Circumventing the Perils of Ownership: A Lender's Guide to the Receiver's Power of Sale in Florida

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In this article, the authors explore both the benefits and obstacles inherent in appointing a receiver with a power of sale, as opposed to proceeding with a full judicial foreclosure or obtaining a deed in lieu of foreclosure.

Despite some signs of an economic recovery, the commercial real estate sector is not out of the woods. Citing sources at Deutsche Bank and Foresight Analytics, the Wall Street Journal reports that $154.5 billion of securitized commercial mortgages and an additional $524.5 billion of whole commercial mortgages held by U.S. banks and thrifts are expected to come due by 2012, the majority of which will not qualify for refinancing because of the deflated value of the underlying properties.[1] Florida, specifically, has been hard hit by the real estate downturn, with an estimated $9.4 billion of distressed commercial loans in South Florida alone.[2] Additionally, the City of Tampa has one of the lowest recovery rates on commercial loans of any city in the United States, "meaning lenders are eating bigger losses when they sell foreclosed properties."[3] As these loans mature, with refinancing often unavailable, the ability of a lender to preserve and realize value from distressed property has become paramount. While a traditional state court foreclosure action and judicial sale is always available to a lender, it may not be the most effective tool at a time when property values are drastically depressed. A deed in lieu of foreclosure, while more expeditious, poses problems for the lender as well. Instead, if lenders are willing to think outside the box, a more flexible, efficient and economical option may be available under Florida law.

Rather than leaving the defaulted borrower in possession of the property or asking a court to appoint a receiver to merely manage it until a judicial sale can be scheduled and completed, lenders may be able to have a receiver appointed who will take a more active role. In addition to managing the property, with the proper court order a receiver could list, market and sell the property in its entirety, thus avoiding a judicial sale at which the senior lender may be the only bidder. This process can avoid the uncertainties and liabilities of taking title at a judicial foreclosure sale while potentially providing a more expeditious means of controlling the collateral and

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maximizing its value to the lender. This article explores that possibility and examines both the benefits and obstacles inherent in appointing a receiver with such powers. First, this article discusses why a lender would be interested in the receiver's power of sale and continues with a review of Florida law, detailing the elements that need to be established in order to have a receiver appointed and examining of the grant of a power of sale to a receiver, both in theory and practice. The potential benefits of appointing a receiver with a power of sale, as opposed to proceeding with a full judicial foreclosure or obtaining a deed in lieu of foreclosure, including the benefits to the lender of avoiding the chain of title, are then explored. Some potential hurdles, such as the borrower's opposition, the claims of junior lien holders and the difficulties in obtaining title insurance, all of which must be considered when contemplating the use of a receiver's power of sale are also discussed. Finally, this article concludes with some advice on successfully implementing a receiver's power of sale in Florida.

The Receiver's Power of Sale

An Overview of Receivers under Florida Law

Although it is an extraordinary remedy, Florida has long recognized a secured lender's right to seek the appointment of a receiver during the pendency of foreclosure proceedings.[4] While the borrower is typically entitled to maintain possession of the property until a foreclosure sale is completed, there are circumstances in which the borrower's right of possession can become subordinate to the equitable rights of the lender. In determining whether a particular situation warrants the appointment of a receiver, a Florida court must "balance the [borrower's] right to own and possess its property against the interests of the [lender] in protecting its security in the property."[5] In applying this test, courts have found that the appointment of a receiver is available when, among other things, the property is mismanaged;[6] the borrower commits waste in connection with the property;[7] there is a need to collect and preserve the property's rents, issues, revenues, profits, proceeds, or income;[8] or when the property is "otherwise subject to serious risk of loss."[9] The existence of a provision in the mortgage calling for the appointment of a receiver upon default, without more, is insufficient.[10]

At the time a receiver is appointed, the court, by necessity, must establish the duties, responsibilities and authority of the receiver via court order. The primary duty of a receiver under Florida law is to "protect the interests and preserve the rights of the parties."[11] However, the full scope of the authority granted to a receiver is within the court's "clear judicial discretion"[12] and is inherent in the equitable powers of the court.[13] The order appointing the receiver will therefore govern what the receiver may and may not do going forward.[14] Such an order may only be overturned upon a showing it was "so arbitrary, unreasonable, or unjust as to amount to an abuse of discretion."[15]

Authority of the Court to Grant an Order Containing a Receiver's Power of Sale

The power of a receiver to sell property, while a relatively new concept in the context of a pending foreclosure action, is nonetheless well established under Florida law. When the ownership of property is in dispute, as it is during the pendency of a foreclosure case, Florida courts have often appointed so called "active" receivers who were empowered to do more than a mere caretaker. In the case of *In re Chira*,[16] a hotel was placed into receivership and the receiver was instructed "to seek the sale of the [h]otel while operating it."[17] The court noted that, because of this, "the Receiver had broader powers to enter into contracts than if he had been appointed solely to conserve the property."[18] The sale of property by a receiver was also given significant discussion in *Fugazy Travel Bureau, Inc. v. State by Dickenson*.[19] There the court reasoned:

> A sale by a receiver is ordinarily improper, but there are instances in which a sale by receiver is expedient and proper. Ordinarily, a proper sale may be made where the character of the property or the surrounding circumstances are such as to render a sale necessary for the adequate protection of the rights of the parties. A sale by a receiver should be carefully watched by the court and not approved where the sale is for less than the property should reasonably be expected to sell, and then only when there is a showing of necessity.[20]

In a foreclosure, where the value of the property may well be less than the balance of the mortgage and further declining by the day, and the appointment of a receiver is warranted for the customary reasons, it certainly would seem that a power of sale might be "necessary for the adequate protection" of the secured lender.

Additionally, some courts have directly suggested that, assuming there are proper grounds to divest the borrower of possession of the property, the appointment of a receiver with a power of sale during a pending foreclosure action is within the court's power. In *Interdevco, Inc. v. Brickellbanc Savings Ass'n*,[21] the court order appointing "a receiver with powers . . . to market and contract to sell or lease all or part of the subject property" was held to be improper, not because the court lacked the authority to grant such a power, but rather because there were insufficient grounds to "interfere with the [borrower's] right to possess and market the property."[22] Similarly, in *Fryer v. Morgan*,[23] a receiver was appointed in a separate action prior to the institution of a foreclosure case. Subsequently, during the pendency of the foreclosure, the court authorized the receiver to sell the property and entered an order instructing the receiver execute a deed in favor of the purchaser.[24] Neither decision was disturbed on appeal.[25] As discussed above, the broad authority of Florida's courts to appoint and authorize the duties of receivers is well established. This, coupled with numerous instances of courts in other contexts authorizing a receiver's power of sale, supports the validity of such orders in the proper circumstances.

The Receiver's Power of Sale in Practice

As a practical matter, procuring a court order containing a receiver's power of sale merely requires that additional language be added to the proposed order presented to the court. Ordinarily, following the initial pleadings the lender would file a Motion for Appointment of Receiver and, if such a motion is granted, the court will subsequently issue an order appointing a receiver. This order will put the receiver in possession of the property and establish the duties and responsibilities of the receiver with regard to the property, which will typically be only the "passive" management of the property. The simple inclusion in this order of language such as the following, in addition to the other standard receiver's powers, would establish a receiver's power of sale:

> The receiver is authorized to: (i) market the Property for sale; (ii) solicit offers for the sale of the Property; (iii) negotiate contracts for the sale of the Property; and (iv) take any other action(s) deemed necessary by the Receiver to effectuate a sale of the Property pursuant to such a contract; provided, however, that any proposed contract for the purchase and sale of the Property shall not be executed by the Receiver until such time as (a) all parties hereto have been provided with notice thereof (including a true and correct copy of the proposed contract) and an opportunity to object to the same, and (b) this Court has approved the Contract pursuant to a separate order.

This language first protects both the borrower and the lender from any impropriety on the part of the receiver by providing for notice of and an opportunity to object to any proposed sale, while giving the receiver latitude to go about procuring a purchaser as it deems fit. Additionally, the requirement that the transaction only be made pursuant to a separate court order allows the court to scrutinize the sale and ensure that the price and terms are proper under the circumstances.

Should an order appointing the receiver have already been issued absent such a provision, the lender would need to obtain a modification of the order appointing the receiver. This can be accomplished through a motion to the court requesting the modification, the drafting of the proposed modified order including a power of sale provision, service upon the other parties, the stipulation of the other parties to the entry of the modified order (if possible) and a hearing before the court to review and enter the same. As the need for a receiver would have already been established, at this point the lender need only show why the additional power of sale is necessary.

The Benefits of a Receiver Having a Power of Sale

The choice between proceeding with a traditional foreclosure sale (or taking a deed in lieu of foreclosure) and seeking a receiver empowered to sell the property is essentially a question of time, expense and liability. A lender must consider (i) the time and cost of completing the full foreclosure process, (ii) the liabilities to which it will be exposed by entering the chain of title (should it be the successful bidder at the foreclosure sale), and (iii) the potential duplicative application of Florida's documentary stamp tax, especially if the lender takes a deed in lieu of foreclosure. Additionally, the appointment of a receiver to manage the property while simultaneously marketing and entertaining purchase offers could increase the recovery of the lender. While a foreclosure sale to a third party may realize only pennies on the dollar, a receiver could manage the property while listing it on the Multiple Listing Service ("MLS") and pursuing other marketing strategies, allowing time for the market to recover and to find a suitable purchaser willing to pay a higher price than a distressed property auction would yield. A potential purchaser from a receiver may also be inclined to pay a higher price for the property since it will be able to perform adequate due diligence during an inspection period, which would be unavailable in a foreclosure sale.

Avoiding the Expense & Hassle of a Foreclosure Sale

While in years past a single asset, single creditor foreclosure could typically be completed in a few months, the current backlog in most of Florida's circuit courts could substantially delay even the simplest foreclosure. Although dealing with residential foreclosures rather than commercial, The Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases' recent report is illustrative of the problem.[26] The bleak picture of this backlog is vividly described with the opening words of this report:

> Picture this: the biggest road out of town. Now imagine it is rush hour. In a thunderstorm. Add that it is also a hurricane evacuation. A lane is closed due to construction delayed by budget impacts. Imagine the traffic jam.
> The clearest description of the impact of the foreclosure crisis and the following recession on Florida's courts can be summarized by that picture. Imagine every car is a case. The General Jurisdiction Courts of our state have a certain amount of judicial infrastructure, just like there is a certain amount of room on the road. There is a certain supply of judges, of court staff, of clerks, of filing space, of hearing time, of courtrooms, even hours in the day . . ..
> The enormous increase in foreclosure filings has overwhelmed those resources in many circuits and represents a caseload traffic jam that the infrastructure cannot meet in a timely and efficient manner . . ..[27]

Much of this delay comes after the initial hearing in the foreclosure action,[28] thus the appointment of a receiver with a power of sale at this time could substantially truncate the time required to be spent in court and thereby circumvent the foreclosure backlog. The disposition of the property would be thereafter handled by the receiver pursuant to a court order, rather than sitting amongst the tall stack of foreclosure cases that the court will eventually get to, saving the lender much of the expense and hassle involved in proceeding down the judicial foreclosure path.

Avoiding the Liability of Entering the Chain of Title

Assuming that the foreclosure could even be processed in a timely fashion, the lender is then faced with an immediate sale of the property, in which it may sell for substantially less than the outstanding balance of the loan, or the lender itself may be the only bidder, thereby acquiring title to the property. If this were to occur, an additional host of problems arise. When the lender enters the chain of title it is exposed to environmental liability, premises liability and regulatory liability, among the many other liabilities and expenses that are inherent in property ownership.[29]

Environmental Liability

Environmental laws at both the state and federal level are often broadly applied as a result of the apparent legislative intent to minimize the financial burden of the cost of clean up to the public. At the federal level, the most well known statute addressing environmental liability is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, commonly know as CERCLA or the "Superfund Act." CERCLA establishes four categories of so called "potentially responsible parties" on whom environmental liability may be imposed, the most pertinent of which for these purposes is the "owner" of the property.[30] Courts have interpreted this category to impose liability on the current owner, whether or not that person had any part in causing the environmental damage.[31] Under this interpretation, a lender taking ownership of property through foreclosure could be liable for any environmental contamination caused by the borrower (or any other predecessors in title), despite the lender's total noncomplicity in the activities that caused the contamination. Such environmental liabilities potentially include the costs of testing, site investigation, medical evaluations, development of remedial action plans, removal of contamination, monitoring, relocation, the provision of alternative water supplies, government oversight costs, and interest—which together could potentially exceed the value of the property.[32]

Although a secured creditor exception was added in 1996, there is still good reason to avoid any possible application of CERCLA. This exception excludes from liability a lender

who obtained title via foreclosure or deed in lieu of foreclosure and who "seeks to sell . . . or otherwise divest the [property] at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements."[33] While ordinarily a lender would certainly seek to dispose of the property on reasonable terms as quickly as possible, in today's economic climate, it may be difficult to establish what constitutes a "commercially reasonable time." Even though the determination of what is reasonable is necessarily fluid, there is no certainty that even the lender's best efforts could accomplish a sale within a timeframe that a court would deem appropriate to satisfy this exception. This predicament, coupled with the enormity of the potential liability, may make it desirable to avoid CERCLA's application altogether by avoiding the chain of title.

In addition to environmental liabilities arising under federal law, Florida law contains two significant environmental liability statues which generally are even less forgiving than federal law. Chapter 376, Florida Statutes, makes the "owner" of contaminated property liable for a discharge of hazardous substances "into or upon any coastal waters, estuaries, tidal flats, beaches, and lands adjoining the seacoast of the state."[34] The Florida Air and Water Pollution Control Act[35] provides the Florida Department of Environmental Protection with a broader "CERCLA-type liability scheme for the recovery of costs associated with releases . . . of hazardous substances,"[36] which pollute the environment of the state. A violation of this Act can expose an owner to a civil penalty of up to $50,000 per day as well as any "damage caused to the air, waters, or property . . . of the state and for reasonable costs and expenses of the state in tracing the source of the discharge, in controlling and abating the source and the pollutants, and in restoring the air, waters, and property . . . of the state to their former condition;"[37] again a potentially enormous expense. As with CERCLA, a lender can become an "owner" by taking title at a judicial foreclosure sale or through a deed in lieu of foreclosure; however, unlike CERCLA, the Florida Air and Water Pollution Control Act contains no exception for a lender acquiring property through foreclosure.[38]

Premises Liability

Owners of real property in Florida are also liable for certain injuries that occur to persons while on the land, often referred to collectively as "premises liability."[39] This is a matter of particular concern to lenders who end up owning property that once merely secured their mortgage, as the law in this area does not merely impose liability only for the affirmative injurious acts of the land owner. Instead, it imposes a duty upon the owner to take reasonable steps to prevent the occurrence of injury, potentially inflicting liability for doing nothing at all.

Under Florida law, the degree of duty owed varies based upon the status of the person on the land, of which three categories prevail.[40] To the first and second categories of persons, licensees and trespassers, little or no duty is owned. Licensees are those persons who "choose to come upon the premises solely for their own convenience without invitation either expressly or reasonably implied under the circumstances."[41] These persons, such as someone entering property to use the telephone[42] or to get change,[43] are owed only the limited duty of protection from exposure to reckless or wanton dangers—"active vigilance is not required."[44] A trespasser, being someone who enters the property without permission "for some definite purpose of his own, or at his own convenience, or merely as an idler with no apparent purpose, other than to satisfy his own curiosity,"[45] is owed no duty other than to refrain from actively inflicting injury.[46] While these persons may enter onto the land, the duty owed to them by the owner is so slight as to border on insignificant.

Of more concern, however, are invitees. This third category is comprised of those persons who "enter or remain on land as a member of the public for a purpose which the land is held open to the public"[47] or who are "invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land."[48] A lender who takes ownership of any type of operating business or leased building must be exceedingly careful, since the vast majority of persons entering the property will likely be classified as invitees, to which the owner owes a duty "to keep his property reasonably safe and protect the visitor from dangers of which he is, *or should be aware.*"[49] This is the same duty that would apply to customers in the lender's own premises and requires repairing or warning visitors of known hazardous conditions and actively seeking out and remediating any such unknown conditions. Therefore, if not careful, by taking title to real property a lender may quickly find itself on the wrong end of a personal injury lawsuit without having done anything more than own the property. To minimize this liability, the lender may have to go to great expense to repair or restore the property and ensure that it remains in a reasonably safe condition.

Regulatory Liability

Should the secured property be comprised of unsold units in a condominium or unsold lots in a subdivision, innumerable other liabilities may exist. A lender taking title to a condominium project could be exposed to significant liability imposed by the Florida Condominium Act.[50] This Act imposes several liabilities on the "developer" of the condominium,[51] which designation may be transferred to a foreclosing lender taking title either by operation of the condominium documents, the foreclosure, or the Act itself.[52] First, the developer is deemed by statute to grant to the purchaser of each unit an implied warranty of fitness and merchantability for the purposes or uses intended.[53] This warranty applies to the unit itself, any personal property transferred with the unit, common area improvements, and the roof, structural, mechanical, electrical and plumbing systems of the building;[54] thus, a lender may potentially become liable for the initial developer's defective construction of the condominium property. Also, the lender stepping into the shoes of the developer may become liable for the developer's financial mismanagement of the condominium and noncompliance with the requirements of the Act. The developer may have comingled condominium association funds with its own, failed to file appropriate documents or amendments with the Division of Florida Condominiums, Timeshares, and Mobile Homes,[55] failed to fund association operating deficits or reserve accounts, failed to hold association board of directors meetings, or failed to properly elect directors or officers. All of these deficiencies must be remedied by taking prompt action consistent with the Act in order to avoid an enforcement action by the Division against the lender, which may result in considerable expense.[56]

The same types of issues may face a

lender taking title to lots or tracts in a residential or commercial development (other than a condominium project) that is governed by a Declaration of Covenants, Conditions and Restrictions recorded by a prior developer, which typically includes a property owners' or homeowners' association controlled by the developer. The lender by acquiring title to the unsold lots or tracts may succeed to the liabilities of the prior developer under the governing documents for the development.

Additionally, a lender taking title to either a developer's unsold lots in a subdivision (which would include unsold units in a condominium), without carefully considering what liabilities and obligations that may entail, must be wary of the federal Interstate Land Sales Full Disclosure Act,[57] often referred to as "ILSA." ILSA is a consumer protection statute designed to ensure that purchasers receive adequate information about a subdivision before buying a lot there. It requires the developer[58] to file a statement of record, which must be approved by the U.S. Department of Housing and Urban Development, disclosing detailed information such as the persons having an interest in the subdivision, the land included in the subdivision, the terms and conditions of sales, and the covenants, conditions and restrictions applicable to the lots.[59] While there are exemptions from ILSA,[60] if the subdivision does not fall within one of these carveouts, an acquiring lender who offers lots for sale may become liable for the developer's violations. This can result in liability to individual purchasers (from either the prior developer or the lender) who may be able to recover (i) the difference between the price they paid for the lot and its current fair market value, or (ii) the full purchase price paid in exchange for a tender of the deed, in both cases with their attorneys' fees and costs.[61] Enforcement actions may also be brought by the U.S. Secretary of Housing and Urban Development seeking injunctive relief and the imposition of fines of up to $10,000 per violation.[62]

Finally, a lender stepping into the chain of title may become the target of legal action brought by individual lot or unit purchasers who may not have pursued action against the foreclosed developer, knowing that the developer would not have the financial wherewithal to satisfy any judgment they might have obtained. To these individuals, the lender may be viewed as a "deep-pocket," thus making their previously unpursued claims quite valuable. Indeed, depending on the depth and breadth of the violations, the lender could be stepping into a potential class action suit that has merely been awaiting a solvent defendant.

It is possible to craft a foreclosure complaint, conduct a foreclosure proceeding and obtain a foreclosure judgment in a manner that can reduce the lender's exposure to regulatory claims that might be asserted against the lender on account of the fact that the lender has succeeded to the liability of the prior developer by becoming the owner of the property. This may be accomplished by expressly excluding certain developer rights and/or obligations from the interests being foreclosed. However, this is an evolving area of the law, requires careful consideration and careful drafting of the foreclosure pleadings and orders, and could be subject to challenge. Additionally, in some instances the owner who succeeds to the interest of the prior developer will need developer rights in order to complete or market a project. If the lender conducts the foreclosure so as to avoid acquiring these rights, it would not then be capable of conveying or assigning such rights to a prospective purchaser. If the lender acquires developer rights because it needs to be able to convey them to a prospective purchaser, by acquiring them it has subjected itself to the liabilities that go with them. If the property (and the developer rights) can be conveyed directly to the prospective purchaser by the receiver in the foreclosure, the lender is spared this dilemma.

Deeds in Lieu & The Documentary Stamp Expense

While a deed in lieu of foreclosure can be effective in accomplishing the lender's goal of controlling the collateral as quickly as possible, the expense and liability factors discussed above remain unchanged. Additionally, the documentary stamp tax expense will increase with a deed in lieu of foreclosure. Florida imposes an excise tax, commonly referred to as the documentary stamp tax, on all instruments effectuating a transfer of real property.[63] While this tax is applicable to transfers both by a certificate of title following a judicial foreclosure sale and a deed in lieu of foreclosure, the base amount upon which the tax is imposed is much different. If the lender were to file a foreclosure suit and proceed to a judgment and sale (assuming the lender is also the purchaser at the sale), the tax is "computed solely on the amount of the highest and best bid received for the property at the foreclosure sale," irrespective of the amount of the debt or the actual market value of the property at the time of the sale.[64] Conversely, if the lender agrees to take a deed in lieu of foreclosure, for documentary stamp purposes it is treated as any other transfer of the property, and the tax is due on the full amount of the mortgage debt then outstanding,[65] which can include interest, late charges, attorneys' fees and other expenses incurred by the lender. Obviously the disparity between these two amounts could be enormous—the foreclosure bid could be as low as $100 (producing a nominal amount of tax), whereas the mortgage debt could be millions of dollars (easily producing a five or six figure tax bill). In either instance, the tax would again be due upon the subsequent transfer from the lender to a third party purchaser. However, through the application of a receiver's power of sale, the receiver is essentially acting on behalf of the borrower at the direction of the court, thus the only taxable transfer is to the eventual purchaser; there is no intermediate transfer to the lender to which the tax could apply.

Hurdles to the Implementation of a Receiver's Power of Sale

While the benefits of a potentially increased recovery coupled with the avoidance of liabilities may weigh heavily in favor of the receiver's power of sale, there are three major hurdles that must be overcome when seeking approval of an order granting a receiver's power of sale. These consist of: (i) the borrower's objections; (ii) the claims of junior lien holders; and (iii) the ability to provide owner's title insurance to a prospective purchaser. Any one of these hurdles, in and of itself, could be enough to prevent the successful implementation and completion of a receiver's sale. As such, they are not merely obstacles to be considered and dealt with if and when they arise, but instead are issues that must be thoroughly and cautiously evaluated before the decision to seek a receiver's power of sale is made.

Borrower's Objections

The primary and threshold hurdle to the successful implementation of the receiver's power of sale the possible objections of the borrower. These must be overcome, or better yet, the lender should seek to obtain the cooperation of the borrower. A borrower may be induced to cooperate with a lender in seeking a receiver's power of sale for many reasons. By way of example, the principals of a borrower may have given the lender a guaranty which will result in personal liability following a foreclosure sale, but which the lender may be willing to waive or reduce if the borrower allows it to proceed with a receiver's sale. If the property in foreclosure is not the only asset of the borrower, the possibility also exists that the lender will seek a deficiency judgment and pursue other assets of the borrower if it objects to a receiver's sale. These scenarios can provide significant motivation for the borrower to concede to the lender's desire for a receiver's sale.

While an uncooperative borrower may merely make a judicial foreclosure more lengthy and expensive, it could completely derail any chance to sell the property through a receiver. Because even the ordinary appointment of a receiver, without a power of sale, is contrary to the interest of the borrower (who may want to remain in control of the property), any resistance by the borrower may defeat this technique. A borrower may wish to prolong the foreclosure process as much as possible, hoping to soften the lender's position on a workout or waiting for the economy to turn around, enabling it to get current on its debts. Additionally, as was previously discussed, the appointment of a receiver is an extraordinary remedy, only available upon a showing by the lender of some justifiable reason to displace the borrower. While lenders may certainly (and often do) prove the existence of these reasons despite the borrower's opposition, the joinder of the borrower in a motion to appoint a receiver will nullify much, if not all, of the court's concern, making the process considerably simpler. In either case, the borrower's interest will be diametrically opposed to the lender's hope of a relatively quick, painless sale by a receiver. The foreclosure process is structured to give protections to the borrower during its course, and by using them, a borrower can erect enough roadblocks to make the receiver's power of sale quite difficult, if not impossible, to achieve. In such a case, pursuing a traditional foreclosure may be the lender's preferred option.

Junior Lien Holders

A second hurdle that arises by avoiding the judicial foreclosure sale is that the property may not be cleansed of junior liens as it would have been upon the issuance of a certificate of title following a foreclosure sale.[66] The existence of these liens would make it difficult if not impossible to successfully market the property to third parties. Additionally, these lien holders will be parties to the foreclosure action and may actively object to the senior secured lender's attempts to have a receiver appointed with a power of sale.

If the value of the property has fallen below the amount outstanding on the senior mortgage, as may be the case in a depressed economy, a judicial foreclosure sale will result in the extinguishment of the junior liens without those lien holders receiving any of the proceeds. Because of the leverage generated by this default position, one potential solution to this problem may be to simply buy out the interests of these junior lien holders. As they would potentially receive nothing in a foreclosure sale, any rational holder of a junior lien should be willing to sell that interest to the senior lender for some nominal sum, netting them something rather than nothing. While this solution would increase the costs to the senior lender, the benefits of avoiding a judicial foreclosure sale could substantially outweigh the expense of purchasing any junior liens for nominal sums.

Additionally, although not yet specifically confirmed by the Florida Supreme Court, there is precedent for a receiver to sell property encumbered by liens free and clear of those liens, with the liens instead attaching to the proceeds from the sale—as the case would be in a judicial foreclose sale. For example, because of the state of disrepair of the property, the trial court in *Arzuman v. Saud*[67] appointed a receiver with a power of sale and subsequently issued an order which "approved the sale, directed the Receiver to proceed with closing, authorized the Receiver to execute all necessary instruments of title for conveyance, and ordered the proceeds held in escrow."[68] When this ruling was challenged on appeal, the Fourth District Court of Appeal upheld the order, noting that the parties' interest in the realty would be transferred by operation of law and attach "to the proceeds of its sale."[69] While *Arzuman* supports this theory in one of Florida's judicial districts, the lack of clear cut, state wide precedent leaves uncertainty within remainder of the state. This uncertainty may be best remedied by legislation affirmatively providing for the treatment of junior liens upon the sale of property by a receiver during a pending foreclosure action. Such legislation may well have the added benefit of easing the flood of foreclosure cases on the court dockets, as resolution of the foreclosure could be reached in many instances with significantly less burden on the courts.

Obtaining Title Insurance

Another significant hurdle to the receiver's power of sale could be the potential inability of the purchaser to obtain title insurance. This again should be a threshold issue that determines whether or not to pursue a receiver's power of sale, since a reasonable purchaser from the receiver will not likely proceed without being able to obtain an acceptable owner's title insurance policy. If this will not be available, the receiver will not be able to sell the property and a judicial foreclosure sale will be preferred. In this regard, Chicago Title Insurance Company, Fidelity National Title Company, and Ticor Title Insurance Company,[70] and subsequently Lawyer's Title Insurance Corporation and Commonwealth Land Title Insurance Company,[71] have all disseminated underwriting bulletins to their agents in Florida regarding receiver's sales. These bulletins indicate that these companies will be unwilling, without more, to "insure title conveyed by a court-appointed Receiver in a mortgage foreclosure action."[72] Three separate procedures are then outlined, compliance with any of which would permit the issuance of title insurance from these companies, despite the conveyance coming from a receiver.

The first procedure would require "a deed of conveyance (e.g., a quit claim deed) from the Owner of the property to the court-appointed Receiver."[73] As discussed previously, the conveyance of property from the borrower to the receiver would be subject to Florida's documentary stamp tax. While there would be no cash payment for such a transfer, documentary stamps are due and payable based upon the amount of "consideration" for the transfer, which, as mentioned above, includes the amount of debt secured by a mortgage encumbering real property.[74] Thus, if this procedure is followed, documentary stamp taxes will be due on the then current outstanding amount of the mortgage, which could be substantial.

The second procedure requires "an Agreed

Order approving the sale and conveyance by the court-appointed Receiver signed by the owner with the formalities of a deed (witnessed by two witnesses and acknowledged). The Agreed Order must contain words of conveyance in favor of the Receiver, so that [the title insurance company] could rely on the Order as the title transfer to the Receiver."[75] This requirement is essentially identical to the first, merely using the Agreed Order rather than a separate quit claim deed to effectuate a transfer from the owner to the receiver. As such, even though it is not strictly speaking a "deed," the Florida documentary stamp tax could still apply, as the tax is additionally applicable to "instruments, or writings whereby any lands, tenements, or other real property, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed."[76] It would not be a stretch of the imagination for the Florida Department of Revenue to seek to collect the tax on such an Agreed Order, which bears all indications of a deed other than its label. Additionally, under either of the first two procedures, the receiver would step into the chain of title and face the same potential issues that a lender would face as a property owner.

The third, and most palatable, procedure is also the most complicated. The title insurance companies suggest that they would also be willing to rely "on a Power of Attorney from the [o]wner of the property authorizing the court-appointed [r]eceiver to convey the property to the [i]nsured as attorney in fact."[77] Additionally under this procedure, the title company would require the satisfaction of the mortgage or final judgment of foreclosure, if such had been entered, the dismissal of the foreclosure case with prejudice, the discharge of any notice of lis pendens filed against the property, and a payoff letter from the foreclosing lender.[78] While all of these items would be within the control of the foreclosing lender to accomplish, there will be some time and attorneys' fees and costs incurred in addressing them. The upside to this scenario, however, is that unlike the first two options, no documentary stamp taxes will be due since there is no transfer of title to the receiver. As the attorney-in-fact for the borrower, the receiver is essentially an agent of the borrower and the transfer will be treated as if the borrower had made it himself. While the tax will still be due on the transfer to the eventual purchaser, there will be no taxation on the intermediate step to give the receiver control, and no taxation on any conveyance to the lender (which has stayed outside the chain of title).

While the particular title companies mentioned above have indicated that they will require one of these three procedures in order to insure a purchaser's title, it is unclear whether any of these procedures are actually required under Florida law to convey good title to a third party purchaser from a receiver. As discussed above, courts have broad power to appoint and authorize the conduct of receivers with respect to property which has come under their jurisdiction. Additionally, there is no legal authority to suggest that the sale of property under the jurisdiction of a court (by virtue of the foreclosure action) by a court appointed receiver, pursuant to an order of the court specifically authorizing the sale would fail to convey good title. Furthermore, if the borrower joins in the motion to appoint the receiver (which this article suggests may be a practical requirement to implementing this technique) and does not subsequently object to the sale, there will be no one left to assert an interest in the property; at this point the borrower, along with any remaining lien holders, would have consented to the sale. That being said, if compliance with these procedures is the only way in which to obtain a policy, the power of attorney process is vastly superior to the first two options.

Although for the time being, these five companies are the only title insurers that have imposed restrictions on the issuance of title insurance policies in this context, it is likely that in the near future other companies will follow suit. While a legislative declaration that a receiver in such an instance can convey good title would settle this issue,[79] in the meantime, this looming uncertainty heightens the importance of selecting a proper title insurance company, which both understands the issues inherent in a receiver's sale and is willing to give clear guidance on what will be required to insure title, well in advance of the decision to pursue a receiver's sale.

Conclusion

While there are hurdles to be overcome, there are also distinct advantages to pursuing a receiver's power of sale as opposed to a traditional judicial foreclosure sale. Although the law in this area is only now emerging as a by-product of the increased number of distressed properties and foreclosures that have resulted from the current economic downturn, the foundations of the receiver's power of sale are well rooted in Florida law. The advice of experienced counsel can assist a lender in circumventing the perils of judicial foreclosure and avoiding, or minimizing exposure to, the minefield of environmental liability, premises liability, regulatory liability, documentary stamp tax expense, title insurance restrictions and the like. While the decision to implement such a technique is one that must be carefully thought out and planned in advance, it may be a useful solution available to secured lenders, enabling them to preserve the value of their collateral and exercise more control over the process of liquidation.

NOTES:

[1] Lingling Wei, "Commercial Property Faces Crisis," *The Wall Street Journal*, March 26, 2009, at A1 (stating an estimated two-thirds of securitized mortgages and 50 percent of whole mortgages will not qualify for refinancing); *see also* Christina S.N. Lewis, "Matter of Debate: Bottom in Commercial-Property Values," *The Wall Street Journal*, January 20, 2010 ("That troubled debt totals hundreds of billions of dollars and sits like a time bomb on bank balance sheets and in commercial-mortgage-backed securities held by institutional investors.").

[2] Polyana de Costa, "Delaying the Inevitable Fall with Billions in Loans Coming Due, Some Lenders are Extending Due Dates. It's a Risky Move that could Prolong the Commercial Downturn," Palm Beach Daily Business Review, Volume 55, Issue 247, September 28, 2009.

[3] Shannon Behnken, "Commercial Defaults Increasing," Tampa Tribune, October 20, 2009, Business Section.

[4] *Pasco v. Gamble*, 15 Fla. 562 (Fla. 1876).

[5] *ANJ Future Investments v. Alter*, 756 So. 2d 153, 154 (Fla. 3d DCA 2000).

[6] *Pasco at 566.*

[7] *Federal Land Bank v. Evans*, 106 Fla. 560 (Fla. 1932).

[8] *Carolina Portland Cement v. Baumgartner*, 128 So. 241, 247 (Fla. 1930); *see also Colley v. First Federal Sav. and Loan Ass'n of Panama City*, 516 So. 2d 344 (Fla. 1st DCA 1987).

[9] *Alafaya Square Ass'n v. Great Western Bank*, 700 So.2d 38, 40 (Fla. 5th DCA 1997).

[10] *Boyd v. Bank One Mortgage Corp.*, 509 So. 2d 966 (Fla. 3d DCA 1987).

[11] *State ex rel. Adler v. Barns*, 123 Fla. 184 (Fla. 1936).

[12] *Id.* at 187.

[13] *Carolina Portland Cement, 128 So. at 247.*

[14] *O'Neal v. General Motors Corp.*, 841 F. Supp. 391 (M.D. Fla. 1993) (applying Florida law).

[15] *Interdevco, Inc. v. Brickellbanc Savings Ass'n*, 524 So. 2d 1087, 1089 (Fla. 3d DCA 1988).

[16] *In re Chira*, 343 B.R. 361 (S.D. Fla 2006) (dealing with state court receiver appointed prior to bankruptcy filing).

[17] *Id.* at 368.

[18] *Id.*

[19] *Fugazy Travel Bureau, Inc. v. State by Dickenson*, 188 So. 2d 843 (Fla. 4th DCA 1966).

[20] *Id.* at 844.

[21] *Interdevco, Inc.*, 524 So. 2d 1087.

[22] *Id.* at 1089-90.

[23] *Fryer v. Morgan*, 714 So. 2d 542 (Fla. 3d DCA 1998).

[24] *Id.* at 544.

[25] *Id.*

[26] Final Report and Recommendations on Residential Mortgage Foreclosure Cases, August 17, 2009, available at http://www.floridasupremecourt.org/pub_info/documents/Filed_08-17-2009_Foreclosure_Final_Report.pdf.

[27] *Id.* at 4.

[28] *Id.* at 12.

[29] For example, the property's operating expenses, structural defects, building code violations, as well as other potential liabilities.

[30] 42 U.S.C. § 9607.

[31] *State of New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) ("section 9607(a)(1) unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation.").

[32] Environmental Aspects of Real Estate and Commercial Transactions: From Brownfields to Green Buildings, 3rd Edition (2004), James B. Witkin, editor.

[33] 42 U.S.C. § 9601(20)(E) (added in 1996 by Public Law 104-208, § 2502, to supersede the decision in *United States v. Maryland Bank and Trust Company*, 632 F.Supp 573 (D.Md. 1986), holding a lender liable after acquiring title through foreclosure).

[34] Fla. Stat. § 376.308 (however, this section provides an exception for lenders acquiring through foreclosure, but which only applies when the contaminant is petroleum.).

[35] Chapter 403, Florida Statues.

[36] Michael R. Goldstein, "The Widening Gyre: A Survey of Post-Kelley Lender Environmental Liability Issues Under CERCLA, Chapters 376 and 403, Florida Statutes, and Chapter 24, Dade County Code," 5 *U. Miami Bus. L. J.* 41 (1995).

[37] Fla. Stat. §§ 403.727(3)(a); 403.141(1).

[38] *See* Goldstein, *supra* note 36.

[39] For a through discussion of premises liability in Florida, which is beyond the scope of this article, *see* Wilton H. Strickland, "Premises Liability: A Notable Rift in the Law of Foreseeable Crimes," *Florida Bar Journal*, December 2009.

[40] *Post v. Lunney*, 261 So. 2d 146, 147 (Fla. 1972).

[41] *Iber v. R.P.A. Int'l Corp*, 585 So. 2d 367, 368–69 (Fla. 3d DCA 1991). Note that the definition of "licensees" under premises liability law differs from that of license holders or licensees under real property law who are granted a property interest entitling them to use the land of another for a specified purpose.

[42] *Id.*

[43] *Stewart v. Texas Co.*, 67 So. 2d 653, 654 (Fla. 1953).

[44] *Id.*

[45] *Post*, 261 So. 2d at 147.

[46] *Id.*

[47] *Id.* at 148.

[48] *Id.*

[49] *Id.* at 147 (emphasis added).

[50] Chapter 718, Florida Statues; see *also* Martin A. Schwartz, "The Successor Developer Conundrum in Distressed Condominium Projects," *The Florida Bar Journal*, July/August 2009.

[51] *See* Chapter 718, part II, Florida Statutes.

[52] Op. Att'y. Gen. 077-13, February 8, 1977.

[53] Fla. Stat. § 718.203(1).

[54] *Id.; See also Ocean Beach Resort, Inc. v. Rodack*, 586 So. 2d 363 (Fla. 3d DCA 1991).

[55] *See* Fla. Admin. Code § 61B-17, *et. seq.*

[56] *See* Fla. Admin. Code § 61B-20.006 (listing violations and penalties therefor).

[57] 15 U.S.C. § 1701, *et seq.* For a more detailed discussion of ILSA, *see* Willaim P. Sklar and Jennifer L. Dolce, "The Interstate Land Sales Full Disclosure Act's Two-Year Completion Exemption," *The Florida Bar Journal*, February 1999.

[58] *See U.S. Dept of Housing & Urban Development v. Cost Control Marketing & Sales Management of Virginia, Inc.*, 64 F.3d 920 (4th Cir. 1995) (holding that the term "developer" can include persons taking title from original developer).

[59] 15 U.S.C. § 1705.

[60] 15 U.S.C. § 1702.

[61] 15 U.S.C. § 1709.

[62] 15 U.S.C. §§ 1714 to 1719.

[63] *See* Fla. Stat. §§ 201.02 & 125.0167 (the tax is $0.70 per $100 of consideration, or part thereof, except for property located in Miami-Dade County in which the tax is $0.60 (for single-family residences) and $1.05 (for all other property) per $100 of consideration, or part thereof).

[64] Fla. Stat. § 201.02(9).

[65] Fla. Stat § 201.02(1)(a); Fla. Admin. Code § 12B-4.013(22) ("When computing the tax under Section 201.02, F.S., on a deed of conveyance, the total consideration includes any mortgages encumbering the property being transferred.").

[66] *See, e.g., Household Finance Services, Inc. v. Bank of America, N.A.*, 883 So.2d 346 (Fla. 4th DCA

2004).

[67]*Arzuman v. Saud*, 964 So. 2d 809 (Fla. 4th DCA 2007).

[68]*Id.* at 811.

[69]*Id.; see also, People's-Pittsburgh Trust Co. v. Hirsh*, 65 F.2d 972 (3d Cir. 1933) (holding that a court of equity, under proper circumstances, has power to order a receiver to sell property free and clear of all encumbrances); Brian S. Dervishi & Steven E. Seward, "Using Receivers to Maximize the Value of Distressed Assets," *Florida Bar Journal*, December 2009.

[70]Chicago Title Insurance Company Title Bulletin #2009-33, December 30, 2009; Fidelity National Title Insurance Company Underwriting Bulletin #01/06/2010.1, January 6, 2010; Ticor Title Insurance Company Florida Bulletin No. FL10-001, January 7, 2010 [hereinafter "Initial Title Insurance Bulletins"].

[71]Lawyer's Title Insurance Company & Commonwealth Land Title Insurance Company Joint Bulletin FL 146, January 14, 2010 (containing a rewording of the same content as provided by the *Initial Title Insurance Bulletins*).

[72]Initial Title Insurance Bulletins, para. 2.

[73]*Id.*

[74]*See* note 65, *supra*.

[75]Initial Title Insurance Bulletins, para. 2.

[76]Fla. Stat. § 201.02(1)(a).

[77]Initial Title Insurance Bulletins, para. 3.

[78]*Id.*, para. 4.

[79]For an example of such a statute, see Mich. Comp. Laws § 570.1123, proving in part that, when foreclosing construction liens:

> (2) The receiver may petition the court for authority to sell the real property interest under foreclosure for cash or on other terms as may be ordered by the court . . . The sale under this subsection shall become final upon the entry of an order of confirmation by the court, unless the court allows a period for redemption. . . .
>
> . . .
>
> (4) [A] sale by the receiver, upon becoming final, shall vest in the grantee named in the deed all the right, title, and interest in the real property which the owner, co-owner, lessee, or co-lessee whose interest is being foreclosed had at the date of the execution of the contract for the improvement or at any time thereafter.