Presented:

LENDER'S REMEDIES OTHER THAN FORECLOSURE

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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

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[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 § 9.60l(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).

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