

## IDAHO \*

### I. FORECLOSURE PROCESS

#### A. Notice of Default / Acceleration

##### 1. Does Idaho require written notice of default and acceleration?

Idaho law does not require written notice of default before commencement of judicial foreclosures. Idaho law does require written notice of default to be recorded and served on a debtor before a nonjudicial foreclosure of a trust deed can be commenced. Idaho Code § 45-1505(3).

Properly drafted automatic acceleration clauses should operate according to their terms.

##### 2. Is this requirement waivable, and if so, how?

The notice requirement for nonjudicial foreclosure is not waivable.

##### 3. Are there statutory requirements for how the notice must be sent and can one notice of default and acceleration be sent simultaneously?

Idaho Code Section 45-1506 provides the notice procedures for nonjudicial foreclosure. After recording the notice of default, notice of the date of the trustee sale must be given at least 120 days before the date of the sale. Notice must be sent by registered or certified mail, return receipt requested, but can be sent by first class mail to someone outside of the United States if registered or certified mail is not available. Idaho Code § 45-1506(2) and (13).

Notice must be sent to the last known address of the following persons or their legal representatives: (1) the grantor and any person requesting notice of record as provided in Section 45-1511; (2) any successor in interest to the grantor whose interest appears of record prior to the recording of the notice of default or where the trustee or the beneficiary has actual notice of such interest; and (3) any person having a lien or interest subsequent to the interest of the trustee in the trust deed where such lien or interest appears of record prior to the recording of the notice of default, or where the trustee or the beneficiary has actual notice of such lien or interest. Idaho Code § 45-1506(2). If there is an adult occupant of the real property subject to the sale that is not served notice through the mail, at least three good faith attempts must be made on different days over a period of not less than seven days to serve a copy of the notice to such adult occupant. Each of these attempts must be made at least 30 days prior to the day of the sale. Idaho Code § 45-1506(5).

Properly drafted automatic acceleration clauses should operate according to their terms.

There is no statutory prohibition against giving notice of acceleration at the same time as notice of default.

4. **Would service of the summons and complaint satisfy the notice requirement?**

Idaho law has no additional notice requirements beyond service of the summons and complaint.

5. **Are there any limitations on the lender's right to accelerate the debt based on the nature of the default that has occurred (e.g., monetary versus nonmonetary, material versus immaterial default)?**

It is believed that Idaho law will generally uphold the agreement of the contracting parties and not impose additional limitations on the right to accelerate the debt. However, there is no case law on this point, and Idaho could find cases for other jurisdictions persuasive. *Texas Refrigeration Supply, Inc. v. FDIC*, 953 F.2d 975 (5th Cir. 1992) (Noting that the implied covenant of good faith and fair dealing is "betrayed by '[c]ircumstances which tend to show that the holder has exercised his option to accelerate, not for purposes of preserving his debt or preserving the security therefor, but for the purpose of coercing the maker to pay the then balance remaining unpaid on the note.'"); *See also In re Martin Specialty Vehicles, Inc.*, 87 B.R. 752 (Bankr. D. Mass. 1988) (characterizing the bank's decision to accelerate the note and foreclose upon debtor's assets as "irrational[]" and "thus in objective bad faith, regardless of the Bank's honesty or motives"), *rev'd on jurisdictional grounds*, 97 B.R. 721 (D.Mass.1989).

**B. Limitations on Procedure and Enforcement**

1. **Election of Remedies**

(a) **Does Idaho have a type of foreclosure procedure that could be characterized as an "election of remedies" (e.g., prohibits suit on the note if mortgage foreclosure proceedings are pending and vice versa)?**

Idaho Code Section 45-1505(4) prohibits a nonjudicial foreclosure of a deed of trust if an action, suit, or proceeding has been instituted (and not dismissed) to recover the debt then remaining secured by the trust deed, or any part thereof.

- (b) **When must the election be made, at the outset or at the conclusion of the proceeding?**

The election must be made at the outset of the proceeding.

**2. Security First Requirements**

- (a) **Does Idaho have a type of foreclosure procedure that could be characterized as a “security first” (e.g., the lender must foreclose the mortgage before suit can be brought on the note)?**

Yes. Idaho Code Section 45-1503(1) prohibits the beneficiary of an obligation secured by a trust deed (usually a promissory note) from instituting judicial action to enforce the obligation unless one of four requirements is met: (1) the trust deed has been foreclosed; (2) the action is one for foreclosure of mortgages on real property; (3) the beneficiary’s interest in the property securing the note is “substantially valueless”; or (4) the action is excluded from the meaning of “action” under Section 6-101(3). (For a discussion of what constitutes an “action,” see section I.B.3.a. below).

**3. One-Action Rule**

- (a) **Does Idaho have a type-of foreclosure procedure that could be characterized as a one-action rule (e.g., the lender can either foreclose the mortgage or sue on the note, but not both)?**

Yes, Idaho has a one-action rule for both mortgages and deeds of trust.

Idaho Code Section 6-101(1) applies to mortgages and states that “there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate . . .” However, the following acts or proceedings are not “actions” for the purposes of this section:

- (i) To appoint a receiver for, or obtain possession of, any real or personal property collateral for the debt or other obligation;
- (ii) To enforce a security interest in, or the assignment of, any rents, issues, profits, or other income of any real or personal property;
- (iii) To enforce a mortgage or other lien on collateral located outside the state of Idaho that is security for the same debt;

- (iv) To secure a judgment outside the state of Idaho on a debt secured by real property in the state of Idaho and by real or personal property collateral outside the state of Idaho;
- (v) For the exercise, pursuant to Idaho Code Section 45-1505 (foreclosure of deed trust, when), of a power of sale conferred pursuant to Idaho Code Section 45-1503 (transfers in trust to secure obligation—foreclosure);
- (vi) For the exercise of any right or remedy authorized by: 1) the Idaho Uniform Commercial Code, except the securing of a judgment on the secured debt, including a deficiency judgment; in a court in Idaho; or 2) the UCC as enacted in any other state;
- (vii) For claim and delivery of personal property pursuant to Idaho Code Section 8-301 et seq.;
- (viii) For the exercise of any right to set-off a deposit account, or to enforce a pledge in a deposit account pursuant to a written agreement or pledge or enforcing a banker's lien;
- (ix) To draw under a letter of credit;
- (x) To collect any debt, or enforce any obligation or right, secured by a mortgage or other lien on real property if the property has been sold to a person other than the creditor to satisfy, in whole or in part, a debt or other obligation or right secured by a senior mortgage or other senior lien on the property;
- (xi) Relating to any proceeding in bankruptcy, including filing of a proof of claim, seeking relief from the automatic stay, or any other action with bankruptcy to determine the validity of a debt or other obligation;
- (xii) For filing a claim pursuant to the Idaho Probate Code, or to enforce such a claim which has been disallowed;
- (xiii) Which does not include the collection of the debt or enforcement of the obligation or realization of the collateral securing the debt or other obligation;
- (xiv) Which is exempted from the provisions of this section by specific statute;
- (xv) To recover costs of suit, costs and expenses of sale, attorney fees, and other incidental relief in connection with any action authorized in this subsection. Idaho Code § 6-101(3).

Idaho Code Section 45-1505(4) applies to deeds of trust and prohibits a nonjudicial foreclosure if an action, suit, or proceeding has been instituted (and not dismissed) to recover the debt then remaining secured by the trust deed, or any part thereof. *See also* Idaho Code § 45-1503(1).

**(b) What are the sanctions for violating the rule?**

No Idaho court has addressed the appropriate sanction for a violation of the one-action rule. The Idaho statute, however, is substantially similar to that enacted in California and it is possible Idaho will follow that state's case law, finding that the creditor waived its right to foreclose its real property collateral. *See Pac. Nat'l Bank v. Wozab*, 51 Cal.3d 991, 800 P.2d 557 (1990).

**(c) Can an election be changed? How?**

Under the express language of Idaho Code Section 45-1503(1), it is possible to dismiss a collection lawsuit that has been filed without prejudice and then initiate a nonjudicial foreclosure.

**4. Limitations on Deficiency Actions**

**(a) Are there any general or specific instances when a deficiency judgment cannot be legally obtained (e.g., judicial versus nonjudicial foreclosure, purchase money debt, mortgages on one-to-four-family residential property versus commercial property, acreage mortgaged)?**

Idaho has anti-deficiency statutes for both mortgages and deeds of trust.

Idaho Code Section 6-108 applies to mortgages and prohibits deficiency judgments "in any amount greater than the difference between the mortgage indebtedness, as determined by the decree, plus costs of foreclosure and sale, and the reasonable value of the mortgaged property, to be determined by the court in the decree upon the taking of evidence of such value."

Idaho Code Section 45-1512 applies to deeds of trust. Deficiency judgments can be obtained within three months after any nonjudicial foreclosure sale under a deed of trust, but the judgment cannot be "for more than the amount by which the entire amount of indebtedness due at the time of sale exceeds the fair market value at that time, with interest from date of sale," and the deficiency judgment may never "exceed the difference between the amount for which such property was sold and the entire amount of the indebtedness secured by the deed of trust."

**(b) Are there any "fair value" limitations on the deficiency (e.g., the deficiency is calculated based on the difference between the judgment amount and the fair market value of the property**

**rather than the amount of the successful bid at the foreclosure sale)?**

Yes. Idaho Code Section 6-108 prohibits mortgage deficiency judgments that are greater than the difference between the “reasonable value” of the mortgaged property and the total of mortgage indebtedness plus the costs of the foreclosure and the sale. Idaho Code Section 45-1512 prohibits deeds of trust deficiency judgments greater than “the amount by which the entire amount of indebtedness due at the time of sale exceeds the fair market value at that time, with interest from date of sale.”

**(c) What is the effect of a choice of law provision in the loan documents on the applicability of deficiency laws?**

There is no Idaho authority, either statutory or case law, on the issue of whether a contractual choice of law provision could override the statutory provisions regarding calculation of a deficiency judgment. The language of Idaho Code Section 6-108, which addresses deficiencies in judicial foreclosure actions, begins, however, by providing “[n]o court in the state of Idaho shall have jurisdiction to enter a deficiency judgment . . . in any amount greater than the difference between the mortgage indebtedness . . . plus costs of foreclosure and sale, and the reasonable value of the mortgaged property.”

A good argument can be made that if conflicting state law provided to the contrary, Idaho courts would be without jurisdiction to apply it. A similar argument could be applied based on the language in Section 45-1512 governing the calculation of the amount of a deficiency in the nonjudicial foreclosure context. That statute provides “[t]he court may not render judgment for more than the amount by which the entire amount of indebtedness due at the time of sale exceeds the fair market value at that time, with interest from date of sale, but in no event may the judgment exceed the difference between the amount for which such property was sold and the entire amount of the indebtedness secured by the deed of trust.”

**5. Additional Questions Relative to Limitations on Procedure and Enforcement**

**(a) How do any limitations on procedure and enforcement influence the lender’s enforcement strategies?**

A lender will typically look to a foreclosure action, either judicial or nonjudicial, with an eye toward exhausting the real property collateral as a first step. If there are guarantors, and if it is likely that the foreclosure of the real property is not going to yield sufficient funds to pay the debt, then a lender will want to consider a parallel action against any guarantors as well. If the foreclosure of the real property collateral does not yield sufficient funds to pay the debt, the lender may want to consider filing a deficiency action against the borrower.

**(b) What tactics must a lender follow to preserve its right to a deficiency judgment in the foreclosure action, power of sale exercise, or in a separate action?**

The lender must be able to support its claim of deficiency, e.g., with an appraisal or a real estate agent's opinion of value. In a judicial foreclosure, it is a good practice to ask the court at the time of decreeing if a foreclosure sale is appropriate, and also to either determine the reasonable value of the property or reserve jurisdiction to determine the reasonable value of the property. This is arguably required by the "in the decree" language in Idaho Code Section 6-108. In a nonjudicial foreclosure, a lender must bring a deficiency action within three months after any sale under a deed of trust. Idaho Code § 45-1512.

**(c) What impact do any limitations on procedure and enforcement have on the enforcement of guaranties? What impact do they have on the enforcement of an assignment of rent? What impact do they have on the drawing on a letter of credit or exercising rights under an escrow?**

*Antideficiency Statutes.* Recognizing that a claim against a guarantor is based on obligations created by the guaranty agreement, and not on obligations created under a deed of trust, the Idaho Supreme Court has held that obligations under a guaranty agreement are not subject to Idaho's statutory anti-deficiency statute for a nonjudicial sale under a deed of trust. See *First Sec. Bank of Idaho v. Gaige*, 115 Idaho 172, 765 P.2d 683 (1988) (holding that Idaho's anti-deficiency statute for deeds of trust (Idaho Code Section 45-1512) does not apply to a guarantor that is not a trustor under a deed of trust); *First Interstate Bank of Idaho v. Gill*, 108 Idaho 576, 701 P.2d 196 (1985) (holding that if a guarantor does not have an ownership interest in the real property pledged as collateral under a deed of trust, Idaho's anti-deficiency statute for deeds of trust does not require a lender to pursue a

deficiency judgment against the guarantor within the 90-day period proscribed in such statute).

Although this issue has not yet been addressed by any Idaho courts in the context of a judicial foreclosure action, based on the reasoning in *Gaige* and *Gill* that the purpose of the anti-deficiency statute in question in those cases was to protect the borrower (not the guarantor), if a court were to address this issue it would likely conclude that the obligations under a guaranty agreement are not subject to Idaho's statutory anti-deficiency statute for the judicial foreclosure of a mortgage. Idaho Code § 6-108.

A plain reading of the anti-deficiency statute for the judicial foreclosure of a mortgage further supports this position. That statute provides that a court does not have jurisdiction to enter a deficiency judgment in a case "involving a foreclosure of a mortgage on real property" unless such deficiency judgment meets certain statutory standards. Idaho Code § 6-108. Because any action on a guaranty agreement would be based on the guarantor's obligations under the guaranty agreement and not on the borrower's obligations created under a mortgage, such action on a guaranty would arguably not involve the "foreclosure of a mortgage on real property;" and therefore, such action should not be subject to Idaho Code Section 6-108.

*One-Action Rule.* Although Idaho courts have not yet addressed whether Idaho's one-action rules for mortgages and deeds of trust (Idaho Code Sections 6-101, 45-1503, 45-1505(4)) provide any protection to a guarantor under a guaranty agreement, the logic and rationale of the *Gaige* and *Gill* decisions should also apply to such issue, and should support the position that Idaho's one-action rules do not protect guarantors.

A plain reading of Idaho's one-action rule statutes further supports this position. One of Idaho's one-action rule statutes for deeds of trust applies only to actions against a "grantor . . . to enforce an obligation owed by the grantor" that is "secured by" the deed of trust. Idaho Code § 45-1503(1); *accord*, Idaho Code § 45-1505(4) (a trustee may only foreclose a trust deed by power of sale if there is no existing action to recover the debt then remaining "secured by the trust deed"). Similarly, Idaho's one-action rule statute for mortgages applies to the enforcement of any debt or right "secured by mortgage." Idaho Code § 6-101(1). Because any action by a lender on a guaranty agreement would be against the guarantor, and not the mortgagor/grantor, and because any such action would



be for the recovery of amounts owed under the guaranty, and not for amounts “secured by” a deed of trust or a mortgage, a plain reading of these statutes supports the position that Idaho’s one-action rule should not provide protection to a guarantor under a guaranty agreement.

*Waiver of Statutory Protections.* Idaho courts have upheld the waiver by a guarantor of the protection of Idaho’s statutory anti-deficiency statute for a nonjudicial sale under a deed of trust (Idaho Code Section 45-1512) pursuant to a waiver in a guaranty agreement to the effect that a lender need not proceed against the borrower or any collateral before the lender can pursue an action against a guarantor. *Valley Bank v. Larson*, 104 Idaho 772, 763 P.2d 653 (1983); see also *First Sec. Bank of Idaho v. Gaige*, 115 Idaho 172, 765 P.2d 683 (1988).

Although Idaho courts have not yet addressed whether a guarantor can waive the protections of either (i) Idaho’s statutory anti-deficiency statute for foreclosure of a mortgage (Idaho Code Section 6-108), or (ii) Idaho’s one-action rule for mortgages and deeds of trust (Idaho Code Sections 6-101, 45-1503 and 45-1505(4)), the holdings of the *Larson* and *Gaige* decisions should be persuasive authority in support of the position that a guarantor can waive such statutory protections. Accordingly, even if Idaho’s statutory anti-deficiency statute for foreclosure of a mortgage and one-action rule statutes are deemed to protect guarantors, a carefully drafted guaranty agreement that includes waivers of such protections should arguably protect the lender.

*Summary.* Absent any contractual provisions (such as nonrecourse provisions) in the loan documents that expressly prevent or otherwise restrict a lender from proceeding with an action against a guarantor under a guaranty agreement, and provided that the guaranty agreement provides appropriate waivers, a lender should be able to pursue a guarantor under a guaranty agreement without first initiating an action under a mortgage or deed of trust, or complying with Idaho’s anti-deficiency statutes.

*Assignment of Rents, Letters of Credit and Escrows.* Idaho’s one-action rules by their terms are expressly inapplicable to “actions”: (a) to enforce a security interest in or assignment of, any rents, issues, profits, or other income of any real or personal property; and (b) to draw under a letter of credit. Idaho Code §§ 6-101(3)(b) and (i), and 45-1503(1)(d). No Idaho case has addressed the

applicability of the one-action rule to actions taken against escrow accounts.

- (d) May lenders waive the right to a deficiency judgment to obtain other rights (e.g., shorten or extinguish redemption rights, expedite the foreclosure sale)?**

Idaho law does not prohibit a lender from waiving its right to a deficiency judgment to obtain other rights. However, Idaho law prohibits contractual waiver of the right to redemption (Idaho Code § 45-110) and otherwise limits the ability of parties to contract away procedural requirements (Idaho Code § 29-110).

- (e) How and when, in relation to the foreclosure action, may a deficiency judgment be obtained?**

Idaho Code Section 45-1502 allows for a deficiency judgment proceeding within three months after the nonjudicial foreclosure of a deed of trust. Idaho Code Section 6-101 allows for a deficiency judgment after determination that the proceeds from a judicial foreclosure were insufficient. However, it is important to remember that Idaho Code Section 6-108 expressly provides that the “reasonable value of the mortgage property” is “to be determined by the court in the decree upon the taking of evidence of such value” (emphasis added). Since the “decree” referred to is the decree of foreclosure, a creditor must remember to specifically request that the court go further than just decreeing the amount owed and the right of foreclosure, but also present evidence of and seek that the reasonable value of the property be set forth in the decree of foreclosure.

- (f) How is the amount of the deficiency calculated?**

Idaho Code Section 6-108 applies to mortgages and calculates the maximum deficiency judgment as “the difference between the mortgage indebtedness, as determined by the decree, plus costs of foreclosure and sale, and the reasonable value of the mortgaged property, to be determined by the court in the decree upon the taking of evidence of such value.”

Idaho Code Section 45-1512 applies to deeds of trust and calculates the maximum deficiency judgment as “the amount by which the entire amount of indebtedness due at the time of sale exceeds the fair market value at that time, with interest from date of sale” and the judgment may never “exceed the difference

between the amount for which such property was sold and the entire amount of the indebtedness secured by the deed of trust.”

**(g) Is there a procedure for surplus monies?**

Idaho Code Section 6-102 (mortgages) allows the court to pay any surplus money remaining after payment of the amount due, with costs, to the person entitled to it and in the meantime direct it to be deposited in court. Section 45-1507(3) (trust deeds) requires surplus after payment of certain expenses and the foreclosing obligation to be paid to holders of recorded subsequent liens, and Section 45-1507(4) requires any remaining surplus thereafter to be paid to the grantor of the trust deed or to his successor in interest entitled to such surplus.

**(h) Is there any federal or state case law or any statutes in Idaho as to whether a suit can be brought on a note or guaranty in this state if foreclosure proceedings are pending in another state and vice versa?**

Idaho’s one-action rules generally bar an action on the debt or foreclosure if another action is pending. Excepted from this rule, however, are the following actions: (a) to enforce a mortgage or other lien upon any real or personal property collateral located outside of the state which is security for the same debt or other obligation (Idaho Code § 6-101(3)(c)); and (b) to secure a judgment outside of this state on a debt or other obligation secured by real property in this state and by real or personal property collateral located outside this state (Idaho Code § 6-101(3)(d)). As discussed above, the Idaho one-action rule does not likely apply to enforcement of guaranties.

**(i) Are there any additional distinctions in enforcement among mortgages secured by residential, commercial (including multi-family), or agricultural properties?**

Deeds of trust typically contain a recital that the property contains 40 acres or less or is located within an incorporated city or village. *See* Idaho Code § 45-1502. Such recital is deemed binding upon all parties and conclusive as to compliance with statutory requirements of Section 45-1502(5). Without such a recital, if the property is not located within an incorporated city or village and it exceeds 40 acres in size, the lender must use a mortgage.

There is no redemption for nonjudicial foreclosures. After judicial foreclosure sale, the redemption period for real property of 20

acres or less is six months. Above that acreage, the period is one year. Idaho Code § 11-310.

**C. Judicial Foreclosures**

- 1. Are judicial foreclosures allowed in this state? For a mortgage? For a deed of trust? Are judicial foreclosures customary?**

Mortgages must be foreclosed judicially. Deeds of trust may be foreclosed judicially, but are customarily foreclosed nonjudicially.

- 2. What is the time frame to complete a judicial foreclosure?**

The time frame to complete a judicial foreclosure is at least 60 days and very likely to be longer. There is no statutory minimum, and the timing depends on defenses raised and the district court calendar.

- 3. Does the mortgagor have statutory redemption rights in addition to the equitable rights of redemption? What is the statutory redemption period? Does it vary based on the type of property or other factor?**

Yes. The redemption period for real property of 20 acres or less is six months. Above that acreage, the period is one year. Idaho Code § 11-402.

Redemption rights are not offered to the mortgagee where the estate or interest foreclosed is a leasehold of two years' unexpired term or less. In this instance, the sale is absolute without the right of redemption. Idaho Code § 11-310.

- 4. Does the statutory redemption period start to run before or after the foreclosure sale?**

It begins after the date that the property is sold.

- 5. Is the statutory redemption period waivable, and if so, how?**

No. Idaho Code Section 45-110 states: "[a]ll contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien are void."

- 6. Are there any statutory reinstatement rights, and if so, what are they, are they waivable, and how?**

Idaho law does not allow reinstatement of an obligation after judicial foreclosure.

**7. Do other parties (e.g., junior lenders) have redemption rights?**

Yes. Idaho Code § 11-401.

**8. Is anyone disqualified from bidding (such as the mortgagee or mortgagor)?**

Idaho Code Section 11-304 prohibits “the officer holding the execution [and] his deputy” from being a purchaser or being interested in any purchase at such a sale under execution.

**9. What are the associated costs?**

The sheriff’s fee varies by county and usually ranges between \$100 to \$200, plus incidental expenses. Publication costs vary, depending on the newspaper and the length of the legal description. They usually fall in the range of \$500 to \$800. The cost of the title report is set by the Idaho Department of Insurance based on the loan balance. Obviously, any litigation costs are additional.

**10. Is there a sale by sheriff or other official? What is the cost? Are the costs negotiable or nonnegotiable?**

The sheriff executes the sale. The sheriff’s fee varies by county and usually ranges between \$100 to \$200, plus incidental expense. The sheriff’s fee and costs are not negotiable.

**11. Are there trustee fees? What are they? Are they negotiable or nonnegotiable?**

There is no trustee in a judicial foreclosure.

**12. What are the advertising costs?**

Publication costs vary, depending on the newspaper and the length of the legal description. They usually fall in the range of \$500 to \$800.

**13. Is there a transfer tax? How is it calculated?**

No.

**14. Are there any other relevant considerations?**

Yes. After the foreclosure sale, but before the expiration of the redemption period, the successful purchaser is entitled to receive rent from the tenant for the use and occupation of the property. Idaho Code §11-407. Any rents received shall be a credit upon the amount required for

redemption, and the redeemer is entitled to an accounting. In the event the tenant in possession refuses or fails to pay demanded rents, the successful purchaser may bring an action for unlawful detainer to evict the tenant, even if the redemption period is not expired. *Acker v. Mader*, 94 Idaho 94, 481 P.2d 605 (1971).

**15. What is the process? (Please include information regarding necessary parties, statutorily required notices and grace period, marshaling requirements, and any other relevant considerations.)**

- (a) File and serve the complaint. The necessary parties include the borrower and all entities or individuals holding interests or encumbrances of record.
- (b) Record the lis pendens in the public records.
- (c) An answer or response to the complaint is due within 20 days from the date of service of the summons and complaint.
- (d) If one is seeking a deficiency judgment, the court must determine the value of the property within the decree. Idaho Code § 6-108. The requirement of determining the value within the decree is relaxed if the court specifically reserves jurisdiction for the purpose of determining the value at a later date.
- (e) The sheriff of the county in which the property is located schedules and notices sales by posting a notice of sale for 20 days in three places in the city or precinct (which is not specifically defined by statute but is assumed to mean voting precinct for purposes of general elections) where the property is located and three places within the property or precinct in which the sale is to be held. Idaho Code § 11-302(3). There is no specific statutory requirement that the property itself be posted, although the sheriff's practice is to make one of the three required postings in the precinct where the property is located by posting at the property itself.
- (f) Notice of the sheriff's sale must be published for at least three consecutive weeks in a newspaper of general circulation in the county where the property is located. Idaho Code § 11-302(3).
- (g) The sale must occur between 9 a.m. and 5 p.m. on a "legal" day for county business (this excludes state-recognized holidays and weekends). Idaho Code § 11-304.

- (h) The successful purchaser at the sale receives a certificate of sale. One duplicate of the certificate of sale is recorded in the real estate records of the county and the other is filed with the district court presiding over the foreclosure action. Idaho Code §§ 11-309, 11-310.
- (i) At the expiration of the statutory redemption period—six months for properties 20 acres or less, one year for properties greater than 20 acres—providing that no redemption has been made, the successful bidder requests and receives from the sheriff conducting the sale a sheriff's deed that is then recorded in the real estate records where the property is located. The recording of the sheriff's deed concludes the foreclosure process unless additional matters are pending in the district court pertaining to the fixing of any deficiency judgment against the borrowers.

#### **D. Nonjudicial Foreclosures**

##### **1. Does Idaho permit a nonjudicial foreclosure?**

Yes. Applicable statutes are found in Idaho Code Section 45-1501, et. seq.

##### **2. What requirements must be met (e.g., can it apply to residential, agricultural, and commercial mortgage loans)?**

Deeds of trust can only be used to transfer “real property” that is either (a) any real property located within an incorporated city or village at the time of the transfer, or (b) any real property not exceeding 40 acres, regardless of its location. If the deed of trust has a statement that provides that the real property is within either of these provisions, even if not true, the statement will be binding upon all parties and conclusive as to compliance. Idaho Code § 45-1502(5).

##### **3. What is the time frame to complete one?**

Typically, the nonjudicial foreclosure sale process takes anywhere from 125 to 140 days. Notice of the date of sale must be given no less than 120 days after a notice of default has been recorded in the county record where the property is situated. Idaho Code § 45-1506. A beneficiary has the right to have the trustee postpone the sale by announcing a postponement of up to 30 days at the time of the sale, and theoretically this could work to postpone a sale over and over again. *See* Idaho Code § 45-1506(8). However, it is believed that the original notice would likely be considered “stale” if a sale were verbally continued more than six months.

4. **Does the mortgagor (or any other party, e.g., a junior lender) have redemption rights? What is the redemption period?**

There is no redemption period for nonjudicial foreclosure under Idaho law, but there is a “cure” period prior to the sale itself of which both the debtor and junior lenders may avail themselves. Under Idaho Code Section 45-1506(12), for a time period of up to 115 days from the recording of the notice of default, the default may be cured by paying the unaccelerated amount due, together with trustees’ fees and any other amounts due on the underlying obligation. Care should be taken, however, to determine whether the Internal Revenue Service is interested in exercising its redemption right that persists for 120 days after the sale in accordance with 26 U.S.C. § 7425(b).

5. **Does the statutory redemption period start to run before or after the foreclosure sale?**

There is no redemption period for nonjudicial foreclosures. The “cure” period under state law begins to run before the sale and ends prior to the sale.

6. **Is the statutory redemption period waivable, and if so, how?**

There is no redemption period for nonjudicial foreclosures. There is no authority on whether the right to cure is waivable, but any creditor should be cautious in relying on the effectiveness of a waiver in light of Idaho statutory law voiding contracts for the foreclosure of property subject to a lien. Idaho Code § 45-110.

7. **Are there any other statutory reinstatement rights, and if so, what are they, are they waivable, and how?**

Yes. Idaho Code Section 45-1506(12) allows a grantor to cure any default identified in the recorded notice of default within 115 days from the date the notice of default is recorded. The expiration of the cure period operates independently of the procedure by which the sale date is established, and it is possible for the cure period to expire days or weeks in advance of the trustee’s sale. To cure, the grantor or junior encumbrance holder must tender the full amount of any unpaid payments, pay taxes, etc. (based on the defaults alleged in the notice of default), plus pay to the trustee the costs of foreclosure and reasonable attorney fees. An offer to pay without an actual, present, physical tender of payment is insufficient to effect a cure. *Owens v. Idaho First National Bank*, 103 Idaho 465, 466, 649 P.2d 1221, 1222 (Ct. App.), *cert. denied*, 116 Idaho 466, 776 P.2d 828 (1982).



**8. Is anyone disqualified from bidding (such as the mortgagee or mortgagor)?**

Idaho Code Section 45-1506 allows anyone to bid at the auction for a sale of a deed of trust.

Idaho Code Section 11-304 prohibits “the officer holding the execution [and] his deputy” from being a purchaser or being interested in any purchase at such a sale under execution.

**9. What are the associated costs of the nonjudicial foreclosure?**

Trustees’ fees range from \$450 to \$600; advertising costs vary by publication but range from \$200 to \$800; title litigation report and/or trustee sale guarantee is priced comparably to an owner’s title insurance policy. If the creditor takes the property by way of a credit bid at the sale, most title insurance companies will give purchase credit towards an owner’s policy, based on the purchase of the trustee sale guarantee.

**10. Is there a sale by a sheriff or others? What is the cost? Are the costs negotiable or nonnegotiable?**

The trustee conducts the nonjudicial sale pursuant to a deed of trust and costs are negotiable. In Idaho, the following persons may serve as trustee: (a) any member of the Idaho state bar; (b) any bank or savings and loan association authorized to do business under the laws of Idaho or the United States; (c) an authorized trust institution having a charter under chapter 32, title 26, Idaho Code, or any corporation authorized to conduct a trust business under the laws of the United States; or (d) a licensed title insurance agent or title insurance company authorized to transact business under the laws of the state of Idaho.

The sheriff conducts the judicial sale of a mortgage or deed of trust foreclosed judicially and costs are not negotiable. Idaho Code § 45-1504(1).

**11. Are there trustee fees? What are they? Are they negotiable or nonnegotiable?**

There are trustee fees for a nonjudicial sale on a deed of trust. They are negotiable and are generally a fixed price.

**12. What are the advertising costs?**

Advertising costs are newspaper specific.

**13. Is there a transfer tax? How is it calculated?**

There is no transfer tax.

**14. Are there any other relevant considerations?**

Since the Internal Revenue Service retains a redemption right, the IRS must be notified no later than 25 days prior to sale to prevent an IRS lien that was filed prior to 30 days of the sale from encumbering the property. 26 U.S.C. § 7425(c).

**15. What is the process? (Please include information regarding necessary parties, statutorily required notices and grace periods, marshaling requirements, and any other relevant considerations.)**

The trustee must file a notice of default with the names of the beneficiaries and the book and page where the trust deed is recorded or a description of the trust property. The nature and description of the breach and a statement of the decision to sell the property must be included. A copy of that notice must be sent to any person requesting the notice by registered or certified mail. There can be no action, suit, or proceeding in progress to recover the debt remaining secured by the trust deed or, if there is, that action, suit, or proceeding must be dismissed.

Pursuant to Idaho Code Section 45-1506, at least 120 days before the sale, notice must be given (by registered or certified mail, return receipt requested) to the following and/or their legal representatives:

- (a) the grantor in the trust deed and any person requesting notice of record,
- (b) any successor in interest to the grantor (including, but not limited to, a grantee, transferee, or lessee) when the successor in interest is on record or the trustee has notice of the successor, and
- (c) any person having a lien or interest subsequent to the interest of the trustee in the trust deed (when that person is on record or the trustee has notice of that person).

The notice of sale shall set forth the names of the grantor, trustee, and beneficiary, a description of the property, the book and page of the mortgage record or the recorder's instrument number where the trust deed is recorded, the default for which the foreclosure is made, the sum owing on the obligation secured by the trust deed, and the date, time, and place of sale (after 9 a.m. and before 4 p.m. in the county where the property is located).

At least three good faith attempts must be made, on different days, over a period of at least seven days each and those attempts must be made at least 30 days before the sale, to serve a copy of the notice of sale upon an adult occupant of the property. A copy of the notice of sale must also be conspicuously placed on the property. Idaho Code § 45-1506(5).

A copy of the notice of sale must be published in a newspaper of general circulation in each of the counties in which the property is situated once a week for four successive weeks, making four publishings in all, with the last publication to be at least 30 days before the sale. Idaho Code § 45-1506(6). An affidavit of mailing notice of sale and an affidavit of posting and publication of notice of sale shall be recorded in the mortgage records in the counties in which the property is situated at least 20 days before the sale. Idaho Code § 45-1506(7).

Idaho Code Section 45-1508 provides that a sale made by a trustee under this act is final.

#### **E. Comparison**

- 1. Are there any advantages or disadvantages to proceeding judicially versus nonjudicially, especially regarding the costs and time? (The impact on the right to a deficiency is addressed in the “Limitations on Procedure and Enforcement section.)**

Nonjudicial foreclosure is the preferred method of foreclosure. It is less expensive, less formalistic, less time-consuming, and it avoids rights of redemption.

- 2. Can a lender elect to do either a judicial or nonjudicial foreclosure after the loan is first made (i.e., does the lender’s choice of a “mortgage” document versus a “deed of trust” limit what type of action it can make later)?**

The lender can only make such an election of judicial versus nonjudicial foreclosure if the security instrument is a deed of trust. A mortgagee must go through judicial foreclosure.

#### **F. Miscellaneous**

- 1. Do any statutory provisions permit “friendly” foreclosures?**

Statutory provisions do not address “friendly” foreclosures. “Friendly” foreclosures and deeds in lieu are often used.

- 2. Are there any special steps for foreclosure of a leasehold mortgage?**

There are no special steps. Redemption rights are not offered to the mortgagee where the estate or interest foreclosed is a leasehold of two years' unexpired term or less. In this instance, the sale is absolute without the right of redemption. Idaho Code § 11-310.

**3. Does this state permit a private sale?**

No Idaho authority permits a sale of real property security by a private party or by any person other than the sheriff in a judicial foreclosure or trustee in a nonjudicial foreclosure.

**II. APPRAISALS**

**A. Are there any value limits on foreclosure bid prices?**

There are no statutory limits. The lender is allowed a credit bid of what he is owed in the foreclosure under his note, including costs incurred to protect lien interest (such as property taxes and costs of securing property from neglect and waste).

**B. Is a third party MAI (Member of Appraisal Institute) appraisal required for a foreclosure sale?**

No, but an appraisal from a third party MAI may add evidentiary weight in a contested case.

**C. Are there any cases interpreting or applying the *BFP* case regarding fraudulent conveyance challenges to a foreclosure sale in this state?**

No.

**III. ENFORCEMENT OF GUARANTIES/CARVE-OUTS FROM EXCULPATION**

**A. Are there any issues that need to be identified regarding enforcement of a guaranty or personal liability for diversion of rents, fraud, environmental loss, etc.?**

Idaho courts have not addressed any issues related to carve-outs from exculpation (liability to the borrower and guarantor for diversion of rents, fraud, environmental loss, etc.).

**B. Are there any issues that need to be identified regarding enforcement and recovery of late charges, default interest, and prepayment charges?**

*Nonspecified Interest Rate.* For any loans that do not specify the interest rate, interest is statutorily proscribed at 12 percent per annum. Idaho Code § 28-22-104.

*Specified Interest, Late Charges, Default Interest, and Prepayment Charges.* Interest, late charges, default interest, and prepayment charges may be for any amounts agreed to between the parties in the loan documents if not otherwise prohibited by law. See Idaho Code Section 28-42-201 (for a loan, finance charges “shall be that which is agreed between the parties to the transaction. In addition to the finance charge permitted herein, a creditor may contract for and receive any other charge, except to the extent expressly prohibited or limited by this act.”). For all commercial loans and residential first lien mortgage/deed of trust loans, Idaho does not have any limitations on interest rates, late charges, or prepayment charges. For any residential mortgage/deed of trust loan secured by real property of the borrower that is used or expected to be used as a primary residence of the borrower and that is not secured in a first lien position, late charges are limited to the greater of 5 percent of the unpaid amount of any late payment, or \$15. Idaho Code § 28-42-301. For certain consumer credit transactions, the Idaho Credit Code provides limitations and restrictions on amounts that may be charged by a lender, including prepayment charges. Idaho Code §§ 28-41-101 et seq.

*Applicability to Guarantors.* To the extent that a borrower owes late charges, default interest, and/or prepayment charges, and a guaranty agreement is drafted broadly enough to cover all such amounts owed by the borrower, the guarantor will be liable for all such amounts under the guaranty agreement.

**C. How are mechanic’s liens handled (e.g., priority/process to foreclosure, bonding)?**

Idaho Code Sections 45-501 et. seq. are the relevant Idaho statutes on mechanic’s liens. Idaho Code Section 45-512 provides priority provisions for mechanic’s liens:

In every case in which different liens are asserted against any property, the court in the judgment must declare the rank of each lien or class of liens which shall be in the following order:

- (a) All laborers, other than contractors or subcontractors,
- (b) All materialmen, other than contractors or subcontractors,
- (c) Subcontractors,
- (d) The original contractor, and
- (e) All professional engineers and licensed surveyors.

If the proceeds of sale are insufficient to pay all lienholders:

- (a) The liens of all laborers, other than the original contractor or subcontractor, shall first be paid in full, or pro rata if the proceeds are insufficient to pay them in full.
- (b) The liens of all materialmen, other than the original contractor or subcontractor, shall be paid in full, or pro rata if the proceeds are insufficient to pay them in full.
- (c) Out of the remainder, if any, the subcontractors shall be paid in full, or pro rata if the remainder be insufficient to pay them in full, and the remainder, if any, shall be paid pro rata to the original contractor and the professional engineers and licensed surveyors; and each claimant shall be entitled to execution for any balance due him after such distribution; such execution to be issued by the clerk of the court upon demand, at the return of the sheriff or other officer making the sale, showing such balance due.

This section applies to cases in which there are no intervening other liens. Where other liens are involved, the time or date when building was commenced or laborer began to work, or materialman commenced to furnish material, establishes the priority date in determining priority of such liens over such other liens.

Because mechanic's liens are statutory, all required formalities of the lien law are required to be observed. A claim of lien must be filed with the county recorder within 90 days after the completion of labor or services, or furnishing of materials and must include all of the information set out in Idaho Code Section 45-507. Additionally, such lien claim "must be verified by the oath of the claimant, his agent or attorney, to the effect that the affiant believes the same to be just." A copy of the claim of lien must be served on the owner of the property either by personal delivery or by certified mail no later than five business days after the lien is filed. Further, if a person is required to register as a "contractor" and fails to do so, that person forfeits his right to lien for any work done in that capacity. See Idaho Code § 54-5208.

Once the claim of lien is filed, an action to foreclose the lien must be commenced and a *lis pendens* recorded, within six months. Failure to do so renders the lien void. Idaho Code § 45-510.

A surety bond may be posted to release the lien under Idaho Code Section 45-518. The parties may stipulate to a cash bond in lieu of a surety bond. Sometimes a title company will agree to issue a policy of title insurance that does not list the lien as an exception, usually for a deposit into escrow in a manner that assures the title insurance company that sufficient funds will be available to pay the lien and any reasonably foreseeable attorneys' fees in the event that the court decrees foreclosure of the lien. If a surety bond is utilized, the statutory scheme seems to

contemplate an expedited, preferential trial setting if the lien claimant seeks it. See Idaho Code § 45-522.

Partial lien waivers from subcontractors are commonly used by lenders as a condition of approving a draw payment to the general contractor.

#### **IV. REVENUE CAPTURE PRIOR TO FORECLOSURE**

##### **A. Assignment of Rents**

- 1. Are there any specific issues regarding notices or the time of invoking an assignment of rents? Are rents customarily collected by the mortgagee or by a receiver?**

*Notices and Timing.* In the 2007 Idaho legislature, a bill was introduced to adopt the Uniform Assignment of Rents Act, an act that addresses many issues regarding assignment of rents, including issues relating to notices and timing to invoke an assignment of rents. The bill was not adopted. Accordingly, there are currently no unique issues regarding notices or timing considerations for invoking an assignment of rents, other than as expressly provided in the loan documents.

*Custom of Collecting Rents.* Prior to an event of default under the loan documents, unless the lender required the borrower to use a lockbox mechanism for collecting rents, rents are typically collected by the borrower. Following an event of default under loan documents that contain an assignment of rents provision, there is not any custom in Idaho regarding whether or not rents are collected by the lender or by a receiver. Lenders will often require that tenants of the encumbered collateral send the rents directly to the lender. However, lenders will also just as often obtain a receiver to collect such rents. As discussed in Section V.C below, because of the uncertainty regarding whether Idaho courts would recognize an assignment of rents as an absolute present assignment, the safest course of action for a lender to ensure that it can receive rents from the mortgaged property prior to obtaining legal possession of the property is for the lender to obtain a receiver to collect such rents.

##### **B. Receiverships**

- 1. What are the criteria for obtaining a receiver?**

Idaho Code Sections 8-601 and 8-601A provide for appointment of receivers. In relation to foreclosure:

A judge may appoint a receiver in an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it

appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt. Idaho Code § 8-601(2).

A receiver may be appointed where it appears that: (1) personal property subject to a deed of trust or mortgage, or to related security documents, is in danger of being lost, removed, concealed, materially injured, or destroyed; (2) real property subject to the deed of trust or mortgage is in danger of substantial waste or that the income therefrom is in danger of being lost; or (3) the property is or may become insufficient to discharge the debt that it secures. Idaho Code § 8-601A.

**2. What is the process?**

A receiver can be appointed by the court in an action by a mortgagee for the foreclosure of his mortgage. Idaho Code § 8-601. Pursuant to Section 8-601A, at any time after the filing of a notice of default and election to sell real property under a power of sale contained in a deed of trust, the trustee or beneficiary of the deed of trust may apply to the district court for the county in which the property is located for the appointment of a receiver of that property and of any personal property subject to the deed of trust or to related security documents. If the above criteria set forth in this code section are met, a receiver can be appointed. No party, attorney, or person interested in an action can be appointed as a receiver without the written consent of the parties filed with the clerk. Idaho Code § 8-603.

**3. How difficult is it to obtain a receiver? What is the estimated cost in appointing/having one?**

It must be clearly shown that a receiver is absolutely necessary for the preservation of the mortgaged property before a receiver will be appointed. Idaho Code § 8-601A. Costs in obtaining a receiver range from court costs and the receiver's charges to costs chargeable to the property, e.g., the receiver's expenses incurred in upkeep of the property.

**4. Can the lender recommend the party to be appointed as receiver?**

Yes.

**5. What is the time frame to appointment?**

There are no time limits in the Idaho Code on appointment. The focus is instead on whether a receiver is, in fact, necessary.

**6. Does the lender assume any mortgagee-in-possession liability?**



There are no Idaho statutes or cases to indicate that the lender would assume any such liability. It is recommended that the lender not take possession as mortgagee, but if it is necessary to act, instead seek to have a receiver appointed.

**7. Is a bond required? If yes, what is the estimated amount?**

Yes. The amount and nature of the bond are determined by the court. Idaho Code § 8-604.

**8. What authority does the receiver have beyond the ability to collect rent (e.g., make repairs, and/or extend existing leases, sign leases) and to bind a subsequent foreclosure purchase to those actions?**

Idaho Code Section 8-605 states the powers of the receiver: “the receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize.” Idaho Code Section 8-606 allows the receiver to invest funds upon interest by order of the court but only if all parties to the action consent.

**C. Sequestration of Rents**

**1. Does Idaho have a sequestration of rents statute? If yes, please explain its particulars.**

Idaho does not have any statutory provisions for sequestration of rents.

**D. Escrows/Letters of Credit**

**1. Are there any specific requirements for cashing letters of credit or exercising rights under escrows (i.e., notice) to be considered? If yes, please explain the particulars.**

There are no Idaho statutes or cases to indicate that there are any such specific requirements.

**E. Temporary Restraining Orders**

**1. Can temporary restraining orders be obtained to intercept rent before a receiver is appointed? If yes, please explain the particulars.**

Idaho statutes regarding temporary restraining orders and receiverships do not address the issue of whether a temporary restraining order can be obtained to intercept rent before a receiver is appointed.

**2. When is the TRO perfected (e.g., when the bond is filed)?**

No Idaho cases have addressed the issue of perfection in the context of TROs.

**V. PERFECTION OF THE ASSIGNMENT OF RENTS**

**A. What action is needed to “perfect” an assignment of rents (e.g., render it enforceable against the borrower and tenants) under state law? Is it perfected by filing of record?**

An assignment of rents provision, whether in a deed of trust, mortgage, or stand-alone document, must be properly recorded against the real property in the real property records of the county in which the property is located to be perfected (e.g., render it enforceable against the borrower and tenants) as a matter of state law.

**B. If the assignment is not perfected before a bankruptcy petition is filed, can it be perfected post-petition? How?**

No Idaho cases have addressed the issue of post-petition perfection of an assignment of rents.

**C. Does this state recognize an absolute assignment of rents causing the rents not to be included in the borrower’s assets? What is necessary for an assignment of rents to be characterized as absolute? Would use of a lockbox/cash management account cause the assignment to be absolute?**

A mortgage or deed of trust that includes an assignment of rents provision, and/or a stand-alone assignment of leases and rents agreement, is typically valid and enforceable in Idaho. However, an issue that has not been resolved under Idaho law is whether or not an assignment of rents provision which purports to be an absolute assignment, but which is subject to defeasance upon payment of a debt owed by assignor (the borrower) to assignee (the lender), is enforceable as an absolute assignment which allows the lender to receive rents prior to obtaining possession of the mortgaged property. This issue is particularly relevant in the context of whether, following the borrower’s bankruptcy, the lender is entitled to receive the rents from the mortgaged property, or alternatively, whether such rents are property of the bankruptcy estate.

No controlling Idaho state judicial precedent exists addressing whether a properly drafted assignment of rents provision is enforceable as an absolute assignment.

However, certain Idaho statutes provide, and the Idaho courts have held on numerous occasions, that the form of an instrument yields to its underlying purpose; and therefore, that certain instruments (such as deeds, options, and assignments of a vendor's interest in a land sale contract) were liens rather than conveyances. Based on such authority, an assignment of leases and rents provision which purports to be an absolute assignment, but which is subject to defeasance upon payment of a debt owed by assignor (the borrower) to the assignee (the lender), would arguably not be deemed to be an absolute present assignment. However, the United States District Court for the District of Idaho held that based on the express language in the deed of trust that the assignment of rents created a present assignment, such assignment of rents clause, although exercisable upon default in the payment of a debt, created an absolute assignment of, rather than a lien on, the rents. *In re Don Gould*, 78 B.R. 590 (Bankr. D. Idaho 1987). This decision is not binding on Idaho state courts; therefore, there is no assurance that an Idaho state court would adopt the holding of such decision.

In the event that an Idaho state court does not adopt such holding, such court would rule that a mortgage or deed of trust (or a stand-alone assignment of leases and rents agreement) that has properly attached and has been perfected, creates a valid, enforceable, and perfected lien on, and security interest in, the leases and rents in favor of the holder of the note to secure the obligations recited in the mortgage or deed of trust (or a stand-alone assignment of leases and rents agreement).

To increase the likelihood that an assignment of rents provision is determined to be an absolute assignment, a lender should include very clear express language to that effect in the applicable loan documents. Furthermore, although there is no legal authority holding that the use of a lockbox/cash management account alone would cause the assignment to be absolute, the use of such account would likely be considered by an Idaho court in determining whether or not an assignment was absolute. Finally, based on the propensity of the Idaho courts to review and consider the law of other states when the Idaho courts have not previously addressed an issue, and based on extensive legal authority from other states to the effect that a lender is entitled to receive rents collected by a receiver, a lender should consider attempting to obtain the appointment of a receiver to collect rents following an event of default.

## **VI. DEEDS IN LIEU OF FORECLOSURE**

### **A. What are the required documents?**

The creditor will need to obtain a title report; the parties should agree on how the taxes are to be paid or prorated; any warranties of title given by the debtor should be set forth in the deed to the creditor; and the creditor should preserve his mortgage and debt for possible future foreclosure. Additionally, an "estoppel

affidavit” is typically used to set out that the deed is an absolute conveyance and not intended as a mortgage or otherwise as anything other than an absolute conveyance, and that the deed is given freely and without duress.

- B. Does any statute govern the ability/process to convey equity of redemption? Please explain the process and the requirements (such as cancellation of debt or personal liability, or other considerations).**

No statute directly addresses this issue, but Idaho Code Section 45-110 is potentially applicable to prohibit conveyance. However, no Idaho court has considered the issue, and at least one appellate decision impliedly holds to the contrary. *See Kerr Land & Livestock, Inc. v. Glaus*, 107 Idaho 767, 692 P.2d 1199 (Ct. App. 1984) (rejecting argument that deed in lieu should be treated as a mortgage).

- C. Is there any case law on executory deed transactions (e.g., a deed in escrow as part of a workout? The initial loan closing?)?**

Yes. *See Kerr*, 107 Idaho at 769, 692 P.2d at 1201 (upholding deed in lieu held and recorded later in workout situation).

- D. Can the deed be taken subject to the mortgage?**

There is no Idaho case law on this point, but it is the typical practice in a deed in lieu situation to make the deed in lieu subject to the existing mortgage or deed of trust on the property. The reason for this is to let the title conveyed by the deed of trust “season” for a time, i.e., see if any successful fraudulent conveyance challenge is brought or voidable preference challenge in bankruptcy. If one wanted to further reduce the risk that a merger of estates issue is raised, one could take title under the deed in lieu in a different entity than the entity or person listed as the mortgagee or beneficiary of the deed of trust.

- E. What are the estimated costs of an owner’s title insurance policy? What are the dollar figures per thousand dollars coverage? Are these negotiable or nonnegotiable?**

For the American Land Title Company, one pays \$3 per each thousand dollars of coverage, and this is nonnegotiable. There is a \$45 set-up fee. Closing fees are sometimes negotiable. Title insurance companies typically will not offer extended coverage for an ownership interest derived from a deed in lieu. Instead, only standard coverage is available.

- F. Are there any specific local issues to be considered?**

None.

## **VII. TAXES**

### **A. Does Idaho sell tax certificates for delinquent taxes? Can the mortgagee or an affiliate buy these?**

No, the State of Idaho does not sell tax certificates for delinquent taxes. However, upon delinquency of real property taxes for more than three years, and upon compliance with certain statutory requirements, a tax deed shall be issued to the county in which the property is located. Idaho Code §§ 63-1005, 63-1006. The record owner of the property subject to delinquent taxes has the opportunity to have a hearing regarding the appropriateness of the issuance of a tax deed. Idaho Code § 63-1006. Upon compliance with certain statutory requirements, the county has the power to sell property it owns at public auction, including property acquired by tax deed. Idaho Code § 31-808. Once a tax deed has been issued to a county, the property may be redeemed by the record owner until the earlier to occur of (i) the date that the county has entered into a contract to sell the property, (ii) the date that the county has transferred title to the property to another party, or (iii) three years from date of the issuance of the tax deed to the county. Idaho Code § 63-1007.

Subject to certain statutory limitations and requirements, the mortgagee or an affiliate can buy the property at public auction. Idaho Code § 31-808.

### **B. How long after the delinquency is the tax certificate sold?**

Tax certificates are not sold, but a tax deed for the property will be issued to the county if the tax delinquency is not redeemed within three years from the date of the delinquency, and thereafter the property can be sold by the county. Idaho Code §§ 63-1005(1), 31-808.

### **C. How long is the period to redeem?**

The record owner of the property may redeem the property until the earlier to occur of: (i) the date that the county has entered into a contract to sell the property, (ii) the date that the county has transferred title to the property to another party, or (iii) three years from the date of the issuance of the tax deed to the county. Idaho Code § 63-1007.

### **D. Are redemption rights assignable?**

Redemption rights are not assignable. Idaho Code Section 63-1007(1) (“after the issuance of a tax deed, real property may be redeemed only by the record owner or owners, or party in interest...”)

**E. What is the interest rate (or other penalties or charges) accruing on unpaid taxes?**

Interest is 1 percent per month calculated from January 1 following the year the tax lien attached. Idaho Code § 63-1001.

**F. Property Tax Assessments**

**1. What is the date of annual assessments for all lienable taxes of whatever name?**

Generally, notices of assessment must be mailed by the county assessor to the taxpayer no later than the first Monday of June of each year. Idaho Code § 63-308(1).

**2. What is the last date for filing an appeal of the assessment?**

The fourth Monday of June of each year. Idaho Code § 63-501A.

**3. Does a foreclosure or deed in lieu trigger a reassessment?**

No.

**G. State and Local Conveyance Taxes**

**1. Are these taxes applicable in a foreclosure?**

Idaho does not have state or local conveyance taxes.

**2. Can the lender avoid conveyance taxes or sheriff's fees by making a nominal bid?**

Not applicable.

**3. Are these taxes applicable in a deed in lieu?**

Not applicable.

**VIII. BANKRUPTCY CONSIDERATIONS**

**A. Please explain the position of federal courts in this state on:**

**1. Absolute Priority Rule**

In the Idaho bankruptcy case *In re Bonner Mall Partnership*, the Ninth Circuit held that the new value exception to the absolute priority rule survived enactment of the Bankruptcy Code. *In re Bonner Mall P'ship*, 2

F.3d 899 (9th Cir. 1993), *cert. granted, case vacated and dismissed*, U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 115 S.Ct. 386, 130 L.Ed.2d 223 (1994). The Idaho bankruptcy court has further held that a contribution of post petition earnings does not constitute "new value," allowing an exception to the absolute priority rule for confirmation of a plan over the objection of an impaired creditor. *In re Eitemiller*, 149 B.R. 626 (Bankr. D. Idaho 1993). What does constitute new value is determined on a case by case basis. *Id.*

**2. Negative Amortization**

No reported decisions in Idaho.

**3. Hotel Room Receipts as Rent**

No reported decisions in Idaho.

**4. Market Interest Rates**

No reported decisions in Idaho.

**5. Waiver of a Right to Automatic Stay**

No reported decisions in Idaho.

**6. Bad Faith Filings**

Whether a Chapter 13 plan has been proposed in good faith is determined under the totality of the circumstances with an examination of the specific facts of the case. *In re Bowen*, 349 B.R. 814 (Bankr. D. Idaho 2005). The frequent recourse to bankruptcy protection by a serial filer is one factor that may be used to determine whether a plan is proposed in good faith. *Id.* (confirming plan upon finding that it was filed in good faith upon eve of foreclosure sale despite earlier bankruptcy cases filed by the same debtor).

**7. New Value Exception**

In the Idaho bankruptcy case *In re Bonner Mall P'ship*, the Ninth Circuit held that the new value exception to the absolute priority rule survived enactment of the Bankruptcy Code. *In re Bonner Mall P'ship*, 2 F.3d 899 (9th Cir. 1993), *cert. granted, case vacated and dismissed*, U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 115 S.Ct. 386, 130 L.Ed.2d 223 (1994). The Idaho bankruptcy court has further held that a contribution of post-petition earnings does not constitute "new value," allowing an exception to the absolute priority rule for confirmation of a

plan over the objection of an impaired creditor. *In re Eitemiller*, 149 B.R. 626 (Bankr. D. Idaho 1993). What does constitute new value is determined on a case by case basis. *Id.*

**8. Bankruptcy-Proofing Devices**

No reported decisions in Idaho.

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