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Residential Liens and Foreclosures (Oklahoma Focus)

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RESIDENTIAL LIENS AND FORECLOSURES (OKLAHOMA FOCUS)

MONICA AMIS WITTRICK*

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I. Residential Liens in General

A lien is a right given to a creditor to have a debt or charge satisfied out of the real or personal property belonging to a debtor. It always arises from a debt and can be created either by agreement of the parties, commonly called "consensual" liens, or by operation of law, commonly called "nonconsensual" liens. A lien may be a general lien affecting all of the debtor's property, as in the case of a judgment lien, or it may be a special lien affecting only a specific property, as when a mortgage is given on a specific piece of property.

A. Mortgages

In General. The mortgage is the most typical encumbrance against real property. It is a voluntary special lien, in that the property owner voluntarily mortgages a specific property. A mortgage is a means, recognized by law, by which property is pledged as security for the payment of a debt. With respect to the type of interest conveyed by a mortgage, Oklahoma is classified as a lien theory of mortgage state, in contrast to other states in which the mortgage is an actual conveyance of the property, i.e. title theory states. Oklahoma recognizes several different types of mortgage instruments: regular mortgages,¹ deeds of trust,² deeds absolute given as security for debts³ and equitable mortgages.

Perfection of Lien. Since Oklahoma is a "race-notice" jurisdiction, the mortgage is perfected by filing a proper mortgage with the county clerk of each county in which the property is located. The mortgage must sufficiently describe the secured property and be properly acknowledged in order to give record notice of the mortgage. In the absence of recording, the mortgage is still valid as between the parties thereto. There are also instances in which a valid mortgage will be imposed in an action between vendor and purchaser.

Enforcement of Lien. The enforcement of a residential mortgage is the main focus of this paper and is discussed in greater detail in the following section.

B. Judgments

In General. A judgment is a final determination by a court of competent jurisdiction on the matter submitted to it by the parties involved. Many *orders* are made by a court in the progress of every trial, which are not properly called *judgments*. There are, for example, rulings, interlocutory orders, findings of certain pretrial facts or matters of law, temporary orders, and orders of dismissal of certain parties. A final judgment must dispose of all of the issues involved so that no

1. See 46 OKLA. STAT. § 3 (1991).

2. See *id.* § 1.1.

3. See *id.* § 1.

further action by the court will be necessary in order to settle and determine the entire controversy. The most common legal judgment is one for money damages.

A district court judgment, decree, or appealable order must be in written form and must contain a caption of the case, a statement of the disposition of the matter and the signature and title of the court. A statement regarding costs, attorney's fees and interest may be included if the same have been determined prior to the time the judgment is signed by the court. Costs, attorney's fees and interest that have not previously been included in a judgment, decree or appealable order may be determined by the court upon timely application, regardless of whether an appeal has been filed.

A judgment of a state district court exists from the date the judgment is *rendered*. In most cases, this date of rendition will be the date set out in the judgment or order as the date of the hearing. In many contested cases, the judge may take a matter under advisement and will not "render" his judgment until a date after the hearing. Once the judgment has been reduced to writing and filed with the court clerk, the court shall direct file-stamped copies of the judgment to be mailed to all parties in the action. Such mailing is evidenced by a Certificate of Mailing filed in the case.

Perfection of Lien. Once a money judgment is obtained, the judgment creditor may acquire a lien over all property of the judgment debtor, except homestead property, in the county where the judgment is "perfected." By properly filing judgment liens in all counties in which the judgment debtor owns property, the judgment creditor may obtain a lien over most property owned by the judgment debtor.

Generally, judgments or appealable orders must be signed by the court and filed with the court clerk prior to enforcement. However, the following matters are enforceable upon pronouncement by the court: divorce, separate maintenance, annulment, postdecree matrimonial proceedings, paternity, custody, adoption, termination of parental rights, mental health, guardianship, juvenile matters, habeas corpus proceedings, temporary restraining orders, temporary injunctions, permanent injunctions, conservatorship, probate proceedings, special executions in foreclosure actions, quiet title actions, partition proceedings, or contempt citations.

Enforcement of Lien. Only a judgment or final order for the payment of money may not be enforced by execution or other proceeding until ten days after the judgment or order is filed. The ten day limitation does not apply to the proceedings outlined above.

The clerk of the district court is no longer required to maintain a "judgment docket" within his office. The county clerk is mandated to maintain a "Judgment Index" showing each statement of judgment, in which the names of all judgment debtors are indexed in alphabetical order. The Judgment Index contains the names of each judgment debtor, names of the judgment creditors, identification of the court and style of the case, case number, amount of the judgment, date of the filing of the judgment, and the date of filing of the statement of judgment. The law is very plain, nevertheless, that the lien of the judgment is effective upon presentation of the statement of judgment to the county clerk, tender of filing fee and acceptance

of the statement of judgment, and not when physically entered on the Judgment Index.

The judgment lien represents security for the underlying debt and conveys a right of execution to the judgment creditor in satisfaction of his debt. Judgments are not, in and of themselves, liens upon property. A judgment lien is a creature of statute and is completely dependent upon the authorization statute for the terms and limits of its existence. Since a judgment lien is statutorily created, strict compliance with the statutes is mandatory before a judgment creditor's lien will attach.

When a statement of judgment is properly filed, the money judgment lien is impressed upon all of the real estate owned by the judgment debtor in that county. It also attaches to any property subsequently acquired by the debtor, whether by purchase, gift, inheritance or otherwise.

The law places an affirmative burden on the judgment holder to execute on the judgment. If a judgment holder fails to execute his judgment, it may become dormant and cease to operate as a valid lien.

It should also be noted that as to priority of the judgment lien vis-à-vis other general judgment liens, an execution or garnishment must be issued and filed with the county clerk within one year from the time judgment is *rendered* in order to maintain the priority of that judgment lien to the prejudice of the other judgment creditors. Failure to issue the execution or garnishment within a year of the judgment's rendition may jeopardize that judgment creditor's priority over other judgment lien claimants.⁴ If the debtor fails to pay the judgment, the creditor may bring an action to have the debtor's property sold to satisfy the judgment debt.

C. Property Taxes

In General. Real property (ad valorem) taxes are apportioned according to the value of nonexempt property.⁵ The determination of the property value is the duty of the county assessor. Taxes upon real property are a lien for seven years from the date upon which such tax became due and payable.⁶ Ad valorem real property taxes are a lien superior to all other liens.

Perfection of Lien. There is no formal "perfection" of an ad valorem tax; the properties are placed on the tax rolls according to statute.⁷

Enforcement of Lien. The county treasurer must, in all cases where taxes are a lien upon real property and are unpaid on April 1 of any year, proceed to advertise

4. The following statutes define the manner in which the various types of judgment liens may be perfected, continued and released: District Court Judgments, 12 OKLA. STAT. §§ 706(A), 735, 801 (1991 & Supp. 1997); Small Claims Judgments, 12 OKLA. STAT. §§ 1770-1772 (Supp. 1997); Foreign Judgments, 12 OKLA. STAT. §§ 720-722 (1991); Alimony Judgments, 43 OKLA. STAT. § 134 (Supp. 1997); Child Support, 43 OKLA. STAT. § 135 (Supp. 1997); 56 OKLA. STAT. § 237.7 (Supp. 1997); Federal Court Judgments, 28 U.S.C. § 1962 (1994); Federal Debt Collection Procedures Act, 28 U.S.C. § 3001-3308 (1994); 68 OKLA. STAT. § 3401-3407 (1991); Bankruptcy and Judgment Liens, 11 U.S.C. § 522(f) (1994 & Supp. IV 1998).

5. See 68 OKLA. STAT. §§ 2801-2819 (Supp. 1997).

6. See 68 OKLA. STAT. § 3101 (1991).

7. See 68 OKLA. STAT. §§ 2801-2819 (Supp. 1997).

and sell such real estate for such taxes, including personal property taxes, special assessments, and costs according to statute.⁸

D. Special Assessments

In General. Special assessments are taxes or levies customarily imposed against only those specific parcels of realty that will benefit from a proposed public improvement. Whereas property taxes are levied for the support of the general functions of government, special assessments cover the cost of specific local improvements such as streets, sewers, irrigation and drainage.

Perfection of Lien. A special assessment may attach at the commencement of the improvement or at an earlier or later time as designated by the court order or agreement. There are also other special assessments created by statute which may become due as a result of trash or weeds or demolition of property. These liens are imposed by municipalities or county commissioners in some areas of the state and "certified" to the respective counties. These liens are afforded the same priority as ad valorem taxes under title 11, sections 22-111 and 22-112 of the Oklahoma Statutes.

Enforcement of Lien. The owner usually has the option of paying special assessments in installments over several years with interest or paying the balance in full at the beginning. Although the assessment may be payable in installments, the statutes usually provide that the lien shall be for the full amount assessed against the property, which includes future installments not yet due and payable.

There are also special assessments in the nature of homeowners' association assessments. A homeowners' association is usually an incorporated, nonprofit corporation formed under a declaration of restrictions. The right of enforcement of restrictions and liens is transferred by the declaration to the homeowners' association. The declaration of restrictions and the corporate bylaws may provide for the maintenance of common elements such as streets, sewer, walls, insurance, etc. through assessments due from each member of the association by virtue of his ownership of property within the development. These homeowners' association assessment liens are normally filed as the assessments become past due. In some instances, however, the liens are created in the declaration of restrictions and attach upon the declaration's filing with the county clerk. Although the liens may be created within the declaration of restrictions itself, often the homeowners' association liens will be subordinated to any purchase money, first mortgage within the terms of the declaration.⁹

E. Mechanics' and Materialmen's Liens

In General. A mechanic's and materialmen's lien is a statutory lien in favor of those who furnish labor or materials for the improvement of real property. The statute extends extraordinary rights to the unpaid provider of services and materials

8. See 68 OKLA. STAT. §§ 2914, 3101 (1991).

9. See 60 OKLA. STAT. § 852 (1991).

to property he was instrumental in improving.¹⁰ These liens tend to improve the chances of such persons receiving compensation for the labor and materials provided.

Perfection. A mechanic's lien is superior to all liens that were filed subsequent to the commencement of such labor or provision of materials by the lien holder. This lien is also superior to any lien of which the lien holder had no notice, and that was unrecorded at commencement of the work or the providing of materials by the lien holder. Once filed, the mechanic's lien attaches to the land as well as to the improvements.

Any person claiming a lien must file a statement setting forth the information required by statute in the office of the county clerk of the county in which the land is situated. Such statement must be filed within four months after the date on which material or equipment used on the land was last furnished or labor last performed under contract.¹¹

Any person who furnishes any such material or lease or rents equipment used on the land or performs such labor as a *subcontractor*, may obtain a lien upon such land, or improvements, or both, from the same time, in the same manner, and to the same extent as the original contractor, for the amount due him for such material, equipment and labor, by filing with the county clerk of the county in which the land is situated, within ninety days after the date upon which material or equipment used on said land was last furnished or labor last performed under such subcontract, a statement setting forth the information required by statute.¹²

Enforcement of Lien. A mechanic's lien can be enforced by foreclosure in accordance with title 42, section 172 of the Oklahoma Statutes. Failure to pursue a mechanic's lien within one year will terminate the lien.¹³

F. Unpaid Specific Taxes

In General. Nonpayment of tax liabilities based upon such taxes as state and federal income and/or estate taxes, corporate franchise taxes, etc., generally causes a lien to be placed on all property owned by the nonpaying party. If the specific tax is a state tax and the estate has not paid such tax, a lien is placed over all of the real and personal property included in the estate. Clear title to property cannot be given until these tax liens are discharged.

Perfection of Lien. On November 6, 1990, the Omnibus Budget Reconciliation Act of 1990 amended section 6502 of the Internal Revenue Code relating to collection of delinquent federal income taxes after assessment.¹⁴ A federal tax lien continues until the liability is satisfied or becomes unenforceable by reason of "lapse of time." Prior to enactment of the Act, "lapse of time" was deemed to be

10. See 42 OKLA. STAT. §§ 141-153 (Supp. 1997).

11. See *id.* § 142.

12. See 42 OKLA. STAT. § 143 (1991).

13. See *id.* § 149.

14. See Omnibus Budget Reconciliation Act of 1990, § 11317(a)(1)-(2), Pub. L. No. 101-508, 104 Stat. 1388, 1388-458 (codified at I.R.C. § 6502 (1994)).

six years from the date of the assessment.¹⁵ The Act amended the section by deleting the six-year time limitation and substituting a ten-year time limitation.¹⁶ Hence, enforcement of a tax lien may be commenced by administrative levy or by court proceedings instituted within ten years *plus thirty days* from the date of the assessment.

Federal liens are filed pursuant to the Uniform Federal Lien Registration Act.¹⁷ State tax liens are filed pursuant to title 68, sections 231 and 250 of the Oklahoma Statutes. The liens or warrants may be filed and constitute a lien on any property owned by the debtor within the county where the liens are filed. The priority of the liens runs from the date of filing.

Enforcement of Lien. A federal tax lien is a lien on *all* property owned by a delinquent taxpayer, including homestead property. In fact, there is almost no situation in which real property or an interest in real property would be considered exempt from a lien for nonpayment of federal taxes.

Generally, tax liens may be released by payment of the tax due. In the event that the proceeds from the sale of the debtor's property are insufficient to pay the tax in full, it is possible to negotiate a Certificate of Discharge. When a federal tax lien is found to exist, the following may be considered:

(1) Certificate of Discharge — this operates only to release a certain piece of property from the tax lien and is not a general discharge or release of liability.

(2) Certificate of Release — this certificate evidences the full and complete satisfaction of the debtor's tax liability.

(3) Certificate of Non-Attachment — the most common purpose of the Certificate of Non-Attachment is for the IRS to show evidence that a seller is not the same person named in a federal tax lien.

These tax liens may be enforced according to seizure and sale under federal law. Often, notice of the seizure and sale proceedings will occur off-record until the period of time when the right of redemption of the taxpayer has expired.¹⁸

II. Explanation of the Residential Judicial Foreclosure Process

A. Overview

Generally, a mortgagee must take some affirmative action to exercise its option to accelerate the note and mortgage upon a default. A default, without some overt action by the mortgagee, will not cause acceleration.¹⁹ Unless the mortgage or

15. See I.R.C. § 6502(a)(1) (1988), amended by I.R.C. § 6502(a)(1) (1994).

16. See Omnibus Budget Reconciliation Act of 1990, § 11317(a)(1)-(2), 104 Stat. at 1388-458.

17. 68 OKLA. STAT. § 3403 (1991).

18. The following tax liens may also be enforced under Oklahoma law in accordance with title 68, section 250: Estate Taxes, 68 OKLA. STAT. §§ 801-827 (1991 & Supp. 1997); Franchise Taxes, 68 OKLA. STAT. §§ 1201-1214 (1991 & Supp. 1997); Sales Taxes, 68 OKLA. STAT. §§ 1350-1374 (1991 & Supp. 1997); Use Taxes, 68 OKLA. STAT. §§ 1401-1411 (1991 & Supp. 1997); Vehicle Taxes, 68 OKLA. STAT. §§ 2101-2110 (1991 & Supp. 1997); Income Taxes, 68 OKLA. STAT. §§ 2351-2385 (1991 & Supp. 1997).

19. See *Union Central Life Ins. Co. v. Adams*, 38 P.2d 26, 28 (Okla. 1934).

applicable regulation expressly requires it, no notice of default need be given prior to acceleration. In Oklahoma, there is ample authority that service of process upon the mortgagor is sufficient election by the mortgagee to accelerate the indebtedness and provides all the notice to which the mortgagor is entitled.²⁰

The mortgagee typically contacts the attorney with instructions to begin foreclosure proceedings. At the outset, the following documents are obtained by counsel: note and all endorsements; mortgage and riders; assignment(s) of mortgage; other security documents covering personal property and rent assignments; loan agreements; modifications and amendments; guaranties; assumption agreements; original mortgage title policy; account history; and copies of default notices, if required.

B. Pre-Foreclosure Title Examination and Chain of Assignments

A recently certified abstract must be examined to identify all necessary parties to be included as defendants in the foreclosure petition. These parties are necessary to ensure that marketable title is obtained for the client or grantee at the conclusion of the foreclosure action. The examination will disclose all title problems prior to the foreclosure filing so that they may be cured within the foreclosure process — a quasi-quiet title, so to speak. These title problems not otherwise associated with the mortgage foreclosure itself would include prior conveyancing problems, probate, divorce, bankruptcy, legal descriptions, tax deeds, etc. Many attorneys practicing in this area rely on commitments for title insurance as the basis of their foreclosure action.

The title examiner must verify that the foreclosure is being prosecuted by the real party in interest, i.e., the holder of the mortgage. If the abstract or title commitment reveals that the mortgage was assigned prior to the filing of the foreclosure petition, the petition should reflect the last assignee of record as the plaintiff.

Many times a foreclosure action will be filed by an entity that does not have a mortgage interest of record. If the loan is transferred *after* the institution of the foreclosure action in the name of the original mortgagee, the action may proceed in the name of the original party, in accordance with title 12, section 2025(C) of the Oklahoma Statutes, which provides:

C. TRANSFER OF INTEREST. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.²¹

While it is preferable to make application to the court to substitute parties, the statute does not require such a procedure.

Occasionally, an action will be initiated in the name of one entity, but the record reveals that another party is the mortgagee. In such cases, a motion and order to substitute the real party in interest may be necessary. This may occur when a

20. See *Federal Nat'l Mortgage Ass'n v. Walter*, 363 P.2d 293 (Okla. 1961).

21. 12 OKLA. STAT. § 2025(C) (1991).

foreclosure is filed before the foreclosing attorney has had an opportunity to check title. This simple step will correct the action to conform with the procedural requirements of title 12, section 2017(A) of the Oklahoma Statutes, requiring all actions to be prosecuted in the name of the real party in interest.

The attorney should also be familiar with 12 U.S.C. § 1723(a) and 24 C.F.R. § 300.1 with respect to assignments of Government National Mortgage Association (GNMA) loans, in which an actual assignment of mortgage may not be filed of record.

C. Lis Pendens

The first instrument filed with the county clerk indicating the start of a foreclosure action is the Notice of Pendency of Action, often entitled *Lis Pendens*. The notice of pendency of action must include the legal description and identify the case and jurisdiction where filed. The notice must be filed in all counties where the secured property is located.

The notice (1) alerts the general public that an action is pending against the subject property which may ultimately affect the rights of record owners and lien claimants, and (2) bars the attachment of liens or the effectiveness of conveyances as against the prevailing party's title at the conclusion of the foreclosure process. Title 12, section 2004.2 of the Oklahoma Statutes provides:

NOTICE OF PENDENCY OF ACTION

A. Upon the filing of a petition, the action is pending so as to charge third persons with notice of its pendency. While an action is pending, no third person shall acquire an interest in the subject matter of the suit as against the prevailing party's title, except that:

1. As to actions in either state or federal court involving real property, such notice shall be effective from and after the time that a notice of pendency of action, identifying the case and the court in which it is pending and giving the legal description of the land affected by the action, is filed of record in the office of the county clerk of the county wherein the land is situated; and

2. Notice of the pendency of an action shall have no effect unless service of process is made upon the defendant or service by publication is commenced within one hundred twenty (120) days after the filing of the petition.

B. Except as to mechanic's and materialman lien claimants, any interest in real property which is the subject matter of an action pending in any state or federal court, acquired or purported to be acquired subsequent to the filing of the notice of pendency of action as provided in subsection A of this section, or acquired or purported to be acquired prior to but filed or perfected after the filing of such notice of pendency of action, shall be void as against the prevailing party or parties to such action.

C. No person purporting to acquire or perfect an interest in real property in contravention of this section need be given notice of a sale upon execution or of hearing upon confirmation thereof.²²

It is foreseeable that the foreclosing attorney may fail to heed the provisions of paragraph two providing that if service is not made within 120 days of the filing of the petition, then the Notice of Pendency is *void*. If the Notice of Pendency is void, then a third party may effectively acquire an interest in the real property which may be superior to the interest of the purchaser at a sheriff's sale. In the case of service by publication, notice by publication merely needs to be "commenced." "Commenced" is most often interpreted as signifying the first time the notice is published in the appropriate newspaper.²³

The recording date and time of the notice of pendency is very important to the title examiner and the foreclosing attorney. There will almost always be a "gap" of time between the date of the final certificate of the pre-foreclosure abstract or the effective date of the title commitment, and the time when the notice of pendency is filed with the county clerk. This gap period must be closely scrutinized to make sure no intervening interests or claims have been filed. If the liens or conveyances were filed and indexed before the notice of pendency, then the claimants' interests are not affected by the notice and such parties must be joined as defendants in the foreclosure action.

Occasionally, even the most seasoned practitioners will omit a junior lienholder. An omitted lienholder retains its right of redemption and retains its lien on the property itself.²⁴ The omission might be corrected by any of the following methods:

- (a) obtain a quit claim deed and or a lien release from the omitted parties;
- (b) move the court for an order to void the sheriff's deed, set aside the Order Confirming Sheriff's Sale and Partial Vacation of the Judgment, amend the petition to add the necessary parties, and complete the foreclosure process again;²⁵ or
- (c) institute a *de novo* foreclosure action seeking equitable relief from title 42, sections 18 and 19 of the Oklahoma Statutes, as in *First National Bank & Trust v. Stark*,²⁶ utilizing the doctrine of nonmerger.

There is clear authority in Oklahoma that a foreclosure that is defective because a junior lienholder was omitted cannot be cured by a subsequent quiet title action. The mortgage must be reforeclosed.²⁷ In the case of *Creditthrift of America, Inc. v. Amsbaugh*,²⁸ the first mortgagee *intentionally* failed to join a second mortgagee

22. *Id.* § 2004.2.

23. *See id.* § 2004(C)(3)(c).

24. *See* 42 OKLA. STAT. § 18 (1991).

25. Careful attention must be paid to the requirements of 12 OKLA. STAT. §§ 1031-1038 (Supp. 1997).

26. 249 P.2d 117 (Okla. 1952).

27. *See* First Fed. Sav. & Loan Ass'n, Chickasha v. Nath, 839 P.2d 1336, 1340-41 (Okla. 1992).

28. 773 P.2d 1287 (Okla. Ct. App. 1988)

in a foreclosure action.²⁹ The court held that the first mortgagee was not entitled to equitable relief under title 42, section 22 of the Oklahoma Statutes in order to keep the first mortgage alive for protection against a second mortgage.³⁰ Therefore, the only process by which to establish the priority of a first mortgage over omitted parties is by "reforeclosure" and not by quiet title action, unless the inferior parties are willing to negotiate an agreed release or conveyance of their interest.

If the liens or conveyances were filed *after* the notice of pendency *and* the defendants were served within 120 days of the filing of the petition, then such liens and encumbrances are precluded from affecting the title of the prevailing party in the foreclosure action and the claimants need not be parties to the suit.

What if *some*, but not all, of the defendants are served within 120 days? The intent of title 12, section 2004.2 of the Oklahoma statutes is that the notice of pendency operates as against the property, while the 180-day rule of section 2004(I)³¹ operates against the remaining defendants.

D. The Petition

For loans originated prior to November 1, 1986, all foreclosures must be by judicial action.³² If the mortgaged property consists of one tract situated in two or more counties, the foreclosure may be brought in any county where a tract or part thereof is located.³³ Title 12, section 2003 of the Oklahoma Statutes states that a civil action is commenced by filing a petition with the court.³⁴ Previous law requiring the filing of the petition *and* issuance of the summons for commencement of an action was replaced in 1984.³⁵

The petition must name all parties with an interest in the property. Necessary parties to a mortgage foreclosure action include: mortgagor(s); grantees in possession or occupant(s); assumptors; guarantors, endorsers, co-makers of the Note; holders of potential homestead claims; junior lienholders; lessees subsequent to the mortgage or prior; any other party necessary to provide clear title.

The petition must state a cause of action. Title 12, section 2008(A)(1) of the Oklahoma Statutes provides that the petition shall contain a short and plain statement of the claim showing that the plaintiff is entitled to relief and a demand for judgment for the relief to which he deems himself entitled.³⁶ Because foreclosure is an action "sounding in contract," the amount due under the note and mortgage must be specified. In most cases, the petition should describe the note, amount due, default, acceleration and amounts expended by the mortgagee under the terms of the note and mortgage. It should also describe the mortgage by book and

29. *See id.* at 1289.

30. *See id.*

31. 12 OKLA. STAT. § 2004(I) (Supp. 1997).

32. *See* 12 OKLA. STAT. § 131 (1991).

33. *See id.* § 132.

34. *See id.* § 2003.

35. *See* 12 OKLA. STAT. § 151 (1981) (amended by 12 OKLA. STAT. 2003 (1991)).

36. *See* 12 OKLA. STAT. 2008(A)(1) (1991).

page and recite that the mortgage tax was duly paid.³⁷ It should describe any junior liens to be foreclosed and state each party's interest in the property. Note that if the United States is a party, there are certain pleading and service requirements.³⁸ The Oklahoma Tax Commission also has minimum pleading requirements when it has been joined in an action to foreclosure.³⁹

The prayer for relief should include a request for: *in personam* judgment against those parties liable on the note; *in rem* judgment against all parties for foreclosure of the mortgage and for the sale of the mortgaged property to satisfy the mortgage debt; and any other relief necessary, such as mortgage reformation, determination of death, etc.

E. Service of Process

As set forth in title 12, section 2004 of the Oklahoma Statutes, service upon the defendants can be obtained through:

- (1) personal delivery by sheriff or private process server;
- (2) service by mailing a copy of the summons and petition by certified mail, return receipt requested and delivery restricted to the addressee;
- (3) service by publication;
- (4) service on the Secretary of State (for foreign and domestic corporations); and
- (5) service by other methods ordered by the court which are reasonably calculated to give actual notice of the proceeding and an opportunity to be heard.⁴⁰

Personal Service: Under title 12, section 2004(C)(1)(a) of the Oklahoma Statutes, personal service on a defendant must be made by a sheriff, deputy or licensed process service.⁴¹ The signature of the person making the return should be checked for a recitation of authority to serve. In some counties, particularly Tulsa County, the attorney for the plaintiff must "appoint" on the face of the summons the person to make service.

Service on an individual may be made personally, or by serving a resident over the age of fifteen of the dwelling or usual place of abode, or by serving an authorized agent.⁴² If the defendant is under age fifteen, the "infant" and either his parent, guardian, or if neither can be found, the person having care and control of the infant with whom he lives must be served. In the case of an incompetent person, the guardian must be served in addition to the incompetent defendant.⁴³

A domestic or foreign corporation, partnership, or unincorporated association must be served via an officer, a managing or general agent, or a registered service agent.⁴⁴ The United States, its officers or agencies, must be served in accordance with Federal Rule of Civil Procedure 4. A state, county or city government entity

37. See 68 OKLA. STAT. § 1907 (Supp. 1997).

38. See 28 U.S.C. § 2410 (1994).

39. See 68 OKLA. STAT. §§ 234(B), 801 (Supp. 1997).

40. 12 OKLA. STAT. § 2004 (Supp. 1997).

41. See *id.* § 2004(C)(1)(a).

42. See *id.* § 2004(C)(1)(c)(1).

43. See *id.* § 2004(C)(1)(c)(2).

44. See *id.* § 2004(C)(1)(c)(3).

must be served according to the specific statute which governs, if any, or if none, then upon the chief executive officer, secretary, clerk, or other officer whose duty it is to maintain records of the organization.⁴⁵ Inmates under the jurisdiction of the Department of Corrections are served through their warden, superintendent, or their designee.

Oklahoma law is well established that a return of service of summons, properly executed by an officer of this state or of the state where the process is served, is prima facie evidence of its truthfulness. Strong and convincing proof is required to overcome this presumption of truthfulness.⁴⁶

Some of the typical problems arising from service returns include incomplete or illegible returns and lack of sufficient identification of the party served (if not the named defendant) as being adequate age (fifteen years or older) and a regular resident of the named defendant's household. In such cases, an amended return setting forth complete and legible information will cure the title deficiency.

Certified Mail: Service by mail must be made upon each individual defendant and must be (1) certified (2) return receipt requested and (3) restricted to the address. Service is effective on the date of receipt or refusal. The statute provides that acceptance or refusal of service by mail "by a person who is fifteen years of age or older who resides at the defendant's dwelling house or usual place of abode shall constitute acceptance or refusal by the party addressed." The question is how does the plaintiff's attorney know or verify the facts underlying such service?

What if service is *refused*? Upon notice of the refusal and at least ten days before entry of default judgment, the plaintiff must mail a copy of the petition and summons by regular first class mail, together with a notice that informs the defendant that despite refusal the case will proceed and judgment by default will be entered unless he appears.⁴⁷ In this case, a default judgment *shall* be set aside upon motion of the defendant if the defendant can show the court that the return receipt was signed or refused by an unauthorized person. Such motion must be filed within one year after the defendant has notice, but not to exceed two years after judgment. Note that the defendant does not have to show a legitimate defense prior to making application to the court under this section.

Service by certified mail upon domestic or foreign corporations, partnerships or other unincorporated associations may cause some concern to a title examiner because the return receipt attached to the service return typically is not signed by the service agent, partner, or corporate officer to whom it is addressed. Rather, an employee or agent will sign the receipt. Such an occurrence, in accordance with title 12, section 2004(C)(2)(c) of the Oklahoma Statutes, gives rise to a presumption that the receipt was signed by an employee authorized to receive certified mail:

In the case of an entity described in division (3) of subparagraph c of paragraph 1 of this subsection, acceptance or refusal by any officer or

45. See *id.* § 2004(C)(1)(c)(5).

46. See *Wilson v. Upton*, 373 P.2d 229, 231 (Okla. 1962); *Howard v. Stewart*, 159 P.2d 527, 530 (Okla. 1945).

47. See 12 OKLA. STAT. § 2004(C)(2)(c) (Supp. 1997).

any employee of the registered office or principal place of business who is authorized to or who regularly receives certified mail shall constitute acceptance or refusal by the party addressed. A return receipt signed at such registered office or principal place of business shall be presumed to have been signed by an employee authorized to receive certified mail.⁴⁸

Publication: If service cannot be perfected by personal service or certified mail, the rules outlined in title 12, section 2004(C)(3) of the Oklahoma Statutes and Oklahoma District Court Rule 16⁴⁹ must be followed.⁵⁰ Before entry of a default judgment based upon publication "service," the court must conduct an inquiry as to the sufficiency of the search by the plaintiff to locate and serve the defendants. This diligent search includes search of tax rolls, deed records, judicial and other official records, telephone directories, etc.⁵¹

There is one caveat in this area when the foreclosing attorney must seek the court's assistance in determining heirship to property. Title 84, sections 257 through 260 of the Oklahoma Statutes provide that service of notice by publication must be made upon "[t]he heirs, executors, administrators, devisees, trustees and assigns, of _____ deceased."⁵² There are many title examiners who take the position that this section controls over the more general statute, title 12, section 2004(C)(3).

Where service by publication is necessary, the following documents should appear in the proceedings:

(1) either:

(a) a foreclosure petition verified by the plaintiff or plaintiff's attorney, which avers that with due diligence service cannot be made by any other method; or,

(b) a separate affidavit for service by publication averring same;

(2) a notice of service by publication setting forth the required language of section 2004(C)(3);

(3) a publisher's affidavit of publication, setting forth the dates of publication and including a copy of the notice as published;

(4) language in the Judgment and Decree of Foreclosure mandated by District Court Rule 16.⁵³

The documents must be examined carefully to determine if they contain all of the language required by section 2004(C)(3). Specifically, the publisher's affidavit must include identification of the district court where the petition is filed, the name of the plaintiff, the name(s) of all defendants to be served by publication (including all defendants whose unknown successors are to be served), a statement that the named defendants (and their unknown successors) have been sued and must answer the

48. 12 OKLA. STAT. § 2004(C)(2)(c) (Supp. 1997).

49. OKLA. DIST. CT. R. 16.

50. *See also* Bomford v. Socony Mobile Oil Co., 440 P.2d 713, 720 (Okla. 1968) (holding that, before a plaintiff may resort to publication, he must make a diligent search of all available sources).

51. *See* 12 OKLA. STAT. § 2004(C)(3)(c) (Supp. 1997).

52. 84 OKLA. STAT. § 257 (Supp. 1997).

53. *See* 12 OKLA. STAT. § 2004(C)(3) (Supp. 1997).

petition on or before a time stated (not less than 41 days from the date of first publication), a description of the nature or type of the judgment which will be entered if the defendant fails to answer, and the legal description of the property.⁵⁴ The notice must be published once a week for three consecutive weeks.⁵⁵

These requirements are *mandatory*. If any are omitted from the published notice, service is defective. To cure such a defect, the examiner may require that the sheriff's deed be voided, the order confirming sheriff's sale, the sheriff's sale proceedings and the judgment be vacated, and the service by publication be corrected and republished. Obviously, obtaining a quit claim deed or release of lien from the defendants named in the publication notice may be an unrealistic curative option since the defendant could not be found for personal service at the outset of the action.

It must also be remembered that a party against whom publication service has been effected may file a motion to open the judgment within three (3) years after the judgment is entered. However, section 2004(C)(3)(f) provides that title to any property which is the subject of and which passed to a purchaser in good faith by or in consequence of the judgment shall not be affected by a motion to set aside.

Service on the Secretary of State: Service on the Secretary of State is a process by which a domestic or foreign corporation can be served when the plaintiff discovers that there is no registered agent for the corporation listed in the records of the Secretary of State, or that neither the registered agent nor an officer of the corporation can be found at the registered office of the corporation. When such service is encountered by the title examiner, check for the following: service returns showing that the plaintiff, before resorting to service on the Secretary of State, attempted service either in person or by mail on the corporation at (a) the corporation's last known address shown on the records of the Franchise Tax Division of the Oklahoma Tax Commission, if any is listed there; and (b) the corporation's last known address shown on the records of the Secretary of State and the corporation's last address known to the plaintiff. If any of these addresses are the same, the plaintiff is not required to attempt service more than once at any address.⁵⁶ If this method of service is elected, then the answer date set forth in the summons must be forty (40) days from the date the Secretary of State is served.

Before entry of a default judgment against a corporation served via the Secretary of State under this section, the court shall determine whether the requirements of title 12, section 2004(C)(4) of the Oklahoma Statutes have been satisfied. Appropriate language tracking the findings of the court should be put in the judgment.

If it has a defense, a corporation served in this manner may file a motion to set aside the judgment within one year after it receives notice of the default judgment, but in no event more than two years after entry of the judgment. As a side note, there is no corollary to the good faith purchaser rule as provided for in the section

54. *See id.* § 2004(C)(3)(c).

55. *See id.*

56. *See id.* § 2004(C)(4).

dealing with service by publication⁵⁷ when service is upon the Secretary of State under section 2004(C)(4) and the court has discretion whether to grant the motion.⁵⁸

Other Methods: The above methods of service of process are the methods most commonly encountered during the examination of an abstract. The examiner should be cognizant that the court has the power to order service upon a defendant by "other methods." Such an order allowing alternate means of service should state that the "other method" authorized by the court is "reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard."⁵⁹

Service by Acknowledgment: Title 12, section 2004(C)(5) of the Oklahoma Statutes provides that an acknowledgment on the back of the summons or the voluntary appearance of a defendant is equivalent to service.⁶⁰

Answer Time: The named parties are given twenty (20) days to file an answer to the petition after service has been completed.⁶¹

Title 28 U.S.C. § 2410(c) partially removes the ban on sovereign immunity and permits the United States to be named as a party to a suit under certain circumstances. This section permits the United States to be named as a party in any action "to foreclose a mortgage or other lien upon . . . real or personal property on which the United States has, or claims a mortgage or other lien."⁶² If the United States is a named party defendant, the government has sixty (60) days from the date of service to file an answer.⁶³ If the Secretary of State has been served as a substitute service agent under title 12, section 2004(C)(4) of the Oklahoma Statutes, then the answer date is fixed at forty days, as noted above.⁶⁴

F. Judgment

The judgment in the foreclosure action should reflect all of the elements of record to that point in the action. Specifically, it should reflect the correct names of the parties, findings of jurisdiction and proper service upon all named defendants, and the correct legal description of the real property which is the subject of the action. If answers were filed by defendants, the judgment should reflect findings as to the resolution thereof. The court may have entered default judgment where defendants have entered an appearance if defendants failed to response to a Motion for Default or Summary Judgment which had been filed. If defendants have answered, they may have chosen to agree to judgment. In such a case, these defendants and/or their attorneys should have signed off or agreed to the judgment.

If the judgment does not accurately reflect the facts appearing in the record, an application and order nunc pro tunc may be an appropriate title curative measure.

57. *See id.* § 2004(C)(3)(f).

58. *But see id.* § 2004(C)(2)(c) (discussing default judgment based on certified mail).

59. *Id.* § 2004(C)(6).

60. *See id.* § 2004(C)(5).

61. *See id.* § 2012.

62. 28 U.S.C. § 2410(c) (1994).

63. *See id.* § 2410.

64. *See* 12 OKLA. STAT. § 2004(C)(4)(d) (Supp. 1997).

If a defendant who has answered failed to sign off on the journal entry of judgment, a ratification of judgment signed by said defendant and/or his attorney may be an appropriate title curative measure. State and federal statutes prohibit judgment against entities of the government.

The judgment must establish the debt and describe the circumstances allowing aid upon that judgment to be by Special Execution and Order of Sale. The judgment may also determine lien priority and disbursement of proceeds, if any. Most mortgages also provide that election to sell the property with or without appraisal must be made at the time judgment is entered.

Title 28 U.S.C. § 2410(c) establishes the following redemption right:

Where a sale of real estate is made to satisfy a lien *prior* to that of the United States, the United States shall have one year from the date of the sale within which to redeem, except that with respect to a lien arising under the internal revenue laws the period should be 120 days or the period allowable for redemption under state law, whichever is longer⁶⁵

The FDIC has agreed, with certain limited exceptions, to waive (1) all consent rights under The Financial Institutions Reform, Recovery and Enforcement Act⁶⁶ with respect to foreclosures of FDIC and RTC owned or encumbered property⁶⁷ and (2) the special redemption rights provided by 28 U.S.C. § 2410(c), as of July 2, 1992.

Generally, cases involving title to real property must be presented to the District Judge, though there are exceptions.⁶⁸ There is some argument that an Associate or Special Judge has no authority to hear matters dealing with title to real property, as in a mortgage foreclosure action.

G. Special Execution and Order of Sale

No real estate may be sold for the payment of any money or security for which it may be pledged or assigned except pursuant to judgment of the court.⁶⁹ The court clerk issues the special execution and order of sale containing the legal description of the property to the sheriff of the county in which the property is located. If appraisal is waived in the mortgage or if it is optional in the mortgage and is waived at the time of taking judgment, then no order of sale can issue for six months from the date of the judgment.⁷⁰ When the special execution and order of sale is with appraisal, the six month waiting period does not apply.

Upon receipt of the special execution and order of sale with appraisal, the sheriff will appoint three residents of the county to appraise the property and to

65. 28 U.S.C. § 2410(c) (1994).

66. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in scattered sections of 12 U.S.C.).

67. *See id.* 12 U.S.C. § 1825(b)(2).

68. *See* 20 OKLA. STAT. § 95.8 (1991).

69. *See* 12 OKLA. STAT. § 686 (1991).

70. *See id.* § 760.

make written return thereof. Upon receiving the appraisal, the sheriff or deputy will execute the notice of sheriff's sale.

A notice of the sheriff's sale should appear in the abstract and should evidence execution in conformity with title 12, section 764(A)(2) of the Oklahoma Statutes. The notice must contain:

- (1) the legal description of the property to be sold;
- (2) the date, time and place of the sale;
- (3) the appraised value; and,
- (4) the names of all parties whose actual address is unknown. The notice must also designate the person or person(s) whose unknown successors are being notified.⁷¹ This notice must be published once a week for two consecutive weeks, with the first publication appearing at least thirty days prior to the scheduled sale date. The notice must be published (a) in a newspaper "printed" in the county, or (b) in the case where there is no such newspaper, in a newspaper of general circulation, and posted on the courthouse door and in five other public places in the county, two of which must be in the township in which the property is located.⁷²

In counties having a population greater than 110,000, the advertisement must be "published" in some newspaper "published" in the city or township in which the property is located or, if there is no newspaper published in such city or township, then in some newspaper published in the county. The topic "what does it mean to publish versus print" is a lively one among real estate practitioners.⁷³

The plaintiff must mail copies of the notice of sheriff's sale to all parties who claim an interest in the property and whose addresses are known, at least ten days prior to the scheduled sale date. An affidavit of mailing and of publication or posting of notice of sale must be filed in the case. If the record as it appears in the abstract indicates an omission in the notice process required in section 764(a)(2), then the examiner should evaluate the omission to determine if it is fatal to the validity of the sheriff's sale. Typically, omissions of statutorily mandated information in the notice will taint the sale. These might include first publication of notice less than thirty days from the scheduled sale date, incorrect legal description, failure to mail notice to a party whose address is known, etc. Curative measures may include setting aside the sale and causing an alias special execution to issue and a correct notice to be mailed or published in accordance with section 764(A)(2).

The record should then evidence a sheriff's return of sale. This pleading should reflect:

- (1) the date of the sale;
- (2) the identity of the successful bidder;
- (3) the appraised value;
- (4) the sale price; and

71. *See id.* § 764(A)(2).

72. *See id.*

73. *See generally* Zenith Limestone Co. v. Exchange Trust Co., 51 P.2d 823 (Okla. 1936) (discussing when a newspaper is "published" in a particular place as opposed to "printed").

(5) the signature of the sheriff or appointed deputy.⁷⁴

The property must not be sold for less than two-thirds of the sheriff's appraised value of the property.⁷⁵ The statute provides that "no property shall be sold *for less than* two-thirds (2/3rds) of the value returned."⁷⁶ Some attorneys will argue that the property must sell for "at least" two-thirds, or two-thirds plus \$1, the statute is very clear that a bid of precisely two-thirds of the appraised value is an acceptable bid.

Customarily, there is an absence of participation by outside bidders. In such absence, the secured lender's credit bid of all or a part of the indebtedness then owed will usually be accepted by the sheriff at the sale. Only amounts secured by the mortgage being foreclosed can be part of the credit bid.⁷⁷ Any bid by a lender over and above the total debt amount will have to be satisfied in the form of cash advanced by the lender. If the accepted bid is determined to be for more than the amount secured, the party next in priority will be entitled to the excess, as ordered by the court.

Unlike returns of general execution, returns of special execution need not be made within sixty days as mandated by title 12, section 802 of the Oklahoma Statutes. The failure of the sheriff to "return" a writ of special execution on or before a return date set by the court is an irregularity which is cured by confirmation of the sale by the court.⁷⁸

The remaining documents involve the confirmation of the sale by the court. These include:

- (1) Motion to Confirm Sheriff's Sale;
- (2) Notice of Hearing of Motion to Confirm Sheriff's Sale;
- (3) Proof of Publication of Notice of Hearing (where necessary);
- (4) Affidavit of Mailing Notice of Hearing; and
- (5) Order Confirming Sheriff's Sale.

Pursuant to title 12, section 765(a)(1) of the Oklahoma Statutes, a written notice of hearing on the confirmation of the sale must be mailed by first class mail, postage prepaid, to all persons who received notice of sale and to the highest bidder at the sale at least ten days prior to the hearing.⁷⁹ If the name or address of any such person is unknown, the notice of hearing must be published in a newspaper authorized to publish legal notice in the county in which the property is situated.⁸⁰ The notice must be published at least at least ten (10) days prior to the date of hearing. The designation of the newspaper for publication of the notice of hearing motion to confirm sheriff's sale is more liberal than that required for publication of the notice of sheriff's sale.

74. 12 OKLA. STAT. § 764 (1991).

75. *See id.* § 762.

76. *Id.* (emphasis added).

77. *See Charles F. Curry Co. v. Goodman*, 737 P.2d 963, 965 (Okla. Ct. App. 1987).

78. *See Price v. Citizen's Bank of Mediapolis*, 102 P. 800, 803 (Okla. 1909).

79. *See* 12 OKLA. STAT. 765(A)(1) (1991).

80. *See id.*

The title examiner should pay close attention to the confirmation documents to determine if publication of the notice of hearing is required. If no defendant was served by publication, then publication of the notice of the confirmation hearing may not be required. In such cases, the plaintiff's affidavit of mailing notice of hearing should reflect that the notice was mailed to all defendants and that the addresses of all defendants were known to the plaintiff.

The order confirming sheriff's sale should reflect that the court, upon hearing and examination of record, deems the sale procedure followed by the sheriff to meet the statutory requirements. The order should also instruct the sheriff to execute and deliver a deed to the party in whose name the sale is confirmed. Many times the plaintiff will request in its motion to confirm sheriff's sale that the court should instruct the sheriff to execute the deed to the mortgage insurer (Secretary of Housing and Urban Development, Secretary of Veteran's Affairs, Federal National Mortgage Association, etc.) to whom all the plaintiff's rights have been assigned. If the order acknowledges the request and the deed reflects compliance with the court order, then no separate requirement for placement of a written assignment of interest of record is required.

H. Sheriff's Deed

Finally, the sheriff's deed should reflect the complete and accurate legal description of the property which was the subject of the foreclosure action. The deed must recite the execution, names of the parties, and the amounts and date of the judgment, be signed by the county sheriff "or other officer," be properly acknowledged, and reflect filing and indexing in the county clerk's office.

Title 12, section 766 of the Oklahoma Statutes contains the following language:

The deed shall be sufficient evidence of the legality of such sale, and the proceedings therein, until the contrary be proved, and shall vest in the purchaser as good and as perfect an estate in the premises therein mentioned, as was vested in the party at, or after, the time when such lands and tenements became liable to the satisfaction of the judgment.⁸¹

Must the sheriff sign the deed? Section 766 suggests that the sheriff or "other officer" may sign the deed.⁸² Section 772 also suggests that an "other officer" may sign the deed.⁸³ The succeeding sheriff or other officer even though he did not conduct the sale, may execute the deed if the predecessor's term has expired, if the sheriff or other officer is absent or rendered unable by death or otherwise, or if there is a certificate from the court signed by the clerk setting forth that the sale was fairly and legally made.

81. 12 OKLA. STAT. § 766 (1991).

82. *See id.*

83. *See id.* § 772.

I. Deficiency Judgment

A personal judgment may be rendered for the amount or amounts owed by the borrower, with interest, costs, attorney's fees and expenses, as provided for in the note and mortgage, less the foreclosure sale proceeds. Within ninety days after the sheriff's sale, a motion to enter a deficiency judgment must be made. The motion for deficiency judgment may be combined with the motion to confirm sheriff's sale.⁸⁴

The notice of hearing on the application for deficiency judgment must be served personally on the borrower or in such manner as the court may direct.⁸⁵ Upon such motion, the court, whether or not the borrower appears, will determine the "fair and reasonable" market value of the property as of the date of the sale or such nearest earlier date as there shall have been any market value, and will make an order directing the entry of the deficiency judgment. The deficiency judgment will be for an amount equal to the sum owing by the borrower as determined by the judge, with interest, costs, and disbursement of the action less the market value as determined by the court, or the sale price of the property at sheriff's sale, whichever is higher.

If no motion for deficiency judgment is filed, the proceeds of the sale, regardless of the amount, will be deemed to be in full satisfaction of the mortgage debt. No right to recover any deficiency in any action or proceeding will exist.⁸⁶ This requirement has been held to act as an *extinguishment* of the debt and not as a statute of limitations.⁸⁷

The date of the entry of the deficiency judgment constitutes a new judgment for the purposes of dormancy statutes.⁸⁸ For other purposes, the deficiency judgment is not a new judgment, but rather the "residue" of the previously entered foreclosure judgment. If the original judgment was filed with the county clerk as a judgment lien, the judgment lien of the deficiency judgment will relate back in time to the filing of the original judgment with the county clerk.

A foreclosure judgment against the mortgagor and the guarantor may be a "judgment" against the guarantor independent of the judgment against the mortgagor which may be extinguished if no motion is filed within the ninety (90) day period after the sheriff's sale. As to the guarantor, the Oklahoma Supreme Court, absolutely rejected the notion that "the benefits of § 686 discharge automatically avail to a guarantor."⁸⁹

Entry of a deficiency judgment is a prerequisite to issuance of a general execution or garnishment.⁹⁰ The initial decree of foreclosure provides for judgment on the

84. *See id.* § 686.

85. *See* Capitol Fed. Sav. Bank v. Bewley, 795 P.2d 1051, 1053 (Okla. 1990).

86. *See* 12 OKLA. STAT. § 686 (1991); Reliable Life Ins. Co. of St. Louis v. Cook, 601 P.2d 455, 456 (Okla. 1979).

87. *See* International Paper Co. v. Whitson, 595 F.2d 559, 562 (10th Cir. 1979).

88. *See* 12 OKLA. STAT. § 735 (Supp. 1997); Baker v. Martin, 538 P.2d 1048, 1050 (Okla. 1975).

89. Riverside Nat'l Bank v. Manolakis, 613 P.2d 438, 440 (Okla. 1980).

90. *See* Ingerton v. First Nat'l Bank & Trust Co. of Tulsa, 291 F.2d 662, 665 (10th Cir. 1961).

underlying debt upon which the foreclosure sale is based. The amount remaining due after the sale is not a sum certain until the court decrees such in its entry of deficiency judgment. Thus, before a creditor can take further action to collect the remaining debt, such remaining debt must be determined or "liquidated" by the court.

J. Corrective Measures

When a title defect in a foreclosure action cannot be easily remedied, consider one of these most commonly used curative measures:

- (1) Quit Claim Deed;
- (2) Judgment, lien or mortgage release;
- (3) Motion and Order Nunc Pro Tunc⁹¹;
- (4) Motion and order to void sheriff's deed, set aside order confirming sale, vacate the judgment in whole or in part, amend petition and (if necessary) re-serve all or some of the defendants, obtain new judgment, new sale proceedings and new sheriff's deed;
- (5) Quiet Title Action⁹²; or
- (6) De novo foreclosure.

III. Bankruptcy

A. The Automatic Stay

The filing of a petition in bankruptcy gives rise to an automatic stay which restrains any affirmative steps in the foreclosure process after the moment of filing. The automatic stay is effective to restrain an uncompleted foreclosure sale.⁹³ The lender is forced to evaluate options, including relief from the automatic stay or dismissal of the case. The result is not always clear when the petition is filed after completion of the sheriff's sale but before some ministerial act, such as recording the sheriff's deed.

There is no federal law restraining the foreclosure promptly upon a lifting or annulling of the automatic stay, although some consideration should be given to the necessity for renoticing pursuant to state law. The existence of a period for the filing of an appeal by the debtor does not operate to restrain the sale unless a stay pending appeal is obtained from the bankruptcy court or, only if first requested and

91. The phrase "nunc pro tunc" is defined in *In re Peter's Estate*, 51 P.2d 272 (Okla. 1935) as "now for then" and applies to acts allowed to be done after the time when they should have been done, with retroactive effect. This process should not be overused and cannot be used to correct problems which the record does not reveal. It should only be used to conform the order of the court, i.e. the Judgment or Order Confirming Sheriff's Sale, to reflect the true record of the case.

92. This remedy cannot be used to cure an omitted lienholder. Only re-foreclosure can cure the problem of an omitted lienholder. This remedy might arguably be used to cure a title problem not related to the foreclosure — such as a defective probate conducted prior to the mortgage being filed of record or a defective tax sale conducted years in the past.

93. See 11 U.S.C. § 362(a) (Supp. IV 1998).

refused in the bankruptcy court, from an appellate court.⁹⁴ The completion of a foreclosure sale pending appeal in the absence of a stay moots the appeal and should result in its dismissal, even when the secured creditor is the purchaser at the foreclosure sale.⁹⁵

B. Chapter 7 Relief

The objective of a chapter 7 is the discharge of debt and a "fresh start" for the debtor. Even though the chapter 7 debtor obtains a discharge of his personal liability on the promissory note, the lien represented by the mortgage remains enforceable by the lender. If the debtor wishes to retain assets that are collateral in a chapter 7, any delinquency must be cured and the debtor must continue to make payments to the lender. Otherwise, the lender is entitled to modify the automatic stay and foreclose.

The lender's alternatives when a chapter 7 is filed are to:

- (1) wait until the debtor's discharge order has been entered and the case has been closed, at which time the lender may continue the foreclosure process without an order of the bankruptcy court; or
- (2) file a motion for relief from the automatic stay and for abandonment of the property to continue the foreclosure process.

Section 362(d) of the Bankruptcy Code provides as follows:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay for cause, including lack of adequate protection of an interest in property of such party in interest; or with respect to a stay of an act against a property under subsection (a) of this section, if —

- (A) the debtor does not have an equity in such property; and
- (B) the property is not necessary to an effective reorganization⁹⁶

In a chapter 7, when the debtor is in default on the loan, whether relief from the stay is granted or not is in large part dependent upon the amount of equity in the property. If there is no equity in the property above the liens, then the lender is not "adequately protected" and will usually be granted relief from stay to proceed with foreclosure. The lender is entitled to relief within eighteen (18) days of the date the motion is filed and served, unless an objection is filed by the debtor. Under local court rules for the Western District of Oklahoma, a preliminary hearing must be held within thirty days of the filing of the objection, and a final hearing must be held within thirty days of the preliminary hearing. If a preliminary hearing is not held, then the motion to lift the stay is deemed confessed. If no hearing is held within sixty days, however, and no order lifting the stay is presented to the court, then the motion to lift the stay lapses and a new motion must be filed.

94. See FED. R. BANKR. 8005.

95. See *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294, 1295 (11th Cir. 1984).

96. 11 U.S.C. § 362(d) (Supp. IV 1998).

C. Chapter 13 Relief

Chapter 13 of the Bankruptcy Code, aptly entitled "Adjustment of Debt of an Individual with Regular Income," is designed to enable individual debtors under court protection and supervision to apply a portion of future earnings to the payment of all or a portion of their debts over an extended period of time. The debtor is protected from creditors by the automatic stay while a plan is proposed and carried out.⁹⁷

Under 11 U.S.C. § 1322(b)(2), the plan may modify the rights of secured creditors. The general rule is that a claim secured only by a mortgage on real estate that is the debtor's principal residence may not be modified. The plan may provide for the curing of any default, but the original payment requirements and lien may not be altered.⁹⁸ Even though the creditor has accelerated the note and mortgage, the mortgagor is at liberty to urge a chapter 13 plan that will cure, or deaccelerate, the default, up to the time the debtor's right to redeem is foreclosed.

On October 17, 1994, President Clinton signed into law the "Bankruptcy Reform Act of 1994."⁹⁹ The Act amends section 1322 by inserting the following:

(c) notwithstanding subsection (b)(2) and applicable nonbankruptcy law —

(1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; and

(2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325 (a)(5) of this title.¹⁰⁰

The Act also adds a new subsection to section 1322:

(e) notwithstanding subsection (b)(2) of this section and sections 506(b) and 1325(a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default, shall be determined in accordance with the underlying agreement and applicable non-bankruptcy law.¹⁰¹

Section 1322(c) makes it clear that a debtor in a chapter 13 case may cure a home mortgage default through completion of a foreclosure sale under applicable

97. See 11 U.S.C. §§ 1301-1330 (1994).

98. See *Nobelman v. American Sav. Bank*, 508 U.S. 324, 332 (1993).

99. Pub. L. No. 103-394, 108 Stat. 4106.

100. *Id.* § 301, 108 Stat. at 4131.

101. *Id.* § 305, 108 Stat. at 4134.

nonbankruptcy law and through the period of redemption, which, under Oklahoma law, would be to the time of confirmation of the sheriff's sale.

Co-debtors: Chapter 13 contains a special automatic stay provision applicable to co-debtors.¹⁰² A creditor may not act, or commence or continue any civil action to collect all or any part of a consumer debt from an individual who is liable with the debtor. The stay also applies to persons who put up collateral to secure the debt. The stay results only in a procedural delay and does not affect the creditor's right to full satisfaction from the debtor and co-debtor. The lender is required to wait for payment under the chapter 13 plan before pursuing remedies against the co-debtor. There is a special limitation on the scope of the stay when dealing with negotiable instruments — the holder of the note may present an instrument or give notice of dishonor to a co-debtor so as not to effectuate a technical discharge under the Uniform Commercial Code.¹⁰³ Federal law will allow lifting of the stay as against a co-debtor where (1) the co-debtor actually received the consideration on which the loan was based; (2) the plan filed by the debtor proposes not to pay the entire claim; and (3) continuation of the stay will result in irreparable harm to the creditor.¹⁰⁴

D. Annul Versus Lift

While it is certainly not advisable to conduct knowingly a foreclosure sale in violation of an automatic stay, situations do arise in which the foreclosing lender is unaware of the filing and conducts a foreclosure sale in good faith. Whether such a sale is void or voidable may depend on the subsequent treatment accorded the case in the bankruptcy court.

In some cases the court may annul the stay *ab initio*, thus validating a sale that was arguably in violation of the stay.¹⁰⁵ An annulment of the automatic stay will make it unnecessary for the creditor to repeat the particular step in the foreclosure process.

E. Effect of Valid Foreclosure Sale

In a 5-4 decision, the United States Supreme Court ruled that debtors whose property is sold for failing to make mortgage payments cannot cancel the sale after filing for bankruptcy protection.¹⁰⁶ The Court held that federal bankruptcy law does not allow setting aside noncollusive foreclosure sales that follow regular state foreclosure proceedings, even if the selling price was significantly less than fair market value.¹⁰⁷ This ruling was codified in the Bankruptcy Reform Act of 1994.¹⁰⁸

102. See 11 U.S.C. § 1301 (1994).

103. See *id.* § 1301(b)(1).

104. See *id.* § 1301(c).

105. See *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984) (holding that 11 U.S.C. § 362(d) grants bankruptcy courts the power to annul the automatic stay).

106. See *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994).

107. See *id.* at 548.

108. Pub. L. No. 103-394, 108 Stat. 4106.

IV. Reinstatement

Sometimes a lender will agree to accept a reinstatement of the loan after the debt has been accelerated and the foreclosure petition has been filed. If a foreclosure action has been filed, a dismissal without prejudice should be filed in the foreclosure action. If judgment for foreclosure has already been entered, an application should be made to the court to reinstate the note and mortgage to their pre-judgment status, which was, by legal fiction, canceled in and merged into judgment. The judgment should be released and the action should be dismissed without prejudice.

The Notice of Pendency is *not a lien*, therefore, no separate release of notice is required when the action has been dismissed in the district court. It is a better practice, however, to file a release of the notice of pendency with the county clerk.

V. Deeds in Lieu of Foreclosure

Bargaining for the borrower's consensual turnover of the property is a worthwhile workout objective for the secured lender. Even when the property provides a marginal source of repayment, a deed in lieu of foreclosure may be advisable to avoid the expense, delay and publicity of foreclosure. From the borrower's standpoint, a deed in lieu can be effectuated so as to minimize notoriety, to protect, to some extent, credit standing, and to control various tax effects by settling the timing of the loss (or phantom gain), the amount of consideration to be recited in the deed, and the treatment of the deficiency, if any.

A deed in lieu transaction must be supported by adequate consideration.¹⁰⁹ Although the discharge of the indebtedness is generally considered to be sufficient consideration, any additional consideration should also be recited in both the deed and the deed in lieu agreement. This might include, for instance, an agreement not to pursue a deficiency judgment, or to release the borrower from other liabilities. A transfer of the mortgaged premises from the mortgagee, after maturity or acceleration of the mortgage indebtedness, if the transfer is for adequate consideration and free from fraud, oppression or undue advantage, is permitted and binding under Oklahoma law.¹¹⁰

Title Examination Standard 24.6 states that:

deeds from mortgagors to mortgagees are subject to close scrutiny by the Court if it should be asserted they were given as additional security; nevertheless, such deeds do not warrant the rejection of the title unless there is some affirmative showing in the title that they were given merely as additional security.¹¹¹

109. See 24 OKLA. STAT. §§ 112-123 (1991).

110. See *Morrow Dev. Corp. v. American Bank & Trust Co.*, 875 P.2d 411, 414-15 (Okla. 1994); *Stallings v. Little*, 130 P.2d 525, 526 (Okla. 1942); *Speed v. Fariss*, 113 P.2d 595, 597 (Okla. 1941); *Moore v. Berlin*, 99 P.2d 886, 888 (Okla. 1939).

111. OKLA. TITLE EXAMINATION STANDARD 24.6 (1997).

Documentation for a deed in lieu transaction is relatively simple, usually consisting of a deed, a deed in lieu agreement, appropriate affidavits and a commitment for title insurance or other check of title. The lender will want to ensure absolute and irrevocable title pursuant to the deed while preserving the continuing priority of the mortgage lien against junior lienholders, if any, or "surprise" intervening interests such as mechanics' lien claimants.

To document the adequacy of the lender's consideration, it is a good idea to include in the deed in lieu agreement a statement by the borrower giving an estimate of the property's value and of the borrower's equity. A statement that the borrower believes his equity to be equivalent to the lender's consideration should also be included.

In attempting to procure title insurance pursuant to a conveyance by the mortgagor, the lender should anticipate that the title insurer will require specific affidavits from the borrower as to his intent, free will, informed consent, understanding as to value, and a list of similar items. Consistent with their concern that good and sufficient value has been received by the mortgage, a number of title insurers will not insure the transaction absent a contractual release of all liability in favor of the mortgagor, a statement that the indebtedness has been satisfied, and a release of the mortgage. Even then some title companies will insist on exceptions in the owner's policy pertaining to bankruptcy or fraudulent conveyance.

The common law doctrine of merger provides that when a greater estate in land (e.g. fee simple ownership) and a lesser estate (e.g. a mortgagee's interest) are combined in a single person with no intervening interest, the lesser estate disappears and is "merged" into the larger estate. Without survival of the mortgage lien, a lender has no means by which to foreclose the interest of any junior lienor. The existence of a merger is a question of the parties' intent and their expression to the contrary will be respected. In Oklahoma, a conveyance from a mortgagor to a mortgagee does not sacrifice the mortgagee's right to foreclose against intervening interests except for the title-insurance-inspired requirement for release or discharge of the mortgage.¹¹²

If the lender wishes surely to preserve the mortgage, the parties should expressly provide in the deed (and deed in lieu agreement) for its survival with the following language:

THIS DEED IS AN ABSOLUTE CONVEYANCE OF TITLE, IN EFFECT AS WELL AS IN FORM, AND IS NOT INTENDED AS A MORTGAGE, TRUST CONVEYANCE OR SECURITY OF ANY KIND. The consideration therefor is full release of said *** and ***, Husband and Wife, from any and all personal liability for the indebtedness secured by one certain promissory note dated ***, in the original amount of \$*** and the mortgage, executed in connection with said loan. Said Mortgage was originally in favor of ***, a corporation,

112. See *Paris Bank of Texas v. Custer*, 681 P.2d 71, 75 (Okla. 1984); *American First Title & Trust Co. v. First Federal Sav.*, 415 P.2d 930 (Okla. 1965).

recorded in Book ***, Page ***, and subsequently assigned to ***, a corporation, by Assignment recorded in Book ***, Page ***, of the records of the County Clerk of *** County, Oklahoma. It is the intention of and specifically understood by the parties of the first and second parts, and, by this acceptance of delivery and recordation hereof, the party of the second part hereby declares that the above described mortgage and related lien shall not merge or be merged with the title of the above described property conveyed and acquired under this Deed.

This language is also suggested to make it clear to the county clerk that the deed will be exempt from documentary stamp tax under title 68, section 3202(13) of the Oklahoma Statutes.

The lender should also avoid making any agreement to reconvey the property to the borrower later if the borrower repays the indebtedness. This may be characterized as merely additional security for the original loan and some courts will treat such arrangement as a second mortgage.¹¹³ If the transaction is so construed, the lender will be required to foreclose the indebtedness as though no deed from the borrower had been received.¹¹⁴

The conveyance of mortgaged property to the lender will not necessarily preclude the lender from pursuing a deficiency judgment against the borrower, absent a contrary agreement by the parties. This is the case even when a merger of title has occurred because the existence of the debt is a separate question from the survival of the mortgage.

When the parties agree, as they frequently do, that part of the consideration for the deed in lieu of foreclosure is the lender's covenant not to sue the borrower for a deficiency, such intention should be clearly expressed.

VI. Power of Sale (Oklahoma)

In 1986 the Oklahoma Legislature passed the Power of Sale Foreclosure Act.¹¹⁵ In order to foreclose by power of sale, the mortgage must state in bold and underlined type substantially the following: "A power of sale has been granted in this mortgage. A power of sale may allow the mortgagee to take the mortgaged property and sell it without going to court in a foreclosure action upon default by the mortgagor under this mortgage."¹¹⁶ The provisions of the power of sale law do not apply to a mortgage on the borrower's homestead where the borrower elects judicial foreclosure:

The mortgagee must give the borrower written notice of intention to foreclose by power of sale by certified mail addressed to the borrower at the borrower's last known address. The notice must state:

1. the name and address of the mortgagee;

113. See 42 OKLA. STAT. § 11 (1991); 46 OKLA. STAT. § 1 (1991).

114. See *Republic Fin. Corp. v. Mize*, 682 P.2d 207, 217-18 (Okla. 1983).

115. 46 OKLA. STAT. §§ 40-48 (1991).

116. 46 OKLA. STAT. § 43(A)(2)(a) (1991).

2. the nature of the breach(es) or default(s) claimed with reasonable specificity;
3. that the borrower has a right for thirty-five (35) days from the date the notice is sent to cure a breach or default and thus reinstate the mortgage;
4. the amount of money or action necessary to effect cure; and
5. that, if the breach or default is not cured, the mortgage may accelerate the debt and give the notice provided with regard to judicial foreclosure or otherwise foreclose the mortgage.¹¹⁷

The notice must also contain a provision, in bold and underlined type, to the effect that the notice contains important information concerning legal rights under the mortgage and Oklahoma law and must state that if the borrower has any questions, it should consult an attorney.¹¹⁸

If a non-homestead borrower is in default more than three times in a twenty-four-month period and has been notified as provided above, no additional notice of intention to foreclose will be required prior to acceleration. If a homestead mortgagor is in default more than four times in a twenty-four-month period and has been notified as provided above, the mortgagee need not provide an additional notice of intent to foreclose prior to acceleration.

If a mortgagee elects to use a power of sale granted in the mortgage, it must execute a written notice of sale directed to the borrower and to any person having an interest, claim, or lien of record in the property whose interest, claim or lien the mortgagee seeks to foreclose by the exercise of its power of sale.

When a notice of intention to foreclose is required, an affidavit stating that such notice has been properly sent must be attached to the notice of sale. If no notice of intention to foreclose is required, an affidavit to that effect must be attached to the notice of sale.

The notice of sale must state the occurrence of a breach or default of the mortgage and the general nature thereof, such as "failure to make a payment due," "failure to pay taxes," "failure to maintain property," etc. The election to use the power of sale, the date, time and place of the sale of the property, the legal description of the property as it appears in the mortgage and any street address of the property must be included in the notice. The notice must advise the borrower of the borrower's right to redeem the property from foreclosure by paying all principal, interest and other sums secured by the mortgage to the mortgagee prior to the execution and delivery of the deed. It must advise all persons claiming an interest in the property that the property will be sold subject to their claim unless they elect to join the exercise of the power of sale or that the mortgagee claims an interest superior to the claim of such persons and that their interests may be subject to being terminated by sale unless they take appropriate legal action.

The notice shall include, in bold and underlined type, a provision advising the borrower that if the mortgage is on the borrower's homestead, the property shall be sold pursuant to a power of sale without judicial foreclosure unless, at least ten days before the property is to be sold under a power of sale, the borrower sends written

117. *See id.* § 44.

118. *See id.* § 45.

notice by certified mail to the mortgagee stating that the property involved is the borrower's homestead and that judicial foreclosure is elected, and files of record a copy of such notice, containing a legal description of the property with the county clerk of the county in which the property is located. The notice must further advise the borrower in bold and underlined type, that if the property is sold pursuant to a power of sale, the borrower may avoid a deficiency judgment by sending a written notice by certified mail to the mortgagee, at least ten days before the property is to be sold under the power of sale, that states that the property involved is the borrower's homestead and that the borrower elects against a deficiency judgment. The notice must also contain a provision, in bold and underlined type, to the effect that the notice contains important information involving the property of the person receiving the same and state that he may want to seek legal advice.

The notice of sale must be personally served in the manner of service of process of civil cases. If the address of any party or unknown successor being served is not known to the mortgagee, then an affidavit in support of service by publication must be prepared and filed. The notice must be published in a newspaper authorized to publish legal notice in each county in which the property is to be sold. The notice must state the name of the mortgagor and the holder of any prior or junior lien, and must designate the persons whose unknown successors are being served. The notice must be published once a week for four consecutive weeks, the first publication date being at least thirty days prior to the sale date.

The notice must be recorded with the affidavit of mailing notice of intent to foreclose discussed above in the office of the county clerk. The filing of the notice of sale with the county clerk constitutes *lis pendens* of the foreclosure proceeding.

To verify compliance with the power of sale proceedings, proof of the returns of service, the affidavit in lieu of personal service, and proof of publication must be recorded with the county clerk at any time prior to the recording of the mortgagee's deed.

The sale may be held in any county in which part of the property to be sold is situated at the time designated in the notice of sale. Title 46, section 46 of the Oklahoma Statutes states that the property is sold to the highest bidder with no minimum bid requirement.¹¹⁹ The purchaser must post ten percent of the bid within twenty-four hours of the sale and the deposit must be placed in escrow by the mortgagee.

There are certain requirements under section 46 relating to change in location or postponement of the sale.

The mortgagee's deed is without warranty and must identify the interests foreclosed of the mortgagee and of others, including the parties involved. It must indicate where the documents evidencing those interests are recorded and must recite that the deed is executed by the mortgagee exercising a power of sale. The signature and title or authority of the person signing the deed as grantor is sufficient proof of the signer's authority.

119. *See id.* § 46.

The deed constitutes conclusive evidence of the fulfillment of the statutory requirements in favor of purchasers for value and without actual notice so long as the failure to meet those requirements would otherwise render the sale only voidable and, even if the sale is void, after the passage of two years from the date of the recording of the deed. Further, there is no right of redemption after the sale, except for the federal statutory rights of the federal government.

If the foreclosure was by power of sale, Oklahoma law creates a dual system for deficiency judgment depending upon whether the property is homestead or non-homestead. For non-homestead property, the borrower is liable for any deficiency between the amount received from the sale and the total indebtedness, which includes principal, interest, costs and expenses of the sale, and attorney's fees, as the note and mortgage provide. The action for deficiency must be brought within ninety days of the sale.¹²⁰

The borrower has a right to obtain a judicial finding of the fair market value of the property as of the date of the sale. If the fair market value is determined, the fair market value rather than the foreclosure sale price is used to determine the deficiency. The borrower must establish that the fair market value on the date of the sale exceeded the bid or sales price.

If the property is homestead property, the borrower can avoid a deficiency judgment under the power of sale by sending written notice to the lender by certified mail at least ten days prior to the scheduled foreclosure sale date. The borrower's notice must state that the property is homestead and that the borrower elects against a deficiency. If there is a question as to whether the property is the borrower's homestead, the lender may bring an action for deficiency and for the judicial determination of the homestead nature of the property.¹²¹

VII. Conclusion

A successful foreclosure practice requires expertise in the areas of civil procedure, debtor and creditor rights, bankruptcy, probate, real property title examination, divorce, commercial tax, federal consumer and banking regulations, and lien law. Each of these areas of law is impacted by frequent changes by the legislature, by Supreme Court decision, and by general practice procedures. Technology also plays an increasing role; the use of computers with adequate data management programs is vital to a flourishing foreclosure practice. Large mortgage servicing companies are placing increasing pressure and responsibility on practitioners in this area for faster and cheaper services. It is imperative, however, that practitioners do not sacrifice the quality of their services for quantity of services.

120. See 46 OKLA. STAT. § 43 (1991).

121. See *id.*

APPENDIX 1: CHECKLIST — THE OKLAHOMA POWER OF SALE
MORTGAGE FORECLOSURE ACT, 46 OKLA. STAT. § 40

___ Original Mortgage — required language relating to power of sale:
A power of sale has been granted in this mortgage. A power of sale may allow the mortgagee to take the mortgaged property and sell it without going to court in a foreclosure action upon default by the mortgagor under this mortgage.

___ Notice of Intent to Foreclose

___ By Mortgagee

___ By certified mail

___ To the Borrower's last know address

___ Notice must include:

___ Name/Address of Mortgagee

___ Nature of the breach or default

___ Advisement of right to cure within 35 days

___ Amount of money necessary to cure/reinstate

___ Advisement if not cured, mortgagee may accelerate debt and give notice of sale

___ *Statement that it contains important information concerning legal rights under the mortgage and Oklahoma law and if the borrower has any questions, an attorney should be consulted.*

Exception: FNMA/FHLMC loans and successive Notice of Intents within 24 month period

___ 35 day cure period expires

___ Notice of Sale

___ Directed to

___ borrower

___ prior encumbrancers (subject to)

___ junior encumbrancers (foreclosed out)

___ designates the person(s) whose unknown successors are being served

___ States occurrence of default and the general nature thereof

___ Advises of the election to use the power of sale

___ Date _____

___ Time _____

___ Place _____ (May be anywhere in the county)

___ Legal description

___ Street address

___ Advise borrower of right to redeem prior to execution and delivery of deed

___ Advise prior encumbrancers that property will be sold subject to (unless joinder)

- ___ Advise junior claimants interests are being terminated unless legal action taken
- ___ *If the mortgage is on the borrower's homestead, the property shall be sold pursuant to a power of sale without judicial foreclosure unless, at least 10 days before property is to be sold, borrower sends written notice by certified mail to mortgagee stating that the property involved is the borrower's homestead and that judicial foreclosure is elected and files of record a copy of such notice with county clerk, containing legal description. If property is sold pursuant to power of sale, the borrower may avoid a deficiency judgment by sending a written notice by certified mail to mortgagee, 10 days prior to sale date, that state property involved is homestead and that borrower elects against deficiency judgment. This notice contains information involving the property of the person receiving same and that he may want to seek legal advice.*
- ___ Personally served (12 OKLA. STAT. § 2004) within 30 days of sale date
- ___ served _____
- ___ served _____
- ___ served _____
- ___ served _____
- ___ served _____
- ___ If address of party not known, then Affidavit in Support of Service by Publication
- ___ Published
- ___ Newspaper: _____
- ___ 1 x 4 Date of first publication _____
- ___ More than 30 days prior to sale date
- ___ Notice of Sale recorded with County Clerk —
- ___ Book/Page: _____
- ___ Notice of Sale
- ___ Affidavit of Mailing Notice of Intent to Foreclose
- ___ Within 10 days of expiration of 35 day cure period
- ___ Supporting sale docs recorded with County Clerk —
- ___ Book/Page: _____
- ___ Returns of Service/Affidavit in Support of Service by Publication
- ___ Publisher's Affidavit
- ___ Recorded prior to recording of Mortgagee's Deed
- ___ Mortgagee's Deed
- ___ Signed by _____ (Apparent Authority)
- ___ Purchaser: _____
- ___ 10% of bid paid within 24 hours and placed in escrow by mortgagee
- ___ Without warranty
- ___ Identifies mortgagees and other interests foreclosed
- ___ Identifies parties involved
- ___ Indicates where documents evidencing those interests are recorded
- ___ States that deed is executed by mortgagee exercising power of sale

_____ No right of redemption except for USA/IRS

_____ Recorded on _____ in Book/Page _____

Deed may only be set aside as void or voidable for 2 years.

APPENDIX 2: SINGLE FAMILY MORTGAGE
FORECLOSURE ACT OF 1994

The Secretary of Housing and Urban Development may foreclose on any defaulted single family mortgage regardless of when the mortgage was executed by utilizing the remedies set forth in the Single Family Mortgage Foreclosure Act 1994, found at 12 U.S.C. §§ 3751-3768. This Act applies only to mortgages held in the name of the Secretary of Housing and Urban Development. If a mortgage is held or serviced by a private entity, although it may be a HUD-insured loan, regular state statutory procedures must be followed. There is pending legislation in Congress to make this procedure applicable to any HUD or VA insured loan.

The sales are conducted by "Foreclosure Commissioners" — usually private attorneys who are officially appointed and designated by the Secretary of HUD. The Foreclosure Commissioner must first send a Notice of Default and Foreclosure Sale. The "Notice" must include:

1. The Foreclosure Commissioner's name, telephone number, and address
2. The legal description of the subject property or street address
3. The recording information of the mortgage
4. Identification of the failure to make payment, including amount due, other costs, reinstatement information and date of default, other or event of default
5. The bidding and payment requirements for the foreclosure sale, including time and method of payment of the balance of the foreclosure purchase price, that all deposits and balance of purchase price shall be paid by certified check or cashier's check, and that no deposit will be required of the Secretary when the Secretary bids at the sale
6. The date, time and location of the foreclosure sale
7. A statement that the foreclosure is being conducted in accordance with the Act
8. Description of costs to be paid by the purchaser upon transfer of title

The Act states that the Foreclosure Commissions will serve Notice of Default and Foreclosure Sale upon the following persons and in the following manner, and no additional notice will be required to be served, notwithstanding any notice requirements of any State or local law.

The Notice of Default and Foreclosure Sale must be filed not less than 21 days before the date of the foreclosure sale with the County Clerk and must be sent by certified mail to the current property owner, the original mortgagor and all subsequent mortgagors who remain liable on the note, all tenants, and all lien holders. The statute says that notice by mail is deemed duly given upon mailing, whether or not received by the addressee and whether or not a return receipt is received or the notice is returned.

The Notice must also be published once a week for three successive weeks prior to the sale in a legal publication in the county.

The sale must be conducted in the matter and time and place as identified in the Notice and must be conducted by the Foreclosure Commissioner. The Foreclosure Commissioner will issue a deed to the purchaser upon receipt of the entire purchase price. The law states that notwithstanding any state law to the contrary, delivery of

a deed by the Foreclosure Commissioner is a conveyance of the property and constitutes passage of good and marketable title to the mortgaged property. The purchaser of property under the Act is presumed to be a bona fide purchaser.

Lastly, there is no right of redemption in the mortgagor subsequent to a foreclosure completed pursuant to the Act. With regard to the preemption of State laws regarding rights of redemption, a foreclosure is considered completed upon the date and at the time of the foreclosure sale. The Deed acts as return of the sale as well as the conveyance, so there are certain required recitals in the deed. These include the date, time and place of the sale, a statement that the foreclosed mortgage was held by the Secretary, the recording information of the mortgage, the details of service, the date and place of filing of the Notice, a statement that the sale was conducted in accordance with the Act and with the terms of the Notice, and the name of the successful bidder and price paid.

There still exists the right to seek a deficiency judgment after this nonjudicial procedure. The federal statute is silent with respect to timing and the interplay of state law. Therefore, would it be most prudent to ask that the mortgage be released and the note canceled to alleviate any possibility that a deficiency judgment may relate back in time to some earlier procedure?

APPENDIX 3: CHECKLIST — THE FEDERAL
SINGLE FAMILY MORTGAGE
FORECLOSURE ACT OF 1994, 12 U.S.C §§ 3571-3768

- ___ Confirm designation of Foreclosure Commissioner
 - ___ Obtain a copy of the written designation executed by the Secretary, General Counsel or Field Assistant General Counsel of HUD. (24 CFR § 29.101 designation is conclusive evidence Foreclosure Commissioner has been determined to be qualified by Secretary of HUD)
 - ___ Obtain evidence of identity and authority of person acting on behalf of the Commissioner if appointed by unique title or position as opposed to being appointed by name
 - ___ In the event a substitute Foreclosure Commissioner has been appointed, obtain evidence of the substitute designation and service of the substitute designation as required.
- ___ Notice of Default and Foreclosure Sale
 1. The Foreclosure Commissioner's name, telephone number, and address;
 2. The legal description of the subject property or street address;
 3. The recording information of the mortgage;
 4. Identification of the failure to make payment, including amount due, other costs, reinstatement information and date of default, other, or event of default;
 5. The bidding and payment requirements for the foreclosure sale, including time and method of payment of the balance of the foreclosure purchase price, that all deposits and balance of purchase price shall be paid by certified check or cashier's check, and that no deposit will be required of the Secretary when the Secretary bids at the sale;
 6. The date, time and location of the foreclosure sale (must be between 9:00 a.m. and 4:00 p.m.);
 7. A statement that the foreclosure is being conducted in accordance with the Act;
 8. Description of costs to be paid by the purchaser upon transfer of title.
- ___ Evidence of proper service of Notice of Default and Foreclosure Sale
 - ___ Affidavit of Mailing
 - ___ Sent to all lien holders, both junior and inferior
 - ___ Sent no later than 21 days before foreclosure sale to . . .
 - ___ those certain parties found in the public record as it existed 45 days before the date originally set for the foreclosure sale
- ___ Proof of Publication
 - Published 1 x 3 successive weeks in newspaper of general circulation in county
 - ___ Prior liens?
 - ___ If sale proceeds are being used to pay off superior liens, obtain releases.

- ____ Foreclosure Commissioner's Deed
 - ____ Record of Sale shown in deed or accompanying affidavit
 - Date, time and place of sale
 - Statement that foreclosed mortgage was held by the Secretary
 - Date of the mortgage, date of recording, office of recording and book and page
 - Details of the service of the Notice of Default and Foreclosure Sale, including names, addresses and date on which notices were mailed; name of the newspaper and date of publication
 - Date and place of filing the Notice of Default and Foreclosure Sale
 - State that the foreclosure was conducted in accordance with the Act and the Notice of Default and Foreclosure Sale
 - Name of the successful bidder and the amount of the successful bid
 - ____ Book ____Page____ of filing Commissioner's Deed and date of filing
- ____ If sale canceled by reinstatement or otherwise, Notice of Cancellation of Sale must be filed in the same place and manner as the Notice

DURATION, EXTENSION AND RELEASE OF JUDGMENT LIENS (HISTORICAL) (2/1/98)

Jurisdiction	Time Period	Documents Required	Filing Office	Duration	How Extended	How Released
State District Court	Prior to 10/1/78	Judgment	Court Clerk - Judgment Docket	5 years from rendition	General Execution - Court Clerk	Release filed with Court Clerk
	10/1/78 - 11/1/88	Certified Copy of JE	County Clerk	5 years from rendition	General Execution - Court Clerk	Release filed with Court Clerk
	11/1/88 - 1/1/91	Aff of Judgment and Certified Copy of JE	County Clerk	5 years from rendition	General Execution or Garnishment - Court Clerk/County Clerk	Released filed with Court Clerk
	1/1/91 - 6/1/91	Certified Copy of JE	County Clerk	5 years from rendition	General Execution or Garnishment - Court Clerk/County Clerk	Release filed with Court Clerk
	6/1/91 - 10/1/93	Affidavit of Judgment/ Certified Copy of JE	County Clerk	5 years from rendition	General Execution or Garnishment - Court Clerk/County Clerk	Release filed with Court Clerk
	10/1/93 - 11/1/97	Statement of Judgment	County Clerk - Judgment Index	5 years from rendition	General Execution or Garnishment - Court Clerk/County Clerk	Release of Judgment Lien filed with County Clerk
	11/1/97 -	Statement of Judgment	County Clerk - Judgment Index	5 years from rendition	General Execution, Garnishment or "Notice of Renewal of Judgment" - Court Clerk/County Clerk	Release of Judgment Lien filed with County Clerk
Domestic - Allimony	9/1/91	Judgment	Court Clerk ? [Court imposed lien]	???	General Execution or Garnishment	Release and Satisfaction filed with court clerk

Jurisdiction	Time Period	Documents Required	Filing Office	Duration	How Extended	How Released
Domestic - Child Support	10/1/85 - 5/15/86	Certified Copy of JE	County Clerk	5 years from filing* [Superior to all liens exc. 1st mtg]	General Execution	Release and Satisfaction filed with court clerk
	5/15/86 - 10/1/87	Certified Copy of JE	County Clerk	5 years from filing* [priority established when filed]	General Execution	Release and Satisfaction filed with court clerk
	10/1/87 -	Certified Copy of JE	County Clerk	5 years from filing* [Obligation does not become dormant but lien does]	General Execution or Garnishment	May be released by DHS or party entitled to support
Small Claims	Prior to 10/1/79	Judgment	Court Clerk - Judgment Docket	5 years from rendition	General Execution	Release filed with Court Clerk
	10/1/79 - 10/1/82	Judgment and Certified Copy of JE	Court Clerk - Judgment Docket and County Clerk	5 years from rendition	General Execution	Release filed with Court Clerk
	10/1/82 -	Statement of Judgment	County Clerk	5 years from rendition	General Execution or Garnishment	Release filed with County Clerk
Federal District Court	prior to 10/1/78	Certified Copy of JE	Oklahoma, Tulsa and Muskogee Counties	5 years from rendition	Same as state court	Same as state court.
	10/1/78 -	"Domesticated" JE	All other counties	5 years from rendition	Same as state court	Same as state court.
	10/1/78 -	Same as st. dist. court	Same as st. dist. court	Same as st. dist. court	Same as st. dist. court	Same as st. dist. court
Judgments under FDCPA	5/29/91 -	Certified Copy of Abstract of Judgment	County Clerk [filed as tax lien]	20 years from filing	Notice of Renewal [approved by court] filed with Court Clerk	Release filed with County Clerk
Foreign Judgments	5/15/68 -	Certified Copy of JE	County Clerk after properly "domesticated"	5 years from filing	Same as st. dist. court	Same as st. dist. court