

Defaulted Real Estate Loan Remedies in Mississippi

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Mississippi – Non-Judicial Foreclosure

Power of sale held by Trustee under Deed of Trust



Land Records to Review

MAIN TWO

- Note
- Deed of Trust

ALSO

- Substitution of Trustee
- Assignment of Lien
- Loan Modification(s) of record
- Other Liens
- Other land records



Loan File

- Loan modification(s) not of record
- Reinstatement quotes
- Payoff quotes
- Forbearance Terms
- Other loan records



Homestead Properties

- DOT must be signed by both spouses
- Mutual and Simultaneous
- Title insurance



Loss Mitigation

- Loan Modification
- Deed-in-Lieu
- Cash for Keys
- Short Sale
- Discounted Payoff
- Agreed Foreclosure with Waiver of Deficiency
- Forbearance



Documents to Prepare

- Substitution of Trustee
- Notice of Default
- Notice of Sale
- Notice of Sale in Newspaper
- Notice of Sale posted at courthouse
- Notice to IRS
- Reinstatement Quote
- Other documents required by Note/DOT
- Other documents required by federal statutes



Conducting the Sale

- Follow notice of sale
- Read notice of sale
- Bidding
- Affidavit
- Trustee's deed
- Proof of publication
- No right to redemption
- Surplus funds
- Deficiency



Common Defenses Raised by Borrowers

LAWSUITS

- Lawsuit for injunctive relief to prevent foreclosure
- Refusal to vacate, requiring eviction action by REO owner
- Lawsuit for wrongful eviction

CLAIMS

- Breach of contract
- Negligence
- Fraud
- Intentional infliction of emotional distress

REMOVAL TO FEDERAL COURT

Settlement

- Loan Modification
- Deed-in-Lieu
- Cash for Keys
- Short Sale
- Discounted Payoff
- Agreed Foreclosure with Waiver of Deficiency
- Forbearance



Pitfalls: Deeds of Trust

- Deed of Trust must be signed by all holders of an interest in the property (if individual, includes spouses with marital interest)
- Signatures of grantors must be properly acknowledged by a notary under seal
 - 7year curative statute for defective acknowledgments (Miss. Code. Ann. § 89-3-13)
 - Clerk's recording of instrument with defective acknowledgement (Miss. Code Ann. § 89-3-1)
- Deed of Trust must be recorded with Chancery Clerk in county where property is located
- Must state maturity date
- Statue of limitations = 6 years from stated maturity date (or accelerated due date)



Recording Tax

- No recording or transfer tax in Mississippi
- Tax existed in past, but statute repealed decades ago

Actions Upon Default

- Send notice of default/acceleration to borrowers and any guarantors (right to cure only if required by loan documents)
- Record Limited Power of Attorney (for CMBS or other loans where holder of the loan is acting via an agent)
- Appoint Substitute Trustee – must be recorded with chancery clerk; gives new trustee duties of original trustee
- Order updated title report
- Be sure loan documents and deed of trust properly assigned to the current holder.
- Conduct updated UCC search



Title Issues

- Confirm all interests held in real estate
- Holder of fee simple and leaseholds
- Easements, restrictions, covenants, etc.
- Existence of Senior liens – title insurance claim if deed of trust is insured as a first lien
- Junior liens – judgment liens, materialman liens, les pendens – need not be listed in foreclosure sale notice
 - good practice to give notice of foreclosure to any significant junior lienholder (particularly if equity exists)
- * Junior Lienholder – Subordination to D/T Modifications?

Title Issues (continued)

- Real estate taxes – county or municipal taxes and assessments prime other liens
 - Irrevocable loss of collateral if past due taxes mature into Tax Deed (which occurs on 2nd anniversary of tax sale)
- IRS liens – special notice of foreclosure required under federal law if junior
- Foreclosure does not “wipe out” property tax liability
 - Property taxes “run with the land”

Foreclosure – Non-Judicial

- Total time to foreclose: approximately 60 day process from start to finish
- Advertisement – notice of sale published once each week for four (4) consecutive weeks (in newspaper circulated in county where the property located)
- Notice of Sale – send copy to borrowers and guarantors on or before the first date of publication. Good practice to use registered or certified mail.
- Posting notice of sale at on public bulletin board at county courthouse (prior to first publication)



Foreclosure – Non-Judicial (continued)

- Place of sale – at the county courthouse in county where property is located. Sale notice must give specific location at the courthouse, (e.g. “North Main Entrance”)
- Time – any time between legal hours of 11:00 a.m. and 4:00 p.m.
- Notice must set specific date for conduct of foreclosure sale. Any day other than weekend or legal holiday may be utilized.

Foreclosure – Non-Judicial (continued)

- Combining UCC Article 9 personal property foreclosure w/ real property foreclosure.
 - Notice of Default should contain proper UCC “public sale disposition” language.
- Lender’s counsel may serve as Trustee (no ethical issues).
 - Fiduciary duty to fairly carry out terms of the trust

Foreclosure – Tax Liens

- Additional statutory notice must be given to the IRS. After a foreclosure sale in which the notice of priority is given, taxing authority has 120 days right to redeem the foreclosed property.



Conduct of Sale

- Auction-type process on courthouse steps: Sale to highest bidder (cash or credit bid)
 - “Calling” the sale: must read aloud the entire Sale Notice (w/ legal descriptions)
 - Foreclosure can be abandoned at any time prior to completion of sale (but must start over “from scratch” with new foreclosure)
- If foreclosure process is completed properly, it is “done deal”.
- Borrower has no post-foreclosure Right of Redemption



Conduct of Sale (continued)

- Terms of sale stated in sale notice
- Credit bidding allowed
- Creditor may bid and assign bid to third party
 - Substitution of Trustee should contain authorization for assignment of credit bid
 - Credit Bid amount considerations
 - Posturing for possible pursuit of deficiency judgment?
 - Credit bid can not be so low as to “shock the conscience” of a reviewing court (i.e. grossly insufficient)



Trustee's Deed

- Trustee's Deed to winning bidder (or its assignee) transfers property
- Prevailing cash bidder – strongly advise requiring payment in full (with certified funds) at time of sale.
 - Short adjournment of sale, if needed for cash purchaser
 - Prevailing cash bid is presumed to reflect fair market value
- Witness affidavit re: conduct of foreclosure sale



How a debtor can stop the foreclosure sale

- Reinstatement (Miss. Code Ann. § 89-1-59)
- Bankruptcy filing stops a sale of debtor's property
 - Trigger of guarantor liability?
- Injunctions to stop foreclosure:



Typical defenses to foreclosure

- Could be used as grounds for injunction/TRO pre-foreclosure
 - most commonly: post foreclosure in judicial action to set aside foreclosure as invalid (borrower must initiate the action)
- Defect in foreclosure process
- Absence of monetary default
- Servicing error
 - misapplication of payments
 - rejection of payments
 - unauthorized establishment of escrow account
 - failure to honor loan modification
 - failure to offer loan modification
 - dual tracking
 - misrepresentation regarding date of sale
 - failure to accept tender of reinstatement payment
- Lack of standing to enforce deed of trust

Receiverships

- Receivership is an action in equity for the safekeeping, management, collection, and disposition of property
 - Chancery court is exclusive venue for receiver's appointment (under MS law)
 - Federal vs. state venue choices
- Statutory authority and case law give court wide discretion to fashion the relief granted
- Prior consent to appointment of receiver by borrower in loan documents can be persuasive (but not absolute)
- Even with consent to appointment language, judge retains discretion to appoint or not to appoint
- Receivership funded by property's cash flow (or lender's advances)



Receiverships (continued)

- Injunctive relief usually sought in conjunction with receivership to compel cooperation of borrower and its agents with receiver
- Receiver must post receiver's bond. Miss. Code Ann. 11-5-159.
- Five (5) days notice must be given to Defendants (absent "good cause shown"). Miss. Code Ann. §11-5-153
- Receivers can sell property but need court approval
 - Strategy Issue: Include sale authority in Order Appointing Receiver?
- Order should expressly preserve right for lender to proceed with remedy of foreclosure

Receiverships (continued)

- Receiver is "ancillary" remedy: Compliant for receiver must assert equitable claims against borrower (e.g. request for accounting of rents)
 - Chancery vs. Circuit Court distinction in Mississippi
- Hearing Date: Scheduled at Court Administrator's discretion (request for TRO will usually expedite hearing date)
- Don't "cry wolf": If TRO is requested, must have facts showing potential for "irreparable injury" (i.e. an injury that monetary award can not cure)

Receiverships (continued)

- No Adjudication of Merits: Receiver's appointment does not determine outcome of the lawsuit
 - Property owner continues to have right to make workout proposals
 - Property owner can solicit purchase offers and present offers to the Receiver
 - Property owner can gain property access (w/ Receiver's approval)
- Don't overreach w/ content of Order Appointing Receiver (e.g. inclusion of findings on issues court did not consider)

Receiverships (continued)

- Key Evidentiary Issues:
 - Health/Safety risks
 - Deferred maintenance
 - Waste
 - Borrower's misuse of rents/profits
- Receiver can be natural person or legal entity
 - "Point Person" should attend hearing on Receiver Motion
 - Should inspect property pre-hearing and be prepared to testify
 - Receiver is Officer of the Court w/ fiduciary duty to all parties.
 - Communications w/ Receiver are not privileged!

Post-Foreclosure Deficiency

- Statute of limitations – one (1) year after date of foreclosure sale
- Absent fraud, collusion, misconduct or irregularity in the sale process – deficiency shall be total debt plus costs of sale, less fair market value of the property at the time of the sale
- Burden of Proof: Lender must establish that the credit bid price is equal to the fair market value at the time of the sale
 - Essentially mandates pre-foreclosure Appraisal

Deficiency (continued)

- Decide whether you are going to pursue 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 or “Brokers Opinion of Value”.

Guarantor Liability

- Mississippi law recognizes Guaranty like any other contract
- Mississippi law enforces contracts “as written”, particularly when the parties are sophisticated business persons and/or person who was represented by legal counsel
- Caution: Pursuit of guarantor may trigger counter claim for “lender liability”
 - Possibility of getting “bogged down” with discovery, etc.
 - Recommend evaluation of Guarantor’s potential assets before filing suit

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