

Power of Sale in Wisconsin Loan Documents

In addition to providing real estate opinions, members of Reinhart's Real Estate Opinion Committee 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 providing that service, a very common issue that we encounter involves a lender's request to obtain a non-enforceable remedy such as the power to privately sell a borrower's mortgaged real property following a default by the borrower. Under Wisconsin law, nonjudicial foreclosure is prohibited, and lenders seeking to foreclose and then sell a defaulting borrower's Wisconsin real property are required to adhere to the judicial foreclosure and subsequent sheriff's sale procedures set forth in Chapter 846 of the Wisconsin Statutes. As a result, a lender's otherwise standard power of sale provision will be deemed to be unenforceable pursuant to current Wisconsin law.

Regardless of whether we are representing borrowers or lenders as local counsel, we will normally flag a power of sale provision when reviewing a set of loan documents so that we can notify our client and its principal counsel about the unenforceability of that provision under current Wisconsin law. We might also modify the power of sale language in the applicable mortgage or other loan document itself to indicate that such a power 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 will not invalidate the principal benefits of that mortgage or loan document. If you have questions about this update, please contact your Reinhart attorney or any member of the Reinhart Real Estate Opinion Team.

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