

Mortgage Lending Institute

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**Arrows in the Quiver: Remedies for Commercial
Real Estate Secured Loans**

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Brian T. Morris is a shareholder in the Dallas office of Winstead PC where he has practiced since 1987. Brian is the past Practice Group Leader for the Firm's Dallas Commercial Litigation Practice Group. Brian's practice focuses primarily on real estate litigation and financial services litigation. Brian has tried numerous cases in state and federal court and tried numerous arbitrations. His experience includes the representation of lenders, servicers, owners, developers, title companies, sellers, purchasers, and landlords, and includes the defense of class actions, including consumer class actions, general contract and business disputes, the representation of lenders in connection with real and personal property foreclosures, workouts, the defense of usury claims and lender liability claims including claims for fraud, statutory fraud, breach of fiduciary duty, breach of duty of good faith and fair dealing, tortious interference and wrongful foreclosure.

Brian is a co-author (with Mike Baggett) of a three volume Texas Practice Guide: Real Estate Litigation, published by West in 2002 and updated annually. Brian also co-authored several sections of Mike Baggett's Texas Foreclosure Law & Practice. Brian was a contributing author for the Texas Foreclosure Manual, 3d Edition (2014) published by the State Bar of Texas. Brian is a frequent speaker on several topics involving financial services litigation, real estate litigation and loan workouts. Brian has been named a Texas Super Lawyer and is AV rated.

Brian obtained a BA from Vanderbilt University in 1984. Brian obtained a JD from the Cecil C. Humphrey's School of Law at the University of Memphis where he was a member of the Law Review.

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I. INTRODUCTION

In 2019, I gave a presentation at the Mortgage Lending Institute regarding remedies for commercial real estate secured loans. The Introduction section of the written materials discussed the possibility of an economic downturn just around the corner, and the first few sentences stated that there would be a downturn and that the only question was “when, not if.” The Introduction mentioned numerous economic trends and quoted several economists and commentators who were predicting a downturn in the next two to three years. The justification for most such predictions was that a recession is overdue because things have been too good for too long.

A little over six months after that presentation, the country was in lock-down due to the COVID-19 pandemic, and the stock market was in a nose dive. By all accounts, it was economic Armageddon. However, despite the direct and immediate impact of the pandemic on retail, hospitality, and the domino effect on most commercial real estate sectors and the unknowns with regard to the future of office space, commercial real estate has weathered the storm, the stock market returned to pre-pandemic levels and beyond and the economy seems relatively strong given the circumstances. At the time of this writing, the Delta variant is surging, and great uncertainty has returned.

I am through speculating when and why there will be a widespread economic downturn which will necessitate use of some or all of the tools and remedies addressed in this paper. However, the purpose of the paper is to provide you with a summary of remedies

available to lenders and servicers when commercial real estate secured loans go into default whether that is the result of some widespread economic downturn or a one off property or borrower specific problem. This presentation is a collaborative effort of Winstead PC. This presentation is from the perspective of a lender, but hopefully, the presentation will be relevant and useful to any party dealing with a troubled real estate secured loan, whether lender, borrower, guarantor or equity source.

II. REMEDIES AND TOOLS

A. Receiverships

Receiverships were commonly used during the Great Recession and often by special servicers. A receivership enables the lender or servicer to preserve, manage, restore, market and ultimately dispose of real estate collateral through a receiver while being insulated from and avoiding potential claims and liabilities resulting from ownership of the real estate. Receiverships were often pursued in judicial foreclosure states where there was a backlog of cases and it could take years to obtain a judgment or order for foreclosure. A receivership could be used to avoid that delay in the sale of the property via a sale by the receiver or to enable the receiver to preserve, maintain and rehabilitate the property pending a judicial foreclosure. In Texas, receiverships were and are used as an alternative to a nonjudicial foreclosure sale to enable the lender to sell the property (a court-approved sale of the property by the receiver) without taking title and assuming the risks and liabilities of ownership.

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