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# MORTGAGES IN NEW MEXICO

## MARK STYLES\*

In New Mexico, the financing of real estate is most commonly achieved through the use of a mortgage. The purpose of this article is to review the basic legal framework governing real property mortgages in New Mexico.<sup>1</sup> The applicable statutes and case law<sup>2</sup> relevant to mortgages in New Mexico are discussed.

### I. MORTGAGE AS A LIEN

A mortgage in New Mexico is a lien upon real estate.<sup>3</sup> As a lien, a mortgage passes no title to the mortgaged property.<sup>4</sup> Explaining these principles, the supreme court in *Kuntsman v. Guaranteed Equities, Inc.*,<sup>5</sup> stated: "New Mexico has never departed from the early definition of a 'mortgage' as a 'conveyance of real estate, or some interest therein, defeasible upon the payment of money or the performance of some other condition.'"<sup>6</sup> As a result, a mortgage cannot constitute the "color of title" needed for purposes of a claim of adverse possession.<sup>7</sup> Section 48-7-1 of the New Mexico statutes changes the common law rule that the mortgagee is entitled to possession of mortgaged property.<sup>8</sup> Unless the mortgage provides otherwise, the owner of the real property, not the mortgage holder, has the right of possession.<sup>9</sup>

As a lien, a mortgage must secure an obligation from the mortgagor to the mortgagee. Typically, a promissory note evidences a debt from

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1. A detailed analysis of remedies, including the specifics of foreclosure procedure and law, is not within the scope of this article. This article does not extend to personal property mortgages or security interests. This discussion also does not cover matters of federal law such as Truth in Lending, Real Estate Settlement Procedures Act, Interstate Land Sales Act, Federal Trade Commission rules, federal banking statutes, and regulations governing federal guarantees of loans secured by residential property.

2. The first reported New Mexico case containing the word "mortgage" is *Chaves v. Gutieres*, 1 N.M. 147 (1857).

3. See, e.g., *Slemmons v. Massie*, 102 N.M. 33, 690 P.2d 1027 (1984); *State ex rel. Hill v. District Court of Eighth Judicial Dist.*, 79 N.M. 33, 439 P.2d 551 (1968); *Griffith v. Humble*, 46 N.M. 113, 122 P.2d 134 (1942); *Eccles v. Will*, 23 N.M. 623, 170 P. 748 (1918).

4. See, e.g., *Texas American Bank/Levelland v. Morgan*, 105 N.M. 416, 733 P.2d 864 (1987); *Cleveland v. Bateman*, 21 N.M. 675, 158 P. 648 (1916).

5. 105 N.M. 49, 728 P.2d 459 (1986).

6. *Id.* at 50 (quoting *Palmer v. City of Albuquerque*, 19 N.M. 285, 298, 142 P. 929, 933 (1914)).

7. *Slemmons*, 102 N.M. at 34, 690 P.2d at 1028. The requirements for an adverse possession claim are more fully set forth in N.M. STAT. ANN. § 37-1-22 (1978).

8. *Kitchen v. Schuster*, 14 N.M. 164, 89 P. 261 (1907).

9. N.M. STAT. ANN. § 48-7-1 (1978).

the mortgagor to the mortgagee.<sup>10</sup> Analyzing the provisions of loan documents, the New Mexico Supreme Court in *Gonzales v. Tama*, stated: "This court has held that if a note and mortgage are made at the same time and in relation to the same subject as parts of one transaction, they will be construed together as if they were parts of the same instrument."<sup>11</sup> Thus, as with other contracts, it is necessary to consider all of the documents related to the transaction when evaluating the terms and conditions of a mortgage.<sup>12</sup> Even so, where the provisions of a note vary from the terms of the mortgage securing it, the provisions of the note control.<sup>13</sup>

It should be recognized that a mortgage is different from other interests in real property. It is not a vendor's lien.<sup>14</sup> A real estate contract has also been held not to be an "equitable mortgage."<sup>15</sup> Since no title passes, a junior mortgagee is not liable to a senior mortgagee for the debts of the mortgagor.<sup>16</sup>

## II. DEEDS AS MORTGAGES

New Mexico follows the great weight of authority that a deed may constitute a mortgage.<sup>17</sup> Parol evidence may be introduced to show that a deed was given as a mortgage.<sup>18</sup> In *Boardman v. Kendrick*, the supreme court noted some of the reasons for allowing the use of parol evidence. These include the potential for fraud by the grantor, mistake, or the need for such proof in determining the intention of the parties.<sup>19</sup> In determining whether a deed is a mortgage, the supreme court has also explained:

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10. For clarification purposes, a mortgagor is the person who owns the real estate. The mortgagor borrows money from the mortgagee. The mortgagor grants the mortgage to the mortgagee. The lender is the mortgagee. See also N.M. STAT. ANN. § 37-1-16 (1978) concerning extensions of the statute of limitations on a debt and the recording of a notice so as to continue the mortgage securing the obligation.

11. 106 N.M. 737, 738, 749 P.2d 1116, 1117 (1988). See also *Comer v. Hargrave*, 93 N.M. 170, 598 P.2d 213 (1979); *Samples v. Robinson*, 58 N.M. 701, 275 P.2d 185 (1954).

12. See *Gonzales*, 106 N.M. at 738, 749 P.2d at 1117.

13. *Samples*, 58 N.M. 701, 275 P.2d 185.

14. *Bingaman v. Cook*, 79 N.M. 627, 447 P.2d 507 (1968). See also *Zumwalt v. Goodwin*, 133 F.2d 984 (10th Cir. 1943).

15. *Bishop v. Beecher*, 67 N.M. 339, 355 P.2d 277 (1960).

16. It is improper for a court to grant a judgment in favor of the senior mortgagee against the junior mortgagee on the same piece of property. See *Federal Nat'l Mortgage Ass'n v. Rose Realty, Inc.* 79 N.M. 281, 442 P.2d 593 (1968).

17. See, e.g., *Toulouse v. Chillili Coop. Ass'n*, 108 N.M. 220, 770 P.2d 542 (1989); *Trujillo v. Montano*, 64 N.M. 259, 327 P.2d 326 (1958); *Boardman v. Kendrick*, 59 N.M. 167, 280 P.2d 1053 (1955); *Sargent v. Hamblin*, 57 N.M. 559, 260 P.2d 919 (1953); *Palmer v. City of Albuquerque*, 19 N.M. 285, 142 P. 929 (1914); *King v. Warrington*, 2 N.M. 318 (1882). See also 3 R. POWELL, LAW OF REAL PROPERTY ¶ 447 (1986); Annotation, *Deed Absolute on its Face, With Contemporaneous Agreement or Option for Repurchase by Grantor, As Mortgage vel non*, 155 A.L.R. 1104 (1945).

18. *Alexander v. Cleveland*, 13 N.M. 524, 86 P. 425 (1906); *Boardman*, 59 N.M. 167, 280 P.2d 1053.

19. 59 N.M. at 173, 280 P.2d at 1058 (citing 4 POMEROY'S EQUITY JURISPRUDENCE § 1196 (5th ed.)).

A deed, absolute in form, is presumed in law to be an absolute conveyance, and, in the absence of a showing of fraud, mistake, ignorance or undue influence, the burden is on the one seeking to establish it as a mortgage to overcome this presumption by clear, unequivocal and convincing evidence.<sup>20</sup>

Section 47-1-39 likewise recognizes that a deed may be a mortgage.<sup>21</sup> Thus, a document which appears to be a deed may really be a mortgage.

The intention of the parties at the time the deed was executed is a key factor when evaluating if a deed is a mortgage.<sup>22</sup> When making its review, a court will evaluate other evidence, including relinquishment of possession, passage of time, payment of taxes, construction of improvements and the execution of contracts to sell the property.<sup>23</sup> The New Mexico Supreme Court has stated:

One test which may be applied in determining the nature of the transaction is whether there exists mutuality and reciprocity of rights between the parties. In other words, it may be helpful to determine whether the grantee has the right to compel the grantor to pay the consideration named in the agreement for reconveyance. If he can compel such payment the transaction is generally regarded as a mortgage, while if he cannot compel such payment the transaction is generally regarded a conditional sale.<sup>24</sup>

Elaborating on this test, the supreme court has held:

The great weight of authority supports the position that the existence of an indebtedness running from the grantor to the grantee is essential to a conclusion that a deed be construed as a mortgage. Not only must there be the indebtedness, but the rights and remedies of the parties must be mutual, that is, there must be the right of the grantee to demand and enforce his debt and the obligation of the grantor to pay.<sup>25</sup>

### III. STATUTORY FORM OF MORTGAGE

New Mexico statutes clarify the minimum legal requirements of a mortgage. Section 47-1-27 establishes that a statutory form of mortgage

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20. *Toulouse*, 108 N.M. at 222, 770 P.2d at 544 (quoting *Bell v. Ware*, 69 N.M. 308, 309, 310 P.2d 706, 707 (1961)). See also *Ringwald v. Lowe*, 35 N.M. 185, 291 P. 492 (1930).

21. N.M. STAT. ANN. § 47-1-39 (1978). This section states:

A deed in substance following the forms entitled "mortgage" or "deed of trust" shall when duly executed have the force and effect of a mortgage or deed of trust by way of mortgage to the use of the mortgagee and his heirs and assigns with mortgage covenants and upon statutory mortgage condition as defined in the following two sections to secure the payment of the money or the performance of any obligation therein specified. The parties may insert in such mortgage any other lawful agreement or condition.

22. *Raulie v. United States*, 400 F.2d 487 (10th Cir. 1968); *Sargent v. Hamblin*, 57 N.M. 559, 570, 260 P.2d 919, 929 (1953).

23. *Sargent*, 57 N.M. at 571, 260 P.2d at 930.

24. *Id* at 570.

25. *Bell*, 69 N.M. at 312, 366 P.2d at 708. Cf. *Trujillo v. Montano*, 64 N.M. 259, 327 P.2d 326 (1958), where the supreme court held that the deed given by the grantor to the grantee was an unconditional sale, subject only to an option to repurchase.

may be used and that the statutory form is a sufficient mortgage form in New Mexico.<sup>26</sup> This statute also provides that the statutory forms may be "altered as circumstances require, and the authorization of such forms shall not prevent the use of other forms."<sup>27</sup> Section 47-1-44(6) sets forth the statutory form of mortgage.<sup>28</sup> While this form effectively and legally creates a mortgage, it is the most skeletal of possible forms.<sup>29</sup>

#### IV. STATUTORILY DEFINED LANGUAGE

A number of words and phrases commonly used in mortgages are defined by New Mexico statutes. In order to have a valid mortgage, a "granting" clause is necessary. Section 47-1-32 states: "In a conveyance of real estate the word 'grant' shall be a sufficient word of conveyance without the use of the words 'give, bargain, sell and convey' and no covenant shall be implied from the use of the word, 'grant.'"<sup>30</sup> Section 47-1-40 establishes and defines the phrase "mortgage covenants."<sup>31</sup> By inserting the words "mortgage covenants" in a mortgage, the standard legal representations of the mortgagor to the mortgagee are established. Likewise, section 47-1-41 defines the words "statutory mortgage condi-

26. N.M. STAT. ANN. § 47-1-27 (1978).

27. *Id.* See also *id.* § 47-1-39. Most mortgages contain additional agreements and provisions.

28. *Id.* § 47-1-44.

29. *Id.*

30. *Id.* § 47-1-32. Compare section 47-1-32 with section 47-1-14 which defines the words "bargained and sold."

31. N.M. STAT. ANN. § 47-1-40 (1978) states:

In a mortgage or deed of trust by way of mortgage of real estate "mortgage covenants" shall have the full force and meaning and effect of the following words and shall be applied and construed accordingly: "the mortgagor for himself, his heirs, executors, administrators and successors, covenants with the mortgagee and his heirs, successors and assigns that he is lawfully seized in fee simple of the granted premises; that they are free from all incumbrances; that the mortgagor has good right to sell and convey the same; and that he will, and his heirs, executors, administrators and successors shall, warrant and defend the same to the mortgagee and his heirs, successors and assigns forever against the lawful claims and demands of all persons."

The definition of "mortgage covenants" includes the representation that the mortgagor is lawfully seized in fee simple of the granted premises. As a result, mortgage covenants would be violated at the time of inception of the mortgage if the mortgagor only held a purchaser's interest in the real property pursuant to a real estate contract. In New Mexico, the purchaser under a real estate contract merely holds equitable title in the real estate and is therefore not lawfully seized in the real estate. See, e.g., *Marks v. City of Tucumcari*, 93 N.M. 4, 595 P.2d 1199 (1979); *Bank of Santa Fe v. Garcia*, 102 N.M. 588, 698 P.2d 458 (1985). The seller under a real estate contract, on the other hand, holds legal title. *Marks*, 93 N.M. 4, 595 P.2d 1199; *Bank of Santa Fe*, 102 N.M. 588, 698 P.2d 458. The supreme court in *First National Bank of Belen v. Luce*, 87 N.M. 94, 529 P.2d 760 (1974), found that a mortgage granted by the seller under a real estate contract did not attach to the real property. The court in that case stated: "It would appear to us that at the time [the mortgagor] executed the mortgage to the Bank, the only interest he owned in such real estate involved a possibility of reverter to him in the event of a default in payment of the real estate contract." *Id.* at 95, 529 P.2d at 761. This result is consistent with the holding in *In re Simpson*, 56 Bankr. 586 (D.N.M. 1986), where the New Mexico bankruptcy court held that a seller's interest pursuant to a real estate contract is personal property in the form of a general intangible.

tion."<sup>32</sup> These words establish the basic obligations of the mortgagor in connection with the mortgage.

## V. RIGHTS COVERED BY MORTGAGES

A mortgage on real property in New Mexico may cover all of the mortgagor's rights in the real property. Section 47-1-34 of the New Mexico statutes states: "In a conveyance or mortgage of real estate all rights, easements, privileges and appurtenances belonging to the granted estate shall be included in the conveyance, unless the contrary shall be stated in the deed, and it shall be unnecessary to enumerate or mention them generally or specifically."<sup>33</sup> Thus, a properly drafted mortgage should

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32. N.M. STAT. ANN. § 47-1-41 (1978) provides:

In a mortgage or deed of trust by way of mortgage of real estate the words, "statutory mortgage condition" shall have the full force, meaning and effect of the following words and shall be applied and construed accordingly: "in the event any of the following terms, conditions or obligations are broken by the mortgagor, this mortgage (or deed of trust) shall thereupon at the option of the mortgagee, be subject to foreclosure and the premises may be sold in the manner and form provided by law, and the proceeds arising from the sale thereof shall be applied to the payment of all indebtedness of every kind owing to the mortgagee by virtue of the terms of this mortgage or by virtue of the terms of the obligation or obligations secured hereby:

A. mortgagor shall pay or perform to mortgagee or his executors, administrators, successors or assigns all amounts and obligations as provided in the obligation secured hereby and in the manner, form, and at the time or times provided in the obligation or in any extension thereof;

B. mortgagor shall perform the conditions of any prior mortgage, encumbrance, condition or covenant;

C. mortgagor shall pay when due and payable all taxes, charges, and assessments to whomsoever and whenever laid or assessed upon the mortgaged premises or on any interest therein;

D. mortgagor shall, during the continuance of the indebtedness secured hereby keep all buildings on the mortgaged premises in good repair and shall not commit or suffer any strip or waste of the mortgaged premises;

E. mortgagor shall pay when due all state and federal grazing lease fees; and

F. mortgagor shall keep the buildings on the mortgaged premises insured in the sum specified and against the hazards specified in the mortgage for the benefit of the mortgagee and his executors, administrators, successors and assigns. The insurance shall be in such form and in such insurance companies as the mortgagee shall approve. Mortgagor shall deliver the policy or policies to the mortgagee and at least two days prior to the expiration of any policy on the premises shall deliver to mortgagee a new and sufficient policy to take the place of the one so expiring. In the event of the failure or refusal of the mortgagor to keep in repair the buildings on the mortgaged premises or to keep the premises insured, or to deliver the policies of insurance, as provided; or to pay taxes and assessments, or to perform the conditions of any prior mortgage, encumbrance, covenant or condition, or to pay state and federal grazing lease fees, the mortgagee and its executors, administrators, successors or assigns may, at his option make such repairs, or procure such insurance, or pay such taxes or assessments, or pay such state and federal grazing lease fees, or perform such conditions and all monies thus paid or expenses thus incurred shall be payable by the mortgagor on demand and shall be so much additional indebtedness secured by the mortgage.

33. *Id.* § 47-1-34.

pick up all real property rights of the mortgagor in the mortgaged property.<sup>34</sup>

## VI. EXTENT OF MORTGAGE LIEN

Considerable case law exists in New Mexico as to the extent of the lien created by a mortgage. Two clauses of central importance to the issue are future advance clauses and dragnet clauses. Establishing the basic law in this area, section 48-7-9 states:

Every mortgage or other instrument securing a loan upon real estate and constituting a lien, or the full equivalent thereof, upon the real property securing such loan, may secure future advances and the lien of such mortgage shall attach upon its execution and have priority from the time of recording as to all advances, whether obligatory or discretionary, made thereunder until such mortgage is released of record; provided, that the lien of such mortgage shall not exceed at any one time the maximum amount stated in the mortgage.<sup>35</sup>

This statute removes the distinction under prior law between obligatory and discretionary advances.<sup>36</sup>

Mortgages in New Mexico often contain a "dragnet clause." A dragnet clause has been defined as a "provision in a mortgage in which the mortgagor gives security for past and future advances as well as present indebtedness."<sup>37</sup> Dragnet clauses which purport to secure all debts, past, present and future between parties are generally disfavored and must be

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34. A proper legal description is essential. See *infra* notes 83-92 and accompanying text. See also 1969 Opinion of Attorney General No. 69-86 which states that improvements, such as homes, outbuildings, etc., are considered part of the real estate and the value of such improvements are considered in arriving at the determination of the value of such real property. See also N.M. STAT. ANN. §§ 69-1-1 through 69-10-4 (Repl. Pamp. 1989); O'Kane v. Walker, 561 F.2d 207 (10th Cir. 1977); Padilla v. Roller, 94 N.M. 234, 608 P.2d 1116 (1980); Sachs v. Board of Trustees, 89 N.M. 712, 557 P.2d 209 (1976); Johnson v. Gray, 75 N.M. 726, 410 P.2d 948 (1966); Rock Island Oil & Ref. Co. v. Simmons, 73 N.M. 142, 386 P.2d 239 (1963) (concerning minerals and oil and gas); N.M. STAT. ANN. §§ 47-3-1 to -5 (1978) (governing solar rights); N.M. STAT. ANN. §§ 72-1-7 through 72-18-1 (Repl. Pamp. 1985); and Sun Vineyards, Inc. v. Luna County Wine Dev. Corp., 107 N.M. 524, 760 P.2d 1290 (1988) (concerning water rights).

35. N.M. STAT. ANN. § 48-7-9 (Repl. Pamp. 1987).

36. See, e.g., House of Carpets, Inc. v. Mortgage Inv. Co., 85 N.M. 560, 514 P.2d 611 (1973); Heller v. Gates City Bldg. & Loan Ass'n, 75 N.M. 596, 408 P.2d 753 (1965). Regarding an issue tangentially related to future advances, the court has reviewed whether property subject to a trust may secure a pre-existing debt. In International State Bank v. Bray, 87 N.M. 350, 533 P.2d 583 (1975), the court was faced with a situation where property subject to a trust was mortgaged to a bank. A pre-existing debt existed at the time the mortgage was granted. The mortgage provided that it secured "all other indebtedness of the undersigned . . . contracted or to be contracted, and due or to be due up to an amount of \$30,000.00." It was not until after the bank had advanced \$22,917.00 in new funds that the bank learned of the assertion that the property was subject to a trust. The court held that a transfer of trust property as security for a pre-existing debt is not a transfer for value. Therefore, the court limited the lien of the mortgage to the \$22,917.00 of new money disbursed prior to the time the bank learned of the claim that the property was subject to a trust. The mortgage was held not to secure pre-existing monies or any monies advanced after the date of such notice.

37. In re Bass, 44 Bankr. 113, 114 (D.N.M. 1984); see also Uransky v. First Fed. Sav. & Loan Ass'n, 684 F.2d 750, 756 n.5 (11th Cir. 1982); Ruidoso State Bank v. Castle, 105 N.M. 158, 159, 730 P.2d 461, 462 (1986).

strictly construed.<sup>38</sup> The supreme court has explained the basis for this policy:

[I]n lending money secured by property, recording statutes provide for notice to other potential lenders that indicate the upper limits of that financing. . . . Because potential lenders rely upon the recorded mortgages to determine whether to make other loans there must be certainty as to the extent to which a mortgage encumbers property.<sup>39</sup>

While a dragnet clause may extend to all obligations from the mortgagor to the mortgagee,<sup>40</sup> the court will review the facts and circumstances in each particular case.<sup>41</sup> In making its determination, the court will focus upon the intent of the parties as evidenced by the circumstances surrounding the mortgage and the nexus between the mortgage and obligations involved.<sup>42</sup> A failure to specifically provide that a pre-existing debt is intended to be secured by the mortgage has resulted in the determination by the court that the parties did not intend for the dragnet clause to extend to such prior debt.<sup>43</sup>

The extent of the lien pursuant to a mortgage is limited. As noted above, section 48-7-9 limits the amount secured by a mortgage at any one time to the maximum amount stated in the mortgage.<sup>44</sup> Apparently, in instances where a future advance clause is contained in a mortgage, but the maximum amount is not stated, the mortgage will secure an amount up to the face amount of the note.<sup>45</sup> The amount secured also includes the interest, costs, and attorneys' fees related to such amount.<sup>46</sup> Sums owed in excess of the permitted secured amount are unsecured.<sup>47</sup>

It is not clear in New Mexico, however, to what extent certain advances qualify as future advances and are thereby secured by the mortgage. As noted above, courts have determined that a future advance clause is applicable to the face amount of the note, plus interest, costs and attorneys' fees.<sup>48</sup> It has not been judicially determined in New Mexico, though, whether or not advances pursuant to the mortgage for such things as insurance, property taxes, to protect the collateral, to maintain

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38. *Uransky*, 684 F.2d at 756 n.5; *In re Bass*, 44 Bankr. at 115; *FDIC v. Peterson*, 27 Bankr. 95, 97 (M.D. Fla. 1983); *Ruidoso State Bank*, 105 N.M. at 160, 730 P.2d at 463.

39. *New Mexico Bank & Trust Co. v. Lucas Bros.*, 92 N.M. 2, 4, 582 P.2d 379, 381 (1978). See also *infra* notes 93-99 and accompanying text.

40. See *Clovis Nat'l Bank v. Harmon*, 102 N.M. 166, 692 P.2d 1315 (1985).

41. See *In re Bass*, 44 Bankr. 113; *Ruidoso State Bank*, 105 N.M. 158, 730 P.2d 461.

42. *Ruidoso State Bank*, 105 N.M. at 160, 730 P.2d at 463.

43. *Id.*

44. Presumably, based upon the language of the statute, the amount secured can be increased and decreased repeatedly over time, so long as the amount does not exceed the stated maximum amount.

45. *In re Bass*, 44 Bankr. at 116; *Pioneer Sav. & Trust v. Rue*, 109 N.M. 228, 794 P.2d 418 (1990).

46. *Pioneer Sav. & Trust*, 109 N.M. at 232, 794 P.2d at 422; *Lucas Bros.*, 92 N.M. at 5, 582 P.2d at 382.

47. *In re Bass*, 44 Bankr. at 116; *Pioneer Sav. & Trust*, 109 N.M. at 232, 794 P.2d at 422. It is important to note that the excess amount does not merely lose lien priority over other liens.

48. See *supra* note 45.

the collateral or to repair the collateral would be secured in the absence of a future advance clause.<sup>49</sup>

## VII. ESCROW OF FUNDS

Mortgages often require that an escrow account be established with the mortgagee to insure the timely payment by the mortgagor of real estate taxes, property insurance and other charges required by the mortgage.<sup>50</sup> Section 48-7-8 limits the size of escrows established for this purpose.<sup>51</sup> The statute prohibits an accumulation in an escrow account of monies in an amount which exceeds the total escrow charges for two months, plus the pro rata accrual on an annual basis for such charges. Once each year, upon the demand of the mortgagor, excess monies in an escrow account must be credited to the principal amount secured by the mortgage or applied as otherwise provided in the mortgage.<sup>52</sup>

## VIII. INSURANCE AND CONDEMNATION PROCEEDS

As a general proposition, insurance and condemnation proceeds are handled as provided in the mortgage. Typically, mortgagors want to receive the proceeds.<sup>53</sup> Mortgagees, on the other hand, generally want to apply all proceeds to payment of the mortgagor's debt. In instances where the collateral is a single family residence, though, a New Mexico statute provides that the mortgagor may require that the insurance proceeds be applied toward the repair and replacement of the damaged property.<sup>54</sup> In order for this to occur, the mortgagor must establish, to the satisfaction of the mortgagee, that the repair will restore the property to a value at least equal to the balance owed to the mortgagee at the time of the damage to the property.<sup>55</sup>

## IX. INSURANCE NOTICE

Mortgagees may not tie the extension of credit to the purchase of insurance from a particular insurer. Under section 59A-16-14(A) of the New Mexico Insurance Code,<sup>56</sup> a lender is specifically prohibited from requiring coverage "through a particular insurer, agent, solicitor or broker" and must inform the mortgagor of his rights regarding the purchase

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49. To date, there has been no reported New Mexico opinion answering this question.

50. For example, such other charges might include payments on a prior ground lease or encumbrance.

51. N.M. STAT. ANN. § 48-7-8 (Repl. Pamp. 1987).

52. *Id.*

53. Sometimes the mortgagor will want to use the proceeds to rebuild the damaged property.

54. N.M. STAT. ANN. § 48-7-10 (Repl. Pamp. 1978).

55. *Id.* See also *infra* notes 146-55 and accompanying text.

56. N.M. STAT. ANN. §§ 59A-1-1 *et seq.*

of insurance.<sup>57</sup> As a result, an insurance notice is typically provided by the mortgagee to the mortgagor prior to or at the closing of a real estate loan.

## X. PREPAYMENT PENALTIES

New Mexico has adopted a specific statute prohibiting prepayment penalties only on home loans.<sup>58</sup> Section 56-8-30, regarding prepayment of home loans, states: "No provision in a home loan, the evidence of indebtedness of a home loan, a real estate contract or an obligation secured by a real estate mortgage requiring a penalty or premium for prepayment of the balance of the indebtedness is enforceable."<sup>59</sup> Section 56-8-24 of the Residential Home Loan Act defines for the purposes of that statute a residence as a "dwelling and the underlying real property designed for occupancy by one to four families."<sup>60</sup> This definition also includes mobile homes and condominiums.<sup>61</sup> There is no analogous provision for loans secured by commercial (i.e. non-residential) property. Section 56-8-24(B), in pertinent part, defines "home loan" for purposes of that act as:

1. A loan made to a person, all or a substantial portion of the proceeds of which will be used to purchase, construct, rehabilitate, sell a residence or refinance a loan on a residence which loan will be secured in whole or in part by a security interest in the residence evidenced by a real estate mortgage;
2. The principal amount secured by a real estate mortgage on a residence when that real estate mortgage was executed by the mortgagor in connection with his purchase of the property, and the obligation secured represents a part of the deferred purchase price.<sup>62</sup>

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57. *Id.* N.M. STAT. ANN. § 59A-16-14(A) (Repl. Pamp. 1988) states in pertinent part: No person engaged in selling real or personal property or in the business of financing the purchase of real or personal property, or lending money on the security of real or personal property, and no trustee, director, officer, agent or other employee of any such person, shall require, as a condition precedent, concurrent or subsequent to the sale, or financing the purchase of such property, or to lending money upon the security of a mortgage thereon, or as a condition precedent, concurrent or subsequent, for the renewal or extension of any such loan or mortgage or for the performance of any other act in connection therewith, that the person purchasing such property, or for whom such purchase is to be financed, or for whom the money is to be loaned, or for whom such extension, renewal or other act is to be granted, or performed, negotiate any policy of insurance or renewal thereof covering such property through a particular insurer, agent, solicitor or broker. The lender is required to inform the buyer of his rights regarding the placing of insurance on a form prescribed by the superintendent. The buyer must signify that he has been so informed. This section shall not prevent the exercise by any person of his right to designate the terms and provisions of the policy and the amount of coverage with respect to insurance on property pledged or mortgaged to such person.

It is doubtful that violation of this statute would render a mortgage unenforceable. See *Forrest Currell Lumber Co. v. Thomas*, 81 N.M. 161, 464 P.2d 891 (1970).

58. See Residential Home Loan Act, N.M. STAT. ANN. §§ 56-8-22 to -30 (Repl. Pamp. 1986).

59. N.M. STAT. ANN. § 56-8-30 (Repl. Pamp. 1986).

60. *Id.* § 56-8-24(A).

61. *Id.*

62. *Id.* § 56-8-24(B).

Likewise, a real estate mortgage is defined for purposes of that act to be: "[A]ny document creating a security interest in a residence owned by a person to secure payment of a home loan as defined in Paragraphs (1) and (2) of Subsection B of this section and includes mortgages and deeds of trust."<sup>63</sup> Thus, a loan secured by a mortgage on a residence may be prepaid without penalty, regardless of the provisions of the mortgage.

## XI. DUE ON SALE CLAUSES

In New Mexico, a due on sale statute has been adopted.<sup>64</sup> As a general proposition, due on sale clauses in mortgages made or assumed after October 15, 1982, are enforceable.<sup>65</sup> Due on sale clauses are statutorily defined to mean provisions which authorize a mortgagee to accelerate indebtedness and declare due and payable sums secured by a mortgage if all or any part of the real property, or an interest in the real property, is sold or transferred by the mortgagor.<sup>66</sup> A due on sale clause is similarly statutorily deemed to exist if a mortgagee is entitled to require an increase in the interest rate as a condition to approving an assumption of a loan.<sup>67</sup> Section 48-7-20 provides that a mortgagee may not exercise its rights pursuant to a due on sale clause upon the occurrence of any of the following events:

1. The creation of a subordinate lien or encumbrance which does not relate to a transfer of rights of occupancy in the property;
2. Creation of a purchase money security interest for household appliances;
3. Transfer by devise, descent or operation of law upon the death of a joint tenant or tenant by the entirety;
4. Granting a lease or interest of three years or less not containing an option to purchase;
5. Transfer to a relative resulting from the death of a borrower;
6. Transfer where the spouse or children of the borrower become an owner of the property;
7. Transfer resulting from a decree of a dissolution of marriage, legal separation agreement or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property; or
8. Transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property.<sup>68</sup>

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63. *Id.* § 56-8-24(F).

64. *Id.* §§ 48-7-15 to -24.

65. *See id.* §§ 48-7-17 and -19.

66. *Id.* § 48-7-16.

67. *Id.*

68. *Id.* § 48-7-20. *See also* State ex rel. Bingaman v. Valley Sav. & Loan Ass'n, 97 N.M. 8, 636 P.2d 279 (1981), where the court held due on sale clauses in mortgages prior to the adoption of the due on sale statute to be unenforceable in instances where the mortgagee was unable to show substantial impairment. The court considered due on sale clauses to be a "restraint on alienation." *Cf.* Quintana v. First Interstate Bank, 105 N.M. 784, 737 P.2d 896 (Ct. App. 1987) (due on sale clause in a commercial mortgage is not a restraint on alienation).

Except in the situations listed in the statute, a mortgagee may accelerate a loan upon the mortgagor's sale of the property if the mortgage contains a due on sale clause.

## XII. LIMITATION OF INDEMNIFICATION

Most mortgages contain some sort of indemnification agreement. Indemnification clauses sometimes cover a wide range of issues. New Mexico statutes, however, prohibit certain indemnity agreements in which the indemnitee seeks to be indemnified against liability arising from the indemnitee's own actions.<sup>69</sup> A violation of section 56-7-1 renders an indemnity agreement absolutely void.<sup>70</sup>

## XIII. STATUTORY REDEMPTION PERIOD

The parties to a mortgage may agree to a reduction in the statutory redemption period.<sup>71</sup> Generally, redemption of real property sold under a judgment or decree of foreclosure may occur at any time within nine

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69. N.M. STAT. ANN. § 56-7-1 (Repl. Pamp. 1986) states:

Any provision, contained in any agreement relating to the construction, installation, alteration, modification, repair, maintenance, servicing, demolition, excavation, drilling, reworking, grading, paving, clearing, site preparation or development, of any real property, or any improvement of any kind whether on, above or under real property, including without limitation, buildings, shafts, wells and structures, by which any party to the agreement agrees to indemnify the indemnitee or the agents and employees of the indemnitee, against liability, claims, damages, losses or expenses, including attorney fees, arising out of bodily injury to persons or damage to property caused by, resulting from, in whole or in part, the negligence, act or omission of the indemnitee, or the agents or employees of the indemnitee, or any legal entity for whose negligence, acts or omissions any of them may be liable, is against public policy and is void and unenforceable, unless such provision shall provide that the agreement to indemnify shall not extend to liability, claims, damages, losses or expenses, including attorney fees arising out of:

A. The preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications by the indemnitee, or the agents or employees of the indemnitee; or

B. The giving of or the failure to give directions or instructions by the indemnitee or the agents or employees of the indemnitee, where such giving or failure to give directions or instructions is the primary cause of bodily injury to persons or damage to property.

The word 'indemnify' as used in this section includes, without limitation, an agreement to remedy damage or loss caused in whole or in part by the negligence, act or omission of the indemnitee, the agents or employees of the indemnitee, or any legal entity for whose negligence, acts or omissions any of the foregoing may be liable.

Section 56-7-2 is a similar statutory provision pertaining to indemnity agreements regarding any well for oil, gas or water or mine for any mineral.

70. *Sierra v. Garcia*, 106 N.M. 573, 746 P.2d 1105 (1987).

71. N.M. STAT. ANN. § 39-5-19 (1978) states, in pertinent part:

The parties to any such instrument may, by its terms, shorten the redemption period to not less than one month, but the district court may in such cases, upon a sufficient showing before judgment that redemption will be effected, increase the period of redemption to not exceed nine months, notwithstanding the terms of such instrument.

See also *First Nat'l Bank in Albuquerque v. Contrends, Inc.*, 90 N.M. 33, 559 P.2d 410 (1977); *Ulivarri v. Lovelace*, 39 N.M. 36, 38 P.2d 1114 (1934).

months of the date of the foreclosure sale.<sup>72</sup> By agreement, however, the parties to a mortgage may reduce the redemption period to not less than one month.<sup>73</sup> Enforcement of a reduced redemption period as established by a mortgage is discretionary with the court.<sup>74</sup> The reduced redemption period is applicable to junior mortgagees, even in instances where the junior mortgagee did not have a clause reducing the redemption period in its mortgage.<sup>75</sup>

#### XIV. MORTGAGES ON COMMUNITY PROPERTY

The signature of both spouses generally should be obtained when placing a mortgage on community real property. Section 40-3-13 states that both spouses generally must join in all mortgages on community real property:

Except for purchase-money mortgages and except as otherwise provided in this subsection, the spouses must join in all transfers, conveyances or mortgages or contracts to transfer, convey or mortgage any interest in community real property and separate real property owned by the spouses as co-tenants in joint tenancy or tenancy in common. . . . Any transfer, conveyance, mortgage or lease or contract to transfer, convey, mortgage or lease any interest in the community real property or in separate real property owned by spouses as co-tenants in joint tenancy or tenancy in common, attempted to be made by either spouse alone in violation of provisions of this section shall be void and of no effect, except that either spouse may transfer, convey, mortgage or lease directly to the other without the other joining therein.<sup>76</sup>

Interpreting this statute, the New Mexico Supreme Court has held that the words "join in" as used in this section mean "sign."<sup>77</sup>

#### XV. JOINT TENANCIES

Among other forms of ownership, real property may be held by joint tenants in New Mexico. Joint tenancy is created and defined by statute.<sup>78</sup> Section 47-1-35 provides:

72. N.M. STAT. ANN. § 39-5-18 (Cum. Supp. 1989). However, in *Plaza National Bank v. Valdez*, 106 N.M. 464, 745 P.2d 372 (1987), and *Sun Country Savings Bank of New Mexico v. McDowell*, 108 N.M. 528, 775 P.2d 730 (1989), the court calculated the applicable redemption period from the date of the order confirming the sale. Such a calculation is directly contrary to the statute which requires that the redemption period begin on the date of the foreclosure sale.

73. N.M. STAT. ANN. § 39-5-19 (1978).

74. *Id.*

75. *McDowell*, 108 N.M. 528, 775 P.2d 730. In *McDowell*, a junior mortgagee's redemption rights were limited to a shorter redemption period as established in the prior mortgage. For a discussion concerning the possible absence of redemption rights when a mortgage on a ground lease is foreclosed, see *infra* notes 141-45 and accompanying text.

76. N.M. STAT. ANN. § 40-3-13 (Repl. Pamp. 1989); see generally *Arch, Ltd. v. Yu*, 108 N.M. 67, 766 P.2d 911 (1989); *Hannah v. Tennant*, 92 N.M. 444, 589 P.2d 1035 (1979). *But cf.* *Otero v. Wheeler*, 102 N.M. 770, 701 P.2d 369 (1985) (court found that a wife had ratified her husband's sale of community real estate).

77. *Hannah*, 92 N.M. 444, 589 P.2d 1035.

78. N.M. STAT. ANN. § 47-1-26 (1978) provides:

A joint tenancy in real property is one owned by two or more persons, each owning

In a conveyance or mortgage of real estate, the designation of two or more grantees "as joint tenants," shall be construed to mean that the conveyance is to the grantees as joint tenants and not as tenants in common, and to the survivor of them and the heirs and the assigns of the survivor.<sup>79</sup>

The execution of a mortgage by one joint tenant, though, does not encumber the interest in the real property of the other joint tenants.<sup>80</sup> A joint tenant is only able to encumber the interest in the real property held by such joint tenant.<sup>81</sup> The execution of a mortgage which encumbers one joint tenant's interest in New Mexico real property does not sever the joint tenancy.<sup>82</sup>

## XVI. LEGAL DESCRIPTIONS

It is critical that each mortgage completely and accurately describe the property to be covered by the mortgage. New Mexico case law provides that a description in a conveyance, such as a deed or mortgage, is sufficient if it identifies the real property or the means by which the real property can be located. In *Comadina v. Edmondson*,<sup>83</sup> the court stated:

[i]t is fundamental that "in order to make a valid conveyance of land, it is essential that the land itself, the subject of the conveyance, be capable of identification, and, if the conveyance does not describe the land with such particularity as to render this possible, the conveyance is absolutely nugatory."<sup>84</sup>

In New Mexico, it is presumed that the mortgagor intended to convey something.<sup>85</sup> Therefore, the court should uphold the mortgage unless the description is so vague or contradictory that the court cannot ascertain what property in particular the mortgager meant to convey.<sup>86</sup> A description of property is not sufficient if it is capable of more than one interpretation, taking into account all data and extrinsic evidence.<sup>87</sup>

In *Hughes v. Meem*,<sup>88</sup> the court stated that the purpose of a valid legal description:

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the whole and an equal undivided share, by title created by single devise or conveyance when expressly declared in the will or conveyance to be a joint tenancy, or by conveyance from a sole owner to himself and others, or from tenants in common to themselves, or to themselves and others, or from husband and wife when holding as community property or otherwise to themselves or to themselves and others, when expressly declared in the conveyance to be a joint tenancy, or when granted or devised to executors or trustees.

79. *Id.* § 47-1-35.

80. *Texas American Bank/Levelland v. Morgan*, 105 N.M. 416, 733 P.2d 864 (1987).

81. *Id.*

82. *Id.*

83. 81 N.M. 467, 468 P.2d 632 (1970).

84. *Id.* at 469, 468 P.2d at 634 (quoting 4 TIFFANY, REAL PROPERTY § 990 (3d ed. 1939)).

85. *Id.* at 469, 468 P.2d at 634.

86. *Id.*

87. *Richards v. Renehan*, 57 N.M. 76, 253 P.2d 1046 (1953).

88. 70 N.M. 122, 371 P.2d 235 (1962).

is to identify such subject matter; and it may be laid down as a broad general principle that a deed will not be declared void for uncertainty in description if it is possible by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed. It is sufficient if the description in the deed or conveyance furnishes a means of identification of the land or by which the property conveyed can be located. . . . So, if a surveyor with the deed before him can, with the aid of extrinsic evidence if necessary, locate the land and establish its boundaries, the description therein is sufficient.<sup>89</sup>

Where the legal description is uncertain, extrinsic evidence may be used to ascertain the intent of the mortgagor.<sup>90</sup> Section 47-1-46 provides that real estate may be described by reference to a legal description contained in another recorded instrument, provided that the instrument containing the description by reference cites the relevant recording information so that the instrument containing the legal description can be located and the legal description identified.<sup>91</sup> When describing real property in a mortgage, it is best to specifically include and describe all of the real property interests which are intended to be covered.<sup>92</sup>

## XVII. RECORDATION

New Mexico has adopted recording statutes which are applicable to mortgages.<sup>93</sup> Recording a document in the real property records of the county clerk provides notice "to all the world of the existence and contents of the instrument so recorded from the time of recording."<sup>94</sup> The supreme court in *Jeffries v. Martinez*<sup>95</sup> held that section 14-9-3: "[P]rotects the rights of innocent purchasers for value without notice of unrecorded instruments. . . . Equitable principles require that the innocent purchaser should prevail over one who negligently fails to record a deed upon which he seeks to rely."<sup>96</sup> The New Mexico recording statute is a "notice"

89. *Id.* at 125-26, 371 P.2d at 238 (quoting 16 AM. JUR. (DEEDS) § 262).

90. *Garcia v. Garcia*, 86 N.M. 503, 525 P.2d 863 (1974); *see also Padilla v. City of Santa Fe*, 107 N.M. 107, 753 P.2d 353 (Ci. App. 1988); *Blumenthal v. Concrete Constructors Co.*, 102 N.M. 125, 692 P.2d 50 (1984); *Atlantic Ref. Co. v. Beach*, 78 N.M. 34, 436 P.2d 107 (1968); *Cordova v. Town of Atasco*, 53 N.M. 76, 201 P.2d 996 (1949); *Genteel v. Crossan*, 7 N.M. 589, 38 P.2d 247 (1894).

91. N.M. STAT. ANN. § 47-1-46 (1978); *see also id.* § 14-8-16 (Supp. 1989) (recording of legal descriptions).

92. *But see Ames v. Robert*, 17 N.M. 609 (1913); *see also supra* note 34.

93. N.M. STAT. ANN. § 14-9-1 (Repl. Pamp. 1988) provides: "All deeds, mortgages, United States patents and other writings affecting the title to real estate, shall be recorded in the office of the county clerk of the county or counties in which the real estate affected thereby is situated." *See also Shaeffer v. McCulloh*, 38 N.M. 179, 29 P.2d 46 (1934).

94. N.M. STAT. ANN. § 14-9-2 (Repl. Pamp. 1988). Section 14-9-3 also provides: "No deed, mortgage or other instrument in writing, not recorded in accordance with Section 14-9-1 (1978) shall affect title or rights to, in any real estate, of any purchaser, mortgagee in good faith or judgment lien creditor, without knowledge of the existence of such unrecorded instruments."

95. 93 N.M. 508, 601 P.2d 1204 (1979).

96. *Id.* at 510, 601 P.2d at 1206. *See also Jeffers v. Doel*, 99 N.M. 351, 658 P.2d 426 (1982).

statute<sup>97</sup> which is intended to protect "innocent purchasers for value without notice of unrecorded instruments who have invested money in property."<sup>98</sup> In order to be protected by the recording statute, though, a party must be a mortgagee in good faith.<sup>99</sup> Therefore, each time a mortgage is created, it should be recorded.

## XVIII. EXECUTION AND ACKNOWLEDGMENT

In order to be filed of record, a mortgage must be signed. Section 47-1-5 provides that all conveyances of real estate must be subscribed by the person transferring his title or interest in real property.<sup>100</sup> Section 47-1-6 provides that a seal or scroll is not necessary to the validity of any contract or conveyance regarding real property.<sup>101</sup>

In New Mexico, the signatures on a mortgage must be acknowledged in order for the mortgage to be recorded.<sup>102</sup> Section 14-8-4, in pertinent part, states: "Any instrument of writing, duly acknowledged and certified, may be filed and recorded. Any instrument of writing, not duly acknowledged and certified, may not be filed and recorded, nor considered of record, though so entered."<sup>103</sup> The New Mexico statutes provide a variety of acknowledgment forms.<sup>104</sup> The key to a legally effective acknowledgment in New Mexico is the inclusion of the words "was acknowledged" in the acknowledgment.<sup>105</sup> Courts have held, however, that

97. See, e.g., *Kuntsman v. Guaranteed Equities, Inc.*, 105 N.M. 49, 728 P.2d 459 (1986); *Citizens Bank of Clovis v. Hodges*, 107 N.M. 329, 757 P.2d 799 (Ct. App. 1988).

98. *Angle v. Slayton*, 102 N.M. 521, 523, 679 P.2d 940, 942 (1985); see also *Arias v. Springer*, 42 N.M. 350, 78 P.2d 153 (1938).

99. *Withers v. Board of County Comm'rs*, 96 N.M. 71, 628 P.2d 316 (Ct. App. 1981).

100. N.M. STAT. ANN. § 47-1-5 (1978); see also *Garcia v. Leo*, 30 N.M. 249, 231 P. 631 (1924); *McBee v. O'Connell*, 16 N.M. 469, 120 P. 734 (1911).

101. N.M. STAT. ANN. § 47-1-6 (1978); see, e.g., *Griffith v. Humble*, 46 N.M. 113, 122 P.2d 134 (1942); *Parker v. Beasley*, 40 N.M. 68, 54 P.2d 687 (1936); *Merchants Nat'l Bank v. Otero*, 24 N.M. 598, 175 P. 781 (1918). See also N.M. STAT. ANN. § 53-2-9 (Repl. Pamp. 1983) (validating, notwithstanding the lack of a seal that was previously required, all instruments executed prior to the effective date of the statute); N.M. STAT. ANN. § 3-11-4(C) (Cum. Supp. 1989) (providing that the failure to have a corporate seal or the failure to affix a corporate seal does not affect the validity of any instrument, or any action taken in pursuance thereof or in reliance thereon); N.M. STAT. ANN. § 14-13-9 (Repl. Pamp. 1988) (providing that the form of acknowledgment for a corporation which has no corporate seal may be modified with words indicating that the corporation does not have a seal); N.M. STAT. ANN. § 14-13-21(A) (Repl. Pamp. 1988) (indicating that the absence of a seal can be indicated by modifying the statutory short form of acknowledgment contained in section 14-13-23).

102. See N.M. STAT. ANN. § 14-9-1 (Repl. Pamp. 1988).

103. *Id.* § 14-8-4 (Repl. Pamp. 1988). Section 14-8-4 also provides, in pertinent part, that: "instruments acknowledged on behalf of a corporation need not have the corporation's seal affixed thereto in order to be filed and recorded."

104. See *id.* §§ 14-13-9, -19, -23.

105. *Id.* See also section 14-13-21 which defines the words "was acknowledged" as follows:

A. In the case of a natural person acknowledging that such person personally appeared before the officer taking the acknowledgment and acknowledge that he executed the acknowledged instrument as his free act and deed for the uses and purposes therein set forth;

B. In the case of a person acknowledging as principal by an attorney-in-fact that such attorney-in-fact appeared personally before the officer taking the acknowledgment and that the attorney-in-fact acknowledged that he executed the acknowl-

substantial compliance with the acknowledgment statutes is sufficient.<sup>106</sup>

## XIX. REMEDIES

Foreclosure is the basic remedy available to a mortgagee. The proceeds of a foreclosure sale are applied to the mortgagor's obligations secured by the mortgage.<sup>107</sup> A number of statutes are relevant to foreclosure proceedings.<sup>108</sup>

Possession of the property may be taken from the mortgagor prior to a foreclosure sale.<sup>109</sup> If the mortgage so provides, a mortgagee may take possession of the property and thereby become a "mortgagee-in-possession."<sup>110</sup> Likewise, a third party could be appointed receiver for the property by a court.<sup>111</sup>

edged instrument as the free act and deed of the principal for the uses and purposes therein set forth;

C. In the case of a partnership acknowledging by a partner or partners, that such partner or partners personally appeared before the officer taking the acknowledgment and that he or they acknowledged that he or they executed the acknowledged instrument as the free act and deed of the partnership for the uses and purposes there set forth;

D. In the case of a limited partnership acknowledged by a general partner or general partners, that such partner or partners personally appeared before the officer taking the acknowledgment and that he or they acknowledged that he or they executed the acknowledged instrument as the free act and deed of the limited partnership for the uses and purposes there set forth; and

E. In the case of a corporation or incorporated association acknowledging by an officer or agent of the corporation or incorporated association that such acknowledging officer or agent personally appeared before the officer taking the acknowledgment; that the seal affixed to the instrument is the corporate seal of the corporation or association, that the instrument was signed and sealed on behalf of the corporation or association by authority of its board of directors, and that the acknowledging officer or agent acknowledged that the acknowledged instrument was the free act and deed of such corporation or association for the uses and purposes there set forth.

N.M. STAT. ANN. § 14-13-21 (Repl. Pamp. 1988). In a case where the corporation or association has no corporate seal, this fact can be indicated by adding to the acknowledgment the words: "The corporation (or association) has no corporate seal." See, e.g., N.M. STAT. ANN. § 14-13-9 and -21(E) (Repl. Pamp. 1988).

106. See, e.g., *Security Fed. Sav. & Loan Ass'n v. Commercial Inv., Ltd.*, 92 Bankr. 488 (D.N.M. 1988). In *Security Federal*, the court found that a mortgagee substantially complied with the requirements for an acknowledgment. The mortgage showed the name of the corporation appearing just above the form of acknowledgment and the only information not appearing was the state of incorporation of the acknowledging corporation.

107. See *supra* notes 35-49 and accompanying text.

108. While it is outside the scope of this article to discuss in any detail New Mexico foreclosure practice and procedure, see generally New Mexico Rules of Civil Procedure for District Courts, N.M. STAT. ANN. §§ 39-5-1 to -23 (1978) (governing foreclosure sales), N.M. STAT. ANN. §§ 38-1-14 and -15 (Repl. Pamp. 1987) (concerning a notice of *lis pendens*), and N.M. STAT. ANN. § 38-3-1(d) (Repl. Pamp. 1987) (governing venue).

109. See N.M. STAT. ANN. § 48-7-1 (1978) and *supra*, text accompanying note 9.

110. *Davis v. Savage*, 50 N.M. 30, 168 P.2d 851 (1946). This remedy is disfavored as the mortgagee runs a risk of incurring liability to the mortgagor.

111. Typically, New Mexico mortgages provide that a receiver may be appointed. The actual appointment of a receiver, though, is subject to the discretion of the court. Mortgages often contain provisions stating that a receiver may be appointed by a court once a default has occurred, regardless of the solvency of the mortgagor, the condition of the property and/or the value of the real property. Mortgages also often grant the mortgagee-in-possession or the receiver the right to take all action necessary to manage the property, including but not limited to the right to make repairs, execute leases, and terminate leases.

## XX. ASSIGNMENT OF LEASES AND RENTS

Mortgages sometimes contain an assignment of leases and rents clause.<sup>112</sup> If the real property covered by the mortgage is property which generates income, the assignment of leases and rents is an important provision for the mortgagee. An assignment of leases and rents can be exercised by the mortgagee as an additional remedy.<sup>113</sup>

## XXI. ATTORNEYS' FEES

In New Mexico, attorneys' fees are not recoverable as damages unless granted by the mortgage.<sup>114</sup> Therefore, most mortgages contain an attorneys' fees clause.<sup>115</sup> Even so, attorneys' fee clauses in mortgages which grant a fixed amount or percentage are not favored.<sup>116</sup> Discussing the factors relevant when assessing the appropriate amount of the attorneys' fees, the supreme court in *Gonzales v. Tama* observed: "Among the many factors which properly may be considered in a determination thereof are the nature and extent of the services, the time necessarily consumed, the professional skill and experience of the attorney and the results accomplished. Each case must be governed by its own facts and circumstances."<sup>117</sup> Therefore, each case will be individually evaluated by the court regarding an award of attorneys' fees.

## XXII. RELEASES

Once the obligations secured by a mortgage have been satisfied, the mortgage needs to be released.<sup>118</sup> It is the duty of the mortgagee to release the mortgage.<sup>119</sup> A failure to release a mortgage may result in a

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112. In New Mexico, leases may be considered personal property. See *infra* notes 141-45 and accompanying text and *Western Sav. & Loan Ass'n v. CFS Portales Ethanol I*, 107 N.M. 143, 754 P.2d 520 (1988) and the cases cited therein. See also N.M. STAT. ANN. § 55-9-104(J) (Repl. Pamph. 1978) (providing that the secured transactions portion of the New Mexico Commercial Code does not apply "to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder"). Notice to others of the assignment of leases and the attempted perfection of the assignment of rents is generally accomplished by recording the assignment of leases and rents in the real property records of the county clerk. An assignment of leases and rents can be taken by way of a document separate from the mortgage.

113. The exercise of the assignment of leases and rents is generally accomplished through notice to the mortgagor and/or notice to the parties obligated to pay rent pursuant to the leases.

114. See, e.g., *State ex rel. Stanley v. Lujan*, 43 N.M. 348, 93 P.2d 1002 (1939); *Lujan v. Gonzales*, 84 N.M. 229, 501 P.2d 673 (Ct. App. 1972).

115. Mortgages also frequently give the mortgagee the right to collect as damages the costs and expenses incurred in litigation related to the mortgage and/or in the event of foreclosure. See also N.M. STAT. ANN. § 39-3-30 (1978) concerning costs in civil suits.

116. See, e.g., *Budagher v. Sunny Land Enters.*, 90 N.M. 365, 563 P.2d 1158 (1977).

117. 106 N.M. 737, 739, 749 P.2d 1116, 1118 (1988) (quoting *Featherstone v. Barash*, 382 F.2d 641, 644 (10th Cir. 1967)); see also *Fryar v. Johnsen*, 93 N.M. 485, 601 P.2d 718 (1979); *Sup. Ct. RULES ANN.* 16-105 (Recomp. 1986) (Rule of Professional Conduct).

118. See *supra* notes 107-11 and accompanying text.

119. N.M. STAT. ANN. § 48-7-4 (1978) provides:

That when any debt or evidence of debt secured by a mortgage or deed of trust upon any real estate in the State of New Mexico shall have been fully satisfied, it shall be the duty of the mortgagee, trustee or the assignee of such debt or other

fine against the mortgagee and may render the mortgagee liable in a civil action to the owner of the real estate.<sup>120</sup>

The New Mexico Supreme Court recently held that a release of a mortgage which resulted from a clerical error did not excuse the mortgagor's obligations.<sup>121</sup> In that case, the mortgage was rerecorded once the error was discovered. In its opinion, the supreme court did not discuss the impact, if any, upon lien priority as a result of the release and rerecording of the mortgage.<sup>122</sup>

### XXIII. MORTGAGE ASSIGNMENTS

Mortgages may be assigned.<sup>123</sup> Among other things, section 48-7-2 protects mortgagors whose mortgages have been assigned. Under section 48-7-2, the debt on an unrecorded assignment may be extinguished by the mortgagor's payment of principal and interest to the original mortgagee.<sup>124</sup> Where the assignment has been recorded, payment may be made to the assignee.<sup>125</sup> Section 47-1-44 sets forth a statutory form which can

evidence of debt, as the case may be, to cause the full satisfaction thereof to be entered on record in the office of the county clerk in the county where such mortgage or deed of trust is recorded.

*See also* New Mexico Bank & Trust Co. v. Lucas Bros., 92 N.M. 2, 582 P.2d 379 (1978).

120. N.M. STAT. ANN. § 48-7-5 (1978). The fine does not tend to be a great motivator since it is in an amount not less than \$10.00 nor more than \$25.00. *Id.* The prevailing landowner is also entitled to recover from the mortgagee the reasonable attorney's fee incurred by the owner in clearing the title to the property. *Id.* See also section 48-7-6, which provides for the release of a mortgage by an administrator or executor in the event of the death of the mortgagee.

121. Los Alamos Credit Union v. Bowling, 108 N.M. 113, 767 P.2d 352 (1989).

122. *Id.* See also Eldridge v. Salazar, 81 N.M. 128, 464 P.2d 547 (1970).

123. N.M. STAT. ANN. §§ 48-7-2 and -3 (1978).

124. N.M. STAT. ANN. § 48-7-2 states:

In cases where assignments of real estate mortgages are made subsequent to the date this act takes effect, and such assignments are not recorded in the office of the county clerk of the proper county, the mortgagor, his heirs, personal representatives or assigns may pay the principal debt secured by such mortgage or accrued interest thereof, prior to the recording of such assignment, to the mortgagee; that if an assignment of such mortgage appears upon the proper record of such county clerk, then such payment may be made to the last assignee whose assignment is so recorded, and such payments shall be effectual to extinguish all claims against such mortgagor, his heirs, personal representatives, or assigns, for or on account of such interest or such principal indebtedness.

*Cf.* Hayden v. Speakman, 20 N.M. 513, 150 P. 292 (1915) (decided prior to adoption of N.M. STAT. ANN. § 48-7-2).

125. N.M. STAT. ANN. § 48-7-2 also provides:

No transfer of any note, bond or other evidence of indebtedness, by endorsement or otherwise, where such indebtedness is secured by a mortgage on real estate within this state, shall prevent or operate to defeat the defense of payment of such interest or principal by the mortgagor, his heirs, personal representatives or assigns, where such payment has been made to the mortgagee whose mortgage is duly recorded or to the assignee whose assignment appears last of record in accordance with the provisions of this act [48-7-2, 48-7-3 1978]; provided, however, that the assignee who may hold an unrecorded assignment of a real estate mortgage which is immediately subsequent to such recorded mortgage or to the last recorded assignment shall have a right of action against his assignor to recover the amount of any such payment of interest or principal made to such assignor, as upon an account for money had and received for the use of such assignee.

be used to assign a mortgage.<sup>126</sup> In New Mexico, the word "assign" is sufficient to transfer the mortgage.<sup>127</sup>

In *Seasons, Inc. v. Atwell*,<sup>128</sup> the supreme court indicated a willingness to uphold mortgage assignments. In that case, a number of difficulties existed concerning the assignment.<sup>129</sup> Explaining its decision, the court stated:

An assignment and the language of an assignment may be informal as long as it shows an intention on the part of the owner of a right or interest in the property to transfer it. . . . We are thus concerned with the intent of the assignor and this is to be gleaned, if possible, from the document itself.<sup>130</sup>

Therefore, it is likely New Mexico courts would uphold most attempts to assign a mortgage.

A couple of New Mexico cases also have dealt with the rights of a person who receives a mortgage by way of assignment. In *Simpson v. Bilderbeck, Inc.*,<sup>131</sup> the supreme court upheld an assignment of a mortgage to an accommodation maker who had paid the underlying indebtedness. The court found that the accommodation maker in that case was subrogated to the lien rights of the initial mortgagee and that the mortgage could be foreclosed.<sup>132</sup> In *Johnson v. Sowell*,<sup>133</sup> the supreme court upheld the assignment of a mortgage to the initial mortgagor after the property had been sold by the initial mortgagor.<sup>134</sup> In that case, a partial assignment of a mortgage was likewise recognized.<sup>135</sup>

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126. *Id.* § 47-1-44(12).

127. N.M. STAT. ANN. § 47-1-43 (1978) defines the word "assign": "In an assignment of a mortgage or deed of trust by way of mortgage of real estate the word 'assign' shall be a sufficient word to transfer the mortgage or the beneficial interest under the deed of trust, without the words, 'transfer and set over.'"

128. 86 N.M. 751, 527 P.2d 792 (1974).

129. Among other things, the words "sell, transfer and convey" were used in lieu of the word "assigns", the mortgage was held by a person individually but was transferred by that person's partnership and the acknowledgment, despite the fact that the partnership executed the assignment, provided that the signature was by the partner individually. The court stated:

The facts before us raise no question as to the due execution of the document, that is to say, its execution by a person competent to execute it. Neither is the question presented as to its genuineness. Its execution by Mr. Nunley is not questioned, his signature is not claimed to be spurious, nor is anything said to have been added to or deleted from it following execution.

*Id.* at 754, 527 P.2d at 795.

130. *Id.*

131. 76 N.M. 667, 417 P.2d 803 (1966).

132. *Id.* at 670, 417 P.2d at 806.

133. 80 N.M. 677, 459 P.2d 839 (1969).

134. In *Johnson*, the mortgagor was entitled to be subrogated to the rights of the initial mortgagee. While the court felt that notice to the debtor should be given by the assignee in order to protect himself against subsequent assignees, the court held that the validity of an assignment of a "chase in action" is not affected by the failure of the assignee to give notice of the assignment to the debtor. *Id.* at 679, 459 P.2d at 841.

135. In permitting the partial assignment, the court, observing that an escrow of payments was involved, commented: "There has been no hardship on the appellees . . . , as there was no change in the manner or method of payments by them. They were to pay the escrow agent, who distributed and applied their payments as instructed." *Id.* at 680, 459 P.2d at 842. Partial assignments presumably would be recognized even in instances where no escrow agent was involved.

## XXIV. OUT OF STATE LENDERS

New Mexico has adopted statutes relating to foreign corporations that lend money secured by mortgages on New Mexico real property. Although foreign corporations generally are required to obtain a New Mexico certificate of authority before transacting business in New Mexico, section 53-17-1 provides a specific exception to this requirement for mortgages.<sup>136</sup> Therefore, it is clear that a foreign corporation may be a mortgagor or mortgagee without being required to qualify to transact business in New Mexico.<sup>137</sup> It should be noted, however, that further activity by a mortgagee, such as property marketing and property management might result in the requirement that the foreign corporation qualify to transact business in New Mexico.<sup>138</sup> While it is not necessary that foreign corporations be certified to transact business in the state prior to making a loan secured by a mortgage, most foreign corporation mortgagees must file a statement with the New Mexico Secretary of State appointing the Secretary of State their agent for service of process.<sup>139</sup>

136. N.M. STAT. ANN. § 53-17-1 (Repl. Pamp. 1983) states:

No foreign corporation shall transact business in this state until it has procured a certificate of authority to do so from the Commission. . . . Without excluding other activities which may not constitute transacting business in this state, a foreign corporation shall not be considered to be transacting business in this state, for the purposes of the Business Corporation Act, by reason of carrying on in this state any one or more of the following activities: . . .

G. Creating as borrower or lender, or acquiring, indebtedness or mortgages or other security interests in real or personal property;

H. Securing or collecting debts or enforcing any rights in property securing them;

I. Transacting any business in interstate commerce;

K. Investing in or acquiring, in transactions outside New Mexico, royalties and other non-operating interests and the execution of division orders, contracts of sale and other instruments incidental to the ownership of the non-operating mineral interest.

137. *Id.*

138. *Id.*

139. N.M. STAT. ANN. § 38-1-18 (Repl. Pamp. 1987) provides:

Any foreign corporation, foreign bank or foreign real estate trust without being admitted to do business in this state, may loan money in this state only on real estate mortgages, deeds of trust and notes in connection therewith, and take, acquire, hold and enforce the notes, mortgages or deeds of trust given to represent or secure money so loaned or for other lawful consideration. All such notes, mortgages or deeds of trust taken, acquired or held are enforceable as though the foreign corporation, foreign bank or foreign real estate trust for an individual, including the right to acquire the mortgaged property upon foreclosure or under other provisions of the mortgage or deed of trust, and to dispose of the same. Any such corporation, bank or trust except banks and institutions whose shares, certificates or deposit accounts are insured by an agency or corporation of the United States government shall first file with the Secretary of State a statement signed by its president, secretary, treasurer or general manager, that it constitutes the secretary of state its agent for the service of process for cases limited to, and arising out of such financial transactions, including therein the address of its principal place of business. Upon such service of process, the secretary of state shall forthwith forward all documents by registered or certified mail to the principal place of business of the corporation, bank or trust. Nothing in this section authorizes any such corporation, bank or trust to transact the business of a bank or trust company in this state.

See also Op. Att'y Gen. No. 69-13 (1969) and Op. Att'y Gen. No. 68-43 (1968).

## XXV. RESIDENTIAL LOAN SERVICING

New Mexico currently requires that residential loan servicers maintain an office or an agent in New Mexico. This requirement, found in section 58-21-27, applies only to mortgagees that service "single residential mortgages on New Mexico real estate."<sup>140</sup> The apparent purpose of this statute is to make it easier for New Mexico residential mortgagors to obtain information regarding the mortgage.

## XXVI. LEASEHOLD MORTGAGES

The status of mortgages covering property subject to a ground lease is currently unclear.<sup>141</sup> It had been assumed for many years that ground leases of sufficiently long duration covering real property in New Mexico constituted an interest in real property upon which a mortgage could be placed. This understanding is reflected in various New Mexico statutes and regulations.<sup>142</sup> The New Mexico Supreme Court, however, in *Western Savings & Loan Association v. CFS Portales Ethanol I Ltd.*,<sup>143</sup> held that "a leasehold or term for years is a chattel, not real property, no matter how long its term."<sup>144</sup> As a result, considerable confusion within the real

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140. In full, the statute reads:

Any business, organization or similar entity which services single residential mortgages on New Mexico real estate shall either maintain its principal office, a branch office or an agent in New Mexico for the purpose of providing information, including but not limited to, providing the interest to inquiries for mortgagors or their designated agents pertaining to data about their mortgage. Response to the mortgagor's inquiries shall be made within 10 working days from the date of inquiry.

N.M. STAT. ANN. § 58-21-27 (Cum. Supp. 1989). See Op. Att'y Gen. No. 87-40 (1987) (maintaining a post office box in New Mexico is not sufficient for purposes of this statute). It is unclear as to the impact of this statute upon the determination of whether or not a foreign lender is transacting business in New Mexico. See *supra* notes 136-39 and accompanying text.

141. In New Mexico, long-term ground leases are relatively common. Such ground leases typically let the lessee (tenant) make improvements on the property. The lease is usually for a sufficient term so that the economic benefit of the improvements can be recovered by the lessee. Upon termination of the lease, the right to use the property along with all improvements thereon usually reverts back to the lessor (owner).

142. Leasehold condominiums are authorized by N.M. STAT. ANN. § 47-7(B)-6 (Repl. Pamp. 1982). Title insurance is available insuring mortgages on leasehold estates. See the following New Mexico Title Insurance Regulations: No. 30-A-III-b governing original leasehold policy rates; No. 30-A-IV-b governing owner's or leasehold policies; No. 30-A-V-a governing reissue owner's or leasehold rates; No. 30-A-VII-l governing leasehold endorsements to owner's or loan policies; No. 30-B-IV-b governing leasehold owner's policies; No. 30-B-V-b governing leasehold loan policies. See also Title Insurance Form 4, New Mexico Leasehold/Owner's policy and Title Insurance Form 5, New Mexico Leasehold/Mortgage policy. Compare the foregoing with Section 48-7-20(4) of the Due on Sale Statute which provides that a lease for three years or less which does not contain a purchase option does not trigger a due on sale clause. See also *supra* notes 64-68 and accompanying text.

143. 107 N.M. 143, 754 P.2d 520 (1988).

144. *Id.* at 144, 754 P.2d at 521. This case arose in the unusual context of a certification from the United States District Court for the District of New Mexico to the New Mexico Supreme Court. The specific question involved was whether a 25-year ground lease and the buildings constructed on the land were real property and thus subject to redemption after a foreclosure sale. Curiously, the court compared the common law to the New Mexico Banking Code in reaching its decision. In its analysis, the court failed to distinguish between ground leases and other tenancies. The general consensus among lawyers and title insurance companies is that the decision in this case is wrong.

estate industry currently exists as to how to create and perfect liens on real property subject to a ground lease.<sup>145</sup>

## XXVII. CONDOMINIUM MORTGAGES

It is possible to take a mortgage on various interests in a condominium regime, provided the mortgagee complies with the requirements of the New Mexico Condominium Act.<sup>146</sup> In order to obtain a lien on a condominium unit, it is necessary to use the condominium unit description as the legal description.<sup>147</sup> The unit description of a validly created condominium is legally sufficient.<sup>148</sup>

Under the Condominium Act, a mortgage lien can only be placed against the mortgagor's interest in the condominium unit, not the real estate itself.<sup>149</sup> It is possible for a mortgagee to take a mortgage on the developer's "development rights" in the condominium project.<sup>150</sup> Pursuant to the Condominium Act, it is also possible for a condominium association to grant a mortgage upon the common elements.<sup>151</sup>

Other portions of the Condominium Act are specifically applicable to mortgagees. Section 47-7(B)-19 of the Condominium Act, governing the rights of mortgagees, states:

The declaration may require that all or a specified number or percentage of the mortgages or beneficiaries of deeds of trust encumbering the units or vendors of units under installment sales contracts approves specified actions of the unit owners or the association as a condition

145. In an effort to perfect liens against leasehold estates, mortgagees are presently forced to attempt to perfect their lien by both recording in the real property records and by filing in personal property records pursuant to Article 9 of the New Mexico Commercial Code, N.M. STAT. ANN. §§ 55-9-101 to -507 (Repl. Pamp. 1987).

146. *Id.* §§ 47-7(A)-1 to -7(D)-20 (Repl. Pamp. 1982).

147. N.M. STAT. ANN. § 47-7(B)-4 (Repl. Pamp. 1982) provides:

A description of a unit which sets forth the name of the condominium, the recording data for the declaration, the county in which the condominium is located and the identifying number of the unit is a sufficient legal description of that unit and all rights, obligations and interests pertinent to that unit which were created by the declaration or bylaws.

148. Commissioners' Comment No. 2 to Section 47-7(B)-4 states:

The intent of this section is that no description of a unit in a deed, lease, deed of trust, mortgage or any other instrument or document shall be subject to challenge for failure to meet any common law or other requirements so long as the requirements of this section are satisfied and so long as the declaration itself, together with the plats and plans which are a part of the declaration, provides a legally sufficient description.

149. N.M. STAT. ANN. § 47-7(C)-17(D) (Cum. Supp. 1989) provides:

Subsequent to recording the declaration as provided in the Condominium Act and while the real estate remains subject to that Act, no lien shall arise or be effective against the real estate. During the period, liens or encumbrances shall only arise or be created against each unit and the percentage of undivided interest in the common elements, appurtenant to the unit, in the same manner and under the same conditions as liens and encumbrances may arise or be created upon any other parcel of real property subject to individual ownership.

150. See N.M. STAT. ANN. § 47-7(B)-10 (Repl. Pamp. 1982) and Commissioners' Comments No. 2 and 3 thereto.

151. *Id.* § 47-7(C)-12 and Commissioners' Comments thereto.

of the effectiveness of those actions, but no requirement for approval may operate to deny or delegate control over the general administrative affairs of the association by the unit owners of the executive board or prevent the association or the executive board from commencing, intervening in or settling any litigation or proceeding or receiving and distributing any insurance proceeds except pursuant to Section 46 [47-7(C)-13 N.M.S.A. 1978] of the Condominium Act.<sup>152</sup>

Therefore, depending on the provisions in the declaration, a mortgagee might become involved when a condominium association desires to take certain actions.<sup>153</sup> A mortgagee will generally need to deal with a condominium association if the unit covered by the mortgage is damaged. Section 47-7(C)-13 provides that insurance proceeds must be paid to an insurance trustee, and not to a mortgagee.<sup>154</sup> In most cases, the insurance proceeds will be used by the insurance trustee to repair and restore the property.<sup>155</sup>

## XXVIII. DEED OF TRUST

New Mexico has adopted a Deed of Trust Act.<sup>156</sup> Prior to the Deed of Trust Act, all deeds of trust were essentially considered to be mortgages.<sup>157</sup> The Deed of Trust Act, among other things, establishes a private power of sale in certain instances. The Deed of Trust Act may not be used if the real property interest to be covered includes:

1. Any dwelling in the real estate designed for occupancy by one to four families, including mobile homes and condominiums;
2. Any real estate used for farming operations, including farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry or livestock; or
3. Oil and other liquid hydrocarbons or gas, including casehead gas, condensates and other gaseous petroleum substances or coal or other minerals in, on or under real estate including unpatented mining claims unless such minerals have not been severed from and are included in the surface estate.<sup>158</sup>

The Deed of Trust Act may only be used for loans in the amount of \$500,000.00 or more.<sup>159</sup> In order for a deed of trust to be covered by the Deed of Trust Act, the deed of trust must expressly provide that the Act applies to that particular deed of trust.<sup>160</sup> The Deed of Trust Act establishes a specific procedure for holding a private trustee's sale.

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152. *Id.* § 47-7(B)-19.

153. *Id.*

154. *Id.* § 47-7(C)-13.

155. *Id.* See also *id.* § 47-7A-7 (governing distribution of condemnation proceeds).

156. *Id.* §§ 48-10-1 to -21 (Repl. Pamp. 1987).

157. See, e.g., *McInerny v. Guaranteed Equities, Inc.*, 105 N.M. 207, 730 P.2d 1189 (1986); *Kuntsman*, 105 N.M. 49, 728 P.2d 459 (1986).

158. N.M. STAT. ANN. § 48-10-3(h)(3) (Repl. Pamp. 1987).

159. *Id.* § 48-10-4.

160. *Id.*

No real estate, however, can be sold pursuant to a private trustee's sale unless at least 180 days have elapsed since the date the notice of sale was recorded.<sup>161</sup> A sale of real estate pursuant to the power of sale in a deed of trust shall not occur after an action to foreclose the deed of trust has been commenced, unless the foreclosure action has been dismissed.<sup>162</sup> At the trustee's sale, the beneficiary (*i.e.*, the lender or mortgagee) is entitled to a credit bid in an amount up to the amount owed by the borrower.<sup>163</sup> Following a trustee's sale, the borrower does not have any right of redemption.<sup>164</sup> Prior to the date of the sale, however, the borrower has the right to reinstate the deed of trust by paying the amount then due, other than the portion of the principal which would not have been due had no default occurred, plus certain costs permitted by the statute.<sup>165</sup> Following a trustee's sale, if monies are still owed by the borrower to the lender, the lender may bring a suit to recover the deficiency within twelve months after the date of the sale.<sup>166</sup>

## XXIX. CONCLUSION

When creating a mortgage in New Mexico, a number of relevant considerations arise. The mortgage should reflect the intent of the parties and clearly set forth the various agreements. The mortgage should also comply with the legal requirements of New Mexico law. New Mexico statutes and the common law established by New Mexico courts, as discussed above, have created the legal parameters specifically applicable to mortgages on New Mexico real property. As the years go by, more questions will be answered by the courts and new statutes will be adopted by the legislature. The law in New Mexico governing mortgages, therefore, will continue to evolve.

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161. *Id.* § 48-10-10(c). Thus, the concern among lenders is that the Deed of Trust Act may merely convert a monthly payment schedule into a semi-annual payment schedule for the borrower.

162. *Id.* § 48-10-10(b).

163. *Id.* § 48-10-14(a).

164. *Id.* § 48-10-14(b).

165. *Id.* § 48-10-16.

166. *Id.* § 48-10-17.