



Commercial Foreclosure Due Diligence: *What to Do Before, During and After Foreclosure*

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**Commercial Foreclosure Due Diligence -
What To Do Before, During and After Foreclosure**

- I. Pre-Foreclosure
 - A. Preliminary Considerations
 - 1. Lender's ability to foreclose, own and operate property
 - 2. Bring action to put pressure on Borrower
 - B. Pre-Negotiation Agreement
 - 1. If modification and restructuring contemplated
 - 2. Contents of Agreement
 - a. Standstill
 - b. Agreement as to amount owed and no equity
 - c. Admission of default
 - i. Waiver of notice and cure periods
 - d. Waiver of defenses and counterclaims
 - i. Enforceability
 - ii. Perfection
 - 3. Attorney-Client Privilege
 - C. Update Due Diligence and Review Loan File
 - 1. Update title
 - a. Commitment or minutes of foreclosure
 - 2. Property and Liability Insurance
 - 3. Lien Searches
 - 4. Appraisal
 - 5. Environmental

6. Physical inspection
7. Financial information
8. Loan documents
 - a. Possession and completeness
 - b. Perfection
 - c. Defaults and notices
 - i. Third parties - servicers, co-lenders, participants and senior lender
 - d. Alerts Borrower to potential affirmative defenses and counterclaims

D. Defenses/Lender Liability Issues

1. Breach of Contract
2. Bad Faith
3. Duress
4. Equitable Subordination
5. Confidentiality
6. Wrongful Lending
7. Force Majeure

E. Tax and Liability Issues

1. Lender
 - a. Write Down
 - b. Transfer Taxes
2. Borrower

- a. Forgiveness of Indebtedness Income
 - i. Recourse and Nonrecourse Debt
 - ii. Insolvency
- F. Alternatives to Foreclosure
 - 1. Deed in Lieu of Foreclosure
 - a. Voluntary
 - i. Clogging the Equity of Redemption
 - b. Intervening Liens and Leases
 - c. Mortgage remains of record
 - d. Non-merger endorsement
 - e. Deed in Escrow
 - 2. Consent Foreclosure
 - a. Waiver of Deficiency
 - 3. Strict Foreclosure
 - 4. UCC Sale
 - a. Assignment of stock, partnership or membership interests or other beneficial interest of Borrower
 - b. Voluntary sale
 - i. Risks
- G. Notice of Default/Acceleration
- H. Bankruptcy
 - 1. Springing Guaranty or Indemnities
 - 2. Pre-packaged Bankruptcies

3. Automatic Relief from Stay
4. Lender bankruptcy
 - i. D'Oench, Duhme Doctrine

II. During Foreclosure

A. Election of Remedies

1. Deed State (Deed of Trust) - Trustee's Sale
2. Lien State (Mortgage) - Judicial/Non-Judicial Foreclosure (Power of Sale)
 - a. Double-track
3. Suit on Note
4. Guaranty

B. Minutes of Foreclosure/Title Commitment

C. Filing Complaint/Notice of Default

- i. State v. Federal Court
 - a. Diversity and Amount in Controversy in Excess of \$75,000

D. Appointment of Receiver/Mortgagee in Possession/Replacement of Property Manager

1. Activation of Assignment of Rents
2. Risks

E. Cash Management Agreement

F. One-Action and Antideficiency Statutes

1. One-Action - one lawsuit
2. Antideficiency - prohibit or limit to fair market value or price at foreclosure sale

G. Redemption Periods and Reinstatement Rights

1. Waiver

H. Bankruptcy

1. Single Asset
 - a. Non-Consolidation
2. Relief from Stay
 - a. Bad Faith
 - b. Lack of Adequate Protection
 - c. No Equity or Not Necessary to Reorganization

III. Post-Foreclosure

A. Title Insurance Issues

1. Rights of Appeal
2. Creditor's Rights
 - a. Possible waiver for Bona Fide Purchaser for Value
 - i. Purchaser of Loan Documents not BFP because becomes related party

B. Fraudulent Conveyance and Bankruptcy

1. Fraudulent conveyance
 - a. Reasonably equivalent value
 - b. Insolvency of Borrower
2. Preference
3. 363 Sale

