REAL PROPERTY LAW
ACADEMY
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Commercial Mortgages, SNDAs and Tenant Estoppels

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Commercial Mortgages, SNDAs and Tenant Estoppels
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I. COMMERCIAL MORTGAGES

A. What is a Mortgage?

1. Mortgages Generally. A mortgage is an instrument under which the owner of an interest in real estate (the mortgagor) grants to a lender (the mortgagee) a lien on real property to secure a debt or other obligation. It is Michigan custom and practice to use a document titled and styled as a mortgage when taking a lien on real property. In many states, a deed of trust is used as the mortgage instrument rather than a mortgage. A deed of trust involves a conveyance of real property to a trustee to hold as security for the payment of a debt or obligation. In substance, a deed of trust is essentially the same as a mortgage with a power of sale. See Nelson & Whitman, Real Estate Finance Law (3d ed), § 1.6, pp 11-12. While a deed of trust can be used in Michigan, in practice they are not used. See 1 Cameron, Michigan Real Property Law (3d ed), § 18.2-18.4, pp 680-81.

2. Lien Theory of Mortgages. Michigan follows the lien theory of mortgages rather than the title theory. *McKeighan v Citizens Commercial & Savings Bank*, 302 Mich 666; 5 NW2d 524 (1942); *Bowen v Brogan*, 119 Mich 218; 77 NW 942 (1899); *Midwest Bank v O'Connel*, 158 Mich App 565; 405 NW2d 201 (1987).

a. Under the lien theory, "a mortgagee has no title to the premises mortgaged. . . . A mortgage on real estate creates merely a contingent interest in real estate which may become an absolute one only by foreclosure." *Midwest*, at 569 (citing *Union Guardian Trust Co v Nichols*, 311 Mich 107; 18 NW2d 383 (1945)). A mortgagor retains full ownership and rights to possession of the mortgaged property, including legal and equitable title, and the mortgagee's interest is as lienholder. See Nelson & Whitman, § 4.2, p 130.

b. The title theory has its origin in English common law under which the mortgagor conveyed fee simple title to the mortgagee, subject to defeasance upon satisfaction of the condition subsequent that the mortgage debt is repaid. Some states have a modified or intermediate theory of mortgages under which the

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In preparing these materials, I relied extensively on John Cameron's excellent treatise on Michigan Real Property Law published by The Institute for Continuing Legal Education, currently in its third edition. I also made extensive use of the Michigan Land Title Standards, published by the Real Property Law Section of the State Bar of Michigan. I currently serve on the Michigan Land Title Standards Committee which is responsible for its publication. Both resources are indispensable to the practice of real estate law (including real estate finance law) in Michigan and are highly recommended.

Finally, I wanted to express my gratitude to Mike Luberto at Chirco Title for peer reviewing these materials and providing helpful comments. Of course, any errors or omissions are mine alone.

mortgagee's rights to possession only arise after a default. Nelson & Whitman, § 4.3, p 134.

c. Implications of the lien theory for Michigan finance practice is that, absent a statutory exception (e.g., assignment of rents and receiverships, discussed later), the mortgagor is not entitled to title and possession of the mortgaged property or the right to receive any rents or other income from the property until the mortgagee forecloses the mortgage and the redemption period has expired without redemption.

B. What are the Standard Elements and Attributes of a Mortgage

1. Required Elements

a. Statutory Form of Mortgage. MCL 565.154 contains an approved (but not required) form of mortgage. It states:

> "A mortgage of lands that is worded in substance as follows: "A.B. mortgages and warrants to C.D., (here describe the premises) to secure the re-payment of" (here describe the indebtedness or obligations the mortgage secures) and is signed by the grantor, is a valid and enforceable mortgage to the grantee and the grantee's heirs, assigns, successors, and personal representatives with warranty from the grantor and the grantor's legal representatives, of marketable title in the grantor, free from prior incumbrances. If the indebtedness or obligations secured are described generally, such as "all indebtedness that A.B. now and in the future owes to C.D.", and if the words "and warrant" are omitted from the form, the mortgage is valid and enforceable, but without warranty."

Except in rare cases, a mortgage should have a warranty of title by the mortgagor. Thus a Michigan mortgage should always state that the mortgagor "mortgages and warrants" the mortgaged premises to the secure the debt.

b. Debt Secured. As noted above, MCL 565.154 requires that the mortgage describe the debt secured. Although one prominent commentator has recommended that the mortgage state the date for repayment of the debt, see Cameron, § 18.14, pp 690-91, in practice this is seldom done in Michigan mortgages due to the impracticality of amending the mortgage whenever the maturity date is extended. A mortgage may secure future advances and also may secure future debt (discussed infra, at Part I.C.).

c. Perfection; Recordation. To perfect a mortgage lien, a mortgage must be recorded in the real estate records of the County where the mortgaged property is located. Michigan's recording requirements are primarily set forth in MCL 565.201, MCL 565.201a, MCL 565.47 and MCL 565.8. The following is a list of the more important requirements:

(1) Parties' addresses should be listed in the initial paragraph

(2) No discrepancies between parties' names in the body of the mortgage, in the signature blocks and in the acknowledgments

(3) The signature of the mortgagor must be acknowledged by a notary.[2]

(4) The notary and signers must print their names legibly below their signatures

(5) 2½ inch margin at top of first page, at least ½ inch margin on all other pages and margins

(6) 10 point font (no larger)

(7) All print must be in black ink

(8) Drafter and business address must appear in document

(9) Title should describe single "recordable event"[3]

d. Consequences of Failure to Perfect/Record or of Delay in Recording.

(1) Michigan is a race-notice state. MCL 565.29. Failure to record a mortgage (or to otherwise comply with the requirements of the recording statutes) exposes the mortgagee to the risk that a bona fide purchaser (including a mortgagee) could acquire an interest in or lien on the mortgaged property senior to the prior executed mortgage. MCL 565.29 states:

> "Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. The fact that such first recorded conveyance is in the form or contains the terms of a deed of quit-claim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof."

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[2] The Uniform Recognition of Acknowledgments Act, MCL 565.261 *et. seq*., which included safe harbor statutory short forms of acknowledgment, was repealed effective March 12, 2019. As there is no longer any statute specifying the form of acknowledgment, common law applies.

[3] This requirement, apparently unique to Michigan, has been interpreted by some registers of deeds to require truncated instrument names for recording. So a "Mortgage" may be recorded, but not a "Mortgage, Assignment of Leases and Rents, and Security Instrument." Qualifications to the single event, such as "Multifamily Mortgage" or "Construction Mortgage" or "Future Advance Mortgage" also are generally accepted for recording. This interpretation contradicts other Michigan statutes that expressly permit a mortgage to include an assignment of leases and rents and to serve as a security agreement and fixture filing, both discussed later. Notwithstanding this, when the recording statute was initially implemented, many practitioners worried that multiple recordings under various document titles, or separation of the document into its constituent elements would be required. It is now accepted practice (consistent with Michigan statutes) that a mortgage instrument customarily includes other substantive content, such as an assignment of leases and rents and a security agreement. No court case has, however, explicitly addressed this.

The term "conveyance" includes "every instrument in writing, by which any estate or interest in real estate is created, aliened, mortgaged or assigned; or by which the title to any real estate may be affected in law or equity, except wills, leases for a term not exceeding 3 years, and executory contracts for the sale or purchase of lands." MCL 565.35. The term "purchaser" is defined as "every person to whom any estate or interest in real estate, shall be conveyed for a valuable consideration, and also every assignee of a mortgage, or lease or other conditional estate." MCL 565.34.

(2) An unrecorded mortgage can be avoided by a bankruptcy trustee under its "strong arm" powers under 11 USC 544. § 544 of the Bankruptcy Code gives the debtor or trustee the ability to assert the rights and powers of, and to avoid transfers that are voidable by, a bona fide purchaser of real estate as of commencement of the bankruptcy. To the extent that a bona fide purchaser would have been able to void or take clear of an interest, the debtor or trustee will be able to do the same. See also *In re Neal*, 406 BR 288 (ED Mich 2009) (holding that a lost mortgage could not be perfected by recording a copy of the mortgage by affidavit). In response to *Neal*, MCL 565.451(a)(g) was recently signed into law expressly providing that a lost or destroyed mortgage can be perfected by attaching a copy to a recorded affidavit. The affidavit must meet certain requirements described in the statute.

(3) A mortgage not recorded timely is also subject to avoidance as a preference under 11 USC 547(b). A mortgage which is recorded within 30 days of the date granted relates back to the date of execution for determining the start of the 90-day preference period. 11 USC 547(e)(2)(A). Therefore, a mortgagee should be sure to record within such 30-day period.

e. Description of the Mortgaged Property.

(1) A mortgage must contain a description of the mortgaged premises and the description must be sufficient to enable the land to be identified. *Bergschlag v Van Wagoner*, 46 Mich 91, 8 NW 693 (1881); *Slater v Breese*, 36 Mich 77 (1877). Rules of construction applicable to deeds apply to mortgages. *Slater*, supra. Unambiguous descriptions must be strictly construed. See Michigan Land Title Standards (6th ed.), Standard 23.1. Ambiguous descriptions must be resolved by determining the actual intent of the parties or, if necessary, by applying settled rules of construction. See Michigan Land Title Standards (6th ed.), Standard 23.2 and cases cited therein.

(2) If the property is platted, the mortgage must include the caption of the plat and the lot number. MCL 560.255; MCL 560.212. *See Richardson v Wells Fargo Home Mortgage Inc. (In re Brandt),* 421 BR 426 (Bankr WD Mich 2009) (holding that a mortgage purporting to encumber a lot in a platted subdivision which did not have the lot number or plat caption was fatally defective because it violated MCL 560.255 and 560.212 and was avoided by a bankruptcy trustee's strong

arm powers, even though the mortgage had the correct street address and tax parcel number for the lot mortgaged).

(3) Although the recording statutes do not require that a mortgage include street addresses or tax parcel numbers, most Michigan registers of deeds will not record a mortgage unless it contains this information. Consequently, it is common practice to include this information.

f. After Acquired Property. A mortgage executed by a mortgagor before acquisition of title to the mortgaged property becomes a valid lien when the mortgagor acquires title to the property, subject to intervening rights of third parties, if any. See Michigan Land Title Standards (6th ed.), Standard 16.1 and cases cited therein.

g. Marital Status of Male Grantor. Statutory and common law dower was recently abolished in Michigan (see MCL 558.30 and amendments to MCL 700.1303, 700.2202, 700.2205 and 700.3807, effective April 6, 2017). MCL 565.221 was also later repealed, which had required that the marital status of a male mortgagor be included in the mortgage.

h. Review by a Title Company. If a title company will insure a mortgagee's mortgage by loan title insurance policy, it is always good practice to be sure the title company's legal description matches the mortgage legal description, and to have the title company review the mortgage prior to closing for any recording issues or other deficiencies.

2. Assignment of Leases and Rents; Lease Modifications

a. As noted earlier, Michigan is a lien theory state. Consequently, the long-standing rule of law in Michigan until 1925 (in the case of trust mortgages) and 1953 (more broadly) was that the mortgagee had no right to collect rents or other income from the mortgaged property until the mortgagee had foreclosed and acquired title to the property after expiration of the redemption period without redemption.

b. With the passage of 1953 PA 210, as amended by 1966 PA 151, MCL 554.231 *et seq*., Michigan law recognized a lender's ability to secure an interest in leases and rents prior to the appointment of a receiver or exercise of foreclosure. See also 1956 PA 66, as amended, MCL 565.81 *et seq*. (as to rents from oil and gas properties), and 1925 PA 228, MCL 554.211, *et seq*. (as to trust mortgages). An assignment of rents may be taken "in or in connection with any mortgage on commercial or industrial property other than an apartment building with less than 6 apartments or any family residence". MCL 554.231. Most Michigan mortgages include assignment of rents provisions, although a separate assignment of rents is sometimes granted in a document separate from the mortgage. The statute does not specify particular language required for the assignment, although a well drafted mortgage or assignment of rents would contain an assignment that becomes operative after a default and also cite to the statute. It is unclear whether an assignment of rents taken without a mortgage is enforceable, although the statutory language suggests it is not. The assignment is only effective after (i) the occurrence of a default under the mortgage, (ii) filing

by the mortgagee in the real estate records of a statutory notice of default, and (iii) service of a copy of the notice of default on the tenants. MCL 554.231-.232. An assignment of leases and rents in a mortgage can be enforced after a foreclosure sale. *Security Trust Co. v Sloman*, 252 Mich 266; 233 NW 216 (1930); *Smith v Mutual Ben Life Ins Co*, 362 Mich 114; 106 NW2d 515 (1960). See generally Michigan Land Title Standards (6th ed.), Standard 16.38.

c. MCL 554.233 states that "[w]hile the mortgage remains in force no modification of the rental covenants in such lease shall be binding upon the holder of such mortgage without his written consent thereto." In *Comerica Bank v TDJ, Inc*, 2000 Mich. App. LEXIS 2255 (Mich. Ct. App. Apr. 25, 2000), the court held that an amendment with "space and rental amount changes" was not binding on a mortgagee.

3. Security Agreement; Fixtures; Construction Mortgages

a. A mortgage may (and usually does) grant a security interest in personal property in addition to granting a lien on real property. Consequently, the mortgage constitutes a security agreement under the Uniform Commercial Code, if the mortgage contains all of the statutory requisites of a security agreement. See MCL 440.9102(ttt) (a security agreement is "an agreement that creates or provides for a security interest"). Typically the personal property covered by such a grant is the personal property located on or used in connection with the mortgaged premises, and permits, licenses, approvals and other general intangibles related to the mortgaged premises.

b. A fixture is an item of personal property that attaches to and becomes a part of real property. See Cameron, §§ 4.2-4.4, pp 134-135 and cases cited therein; see also MCL 440.9102(oo) (defining fixtures as "goods that have become so related to particular real property that an interest in them arises under real property law"). A lien on fixtures can be perfected by a mortgage lien alone because fixtures are real property. A lien on fixtures also can be perfected under the Uniform Commercial Code by filing a UCC-1 financing statement centrally, or by filing a fixture filing in the local real estate records, or by recording a mortgage as a fixture filing. A mortgage is effective as a fixture filing under MCL 440.9502 provided it contains certain information that would otherwise be included in a financing statement filed as a fixture filing. Priorities vary based on the manner of perfection. For a more detailed discussion about liens on fixtures, See Brian D. Hulse, *The Truth about Fixture Filings: Does the Typical Real Estate Lender Really Need One?*, 32 The Practical Real Estate Lawyer 5 (2016).

c. Although a discussion of the priorities of liens and security interests in fixtures is beyond the scope of these materials, note that a "construction mortgage" that is recorded before goods become fixtures has priority over purchase money security interests in goods that will become fixtures if the goods become fixtures before the construction is completed. See MCL 440.9334(8). "A mortgage is a construction mortgage to the extent that it secures an obligation incurred for the construction of an improvement on land, including the acquisition cost of the land, if a recorded record of the mortgage so indicates." *Id*. Consequently, it is good practice to include in a construction mortgage an

explicit statement that it is a construction mortgage for purposes of MCL 440.9334(8).

4. Due on Sale/Encumbrance Clauses.

a. Commercial mortgages generally include due-on-sale provisions which provide that the indebtedness becomes due immediately in the event of sale of the property or a controlling interest in the mortgagor. A sample provision is below:

> "The Indebtedness shall become due and payable immediately, without notice, at the option of Mortgagee, if Mortgagor shall convey, assign or transfer the Premises by deed, land contract or other instrument, or if title to the Premises shall become vested in any other person or party in any manner whatsoever or if there is any disposition (through one or more transactions) of legal or beneficial title to a controlling interest of Mortgagor. In the event ownership of the Premises becomes vested in a person or persons other than Mortgagor (with or without the prior written approval of Mortgagee), Mortgagee may (but shall not be obligated to) deal with and may enter into any contract or agreement with the successor(s) in interest with reference to this Mortgage in the same manner as with Mortgagor, without in any manner discharging or otherwise affecting the lien of this Mortgage or Mortgagor's liability under this Mortgage or upon the Indebtedness."

Due-on-sale clauses in mortgages on multifamily residential and commercial property are enforceable in Michigan, but not in the case of residential property. See *Darr v First Federal Savings & Loan Assn of Detroit*, 426 Mich 11; 393 NW2d 152 (1986) (holding that due-on-sale clauses are not impermissible restraints on alienation); Garn-St. Germain Depository Institutions Act of 1982, 12 USC 1701j-3. Michigan's Due-on-Sale Clause Act, MCL 445.1621 *et seq*., regulates the enforceability of residential mortgage loan due-on-sale clauses. See Cameron, § 18.44, pp 707-12.

b. Commercial mortgages typically include covenants prohibiting the mortgagor from further encumbering the mortgaged premises. Apparently no court in Michigan has addressed the question whether such provisions or so-called "due-on-*encumbrance* clauses" are enforceable. Cameron, § 18.44, p 712. There is also little case law outside Michigan on due-on-encumbrance clauses, but some courts that have looked at them have permitted enforcement only when such clauses are "reasonably necessary to protect the lender's security." *Id*. John Cameron, in his treatise *Michigan Real Property Law*, has expressed doubt about the enforceability of such clauses because a junior mortgage does not impair the senior mortgagee's security, but given the ubiquitous nature of such covenants in Michigan commercial mortgages and the relationship of the parties in commercial transactions, this author believes a court would honor the parties' intent in a commercial setting.

5. Other Provisions Customarily Included in Well Drafted Commercial Mortgages. In addition to provisions describing the mortgaged property and rights, the mortgage debt, an assignment of rents, security agreement provisions, future advance provisions

(discussed below) and the like, well drafted commercial mortgages typically include detailed covenants governing virtually every aspect of the ownership, operation, maintenance and repair of the mortgaged premises and rights and remedies on default, including the following:

a. A covenant to pay the mortgage debt when due. This covenant can have the effect of extending the statute of limitations on collection of the mortgage debt. See Section D.2.

b. Warranties and covenants related to title and assuring that the mortgagor's title is not, and shall not be, impaired.

c. Covenants requiring the payment of taxes, assessments, junior liens, other encumbrances and other charges and impositions assessed against the mortgaged premises, including the requirement that the mortgagor escrow with the mortgagee funds sufficient to pay such sums when due. Mortgages also customarily grant the mortgagee the right to pay such sums and add such payment to the mortgage debt if the mortgagor fails to do so.

d. Covenants requiring the mortgagor to constantly maintain property, liability and other insurance on the mortgaged premises and to extend coverage to the mortgagee (i.e., by naming the mortgagee as a mortgagee under a standard mortgage clause/lender-loss endorsement in the case of property insurance, and as an additional insured in the case of liability insurance). Such provisions also include the requirement that the mortgagor escrow with the mortgagee funds sufficient to pay premiums for such insurance. Commercial mortgages also customarily grant the mortgagee the right to pay such sums and add such payment to the mortgage debt if the mortgagor fails to do so.

e. Provisions entitling the mortgagee to adjust and compromise insurance from any hazard loss and to collect, receive and apply insurance proceeds to the mortgage debt (often with a power of attorney granted to the mortgagee for such purposes). Sometimes mortgages grant the mortgagor the right to receive insurance proceeds to rebuild improvements damaged by casualty subject to certain terms, conditions and requirements.

f. Covenants requiring the mortgagor to abstain from commission of "waste" on the mortgaged property. MCL 600.2927 provides that upon agreement of the parties, the failure to pay taxes or insurance premiums constitutes waste, and authorizes the mortgagee to seek appointment of a receiver over any property (other than a dwelling or farm occupied by the owner or commercial property having an assessed valuation of $7,500 or less) in the event of waste, such receiver to be appointed in the discretion of the court.

g. Covenants requiring the mortgagor to keep the improvements on the property in good order, condition and repair, and to comply with all applicable laws, including environmental laws. Such provisions typically also grant the mortgagee the right to inspect the mortgaged property to confirm compliance with the foregoing and for other purposes (e.g., to appraise the property), and permit the mortgagee to enter the mortgaged property and perform such obligations in the event the mortgagor fails to do so. Typically such provisions

also include broad indemnification and defense provisions in favor of the mortgagee, protecting the mortgagee against a variety of claims that otherwise might arise from the mortgagee's inspection, including liability for the discovery or disclosure of an adverse condition on the mortgaged property.

h. Covenants prohibiting the mortgagor from making material alterations to the mortgaged property without the mortgagee's consent.

i. Provisions governing takings under power of eminent domain or by condemnation or by agreement in lieu thereof, and provisions dealing with the entitlement to and disposition of condemnation proceeds. Typically a mortgagee is empowered to negotiate and settle a condemnation and to collect, receive and apply condemnation proceeds to the mortgage debt (often with a power of attorney granted to the mortgagee for such purposes). Sometimes mortgages grant the mortgagor the right to receive condemnation awards to rebuild improvements damaged by the taking subject to certain terms, conditions and requirements.

j. Provisions detailing events of default which entitle the mortgagee to enforce its rights and remedies under the mortgage, and provisions describing the various remedies available to the mortgagee upon an event of default (e.g., foreclosure by advertisement, judicial foreclosure, appointment of a receiver, performance by the mortgagee of the mortgagor's covenants, suit on the debt, collection of the deficiency and the like). While some remedies are available to the mortgagee as a matter of right, many lenders believe that the better practice is to enumerate at least some (if not all) of the intended enforcement rights. Moreover, in commercial mortgages, the mortgagor and mortgagee may be able to modify or waive rights that otherwise would be available to either party.

k. Finally, mortgages include numerous boilerplate provisions customarily included in well drafted loan documents and other contracts (e.g., provisions governing amendment, waiver, delays in enforcement, successors and assigns, further assurances, notices, reinstatement, jury trial waivers, cost reimbursements, indemnification and the like).

C. Future Advances

1. Types of Future Advance Clauses; Dragnet Clauses. There are two types of future advance clauses. The first type provides that the mortgage secures future advances specifically anticipated by the parties (such as future advances under a line of credit note executed concurrently with the mortgage, future advances under additional promissory notes to be executed subsequent to the mortgage in accordance with a loan agreement executed concurrently with the mortgage, or protective advances made by the lender to pay taxes, secure insurance or for other purposes protecting lender's security). The second type provides that the mortgage secures all present and future indebtedness and obligations of the mortgagor (or a third party borrower) to the mortgagee. This second type is commonly known as a dragnet or anaconda clause. Many bank form mortgages include dragnet clauses. A sample provision appears below (securing all present and future debt of the mortgagor, including a note signed with the mortgage):

"This Mortgage is made to secure when due, whether by stated maturity, demand, acceleration or otherwise, all existing and future indebtedness ("Indebtedness") to Mortgagee of Mortgagor, including without limit payment of

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Dollars ($_____) according to a promissory note made by Mortgagor to Mortgagee dated of even date herewith. This reference to a dollar amount does not limit the dollar amount secured by this Mortgage. Indebtedness includes, without limit, any and all obligations or liabilities of whatever amount of Mortgagor to Mortgagee, whether absolute or contingent, direct or indirect, voluntary or involuntary, liquidated or unliquidated, joint or several, known or unknown; any and all indebtedness, obligations or liabilities for which Mortgagor would otherwise be liable to Mortgagee were it not for the invalidity, irregularity or unenforceability of them by reason of any bankruptcy, insolvency or other law or order of any kind, or for any other reason; any and all amendments, modifications, renewals and/or extensions of any of the above; all costs incurred by Mortgagee in establishing, determining, continuing, or defending the validity or priority of its lien or security interest, or to protect the value of the Premises, or for any appraisal, environmental audit, title examination or title insurance policy relating to the Premises, or in pursuing its rights and remedies under this Mortgage or under any other agreement between Mortgagee and Mortgagor; all costs incurred by Mortgagee in connection with any suit or claim involving or against Mortgagee in any way related to the Premises, the Indebtedness or this Mortgage; and all costs of collecting Indebtedness; all of the above costs including, without limit, attorney fees incurred by Mortgagee.

2. Common Law Rule; Future Advance Mortgages Act. Under Michigan common law, future advances had priority over subsequently recorded interests only as to (a) advances made prior to the date the subsequent interest was acquired and (b) advances made after the date the subsequent interest was acquired if the mortgagee was obligated to make such advances. *Ladue v. The Detroit & Milwaukee Railroad Co*., 13 Mich 380; (1865). This "optional vs obligatory" distinction remains the law in many states. However, Michigan abrogated this common law rule legislatively in the Future Advance Mortgages Act, 1990 PA 348, as amended, MCL 565.901 *et. seq*.[4] Under the Act, a "future advance mortgage" has priority with respect to future advances as if the future advances were made at the time the mortgage was recorded, regardless of whether advances are obligatory or optional. MCL 565.902; MCL 565.901(a), (b) (a "future advance mortgage" is defined as a mortgage that secures an advance made after the mortgage was recorded, whether obligatory or optional).

3. Residential Future Advance Mortgages. The Future Advance Mortgages Act has more restrictive provisions for "residential future advance mortgages," but if a mortgage qualifies as a residential future advance mortgage, then advances under such a mortgage also have priority from the date the mortgage was recorded. In order to qualify as a "residential future advance mortgage," a mortgage must include conspicuous statements on the first page of the mortgage that "This is a future advance mortgage" and a statement of the maximum principal amount secured by the mortgage. Language is conspicuous if it appears in a "printed heading in capitals," or, if appearing in the body of the mortgage or

[4] For a thorough discussion of the Future Advance Mortgages Act and prior law, see Harding, *Future Advance Mortgages Act, to Amend or Not to Amend, Michigan Real Property Review*, 18 Mich Real Prop Rev 139 (1991).

amendment, "in larger or other contrasting type." MCL 565.903a(2). A "residential future advance mortgage" is defined as a mortgage securing future advances upon a single structure designed principally for the occupancy of from 1 to 4 families, or a single manufactured home designed principally for the occupancy of from 1 to 4 families, or a single condominium unit or cooperative unit, designed principally for the occupancy of from 1 to 4 families, or land upon which the mortgagor intends to construct a single structure designed principally for the occupancy of from 1 to 4 families, if the structure is to be constructed using proceeds of a loan secured by the mortgage, unless the mortgagor intends to resell the structure without occupying it as a dwelling, or land upon which the mortgagor intends to place a single manufactured home, if it will be purchased using proceeds of a loan secured by the mortgage, unless the mortgagor intends to resell the manufactured home without occupying it as a dwelling. MCL 565.901(d). However, a mortgage is not a residential future advance mortgage if the land subject to the mortgage is more than 25 acres in size. MCL 565.901(e). If a residential future advance mortgage does not meet the requirements set forth above, then the priority of future advances under the mortgage is governed by prior law (under which priority was based upon whether advances were obligatory or optional). MCL 565.903a(5).

4. Enforceability of Dragnet Clauses. Although under the plain language of Michigan's Future Advance Mortgages Act, all future advances (including those under a dragnet clause) are accorded priority back to the date of the mortgage, some have questioned whether the statute was intended to include future advances under a dragnet clause and whether dragnet clauses should be enforceable as to debt not reasonably within the contemplation of the parties at the time the mortgage was signed. See Harding, *supra* n2, p 139; Cameron, §18.18, p 677 (citing cases pre-dating the future advance statute and out-state authorities). Dragnet clauses are nonetheless ubiquitous in commercial transactions in Michigan and elsewhere, and there is no reason parties to a commercial transaction should not be able to agree to such an arrangement.

D. Applicable Limitations Periods

1. 15-Years to Foreclose. A mortgage must be foreclosed within 15 years after the mortgage becomes due or within 15 years after the last payment was made on the mortgage. MCL 600.5803. See also MCL 600.3205, which provides: "When a recorded mortgage on real property, land contract, or tax lien (except tax liens held by the state or any political subdivision of the state) on lands or property has been paid or satisfied or when 15 years have elapsed since the debt or lien secured by the mortgage, land contract, or tax lien became due and payable or since the last payment made upon it, and no civil action or proceedings have been commenced to collect the same and in case of tax deeds when no service of notice to interested persons (of any kind) has been filed with the county clerk, the owner of the land or property may institute an action in the circuit courts to discharge the mortgage, land contract or tax lien."

2. 10-Years to Enforce Breach of a Covenant. The statute of limitations for "actions founded upon covenants in deeds and mortgages of real estate" is 10 years. MCL 600.5807(4); see also *Schram v. Pillon*, 45 F Supp 942, 943 (ED Mich 1942) (holding that the plaintiff mortgagee may maintain action upon covenants in the mortgage after foreclosure by advertisement and after the statute of limitations has run against the note for which the mortgage was security but before the ten year statute of limitations has run against those covenants); *Guardian Depositors Corp. of Detroit v. Savage*, 287 Mich. 193, 195, 283 N.W. 26, 27 (1938) (holding that 10 year statute of limitation applies to

enforce covenant to pay indebtedness, not 6 year statute of limitations applicable to notes); *Visioneering Inc. Profit Sharing Trust v. Belle River Joint Venture*, 149 Mich App 327, at 333, 386 NW2d 185, at 188 (1986) ("The trial judge correctly held that these covenants [to pay indebtedness evidenced by notes] were subject to the ten-year period of limitation").

3. 30-Years for Mortgage unless Renewed. Under MCL 565.382, a mortgage, unless the appropriate affidavit of renewal is filed, is considered discharged within 30 years after the due date set forth in the mortgage or, if no due date is set forth therein, within 30 years after the recording of such mortgage. See also Michigan Land Title Standards (6th ed.), Standard 16.10.

E. Equitable Mortgages

1. Equitable Mortgages Generally. Under Michigan common law, a court may impose and foreclose an equitable mortgage where an instrument is signed which is intended by the parties to grant a lien on real estate, but is defective. *In re Estate of Moukalled*, 269 Mich App 708; 714 NW2d 400 (2006); see also *Abbott v Godfroy's Heirs*, 1 Mich 178 (1849). "Equity will create a lien only in those cases where the party entitled thereto has been prevented by fraud, accident, or mistake from securing that to which he was equitable entitled." *Chef v Haan*, 269 Mich 593, at 598; 257 NW 894, at 896 (1934). The *Chef* court continued:

> "In order to lay the foundation for an equitable lien upon real estate, there must be a contract in writing out of which the equity springs, indicating an intention to make particular property identified in the written contact security for the debt or obligation, or whereby it is promised to assign, transfer, or convey the property as security. In the absence of such written contract, equity from the relations of the parties may declare an equitable lien out of considerations of right and justice based upon the fundamental principles of equity jurisprudence, such as cases where one joint owner improves property for the benefit of both; where a party innocently makes permanent improvements and repairs which presently enhance the value of the property; but in all such cases, the person seeking to establish the lien must show that in equity, in good conscience, he is entitled to the lien clamed." *Id*., at 598-99.

"In an equitable action, a trial court looks at the entire matter and grants or denies relief as dictated by good conscience." *Moukalled*, at 719. "An equitable lien cannot be imposed, however, if the proponent has an adequate remedy at law." *Id*. "The form or particular nature of the agreement which shall create a lien is not very material, for equity looks at the final intent and purpose rather than at the form; and if intent appear to give , or to charge, or to pledge property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be *sufficiently identified*, the lien follows." *Id*., at 720 (citations omitted) (emphasis supplied).

2. Fact-Specific Cases*; Moukalled.* Equitable mortgage cases are fact-specific and subject to equitable considerations. One example is *Moukalled*, which involved an instrument titled a "Security Agreement," prepared without assistance of an attorney, which provided that in the event certain loans were not paid, certain assets would be liquidated, including two vacant real estate lots. The security agreement provided that the

assets could not be sold without the lender's consent, and it was recorded with the register of deeds (which was accepted as a financing statement). The court held that, although the agreement was not enforceable under Article 9 of the Uniform Commercial Code (which is not applicable to real estate), it was nevertheless an equitable lien on the vacant lots. The court found that "[t]he agreement reflects the clear intent by the parties to use identifiable pieces of property . . . as security for the promissory notes." 269 Mich App 708, at 721. "In this case, but for the parties' mutual mistake of law in preparing an agreement not enforceable under the UCC, petitioner would have been a secured creditor." *Id*., at 721-22.

F. Mortgage Subordination Agreements[5]

1. What Constitutes a Mortgage Subordination Agreement. A mortgage subordination agreement is an agreement between two mortgagees holding mortgages on the same real estate, the primary purpose of which is to agree on the relative priorities of the mortgages. The borrower is not typically a party to the agreement. MCL 565.391 permits a mortgagee to waive the priority of its mortgage in favor of another mortgage or lien. Such waiver may be in the mortgage or in a separate instrument. The statute provides that the separate instrument may be recorded. Recording of the mortgage or separate instrument containing the waiver is constructive notice thereof to anyone dealing with the mortgage. If a mortgage subordination agreement is not recorded, a bona fide purchaser of one of the mortgages that is the subject of the agreement (lacking knowledge of the agreement) may not be bound by the agreement. See MCL 565.29. A subordination agreement is valid if based on valid consideration. *Levitz v Capital Savings & Loan Co*, 267 Mich 92, 96; 255 NW 166, 168 (1934). As with contract law generally, courts will not inquire as to the adequacy of the consideration for a mortgage subordination agreement, and it is enough if the consideration is given in exchange for the promise. *Id*. at 97.

2. Issues for Junior Mortgagees. A lender with a junior mortgage on Michigan real estate is in peril unless it obtains an intercreditor/subordination agreement with the senior mortgagee.

a. As discussed later, a senior mortgagee that forecloses its mortgage by power of sale under Michigan's foreclosure by advertisement statute is not required to notify a junior mortgagee of the foreclosure. Notice need only be given by publication and posting, neither of which are likely to provide actual notice to a junior mortgagee. Consequently, a prudent junior mortgagee will require an intercreditor or subordination agreement with the senior mortgagee, under which, the senior mortgagee agrees to give the junior mortgagee notice of the commencement of a non-judicial foreclosure or other enforcement action.

b. Further, as discussed earlier, Michigan's Future Advance statute permits a senior mortgagee to make future advances in an unlimited amount (whether optional or obligatory) and such advances relate back to the date of the mortgage, thereby priming the junior mortgage. This can occur when the senior mortgage secures a specific note or indebtedness under a credit agreement, as they may be

[5] For a more thorough examination of mortgage subordination agreements, see Scavone, *Mortgage Subordination Agreements: Some Compelling Reasons to Reconsider a Lean Subordination Agreement*, 34 Mich Real Prop Rev 160 (2007).

amended, or when a senior mortgage secures future advances under, for example, a dragnet clause. Therefore, if a junior lender requires preservation of its collateral value, it would need to obtain an agreement from the senior lender to limit its senior lien.

3. Issues for Senior Mortgagees.

a. The interests of senior mortgagees in the case of mortgage subordination agreements arise in two contexts: (1) when the senior mortgagee has a first priority mortgage and consents to a second mortgage; and (2) when the senior mortgagee's mortgage attains its senior status by subordination of a prior mortgage. The issues that follow are relevant considerations for senior mortgagees in either case, but due to the different circumstances under which the senior mortgagee attains its senior status, the intercreditor agreements often are quite different in how (or whether) they address them.

b. It also should be noted that when a first mortgagee is considering consenting to a second that will remain second in priority, in view of the various issues with second mortgages identified below, the initial reaction of the first mortgagee might be to refuse to consent. However, as discussed earlier, it is not clear whether due-on-encumbrance clauses are enforceable and a first mortgagee may be able to mitigate most, if not all, of the risks below with a subordination agreement favorable to the first mortgagee.

c. A senior mortgagee will want the mortgage subordination or intercreditor agreement to acknowledge that the priorities established by the agreement are effective regardless of whether the senior mortgage is recorded and regardless of which mortgage is recorded first. This is particularly true when the mortgages are being granted concurrently. The order of recording in race-notice states like Michigan is "entirely irrelevant to their priorities," since an unrecorded mortgage is "valid and prior to a subsequent mortgagee who takes with notice of the first." Nelson & Whitman, § 12.9, pp 943-44. "It is widely assumed that, since the recording acts apply to subordinations, the parties can forego an express agreement and accomplish a subordination merely by ensuring that the prior mortgage is first. Unfortunately, in many cases this assumption is demonstrably false." *Id*., p 944 n2. Mortgages submitted for recording in one order may ultimately be recorded in a different order due to one mortgage failing to comply with recording requirements (which would delay recording until the defect is corrected, and it can take weeks with some counties before a mortgage is ultimately rejected and returned for correction) or for other reasons.

d. Another issue of significance for senior mortgagees is whether the junior mortgagee can foreclose its mortgage, or exercise its assignment of rents, seek appointment of a receiver, or exercise other remedies, each of which can cause significant problems for the senior mortgagee. In the case of a junior mortgagee's foreclosure, the senior mortgagee must either foreclose itself or watch its borrower lose control of the collateral.

e. Any junior mortgagee enforcement action with respect to the real estate can derail an otherwise performing senior loan and impair the rights of the senior mortgagee. Thus, subordination or intercreditor agreements typically prohibit

such actions, in effect requiring the junior mortgagee to "stand still" until the senior mortgagee is paid in full. Such subordinated junior mortgages are often called "silent seconds." Batty & Brighton, *"Silent" Second Liens–Will Bankruptcy Courts Keep the Peace?,* 9 NC Banking Inst 1, pp 4-5 (2005).

f. Another adverse consequence of a second mortgage for a senior mortgagee relates to three other remedies besides foreclosure that the senior mortgagee might employ after default: (1) requiring the borrower to refinance the senior loan; (2) requiring the borrower to sell the property to satisfy the senior debt; and (3) acquiring the property from the borrower by deed in lieu of foreclosure of the senior mortgage. The existence of the junior mortgage thwarts each of these remedies. A subordination agreement can mitigate these issues by requiring the junior mortgagee to discharge its mortgage in these cases.

g. MCL 600.3224 provides that if property to be foreclosed by advertisement consists of distinct farms, tracts or lots that are not occupied as one parcel, the parcels must be offered for sale separately first, and no more parcels may be sold than are necessary to satisfy the debt. A junior mortgagee might argue that it has an independent right to enforce the statute. See *Masella v Bisson*, 359 Mich 512; 102 NW2d 468 (1960) (holding that a land contract vendee of the mortgagor could require enforcement of the statute and that the borrower's waiver was not binding on the junior mortgagee). A junior mortgagee should be bound, though, by a mortgagor's waiver of the requirements of MCL 600.3224 in the senior mortgage because the junior mortgagee had record notice of the provisions of the senior mortgage and took its junior mortgage subject to it. The senior mortgagee can eliminate this risk with even greater certainty by requiring in a subordination agreement that the senior mortgagee may sell the mortgaged property as one parcel or as separate parcels as the senior mortgagee may elect, thereby waiving any rights the junior mortgagee might have under the statute.

h. The equitable doctrine of marshalling dictates in the context of senior and junior mortgages, that the senior mortgagee should liquidate other collateral to satisfy its debt before foreclosing on the real estate shared with the junior mortgagee. For a recitation of Michigan common law on marshalling, see *Southworth v Parker*, 41 Mich 198; 1 NW 944 (1879). A senior mortgagee should require in any subordination or intercreditor agreement that the junior mortgagee waives any right to require the senior mortgagee to marshal collateral.

i. A junior mortgagee has considerable rights in the event of a bankruptcy of the mortgagor, including the right to receive "adequate protection," to seek relief from the automatic stay to foreclose the junior mortgage, to object to any sale of the real estate, and to vote against the debtor's plan of reorganization. Dobbs, *Negotiating Points in Second Lien Financing Transactions*, 4 DePaul Bus & Comm LJ 189, pp 209-22 (2006). While outside the scope of these materials, a well-drafted subordination agreement favorable to a senior mortgagee should contain provisions addressing such matters in a way that assures that the junior mortgagee cannot impede the senior mortgagee's control over the collateral and its ultimate disposition.

j. A final issue to consider is the consequence of a first priority mortgagee subordinating its mortgage to a third priority mortgage and what effect that

subordination has with respect to the second mortgage between the first and third. Some courts hold that by subordinating the first to the third mortgage, the first is also subordinated to the second. See, e.g., Nelson & Whitman, § 12.9, p 945. This is commonly referred to as the full subordination theory. Other courts hold that subordination of a first mortgage to a third mortgage should have no bearing on the priority of the first versus the second. This is referred to by commentators as the partial subordination theory. See Nation, *Circuity of Liens Arising from Subordination Agreements: Comforting Unanimity No More*, 83 BUL Rev 591, 592-93 (2003). *Union Bank & Trust Co, NA v Farmwald Dev Corp*, 181 Mich App 538; 450 NW2d 274 (1989), adopted the full subordination concept. However, in *In re Cliff's Ridge Skiing Corp*, 123 BR 753 (WD Mich 1991), the bankruptcy court for the western district of Michigan held two years after *Union Bank & Trust* that the partial subordination theory applies in Michigan, though the court did not consider *Union Bank & Trust* or cite any other Michigan authority. Both senior and junior mortgagees must evaluate the impact of these cases and determine whether intervening lienors exist and, if so, whether they should join in an agreement delineating their lien priority.

G. Land Contract Mortgages

1. Law Prior to 1998. Prior to 1998, there was uncertainty under Michigan law as to whether seller/vendor and purchaser/vendee interests were solely real property interests, or also personal property interests. Consequently, when taking and perfecting liens on such interests, prudent lenders would assume that both real estate law and Article 9 applied and perfect accordingly. Michigan eliminated these ambiguities in 1998 PA 106, MCL 565.356 et. seq. (the Land Contract Mortgage Act). See also Michigan Land Title Standards (6th ed.), Standard 16.40.[6]

2. Land Contract Mortgage Act.

a. The Act creates a simple safe harbor for lenders taking either land contract sellers' interests or land contract purchasers' interests as collateral. A lender is not required to comply with the Act in order to take and perfect a collateral interest in land contracts (in which case they would need to abide by the law in effect prior to 1998), but it makes little sense to do otherwise.

b. The Act provides that you may use any standard form of a mortgage to create and perfect a lien on a land contract interest. You no longer are required to file a UCC financing statement to perfect a collateral interest in a land contract. Instead, you can simply record a mortgage like you would any other mortgage. MCL 565.358(4).

c. The Act refers to a specific optional provision that can be added to a land contract mortgage covering a seller's interest in a land contract. If the land contract mortgage contains a collateral assignment of the payments of a vendee (purchaser) under the land contract, the lender has a right to receive payments directly from the land contract purchaser upon default, provided that the lender

[6] For a general discussion of the law prior to 1998 and the Land Contract Mortgage Act, see Gary A. Taback, *The "Land Contract Mortgage" – It's Brand New!, 25* Mich Real Prop Rev 211 (1998).

delivers a statutory notice of default to the land contract purchaser. MCL 565.360(3)(b). This language should always be included in a land contract mortgage on the seller's interest.

d. A problem encountered by lenders securing their loans with land contracts is the occurrence of a default in the underlying contract which has the potential to terminate the lender's lien. The Act gives a mortgagee rights to cure defaults under the land contract and under any prior mortgages or other interests. Under certain circumstances, the mortgagee is also entitled to notice of any default. MCL 565.360(2).

e. The holder of a prior mortgage on land being sold under land contract (or the holder of any other prior interest in the land) also must give the lender under a recorded land contract mortgage all notices or opportunity to cure that a second mortgage holder would be entitled to. Subsection 4 provides that the first mortgagee also must name the land contract mortgagee as a party in interest in any legal proceeding to foreclose the first mortgage. MCL 565.360(4).

f. Section 11 of the Act deals with another historic problem for lenders who foreclose on a land contract seller's interest - the obligation to deliver a deed to the purchaser when the land contract has been fully paid. The Act establishes different obligations for lenders with respect to deeds than for land contract sellers. A lender with a mortgage on a seller's interest in a land contract has the right to deliver a quit claim deed regardless of whether the land contract otherwise requires a warranty deed or other form of deed, so long as the lender has not specifically assumed the seller's obligation to deliver the type of deed specified in the land contract. MCL 565.361(3). Thus a mortgagee can fulfill the seller's obligation under the land contract to deliver a deed without becoming liable for warranties of title.

H. Discharge of Mortgages

1. Requirement to Discharge. Under Michigan law, a mortgagee is required to discharge a mortgage "after full performance of the condition of the mortgage, whether before or after a breach of the mortgage, or, if the mortgage is entirely due, after a tender of the whole amount due . . . ." MCL 565.44.

2. Deadline to Discharge; Liability for Damages. A mortgagee is required to discharge the mortgage within 60 days after being requested and after payment of the mortgagee's reasonable charges. Failure or refusal to discharge a mortgage as and when so required exposes the mortgagee to liability for $1,000 in damages plus actual damages. MCL 565.44.

I. Mortgage Foreclosure[7]

1. Foreclosure by Advertisement/Power of Sale Foreclosure

a. Preliminary Matters.

[7] For a general discussion of mortgage foreclosure and other mortgage remedies in Michigan, see Dudek, *Mortgage Foreclosure and Related Remedies under Michigan Law*, Mich Real Prop Rev 173 (Winter 2003).

(1) Governing Law. Foreclosure by advertisement/power of sale foreclosure is governed by the Revised Judicature Act of 1961, MCL 600.3201 *et. seq*. Foreclosure by advertisement is not a judicial action, but instead is based in contract. The statute has been reviewed and upheld on constitutional grounds. See *Cheff v Edwards*, 203 Mich App 557, at 560; 513 NW2d 439, at 441 (1994) and cases cited therein.

(2) Power of Sale. In order to foreclose a mortgage by advertisement, the mortgage must contain a valid power of sale. MCL 600.3204. See also Michigan Land Title Standards (6th ed.), Standard 16.12. A power of sale is simply the mortgagor's grant to the mortgagee of the power to sell the mortgaged property after default in accordance with the foreclosure by advertisement statute.

(3) Amendments and Assignments Recorded. To foreclosure by advertisement, the mortgage and any amendments, assignments or assumption agreements must have been (1) in recordable form, and (2) recorded. MCL 600.3204(3). See also Michigan Land Title Standards (6th ed.), Standard 16.12.

(4) Foreclosure Commitment. Before commencing foreclosure, a foreclosure title search or title commitment should be obtained to verify the status of title to the mortgaged property, and to confirm that there are no intervening title problems such as tax liens, construction liens or disputes as to ownership or priority of interest. The commitment should be periodically updated through the date of sale.

(5) Federal Tax Liens. For a senior mortgagee to achieve priority over a junior federal tax lien, the tax lien must either be recorded and indexed within 30 days before the foreclosure sale, or the mortgagee must give the IRS not less than 25 days prior notice of the foreclosure sale. See Michigan Land Title Standards (6th ed.), Standard 16.17. This requires a foreclosing mortgagee to obtain title work and update it to the date of the sheriff's sale so that if a junior federal tax lien is recorded within 30 days prior to the sale, notice can be given.

(6) Junior Liens in Favor of the United States or an Agency thereof, including the SBA. 28 USC 2410(c) provides: "Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under the internal revenue laws the period shall be 120 days or the period allowable for redemption under State law, whichever is longer . . . ." See also 26 USC 7425 and Treas. Reg. 301.7425-4. If you have a junior lien in favor of the SBA or any other agency of the United States, there may also be notice requirements similar to federal tax liens. Applicable statutes should be reviewed to confirm.

(7) Sale in Bulk or In Parcels. If the property consists of distinct farms, tracts or lots that are not occupied as one parcel, the parcels must be offered for sale separately first, and no more parcels may be sold than

are necessary to satisfy the debt. MCL 600.3224. The borrower has the right to waive the provisions of MCL 600.3224. *Metropolitan Life Ins Co v Foote*, 95 Mich App 399; 290 NW2d 158 (1980) (holding that a waiver is effective absent third party interests or bad faith). See also Cameron, § 18.80, p 745, stating that the borrower "probably" has the right to waive the provisions of MCL 600.3224, citing *Clark v Stilson*, 36 Mich 482 (1877), and *Foote*. Most commercial mortgages contain an express provision authorizing the mortgagee to sell all or a portion of the mortgaged property, thereby waiving the requirement of MCL 600.3224.

(8) Abandoned Property. Before foreclosing, the lender should determine whether the property is abandoned (applicable only to residential property). If so, the abandoned property requirements of MCL 600.3241 or MCL 600.3241a should be complied with to take advantage of the shortened redemption period, otherwise the longer period will apply.

(9) Default. In order to foreclose a mortgage by advertisement, some default in a condition of the mortgage, making the power of sale operative, must have occurred. MCL 600.3204(1). The debt should be accelerated before commencing foreclosure (a clause of the mortgage should permit such acceleration).

(10) No Suit on Debt. No suit or proceeding can have been instituted at law to recover any part of the debt unless any such suit or proceeding was discontinued or an execution on the judgment rendered therein was returned unsatisfied. MCL 600.3204(1)(b). See Michigan Land Title Standards (6th ed.), Standard 16.14. This is commonly referred to as one of Michigan's one-action rules, and "reflects a legislative intent to force an election of remedies by a mortgagee with respect to a single debt, precluding simultaneous maintenance of a lawsuit on the debt and foreclosure by advertisement, and thereby avoiding double recovery on the same debt." *Citizens Bank v Black*, unpublished per curiam opinion of the Court of Appeals, issued July 23, 2015 ((Docket Nos. 318107, 318981, 318982), p. 4-5 (citing *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 289-92; 818 N.W.2d 460, 463-65 (2012)). A suit seeking appointment of a receiver is not an action or proceeding to recover the debt. MCL 600.3204(1)(b) and MCL 554.1035(f). A suit for money against a guarantor is also not disqualifying because the "guaranty is an obligation separate from the mortgage note." *United States v Leslie*, 421 F2d 763, at 766 (6th Cir 1970). However, the Michigan Court of Appeals has held that when a mortgage includes the guaranty as part of the indebtedness or obligations secured by the mortgage, then the guaranty is part of "the debt secured by the mortgage," and thus triggers the one-action rule and prevents a foreclosure by advertisement simultaneous with the action against a guarantor. *Greenville Lafayette, LLC*, 296 Mich App at 289.

(11) Personal Property. Before foreclosing, the lender should determine whether there is any UCC Article 9 collateral secured by the mortgage (there almost always is) and, if so, determine whether to

foreclose on the personalty as well as the realty in one sale under MCL 440.9604(1)(b) and 9604(2)(b). If the personalty will be sold separately, the sales should be coordinated to assure that there is adequate debt to bid at each sale.

(12) Condominium Units.

(a) *Successor Developer Liability*. Under MCL 559.235, a person who acquires title to the lesser of 10 units or 75% of the units in a condominium project, other than a "business condominium project," by mortgage foreclosure is a "successor developer" under the Michigan Condominium Act. A successor developer has certain obligations as set forth in MCL 559.235. A mortgagee who will be a successor developer should evaluate these obligations and liabilities before foreclosing (indeed, such obligations should be understood by the lender before financing the project).

(b) *Right of Withdrawal; Conversion of Undeveloped Lands to Common Elements*. A foreclosing mortgagee should also consider the effects of MCL 559.167, which can under certain circumstances, result in the conversion of buildable units into common elements.

(13) Military Service. If the mortgagor is an individual, prior to foreclosing the lender should confirm that the mortgagor (i) is not currently serving in the military service, and (ii) has not served in the military within 6 months prior to the foreclosure sale. Also, the mortgagee should obtain a signed Non-Military Service Affidavit from the borrower. MCL 600.3285. See also 50 USC App 511, 516, 517 and 532; Michigan Land Title Standards (6th ed.), Standard 16.27 – applicable to owner in military service on date of sale or within 3 months prior, if (i) owner held title at the commencement of military service and on the date of sale, and (ii) the obligation secured by the mortgage originated before the owner's period of military service.

(14) Issues with Multiple Mortgages; *Ren-Cen*. If the lender has more than one mortgage, careful consideration should be given as to the order and manner of foreclosure. Also, the implications of *Bd of Trustees of Gen. Retirement Sys of Detroit v Ren-Cen Indoor Tennis & Racquet Club*, 145 Mich. App. 318; 377 N.W.2d 432 (1985) should be considered. In *Ren-Cen*, the lender had two separate loans secured by separate mortgages on the same property. The lender foreclosed the second mortgage and purchased the property at a sheriff's sale for the amount owed on defendant's second $500,000 loan, while retaining the first mortgage, securing a separate $1,100,000 loan. The property was worth more than $3,000,000. The lender sued to obtain a deficiency judgment for the amount owed on the first $1,100,000 loan. If there had been one note and one mortgage instead of two, the debtor could have relied on MCL 600.3280 as a defense, but the statute was inapplicable. The Court applied the equitable merger doctrine to prevent the windfall.

See also Dags II, LLC v Huntington Natl Bank, 865 F3d 384 (6th Cir 2017); *FDIC v Torres*, No. 311277, 2014 WL 309787 (Mich. Ct. App. Jan. 28, 2014).

b. Publication and Posting of Notice

(1) Publication. A notice declaring that the mortgage will be foreclosed by a sale of the premises must be published at least once each week for four (4) successive weeks in a newspaper that is published in the county where the premises are situated. MCL 600.3208. Because the sale must be held not less than 28 days after the first publication, see Michigan Land Title Standards (6th ed.), Standard 16.23, foreclosing mortgagees often publish for five (5) consecutive weeks. It is also advisable to publish for five (5) weeks so that if the first published notice has errors from the publication process, they can be corrected in the second and subsequent notices without delaying in the sale date.

(2) Form of Notice. The notice must (or should) specify:

(a) The names of the mortgagor, the mortgagee, and the foreclosing assignee of a recorded assignment of the mortgage.

(b) The date of the mortgage and the date the mortgage was recorded.

(c) The amount claimed to be due on the mortgage on the date of the notice. The amount due is inclusive of principal, interest, taxes paid, escrow deficit, yield maintenance, prepayment penalty and any other costs or expenses incurred which are secured by the mortgage, as of the date of publication. However, attorneys' fees are statutorily limited to a nominal sum ($75 in most cases). See MCL 600.2431.

(d) A description of the mortgaged premises that substantially conforms with the description contained in the mortgage.

(e) A description of the property by giving its street address, if any, although the validity of the notice and sale is not affected by the fact the address is erroneous or omitted.

(f) The length of the redemption period as determined under MCL 600.3240.

(g) The name, address and phone number of the attorney for the party foreclosing the mortgage.

(h) For a residential mortgage, the following statement: "Attention homeowner: If you are a military service member on active duty, if your period of active duty has concluded less than 90 days ago, or if you have been ordered to active duty, please

contact the attorney for the party foreclosing the mortgage at the telephone number stated in this notice."

(i) The following statement: "Notice of foreclosure by advertisement. Notice is given under section 3212 of the revised judicature act of 1961, 1961 PA 236, MCL 600.3212, that the following mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, at a public auction sale to the highest bidder for cash or cashier's check at the place of holding the circuit court in _____ County, starting promptly at (time), on (date). The amount due on the mortgage may be greater on the day of the sale. Placing the highest bid at the sale does not automatically entitle the purchaser to free and clear ownership of the property. A potential purchaser is encouraged to contact the county register of deeds office or a title insurance company, either of which may charge a fee for this information."

(j) Although not required, the recording information for the mortgage is typically included.

MCL 600.3204 and 600.3212. See also Michigan Land Title Standards (6th ed.), Standards 16.18-16.22.

(3) Posting of Notice on Premises. Within 15 days after the notice is first published, a true copy of it must be posted in a conspicuous place on any part of the premises. MCL 600.3208. See Michigan Land Title Standards (6th ed.), Standard 16.24. The place need not be the most conspicuous place on the property, and posting is not invalidated if removed by the borrower or third party.

(4) Notices Required by Loan Documents; Notice to Mortgagor. If notices of foreclosure are required by the loan documents to be furnished to the mortgagor or others (such as subordinated creditors), send such notice as and when required thereby. Personal notice to or service on the mortgagor (or mortgagor's counsel if they are represented by counsel) is advisable to avoid a claim of lack of notice, good faith or due process, although not required.

(5) Condominium Units. If you are foreclosing on a condominium unit, you must give notice of the foreclosure sale to the condominium association within 10 days after the first publication of notice. MCL 559.208(9). Under MCL 559.208(9), failure to give the requisite notice of foreclosure to the association does not invalidate the foreclosure but does provide the association with "legal recourse" for the violation. "'Legal recourse' can include the filing of a civil action that seeks an award of monetary damages. To recover such damages, the plaintiff must prove its actual damage with reasonable certainty. Remote, contingent, or speculative damages cannot be recovered. If actual damage is not sufficiently proved, an award of nominal damages in [the association's] favor is proper." *4041-49 W Maple Condo Ass'n v Countrywide Home Loans, Inc*, 282 Mich App 452, at 462, 768 NW2d 88 (2009).

c. Determination of Bid Amount.

(1) Deficiency Claim. If a mortgagee does not credit bid all of the mortgage debt in a foreclosure by advertisement, the mortgagee has the right to sue for the deficiency against the mortgagor, guarantors or others liable for the mortgage debt. *Guardian Depositors Corp v Powers*, 296 Mich 553, 296 NW 675 (1941), *Gruskin v Fisher*, 405 Mich 51, 273 NW2d 893 (1979). In some cases, the ability to collect a deficiency is limited because the loan is a non-recourse obligation, making the borrower or guarantors liable for the debt only in the event that a "carveout" to the non-recourse obligation is applicable.

(2) Bid Less than True Value; MCL 600.3280. The mortgagor or other person liable on the mortgage debt has a defense and right of set-off to the deficiency claim under MCL 600.3280 to the extent they can allege and show that the property sold was fairly worth the amount of the debt at the time and place of sale or that the amount bid was substantially less than its true value. MCL 600.3280 does not, however, allow the court to set aside the sale or otherwise affect the title of the purchaser, nor does it give the mortgagor or such other person a claim against the mortgagee. *Chabut v Chabut,* 66 Mich App 440, 239 NW2d 401 (1976); MCL 600.3280. The true value of mortgaged property under MCL 600.3280 is reduced by the amount of any senior liens, including back taxes. *First of America Bank – Oakland Macomb, NA v Brown*, 158 Mich App 76, 404 NW2d 706 (1987). A mortgagor or other person liable on mortgage debt cannot assert the defense and right of set-off under MCL 600.3280 if the property is redeemed from foreclosure. *Bankers Trust Co of Detroit v Rose*, 322 Mich 256, 33 NW2d 783 (1948) (applying the predecessor statute to MCL 600.3280, 1940 CL 14444-21). See also Michigan Land Title Standards (6th ed.), Standard 16.43.

(3) No Prohibition on Bid in Excess of True Value. A mortgagee may credit bid at a sheriff's sale more than the true value of the mortgaged property, even to preclude third party bids greater than the value of the property or to preclude the mortgagor from exercising their right of redemption. However, the entire amount bid must be applied against the mortgage debt. *Pulleyblank v Cape*, 179 Mich App 690, 446 NW 2d 345 (1989).

(4) Attorneys' Fees. There is a statutory limitation on bidding attorneys' fees. MCL 600.2431.

(5) Post-Sale Net Operating Income. In order to collect and apply rents under an assignment of rents or from collections by a court-appointed receiver after the foreclosure sale, the foreclosing mortgagee must have debt to apply such rents to. If the foreclosing mortgagee credit bids all of the mortgage debt, then the mortgagor/debtor would be entitled to retain rents collected during the redemption period.

(6) Debt Bid Should be Properly Collectible. Any debt bid at a foreclosure sale, including yield maintenance payments and expenses,

should be properly payable and collectible under the instruments or agreements evidencing the mortgage debt and applicable law.

(7) Full Credit Bid Rule and Consequences. Michigan courts have recognized a "full credit bid" rule which provides that if a lender bids all of its debt at a foreclosure sale, it cannot have a loss or suffer damage related to the mortgage and mortgage debt. A foreclosing mortgagee should always give due consideration to this rule when determining its bid amount. See, e.g., *Smith v Gen Mortgage Corp*, 402 Mich 125; 261 NW2d 710 (1978) (holding that the mortgagee's full credit bid barred recovery by the mortgagee under an insurance policy when a fire partially destroyed the mortgaged property before the foreclosure sale). But see *Bank of America, NA v First American Title Ins Co*, 499 Mich 74; 878 NW2d 816 (2016) (holding that the full credit bid rule does not bar contract claims by a mortgagee against nonborrower third parties).

d. Sale.

(1) Location; Date/Time; Attendees. The mortgage foreclosure sale takes place at the circuit courthouse within the county in which the premises is situated. The sale must occur not less than 28 days after the first publication. MCL 600.3208. See Michigan Land Title Standards (6th ed.), Standard 16.22. A sheriff conducts the sale by public auction. The sale is to the highest bidder. MCL 600.3216. Ordinarily a mortgagee does not physically attend the sale. Sale documents prepared by the mortgagee are delivered to the sheriff in advance of the sale and the sheriff makes the opening bid on the mortgagee's behalf. A mortgagee would need to attend if they desired to make more than an opening bid.

(2) Adjournments.

(a) After publication has commenced, the sale may be adjourned from time to time by the sheriff or other person appointed to make the sale at the request of the party in whose name the notice of sale is published. The sheriff must post a notice of adjournment before or at the time of the sale at the place where it is to be made. If an adjournment is for more than one (1) week, the notice of the adjournment, appended to the original notice of sale, also must be published in the newspaper in which the original notice was published. If publication is required, the first notice of an adjournment must be published within 10 days after the date on which the sale was adjourned, and thereafter it must be published once each week for as long as the sale is adjourned. MCL 600.3220.

(b) Failure to timely adjourn will result in cancellation of the sale (requiring republication and posting).

(3) Sale in Bulk or by Separate Parcels. As noted earlier, if the property consists of distinct farms, tracts or lots that are not occupied as one parcel, the parcels must be offered for sale separately first, and no

more parcels may be sold than are necessary to satisfy the debt. MCL 600.3224. This right can, however, be waived by the mortgagor in the mortgage.

(4) Mortgagee Entitled to Purchase. The mortgagee may purchase the property at the sale. MCL 600.3228. If the mortgagee purchases, it need not bring cash unless the bid exceeds the unpaid balance of the mortgage debt. See also Michigan Land Title Standards (6th ed.), Standard 16.42.

(5) Payment Required. Other than mortgagee purchasers to the extent stated above, all other purchasers must pay cash or the equivalent for the property.

(6) Sheriff's Deed.

(a) Immediately upon making the sale, the sheriff or other person making the sale must deliver a deed for the lands purchased. MCL 600.3232.

(b) Ordinarily the sheriff's deed is prepared by the foreclosing mortgagee and submitted to the sheriff in advance of the sale. The deed typically includes a number of affidavits demonstrating compliance with the publication and posting requirements of the foreclosure statute. The purchaser must attach an affidavit to the sheriff's deed stating the amount required to redeem, including a per diem amount. MCL 600.3240(2).

(c) The deed should be recorded with the register of deeds for the county where the property is located, within 20 days of the date of the sale, but failure to record the deed within the 20-day period does not invalidate the sale, but causes the redemption period to run from the date of recording. MCL 600.3232; see also Michigan Land Title Standards (6th ed.), Standard 16.28 and cased cited therein.

(d) A sheriff's deed becomes operative upon the expiration of the redemption period unless redeemed. MCL 600.3236.

e. Redemption

(1) Who Can Redeem. The mortgagor and its "heirs or personal representative, or any person that has a recorded interest in the property lawfully claiming under the mortgagor or the mortgagor's heirs or personal representative heirs, executors, or administrators," are entitled to redeem the property from foreclosure, by paying the bid amount plus interest at the mortgage rate, plus certain fees. MCL 600.3240(1), (2); MCL 600.3140(1). Persons entitled to redeem have been held to include a second mortgagee, and a wife with a dower interest in the property foreclosed. *Chauvin v American State Bank*, 242 Mich 269; 218 NW 788

(1928) and *Tuller v Detroit Trust Co*, 259 Mich 670; 244 NW 197 (1932), respectively.

(2) Amount Necessary to Redeem. Under MCL 600.3240(2), the redeeming party must pay: (1) the price paid at the foreclosure sale, (2) interest from the time of the sale, (3) the sheriff's fee paid by the purchaser, and (4) an additional $5.00 fee if the payment is made to the register of deeds.

(3) Increase in Redemption Amount for Taxes, Senior Liens, Assessments, Insurance Premiums. Under certain circumstances, a mortgagee can increase the redemption amount in the event the mortgagee makes certain payments for "taxes assessed against the property, amounts necessary to redeem senior liens from foreclosure, condominium assessments, homeowner association assessments, community association assessments, or premiums on an insurance policy covering any buildings located on the property that under the terms of the mortgage it would have been the duty of the mortgagor to pay if the mortgage had not been foreclosed and that are necessary to keep the policy in force until the expiration of the period of redemption." See MCL 600.3240. See also *Michele Senters v Ottawa Savings Bank, FSB*, 443 Mich 45; 503 NW2d 639 (1993) (holding that the statutory scheme should be strictly construed regarding what amounts can be added to the redemption price).

(4) To Whom is the Redemption Amount Paid. The redemption amount may be paid to the purchaser or its assigns or to the register of deeds. MCL 600.3240(1); MCL 600.3140(1).

(5) Redemption Periods. The redemption periods for foreclosure by advertisement are addressed in MCL 600.3240, 600.3241, and 600.3241a. See also Michigan Land Title Standards (6th ed.), Standard 16.44.

(a) Commercial or Industrial Property, or Multifamily Property in Excess of 4 Units (Mortgaged Executed After 1-1-65) -- Six (6) months from the time of sale. MCL 600.3240(7).

(b) Residential Property not Exceeding 4 Units:

(i) If the property is *not* abandoned under MCL 600.3241, and

1. For mortgages executed after January 1, 1965, if the amount claimed is greater than 66-2/3% of the original indebtedness secured by mortgage, six (6) months from the time of sale. MCL 600.3240(8).

2. If the amount claimed is less than or equal to 66-2/3% of the original indebtedness

secured by the mortgage, one (1) year from the time of sale. MCL 600.3240(12).

(ii) If the property *is* abandoned under MCL 600.3241, and:

1. The amount claimed is greater than 66-2/3% of the original indebtedness secured by mortgage, one (1) month from the time of sale. MCL 600.3240(10).

2. The amount claimed is less than or equal to 66-2/3% of the original indebtedness secured by the mortgage, three (3) months from the time of sale. MCL 600.3240(9).

(c) *Abandoned Property*. For property abandoned under MCL 600.3241a, thirty (30) days or until the time to provide the notice required by MCL 600.3241a(c). MCL 600.3240(10).

(d) *Comparison of MCL 600.3241 and MCL 600.3241a*.

(i) MCL 600.3241 provides that abandonment is conclusively presumed upon satisfaction of the following: (a) within 30 days before commencing foreclosure, the mortgagee mails by certified mail, return receipt requested, to the mortgagor's last known address, a notice that the mortgage is in default and that the mortgagee intends to foreclose; (b) before commencing foreclosure, the mortgagee executes and records an affidavit stating that the notice was mailed and the mortgagor has not responded; (c) before commencing foreclosure, the mortgagee mails the recorded affidavit to the mortgagor at the mortgagor's last known address; and (d) before expiration of the applicable redemption period, the mortgagor or anyone else entitled to redeem does not give a written affidavit to the mortgagee and record a duplicate original stating that the mortgagor or person claiming under the mortgagor is occupying or intends to occupy the premises.

(ii) MCL 600.3241a provides that abandonment is conclusively presumed upon satisfaction of the following requirements before the end of the redemption period: (a) personal inspection by the mortgagee which does not reveal that the mortgagor or persons claiming under the mortgagor are occupying or will occupy the premises; (b) posting of a notice at the time of the personal inspection, and mailing of a notice to the mortgagor by certified mail, return receipt requested, stating that the mortgagee considers the premises

abandoned and that the mortgagor will lose all rights of ownership 30 days after the foreclosure sale or when the time to provide notice under subsection (c) expires, whichever is later, unless the mortgagor or its heirs, executors or administrators, or a person lawfully claiming under any of them provides notice that the premises are not abandoned; and (c) within 15 days after the notice required by subsection (b) was posted and mailed, the mortgagor or its heirs, executors or administrators, or a person lawfully claiming under any of them, has not given written notice by mail to the mortgagee at the address provided in the mortgagee's notice stating that the premises are not abandoned.

(iii) The primary distinction between abandonment under MCL 600.3241 and MCL 600.3241a is that the requirements under MCL 600.3241a can be satisfied after commencing foreclosure and even after the foreclosure sale.

(e) *Agricultural Property*. If the sale occurs on or after February 1, 2012 and the property is used for agricultural purposes, one year. MCL 600.3240(11). There is a rebuttable presumption that property is used for agricultural purposes if the requirements of MCL 600.3240(17) are satisfied.

(f) *Default*. In all other cases, one (1) year. MCL 600.3240(12).

(g) *Ambiguities in Statute*. MCL 600.3240(7) through (11), 600.3241 and 600.3241a do not define the terms "commercial or industrial property," "multifamily residential property," "units," "residential property" or "agricultural purposes." It is not clear from the statutes or case law whether these terms pertain to the actual, or intended, or legally permitted use of a property, or at what point in time the use is determined (e.g., on the date the mortgage is granted, or the date the foreclosure notice is published, or the date of the foreclosure sale). Also, the statutes and case law do not explain what is meant by the term "original indebtedness secured by the mortgage." Consequently, a foreclosing mortgagee must do a careful analysis of the risks associated with its determination of the appropriate redemption period and also should confirm with its insuring title company that they will insure the foreclosure given the redemption period used.

(h) *IRS*. The IRS has the greater of (1) the redemption period permitted by law, or (2) 120 days from the date of sale, to redeem if they have a federal tax lien on the foreclosed property. See IRS 7425 above.

(i) *Junior Liens in Favor of the United States or an Agency thereof, including the SBA*. 28 USC 2410(c) provides: "Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under the internal revenue laws the period shall be 120 days or the period allowable for redemption under State law, whichever is longer . . . ." If you have a junior lien in favor of the SBA or any other agency of the United States, there may also be notice requirements similar to federal tax liens. The applicable statutes should be reviewed to confirm.

(j) *Computation of Redemption Period*. In computing the redemption period, the first day is excluded and the last day is included. If the last day falls on a Saturday, Sunday or legal holiday, the redemption period is extended to include the next day which is not a Saturday, Sunday or legal holiday. MCL 8.6; MCR 1.108. See also Michigan Land Title Standards (6th ed.), Standard 16.44.

f. Acquisition of Title

(1) When and What Title Is Acquired. If the redemption period expires without redemption, the sheriff's deed "shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter . . . but no person having any valid subsisting lien upon the mortgaged premises, or any part thereof, created before the lien of such mortgage took effect, shall be prejudiced by any such sale, nor shall his rights or interests be in any way affected thereby." ." MCL 600.3236. *See also Dunitz v Woodford Apartments Co*, 236 Mich 45; 209 NW 809 (1926). The purchaser at a mortgage foreclosure sale acquires an equitable interest in the mortgaged property which ripens into legal title if the property is not redeemed. This equitable interest can be sold or assigned by the purchaser. *Dunitz*; *Roff v Miller*, 189 Mich 558, 155 NW 517 (1915).

(2) Consequences for Condominium Assessments. Under MCL 559.158, a mortgagee or other purchaser at a foreclosure sale is not liable for assessments chargeable to the unit "that became due prior to the acquisition of title to the unit by that mortgagee . . . ." Acquisition of title has been held to occur on the date the foreclosure sale occurs, rather than the date the redemption period expires. *Federal National Mortgage Association v Lagoons Forest Condominium Association*, 305 Mich App 258; 852 NW2d 217 (2014).

(3) Consequences for Property Transfer Cap Purposes. Michigan has a property tax cap on the rate of increase of the taxable value of real estate in Michigan, equal to the lesser of 5% or inflation. MCL 211.27a. The cap is lifted when a property is transferred absent an exemption. Whenever a transfer occurs (exempt or otherwise), a property transfer

affidavit must be filed by the purchaser with the assessor for the locality where the property is located within 45 days after the transfer. A foreclosure sale does not cause the cap to be immediately lifted, however, the cap is lifted one (1) year after the expiration of the redemption period if the mortgagee does not transfer the property before then. MCL 211.27a(7)(d). It is unclear whether a foreclosing mortgagee is required to file a property transfer affidavit under the statute, but the form of Property Transfer Affidavit published by the Michigan Department of Treasury contemplates its filing by lenders because it includes a checkbox for the foreclosure exemption. The affidavit should be filed subsequent to each foreclosure, within 45 days after the sheriff's sale.

(4) Homestead Recission. Within 90 days after a mortgagee acquires title to a principal residence, it should rescind any applicable homestead exemption by filing Form "Request to Rescind/Withdraw Homestead Exemption" (Form 2602). MCL 211.7cc(5).

(5) Consequences for Environmental Liabilities. Under Part 201 of the Michigan National Resources and Environmental Protection Act, an owner or operator of a facility is liable for certain matters unless they conduct and file a baseline environmental assessment. MCL 324.20126. An owner or operator is defined to exclude "[a] person who holds indicia of ownership primarily to protect the person's security interest in the facility, . . , unless that person participates in the management of the facility as described in [MCL 324.20101a]." Also note that MCL 324.20101(1)(q) defines foreclosure as "possession of a property by a lender on which it has foreclosed on a security interest or the expiration of a lawful redemption period, whichever occurs first."

(6) Other Ownership Consequences. A mortgagee who acquires title should file a property transfer affidavit, obtain liability and casualty insurance, secure the property and so forth.

g. Disposition of Surplus Money. Under MCL 600.3252, any surplus proceeds from a mortgage foreclosure sale after payment in full of the mortgage debt must be paid to the mortgagor, his legal representatives or assigns, unless at the time of the sale, or before the surplus is paid, a claimant files with the sheriff a written claim verified under oath that the claimant has a subsequent mortgage or lien encumbering the real estate, stating the amount unpaid, setting forth the facts and nature of the same, in which case the sheriff must deposit the funds with a court for a determination as to whom is entitled to the funds.

2. Judicial Foreclosure

a. Preliminary Matters.

(1) Governing Law. Judicial foreclosure is governed by the Revised Judicature Act, MCL 600.3101 *et. seq*.

(2) Venue. Judicial foreclosure proceedings are brought in the circuit courts. MCL 600.3101.

(3) One-Action Rules/Limitations on Actions.

(a) If a judgment has been obtained in any other civil action for the money, or part thereof, demanded in the complaint in an action to foreclose a mortgage, no proceeding shall be had in the action to foreclose unless the sheriff has returned an execution as unsatisfied, in whole or in part, and certified that he can find no property of the defendant out of which to satisfy the execution except the mortgaged premises. MCL 600.3105(1).

(b) After a complaint has been filed to foreclose a mortgage, while it is pending, and after a judgment has been rendered upon it, no separate proceeding shall be had for the recovery of the debt secured by the mortgage, or any part of it, unless authorized by the court. MCL 600.3105(2).

(4) Cure. If the lender has not accelerated the indebtedness and the borrower pays the installments of principal and interest due plus costs at any time before the judgment or sale, the court will dismiss the case. MCL 600.3110.

(5) Parties to Suit.

(a) *Parties in Interest*. All persons having an interest in the property should be made parties to the lawsuit so that the court can determine the existence, extent, and priority of the lien(s).

(b) *Junior Interest Holders Not Named in Suit*. Under MCL 600.3130, upon expiration of the redemption period without redemption, the sheriff's deed or sale deed vests in the grantee all right, title, and interest the mortgagor had at the time of the execution of the mortgage, or at any time thereafter. Accordingly, absent an agreement between the mortgagee and a tenant to the contrary (e.g., in a non-disturbance agreement), any leases entered into after the execution of the mortgage should be extinguished by the foreclosure. However, in a judicial foreclosure, parties that are not joined in the action retain their rights, notwithstanding the foreclosure or sale. *National Acceptance Co v Mardigian*, 259 F Supp 612 (ED Mich 1966); see also *Byerlein v Shipp*, 182 Mich App 39; 451 NW2d 565 (1990). *But see Dolese v Bellow-Claude Neon Co.*, 261 Mich 57, 245 NW 596 (1933) (holding that a junior lease was terminated even though the tenant was not named in the foreclosure suit).

(6) Lis Pendens. A lis pendens is not required in a judicial foreclosure, but is usually recorded at the time of filing the complaint to give constructive notice of litigation involving the property. The lis pendens is filed with the register of deeds in the county where the

property is located. MCL 600.2701. It can be filed with the complaint or at any time prior to final judgment. MCL 600.2701, 600.2711. A notice of lis pendens is effective as constructive notice from the time of its recording and for a period of three years thereafter. MCL 600.2715.

(7) Condominium Units. If you are foreclosing on a condominium unit, you must give notice of the foreclosure sale to the condominium association not less than 10 days before commencement of the action. MCL 559.208(9).

(8) Proof Debt Exists. Before receiving a judgment, the mortgagee must prove that the debt exists. The court hearing the action must determine which defendants, if any, are personally liable for the debts.

(9) Deficiency. The court's judgment must provide that if there are debts left unpaid after applying the amount received from the sale, the clerk of the court must issue execution for the deficiency.

(10) Certain of the Preliminary Matters for Foreclosure by Advertisement are also Applicable for Judicial Foreclosure. See Part I.I.1.a. above.

b. Determination of Bid Amount**.**

(1) Minimum Bid/Upset Price. The court has the authority to fix and determine a minimum price at which the mortgaged property may be sold. MCL 600.3155. If established, the upset price should be based on the fair market value of the property involved, not the amount remaining to be paid on the mortgage. A court is not required to set an upset price.

(2) Certain of the Bid Determination Issues for Foreclosure by Advertisement are also Applicable for Judicial Foreclosure. See Part I.I.1.c. above.

c. Sale

(1) Sale Not Less than 6 Months after Complaint Filed. The circuit court may order a sale in connection with the foreclosure. However, neither the sale, nor the publication of the notice of sale, may commence until at least 6 months after the complaint for foreclosure has been filed. MCL 600.3115.

(2) Publication and Posting Required before Sale. MCL 600.3125 provides that a judicial foreclosure sale is "subject to [MCL 600.6091]." MCL 600.6091 provides that any person authorized by a court order to sell real estate pursuant to a judgment "shall give notice of, and conduct the sale as in the case of sale of real estate on execution." MCL 600.6052 (the statute governing sales on execution) requires 6 weeks of publication before the date of sale (42 days must pass between first publication and sale), and the notice must also be posted in three public places. MCL 600.3125; MCL 600.6052; MCL 600.6091. But cf. *Carpenter v Smith,*

147 Mich App 560; 383 NW2d 248 (posting notice more than 42 days before sale is sufficient, even if time between first publication and sale is less than 42 days). The first day of publication is excluded and the day of sale is included in calculating the 42 day period. *Westbrook Lane Realty Corp v Pokorny*, 250 Mich 548; 231 NW 66 (1930).

(3) Adjournments. Unlike foreclosure by advertisement, adjournments must be published after the first 1-week adjournment. MCL 600.6052(3).

(4) Sale in Parcels. If the premises can be sold in parcels without injury to the interests of the parties, the judgment shall direct as much of the premises to be sold as is sufficient to pay the amount then due on the mortgage or land contract, with costs, and the judgment shall remain as security for any subsequent default. MCL 600.3165(1). If, however, the court determines that a sale of the whole premises will be most beneficial to the parties the judgment shall be entered for the sale of the whole premises. MCL 600.3165(3). The borrower may waive in advance the requirement that the property be sold in parcels.

(5) Sale by Clerk or Sheriff. The foreclosure sale is made by the county clerk for the county where the judgment was rendered or by other person authorized by the court. MCL 600.3125.

(6) Public Sale. The sale is a public sale and occurs between 9 a.m. and 4 p.m. and takes place at the courthouse or place of holding of the circuit court in the county in which the property is located or as the court may other direct. MCL 600.3125.

(7) Deed. The person making the sale (usually a sheriff) executes the deed, and the deed must be deposited with the register of deeds within 20 days of the date of sale. MCL 600.3130(1), (2).

(8) Affidavit of Posting (and Publication). An affidavit must be filed with the court disclosing that the notice of sale was posted in accordance with the statute. Michigan Land Title Standards (6th ed.), Standard 16.32. Typically this affidavit would also state that the notice of sale was published properly. This affidavit is affixed to the report of sale and filed (see below).

(9) Report of Sale. A report of sale must be filed with the County Clerk subsequent to the sale. The report of sale is approved SCAO form CC 117 (4/86) titled Sheriff's Report of Sale.

(10) Confirmation of Sale. The court must confirm the report of sale. Michigan Land Title Standards (6th ed.), Standard 16.33.

(11) Certain of the Sale Matters for Foreclosure by Advertisement are also Applicable for Judicial Foreclosure. See Part I.I.1.d. above.

d. Redemption

(1) Redemption Period. The redemption period for judicial foreclosures is 6 months from the time of the sale. MCL 600.3140.

(2) Who Can Redeem. See Part I.I.1.e.(1) above.

(3) Redemption Amount. The redemption amount is the sum which was bid with interest from the date of the sale at the interest rate provided for by the mortgage. MCL 600.3140. The register of deeds does not determine the amount necessary for redemption. The purchaser must attach an affidavit to the deed which states the exact amount required to redeem, including any daily per diem amounts, and the date by which the property must be redeemed shall be stated on the certificate of auctioneer. If the sum for redemption is paid to the register of deeds, a fee of $5.00 shall be paid for the care and custody of the redemption money.

(4) Certain of the Redemption Issues for Foreclosure by Advertisement are also Applicable for Judicial Foreclosure. See Part I.I.1.e. above.

e. Acquisition of Title

(1) When and What Title Is Acquired. Under MCL 600.3130, upon expiration of the redemption period without redemption, the sheriff's deed or sale deed vests in the grantee all right, title, and interest the mortgagor had at the time of the execution of the mortgage, or at any time thereafter.

(2) Certain of the Acquisition of Title Issues for Foreclosure by Advertisement are also Applicable for Judicial Foreclosure. See Part I.I.1.f. above.

3. Recap of Foreclosure by Advertisement vs Judicial Foreclosure

a. Foreclosure by Advertisement /Power of Sale Foreclosure

(1) The process of foreclosure does not involve a court or lawsuit, so it generally can be completed less expensively than a judicial foreclosure.

(2) It generally takes 6-7 weeks to sell the property and the redemption period on commercial property is 6 months (so it would take approximately 8 months to acquire title to commercial property).

(3) The mortgagee cannot adjudicate priority issues, reform the mortgage or correct legal description issues because it has no venue for doing so (unless it files suit separately).

(4) The mortgagee cannot bid attorneys' fees except a nominal amount.

(5) The mortgagee has to file a separate suit to collect the deficiency and any deficiency claim is subject to rights of setoff under MCL 600.3280.

b. Judicial Foreclosure

(1) Judicial foreclosure requires a lawsuit, which adds expense.

(2) The sale cannot occur until at least 6 months after the suit is filed and the redemption period is 6 months (so it takes approximately 14 months, at least, to acquire title).

(3) The mortgagor has a venue to contest the existence of a default, which could delay realization on the collateral and increase costs.

(4) The mortgagee can adjudicate priority issues, reform the mortgage and correct legal description issues.

(5) The mortgagee can bid full attorneys' fees (not just the statutory amount) at the sheriff's sale.

(6) The mortgagee can obtain a deficiency judgment and is not subject to setoff under MCL 600.3280. However, the judge has the discretion to set an upset price under MCL 600.3155.

(7) Under MCL 600.3105 no separate proceeding on the debt may be commenced at any time without court authorization.

(8) Adjournments of the foreclosure sale must be published.

J. Receiverships; Receiver Sales

1. Reasons for a Receivership. Because a mortgagee cannot acquire title to or possession of the mortgaged property until it forecloses its mortgage and the redemption period expires without redemption, the mortgaged property can deteriorate or waste, or the mortgagor can even damage the mortgaged property, prior to the time the mortgagee can control the property. Further, even though a mortgagee can exercise its assignment of rents before foreclosure and through the redemption period, tenants often will not pay over the rent to the mortgagee even when required to do so under Michigan's assignment of rents statute. Consequently, mortgagees frequently seek the appointment of a court-appointed receiver to control the mortgaged property until the mortgagee can acquire title and possession.

2. Appointment of Receiver.[8]

a. Under Michigan law, appointment of a receiver is in the discretion of the court. The court "may appoint receivers in all cases pending where appointment is allowed by law." MCL 600.2926. See also MCR 2.622 ("Upon the motion of a

[8] For Michigan receiverships generally, see DeMars, Diehl & Karnib, *When Appointment of a Receiver is Appropriate*, 35 Mich Bus L J 19 (2015).

party or on its own initiative, for good cause shown, the court may appoint a receiver as provided by law."). The phrase "allowed by law" means: "(1) those cases where appointment of a receiver is provided for by statute and (2) those cases where the facts and circumstances render the appointment of a receiver an appropriate exercise of the . . . court's equitable jurisdiction." *Band v Livonia Associates*, 176 Mich App 95, at 105; 439 NW2d 285 (1989).

b. MCL 600.2927 provides that upon agreement of the parties, the failure to pay taxes or insurance premiums constitutes waste, and authorizes the mortgagee to seek appointment of a receiver over any property (other than a dwelling or farm occupied by the owner or commercial property having an assessed valuation of $7,500 or less) in the event of waste, such receiver to be appointed in the discretion of the court.

c. In Michigan, "[t]he primary purpose of a receiver is to preserve property and to dispose of it under the order of the court." See *Band, supra*, at 104 (1989); see also *Cohen v Cohen*, 125 Mich App 206, at 214; 335 NW2d 661 (1982). "The appointment of a receiver is a harsh remedy and should only be resorted to in extreme cases. If less intrusive means are available to effectuate the relief granted by a trial court, a receiver should not be used." *Band, supra*, at 105 (1989); see also *Reed v Reed*, 265 Mich App 131, at 162; 693 NW2d 825 (2005). Appointment of a receiver is appropriate to protect property against imminent danger of loss. See, e.g., *Weathervane Window, Inc v White Lake Constr Co*, 192 Mich App 316, at 322; 480 NW2d 337 (1991). Thus, receivers have been appointed where a borrower has defaulted on its debt and the creditor's security is at risk of impairment or waste, *Burton v May*, 297 Mich 571; 298 NW 286 (1941), or where an entity can no longer do business, *Van Wie v Storm*, 278 Mich 632; 270 NW 814 (1936). The fact that the property owner's "past performance" is "unimpressive" also has led to a finding that the property is at risk. See *Francis Martin, Inc v Lomas*, 62 Mich App 706, at 710-711; 233 NW2d 702 (1975) (where borrowers had, among other things, made no payments due on a promissory note, resulting in a default).

d. The Receivership Act, Michigan Public Act 16 of 2018, MCL 554.1011 et. seq., as amended ("Receivership Act"), does not change the discretionary nature of receiver appointments. The decision remains in the discretion of the court under MCL 600.2926. Section 6 of the Receivership Act, MCL 554.1016, states that the court "may" appoint a receiver under certain specified circumstances.[9] However, the Receivership Act may significantly increase the

[9] MCL 554.1016 states in pertinent part:

"(1) The court may appoint a receiver as follows:

(a) Before judgment, to protect a party that demonstrates an apparent right, title, or interest in real property that is the subject of the action, under either of the following circumstances:

(i) The property or its revenue-producing potential is being subjected to or is in danger of waste, loss, dissipation, or impairment.

(ii) The property or its revenue-producing potential has been or is about to be the subject of a voidable transaction.

(b) After judgment for any of the following reasons:

likelihood that a receiver will be appointed. For example, MCL 554.106(2)(b) permits appointment solely where "[t]he mortgagor agreed in a signed record to appointment of a receiver on default." Virtually all mortgages (and frequently underlying loan documents) contain a consent by the mortgagee to appointment of a receiver after default.

e. Judges vary widely in their willingness to grant receivership requests, and mortgagees should not consider this to be an automatically-available remedy in Michigan where a payment default has occurred. A greater showing like waste is usually necessary.

3. Receiver Sales; Sales Free and Clear of Liens.[10]

a. Law Prior to Adoption of the Receivership Act.

(1) Receivership is Not Primary Relief. Outside of the construction lien foreclosure context, before enactment of the Receivership Act there was no express Michigan statutory authority for a receiver to sell real property. Receiverships have generally been considered to be available only as ancillary relief, not as a remedy in and of themselves. See *National Lumberman's Bank v Lake Shore Machinery Co*, 260 Mich 440; 245 NW 494 (1932). Thus, receivership actions by a mortgagee would typically be accompanied by a foreclosure count or a non-judicial foreclosure.

(2) Clogging the Equity of Redemption.

(a) Receiver sales of mortgaged property contravene a mortgagor's statutory right of redemption under MCL 600.3240

(i) To carry the judgment into effect.

(ii) To preserve nonexempt real property pending appeal or when an execution has been returned unsatisfied and the owner refuses to apply the property in satisfaction of the judgment.

(c) In an action in which a receiver for real property may be appointed on equitable grounds.

(d) During the time allowed for redemption, to preserve real property sold in an execution or foreclosure sale and secure its rents to the person entitled to the rents.

(2) In connection with the foreclosure or other enforcement of a mortgage, the court may appoint a receiver for the mortgaged property under any of the following circumstances:

(a) Appointment is necessary to protect the property from waste, loss, transfer, dissipation, or impairment.

(b) The mortgagor agreed in a signed record to appointment of a receiver on default.

(c) The owner agreed, after default and in a signed record, to appointment of a receiver.

(d) The property and any other collateral held by the mortgagee are not sufficient to satisfy the secured obligation.

(e) The owner fails to turn over to the mortgagee proceeds or rents the mortgagee was entitled to collect.

(f) The holder of a subordinate lien obtains appointment of a receiver for the property."

[10] For receiver sales generally, see Mears & Daniels, *Sales of Receivership Assets Free and Clear of Liens and Interests*, 38 Mich Real Prop Rev 112 (2011).

and MCL 600.3140. Michigan courts have long held that "[t]he statutory right of redemption . . . is not subject to enlargement or abridgement by the courts" and "[a]bsent equitable considerations such as fraud, the plain intent of the statute must be literally followed." *Herman Hughes Lumber Co v. Wood*, 288 Mich 684; 286 N.W. 126 (1939). Actions in contravention of a mortgagor's redemption rights are said to "clog the equity of redemption," an English law doctrine dating back to at least 1639. See Licht, *The Clog on the Equity of Redemption and its Effects on Modern Real Estate Finance*, 60 St. John's Law Review 452 (1986), at 452 n 2; see also *Russo v Wolbers,* 116 Mich App 327 at 336-338; 323 NW2d 385 (1982) ("The doctrine against clogging the equity of redemption is part of the common law of specific performance. It is an inherent and essential characteristic of every mortgage . . . ."). The "old doctrine" was "brought forward in this country to prevent taking an inequitable advantage of distraught borrowers." *Id*., at 336 n 1 (citation omitted).

(b) No published Michigan opinion outside of the construction lien foreclosure context has squarely addressed the question whether court-ordered receiver sales free of the statutory right of redemption are lawful. The farthest Michigan courts have gone in this area is to carve out a narrow exception for receiver sales of assets of a "quasi public corporation" that could not be operated by a receiver except at substantial loss. See *Mears and Daniels, supra n 5*, and *Webber v Miner*, 184 Mich 112; 150 NW 305 (1915); see also *National Bank of Commerce v Corliss*, 217 Mich 435; 186 NW 717 (1922); *Detroit Trust Co v Detroit City Service Co*, 262 Mich 14; 247 NW 76 (1933) ("The right to redeem from a foreclosure sale is a statutory right that has been strictly protected except under the unusual circumstances arising [in connection with a quasi public utility]. The right can be neither enlarged nor abridged by the courts.").

(c) Despite the apparent conflict with the redemption statutes and longstanding Michigan common law, over the last decade or so it increasingly became common practice for mortgagees to seek and courts to authorize receiver sales of real estate free of redemption rights. See *Anderson, supra*, at 2 (referring to the practice as a "colossal change in the practice-in contravention of the last 100 years of common law . . . . without statutory authority").

(i) A number of recent unpublished court decisions have upheld the practice (although not binding precedent). For example, in *CSB Bank v Christy,* 2012 WL 5064618, at 4 *(*Mich App October 18, 2012), the Court of Appeals upheld a court-ordered receiver sale without regard to the requirements of the judicial foreclosure statute, which were "simply inapplicable" to

a receiver sale. See also *First Financial Bank, NA v. Bosgraaf,* Case No. 11-02488 (Ottawa County Circuit Court, July 11, 2012) (holding that the mortgagor's right of redemption under MCL 600.3140 was not applicable to a receiver sale).

(ii) However, in F*rederick Kubik Revocable Trust v Home Apartments LLC*, 2017 WL 6502672 (Mich App December 2017), the court called the trial court's decision to permit a receiver sale free of the defendant's rights of redemption "error", but denied the mortgagor's challenge because the defendants failed to establish that the error "affected their substantial rights and they do not seek to vacate the sale of the property."

(d) In 2014, the Michigan Supreme Court amended the court rules governing receiverships. Such changes included for the first time and express recognition of a receiver's power to sell real property. Under MCR 2.622(E)(2), "[b]y separate order of the court, a receiver may sell real property of the receivership estate." This change also codified a requirement that there be a second order authorizing the sale, usually with submission of the proposed purchase agreement. The power to sell could not be established solely by general authority granted to the receiver under the initial receivership order. While this evidenced the Supreme Court's recognition of the practice of receiver sales, the law was left unclear due to the absence of statutory authority for such sales and the long-standing common law clogging doctrine.

b. Receivership Act, Michigan Public Act 16 of 2018, as amended (the "Receivership Act")

(1) <u>Adoption; Rationale</u>

(a) The Receivership Act was signed into law in Michigan on February 6, 2018 and is effective on May 7, 2018. The Receivership Act was promulgated based upon the Uniform Commercial Real Estate Receivership Act adopted by the Uniform Law Commission ("ULC") in 2015 ("Model Act"). As of this writing, the Model Act has been enacted into law in nine states, including Michigan. The Comments to the Model Act explain the need for the Model Act because few states have "comprehensive statutory guidance regarding the appointment and powers of receivers for commercial real estate." *Id*., at 2. The ULC also noted in the comments to the Model Act that its adoption was designed to override many states' laws which would not permit receiver sales. The Model Act explicitly permits receiver sales free of the mortgagor's rights of

redemption and free of liens.[11] According to the ULC, this is needed in order (1) to allow for effective disposition of real estate securing commercial mortgaged-backed securities (CMBS) loans, and (2) to allow for mortgaged properties to be sold for "arms-length" values rather than "distress sale" prices. *Id*, at 4-5. The ULC also noted that the Model Act followed federal law in regard to receiver sales.

(b) The Receivership Act does not have retroactive effect in Michigan. It was supported by the Michigan Banker's Association, Michigan Realtors and a number of Michigan practitioners and judges. See House Fiscal Agency Legislative Analysis dated October 27, 2017. According to the House Legislative Analysis, the Receivership Act codifies and expands upon the amended Michigan Court Rules amended by the Supreme Court in 2014. *Id*. at 2. The analysis does not comment on the reasoning behind permitting receiver sales free of liens and redemption rights. Of course, to the extent the court rules are inconsistent with the Receivership Act, they are superseded by the Receivership Act.

(2) Applicability. The Receivership Act generally does not apply to improved 1-4 dwelling unit residential property unless the property is not being occupied for dwelling purposes (see Receivership Act Section 4, MCL 554.1014, for details on applicability to residential property). The Receivership Act was amended in 2020 to also apply to fixtures and personal property, regardless of whether related to or used in operating real property.

(3) Sales. The key provisions of the Receivership Act regarding sales of receivership real estate are set forth in MCL 554.1022(1)(b) and in Section 16.

(a) Sales in Ordinary Course. MCL 554.1022(1)(b) provides that except as limited by court order, a receiver may "[o]perate a business constituting receivership property, including . . . sale . . . of the property in the ordinary course of business." Ordinary course sales would presumably include, for example, sales of residential units owned by a real estate developer.

(b) Sales Not in Ordinary Course. Section 16, MCL 554.1026, states in pertinent part:

[11] Real estate sales "free and clear of liens" have long been conducted by bankruptcy trustees or chapter 11 debtors in possession under Title 11 of the United Stated Code, Bankruptcy Code §363(f). The Receivership Act now empowers receivers outside of the bankruptcy context with substantially the same powers. Although not within the scope of this presentation, the Receivership Act also grants receivers with other bankruptcy trustee-type powers not previously understood to be within the powers of a Michigan court-appointed receiver, including the right to reject executory contracts under the Receivership Act Section 17(2).

"(3) With court approval, and after notice and an opportunity for a hearing is given to all creditors and other known interested parties unless the court orders otherwise for cause, a receiver may transfer receivership property other than in the ordinary course of business by sale, lease, license, exchange, or other disposition. Unless the agreement of sale provides otherwise, a sale under this section is free and clear of a lien of the person that obtained appointment of the receiver, any subordinate lien, and any right of redemption but is subject to a senior lien.

(4) A lien on receivership property that is extinguished by a transfer under subsection (3) attaches to the proceeds of the transfer 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.

(5) A transfer under subsection (3) may occur by means other than a public auction sale. A creditor holding a valid lien on the property to be transferred may purchase the property and offset against the purchase price part or all of the allowed amount secured by the lien, if the creditor tenders funds sufficient to satisfy in full the reasonable expenses of transfer and the obligation secured by any senior lien extinguished by the transfer.

(6) A reversal or modification of an order approving a transfer under subsection (3) does not affect the validity of the transfer to a person that acquired the property in good faith or revive against the person any lien extinguished by the transfer, whether the person knew before the transfer of the request for reversal or modification, unless the court stayed the order before the transfer."

(4) Key Points.

(a) Sales are free and clear of rights of redemption.

(b) Sales are free and clear of all "liens" except senior liens. "Lien" is defined as "an interest in property that secures payment or performance of an obligation." MCL 554.1012(g).

(c) Liens attach to proceeds with the same validity, perfection and priority as the liens have with respect to the real estate.

(d) Sales may be public or private, and a creditor may credit bid at a sale provided senior liens are paid.

(e) Good faith purchasers from a receiver are not affected by later court reversal of a receiver sale.

(5) Consequences of the Receivership Act.

(a) The exception may now become the rule. Mortgagees may now seek receivership sales with far greater frequency, if not in the ordinary course.

(b) The Act overrules case law establishing receivership as an ancillary rather than primary mechanism for realization on collateral. However, a receivership does not preclude a mortgagee from foreclosing by advertisement. MCL 554.1035(f).

(c) The Act overrules decades of clogging case law and deference to redemption rights.

(d) Conveyances by receivers typically have been to identified buyers. With the newly created right to credit bid at sales, mortgagees may instead have receivers sell at public auction and credit bid at the sales (thereby avoiding Michigan's lengthy redemption period but allowing the mortgagee to exclusively control the ultimate disposition of the collateral).

c. Receiver Sales under the Construction Lien Act

(1) Under Michigan's Construction Lien Act, a receiver may with court approval sell the real property under foreclosure. MCL 570.1123(2); see also *Stock Building Supply, LLC v Crosswinds Communities Inc*, 317 Mich App 189; 893 NW2d 165 (2016).

(2) In the construction lien foreclosure context, a court can authorize a receiver to sell real property "free and clear of all claims, liens and encumbrances." *Stock Building, supra,* 893 NW2d at 173 (holding that a receiver could sell free and clear of a junior mortgage lien).

d. Receiver Sales to Collect a Judgment. MCL 600.6104(4) provides after a money judgment has been entered in a state court action, the judge "may . . . appoint a receiver of any property the judgment debtor has or may thereafter acquire."

e. Title Insurance for Receiver Sales.

(1) Title companies in Michigan generally have been willing to insure receiver sales. Now that the Receivership Act is law, it settles any lingering concerns title companies might have regarding clogging equity claims and claims that a receiver cannot sell free and clear of liens.

(2) Generally title companies will not insure a receiver sale until the time for appeal of the receivership and sale orders has expired. If the

conveyance occurs prior to entry of final judgment and conclusion of any appeals of the order appointing the receiver or the order authorizing sale of the property, there is uncertainty as to whether the sale will withstand a legal challenge. There is no right to an appeal until the court enters a final judgment which disposes of all the claims and rights and liabilities of all the parties. MCR 2.605 provides that in a receivership and similar actions, "the court may direct that an order entered before adjudication of all of the claims and rights and liabilities of all of the parties constitutes a final order on an express determination that there is no just reason for delay." In order to insulate a receivership sale from attack (and to satisfy title company requirements in order to insure the sale), a sale order should state that it is a final order, and the sale should not occur until after the 21-day appeal period has expired. However, in cases where all parties (including the property owner/debtor) stipulate to entry of the sale order, title companies may be willing to insure prior to expiration of the 21-day appeal period.

(3) In order to insure title a title company will generally require that all parties with an interest in the real estate be parties to the suit. Absent that, a title company may delay insuring the sale until omitted parties are added.

(4) You should always confirm with the title company insuring a receiver sale in advance that they approve of the forms of receivership and sale orders. Note that the sale order should include a legal description of the property to be sold.

K. Deeds In Lieu of Foreclosure

1. Deeds-In-Lieu of Foreclosure Generally. Given Michigan's lengthy redemption period, mortgagees frequently resort to deed-in-lieu of foreclosure transactions in order to obtain title to the mortgage property more quickly. Such transactions require the cooperation of the borrower and usually involve forgiveness of the mortgage debt in consideration for the conveyance, and/or release of related loan guaranty obligations. A deed in lieu of foreclosure of a mortgage given for new consideration, voluntarily and without fraud or duress, is valid. See Michigan Land Title Standards (6th ed.), Standard 1641 and cases cited therein. A deed of mortgaged property which is not given for new consideration, voluntarily and without fraud or duress is insufficient to waive the mortgagor's equitable or statutory right of redemption and violates the doctrine against clogging the equity of redemption. See Cameron, § 18.73, pp 736-37; § 18.111, pp 769-774. Courts will scrutinize any transaction in which a mortgagor waives its equitable or statutory right of redemption. The adequacy of the new consideration is determined by the courts on a case by case basis. *Id.; See also Russo v Wolbers*, *supra*.

2. Deed Cannot Be Taken with the Mortgage. A deed executed concurrent with the mortgage is not enforceable in Michigan. *Oakland Hills Development Corp v Lueders Drainage District,* 212 Mich App 284; 537 NW 2d 258 (1995).

3. Merger. To avoid application of the general rule that when a mortgagee acquires the fee, the mortgage and fee are merged and the mortgage is extinguished, it is common for a deed in lieu of foreclosure to include a non-merger clause containing a statement of

intent that the mortgage and fee do not merge. See Michigan Land Title Standards (6th ed.), Standard 16.41 and the Comment to Standard 16.4 and the authorities cited therein with regard to the merger doctrine. Preservation of the mortgage lien allows the mortgagee to subsequently foreclose and extinguish any subordinate liens or encumbrances should that be necessary.

4. Consideration. The consideration for a deed in lieu is often forgiveness of the mortgage debt, or some part of the mortgage debt in an amount equal to or in excess of the value of the property conveyed. If the mortgagee forgives the mortgage debt, then it could be argued that the mortgagee cannot later foreclose the mortgage (even with a non-merger clause) because it has no debt to bid at a foreclosure sale. To avoid this claim, often the consideration for a deed in lieu is styled as a covenant by the mortgagee not to sue the mortgagor on the mortgage debt.

5. Estoppel Affidavit. A mortgagee should always obtain an estoppel affidavit from the mortgagor confirming the requirements for a deed in lieu have been satisfied. A typical estoppel affidavit often will include the following certifications:

a. That defaults exist under the note or other instruments or agreements evidencing the debt secured by the mortgage, and the mortgage.

b. That the deed in lieu was voluntarily and freely given without fraud or duress, and was intended to be an absolute conveyance, and not as a mortgage or security instrument.

c. That the consideration was fair and adequate, and that total amount of mortgage debt to be forgiven in consideration for the delivery of the deed exceeds the value of the property conveyed.

d. A waiver of the right of redemption and affirmation that no one else has a right of redemption whether by assignment or otherwise.

e. That the mortgagor has peacefully and voluntarily surrendered possession of the mortgaged property to the mortgagee.

Although estoppel affidavits are seldom recorded, it is good practice to put them in recordable form in case you want to record it at a later time to evidence of record the mortgagor's certifications.

6. Title Insurance for a Deeds In Lieu. Unless the deed in lieu is insurable by a title company, there is no point in a lender taking one. Title companies scrutinize such transactions carefully to confirm the transaction satisfies the requirements described above. In particular, they want confirmation that there is substantial consideration for the deed (i.e., that the debt forgiven substantially exceeds the value of the property to be conveyed). They will want to review the form of deed and the estoppel affidavit, together with any deed-in-lieu agreement and covenant not to sue between the parties. You should always run such documents by the title company to obtain their approval before closing.

II. SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENTS (SNDAs) [12]

A. Michigan Law Absent an SNDA

1. When the Lease is Senior to the Mortgage

a. When the lease is senior to the mortgage (and the lease does not contain a self-subordination provision), the lease survives the foreclosure and the lender/purchaser at the foreclosure sale acquires title subject to the lease.

b. "A conveyance of fee title to real property includes the grantor's interest as lessor in any lease of the real property unless a contrary intent appears in the instrument of conveyance." Michigan Land Title Standards (6th ed.), Standard 27.2.

c. A successor landlord is not liable for a tenant's damages resulting from breach by a former landlord prior to the successor acquiring title, although a successor landlord is obligated to perform the duties of a landlord arising afterwards. *Plaza v Abel*, 8 Mich App 19, 153 NW2d 379 (1967).

d. A successor landlord may have an obligation to return a security deposit, even if the successor landlord did not receive the deposit from the former landlord. *Moskin v Goldstein*, 225 Mich 389, 196 NW 415 (1923).

e. Landlord-Tenant Act, MCL 554.601 et. seq. (applicable only to residential, not commercial, leases). Under MCL 554.614, a former landlord is liable to the tenant for return of the security deposit until (a) transfer of the deposit to landlord's successor in interest and notice to the tenant thereof, (b) compliance by the successor landlord with MCL 554.604 (requiring deposit of cash with a regulated financial institution and bonding), or (c) return of the security deposit to the tenant. Even if the former landlord remains liable for the security deposit, that may not relieve the successor of liability for return.

2. When the Lease is Junior to the Mortgage

a. Under Michigan law, when a senior mortgagee forecloses, the junior lease is generally extinguished. "Foreclosure of a mortgage and expiration of the statutory redemption period without redemption extinguishes a lease made after the recording of the mortgage." Michigan Land Title Standards (6th ed.), Standard 27.3 (citing MCL 600.3236, MCL 600.3130). In the case of a judicial foreclosure, contrary to the law in other states, in Michigan a foreclosing mortgagee is not required to name a junior lessee in the suit to extinguish the lease. *Dolese v Bellow-Claude Neon Co.*, 261 Mich 57, 245 NW 596 (1933). Thus Michigan is known as an "automatic termination" or "cutoff" state.

b. In the case of a judicial foreclosure, a mortgagee could seek to provide for survival of a lease in the sale order. Such an order should be given effect

[12] For a thorough discussion of SNDAs, see Joshua Stein, *Needless Disturbances? Do Non-Disturbance Agreements Justify all the Time and Trouble?* 37 Real Prop Prob & Tr J 701 (2003).

notwithstanding the law cited above. In the case of a non-judicial foreclosure, a foreclosing mortgagee could seek to preserve the existence of a subordinate lease by unilaterally subordinating the mortgage to the lease prior to foreclosure, but it is unclear whether these actions would preserve the existence of the lease. However, in either case, if the lender were successful in elevating the priority of the lease so that it survived foreclosure, then upon acquiring title the lender would be obligated to comply with the lease without the benefit of the carve-outs from liability that would normally be included in a well-drafted SNDA.

3. Modification of Rental Covenants. As discussed earlier, MCL 554.233 provides that while a mortgage of leased property is in effect, "no modification of the rental covenants in such lease shall be binding upon the holder of such mortgage without his written consent thereto." In *Comerica Bank v TDJ, Inc*, 2000 Mich. App. LEXIS 2255 (Mich. Ct. App. Apr. 25, 2000), the court held that an amendment with "space and rental amount changes" was not binding on a mortgagee. This law appears to apply regardless of whether the mortgage or lease is granted first.

B. Purposes of an SNDA

1. From the Lender's Perspective. From a lender's perspective, an SNDA may be beneficial to avoid extinguishment of the lease after foreclosure. Also, it gives the lender an opportunity to preserve the existence of the lease by curing landlord defaults. Finally, it can insulate the lender from certain (carve out) liabilities after the lender acquires title to the mortgaged property by foreclosure or deed-in-lieu of foreclosure. Such an agreement therefore may be important to the lender to preserve the collateral value, particularly in the case of income-producing properties like shopping centers and office buildings. However, certain lender protections may appreciably alter the deal between a landlord and tenant, granting the lender protections not afforded the landlord. Where the lender does not wish to preserve the lease, however, an SNDA may not be beneficial. For example, where an affiliate of the borrower is the tenant, the lender may prefer a subordination agreement without non-disturbance provisions.

2. From the Tenant's Perspective. From a tenant's perspective, an SNDA protects the tenant from extinguishment of the lease after foreclosure. It also avoids the expense of being named in a judicial foreclosure suit.

3. Difficulty Obtaining/Negotiating. SNDAs can be very difficult to negotiate and execute for a number of reasons. As noted earlier, the SNDA changes the terms of the lease between the landlord and tenant, so tenants may resist such changes. Also, when the lease exists at the time the mortgage is taken, a tenant has very little incentive to sign an SNDA absent a requirement in the lease that it do so. When the lease is granted after the mortgage is already in place, the lender may not need the SNDA given the nature of the collateral. Such negotiations also often involve a battle of the forms. Most lenders have standard form SNDAs which favor of the lender. Credit tenants have forms of their own which favor the tenant (and neglect the lender's concerns). In each case it seems, time is short and parties often do not anticipate or allow for adequate time to resolve disagreements on the terms of an SNDA.

C. Standard Provisions of an SNDA

1. Subordination

a. An SNDA always includes a provision subordinating the lease to the mortgage. Later the SNDA grants back the non-disturbance right, seemingly contradicting the subordination. One commentator speculated that the reason for this contradictory approach is the "regulatory myth" – a myth that lenders are required by regulation to have a "first mortgage" and that they cannot if the lease is not subordinated. Stein*, supra* n 8*,* pp 709-12.

b. SNDAs usually include a corollary to the subordination provision, that the mortgagee has the right to, and the mortgage controls the disposition of, insurance and condemnation proceeds. These provisions could entitle the mortgagee to apply the proceeds to the debt, in which event the leased premises may not be reconstructed.

2. Non-Disturbance

a. The key provision in an SNDA favoring the tenant is the provision which provides that so long as no default exists under the lease, the lender's foreclosure and acquisition of title will not disturb tenant's possession or rights under the lease (except to the extent other provisions of the SNDA modify such rights).

b. SNDA carve-outs insulate the foreclosing mortgagee or other purchaser (a Successor Landlord) from certain liabilities that they would or might otherwise have as a successor landlord under a lease. For example, a well-drafted SNDA might provide that a Successor Landlord is not:

(1) liable for any act, default or omission of the landlord or any prior lessor;

(2) subject to any claims, abatements, offsets, counterclaims or defenses that the tenant may have against the landlord or any prior lessor;

(3) bound by any rent, additional rent or other charges that the tenant may have paid for more than the then current month to the landlord or any prior lessor;

(4) bound by any amendment, modification, consensual or negotiated surrender or cancellation, or assignment of the lease (or any sublease or other form of third party occupancy of the leased premises) made without the lender's written consent;

(5) bound by any consent, approval or waiver by the landlord without the lender's written consent;

(6) liable for any obligation of the landlord or any prior lessor accruing prior to the date the Successor Landlord has title to, and possession of, the leased premises;

(7) liable for any agreement to undertake or complete demolition, construction or installation of improvements in or with respect to the leased premise;

(8) liable for any payment to the tenant of any sums, or granting to the tenant any credit, with respect to the cost of preparing, altering, furnishing or moving into the leased premises;

(9) liable for any repair or reconstruction following fire, other casualty or condemnation, except to the extent expressly provided in the lease and then only to the extent of insurance, casualty or condemnation proceeds actually received by the Successor Landlord;

(10) in any way liable or responsible for any security or other deposit, except to the extent actually received by Successor Landlord;

(11) liable to the tenant under the lease for obligations of the lessor accruing after Successor Landlord ceases to own the leased premises;

(12) liable for any indirect or consequential damages suffered by the tenant;

(13) liable for any representation or warranty given or made by the landlord or any prior lessor, including without limitation any warranty or representation with respect to environmental, construction, zoning, building code compliance or title matters; and/or

(14) personally liable to the tenant under the lease for any judgement, award or other proceeding requiring the payment of money by Successor Landlord.

3. Attornment. SNDAs usually contain an "attornment" provision requiring the tenant to "attorn" to the Successor Landlord. This obligates the tenant to treat the Successor Landlord as the landlord under the lease. SNDAs also often require the tenant to execute a new lease or an affirmation of attornment at the Successor Landlord's request.

4. Payment of Rents to Lender on Notice. SNDAs typically include a requirement that the tenant pay rent to the lender upon notice (along with an acknowledgement that any such payment is binding on the landlord and cannot be contested by the landlord). Such a provision contradicts Michigan's assignment of rents statute (which, as discussed earlier, requires recording of a statutory notice of default and service on the tenant). It is not clear whether such an agreement in an SNDA is enforceable if the mortgagee/assignee does not otherwise strictly comply with the assignment of rents statute.

5. Estoppel. SNDAs often include provisions which would otherwise be included in an estoppel certificate (e.g., when base rent is paid to, term, extension options, and whether there are any defaults), discussed below.

6. Notice and Opportunity to Cure Defaults. SNDAs typically require the tenant to give the lender notice and an opportunity to cure a default by the landlord under the lease before the tenant can exercise any remedies, including setoff against rents or termination of the lease. Without such rights, a tenant could accumulate significant setoff rights

against future rents (including rents which would otherwise be due after foreclosure), or terminate the lease, all without the lender's knowledge.

7. No Assumption of Liability. SNDAs usually acknowledge that the lender does not have any responsibility for performing the landlord's obligations under the lease unless and until the lender forecloses and acquires title, and then only on the terms set forth in the SNDA.

8. Conflicts. An SNDA typically establishes priority of provisions under the lease, mortgage and SNDA (with the SNDA and mortgage provisions governing in the event of conflicts).

9. Options/Rights of First Refusal. Leases sometimes contain options to purchase and/or rights of first refusal. Such rights pose significant issues for a lender and can have a material adverse effect on the value and marketability of the collateral. Such issues/risks can be mitigated by subordinating such rights in the SNDA and providing that they do not bind the lender or Successor Landlord.

D. Affiliate Tenant SNDA. In circumstances where the borrower/mortgagor and the tenant are affiliated and the lease terms are not on market terms, a lender will subordinate the lease to the mortgage without agreeing to not disturb the tenant's rights in the event of a foreclosure. Such agreements often include provisions more typical of an outright subordination agreement.

III. TENANT ESTOPPEL CERTIFICATES

A. Defined. A tenant estoppel certificate is a written confirmation by the tenant of key terms of the lease and the relationship between the landlord and tenant. Typically, it confirms the documents (the lease and any amendments) that define the landlord-tenant relationship, and attempts to identify whether the tenant currently believes that it has any claims arising under the lease or the landlord-tenant relationship, such as claims of default or offset. The purpose of the certificate is to identify potential issues, and to "estop" or prevent the tenant from later asserting claims inconsistent with the lease or estoppel certificate.

B. When Estoppel Certificates Are Delivered on Real Estate Financings. A mortgage lender making or renewing a loan secured by leased commercial property ordinarily requires the borrower to furnish the lender with a rent roll, copies of the leases, SNDAs from the tenants and estoppel certificates signed by the tenants. Sometimes lender forms incorporate estoppel terms in the SNDAs rather than requiring separate estoppel certificates. For properties with a large number of tenants (e.g., a high-rise office building), a lender may require estoppels from all tenants, but SNDAs only from selected larger tenants.

C. Michigan Law Regarding Estoppel Certificates.

1. Statute of Frauds. A tenant estoppel certificate may have the legal effect of modifying the terms of the lease. Michigan's statute of frauds requires that any change or modification to a lease must be in writing signed by the party to be bound. MCL 566.1. Thus, by confirming the terms of a lease in writing the mortgagee (and landlord) can argue that the terms of the lease are as certified by the tenant.

2. Estoppel. Principles of promissory or equitable estoppel could estop a tenant from denying the facts certified to a mortgagee in an estoppel certificate. Roger B. Chard and Lawrence Shoffner, *Michigan Lease Drafting and Landlord Tenant Law*, § 3.71, pp 3-119-3-120 (2003).

a. The doctrine of promissory estoppel requires "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." *State Bank of Standish v Curry*, 442 Mich 76, at 83; 500 NW2d 104, at 107 (1993) (quoting 1 Restatement Contracts, 2d, § 90, p 242). Reasonable reliance is required and must be induced by an actual promise. An objective standard is used to determine whether a voluntary commitment has been made. To determine the existence and nature of the promise, courts look to the words and actions of the parties and the surrounding circumstances. *Id*. at 84-86. A claim of promissory estoppel is a separate cause of action and if the elements are proven an aggrieved party can recover damages for breach of the promise.

b. "Equitable estoppel is not an independent cause of action, but instead a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact. [Citation omitted]. Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *Conagra Inc v Farmers State Bank*, 237 Mich App 109, at 140-41; 602 NW2d 390, at 405 (1999). Although promissory estoppel and equitable estoppel are quite similar, equitable estoppel is typically invoked as a defense; and is not a cause of action and provides no remedy such as damages. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, at 443-444; 505 NW2d 275, at 279 (1993) (citing *Hoye v Westfield Ins Co*, 194 Mich App 696, at 707, 487 N.W.2d 838, at 843 (1992)).

3. Fraud. Michigan contract law recognizes three fraud doctrines: fraudulent misrepresentation or actionable fraud, innocent misrepresentation, and silent fraud (also known as fraudulent concealment). *Grand Pointe Property, LLC v SEC Grand Pointe, LLC*, 2013 WL 195527, at 12 (citing *Titan Ins Co v. Hyten*, 491 Mich. 547, at 555, 817 N.W.2d 562, at 567-68 (2012)). Actionable fraud requires "(1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. . . ." *Id*. at 13 (citations omitted). Silent fraud requires a legal or equitable duty of disclosure and the truth is suppressed with intent to defraud. *Id*. Just as with estoppel, fraud also requires reliance. *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675; 599 NW2d 546 (1999). Fraud is an independent cause of action and a successful claimant is entitled to damages.

4. Applied to Tenant Estoppel Certificates. Where a tenant has furnished a signed estoppel certificate to a mortgagee with a false statement of material fact, there is little difficulty in proving most of the elements of estoppel and fraud. Indeed, the very

purpose of the certificate (implicit from the title) is to estop the tenant from denying the matters they certify. Thus, estoppel certificates can be valuable tools for lenders. However, they also can be fraught with risk for tenants, who all too often complete them without giving careful consideration to the statements made in them. Most commercial leases require the tenant to furnish estoppel certificates, and lenders routinely require them.

D. **Contents of Estoppel Certificates**. Whether in the SDNA or a separate certificate, the tenant in an estoppel certificate certifies certain key facts pertaining to the lease. Such certifications include:

1. That the tenant is the tenant under the lease, has accepted the leased premises, is in occupancy of the leased premises and is paying the full rent stipulated under the Lease without deduction, counter-claim or set-off.

2. That the lease is in full force and effect and has not been modified, amended, renewed, extended, supplemented or assigned, and no part of the leased premises has been sublet.

3. That there are no defaults under the lease (and no event has occurred that, with the giving of notice and/or the passage of time, would constitute a default under the lease) and there are no grounds for cancellation thereof by the landlord or the tenant.

4. The amounts of base rent and additional rent and dates through which they are paid.

5. The term of the lease, dates of commencement and termination, and term and number of renewal options (if any).

6. Whether there are any rent or other concessions.

7. Whether there are any rights of refusal, rights of first offer, options to purchase, options to expand, options to contract, options to relocate, or options to terminate early, and if so, their terms.

8. Whether the tenant has any interest in, or rights as to, the building or leased property other than an expressly provided in the lease.