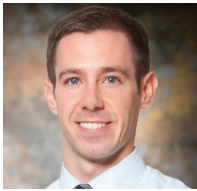


Commercial Foreclosure (ME)

A Practical Guidance® Practice Note by
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This practice note provides an overview of the relevant statutes, rules, and regulations governing commercial foreclosures (both judicial and by power of sale) in Maine. This practice note provides guidance to counsel for a mortgagee foreclosing a mortgage on commercial real property to help ensure that all relevant state-level statutory or regulatory requirements are satisfied to avoid delay and overcome any defenses that might be raised by a mortgagor or party in interest. Although the foreclosure process is mortgagee-driven, the information in this practice note is also relevant to a mortgagor facing a commercial foreclosure.

For general guidance on residential foreclosures in Maine, see [Residential Foreclosure \(ME\)](#) and [Common Defenses to Residential Foreclosure \(ME\)](#).

Evolving federal and state regulations in response to the COVID-19 pandemic as well as COVID-19-triggered court closures and schedule modifications may affect the foreclosure process in Maine. For COVID-19 guidance,

see [Coronavirus \(COVID-19\) Resource Kit](#) and [Coronavirus \(COVID-19\) Resource Kit: Business Response](#).

For general guidance on commercial real estate financing in Maine, see [Commercial Real Estate Financing \(ME\)](#). For guidance on alternatives to commercial foreclosure, see [Workouts of Commercial Real Estate Loans](#).

Available Remedies in Maine

A lender presented with a defaulted loan secured by commercial real estate located in Maine may have more than one foreclosure remedy available. Whereas in the residential context, foreclosure by civil action is the exclusive method of foreclosure currently available in Maine, for certain mortgage loans made in the commercial context, Maine law provides an alternative – foreclosure by power of sale.

This practice note proceeds in two parts. The first part covers the remedy of foreclosure by power of sale, including the circumstances in which it is available and statutory requirements for validly enforcing it. The second part covers the remedy of judicial foreclosure, which is most often pursued by mortgagees in the commercial context only where the more efficient power of sale remedy may be pursued.

Nonjudicial Foreclosure – Legal Framework

Where a loan is made primarily for business, commercial, or agricultural purposes and is secured by a mortgage on commercial property, Maine law makes available to lenders the following statutory power of sale that may be included or incorporated by reference in a commercial mortgage:

POWER

Upon any default in the performance or the observance of the foregoing or other condition, the mortgagee or the mortgagee's executors, administrators, successors or assigns, or the agent or attorney of the mortgagee or the mortgagee's executors, administrators, successors or assigns, may sell the mortgaged premises or such portion thereof as may remain subject to the mortgage in case of any partial release thereof, either as a whole or in parcels, together with all improvements that may be thereon, by a public sale in the county where the real estate then subject to the mortgage is situated, or, if more than one parcel is then subject thereto, then in the county where one of said parcels is situated, or at such place as may be designated for the purpose in the mortgage, first complying with the terms of the mortgage and the statutes relating to the foreclosure of mortgage by the exercise of a power of sale, and the mortgagee or the mortgagee's executors, administrators, successors or assigns or the agent or attorney of the mortgagee or the mortgagee's executors, administrators, successors or assigns may convey the same by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and such sale forever bars the mortgagor and all persons claiming under it from all right and interest in the mortgaged premises, whether at law or in equity.

Me. Rev. Stat. tit. 33, § 501-A.

Availability of Power of Sale as a Remedy

The statutory power of sale may generally be incorporated by reference or included in any mortgage "granted by a corporation, partnership, including a limited partnership or a limited liability partnership, limited liability company or trustee of a trust." Where a mortgage deed is granted by a trustee of a trust, however, the statutory power of sale may not be used to foreclose the mortgage "if at the time the mortgage deed is given the real estate is used exclusively for residential purposes, the real estate has 4 or fewer residential units and one of the units is the principal residence of the owner of at least 1/2 of the beneficial interest in the trust." Me. Rev. Stat. tit. 33, § 501-A; Me. Rev. Stat. tit. 14, § 6203-A(1). If the mortgage deed granted by the trustee of a trust contains a statement that the circumstances giving rise to that limited exception are not present, "the statement conclusively establishes these facts and the mortgage deed may be foreclosed

by the power of sale." Me. Rev. Stat. tit. 14, § 6203-A(1); Me. Rev. Stat. tit. 33, § 501-A. Subsequent conveyance of the mortgaged premises to a different organization or individual does not affect the validity of the power of sale or the mortgagee's ability to exercise it. If the mortgage was executed on or after October 1, 1993, a power of sale may only be exercised if the mortgage deed expressly states that it is given primarily for business, commercial, or agricultural purposes. Me. Rev. Stat. tit. 14, § 6203-A(1). If a mortgage predates October 1, 1993, the power of sale remedy may be more or less broadly available. See Title Standard 609 of the Maine State Bar Association.

Initial Steps to Exercise a Power of Sale

Upon breach of condition of a mortgage that includes a valid power of sale, the holder of the mortgage, "or a person authorized by the power of sale, or an attorney duly authorized by a writing under seal, or a person acting in the name of the holder of such mortgage or any such authorized person, may . . . do all the acts authorized or required by the power." Me. Rev. Stat. tit. 14, § 6203-A(1). Certain statutory requirements must nevertheless be followed to validly exercise the power of sale, regardless of whether such requirements are set forth in the mortgage deed. Me. Rev. Stat. tit. 14, § 6203-A(1)-(4).

Notice of Sale

Central to these requirements is the requirement to provide notice of the sale to interested parties (the form of such notice, a "Notice of Sale") and to publish the Notice of Sale. See Me. Rev. Stat. tit. 14, § 6203-A(1)-(4).

Form and Content of Notice

Section 6203-A(3) prescribes the minimum contents that must be included in a Notice of Sale, namely:

- The identity of the mortgagee
- The identity of the mortgagor
- The terms of the public sale
- The location, date, and time of the public sale
- The street address, if any, of the real estate encumbered by the mortgage –and –
- A description of the real estate encumbered by the mortgage, which may be incorporated by reference to the book and page number of an instrument of record

containing an adequate legal description of the real estate, and the book and page number, if any, of the mortgage

The statute provides a sample form of notice but does not preclude the use of any other form. For an annotated version of the statutory form, see [Notice of Sale \(Commercial Nonjudicial Foreclosure\) \(ME\)](#).

Parties Entitled to Notice

The Notice of Sale must be provided to the following parties:

- **Mortgagor.** No fewer than 21 days before the date of the sale, a copy of the Notice of Sale must be served on the mortgagor or its representative in interest. Alternatively, notice may be sent by registered or certified mail addressed to the mortgagor or the mortgagor's representative at the mortgagor's last known address, or to the person and to the address as may be agreed upon in the mortgage or to the address as may be provided in writing by the mortgagor to the mortgagee. Me. Rev. Stat. tit. 14, § 6203-A(1-A).
- **Parties in interest.** Notice must also be provided to "parties in interest," meaning "those parties having a claim to the [mortgaged] real estate whose claim is recorded in the registry of deeds as of the time of recording the notice of foreclosure." Me. Rev. Stat. tit. 14, § 6203-A(1-A). Accordingly, a foreclosing mortgagee is well-served by obtaining a title search report prior to initiating a power of sale foreclosure to identify not only ownership and encumbrances but all recorded documents that affect the property, such as superior and subordinate mortgages, easements, and lien claims. This search might also identify any title defects that might be corrected prior to initiating a foreclosure. Once parties in interest have been identified, the foreclosing mortgagee should send a copy of the Notice of Sale by first class mail, postmarked at least 21 days prior to the public sale, to all parties in interest, except for parties in interest having a superior priority, "at the address, if any, listed in the instrument evidencing the interest, and, if none is listed, to the registered agent for the party in interest, or to any other address that may be readily available to the mortgagee . . . Failure to notify any party in interest, other than the mortgagor, does not [, however,] invalidate the foreclosure as to other parties in interest who were given notice." Me. Rev. Stat. tit. 14, § 6203-A(1-A).
- **Residential tenants.** If the mortgagee knows or should know by exercise of due diligence that the property is occupied as a residential rental unit, the mortgagee must provide notice to residential tenants at least 21 days prior to the date of public sale. To facilitate this

notice, the mortgagor or its representative in interest is statutorily obligated to provide the name, address, and other contact information for any residential tenant. The required notice may be (1) served on the residential tenant by sheriff, (2) sent by first class mail at the residential tenant's last known address, or (3) posted conspicuously at each entrance to the mortgaged premises. A residential tenant may not be evicted except through an action for forcible entry and detainer pursuant to Me. Rev. Stat. tit. 14, § 6001 at least 21 days after a mortgagee has served the required Notice of Sale; provided, however, that a foreclosing mortgagee might nevertheless pursue a forcible entry and detainer action sooner for a reason unrelated to a foreclosure sale. The failure to provide the notice to residential tenants does not affect the validity of the foreclosure sale. Me. Rev. Stat. tit. 14, § 6203-A(2).

- **Municipality.** Although not required by Section 6203-A, if there are outstanding taxes or municipal assessments such as water, sewer, or stormwater liens, the municipality in which the land lies should be notified. Failure to notify the municipality, however, does not cut off the real estate taxes or assessments, which have priority over the mortgage.
- **The U.S. Government.** Although beyond the scope of this practice note, a foreclosing mortgagee should be mindful of and adhere to any procedure or notice requirements established by federal law in any case where the U.S. Government has a lien against the mortgaged premises. In such cases, for example, special notice may need to be provided to the U.S. Government, and the U.S. Government may hold a right of redemption following the sale even where no such right exists under Maine law. See, e.g., 26 U.S.C. § 7425(b), (d)(1) (providing the Secretary of Treasury the right to redeem within 120 days from the date of sale).

Recording of Notice of Sale

A copy of the Notice of Sale must be recorded in each registry of deeds in which the mortgage deed is or by law should be recorded to provide constructive notice. The notice must be recorded no fewer than 21 days prior to the date of the public sale. Me. Rev. Stat. tit. 14, § 6203-A(2-A).

Publication of Notice of Sale

Likewise, a copy of the Notice of Sale must be published once a week for three consecutive weeks in newspaper of general circulation in the town where the land is located, and the date of the first such publication must occur at least 21 days prior to the date of the public sale. Me. Rev. Stat. tit. 14, § 6203-A(1).

Notice of Intention to Foreclose and of Liability for Deficiency after Foreclosure

If the foreclosing mortgagee intends to pursue a judgment against the mortgagor or any guarantor of the obligations secured by the mortgage for any deficiency resulting after foreclosure of the mortgage, the mortgagee must also provide written notice of its intention to foreclose and of liability for the deficiency. The notice must be served on the mortgagor or its representative in interest or sent by registered or certified mail with return receipt requested at least 21 days prior to the date of sale to the mortgagor's last known address and to such address agreed to in writing in the mortgage. See Me. Rev. Stat. tit. 14, § 6203-E. The notice must be in substantially the form set forth in the statute. For an annotated version of this statutory form, see [Notice of Sale \(Commercial Nonjudicial Foreclosure\) \(ME\)](#).

Following the sale, within 30 days of delivery of the foreclosure deed to the purchaser or purchaser's agent, an affidavit of the mailing of this notice must be signed and sworn to. See Me. Rev. Stat. tit. 14, § 6203-E. A form of affidavit is provided in the statute, but the statute does not preclude the use of any other form. For an annotated version of the statutory form, see [Affidavit of Mailing \(Commercial Nonjudicial Foreclosure\) \(ME\)](#).

The affidavit, if timely made, is prima facie evidence of the mailing of such notice in any deficiency action, and such notice is sufficient notice. As noted in Section 6203-E of Title 14 of the Maine Revised Statutes, the amount of a deficiency is limited to the difference between fair market value of the premises at the time of the sale (based on an independent appraisal) and the sum due to the mortgagee plus interest and expense incurred in making the sale. Me. Rev. Stat. tit. 14, § 6203-E.

Sufficiency of Notice; Effect of Sale

As long as the Notice of Sale is published and given in accordance with the foregoing requirements and in accordance with the power of sale in the mortgage, it "together with such other or further notice, if any, as is required by the mortgage, along with notice to the mortgagor and parties in interest whose interest appears of record at the time that the Notice of Sale is recorded in the appropriate registry of deeds, is sufficient notice of the sale." See Me. Rev. Stat. tit. 14, § 6203-A(4). Accordingly, upon conveyance by the foreclosing mortgagee following the public sale, "the premises are considered to have been sold free and clear of the interest of the mortgagor and of all other parties in interest who have been given notice

in compliance with [Me. Rev. Stat. tit. 14, § 6203-A(1-A)], except for parties in interest having a superior priority to the foreclosing mortgagee." Me. Rev. Stat. tit. 14, § 6203-A(4). Whether or not reference is specifically made to them in the Notice of Sale of deed, however, the premises are conveyed "subject to and with the benefit of all restrictions, easements, improvements, outstanding tax titles, municipal or other public taxes, assessments, liens or claims in the nature of liens and existing encumbrances of record created prior to the mortgage." See id.

"Any other party in interest having a claim to the real estate whose claim is not recorded in the registry of deeds as of the time of recording the [Notice of Sale] need not be given notice." Me. Rev. Stat. tit. 14, § 6203-A(4). "[A]ny such party has no claim against the real estate after completion of the public sale." Id. In light of the foregoing, a foreclosing mortgagee is well-advised to update its title search after recording its Notice of Sale and prior to the date that is 21 days prior to the sale to be certain that it has sent notice to any party in interest whose interest was recorded between the time the initial title search was performed and the recording of the Notice of Sale. If any intervening interests appear of record, the foreclosing mortgagee can then act swiftly to provide timely notice to the holders of such interests. The interests of parties in interest having a superior priority are not affected by the foreclosure. See Me. Rev. Stat. tit. 14, § 6203-A(4).

At the conclusion of the public sale, assuming that the foreclosing mortgagee is not the high bidder, the foreclosing mortgagee executes a purchase and sale agreement with the high bidder. If the high bidder fails to perform its obligations under that agreement, the foreclosing mortgagee may choose to execute a purchase and sale agreement with the next highest bidder. The mortgagee is free to participate in the sale, credit bid, and purchase the mortgaged premises if it is the highest bidder. If the real estate is sold for an amount in excess of the obligations secured by the mortgage, the "excess must be used to satisfy the claims of parties in interest whose interests were extinguished by the foreclosure in the order of priority that existed prior to the foreclosure." Me. Rev. Stat. tit. 14, § 6203-A(5). If there are any excess proceeds remaining after these claims are satisfied (together with any interest and costs thereon), such proceeds must be paid to the mortgagor. "If the mortgagor or any such party in interest cannot be found after a diligent search, the money must be paid into the Superior Court in the county where the land lies for the benefit of the mortgagor or the holder of any such encumbrance." Id.

Conducting a Sale Pursuant to a Power of Sale and Post-sale Procedures

Section 6203-A of Title 14 and Section 501-A of Title 33 of the Maine Revised Statutes only loosely prescribe the process by which a public sale pursuant to the statutory power of sale must be conducted. The mortgaged premises may be sold as a whole or in parcels, for example, and the sale may be held anywhere in the county in which any of the mortgaged parcels is located, unless a location is specifically designated in the mortgage. Me. Rev. Stat. tit. 33, § 501-A. A foreclosing mortgagee is nonetheless well-served by conducting the sale in a commercially reasonable manner. See, e.g., *Bar Harbor Bank & Trust v. The Woods at Moody, LLC*, 974 A.2d 934 (Me. 2009) (analyzing mortgagor's challenge to power of sale foreclosure auction under a commercial reasonableness standard). While Maine law generally requires any person "who engages in the business of auctioneering, professes or advertises to be an auctioneer or advertises the sale of real, personal or mixed property by auction" within the state to hold a valid auctioneer's license, an exemption is provided for mortgage foreclosure sales. See Me. Rev. Stat. tit. 32, §§ 285–286. Adjournments of the sale not exceeding 30 days may be announced to those present from time to time until a sale is made. Me. Rev. Stat. tit. 14, § 6203-A(6).

Intervening Assignments of the Mortgage

Assignment of the mortgage during the power of sale process does not compromise the validity of the sale. The mortgage assignee may complete the foreclosure upon recording the assignment in the applicable registry of deeds. Me. Rev. Stat. tit. 14, § 6203-G.

Affidavit of Sale

Within 30 days after the date of the delivery of the foreclosure deed to the purchaser or the purchaser's agent, the mortgagee or its agent must record in the registry of deeds for the county where the land lies "an affidavit, fully and particularly stating the mortgagee's acts, or the acts of the mortgagee's agent, along with a copy of the [Notice of Sale] as published." Me. Rev. Stat. tit. 14, § 6203-B. The affidavit must:

- Identify the mortgagee and mortgagor
- Include the street address, if any, of the real estate encumbered by the mortgage

- Include a description of the real estate encumbered by the mortgage, which may be incorporated by reference to the book and page number of an instrument of record containing an adequate legal description of the real estate
- Include the book and page number, if any, of the mortgage
- Include the dates of publication and the name of the publishing entity of the public notice required by Me. Rev. Stat. tit. 14, § 6203-A(1)
- Identify the recipients and mailing or service dates of notices provided pursuant to Me. Rev. Stat. tit. 14, § 6203-A(1) and (1)(A) and Me. Rev. Stat. tit. 14, § 6203-E
- Identify the final purchaser under the agreement described in Section 6203-A(5) –and–
- Include the date of delivery of the deed to the purchaser or the purchaser's agent

Me. Rev. Stat. tit. 14, § 6203-B.

"If the affidavit shows that the requirements of the power of sale and Section 6203-A have in all respects been complied with, the affidavit or a certified copy of the record thereof must be admitted as evidence that the power of sale was duly executed." Me. Rev. Stat. tit. 14, § 6203-B. Errors and omissions may be corrected by an amended affidavit recorded in the same manner, which "has the same effect and must be admitted in evidence, as if it had been recorded within said 30 days." *Id.* The amended affidavit, however, "does not prejudicially affect any title or interest in land that may have arisen or have been created between the recording of the original and of the subsequent affidavit." *Id.*

Deficiency Actions

A properly conducted power of sale foreclosure only extinguishes a mortgagor's equitable right of redemption of the mortgaged property; it does not extinguish the mortgagee's claim for money owed on the mortgage note in the event that there is a deficiency upon sale of the property. See *Bar Harbor Bank & Trust v. The Woods at Moody, LLC*, 974 A.2d 934, 937-38 (Me. 2009). Actions on the mortgage note or other obligation secured by a mortgage, such as a guaranty, to recover judgments for deficiencies after foreclosure by sale under the power of sale contained in such mortgage must generally be brought within two years after the date of delivery of the foreclosure deed to the purchaser or the purchaser's agent. If the principal of the note or other obligation does not

become payable until after the date of delivery of the deed to the purchaser or the purchaser's agent, however, then a deficiency action must be brought within two years after the time when the cause of action for the principal accrues. Me. Rev. Stat. tit. 14, § 6203-D.

Judicial Foreclosure – Legal Framework

When foreclosure by power of sale is not possible, judicial foreclosure must be pursued. Before commencing a foreclosure action, a mortgagee should confirm that it has complied with all notice or other pre-suit requirements set forth in the loan agreement, mortgage, note, guaranty, or other loan documents. After a breach of condition of the mortgage and satisfaction of any such requirements, the mortgagee or any person claiming under the mortgagee may file a foreclosure complaint in the superior or district court of the county where the mortgaged property is located. Me. Rev. Stat. tit. 14, § 6321. In this way, commercial foreclosures vary significantly from residential foreclosures where a notice of default must be provided in strict compliance with the statutory requirements and a 35-day right to cure is afforded by statute. Me. Rev. Stat. tit. 14, § 6111 (applicable to foreclosures of mortgages “upon residential property located in [Maine] when the mortgagor is occupying all or a portion of the property as the mortgagor’s primary residence and the mortgage secures a loan for personal, family or household use”).

Consistent with the Maine Rules of Civil Procedure, a copy of the complaint and summons must then be served on the mortgagor and all parties in interest. Me. Rev. Stat. tit. 14, § 6321.

Preliminary Steps to Bring a Judicial Foreclosure Action

Drafting the Complaint

A foreclosure complaint must include the following:

- A certification of proof of ownership of the mortgage note
- Allegations of all assignments and endorsements of the mortgage note and mortgage
- A certification that that all steps mandated by law to provide notice to the mortgagor pursuant to Section 6111 were strictly performed (to the extent applicable)
- Specific allegations of the plaintiff’s claim by mortgage on the real estate

- A specific description of the mortgaged premises, including the street address, if any, on the first page of the complaint
- The book and page number of the mortgage as recorded in the registry, if any
- The existence of public utility easements, if any, that were recorded subsequent to the mortgage and prior to the commencement of the foreclosure proceeding and without mortgagee consent
- The amount due on the mortgage
- The mortgage condition breached by the mortgagor
- A demand for foreclosure and sale

Me. Rev. Stat. tit. 14, § 6321.

“Certification of proof of ownership,” *id.*, “requires only that a foreclosure plaintiff identify the owner or economic beneficiary and, if it is not itself the owner, prove that it has power to enforce the note.” *U.S. Bank, Nat. Ass’n v. Thomes*, 69 A.3d 411, 414-15 (Me. 2013) (quoting *Bank of Am., N.A. v. Cloutier*, 61 A.3d 1242, 1247 (Me. 2013)). Thus, pursuant to Maine’s Uniform Commercial Code, the party in possession of the note endorsed in blank is entitled to enforce it as the holder of the negotiable instrument. See Me. Rev. Stat. tit. 11, § 1-1201; *Cloutier*, 61 A.3d at 1247.

Recording and Providing Notice of the Complaint or Clerk’s Certificate

The mortgagee must provide a copy of the clerk’s certificate or a copy of the complaint to the municipal tax assessor of the municipality where the mortgaged land is located within 10 days of filing the complaint with the court. If using a clerk’s certificate, it must bear the title “Clerk’s Certificate of Foreclosure” and prominently state the street address of the mortgaged premises immediately after that title, in addition to the book and page number of the mortgage, if any. As noted above, a complaint should furnish the same information on the first page of the complaint. Failure to provide notice to the municipal tax assessor as provided, however, does not affect the validity of a foreclosure sale. Me. Rev. Stat. tit. 14, § 6321.

The mortgagee must also “record a copy of the complaint or a clerk’s certificate of the filing of the complaint in each registry of deeds in which the mortgage deed is or by law ought to be recorded and such a recording thereafter constitutes record notice of commencement of foreclosure,” within 60 days of filing the complaint with the court. Me. Rev. Stat. tit. 14, § 6321.

Joining and Providing Notice to Parties in Interest

All parties in interest to the foreclosure proceeding must be served in accordance with the Maine Rules of Civil Procedure. As in the case of a power of sale foreclosure, a party in interest to a judicial foreclosure is any party who has an interest in the mortgaged premises at the time of filing. This may include “mortgagors, holders of fee interest, mortgagees, lessees pursuant to recorded leases or memoranda thereof, lienors and attaching creditors all as reflected by the indices in the registry of deeds and the documents referred to therein affecting the mortgaged premises, through the time of the recording of the complaint or the clerk’s certificate.” Me. Rev. Stat. tit. 14, § 6321. But see *Union Trust v. MacQuinn-Tweedie*, 767 A.2d 289 (Me. 2001) (holding that the holder of an option-contract to purchase the land does not have the same rights as a junior mortgagee/party in interest, and that the option did not survive the foreclosure).

If a mortgagee fails to join a party in interest, any result from the foreclosure action remains valid only against those who were properly joined. Me. Rev. Stat. tit. 14, § 6321. “[A] sale of property that has been judicially foreclosed does not convey the premises free and clear of a recorded interest if the holder of that interest is not made a party to the action.” *Bankr. Estate of Everest v. Bank of Am., N.A.*, 111 A.3d 655, 661 (Me. 2015) (emphasis omitted) (quoting *U.S. Dep’t of Hous. & Urban Dev. v. Union Mortg. Co.*, 661 A.2d 163, 165-66 (Me. 1995)). Accordingly, a foreclosing mortgagee is well-advised to perform a title search in connection with preparing the complaint and to update its title search report through the date of recording of the complaint or clerk’s certificate to be certain that any party holding an intervening interest recorded between the date of the original title search and the recording of the complaint or clerk’s certificate is properly joined as a party in interest to the action. Any party whose interest in the property is not recorded as of the date the foreclosure complaint or clerk’s certificate is recorded need not be joined to the action, and any such party has no rights to the mortgaged property after a completed foreclosure sale. However, such a party may nevertheless move to intervene in the action at any time before final judgment. Me. Rev. Stat. tit. 14, § 6321.

Properly naming and serving all parties-in-interest with an interest junior to the mortgage “provides notice of the imminent foreclosure proceedings. Once notified of the senior mortgagee’s intention to foreclose against the property, the junior mortgagee has the opportunity to appear in the action and have the court determine . . . the ‘order of priority and those amounts, if any, that may

be due to other parties that may appear.” *Bankr. Estate of Everest*, 111 A.3d at 661 (quoting *U.S. Dep’t of Hous.*, 661 A.2d at 165-66). If, upon notice, the junior mortgagee fails to appear in the foreclosure action, the junior mortgagee has no rights to the proceeds from the property once foreclosed. *Bankr. Estate of Everest*, 111 A.3d at 662. On the other hand, even if a mortgagor defaults in the foreclosure proceeding, any party in interest is still entitled to litigate the validity of the mortgage of the foreclosing lender to determine the priorities between the foreclosing party and the party in interest. *Casco Northern Bank, N.A. v. Estate of Grosse*, 657 A.2d 778, 781 (Me. 1995).

If the mortgage is not one of first priority, the foreclosure action does not affect the rights of those with superior priority, and those with superior priority are not joined to the foreclosure action. However, the mortgagee must notify the parties with superior priority by sending them a copy of the foreclosure complaint by certified mail. Me. Rev. Stat. tit. 14, § 6321.

Finally, failure to join the holder of a public utility easement on the mortgaged premises, even if established after the mortgage but before the filing of the foreclosure action, is deemed to be consent to that easement by the mortgagee. Me. Rev. Stat. tit. 14, § 6321.

Consensual Stays of Foreclosure Action; Risk of Waiver

After the foreclosure complaint is filed, the parties may agree to stay the proceedings to allow the mortgagor to bring the mortgage payments up to date. “If the mortgagor does not make payments according to the agreement, the mortgagee may, after notice to the mortgagor, resume the foreclosure process at the point at which it was stayed.” Me. Rev. Stat. tit. 14, § 6321. Nevertheless, mortgagees are cautioned, that:

the acceptance, before the expiration of the right of redemption and after the commencement of foreclosure proceedings of any mortgage of real property, of anything of value to be applied on or to the mortgage indebtedness by the mortgagee or any person holding under the mortgage constitutes a waiver of the foreclosure *unless an agreement to the contrary in writing is signed by the person from whom the payment is accepted* or unless the bank returns the payment to the mortgagor within 10 days of receipt.

Me. Rev. Stat. tit. 14, § 6321 (emphasis added).

Receiving rent or other income from the mortgaged premises while in possession of the premises, however, does not constitute a waiver of the foreclosure proceedings of the mortgage on the premises. Me. Rev. Stat. tit. 14, § 6321.

The Foreclosure Diversion Program

If the mortgaged real estate consists of no more than four units and is the primary residence of the owner, then the foreclosing mortgagee must comply with Me. Rev. Stat. tit. 14, § 6321-A and Rule 93 of the Maine Rules of Civil Procedure, which together provide for a streamlined mediation process if the mortgagor appears in the action and does not waive it. This process, dubbed the “Foreclosure Diversion Program,” is mandated to “address all issues of foreclosure, including, but not limited to, reinstatement of the mortgage, modification of the loan and restructuring of the mortgage debt.” Me. Rev. Stat. tit. 14, § 6321-A. Where applicable, Section 6321-A requires a foreclosing plaintiff to “attach to the foreclosure complaint a one-page form notice” that must contain, at a minimum, the following:

- A statement that failure to answer the complaint will result in foreclosure of the property subject to the mortgage
- A sample answer and an explanation that the defendant may fill out the form and return it to the court in the envelope provided as the answer to the complaint (If the debtor returns the form to the court, the defendant does not need to file a more formal answer or responsive pleading and will be scheduled for mediation in accordance with this section.) –and–
- A description of the Foreclosure Diversion Program

Me. Rev. Stat. tit. 14, § 6321-A(2).

So long as the mortgagor appears and answers the complaint or requests mediation within 20 days of being served with the summons and complaint and does not affirmatively seek to waive mediation, mediation through the Foreclosure Diversion Program is mandatory. If a defendant-mortgagor fails to timely respond, the court nonetheless has discretion to order mediation. See *Bank of Me. v. Peterson*, 107 A.3d 1122, 1124 (Me. 2014). Once referred to the Foreclosure Diversion Program, proceedings in the foreclosure action are effectively stayed until a final mediator’s report is filed with the court or mediation is

terminated by order of the court. Me. R. Civ. P. 93 (d)(1). Rule 93 does the following:

- Authorizes the implementation of informational sessions (which have in fact been implemented) for homeowners faced with foreclosure to ensure that homeowners have the necessary information regarding foreclosure proceedings and the Foreclosure Diversion Program (Me. R. Civ. P. 93 (c)(2))
- Prohibits a mortgagee from filing any dispositive motions or requests for admissions prior to the completion of mediation “or until the court orders that mediation shall not occur” (Me. R. Civ. P. 93 (d)(1))
- Requires a foreclosing plaintiff to provide the borrower with financial forms “requesting information from the defendant that would allow the plaintiff to consider or develop alternatives to foreclosure or otherwise facilitate mediation” (Me. R. Civ. P. 93 (c)(4))
- Requires the presence of “the plaintiff, or a representative of the plaintiff, who has the authority to agree to a proposed settlement, loan modification, or dismissal of the action” at the mediation session (Me. R. Civ. P. 93 (h)(1)(D)) –and–
- Allows the court, if it finds that a party “fail[ed] to attend or to make a good faith effort to mediate,” to order sanctions including, but not limited to, “tolling of interest and other charges pending completion of mediation, assessment of costs and fees,” awarding attorneys’ fees, entry of judgment, dismissal without prejudice, or dismissal with prejudice (Me. R. Civ. P. 93 (j)).

Notwithstanding the foregoing, Rule 93 treats commercial loans differently. The term “commercial loan” is defined by Rule 93 to mean “a loan made to a borrower in which the proceeds of the loan are not used, in whole or in part, for personal, family or household purposes, and/or are not used to refinance a loan made in whole or in part for personal, family or household purposes.” In cases where the mortgage secures only a commercial loan, a foreclosing mortgagee may file and serve with the complaint a motion requesting exemption from the deferral of dispositive motions and requests for admissions established by Rule 93(d)(1), 93(d)(2). Any such motion must include both the assertion that the loan is a commercial loan, as well as the factual basis for that assertion and be accompanied by a proposed order setting forth the specific relief requested. The mortgagee bears the burden of proving that the mortgage solely secures a commercial loan and, even if the mortgagee meets that burden, the court may decline to apply the exemption “in the best interests of justice.” *Id.*

Given the limited application of deferral to the Foreclosure Diversion Program in the commercial context, it is not a primary subject of this practice note.

Summary Judgment in a Judicial Foreclosure

When seeking summary judgment in a foreclosure action, Rule 56(j) of the Maine Rules of Civil Procedure adds the following additional requirements to the ordinary standard for obtaining summary judgment:

- The service and notice requirements of Me. Rev. Stat. tit. 14, § 6111 and the Maine Rules of Civil Procedure must have been strictly performed.
- The plaintiff must have properly certified proof of ownership of the mortgage note and produced evidence of the mortgage note, the mortgage, and all assignments and endorsements of the mortgage note and the mortgage.
- Mediation, when required, must have been completed or waived or the defendant, after proper service and notice, must have failed to appear or respond and have been defaulted or be subject to default.

Me. R. Civ. P. 56(j). As noted above, however, Me. Rev. Stat. tit. 14, § 6111 does not apply in the commercial context.

Where mandatory mediation through the Foreclosure Diversion Program is required and held, Rule 56(j) also provides that the defendant's opposition to a "motion for summary judgment shall not be due any sooner than ten (10) days following the filing of the mediator's report." Me. R. Civ. P. 56(j).

Hearing and Judgment

Assuming that any participation in the Foreclosure Diversion Program has concluded and not resulted in resolution of the mortgagee's claims and absent a dispositive motion being granted in favor of the mortgagee, the case will proceed to a hearing. At the hearing, the court must determine based on the evidence presented:

- Whether there was a breach of the mortgage
- The amount owed by the mortgagor
- The order of priority and those amounts, if any, that may be due to other parties –and –
- Whether any public utility easements survive the proceeding

Me. Rev. Stat. tit. 14, § 6322. Notably, the sufficiency of evidence presented by the plaintiff is always ripe for a challenge. See, e.g., *Deutsche Bank Nat'l Trust Co. v. Eddins*, 182 A.3d 1241 (Me. 2018) (vacating judgment of foreclosure following trial and holding that the bank's use of a senior loan analyst could not provide the requisite foundation pursuant to Me. R. Evid. 803 (6)). If the court determines that the foreclosing plaintiff established the necessary elements, it will issue a judgment of foreclosure and sale ordering the mortgagee to proceed with a sale of the property in a manner consistent with Me. Rev. Stat. tit. 14, § 6323 if the mortgagor (or the mortgagor's successors, heirs, and assigns) does not pay the amount determined by the court to be owed with interest within the redemption period. If the mortgagor pays the amount due within the redemption period, the mortgagee must promptly discharge the mortgage and file a dismissal of the foreclosure action. Me. Rev. Stat. tit. 14, § 6322; see Me. Rev. Stat. tit. 33, § 551.

Post-judgment Procedures

Redemption Period

For mortgages executed prior to October 1, 1975, absent a different period set forth in the mortgage, the redemption period is one year from the date of judgment. Me. Rev. Stat. tit. 14, § 6322. Mortgages executed on or after October 1, 1975, are subject to a redemption period of 90 days from the date of entry of the judgment on the court's docket provided that no appeal is taken. *Id.* Pursuant to the Maine Rules of Appellate Procedure, a party has 21 days from entry of the foreclosure judgment on the docket to appeal the judgment to Maine's Supreme Judicial Court. Me. R. App. P. 2B(c)(1). After the period of redemption expires and before the public sale, the mortgagee in its sole discretion may elect to allow the mortgagor to redeem the property or reinstate the loan. In such an instance, "[t]he mortgagee shall convey the property to the mortgagor upon redemption or may execute a waiver of foreclosure in conjunction with a reinstatement only with the written consent of the mortgagor." Me. Rev. Stat. tit. 14, § 6323. A waiver of foreclosure and the mortgagor's consent to the same must be included in a stipulation of dismissal of the foreclosure and signed by both the mortgagor and mortgagee or their attorneys. Upon filing with the court, "the rights of the parties remain as if no foreclosure had been commenced." *Id.*

Notice to Tenants of Foreclosure Judgment

After entry of final judgment, the mortgagee must provide a copy of the foreclosure judgment to any residential tenants of the premises if the mortgagee knows or should know

by exercise of due diligence that the property is occupied as a residential rental unit. The mortgagor is statutorily obligated to provide the name, address, and other contact information for any residential tenant. A mortgagee must also provide written notice of all matters through and including the sale of the property. The mortgagee must make two good faith efforts to provide the notice required by Section 6322-A to the residential tenant in person, following which notice may be made by first-class mail and registered mail at the tenant's last known address. A forcible entry and detainer action must be brought to evict a tenant and may not be pursued until the notice required by Section 6322-A has been provided and after expiration of the redemption period, except for a reason unrelated to the foreclosure action. Should the mortgagee fail to provide the required notice to residential tenants, the validity of the foreclosure sale is not implicated. Me. Rev. Stat. tit. 14, § 6322-A.

Judicial Sale of the Property

Assuming the mortgagee obtains a foreclosure judgment and the mortgagor or the mortgagor's successors, heirs, or assigns fail to timely redeem the property, the mortgagee's interest in the real property, including any rights to possession, is "forever extinguished." *Duprey v. Eagle Lake Water & Sewer Dist.*, 615 A.2d 600, 605 (Me. 1992). Ninety days after expiration of the redemption period, the mortgagee must begin to publish notices of the foreclosure sale. The notice must be published in a newspaper of general circulation in the county in which the property resides for three consecutive weeks. Me. Rev. Stat. tit. 14, § 6323(1). In addition, the mortgagee must mail notice of the sale by ordinary mail to all parties who appeared in the foreclosure action or to their attorneys of record. That notice must be mailed no fewer than 30 calendar days before the sale date. The failure to provide notice to parties in the foreclosure action does not ultimately affect the validity of the sale of the property. Me. Rev. Stat. tit. 14, § 6323(2). However, should the mortgagee proceed with the public sale before it is allowed pursuant to the statute, the mortgagee may not be entitled to a deficiency judgment "absent unusual or exceptional circumstances." *Cadle Co. v. LCM Assocs.*, 749 A.2d 150, 153 (Me. 2000). Any failure to follow the public sale requirements does not, however, void the foreclosure judgment. See *United States v. Harriman*, 851 F. Supp. 2d 190, 193-94 (D. Me. 2010) (holding that failure to follow the public sale requirements does not void a foreclosure judgment because the mortgagor's rights terminated at the end of the redemption period).

The public sale must generally be held not fewer than 30 and not more than 45 days after the first publication of the sale. If the mortgagee requires more time to sell the property, upon good cause shown and motion by the mortgagee, the court may grant further extensions. The public sale may be adjourned, for any time not exceeding 60 days, by announcement to those present at any such adjournment. Me. Rev. Stat. tit. 14, § 6323(1).

The property must be sold to the highest bidder. The mortgagee must then deliver the winning bidder the deed of sale and any writ of possession that has been issued. The deed conveys the property clear of all interests of the parties in interest properly joined in the foreclosure action. The mortgagee and any party in interest may bid at the sale. If the mortgagee is the high bidder, the mortgagee need not account for any surplus realized upon subsequent sale of the property. The amount of any deficiency is fixed as of the date of the sale, which is "the date on which bids are received to establish the sales price, no matter when the sale is completed by the delivery of the deed to the highest bidder." Me. Rev. Stat. tit. 14, § 6323(1).

"[A] copy of the judgment of foreclosure and evidence of compliance with the requirements of [Me. Rev. Stat. tit. 14, § 6323(1)] for the notice of public sale and the public sale itself must be attached to or included within the deed, or both, or otherwise be recorded in the registry of deeds." Me. Rev. Stat. tit. 14, § 6323(1).

Report of Sale

After deducting the mortgagee's expenses from the sale proceeds, the mortgagee must disburse the remaining proceeds in accordance with the foreclosure judgment, which will reflect the priority of interests, and file a report of such disbursement with the court within the earlier of 90 days after the public sale and 45 days after the mortgagee's delivery of the deed conveying the mortgaged property to the purchaser. Upon motion and for good cause shown before expiration of the deadline, the court may extend the time for filing the report of sale. Failure to timely file the report of sale effectively waives the mortgagee's right to seek a deficiency judgment. The mortgagee must also mail a copy of the report of sale to the mortgagor at the mortgagor's last known address. So long as the mortgagor or any party in interest does not contest the accounting by motion, the report of sale need not be accepted or approved by the court. Any such challenge does not affect the validity of the sale and may concern the accounting only. Where surplus proceeds are due to the mortgagor and the mortgagor has not

appeared in the action, the surplus “must be paid to the clerk of courts, who shall hold the surplus in escrow for 6 months for the benefit of the mortgagor, the mortgagor’s successors, heirs, or assigns and, if the surplus remains unclaimed after 6 months, the clerk shall pay the surplus to the Treasurer of State to be credited to the General Fund until it becomes unclaimed under the Maine Revised Unclaimed Property Act.” Me. Rev. Stat. tit. 14, § 6324.

If the mortgagee acquired the property, the mortgagee’s deficiency claim “is limited to the difference between the fair market value of the premises at the time of the public sale, as established by an independent appraisal, and the sum due the mortgagee as established by the court with interest plus the expenses incurred in making the sale.” Me. Rev. Stat. tit. 14, § 6324.

Statute of Limitations

An action on the note and an action for judicial foreclosure on the mortgage are subject to different statutes of limitations. Actions on the note must be commenced within six years of nonpayment. Me. Rev. Stat. tit. 11, § 3-1118(1). Yet, a mortgagee may bring a foreclosure action if commenced within 20 years from the “time limited in the mortgage for the full performance of the conditions there[in].” Me. Rev. Stat. tit. 14, § 6104. Thus, even when actions on the note are barred under the six-year statute of limitations, a mortgagee might pursue foreclosure of the mortgage.

Potential Defenses to Judicial Foreclosure

As a general matter, the same defenses that may be asserted in an action on the debt may be raised in a suit to foreclose a mortgage. But because foreclosure by civil action is largely a creature of statute in Maine, any failure of the mortgagee to strictly adhere to the requirements of the statute may also be raised as a defense. See, e.g., *Cadle Co. v. LCM Assocs.*, 749 A.2d 150, 152 (Me. 2000). By way of example, failure to provide notice as required by statute might be raised as an affirmative defense. See, e.g., *Camden Nat’l Bank v. Peterson*, 948 A.2d 1251, 1254 (Me. 2008) (analyzing affirmative defense based on failure to provide notice in accordance with statute, albeit in the context of a residential foreclosure).

In addition, a foreclosing mortgagee should be particularly mindful of issues of standing and hearsay. In the residential foreclosure context, the issue of standing has been significantly complicated by a string of recent precedents handed down by the Supreme Judicial Court of Maine.

Much of this case law arises only in the context of cases where the Mortgage Electronic Registration System (MERS) has acted as nominee for the original lender and the mortgage loan is subsequently conveyed through a series of assignments. Because the use of MERS is more prevalent in the residential rather than in the commercial context in Maine, this recent precedent has only limited application in commercial foreclosures.

Similarly, the business records exception to the hearsay rule has been heavily litigated in the context of residential foreclosures in Maine. When the ownership or servicing of a mortgage loan transfers, loan servicers rely on integrated servicing records from previous servicers as evidence of historical loan activity (to confirm the owner’s property interest and to enforce obligations of the mortgage and note). If such records cannot be admitted under the business records exception to the hearsay rule set forth in Rule 803(6) of the Maine Rules of Evidence, the mortgagee may have difficulty meeting its evidentiary burden to prove the amount due on the mortgage note, including reasonable attorney’s fees and court costs. Under the Maine Supreme Judicial Court’s decision in *Beneficial Maine Inc. v. Carter*, 25 A.3d 96 (Me. 2011), however, such records will only be admissible pursuant to Rule 803(6) “if the foundational evidence from the receiving entity’s employee is adequate to demonstrate that the employee had sufficient knowledge of *both businesses’* regular practices to demonstrate the reliability and trustworthiness of the information.” *Id.* at 102 (emphasis added). That is, the custodian testifying must have knowledge of both the previous servicer’s and the current servicer’s record-keeping practices, a requirement that can and does create issues for mortgagees seeking a judgment of foreclosure.

Receiverships

Commercial loan documents frequently provide for the appointment of a receiver to manage the mortgaged premises and collect rents following a default but before a foreclosure judgment is obtained and sale is consummated under the terms of the loan documents. In *Fleet Bank of Maine v. Zimelman*, 575 A.2d 731 (Me. 1990), the Supreme Judicial Court of Maine held that when freely negotiated loan documents provide expressly for appointment of a receiver following default the plaintiff/mortgagee is entitled to appointment of a receiver as a matter of law. As the court stated:

The evidence is clear that defendants did not make timely and sufficient payments as required by the note. The defendants make no claim that their mortgage contract with the Bank was anything other

than a commercial loan agreement negotiated at arms length between knowledgeable business persons. Any advantage gained by the Bank by having a receiver appointed was freely bargained for at the time the agreement was reached. Accordingly, *there is no reason not to enforce the unambiguous language of the mortgage, entitling the Bank to the appointment of a receiver.*

Id. at 735 (emphasis added).

For more on receiverships see [Receivership in Real Estate Transactions](#).

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Sara dedicates significant pro bono legal services representing CASA guardians ad litem in complex child protection cases and currently serves as a member of the Maine CASA Advisory Panel. Sara was also recently appointed by the Maine Supreme Judicial Court to serve as a commissioner for the Maine Civil Legal Services Fund, which annually distributes funds to support civil legal services to persons who otherwise are not able to afford counsel.

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