
Update on New Foreclosure Reform Legislation

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**OHIO STATE BAR ASSOCIATION
CONTINUING LEGAL EDUCATION**

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1.0 CLE CREDIT HOUR; 1.0 Residential Real Property Law Specialization Hours

Tuesday, September 27, 2016 at 1:00pm

Featuring:

Angela D. Kirk; Manley Deas Kochalski, LLC; Columbus
Stephen R. Buchenroth; Vorys, Sater, Seymour and Pease LLP (Retired); Columbus
Tyson A. Crist; Ice Miller LLP; Columbus

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Featured Speakers

Stephen R. Buchenroth

Vorys, Sater, Seymour and Pease LLP (Retired)
Columbus, Ohio

Mr. Buchenroth received his AB from Wittenberg University and his JD from The University of Chicago Law School. He is a retired partner of his firm where he concentrated his practice in the area of commercial real estate and franchising.

Tyson A. Crist

Ice Miller
Columbus, Ohio

Mr. Crist received his BA from The College of Wooster and his JD from The Ohio State University Michael E. Moritz College of Law. He is a member of the American Bankruptcy Institute, Ohio State Bar Association (Banking, Commercial, and Bankruptcy Law Committee), Columbus Bar Association, Ohio State Bar Foundation, and Columbus Bar Foundation. Mr. Crist is a partner in his firm's Bankruptcy and Financial Restructuring Group. His practice primarily involves bankruptcy, litigation, and real estate matters. He has significant experience in representing creditors and creditors' committees in bankruptcy and financial institutions in foreclosures, receiverships, and other litigation involving real estate, as well as a variety of clients in other debtor/creditor and litigation matters. Mr. Crist enjoys both the opportunity to swiftly resolve matters for clients through negotiation and the opportunity to fight for the client's rights in court when agreement is not possible. Given his areas of practice, he is attuned to handling matters always mindful of the cost-benefit and end result. Lately Mr. Crist has been involved in efforts to amend Ohio's receivership legislation to promote a statewide uniform process for receivers to sell property free and clear of liens that affords due process to all parties. For additional information, please visit www.icemiller.com.

Angela D. Kirk

Manley Deas Kochalski LLC
Columbus, Ohio

Ms. Kirk received her BA from The Ohio State University and her JD from Cleveland State University Cleveland-Marshall College of Law. She is a member of the Columbus Bar Association, the Ohio State Bar Association, and the Women Lawyers of Franklin County. Ms. Kirk is a member of her firm's Columbus office and a specialist in foreclosure litigation. Her previous legal experience includes complex litigation, personal injury, and domestic law. Ms. Kirk regularly represents financial institutions throughout all phases of litigated and non-litigated foreclosure actions. She is actively involved in litigation regarding enforcement of title insurance policies, and she has represented financial institutions in the appellate context. Ms. Kirk's practice places and emphasis on settlement and she participates regularly in mediations throughout the State of Ohio. In addition to case work, she manages the law clerks and administers the firm's research needs. Ms. Kirk is a 2013 graduate of the Ohio State Bar Association's Leadership Academy. She is also a mentor in the Supreme Court of Ohio's Lawyer Mentoring program. For additional information, please visit www.mdk-llc.com.

Revisions to Ohio Foreclosure Law Pursuant to Sub. H.B. 390 Effective September 28, 2016

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Background

Ohio's foreclosure law has not materially changed for many decades. It was last changed in certain respects by H.B. 138 in 2008. Since then, each legislative session has seen the introduction of legislation to change various aspects of the foreclosure law, which went nowhere.

In early 2015, Senator William Coley asked the Ohio State Bar Association to take a comprehensive look at the foreclosure process in Ohio and to propose legislation to deal with existing issues. A working group was formed of well over a dozen interested groups from all sides and aspects of the foreclosure process. It held a half dozen interested party meetings and went through some 10 drafts of a bill, which ultimately was introduced in early 2016 as H.B. 463.

During the legislative process, H.B. 463 underwent various amendments in both the House and Senate, and ultimately was passed on May 26, 2016 as a part of H.B. 390. It was signed by the Governor and will become effective on September 28, 2016. The final foreclosure reform provisions as enacted mirror pretty closely H.B. 463, as introduced.

Major Changes

The foreclosure reform provisions within H.B. 390 make eight or so, what I consider to be, major changes to Ohio's foreclosure law and procedure, and a number of more minor changes. We intend to focus on the major changes and discuss the less significant changes as time allows. The PowerPoint lists all the statutory sections that contain substantive changes.

REVISIONS TO OHIO FORECLOSURE LAW

PURSUANT TO SUB. H.B. 390
Effective September 28, 2016

MAJOR CHANGES

1. Expedited foreclosure of vacant and abandoned residential property
 - § 2308.01-03

MAJOR CHANGES (Cont.)

2. Private selling officers

- § 2327.01
- § 2329.01(B)(2)
- § 2329.151-.152
- § 2329.18-.21
- § 5302.31 (Private Selling Officer's Deed)
- § 5721.371-.373

MAJOR CHANGES (Cont.)

3. Online sales

- § 2329.151-.154
- Distinction between residential (mandatory) and commercial (permissive), § 2329.153(E)(1)(a) and (b)
- Creditor can unilaterally, one time, postpone or cancel an on-line auction, §2329.153(E)(2), (E)(3)

MAJOR CHANGES (Cont.)

4. Action on lost note/standing
 - § 1303.08

MAJOR CHANGES (Cont.)

5. Real estate taxes paid from sale proceeds
 - § 323.47

MAJOR CHANGES (Cont.)

6. Recording order of confirmation in lieu of sheriff's deed if deed not timely filed
 - § 2329.31

MAJOR CHANGES (Cont.)

7. Criminalization of damage to property by owner after foreclosure complaint served
 - § 2907.07
 - § 2308.04

MAJOR CHANGES (Cont.)

8. Procedure for selling property which does not sell for 2/3 of appraised value at first sale
 - § 2329.52
 - § 2329.26
 - § 2329.311

OTHER CHANGES

1. § 2303.26
 - Clerk shall not restrict, prohibit or modify the rights of parties to seek service on parties defendant allowed by civil rules

OTHER CHANGES (Cont.)

2. § 2329.071

- If decree entered and property not sold, or sale not underway, within 12 months of decree, the prosecuting attorney can take over the sale process.
- Judgment creditor has the right to redeem within 14 days after the sale.
- Does not apply to commercial property.

OTHER CHANGES (Cont.)

3. § 2329.17

- Appraisers must be residents of, and real property owners in, the county in which the property is located
- For residential property, appraisal to be delivered within 21 calendar days; if not, appraised value is county auditor value
- For commercial property, timing and requirements, if any, may be established

OTHER CHANGES (Cont.)

4. § 2329.211

- Establishes a schedule for minimum deposits at sheriff's sales
- For residential property, if judgment creditor is the purchaser, it shall not be required to make a sale deposit.
- For commercial property, the purchaser at sale shall make a deposit pursuant to the requirements, if any, established for the sale.

OTHER CHANGES (Cont.)

5. § 2329.271

- Specifies and expands information that buyer at sheriff's sale must provide

OTHER CHANGES (Cont.)

6. § 2329.30

- Court may order return of unused portion of deposit

OTHER CHANGES (Cont.)

7. § 2329.31

- Procedure for preparation and recording of sheriff's deed
- Plaintiff's attorney no longer prepares deed

OTHER CHANGES (Cont.)

8. § 2329.311

- Where property is sold with no minimum bid pursuant to § 2329.52 (B) the judgment creditor and first lien holder each have the right to redeem within 14 days of sale

OTHER CHANGES (Cont.)

9. § 2329.312

- Quarterly reporting by levying officers
- AG's office will store the data and make it available to public

OTHER CHANGES (Cont.)

10. § 2329.45

- Effect of reversal on appeal after sale
- Added that the court shall take into account all persons who lost an interest and the priority of those interests.

OTHER CHANGES (Cont.)

11. § 5721.39

- Use of private selling officers in tax certificate sales

CHANGES NOT MADE

1. Statute of limitations to foreclose a mortgage
 - § 1303.16 establishes a 6-year statute of limitations to collect on a note that is in default
 - § 5301.30 establishes a 20-year statute of repose to foreclose a mortgage

These are potentially inconsistent, but since a mortgage cannot secure an obligation that no longer exists, the 6-year statute would apply.

1. EXPEDITED FORECLOSURE

§§ 2308.01-04 establishes an expedited foreclosure procedure for vacant and abandoned residential property that meets certain requirements.

REQUIREMENTS

1. Mortgagee must be person entitled to enforce the note
2. The property must be vacant and abandoned
 - To be considered vacant and abandoned, the court must find
 - by a preponderance of the evidence:
 - (a) the mortgage loan is in monetary default;
 - (b) mortgagee is a person entitled to enforce the note/standing
 - by clear and convincing evidence that at least 3 of a list of 11 factors are true.

THE 11 FACTORS

1. Gas, electric, sewer, or water utility services to the property have been disconnected.

THE 11 FACTORS (Cont.)

2. Windows or entrances to the property are boarded up or closed off, or multiple panes are broken and unrepaired.

THE 11 FACTORS (Cont.)

3. Doors on the property are smashed through, broken off, unhinged, or continuously unlocked.

THE 11 FACTORS (Cont.)

4. Junk, litter, trash, debris, or hazardous, noxious, or unhealthy substances or materials have accumulated on the property.

THE 11 FACTORS (Cont.)

5. Furnishings, window treatments, or personal items are absent from the structure on the land.

THE 11 FACTORS (Cont.)

6. The property is the object of vandalism, loitering, or criminal conduct, or there has been physical destruction or deterioration of the property.

THE 11 FACTORS (Cont.)

7. A mortgagor has made a written statement expressing the intention of all mortgagors to abandon the property.

THE 11 FACTORS (Cont.)

8. Neither an owner nor a tenant appears to be residing in the property at the time of an inspection of the property by the appropriate official of a county, municipal corporation, or township in which the property is located or by the mortgagee.

THE 11 FACTORS (Cont.)

9. The appropriate official of a county, municipal corporation, or township in which the property is located provides a written statement or statements indicating that the structure on the land is vacant and abandoned.

THE 11 FACTORS (Cont.)

10. The property is sealed because, immediately prior to being sealed, it was considered by the appropriate official of a county, municipal corporation, or township in which the property is located to be open, vacant, or vandalized.

THE 11 FACTORS (Cont.)

11. Other reasonable indicia of abandonment exist.

PROCEDURE

1. Mortgage/plaintiff must file motion.
 - If filed before last answer period has expired, court shall decide not later than 21 days, or within time consistent with local rules, after answer period has expired.
 - If filed after last answer period has expired, court shall decide not later than 21 days, or within time consistent with local rules, after motion is filed.

PROCEDURE (Cont.)

2. No mortgagor or other defendant has filed an answer or objection setting forth a defense or objection that if proven would preclude final judgment of foreclosure.

PROCEDURE (Cont.)

3. No mortgagor or other defendant has filed a written statement with the court indicating the property is not vacant and abandoned.

PROCEDURE (Cont.)

4. If a government official has not verified that the property is vacant and abandoned, but the court finds 3 of the 11 factors have been met, then within 7 days of the preliminary finding the court shall order the appropriate official to verify the property is vacant and abandoned.

PROCEDURE (Cont.)

5. Court must hold oral hearing and find the requirements have been met and that plaintiff is entitled to judgment of foreclosure.

PROCEDURE (Cont.)

6. If court finds property is vacant and abandoned, property shall be offered for sale not later than 75 days after order of sale in accordance with Chapter 2329 ORC.

PROCEDURE (Cont.)

7. After finding of vacant and abandoned, the mortgagee may enter property to secure and protect it from damage.
 - Otherwise, the mortgagee may enter the property to secure and protect it only as the mortgage documents allow.

PROCEDURE (Cont.)

8. Equitable and statutory rights of redemption expire upon confirmation of sale.

2. PRIVATE SELLING OFFICERS

- § 2327.01 – Execution Generally (see also § 2329.01)
 - A private selling officer (PSO) is someone who:
 - Is a resident of Ohio
 - Is licensed as an auctioneer under Chapter 4707 of the Revised Code AND
 - Is licensed as a real estate broker or a real estate salesperson under Chapter 4735 of the Revised Code
 - See also §2327.02 where “private selling officer” is added throughout to confer power of court to authorize the use of the private selling officer in addition to Sheriff.
- § 2329.01(B)(2)
 - Private selling officer definition restated (see also § 2327.01)

- § 2329.151 – Authorization of PSO
 - an officer of the court is allowed to conduct a public auction of goods, chattels, and lands,
 - a resident of Ohio licensed as an auctioneer is allowed to conduct the public auction of goods and chattels (the residency requirement is new); and
 - private selling officer is allowed to conduct a public auction of lands

§ 2329.152 – PSO Process

- Paragraph (A)
 - separates the appraisal process and describes how to start a sale by a PSO.
- Paragraph (B)
 - remote bidding is available to judgment creditor and/or lienholder who was a party to the action;
 - in writing via fax, email, overnight delivery, or courier
 - if the sheriff or PSO fails to enter the bid, the sale can be vacated.
- Paragraph (C)
 - postponing and cancelling sales when the sale is by a PSO;
 - the ability to postpone was not previously available.
- Paragraph (D)
 - deals with the PSO's fees and costs.
- Paragraph (E)
 - defines the authority of a PSO in conducting the sale
 - “shall” hire a title agent or insurance company, etc.
- Paragraph (F)
 - deals with the title agent's fees (\$500 presumed reasonable).

- § 2329.18-Sheriff retains the appraisal process
 - Sheriff is required to deposit the appraisal with the clerk
- § 2329.19-Extent of lien of judgment
 - Minor technical change
- § 2329.20- minimum bid still 2/3
 - Sales ‘subject to’ the first
 - Ties in with 2329.21, 2329.51, and 2329.52
- § 2329.21
 - Added taxes to the list of items that must be paid by purchaser

- § 5302.31 (Private Selling Officer's Deed)
 - Sets forth PSO deed format
- § 5721.371-.373 – Tax Cert Actions
 - Private attorney fees in tax cert. actions
 - PSO fees
 - Title agent/insurance company fees

3. ONLINE SALES

- **§ 2329.153(A)-(B)**-Sheriff Sale Website and One integrated website to be used by all 88 counties
 - Minimum requirements of sheriff's website(to name a few):
 - Domain name that is relevant
 - Limited to the judicial sale of real property in OH
 - No charge to view properties
 - Secure payment processing

§ 2329.153-cont.

- **§ 2329.153(C)-Auction Management System (AMS)**
 - Describes a workflow engine that will help to manage the online sale process
 - Shall record data to meet reporting requirements
 - Shall have capability to generate documents related to the sale
 - Shall have an accounting component
 - Shall be integrated with the sheriff's online site

§ 2329.153 cont.

- **§ 2329.153(E) –**
 - Not later than 1 year after the effective date and for 5 years, the sheriff MAY hold online sales;
 - After this period, the sales SHALL be conducted online;
 - Commercial MAY be held online, there is no requirement. § 2329.153(E)(1)(a) and(b);
 - Creditor can postpone or cancel online sale 1x §2329.153(E)(2), (E)(3)

4. ACTION ON LOST NOTE

- § 1303.38 establishes who has standing to bring an action on a lost note.
- Bill enacts changes to this section of the UCC promulgated by Uniform Law Commission in 2002.
- A person not in possession of an instrument is entitled to enforce it if:
 - 1. The person was entitled to enforce the instrument when loss of possession occurred or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce it when loss of possession occurred.
 - Prior to this change, only a person who had possession when instrument was lost or stolen had standing.
 - Note that the expedited foreclosure process requires the mortgagee to be a person entitled to enforce the instrument secured by the mortgage.

5. REAL ESTATE TAXES PAID FROM SALE PROCEEDS

§ 323.47(B)

- Taxes prorated as of date of sale, not confirmation
- If plaintiff is purchaser, proration is not required; payable at the next succeeding date prescribed in § 323.12

§ 323.47(A)

- Similar changes to non-foreclosure sales, e.g., proceedings in partition, or sale by administrator, executor, guardian or trustee

6. COURT ORDER IN LIEU OF SHERIFF'S DEED

- §2329.31 – sheriff's deed must be recorded within 14 days after the confirmation of sale and payment of amount due. If this is not done the purchaser can move the court to proceed with transfer of title, the ensuing court order will:
 1. transfer title to the purchaser, and
 2. order plaintiff to present a certified copy of the order to the recorder's office, and
 3. Order recorder to record the order in the record of deeds.

7. CRIMINALIZATION OF DAMAGE TO PROPERTY BY OWNER AFTER FORECLOSURE COMPLAINT SERVED

- 4th degree misdemeanor – criminal mischief
- If a person knowingly defaces, damages or destroys:
 - One's own residential real property;
 - With the purpose to decrease the value or enjoyment of the property
 - If:
 - (a) The property is subject to a mortgage;
 - (b) The person has been served with a foreclosure complaint with respect to that property.
- § 2329.07(A)(1)
- § 2308.04

8. RESIDENTIAL SALE AT WHICH
PROPERTY DOES NOT SELL FOR
2/3 OF APPRAISED VALUE AT FIRST SALE

- Applies only to sale at fixed location – not on line sales
- If property fails to sell at first sale:
 - No reappraisal required
 - No minimum bid required at second or subsequent sales
 - Buyer must pay costs and real estate taxes
 - Second sale must be between 7 and 30 days after first sale
- May advertise second provisional sale date in advertisement of first sale. No need to re-advertise second sale if this is done.
 - § 2329.26

UNCODIFIED LAW

Language at end of bill that is
part of bill, but will not appear
in any statute

UNCODIFIED LAW (Cont.)

- § 101.03(A)
 - Bill does not preempt vacated property registration ordinances enacted by political subdivisions

UNCODIFIED LAW (Cont.)

- § 101.03(B)
 - 1) Persons governed by act shall act in good faith throughout the foreclosure practice
 - Defined in §1303.201 – the observance of commercially reasonable standards

UNCODIFIED LAW (Cont.)

- § 101.03(B) (cont.)
 - 2) Judgment creditor shall proceed in a commercially reasonable manner in complying with the act consistent with § 1301.01(A)(9) ORC.