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SPECIAL RISKS AND CURATIVE STATUTES

FOR THE STATE OF

OHIO

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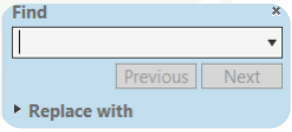

SPECIAL RISKS

CURATIVE STATUTES IN OHIO

SPECIAL RISKS

I. Condominiums and Condominiums in Counties Bordering Lake Erie

Background: Condominiums are a “legal fiction” created by statute to re-characterize a space, generally constructed inside of a building, (aka the “Unit”) as if the physical space (Unit) is real property rather than being part of a structure constructed on real property. Condominiums are “creatures of statute” and a failure to follow the statutes allowing for the creation of condominium property prevents the creation of real property (Unit).

Risk: In Ohio, condominium creation is governed by ORC Chapter 5311. To insure a unit within a condominium, the Condominium Declaration and Drawings must be reviewed to ensure that these documents comply with ORC Chapter 5311. Special care must be exercised when:

1. The condominium is located in a county abutting Lake Erie;
2. The condominium is an “Expandable Condominium”

Standard: The Condominium Declaration is governed by ORC 5311.05. Pursuant to ORC 5311.05 (B), the Declaration must contain the following:

1. A legal description of the land or, for a water slip condominium property, of the land and the land under the water area, submitted to the provisions of this chapter;
2. The name of the condominium property, which shall include the word "condominium";
3. The purpose of the condominium property, the units and recreational and commercial facilities situated in the condominium property, and any restrictions upon the use of the condominium property;
4. A general description of buildings submitted to the provisions of this chapter, stating the principal construction materials and the number of stories, basements, and units. The declaration for a water slip property shall also contain a general description of each water slip and of the piers and wharves forming each water slip submitted to the provisions of this chapter;
5. The unit designation of each unit submitted to the provisions of this chapter and a statement of its location, approximate area, the immediate common element or limited common element to which it has access, and any other information necessary for its proper identification;
6. A description of the common elements and limited common elements submitted to the provisions of this chapter, the undivided interest in those elements appurtenant to each unit, the basis upon which those appurtenant undivided interests are allocated, and the procedures whereby the undivided interests appertaining to each unit may be altered . The undivided interests, basis, and procedures shall be in accordance with ORC 5311.031 to 5311.033 and 5311.04;
7. A statement that each unit owner is a member of a unit owners association established for the administration of the condominium property;
8. The name of a person to receive service of process for the unit owners association, together with the person's residence or place of business located in this state;
9. A statement of any membership requirement if the unit owners association or any unit owners are required to be members of a not-for-profit organization that provides facilities or recreation, education, or social services to owners of property other than the condominium property;
10. The method by which the declaration may be amended, which, except as provided in division(E) of this section, division (E) of section 5311.04, division (B) of section 5311.041, and sections 5311.031 to 5311.033 and 5311.051 of the

Revised Code, requires the affirmative vote of unit owners exercising not less than seventy-five per cent of the voting power;

11. Any further provisions deemed desirable.

ORC 5311.05 (C) provides that an “expandable condominium” must contain the following additional items in the Declaration:

1. The explicit reservation of the declarant's option to expand the condominium property;
2. A statement of any limitations on that option to expand, including a statement as to whether the consent of any unit owner is required, and how that consent is to be ascertained; or a statement that there are no limitations on the option to expand;
3. The time at which the option to expand the condominium development expires, which shall not exceed seven years from the date the declaration is filed for record;
4. A statement that the declarant may, during the six months prior to the time that the option expires, extend the option for an additional seven years with the consent of the holders of a majority of the voting power of the unit owners other than the declarant;
5. A statement of any circumstances that will terminate the option to expand prior to the time established pursuant to division (C)(3)(a) or (b) of this section.
6. A legal description of all additional property that, through exercise of the option, may be submitted to the provisions of this chapter and added to the condominium property;
7. A statement that specifies all of the following:

    (a) Whether the addition of all or a particular portion of the additional property is mandatory;

    (b) If the addition of additional property is not mandatory, whether all or a particular portion of the additional property must be added if any other additional property is added;

    (c) Whether or not there are any limitations on portions of additional property that may be added.

8. A statement of whether portions of the additional property may be added at different times and a statement that sets forth any limitations on the addition of additional property at different times, including the legal descriptions of the boundaries of portions that may be added and specifications on the order in which those portions may be added to the condominium property or a statement that there are no limitations on the addition of additional property;

9. A statement of any limitations on the location of any improvements that may be made on any portion of the additional property added to the condominium property, or a statement that there are no limitations of that kind;

10. A statement of the maximum number of units that may be created on the additional property. If portions of the additional property may be added to the condominium property and the boundaries of those portions are fixed in accordance with division (C)(6) of this section, the declaration also shall state the maximum number of units that may be created on each portion added to the condominium property. If portions of the additional property may be added to the condominium property and the boundaries of those portions are not fixed in accordance with division (C)(6) of this section, the declaration

also shall state the maximum number of units per acre that may be created on any portion added to the condominium property.

11. Except when the original condominium property contained no units restricted to residential use, a statement of the maximum percentage of the aggregate land area and the maximum percentage of aggregate floor area that may be devoted to units not restricted to residential use on any additional property added to the condominium property;

12. A statement of the extent to which any structures erected on any portion of the additional property added to the condominium property will be compatible with structures on the submitted property in terms of quality of construction, the principal materials to be used, and architectural style, or a statement that the structures need not be compatible in those respects;

13. With respect to all improvements to any portion of additional property added to the condominium property, other than structures, a statement setting forth both of the following:

    (a) A description of the improvements that must be made or a statement that no other improvements must be made;

    (b) Any restrictions or limitations on the improvements that may be made or a statement that there are no restrictions or limitations on improvements.

14. With respect to all units created on any portion of additional property added to the condominium property, a statement setting forth both of the following:

    (a) Whether all units of that kind must be substantially identical to units on previously submitted property;

    (b) Any limitations on the types of units that may be created on the additional property or a statement that there are no limitations of that kind.

15. A description of any reserved right of the declarant to create limited common elements within any portion of the additional property added to the condominium property or to designate common elements within each portion. The description shall specify the types, sizes, and maximum number of limited common elements in each portion that may subsequently be assigned to units;

16. Drawings and plans that the declarant considers appropriate in supplementing the requirements of ORC 5311.05 (C);

17. A statement that a successor owner of the condominium property or of additional property added to the condominium property who is not an affiliate of the developer and who is a bona fide purchaser of the property for value, or a purchaser who acquires the property at a sheriff's sale or by deed in lieu of a foreclosure, is not liable in damages for harm caused by an action or omission of the developer or a breach of an obligation by the developer.

If the condominium declared on a leasehold estate, the lease must be a “99 year lease renewable forever” and contain the following additional items:

1. With respect to any ground lease or other leases, the expiration or termination of which could terminate or reduce the amount of condominium property, a statement setting forth the county in which the lease is recorded and the volume and page of the record;
2. A statement setting forth the date upon which each lease referred to in division (D)(1) of this section expires;
3. A statement of whether the unit owners own any land or improvements of the condominium property in fee simple, and if so, a description of the improvements and a legal description of the land;
4. A statement of any rights the unit owners have to remove any improvements within a reasonable time after the expiration or termination of any ninety-nine year lease, or a statement that they have no rights of that nature.
5. A statement of the rights that the unit owners have to redeem the reversion or any of the reversions, or a statement that they have no rights of that nature;
6. A statement that, subsequent to the recording of the declaration, no lessor who executed it and no successor in interest to that lessor has any right or power to terminate any part of the leasehold interest of any unit owner who makes timely payment of the unit owner's share of the rent to the person designated in the declaration for the receipt of that rent and who otherwise complies with all covenants that, if violated, entitle the lessor to terminate the lease.

Drawings depicting the units and their locations be recorded with the condominium declaration. See ORC 5311.07. These drawings must:

1. Graphically show the boundaries, location, designation, length, width, and height of each unit ; the boundaries, location, designation, and dimensions of the common elements and the limited common elements and exclusive use areas; and the location and dimensions of all appurtenant easements or encroachments; and
2. Contain the following certifications:

    a. The certified statement of a registered architect or registered professional engineer that the drawing accurately shows each building or water slip **as built or constructed**;
    b. The certified statement of a registered professional surveyor that the drawing accurately reflects the location of improvements and recorded easements.

Consequently, the units being declared must be built or constructed prior to declaring the Condominium.

An unfortunate and persistent trend in certain counties bordering Lake Erie is to ignore the “build and declare” requirement and declare the condominium prior to constructing the units. These condominiums can be identified by examining the certifications made by the architect/engineer and surveyor. **If the certifications recite that the drawings accurately depict the buildings/improvements “to be constructed”, you have a fatal defect in the formation of the condominium and title cannot be insured.** Prior to insuring title to any condominium unit located in a county bordering Lake Erie, you must have Underwriting approval.

Expandable condominiums present additional risk when you are insuring a unit located in an expansion phase (Units being added to the condominium after the initial declaration.) The initial declaration must be examined to determine the time limit for adding additional units. This time limit may not exceed seven (7) years unless the declaration allows for the option of a single, additional seven (7) year extension. See ORC 5311.05 (C)(3)(a) and (b). After the time period specified in the initial declaration and any applicable extension which was made pursuant to the declaration has expired, no additional units may be added to the condominium.

II. COUNTY ENGINEER DEED APPROVALS: "NEW SURVEY REQUIRED NEXT TRANSFER"

Background: The County Engineer must approve the legal description(s) contained within any deed prior to any deed being presented for recording. Occasionally, the Engineer will approve the legal description, but require a new survey and legal description that land before a future transfer will be approved. Such deeds bear an Engineer's stamp reading "New survey required next transfer" or something similar.

Risk: Such a stamp/requirement may render title to the real property unmarketable which is one of the Covered Risks contained in a Loan Policy, Extended Coverage Residential Loan Policy, Owners Policy and Homeowners Policy.

Standard: Should your vesting deed bear this stamp or should the Engineer stamp a deed you are recording with this stamp, you need to add the following exception to Schedule B of any policy:

"The County Engineer requires that a new boundary line survey be performed and a new legal description filed with the Engineer prior to approving any future transfer of the Land. The Company will not pay loss or damage nor attorneys fees or costs due to said requirement."

III. Foreclosures: Mortgage Foreclosures, Board of Revision Property Tax Foreclosures and Federal Non-Judicial Foreclosures

Mortgage Foreclosures

Background: In Ohio, a mortgage is foreclosed by the filing of a civil complaint in a court of competent jurisdiction (Generally, "Common Pleas" court), obtaining an order of foreclosure, an order selling the real estate, a judicial sale and an order confirming that sale.

Risks: Mortgage foreclosures are governed by a multitude of statutes and certain common law rules of jurisprudence. The failure to follow these statutes and/or rules will result in a complete failure of title to vest in the purchaser at the judicial sale and/or will fail to eliminate liens on the foreclosed land.

Standard:

A. *Schwartzwald* Issues: Standing and Jurisdiction

In Ohio, foreclosures are judicial and dictated by the requirements of ORC Chapter 2329. Prior to filing a complaint to foreclose a mortgage, the foreclosing lender must be the holder of the promissory note and/or the record holder of the mortgage to invoke the jurisdiction of the common pleas court. When the note and/or mortgage is not held by the plaintiff when the foreclosure is filed ("*Schwartzwald*" issue), the foreclosure is void. See Federal Home Loan Mortgage Corp. v. Schwartzwald, 134 Ohio St.3rd 13 (2012).

The promissory note ("note") is held by the foreclosing lender ("plaintiff") when the note states that it is payable to the plaintiff or is properly assigned to the plaintiff. Notes are assigned by virtue of an indorsement by the owner of the note and there must be an unbroken chain of indorsements between the original payee of the note and the plaintiff.

A typical indorsement reads: "Pay to the order of [assignee's name], [signature of the assignor]."

Occasionally, a note is indorsed "en blanc" which is a legal term meaning that the note has become payable to the bearer or possessor of the note. Examples of an "en blanc" indorsement are:

1. "Pay to the order of bearer, [signature of assignor]." Or
2. "[signature of assignor]."
3. "Pay to the order of _____, [signature of assignor]."

The indorsement typically appears somewhere on the note itself, but may be on a separate piece of paper attached to the note. Such a piece of paper is called an allonge.

The note and any allonge must be attached to the complaint for foreclosure as an exhibit. If the note/allonge is not attached to the complaint, the reason it is not attached must be stated in the complaint. See Ohio Civil Rule 10 (D)(1).

The mortgage must either be granted to the plaintiff or be assigned of record to the plaintiff via an unbroken chain of assignments. If the note is not indorsed to the plaintiff or the mortgage is not assigned of record to the plaintiff, a *Schwartzwald* issue can be ignored when:

1. The note is not indorsed to plaintiff, but the mortgage is assigned of record to the plaintiff; or
2. There is an unbroken chain of assignments and any unrecorded assignments are attached as an exhibit to the complaint; or
3. The note is attached to the complaint and the note is indorsed to the plaintiff or indorsed en blanc; or
4. There is an unbroken chain of assignments, but the assignment to plaintiff is recorded after the complaint is filed, provided; however, that the assignment was executed prior to the filing of the complaint; or
5. The Entry confirming the judicial sale (Confirmation Entry) was docketed over a year ago.

If you have a *Schwartzwald* issue that does not fit within these five examples, add the following Exception:

"The Company does not insure against loss or damage nor will it pay attorneys fees or costs to defend you against claims that the Plaintiff in [insert case name, case number and county of the common pleas court the foreclosure was filed in] lacked standing to file said lawsuit or that said common pleas court lacked jurisdiction in said case."

B. Lis Pendens: ORC 2703.26 and 2703.27

Once the complaint is filed, all persons are on notice that title to the real estate is an issue before the court. Anyone who acquires an interest in the real estate takes that interest subject to the outcome of the foreclosure and does not have to be a party defendant in the foreclosure. So long as the foreclosure is completed (sale confirmed), such interests acquired while the foreclosure is pending do not attach to the real estate being foreclosed. However, if such interests attach if the foreclosure is dismissed. This is an important concept to remember when you are closing a short sale where the property is being foreclosed upon. See ORC 2703.26.

When real estate is located in more than one county, the foreclosure can be filed in either county. However, certified copy of the judgment obtained must be filed with the county recorder where the foreclosure was not filed to provide the lis pendens notice. See ORC 2703.27.

Please be aware that mechanics liens for work or materials provided prior to the lis pendens date (date complaint is filed) or relating back to a Notice of Commencement filed prior to the lis pendens date and filed for record after the lis pendens date are not barred ORC 2703.26 or 2703.27. See ORC 1311.21 (C).

C. Filing of Preliminary Judicial Report/Final Judicial Report and Judicial Commitments: ORC 2329.191

ORC 2329.191 (B) provides that when a complaint to foreclosure 1-3 family residential real estate is filed, a Preliminary Judicial Report (PJR) underwritten by a title insurance company authorized to do business in Ohio must be filed with the Court within fourteen days. Additionally, the PJR must have an Effective Date within 30 days of the date the complaint is filed.

The PJR must state the following:

1. A legal description of each parcel of real estate to be sold at the judicial sale;
2. The street address of the real estate or, if there is no street address, the name of the street or road upon which the real estate fronts together with the names of the streets or roads immediately to the north and south or east and west of the real estate;
3. The county treasurer's permanent parcel number or other tax identification number of the real estate;
4. The name of the owners of record of the real estate to be sold;
5. A reference to the volume and page or instrument number of the recording by which the owners acquired title to the real estate;
6. A description of the record title to the real estate; however, easements, restrictions, setback lines, declarations, conditions, covenants, reservations, and rights-of-way that were filed for record prior to the lien being foreclosed are not required to be included;
7. The name and address of each lienholder and the name and address of each lienholder's attorney, if any, as shown on the recorded lien of the lienholder.

Though not required by ORC 2329.191, the PJR must contain the following exception:

> "Subject to easements, restrictions, covenants, conditions, leases for oil, gas, coal and/or other minerals, and reservations of oil, gas, coal and/or other minerals of record."

Whenever a PJR is filed, a Final Judicial Report (FJR) must be filed prior to the judicial sale of residential real estate. The FJR updates title from the effective date of the PJR through the Lis Pendens date and must include a copy of the docket from the foreclosure case. See ORC 2329.191 (B).

ORC 2329.191 (C) requires that either a PJR or an owners policy commitment with judicial endorsement (judicial commitment) be filed within fourteen days of the filing of a foreclosure complaint when the real estate is 5 or more family residential or commercial real estate. The effective date of the PJR/Judicial Commitment must be within 30 days of the filing of the foreclosure complaint. If a PJR is filed, all other requirements of ORC 2329.191(B) must be followed.

If a commitment with judicial endorsement is filed, it must contain the following:

1. A legal description of each parcel of real estate to be sold at the judicial sale;
2. The street address of the real estate or, if there is no street address, the name of the street or road upon which the real estate fronts together with the names of the streets or roads immediately to the north and south or east and west of the real estate;
3. The county treasurer's permanent parcel number or other tax identification number of the real estate;
4. The name of the owners of record of the real estate to be sold;
5. A reference to the volume and page or instrument number of the recording by which the owners acquired title to the real estate;
6. A description of the record title to the real estate; however, easements, restrictions, setback lines, declarations, conditions, covenants, reservations, and rights-of-way that were filed for record prior to the lien being foreclosed are not required to be included;
7. The name and address of each lienholder and the name and address of each lienholder's attorney, if any, as shown on the recorded lien of the lienholder.

Although not required by ORC 2329.191, a Judicial Commitment must either contain specific exceptions for easements, conditions, covenants, restrictions and mineral interests found of record or contain a generic exception:

> "Subject to easements, restrictions, covenants, conditions, leases for oil, gas, coal and/or other minerals, and reservations of oil, gas, coal and/or other minerals of record."

Additionally, the Judicial Commitment must:

1. Include the amount of the successful bid at the judicial sale;
2. Show the purchaser at the judicial sale as the proposed insured; and
3. Shall not expire until thirty days after the recordation of the deed by the officer who makes the sale to that purchaser.

D. Service of the Complaint: Ohio Rule of Civil Procedure 4:

Summons must be served upon all parties having an interest in the real estate being foreclosed unless they have waived service pursuant to Ohio Civil Rule 4 (D). Ohio Civil Rule 4.1 (A) lists the only methods of service (other than Service by Publication under Ohio Civil Rule 4.4):

1. Service by clerk of courts:

2.

a. Methods of Service.

i. Service by United States certified or express mail.

Evidenced by return receipt signed by any person, service of any process shall be by United States certified or express mail unless otherwise permitted by these rules. The clerk shall deliver a copy of the process and complaint or other document to be served to the United States Postal Service for mailing at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk as certified or express mail return receipt requested, with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered.

ii. Service by commercial carrier service.

As an alternative to service under Civ.R. 4.1(A)(1)(a), the clerk may make service of any process by a commercial carrier service utilizing any form of delivery requiring a signed receipt. The clerk shall deliver a copy of the process and complaint or other document to be served to a commercial carrier service for delivery at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk, with instructions to the carrier to return a signed receipt showing to whom delivered, date of delivery, and address where delivered.

3. Personal service.

When the plaintiff files a written request with the clerk for personal service, service of process shall be made by that method.

When process issued from the Supreme Court, a court of appeals, a court of common pleas, or a county court is to be served personally under this division, the clerk of the court shall deliver the process and sufficient copies of the process and complaint, or other document to be served, to the sheriff of the county in which the party to be served resides or may be found.

In the alternative, process issuing from any of these courts may be delivered by the clerk to any person not less than eighteen years of age, who is not a party and who has been designated by order of the court to make personal service of process under this division . The person serving process shall locate the person to be served and shall tender a copy of the process and accompanying documents to the person to be served.

When the copy of the process has been served, the person serving process shall endorse that fact on the process and return it to the clerk, who shall make the appropriate entry on the appearance docket. When the person serving process is unable to serve a copy of the process within twenty-eight days, the person shall endorse that fact and the reasons therefor on the process and return the process and copies to the clerk who shall make the appropriate entry on the appearance docket. In the event of failure of service, the clerk shall follow the notification procedure set forth in division (A)(2) of this rule. Failure to make service within the twenty-eight day period and failure to make proof of service do not affect the validity of the service.

4. Residence service.

When the plaintiff files a written request with the clerk for residence service, service of process shall be made by that method. When process is to be served under this division, deliver the process and sufficient copies of the process and complaint, or other document to be served, to the sheriff of the county in which the party to be served resides or may be found.

When process issues from the municipal court, delivery shall be to the bailiff of the court for service on all defendants who reside or may be found within the county or counties in which that court has territorial jurisdiction and to the sheriff of any other county in this state for service upon a defendant who resides in or may be found in that county.

In the alternative, process may be delivered by the clerk to any person not less than eighteen years of age, who is not a party and who has been designated by order of the court to make residence service of process under this division.

The person serving process shall effect service by leaving a copy of the process and the complaint, or other document to be served, at the usual place of residence of the person to be served with some person of suitable age and discretion then residing therein. When the copy of the process has been served, the person serving process shall endorse that fact on the process and return it to the clerk, who shall make the appropriate entry on the appearance docket.

E. Who May Be Served: Ohio Rule of Civil Procedure 4.2

Ohio Civil Rule 4.2 lists who may be served with summons when any method other than publication is used. Service on a party other than by serving pursuant to this rule will render service void unless that parties files an answer or otherwise appears in the case and does not challenge service.
Summons may be served:

1. Upon an individual, other than a person under sixteen years of age or an incompetent person, by serving the individual;
2. Upon a person under sixteen years of age by serving either the person’s guardian or any one of the following persons with whom the person to be served lives or resides: father, mother, or the individual having the care of the person; or by serving the person if the person neither has a guardian nor lives or resides with a parent or a person having his or her care;
3. Upon an incompetent person by serving either the incompetent's guardian or the person designated in division (E) of this rule, but if no guardian has been appointed and the incompetent is not under confinement or commitment, by serving the incompetent;
4. Upon an individual confined to a penal institution of this state or of a subdivision of this state by serving the individual, except that when the individual to be served is a person under sixteen years of age, the provisions of division (B) of this rule shall be applicable;
5. Upon an incompetent person who is confined in any institution for the mentally ill or mentally deficient or committed by order of court to the custody of some other institution or person by serving the superintendent or similar official of the institution to which the incompetent is confined or committed or the person to whose custody the incompetent is committed;
6. Upon a corporation either domestic or foreign: by serving the agent authorized by appointment or by law to receive service of process; or by serving the corporation at any of its usual places of business by a method authorized under Civ.R. 4.1(A)(1);or by serving an officer or a managing or general agent of the corporation;

7. Upon a limited liability company by serving the agent authorized by appointment or by law to receive service of process; or by serving the limited liability company at any of its usual places of business by a method authorized under Civ.R. 4.1(A)(1); or by serving a manager or member;
8. Upon a partnership, a limited partnership, or a limited partnership association by serving the entity at any of its usual places of business by a method authorized under Civ.R. 4.1(A)(1) or by serving a partner, limited partner, manager, or member;
9. Upon an unincorporated association by serving it in its entity name at any of its usual places of business by a method authorized under Civ.R. 4.1(A)(1); or by serving an officer of the unincorporated association;
10. Upon a professional association by serving the association in its corporate name at the place where the corporate offices are maintained by a method authorized under Civ.R. 4.1(A)(1); or by serving a shareholder; Upon this state or any one of its departments, offices and institutions as defined in division (C) of section 121.01 of the Revised Code, by serving the officer responsible for the administration of the department, office or institution or by serving the attorney general of this state;
11. Upon a county or upon any of its offices, agencies, districts, departments, institutions or administrative units, by serving the officer responsible for the administration of the office, agency, district, department, institution or unit or by serving the prosecuting attorney of the county;
12. Upon a township by serving one or more of the township trustees or the township clerk or by serving the prosecuting attorney of the county in which the township is located, unless the township is organized under Chapter 504 of the Revised Code, in which case service may be made upon the township law director;
13. Upon a municipal corporation or upon any of its offices, departments, agencies, authorities, institutions or administrative units by serving the officer responsible for the administration of the office, department, agency, authority, institution or unit or by serving the city solicitor or comparable legal officer;
14. Upon any governmental entity not mentioned above by serving the person, officer, group or body responsible for the administration of that entity or by serving the appropriate legal officer, if any, representing the entity. Service upon any person who is a member of the "group" or "body" responsible for the administration of the entity shall be sufficient.

F. Process: Service by Publication: Ohio Rule of Civil Procedure 4.4

When the residence of a defendant is unknown, service may be made by publication pursuant to Civil Rule 4.4 when authorized by law. Before service can be made by publication, the party seeking service by publication or their attorney must file an affidavit with the court stating:

1. That service of summons cannot be made because the residence of the defendant is unknown; and
2. List all of the efforts that have been made to ascertain the residence of the defendant (It's not enough to generically state that the affiant has made efforts to locate the defendant. It has to state the specific efforts made to find the defendant, i.e. skip-trace service, internet or paper white pages, etc.); and
3. That the residence of the defendant cannot be ascertained with reasonable diligence.

Failure to state these three things will result in invalid service by publication.

Once the affidavit is filed, the Clerk will cause an advertisement to be made in a newspaper of general circulation in the county in which the complaint is filed. If there is no such newspaper in the county, the advertisement will be made in a newspaper published in an adjoining county.

The advertisement must contain the following:

1. Name and address of the court;
2. The case number;
3. The names of the first plaintiff and first defendant listed in the complaint;
4. The name and last known address, if any, of the person(s) being service by publication;
5. A summary statement of the object of the complaint and relief demanded (In a foreclosure, this statement must list the legal description of the property);
6. State that the person(s) being served have to file an answer within 28 days after publication is made.

In a foreclosure, the advertisement must appear in the newspaper once per week for three weeks. Service is made when the last publication is made.

After the last publication is made, the publisher of the newspaper is required to file an affidavit with the court. This affidavit should recite the dates of publication and must contain a copy of the advertisement. Failure to file the affidavit and copy of the advertisement renders service by publication void.

G. Process: Limits; Amendment; Service Refused; Service Unclaimed: Ohio Rule of Civil Procedure 4.6

In the event a defendant refuses to accept service sent via certified/express mail or commercial carrier, the party seeking service may make a written request that service be sent via ordinary mail. The clerk of court will complete and file a certificate of mailing to evidence that service was sent via ordinary mail. Service is complete upon the filing of the certificate of mailing. It is important to remember that a failure to claim certified/express mail or service sent via commercial carrier is not a refusal of service.

In the event service sent vial certified/express mail or commercial carrier is returned to the clerk and endorsed unclaimed, the party seeking service may make a written request to the clerk for service to be sent ordinary mail. The clerk will file a certificate of mailing when the summons is placed in the mail. Service is deemed completed when the certificate is filed provided the ordinary mail is not returned by the Post Office as undeliverable.

H. **Process: Order of Foreclosure (Writ of Execution): ORC 2329.09**

Once service is completed on all parties with an interest in the property, the Court will determine whether the terms and conditions of the promissory note and mortgage have been breached. Should the Court find the terms/conditions are breached, the Court will grant an “Order of Foreclosure” which is really a “Writ of Execution” pursuant to ORC 2329.09.

This order will direct the Sheriff to levy (Seize and sell) on the real estate described in the mortgage. When the property to be sold is 1-4 family residential real estate, the Court cannot make such an order until a Final Judicial Report has been filed pursuant to ORC 2329.191 (B).

I. **Judicial Sale**

1. Appraisal: ORC 2329.17

Prior to selling real property pursuant to ORC 2329.09, the Sheriff (or other court official) must have the land appraised by three disinterested persons who own real estate in the county. Each of these persons will return an appraisal of the real property which is then averaged to reach an appraised amount. This appraisal is then filed with the clerk pursuant to ORC 2329.18 and the Sheriff will then advertise the property for sale.

2. Minimum Bid: ORC 2329.20

A foreclosure brought by a first lienholder cannot be sold for less than two-thirds of the appraised value filed with the clerk.

A foreclosure by a junior lienholder where the rights of prior lienholders are unaffected (sale made subject to prior liens) may be sold for two-thirds of the difference between the appraised value and the amount owed to prior lienholders when so ordered by the Court (two-thirds of the equity remaining after prior liens are paid).

3. Location of Sale and Prohibited Buyers: ORC 2329.39

The sale must take place in the county where the real estate is located and must be made at the courthouse unless the Court orders a different location. The Sheriff and Appraisers are prohibited from buying the property.

4. Advertisements of Sale: ORC 2329.23 and 2329.26

a. Notices of sale of lands: ORC 2329.23

When the real property being sold is located in a municipal corporation, all advertisements and notices which must be made pursuant to statute must, in addition to a description of the lands/tenements being sold, contain the street number of the buildings or lots. If there is no street number, the advertisement/notice must contain the name of the streets/roads immediately north, south, east and west of the lands that cross or intersect the street/road the real property being sold sits on. If applicable, the advertisement/notice shall contain the website address of the Sheriff to allow a buyer to obtain a complete legal description of the lands/tenements being sold.

b. Notice of date, time and place of sale: ORC 2329.26

Before the real property may be sold, the judgment creditor seeking the sale shall give written notice of the date, time and place of the sale to the debtor and all other persons having an interest in the land who are not in default of answer.

At least seven days prior to the date of sale, a copy of this notice must be filed with the clerk with proof of service endorsed pursuant to Ohio Civil Rule of Procedure 5 (D).
The Sheriff must advertise the sale in a newspaper of general circulation for at least three weeks before the day of the sale. This advertisement must give the date, time and place of the sale as well as a description of the lands and tenements being sold.

c. Return of Sale: ORC 2329.26

Once the property is sold, the Sheriff indorses the Order of Foreclosure to show:
1. The date, time and place the property was sold;
2. The name and address of the purchaser; and
3. The sales price

The purchase has 30 days to pay the full purchase price pursuant to ORC 2329.31 (B).

5. Confirmation of Sale, Right of Redemption and the Sheriff's Deed

a. Confirmation of Sale: ORC 2329.31

Once the Sheriff indorses the Order of Foreclosure, the Court ordering the sale must file an order confirming the sale and distributing the proceeds within 30 day. The Court is required to review the proceedings to ensure that ORC Sections 2329.01 to 2329.61 were followed.

The Court may issue a stay of confirmation to give a debtor time to redeem the property or for any other appropriate reason. If the confirmation is stayed, the confirmation must be filed within 30 days after the stay is lifted.

6. Redemption: ORC 2329.33

The debtor may redeem the property at any time prior to the filing of the confirmation by paying the clerk the amount of the judgment or decree upon which such lands were sold, with all costs, including poundage, and interest at the rate of eight per cent per annum on the purchase money from the day of sale to the time of such deposit, except where the judgment creditor is the purchaser, the interest at such rate on the excess above his claim.

If redeemed the Court will vacate the sale and pay the party for whom the property was sold, the Sheriff (costs of sale) and court costs. Any interest collected is paid to the purchaser at the judicial sale.

7. Deed of Sheriff or Master: ORC 2329.36

Within 7 days of the sale being confirmed, the attorney representing the party who had the property sold must deliver a deed conveying title to the purchaser. The deed must contain the following:

1. Name of the parties to the judgment;
2. Names of the owners of the property sold
3. Reference to the volume/page or instrument number of the next preceding recording instruments by or through which the owners of the property sold claim ownership;
4. Date and amount of the judgment;
5. The substance of the execution or order selling the property;
6. The substance of the return of sale (name and address of purchaser and purchase price);
7. The substance of the confirmation;

The deed is executed and recorded by the Sheriff within 14 days of the date where the purchaser pays the purchase price in full pursuant to ORC 2329.36 (C).

Once filed, the deed is primae facie evidence that the sale was conducted pursuant to ORC 2329.01 to 2329.61 and it vests all interest of the prior owner in the grantee. See ORC 2329.37.

8. Property Which Fails to Sell for Lack of Bidders

When property fails to sell after the initial appraisal and sale, the party seeking the sale may make a motion for the property to be re-appraised and the sale process repeated with the new appraisal. If the property fails to sell after two appraisals, the court may set an amount for which it may be sold without appraisal. See ORC 2329.51.

Board of Revision Property Tax Foreclosures

Background: The Ohio Revised Code allows the Board of Revision (Tax Appeals Board) to hear tax foreclosures in certain circumstances. This jurisdiction is not exclusive and the Court of Common Pleas has concurrent jurisdiction over tax foreclosures.

Risk: The Board of Revision consists of the County Auditor, the County Treasurer and a representative from the Board of County Commissioners. Since the Auditor is the plaintiff in any tax foreclosure, we have a situation where the plaintiff is one of the judges with the other two judges being the county officer to whom taxes are paid (Treasurer) and the party who allocates the spending of tax dollars collected (County Commissioners).

Standard: No tax foreclosure heard by the Board of Revision will be insured.

Federal Non-Judicial Foreclosures

Background: The United States Code provides two methods in which mortgages may be foreclosed through a non-judicial procedure when the Secretary of HUD is the record holder of the mortgage:

1. Multi-Family Non-Judicial Foreclosures; and
2. Single Family Non-Judicial Foreclosures

The process is similar under both statutes.

Risk: The risk is similar to that in IRS Distraint Sales. Both the Single and Multi-family statutes provide that the property is sold free and clear of junior liens. As a consequence, junior lien holders are rarely given notice of the non-judicial sale and the buyer takes subject to the claims of junior lien holders.

Standard: Underwriting approval is required to insure property that was subject to a Federal Non-Judicial Foreclosure. You must ensure that all requirements of the appropriate statute have been met and that junior lienholders were given notice.

IV. IRS Distraint Sales

Background: The Internal Revenue has two ways to sell real estate in order to satisfy the tax obligations owed by the real estate's owner. The IRS may foreclose a Federal Tax Lien by filing a foreclosure suit in Federal District Court or may sell the property subject to a Federal Tax Lien in a non-judicial procedure known as a distraint sale.

Risk: Distraint Sales are authorized by 26 USC 6331; however, such a sale sells only the taxpayer's interest in the real estate. A buyer at a distraint sale takes title subject to liens perfected prior to the Federal Tax Lien (Senior liens), dower claims of the taxpayer's spouse, if any, the interests of co-owners, real estate taxes, restrictions, easements and in many cases, liens which attached subsequent to the Federal Tax Lien (Junior liens).

Standard: As a general rule, the IRS rarely follows its own manual detailing the procedures for conducting a distraint sale and the examination required to underwrite such a sale is rarely worth the time and expense since most distraint sales cannot be insured.

The key to insuring a distraint sale is ensuring that there are no senior liens, no outstanding dower issues, no co-owners and identifying junior lienholders. After this determination, you must make an examination of the IRS' records of the distraint sale. This record is known as the "Record of Seizure and Sale of Real Estate", but is commonly called the Record 21.

The Record 21 consists of two part. Part One is for the use of the IRS and Part Two is for the use of the public. However, IRS Regulations state that the full Record 21 will be made available to the purchaser or a title insurer. A full copy of the Record 21 must be obtained for your file.

To insure title to real estate that was sold at a distraint sale, you must ask the following:

1. Was a Notice of Federal Tax Lien filed against the taxpayer whose real estate was sold by the IRS? No Federal Tax Lien, no distraint sale.

2. Did the IRS give the affected taxpayer a notice and demand for payment of the delinquent tax? If so, did the IRS levy (sell) on the real estate within 10 days after this notice? Prior to proceeding to a distraint sale, the IRS must give the affected taxpayer a notice and demand for payment. The IRS cannot sell the property within 10 days of this notice unless the IRS made a finding that collection of the tax was in jeopardy and the notice and demand was for immediate payment of the tax. See 26 USC 6331(a).

3. Did the IRS give the taxpayer/owner a notice of "seizure", in writing, specifying the amount due and demanded as well as a description of the real estate seized? If so, was the "seizure" conducted within 6 months of the date of assessment of the tax?

   The seizure notice must be either personally delivered to the taxpayer/owner or left at their usual place of abode or business provided it is located within the IRS District where the seizure was made. When the residence/business is located outside the IRS District, the IRS may send the seizure notice to the last known address by regular and certified mail. No seizure notice, no sale. Remember that the seizure date must be within 6 months of the date of assessment. (See Column d on the Notice of Federal Tax Lien for the assessment date) See 26 USC 6502.

4. Did the IRS give the taxpayer/owner notice of the sale including the time, place, manner and conditions of the sale? If the taxpayer/owner resides or has their business in the same IRS District where the seizure was made, IRS regulations (Internal Revenue Manual 5.10.4.11(1)) requires personal delivery of the Notice of Sale. If the taxpayer/owner cannot be readily located or does not reside or have a place of business in the IRS District where the seizure was made, the notice of sale will be sent via certified and regular mail.

   However, if the address is known, can be located and is within the IRS District were the property was served, the Internal Revenue Manual requires that personal contact with the taxpayer must be attempted, and that the notice be left on the door of the residence/business ("door knob" service) when personal delivery cannot be made. Service via certified/regular mail may be attempted in this situation, but are insufficient without "door knob" service. See Internal Revenue Manual 5.10.4.11(2).

5. Did the IRS publish the notice of sale in a newspaper published or generally circulated within the county where the real property was made? If no such newspaper exists, was the notice of sale posted at the nearest post office and two other public places located within that county? The property to be sold is not considered a public place, but a public library or courthouse is. If not, no sale.

6. Did the IRS notify other lienholders and persons with an interest in the real estate of the notice of sale? Even though the distraint sale does not sell the property free and clear of senior liens, dower, and co-owners, the IRS is required to give notice of the sale via regular mail to all parties with a record interest in the real estate: joint-owners, senior lienholders, junior lienholders, transferees, nominees and judgment creditors regardless of whether they have perfected a lien. See Internal Revenue Manual 5.17.3.6.1.2(3) and 5.10.4.11(5).

   In practice, the IRS rarely gives constitutionally adequate notice to junior lienholders! Why? Under 26 USC 6339(c), the issuance of a deed to the purchaser of a distraint sale discharges liens that are junior to the Federal Tax Lien. As a consequence, the IRS often takes the position that the publication/posting of the sale notice is sufficient to notify junior lienholders and eliminate their interests.

   However, see Mennonite Board of Missions v. Adams, 462 US 103. The US Supreme Court held that notice by publication of a tax foreclosure as to a mortgage holder failed to meet the requirements of due process guaranteed by the 5th Amendment to the US Constitution when the address of the mortgagee could be ascertained by "reasonably diligent efforts".

   Finally, the Sixth Circuit Court of Appeals has held that publication/posting of the notice of sale is constitutionally inadequate to protect the interests of junior lien holders in a distraint sale. See Verba vs. Ohio Casualty Insurance Co., 851 F.2d 811 (1988). Also, see Internal Revenue Manual 5.17.3.6.1.2(3). This portion of the Internal Revenue Manual requires the notice of sale to be served on all parties with an interest in the real estate via regular mail and provides IRS personnel with a citation to Verba vs. Ohio Casualty.

   The Record 21 will contain a section specifying who was given notice of the sale and how notice was provided. If it does not, then further inquiry is necessary. Often, the IRS will attach a Form 2434B to the Record 21 listing the encumbrances against the property. The Form 2434B should not be relied upon and an examination of the public records should be made in order to ensure that all parties with an interest in the land were given notice.

An exception(s) should be taken for lienholders and others who were not given proper notice of the sale. Also, remember that since this is an administrative proceeding, lis pendens does not apply.

7. When was the sale? The actual sale must take place not less than 10 days and no more than 40 days from the time of giving public notice of the sale (publication/posting). The sale must take place in the county where the property is located unless the IRS specifically ordered otherwise prior to the sale.

8. What was the sales price? The actual sales price must meet or exceed the minimum bid determined by the IRS prior to the sale. This information will be found on the Record 21.

9. How was the sale conducted? The sale must be conducted either by public auction or by public sale under sealed bids.

10. Did the taxpayer redeem? The taxpayer has 180 days to redeem the property. If less than 180 days have passed since the sale, an exception must be made for this right of redemption.

11. What's in the deed from the IRS? The deed from the IRS is supposed to be issued after the expiration of the redemption period. It must specify a description of the property, the name of the taxpayer whose real estate was sold, the name of the purchaser and the price paid.

    Where's the taxpayer now? The taxpayer must not occupy the property or exercise dominion and control over the property after the IRS issues the deed. If the taxpayer continues to occupy the property or the buyer at the distraint sale is a relative or someone who is "just trying to help" the taxpayer out, there are significant creditor's rights issues which may affect the property. These include, but are not limited to the reattachment of all liens against the property.

    The Internal Revenue Manual is available online at www.irs.gov/irm

V. Marital Rights (Dower)

Background: Ohio is one of four traditional dower states and non-owning spouses are vested with an inchoate right of dower in all real property owned by their spouse.

Risk: The value of Dower is equal to a life estate in an undivided third interest of the land and constitutes an interest that must be dealt with whenever title is conveyed or a mortgage granted. It must be released by the non-owning spouse on all deeds and mortgages. All deeds and mortgages must recite the marital status of the grantor(s). The failure to recite marital status in a deed is considered to be a title defect for fifty years. See Ohio Title Standard 3.6, Problem A.

Standard: Under Ohio law, dower may not be conveyed, but it may be released in favor of a grantee in a deed or mortgage. When the chain of title reveals that the grantor previously had a spouse who did not release dower, an objection to title must be made unless the failure is adequately explained by the record. See Ohio Title Standard 3.6, Problem B.

The deed or mortgage does not need to specifically recite that the non-owner spouse is executing the deed/mortgage to release dower so long as said spouse executes and acknowledges their execution before a notary public. See RC 5301.071 (A).

A divorce or dissolution of marriage terminates all dower rights. A "legal separation" (Must be decreed in an order from a court of competent jurisdiction) terminates dower unless the decree of legal separation specifically recites that the parties retain dower.

However, see Ohio Title Standard 3.6, Problem C which indicates that the records of a divorce, dissolution of marriage or legal separation should be available for examination in the county where the land is located.

VI. Mechanics Liens

Background: The recent economic downturn has brought the risks inherent in providing mechanics lien coverage to the forefront of the underwriting process.

Risk: If a Notice of Commencement is not filed, a mechanics lien relates back in time and becomes a lien from the instant the mechanics lien claimant begins work, including delivery of materials or equipment. When a Notice of Commencement is filed, a filed mechanics lien is a lien as of the date the Notice of Commencement is filed. Consequently, mechanics liens relate back in time and may have priority over the lien of an insured mortgage even though no lien was filed when the mortgage was recorded.

Standard: Mechanics Lien coverage constitutes an ultra-hazardous risk.

For transactions where no construction is contemplated, you must ensure that there has been no work nor materials/equipment delivered to the property, including anything placed on the street or road near the property within the following time periods:

1. 1-4 Family Residential Real Estate: 60 days prior to recording the deed and/or mortgage;
2. All other real estate: 75 days prior to recording the deed and/or mortgage.

When construction is contemplated, you must ensure that there has been no pre-start of construction, including delivery of materials/equipment, when you close/record/disburse funds.

If you encounter a pre-start and you are asked to delete the mechanics lien exception or provide affirmative coverage for mechanics liens, contact Underwriting for a risk assessment.

If you encounter a filed Notice of Commencement, you may delete the Notice of Commencement when:

1. The Notice of Commencement is more than six years old and does not specify a longer period of time for the duration of the project;
2. All construction contemplated for the planned improvements have been completed for at least 60 days or 75 days (60 days for 1-4 family and 75 days for all other real estate and an affidavit stating the following is recorded:
    a. That all work on the improvement contemplated in the Notice of Commencement filed [insert recording information] was completed as of [insert date of last work including any “punch list” items]; and
    b. All contractors, subcontractors and suppliers have been paid in full.

If you are not able to delete a Notice of Commencement, contact Underwriting for a risk assessment.

To assess a mechanics lien risk, Underwriting will need the following:

1. Over-limit Approval Sheet
2. Copy of your commitment
3. Copy of Notice of Commencement, if any
4. Copy of construction agreement and any change orders
5. Percentage of the improvement that has been completed
6. Affidavit of the General Contractor or person serving as the General Contractor listing the name and contact information for all subs/supplies that have done work or provided materials on the project to date.
7. Lien waivers from all persons listed on the General Contractor’s affidavit. If the lien waivers is conditioned on payment, a copy of the cancelled check must be provided.
8. Financial statements: net worth at a minimum and cash flow, if available.

9. Percentage of borrowed funds being used to complete the project.

VII. Minerals

Background: In Ohio, minerals comprise nearly any known substance that can be extracted from the surface or subsurface of the land and sold. The most common minerals found in Ohio are: coal, oil, natural gas, iron ore and limestone. Coal and iron ore were mined prior to Ohio statehood in 1803. The first oil well drilled in North America (Thorla McKee Well) was drilled in 1814 near Caldwell, Ohio; however, oil did not become commercially valuable until the 1850s.

Risk: A mineral search should only be undertaken by the most experienced examiners. A working knowledge of how records have been kept historically is the key to a successful mineral search. Additionally, many of the older records required to adequately examine a mineral title may have been lost through fire, flood, neglect or are no longer stored at the offices of the Recorder and Clerk of Courts. Some records may even be stored at the Ohio Historical Society in Columbus, Ohio. Due to the complexity and inadequate records, insuring over mineral interests constitutes an extra-hazardous risk.

Standard: Take exception to any mineral lease, reservation or separate mineral chain of title found during your exam. Additionally, a general exception for mineral interests will be taken both owners and loan policies.

To delete a specific mineral exception, you must ensure that the procedures of ORC Sections 5301.332 or ORC Section 5301.56 have been followed. ORC Section 5301.332 involves the elimination of oil/gas leases affecting title by following a statutory procedure of serving notice on the holder of the lease, recording an affidavit and waiting for the lease holder to file a preserving affidavit.

ORC Section 5301.332 must be strictly followed. Failure to comply with this code section will result in a lease that still encumbers title. Care should be taken to ensure the following:

1. If the lease encumbers more land than the land being examined, you must ensure that there is no production of oil/gas on any portion of the land subject to the lease. The Ohio Department of Natural Resources is the current governmental office responsible for issuing drilling permits and must be consulted. For older leases, the Township Clerk was the governmental office who issued drilling permits and not all Township issued drilling permits will be found at ODNR.
2. A condition of the lease must be broken in order for the lease to be forfeited. If the condition which was broken is non-payment of royalties or delay rentals, care must be exercised when title to the land under examination is not held by the original lessor. Most oil/gas leases require that the lessee be given notice of a change in ownership so that the lessee knows who is entitled to payment of the royalties/delay rentals. Breach of this condition by the new owner will prevent the lease from being forfeited.
3. ORC 5301.332 contains specific timetables for filing the affidavit and preserving affidavit. These time tables must be strictly adhered to.
4. ORC 5301.332 requires that notice be sent certified mail. Publication may be made only when certified mail has been attempted and fails.

ORC Section 5301.56 deals with re-vesting mineral reservations in the surface owner. The requirements of ORC Section 5301.56 are similar to ORC Section 5301.332 and require that notice be given to the holder of the mineral interest, recording an affidavit and waiting for the holder to file a preserving affidavit and must be strictly followed.

Please note ORC Section 5301.56 (B). The following mineral interests cannot be abandoned to the surface owner:

1. The mineral interest is in coal, or in mining or other rights pertinent to or exercisable in connection with an interest in coal, as described in division (E) of section 5301.53

of the Revised Code. However, if a mineral interest includes both coal and other minerals that are not coal, the mineral interests that are not in coal may be deemed abandoned and vest in the owner of the surface of the lands subject to the interest.

2. The mineral interest is held by the United States, this state, or any political subdivision, body politic, or agency of the United States or this state, as described in division (G) of section 5301.53 of the Revised Code.
3. Within the twenty years immediately preceding the date on which notice is served or published under division (E) of this section, one or more of the following has occurred:
    a. The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located.
    b. There has been actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease to which the mineral interest is subject, from a mine a portion of which is located beneath the lands, or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations, under sections 1509.26 to 1509.28 of the Revised Code, in which the mineral interest is participating, provided that the instrument or order creating or providing for the pooling or unitization of oil or gas interests has been filed or recorded in the office of the county recorder of the county in which the lands that are subject to the pooling or unitization are located.
    c. The mineral interest has been used in underground gas storage operations by the holder.
    d. A drilling or mining permit has been issued to the holder, provided that an affidavit that states the name of the permit holder, the permit number, the type of permit, and a legal description of the lands affected by the permit has been filed or recorded, in accordance with section 5301.252 of the Revised Code, in the office of the county recorder of the county in which the lands are located.
    e. A claim to preserve the mineral interest has been filed in accordance with division (C) of this section.
    f. In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the county auditor's tax list and the county treasurer's duplicate tax list in the county in which the lands are located.

Deletion of the general exception for minerals requires Underwriting approval and an extended title search. For land located in the coal mining regions of Ohio, you must search back to the Federal Land Patent. For all other land, the following applies:

For land located in the traditional oil/gas regions of Ohio (Eastern Ohio, meaning east of Columbus and Northwest Ohio, meaning north and west of Columbus), you must search back to a warranty deed for value recorded prior to 1850. For the southwest portion of the state, a search back to a warranty deed for value recorded prior to 1950 is sufficient.

It is important to note that such searches are expensive and time consuming. An affordable alternative to deletion of the exception may prove to be the issuance of the ALTA 9 and 35 series of endorsements to provide affirmative coverage for the extraction of minerals.

VIII. Property Taxes: Current Agricultural Use Valuation or CAUV

Background: Land used for agricultural purposes may be placed on the “Agricultural Land Tax List” maintained by the County Auditor and are taxed on a reduced/deferred property tax rate known as “Current Agricultural Use Value” or CAUV.

Risk: Whenever CAUV property or any portion thereof is no longer used for agriculture, recapture of a portion of the deferred taxes occurs and that portion is added to the current property taxes. See ORC 5713.34.

Standard: Add the following exception whenever land is taxed at CAUV rates:

"The Land or a portion thereof appears on the Agricultural Land Tax List and the Company will not pay loss or damage nor attorneys fees or costs due to any recoupment of real estate taxes pursuant to ORC 5713.34 should all or a portion of the land be used for any purpose other than agriculture."

IX. Receiverships

Background: In recent years, lienholders have used the appointment of a receiver and a sale by the receiver to circumvent the execution requirements of ORC Chapter 2329. Despite some case law reciting that such a receiver's sale does not have to comply with RC Chapter 2329, such sales constitute an extra-hazardous risk.

Risk: The risk is one that a sale by a receiver could be set aside on appeal or by a post-judgment motion.

Standard: Sales by a receiver must be approved by Underwriting unless all parties (including parties who have failed to make an appearance previously) with an interest in the real estate consent to the receiver's sale.

Only the following receiver sales will be approved unless all parties consent:

1. Receiver must be appointed in a foreclosure case; and
2. There must be an articulated reason for the appointment of the receiver. An allegation that the mortgage allows for the appointment of a receiver is not a sufficient reason absent other facts.
3. All parties with an interest in the real estate, including parties who have failed to enter an appearance and/or are in default must be served with a copy of the motion for sale and any entry approving the sale. If the sale is to be a public sale (Auction), notice of the time and place of the sale must be given.
4. The minimum sales price must be at least two-thirds the fair market value of the real estate. The Company will accept an appraisal and/or the tax value of the property as the fair market value. If the sales price is less than this figure, the Company may agree to insure the property on a case by case basis depending on the facts and circumstances surrounding the sale.
5. The sale must be confirmed and the receiver discharged.
6. The foreclosure case may not be dismissed. It must be closed.

X. Torrens Property (aka Registered Land)

Background: Registered Land is the Ohio Revised Code term for what is commonly known as the Torrens System. The Torrens System is based on the documentation used to transfer title to ships. It was first applied to real property in Australia.

Risk: Registered Land is codified in ORC Chapters 5309 and 5310. Deeds, mortgages, easements, etc. affecting Registered Land must comply with these statutes in order to be recorded. Fortunately, the use of Registered Land is not widespread outside of Hamilton County, Ohio.

Standard: The basis of Registered Land is the Certificate of Title maintained by the county recorder. The Certificate of Title lists the owner of the Registered Land and such an owner, provided they did not take title via fraud, takes free and clear of all matters affecting title to the Registered Land listed on the Certificate of Title except for:

A. Liens, claims, or rights arising or existing under the laws or constitution of the United States that the statutes of this state cannot require to appear of record in the county recorder's office;
B. Taxes and assessments levied by the United States, this state, or any taxing district of this state;
C. Any highway, public way, or private way laid out or acquired by law or otherwise, unless the certificate of title states that the nonexistence of the way or the boundaries of the way, if any boundaries exist, have been determined by the court;
D. Any lease for a term not exceeding three years, when there is actual possession under the lease;
E. Right of appeal within thirty days after decree of registration;
F. If there are easements or other rights appurtenant to a parcel of registered land that are not subject to section 5309.281 of the Revised Code and that for any reason have not been registered, those easements or rights shall remain appurtenant notwithstanding the failure to register them and shall be held to pass with the land.

See ORC 5309.28.

When land is registered, the initial owner listed on the Certificate of Title is issued a duplicate Certificate of Title called the “Owner’s Duplicate Certificate of Title”. Thereafter, whenever any deed, easement, restriction, power of attorney, mortgage, certain leases, etc. are recorded, the Owner’s Duplicate Certificate of Title must be surrendered to the recorder along with the document to be recorded which affects the Registered Land. If the Duplicate is lost, the owner must submit a “lost affidavit” to the recorder in lieu of the Duplicate.

Should you encounter Registered Land, please add the following Requirement to Schedule B I:

“The Land is Registered Land and the Owners Duplicate Certificate of Title or an affidavit of lost Owners Duplicate Certificate of Title must be submitted to the _____ County, Recorder.”

Upon receipt of Duplicate/affidavit and the documents to be recorded, the recorder will issue a new Owners Duplicate Certificate of Title reflecting the newly recorded documents. See ORC 5309.40.

In the event Registered Land is to be owned by a trustee, the deed or another written instrument filed with the deed conveying title to the trustee must recite the following:

A. A full and clear statement defining the trusts, conditions, and limitations, and the powers and duties of the trustee; and
B. State the trustee’s name, residence, and post-office address; and
C. State the name, residence, and post-office address of each beneficiary.

When such deed or other instrument is filed with the recorder, accompanied with the Owner's Duplicate Certificate of Title, if the recorder finds that the grantor had the right to make such grant, and the trustee had the right to receive it, and the instrument conforms to sections 5309.02 to 5310.21, inclusive, of the Revised Code, the shall register such instrument as other instruments are registered and issue a new Owner’s Duplicate. See ORC 5309.69

Please note that the recorder may decline to make a finding and issue a new Owner’s Duplicate unless the deed/instrument has been approved by a “Registered Land Examiner. A Registered Land Examiner is an attorney appointed by the Common Pleas Court after determining that they have the skill, knowledge and experience to examine real estate titles and the posting of a bond. See ORC 5309.04

After title to registered land is vested in the trustee, no transfer, charge, or other dealing with the land, estate or interest, shall be registered, unless the opinion of the probate court or the court of common pleas, certified to the recorder, is first obtained, that such transfer or dealing is in accordance with the true intent and meaning of the trust. If the court has doubt as to the true intent and meaning of the trust, the court shall order an issue to be made up and all parties in interest notified, and the court shall hear and determine the matter and make an order in accordance with law. See ORC 5309.69.

Should you encounter any other matter with Registered Land, contact Underwriting.

XI. Trusts

Background: Ohio law permits a trustee of a trust to hold title to real estate; however, there are certain requirements that must be followed.

Risk: Failure to follow the Standard below may result in a complete failure of title or unmarketability of title.

Standard: When title to land is vested in the trustee of a declared trust (A, Trustee of the A Trust) or the name of the trust itself (A Trust), a memorandum or affidavit of trust must be recorded to memorialize the authority of the trustee to convey title or mortgage the property in order for title to be marketable (See Ohio Title Standard 3.18) or to vest title in the trust (See ORC 5301.071).

A memorandum of trust is preferred and must contain all the information set forth in ORC 5301.255. The memorandum of trust must be executed by the trustee and acknowledged by the trustee before a notary public and be recorded. It must contain the following information:

1. The name and address of the trustee of the trust;
2. The date of execution of the trust;
3. The powers specified in the trust relative to the acquisition, sale, or encumbering of real property by the trustee or the conveyance of real property by the trustee, and any restrictions upon those powers.

A memorandum of trust may set forth the substance or actual text of provisions of the trust.

If you have a transaction where a trustee or a trust is in title, you must obtain a “certification of trust” for your file in addition to recording a memorandum of trust. A certification of trust is used to verify the truthfulness of the statements contained in the memorandum of trust. ORC 5810.13 provides that the certification must contain the following:

1. A statement that the trust exists and the date the trust instrument was executed;
2. The identity of the settlor;
3. The identity and address of the currently acting trustee;
4. The powers of the trustee;
5. The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
6. The authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee.
7. A certification of trust shall state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

ORC 5810.13 does not affect the use or validity of a memorandum of trust under section 5301.255 of the Revised Code.

Whenever the trustee of an undisclosed trust is in title (A, Trustee), you do not have notice that a trust exists and may proceed as if title is vested in an individual. However, the spouse of a person holding title as trustee of an undisclosed trust does not have a right of dower in real estate titles in this matter unless the spouse files an affidavit claiming dower. See ORC 5301.03.

When the trustee of an undisclosed trust dies, the trust must be declared or if there is no trust, the real estate is part of the decedent's probate estate.

Whenever the trustee of a disclosed trust (A, Trustee of the A Trust) is in title and resigns or dies, an affidavit of successor trustee must be recorded. See ORC 5301.171. A successor trustee affidavit must contain the following:

1. The name of the immediately preceding trustee and any co-trustees;
2. The addresses of all trustees;
3. A reference to the deed or other instrument vesting title in the trustees;
4. The legal description of the real property.

The affidavit should recite the reason why the former trustee no longer serves and any supporting documentation (certified copy of death certificate, resignation letter, etc.) attached.

XII. Water: Rivers, Streams, Lakes, Ponds and Canal Land

Rivers, Streams, Lakes and Ponds

Background: A survey, the legal description or other information may indicate that a body of water is located on or abuts the land. Such circumstances require us to take special exceptions due to the nature of water and erosion.

Risk: Bodies of water are common boundary lines which tend to shift over time leading to boundary line disputes. Additionally, the State of Ohio claims ownership of submerged land which may lie beneath the "high water mark" of certain bodies of water leading to disputes with owners whose legal description includes submerged land out to the "low water mark".

Standard: Whenever a survey, the legal description or other information indicates a body of water is located on or abuts the land, the following exception must be added to Schedule B:

"The Company does not insure the following:

1. Riparian Rights; or
2. Title to that portion of the Land lying beneath the high water mark of [insert name or description of the body of water];"
3. [Insert the appropriate exception for navigable or non-navigable bodies of water]
   - *For Navigable Bodies of Water:* Lake Erie, Ohio River and portions of the Maumee River, Sandusky River and Cuyahoga River: "Rights of the United States, the State of Ohio and the public in general in and to that portion of the Land lying beneath [insert name of the body of water]."
   - *For Non-navigable Bodies of Water:* "Rights of upper and lower riparian owners and the public in general to the waters of [insert name/description] and to the unpolluted, natural and uninterrupted flow thereof."

Canals and Filled-in Canal Land

Background: Ohio was one of several states profoundly affected by the digging of canals to transport goods during the early 1800s. The after-math effects title to real estate today. Title to existing canals, whether they still hold water, are dry or filled-in, constitute a risk requiring Underwriting approval to insure.

Risk: The State of Ohio is the legitimate owner of hundreds of miles of canals and claims ownership of more canals based upon surveys commissioned by the State in the early 20th Century. The State has given deeds and leases for many canal lands; however, possession of a survey of canal land, deeds for canal land, and ownership thereof are separate issues. It

is important to remember that the State did not construct the majority of canals and as a consequence, many canals were never actually owned by the State.

Standard: Generally, we will take an exception to any and all claims to canal lands affecting title to Land being insured and an exception to any lease of canal land granted by the State.

Occasionally, we are asked to insure title to canal land. Such coverage will require an extended title search for vesting to a warranty deed for value recorded prior to 1825 and Underwriting approval.

Please note that the vast majority of canal lands are not insurable due to the lack of physical access to these older records. However, the local historical society is an invaluable resource for key information relating to who constructed the canal, whether the canal was offered to the State and whether the State purchased and accepted the canal.

XIII. Vacated Streets

Background: Vacation of streets and alleys vests public utilities and abutting and adjoining land owners with certain easements whether such easements are recited in the municipal ordnance of vacation.

Risk: These easements are not evidenced by written documents and may not be apparent from a physical inspection of the Land; however, the failure to take exception to these rights may result in a claim.

Standard: When a survey, the legal description or other information reveals a vacated street abutting or running through the land, you must take exception to the rights of owners of land abutting the former street for ingress/egress and the rights of public utilities that where physically located in the former street at the time of vacation. See ORC 723.04 to 723.08. The exception should read:

> "Rights, if any, of the following in and to vacated [insert name of street or other description of the vacated street, i.e. "alley vacated by [insert name of city or county] Ordinance Number _____"]:
>
> 1. Abutting and adjoining owners of real property for ingress and egress; and
> 2. Public utilities physically located in said vacated street/alley prior to vacation thereof."

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CURATIVE STATUTES

The following sections of the Ohio Revised Code contain what are known as "curative" provisions which resolve some the more commonly encountered issues affecting title.

I. ORC Section 5301.07 Validating Certain Deeds

When any instrument conveying real estate or an interest therein (including, but not limited to leases, land contracts, easements and mortgages) has been of record for more than 21 years at the County Recorder for the county where the real property is located, the instrument is cured of any defect provided the defect is due to:

A. Such instrument was not properly witnessed;
B. Such instrument lacks a certificate of acknowledgment;
C. The certificate of acknowledgment was defective in any respect.

II. ORC Section 5301.071 Validity of Instruments Not Affected by Certain Actions or Omissions

Any instrument conveying real estate or an interest therein (including, but not limited to leases, land contracts, easements and mortgages) which has been recorded at the County Recorder where the real property is located is not defective or invalid because of the following:

A. The dower interest of the spouse of any grantor was not specifically released, but that spouse executed the instrument in the manner provided in ORC Section 5301.010.
B. The officer taking the acknowledgment of the instrument having an official seal did not affix that seal to the certificate of acknowledgment.
C. The certificate of acknowledgment is not on the same sheet of paper as the instrument.
D. The executor, administrator, guardian, assignee, or trustee making the instrument signed or acknowledged the same individually instead of in a representative or official capacity.
E. The grantor or grantee of the instrument is a trust rather than the trustee or trustees of the trust if:

1. the trust named as grantor or grantee has been duly created under the laws of the state of its existence at the time of the conveyance, and
2. a memorandum of trust that complies with ORC Section 5301.255 contains a description of the real property conveyed by that instrument is recorded in the office of the county recorder in which the instrument of conveyance is recorded.

Provided (1) and (2) are complied with, such a conveyance is treated as if the trustee(s) of the trust were the grantees. (See ORC 5301.071 (E) as a conveyance to a trust which complies with ORC Section 5301.071 (E) is to be given retroactive effect.)