

## CHAPTER XVI

### MORTGAGES AND MORTGAGE FORECLOSURES



#### STANDARD 16.1

##### LIEN OF MORTGAGE ON AFTER-ACQUIRED TITLE

**STANDARD:** A MORTGAGE, EXECUTED BY A MORTGAGOR BEFORE ACQUISITION OF TITLE TO THE MORTGAGED REAL PROPERTY, BECOMES A VALID LIEN WHEN THE MORTGAGOR ACQUIRES TITLE TO THE REAL PROPERTY, SUBJECT TO INTERVENING RIGHTS OF THIRD PARTIES, IF ANY.

**Problem A:** Robert Brown executed a mortgage of Blackacre which contained a warranty of title and was recorded. Brown subsequently acquired record title to Blackacre. Is the mortgage a valid lien on Blackacre?

**Answer:** Yes. By virtue of the warranty contained in the mortgage, Brown's after-acquired title inured to the benefit of the mortgagee.

**Problem B:** Same facts as in Problem A, except that the mortgage contained no warranty of title. Is the mortgage a valid lien on Blackacre?

**Answer:** Yes. A mortgagor who acquires title to mortgaged real property after executing the mortgage may not avoid the lien of the mortgage because of lack of title at the time of execution. Moreover, if the mortgage were foreclosed, whether by judicial proceedings or advertisement, the deed given at foreclosure sale would convey Brown's after-acquired title to the grantee of the sheriff's deed.

**Authorities:** Problem A: MCL 565.154. *Caple v Switzer*, 122 Mich 636, 81 NW 560 (1900); *Jacobsen v Nieboer*, 299 Mich 116, 299 NW 830 (1941).

Problem B: MCL 600.3130 and 600.3236. *Brayton v Merithew*, 56 Mich 166, 22 NW 259 (1885); *Clark v Daniels*, 77 Mich 26, 43 NW 854 (1889); *Gray v Franks*, 86 Mich 382, 49 NW 130 (1891); *West Mich Park Association v Pere Marquette R Co*, 172 Mich 179, 137 NW 799 (1912).

**Comment:** Before Brown's title was evidenced of record, a third party could have acquired an interest in Blackacre superior to the rights of Brown and, consequently, to those of his mortgagee. If, however, Brown were in possession of Blackacre, a third party would be charged with constructive notice of Brown's interest and of the existence of the mortgage. *Balen v Mercier*, 75 Mich 42, 42 NW 666 (1889).

## STANDARD 16.2

### EFFECT OF MORTGAGE PURPORTING TO CORRECT OR MODIFY REAL PROPERTY DESCRIPTION IN PRIOR MORTGAGE

**STANDARD:** A MORTGAGE RECITING THAT IT IS GIVEN TO CORRECT OR MODIFY THE REAL PROPERTY DESCRIPTION IN A PREVIOUSLY EXECUTED MORTGAGE DOES NOT RELEASE THE REAL PROPERTY COVERED BY THE PRIOR MORTGAGE UNLESS THERE IS EVIDENCE THAT THE MORTGAGEE AGREED TO THE CORRECTION OR MODIFICATION.

**Problem A:** Robert Brown executed a mortgage of Blackacre to Edward Lane. Subsequently, without Lane's consent, Brown executed another mortgage to Lane covering only the south half of Blackacre, which recited that it was given to correct an error in the real property description in the prior mortgage. Is the north half of Blackacre released from the prior mortgage?

**Answer:** No.

**Problem B:** Robert Brown executed a mortgage of Blackacre to Edward Lane. Subsequently, without Lane's consent, Brown executed another mortgage to Lane of Whiteacre, which recited that it was given to correct an error in the real property description in the prior mortgage. Later, Lane discharged the mortgage describing Whiteacre. Are both Blackacre and Whiteacre released from Lane's mortgage lien?

**Answer:** Yes. Lane's execution of the discharge evidenced his agreement to the correction.

**Authority:** *Hurst v Beaver*, 50 Mich 612, 16 NW 165 (1883).



## STANDARD 16.3

### REFERENCE TO MORTGAGE IN CHAIN OF TITLE

**STANDARD:** A RECORDED REFERENCE TO A MORTGAGE WHICH CANNOT BE IDENTIFIED WITH ANY RECORDED MORTGAGE IN THE CHAIN OF TITLE CONSTITUTES A CLOUD ON THE TITLE.

**Problem A:** John Doe deeded Blackacre expressly subject to a mortgage described as being held by Edward Lane. The mortgage referred to in the deed has not been recorded. May the reference to the mortgage be disregarded?

**Answer:** No.

**Problem B:** John Doe mortgaged Blackacre to Edward Lane. Lane assigned the mortgage to Arthur Mills. The mortgage and assignment were recorded. Doe then deeded Blackacre expressly subject to a mortgage described as being held by Edward Lane. May the reference in the deed be assumed to identify the mortgage now held by Mills?

**Answer:** Yes.

**Problem C:** John Doe executed a mortgage of Blackacre in the amount of \$45,000 to Edward Lane. The mortgage was recorded. Doe then deeded Blackacre expressly subject to a mortgage described as being in the amount of \$30,000 and held by Edward Lane. May the reference in the deed be assumed to identify the \$45,000 mortgage to Lane?

**Answer:** Yes.

**Authorities:** *Fitzhugh v Barnard*, 12 Mich 104 (1863); *Baker v Mather*, 25 Mich 51 (1872); *Houseman v Gerken*, 231 Mich 253, 203 NW 841 (1925); *Winkworth Fuel & Supply Co. v Bloomsbury Corp.*, 266 Mich 298, 253 NW 304 (1934).



## STANDARD 16.4

### EFFECT OF SUBSEQUENT CONVEYANCE BY MORTGAGE HOLDER WHO ACQUIRES FEE TITLE

**STANDARD:** A DEED FROM A TITLE HOLDER, WHO IS ALSO THE HOLDER OF A MORTGAGE COVERING THE SAME REAL PROPERTY, CONVEYS TITLE FREE OF THE MORTGAGE, IF THE CONVEYANCE IS TO A BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE OF A CONTRARY INTENT.

**Problem A:** Edward Lane, a single man, held a mortgage covering Blackacre. Later Lane acquired fee title to Blackacre and conveyed Blackacre to Samuel Peck by a warranty deed containing no reference to the mortgage. The mortgage is still of record. Peck is a bona fide purchaser for value without notice of any intent not to merge the fee title and mortgage. Did Peck take free of the mortgage?

**Answer:** Yes.

**Problem B:** Same facts as in Problem A, except that the deed from Lane to Peck contained the following exception: "Subject to a mortgage of record held by grantor, which mortgage grantee hereby assumes and agrees to pay." Did Peck take free of the mortgage?

**Answer:** No.

**Authorities:** *Anderson v Thompson*, 225 Mich 155, 195 NW 689 (1923); *First National Bank of Utica v Ramm*, 256 Mich 573, 240 NW 32 (1932); *Vollmer v Coenis*, 309 Mich 319, 15 NW2d 654 (1944); *Union Bank v Farmwald*, 181 Mich App 538, 450 NW2d 274 (1989); *Byerlein v Shipp*, 182 Mich App 39, 451 NW2d 565 (1990).

**Comment:** The general rule that the mortgage interest is merged into the fee when the holder of a real property mortgage becomes the owner of the fee is subject to the exception that, when it is in the interest of the mortgagee and it is the mortgagee's intention to preserve the mortgage, there is no merger, unless the rights of the mortgagor or third persons are affected thereby. Recorded evidence of intent with respect

to merger may appear from instruments other than deeds, such as land contracts, assignments of mortgage, partial releases of mortgage or subordination agreements.

## STANDARD 16.5

### EFFECTIVENESS OF DISCHARGE OF MORTGAGE

**STANDARD:** A DISCHARGE OF MORTGAGE WHICH REASONABLY IDENTIFIES THE MORTGAGE TO BE DISCHARGED IS EFFECTIVE NOTWITHSTANDING MINOR DISCREPANCIES.

**Problem A:** A discharge of mortgage correctly recites all information necessary to reasonably identify the mortgage, but recites an incorrect date of the mortgage. Is the discharge valid?

**Answer:** Yes.

**Problem B:** Arthur Mills, the assignee of a mortgage given to Edward Lane, executed a discharge of the mortgage in which Mills referred to the mortgage as being given to himself. Is the discharge valid?

**Answer:** Yes.

**Problem C:** Robert Brown mortgaged Blackacre to Edward Lane and then deeded Blackacre to Samuel Peck. Lane executed a discharge of the mortgage, correctly reciting all information necessary to reasonably identify the mortgage, but referring to the mortgage as having been executed by Peck. Is the discharge valid?

**Answer:** Yes.

**Problem D:** Robert Brown mortgaged Blackacre to Edward Lane. Lane executed a discharge of mortgage which incorrectly states the liber and page of the mortgage. Is the discharge valid?

**Answer:** No. The erroneous recording information raises sufficient doubt and requires further inquiry.

**Authorities:** *Reading v Waterman*, 46 Mich 107, 8 NW 691 (1881); *Brown v Burney*, 128 Mich 205, 87 NW 221 (1901).



## STANDARD 16.6

### MORTGAGE HELD BY HUSBAND AND WIFE

**STANDARD: A MORTGAGE HELD BY HUSBAND AND WIFE IS HELD AS TENANTS BY THE ENTIRETIES UNLESS OTHERWISE EXPRESSLY PROVIDED.**

**Problem:** A mortgage executed in 1980 was given (or was assigned) to Edward Lane and Jennifer Lane, husband and wife. Jennifer Lane died in 1990. Edward Lane discharged the mortgage in 1992. Is the discharge valid?

**Answer:** Yes.

**Authorities:** MCL 557.151 and 557.81.

**Comment:** While a mortgage is held by tenants by the entireties, neither spouse, acting alone, may convey any interest in the mortgage. After the death of either spouse, the survivor may assign or discharge the mortgage. *Hoyt v Winstanley*, 221 Mich 515, 191 NW 213 (1922); *De Young v Mesler*, 373 Mich 499, 130 NW2d 38 (1964).



## STANDARD 16.7

### DISCHARGE OR ASSIGNMENT OF MORTGAGE BY MICHIGAN PROBATE FIDUCIARY

**STANDARD:** A DISCHARGE OR ASSIGNMENT OF A MORTGAGE COVERING MICHIGAN REAL PROPERTY, EXECUTED BY A PROBATE FIDUCIARY WHO IS QUALIFIED IN MICHIGAN, IS VALID.

**Problem A:** Edward Lane, a Michigan resident, held a mortgage covering Michigan real property. Lane died and Fred Adams was appointed and qualified in Michigan as the personal representative of Lane's estate. Adams, as personal representative, executed a discharge of the mortgage. Is the discharge valid?

**Answer:** Yes. The personal representative could also validly assign the mortgage.

**Problem B:** Same facts as in Problem A, except that Edward Lane was an Arizona resident. Is the discharge valid?

**Answer:** Yes. The answer is the same whether Adams was appointed in regular or ancillary proceedings.

**Authorities:** MCL 700.3601 *et seq.* (as to fiduciaries of decedents' estates generally); 700.4201 *et seq.* (as to foreign personal representatives generally); 700.3715 (as to powers of personal representatives generally); 700.5423 (as to conservators generally).

**Comment A:** As used in this Standard, "probate fiduciary" means those Michigan fiduciaries defined in MCL 700.1104, and foreign fiduciaries qualified in Michigan pursuant to MCL 700.4203.

**Comment B:** With respect to the obligation of a mortgagee to discharge a mortgage, see MCL 565.41.



## STANDARD 16.8

### DISCHARGE OR ASSIGNMENT OF MORTGAGE BEFORE APRIL 1, 2000 BY FOREIGN PROBATE FIDUCIARY NOT QUALIFIED IN MICHIGAN

**STANDARD:** A DISCHARGE OR ASSIGNMENT OF A MORTGAGE COVERING MICHIGAN REAL PROPERTY, EXECUTED BY A FOREIGN PROBATE FIDUCIARY NOT QUALIFIED IN MICHIGAN, IS INVALID IF EXECUTED BEFORE MARCH 29, 1985. ON OR AFTER MARCH 29, 1985, AND BEFORE APRIL 1, 2000, A FOREIGN PROBATE FIDUCIARY IN A DECEDENT'S ESTATE MAY EXECUTE AND DELIVER A DISCHARGE OF MORTGAGE UPON PAYMENT OF THE MORTGAGE DEBT.

**Problem A:** A mortgage of Michigan real property was given to Edward Lane, an Ohio resident. Lane died and his estate was probated in Ohio. Fred Adams qualified in Ohio as fiduciary of Lane's estate. Adams, as fiduciary, executed a discharge of the mortgage on December 1, 1981. Is the discharge valid?

**Answer:** No. Before April 1, 2000, a foreign probate fiduciary, not qualified in Michigan, had no authority to assign a mortgage and, before March 29, 1985, had no authority to discharge one.

**Problem B:** Same facts as in Problem A, except that the fiduciary received payment of the mortgage debt and executed a discharge of the mortgage on May 1, 1985. Is the discharge valid?

**Answer:** Yes. The Revised Probate Code was amended, effective March 29, 1985, to permit a foreign probate fiduciary in a decedent's estate to execute and deliver a discharge of mortgage upon payment of the mortgage debt.

**Authorities:** Problem A: *Reynolds v McMullen*, 55 Mich 568, 22 NW 41 (1885); *McIntire v Conrad*, 93 Mich 526, 53 NW 829 (1892).

Problem B: MCL 700.234, as amended by 1984 P.A. 377 (repealed effective April 1, 2000 by 1998 P.A. 36, being MCL 700.8102).

**Comment A:** Before April 1, 2000, a foreign probate fiduciary, not qualified in Michigan, was not authorized to maintain proceedings to foreclose a mortgage of Michigan real property on behalf of the decedent. *Weaver v Shevitz*, 253 Mich 535, 233 NW 244 (1931).

**Comment B:** Although a mortgagor could pay the mortgage debt to a foreign probate fiduciary in accordance with MCL 700.232, 700.233 and 700.234, the Revised Probate Code, before March 29, 1985, provided no authority for a foreign probate fiduciary, not qualified in Michigan, to execute and deliver a discharge of a mortgage. A mortgagor who paid the mortgage debt to a foreign fiduciary could, however, obtain a judicial discharge of the mortgage pursuant to MCL 600.3175. The Revised Probate Code was amended by 1984 P.A. 377, effective March 29, 1985, to permit a foreign probate fiduciary in a decedent's estate to execute and deliver a discharge of mortgage in satisfaction of the mortgage debt, but it did not provide authority to the fiduciary to execute and deliver an assignment of a mortgage.

**Comment C:** Foreign fiduciary, as used in this Standard, is defined in MCL 700.231

**Note:** See Standard 16.9 with respect to the execution and delivery of a discharge or assignment of a mortgage by a foreign probate fiduciary on and after April 1, 2000. Also see Standard 7.12 with respect to conveyances by foreign probate fiduciaries.

## STANDARD 16.9

### DISCHARGE OR ASSIGNMENT OF MORTGAGE BY DOMICILIARY FOREIGN PERSONAL REPRESENTATIVE ON OR AFTER APRIL 1, 2000

**STANDARD:** A DISCHARGE OR ASSIGNMENT OF A MORTGAGE COVERING MICHIGAN REAL PROPERTY, EXECUTED BY A DOMICILIARY FOREIGN PERSONAL REPRESENTATIVE ON OR AFTER APRIL 1, 2000 IS VALID IF:

- (A) ESTATE ADMINISTRATION OR AN APPLICATION FOR ADMINISTRATION IS NOT PENDING IN MICHIGAN; AND
- (B) THE DOMICILIARY FOREIGN PERSONAL REPRESENTATIVE HAS FILED WITH A COURT IN THE COUNTY IN WHICH THE REAL PROPERTY IS LOCATED AUTHENTICATED COPIES OF THE REPRESENTATIVE'S APPOINTMENT AND ANY OFFICIAL BOND THE REPRESENTATIVE HAS GIVEN.

**Problem:** A mortgage covering Michigan real property was given to Edward Lane, an Ohio resident. Lane died and his estate was probated in Ohio. Fred Adams qualified in Ohio as the personal representative of Lane's estate. No petition for local administration of Lane's estate was filed in Michigan. Adams filed authenticated copies of his Ohio appointment and official bond with the probate court in the county in which the real property was located. Adams executed a discharge of mortgage as the domiciliary foreign personal representative of Lane's estate on December 1, 2000. Is the discharge valid?

**Answer:** Yes.

**Authorities:** MCL 700.4203 and 700.4204.

**Comment A:** "Foreign personal representative" is defined in MCL 700.1104 as a personal representative appointed by another jurisdiction. Although "domiciliary foreign personal representative" is not statutorily defined, the Committee interprets the term "domiciliary foreign per-

sonal representative” as used in the Estates and Protected Individuals Code to mean a foreign personal representative appointed by a court in the jurisdiction in which the non-resident decedent resided at the time of death.

**Comment B:** The statutory requirement that administration “is not pending in Michigan” is not limited to the county or counties in which mortgaged real property is located, and a domiciliary foreign personal representative has no authority to discharge or assign a mortgage if an estate administration is pending in any county in Michigan. Similarly, the statute does not identify the court in which copies of the appointment and official bond of the domiciliary foreign personal representative are to be filed.

## STANDARD 16.10

### RECORDED MORTGAGE OVER 30 YEARS OLD

**STANDARD:** A RECORDED MORTGAGE, NOT RENEWED OR EXTENDED OF RECORD, IS CONSIDERED TO BE DISCHARGED AFTER 30 YEARS HAVE ELAPSED SINCE ITS DUE DATE, OR SINCE ITS DATE OF RECORD IF NO DUE DATE IS RECITED IN THE MORTGAGE.

**Problem:** A mortgage, dated and recorded in 1955, was due 15 years after its date. No renewal affidavit, extension agreement or discharge relating to the mortgage is recorded. In 2001, may the mortgage be disregarded?

**Answer:** Yes.

**Authorities:** MCL 565.382. *Austin v Anderson*, 279 Mich 424, 272 NW 730 (1937).



## STANDARD 16.11

### EFFECT OF RECEIVERSHIP ON RIGHT TO FORECLOSE

**STANDARD:** PRIOR CONSENT OF THE COURT HAVING CUSTODY OVER THE REAL PROPERTY OF A PARTY IN RECEIVERSHIP IS NECESSARY FOR A VALID FORECLOSURE OF A MORTGAGE COVERING THE REAL PROPERTY.

**Problem:** Brown Corporation mortgaged Blackacre to Edward Lane. By circuit court proceedings, Brown was placed in receivership. While the receivership was pending, Lane foreclosed his mortgage by advertisement and obtained a deed to Blackacre at the foreclosure sale. Upon expiration of the redemption period, did Lane acquire marketable title to Blackacre?

**Answer:** No. Because the receiver has custody of Blackacre in the receivership proceedings, a foreclosure sale held without consent of the court is voidable.

**Authorities:** *Campau v Detroit Driving Club*, 130 Mich 417, 90 NW 49 (1902); *In Re Petition of Chaffee*, 262 Mich 291, 247 NW 186 (1933); *Kuschinski v Equitable & Central Trust Co.*, 277 Mich 23, 268 NW 797 (1936).



## STANDARD 16.12

### ATTEMPTED FORECLOSURE BY ADVERTISEMENT OF MORTGAGE NOT CONTAINING VALID POWER OF SALE

**STANDARD:** A MORTGAGE CANNOT BE VALIDLY FORECLOSED BY ADVERTISEMENT UNLESS IT CONTAINS A VALID POWER OF SALE.

**Problem A:** A mortgage was foreclosed by advertisement. The mortgage did not contain a power of sale. Was the foreclosure valid?

**Answer:** No.

**Problem B:** A mortgage was foreclosed by advertisement. The mortgage contained a power of sale which provided that the power could be exercised by the mortgagee without giving any notice of the foreclosure sale. Was the foreclosure valid?

**Answer:** No. A power of sale which attempts to dispense with the notice is not a valid power of sale.

**Authorities:** Generally: MCL 600.3201.

Problem A: *Hebert v Bulte*, 42 Mich 489, 4 NW 215 (1880); *Larivierre v Rains*, 112 Mich 276, 70 NW 583 (1897).

Problem B: *Pierce v Grimley*, 77 Mich 273, 43 NW 932 (1889); *Gehrke v Janowitz*, 55 Mich App 643, 223 NW2d 107 (1974).

**Comment:** A mortgage which does not contain a valid power of sale may be foreclosed only by judicial proceedings. *Cowles v Marble*, 37 Mich 158 (1877).



## STANDARD 16.13

### NECESSITY OF RECORDING MORTGAGE AND ASSIGNMENT OF MORTGAGE IN FORECLOSURE BY ADVERTISEMENT

**STANDARD: A MORTGAGE CANNOT BE VALIDLY FORECLOSED BY ADVERTISEMENT UNLESS:**

- (A) THE MORTGAGE CONTAINING A POWER OF SALE HAS BEEN RECORDED;**
- (B) THE PARTY FORECLOSING THE MORTGAGE IS EITHER:
  - (1) THE OWNER OF THE INDEBTEDNESS OR OF AN INTEREST IN THE INDEBTEDNESS SECURED BY THE MORTGAGE; OR**
  - (2) THE SERVICING AGENT FOR THE MORTGAGE; AND****
- (C) A RECORD CHAIN OF TITLE EXISTS EVIDENCING THE ASSIGNMENT OF THE MORTGAGE TO THE PARTY FORECLOSING THE MORTGAGE, IF THAT PARTY IS NOT THE ORIGINAL MORTGAGEE.**

**Problem A:** Robert Brown mortgaged Blackacre to Edward Lane. The mortgage contained a power of sale and was recorded. Lane assigned the mortgage to Arthur Mills, but the assignment was not recorded. Mills subsequently assigned the mortgage to William Smith, and the assignment was recorded. Smith foreclosed the mortgage by advertisement. Was the foreclosure valid?

**Answer:** No. If the mortgage is not foreclosed by the original mortgagee, then the mortgage and any assignments of the mortgage necessary to establish a chain of title in the foreclosing party must be recorded.

**Problem B:** Robert Brown mortgaged Blackacre to Edward Lane. Lane died July 1, 1990. Lane's estate was probated and the residue assigned to his

son, John Lane. No instrument evidencing the assignment of the mortgage to John Lane was recorded. In 1995 John Lane foreclosed the mortgage by advertisement. Was the foreclosure valid?

**Answer:** No. A foreclosure on or after December 29, 1994 is not valid unless all assignments, including an assignment by operation of law, required to create a chain of title in the foreclosing party are recorded.

**Problem C:** Same facts as in Problem B, except that the foreclosure occurred in 1994 and the sheriff's deed was recorded on November 1, 1994. Was the foreclosure valid?

**Answer:** Yes. Before December 29, 1994, evidence of an assignment effected by operation of law was not required to be recorded for the foreclosure to be valid.

**Problem D:** Robert Brown mortgaged Blackacre to Northern Bank. Northern Bank assigned the mortgage to Holdings Company, as security for a loan by Holdings Company to Northern Bank. The assignment was not recorded. Northern foreclosed the mortgage by advertisement. Was the foreclosure valid?

**Answer:** Yes. Northern Bank remained the record holder of the mortgage and its right to foreclose the mortgage was not affected by the unrecorded assignment for security only.

**Problem E:** Robert Brown mortgaged Blackacre to Northern Bank. Northern Bank assigned the mortgage to Holdings Company, but continued to service the mortgage as servicing agent for Holdings Company. The assignment to Holdings Company was recorded. The mortgage was foreclosed by advertisement in the name of Holdings Company by Northern Bank, its servicing agent. Was the foreclosure valid?

**Answer:** Yes. A servicing agent may foreclose a mortgage by advertisement in the name of the record holder of the mortgage.

**Problem F:** Same facts as in Problem E, except that the mortgage was foreclosed by advertisement in the name of Northern Bank, the servicing agent. Was the foreclosure valid?

**Answer:** No. A servicing agent may not foreclose a mortgage by advertisement in its own name unless an assignment of the mortgage to the servicing agent is recorded.

**Authorities:** Generally: MCL 600.3204(1)(c) and 600.3204(3).

Problem A: *Dohm v Haskin*, 88 Mich 144, 50 NW 108 (1891); *Arnold v DMR Financial Services*, 448 Mich 671, 532 NW2d 852 (1995).

Problem B: MCL 600.3204(1)(c) and 600.3204(3).

Problem C: MCL 600.3204. *Miller v Clark*, 56 Mich 337, 23 NW 35 (1885).

Problem D: *Feldman v Equitable Trust Co.*, 278 Mich 619, 624, 270 NW2d 809 (1937); *Arnold v DMR Financial Services*, 448 Mich 671, 532 NW2d 852 (1995).

Problems E and F: MCL 600.3204(1)(c) and 600.3204(3).

**Comment:** Section 9-607(b) of the Uniform Commercial Code permits a secured party who has a security interest in an obligation of a debtor/mortgagee secured by a mortgage to record the security agreement creating the security interest and a sworn affidavit to satisfy the requirement that an assignment of the mortgage be recorded to foreclose the mortgage by advertisement. The recorded sworn affidavit must include a statement that a default has occurred and that the secured party is entitled to foreclose the mortgage by advertisement. The recorded security agreement and sworn affidavit may be used to create the necessary record chain of title evidencing the assignment of the mortgage to the foreclosing party. MCL 440.9607(b) and Official Comment 8.



## STANDARD 16.14

### LEGAL PROCEEDINGS THAT BAR FORECLOSURE BY ADVERTISEMENT

**STANDARD:** FORECLOSURE BY ADVERTISEMENT IS BARRED IF LEGAL PROCEEDINGS ARE PENDING IN WHICH JUDGMENT ON THE MORTGAGE DEBT MAY BE RENDERED OR IF A JUDGMENT HAS BEEN RENDERED AND EXECUTION HAS NOT BEEN RETURNED UNSATISFIED IN WHOLE OR IN PART.

**Problem A:** A mortgage given by Robert Brown to Edward Lane was in default. Brown died and his estate was probated. At the hearing on claims, Lane's claim for the mortgage debt was allowed, but it was never paid. Lane subsequently foreclosed the mortgage by advertisement. Was the foreclosure valid.

**Answer:** Yes. The filing of a claim against the estate of a mortgagor is not a "suit or proceeding at law" within the meaning of the statute setting forth the prerequisites for foreclosure of mortgages by advertisement.

**Problem B:** A mortgage given by Robert Brown to Edward Lane was in default. Lane sued to collect the mortgage debt and obtained a judgment for the amount owing on the debt. Execution on the judgment was returned unsatisfied. Lane subsequently foreclosed the mortgage by advertisement. Was the foreclosure valid?

**Answer:** Yes. After execution upon the judgment was returned unsatisfied, the mortgagee was entitled to foreclose by advertisement.

**Problem C:** Same facts as in Problem B, except that while the suit was pending Lane foreclosed his mortgage by advertisement. Was the foreclosure valid?

**Answer:** No. Until the suit is discontinued or, if judgment is rendered, execution upon the judgment is returned unsatisfied, in whole or in part, foreclosure of the mortgage by advertisement is barred.

**Comment:** In construing a predecessor statute to MCL 600.3204(1)(b), the Michigan Supreme Court stated that the object and intent “is to prevent the creditor pursuing a double remedy at the same time, thus, putting the debtor to needless costs and expense.” *Larzelere v Starkweather*, 38 Mich 96, 105 (1878).

**Authorities:** Generally: MCL 600.3204(1)(b).

Problem A: *Larzelere v Starkweather*, 38 Mich 96 (1878).

## STANDARD 16.15

### EFFECT ON JUNIOR FEDERAL TAX LIEN OF MORTGAGE FORECLOSURE BY ADVERTISEMENT WITH SALE HELD ON OR BEFORE NOVEMBER 2, 1966

**STANDARD:** FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT WITH THE FORECLOSURE SALE HELD ON OR BEFORE NOVEMBER 2, 1966, AND FAILURE TO REDEEM FROM THE SALE, DIVESTS THE MORTGAGED PREMISES OF ANY FEDERAL TAX LIEN OVER WHICH THE MORTGAGE HAD PRIORITY WITHOUT THE NECESSITY OF GIVING ANY NOTICE TO THE UNITED STATES.

**Problem:** Blackacre was encumbered by a recorded mortgage and a filed and indexed junior federal tax lien. The mortgage was foreclosed by advertisement, the foreclosure sale was held before November 2, 1966, and no redemption occurred. Did the purchaser at the foreclosure sale hold Blackacre free of the junior federal tax lien?

**Answer:** Yes.

**Authorities:** *United States v Brosnan* and *Bank of America v United States*, 363 US 237, 80 S Ct 1108, 4 L Ed 2d 1192 (1960).



## STANDARD 16.16

### EFFECT ON JUNIOR FEDERAL TAX LIEN OF MORTGAGE FORECLOSURE BY ADVERTISEMENT WITH SALE HELD ON OR AFTER NOVEMBER 3, 1966 AND INITIAL PUBLICATION OF NOTICE OF SALE BEFORE NOVEMBER 3, 1966

**STANDARD:** FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT WITH THE FORECLOSURE SALE HELD ON OR AFTER NOVEMBER 3, 1966, AND FAILURE TO REDEEM FROM THE SALE, DIVESTS THE MORTGAGED PREMISES OF ANY FEDERAL TAX LIEN OVER WHICH THE MORTGAGE HAD PRIORITY, IF THE FIRST EFFECTIVE NOTICE OF THE FORECLOSURE SALE WAS PUBLISHED BEFORE NOVEMBER 3, 1966.

**Problem:** A mortgage covering Blackacre, recorded on May 19, 1964, was foreclosed by advertisement. A notice of foreclosure was first published on August 15, 1966, and the sale was held on November 19, 1966. A notice of a federal tax lien against the owner was recorded on October 22, 1964. The redemption period expired without redemption occurring. Does the purchaser at the foreclosure sale hold Blackacre free of the junior federal tax lien?

**Answer:** Yes.

**Authority:** Treas Reg §301.7425-1(b).

**Comment:** Treasury Regulation 301.7425-1(b) states that the notice of sale provision of 26 USC 7425(c)(1) does not apply to sales occurring after November 2, 1966 if, before November 3, 1966, an act was performed which was required and effective under local law with respect to the sale. The publication of notice of sale is given in the regulation as an example of such an act.



## STANDARD 16.17

### EFFECT ON JUNIOR FEDERAL TAX LIEN OF MORTGAGE FORECLOSURE BY ADVERTISEMENT INITIATED ON OR AFTER NOVEMBER 3, 1966

**STANDARD:** FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT INITIATED ON OR AFTER NOVEMBER 3, 1966, AND FAILURE TO REDEEM FROM THE SALE, DIVESTS THE MORTGAGED PREMISES OF ANY JUNIOR FEDERAL TAX LIEN, IF:

- (A) NO NOTICE OF FEDERAL TAX LIEN WAS FILED FOR RECORD AND INDEXED (IN ACCORDANCE WITH 26 USC 6323 AND MCL 211.661) MORE THAN 30 DAYS BEFORE THE FORECLOSURE SALE;
- (B) PROPER NOTICE OF THE SALE WAS GIVEN TO THE UNITED STATES NOT LESS THAN 25 DAYS BEFORE THE SALE; OR
- (C) THE UNITED STATES CONSENTS TO THE SALE FREE OF THE LIEN.

**OTHERWISE, THE SALE IS MADE SUBJECT TO AND HAS NO EFFECT ON THE FEDERAL TAX LIEN.**

**Problem A:** A mortgage covering Blackacre, recorded in 1998, was foreclosed by advertisement at a foreclosure sale held on May 18, 1999. The redemption period was six months after the date of the sale. A notice of federal tax lien against the owner was filed for record and indexed in the office of the register of deeds for the county in which Blackacre is located on May 9, 1999. No notice of the foreclosure sale was given to the United States. The redemption period expired without redemption. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

**Answer:** Yes. Because the notice of federal tax lien was not filed for record and indexed more than 30 days before the sale, the sale and expiration of the right to redeem divested Blackacre of the federal tax lien.

**Problem B:** Same facts as in Problem A, except that the notice of federal tax lien against the owner was filed for record and indexed on April 12, 1999. The redemption period expired without redemption. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

**Answer:** No. Because the notice of federal tax lien was filed for record and indexed more than 30 days before the foreclosure sale, and because no notice of the sale was given to the United States, the sale was made subject to and would not affect the federal tax lien.

**Problem C:** Same facts as in Problem B, except that proper notice of the foreclosure sale was given to the United States 25 days or more before the sale. The redemption period expired without redemption having been made. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

**Answer:** Yes. Because the notice of federal tax lien was filed for record and indexed more than 30 days before the sale, to divest Blackacre of the federal tax lien, it was necessary that the United States be given notice of the sale.

**Problem D:** Notice of a foreclosure sale to be held on May 18, 1999 to foreclose a mortgage covering Blackacre was published. Notice of the sale was given to the United States 25 or more days before May 18, 1999 in reference to a notice of federal tax lien against the owner filed for record and indexed on April 12, 1999. The sale was adjourned to and held on May 25, 1999, without notice to the United States. The redemption period was six months. The redemption period expired without redemption. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

**Answer:** Yes. Because notice of the sale scheduled for May 18, 1999 had been given to the United States, the only notice of postponement of the sale required to be given was that required by local law.

**Problem E:** Notice of a foreclosure sale to be held on May 18, 1999 to foreclose a mortgage covering Blackacre was published. A notice of a federal tax lien against the owner was filed for record and indexed April 23, 1999. No notice of the sale was given to the United States. The sale was adjourned to and held on May 25, 1999. The redemption period was six months. The redemption period expired without redemption. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

**Answer:** Yes. Had the sale been held on the originally scheduled date, no notice to the United States would have been required because no notice of a federal tax lien was filed for record and indexed more than 30 days before the sale date. If the sale is actually held no more than 30 days after the originally scheduled date, no notice to the United States, pursuant to 26 USC 7425(c)(1), is required even though notice of the federal tax lien is filed for record and indexed more than 30 days before the actual sale.

**Problem F:** Same facts as in Problem E, except that, as a result of one or more adjournments, the sale was held on June 22, 1999. The redemption period expired without redemption. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

**Answer:** No. Because the sale was held more than 30 days after the originally scheduled date and because notice of a federal tax lien was filed for record and indexed more than 30 days before the sale, notice of the adjournment must be given to the United States pursuant to 26 USC 7425(c)(1).

**Problem G:** Notice of a foreclosure sale to be held on May 18, 1999 to foreclose a mortgage covering Blackacre was published. The sale was adjourned to and held on June 25, 1979. A notice of a federal tax lien against the owner was filed for record and indexed on June 8, 1999. No notice of the sale was given to the United States. The redemption period expired without redemption. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

**Answer:** Yes. Although the sale was held more than 30 days after the originally scheduled date, it was not necessary to give notice to the United States because no notice of a federal tax lien was filed for record and indexed more than 30 days before the sale.

**Problem H:** Blackacre was a residential parcel less than three acres in size on which a single family dwelling was located. A mortgage of Blackacre recorded in 1999 was foreclosed by advertisement at a foreclosure sale on June 29, 2000. The mortgagee proceeded under MCL 600.3241, and the redemption period was 30 days after the sale date. A federal tax lien against the owner was filed for record and indexed on May 18, 2000. Notice of the foreclosure sale was given to the United States. Did the purchaser at the foreclosure sale acquire Blackacre free of the federal tax lien after expiration of the 30-day redemption period?

**Answer:** No. The United States had 120 days to redeem from the foreclosure sale.

**Authorities:** 26 USC 7425(b), (c)(1) and (2) and (d). Treas Reg §301.7425-2 and 3.

**Comment A:** Notice of Foreclosure Sale.

26 USC 7425(c)(1) provides that notice of sale “shall be given (in accordance with regulations prescribed by the Secretary) in writing by registered or certified mail or by personal service, not less than 25 days prior to such sale, to the Secretary.”

Treasury Regulation §301.7425-3(d) provides:

#### Contents of Notice

A notice will be considered adequate if it contains the following information:

1. Name and address of the person submitting the notice of sale.
2. A copy of each Notice of Federal Tax Lien (Form 668) affecting the real property to be sold or the following as shown on each such notice:
  - (a) The Internal Revenue District named thereon;
  - (b) The name and address of the taxpayer; and
  - (c) The date and place of filing of the notice.

3. With respect to the property to be sold, the following:
  - (a) A detailed description – “in the case of real property, the street address, city and State, and the legal description contained in the title or deed to the property and, if available, a copy of the abstract of title.”
  - (b) The date, time and place and terms of the proposed sale.
4. “The approximate amount of the principal obligation, including interest, secured by the lien sought to be enforced and a description of the other expenses (such as legal expenses, selling costs, etc.) which may be charged against the sale proceeds.”

#### Upon Whom is Notice to be Served?

Notice shall be given to the Area Director for the Internal Revenue District in which the sale is to be conducted, marked for the attention of the Technical Support Group.

#### Time of Service

Although the Internal Revenue Code provides that notice shall be given not less than 25 days before a foreclosure sale, the Treasury Regulation §301.7502-1(c)(2) provides that 26 USC 7502 and 7503 shall apply. The former provides that the date of registering a letter shall be deemed to be the date of delivery. The latter section specifies that if the last day for performing any prescribed act falls on Saturday, Sunday or a legal holiday, the performance of such act will be considered timely if performed on the next succeeding day which is not Saturday, Sunday or a legal holiday. With respect to certified mail, the postmark date is likewise deemed to be the date of delivery if the postmark is made by a postal employee.

If a notice of sale is submitted in duplicate to the Area Director and a written request that receipt be acknowledged is made, the Area Director will so acknowledge, indicating the date and time of receipt of the notice.

#### Inadequate Notice

If the Area Director determines that a notice is inadequate, the Area Director will give notice of the inadequate items to the person who

submitted the notice. In any case where a notice of a foreclosure sale given after December 31, 1976 does not contain the information required under No. 2 above, the Area Director may give written notification of such omission without specification of any other inadequacy. In either event, an adequate notice must be given at least 25 days before the sale date. But if one who submits a timely notice does not receive written notification that the notice is inadequate more than five days before the sale date, the notice is considered adequate.

#### Disclosure of Adequacy of Notice

Upon receipt of a written request indicating the reason therefore, the Area Director is authorized to disclose to any person who has a proper interest whether an adequate notice of sale was given.

#### **Comment B:** Recorded Evidence of Notice to the United States and Service

For the purpose of evidencing that proper and timely notice of mortgage foreclosure sale was given to the United States, the Committee recommends that an affidavit stating that proper notice of the foreclosure sale was given to the United States not less than 25 days before the sale date by personal service, or by registered or certified mail, be recorded. The affidavit, to which a copy of the notice given should be attached, may be recorded with the sheriff's deed or separately, and it should state the date and manner of service, and that no notice of inadequacy as provided for in Treasury Regulation §301.7425-3(d)(2) was received. If service was by registered or certified mail, the receipt or a copy of the notice should be attached to the affidavit and should show timely receipt by the United States. If the receipt does not show timely receipt by the United States, the delivery may still have been made more than 25 days before the sale date if the registered or certified receipt bears a postmark made by a postal employee which postmark was not less than 25 days before the sale date. 26 USC 7502; Treas Reg §301.7502-1(c)(2).

**Caveat:** 26 USC 7425(d) provides in part that “the Secretary may redeem such property within the period of 120 days after the date of such sale or the period allowable for redemption under local law, whichever is longer.”

## STANDARD 16.18

### OMISSION OF OR ERROR IN MORTGAGOR'S NAME IN NOTICE OF SALE IN FORECLOSURE BY ADVERTISEMENT

**STANDARD:** IN FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT, THE CORRECT NAMES OF ALL MORTGAGORS MUST BE INCLUDED IN THE PUBLISHED NOTICE OF SALE.

**Problem A:** Robert Brown, the owner of Blackacre, and Rose Brown, his wife, who had no interest in Blackacre other than her inchoate dower, executed a mortgage of Blackacre. In a foreclosure by advertisement, Rose Brown was not named in the published notice of sale. Is the notice sufficient?

**Answer:** No.

**Problem B:** Robert Brown and Rose Brown, husband and wife, executed a mortgage of Blackacre. In a foreclosure by advertisement, the name of Rose Brown was given as Jane Brown in the published notice of sale. Is the notice sufficient?

**Answer:** No.

**Authorities:** Generally: MCL 600.3212.

Problem A: *Oades v Standard Savings & Loan Association*, 257 Mich 469, 241 NW 262 (1932).

Problem B: *Lee v Clary*, 38 Mich 223 (1878); *Zlotocizski v Smith*, 117 Mich 202, 75 NW 470 (1898).

**Note:** See Standards 2.1, 2.2 and 2.3 regarding the rule of *idem sonans*, the use of middle names and initials, and abbreviations of first and middle names.



## STANDARD 16.19

### OMISSION OF NAME OF FORECLOSING ASSIGNEE OF RECORD IN PUBLISHED NOTICE OF SALE IN FORECLOSURE BY ADVERTISEMENT

**STANDARD:** IN FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT, THE PUBLISHED NOTICE OF SALE MUST INCLUDE THE NAME OF THE FORECLOSING ASSIGNEE OF A RECORDED ASSIGNMENT OF THE MORTGAGE.

**Problem:** A mortgage was assigned of record to Arthur Mills. Mills foreclosed it by advertisement. The published notice of sale did not name Mills. Is the notice sufficient?

**Answer:** No.

**Authority:** MCL 600.3212(a).

**Comment A:** The words “the assignee” as used in the cited section designate the foreclosing assignee and not *mesne* assignees. Mortgage foreclosures were sustained in *Fox v Jacobs*, 289 Mich 619, 286 NW 854 (1939); and *Peterson v Jacobs*, 303 Mich 329, 6 NW2d 533 (1942), where *mesne* assignments had not been set forth in the notice, and in *Guardian Depositors Corp v Keller*, 286 Mich 403, 282 NW 194 (1938), where the name of a *mesne* assignee was set forth erroneously.

**Comment B:** See Standard 16.13 with respect to the necessity of recording mortgage assignments, and the Comment thereto regarding the requirements of MCL 440.9607(b).

**Comment C:** The Committee expresses no opinion as to the effect of an assignment of the foreclosing assignee’s interest after publication of the initial notice of sale.



## STANDARD 16.20

### INCLUSION OF LENGTH OF REDEMPTION PERIOD IN PUBLISHED NOTICE OF SALE IN FORECLOSURE BY ADVERTISEMENT

**STANDARD:** IN FORECLOSURE BY ADVERTISEMENT OF A MORTGAGE EXECUTED ON OR AFTER JANUARY 1, 1965, THE LENGTH OF THE REDEMPTION PERIOD MUST BE INCLUDED IN THE PUBLISHED NOTICE OF SALE.

**Problem A:** A mortgage executed in 1958 was foreclosed by advertisement in 1962. The published notice of sale did not include the length of the redemption period. Is the notice sufficient?

**Answer:** Yes.

**Problem B:** A mortgage executed in 1989 was foreclosed by advertisement in 1992. The published notice of sale did not state the redemption period. Is the notice sufficient?

**Answer:** No.

**Authority:** MCL 600.3212.

**Comment:** MCL 600.3232 provides that the officer making the foreclosure sale shall endorse on the deed the time when it will become operative unless redeemed. MCL 600.3248 provides that in making the endorsement the officer may rely conclusively on the redemption period included in the notice of sale. In cases where abandonment is claimed, the length of the redemption period is sometimes stated in the notice of sale in the alternative. See, MCL 600.3204(9), (10) and (11), 600.3241 and 600.3241a. The Committee expresses no opinion as to whether the inclusion of the length of the redemption period in the alternative complies with MCL 600.3212.



## STANDARD 16.21

### IRREGULARITIES IN PUBLISHED NOTICE OF SALE IN FORECLOSURE BY ADVERTISEMENT

**STANDARD:** SLIGHT AND INCONSEQUENTIAL IRREGULARITIES IN THE PUBLISHED NOTICE OF SALE IN FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT DO NOT INVALIDATE THE FORECLOSURE SALE.

**Problem A:** The published notice of sale to foreclose a mortgage by advertisement identified the mortgagee as “Dixon,” but the correct name was “Dickson.” The notice was otherwise correct. Is the notice sufficient?

**Answer:** Yes. By the rule of *idem sonans*, the names are deemed to be the same.

**Problem B:** The published notice of sale in a foreclosure by advertisement described a *mesne* assignee as Union Guardian Trust Company, but the correct name of the assignee was Union Guardian Trust Company of Detroit, a Michigan corporation, Trustee. The mortgage was foreclosed by advertisement by a subsequent assignee. Is the notice sufficient?

**Answer:** Yes. The name of a *mesne* assignee, if included, need not be stated with absolute accuracy.

**Problem C:** The published notice of sale to foreclose a mortgage by advertisement incorrectly states the date of the mortgage. The date, liber and page of its recording were correctly stated. Is the notice sufficient?

**Answer:** Yes. The correct recording information is sufficient to identify the mortgage.

**Problem D:** The published notice of sale to foreclose a mortgage by advertisement failed to state the recording date of the mortgage, but correctly stated the liber and page. Is the notice sufficient?

**Answer:** Yes. The recording date can be ascertained from the recorded mortgage.

**Problem E:** The published notice of sale to foreclose a mortgage by advertisement stated that the sale will be held on Thursday, March 10, 1993, which date was actually a Friday. Is the notice sufficient?

**Answer:** Yes. There is no requirement that the day of the week be stated. In case of any discrepancy, the day of the month is controlling.

**Problem F:** The published notice of sale to foreclose a mortgage by advertisement described the real property as being situated at the northwest corner of a certain street intersection. The real property was situated at the northeast corner of the intersection. The liber and page of the recorded plat which includes the real property were correctly stated. Is the notice sufficient?

**Answer:** Yes. The correct reference to the recorded plat is sufficient.

**Problem G:** The published notice of sale to foreclose a mortgage by advertisement was signed in the name of First State Bank of Newton as mortgagee. The name of the bank was First State Savings Bank of Newton. The name of the bank was correctly stated in that part of the notice describing the parties to the mortgage. Is the notice sufficient?

**Answer:** Yes. The notice is sufficient if it correctly names the foreclosing mortgagee; signing of the notice is not required.

**Authorities:** Generally: MCL 600.3212.

Problem A: *Reading v Waterman*, 46 Mich 107, 8 NW 691 (1881).

Problem B: *Guardian Depositors Corp v Keller*, 286 Mich 403, 282 NW 194 (1938).

Problem C: *Reading v Waterman*, 46 Mich 107, 8 NW 691 (1881); *Brown v Burney*, 128 Mich 205, 87 NW 221 (1901).

Problem D: *Lau v Scribner*, 197 Mich 414, 163 NW 914 (1917).

Problem E: *State Savings Bank v Wayne Circuit Judge*, 95 Mich 100, 54 NW 632 (1893); *First State Bank of Decatur v Day*, 188 Mich 228, 154 NW 101 (1915).

Problem F: *Guardian Depositors Corp v Keller*, 286 Mich 403, 282 NW 194 (1938).

Problem G: *Mich State Insurance Co v Soule*, 51 Mich 312, 16 NW 662 (1883).



## STANDARD 16.22

### MATTERS REQUIRED TO BE INCLUDED IN NOTICE OF SALE IN FORECLOSURE BY ADVERTISEMENT

**STANDARD:** THE PUBLISHED NOTICE OF SALE IN FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT NEED INCLUDE ONLY THOSE MATTERS REQUIRED BY THE FORECLOSURE STATUTE.

**Problem A:** In foreclosure of a mortgage by advertisement, the liber and page of the recorded mortgage are not included in the published notice of sale. Is the notice sufficient?

**Answer:** Yes.

**Problem B:** In foreclosure of a mortgage by advertisement, the published notice of sale includes the recording date of the mortgage, but not the hour and minute of recording. Is the notice sufficient?

**Answer:** Yes.

**Problem C:** In foreclosure of a mortgage by advertisement, the names of the grantees of the mortgagor, including the owner at the time of foreclosure, are not included in the published notice of sale. Is the notice sufficient?

**Answer:** Yes.

**Problem D:** In foreclosure of a mortgage by advertisement, the published notice of sale fails to state that no legal proceedings to enforce the mortgage debt are pending. Is the notice sufficient?

**Answer:** Yes.

**Problem E:** In foreclosure of a mortgage by advertisement, the published notice of sale does not include any reference to previous foreclosures by advertisement which were either defective or not carried to completion. Is the notice sufficient?

**Answer:** Yes. Foreclosure by advertisement is not a suit or proceeding at law within the meaning of the foreclosure statute.

**Problem F:** In foreclosure of a mortgage by advertisement, the published notice of sale identifies the mortgagee by its name in the recorded mortgage, rather than the different name subsequently adopted by the mortgagee. Is the notice sufficient?

**Answer:** Yes.

**Authorities:** Generally: MCL 600.3212.

Problem A: *McCammon v Detroit, Lansing & Northern R Co*, 103 Mich 104, 61 NW 273 (1894).

Problem B: *Lee v Clary*, 38 Mich 223 (1878).

Problem D: *Guardian Depositors Corp v Keller*, 286 Mich 403, 282 NW 194 (1938).

Problem E: *Lee v Clary*, 38 Mich 223 (1878).

Problem F: *Union Guardian Trust Co v Kowalsky*, 267 Mich 110, 255 NW 171 (1934).

## STANDARD 16.23

### TIME REQUIRED BETWEEN FIRST PUBLICATION AND FORECLOSURE SALE

**STANDARD:** IN FORECLOSURE OF A MORTGAGE BY ADVERTISE-  
MENT, THE NOTICE MUST BE PUBLISHED ONCE EACH  
WEEK FOR AT LEAST FOUR SUCCESSIVE WEEKS AND  
THE SALE MUST BE HELD NOT LESS THAN 28 DAYS AF-  
TER THE FIRST PUBLICATION.

**Problem A:** The sheriff's deed in foreclosure by advertisement of a mortgage executed on April 1, 1992 shows publication once each week for four successive weeks with the sale being held on the day following the fourth publication, 22 days after the first publication. Is the foreclosure valid?

**Answer:** No.

**Problem B:** A mortgage executed and recorded in 1990 was foreclosed by advertisement in 1993. The sheriff's deed shows publication of the notice of sale once each week for four successive weeks with the sale being held 28 days after the first publication. Is the foreclosure valid?

**Answer:** Yes.

**Authorities:** Generally: MCL 600.3208.

Problem A: *Gantz v Toles*, 40 Mich 725 (1879); *Bacon v Kennedy*, 56 Mich 329, 22 NW 824 (1885); *Casey v Goetzen*, 240 Mich 41, 214 NW 948 (1927).

Problem B: *State Savings Bank v Matthews*, 123 Mich 56, 81 NW 918 (1900); *Grand River Avenue Church of Christ v Berkshire Life Insurance Co*, 254 Mich 480, 236 NW 881 (1931).

**Comment A:** In *Jackson Investment Corporation v Pittsfield Products, Inc.*, 162 Mich App 750, 413 NW2d 99 (1987), the Court of Appeals held that the failure of the notice of sale to satisfy the requirements of

MCL 600.3208 renders a subsequent foreclosure sale voidable, not void.

**Comment B:** Publication may be in any newspaper published in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated. MCL 600.3208. The term “newspaper,” as used in the foreclosure statute, is defined in MCL 600.1461.

For cases involving compliance of particular newspapers with statutory requirements, see *Hooch v Sloman*, 155 Mich 1, 118 NW 489 (1908); *Lau v Scribner*, 197 Mich 414, 163 NW 914 (1917); and *Moss v Keary*, 231 Mich 295, 204 NW 93 (1925).

## STANDARD 16.24

### POSTING OF NOTICE OF SALE IN FORECLOSURE BY ADVERTISEMENT

**STANDARD:** IN FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT, A TRUE COPY OF THE PUBLISHED NOTICE OF SALE MUST BE POSTED IN A CONSPICUOUS PLACE UPON ANY PART OF THE REAL PROPERTY BEING FORECLOSED WITHIN 15 DAYS AFTER THE FIRST PUBLICATION OF THE NOTICE OF SALE.

**Problem:** In foreclosure of a mortgage by advertisement, the first notice of sale was published on September 6, 1992. The published notice of sale was posted on the mortgaged real property on September 26, 1992. The sale was held on the day specified in the notice. Is the sale valid?

**Answer:** No.

**Authority:** MCL 600.3208.

**Comment A:** For an example of what may qualify as a conspicuous place for the posting of the notice of sale, see *Jennings v Arnold*, 272 Mich 599, 262 NW 419 (1935).

**Comment B:** In *Jackson Investment Corporation v Pittsfield Products, Inc.*, 162 Mich App 750, 413 NW2d 99 (1987), the Court of Appeals held that a defect in the notice of sale renders a subsequent foreclosure sale avoidable, not void. Although the question before the court concerned adequacy of the published notice, the court's opinion encompassed all requirements of notice under MCL 600.3208 and 600.3212.



## STANDARD 16.25

### SALE OF DISTINCT TRACTS IN FORECLOSURE BY ADVERTISEMENT

**STANDARD:** IN FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT, MORTGAGED REAL PROPERTY CONSISTING OF DISTINCT FARMS, TRACTS, OR LOTS, NOT OCCUPIED AS ONE PARCEL, MUST BE SOLD SEPARATELY IF THERE IS NO PROVISION IN THE MORTGAGE FOR SALE EN MASSE. NO MORE OF SUCH DISTINCT FARMS, TRACTS, OR LOTS MAY BE SOLD THAN NECESSARY TO SATISFY THE AMOUNT DUE.

**Problem:** Robert Brown mortgaged Blackacre to Edward Lane by a metes and bounds description and then sold several tracts, each having an area of 11 acres, under land contracts. Lane released some but not all of these tracts from the mortgage. In a foreclosure of the mortgage by advertisement, Blackacre, excluding the tracts previously released, was sold as one parcel. Is the foreclosure sale valid?

**Answer:** No. The contract purchasers were in at least constructive possession of the tracts which they had purchased. This negated the possibility of the unreleased portion of Blackacre being occupied as one parcel.

**Authorities:** MCL 600.3224. *Lee v Mason*, 10 Mich 403 (1862); *O'Connor v Keenan*, 132 Mich 646, 94 NW 186 (1903); *Walker v Schultz*, 175 Mich 280, 141 NW 543 (1913); *Jerome v Coffin*, 243 Mich 324, 220 NW 675 (1928); *Northwestern Loan & Discount Corp v Scully*, 256 Mich 202, 239 NW 352 (1931); *Masalla v Bisson*, 359 Mich 512, 102 NW2d 468 (1960).

**Comment A:** In sale on foreclosure by advertisement, the controlling factor in determining how the real property should be sold is not whether it is separately described, but whether it is occupied as a single parcel. *Larzelere v Starkweather*, 38 Mich 96 (1878). Although the cited statutory provision is otherwise mandatory in foreclosure by advertisement of separate parcels, the Committee believes, on the authority

of *Metropolitan Life Insurance Co v Foote*, 95 Mich App 399, 290 NW2d 158 (1980), leave to appeal denied, 412 Mich 889 (1981), that if the mortgage authorizes a foreclosure sale *en masse*, it will be binding on the parties to the mortgage, in the absence of third party interests or bad faith on the part of the mortgagee.

**Comment B:** With respect to sales of distinct tracts in foreclosure by advertisement of mortgages held by Michigan State Housing Development Authority, see MCL 125.1449(f).

## STANDARD 16.26

### SALE OF DISTINCT TRACTS IN JUDICIAL FORECLOSURE

**STANDARD:** IN A SALE ON JUDICIAL FORECLOSURE OF A MORTGAGE, MORTGAGED REAL PROPERTY CONSISTING OF DISTINCT FARMS, TRACTS, OR LOTS SHALL BE SOLD SEPARATELY, UNLESS IT APPEARS TO THE COURT THAT:

- (A) SALE OF INDIVIDUAL PARCELS WILL INJURE THE INTERESTS OF THE PARTIES;
- (B) SALE OF THE WHOLE PREMISES WILL BE MOST BENEFICIAL TO THE PARTIES; OR
- (C) THE MORTGAGE PERMITS THE SALE TO BE HELD *EN MASSE* AND THERE IS NO SHOWING THAT SUCH A SALE IS BEING MADE IN BAD FAITH.

IF THE REAL PROPERTY IS SOLD SEPARATELY, NO MORE OF THE DISTINCT FARMS, TRACTS, OR LOTS MAY BE SOLD THAN NECESSARY TO SATISFY THE AMOUNT DUE.

**Problem A:** Robert Brown owned Blackacre, a platted subdivision containing four lots, each improved with a free standing office building leased to various tenants. Brown mortgaged Blackacre to Edward Lane. In a judicial foreclosure of the mortgage, Brown objected to the sale of the lots individually. However, the court found that neither party's interest would be injured by the sale of individual lots and entered an order providing for the lots to be sold separately. Is the foreclosure sale valid?

**Answer:** Yes.

**Problem B:** Same facts as in Problem A, except that the mortgage permits Lane to elect to have the lots sold *en masse* rather than individually. In the judicial foreclosure, Brown objected to the sale of the lots *en masse* but

did not show that such a sale would be in bad faith. The court entered an order providing for the lots to be sold *en masse*. Is the foreclosure sale valid?

**Answer:** Yes.

**Authorities:** Generally: MCL 600.3165. *Vaughn v Nims*, 36 Mich 297 (1877); *Masella v Bisson*, 359 Mich 512, 102 NW2d 468 (1960).

Problem B: *Metropolitan Life Insurance Co v Foote*, 95 Mich App 399, 290 NW2d 158 (1980); *lv den*, 412 Mich 889 (1981).

**Comment:** With respect to sales of distinct tracts in judicial foreclosure of mortgages held by the Michigan State Housing Development Authority, see MCL 125.1448n.

## STANDARD 16.27

### EFFECT OF MILITARY SERVICE ON VALIDITY OF SALE IN FORECLOSURE BY ADVERTISEMENT

**STANDARD:** UNLESS THE FORECLOSURE SALE IS MADE PURSUANT TO EITHER AN ORDER PREVIOUSLY GRANTED BY A COURT AND A RETURN THERETO MADE AND APPROVED BY THE COURT OR AN AGREEMENT EXECUTED DURING OR AFTER THE PERIOD OF MILITARY SERVICE OF THE OWNER, A SALE ON FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT IS INVALID AS AGAINST THE OWNER IF THE OWNER WAS IN MILITARY SERVICE ON THE DATE OF SALE OR WITHIN THREE MONTHS PRIOR THERETO, IF:

- (A) THE OWNER OF THE MORTGAGED PROPERTY HELD TITLE AT THE COMMENCEMENT OF THE MILITARY SERVICE AND ON THE DATE OF THE SALE; AND
- (B) THE OBLIGATION SECURED BY THE MORTGAGE ORIGINATED BEFORE THE OWNER'S PERIOD OF MILITARY SERVICE.

**Problem A:** A mortgage covering Blackacre was foreclosed by advertisement in 1993. The record does not disclose whether any owner of Blackacre was in the military service of the United States. Is the sale valid?

**Answer:** The validity of the sale cannot be determined, because the owner's military service status is unknown. A recorded affidavit would provide *prima facie* evidence of the owner's military service status.

**Problem B:** Amanda Brown mortgaged Blackacre to Edward Lane in 1990. Brown has been in military service since 1991. In 1993, Lane foreclosed the mortgage by advertisement and the sale was held on December 10, 1993. Is the foreclosure valid?

**Answer:** No.

**Problem C:** Same facts as in Problem B, except that Brown was honorably discharged from military service on September 1, 1993. Is the foreclosure sale valid?

**Answer:** Yes.

**Problem D:** Same facts as in Problem B, except that Brown was in the U.S. Navy Reserves and was ordered to active duty on November 1, 1993. Is the foreclosure valid?

**Answer:** No.

**Authorities:** 50 USC App 511, 516, 517 and 532.

**Comment A:** The benefits of 50 USC App 532 extend to any person on active duty or recently released from active duty, any person who has been ordered to report for induction under the Military Selective Service Act (50 USC App 451 *et seq.*), any member of a reserve component of the Armed Forces who is ordered to report for military service, and certain others as provided in the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. 50 USC App 501 *et seq.*

**Comment B:** The recording of an affidavit as to the military service of a person named in a mortgage is permitted. The affidavit must include a description of the real property involved by setting out the description in full or by incorporating the same by reference to a recorded instrument in the chain of title which contains a description of the real property. The affidavit is *prima facie* evidence of the facts stated. MCL 565.451a, 565.451c and 565.453.

**Comment C:** A false affidavit as to military service cannot be used as the basis of a valid foreclosure. *Wilkin v Shell Oil Co.*, 197 F2d 42 (CA 10, 1951), *cert den*, 344 US 854, 73 S Ct 92, 97 L Ed 663 (1952), *rehearing den* 344 US 888, 73 S Ct 183, 97 L Ed 687 (1952).

## STANDARD 16.28

### EFFECT OF FAILURE TO RECORD DEED WITHIN 20 DAYS AFTER SALE IN FORECLOSURE BY ADVERTISEMENT

**STANDARD:** FAILURE TO RECORD THE DEED GIVEN AT A SALE IN FORECLOSURE BY ADVERTISEMENT WITHIN 20 DAYS AFTER SALE DOES NOT INVALIDATE THE SALE, BUT CAUSES THE PERIOD OF REDEMPTION TO RUN FROM THE DATE OF RECORDING.

**Problem:** Robert Brown, a single man, mortgaged Blackacre to Edward Lane. The mortgage was foreclosed by advertisement, and sale was held on January 16, 1995. On that day, the officer who conducted the sale executed a deed of Blackacre to Lane. The deed stated that it would become effective six months after the date of sale, which was the applicable redemption period. The deed was not recorded until April 16, 1995. On August 1, 1995, Edward Lane and Elsie Lane, husband and wife, deeded Blackacre to Simon Grant. Did Grant acquire title to Blackacre free of the interest of Brown?

**Answer:** No. Because the deed was not recorded within 20 days after the sale, MCL 600.3232, Brown or his successors in interest can redeem Blackacre through October 16, 1995.

**Authorities:** MCL 600.3232 and 600.3240. *Perkins v Keller*, 43 Mich 53, 4 NW 559 (1880); *Mills v Jirasek*, 267 Mich 609, 255 NW 402 (1934).

**Comment:** If failure to record the foreclosure sale deed within the 20-day period adversely affects the rights of third parties, the deed might not be valid as to them. *Mills v Jirasek, supra*.



## STANDARD 16.29

### TIME TO CONTEST SALE IN FORECLOSURE BY ADVERTISEMENT

**STANDARD:** THE VALIDITY OF A SALE IN FORECLOSURE BY ADVERTISEMENT MAY NOT BE CONTESTED BY THE MORTGAGOR OR THOSE IN PRIVITY WITH THE MORTGAGOR AFTER FIVE YEARS AFTER EXPIRATION OF THE REDEMPTION PERIOD.

**Problem:** Robert Brown mortgaged Blackacre to Edward Lane. The mortgage was foreclosed by advertisement in 1987. Lane purchased Blackacre at the sale. In 1994, Lane brought an action to quiet title. Brown's answer asserted that the foreclosure proceedings were invalid. Is Brown's defense barred?

**Answer:** Yes. The statutory five-year period bars not only actions challenging a foreclosure sale, but also defenses asserting irregularities in a sale.

**Authorities:** MCL 600.5801. *Olmstead v Johnson*, 313 Mich 57, 20 NW2d 809 (1945); *US v Garno*, 974 F Supp 628 (ED Mich 1997).

**Comment:** MCL 600.5801 applies where the foreclosure sale is claimed to be invalid, but does not bar a claim of title adverse to that of the mortgagor. *Lau v Pontiac Commercial & Savings Bank*, 260 Mich 73, 244 NW 233 (1932).



## STANDARD 16.30

### MISDESCRIPTION IN NOTICE OF SALE IN JUDICIAL MORTGAGE FORECLOSURE

**STANDARD:** THE NOTICE OF SALE PURSUANT TO A JUDGMENT OF FORECLOSURE MUST DESCRIBE THE REAL PROPERTY TO BE SOLD WITH COMMON CERTAINTY BY SETTING FORTH THE NAME OR NUMBER OF THE TOWNSHIP IN WHICH IT IS LOCATED, AND THE NUMBER OF THE LOT, OR BY OTHER APPROPRIATE DESCRIPTION.

**Problem:** In foreclosure of a mortgage by judicial proceedings, the real property was described in the notice of sale as Lot 97 of Sweetwater Subdivision, according to the recorded plat thereof. No such plat exists. Was the notice valid?

**Answer:** No.

**Authorities:** MCL 600.6052 and 600.6091.

**Comment:** A description of the real property with common certainty, has been interpreted to mean a description with sufficient accuracy to enable the public by exercise of ordinary intelligence to identify the property or to be directed to a means of obtaining an exact description. *Provident Mutual Life Insurance Co v Vinton Co*, 282 Mich 84, 275 NW 776 (1937); *Guardian Depositors Corp v Keller*, 286 Mich 403, 282 NW 194 (1938).



## STANDARD 16.31

### PUBLICATION AND POSTING OF NOTICE OF SALE IN JUDICIAL MORTGAGE FORECLOSURE

**STANDARD:** IN FORECLOSURE OF A MORTGAGE BY JUDICIAL PROCEEDINGS, PUBLICATION OF THE NOTICE OF SALE MAY NOT BE COMMENCED UNTIL THE TIME FIXED BY THE JUDGMENT FOR PAYMENT HAS EXPIRED AND SIX MONTHS AFTER COMMENCEMENT OF THE ACTION. THE NOTICE MUST BE POSTED NOT LESS THAN 42 DAYS BEFORE THE SALE AND PUBLISHED ONCE EACH WEEK FOR AT LEAST SIX SUCCESSIVE WEEKS BEFORE THE SALE.

**Problem:** In foreclosure of a mortgage by judicial proceedings, the notice of sale was published once each week for six successive weeks before the sale. It was first published after the time fixed by the judgment for payment had expired, and more than six months after commencement of the action. The notice of sale was posted more than 42 days before the sale, but the sale was held less than 42 days after the first publication. Is the sale valid?

**Answer:** Yes. Notice must be posted no less than 42 days before the sale but publishing the notice each week for six successive weeks in advance of the sale is sufficient to comply with the statute and court rule, even though the sale occurred less than 42 days after the first publication.

**Authorities:** MCR 3.410(C); 600.6052 and 600.6091. *Carpenter v Smith*, 147 Mich App 560, 383 NW2d 248 (1985).

**Comment:** The 42-day period for the posting of notice excludes the day of posting and includes the day of sale. *Wesbrook Lane Realty Corp v Pokorny*, 250 Mich 548, 231 NW 66 (1930).



## STANDARD 16.32

### AFFIDAVIT OF POSTING OF NOTICE OF SALE IN JUDICIAL MORTGAGE FORECLOSURE

**STANDARD:** TO ACQUIRE VALID TITLE UNDER A MORTGAGE FORECLOSURE DEED ON A SALE HELD PURSUANT TO A JUDGMENT OF FORECLOSURE, AN AFFIDAVIT MUST BE FILED WITH THE COURT, DISCLOSING THAT NOTICE OF SALE HAS BEEN POSTED IN ACCORDANCE WITH THE STATUTE IN THE TOWNSHIP OR CITY WHERE THE SALE WAS HELD AND, IF THE FORECLOSED REAL PROPERTY IS LOCATED IN ANOTHER TOWNSHIP OR CITY, THEN ALSO IN THE OTHER TOWNSHIP OR CITY.

**Problem:** Blackacre was sold at a judicial mortgage foreclosure sale. The sale was held in a township other than that in which the mortgaged premises were located. The report of sale stated that notices of the sale were posted in both townships; however, the attached affidavits disclosed posting only in the township where the sale occurred. Was the sale valid?

**Answer:** No. The recital contained in the report of sale that there had been a posting in both townships did not eliminate the need for an affidavit disclosing proper posting.

**Authorities:** MCL 600.6052 and 600.6091. *New York Baptist Union v Atwell*, 95 Mich 239, 54 NW 760 (1893).

**Comment:** This Standard is to be considered in connection with MCL 600.6054, which provides that the failure of any officer to give the notice of sale required by MCL 600.6052 shall not affect the validity of any sale made to a purchaser in good faith without notice of the omission.

See also *Kelso v Coburn*, 334 Mich 43, 53 NW2d 686 (1952).



## STANDARD 16.33

### NECESSITY OF CONFIRMATION OF REPORT OF SALE IN JUDICIAL MORTGAGE FORECLOSURE

**STANDARD:** CONFIRMATION OF A REPORT OF SALE IS NECESSARY TO VALIDATE A DEED GIVEN PURSUANT TO A MORTGAGE FORECLOSURE BY JUDICIAL PROCEEDINGS.

**Problem:** A mortgage was foreclosed by judicial proceedings. A judgment of foreclosure was entered, a foreclosure sale was properly held, a report of sale was filed and a deed recorded, but the sale was not confirmed by the court. Did the purchaser acquire good title subject only to the right of redemption?

**Answer:** No.

**Authorities:** *Demaray v Little*, 17 Mich 386 (1868); *Howard v Bond*, 42 Mich 131, 3 NW 289 (1879); *Gerasimos v Wartell*, 244 Mich 588, 222 NW 211 (1928); *Mich Trust Co v Cody*, 264 Mich 258, 249 NW 844 (1933); *Detroit Trust Co v Hart*, 277 Mich 561, 269 NW 598 (1936).

**Comment:** No specific statute requires confirmation of a mortgage foreclosure sale. It is not required by any court rule, but it has always been held to be necessary. Confirmation of sale is not a matter of right, even if unopposed, and the court may in the exercise of its equitable powers refuse to confirm a sale and order a resale.



## STANDARD 16.34

### MISDESCRIPTION IN DEED PURSUANT TO JUDICIAL MORTGAGE FORECLOSURE

**STANDARD:** THE DESCRIPTION IN A DEED GIVEN PURSUANT TO A MORTGAGE FORECLOSURE BY JUDICIAL PROCEEDINGS MUST IDENTIFY THE REAL PROPERTY WITH REASONABLE CERTAINTY, BUT A CLERICAL ERROR MAY BE CORRECTED.

**Problem:** A mortgage covered lots numbered consecutively from 74 through 93. The mortgage was foreclosed by judicial proceedings, and the judgment and notice of sale contained the correct description. The report of sale and the deed described the property as lots numbered consecutively from 79 through 93. Upon discovery of the error, the court, after notice, confirmed the sale, *nunc pro tunc*, in a corrected report. May the report of sale and the deed be corrected?

**Answer:** Yes. The error was clerical and was apparent from the court records. The corrections did not disturb the judgment and proceedings thereunder, but merely made the record conform to the facts.

**Authority:** *Walsh v Colby*, 153 Mich 602, 117 NW 207 (1908).



## STANDARD 16.35

### TIME TO CONTEST SALE PURSUANT TO JUDICIAL MORTGAGE FORECLOSURE

**STANDARD:** THE VALIDITY OF A DEED GIVEN PURSUANT TO JUDICIAL MORTGAGE FORECLOSURE PROCEEDINGS MAY NOT BE CONTESTED BY THE MORTGAGOR OR THOSE IN PRIVITY WITH THE MORTGAGOR AFTER FIVE YEARS AFTER THE EXPIRATION OF THE REDEMPTION PERIOD, IF THE COURT HAD JURISDICTION AND THE REPORT OF SALE WAS CONFIRMED.

**Problem:** A mortgage executed by Robert Brown was foreclosed by judicial proceedings and the report of sale confirmed in 1988. In 1995 Brown brought an action against the purchaser at the sale alleging that the sale was invalid because of certain irregularities in the foreclosure. Does the statute of limitations bar Brown's action?

**Answer:** Yes.

**Authorities:** MCL 600.5801. *West Michigan Park Association v Pere Marquette Railroad Co*, 172 Mich 179, 137 NW 799 (1912).

**Comment:** MCL 600.5801 applies only where the foreclosure proceedings are claimed to be invalid. It cannot be used as a defense against a claim of title adverse to that of the mortgagor. *Donovan v Ward*, 100 Mich 601, 59 NW 254 (1894).



## STANDARD 16.36

### EFFECT OF MILITARY SERVICE ON REDEMPTION FROM FORECLOSURE SALE

**STANDARD: THE RUNNING OF THE REDEMPTION PERIOD FROM A MORTGAGE FORECLOSURE SALE IS TOLLED BY THE MILITARY SERVICE OF THE OWNER.**

**Problem A:** A mortgage covering Blackacre was foreclosed by advertisement. At the foreclosure sale on December 1, 1992, Blackacre was sold to Edward Lane. The sheriff's deed to Lane was recorded the same day. The record does not disclose whether the owner was in the military service of the United States at any time during the redemption period. In 1994, Lane deeded Blackacre to Samuel Peck. Did Peck acquire marketable title to Blackacre?

**Answer:** No. The sheriff's deed may not have become absolute. An affidavit that there were no parties as to whom the redemption period was extended on account of military service is *prima facie* evidence thereof and should be recorded.

**Problem B:** Robert Brown mortgaged Blackacre to Edward Lane in 1990. Brown has been in military service since 1991. In 1992, Lane brought judicial proceedings to foreclose the mortgage. The court determined that Brown's military service did not materially affect his ability to make payments and entered a judgment of foreclosure. At the foreclosure sale on December 10, 1993, Blackacre was sold to Lane. The sale was confirmed and the deed to Lane recorded. After expiration of the statutory redemption period, Lane deeded Blackacre to Samuel Peck. Did Peck acquire marketable title to Blackacre?

**Answer:** No. The redemption period would not begin to run against Brown until the end of his military service.

**Problem C:** Same facts as in Problem B, except that Brown enlisted in the U.S. Army on December 30, 1993. Did Peck acquire marketable title to Blackacre?

**Answer:** No. No part of Brown's time in military service may be included in computing the redemption period.

**Problem D:** Same facts as in Problem B, except that Brown was in the U.S. Army Reserves and on December 30, 1993, received an order to report for active duty. Did Peck acquire marketable title to Blackacre?

**Answer:** No.

**Authorities:** 50 USC App 525 and 517.

**Comment A:** Although 50 USC App 532 permits a court in a judicial proceeding to order a foreclosure sale if in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of the defendant's military service, the provisions of 50 USC App 525 concerning the tolling of the redemption period are mandatory and may not be abridged by a court. See, Standard 16.25 as to 50 USC App 532.

**Comment B:** The recording of an affidavit as to the military service of a person named in a mortgage is permitted. The affidavit must include a description of the real property involved by setting out the description in full or by incorporating the description by reference to a recorded instrument in the chain of title which contains a description of the real property. The affidavit is *prima facie* evidence of the facts stated. MCL 565.451a, 565.451c and 565.453.

**Comment C:** A false affidavit as to military service cannot be used as the basis of a valid foreclosure. *Wilkin v Shell Oil Co.*, 197 F2d 42 (CA 10, 1951), *cert den*, 344 US 854, 73 S Ct 92, 97 L Ed 663 (1952), *reh den*, 344 US 888, 73 S Ct 183, 97 L Ed 687 (1952).

## STANDARD 16.37

### ASSIGNMENT OF RENTS SECURING TRUST MORTGAGE

**STANDARD:** AN ASSIGNMENT OF RENTS CONTAINED IN, OR GIVEN IN CONNECTION WITH, A TRUST MORTGAGE IS ENFORCEABLE UPON DEFAULT, AFTER RECORDING OF A NOTICE OF DEFAULT IN THE OFFICE OF THE REGISTER OF DEEDS FOR THE COUNTY IN WHICH THE MORTGAGED PROPERTY IS SITUATED AND SERVICE OF A COPY OF THE NOTICE UPON THE OCCUPANTS OF THE PROPERTY.

**Problem:** A trust mortgage to Security Trust Company, as trustee, covering Blackacre, on which a five-unit apartment building was located, was executed and recorded on September 1, 1995. The mortgage contained an assignment of the rents and profits of the mortgaged property. On June 1, 1997, upon default under the mortgage, the trustee recorded a notice of default in the office of the register of deeds for the county in which Blackacre was situated, and also served a copy of the notice upon the occupants of the apartment building. Is the assignment enforceable against the occupants?

**Answer:** Yes.

**Authorities:** MCL 554.211, 554.212 and 554.213. *Guaranty Trust Co v Feldman*, 247 Mich 524, 226 NW 233 (1929); *Security Trust Co v Sloman*, 252 Mich 266, 233 NW 216 (1930); *Abrin v Equitable Trust Co*, 271 Mich 535, 261 NW 85 (1935).

**Comment A:** Discharge of a trust mortgage operates as a release of an assignment of rents contained in, or given in connection with, the trust mortgage.

**Comment B:** An assignment of rents contained in, or given in connection with, a trust mortgage executed before August 16, 1925 is not enforceable. *Central Trust Co v Wolf*, 262 Mich 209, 247 NW 159 (1933).



## STANDARD 16.38

### ASSIGNMENT OF RENTS SECURING MORTGAGE WHICH IS NOT TRUST MORTGAGE

**STANDARD:** AN ASSIGNMENT OF RENTS CONTAINED IN, OR GIVEN IN CONNECTION WITH, A MORTGAGE WHICH IS NOT A TRUST MORTGAGE, COVERING INDUSTRIAL OR COMMERCIAL REAL PROPERTY OTHER THAN AN APARTMENT BUILDING CONTAINING LESS THAN SIX UNITS, IS ENFORCEABLE UPON DEFAULT, AFTER RECORDING OF A NOTICE OF DEFAULT IN THE OFFICE OF THE REGISTER OF DEEDS FOR THE COUNTY IN WHICH THE MORTGAGED PROPERTY IS SITUATED AND SERVICE OF A COPY OF THE NOTICE, TOGETHER WITH A COPY OF THE INSTRUMENT UNDER WHICH THE ASSIGNMENT IS MADE, UPON THE OCCUPANTS OF THE PROPERTY.

**Problem A:** A mortgage given by Roberta Brown, covering Blackacre, on which a 100 unit apartment building was located, was executed and recorded on May 26, 1991. The mortgage was not a trust mortgage and contained an assignment of rents of the mortgaged real property. On March 20, 1994, Roberta Brown deeded Blackacre to Samuel Peck. On June 1, 1998, upon default under the mortgage, the mortgagee recorded a notice of default in the office of the register of deeds for the county in which Blackacre was situated, and served a copy of the notice and of the mortgage containing the assignment upon the occupants of the apartment building. Is Peck bound by the assignment of rents?

**Answer:** Yes.

**Problem B:** Same facts as in Problem A, except that the apartment building contained five units. Is Peck bound by the assignment of rents?

**Answer:** No, but Peck would have been bound if the mortgage had been a trust mortgage. See, Standard 16.35.

**Authorities:** Problem A: MCL 554.231, 554.232 and 554.283. *Smith v Mutual Benefit Life Insurance Co*, 362 Mich 114, 106 NW2d 515 (1960).

Problem B: MCL 554.231 and 600.2932. *Hazeltine v Granger*, 44 Mich 503, 7 NW 74 (1880); *Nusbaum v Shapero*, 249 Mich 252, 228 NW 785 (1930); *American Trust Co v Mich Trust Co*, 263 Mich 337, 248 NW 829 (1933).

**Comment A:** Even if no assignment of rents was contained in, or given in connection with, a mortgage, an assignment of rents subsequently entered into for a separate consideration may be enforceable. *Central Trust Co v Wolf*, 262 Mich 209, 247 NW 159 (1933); *Mass Mutual Life Insurance Co v Reutter*, 268 Mich 175, 255 NW 754 (1934); *Mass Mutual Life Insurance Co v Sutton*, 278 Mich 457, 270 NW 748 (1936).

**Comment B:** Discharge of a mortgage operates as a release of an assignment of rents contained in or given in connection with the mortgage.

**Comment C:** Before June 24, 1966, an assignment of rents given in connection with a mortgage that was not a trust mortgage was effective only as to those leases in effect when the mortgage was given. 1966 P.A. 151, effective June 24, 1966, amended MCL 554.232 to make such an assignment also effective as to leases entered into after execution of the mortgage.

## STANDARD 16.39

### FORECLOSURE OF MORTGAGE HELD BY MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY

**STANDARD:** ON OR AFTER DECEMBER 10, 1981, FORECLOSURE OF A MORTGAGE HELD BY THE MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY MUST COMPLY WITH THE PROCEDURES PROVIDED IN THE MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY ACT.

**Authorities:** MCL 125.1448, 600.3101 and 600.3201.

**Comment:** Before December 10, 1981, a mortgage held by the Michigan State Housing Development Authority could be foreclosed under the general foreclosure statutes.



## STANDARD 16.40

### LAND CONTRACT MORTGAGE

**STANDARD:** A LAND CONTRACT MORTGAGE IS AN APPROPRIATE INSTRUMENT TO ENCUMBER A LAND CONTRACT VENDOR'S OR VENDEE'S INTEREST IN REAL PROPERTY TO SECURE A DEBT OR OBLIGATION.

**Problem A:** Ruth Roe sold Blackacre on land contract to John Smith. Roe later granted a mortgage on Blackacre to Bank to secure the repayment of a debt. Is Roe's vendor's interest in Blackacre a real property interest which may be encumbered by a mortgage?

**Answer:** Yes.

**Problem B:** Same facts as in Problem A, except that Smith later granted a mortgage to Bank to secure repayment of a loan from Bank. Is Smith's vendee's interest in Blackacre a real property interest which may be encumbered by a mortgage?

**Answer:** Yes.

**Problem C:** Same facts as in Problem A, except that Roe defaulted on the land contract mortgage. Is Smith obligated to continue to make payments on the land contract?

**Answer:** Yes.

**Problem D:** Same facts as in Problem A, except that Smith fulfilled his obligations under the land contract. Is Roe obligated to convey Blackacre to Smith?

**Answer:** Yes.

**Problem E:** Same facts as in Problem D. Is Bank obligated to discharge the land contract mortgage?

**Answer:** Yes.

**Authorities:** Problems A and B: MCL 565.357; *Graves v American Acceptance Mortgage Corp*, 469 Mich 608, 677 NW2d 829 (2004).

Problem C: MCL 565.360(3).

Problem D: MCL 565.361(2).

Problem E: MCL 565.361(4).

**Comment A:** 1998 P.A. 106 resolved any uncertainty as to whether the interests created by a land contract should be treated as personal property or real property. The statute states, “[a] vendor or vendee under a land contract may grant a land contract mortgage to secure any debt or obligation that may be secured by a real estate mortgage.” MCL 565.357(1). In addition, the statute provides that “the interests of vendors and vendees subject to a land contract mortgage are real property interests.” MCL 565.357(2).

**Comment B:** With respect to Problem C, Smith must continue to make payments on the land contract until he receives notice that Bank has foreclosed on the land contract mortgage and Roe has not redeemed her interest. At that time, Smith must continue to make payments to the new owner (i.e., the successful bidder at foreclosure sale, its successors or assigns). MCL 565.360(3). However, if Smith has actual notice of the foreclosure sale, he must make any payments due during the redemption period to the register of deeds in accordance with MCL 600.6058.

**Comment C:** With respect to Problem D, unless Bank assumes the obligation, Roe remains obligated to deliver the deed to Smith. MCL 565.361(2).

**Comment D:** With respect to Problem E, the statute requires that the mortgagee “execute a discharge of the land contract mortgage or a release of the security assignment in the same manner as now provided by law for the discharge of mortgages.” MCL 565.361(4).