

TROUBLED CREDITS PRACTICE GROUP

CLIENT ALERT: Sales of Property by Receivers

AUGUST 2011

Does a receiver appointed at the request of a mortgage lender have authority in Colorado to sell the mortgaged property over the objection of the owner? At a hearing I attended recently, the judge said a receiver has no such authority even if the proposed sale is in the best interest of all parties. The ruling runs counter to a growing trend of lenders avoiding the foreclosure process by utilization of a court-appointed receiver to sell property.

The use of a receiver to sell property can be advantageous to both the lender and the borrower. For example, in a condominium project, the receiver can sell individual units at retail, generating more money for the lender and reducing the borrower's exposure for a deficiency judgment. The lender also avoids taking title to the property at foreclosure or entering into a contract with the ultimate purchaser, thereby reducing its exposure.

In development projects, the borrower often has pending contracts at the time a receiver is appointed or foreclosure commenced and may have liability under such contracts if the receiver does not close. With respect to the units that have not been placed under contract, the receiver will often allow the borrower to continue its marketing efforts.

I have been involved in several receiverships, representing both borrowers and lenders, in which the receiver sold individual condominium units to maximize the return to the lender. But in each case, the borrower consented to the arrangement and, in fact, continued to work with the receiver to market the property.

The proposed sale at issue in the hearing I attended in May, by contrast, was a bulk sale of a residential development project. For authority, the receiver relied upon the language in the order of appointment which granted the receiver the power to sell the collateral. The property owner pointed out that the *ex parte* order appointing a receiver was inconsistent with the deed of trust which authorized appointment of a receiver only during the pendency of a foreclosure and only to take possession of the property.

The property owner also argued that an order authorizing the receiver to sell the mortgaged property would be inconsistent with the Colorado statute that provides that a deed of trust or mortgage is only a lien, not a conveyance, regardless of its terms. Finally, the owner relied upon statutes that make a pre-default waiver of cure rights in either a real property or personal property foreclosure void as against public policy.

The judge relied upon the language of the deed of trust in ruling against the receiver and lender. Because the judge found that the deed of trust did not authorize a receiver to sell the mortgaged property, he did not answer the question of whether a provision authorizing a sale by a receiver would have been enforceable.

The Troubled Credits practice group has substantial experience in receivership actions. For more information on this Client Alert or for help in appointing or dealing with a receiver, contact any of the attorneys in the Troubled Credits practice group (for a listing, click here).

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
THOMAS MACDONALD 

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