

Common Mortgagee Remedies Which Are Unenforceable Under Wisconsin Law

In addition to providing real estate opinions, members of Reinhart's Real Estate Opinion Team are also fortunate to be called upon regularly to tailor loan documents prepared by out-of-state clients and their principal attorneys to fit with the peculiarities of Wisconsin law. In that role, we frequently encounter form language attempting to provide a mortgagee with various remedies that may work very well for lenders in other jurisdictions but are unenforceable under Wisconsin law. In a previous update, for example, we noted that Wisconsin adheres to the judicial foreclosure process and, as a result, power of sale provisions are unenforceable under Wisconsin law. However, there are a few other remedies that are widely available to lenders receiving mortgages for property located in other states that would not be available to mortgagees of Wisconsin real property.

As we noted in our previous update regarding the difficulties posed by power of sale provisions under Wisconsin law, lenders receiving mortgages on Wisconsin real property would also encounter difficulties attempting to enforce remedy provisions purporting to give the mortgagee the right to immediate access to the mortgagee's real property following a default by the borrower or attempting to provide the mortgagee with the right to dispossess the mortgagor following an event of default. In each case, the provisions creating those remedies would be deemed subject to and likely superseded by Wisconsin's prohibition on nonjudicial foreclosures and the statutory requirements set forth in Chapter 846 of the Wisconsin Statutes governing foreclosure which mortgagees are required to follow.

In reviewing loan documents that are to be governed by Wisconsin law, we usually will seek to identify any such unenforceable remedies so that we can notify our client and its principal counsel in advance that such a provision would be unenforceable under current Wisconsin law. We might also modify the provision purporting to grant such a remedy in the applicable mortgage or other loan document to indicate that such a remedy would only be granted to the lender to the extent it was available under Wisconsin law. Typically, however, we would not insist upon the removal of such an unenforceable provision, as its existence within the mortgage or other loan document would normally not invalidate the principal benefits of the mortgage or loan document.

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