

PRESENTATION

## Remedial Action in Seven Southeastern States - Louisiana

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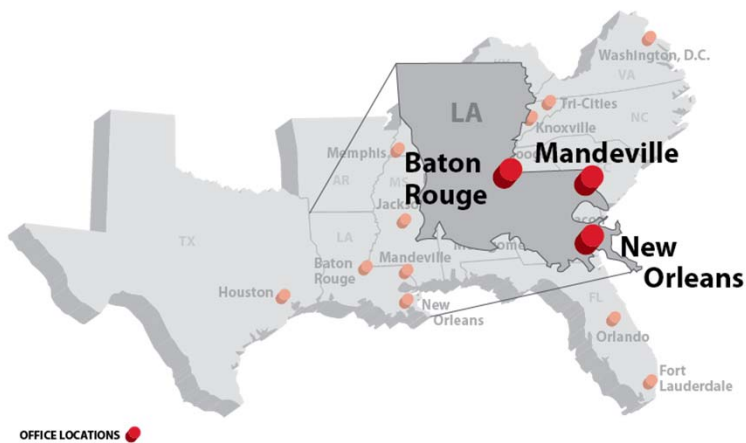
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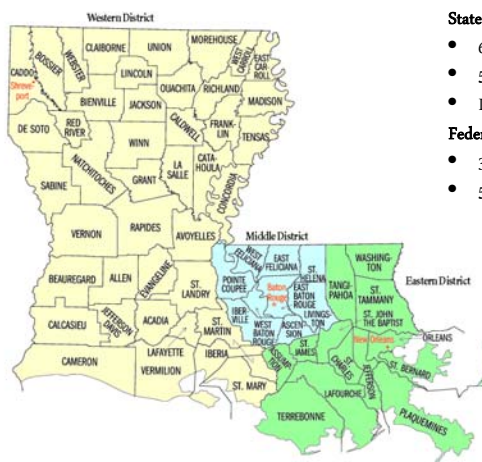
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## Louisiana State and Federal Courts



- State**
- 64 Parishes
  - 5 State Appellate Courts
  - La Sup. Ct
- Federal /Bankruptcy**
- 3 Federal Districts
  - 5<sup>th</sup> Circuit Appeal

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## Pre-Foreclosure Review

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- Review loan documents
  - Original or Certified Copy of promissory note
    - See also HB 1259 (substitute for HB 661) which would allow use of a reproduction of a promissory note instead of having to produce the original when foreclosing on a mortgage loan through executory process. The financial institution would be required to certify that the reproduced note is a true and correct reproduction of the original in accordance with the requirements of R.S. 13:3733.1.
  - Mortgage
  - Chain of assignments
  - Thorough Priority Verification – Public Record Review
- Verify Key Facts:
  - the secured note is in default
  - the existence, amount due and owing under the note
  - changes in the interest rate during the term of the note

## Pre-Foreclosure Review Continued

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- For residential foreclosures, due diligence of “bona fide” tenants (Protecting Tenants at Foreclosure Act)
- Determine whether a deficiency judgment is desirable
  - If a deficiency judgment is desirable, then the sale of the property must be made with appraisal.
- Consider whether a keeper (receiver) is desirable and review loan documents for authority or restrictions on same
- Consider whether Soldiers & Sailors Relief Act for Individuals Applies
- Review Choice of Law Provisions in Note
- Review Property Tax Status
- Confirm Property Insurance or Force Placed Insurance
- Compliance with La. Civ. Code art. 3298 for Multiple Indebtedness Mortgages

## Pre-Foreclosure Review Continued

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- Compliance with New CFPB Regulations Effective January 10, 2014 (12 CFR 1024.41(f)(1)) (120 Day Delay Period)
  - 41(f)(1) Pre-foreclosure review period.
    - First notice or filing required by applicable law. The first notice or filing required by applicable law refers to any document required to be filed with a court, entered into a land record, or provided to a borrower as a requirement for proceeding with a judicial or non-judicial foreclosure process. Such notices or filings include, for example, a foreclosure complaint, a notice of default, a notice of election and demand, or any other notice that is required by applicable law in order to pursue acceleration of a mortgage loan obligation or sale of a property securing a mortgage loan obligation.

## Title Insurance Issues

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- Regulation of Title Insurance in Louisiana
  - Published rates and published endorsements
  - Louisiana Department of Insurance ([ldi.louisiana.gov](http://ldi.louisiana.gov))
    - REO Risk Assessment
    - Adverse Possession
    - Service of Process
    - Notice to Inferior Creditors
    - Non-Military Affidavit
    - Publication
    - Seller / Purchaser Affiliation
    - Purchase Price Issues
- Review Existing Title Policy
- Continuation of Coverage – Loan vs. Owner Policy (*cf.* insuring foreclosure sales)

## Louisiana: Non-Judicial by Power of Sale

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- Real Property Not Permitted:
- Personal Property: La. R.S. 6:965, *et seq.* which, upon meeting certain requirements, allows “self-help” repossession of automobiles under very limited circumstances

## Louisiana: Judicial Foreclosure – Deficiency Judgments

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- In an executory proceeding, right to a deficiency judgment turns on whether the judicial sale was conducted with or without appraisal. If the property is sold without appraisal, the highest bid need only be sufficient to cover costs and the amount of any encumbrances prior to that of the seizing creditor, and the debtor is not liable for a deficiency.
- If the creditor requests sale with the benefit of appraisal, the property cannot be sold for less than two-thirds of the appraised value at the first auction. If no satisfactory bids are obtained, the creditor may request that it be reoffered for sale. At the second auction the property is sold for cash for whatever it will bring, provided that the bid is sufficient to cover costs and encumbrances superior to that of the seizing creditor.
- When sold with benefit of appraisal, the debtor can be liable for a deficiency.

## Louisiana: Judicial Foreclosure – Executory Process

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- Executory Process is an *in rem* action derived from the Civil Code.
- Preferred method as it results in obtaining a faster sheriff's sale date due to plaintiff not having to go through "normal" lawsuit process and then wait for the running of suspensive appeal periods.
- Requires act of mortgage or vendor's privilege to be in authentic form and contain a confession of judgment.
- Strict requirements concerning nature and form of documents submitted in support of foreclosure by executory process.

## Louisiana: Judicial Foreclosure – Executory Process

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- The Petition
  - Verification
  - Affidavit of officer of the lender that verifies
    - the secured note is in default
    - the existence, amount due and owing under the note
    - changes in the interest rate during the term of the note
    - etc.
  - Original Promissory Note (Art. 2635)
  - Certified Copy or Duplicate Original of Mortgage (Art. 2635)
  - Certified Copy of Evidence of Activity for Corporations, LLC's and Partnerships (Art. 2636)
  - Documents demonstrating the assignment of the Note and Mortgage to Bank.

## Louisiana: Judicial Foreclosure – Executory Process

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- Other documents needed under the circumstances
  - Motion and Order to substitute copy for original Promissory Note
  - Mennonite Notices (need to run mortgage records to see if any liens exist)
  - Motion and order to appoint a keeper (receiver) to maintain the property
- Order for Issuance of Writ of Seizure and Sale
  - Order issuing writ of seizure and sale commanding sheriff to seize and sell the property affected by the mortgage. (Art. 2638)

## Executory Process: Procedure/Logistics for Seizure and Sale

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- If Petition is in order, Court will issue Order without prior notice to borrower.
- Pursuant to the Order, the Clerk of Court will issue a Writ Of Seizure And Sale (Art. 2638), directing sheriff to seize and sell the mortgaged property.
- Clerk of Court will also issue a Notice of Demand that will allow the debtor three days to pay the amount demanded. The Sheriff must serve the Notice of Demand BEFORE execution on the writ of seizure and sale. However, if the Notice of Demand for payment is waived, the sheriff may immediately execute on the writ of seizure and sale.
  - May be waived, in which case sheriff will immediately execute

## Executory Process: Procedure/Logistics for Seizure and Sale

- Upon seizure, the sheriff must serve a notice of seizure on the borrower. (Art. 2721(B)). Also, third parties with interests in the property must be notified of the judicial sale of the property (Mennonite Notice).
- Seizure may be physical or constructive; a keeper may be appointed to manage the seized property.
- Advertisement: Newspaper in parish where property is located, may appear any time following three days' delay following service of the notice of seizure on borrower. Include full description of property, day, time, place at which property will be sold at judicial sale. Must be published twice for immovable property: (a) first, at least thirty days before judicial sale; (b) second, several days before the sale. (Art. 2331)
- Judicial Sale: (Art. 2336)
  - o In order to maintain the ability to obtain a deficiency judgment, the sale must be with appraisal:

## Executory Process: Procedure/Logistics for Seizure and Sale

- o Many parishes will require a recent appraisal. The requirements of the date of the appraisal differ parish-by-parish. Many sheriffs are willing to work with foreclosing creditors on large commercial foreclosures and waive any local (and often, unwritten) requirement that the appraisal be updated within a particular period of time, but it is advisable to obtain the most recent appraisal possible and work with an appraiser to update it as necessary.
- Reinscription of Mortgage
- Mortgage and Conveyance Certificate
- Confirm correct legal description
- Review and entertain inquiries from potential purchasers
- Coordinating and filing of sheriff's deed and payment of sheriff's invoice
- Final payments to keeper and discharge of keeper



## Louisiana: Judicial Foreclosure – Executory Process

- As part of the Executory Process, the seizing creditor may request a Keeper for the property (which is akin to a receiver in other jurisdictions). Some State Court Judges want to appoint someone local, but we typically propose the Keeper who is an expert on managing the property type.
- Sheriff's Commission:
  - **State Court:** There is a statutory 3% commission on sheriff's sales, including credit bids. That number can be negotiated down by agreement with the sheriff prior to commencing the executory process, however, it varies by Parish.
  - **Federal:** 1.5% commission capped at 50K (28 USC 1921 & 28 CFR 0.114(h))
    - See e.g., *Asset One La. v. Vulcan Minerals & Energy, Inc.*, 2002 WL 1303118 (E.D. La. June 11, 2002, J. Zainey) (denying request for injunction to arrest executory process in federal court); cf. *LBUS 2005-C2 Meraux Shopping Center, LLC v. River Park Real Estate, LLC*, Civ Act. 06-3951 (E.D. La. July 28, 2006, J. Berrigan) (dismissing petition for executory process filed in federal court given that federal rules require citation, summons and judgment, whereas executory proceedings under La. law effect seizure and sale of property "without previous citation and judgment per La. Code Civ. Pro. art. 2631).

## Louisiana: Judicial Foreclosure – Ordinary Process

- Foreclosure of a mortgage by ordinary process results in an ordinary proceeding against the mortgagor for a money judgment and for recognition of the mortgage or privilege.
- Defendant entitled to the normal delays for answering, as well as the suspensive appeal period (60 days).
- After suspensive appeal period, mortgage is enforced via a writ of fieri facias. Defendant is served with a notice of seizure and the sheriff will advertise the judicial sale twice within a 30-day period prior to the sale.
- Provisional Remedies – Writ of Sequestration

## Additional Considerations

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- Jurisdiction/venue of the Court pursuant to which the sheriff's deed was issued
- Check that all defendants were served with notice of seizure, or attorneys at law were properly appointed for any nonresident or absentee defendants
- If mortgagor is not the owner of the real estate at the time of foreclosure, ascertain that the current owner was notified of the seizure
- Review description of property in mortgage, judicial advertisements and sheriff's deed and check for any discrepancies
- With respect to the amount of the bid, if there were encumbrances superior to that of the seizing creditor, ascertain that the amount of the bid was sufficient to satisfy the superior encumbrances
- If there were inferior lienholders, ascertain that they were given "Mennonite" notices of the pending sheriff's sale
- With respect to real estate taxes, ascertain that the real estate taxes due at the time of foreclosure were paid by the sheriff or that the purchaser acquired the property subject to outstanding taxes

## Additional Considerations Continued

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- Review the mortgage certificates run in connection with the sheriff's sale and ascertain that the sheriff cancelled all inferior encumbrances
- If the sheriff's sale was the result of an executory proceeding pursuant to a writ of seizure and sale, and if the Internal Revenue Service filed a federal tax lien more than 30 days before the sale, obtain a copy of a letter addressed to the Internal Revenue Service which complies with the requirements of 26 U.S.C.A. § 7425(c) with evidence that the Internal Revenue Service received the letter at least twenty-five days before the sale, or obtain a copy of a letter from the Internal Revenue Service acknowledging receipt of adequate notice
- If a sheriff's sale was the result of an ordinary proceeding pursuant to a writ of fieri facias, and if the Internal Revenue Service filed a federal tax lien before commencement of the proceeding, ascertain that the Internal Revenue Service was made a party to the proceeding.
- If the real estate that was the subject of the sheriff's sale was owned by FDIC or was subject to a nonconsensual security interest in favor of FDIC, obtain evidence that FDIC consented to the sale.

## Louisiana: Right of Redemption

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- Louisiana law does not provide for a right of redemption
- Three (3) year Tax Sale Redemption for Non Payment of Ad Valorem Taxes
  - *Orleans Dist. Redevelopment v. Ocwen, [cite]* (finding tax sale an absolute nullity insusceptible of prescription in the event of failure to provide Mennonite notice to the mortgagee).

## Foreclosure Alternatives

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- Short Sale
- Deed in Lieu/ Dation en Paiement
- Workout/Forbearance/Restructure
- Ordinary Process/Writ of Sequestration
  - Must show:
    - Ownership interest or a right to possess the property
    - Property is within the power of the debtor to conceal, dispose of or waste
    - Must be made by specific factual allegations
    - Requires creditor to post a bond set by court unless dispensed with by law

## Post-Foreclosure Actions

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- Title Insurance
- Tenant Notices/Evictions
- Utilities
- Tax Assessment
- Revisit Property Insurance (once creditor becomes owner)
- Payment of Sheriff's Commission and Costs
- Refund of Deposit from Clerk
- Payment and Discharge of Keeper (if applicable)
- Recordation of Sheriff's Deed

## Recent Cases

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- *LEGGO v. Brennan's Claims*
- *Colonial Finance LLC v. Colonial Golf & Country Club, Inc.* Case No. 11-CA-5 (La. App. 5<sup>th</sup> Cir. 2011)
- In re: Hari Aum, 714 F.3d 274 (5<sup>th</sup> Cir. 2013)

## Table of Authorities

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Questions?

**PRESENTATION**

## Foreclosures in Georgia

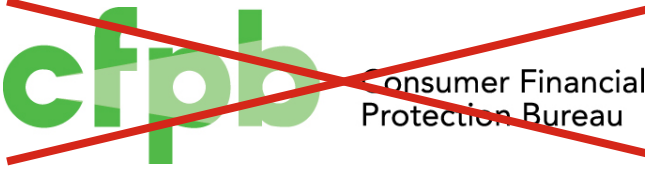
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## A Crisis in Decline?

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- **According to the Corelogic March, 2014 Foreclosure Report:**
  - Georgia had the fifth highest number of completed foreclosures in year ending March, 2014: 33,232
  - A 31% decrease from the prior year
  - Serious delinquency rate for the Atlanta metro area: 4.8%
  - Down from 5.48% in July, 2013



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## Mortgage Law in Georgia

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Title state

Security Deeds rather than deeds of trust

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## Standing to Foreclose

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*You v. J.P. Morgan Chase Bank, N.A.*

293 Ga. 67, 74 (2013)

“the holder of a deed to secure debt is authorized to exercise the power of sale in accordance with the terms of the deed even if it does not also hold the note or otherwise have any beneficial interest in the debt obligation underlying the deed.”



## Foreclosure Procedures

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Non-judicial

The procedures for a non-judicial foreclosure are straightforward



## Foreclosure Procedures (continued)

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### Rules No 1, 2 and 3

- Read the security deed.

Must contain language transferring title, must explicitly provide for a power of sale, make sure it gives the lender the right to bid at the foreclosure sale.

## Notice Requirements

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- O.C.G.A. 44-14-162 et seq.
- Notice more than 30 days prior to foreclosure sale.
- Previously, written notice not required for homes not intended to be the borrower's primary residence, but that was amended in 2012.



## Notice Requirements (continued)

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- Notice must include the name, address and telephone number for the person or entity with authority to negotiate the terms of the loan.
- Court precedent: sufficient to identify loan servicer rather than the investor or owner. Sufficient to identify attorney for lender.

*TKW Partners, LLC v. Archer Capital Fund, LP*, 302 Ga. App. 443 (2010); *Ford v. CitiMortgage, Inc.*, No. 13-14683, --- F. App'x ---, 2014 WL 1257953, at \*1 (11th Cir. Mar. 28, 2014); *Carr v. U.S. Bank, N.A.*, 534 F. App'x 878 (11th Cir. 2013); *Harris v. Chase Home Fin., LLC*, 524 F. App'x 590 (11th Cir. 2013).

## Notice Requirements (continued)

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- Sent by registered or certified mail, return receipt requested.
- Don't have to prove receipt, just proper mailing.
- Sent to property address, or any other address specified by the borrower in writing.



## Notice Requirements (continued)

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For a high cost home loan, have to send notice more than 14 days prior to publication of the legal advertisement.  
O.C.G.A. 7-6A-5(11).

HCHL?

- exceeds HOEPA rate; or
- total points and fees exceed 5% of the loan amount if loan is \$20k or more.

## Notice Requirements (continued)

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- **Published advertisements:**
  - paper of record
  - once a week for the four consecutive weeks prior to the foreclosure sale.
  - full and complete description, including legal description.
  - if contains street address, must be in **bold** type.

## Sale Day

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Sale must be cried on the courthouse steps

Between 10 a.m. and 4 p.m.

First Tuesday of the month

By lender, or agent or attorney for lender

Funds generally must be tendered immediately

Cash or cashier's check acceptable

## Excess proceeds

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Generally owed to debtor

May be applied by foreclosing lender to other debts held by the lender

May be paid to other junior lienholders as well

If there are junior lienholders, safe bet is to file an interpleader

## Foreclosure Miscellany

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No statutory right of redemption.

Transfer Tax: \$1 for the first \$1,000 or fractional part of \$1,000 and at the rate of 10 cents for each additional \$100 or fractional part of \$100

If fail to pay Transfer Tax, deed is unrecordable. However, since 1984 recorded deeds provide constructive notice whether the tax was paid or not.

## Confirmation/Deficiency Judgments

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- **Deficiency judgments are permitted in Georgia, but:**
  - Must report the sale to a superior court judge within 30 days of sale.
  - Court then sets a hearing.
  - Provide notice to debtor more than 5 days prior to hearing.
  - Must prove that the property sold for at least its fair market value and that the sale was conducted in accordance with the procedural requirements.

## Confirmation/Deficiency Judgments **(continued)**

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- **Deficiency judgments are permitted in Georgia, but:**
  - Decide whether you are going to confirm prior to conducting the sale.
  - Hire an appraiser who has testified and been accepted as an expert before by other courts.
  - Have the appraisal dated to the date of the foreclosure sale.
  - Get a detailed appraisal.
  - Do not rely on a drive by appraisal.

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## Judicial Foreclosure

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- **Used when:**
  - the Security Deed does not provide a power of sale.
  - Occasionally used when there are title or boundary line issues.
  - If Lender wants to combine a suit on note with a foreclosure to avoid confirmation requirement.



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## Judicial Foreclosure (continued)

- **3 types:**
  1. Foreclosure in equity
  2. Foreclosure at law
  3. Judicial Foreclosure of a deed to secure debt



## Georgia Title Issues

- **Form of Deeds**
  - Must contain:
    - language conveying title
    - an accurate description of the property
  - Must be signed by the Maker
    - Corporate deeds should be signed in the name of the corporation by a duly authorized officer or agent
  - Deed must be attested by 2 witnesses, one of whom should be a notary (notarial seal should be attached)
    - Should indicate that witnesses actually saw the maker sign



**PRESENTATION**

## Receiverships Under Georgia Law

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## Receiverships Under Georgia Law

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- The Grounds for Receivership
- Exploring the Standard
- Notice
- The Receiver's Authority
- Discharge of the Receiver & Dismissal of the Receivership Complaint
- Anything Else I Should Know?

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## Receivership: Grounds Generally

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A receiver is a court appointed individual or company that takes possession of and manages property when the subject property or fund is the subject of pending litigation and the rights of either or both parties cannot otherwise be fully protected.

[O.C.G.A. § 9-8-1]

## Receivership: Grounds Generally (continued)

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A receiver may be appointed when there is no one to manage a subject fund or property.

[O.C.G.A. § 9-8-1]

## Receivership: Trusts or Joint Property

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A receiver may be appointed to take possession of and protect trust or joint property and funds whenever the danger of destruction and loss shall require such interference.

[O.C.G.A. § 9-8-2]

## Receivership: Assets Liable for a Debt

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

[O.C.G.A. § 9-8-3]

## The Standard

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### A receivership may be appointed when:

1. Prudently and cautiously exercised
2. Clear and urgent cases
3. Trial court discretion

[O.C.G.A. § 9-8-4]

## Receivers Have Been Appointed In These Situations

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Possible destruction of collateral

Damage to collateral

Loss of income from the collateral

## Receivers Will Not Be Appointed When

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Mere nonpayment by a mortgagor

Mere nonpayment of taxes

Mere nonpayment of insurance

## Notice: Who Has To Know & When?

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General Rule – Provide a copy of the stamp filed complaint and rule nisi to borrower & borrower's counsel (if applicable)

Extraordinary circumstances – Receivership may be appointed without notice of the borrower. [O.C.G.A. § 9-8-3].

## The Receiver's Authority

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Officer of the court

Scope of authority is defined by the court making the appointment

Tailor each receivership order to the specifics of a given case

## Discharge of the Receiver & Dismissal of the Receivership Complaint

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At completion of the receivership, the receiver will file a Motion for Approval of Final Accounting, Ratification of Receiver's Actions and Discharge of Receiver.

Upon entry of the Order, a Motion to Dismiss must be filed.

Receivership cases cannot be dismissed unless there is an order of the court. [O.C.G.A. § 9-11-66].

## Anything Else I Should Know?

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**Attorney-Client Privilege:** Receiver controls the attorney-client privilege belonging to the enterprise.

**In Pari Delicto Defenses:** If a receiver replaces dishonest managers and then asserts claims against third-parties, who may have participated or been involved in the activities of the enterprise in receivership. The 3rd parties may raise an in pari delicto defense, claiming that they should not be liable to the receiver because of the dishonest and illegal acts of the former managers.

## Lender Liability Update

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***Considine v. Murphy***

***CFPB bulletins focusing on vendor evaluations***

***Nativi v. Deutsche Bank***

***Lender Placed Insurance Rules***