A LENDER'S GUIDE TO FORECLOSURE ACTIONS†

By Bruce J. Bergman, Esq.*

For attorneys, mortgage foreclosure actions are highly technical, even arcane activities of their specialty; but for mortgagees, foreclosures are real and critical problems involving dollars and cents. Consummate legal skills may be needed to bring a foreclosure action to an ultimate conclusion, but the lender must guide himself by practical considerations and the mortgagee does himself a great service when he becomes knowledgeable about such considerations.

The silent films' old image of the villainous black-hatted mortgage collector who is the enemy of widows has no place in the modern professional real estate world. Nevertheless, it is a perception which persists in the minds of many people, even lenders. Perhaps that is why mortgage holders treat defaulting borrowers so casually. This is unfortunate. Compassion should not prevent lenders from adopting a meticulous approach to the preservation

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of cash flow and investment.

Every mortgage has a due date. It also usually specifies a grace period during which payment may be submitted—perhaps ten or fifteen days. It is not belaboring the obvious to suggest that you should have a system that flags due dates and requires certain action at the end of the grace periods.

Without consistent responses on the lender's part, delinquincy periods can become totally unmanageable. There must be some consistent due date which triggers a phone call and/or a form letter reminding the mortgagor that payment is overdue. Once a policy and a system is in place, you can proceed to expeditously protect your interests.

ACCELERATING THE BALANCE

If you are a lender, eventually (and sooner rather than later is preferable), you will have to deem some mortgages in default. You must now take action, and any action you take must proceed from a position of *strength.*

You obtain vital leverage by declaring the *entire* mortgage balance immediately due and payable. Your authority to do this is found in the usual "acceleration clause." In a typical example of this standard clause in New York (we will use principally New York examples in this article), the

mortgage covenants:

> That the whole of said principle sum and interest shall become due at the option of the mortgagee: after default in the payment of any instalment of principle or of interest for fifteen days; or after default after notice and demand either in assigning and delivering the policies insuring the building against loss by fire or in reimbursing the mortgagee for premiums paid on such insurance, as hereinbefore provided; or after default upon request in furnishing a statement of the amount due on the mortgage and whether any offsets or defenses exist against the mortgage debt, as hereinafter provided. An assessment which has been made payable in installments at the application of the mortgagor or lessee of the premises shall nevertheless, for the purpose of this paragraph be deemed due and payable in its entirety on the day the first installment becomes due or payable or a lien.

This clause places primary reliance upon the most common default—failure to pay principle and interest. Acceleration is also available for defaults of other types, but such defaults may well be treated differently by the courts from the treatment of payment defaults.

For example, failure to pay taxes is generally viewed by case law as less severe than neglect to submit a monthly payment. Consequently, the broad principles that we shall assert about the power of

acceleration may not be applicable for every variety of default.

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For example, failure to pay taxes is generally viewed by case law as less severe than neglect to submit a monthly payment. Consequently, the broad principles that we shall assert about the power of acceleration may not be applicable for every variety of default.

Acceleration clauses have consistently been upheld by the courts as valid and enforceable, and case law generally rejects arguments that they represent a penalty or forfeiture.

The Acceleration Letter

The mere failure of a mortgagor to honor particular conditions of the mortgage does not automatically accelerate the mortgage's maturity. The acceleration clause must be in the mortgage, the mortgagor must perform an act which falls within the terms of the clause, *and* the mortgagee must make an unequivocal election to declare the total principle balance due.

The mortgagee may exercise that unequivocal election by writing a letter or by actually instituting the foreclosure action. We recommend that he transmit the letter. The lender who starts out by undertaking a foreclosure loses valuable time preparing the documentation that counsel needs to start the action. Days are consumed in the mailing of the material, followed by however long it takes a busy law office to send the letter. In the meanwhile, all sorts of unfortunate developments (that we will discuss later) may occur.

Hence we recommend that you prepare the acceleration letter yourself, making sure that it is sent in accordance with the terms of the mortgage, that is, by registered, certified, or regular mail. Since certain unscrupulous mortgagors may be expecting a certified correspondence, and often refuse to accept such letters, you should consider mailing the letter by *both* certified and regular mail, thus virtually assuring receipt.

A suggested form of acceleration letter follows:

Dear .....,

By reason of your failure to pay the monthly payments of $ ..... each

of which became due on ..... day of ....., ... and ....., the mortgagee ..... has elected and does hereby elect to declare the entire mortgage indebtness immediately due and payable and formal demand is hereby made upon you for the payment of the principle balance of $ ....., together with the interest at the rate of .....% per annum from ....., which interest computed to ..... amounts to $ ..... (per diem rate is $ .....). The total amount owing as of the date hereof for which demand of payment is hereby made amounts to $ .....

Very truly yours,

.....

Having sent such a letter, *you* now have the upper hand.

Why Acceleration Is So Important

There are two major reasons why the submission of the acceleration letter is so critical. First, suppose the mortgagor is a chronic defaulter. Month after month, year after year, you have chased him for the money and you no longer want the expense and problem he represents. Before you accelerate the mortgage, the mortgagor is free to tender his arrears at any time, and you are bound to accept, even if you prefer not to. However, once you, the mortgagee,

have accelerated the balance, you need not accept arrears, and you may insist upon the full satisfaction of the mortgage.

Second, suppose this particular loan is at an interest rate well below the current market. No matter how tardy the mortgagor has been, or is, until you have validly accelerated the entire balance, you must accept a tender of arrears. But, *after* acceleration, you are free to foreclose or alternatively, to insist that the mortgagor enter into a mortgage modification or extension agreement at a *higher* rate of interest.

Another benefit of acceleration is that the mortgagee can demand that, as a condition of reinstating the loan, the mortgagor pay any legal fee that the lender has incurred in connection with the defaults. The mortgagor may deem this unfair—even outrageous—but the mortgagee is simply not obligaged to reinstate after acceleration.

The Tender Ruse

As we noted, if *before* acceleration the defaulting mortgagor actually tenders all that he owes (including late charges or any other fees required by the mortgagee and sanctioned by local law), the mortgagee *must* accept the tender. Of course, if the tender offer is less than full payment, it can be rejected. It is critical, however, that there must be an actual tender. A promise

to pay or a suggestion that "it can be worked out" is not the same as an actual submission of the sums due.

What occasionally trips up the unwary mortgagee is the particular tender after acceleration. Assume that you are a residential lender. A borrower is in arrears for three months at $800 per month. He is past due on a total of $2,400 plus late charges of 2 percent per month (as permitted in some states), or $48. Instead of submitting $2,448, he sends $2,400. It is tempting to accept. But you don't have to do it.

If this is a mortgage that you wish to rid of, or if you desire to increase the interest rate, you need not hesitate in rejecting the offer. Indeed, if you accept the tender, the acceleration may be deemed *waived* and you are back where you started.

We recommend that under these circumstances, you reject the purported tender with a letter like the following:

Dear .....,

We have received certain check(s) from you purportedly submitted as payments toward your mortgage.

However, as you have been informed, the entire principle balance of the

mortgage has been accelerated and has become due. We need not, and will not, accept anything less than full payment.

Accordingly, the sum(s) submitted by you are rejected and returned herewith, as follows:

(List checks)

Please feel free to discuss this matter further with us. (An optional phrase, if you wish at this juncture to enter into a modification or extension agreement.)

Very truly yours,

.....

KEEPING UP THE PRESSURE

How many times have you had the experience of (or heard about) a foreclosure action that dragged on for an extended period while the parties negotiated a settlement. To be sure, any defaulting mortgagor who has the wherewithal to take advantage of legal process can effectively tie up a foreclosure for an inordinate time. But many of the dragged-out foreclosure actions are simply the result of bad strategy on the mortgagee's part.

The error made by some mortgagees in working out settlements is that they hold the action in abeyance pending the hoped-for resolution. The foreclosure must always proceed apace, as if no settlement were contemplated until the very moment that a resolution takes place. Only if the lender acts in this fashion can the mortgagor be constrained to capitulate.

Even though most foreclosures *are* settled, experience indicates that defaulting mortgagors either cannot or will not honor their obligations until their positions are irretrievable. Perhaps they are trying to buy time to sell the property. Perhaps they hesitate to obtain a loan from family or friends or are loath to encumber some other valuable property. But whatever the reason, they usually won't move until they absolutely have to. Hence, continuous lender pressure is essential to bring the foreclosure to a favorable and

expeditous conclusion.

This truism can be graphically demonstrated by listing typical steps in a mortgage foreclosure case. The procedure in New York, for example, is the following:

—Collection procedures;
—Acceleration;
Summons and complaint;

—Summons and complaint;
—Answer;
—Motion for summary judgement or trial (if contested);
—Appointment to referee to compute;
—Referee's computation;
—Judgment of foreclosure;
—Publication of Notice of Sale;
—Sale; and
—Closing.

Thus there are typically about eleven identifiable plateaus in a mortgage foreclosure case. Each step is a prerequisite to the other and must be methodically pursued. If, at one of these steps, the mortgagor offers to you an acceptable settlement (be it full payment, recasting of the mortgage, or whatever), you may be tempted to ask your lawyer to stop the action to await the resolution. "After all," you say, "the mortgagor promised to pay us."

But what if the promised conclusion doesn't arrive in ten or thirty days? (Again experience tells us it won't.) You, the mortgagee, end up sitting in place wondering when or whether the payment will be made. Meanwhile, you are no closer to the foreclosure sale than you were thirty days ago.

Penny Wise and Pound Foolish

Some mortgagees believe they should stop the foreclosure proceedings when a conclusion appears to be in the offing, in order to save legal fees. Most foreclosure attorneys peg their fees to the progress of the case. Although fees vary greatly from state to state, and even from firm to firm in one community, here is a table which will serve to explain the point.

EXAMPLE LEGAL FEES

(For an uncontested residential mortgage foreclosure)

Stage of Case	*Total Fee*
Submission of file to counsel for analysis	*$ 250*
Preparation of summons and complaint	*600*
Appointment of referee	*800*
Judgment of foreclosure	*1,000*
Sale	*1,200*

Even thought the attorney's fee is increased as each stage is passed, you are probably well advised to press on with the foreclosure. Assume the summons and complaint have been served, the time to answer expired, and foreclosure counsel is now entitled to $600 plus disbursements. At this point you work out an appropriate settlement with the mortgagor, the terms of which are to consummated within twenty days. Should you wait the twenty days for payment, or should you direct the attorney to have a referee appointed? We strongly suggest the latter.

Although it is correct that after the referee is appointed you will now have to pay the attorney $800 rather than $600, the mortgagor will have to bear this fee as part of any settlement. He should be advised unequivocally that you will carry the action foward until the day that money is *in hand,* and until that time whatever legal expenses emerge are the mortgagor's responsibility.

You can pinpoint the date when the attorney will move for the appointment of the referee, so that the mortgagor can know when his payment must arrive to avoid the additional legal cost. If you approach the case with this attitude you will ensure faster settlements upon terms most favorable to you.

MECHANICS OF SETTLEMENT

There may come a time when it is reasonable for the mortgagee to allow a mortgagor to make good his outstanding obligations over a period of months. If the two parties make such an agreement, stopping the forclosure action can be acceptable. Halting the case, however, is different from *withdrawing* the action.

At this juncture, the parties agree to a stipulation of settlement. The content of that stipulation is of paramount concern. The mortgagee who gives less than careful attention to the terms of the stipulation may find that lapse is costly in added time and expense.

We suggest, below, a form of stipulation that protects the mortgagee. Each clause is followed by a comment that explains its significance.

Caption (Title) of Action — Stipulation
Index No. .....

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned as follows;

1. Notice of Pendency of this action was filed in the Office of the County Clerk of ..... County on ..... and an amended notice of pendency (if applicable) was filed in said office on .....

2. The defendant ..... was served under the provisions of (cite local procedural sections of law), but has not appeared or answered. (if applicable recite answers submitted and date)

Comment: If there was any question about the technical propriety of service of process (which is critical in every lawsuit), the mortgagor, who signs the stipulation, now waives any possible claim of defect.

3. Said defendant has no defense to this action and does not intend to interpose

any answer herein. [Or, defendant withdraws its answer (and counterclaim) and waives any defense purportedly set forth therein.]

Comment: If the defendant has some claimed defense in reserve, or if he stated a defense in the answer, he now waives that defense, and is unavailable for use later should the settlement fail and the litigation be revived.

4. Said defendant agrees to make or cause to be made the following payments at the respective times hereinafter set forth by checks made payable to *(list mortgagee's counsel)* as attorneys for *(mortgagee)*

Date	Check No. dated	
	received subject to collection	$.....
Date	One half of balance of arrears and all	
	all counsel fees and disbursements to be paid	$.....
Date	Remaining balance of arrears	$.....

(This list can contemplate as many payments as agreed upon)

Comment: The schedule of payments is now absolutely clear. A later clause will state that any mortgagor violation will trigger renewal of foreclosure action.

5. Said payments should be applied firstly to the counsel fees and disbursements of *(name of counsel)* which are as follows:

Counsel Fees		$.....
Proceedings for order to publish, appoint Guardian ad Litem and preparation of consent, affidavit and answer of Guardian ad Litem		.....
Disbursements:		
Foreclosure search	$	
Index Number fee	$	
Filing fee lis pendens	$	
Service of process	$	
Filing fee amended lis pendens	$	
Advertising summons	$	
Guardian ad Litem's fee	$	
Xerox, postage and telephone	$	
		$ .....
Total		$ .....

Comment: Obviously the categories and amounts of legal fees and disbursements vary in each jurisdiction and in each case. These disbursements should, however, be specifically listed so there is no confusion about where the funds are going and why.

6. The remainder of the aforesaid payments shall be allocated in such manner as *(mortgagee)*, in its sole and absolute discretion, from time to time, shall determine provided same shall be applied to interest, reduction of principle, late charges and any other disbursements which *(mortgagee)* may incur for the protection of the security of its mortgage.

7. It is understood that late charges incurred during the lifetime of this stipulation are to be imposed and paid in the aforesaid allocation.

Comment: Without Clause 7 there might be an ambiguity as to whether late

charges continue to acrue. There is no reason for late charges not to continue to accrue merely because a settlement agreement has been reached.

8. The annual interest rate mentioned in plaintiff's mortgage note and mortgage is hereby changed to .....% per annum (increased from .....% per annum) effective the date of this stipulation, ... 198....

9. The plaintiff's mortgage note and mortgage described in the complaint are not to be deemed to be reinstated until said defendant shall have timely and fully completed all of the foregoing payments. Upon completion of all of the foregoing payments, the mortgage will be reinstated according to its terms, except that the interest rate will be .....% per annum, effective ..... 198 ....

Comment: Clause 9 is another example of maintaining leverage. Until defendant fully complies with the terms of the settlement, the mortgagee has conceeded nothing.

10. Notwithstanding the increase in annual mortgage interest rates, the amount of the monthly mortgage payment for principle and interest, exclusive of realestate taxes and insurance, if any, shall not be increased, however, the entire remaining balance of the mortgage indebtedness shall be paid fully no later than .....

Comment: In this particular settlement, the annual interest rate on the mortgage was increased. Clause 10 establishes that monthly payments, however, are not increased so that an oppressive rate is not placed on the mortgagor, but a balloon payment is due at the end of the mortgage term. Other types of settlements may be made. For example, you may negotiate an increase in monthly payments, in which event those terms would be stated here, much like the language in a mortgage note or bond.

11. Defendant ....., in addition to the payments of principle and interest payable pursuant to the mortgage note or this stipulation (the installments), will pay to *(mortgagee) [if at any time required by* **(mortgagee)]**, on each date and in the manner specified in the mortgage note or this stipulation for payment of an installment an amount (the Escrow Fund) which would be sufficient to pay the taxes payable, or estimated by *(name mortgagee)* to be payable, together with insurance premiums, during the ensuing twelve (12) months, divided by the number of installments due during such twelve-month period. If the amount of the Escrow Fund shall exceed the amounts due pursuant to this paragraph, *(mortgagee) shall credit such excess against future payments to be made to the Escrow Fund. In allocating such excess,* **(mortgagee)** may deal with the person(s) shown on the records of *(mortgagee)* to be the owner(s) of the mortgaged property. If the Escrow Fund is not sufficient to pay the items set forth above, defendant shall pay to *(mortgagee)* upon request, an amount which *(mortgagee)* shall estimate as sufficient to make up the deficiency. Until expended or applied as above provided, any amounts in the Escrow Fund shall constitute additional collateral security for the debt and shall not bear interest, except as required by law. In the event that the foreclosure will be discontinued, the provisions of this paragraph shall be deemed to survive with the same force and effect as if originally embodied in the mortgage note and mortgage.

Comment: Clause 11 contains additional terms of a mortgage extension agreement, terms that vary in different juridictions. In addition, depending

upon local law and custom, your counsel may recommend that the terms of the extension be embodied in a separate agreement as opposed to the stipulation.

12. The plaintiff will take no affirmative steps in this action so long as the defendant complies with all of the covenants on his part to be performed under this stipulation. If, however, there will be a default on the part of the defendant under any provisions of this stipulation for seven (7) or more days, plaintiff, at its option, will have the right to proceed with the obtaining of a Judgement of Foreclosure and Sale without notice, including all intermediary steps such as appointment of a Referee to compute and subsequent steps such as foreclosure sale. In the event of a foreclosure sale, plaintiff will send notice of sale to said defendant.

Comment: If the defendant violates the covenants of this stipulation, the mortgagee may have received some money in hand and may, nevertheless, be able to proceed with the foreclosure action from the point where he left off.

13. If under the provisions of this stipulation plaintiff shall actually proceed with this action after default on the part of said defendant under any of the provisions of this stipulation, the defendant shall be given credit for all sums actually paid by him to *(name mortgagee)* allocated in accordance with the provisions of this stipulation. However, it is understood that the defendant shall not be entitled to receive any refund or credit for attorneys' fees or disbursements paid to *(name counsel).*

14. The provisions of this stipulation shall survive the discontinuance of this action.

15. This stipulation may be executed in counterparts, which counterparts, when taken together, shall constitute this stipulation.

Comment: This final clause allows separate stipulations to be signed by both parties, thus saving mail time back and forth.

It should be apparent that while the form of stipulation that we have suggested is comprehensive, it cannot cover every detail of the case. For example, if the mortgagee had not been escrowing for taxes, there should be a paragraph reciting that all real estate taxes becoming a lien on or after a certain date shall be paid by the defendant as and when they become due and payable and defendant shall submit receipted tax bills to mortgagee or his counsel within fifteen days after each respective item becomes due.

THOSE DEVASTATING RECEIVERSHIPS

One of the most potent weapons available to the mortgagee (a weapon that many mortgagees often neglect), is the appointment of a receiver. When the forclosing mortgagee believes that the property may decline in value during the course of the action, or the defaulting mortgagor (or the party in possession) may allow the premises to run down, the mortgagee may ask the court to appoint a receiver to preserve the property and collect the income.

Receivers are most often sought for income-producing commercial properties and apartment houses, although they may occasionally be advisable in the foreclosure of one- and two-family homes in which the

parcels are endangered or if the course of the foreclosure is expected to be protracted.

The mechanics of arranging for the receiver's appointment are not particularly complex in many jurisdictions. In New York, for example, a receiver can be appointed ex parte, that is, without notice to any other party.

The authority for this convenience is found in the statutory clause in New York mortgages that provides: "That the holder of the mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver." Such standard language has specifically been construed by statute in New York to mean that appointment may be obtained without notice.[1]

HOW TO DO IT

Let us assume you are unable to collect the mortgage payments on an apartment building. The acceleration letter brings no response, so you give the documentation to counsel to institute the foreclosure.

The attorney orders the foreclosure search, which, among other items, sets forth all the necessary parties to be served in order to cut off all other interests and transfer good title at the foreclosure sale. Almost invariably, the search reveals multiple necessary defendants such as judgment creditors, mechanic's lienors, subordinate mortgages, and governmental authorities to whom income or corporate franchise taxes may be due. One of these creditors is bound to be very easy to locate for the service of process. (Usually, this is a major bank, the state or the federal government.)

Your attorney prepares the summons, complaint, and *lis pendens* and files them with the county clerk. On the very same day, he arranges to serve the easily locatable defendant. Now the foreclosure action has begun, both technically and actually. The proceedure for appointing a receiver requires little additional effort. If the attorney has simultaneously prepared the motion for the receivership (which need not be served on anyone), he now just gives it to the court, and in a day or so you've got your receiver.

Obtaining a receiver can even be done faster than this, depending, of course, upon local practice. An aggressive attorney may sometimes "walk the papers through the court" and obtain the receivership order on the very first day of the foreclosure action. If there is a particular attorney you wish to have

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[1]N.Y. Real Prop. Law § 254, subdiv. 10, states:

Mortgagee entitled to appointment of receiver. A covenant "that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver," must be construed as meaning that the mortgagee, his heirs, successors or assigns, in any action to foreclose, the mortgage, shall be entitled, *without notice* and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage; and the rents and profits in the event of any default or defaults in paying the principle, interest, taxes, water rents, assessments or premiums of insurance, are assigned to the holder of the mortgage as further security for the payment of the indebtedness. [Emphasis added.]

in charge, your lawyer can sometimes bring him to court and persuade the judge to select your choice.

Obviously, this procedure is subject to considerable local variation, but in many jurisdictions the action can be consummated with great speed.

Once the receiver is appointed, he proceeds to "qualify." In New York, that requires that he file an oath and bond with the county clerk. The receiver then sends to all tenants and occupants of the premises a notice that all rents are to be paid to him or to his managing agent, if the order made provisions for an agent. (The notice is widely referred to as a "Notice to Attorn.")

Imagine the mortgagor's shock when he learns that all the money he was planning to collect during the pendency of the foreclosure is now going to a court-appointed receiver with the net ultimately to the mortgagee! That dismay has so often precipitated immediate settlements very favorable to the mortgagees.

Cost and Problems of Receivership

Once the mortgagor discovers the receiverships, rather than capitulating, he could become litigious. But it is extremely difficult for mortgagors to set aside receiverships that have been skillfully obtained. Technical objections rarely succeed. Constitutional challanges have been consistently rejected. Nevertheless, the angry mortgagor, *can* stir up litigation which can prove expensive.

☐ *Legal Fees.* If the matter is ultimately settled, a condition of the settlement should be the mortgagor's obligation to pay all legal fees including those engendered by the receivership portion of the action. Should the case not be settled and should the foreclosure be carried all the way to sale, it is unlikely that the increased legal fees that were brought about by the receivership can be recouped. Nevertheless, experience has shown that most often, the receivership *does* precipitate a settlement so the possibility of higher legal fees is not an unreasonable risk.

☐ *Receiver's compensation.* The receiver must, of course, be compensated. But the amount of that payment is hardly oppressive. In New York, for example, a receiver is entitled to 5 percent of the sums he receives and disburses. This is most often interpreted as meaning 5 percent of monies that he receives. However, there is some authority for the percentage to be paid on *both* income and dibursements. The question remains unsettled.

The receiver is paid his percentage on the monies that he collects for all sums that were already due or to become due as of the date of his appointment. If the mortgagor himself is in poossession of the premises, he too must attorn to the receiver upon which commissions are to be paid. If the mortgagor has given sweetheart leases to family and friends, the receiver may challenge these and collect reasonable rents from those parties. This income is, naturally, commissionable.

If the order appointing the receiver gave him authority to engage a managing agent (an authority that we recommend to the mortgagee), the receiver is authorized to deduct the agent's commission from the sums he collects. If the order appointing the receiver authorized him to engage his own attorney (also recommended), the mortgagee must pay *reasonable* legal fees. The size of these fees are subject to judicial review. The mortgagee must pay the receiver's reasonable and necessary disbursements, taken on a case-by-case basis. Sums that mortgagee advances to the receiver, if the latter's account is short, may be subject to commission depending upon circumstances too convoluted to detail in this article.

When an action is settled before the receiver has had an opportunity to collect any rents, there is some question in New York as to whether he may receive only a maximum of $100 as his commission or the "reasonable" value of the services that he rendered.

There *are* costs involved with receivership: disbursements, commissions to receiver and managing agent, and fees to the receiver's attorney. But the income that would otherwise have gone to the defaulting mortgagor should exceed these expenses. Even if it does not, the receivership may be necessary to preserve both the property and your advantage in the case. In the right circumstances, the mortgagee should always consider the possibility of receivership.

DEED IN LIEU OF FORECLOSURE

If a satisfactory settlement cannot be developed, the best option open to the mortgagee may be receiving a deed in lieu of foreclosure. This proceedure is fraught with technical pitfalls that the mortgagee should recognize.

Following are examples of the problems:

☐ Taking a deed in lieu of foreclosure means the mortgagee obtains title subject to whatever encumbrances may have already attached to the property. Thus a title search *and* its careful analysis is absolutely essential.

☐ As a part of the transaction, the mortgage debt must be cancelled, lest the courts deem the new deed as a deed absolute given as security for a debt, in other words, another mortgage. Since an assignment of the mortgage to a third-party purchaser may be an excellent device to save mortgage taxes, it may be sufficient to cancel only the *mortgage note*. Check with your counsel for the rulings on this point in your state.

☐ Since only a bona fide purchaser *for value* is protected against unrecorded interests, it is essential—insome states—that the transaction recite value. In some jurisdictions the forgiving of an antecedent debt is not treated as value.

☐ If there is equity in the property above the mortgage debt, the tranaction may run afoul of the Bankruptcy Act as a preference.

The foregoing is only a partial list of possible problems, so obtaining a deed

THE ADMISSIBILITY OF AUTOPSY REPORTS

*by Richard S. Kaye, Esq.**

An autopsy report prepared by the office of the Medical Examiner as a public official is admissible as a public record and is prima facie evidence of the facts and findings contained therein.

The law is quite clear that where a public officer prepares a certificate or an affidavit referable to his findings while performing in the course of his official duty, that certificate or affidavit is prima facie evidence of the facts stated therein. This premise is codified in Rule 4520 of the Civil Practice Law and Rules, which states as follows:

> Where a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit to a fact ascertained, or an act performed, by him in the course of his official duty, and to file or deposit it in a public office of the State, the certificate or affidavit so filed or deposited is prima facie evidence of the facts stated.

There can be no dispute that the representatives and physicians affiliated with the Office of the Medical Examiner are public officials, as contemplated in Rule 4520. As such, these officials are presumed to act honestly and in

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in lieu of foreclosure should be approached with caution and meticulousness.

CONCLUSION

The technical complexities of mortgage forclosure actions certainly require the aid of skilled legal counsel. But the engagement of an attorney does not mean that the real estate professional must then abdicate his responsibilities to watch over his own interests. Quite the contrary is true. The mortgagee should participate intelligently in the action to safeguard his own position.

The lender who is faced with a defaulting borrower should serve as his own ally by being prepared for the following courses of action:

☐ Have a coherent collection system so that portfolios do not become unmanageable.

☐ When a system indicates that something more than requests for payment are in order, accelerate the balance.

☐ Press relentlessly through the stages of the foreclosure action.

☐ Always consider the significant advantages of a receivership.

☐ If an action is to be settled by a deed in lieu of foreclosure, be certain that your attorney is thoroughly familiar with all the nuances.

The mortgagee who is prepared can reduce his problems with troublesome borrowers and shorten litigation periods by maintaining leverage and applying legitimate pressures.