2d 782 (2010)
American Medical Services Inc. v. Mutual Federal Savings & Loan Assn., 52 Wis. 2d 198, 188 N.W.2d 529 (1971); Community National Bank v. Medical Benefit Administration, 242 Wis. 2d 626, 626 N.W.2d 340, (Ct. App. 2001)
Chapter 128 Wis. Stats; Northridge Bank v. Community Eye Care Center, 91 Wis. 2d 298, 282 N.W.2d 632, (Ct. App. 1979); Wisconsin Brick and Block Corp v. Vogel, 54 Wis. 2d 321, 195 N.W.2d 664 (1972)

Wyoming

Foreclosure Summary

Security Instrument	Mortgage
Judicial	Yes
Non-Judicial	Yes
Initial Public Notice	Complaint/Publication
Time Frame (non-judicial)	180 days
Debtor's Redemption Period	3 months or 12 months depending on property size and location
Deficiency	Yes

Receivership Summary

Ex-Parte	No
Approximate Time from for Appointment	30-60 days
Who or What can act as Receiver	Individual or Company
Specific Receiver Requirements	Must swear an oath, post bond, and publish notice of appointment
Is there any approval list for Receivers	No
Out of State Receivers Allowed	Yes

Foreclosure Section:

I. General Information:

Wyoming is a lien theory state. Title to the property is deemed to remain with the mortgagor. The mortgagee only has a lien on the property and has no interest in the title. The mortgagee only has a right to foreclose in the event of a default. Wyoming's lien theory is a creation of the Wyoming Supreme Court.

A mortgage must be recorded in the office of the registrar of deeds (county clerk) in the county where the property is located [WYO. STAT. ANN. § 34-1-118]. Wyoming is a race-notice state. The effect is that a properly recorded mortgage is constructive notice to any and all third parties, and such mortgage takes precedence over any subsequent purchaser, mortgagee, or lien claimant [WYO. STAT. ANN. § 34-1-121]. An unrecorded mortgage is void as to a subsequent good-faith purchaser who gives valuable consideration, whose conveyance shall be first duly recorded [WYO. STAT. ANN. § 34-1-120]. The burden of proving good faith and valuable consideration is on the purchaser of the property [*Soppe v. Breed*, 504 P.2d 1077 (Wyo. 1973)].

It is a prerequisite to foreclosure that when a mortgage has been assigned to a third party, that foreclosing third party must have a recorded assignment [WYO. STAT. ANN. § 34-4-103]. It is important to note that the recording of the assignment of a mortgage, shall not in itself, be deemed notice of such assignment to the mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them or either of them to the mortgagee [WYO. STAT. ANN. § 34-1-128].

If the mortgaged premises consist of distinct tracts or lots, the foreclosing mortgagee may offer for sale separately the distinct tracts or lots as a whole, or the foreclosing mortgagee may offer for sale separately sufficient tracts or lots necessary to satisfy the amount due on the mortgage on the date of the notice of sale [WYO. STAT. ANN. § 34-4-107].

A judicial or nonjudicial foreclosure sale may be rescinded at any time after the sale, but before the sheriff's deed has been recorded. If the purchaser at the foreclosure sale was the foreclosing mortgagee, then the foreclosing mortgagee may rescind the sale for any reason by executing and recording a notice of foreclosure sale rescission in the office of the county clerk of the county where the real estate is located. Similarly, if the purchaser at the foreclosure sale was not the foreclosing mortgagee, then the foreclosing mortgagee and the certificate holder (the party holding the certificate of sale) may agree to rescind the foreclosure sale for any reason. The foreclosing mortgagee must refund to the certificate holder either an amount agreed upon, or the foreclosure sale bid amount, plus ten (10%) per annum. A notice of rescission, signed by the foreclosing mortgagee and the certificate holder, must be recorded in the office of the county clerk of the county where the real estate is located. Should the purchaser at the foreclosure sale be a party other than the foreclosing mortgagee, and the certificate holder does not agree to rescind the sale, the foreclosing mortgagee may still rescind the foreclosure sale if the foreclosure sale did not comply with the applicable federal or state law. In such an instance, a refund of the certificate holder's bid amount, plus interest, is the certificate holder's only remedy notwithstanding any other provision of law. Upon the recording of a notice of foreclosure sale rescission, the following occurs: (1) the mortgage and all rights thereunder, as well as all junior liens are revived as if no foreclosure sale had taken place; (2) the certificate of sale is rendered null and void as if the foreclosure sale had not taken place; and (3) the mortgagor's indebtedness to the foreclosing mortgagee is revived as of the date of the foreclosure sale, as if no foreclosure sale had taken place, or as otherwise agreed to by the mortgagor and mortgagee [WYO. STAT. ANN. § 1-18-115].

II. Judicial Foreclosure Basics:

Judicial foreclosure Judicial foreclosure is an in rem proceeding; proper venue is in the county where the land is situated [WYO.

STAT. ANN. § 1-5-101]. Any person with an interest in the land, which is junior or subject to the mortgage, is a necessary party defendant. A party who acquires an interest during the course of the proceedings is not a necessary party. If a junior lien holder is not made a party to the foreclosure, the junior lien holder can foreclose on the property himself as if the foreclosure had never taken place [Patel v. Khan, 970 P.2d 836 (Wyo. 1998)]. A foreclosure will not affect a senior interest, and the purchaser will take subject to such senior interest.

The typical form of judgment in Wyoming gives a judgment to the mortgagee for the entire amount of the debt, and then orders that the property securing the debt be sold, with the proceeds of the sale applied in satisfaction of the debt. A judicial foreclosure results in a public auction conducted by the sheriff. Notice of the time and place of the sale, the names of the plaintiff and defendant, and a description of the property must be advertised in a newspaper of general circulation in a county where the property is located for four consecutive weeks before the sale [WYO. STAT. ANN. § 1-18-101]. The property is sold at a public auction to the highest bidder; however, the mortgagee may bid at the sale and is often the only bidder present because the mortgagee can credit bid up to the value of the debt without having to pay any money. The purchaser, at the foreclosure sale, receives a certificate of purchase, which is executed by the sheriff conducting the sale, stating the amount of the bid and that the purchaser is entitled to a sheriff's deed at the end of the period of redemption, unless the property is redeemed [WYO. STAT. ANN. § 1-18-102]. This certificate of purchase is to be recorded.

The purchase price at the foreclosure sale establishes the redemption price and also determines the deficiency. If the foreclosure sale is properly conducted, the purchaser at the sale takes title free and clear of all junior interests joined in the foreclosure action and of unrecorded conveyances or mortgages. If the property sells for less than the amount of the judgment, there is a deficiency judgment for the difference, which is the personal obligation of the mortgagor.

III. Non-Judicial Foreclosure Basics/Power of Sale Guidelines:

The following are prerequisites for a non-judicial foreclosure:

- **(a)** The mortgage must contain a power of sale provision [WYO. STAT. ANN. § 34-4-102(a)];
- **(b)** The mortgage must have been recorded [WYO. STAT. ANN. § 34-4-103(a)(iii)];
- **(c)** There must have been a default [WYO. STAT. ANN. § 34-4-103(a)(i)];
- **(d)** No suit or proceeding has been instituted at law to recover the debt then remaining secured by such mortgage, or any part thereof, or if any suit or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered therein has been returned unsatisfied in whole or in part [WYO. STAT. ANN. § 34-4-103(a)(ii)]; and
- **(e)** That written notice of intent to foreclose the mortgage by advertisement and sale has been served upon the record owner and the person in possession of the mortgaged premises, if different than the record owner, and the person in possession at least 10 days before commencement of publication of notice of sale. Proof of compliance with this requirement shall be by affidavit [WYO. STAT. ANN. § 34-4-103(a)(iv)].

In Wyoming, the purpose of the advertisement and sale foreclosure is to avoid the expense and delay of a judicial proceeding. Unless the mortgage provides otherwise, advertisement and sale foreclosures must be conducted in accordance with the statutory procedures. Written notice of intent to foreclose by advertisement and sale must be served by

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certified mail, return receipt requested, and mailed at least 10 days before commencement of publication of notice of sale [WYO. STAT. ANN. § 34-4-103(a)(iv)]. The notice of intent must be mailed to the last known address of the record owner and the party in possession of the property, if different than the record owner. Strict compliance is required. Thereafter, a notice of sale must be published for four consecutive weeks in a newspaper of general circulation in the county where the property is located [WYO. STAT. ANN. § 34-4-104]. The statute specifies the form and contents of the notice [WYO. STAT. ANN. § 34-4-105]. The sheriff, or a person appointed for that purpose, conducts the sale [WYO. STAT. ANN. § 34-4-106]. The property is sold at a public auction to the highest bidder; however, the mortgagee may bid at the sale and is often the only bidder present because the mortgagee can credit bid up to the value of the debt without having to pay any money. The purchaser, at the foreclosure sale, receives a certificate of purchase, which is executed by the sheriff conducting the sale, stating the amount of the bid and that the purchaser is entitled to a sheriff's deed at the end of the period of redemption, unless the property is redeemed [WYO. STAT. ANN. § 1-18-102]. This certificate of purchase is to be recorded.

The purchase price at the foreclosure sale establishes the redemption price and also determines the deficiency. If the foreclosure sale is properly conducted, the purchaser at the sale takes title free and clear of all junior interests joined in the foreclosure action and of unrecorded conveyances or mortgages. If the property sells for less than the amount of the judgment, there is a deficiency judgment for the difference, which is the personal obligation of the mortgagor.

A defective sale may be set aside by the mortgagor, and the mortgagor is not required to redeem, although a bona fide purchaser from the foreclosure purchaser generally takes title free of any defects in the sale. If the property sells for less than the debt, the mortgagee may seek a judgment against the mortgagor for the deficiency, even if the mortgage does not

provide for a deficiency judgment [See Fitch v. Buffalo Fed. Sav. and Loan Ass'n, 751 P.2d 1309 (Wyo. 1988)].

IV. Right of Redemption After a Foreclusre Sale:

A mortgagor has a statutory right to redeem the property after the mortgage has been foreclosed upon and the property has been sold at a foreclosure sale. The certificate of purchase, which is presented to the successful bidder at the foreclosure sale, is only a lien against the property [First Southwestern Fin. Serv. v. Laird, 882 P.2d 1211 (Wyo. 1994)]. Actual legal title to the property still remains with the mortgagor until the statutory redemption period has expired. Wyoming classifies property as either non-agricultural or agricultural real estate in terms of redemption. Agricultural real estate includes any parcel of land in excess of 80 acres lying outside the boundaries of an incorporated city, town or subdivision [WYO. STAT. ANN. § 1-18-103(c)]. Non-agricultural real estate may be redeemed within three months after the date of the sale [WYO. STAT. ANN. § 1-18-103(a)]. Agricultural real estate may be redeemed within 12 months after the date of the sale [WYO. STAT. ANN. § 1-18-103(b)].

The amount to be paid to exercise the right of statutory redemption is based upon the price paid at the foreclosure sale. The mortgagor must pay either an amount agreed upon by the purchaser and the redemptioner, or the purchase price plus ten percent (10%) interest, plus the amount of any taxes, assessments, or liens paid by the purchaser [WYO. STAT. ANN. § 1-18-103(a)]. In redeeming non-agricultural real estate, the mortgagor is entitled to possession, rents, and profits for the 3-month period during which he may redeem [WYO. STAT. ANN. § 1-18-104(e)]. For agricultural real estate, the mortgagor is entitled to possession, rents, and profits for the 12-month period during which he may redeem [Wyo. Stat. Ann. § 1-18-104(e)].

If the mortgagor does not redeem, junior parties, including judgment creditors and any grantee or mortgagee of the real estate or any person holding a lien on the property, may redeem

within 30 days after the expiration of the mortgagor's redemption period [WYO. STAT. ANN. § 1-18-104(a)]. The redemptioner must pay to the purchaser or to the officer conducting the sale, either an amount agreed upon by the purchaser and the redemptioner, or the amount bid with interest at ten percent (10%) per annum from the date of sale, and the amount of any assessments or taxes and the amount due on any prior lien which the purchaser may have paid after the purchase, with interest. If the purchaser also has a lien prior to that of the redemptioner, the redemptioner shall also pay the amount of the lien with interest [WYO. STAT. ANN. § 1-18-104(b)].

If the mortgagor redeems, junior liens are revived because redemption renders the foreclosure sale null and void [Newman v. American Nat'l Bank, 780 P.2d 336 (Wyo. 1989)]. A mortgage given to secure the redemption money has priority over any junior liens that might be revived. There is a split of authority as to whether redemption cancels the right to a deficiency judgment against the mortgagor; however, a judgment lien for any deficiency may attach to the property.

V. No Power of Sale Foreclosure Guidelines:

Same as judicial foreclosure procedures described above.

VI. Foreclosure when Instrument Contains No Power of Sale:

If the mortgage does not contain a power of sale provision, the mortgagee must foreclose by means of judicial foreclosure as described above.

VII. Sale Under Power where Instrument Silent as to Place or Terms of Sale:

Foreclosure sales are conducted in the county where the real property is located. WYO. STAT. ANN. § 34-4-106 requires that the sale be conducted at a public venue, between the hours of 10:00 a.m. and 5:00 p.m. at the front door of the courthouse, or the place of holding the district court of the county within the county in which the real property to be sold is located, and shall be made by the sheriff or deputy sheriff of the county, to the

highest bidder. The sale must be conducted in accordance with Wyoming's statutory guidelines described above.

VIII. Notice of Sale and How Notice is Given:

Generally, Written notice of intent to foreclose by advertisement and sale must be served by certified mail, return receipt requested, and mailed at least 10 days before commencement of publication of notice of sale [WYO. STAT. ANN. § 34-4-103(a)(iv)]. The notice of intent must be mailed to the last known address of the record owner and the party in possession of the property, if different than the record owner. Strict compliance is required. A notice of sale is also mailed to the mortgagor and all holders of recorded mortgages and liens subordinate to the mortgage being foreclosed which appear of record at least 25 days before the scheduled foreclosure sale. The notice of sale must be published for four consecutive weeks in a newspaper of general circulation in the county where the property is located [WYO. STAT. ANN. § 34-4-104]. The statute specifies the form and contents of the notice [WYO. STAT. ANN. § 34-4-105].

IX. Place and Time for Conducting Foreclosure by Power of Sale:

Generally, foreclosure sales take place at the front door of the courthouse, or the place of holding the district court of the county within the county in which the premises to be sold, or some part of them, are situated, and is conducted between the hours of 10:00 am and 5:00 pm.

Relevant Codes, Statutes or Case Law:
Generally, Wyo. Stat. Ann. §§ 1-18-101 et seq. and 34-4-101 et seq. contain Wyoming's foreclosure and redemption statutes.

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Receivership Section:

I. General Information:

A receiver may be appointed by the district court in the following actions or cases:

(a) By a vendor to vacate a fraudulent purchase of property;

(b) By a creditor to subject any property or fund to his claim;

(c) By a partner or other person jointly owning or interested in any property or fund whose right to or interest in the property or fund or the proceeds thereof is probably and where it is shown that the property or fund is in danger of being lost, removed or materially injured;

(d) By a mortgagee for the foreclosure of his mortgage and sale of mortgaged property where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that a condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt;

(e) After judgment to carry the judgment into effect;

(f) After judgment to dispose of the property according to the judgment or preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the property in satisfaction of the judgment;

(g) When a corporation has been dissolved or is insolvent or in imminent danger of insolvency or has forfeited its corporate rights; and

(h) In all other cases where receivers have been appointed by courts of equity.

[WYO. STAT. ANN. § 1-33-101].

II. Appointment Process:

A. The Basics:

A receiver is appointed by a district court, generally after a petition or application is made to the court. The petition or application is usually made in the form of a motion. As a general rule, a receiver should not be appointed until after notice is provided to the defendant or any other interested party [See O'Donnell v. First Nat'l Bank, 9 Wyo. 408 (Wyo. 1908)].

B. Time Frame for Appointment:

This will largely depend on the docket of the court and whether the motion is contested or uncontested. Generally, uncontested motions to appoint a receiver are granted within 30-60 days of filing the motion.

C. Specific Requirements for a Receiver:

Generally speaking, the receiver cannot be an interested party in the action or proceeding, except where consent of the parties is given [WYO. STAT. ANN. § 1-33-102]. Before the receiver enters upon his duties, the receiver must be sworn to perform faithfully and give surety approved by the court, or by the clerk upon order of the court, in such sum as the court shall direct not to exceed double the amount of any property involved, conditioned that he will faithfully discharge the duties of receiver and obey the orders of the court [WYO. STAT. ANN. § 1-33-103]. In applicable circumstances, a receiver is required to publish notice of his appointment as a receiver for three weeks in a newspaper of the county of appointment, stating the date of the appointment and requiring all persons having claims against the person, company, corporation or partnership for which the receiver is appointed to exhibit their claims to the receiver within four months from the date of first publication [WYO. STAT. ANN. § 1-33-108]

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D. Can you go in Ex Parte?

No.

III. Order Appointing Receiver:

Items generally included in the order are the legal description of the property, the reason a receiver is being appointed, the name and contact information of the receiver, the time frame that the receivership will be in effect (if known), compensation to be paid to the receiver, a requirement that the receiver post bond in accordance with Wyoming Statutes, a requirement that the receiver comply with the notice requirements and other requirements set forth in Wyoming's receivership statutes, and a list of items, tasks, and powers that the receiver is authorized to do or utilize.

Any person having a claim against the person, company, property, corporation or partnership for which the receiver is appointed must exhibit his or her claim to the receiver within four months from the date of the first publication of the notice of appointment of receiver, and if the claims are not made within that time frame, they are forever barred from participation in the assets of the receivership. If a properly filed claim is rejected by the receiver, or if allowed by the receiver and rejected by the court, the holder of the claim must bring suit against the receiver within four months after the date upon which he is given notice of the rejection, otherwise the claim is forever barred.

IV. Additional Instructions and Orders:

Receiverships are somewhat uncommon in the State of Wyoming, and the case law and statutes on receiverships are sparse. Because of this, petitioners may need to educate the court about receiverships in their pleadings.

V. Loans and Advances:

There are no rules or statutes that govern loans or advances in the context of a receivership; however, WYO. STAT. ANN. § 1-33-104 provides that a "receiver under control of the court, may bring and defend actions in his own name as receiver, take and

keep possession of the property, receive rents, collect, compound for and compromise demands, make transfers and generally do acts respecting the property as the court may authorize." Generally, a court order governs whether a receiver is able to make loans or advances.

VI. Sales During the Receivership:

This issue has not been addressed in Wyoming; however, a receiver would most likely be required to obtain court authorization prior to completing any construction.

Generally, a court order is required for a sale of receivership property [*See* WYO. STAT. ANN. § 1-17-414].

Property may also be sold when permitted by Court order [*See* WYO. STAT. ANN. § 1-17-414].

VII. Liens Against Receivership Property:

A. The Wyoming Supreme Court has previously held that "[t]he receiver, by his appointment, succeeded only to the title of the judgment debtor and as to property encumbered [sic] by liens he has only such rights as the judgment debtor had at the time of the appointment" [*James S. Jackson Co. v. Meyer*, 677 P.2d 835, 838 (Wyo. 1984) (citations omitted)].

B. There is very little guidance in Wyoming on this issue. Wyoming has one statute that may provide some direction for lien issues when a receiver is appointed. WYO. STAT. ANN. § 1-17-414 states:

> If it appears that the judgment debtor has an interest in real estate in the county in which proceedings are had, as mortgagor, mortgagee or otherwise, and his interest can be ascertained as between

> himself and any person holding the legal estate or having a lien or interest therein, without controversy, the receiver may be ordered to sell and convey the real estate, or the interest of the debtor. The sale shall be conducted as provided for the sale of real estate upon execution, and before execution of the deed, the proceedings of sale shall be approved by the court in which the judgment was rendered or the transcript filed.

The Wyoming Supreme Court has held that a lien holder may not disturb the receivership to foreclose on its lien without first obtaining permission from the court.

> It is stated in 53 C. J. 111-112 that the rule against interference with the receiver's possession applies even though a claimant's lien is paramount to the right of the receiver. In 53 C. J. 131, 132, the general rule is stated that when property has passed into the hands of a receiver, it is not subject to execution. Cases are cited from about twenty different jurisdictions. All the authorities, without exception, seem to be agreed that no holder of a lien, paramount or otherwise, can, without the court's authority, disturb the receiver's possession. . . . The proper remedy, as stated by High on

> Receivers, (2nd Ed.) Sec. 141, 'for a judgment creditor, who desires to question the receiver's right to the property, is to apply to the court appointing him to have the property released from the receiver's custody, in order that he may proceed against it under judgment.' [*Tibbals v. Graham*, 50 Wyo. 277, 298-299 (Wyo. 1936)].

VIII. Owners Associations:

This issue has not been addressed in Wyoming.

IX. Construction Related to Receivership Property:

This issue has not been addressed in Wyoming; however, a receiver would most likely be required to obtain court authorization prior to completing any construction.

X. Ending the Receivership:

Wyoming Rule of Civil Procedure 66 provides that an action wherein a receiver has been appointed shall not be dismissed except by order of the court. Accordingly, a court order is needed to end the receivership.

Relevant Codes, Statutes or Case Law:

Receiverships are governed by WYO. STAT. ANN. §§ 1-33-101 to 1-33-110 and Wyoming Rule of Civil Procedure 66. Some of the Wyoming cases that have dealt with receivers include: O'Donnell v. First Nat'l Bank, 9 Wyo. 408, 94 P. 337 (Wyo. 1901); Barber v. Barber, 349 P.2d 198 (Wyo. 1960); Barrett v. Green River & Rock Springs Livestock Co., 28 Wyo. 379, 205 P. 742 (Wyo. 1922); State ex. Rel Avenius v. Tidball, 35 Wyo. 496, 252 P. 499 (Wyo. 1927); Grieve v. Huber, 38 Wyo. 223, 266 P. 128 (Wyo. 1928); Anderson v. Riddle, 10 Wyo. 277, 68 P. 829 (Wyo. 1902); State Bd. Of Law Exmrs. v. Goppert, 66 Wyo. 117, 205 P.2d 124 (Wyo. 1949); Stockmen's Nat'l Bank v. Calloway Shops, 41 Wyo. 232, 285 P. 146 (Wyo. 1930); Krist v. Aetna Cas. & Sur., 667 P.2d 665 (Wyo. 1983).

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UCC And Related Issues In Enforcing Defaulted Loans Secured By Real And Personal Property

1. Why should a CRE lender care about the UCC?

Most commercial real estate (CRE) loans are secured in part by personal property, both tangible and intangible. Consensual liens on personal property (also called security interests) are generally governed by Article 9 of the Uniform Commercial Code (UCC). A secured lender who ignores Article 9 is probably leaving money on the table by failing to pursue assets that might improve its loan recovery or by failing to use remedies that might speed its loan resolution.

2. Does Article 9 of the UCC apply to all consensual liens on personal property?

No. Although Article 9 of the UCC applies to many such liens, Article 9 specifically excludes certain liens from its coverage. Chief among these excluded liens are assignments of leases and rents. Whether a real property owner's interest in leases and rents is treated as real property or as personal property may vary from state to state. In California, for example, a real property owner's interest in leases and rents is treated as personal property. No matter how such interests are classified, however, enforcement of an assignment of leases and rents will generally be governed by law other than the UCC.

3. Does Article 9 of the UCC cover any transactions that might surprise a secured lender?

Yes: note sales. Although Article 9 has historically applied mainly to security interests intended to secure an obligation, since July 1, 2001 (in most states), Article 9 has also covered sales of promissory notes (whether or not the promissory notes qualify as "negotiable instruments" under Article 3 of the UCC). Although this change in the law might seem a bit strange, it has proved to be good news for secured lenders:

A. First, Article 9 provides that the sale of a promissory note automatically carries with it all related liens

(*e.g.*, mortgages and deeds of trust) and all related supporting obligations (*e.g.*, guaranties and letters of credit). This rule is particularly useful to a lender who bought a promissory note in a "lightly documented" transaction (*i.e.*, a transaction in which the note was indorsed by the prior lender to the current lender but no assignment of loan documents was executed).

B. Second, Article 9 provides the buyer in a "lightly documented" note sale who wishes to enforce a mortgage or deed of trust no judicially with a special procedure that enables the buyer to become, in effect, the beneficiary of record.

4. Must a lender whose loan is secured by both real and personal property foreclose on the personal property separately from the real property collateral?

No. Article 9 of the UCC generally permits a secured lender (a) to conduct a "unified sale" of both the real property and the personal property under the real property rules or (b) to proceed separately as to the personal property under the Article 9 rules without prejudicing the secured lender's rights with respect to the real property under the real property rules. In California, Article 9 is even more flexible: the secured lender may proceed as to some or all of the personal property under the Article 9 rules and, together with the real property, some or all of the personal property under the real property rules.

5. Must a lender's security interests in personal property collateral be perfected before the lender can foreclose on or otherwise enforce those security interests?

No. None of a secured party's post-default rights and remedies under Article 9 of the UCC depends on whether the secured party's security interests are perfected. That said, it is generally advisable for a secured party (such as a secured lender) to perfect all of its personal property security interests and to ascertain the relative priority of its personal property security interests vis-à-vis other claimants before foreclosing on or otherwise enforcing

its personal property security interests. If the secured party fails to do so, it runs the risk that another claimant may be able to assert a prior claim to the proceeds of the secured party's foreclosure sale or other enforcement action.

6. Have there been any recent changes in the law that might affect whether a secured party's personal property security interests are perfected?

Yes. Pursuant to the so-called 2010 amendments that in most states became effective on July 1, 2013, the debtor name rules for financing statements filed pursuant to Article 9 of the UCC were significantly altered. These rules apply not only to initial financing statements filed on or after the applicable effective date, but also to continuation statements filed on or after the applicable effective date. Failure to comply with the new debtor names rules could result in a financing statement (including one that was continued) being deemed "seriously misleading," resulting in the financing statement being ineffective to perfect the secured party's security interest in the collateral covered by the financing statement.

The new debtor names rules are particularly important for the following types of debtors: (1) registered organizations (*e.g.*, corporations, limited partnerships and limited liability companies); (2) trusts and trustees; (3) individuals; and (4) to a lesser extent, non-registered organizations (*e.g.*, general partnerships). Briefly, the new rules are as follows:

Registered organizations: For a registered organization, the name to use is the name that is stated to be the registered organization's name on the "public organic record" (*e.g.*, a corporation's articles of incorporation or a limited partnership's certificate of limited partnership) most recently filed with or issued or enacted by the registered organization's jurisdiction of organization which purports to state, amend, or restate the registered organization's name.

Trusts and trustees: Here, there are three basic rules: (1) If the trust is a ***registered organization*** (*e.g.*, a Delaware statutory trust), the debtor name rules for registered organizations apply. (2) If the trust is ***not a registered organization*** and the organic record of the trust (*i.e.*, the trust agreement or other governing

instrument) ***specifies a name*** for the trust, then (a) the financing statement must provide, as the name of the debtor, the name specified in the organic record of the trust and (b) in a separate part of the financing statement, the financing statement must indicate that the collateral is held in a trust. (3) If the trust is ***not a registered organization*** and the organic record of the trust ***does not specify a name*** for the trust, then (a) the financing statement must provide, as the name of the debtor, the name of the settlor or testator and (b) in a separate part of the financing statement, the financing statement must (i) provide additional information sufficient to distinguish the trust from other trusts having one or more of the same settlors or the same testator and (ii) indicate that the collateral is held in a trust, unless the additional information so indicates. ***Note***: under these rules, if a financing statement simply provides the trustee's name as the name of the debtor, the financing statement is highly likely to be "seriously misleading" and, therefore, ineffective.

Individuals: In any given state where a financing statement is to be filed, the individual debtor name rules vary depending on whether the state selected "Alternative A" or "Alternative B" of the 2010 amendments.

Alternative A. If the debtor is an individual to whom the state has issued a driver's license that has not expired, the financing statement must provide the name of the individual which is indicated on the driver's license (or, if applicable, a state identification card). If the foregoing does not apply, the financing statement must provide either (i) the individual name of the debtor or (ii) the surname and first personal name of the debtor. In some states, a non-driver identification card may substitute for a driver's license for this purpose.

Alternative B. The financing statement must provide, as the debtor's name, one of the following: (i) the individual name of the debtor; (ii) the surname and first personal name of the debtor; or (iii) the name of the individual which is indicated on a driver's license (or, if applicable, a non-driver identification card) that the state has issued to the individual and which has not expired.

Non-registered organizations (excluding trusts): If the debtor has a name, the financing statement must provide the organizational name of the debtor. If the debtor does not have a

name, the financing statement must provide the names of the partners, members, associates, or other persons comprising the debtor, ***in a manner that each name provided would be sufficient if the person named were the debtor***.

7. How does a lender enforce its rights in a borrower's deposit account that is subject to a deposit account control agreement among the lender, the borrower and the bank?

Assuming that the deposit account control agreement is properly drafted, enforcement is generally a two-step process. First, the lender should send the bank a "notice of exclusive control" or similar instruction to cut off the borrower's access to the funds in the deposit account and to ensure that the bank will no longer comply with any instructions regarding the deposit account that the bank may receive from the borrower. Second, the lender should direct the bank to transfer some or all of the funds in the deposit account to an account designated by the lender. Note: under Article 9 of the UCC, once the funds in the deposit account are transferred to the lender's account, such funds must be applied to the secured obligation (*i.e.*, the borrower's outstanding indebtedness).

8. In many secured loan transactions, the lender holds borrower funds in a deposit account established in the lender's name. How does the lender enforce its rights in such a deposit account?

Assuming that the borrower has no access to the deposit account (*i.e.*, no ability to withdraw or transfer funds from the deposit account), enforcement is even easier. There is no need for the first step described in the answer to Question 5 above: the lender already has exclusive control. All that is necessary is for the lender to transfer the funds in the deposit account to the lender's account. As before, once the funds in the deposit account are transferred to the lender's account, such funds must be applied to the secured obligation.

9. Do all bank accounts constitute deposit accounts under Article 9 of the UCC?

No. Some bank accounts (particularly those in CMBS deals where funds must be invested in "permitted investments") constitute "securities accounts" rather than "deposit accounts" under Article 9 of the UCC. Different rules apply to security interests in securities accounts, not only to the creation and perfection of such security interests but also to the enforcement of such security interests. For more information on how to deal with that type of collateral, consult a UCC expert.

10. If some of the contracts that are part of the collateral package for a secured loan have anti-assignment clauses, are the lender's liens on these contracts invalid?

No, not necessarily. Article 9 of the UCC has special rules that may, in some cases, wholly or partially override contractual anti-assignment clauses. For example, franchise agreements often have anti-assignment provisions that purport to make a collateral assignment or other transfer of the franchisee's rights without the franchisor's consent a default entitling the franchisor to terminate the franchise agreement. If a franchisee collaterally assigns its rights under a franchise agreement to a lender as security for a loan, Article 9 provides that the collateral assignment does not constitute a default and that the lender's security interest is valid. While Article 9 limits the lender's ability to enforce its security interest in the franchise agreement against the franchisor, the lender still benefits significantly from these special rules. If the franchisee's rights under the franchise agreement are later sold to a third party (whether pursuant to a section 363(f) sale in bankruptcy or as part of a consensual sale outside of bankruptcy), the lender's security interest will attach to the sale proceeds and will be fully enforceable at that point.

11. If a lender with a lien on the borrower's real property also has a security interest in the equity interests in the borrower, should the lender enforce its loan to the borrower by pursuing a UCC sale of the equity interests?

As a general rule, no (unless proper waivers have been obtained). In most cases, a UCC sale of equity interests is structured as a public sale so that the lender can participate in the sale. In part because the lender has the right to credit bid its debt, the winning bidder in a UCC sale of equity interests will almost invariably be the lender. The problem is this: a full or partial credit bid may result in the sponsor party who pledged the equity interests having a reimbursement claim against the borrower for the amount of the bid. In addition, a full credit bid may result in the sponsor party being subrogated to (*i.e.*, acquiring by operation of law) all of the lender's rights against the borrower under the lender's loan and security documents. In the latter scenario, the lender and the sponsor party would effectively switch positions, with the lender becoming the owner of the equity interests and the sponsor party acquiring a first lien against the borrower's real and personal property. Bottom line: before proceeding under these circumstances, consult with an experienced finance attorney who is knowledgeable not only about enforcing liens on real and personal property but also about dealing with suretyship rights and defenses.

Common Foreclosure Terms

Accelerate
an option given to lenders through an “acceleration” clause in the mortgage or deed of trust requiring the borrower to pay the entire balance of the loan all at once if their loan is in default.

Affidavit
A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public. A great deal of evidence is submitted by affidavit, esp. in pretrial matters such as summary-judgment motions.

Appraisal
The determination of what constitutes a fair price; valuation; estimation of worth.

Appreciation
An increase in an asset's value, usu. because of inflation.

Assignment
The transfer of rights or property.

Bid
A buyer's offer to pay a specified price for something that may or may not be for sale.

Certificate of Sale
A document given to the winning bidder at a foreclosure sale stating their rights to the property once the borrower’s redemption period has expired.

Clear Title
A title free from any encumbrances, burdens, or other limitations.

Credit Bid
A bid on behalf of the lender at a foreclosure sale. The bid amount must be less than or equal to the balance of the loan in default.

Decree
A court's final judgment.

Deed
A written instrument by which land is conveyed.

Deed-in-lieu of Foreclosure
A deed by which a borrower conveys fee-simple title to a lender in satisfaction of a mortgage debt and as a substitute for foreclosure.
Deed of Trust
Deed conveying title to real property to a trustee as security until the grantor repays a loan. This type of deed resembles a mortgage.
Default
A mortgage of deed of trust is said to be in default when the borrower fails to make the payments as agreed to in the original promissory note.
Deficiency Judgment
A judgment against a debtor for the unpaid balance of the debt if a foreclosure sale or a sale of repossessed personal property fails to yield the full amount of the debt due.
Equitable Title
A title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title.
Fair Market Value
The price a property would sell for on the open market.
Foreclosure
A legal proceeding to terminate a mortgagor's interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property.
Free & Clear
Unencumbered by any liens; marketable.
Judicial Foreclose
A costly and time-consuming foreclosure method by which the mortgaged property is sold through a court proceeding requiring many standard legal steps such as the filing of a complaint, service of process, notice, and a hearing. • Judicial foreclosure is available in all jurisdictions and is the exclusive or most common method of foreclosure in at least 20 states.
Lien
A legal right or interest that a creditor has in another's property, lasting usu. until a debt or duty that it secures is satisfied.

Legal Description
A formal description of real property, including a description of any part subject to an easement or reservation, complete enough that a particular piece of land can be located and identified. The description can be made by reference to a government survey, metes and bounds, or lot numbers of a recorded plat.

Lender
A person or entity from which something (esp. money) is borrowed.

Lis Pendens
A notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome.

Mortgage
A conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms.

Non-Judicial Foreclosure
A foreclosure process by which, according to the mortgage instrument and a state statute, the mortgaged property is sold at a nonjudicial public sale by a public official, the mortgagee, or a trustee, without the stringent notice requirements, procedural burdens, or delays of a judicial foreclosure A foreclosure method that does not require court involvement.

Notary
A person authorized by a state to administer oaths, certify documents, attest to the authenticity of signatures, and perform official acts in commercial matters, such as protesting negotiable instruments.

Notice of Sale
A notice giving specific information about the loan in default and the proceedings about to take place. This notice must be recorded with the county where property is located and advertised as stated in the security document or as dictated by state law.

Personal Property
Any movable or intangible thing that is subject to ownership and not classified as real property.

Posting
To publish, announce or advertise by physically attaching a notice to an object.

Postponement
To put off to a later time.

Right of Redemption
A borrower's right to reacquire a property lost due to a foreclosure.

Request for Notice
A recorded document requiring a trustee send a copy of a Notice of Default or Notice of Sale concerning a specific deed trust in foreclosure to the person who filed the document.

Subject to
The purchase of a property with an existing lien against the title without assuming any personal liability for the liens payment.

Title
The instrument that is evidence of a person's right in real.

Trustee
A person appointed by the U.S. Trustee or elected by creditors or appointed by a judge to administer the bankruptcy estate during a bankruptcy case.

Trustee sale
An auction of real property conducted by a trustee. Also known as a Sheriff's Sale.

Upset Bid
A bid in a judicial sale made for more than the purchaser's bid so that the sale will be set aside.

Writ
A court's written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing some specified act.

Common Receivership Terms

Affidavit
A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public.

Ancillary Jurisdiction
A court's jurisdiction to adjudicate claims and proceedings related to a claim that is properly before the court.

Bankruptcy
A statutory procedure by which a (usually insolvent) debtor obtains financial relief and undergoes a judicially supervised reorganization or liquidation of the debtor's assets for the benefit of creditors; a case under the Bankruptcy Code.

Bond
A written promise to pay money or do some act if certain circumstances occur or a certain time elapses; a promise that is defeasible upon a condition subsequent; esp., an instrument under seal by which (1) a public officer undertakes to pay a sum of money if he or she does not faithfully discharge the responsibilities of office, or (2) a surety undertakes that if the public officer does not do so, the surety will be liable in a penal sum.

Complaint
The initial pleading that starts a civil action and states the basis for the court's jurisdiction, the basis for the plaintiff's claim, and the demand for relief.

Ex Parte
Done or made at the instance and for the benefit of one party only, and without “regular” notice to, or argument by, any person adversely interested; of or relating to court action taken by one party without notice to the other, usually for temporary or emergency relief.

Federal Jurisdiction
The exercise of federal-court authority over a matter, rather than a state court.

Foreclosure
A legal proceeding to terminate a borrower's interest in property, instituted by a lender either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property.

Franchise Agreement
The contract between a franchisor and franchisee (example: hotel or restaurant) establishing the terms and conditions of the franchise relationship. State and federal laws regulate franchise agreements.

Jurisdiction
A court's power to decide a case or issue a decree; state or federal.

Liability
The quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.

Receiver
A "disinterested" third part appointed by a court as its agent to take possession of property and assets to protect them during an existing legal action. A "rents and profits" Receiver takes possession and control of only specific real property and/or personal property specifically pledged as security for a loan.
A "general assets" or "equity" receiver may be taking control of an entire company or other legal entity if that entity itself is obligated on the loan.

Receiver's Certificate
An instrument issued by a receiver as evidence that the holder is entitled to receive payment from funds controlled by the bankruptcy court.

Receivership Estate
The totality of the interests that the receiver is appointed to take custody and control of; whether certain specific real or personal property or all assets owned by the defendant in a legal action.

Receivership Sale
A sale conducted by the Receiver under the authority of the "Order Appointing Receiver" or other court authority, often prior to a foreclosure, which avoids the lender/plaintiff ever being the owner of the property. Receivers are also used to collect on a judgment already granted to a plaintiff in a prior legal action.

Remedy
The means of enforcing a right or preventing or redressing a wrong; a legal remedy in a court of law, or an equitable remedy in a court of equity.
Secured Creditor
A creditor who has the right, upon the debtor's default, to proceed against collateral and apply it to the payment of the debt.
Security
Collateral given or pledged to guarantee the fulfillment of an obligation; esp., the assurance that a creditor will be repaid any money or credit extended to a debtor.
Subject Matter Jurisdiction
Jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things. Jurisdiction may lie in state or federal court.
Unsecured Creditor
A creditor who, upon giving credit, takes no rights against specific property of the debtor.

About our Authors

Intro

Bill Hoffman is CEO of Trigild - a leading fiduciary, hospitality, and commercial real estate services firm – that he founded in 1976. He has handled over 800 Receivership and Bankruptcy Trustee appointments for over 2,500 real estate and business assets throughout North America and the Caribbean. Recent appointments include an ATM sale-leaseback Ponzi scheme for the U.S Securities and Exchange Commission, a food processing plant, a tenants-in-common syndication company, and hundreds of hotels, office, retail, shopping centers, residential projects, restaurants, golf courses, and a variety of businesses.

Hoffman is an attorney, admitted to both California and New York Bar Associations, a licensed real estate broker and former Adjunct Professor at San Diego State University. He was also an active participant in the American Bar Association's Uniform Law Committee that wrote the "Uniform Commercial Real Estate Receivership Act" currently before many state legislative bodies for approval. He is a frequent lecturer at conferences, and authored the "Trigild Deskbook" – a state-by-state guide to receivership and bankruptcy laws.

Hoffman is also co-founder of the Trigild Lender Conferences, the bi-annual preeminent symposiums for professionals who work with non-performing commercial loans. He has written over one hundred articles for numerous legal, finance, hospitality, real estate, business, and general publications. He is often interviewed on subjects including commercial real estate, hotels, receivership and bankruptcy for various media, including *The Wall Street Journal*, *National Real Estate Investor*, the *Los Angeles Times*, *Bloomberg News*, *Real Estate Forum*, *The New York Times*, *GlobeSt.com*, *Newsday*, *and a variety of business and trade journals.*

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General Principles

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Tom is a member of the Uniform Law Commission and a Fellow of the American College of Commercial Finance Lawyers. He received his A.B. from Brown University in 1981 and his J.D. from the University of North Carolina School of Law in 1984. He is admitted to practice in Massachusetts and Rhode Island.

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Alabama

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He has a wide background with vast experience in commercial loan restructurings and workouts; health care, hospitality and other project-based financing matters. He also handles commercial bankruptcy cases for creditors.

Eric has substantial experience in maximizing value for creditors through loan sales and collateral recovery, including commercial foreclosure, receivership sales and the subsequent disposition of recovered assets (including REO sale transactions and auctions). A fellow in the American College of Mortgage Attorneys, Eric serves on the board of directors of the Business Council of Alabama (BCA) and is the president of the Turnaround Management Association – Alabama Chapter. He is also

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Alaska

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Joseph J. Perkins represents mining companies, oil and gas companies, Native corporations, and financial institutions in connection with their transactions, properties, and projects. He has worked in some capacity on every major natural resources project in Alaska, on many major transactions, and hundreds of smaller transactions. In early 2007, Joe was a Visiting Professor of Law at the University of Wyoming College of Law, where he taught Oil and Gas Law. He also has authored or co-authored

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Mr. Pitcher advises institutional lenders and special servicers on workouts and restructurings, and also represents investors in the purchase of distressed assets. He regularly advises clients on the acquisition, financing, and sale of commercial properties and in the negotiation and drafting of commercial and retail leases, guaranties, and related occupancy agreements for both landlord and tenant parties.

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Jim Cochran is a partner with O'Connor Cochran LLP, a real estate and finance law firm based in Los Angeles, California. Jim has extensive experience advising clients in workouts and restructurings involving complex collateral packages and multiple jurisdictions. He routinely represents secured lenders, distressed debt investors, special servicers and other clients in connection with secured loan restructurings (including consolidations), structured asset dispositions, collateral "take backs," note sales and similar matters as well as lien enforcement proceedings (including judicial and nonjudicial foreclosures of retail, office, hotel and other properties and UCC sales of limited liability company and partnership interests). Jim also advises lenders and investors in a wide variety of sophisticated commercial real estate financings, including mortgage loan transactions (both recourse and non-recourse) and mezzanine loan transactions. In addition, Jim has particular expertise in loan portfolio reviews, secured financings, enforcement actions and other matters involving Article 9 (Secured Transactions) of the Uniform Commercial Code. Jim is a frequent speaker and author on the topics in his areas of expertise. Formerly a co-chair of the Uniform Commercial Code Committee of the California State Bar's Business Law Section and a member of the Section's Executive Committee, Jim recently served as a member of the Board of Governors of the Financial Lawyers Conference. He is currently a member of the Opinions Committee of the California State Bar's Business Law Section.

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Colorado

Lino Lipinsky de Orlov is a litigation partner in the Denver office of McKenna Long & Aldridge LLP, an international law firm. His practice emphasizes representation of clients in real estate, trade secrets, creditor's rights, employment, and contract cases. Among his notable matters, he represented the defendant in one of the largest age discrimination cases filed in the District of Colorado, a national financial services corporation in multi-million dollar trade secrets litigation, and a Fortune 500 retailer in complex real estate cases. In addition to handling state and federal litigation, Mr. Lipinsky counsels clients and writes on legal issues relating to technology. He is a member of the firm's Cybersecurity Practice Group and the E-Discovery Committee of the United States District Court for the District of Colorado. Among his honors, Mr. Lipinsky was selected by his peers to be included in *The Best Lawyers in America, 19th edition*, for his work in commercial litigation. In addition, he has been recognized as a "Colorado Super Lawyer" by the publishers of Law and Politics and a "Legal Luminary" by the American Constitution Society. Mr. Lipinsky is President of the Faculty of Federal Advocates, a member of the Public Affairs Council of the Denver Metro Chamber of Commerce, and a co-founder of the Colorado Chapter of the American Constitution Society. He received his A.B. degree, *magna cum laude*, from Brown University and his J.D. degree from New York University School of Law, where he was a member of the *New York University Law Review*. He is a member of the Colorado, District of Columbia, and New York bars.

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Mr. Jaffe is a frequent author and lecturer on various bankruptcy subjects. Since 2003, he has authored or co-authored the article covering recent case developments under section 547 of the Bankruptcy Code (preferences) for *Norton's Annual Survey of Bankruptcy Law*. He also has published feature articles in *Law 360* and authored the chapter on Delaware state court receiverships in the treatise *Strategic Alternatives For and Against Distressed Businesses*.

He has lectured on bankruptcy topics and authored materials for the American Conference of Bankruptcy Judge's annual meeting, the American Bankruptcy Institute's Southeast Regional Conference, the American Bankruptcy Institute's Construction Law Subcommittee and the Pennsylvania Bar Institute. He has been a regular author and lecturer for continuing legal education provider, The Knowledge Group – lecturing on various issues of interest to creditors and parties in bankruptcy cases. He also has prepared extensive bankruptcy materials for the Eastern District of Pennsylvania Bankruptcy Conference. Mr. Jaffe is a bench member of the Delaware Bankruptcy Inn of Court, for which he has appeared as a panelist and authored materials.

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Hawaii

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Mr. Rogers practices in the areas of commercial litigation, lender liability, real estate and land use, title insurance and escrow, environmental and cultural resources, collections and

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Mr. Rogers was the first Legal Fellow in a joint program between the Hawai`i Department of the Attorney General and Department of Land and Natural Resources, administratively prosecuting Hawaii's first coral damage cases. He is also the proud recipient of a 2012 Outstanding Pro Bono Attorney Award, and maintains a preeminent rating from Martindale-Hubbell, and top Real Estate Litigation attorney ranking from Best Lawyers in America.

Before joining AHFI, Blaine clerked for the Honorable David Alan Ezra, Chief Judge Emeritus of the United States District Court for the District of Hawaii. He received his J.D. from the University of Hawai`i William S. Richardson School of Law (magna cum laude), and his B.A. from UCLA.

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Kristin L. Holland is a partner at Alston Hunt Floyd & Ing and litigates commercial, real estate, civil rights, class action and intellectual property matters. She develops efficient and intelligent strategies to win cases and resolve disputes for her clients. Her clients have included numerous private and public corporations, media companies, lenders, real estate investment trusts (REITs), and a variety of rights holders, from social media websites to film studios to clothing retailers.

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Louise K.Y. Ing is a founding shareholder and director of Alston Hunt Floyd & Ing, in affiliation with Dentons. She uses her problem-solving skills and deep relationships in the Hawai`i community to help businesses and nonprofits resolve their disputes, prevent future ones and get back to business. Her commercial litigation and dispute resolution practice covers business transactions, leases, employment, real estate, creditors' rights and bankruptcy law, proprietary information, non-

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Her awards and recognitions include 2017 Benchmark Litigation Star; Best Lawyers in America's® 2015 Hawai'i Lawyer of the Year for both Bankruptcy Litigation and Bet-the-Company Litigation; Benchmark Litigation Top 250 Women in Litigation; Best Lawyers in America® in the categories of Commercial Litigation, Bet–the-Company Litigation, Bankruptcy Litigation, Labor and Employment Litigation, and Real Estate Litigation; Martindale-Hubbell AV rating; Super Lawyers; the Patsy T. Mink PAC award for her legislative advocacy work on women's health issues; and leadership awards from Hawaii Women Lawyers, Hawaii State Bar Association, the YWCA of O`ahu, Girl Scouts of Hawaii, and Pacific Business News (Career Achievement Award 2016).

Louise has served as past President of the Hawaii State Bar Association, Hawaii State Bar Foundation and Hawaii Women's Legal Foundation. Her board service in the community has covered both non-profits (the University of Hawai`i Foundation and Child & Family Service, among others) and Hawai`i-based businesses such as Island Holdings and American Savings Bank (former director).

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Zack's main focus is advising clients on resolving distressed and non-performing commercial loans. He counsels clients in out-of-court workouts and restructurings, foreclosures, receiverships, bankruptcy, and the management and disposition of REO property. He has substantial experience with many kinds of workout and restructuring transactions, including modifications, forbearance agreements, discounted payoff agreements, deed-in-lieu agreements, and loan sale agreements.

Zack also regularly represents court-appointed receivers. He advises on all aspects of their duties, including reporting, management, leasing, vendor contracts, staffing, and disposition of receivership assets. He has represented receivers of multi-family rental properties, retail centers, office buildings, hotels, and superregional shopping malls, among other assets. Zack has also counseled acquirers of assets out of receivership.

Zack is admitted to practice law in Ohio, Indiana, Kentucky, and Michigan. Beyond that, he has counseled clients on workout and restructuring transactions all over the United States.

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Louisiana

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Maine

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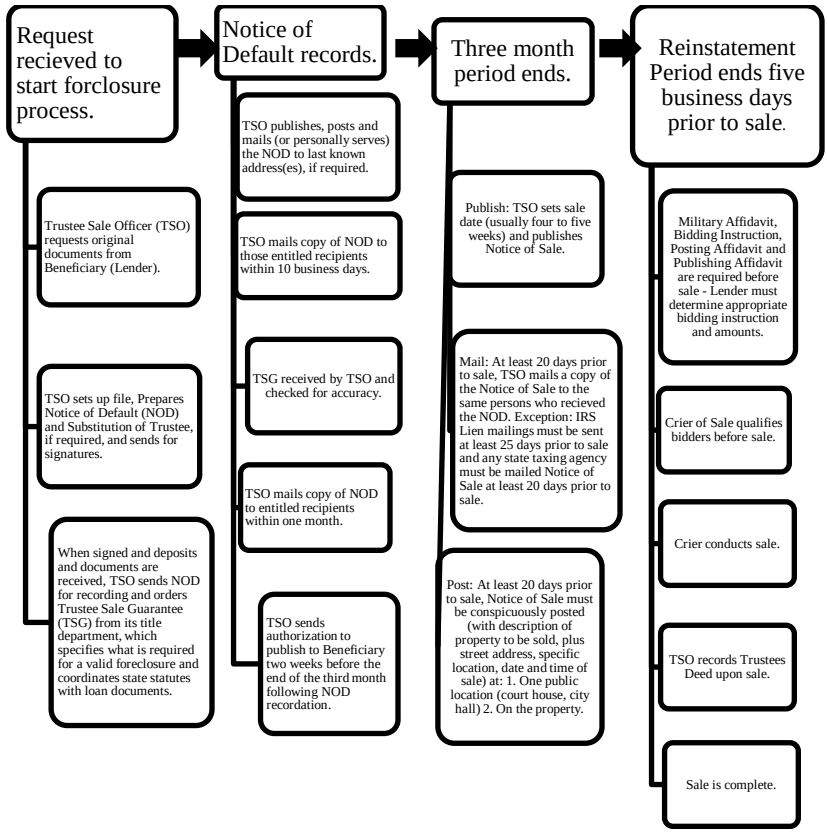
Buchalter

California Non-Judicial Foreclosure Flow Chart



Items may occur in tandem

*This flow chart which was prepared by the law firm of Buchalter, is not intended to provide specific legal advice or to establish an attorney-client relationship. Consult an appropriate professional for advice about your particular situation.

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