

## MEMORANDUM

To: Drafting Committee, Advisors, and Observers  
Model Act on Appointment and Powers of Real Estate Receivers

From: Wilson Freyermuth, Reporter

Date: March 3, 2014

Re: Receiver's Power to Sell Free and Clear of Liens/Rights of Redemption  
Additional Background Information

This memorandum provides some additional background information for the benefit of use of the Drafting Committee in its consideration of the Model Act's provisions regarding the power of a receiver to sell receivership property outside the ordinary course of business.

The memorandum is divided into two parts. Part I of the memorandum provides some context on existing state laws governing the extent to which states currently provide post-sale rights of statutory redemption (or permit waivers of such rights). I have provided this information based on concerns expressed by some committee members regarding whether a Model Act that authorized receiver sales free and clear of redemption rights would be too aggressive of a reform. [As discussed in the September 2013 meeting, such a concern can and is also addressed by the adoption of alternative approaches for inclusion in the Act. Nevertheless, this additional background is useful to demonstrate the actual volume of states recognizing statutory redemption rights.

Part II of the memorandum provides the text of the material to be added to the next edition of the Nelson and Whitman Real Estate Finance Law treatise (currently in press) regarding the receiver's power to sell real estate, along with some additional authorities (gathered with the assistance of Baruch Kreiman, a student of Prof. Nelson's at Pepperdine University School of Law).

### **I. EXISTING STATE LAW PROVISIONS GOVERNING POST-SALE STATUTORY REDEMPTION**

Part I sets forth a state-by-state summary of the extent to which existing states provide for a post-sale right of statutory redemption. This information may provide some useful context in terms of considering the extent to which the Model Act might authorize receivership sales free and clear of rights of redemption, and may serve to identify states in which such a Model Act provision might prove more or less controversial.

In summary, there are only 25 states that recognize some form of post-sale redemption period.

#### **States recognizing statutory redemption after both judicial and nonjudicial foreclosure.**

There are nine states that authorize statutory redemption by the mortgagor after the sale: Alabama, Michigan, Minnesota, Montana, New Mexico, North Dakota, South Dakota,

Tennessee, and Wyoming. In Tennessee, the mortgagor can waive the right in the mortgage documents. In Montana, the right does not exist for foreclosure of tracts covered by Montana's Small Tract Financing Act. In New Mexico, the redemption period may be shortened by agreement in the mortgage, but not waived altogether.

**States recognizing statutory redemption only after nonjudicial foreclosure.** Missouri is the only such state, and the right arises only where the foreclosing lender is the foreclosure sale purchaser.

**States recognizing statutory redemption only after judicial foreclosure.** Fifteen states authorize statutory redemption by the mortgagor after the sale: Alaska, Arizona, Arkansas, California, Idaho, Illinois, Iowa, Kansas, Kentucky, Nevada, New Hampshire, New Jersey, Oregon, Utah, Washington.

However, the right is subject to substantial qualification in a number of these jurisdictions. For example, in three of these states (Arkansas, Illinois, Kansas), the mortgagor can waive the right in the mortgage itself. In several others (California, Iowa), the right is waived if the lender forgoes or cannot pursue a deficiency. In Kentucky, the right arises only if the sale brings less than 2/3 of the property's appraised value. While there is a post-sale right of statutory redemption following a judicial foreclosure in Utah, Utah courts have held that it does not apply in the case of a receiver's sale. *Chapman v. Schiller*, 83 P.2d 249 (Utah 1938) (see Part II of this memorandum for further discussion of the *Chapman* case).

Finally, of these fifteen states, more than half of them authorize nonjudicial foreclosure, and do not permit the mortgagor any post-sale redemption right following a nonjudicial foreclosure. These states include Alaska, Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington.

### **State-by-state synopses (including, with a few exceptions, statutory references)**

#### **Alabama**

Alabama primarily uses nonjudicial foreclosure. There is a one-year statutory redemption period after the foreclosure sale. Ala. Code § 6-5-248(a). [A bill currently pending in the Alabama legislature would reduce this period to 60 days.] This right cannot be waived prior to foreclosure, but may be waived post-foreclosure. Ala. Code § 6-5-250. The mortgagor also waives its statutory redemption right if it fails to deliver possession to the foreclosure sale purchaser within 10 days after written demand for possession. Ala. Code § 6-5-251.

#### **Alaska**

The mortgagor has no statutory right of redemption following a nonjudicial foreclosure. Alaska Stat. § 34.20.090. By contrast, if the lender forecloses judicially, the mortgagor has a 12-month statutory redemption period from the order confirming the sale. Alaska Stat. § 09.35.250. There is no case law indicating that the borrower may waive the redemption right following a judicial foreclosure sale.

## **Arizona**

Following judicial foreclosure, the mortgagor has a statutory right of redemption for 30 days (if the property was abandoned and not used for grazing/agricultural purposes) or six months (for all other real property). Ariz. Rev. Stat. §§ 12-1283, 12-1282(A), (B). There is no case law indicating that the borrower may waive the redemption right following a judicial foreclosure sale.

Following a nonjudicial foreclosure sale, the borrower does not have a right of statutory redemption. Ariz. Rev. Stat. § 33-811(B).

## **Arkansas**

Following judicial foreclosure, the mortgagor has a statutory redemption period of one year. Ark. Code Ann. § 18-49-106(a)(2). However, this right of redemption can be (and typically is) effectively waived in the loan documents itself, and thus rarely arises. Ark. Code Ann. § 18-49-106(b) (“The mortgagor may waive the right of redemption in the mortgage or deed of trust so executed and foreclosed.”).

Nonjudicial foreclosure is available only where the mortgagee is a mortgage company, bank, or savings and loan and where the mortgaged property is not used primarily for agricultural purposes. Ark. Code Ann. § 18-50-101. The mortgagor has no statutory redemption right following nonjudicial foreclosure. Ark. Code Ann. § 18-50-108(b).

## **California**

Following the completion of a judicial foreclosure, the mortgagor has a one-year period of statutory redemption, Cal. Civ. Proc. Code § 729.010, unless the mortgagee waives any right to collect a deficiency or a deficiency is barred because the debt is purchase money in character. Cal. Civ. Proc. Code §§ 726(e), 716.020. The mortgagor has no right of statutory redemption following a nonjudicial foreclosure sale.

## **Colorado**

Most foreclosures occur via Colorado’s unique nonjudicial procedure under which a foreclosure sale is conducted by the Public Trustee. Subordinate lienholders have redemption rights that can be exercised in the immediate aftermath of the sale (15-19 days following sale for the “most senior” junior lien). Colo. Rev. Stat. Ann. § 38-38-302. Once the time for subordinate lienholders to redeem has expired, title vests in the purchaser free and clear of all rights of redemption; if there are no lienholders with the right to redeem, title vests in the purchaser eight days after the sale. Colo. Rev. Stat. Ann. § 38-38-501(1).

## **Connecticut**

Foreclosure in Connecticut is by judicial foreclosure, which occurs typically by strict foreclosure in which the time for redemption is fixed by the court in its discretion. In the event the borrower cannot redeem by the new “law day,” the borrower’s title is extinguished and the borrower no longer has any right of redemption. Sale may occur where ordered by the court (where the value of the property likely exceeds the outstanding debt). There is no redemption right following the foreclosure sale. Conn. Gen. Stat. Ann. § 49-26. Connecticut does not permit nonjudicial foreclosure.

## **Delaware**

Delaware permits only judicial foreclosure. There is no statutory right of post-sale redemption. The borrower is considered to have the equitable right of redemption prior to sale, but there is a 30-day period

for judicial confirmation of the sale; the statute does not clearly address whether redemption may occur within this period. Del. Code Ann. tit. 10, §§ 5605, 5606.

### **District of Columbia**

Judicial foreclosure in D.C. is rarely used. Nonjudicial foreclosure is permitted. D.C. Code § 45-715. There is no statutory right of redemption following a nonjudicial foreclosure.

### **Florida**

Foreclosure in Florida is judicial only. Following the foreclosure sale, the certificate of title/sale is delivered to the buyer after 10 days unless there are objections filed, in which case the certificate may not be delivered until the court resolves those objections. The mortgagor may redeem until the certificate of sale is delivered, but not thereafter. Fla. Stat. Ann. § 45.0315.

### **Georgia**

Georgia authorizes both judicial and nonjudicial foreclosure. A regularly conducted execution sale delivers title to the property without right of redemption. Ga. Code Ann. § 9-13-173. Likewise, there is no right of statutory redemption following a nonjudicial foreclosure.

### **Hawaii**

Hawaii does not provide a right of redemption following an execution sale. Haw. Rev. Stat. § 651-44. In a nonjudicial foreclosure, the conveyance of the deed occurs no less than ten days following the sale and no more than 45 days following the sale. After the deed is delivered, the mortgagor has no right of statutory redemption. Haw. Rev. Stat. § 667-33(a), (b).

### **Idaho**

Following judicial foreclosure, the mortgagor has a statutory right of redemption that is six months in length (one year for tracts exceeding 20 acres in size). Idaho Code § 11-402. There does not appear to be any case law indicating that the statutory right of redemption may be waived in the mortgage.

Following a nonjudicial foreclosure sale, there is no right of statutory redemption. Idaho Code § 45-1508.

### **Illinois**

Illinois permits only judicial foreclosure. The mortgagor can redeem the property until the later of six months after service of summons of the foreclosure action (seven months for residential property) or three months after the foreclosure judgment. 735 ILCS 5/15-1603(b). The mortgagor can waive the right of redemption in the mortgage unless the mortgagor is a mortgagor of residential real estate or an individual mortgagor of agricultural real estate. 735 ILCS 5/15-1601(a), (b). Any mortgagor can also waive the right of redemption after commencement of foreclosure. 735 ILCS 5/15-1601(c).

### **Indiana**

Indiana permits only judicial foreclosure, and while there is a pre-sale right of redemption, Ind. Code § 32-29-7-7, there is no post-sale right of statutory redemption. Ind. Code § 32-29-7-13.

## **Iowa**

Following a judicial foreclosure, the mortgagor has a right to redeem for a one-year period (exclusive for six months). Iowa Code § 628.3. For nonagricultural land, the mortgagee can seek to waive its right to a deficiency judgment and foreclose without the mortgagor having a right of redemption, but the mortgagor may reject this approach. Iowa Code § 654.20. Likewise, for nonagricultural land, the mortgagee can foreclose without redemption rights pursuant to a nonjudicial “consent” process. Iowa Code § 655A.8. Case authority indicates that this right of redemption is transferable, but there does not appear to be case authority indicating that the right of redemption may be waived in the mortgage itself.

## **Kansas**

Kansas permits only judicial foreclosure. The mortgagor has a statutory right of redemption that is one year generally, Kan. Stat. Ann. § 60-2414(a), but is reduced to 3 months if less than one-third of the original indebtedness has been repaid. Kan. Stat. Ann. § 60-2414(m). The mortgagor may agree to a shorter redemption period, or may entirely waive the right of post-sale redemption, by agreement in the mortgage instrument, except for mortgages covering agricultural lands or for mortgages covering single or two-family dwellings owned by or held in trust for natural persons owning or holding such dwelling as their residence. Kan. Stat. Ann. § 60-2414(a).

## **Kentucky**

Kentucky permits only judicial foreclosure. If the sale does not bring two-thirds (2/3) of the land’s appraised value, the mortgagor has a one-year post-sale period of statutory redemption for the mortgagor. Ky. Rev. Stat. § 426.530. If the sale is an execution sale and does not bring two-thirds (2/3) of the land’s appraised value, the mortgagor’s redemption period is six months. Ky. Rev. Stat. § 426.220. Junior lienholders do not have redemption rights. *Kirklevington Assocs., Ltd. v. Kirklevington North Assocs., Ltd.*, 848 S.W.2d 453 (Ky. Ct. App. 1993).

Although that statute describes the redemption right as a “personal privilege,” Kentucky courts have held that the mortgagor has the “right to lose it by limitation, to exercise it himself, or to transfer it to a third person.” *Town Branch Storage, Inc. v. Commonwealth*, 995 S.W.2d 398 (Ky. Ct. App. 1999). There does not appear to be any case authority that would expressly permit waiver of the right of redemption in the mortgage itself.

## **Maine**

Nonjudicial foreclosure is permitted only for commercial mortgage foreclosures (business, commercial, or agricultural purpose). 14 Me. Rev. Stat. Ann. § 6203-A. There is no statutory redemption right following nonjudicial foreclosure.

Judicial foreclosure is required for residential property. The mortgagor has a 90-day right of redemption running from the date of judgment; if there is no redemption, the property is sold and there is no post-sale redemption right. 14 Me. Rev. Stat. Ann. §§ 6322, 6323. Section 6322 provides:

On mortgages executed prior to October 1, 1975, unless the mortgage contains language to the contrary, the period of redemption shall be one year from the date of the judgment. On mortgages executed on or after October 1, 1975, the period of redemption shall be 90 days from the date of the judgment.

Because the former one-year redemption period applied “unless the mortgage contains language to the contrary,” but the current 90-day redemption period does not have the same qualification, it appears that the statute does not authorize the mortgagor to waive the statutory redemption right in the mortgage itself.

### **Maryland**

Most foreclosures in Maryland occur via nonjudicial foreclosure. Md. Code Real Prop. § 7-105. The sale must be ratified and confirmed by the court before the lender may pursue a deficiency. There is no post-sale right of statutory redemption.

### **Massachusetts**

Most foreclosures in Massachusetts occur via nonjudicial foreclosure as long as the mortgage contains the necessary statutory power of sale. Following such a sale, there is no post-sale right of statutory redemption. Mass. Gen. Laws Ann. ch. 183, § 21.

### **Michigan**

Michigan permits nonjudicial foreclosure (or “foreclosure by advertisement”). There is a post-sale right of statutory redemption following nonjudicial foreclosure that is six months in duration for most commercial mortgages, 1 year for agricultural property, and either six or 12 months for residential property, Mich. Comp. Laws Ann. § 600.3240, although the period may be shortened in the event the property is abandoned (or extinguished altogether in the event the property is subject to waste).

The mortgagor’s statutory right of redemption may be waived only by a subsequent agreement upon new consideration, not by agreement in the mortgage itself. See, e.g., *Russo v. Wolbers*, 323 N.W.2d 385 (Mich. Ct. App. 1982).

### **Minnesota**

Most mortgages in Minnesota are foreclosed nonjudicially (by “advertisement”). The mortgagor has a post-sale right of statutory redemption that is ordinarily six months, but is increased to 12 months if the property exceeded 40 acres in size (10 acres if the property was in agricultural use at time mortgage was granted), or is reduced to five weeks if the property has been abandoned. Minn. Stat. Ann. § 580.23. With respect to parcels in agricultural use, the mortgagor may agree in the mortgage to waive the 12-month statutory redemption period; if so, the regular six-month period applies.

### **Mississippi**

Foreclosure in Mississippi occurs primarily through nonjudicial foreclosure. Miss. Code Ann. § 89-1-55. There is no post-sale right of statutory redemption in Mississippi, whether foreclosure occurs judicially or nonjudicially. *Dean v. Simpson*, 108 So.2d 546 (Miss. 1959).

### **Missouri**

Nearly all foreclosures in Missouri occur by nonjudicial foreclosure. Missouri does have a one-year post-sale statutory redemption period that arises if the foreclosing mortgagee purchases at the sale, but not where a third party purchases the property. Mo. Rev. Stat. Ann. § 443.310 et seq. This statute is rarely used, as it requires the mortgagor to give notice of intention to exercise the redemption right prior to the sale and to post a bond. There is no case authority recognizing that the statutory redemption right may be waived by the mortgagor in the mortgage itself.

## **Montana**

Foreclosures in Montana can occur via judicial or nonjudicial foreclosure. Regardless of the type of foreclosure, the mortgagor has a one-year statutory redemption period following the sale. Mont. Code Ann. §§ 25-13-802, 71-1-228. However, Montana also has a Small Tract Financing Act that provides for nonjudicial foreclosure for parcels under 40 acres. Following a sale under the STFA, there is no statutory right of redemption. Mont. Code Ann. §§ 71-1-228, 71-1-318(3).

Mont. Code Ann. § 71-1-208 provides that “A ... waiver in favor of subsequent purchasers, encumbrancers, or mortgagees as regards any real estate mortgage of record or the property therein included may be recorded in like manner as a real estate mortgage, and such record shall operate as due and legal notice to the mortgagor and the mortgagee and to all other interested persons. Any such ... waiver shall be valid and binding so far as the mortgage therein referred to or the property covered by such mortgage is concerned, when executed by the record holder of the mortgage involved.” For parcels not covered by the STFA, it is not clear whether this section would validate a waiver of the statutory right of redemption in the mortgage itself or whether it would validate a waiver delivered in a separate instrument.

## **Nebraska**

Nebraska authorizes nonjudicial foreclosure. There is no right of statutory redemption following foreclosure. Neb. Rev. Stat. § 76-1010(2). Likewise, even in a judicial foreclosure, there is no right of statutory redemption. Neb. Rev. Stat. § 25-1530(2).

## **Nevada**

Most foreclosures in Nevada occur through nonjudicial foreclosure. There is no right of statutory redemption following a nonjudicial foreclosure sale. Nev. Rev. Stat. Ann. § 107.080(5). Judicial foreclosure is available but rare. There is a one-year statutory right of redemption following a judicial foreclosure sale. Nev. Rev. Stat. Ann. § 21.210. An attempted waiver of that right in the mortgage documents would be invalid. Nev. Rev. Stat. Ann. § 40.453.

## **New Hampshire**

New Hampshire permits nonjudicial foreclosure where the mortgage contains a power of sale. There is no post-sale right of statutory redemption. N.H. Rev. Stat. Ann. § 479:19. There would be a one-year period of statutory redemption following an execution sale. N.H. Rev. Stat. Ann. § 529:26. There appears to be no case authority addressing whether the statutory redemption period following an execution sale may be waived in the mortgage.

## **New Jersey**

New Jersey permits only judicial foreclosure. The mortgagor has a 10-day period to redeem following the foreclosure sale. See, e.g., *Hardyston Nat'l Bank of Hamburg v. Tartamella*, 267 A.2d 495 (N.J. 1970) (mortgagor is entitled to redeem within ten-day statutory period for objections to foreclosure sale and until an order confirming sale if objections are filed).

## **New Mexico**

Most foreclosures in New Mexico occur by judicial foreclosure. There is a post-sale right of statutory redemption that is 9 months in length, N.M. Stat. Ann. § 39-5-18, although the deed of trust can by agreement shorten the redemption period to no less than one month. See N.M. Stat. Ann. § 39-5-19 (“The parties to any such instrument may, by its terms, shorten the redemption period to not less than one month, but the district court may in such cases, upon a sufficient showing before judgment that redemption will be effected, increase the period of redemption to not to exceed nine months notwithstanding the terms of such instrument.”)

New Mexico has a nonjudicial foreclosure statute, but it is rarely used. Following a nonjudicial foreclosure, the redemption periods are the same as for judicial foreclosure (nine months, although the deed of trust may shorten the redemption period to one month). N.M. Stat. Ann. § 48-10-16(A).

## **New York**

New York permits only judicial foreclosure. The mortgagor has no right of post-sale statutory redemption. N.Y. Real Prop. Act. & Proc. Law § 1353.

## **North Carolina**

Most foreclosures in North Carolina are nonjudicial. After the sale takes place, anyone has 10 days to post an “upset bid.” The clerk issues an order of possession when an upset bid is no longer possible. There is no statutory right of post-sale redemption. N.C. Gen. Stat. § 45-21.29A.

A similar “upset bid” approach applies with respect to execution sales of real property following judicial action. Likewise, there is no statutory right of post-sale redemption following the expiration of the period for upset bids. N.C. Gen. Stat. §§ 1-339.64 to 1-339.68.

## **North Dakota**

Following a judicial foreclosure sale, the mortgagor has a 60-day right of statutory redemption, unless the property is agricultural, in which case the mortgagee has one year to redeem from the filing of the summons and complaint, or until 60 days after the sale, whichever is later. N.D. Cent. Code § 32-19-18.

Nonjudicial foreclosure is permissible in North Dakota only where the state is mortgagee. N.D. Cent. Code § 35-22-01. Following a nonjudicial foreclosure sale, the mortgagor has the same right of redemption as would exist following a judicial foreclosure. N.D. Cent. Code § 35-22-20.

There does not appear to be any case authority recognizing that the post-sale right of statutory redemption might be waived in the mortgage itself. See, e.g., *Wells v. Geyer*, 96 N.W. 289 (N.D. 1903) (“While the right of redemption may be surrendered, such must be the intention of the parties, and grounded on a new and adequate consideration. Equity will not recognize an agreement to waive the right of redemption, where such agreement is made simultaneously with the execution of the mortgage.”).

## **Ohio**

Ohio permits only judicial foreclosure. Once judgment is obtained, the sale process commences with an appraisal to determine the fair market value of the property. The opening bid must be at least 2/3 of the fair market value. The court has the discretion to allow the sale to be conducted by a licensed auctioneer in lieu of the sheriff’s sale; these sales tend to be better advertised and to produce higher sale prices. The



mortgagor has the right to redeem the property until the sale is confirmed, but has no right of statutory redemption thereafter. Ohio Rev. Code § 2329.33.

### **Oklahoma**

Oklahoma provides for nonjudicial foreclosure. Where the property is the mortgagor's homestead, the mortgagor can elect to avoid a deficiency judgment if the sale occurs by power of sale, or can elect to require the mortgagee to foreclose by judicial process. 46 Okla. Stat. Ann. § 43(A). For this reason, power of sale foreclosure is typically preferred only for commercial mortgages. The mortgagor may redeem prior to the sale, 42 Okla. Stat. Ann. § 18(A), but there is no post-sale right of statutory redemption. Any contract in restraint of the right of redemption from a lien is void, 42 Okla. Stat. Ann. § 11.

Likewise, where foreclosure occurs through execution sale following judicial process, there is no post-sale right of statutory redemption. 12 Okla. Stat. Ann. §§ 686, 687.

### **Oregon**

Oregon provides for both judicial and nonjudicial foreclosure. There is no statutory right of post-sale redemption following nonjudicial foreclosure. Or. Rev. Stat. § 86.797.

Following judicial foreclosure, the mortgagor has a six-month post-sale statutory redemption period. Or. Rev. Stat. §§ 88.106, 18.964. There does not appear to be any case authority recognizing that this right of redemption may be waived by the mortgagor in the mortgage itself.

### **Pennsylvania**

Pennsylvania permits only judicial foreclosure. There is no post-sale right of statutory redemption. Trigild Deskbook, 343.

### **Rhode Island**

Foreclosure in Rhode Island typically occurs via nonjudicial foreclosure, although it may also occur pursuant to judicial process. R.I. Gen. Laws Ann. § 34-27-1. There is no post-sale right of statutory redemption. R.I. Gen. Laws Ann. § 34-11-22.

### **South Carolina**

South Carolina permits only judicial foreclosure. The foreclosure sale remains open for 30 days following sale, during which time any person may enter an "upset bid," thereby triggering a second sale, unless the lender waives the right to a deficiency. S.C. Code Ann. § 15-39-720. The mortgagor has no statutory right of post-sale redemption. S.C. Code Ann. § 29-3-10 provides that "all releases of the equity of redemption shall be binding and effectual in law."

### **South Dakota**

Foreclosure typically occurs via nonjudicial foreclosure or by a deed in lieu procedure specified in S.D. Codif. Laws § 21-48A-1 (the deed in lieu procedure involves notice to junior lienholders, who must redeem within 60 days or their liens are released). For mortgages of 40 acres or less, the post-sale statutory redemption period is 180 days if the mortgage so provides; otherwise, the period is one year.

S.D. Codif. Laws § 21-52-11. There does not appear to be any case law recognizing that the mortgagor may entirely waive the right of statutory redemption in the mortgage itself.

### **Tennessee**

Most foreclosures in Tennessee occur via nonjudicial foreclosure. Following a foreclosure sale, there is a two-year right of statutory redemption. However, the deed of trust may contain an explicit waiver of the right of redemption and, if it does, the mortgagor has no right of statutory redemption. Tenn. Code Ann. § 66-8-101(3).

### **Texas**

While judicial foreclosure is available, foreclosure in Texas typically occurs by nonjudicial foreclosure. There is no post-sale right of statutory redemption following either nonjudicial foreclosure, *Smith v. Olney Fed. Sav. & Loan Ass'n*, 415 S.W.2d 515 (Tex. Ct. Civ. App. 1967) (when regular sale is made under a power contained in an instrument, mortgagor is precluded as fully as if mortgagor had been made party defendant in judicial foreclosure), or judicial foreclosure. Tex. Civ. Prac. & Rem. Code § 34.045(a).

### **Utah**

Utah permits nonjudicial foreclosure, following which there is no statutory right of redemption. Utah Code Ann. § 57-1-28(3).

Following a judicial foreclosure sale, there is a six-month statutory redemption period. Utah R. Civ. Proc. 69C(d). There does not appear to be case authority addressing whether this redemption right may be waived in the mortgage. There is case authority, however, recognizing that this statutory redemption right does not arise in the case of a receiver's sale. *Chapman v. Schiller*, 83 P.2d 249 (Utah 1938).

### **Vermont**

Vermont has a strict judicial foreclosure process under which the mortgagor has six months to redeem its interest following the date of the foreclosure judgment. Vt. Stat. Ann. tit. 12, § 4941. The mortgagee can get the six-month redemption period shortened if the property has been abandoned or is subject to waste, or if the mortgagor and mortgagee have agreed to a shorter period. If there is equity in the property, foreclosure occurs by public auction. There is no statutory right of redemption after the strict foreclosure period expires or after a sale occurs. *Trigild Manual*, at 404.

Vermont does allow nonjudicial foreclosure, but not for individual residences or farmland. Vt. Stat. Ann. tit. 12, § 4961. There is no statutory right of redemption following a nonjudicial foreclosure sale. Vt. Stat. Ann. tit. 12, § 4968.

### **Virginia**

Most foreclosures in Virginia occur by nonjudicial foreclosure. There is no statutory right of redemption following the sale. *In re Rolen*, 39 B.R. 260 (Bankr.W.D.Va. 1983).

### **Washington**

Following a judicial foreclosure sale, the borrower has a right of statutory redemption that is one year in length, or eight months for nonagricultural property where the mortgagee has waived its right to a deficiency judgment. Wash. Rev. Code Ann. § 6.23.020(1). If the court concludes that the mortgagor has

abandoned the property for six months or more, the sale is free of any right of redemption. Wash. Rev. Code Ann. § 61.12.093. Case authority suggests that the mortgagor's right of redemption cannot be waived in the mortgage document itself. *Boyer v. Paine*, 110 P. 682 (Wash. 1910).

Most foreclosures in Washington occur by nonjudicial foreclosure. There is no right of statutory redemption following the sale. Wash. Rev. Code Ann. § 61.24.050(1).

### **West Virginia**

West Virginia allows nonjudicial foreclosure, which is commonly used. There is no right of statutory redemption following a nonjudicial sale. W.Va. Code ch. 38, art. 1. Likewise, there is no statutory right of redemption following an execution sale pursuant to a judgment. W.Va. Code ch. 38, art. 3.

### **Wisconsin**

Wisconsin is a judicial foreclosure state (nonjudicial foreclosure was abolished by statute in 1983). Once a foreclosure judgment has been entered, the mortgagor has a period of time in which to redeem the property prior to sale, during which time no sale can occur. Wis. Stat. Ann. § 846.13. This period is six months for commercial property, and twelve months for single-family residential property. Wis. Stat. Ann. §§ 846.10, 846.103. If the mortgage so provides, the mortgagee can elect to cut the redemption period in half if it agrees to waive any deficiency claim against the mortgagor. Wis. Stat. Ann. § 846.101. The redemption period is two months if the mortgagee can demonstrate that the property has been abandoned. Wis. Stat. Ann. § 846.102.

Once the sale occurs, there is no post-sale right of redemption.

### **Wyoming**

Most foreclosures in Wyoming occur by nonjudicial foreclosure. For nonagricultural property, the mortgagor has a statutory right of redemption for 90 days following the sale; if the mortgagor does not redeem, junior lienholders have an additional 30 days to redeem. Wyo. Stat. Ann. § 1-18-103(a). There is a 12-month redemption period for agricultural real estate (parcels in excess of 80 acres outside the boundaries of a municipality). Wyo. Stat. Ann. § 1-18-103(b), (c). Any agreement in the mortgage by which the mortgagor attempts to waive its redemption right is considered unenforceable. *Sannerud v. Brantz*, 928 P.2d 477 (Wyo. 1996).

## **II. ADDITIONAL BACKGROUND REGARDING RECEIVER'S POWER TO SELL**

### **A. Text from Nelson, Whitman, Burkhardt & Freyermuth, Real Estate Finance Law (6th ed. Practitioner Series) (ThomsonReuters) (currently in press)**

One source of uncertainty in recent case law concerns whether a receiver has the power to sell real estate. Traditionally, a receiver's ability to sell receivership property varied depending upon the circumstances of the receivership. For example, when a court appointed a general receiver for all of the assets of an insolvent debtor, the court would typically empower the receiver to gather and sell the assets of the debtor, in much the same way that a bankruptcy trustee might gather and liquidate the debtor's nonexempt assets in a Chapter 7 bankruptcy case.<sup>1</sup>

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<sup>1</sup> See § 8.17 *infra*.

By contrast, when a court appointed a limited receiver to take possession of a specific asset — such as a receiver for mortgaged property pending foreclosure sale — the receiver’s role was more typically viewed as custodial. For this reason, receivers appointed in conjunction with foreclosure proceedings were often viewed as having the power to operate, maintain, and preserve the property pending the foreclosure sale—but not to sell the property, as the sale would instead take place under the applicable foreclosure procedures.<sup>2</sup> Thus, a general order of a court appointing a receiver of mortgaged property did not authorize the receiver to sell that property,<sup>3</sup> at least not without a further order of the court specifically authorizing such a sale if necessary for the benefit of all parties concerned.<sup>4</sup>

In the context of the recent real estate crisis, however, some commentators have advocated that receivership can be an effective way to dispose of real estate—and particularly, that it may in some cases provide a more effective way of disposing of mortgaged real property than the foreclosure process. Under current foreclosure law in all American jurisdictions, a foreclosure sale is a “distress sale,” i.e., a public auction sale on the courthouse steps (or at some other public place). Foreclosure by public sale is traditionally justified as a means to protect the mortgagor’s equity in the mortgaged property, particularly by comparison to the historical approach under which a defaulting borrower simply forfeited its interest in the mortgaged property (and any equity the borrower may have accumulated either through principal reduction or market appreciation).<sup>5</sup> Nevertheless, it is unclear whether public foreclosure sales consistently bring prices that approximate the market value that might be obtained in an arms-length, non-distress sale.<sup>6</sup> By contrast, a receiver of mortgaged commercial real property could readily market that property to potential buyers in the context of operating the property during the receivership. Such marketing could permit potential buyers to perform more meaningful and complete due diligence. Further, a sale subject to judicial review and confirmation could produce greater finality regarding the title acquired by the buyer at the sale. Thus, there is certainly reason to expect that at least in some contexts, receiver sales of mortgaged real estate might produce higher sale prices than public foreclosure sales.

There is another potential advantage to receiver sales, and it arises out of the structure of the securitization of commercial mortgages. Commercial mortgage-backed securities (CMBS) loans are held in real estate mortgage investment conduits (“REMICs”), which are special purpose vehicles used for the pooling of mortgage loans and the issuance of mortgage-backed

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<sup>2</sup> See 1 Clark on Receivers, §§ 485, 486 (2d ed.1929).

<sup>3</sup> See 1 Clark, *supra* note 2, at § 483.

<sup>4</sup> See 1 Clark, *supra* note 2, at §§ 485, 486.

<sup>5</sup> See §§ 1.2 to 1.4 *supra*.

<sup>6</sup> The ability of such sales to bring prices approximating market value is particularly compromised where the mortgagor remains in possession of the mortgaged premises prior to the sale, as the mortgagor’s possession (and frequently the mortgagor’s lack of cooperation) makes it difficult or impossible for third party bidders to obtain meaningful information regarding the condition of the property.

securities.<sup>7</sup> The Internal Revenue Code forbids REMICs from issuing new debt or making new loans, at the risk of losing their tax status as pass-through entities. Thus, if a REMIC ends up having to purchase the mortgaged property at a foreclosure sale, it cannot make a new loan to a potential buyer on a seller-financing basis. However, the Internal Revenue Code does permit a REMIC to make limited modifications to an existing defaulted loan. Thus, if the property can be sold through a receiver or by the borrower directly, with the buyer assuming the mortgage, the mortgage loan can be modified and restructured without threatening the REMIC's tax status. Thus, a CMBS lender may have good reason to believe a receiver sale can produce higher price by comparison to a public foreclosure (cash) sale, making such a sale attractive to a CMBS lender that does not wish to foreclose (and possibly take ownership) of a property that is worth less than the outstanding mortgage debt.<sup>8</sup>

An existing federal statute explicitly authorizes a receiver appointed by a federal court to sell mortgaged property.<sup>9</sup> Furthermore, the statute permits the receiver to sell the property in a private sale:

After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby.<sup>10</sup>

As a result, mortgagees can in appropriate cases seek the appointment of a federal court receiver, ancillary either to an action to foreclose the mortgage or for specific performance of the borrower's assignment of rents. Nevertheless, one could typically obtain a federal court receiver only if there existed sufficient diversity of citizenship among the parties to warrant federal jurisdiction.

By contrast, under existing state laws, the authority for receiver sales is much less clear.

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<sup>7</sup> See §§ 5.27 and 11.3 *infra*.

<sup>8</sup> See generally John C. Murray & Kenneth R. Jannen, *Public and Private Sales of Real Property by Federal Court Receivers*, ACREL Papers (March 2011); Morris A. Ellison, Lawrence M. Dudek & Samuel H. Levine, 'Tis Better to Receive — The Use of a Receiver in Managing Distressed Real Estate, ACREL Papers (October 2009).

<sup>9</sup> 28 U.S.C.A. § 2001. While the statute does not explicitly state that such a sale would be free of subordinate liens (and thus serve the same title-clearing function as a foreclosure sale), section 2001(a) provides that the receiver may sell "upon such terms and conditions as the court directs." Thus, it seems clear that if the court orders a sale free and clear of subordinate liens, that sale would have the effect of extinguishing any subordinate lien (unless the holder of that lien did not receive notice and a reasonable opportunity to challenge the appointment of the receiver or the sale itself). See generally Toni Pryor Wise, *Federal Receiverships — A New Old Tool for Selling Distressed Commercial Properties?*, ACREL Papers (March 2011).

<sup>10</sup> 28 U.S.C.A. § 2001(b).

There are a few states with statutory provisions that explicitly grant the power of sale to a receiver.<sup>11</sup> In most states, however, there is no comprehensive statute governing real estate receiverships, or the applicable statutes do not explicitly address whether the receiver has a power of sale. As a result, in some states, there is doubt as to whether or in what circumstances a state court receiver could conduct a sale of mortgaged property, and whether such a sale would be free and clear of liens and any applicable statutory redemption rights. The litigation in *Shubh Hotels Boca, LLC v. Federal Deposit Insurance Corp.*<sup>12</sup> provides a good example. Shubh Hotels Boca, LLC (Shubh) owned a 180-room hotel in Boca Raton, subject to \$28.8 million mortgage loan. In May 2009, the mortgagee instituted a judicial foreclosure proceeding following financial defaults by Shubh, and the lender obtained the appointment of a receiver to collect rents during the foreclosure proceeding. By January 2010, hotel operations were losing \$28,000 each month and the receiver was unable to raise borrowed funds to continue operating the hotel. The mortgagee immediately moved to have the property sold as soon as a buyer could be identified. The trial court granted this motion, and the receiver identified a buyer willing to pay \$9 million for the hotel, but Shubh objected to the proposed sale on the ground that the receiver had no legal authority to sell the hotel and could not convey title. The trial court rejected this objection and entered an order authorizing the sale, but the Florida District Court of Appeal reversed, noting that no Florida statute authorized a court-appointed receiver in a foreclosure case to sell the mortgaged property.<sup>13</sup> The court also noted that the mortgage itself did not specifically authorize the receiver to sell the property, but only “to protect and preserve” the mortgaged property, to “operate [it] preceding foreclosure or sale,” and to collect rents and apply them against the debt.<sup>14</sup> More generally, the court noted that “the mere appointment of a receiver does not itself confer any of the owner’s power or authority to sell such property,” that “the role of a receiver in a foreclosure action is only to preserve the property’s value,” and that implying a power of sale would be inconsistent with that limited role.<sup>15</sup> Finally, the court noted that under Florida law, every mortgagor has a statutory right of redemption until the issuance of a certificate of sale by

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<sup>11</sup> See, e.g., Ind. Code § 32-30-5-7 (receiver may “sell property in the receiver’s own name, and generally do other acts respecting the property as the court or judge may authorize”); N.C.Gen.Stat. § 1-505 (receiver may sell property “upon such terms as appear to be to the best interests of the creditors affected by the receivership”); Wash. Rev. Code Ann. § 7.60.260 (granting receiver the power to sell mortgaged property with the court’s approval after notice and hearing). Minnesota’s comprehensive receivership statute distinguishes between a general receiver (i.e., a receiver appointed to liquidate and administer all of a person’s nonexempt property) and a limited (or custodial) receiver, Minn.Stat. Ann. § 576.21(h), (k), and recognizes a receiver’s power to sell free and clear of liens only in a general receivership. Minn.Stat. Ann. §§ 576.29(b), 576.46

<sup>12</sup> 46 So.3d 163 (Fla.Dist.Ct.App.2010).

<sup>13</sup> *Shubh*, 46 So.3d at 165-166.

<sup>14</sup> *Shubh*, 46 So.3d at 166.

<sup>15</sup> *Shubh*, 46 So.3d at 167 (citing *Eppes v. Dade Devs., Inc.*, 126 Fla. 353, 170 So. 875 (1936); *Cone-Otwell-Wilson Corp. v. Commodore’s Point Term Co.*, 94 Fla. 448, 114 So. 232 (1927); and *Alafaya Square Ass’n Ltd. v. Great Western Bank*, 700 So.2d 38 (Fla.Dist.Ct.App.1997)).

the clerk of court, and held that “[r]ecognizing a general interim power of a receiver to sell mortgaged property in a foreclosure case would contravene” that redemption right.<sup>16</sup>

Decisions in several other states have raised similar doubts about the effective power of a receiver to sell mortgaged property outside of the foreclosure context. For example, in South Carolina, courts have held that the purpose of a receiver is to preserve the status quo, and do not permit receivers to sell receivership property.<sup>17</sup> Likewise, a Minnesota court reversed a trial court’s order authorizing a receivership sale free and clear of the borrower’s statutory right of redemption, holding that such a result was contrary to the state’s mortgage foreclosure statute, which affords the mortgagor a statutory redemption right.<sup>18</sup>

By contrast, courts in several other states have upheld receiver sales free and clear of liens and statutory redemption rights. In *CSB Bank v. Christy*,<sup>19</sup> the Michigan Court of Appeals upheld a receiver’s sale of mortgaged property, rejecting challenges by a mortgagor that sale violated Michigan’s foreclosure requirements. Likewise, several decisions in Ohio have concluded that a receiver may sell mortgaged property free and clear of liens and encumbrances in a private sale where authorized by the court in the order of appointment.<sup>20</sup> Interestingly, the Ohio decisions rely on the fact that the Ohio statute empowers the receiver to “do such acts respecting the property as the court authorizes” and does not contain any restrictions on what the court may authorize when it issues orders regarding receivership property.<sup>21</sup> In this regard, the Ohio decisions take the opposite interpretive approach from the Florida court in *Shubh*. A Pennsylvania court has held that a receiver may sell real estate free and clear of liens if there is “a reasonable prospect that a surplus will be left to be distributed among general creditors.”<sup>22</sup>

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<sup>16</sup> *Shubh*, 46 So.3d at 167.

<sup>17</sup> See, e.g., *Kirven v. Lawrence*, 244 S.C. 572, 137 S.E.2d 764 (1964); *Andrick Dev. Corp. v. Maccaro*, 280 S.C. 103, 311 S.E.2d 95 (Ct.App.1984).

<sup>18</sup> *Todd Enters., LLC v. MidCountry Bank*, 2013 WL 4045765 (Minn.Ct.App.2013) (not reported in N.W.2d).

<sup>19</sup> *CSB Bank v. Christy*, No. 305869 (Mich.Ct.App. Oct. 18, 2012) (unpublished). The court rejected the mortgagor’s circumvention argument out of hand, observing “this was not a sale pursuant to foreclosure; it was a receivership sale. The sale was being conducted pursuant to the prior order appointing a receiver—not a judicial foreclosure. Thus, the various requirements for a sale by foreclosure are simply inapplicable ....”). *Christy*, slip op. at 5.

<sup>20</sup> *Park Nat’l Bank v. Cattani, Inc.*, 187 Ohio App.3d 186, 931 N.E.2d 623 (2010); *Huntington Nat’l Bank v. Motel 4 BAPS, Inc.*, 191 Ohio App.3d 90, 944 N.E.2d 1210 (2010); but see *Director of Transp. v. Eastlake Land Dev. Co.*, 177 Ohio App.3d 379, 894 N.E.2d 1255 (2008) (holding, over a dissent, that court lacked the authority to order a receiver sale of mortgaged property without lienholder consent).

<sup>21</sup> *Cattani*, 931 N.E.2d at 625-626; *Motel 4 BAPS*, 944 N.E.2d at 1213.

<sup>22</sup> *Bogosian v. Foerderer Tract Committee, Inc.*, 264 Pa.Super. 84, 399 A.2d 408 (1979).

This uncertainty is a lamentable by-product of the outdated and inadequate state statutory provisions governing receiverships. As one judge has noted, “[i]n today’s volatile real estate climate, many distressed properties could be hopelessly encumbered by liens based on bad investment decisions. The receiver’s authority, with the consent of the trial judge, provides a venue out of this problem in some circumstances.”<sup>23</sup> Statutory reform could provide much needed clarity.<sup>24</sup>

## **B. Additional Authorities**

**1. Utah.** Consistent with the Michigan and Ohio decisions cited in the above excerpt, the Utah Supreme Court has upheld a receiver’s power to sell property free and clear of statutory redemption rights. In *Chapman v. Schiller*, 83 P.2d 249 (Utah 1938), the court had appointed a receiver for the assets of the Bamberger Electric Railroad Company, and authorized the receiver to sell a parcel of land free and clear of the liens of two deeds of trust and as well as the borrower’s statutory redemption rights. One of the company’s bondholders then sought and obtained a temporary writ of prohibition against the appointing court to prevent the sale from taking place. The Supreme Court of Utah denied a permanent writ of prohibition, however, holding that the court’s order of sale was within the jurisdiction and discretion of the appointing court. The court’s reasoning is excerpted here:

The main question is, does the court, in receivership cases of public utility properties, have the power to order a receivership sale of those properties free and clear of all right of redemption without the consent of all bondholders? This presents squarely the question of whether the court's power in reference to receiverships contains the power to sell on terms fixed by the court, independently of the foreclosure statutes. We think the court has such power. The reason is quite fundamental and lies in the nature of receivership proceedings as distinguished from the statutory foreclosure proceedings. The latter provides a method for the lien holder to satisfy his debt from the pledge. It does not supersede the power of the court to deal with property properly in its custody for operation or liquidation through its own instrumentality, a receiver. This power is a judicial power. It arises as a fit mode of exercising its more ultimate power of preserving and administering a debtor’s property for the benefit of all parties concerned, but primarily for the creditors. It is therefore spoken of as judicial rather than statutory. Although statutes do prescribe the conditions and limits of its exercise, we are not here concerned with the power of the legislature to prescribe conditions or limitations on the power by statute.

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<sup>23</sup> *Director of Trans. v. Eastlake Land Dev. Co.*, 177 Ohio App.3d 379, 894 N.E.2d 1255, 1264 (Gallagher, J., dissenting).

<sup>24</sup> In 2012, the Uniform Law Commission appointed a drafting committee to prepare a new model law governing the appointment and powers of real estate receivers. Final approval of that Act is anticipated in 2015.



A receiver's sale is said to be a judicial sale as contradistinguished from a sheriff's sale on execution or foreclosure. And such judicial sales, unless defined or regulated by statute, rest upon and are governed by the order of the court decreeing the sale. In a judicial sale the court makes its own law of the sale, subject only to the use of sound discretion in the exercise of the power. Clark on Receivers, Sec. 591. The statutory provisions governing mortgage foreclosures or sales on execution do not apply to a sale by a receiver. [citations omitted]

We conclude, therefore, that receivers' sales made under proper order of court with jurisdiction of the interested parties (to be later considered) is valid by virtue of a power outside and independent of the power which is in the courts by reason of the foreclosure statutes.

Can the property be sold at a receiver's sale by order of the court, free from right of redemption? It follows as a corollary from what has been said that the court in its sound discretion may do so. Right of redemption is a privilege conferred by statute. It does not exist independently of statute. The statutory right of redemption is conferred in case of execution sales. It does not exist by statute in the case of receivers' sales. Consequently, the right of redemption, together with a named period for redemption, may be given or withheld by the decree of the court ordering a receiver's sale. Home Mortgage Co. v. Sitka Co., [148 Or, 502, 36 P.2d 1038]. Generally in selling a railroad we would expect the right to be withheld because the sale with the privilege of redemption would keep a purchaser in such uncertain status during the period that the property might not bring as much as it would if the privilege were contained in the decree of sale. The court's discretion in conferring or withholding the privilege might, in a proper action, be attacked but not in an action such as this which is to test only its power.

Can the property be sold at receiver's sale free of liens? Ordinarily only the debtor's equity is sold at receiver's sale. The property is sold subject to liens. By weight of authority the property may be sold free of liens where the lien holders are parties to the proceedings. See *State ex rel. Dooley & Co. v. Superior Ct.*, 128 Wash. 253, 222 P. 492, *Van Huffel v. Harkelrode*, 284 U.S. 225, 52 S.Ct. 115, 76 L.Ed. 256, 78 A.L.R. 458, where cases pro and con are cited. The following authorities uphold the right of the court to sell free of liens of parties to the proceedings. *Black v. Manhattan Trust Co.*, D.C.Or., 213 F. 692; *Spreckels v. Spreckels Sugar Corp.*, 2 Cir., 79 F.2d 332; *People's Pittsburgh Trust Co. v. Hirsch*, 3 Cir., 65 F.2d 972; *Baird v. Moshannon Coal Min. Co.*, 318 Pa. 63, 178 A. 19; *Home Mortgage Co. v. Sitka Co.*, supra; *Buss Machine Works v. Watsontown Door & Sash Co.*, D.C.Pa., 2 F.Supp. 757; 34 Cyc. 332; 53 C.J. 209.

*Chapman*, 83 P.2d at 251-252. The court acknowledged that courts in some jurisdictions had held that "where there is no equity in the person in receivership, such that on a sale nothing would be obtained for the general creditors, a sale free of liens will not ordinarily be ordered." *Id.* at 252. The court refused to adopt this as the law in Utah, noting that the rule "wherever adopted has been held to be discretionary" and that the writ of prohibition had been requested on the ground that the court had lacked jurisdiction to order the sale. The court instead held that a Utah court has the power to sell at a receiver's sale free from liens and rights of redemption as

long as the lienholders and redemptioners were parties to the receivership proceedings. *Id.* at 252-253.

**2. California.** [The following summary is adapted from a paper prepared by Pepperdine University law student Baruch Kreiman.] In *People v. Riverside University*, 111 Cal. Rptr. 68 (Ct. App. 1973), the court ordered a receiver for Riverside University in an action to enjoin the University from engaging in certain unlawful and fraudulent business practices. In the context of operating the University, the receiver determined to sell certain furniture and equipment to generate funds for continued operation of the school. The receiver prepared a report listing the property sold and the prices received, along with evidence that the property was sold at fair market value. In response to an attack on the validity of the sale, the court noted that Cal. Code Civ. Proc. § 568.5 authorized the receiver to sell real or personal property free and clear of the right of redemption, subject to court approval. 111 Cal. Rptr. at 73. The court held that the sale was within the scope of the receiver's charge under the order of appointment and that, even if selling property would not have fallen under the breadth of his original charge, "an action of a receiver in equity, though taken without prior court authorization, may be ratified by subsequent court approval." 111 Cal. Rptr. at 74. The decision in *Riverside University* shows that when a receiver is tasked with continuing the operation of a business or property there can be a broad scope of powers allowed to the receiver. The court went so far as to say that "the receiver was entitled to an approval of his account and final discharge, notwithstanding the fact the sales were not made in the manner provided for sales on execution." 111 Cal. Rptr. at 75.

However, the *Riverside University* case did not specifically address a receiver taking possession in the context of a foreclosure proceeding. A more recent decision raises a possible concern over the power of a court to authorize a receiver to sell free of a mortgagor's right of redemption.

In *Wells Fargo Fin. Leasing Inc. v. D&M Cabinets*, 99 Cal. Rptr. 3d 97 (Ct. App. 2009), a judgment creditor sought to foreclose his judgment lien on the debtor's owner-occupied dwelling. California Code of Civil Procedure § 704.740 provides a statutory homestead exemption applicable when a judgment creditor seeks to foreclose its lien on an owner-occupied dwelling. In this case, the creditor sought to avoid that statutory procedure by obtaining the appointment of a receiver and having the receiver empowered to sell the land to satisfy the debt. The trial court appointed the receiver and authorized the sale, but the California Court of Appeals reversed, holding that "Wells Fargo moved for appointment of a receiver for the express and limited purpose of selling the subject property without complying with section 704.740." 99 Cal. Rptr. 3d at 103.

The impact of the court's reasoning in *D&M Cabinets* is not entirely clear. On the one hand, one might argue that if a mortgagee was seeking a receiver for the sole purpose of having the receiver sell the property and thereby circumvent redemption rights that the mortgagor might otherwise be able to assert in the context of a mortgage foreclosure, the court could not (or should not) appoint the receiver. However, if the mortgagee can obtain the receiver's appointment for a legitimate reason, such as maintaining a property that was losing equity or was potentially insufficient as security for the loan, then authorizing the receiver to sell without regard to the owner's right of redemption may be viewed as proper. A more difficult case might

be presented where the mortgagee sought appointment for dual purposes, i.e., both to preserve deteriorating property and to obtain a receiver sale free and clear of the mortgagor's redemption rights.