Mortgage Modification Agreements in Difficult Economic Times; Deeds in Lieu of Foreclosure/Deeds in Escrow

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Business Reasons for Modification of Loan Documents

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Business Reasons for Modification of Loan Documents

- Extend (or shorten) maturity date.
- Capitalize delinquent interest.
- Raise (or lower) interest rate.
- Increase (or decrease) default rate.
- Change or postpone payment dates, or amount of payments.
- Permit assumption and/or release borrower from personal liability.
- Provide for additional principal disbursements.
- Partially release property.
- Postpone foreclosure to avoid taking property back at deflated value on books of lender.
- Require additional security for loan
  - Additional property (Preference under sec. 547 of Bankruptcy Code?)
  - Personal guarantee of borrower or third parties, etc.

Business Reasons for Modification of Loan Documents (continued)

- Opportunity exists to add or update mortgage provisions, or to correct defects, or to add clauses providing lender right to share in potential upside:
  - Provisions:
    - Due-on-sale clause
    - Cross-default
    - Guaranty / guaranties
    - Environmental indemnities
    - Prepayment
    - Credit Enhancements (letter of credit, etc.)
    - Non-recourse carveouts
  - Defects:
    - Drafting defects
    - Incorrect legal description, names, etc.
  - New Clauses:
    - Shared-appreciation
    - Contingent-interest
- Whether or not original (as opposed to subsequent) borrower executes modification agreement may be unimportant to lender if loan is nonrecourse and property constitutes lender's sole security. However, if original borrower has any personal liability on loan, or if there are "carveouts" from exculpatory provisions in nonrecourse loan, such considerations become especially important to the lender.

General Legal Considerations

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General Legal Considerations

- Modification agreements are useful prior to acceleration of loan and foreclosure, and may give borrower "breathing room" to bring loan current (especially if borrower is cooperative and solvent, and/or property may increase in value).
- Make certain that language in original loan documents contains right to modify or extend loan at any time for any reason without notice to third parties – and is not subject to "reasonableness" standard.
- Restatement of Law (Property) (Mortgages) position – if mortgagor specifically reserves right to modify in original mortgage, priority is retained even if modification is materially prejudicial to subordinate lienholders (not majority case-law position).
- Obtain title search to determine status of title - especially if there are any other liens or encumbrances on property.
- Law generally is that priority of lien will be lost to extent that subordinate lienholders are prejudiced, or security is impaired, unless subordinate lienholders consent and formally subordinate to the modification (or enter intercreditor or subordination agreement).

General Legal Considerations (continued)

- Some courts may hold that entire priority will be lost and priority of original loan will be entirely subordinated as result of modification without consent of subordinate lienholder (usually in connection with subordinated purchase-money loans; loans where modification is so drastic as to amount to new loan; where no right to subsequently modify is contained in first mortgage: or as a result of inability to determine exact extent of prejudice to subordinate lienholder).
- Other courts may hold that virtually any change in terms of mortgage (other than decrease in interest rate), e.g., even an extension of maturity date, may prejudice subordinate lienholders (because loan will not be paid off at time originally anticipated). Any change that makes an increased demand on borrower's cash flow could be interpreted as prejudicing intervening lien claimants, or any change that increases likelihood of default or encourages lack of financial responsibility by borrower (e.g., large balloon payment at maturity and therefore increased risk of default).
- Under some circumstances, and in some jurisdictions (which are in distinct minority), any change whatsoever in the original terms, even a decrease in the interest rate, may not be permissible without consent of junior lienholders.

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General Legal Considerations (continued)

- Always conduct title search before modification of mortgage (including federal tax liens and UCC filings), and determine what modification endorsements are available from title company based on nature and scope of modification and regulatory and statutory permissibility of issuance of such endorsements in particular jurisdiction.
- It may be good idea to send borrower a letter prior to agreeing to enter into Modification Agreement, stating clearly the conditions (including "drop dead" dates) under which modification will be considered and a Modification Agreement prepared – or consider execution of "pre-negotiation agreement," to be executed by both parties (see article on such agreements in written materials).
- Always prepare written Modification Agreement containing all terms of workout, and record it, unless (depending on jurisdiction) only change is decrease in interest rate or simple (and relatively short – e.g., six months or less) extension, or extension of limited number of monthly payments to maturity date.
- If the title report shows that intervening lien claimants exist, then obtain their consent and subordination as part of the Modification Agreement, or have parties enter into intercreditor or subordination agreement.

General Legal Considerations (continued)

- Obtain appropriate title insurance endorsement (if available), to be paid for by borrower, insuring (if available based on facts of the transaction) continuing priority, validity, and enforceability of first mortgage lien after recording of Modification Agreement.

- Obtain consent of any guarantors of original loan prior to modification; otherwise they may be released.

- If present owner of property is not original mortgagor, original mortgagor must also sign Modification Agreement to preserve such mortgagor's personal liability (if any) to lender.

- Provide in original loan documents (and Modification Agreement) for right of lender to subsequently amend and modify note and mortgage in any respect. If subsequent encumbrances are permitted in loan documents, make them conditional upon execution of subordination agreement by subordinate lienholder at time of each such encumbrance, with subordinate lienholder agreeing to subordinate to lien of first mortgage (perhaps with certain restrictions) as same may be subsequently amended. If original mortgage contemplates future disbursement, modification or assumption, insert clause in mortgage requiring title endorsement to original title policy insuring such future modification when it occurs.

General Legal Considerations (continued)

- Where possible, have subordinate lienholders execute subordination or intercreditor agreement to establish rights and obligations of respective parties, including future modification rights and limitations.

- Determine if mortgage loan has been securitized, and if it is securitized, and has been transferred to another entity (or entities), make certain that both proper lender party(ies) and borrower party(ies) execute Modification Agreement. Some courts (both state and federal, including bankruptcy courts), are now requiring proof of possession of note, or are ruling that certain parties, such as loan servicers, have no standing to bring action).

- Keep abreast of current developments (including state and federal statutes and regulations) regarding ability and authorization of lender, loan servicer, etc., to modify securitized loan. Treasury secretary has urged loan modifications, but no force of law presently exists. Lenders (or servicers) are still modifying securitized loans, and lawsuits have been filed on behalf of trustees and investors challenging such modifications. Loan modifications of securitized loans are expected to grow 15-20% in 2009 from virtually none. There has been a movement to revise existing bankruptcy law to permit “cramdowns” in Chapter 13 cases.

- Special features in modification structure could include lender's right to any excess cash flow, shortened maturity date on loan (if deemed desirable), tax escrow, cash-management agreement with “waterfall” provision, and other safeguards that would reduce probability of future default and lower lender's exposure on loan.

General Legal Considerations (continued)

- In properties requiring capital improvements, or significant tenant improvements and leasing commissions, estimated expenditures for such items should be set forth in budget prepared by borrower for lender's review and approval on an annual basis, if not more often. If possible, lender should shorten existing notice and cure periods and obtain personal recourse for misapplication of post-default rents and other "bad boy" acts by borrower.

- Credit Agreement statutes – Most states have passed laws protecting lenders from alleged oral agreements to lend, modify, extend or refinance existing loan, or forbear from contractual remedies, unless specific written agreement exists between lender and borrower. (Some of these statutes only apply to residential loans, others apply only above certain minimum dollar thresholds). See article in materials on pre-workout agreements.

- Where change (or changes) in existing debt obligation by modification is so substantial as to amount virtually to issuance of new security, same income tax consequences will follow as if a new security were actually issued.
  - For Example: Modified debt instrument will be treated as a new debt instrument given in consideration for the old, unmodified debt instrument.

General Legal Considerations (continued)

- Modification of an existing loan may constitute taxable event if modification is so substantial that it amounts to issuance of new security. Gain or loss will be realized depending on borrower's adjusted basis in debt instrument and amount realized from "disposition" of "old" debt instrument.

- Modification will be deemed "material" if there is reduction in interest rate or an advance of additional funds by lender. Such a transaction is treated by the IRS as taxable disposition of "property" for new cash or property.

General Legal Considerations (continued)

- RP 2008-28 (2008) applies to modification of mortgage loan held by a REMIC or an investment trust.
  - "Describes conditions under which modifications of certain mortgage loans will not cause the IRS to either challenge the tax status of certain securitization vehicles that hold the loans or to assert that those modifications create a liability for tax on a prohibited transaction."
  - OK if "a change in the terms of an obligation is "occasioned by default or a reasonably foreseeable default." Applies to all modifications between May 16, 2008 and Dec. 31, 2010.
- Mortgage Forgiveness Debt Relief Act (2007) – forgiven mortgage indebtedness is no longer taxable income under certain conditions.

General Legal Considerations (continued)

- generally allows taxpayers to exclude income from the discharge of debt on their principal residence. Debt reduced through mortgage restructuring, as well as mortgage debt forgiven in connection with foreclosure, qualifies for relief.

- This provision applies to debt forgiven in calendar years 2007 through 2012. Up to $2 million of forgiven debt is eligible for this exclusion ($1 million if married filing separately). The exclusion does not apply if discharge is due to services performed for lender or any other reason not directly related to a decline in home's value or taxpayer's financial condition.

- More information, including detailed examples, can be found in Publication 4681, Canceled Debts, Foreclosures, Repossessions, and Abandonments. Also see IRS news release IR-2008-17.

General Legal Considerations (continued)

- Bankruptcy issues:
  - Chapters 7 (liquidation), 11 (reorganization), and 13 (wage-earners) of Bankruptcy Code currently prevent modification of rights of holder of claim secured only by security interest in an individual debtor's principal residence and prevent "lien stripping" (although there is still some uncertainty regarding Chapter 11). "Mortgage lien on principal residence passes through bankruptcy unaffected."
  - With respect to Chapter 11, in commercial bankruptcy case plan can, under certain (and rare) circumstances, be "crammed down" on impaired class (usually mortgage lender who votes to reject plan) and debtor may
    - Reduce principal amount of secured claim to value of collateral,
    - Reduce interest rate
    - Extend maturity date
    - Cure or waive any defaults
    - Alter repayment schedule
  - Can non-monetary terms of mortgage (e.g., due-on-sale, prepayment, etc.) be modified in Chapter 11 bankruptcy proceeding? Courts are split. (See discussion of this issue in Modification Agreements article in materials.)
  - It may be a good idea to review and restate certain terms and conditions (e.g., prepayment provision) to make certain they are still valid, in both modification agreement and bankruptcy plan.
  - Waiver of automatic stay clause in Modification Agreement – is it enforceable? Courts are split; depends on facts and whether certain criteria are met. Always have clause state that it is "subject to court approval."

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Summary:

- For tax and/or economic reasons (or statutory and/or regulatory reasons), lenders may be amenable to entering into modification agreements with distressed borrowers (who are cooperative and willing to work with their lenders, and) under certain circumstances, in hope that present unsettled economic situation will improve and land values will eventually rise, to provide exit strategy for both parties.
- Many borrowers may be able to continue to make mortgage payments if certain -- even if only temporary -- monetary concessions are granted by lenders.
- Caution must be exercised by both borrowers and lenders when negotiating terms and conditions of modification agreements. Especially in connection with commercial loans, there are many business and legal aspects that must be carefully considered.
- Each situation is unique, and there is no "one size fits all" for loan modification agreements; each party may need to make some concessions in order to obtain satisfactory result.
- Securitization of mortgage loans has made modifications more difficult and time-consuming. Federal legislation and/or modification of Bankruptcy Code may change this dynamic, and should be closely monitored.

Deeds in Escrow

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Deeds in Escrow

- To benefit of both parties; time, expense, publicity, forbearance, avoid adverse tax consequences, avoid bankruptcy, no personal liability. Often in connection with forbearance agreement. Author has done more than 300 both inside and outside of bankruptcy

- Consideration must be actual, separate agreement, represented by competent counsel, commercial transaction? Sophisticated parties? Debtor in default, and debt due less than value of property? "Two-party" dispute?

- Closely examined by courts of equity. Deed cannot be granted or escrowed as part of original mortgage transaction (void). Equitable and public policy principles. Clogging borrower's equity of redemption (statutory and equitable), or construed as equitable mortgage. But still see attempts by lenders to do this; *see Bernstein v. New Beginnings Trustee, LLC*, 988 So. 2d 90, 96 (Fla. App. 2008) ("Despite the labels on the documents, it is the substance of the transaction and the *real* intent of the parties that controls") (emphasis in text); *Greene v. East Coast Marketing*, *Inc. (In re Greene)*, 2007 WL 1309047 (Bankr. E.D. Va., May 3, 2007), at *5 ("Courts generally hold that when a mortgagor executes a deed in lieu of foreclosure as part of the initial mortgage transaction with instructions that the mortgagee can record the instrument immediately in the event of a future default, the deed is void and unenforceable. . . [Such arrangements have been deemed unenforceable under general equitable and public policy principles"; bankruptcy court held deed was fraudulent conveyance; no reasonably equivalent value because deed given at time of mortgage).

Deeds in Escrow

- Clogging doctrine; give deed to mortgagee in future if certain events occur; prevents redemption rights and constitutes "collateral advantage." Clog is provision in mortgage itself (or related document) denying redemptive rights if subsequent default (e.g., option to purchase, deed in escrow, contract of sale, lease with option, equity participation).

- Equitable mortgage – document not labeled as mortgage ("deed") but in reality secures debt.

- Deed in escrow, as part of workout, may be challenged as "clog," because removes redemption rights via deed or separate docs, and deed already secured by mortgage on property. But equitable mortgage claim also is a concern – deed in lieu of foreclosure should not be enforced because under transaction docs it's a continuing security device.

- No right to take deed and then reconvey upon payment of debt. General presumption is deed is "absolute on its face."

- No residual rights (including option to purchase, right-of-first refusal, or even lease) should be given to mortgagor-grantor, as they may constitute an equitable mortgage.

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Deeds in Escrow

- State statutes – evidence may establish that deed is actually security device (Restatement). See p. 10 of article in materials for Restatement tests. Parol evidence may be allowed, even where separate writing exists.

- Parties' intention (to actually create an equitable mortgage instead of deed) may be shown by:

  – The statements of the parties.
  – The existence of a substantial disparity between the value received by the grantor and the actual value of the real property at the time of conveyance.
  – The fact that the grantor retained possession of the real property.
  – The fact that the grantor continued to pay real estate taxes and other property expenses.
  – The fact that the grantor made improvements to the real estate subsequent to the conveyance.
  – The nature of the parties to the transaction and their relationship both prior to and after the conveyance.

Deeds in Escrow

- Loan workout – courts generally approve if: delinquency; workout subsequent to original mortgage; valid consideration (no personal liability; agree to forebear from exercising remedies if non-recourse loan; borrower acknowledges loan default.) Restatement says “close question”; “executory” deed-in-lieu?

- “Positive factors” – sophisticated commercial parties; bargaining strength; competent counsel; acknowledged default; valid consideration; little or no equity in property. Courts favor out-of-court settlements; avoids litigation and bankruptcy time and expense. See factors listed on p. 12 of article in materials.

- In some states, can waive right of redemption (commercial), including at inception of loan (Ill.).

Deeds in Escrow

- “Must be fair, frank, honest, and without fraud, misconduct, undue influence, oppression or unconscionable advantage of the poverty, distress or fears of the mortgagor.”
- Consideration can be either release of personal liability or forbearance from legal remedies.
- Subordinate lienholders – should it be done at all? Must they receive notice; what if some before deed-in-lieu and some after? Courts may look to preserve rights of subordinate lienholders in certain circumstances. *See Restatement 3d of Property*: Mortgages § 8.5, Reporter’s Notes, Comment E. *Cf. Klein v. DeVries* 309 Ill. App. 3d 271 (Ill. App. 2nd Dist. 1999), *appeal denied*, 188 Ill. 2d 565 (2000), discussed on pp. 17-18 of article in materials.
- Mortgage should be kept alive and not released (consider “covenant not to sue” borrower to keep loan obligation alive).

Deeds in Escrow

- **Bankruptcy Concerns:**
  - Executory Contract – No delivery, part of debtor's estate, unenforceable. Bankruptcy courts generally so hold. Relation back?
  - Violation of Sec. 362 automatic stay – can't deliver deed.
  - Fraudulent conveyance, preference, or unperfected lien – Sec. 544 of Code ("strong-arm" powers of trustee to use federal as well as state fraudulent-transfer statutes; extended statute of frauds). What about reinstatement or "clawback" provisions? May not be able to get creditors' rights coverage from title insurer.
  - Is deed not part of mortgagor's bankruptcy estate when deed is placed in escrow before bankruptcy filing (because nothing more to be performed by either party) or is it considered not part of estate only when it has been delivered out of escrow? Does vesting of legal title "relate back" to date of deed, when placed in escrow? Courts are split.
  - Preference (90 days or one year) or fraudulent conveyance (2 years under 2005 amendments to Bankruptcy Code) . Can title co. insure without a bankruptcy exception for both occurrences (plus state law; 2 to 4 year statutes of limitation)?

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Deeds in Escrow

- See *In re Webb Mtn., LLC*, 2009 WL 4250333 (Bankr. E.D. Tenn., Feb. 11, 2009), a copy of which is in the materials.
  - Contains excellent "roadmap" regarding criteria for successful deed in escrow.
  - Bankruptcy court found deed in escrow (as part of mortgage extension and workout) valid and enforceable in accordance with deed-in-escrow workout agreement between parties, and rejected borrower's claim that conveyance was in actuality an "equitable mortgage" or a "clog" on borrower's right of redemption.
  - Court ruled that lender's recording of deed in escrow after bankruptcy court issued order dismissing the bankruptcy case (even though decision was later reversed on appeal) was valid.
  - Bankruptcy court ordered further findings on value of property at time of recording of deeds in escrow, and determination of borrowers' solvency or insolvency, to determine if reasonably equivalent value had been given to avoid fraudulent conveyance under sec. 548 of Bankruptcy Code and state fraudulent conveyance statute; sworn statement by borrowers stated that value and/or consideration was "$0."
  - Court noted that there "nothing in the record to allow the court to determine the value of the Webb Mountain property on [the date the deeds were placed into escrow"], *Id.* at *38, and denied lender's motion for summary judgment on this issue.
  - Lesson for lenders: Obtain appraisal to show value of property is less than debt; and have borrower attest to this in workout agreement.

Deeds in Escrow

- **Exploding and Springing Guaranties and Indemnities – see p. 24 of article:**
  - **Becomes enforceable at filing of bankruptcy petition by or against mortgagor; or**
  - **Assertion of lender-liability claims against mortgagee; or**
  - **Institution of litigation by mortgagor seeking injunctive relief or otherwise seeking to prevent mortgagee from exercising its remedies under workout documents (including delivery of deed in escrow) or underlying loan documents; or**
  - **Contesting of subsequent foreclosure or enforcement proceeding filed by the mortgagee; or**
  - **Violation of certain "bad boy" covenants in the workout and loan documents.**
  - **Can be used in bankruptcy proceedings involving deed-in-escrow to prevent subsequent bankruptcy filing by debtor.**

Deeds in Escrow

- Fortunately for lenders, § 524(e) of Bankruptcy Code provides that bankruptcy discharge does not discharge obligation of any non-debtor party. Courts generally have construed this statutory provision as prohibiting bankruptcy plans from modifying or releasing obligations and liabilities of guarantors under third-party guaranties and prohibiting bankruptcy courts from enjoining enforcement of such guarantees.

- *See 111 Debt Acquisition LLC v. Six Ventures, Ltd.*, 2009 WL 44181 (S.D. Ohio, Feb. 18, 2009) – U.S. District Court agreed with lender that bankruptcy filing constituted "springing recourse event," which triggered guarantors' obligation for immediate payment of full debt. Court rejected guarantors' argument that loan transaction documents and guaranty were ambiguous.

- Deed in Escrow as Part of Approved Bankruptcy Plan: Bankruptcy plan and confirmation order should include specific findings of fact and conclusions of law that conveyance of property constitutes an absolute transfer of property and is not intended by parties as an equitable mortgage. Escrow instructions should state that if subsequent default occurs under plan or under loan documents (as same may have been revised or restated pursuant to plan), title insurance company, as escrow agent, will release deed and other escrowed documents and deliver them to designated party.

Deeds in Escrow

- **Because bankruptcy court will have specifically approved this type of arrangement, it should be enforced even if mortgagor is later subject of second bankruptcy case is filed by or against mortgagor, based on collateral estoppel, *res judicata* principles, and equitable grounds. Mortgagee should, therefore, be entitled to relief from automatic stay in subsequent bankruptcy proceeding and to specific enforcement of escrow arrangement. If debtor attempts to avoid enforcement of deed in escrow by filing subsequent bankruptcy proceeding, mortgagee could also seek to have subsequent case dismissed as bad-faith filing, or ask court to abstain from hearing case in best interests of creditors of estate. See *In re 203 N. LaSalle Street Partnership*, 246 B.R. 325 (Bankr. N.D. Ill. 2000).**

Deeds in Escrow

- Possibility of negation of voluntary conveyance by subsequent bankruptcy was minimized in *203 N. LaSalle St.* case, because one of debtor’s principals personally had agreed to pay mortgagee $10 million (via indemnity agreement) if any of debtor’s equity holders caused debtor to file another voluntary bankruptcy petition that attempted to block enforcement of voluntary conveyance. District Court also noted that mortgagee had cited no case holding that voluntary-conveyance provision might not be enforceable.

Deeds in Escrow

- But in *Metropolitan Life Ins. Co. v. Olsen (In re Olsen)*, fn. 61(8th Cir. 1988), court found that the debtor's confirmed Chapter 11 reorganization plan had not been substantially consummated even though quit claim deed had been placed in escrow. Court ruled that because plan was not substantially consummated and debtor's position was adversely affected by unanticipated changes in government farm policy, it had right to modify plan by reducing yearly loan payments, thereby avoiding immediate transfer of deed from escrow.

- *See also In re Cook*, 126 B.R. 575 (Bankr. D.S.D. 1991), aff'd *in part and rev'd in part, remanded by, in part*, 147 B.R. 513 (D.S.D. 1992) ("finality of confirmation . . . does not prevent a bankruptcy court from exercising jurisdiction to review its orders where equity so requires

Deeds in Lieu of Foreclosure – Subsequent Foreclosure of Subordinate Liens

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Deeds in Lieu of Foreclosure: Subsequent Foreclosure of Subordinate Liens

- **Recent case law generally supports ability of mortgagee to foreclose its mortgage after acceptance of deed in lieu of foreclosure, at least where settlement agreement and deed contain an anti-merger provision.**

- **Courts generally hold that mortgagee did not forfeit its rights as mortgagee when it took deed in lieu of foreclosure, and doctrine of merger presumes that mortgagee retains all rights; mortgage debt is not satisfied or extinguished.**

- **But some states prohibit mortgagee from pursuing an action for deficiency judgment.**

Deeds in Lieu of Foreclosure: Subsequent Foreclosure of Subordinate Liens

- **See also: *Restatement 3d of Property*: Mortgages § 8.5, Reporter's Notes, Comment E.:**

  Under this section, however . . . the mortgagee who takes a deed in lieu with actual knowledge of a junior lien will lose the right to foreclose irrespective of whether there is merger intent. [This is distinct minority position.]

- **In Illinois, *735 ILCS 5/15-1401* states (with respect to issue of merger) that:**

  A deed in lieu of foreclosure, whether to the mortgagee or mortgagee's nominee, shall not effect a merger of the mortgagee's interest as mortgagee and the mortgagee's interest derived from the deed in lieu of foreclosure.

Deeds in Lieu of Foreclosure: Subsequent Foreclosure of Subordinate Liens

- Vast majority of states rely (at least in part) on intention of parties, either express or implied, to determine whether merger occurred as result of deed-in-lieu transaction.

- Doctrine of merger is not favored by courts, and some courts will "imply" an intention to keep mortgage of record, even without non-merger language, based on facts of case.

- In Texas, *Tex. Prop. Code* § 51.006 permits mortgagee to void previously accepted deed-in-lieu in certain circumstances and foreclose deed of trust. Also, statute authorizes mortgagee to foreclose its deed of trust after accepting deed in lieu of foreclosure. In both cases statute provides that priority of deed of trust is not affected or impaired by deed-in-lieu.

Deeds in Lieu of Foreclosure: Subsequent Foreclosure of Subordinate Liens

- **Courts may not be willing to enforce non-merger provision in deed in lieu of foreclosure where rights of innocent third parties may be affected – or even lost – because of fraud or inequitable conduct by parties to deed. (But this is rare and applies only in very complicated and unique factual situations.)**

- **In *United States Leather, Inc. v. Mitchell Mfg. Group, Inc.*, 276 F.3d 782 (6th Cir. 2002), Sixth Circuit held that under (very unusual) facts of case, allowing an exception to merger rule (based on intention of the parties stated in quitclaim deed) would not be enforced because it would inequitably permit mortgagor to void its obligations to an intervening judgment creditor to the sole advantage of mortgagor's corporate parent.**

Deeds in Lieu of Foreclosure: Subsequent Foreclosure of Subordinate Liens

- Court noted that non-merger provisions are generally upheld in Michigan, but this case was distinguishable from other Michigan cases where non-merger language contained in deed-in-lieu had been enforced, as this was not situation where mortgagee was trying to protect itself from claims of junior lienholders of mortgagor.

- Sixth Circuit was careful in its opinion to limit its holding to facts presented, and reiterated general enforceability of non-merger provisions.

- Where available, and based on applicable law and facts, (and circumstances of transaction), title company may be willing to issue non-merger endorsement. (See article for sample.)

Questions & Answers

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