

Arrows in the Quiver: Remedies for Commercial Real Estate Secured Loans

Presentation for:

Mortgage Lending
Institute

Austin, Texas

September 16, 2021

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Remedies and Topics Addressed in Paper

- Application for receiver
- Deed in lieu of foreclosure
- Judicial foreclosures
- Non-judicial foreclosure
- Enforcement of assignments of rents
- Suit on note and guaranty
- Deficiency suits



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Scope of Presentation

- Receiverships
- Limitations issues/equitable subrogation
- Lender liability issues
- TARA

Receivership

- A receiver is a court appointed disinterested party who takes possession of the property at issue in the litigation
- Receiver holds and protects property pursuant to court order pending further order from the court
- Receiver represents the interests of all persons in the subject property including all owners and creditors
- Receiver is not an agent of any of the parties
- Receiver is an officer of the court and the medium through which the court acts

Receivership

- Available in equity
- Available pursuant to statutory authority
 - Texas Civil Practice & Remedies Code Chapter 64
 - Texas Business Organizations Code Chapter 11 (governs appointment of receivers for domestic entities and assets of domestic entities)
 - Additional procedural requirements for the appointment of a receiver are found in Rule 695 and 695a

Receivership

- Grounds the receiver under both Texas Civil Practice & Remedies Code § 64.001 and Texas Business Organizations Code § 11.403 include:
 - An action by a creditor to subject any property or fund to the creditor's claim
 - An action by a mortgagee for the foreclosure of the mortgage and sale of the mortgaged property
- If receiver sought by creditor to subject any property or fund to the creditor's claim,
 - the creditor must have a probable right or probable interest in the property or funds (i.e., a security interest), and
 - the property or fund placed with the receiver must be in present or immediate danger of being wasted, lost or removed or materially injured
- If the receiver is sought by a creditor to subject any property or funds of an entity subject to the Tex. Bus. Org. Code, then in addition to the foregoing requirements, the party seeking the receiver must also establish:
 - that circumstances exist that are considered by the court to necessitate the appointment of a receiver to conserve the property or fund to avoid damage to the interested parties
 - all other requirements of law are complied with, and
 - all other available legal and equitable remedies are inadequate. Tex. Bus. Org. Code § 11.403 (b)(1) – (4)
- If the receiver is sought by a mortgagee in an action for foreclosure of the mortgage and sale of the mortgaged property,
 - it must appear that either:
 - the mortgaged property is in danger of being lost, removed or materially injured; or
 - the mortgage is in default and the mortgaged property is probably insufficient to discharge the debt (i.e., property is under water)

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First appeared as part of the conference materials for the
55th Annual William W. Gibson, Jr. Mortgage Lending and Servicing Institute session
"Arrows in the Quiver: Remedies for Commercial Real Estate Secured Loans"