



# 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

