

Presented:

LENDER'S REMEDIES OTHER THAN FORECLOSURE

Thomas M. Whelan

**Thomas M. Whelan
Thalheimer, Cipione, Whelan & Morgan, PLLC**

TABLE OF CONTENTS

	<u>PAGE</u>
I. INTRODUCTION	1
II. RECEIVERSHIP	2
A. FEDERAL COURT CONSIDERATIONS	3
B. RECEIVER.....	3
C. NATURE OF RECEIVERSHIP	4
D. EFFECT ON OTHER REMEDIES	4
1. Real Property	4
2. Personal Property.....	5
3. Court Permission to Foreclose	5
E. RECEIVER PROCEDURE	5
1. Venue: Pleading Consideration.....	5
2. Pleadings	6
3. Notice of Appointment	6
(a) Appointment <i>Ex Parte</i>	6
(b) Appointment on Notice	7
(c) Fixed and Immovable Property.....	7
4. Hearing.....	8
5. Eligibility	8
6. Receiver's Oath & Bond	8
7. Applicant's Bond.....	8
F. TWO TYPES OF RECEIVERSHIP.....	9
1. Equitable Receivership.....	9
2. Statutory Receivership.....	9
3. Distinction between Equitable and Statutory Receiverships.....	10
G. GENERAL STATUTORY GROUNDS FOR APPOINTMENT	10

1.	Subsection (a)(2): Action by Creditor to Subject Property or Fund to its Claim	11
	(a) Probable Interest in or Right to Property or Fund.....	12
	(b) Danger of Loss, Removal, or Material Injury	12
2.	Subsection 64.001(a)(4): Action by Mortgagee for Foreclosure of Mortgage and Sale of Mortgaged Property	13
3.	Subsection 64.001(a)(6): Usages in Equity	13
	(a) Contractual-Equitable Receiver.....	13
	(i) <i>Example</i>	14
	(ii) <i>Enforceability of Contractual Receivership Provisions</i>	14
	(b) Receiver for Rents	15
	(c) This leaves only the usages in equity as a potential ground for appointment of a receiver.....	15
H.	POST JUDGMENT RECEIVERSHIP	15
I.	POWERS OF RECEIVER.....	16
1.	Inherent Rights and Powers	16
2.	Personal Liability of Receiver	16
3.	Inventory	17
4.	Power to Sell.....	17
	(a) Sale Procedures	17
	(b) Distribution Priorities Upon Receiver's Sale	18
	General Rule:	18
	(i) <i>Priority of Existing Liens</i>	18
	(ii) <i>Exceptions to General Lien Priority Rule</i>	19
	(c) Costs of Receivership	19
	(d) Compensation of Receiver	19
	(i) <i>Amount</i>	19
	(ii) <i>Timing of Payments</i>	20
	(e) Legal Effect of Improper Sale	20
5.	Discharge	20

J.	APPELLATE REVIEW	20
1.	Who May Appeal.....	20
2.	Interlocutory Appeals.....	21
	(a) Order Appointing Receiver is Appealable.....	21
	(b) Order Vacating Appointment is Appealable	21
	(c) Order Denying Appointment is Not Appealable.....	21
3.	Final Orders	22
	(a) Order Resolving Discrete Issues	22
	(b) Order Denying Termination.....	22
	(c) Order Releasing Property	22
K.	PRECLUSIVE EFFECT	22
L.	ENFORCEMENT OF FOREIGN JUDGMENTS AND ANCILLARY RECEIVERSHIPS.....	23
1.	Loans Secured by Property Located in More than One State.....	23
	(a) Full Faith and Credit.....	23
	(b) Foreign Judgment	24
	(c) Finality	24
	(d) Order Appointing Receiver	24
2.	UEFJA Domestication Procedures.....	25
	(a) Act of Congress	25
	(b) Statute of this State.....	26
	(i) TEX. R. EVID. 902: Self Authenticating Public Records	26
	(ii) TEX. R. EVID. 901: Other Evidence of Authenticity	27
3.	Notice.....	28
4.	Vacating Foreign Judgment.....	28
5.	Appointment of Ancillary Receiver	28
	(a) Subject Matter Jurisdiction to Appoint Receiver.....	28
	(b) Standing to Request Appointment.....	29

	(c)	Jurisdiction to Appoint Ancillary Receiver	29
	(d)	Jurisdiction to Appoint Receiver for All Property and Business of Foreign Entity	29
III.		INJUNCTION	29
	A.	PRACTICAL CONSIDERATION	30
	B.	THREE STAGES OF INJUNCTIVE RELIEF	31
	C.	GENERAL GROUNDS FOR INJUNCTIVE RELIEF	32
	1.	TRO	32
		(a) <i>Ex Parte</i> TRO	33
		(b) TRO Bond	33
		(i) <i>Amount of Bond</i>	33
		(ii) <i>Drafting Consideration</i>	34
		(c) Duration of TRO	34
	2.	Temporary/Preliminary Injunctions	34
		(a) Injunction Bond	35
		(b) Service	35
	3.	Permanent Injunctions	35
	D.	PROCEDURES	36
	1.	Texas State Court	36
	2.	Federal Court Sitting in Texas	36
	3.	Venue	36
	4.	Discovery	36
	E.	PRACTICAL ISSUES	36
	F.	ENFORCING AN INJUNCTION	37
	1.	Contempt	37
		(a) Hearing	38
		(b) Corporate Contemners	38
	2.	Challenging Contempt	39
		(a) Mandamus	39
		(i) <i>Abuse of Discretion</i>	39

	(ii) <i>No Adequate Remedy by Appeal</i>	40
	(b) Habeas Corpus.....	40
3.	Other Challenges by Enjoined Party.	40
	(a) Defenses	40
	(b) Modifying or Dissolving Injunction.....	41
	(c) Wrongful Injunction	41
G.	APPEALS.....	41
	1. TRO.....	41
	2. Temporary Injunction.....	41
	3. Permanent Injunction	42
IV.	SEQUESTRATION	42
	A. GROUNDS	43
	B. NATURE OF REMEDY	43
	C. PROCEDURE.....	43
	1. Sequestration Bond	44
	2. Motion to Dissolve.....	44
	3. Wrongful Sequestration	44
	D. EFFECT ON OTHER REMEDIES	44
V.	ATTACHMENT.....	45
	A. GROUNDS FOR ATTACHMENT	45
	B. ACTIONS IN WHICH ATTACHMENT IS AVAILABLE.....	47
	1. Claims against Non Residents.....	47
	2. Liquidated Claims Against Texas Residents.....	47
	3. Unliquidated Claims Against Texas Residents	47
	4. Amounts Owing But Not Due	47
	C. PROCEDURE.....	48
	1. Bond	48
	2. Wrongful Attachment	48
	D. PROPERTY SUBJECT TO ATTACHMENT	48
VI.	GARNISHMENT	49

A.	GROUNDS FOR GARNISHMENT	49
B.	PROCEDURE FOR GARNISHMENT	50
1.	Garnishment Bond	50
2.	Wrongful Garnishment	50
3.	Attorneys' Fees	51
C.	ACTIONS IN WHICH GARNISHMENT IS AVAILABLE	51
D.	PROPERTY SUBJECT TO GARNISHMENT	51
1.	Property Held by Government	51
2.	Exempt Property	52
VII.	POST-FORECLOSURE EVICTIONS	52
A.	EVICTING MORTGAGOR AFTER FORECLOSURE	53
1.	Void versus Voidable Foreclosures	54
2.	Haith v. Drake	54
3.	Jurisdiction in Simultaneous Proceedings	54
4.	JP Court Jurisdiction after Voidable Foreclosure	55
5.	District Court Jurisdiction after Void Foreclosure	55
B.	EVICTING TENANT OF MORTGAGOR AFTER FORECLOSURE	55
1.	Notice	56
2.	Ratification	56
3.	Liability Risks	56
4.	Drafting Suggestion	57
VIII.	LIS PENDENS	57
A.	INTRODUCTION	57
B.	PURPOSE OF LIS PENDENS	59
C.	STATUTORY PROCEDURES FOR RECORDING LIS PENDENS	60
D.	EFFECT OF RECORDING LIS VALID PENDENS	60
E.	DURATION OF LIS PENDENS NOTICE: JUDICIAL SALES	62
F.	EFFECTIVENESS OF LIS PENDENS	63
1.	Real Property Claim	63
2.	Award of Real Property	64

3.	Adequate Nexus Test	64
4.	Direct v. Collateral Interests in Real Property	65
	(a) True Purchase and Sale Contract v. Option Contracts	65
	(b) Interests in Entity v. Interest in Real Property.....	66
	(c) Shareholder Derivative Suits.....	66
	(d) Constructive Trusts.....	67
	(e) Wrongful Foreclosure.....	67
5.	Zoning & Platting.....	68
G.	REMOVAL OF LIS PENDENS.....	68
	1. Expunction: Merits Based Removal	68
	2. Expunction for Insufficient Pleadings.....	69
	3. Expunction for Insufficient Evidence.....	69
	(a) Cancellation: Security Based Removal.....	69
	(b) Payment.....	69
	(c) Undertaking.....	69
H.	EFFECTS OF EXPUNCTION.	70
	1. Sommers for Alabama & Dunlavy, Ltd. v. Sandcastle Homes, Inc., 521 S.W.3d 749, 753 (Tex. 2017).	71
	2. Hatfield and McCoy or Mr. Rodgers: Won't you be my neighbor?.....	72
I.	SUIT FOR SPECIFIC PERFORMANCE OF CONTRACT TO BUY INTERESTS IN SPE THAT OWNS SPECIFIC REAL PROPERTY.....	73
IX.	CONCLUSION	73

LENDER'S REMEDIES OTHER THAN FORECLOSURE

I. INTRODUCTION

To foreclose, or not to foreclose, that is the question. Whether 'tis wiser to notice, post, and sell that pledged to secure repayment of the wronged lender's fortune, or to file suit against the deadbeat, and, by appointing a receiver, end the delinquent's reign.

. . . Aye, there's the rub.

The planning committee tasked me with presenting an outline on a lender's remedies other than foreclosure. The topic itself raises a number of questions. What are a lender's other remedies? Why - when non-judicial foreclosure is relatively so easy and inexpensive - would a mortgage lender resort to other remedies? And what terms - if any - can a mortgage lender include in its loan documents to make resort to these other remedies easier and less expensive? This outline explores these questions.

Many office lawyers - those who draft loan documents and counsel clients before turning a dispute over to the trial lawyers - hope never to read the Texas or Federal Rules of Civil Procedure and related statutes governing receiverships, injunctions, and other extraordinary remedies. And many trial lawyers - those who must enforce loan documents - infrequently handle lawsuits seeking such extraordinary relief. Counsel serving in both roles would do well to familiarize themselves with the applicable rules and statutes.

For office lawyers, these rules and statutes may suggest drafting opportunities that ultimately increase the prospects of success in, and reduce the costs of, litigation. For trial lawyers, detailed familiarity with these rules and statutes will help avoid the numerous traps, which are so easy to step into, when, as in the case of an injunction proceeding, everything must be done in a hurry.

For everyone, obtaining extraordinary relief is highly technical and frequently expensive. In addition to the usual steps involved in preparing a lawsuit (*e.g.*, assessing the merits of possible claims, the probability of success, the consequences of failure, deciding to sue in state or federal court, determining venue, *etc.*), a party pursuing an injunction or other extraordinary remedy must comply with the additional requirements for obtaining such relief (*e.g.*, posting bonds, *etc.*) and assess the probable costs and practical burdens of the ensuing litigation. And for a party attempting to fend off a request for such relief, familiarity with the controlling statutes and rules is an essential part of identifying ways to forestall or dissolve an order granting such relief.

II. RECEIVERSHIP

A receivership is an alternative to non-judicial foreclosure when a non-judicial foreclosure is impractical, impossible, or presents unacceptable legal risks. By interfering with a secured creditor's attempt to repossess collateral, a debtor may breach the peace, thus forcing a secured creditor to abandon self-help and to resort to judicial process.¹ A debtor may make foreclosure impossible, at least temporarily, by obtaining a court order enjoining a non-judicial foreclosure; in response, a secured creditor may seek appointment of a receiver to sell collateral or to collect the rents and revenues from the property pending disposition of the injunction.² A disputed event of default (*e.g.*, failing to remit net operating income under a cash flow mortgage) may warrant obtaining a judicial finding of default before foreclosing in order to limit the risk of a later claim by the debtor to rescind the foreclosure itself or to recover damages for wrongful foreclosure.³ In these and other circumstances, a receiver may be useful, or even necessary, to preserve collateral pending foreclosure or to foreclose at all.

Even so, a secured creditor should carefully weigh any potential benefits against the considerable burdens of having a receiver appointed. Once a receiver is appointed, the receiver - not the debtor or the secured creditor - will control the property. Some courts will consider an applicant's recommendation for a receiver, but some courts, given the receiver's disinterested role, are reluctant to appoint a receiver recommended by one party without the consent of the others. A receiver - often a lawyer - won't be able to administer the receivership estate by herself, and she will have to hire skilled and experienced help (*e.g.*, a management company, accountants, *etc.*). This help doesn't come free.

When the receiver's learning curve is taken into account, it is unlikely that a receiver charged with taking over operation of a sizable income producing property can operate the property more efficiently than an incompetent owner-borrower who is attempting to operate the property in good faith. Thus, a

¹ See TEX. BUS. & COM. CODE § 9.609(b)(2) (2009) (TEXAS UCC) (secured party may take possession of collateral without judicial process, if it proceeds without breach of the peace); *MBank El Paso v. Sanchez*, 836 S.W.2d 151, 152-54 (Tex. 1992) (holding that creditor has non-delegable duty not to breach peace and that creditor breached peace when its subcontractor repossessed collateral over objections of debtor); *Geise v. NCNB Texas*, 881 S.W.2d 776, 783 (Tex. App. - Dallas 1994, no writ) (stating that unreasonable damage to property constitutes breach of peace).

² See TEXAS UCC § 9.601(a) - (b) (stating right to reduce claim to judgment, foreclose, or otherwise enforce claim or security interest may be "exercised simultaneously"); TEXAS UCC § 9.604 (establishing procedure if security agreement also covers real property or fixtures); *Cohen v. Rains*, 769 S.W.2d 380, 385 (Tex. App. - Fort Worth 1989, writ denied) (remedies under TEXAS UCC are cumulative); *Hubbard v. Lagow*, 576 S.W.2d 163, 165 (Tex. Civ. App. - Austin 1979, writ ref'd n.r.e.) (remedies under TEXAS UCC are cumulative).

³ See TEX. CIV. PRAC. & REM. CODE ch. 37 (2009) (declaratory judgments).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Lender's Remedies Other Than Foreclosure

Also available as part of the eCourse

[2024 William W. Gibson, Jr. Mortgage Lending and Servicing eConference](#)

First appeared as part of the conference materials for the

58th Annual William W. Gibson, Jr. Mortgage Lending Institute session

"Part 1: Workout, Foreclosure, Deed-in-Lieu, Receivership, and Other Judicial and Non-Judicial Remedies. So Many Choices..."