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SURVEY OF THE RIGHTS OF RECEIVERSHIPS TO SELL REAL PROPERTY

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I. INTRODUCTION

At the base of mortgage law is the Equity of Redemption.[1] This is a common law right, which developed in England centuries ago,[2] and is part of the law the colonists brought over to America. The equity of redemption allows a mortgagor a period of time after he defaults within which to pay off the loan and not lose the property[3] or—perhaps more importantly—any equity the mortgagor

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[1] *See* GRANT S. NELSON, DALE A. WHITMAN, ANN M. BURKHART & R. WILSON FREYERMUTH, REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT CASES AND MATERIALS 112–15 (8th ed. 2009) (discussing the evolution of the modern mortgage arrangement and the introduction of equitable principles into the real estate transaction).

[2] *Id.*

[3] *Id.* Foreclosure is the actual time of cutting off the equity of redemption. *Id.* Before the concept of a foreclosure sale was introduced, the common law mortgages included a date for repayment called "law day." *Id.* If the mortgagor could not pay off the debt on that day he would forfeit all his interests in the property to the mortgagee, even if the only reason for the mortgagor's inability to pay was his inability to find the mortgagor on that day. *Id.* The English Chancery courts established the concept of a right of the mortgagor to a tardy redemption of the property, which became the source of the equity of redemption. *Id.* Foreclosure was then instituted to allow the mortgagee to go into court and establish a date on which the mortgagee's right of redemption would

owns in the property.[4] During this period of time between default and the foreclosure sale, which eventually developed from a "strict foreclosure," the lender is losing equity in the property.[5] The relatively small per-transaction amount of equity the lender loses in cases of default on residential property can be justified by the competing policy goal of allowing homeowners an extra chance to keep their property. However, in bigger commercial mortgages—where the property is not a homestead—those policy concerns are not as great, and there is less justification for a long delay between default and the foreclosure sale. Moreover, the potential monetary losses to the mortgagee in the period between default and foreclosure sale are much larger in commercial mortgages than they are in residential loans for smaller amounts of money.[6]

Ancillary remedies were developed by the law to protect lenders during the period between default and foreclosure sale and, consequently, encouraged lenders to make such loans.[7] The ancillary remedies available to a lender after

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be cut off. *Id.* Later evolution of foreclosure led to the advent of the foreclosure sale. *Id.*

[4] "Equity" is defined as "the value of a piece of property (such as a house) after any debts that remain to be paid for it (such as the amount of a mortgage) have been subtracted." *Equity Definition*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/equity (last visited Oct. 26, 2014). This means, if a mortgagor defaults on a $100,000 loan secured by a mortgage on a $200,000 property, the mortgagor owns $100,000 of equity in his property. *See generally* NELSON ET AL., *supra* note 1. Under the old English rules of law day or even under strict foreclosure, any equity the mortgagor owned in the property would be forfeited to the mortgagee. *Id.* The modern foreclosure sale and right to surplus from the sale was instituted to protect the mortgagor's right to his equity in the property. *Id.*

[5] This occurs due to the fact there is typically a long period of time from the mortgagor's default on his loan until foreclosure proceedings begin, run their course, and finally conclude with a foreclosure sale. *See* Amy Loftsgordon, *States With Long Foreclosure timelines*, NOLO, http://www.nolo.com/legal-encyclopedia/states-with-long-foreclosure-timelines.html (last visited Oct. 26, 2014) (saying foreclosures in the first quarter of 2013 took an average of 477 days to process and mentioning judicial foreclosures—the type of foreclosure this article is primarily concerned with, because only with a judicial foreclosure are deficiency judgments permitted—take even longer than that timeframe). During this time, the mortgagor in default typically does not make payments on the loan, and, in effect, is living on the property rent-free until the foreclosure sale, or until the end of the statutory redemption period in the states that allow the debtor to retain possession during that period. *See generally* NELSON ET AL., *supra* note 1. The mortgagor is, therefore, taking equity out of the property equal to the fair rental value of the property during the time he is in possession without paying. *Id.*

[6] This is simply because the cost of maintaining the property and paying property taxes will be higher—even if not proportionally higher—than in a residential property. Additionally, commercial properties generate profits, because even though the owner is in default, he may still have tenants and favorable leases on the property, and mortgagors in default may be tempted to keep those profits rather than pay them towards the debt.

[7] NELSON ET AL., *supra* note 1, at 358. The text explains there are three theories of mortgage: title theory, lien theory, and the intermediate theory. *Id.* These three theories explain the nature of the mortgagee's interest in the property. *Id.* Under the title theory, the mortgagee obtains legal title at the signing of the mortgage; under lien theory legal title may not be passed until foreclosure occurs. *Id.* The interest of the mortgagee in the property can affect what manner of ancillary remedies is available to him in the interim between default and foreclosure sale. *Id.* Under title

the mortgagor defaults are: (1) possession;[8] (2) assignment of rents agreements;[9] and (3) appointment of a receiver.[10] One of the advantages to appointing a receiver, rather than taking possession of the land or executing an assignment of the rents agreement, is the receiver acts as an intermediary that insulates the mortgagee from certain liabilities involved with having possession of the land.[11] Another advantage is mortgagees are typically institutional lenders who are not in the business of managing land,[12] and the appointed receiver will generally be someone more familiar with, and better equipped to perform, the task.[13]

The mortgages where a receiver will be used are generally recourse mortgages, meaning a deficiency judgment or personal liability is available to cover any part of the debt not satisfied by the foreclosure sale.[14] However, to assess personal liability, the foreclosure must be conducted judicially, which takes even longer than non-judicial foreclosures.[15] The receiver's role is to

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theory the mortgagor may be entitled to take possession of the property, though generally not without some judicial action, while in a lien theory jurisdiction the mortgagee will have to resort to enforcing an assignment of the rents agreement. *Id.*

[8] *Id.* at 360.

[9] *Id.* at 372.

[10] *Id.* at 392.

[11] *See* Coleman v. Hoffman, 64 P.3d 65, 67–70 (Wash. Ct. App. 2003) (reversing the trial court ruling for summary judgment on the common law premises liability claim as to Hoffman and Anderson Hunter and saying, due to the fact they took possession of the property, they were exposed to premises liability claims stemming from that property); *cf.* Trustco Bank, Nat'l Ass'n v. Eakin, 681 N.Y.S.2d 410, 412 (N.Y. App. Div. 1998). Receiver is a court officer and not an agent of the parties, and during the pendency of the receivership the property is in the possession of the court itself. *Id.* In this case, poor management and lack of funds with which to manage the property lead to it depreciating in value during the time of the receivership, but the receiver was immunized from liability as an officer of the court, and the mortgagee had not taken possession of the property because the receiver is not his agent and was, therefore, not liable for the depreciation of the land's value. *Id.*

[12] *See* Joaquin Benitez, *Foreclosure: The secret the banks don't want you to know!*, TRIBUNA (July 25, 2013), http://www.tribunact.com/foreclosure/.

[13] *See, e.g.*, CAL. CIV. PROC. CODE §§ 567–68 (West 2012) (stating "The receiver must be sworn to perform the duties faithfully," and those powers include "power to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the [c]ourt may authorize.").

[14] *See, e.g.*, CIV. PROC. § 580b(a)(3) (West 2014) ("[N]o deficiency shall be owed or collected, and no deficiency judgment shall lie, for . . . a deed of trust or mortgage on a dwelling for not more than four families given to a lender to secure repayment of a loan that was used to pay all or part of the purchase price of that dwelling."). This statute is representative of the general legislative intent of specifically providing anti-deficiency protection to residential—consumer—loans, and such laws are not in place to protect commercial borrowers.

[15] *See* Loftsgordon, *supra* note 5 (saying this is because a court is "involved in every step of the foreclosure. As a result, the judicial foreclosure process often takes a lot longer than a non-judicial one. Backlogged courts, judges' schedules, hearings, and required paperwork all contribute to a prolonged process. Courts are simply unable to process a large volume of foreclosures in an expedited manner.").

make sure the profits being generated in the interim between the default and the foreclosure sale go towards paying down the debt and not towards padding the mortgagor's pockets.[16] When the mortgage is non-recourse and there can be no deficiency judgment against the mortgagor, a receiver is vital to ensure the mortgagee can recover as much of the money owed to him as possible.[17]

The receiver aids that goal by ensuring the profits accruing from the default until the sale go towards the debt, and the losses suffered by the lender will be minimalized. The focus of this article is on the abilities of the receiver and the restrictions put on him regarding his management of the property—specifically, whether the receiver has the ability to sell the land free and clear of all liens, and, if so, under what circumstances and by what method.

Part II gives an overview of the article, discusses the structures of receivership statutes in various jurisdictions, and further discusses receivership sales.[18] Part III analyzes the statutory frameworks and caselaw from a selection of jurisdictions with regards to their treatment of receiverships and focuses on sales made by the receiver in the foreclosure context.[19] Part IV suggests any uniform law for sales by receiverships should consist of three elements: (1) the agreement must be made post-default; (2) there should be an objection system to protect junior lienholders; and (3) there should be exceptions to protect homesteads and farm owners.[20]

II. OVERVIEW AND GOAL OF THE ARTICLE

Every state has its own statutory framework regarding receiverships.[21]

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[16] *See* CIV. PROC. §§ 567–68. Duties of the receiver are tasks pertaining to the goal of directing profits from the property to the mortgagee that the court appointed the receiver for. *Id.*

[17] While this will not often come up in mortgages for residential properties where there are no profits being generated that the mortgagee stands to lose, this can occur in other circumstances. A prime example of an instance where a receiver is vital and the loan is non-recourse is the case of a commercial property, which is transferred subject to the mortgage *i.e.*, the grantee did not assume personal liability for the property. In such cases, the grantor/mortgagor is secondarily liable on the debt and can be found personally liable but will generally not be in a position to pay that debt. NELSON ET AL., *supra* note 1, at 453. If the creditor tries to levy against him, the grantor/mortgagor will declare bankruptcy. In this case, it is imperative for the mortgagee to stop the grantee from draining equity from the property and not being personally liable for any deficiencies at the foreclosure sale. The quick use of a receiver—sometimes ex parte—can put a stop to the grantee's equity draining. The practice of taking subject to a mortgage in default, or almost in default, and diverting profits away from the mortgagee has been criminalized in some jurisdictions as "rent skimming". *See* CIV. PROC. §§ 890–94.

[18] *See infra* Part II and accompanying notes 21–39.

[19] *See infra* Part III and accompanying notes 40–202.

[20] *See infra* Part IV and accompanying notes 203–209.

[21] *See, e.g.*, CIV. PROC. § 564 (West 2014); MASS. GEN. LAWS ch. 156D, § 14.32 (2014); MINN. STAT. ANN. § 576.21 (West 2014); N.Y. REAL PROP. ACTS. LAW (McKinney 2014); WASH. REV. CODE ANN. § 7.60.005 (West 2014).

These vary as to when and how the receiver is appointed,[22] as well as what the receiver can do to the property,[23] and when and to what extent he must report to the court.[24] The focus of this article is on examining various states' approaches to receiverships, particularly receivers appointed in the mortgage foreclosure context. The article will proceed by examining a state's statutory framework and will then explore any relevant caselaw.

Receivers selling land free and clear of liens in public or private sales, depending on the reasonable estimate of the form most likely to bring in the best value for the land, are a parallel to trustees in a bankruptcy court.[25] Trustees charged with selling the land can do so in any format, subject to approval by a court, calculated to bring in the most value.[26] They are incentivized to execute the estate to bring in maximum value by tying their compensation to the total amount of funds they generate for the pool to pay off unsecured creditors.[27] A similar device could be used in the foreclosure receiver context by giving him multiple options and allowing the receiver to determine which route is likely to bring the most value to all parties: maintaining the property and collecting rents, selling the land publicly at an auction, or conducting a private sale, subject to court approval. The receiver could then be compensated commensurate with how much value the receivership estate benefited from the property.[28]

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[22] *See, e.g.*, CIV. PROC. § 564 (West 2014); GEN. LAWS ch. 156D, § 14.32 (2014); MINN. STAT. § 576.24 (2014); WASH. REV. CODE § 7.60.025 (2014).

[23] *See, e.g.*, CIV. PROC. § 568 (West 2014); GEN LAWS ch. 156B § 106 (2014); MINN. STAT. § 576.25(5)(d) (2014); WASH. REV. CODE § 7.60.060 (2014).

[24] *See, e.g.*, Cal. Rules of Court, Rule 3.1182 (Jan. 1, 2007), *available at* http://www.courts.ca.gov/cms/rules/index.cfm?title=three&linkid=rule3_1182; MASS. R. CIV. P. 66 (West 2014); MINN. STAT. ANN. § 576.36 (West 2014); WASH. REV. CODE § 7.60.100 (2014).

[25] *See Federal and State Court Receiverships as Alternatives to Bankruptcy – Pros and Cons*, AMERICAN BANKRUPTCY INSTITUTE, http://www.abiworld.org/BestofABI/materials/StateLaw ReceivershipMemo.pdf (last visited Oct. 27, 2014) ("The general receiver is analogous to a bankruptcy trustee [because] the receiver controls all the assets and operates the businesses with the intent to either sell such assets as a going concern or liquidate the assets of the business. In either case, the receiver disburses the proceeds to the creditors according to the priority of their interests.").

[26] 11 U.S.C. § 363 (2012) ("The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business. . . . The trustee may sell property . . . free and clear of any interest in such property of an entity other than the estate.").

[27] *Id.* § 326(a) ("In a case under chapter 7 or 11, the court may allow reasonable compensation . . . of the trustee for the trustee's services . . . not to exceed 25 percent on the first $5,000 or less, 10 percent on any amount in excess of $5,000 but not in excess of $50,000, 5 percent on any amount in excess of $50,000 but not in excess of $1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of $1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.").

[28] This could be measured by percentage of rents or in the case of a sale perhaps calculated as percentage of amount gained above the reasonable expected sale price at foreclosure, including the losses from waiting that long, and court and other procedural fees.

A receiver that is empowered to sell land free and clear of liens can pursue potential buyers with all the tools used in conventional land sales.[29] In conventional real estate sales, the seller can shop the property to find the best price. If an acceptable offer is not made, the seller has the luxury of not making the sale. The current state of foreclosure sales, as well as receiver sales in some states, requires an auction.[30] The bidding is intended to bring about a good price through competition, but, in reality, this is not necessarily true.[31] This is due to the fact there must be a sale at the end of the auction day, regardless of whether any good offers were made.[32] A receiver sale in which the receiver may act as a real estate agent would bring about a higher sales price.[33] This is a benefit to

[29] Patrick Mears & Dustin Daniels, *Sales of Receivership Assets Free and Clear of Liens and Interests*, 38 MICH. REAL PROP. REV. 112 (2011). When a receiver is restricted to sales by public auction, the sale price is capped at the amount the highest bidder present at the auction will bid. This can lead to property being sold at a discount because the seller has given up the valuable negotiating ability of being able to walk away. A more common approach to selling real estate is the use of agents and brokers who actively seek out the best buyer for the particular property, rather than posting notice for an auction and hoping the right buyer bids at the right price. When the receiver is able to sell in this manner, he is better able to get more value for the property. Another difference between the conventional sale for land and sales by a receiver is, while most homes for sale are sold free and clear of liens and include a deed with an implied warranty of good title, oftentimes the property held by the receiver is subject to multiple liens, including junior mortgage holders and judgment lienholders. Even when the purchase price of the property is discounted to account for junior liens on the property, the very existence of those interests harms the value of the property because buyers are hesitant to purchase land subject to imminent foreclosure and due to the "first in time first in priority" principle, buyers of land subject to liens will have a more difficult time finding new financing. Allowing receivers to sell property free and clear of liens can give the receiver a more marketable asset with more willing buyers, and, thus, lead to a higher purchase price. Those liens would be converted into unsecured claims on the mortgagor with a priority interest on the proceeds of the sale of the property. The higher price from the sale of the property, due to its increased marketability and clean title, ultimately benefits the junior interests because it is likely there will be more money when the sale is conducted by conventional means. And, if the foreclosure would have run its course and ended in a regular foreclosure sale, the junior interests would not have been better off, because their claims would be wiped out after the foreclosure sale, to satisfy the senior interests.

[30] *See* NELSON ET AL., *supra* note 1, at Chapter 6.

[31] *See, e.g.*, Baskurt v. Beal, 101 P.3d 1041, 1042–43 (Alaska 2004). In this case, the property value was at least above $100,000, and perhaps worth double that amount. *Id.* at 1042. But, due to the manner of the sale—a foreclosure auction sale—the price was limited to the most anyone present would be willing to pay. *Id.* In this case, Baskurt made the opening and only bid for $26,781.81, a dollar over the remaining debt owed on the property, on behalf of the partnership. *Id.* at 1043. There were no other bids, and the property was sold to Baskurt, Joyce, and Rosenthal via a trustee's deed. *Id.* The sale in this case was voidable but not because of the low purchase price. *Id*. at 1044–46.

[32] *See by* Andrew Latham, *Foreclosure Auction Rules*, SFGATE, http://homeguides.sfgate.com/foreclosure-auction-rules-1383.html (last visited Dec. 18, 2013).

[33] *See* Yuen Leng Chow, Isa Hafalir & Abdullah Yavas, *Auction versus Negotiated Sale: Evidence from Real Estate Sales*, ANDREW.CMU.EDU (Feb. 8, 2011), http://repository.cmu.edu/cgi/viewcontent.cgi?article=2437&context=tepper (discussing situations in which auctions can bring in higher sales prices than traditional real estate broker sales). But, it is important the receiver have the ability to use whichever method of sale is reasonably calculated to realize the most value from the

both the mortgagee and mortgagor. It would also be a faster and more efficient process than the standard public sale in a foreclosure, because the receiver is appointed soon after default and could begin selling the property, if that is determined to be the best course of action, immediately, rather than waiting the months or years until the foreclosure sale.

The arguments against a receiver selling free and clear of liens is the mortgagor will lose his right to statutory redemption, in the states in which there is such a right,[34] and, more importantly, sales by a receiver can be seen as a way of circumventing the foreclosure process and being a clog on the equity of redemption. A clog on the equity of redemption can be anything that takes away the mortgagor's rights to late payment, after default, before the mortgagee completes all foreclosure proceedings, which now includes a foreclosure sale.[35] Clogs on the equity of redemption are not allowed in any jurisdiction in the United States or the United Kingdom, among many others.[36] But, the issue of sales by receivers being a clog on the equity of redemption only arises when the agreement to allow such sales is made ex ante[37]—that is, the agreement is in the original mortgage note or was agreed to before the mortgagor defaulted.[38] Similar agreements made ex post—"work-out" agreements after a default—can shortcut the foreclosure process, if the mortgagor defaults again or fails to meet

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property. *Id.* When the receiver is free to determine whether this property is of a heterogeneous nature and will be well served by a public auction, or if the property is not highly in demand or unique and will be best served by carefully seeking out the right buyer, then the receiver has the proper tools to maximize the property's value. *Id.*

[34] *See generally* Grant S. Nelson, *Confronting the Mortgage Meltdown: A Brief for the Federalization of State Mortgage Foreclosure Law*, 37 PEPP. L. REV. 583, 589 (2010) ("In almost half of the states the foreclosure sale is not the end of the road for the borrower. A concept commonly termed 'statutory redemption' allows the mortgagor-debtor and, in many instances, junior lienholders, up to a year or longer to regain title after the foreclosure sale by paying the foreclosure purchaser the sale price plus accrued interest and other expenses.").

[35] *See* NELSON ET AL., *supra* note 1, at chapter 3.

[36] *See id.* at 115–16 (discussing several forms of mortgage substitutes that developed over time as ways to circumvent the clogging the equity of redemption doctrine). If the clog on the equity is obvious and poorly concealed by the particular device, the court may allow parole evidence to show the device is in fact a mortgage and should be treated as such. The installment land contract is a rare case of a mortgage substitute that is not fully under mortgage law. *Id*; *see also id.* at 272 (discussing the same concepts of clogs on the equity of redemption in more depth).

[37] *Id.* at 272. "For centuries it has been the rule that a mortgagor's equity of redemption cannot be clogged and that he cannot, as a part of the original mortgage transaction, cut off or surrender his right to redeem. Any agreement which does so is void and unenforceable as against public policy." *Id*; *see also id.* at 272–73 (quoting 4 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1193, at 568 et seq. (5th ed. 1941)) ("[I]f the instrument is in its essence a mortgage . . . the debtor or mortgagor cannot, in the inception if the instrument . . . in any manner deprive himself of his equitable right to come after default . . . to redeem the land from the lien and encumbrance of the mortgage; the equitable right of redemption, after a default is preserved, remains in full force, and will be protected and enforced by a court of equity, no matter what stipulations the parties may have made in the original transaction purporting to cut off this right.").

[38] *See* NELSON ET AL., *supra* note 1, at 272.

some other provision of the work-out agreement, without being a clog on the equity of redemption.[39]

III. SURVEY OF RECEIVERSHIP STATUTORY AND CASELAW FRAMEWORKS

As the law developed, many areas of law were codified by legislature, either on a state-by-state basis or at the federal level. Real property law, however, has been ruled, to a large extent, by the common law doctrines and legal traditions that were developed over centuries. Real property has been treated separately from personal property to a point where the Uniform Commercial Code (UCC), one of the few examples of property law that has been uniformly adopted by the states, excludes real property security interests from its article nine code of secured transactions.[40] The UCC goes so far in its exclusion of real property from article nine that even rents, which are arguably like any other accounts receivable, are excluded from the UCC if they derive from the use of land.[41] Due to this general hesitance to enact sweeping legislation on real property, there are few national laws pertaining to real property.[42] And, even on a more local level, a lot of discretion is left to the courts.[43]

The statutory framework for some states is silent on the subject of

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[39] *See id.* at 277. ("The 'anti-clogging' doctrine is generally inapplicable to transactions that are *subsequent* to the execution of the mortgage.").

[40] UCC § 9-109.

[41] *See* R. Wilson Freyermuth, *Of Hotel Revenues, Rents, and Formalism in the Bankruptcy Courts: Implications for Reforming Commercial Real Estate Finance*, 40 UCLA L. REV. 1461, 1512 (1993) (examining the UCC approach to rents as being real property as well as the land versus services distinction that determines whether the particular rents are controlled by article nine).

[42] For example, the masterfully crafted Uniform Nonjudicial Foreclosure Act has not been adopted by a single state. *Nonjudicial Foreclosure Act*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Nonjudicial%20Foreclosure%20Act (last visited Dec. 18, 2014). Another example is the Uniform Assignment of rents clause, which is viewed as a very successful real property uniform law despite it being adopted in (what would be considered in other contexts) a paltry five states, not including Massachusetts who introduced it in 2014, since its introduction in 2005. *Assignment of Rents Act,* UNIFORM L. COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Assignment%20of%20Rents%20Act (last visited Dec. 18, 2014).

[43] *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 64.031(5) (West 2014) ("Perform other acts in regard to the property as authorized by the court."). *See generally* 2 A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE: PROPERTY § 111 (4th ed. 2001) ("The distinction between real and personal property is still drawn in the United States in the light of the historical past, and real property continues to be defined as a freehold interest in land. But, because tenures have been largely abolished by statutes declaring all land to be allodial, and in jurisdictions in which tenures may be said to have survived the only remaining incident of tenure is escheat, the distinction between real and personal property has lost most of its original significance. In contemporary American practice, therefore, distinction is made between land and movables, and modern treatises of property law include consideration of both elements of wealth.").

receiverships in the mortgage and foreclosure context.[44] Many others use a general "skeleton" set of guidelines for receivers and leave the details to common law and the court system.[45] This approach emphasizes the receiver is an agent of the court and, thus, can do "such other duties respecting the property as authorized by the court,"[46] or "generally to do such acts respecting the property as the court may authorize."[47] With this overly generalized charge, the legislature allows caselaw to determine the exact contours of the receiver's powers.

There are, however, some states whose statutes address this topic in more depth,[48] and there are federal statutes that apply to specific types of land.[49]

A. Federal Statutory Framework

Federal laws about receiverships and receivers' abilities are discussed in the context of prejudgment remedies under Chapter 176, Federal Debt

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[44] *See* ALASKA STAT. § 09.40.240 (2014) ("A receiver may be appointed by the court in any action or proceeding . . . when the party's right to the property that is the subject of the action or proceeding and that is in the possession of an adverse party is probable, and where it is shown that the property or its rents or profits are in danger of being lost or materially injured or impaired."). In the case of Alaska's statutory framework, the application of receiverships to foreclosure proceedings is not clearly spelled out.

[45] *See, e.g.*, CAL. CIV. PROC. CODE § 568 (West 2014); IDAHO CODE ANN. § 8-605 (2014); IND. CODE § 32-30-5-7 (2014); KAN. STAT. ANN. § 60-1302 (2014); KY. REV. STAT. ANN. § 425.600 (West 2014); MONT. CODE ANN. § 27-20-302 (2014); N.D. CENT. CODE § 32-10-04 (2014); OHIO REV. CODE ANN. § 2735.04 (West 2014); OKLA. STAT. tit. 12, § 1554 (2014); S.D. CODIFIED LAWS § 21-21-9 (2014); WYO. STAT. ANN. § 1-33-104 (West 2014).

[46] *See, e.g.*, ARIZ. R. CIV. P. 66(c) (2014).

[47] *See* KY. REV. STAT. ANN. § 425.600; N.D. CENT. CODE § 32-10-04; WYO. STAT. ANN. § 1-33-104.

[48] *See* MINN. STAT. § 576.24 (2014) (establishing there are two kinds of receiverships and "[a] receivership may be either a limited receivership or a general receivership. Any receivership that is based upon the enforcement of an assignment of rents or leases, or the foreclosure of a mortgage lien, judgment lien, mechanic's lien, or other lien pursuant to which the respondent or any holder of a lien would have a statutory right of redemption, shall be a limited receivership . . . a receiver may have control over all the property of the respondent. At any time, the court may order a general receivership to be converted to a limited receivership and a limited receivership to be converted to a general receivership."); WASH. REV. CODE § 7.60.015 (2014) (establishing two types of receivership: "A receiver must be either a general receiver or a custodial receiver. A receiver must be a general receiver if the receiver is appointed to take possession and control of all or substantially all of a person's property with authority to liquidate that property . . . . A receiver must be a custodial receiver if the receiver is appointed to take charge of limited or specific property of a person or is not given authority to liquidate property. . . . When the sole basis for the appointment is the pendency of an action to foreclose upon a lien against real property . . . the court shall appoint the receiver as a custodial receiver. The court by order may convert either a general receivership or a custodial receivership into the other."); *Id.* § 7.60.260 (allowing a receiver to make sales free and clear of liens).

[49] 28 U.S.C. §§ 3103, 2001 (2012).

Collection Procedure.[50] In Section 3103, the statute grants the receiver the ability to "sell pursuant to section 3007 such real and personal property as the court shall direct."[51] Section 3007 says the motion to sell the property may be initiated by the court itself or by either party.[52] The statute lays out two guidelines as to the authority to sell perishable personal property.[53] First, the property must be "likely to perish, waste, or be destroyed, or otherwise substantially decrease in value during the pendency of the proceeding."[54] Secondly, if the above condition is met, the "court shall order a commercially reasonable sale of the property."[55]

The statute does not define the term "commercially reasonable." This grants the court the ability to determine whether the property is properly sold at a public auction or, if sold in a private sale, the price agreed to is commercially reasonable.

However, in 28 U.S.C. § 2001 the statute lays out a more detailed framework for judicial sales of land.[56] The statute says property in the possession of a receiver "shall be sold at public sale in the district wherein any such receiver was first appointed."[57] The statute also allows a private sale to be confirmed by the court, "if [the court] finds that the best interests of the estate will be conserved thereby."[58] The statute further states, before a court may confirm a private sale, there must be three independent appraisals of the property to be sold,[59] and the court will not confirm any sale for less than two thirds of the appraised value.[60] Additionally, the agreed price for the land to be sold privately must be advertised for ten days,[61] and "[t]he private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a [ten] per centum increase over the price offered in the private sale."[62]

It should be noted the federal statutes are not specifically dealing with a receiver's sale made during a foreclosure proceeding,[63] and it could be argued any sales during a foreclosure proceeding cut off a bit of the mortgagor's equity

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[50] *Id.* § 3103.
[51] *Id.* § 3103(b)(1)(B).
[52] *Id.* § 3007(a).
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.* § 2001. This section is under Chapter 127, Executions and Judicial Sales.
[57] *Id.* § 2001(a).
[58] *Id.* § 2001(b).
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] These statutes are under the chapter dealing with judicial proceedings generally and executions and judicial sales generally. *Id.* §§ 1961–1964; *see also id.* §§ 2001–2007.

of redemption. Nevertheless, these statutes give a clear picture of how the United States Code deals with the sales of property during pending judicial actions generally,[64] and the additional laws that are in force when dealing with real property.[65]

B. California

Under the California statutes, a receiver can be appointed in the mortgage foreclosure context, "where it appears that the property is in danger of being lost, removed, or materially injured, or that the condition of the deed of trust or mortgage has not been performed, and that the property is probably insufficient to discharge the deed of trust or mortgage debt."[66] When describing the receiver's powers, the California statute details the basic duties of a receiver, including possession, receiving rents, and collecting debts.[67] The statute goes on to include the catchall provision granting the receiver the additional power "generally to do such acts respecting the property as the [c]ourt may authorize."[68]

In addition to this statute though, California has statutes detailing the sale of the property of a judgment creditor.[69] The statutes detail the notice requirements,[70] including":

> [A notice to] all persons having liens on the real property on the date of levy that are of record in the office of the county recorder and shall instruct the levying officer to mail notice of sale to each such person at the address used by the county recorder for the return of the instrument creating the person's lien after recording. The levying officer shall mail notice to each such person, at the address given in the instructions, not less than [twenty] days before the date of sale.[71]

The statutes require sales to satisfy a judgment debtor be made in the form of a public auction and sold to the highest bidder.[72] The California statute specifically mentions such a sale extinguishes all subordinate liens on the

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[64] *See supra* note 49.
[65] 28 U.S.C. § 3007 (2012).
[66] CAL. CIV. PROC. CODE § 564(b)(2) (West 2014).
[67] *Id.* § 568.
[68] *Id.*
[69] *Id.* § 568.5 ("A receiver may, pursuant to an order of the court, sell real or personal property in the receiver's possession upon the notice and in the manner prescribed by Article 6 [commencing with Section 701.510] of Chapter 3 of Division 2 of Title 9. The sale is not final until confirmed by the court.") (parentheses in original).
[70] *Id.* § 701.540.
[71] *Id.* § 701.540(h).
[72] *Id.* § 701.560.

property.[73]

In *People v. Riverside University*,[74] LeMoyne S. Badger was appointed as a receiver during an action brought against Riverside University to enjoin it from engaging in certain unlawful and fraudulent business practices[75]:

> The receiver was authorized and instructed to take possession of and preserve and maintain the property, assets[,] and records of the university; to continue the university in operation by employing such persons as may be necessary to conduct regular courses of instruction and to pay for their services at ordinary and usual rates from funds that shall come into his possession as receiver; 'to do all those things and to incur the risks and obligations ordinarily incurred by owners, managers, and operators of similar educational institutions, as such receiver, and no such risk or obligations so incurred shall be the personal risk or obligation of the receiver, but a risk and obligation of the receivership estate'; to 'exert every means possible to ensure that all students currently enrolled in Riverside University have the opportunity to complete the current quarter ending about June 30, 1971.'[76]

The receiver alleged it was necessary to sell certain furniture and equipment to continue to operate the school.[77] He listed everything sold and the prices received for them, along with an investigation showing they were sold at fair market value.[78] In determining the validity of the receiver's sales, the court quoted section 568.5 of the California Code of Civil Procedures saying, "A receiver may . . . sell real or personal property . . . . The sale shall not be final until confirmed by the court. Sales made pursuant to this section shall not be subject to redemption."[79] The court went on to say, even if selling property would not have fallen under the breadth of his original charge, "an action of a receiver in equity, though taken without prior court authorization, may be

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[73] *Id.* § 701.630 ("If property is sold pursuant to this article, the lien under which it is sold, any liens subordinate thereto, and any state tax lien [as defined in Section 7162 of the Government Code] on the property sold are extinguished.") (parentheses in original).

[74] People v. Riverside Univ., 111 Cal. Rptr. 68 (Cal. Ct. App. 1973), *superseded by statute*, CIV. PROC. §§ 568.5, 704.740, 708.610, 708.620, *as recognized in* Wells Fargo Fin. Leasing, Inc. v. D & M Cabinets, 99 Cal. Rptr. 3d 97, 103 (Cal. Ct. App. 2009). The statute establishes certain limits on courts' ability to authorize a receiver to sell "the interest of a natural person in a dwelling . . . under this division to enforce a money judgment except pursuant to a court order for sale obtained under this article and the dwelling exemption shall be determined under this article." *Id.* However, the statute does not reverse the court's authorization for sale of property not subject to the statutory homestead procedure. *Id.*

[75] *Riverside Univ*., 111 Cal. Rptr. at 70.

[76] *Id.* at 71.

[77] *Id.* at 72.

[78] *Id.*

[79] *Id.* at 73.

ratified by subsequent court approval."[80]

The court's decision in *People v. Riverside* shows, when a receiver is tasked with continuing the operation of a business or property, there can be a broad scope of powers allowed to the receiver.[81] The court went so far as to say "the receiver was entitled to an approval of his account and final discharge, notwithstanding the fact the sales were not made in the manner provided for sales on execution."[82]

However, this case was not specifically dealing with a receiver taking possession during a foreclosure proceeding. It is possible courts feel "if no good reason appears for refusing to confirm a receiver's sale, such as chilling of bids or other misconduct or gross inadequacy of price, the sale should be confirmed,"[83] but mortgages and foreclosures bring up the issues of equities of redemption and clogs on it, as well as further statutory redemptions after the foreclosure sale is completed.

In *Wells Fargo Financial Leasing Inc. v. D & M Cabinets*,[84] the judgment creditor foreclosed his judgment lien on the debtor's owner-occupied dwelling.[85] There is a statutory homestead exception when foreclosing a judgment lien on an owner-occupied dwelling, and the creditor attempted to avoid that statutory procedure by appointing a receiver and charging him to sell the land to satisfy the debt.[86] While the trial court allowed this, on appeal the court found, "Wells Fargo moved for appointment of a receiver for the express and limited purpose of selling the subject property without complying with section 704.740. Accordingly, [it reversed] the order in its entirety."[87] We may draw a parallel from *Wells Fargo Financial* to the topic of equity of redemption. It would follow from *Wells Fargo Financial*, if a court found the sole purpose of appointing a receiver was to sell the property and circumvent the mortgagor's rights of equity of redemption and statutory redemption, then the court would reverse that order. However, if the receiver was appointed for legitimate reasons, such as maintaining a property that was losing equity or that was potentially insufficient as security for the loan, and then circumstances after default mandated a sale by the receiver, the *Wells Fargo Financial* court may find the receiver's actions were proper.[88]

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[80] *Id.* at 74.
[81] *Id.* at 73.
[82] *Id.* at 75.
[83] *Id.*
[84] 99 Cal. Rptr. 3d 97 (Cal. Ct. App. 2009).
[85] *Wells Fargo Fin.*, 99 Cal. Rptr. 3d at 100–01.
[86] *Id.* at 102–03.
[87] *Id.* at 103.
[88] The court in *Wells Fargo Financial* found the receiver sale was solely a device being used to circumvent the statute. *Id.* The court stressed the receiver was appointed "for the sole and limited purpose of selling the subject property in avoidance of section 704.740." *Id.* The sole and limited

C. Minnesota

Under Minnesota statutory framework a receiver is defined as "a person appointed by the court as the court's agent, and subject to the court's direction, to take possession of, manage, and, if authorized by this chapter or order of the court, dispose of receivership property."[89] Minnesota law distinguishes two types of receiverships: "general receivership and [] limited receivership."[90] The statute spells out "the enforcement of an assignment of rents or leases, or the foreclosure of a mortgage lien, judgment lien, mechanic's lien, or other lien pursuant to which the respondent or any holder of a lien would have a statutory right of redemption,"[91] as examples of when the court will order a limited receivership.[92] If the court order appointing the receiver is silent on which type of receivership is being established, the default is a limited receivership.[93] The statutes are not clear as to what circumstances would lead to the appointment of a general receiver, but they do say, "[a]t any time, the court may order a general receivership to be converted to a limited receivership and a limited receivership to be converted to a general receivership."[94]

The limited receivership is charged with the standard receiver's powers including collecting rents and profits, and managing and maintaining the property.[95] The general receiver is granted additional powers, most notably for the purposes of this article: abilities "to operate any business constituting receivership property in the ordinary course of the business, including the use, sale, or lease of property of the business or otherwise constituting receivership property, and the incurring and payment of expenses of the business or other receivership property,"[96] and "if authorized by an order of the court following notice and a hearing, to use, improve, sell, or lease receivership property other than in the ordinary course of business."[97] The court may order the general

purpose of avoiding a statute analysis can be applied in cases where the law a receiver is avoiding is the common law rule of equity of redemption of mortgages the statutory redemption available in California as well as some other states. The question left unanswered by the court in *Wells Fargo Financial* is whether sales by receivers that are appointed for a different cause—for example, the maintenance of the asset or property during the pendency of foreclosure proceedings—could be sold in avoidance of such laws? And, to take the question one step further, would this court allow a receiver's sale when the receiver was appointed for dual purposes—to avoid a certain law as well as for a legitimate reason?

[89] MINN. STAT. § 576.21(p) (2014) (internal quotations marks omitted).
[90] *Id.* § 576.24.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* § 576.29, subd. 1(a)(1).
[96] *Id.* § 576.29, subd. 1(b)(4)
[97] *Id.* § 576.29, subd. 1(b)(5)

receiver's sale of the receivership property be free and clear of all liens,[98] and, additionally, the court may order the sale be free of the respondent's rights of redemption.[99]

The Minnesota statutory framework explicitly grants large powers of sale to the court–appointed receivers.[100] Under these statutes, a court can convert the default limited receivership in a mortgage proceeding into a general receivership and then allow that receiver to sell the receivership property free and clear of liens.[101]

In a case heard by the Supreme Court of Minnesota as early as 1920, the court upheld a sale by a receiver.[102] The court said, "A sale made by a receiver is a 'judicial sale.' In the absence of a statute regulating such sales, the time, manner, terms of sale, and notice thereof are matters to be determined solely by the court having jurisdiction over the proceedings and control of the property."[103] The appellant challenged the sale claiming the receiver did not observe the notice directions given by the court.[104] However, the court ruled it was a judicial sale and, "in the absence of a statute regulating it, not only were the time, manner, terms of sale, and notice thereof matters to be determined solely by the court, but it also had discretionary power to modify the directions contained in the order appointing the receiver."[105]

Under Minnesota law and its interpretation, receiverships are capable of selling the property in the receivership.[106] The statutory framework lays out a procedure for courts to convert receivers in the mortgage foreclosure setting into general receivers[107] empowered to conduct court ordered sales of the

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[98] *Id.* § 576.46, subd. 1(a). This includes all liens with the exception of unpaid real estate tax liens and liens arising under federal law. *Id.*

[99] *Id.*

[100] *Id.* §§ 576.29, subd. 1(b)(4)–(5); MINN. STAT. § 576.30, subd. 3 (2014) ("[E]xecution of the deed by the receiver shall be prima facie evidence of the authority of the receiver to sell and convey the real property described in the deed. The court may also require a motion for an order for sale of the real property or a motion for an order confirming sale of the real property."); *Id.* § 576.46, subd. 1(a) ("The court may order that a general receiver's sale of receivership property is free and clear of all liens . . . and may be free of the rights of redemption of the respondent if the rights of redemption are receivership property and the rights of redemption of the holders of any liens, regardless of whether the sale will generate proceeds sufficient to fully satisfy all liens on the property.").

[101] *Id.* § 576.24.

[102] Northland Pine Co. v. Northern Insulating Co., 177 N.W. 635 (Minn. 1920), *abrogated by* Hunter v. Anchor Bank, 842 N.W.2d 10, *16 (Minn. Ct. App. 2013) (ruling mortgage defendants' failure to strictly comply with "foreclosure by advertisement" statute rendered foreclosure sale void).

[103] *Northland Pine*, 177 N.W. at 635.

[104] *Id.* at 636.

[105] *Id.* It should be noted this case has been abrogated with regards to ability to ignore notice requirements. Inadequate notice may result in a voided sale.

[106] *See, e.g.*, MINN. STAT. § 576.29, subd. 1(b)(5) (2012).

[107] *See* MINN. STAT. § 576.24 (2014). The section states a receiver in a mortgage lien foreclosure context is a limited receiver but then gives the court permission to "[a]t any time . . . order a general

receivership property.[108] The statutes address the concerns that are unique to sales of real estate in the mortgage foreclosure context: rights of redemption and associated clogs on the equity of redemption,[109] and the statutory right of redemption.[110] Minnesota Statutes section 576.46, subdivision 1(a)[111] addresses sales free and clear of rights of redemption by requiring those rights to be part of the receivership property being sold.[112] It also allows any owner or lienholder to object to the sale.[113] If a timely objection is filed, the court will determine whether "the amount likely to be realized from the sale by the objecting person is less than the objecting person would realize within a reasonable time in the absence of this sale."[114] This safeguard prevents sales that might be a clog on the equity of redemption by only allowing sales that are consented to by all parties post-default.[115]

The same section provides some extra protection for the farmers and consumer debtors statutory redemption laws typically seek to protect allowing them the extra time to possess the land after the foreclosure sale.[116] Perhaps to ensure receivership sales are used in the commercial real estate context, and not as a method of circumventing statutory redemption periods, Minnesota Statutes section 576.46, subdivision 1(a)(1) restricts the ability to sell free and clear of liens when either "the property is (i) real property classified as agricultural land under section 273.13, subdivision 23, or the property is a homestead under

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receivership to be converted to a limited receivership and a limited receivership to be converted to a general receivership." *Id.* This power allows a court to—on a case-by-case basis—convert ex-post facto appointed receivers in mortgage foreclosures from the default limited receivership into a general receivership, *id.*, and thereby grant them the powers to sell the property, *id.* § 576.29, subd. 1(b)(5), and even to sell it free and clear of liens. *Id.* § 576.46, subd. 1(a).

[108] It is unclear from the language of the statute whether the sale must be a public one or if it may be conducted in the manner of selling property generally, by way of seeking out individual buyers and/or using brokers. However, the absence of clear intent in the statute would lead towards the conclusion a court may authorize any type of sale subject to MINN. STAT. § 576.46, subd. 1(b) (2012), which gives the receiver the burden to prove the amount likely to be realized by the objecting person from the sale is equal to or more than the objecting person would realize within a reasonable time in the absence of the sale. *Id.* § 576.46, subd. 1(b).

[109] *Id.* § 576.46, subd. 1(a).

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *See supra* note 39 and accompanying text. Agreements to sell the property and circumvent foreclosure proceedings are not clogs on the equity of redemption when agreed to after default. *Id.* Under this statutory framework, not only is there a owner complaint system to ensure this agreement to sell happened after default, there is the additional layer of defense: the requirement to go into court to have the receiver converted from limited to general. MINN. STAT. § 576.24 (2014). With these two safeguards in place the court can police receivership sales and ensure they are mutually agreeable forms of maximizing value from the property and not clogs on the equity of redemption.

[116] MINN. STAT. § 576.46, subd. 1(a)(1) (2014).

section 510.01; and (ii) each of the owners of the property has not consented to the sale following the time of appointment."[117]

D. North Carolina

In North Carolina, a duly appointed receiver is given the power to sell property as one of his enumerated powers.[118] The statutory framework lays out cases in which a receiver will be appointed.[119] Mortgage foreclosures are not explicitly mentioned,[120] but, in all likelihood, they are covered by the General Statutes of North Carolina section 1-502(1),[121] which says a receiver may be appointed:

> Before judgment, on the application of either party, when he establishes an apparent right to property[,] which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to

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[117] *Id.*

[118] *See* N.C. GEN. STAT. § 1-505 (1971); N.C. GEN. STAT. § 1-507.2(4) (1955).

[119] N.C. GEN. STAT. § 1-502 (1981).

[120] N.C. GEN. STAT. § 1-507.2(2) mentions a receiver's ability to "[f]oreclose mortgages, deeds of trust, and other liens executed to the corporation." *Id.* Section 1-507.4 discusses foreclosure by receivers and trustees of corporate mortgagees or grantees saying:

> Where real estate has been conveyed by mortgage deed, or deed of trust to any corporation in this [s]tate authorized to accept such conveyance for the purpose of securing the notes or bonds of the grantor, and such corporation thereafter shall be placed in the hands of a receiver or trustee in properly instituted court proceedings, then such receiver or trustee under and pursuant to the orders and the decrees of the said court or other court of competent jurisdiction may sell such real property pursuant to the orders and the decrees of the said court or may foreclose and sell such real property as provided in such mortgage deed, or deed of trust, pursuant to the orders and decrees of such court.
>
> All such sales shall be made as directed by the court in the cause in which said receiver is appointed or the said trustee elected, and for the satisfaction and settlement of such notes and bonds secured by such mortgage deed or deed of trust or in such other actions for the sales of the said real property as the said receiver or trustee may institute and all pursuant to the orders and decrees of the court having jurisdiction therein.

Id. However, these sections discuss the situation where a corporation has become insolvent and the receiver is appointed to liquidate the corporation. *Id.* § 1-507.1. This is a different circumstance than the case of a receiver simply maintaining the property during the pendency of foreclosure proceedings. Moreover, the receiver in section 1-507.4 cannot sell the mortgaged property; he must go through the full foreclosure proceedings under this section. *Id.* § 1-507.4.

[121] N.C. GEN. STAT. § 1-502

answer may be had on application to the court.[122]

Therefore, when the property being foreclosed is losing equity, as often can happen to a commercial property after default,[123] the mortgagee can apply to a court to appoint a receiver.[124] Once the receiver has been appointed, the district judge has the power to order the sale of the receivership property under the terms that will best serve the affected creditors.[125] Section 1-505 of the General Statutes says to look to Article 29A of Chapter 1 of the General Statutes for a more detailed discussion of the procedures used in judicial sales.[126] Section 1-339.3A of that article says the "judge or clerk of court having jurisdiction has authority in his discretion to determine whether a sale of either real or personal property shall be a public or private sale."[127] The North Carolina statutes are not clear as to whether the sale of the property can be made free and clear of all liens or rights of redemption.

E. Ohio

The Ohio receivership statute is representative of many other states' receivership statutes.[128] There is a statute listing cases in which a receiver may be appointed,[129] including in an action for the foreclosure of a mortgage by a mortgagee where the property seems in danger of being "lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt."[130] However, with regards to the powers of a receiver, the statute simply states, "a receiver may bring and defend actions in his own name as receiver, take and keep possession of property, receive rents, collect, compound for, and compromise demands, make transfers, and generally do such acts respecting the property as the court authorizes."[131] The last clause of this statute is found in many other states' receivership statutes, albeit with somewhat different

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[122] *Id.*

[123] After default, the commercial mortgagor may cease paying the mortgagee while diverting rents and profits to his own pocket, effectively draining equity from the property, at least until an assignment of rents clause is enforced. The mortgagor also has little incentive to maintain or repair his property after foreclosure proceedings begin, and there is the danger the property will lose significant value by the time of the sale.

[124] *See* N.C. GEN. STAT. § 1-502.

[125] N.C. GEN. STAT. § 1-505 (1971).

[126] *Id.*

[127] N.C. GEN. STAT. § 1-339.3A (1997).

[128] *See supra* notes 44–48 and accompanying text.

[129] OHIO. REV. CODE ANN. § 2735.01 (West 2013).

[130] *Id.* § 2735.01(B).

[131] *Id.* § 2735.04.

language.[132] This clause, by its broad and general nature, seems to indicate a legislative intent charging the courts with the final decision of what powers to grant the receiver.

The Ohio court of appeals ruled in *Director of Transportation v. Eastlake Land Development Co.*[133] the trial court's authorization of a receiver's sale of a parcel of land free and clear of liens was an error as a matter of law.[134] However, that case did not turn on the power of receivers to sell land free and clear of liens or the court's ability to authorize such sales.[135] The court of appeals in *Eastlake Land Development* found the court had not properly notified the affected lienholder;[136] thus, the sale would have been a deprivation of his due process rights.[137] In *Eastlake Land Development*, the properties in question were two vacant industrial parcels in Eastlake, Ohio.[138] John Chiappetta borrowed a total of $750,000 and secured the loans with three mortgages on his two parcels of land.[139] These mortgages were all later assigned to American First Federal, Inc. (AFF).[140] After taking out those loans against his property:

> Eastlake Land Development Company, by and through its president, John Chiappetta[141] entered into a loan agreement and promissory note with the [s]tate to fund development and construction on the

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[132] *See supra* notes 44–48 and accompanying text.

[133] Dir. Of Transp. v. Eastlake Land Dev. Co., 894 N.E.2d 1255 (Ohio Ct. App. 2008).

[134] *Id.* at 1261.

[135] In this case, the property was being sold free and clear of senior liens. *Id.* at 1258–59. The general proposition to sell property free and clear of liens is the lienholder who has the ability to wipe out junior liens at a proper foreclosure sale is attempting to wipe out those sell the property free and clear of those junior liens that are inevitably going to be extinguished through a foreclosure sale. There is an incentive for such a junior interest to allow the property to be sold free and clear of his liens in the hopes such a sale will bring a higher value to the property and perhaps pay off more of the debt owed to him than he would realize otherwise. *See, e.g.*, *supra* note 109 and accompanying text (stating the Minnesota free and clear sales statutes allows complaints to the sale if it can be determined the amount likely to be realized from the sale by the objecting person is less than the objecting person would realize within a reasonable time in the absence of this sale. Therefore, if a junior lienholder wants to stop the free and clear sale by the senior lienholder he must demonstrate he will gain more from a foreclosure sale. Because a foreclosure sale extinguishes the junior lienholder's rights, it will generally not be possible for a junior lienholder to lodge an allowable complaint against the free and clear sale. By contrast, the senior lienholder will always be as well off or better off if the junior lienholder does not conduct the free and clear sale and will almost always be able to stop the sale free and clear of his lien.). In this case, however, the junior lienholder was attempting to sell property free of a senior lien without giving due process to that senior interest, and the court could easily find this receivership sale was invalid, even if the court was generally agreeable to receivership sales free and clear of junior liens. *Eastlake Land Dev.*, 894 N.E.2d at 1261.

[136] *Eastlake Land Dev.*, 894 N.E.2d at 1261.

[137] *Id.*

[138] *Id.* at 1257.

[139] *Id.*

[140] *Id.* at 1258.

[141] *Id.* at 1257–58.

> property.[142] The city of Eastlake guaranteed the loan, which [totaled] $2,425,000.[143]
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> . . . Eastlake Land Development Company defaulted on the loan[, and] the State filed suit against Eastlake Land Development Company and the city of Eastlake . . . .[144]
>
> . . . The [s]tate also requested . . . a receiver . . . . [T]he trial court appointed [one].[145]
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> . . . .
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> . . . [T]he receiver filed a request . . . to sell the second parcel. . . . .[146]
>
> . . . On January 30, 2007, the trial court entered an order setting the receiver's motion for hearing on February 13, 2007.[147] Inexplicably, however, on the same day, despite having set the receiver's motion for hearing, and without vacating its order setting the hearing, the trial court entered an order granting the receiver's request to sell the second parcel . . . .[148]

The court of appeals noted "[t]he record reflects that the receiver never served AFF with a summons and complaint notifying AFF that he sought to extinguish its interests through the sale of the property."[149] The court of appeals did not focus on whether the trial court had the ability to authorize the receiver to sell the second parcel free and clear of liens.[150] Rather, the court stressed the question was if the trial court had the power to authorize a receiver to "sell the second parcel free and clear of AFF's liens *even though AFF had not consented to the same and had not received notice that the property would be sold free of its lien*."[151] Once the threshold question was framed in this manner, it was easy for the court of appeals to find "[t]he trial court's order authorizing the receiver to [sell the property free and clear of AFF's lien] effectively resulted in a denial of AFF's due-process rights and, accordingly, was erroneous as a matter of law."[152]

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[142] *Id.*
[143] *Id.*
[144] *Id.* at 1258.
[145] *Id.*
[146] *Id.* (after the first parcel had been sold over AFF's objections).
[147] *Id.*
[148] *Id.*
[149] *Id.* at 1260.
[150] *Id.* at 1261.
[151] *Id.* (emphasis added).
[152] *Id.*

This case states this receiver's sale of land free and clear of liens was invalid, but it can be inferred, if the lienholder consented to the sale, perhaps it would be in the power of the court to order such a receiver's sale.[153] This case was unusual because the sale was being orchestrated by a junior lienholder attempting to wipe out a senior lien that would have had priority in a proper foreclosure proceeding. Therefore, the appellate court found the sale as an attempt to circumvent due process rights.[154] However, in a more standard receiver setting, where the receiver is appointed to protect the senior lienholder's interests during the interim until the foreclosure sale, due process would not be implicated, and perhaps this court would have reached a different result.[155]

In *Huntington National Bank v. Motel 4 BAPS, Inc.*,[156] the Ohio Court of Appeals said:

> Ohio courts have held that "[Ohio Rev. Code Ann.] Chapter 2735, 'does not contain any restrictions on what the court may authorize when it issues orders regarding receivership property', [and] . . . this includes the power to authorize a receiver, under certain circumstances, to sell property at a private sale free and clear of all liens and encumbrances."[157]

The mortgagor in *Huntington National Bank* appealed from the lower court's decision to confirm the receiver's sale of the property after Motel 4

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[153] This case turned on whether the sale foreclosure of junior liens could wipe out senior interests without notice, let alone consent, of that senior interest. *Id.* However, if there were no due process concerns, the court may have come to a different conclusion. In this case, the majority admitted freely they concurred with the dissent's observation by saying:

> [The dissent] can "find no Ohio case which holds that the only way to extinguish a lienholder's interest in a property is through a foreclosure action." Nor can [the majority]. However, the procedures mandated by foreclosure are more than statutory "hoops" through which one must jump; they embody real concepts of due process. Notice, opportunity to be heard, independent appraisal, and public sale are designed to protect the interests of all parties; due process is a notion embedded in all court action.

Id. The majority did not rule there was no ability to have a receiver sell free and clear, it only ruled in this specific case procedural flaws in the due process and notice requirements were so great as to not require the case to be decided on the basis of a receiver's powers to sell property free and clear of liens. *Id.*

[154] *See id.* ("The threshold question confronting us in this case is whether the trial court could authorize the receiver to take the action he took, i.e., to sell the second parcel free and clear of AFF's liens even though AFF had not consented to [the] same and had not received notice that the property would be sold free of its lien.").

[155] *See id.* (saying "a receiver's sale is subject to due-process requirements and review, and failure to provide the same requires reversal and remand." The implication is that the violation of due process brought about the result in this case but not that the receivership arrangement generally could not take similar actions if there were not any due process issues.).

[156] Huntington Nat'l Bank v. Motel 4 BAPS, Inc., 944 N.E.2d 1210 (Ohio Ct. App. 2010).

[157] *Id.* at 1213.

defaulted on its loan.[158] The mortgagor had filed a motion to stay the receiver's auction; it claimed, "the receiver [had] failed to provide Motel 4 notice of the sale as required by [Ohio Rev. Code Ann. section] 2329.26[,] and that the sale constructively cut off Motel 4's redemption rights."[159] The trial court conducted a hearing and authorized the sale by the receiver.[160] In beginning its review of the case, the court of appeals declared, "[A] receiver is appointed for the benefit of all the creditors of the property subject to receivership."[161] And, the receiver, as an officer of the court, must act in accordance with what the court deems appropriate.[162] The court of appeals quoted the Ohio Supreme Court, saying it "interpreted [Ohio Revised Code Annotated section] 2735.04 as 'enabling the trial court to exercise its sound judicial discretion to limit or expand a receiver's powers as it deems appropriate.'"[163] The court of appeals said the standard by which to judge a trial court's orders to receivers is "a reviewing court will not disturb the trial court's judgment absent an abuse of discretion."[164] In this case, the court of appeals did not find any abuse of discretion by the trial court in allowing a sale free and clear of liens by the receiver.[165] Thus, the receiver's sale was confirmed.[166]

Another Ohio Court of Appeals case is worthy of note for its contribution to the discussion of transfers of property made during the pendency of a foreclosure without being a clog on the equity of redemption.[167] In *Panagouleas Interiors, Inc. v. Silent Partner Group, Inc.*,[168] the court held the deed in lieu of foreclosure at issue was invalid,[169] and, "[f]urthermore, the 'subsequent agreement' that can circumvent the prohibition against clogging typically occurs only after default."[170]

In 1993, Pete Panagouleas, a hotel owner specializing in hotel renovation, purchased a hotel located at 330 West First Street,[171] "To avoid foreclosure,

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[158] *Id.* at 1211.
[159] *Id.* at 1211–12.
[160] *Id.* at 1212.
[161] *Id.* (quoting Castlebrook Ltd. v. Dayton Properties Ltd., 604 N.E.2d 808 (Ohio Ct. App. 1992)) (internal quotation marks omitted).
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.* at 1214.
[166] *Id.*
[167] Note receivership sales are similar to other mortgage substitutes because they seek to alienate the debtor's property without resorting to the full foreclosure process. *See* NELSON ET AL., *supra* note 1, at Chapter 3.
[168] No. 18864, 2002 WL 441409 (Ohio Ct. App. 2002).
[169] *Id.* at 12.
[170] *Id.* at 11.
[171] *Id.* at 1.

Panagouleas agreed to sell the hotel to Anthony Corona."[172] Corona gave a mortgage on the property to Panagouleas and Silent Partner Group (SPG), who purchased the first mortgage from Panagouleas.[173] The letter outlining the terms of the mortgage agreement and the repayment information also provided: "The funding of this loan will be simultaneously consummated with a contract, full assignment of [n]ote and [m]ortgage and deed in lieu of foreclosure in escrow."[174] The letter also stated:

> [I]n the event of a default by Corona, Panagouleas will have [thirty] days after the interest escrow of $91,458.36 has been depleted to redeem the first mortgage and [d]eed in lieu of foreclosure. If Panagouleas does not redeem the discharge of the [s]econd mortgage will be recorded. The interest escrow will be drawn upon monthly. However, if Corona should default, Panagouleas will be given notice of the default. SPG will draw $7,621.53 monthly against the escrow until it is depleted. Upon depletion of the escrow Panagouleas shall have [thirty] days to redeem. If Panagouleas has not redeemed within the [thirty] day period SPG will record the discharge.[175]

Corona defaulted on the SPG "[t]rust note and mortgage agreement almost immediately."[176] Panagouleas was notified on the default, and his son Pete, who himself was ill, "began to attempt to repurchase the note."[177] However, SPG did not receive any funds by the time the grace period ran out,[178] and "[c]onsequently . . . recorded the deed in lieu of foreclosure."[179]

Corona and Panagouleas Interiors, Inc. (PI), on whose behalf Panagouleas signed the deed and mortgage, challenged the trial court's finding upholding the validity of the deed in lieu of foreclosure.[180] PI claimed the deed in lieu of foreclosure did not transfer legal and equitable title to SPG, and they were required to use traditional foreclosure procedures because the deed in lieu of foreclosure operated to deprive Pete Panagouleas and Anthony Corona of their equity of redemption.[181] The court quoted *Shaw v. Walbridge*,[182] an old, yet still controlling, Ohio Supreme Court case as saying:

> There is no rule of law which prevents a mortgagor from disposing

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[172] *Id.*
[173] *Id.* at 2.
[174] *Id.*
[175] *Id.*
[176] *Id.* at 4.
[177] *Id.*
[178] *Id.* at 5.
[179] *Id.*
[180] *Id.* at 8.
[181] *Id.*
[182] Shaw v. Walbridge, 33 Ohio St. 1 (Ohio 1877).

> of his equity of redemption to a mortgagee by private arrangement, but courts of equity will not permit a mortgagee to take advantage of his position so as to wrest from the mortgagor his equity, by an unconscionable bargain. The transaction will be jealously scrutinized, but if the agreement is a fair one, under all the circumstances of the case, it will be upheld.[183]

The court found the agreement cutting off the equity of redemption was made contemporaneously—all the documents were determined to be part of the same transaction—with the mortgage agreement, and "no agreement can be made at the time of the mortgage, depriving the mortgagor of his right to redeem."[184] The court pointed out "the 'subsequent agreement' that can circumvent the prohibition against clogging typically occurs only after default."[185]

Panagouleas Interiors affirmed the courts' stance on allowing transfers of real property without the traditional mortgage foreclosure procedures when the agreement to do so is made post-default.[186] It can be inferred from the court's holding, when the agreement[187] to transfer property not subject to traditional rules is made post-default, it can circumvent the prohibition against clogging the equity of redemption. This particular case dealt with clogs on the equity of redemption that were presented in the form of deeds in lieu of foreclosure.[188] However, a similar rationale should apply when the agreement circumventing the prohibition against clogs on the equity of redemption is an agreement made post-default appointing a receiver, and granting him the ability to sell the property in any manner he determines is reasonably calculated to bring the highest purchase price, if he determines a sale is the best course of action.

F. Washington

Washington statutes distinguish two types of receiverships: a general receivership and a custodial receivership.[189] One of the statutes states courts

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[183] *Panagouleas Interiors*, 2002 WL 441409, at 9.

[184] *Id.* at 10.

[185] *Id.* at 11 (quoting 4 POWELL ON REAL PROPERTY § 37.44, at 37–305 (Michael Allan Wolf ed., 1997); RESTATEMENT (THIRD) OF THE LAW OF PROPERTY § 3 (1997)).

[186] *Id.*

[187] There may be a requirement for new consideration, such as extension of time to pay, for the agreement to have legal weight. *See id.* ("Specifically, no new consideration flowed to Corona, who was the party relinquishing the equity of redemption. Additionally, to the extent that the equity of redemption belonged to Pete, no new consideration existed either, since these matters were all part of the same transaction.").

[188] *Id.* at 1.

[189] *See* WASH. REV. CODE § 7.60.005(10)-(11) (2004); *Id.* § 7.60.015 (differentiating the two types of receivership: "A receiver must be either a general receiver or a custodial receiver. A receiver must be a general receiver if the receiver is appointed to take possession and control of all

should appoint a custodial receivership in cases where the sole basis for appointment is the pendency of an action to foreclose upon a lien against the property.[190] Only general receivers are empowered to liquidate the receivership property,[191] while a custodial receiver cannot.[192] However, if there are more bases for appointing the receivership than simply the pendency of a foreclosure action, perhaps a general receivership can be established.[193] The Revised Code of Washington section 7.60.025(1)(g), for example, says, "[W]hen the property . . . [is] in danger of waste, impairment, or destruction, or where the abandoned property's owner has absconded with, secreted, or abandoned the property, and it is necessary to collect, conserve, manage, control, or protect it, or to dispose of it promptly,"[194] there are grounds for a receivership to be appointed.[195] Therefore, if there is a case of a pending foreclosure of a mortgage on a commercial property that is quickly losing equity or depreciating in value, the multiple bases may warrant a general receivership being appointed to liquidate the property. Even if a custodial receivership is appointed, "[t]he court by order may convert either a general receivership or a custodial receivership into the other."[196]

The Revised Code of Washington section 7.60.260(2) states court ordered sales under this section be made free and clear of liens—the liens attach to the proceeds of the sale—and all rights of redemption.[197] The Washington statute provides safeguards to owners and lienholders similar to those found in the Minnesota statutes.[198] There is a safeguard that shows a similar intent to statutory redemption laws in mortgage, which grant residential mortgagors and farmstead owners extra protection.[199] There is also a complaint system that

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or substantially all of a person's property with authority to liquidate that property and, in the case of a business over which the receiver is appointed, wind up affairs. A receiver must be a custodial receiver if the receiver is appointed to take charge of limited or specific property of a person or is not given authority to liquidate property.").

[190] *Id.* § 7.60.015.

[191] *Id.*

[192] *Id.*

[193] In section 7.60.015, the statute clearly states, "When the sole basis for the appointment is the pendency of an action to foreclose upon a lien against real property . . . the court shall appoint the receiver as a custodial receiver." The legislative intent is not clear as to its treatment of cases in which there are multiple bases for the appointment of a receiver and which only one of those bases is the pendency of a foreclosure action.

[194] WASH. REV. CODE § 7.60.025(1)(g) (2011).

[195] *Id.*

[196] *Id.* § 7.60.015.

[197] *Id.* § 7.60.260(2) ("The court may order that a general receiver's sale of estate property . . . be effected free and clear of liens and of all rights of redemption, whether or not the sale will generate proceeds sufficient to fully satisfy all claims secured by the property . . . . ").

[198] *Id.*

[199] *Id.* § 7.60.260(2)(i) (stating sales free and clear of liens are allowed unless, "[t]he property is real property used principally in the production of crops, livestock, or aquaculture, or the property is

allows owners or parties with an interest in the property to file a timely opposition to the sale.[200] The court would then have to determine if the amount likely to be realized by the objecting person from the receiver's sale is less than the person would realize within a reasonable time in the absence of the receiver's sale before proceeding with the sale.[201]

IV. A POSSIBLE UNIFORM FRAMEWORK

Real property has traditionally been treated differently than personal property and is afforded the extra protection of equity of redemption and, in some jurisdictions, statutory redemption. Therefore, legislatures have been much quicker to pass laws for the execution of estates in a bankruptcy or the sale of personal property in satisfying a judgment lien. However, in today's global economy, one company—such as Fannie Mae or Freddie Mac—buying mortgages or deeds of trust on the secondary market may hold mortgages from fifty different jurisdictions and subject to fifty different sets of laws. The system can, therefore, be streamlined and become more efficient from any uniform laws in the real property arena. Advocating for a nationally uniform foreclosure law system is beyond the scope of this article.[202] However, this article is suggesting state statutes do more to address the rights and abilities of receivers. As it presently stands, many states use a simple and general catch-all, such as allowing receivers to "make transfers, and generally . . . do such acts respecting the property as the court may authorize,"[203] or "generally do such acts respecting the property as the court authorizes."[204] These statutes leave much of the decisions up to the court system. This, in turn, leads to more inefficiency, because it is the inefficiencies of the court system—including two-year waiting times for judicial foreclosure proceedings—which necessitates receiverships as an ancillary remedy during the pendency of those actions. A bright line statute clearly laying out a framework for what is expected of a receivership, and what procedures and safeguards should be put in place in the case of sales of property by the receiver, would minimize the toll on the court system by requiring at most a review of the receiver's transaction, as opposed to being intimately

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a homestead under [WASH REV. CODE § 6.13.010(1)], and the owner of the property has not consented to the sale following the appointment of the receiver . . . .").

[200] *Id.* § 7.60.260(2)(ii) ("The owner of the property or a creditor with an interest in the property serves and files a timely opposition to the receiver's sale, and the court determines that the amount likely to be realized by the objecting person from the receiver's sale is less than the person would realize within a reasonable time in the absence of the receiver's sale.").

[201] *Id.*

[202] *See generally supra* note 42 (discussing, even where sweeping uniform foreclosure laws have been introduced, they have not been adopted).

[203] *See supra* note 46.

[204] *See supra* note 47.

involved at every step.

A uniform statute allowing receiver sales, especially sales free and clear of liens, during a foreclosure proceeding would have to balance two sides. On one hand, it would grant the receiver a measure of independent authority, which would allow him to determine what type of sale to use or if a sale is the best course of action at all. It would also incentivize the receiver to engage real estate brokers to facilitate a possible sale. The other side of the scale would be measures to ensure the sale does not clog the equity of redemption or obstruct statutory rights of redemption. A state's receivership sales statute could address these concerns by requiring the choice or agreement to sell to be made after the default by the mortgagor, either in court or in a private agreement by the parties. It could also require court approval of a potential sale to ensure no foul play by the receivers. These safeguards would ensure the ability to sell without resort to a full foreclosure proceeding is not granted at the same time as the mortgage is issued, which raises issues of possible clogs on the equity of redemption. The rights of junior lienholders whose interests are subject to being extinguished by way of the receiver's free and clear sale should be granted the right to object to the sale in a manner similar to the system discussed in the statutory frameworks of both Minnesota and Washington.[205]

In addressing statutory rights of redemption where they apply, a sale could be made subject to it, though that would reduce potential purchase prices. Or, since those rights are statutory, a receiver sales statute could be made to be an exception from the redemption right by the same body that instituted the right. Alternatively, the receivership sales statutes could have built in exceptions for the classes of people that statutory redemption is primarily aimed at helping retain possession of their property—homestead and farmstead owners. The blueprint for such an exception can be found in the statutory framework of Minnesota and Washington. In Washington's revised code section 7.60.260(2), for example, it lays out the exceptions:

> The court may order that a general receiver's sale of estate property either (a) under subsection (1) of this section, or (b) consisting of real property which the debtor intended to sell in its ordinary course of business be effected free and clear of liens and of all rights of redemption, whether or not the sale will generate proceeds sufficient to fully satisfy all claims secured by the property, unless either:
>
> (i) The property is real property used principally in the production of crops, livestock, or aquaculture, or the property is a homestead

[205] *See supra* note 114 and accompanying text. "If a timely objection is filed, the court will determine whether the amount likely to be realized from the sale by the objecting person is less than the objecting person would realize within a reasonable time in the absence of this sale". MINN. STAT. § 576.461(a) (2014).

> under RCW 6.13.010(1), and the owner of the property has not consented to the sale following the appointment of the receiver . . . .[206]

Minnesota statutes section 576.46, subd. 1(a)(1) uses similar language:

> The court may order that a general receiver's sale of receivership property is free and clear of all liens, except any lien for unpaid real estate taxes or assessments and liens arising under federal law, and may be free of the rights of redemption of the respondent if the rights of redemption are receivership property and the rights of redemption of the holders of any liens, regardless of whether the sale will generate proceeds sufficient to fully satisfy all liens on the property, unless either: (1) the property is (i) real property classified as agricultural land under section 273.13, subdivision 23, or the property is a homestead under section 510.01; and (ii) each of the owners of the property has not consented to the sale following the time of appointment . . . .[207]

For a receivership statute to increase efficiency and uniformity in the law, and allow sales of real property free and clear of liens without infringing on any traditional rights associated with real property, it would require three elements: First, agreements allowing the receiver to sell the property must be agreed to by the mortgagor post-default to avoid clogging the equity of redemption; second, there must be an objection system that allows junior lienholders an opportunity to prove they would receive more value if not for the proposed sale (any party that feels the proposed sale price is too low can also employ this objection system); and third, the statute should include the built in protections for homestead and farmstead owners.[208]

V. CONCLUSION

This article discusses receiverships that arise during the pendency of a foreclosure sale, be it through a judicial sale or a power of sale deed of trust in the states in which they are available. The primary issue is the capture of as much money as possible for the benefit of the mortgagee in a commercial mortgage setting, where rents are accruing even after the mortgagor's default.

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[206] WASH. REV. CODE § 7.60.260(2) (2011).

[207] MINN. STAT. § 576.46, subd. 1(a)(1) (2012).

[208] *See infra* Part I. The mortgages generally needing the protection afforded by a receiver's right to sell are non-recourse commercial mortgages wherein the mortgagee can lose equity rapidly during the pendency of the sale. *Id.* Homestead and farmstead owners on the other hand, are the mortgagors the protections of mortgage law were primarily developed to protect. *Id.* Furthermore, homestead and farmstead owners are often at a bargaining disadvantage to large institutional lenders—mortgagees. Thus, putting statutory protections in place to protect their interest stops mortgagees from taking advantage of their weaker bargaining position.

This article examines the statutory framework of a selection of states to determine the extent of the receiver's powers, with a specific eye towards his or her power to sell the property and the limits regarding that power, if it exists at all. Real property is an area of law that is very diverse and differs from state to state. This article argues, however, in the modern world of commercial mortgages, where the mortgagee is often an institutional lender with a multi-state presence and even the mortgagors or at least their investors can span states, there should be a trend towards uniformity in the law.