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OKLAHOMA LENDING LAW A GUIDE FOR COMMERCIAL LENDERS

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OKLAHOMA LENDING LAW

A GUIDE FOR COMMERCIAL LENDERS

I. INTRODUCTION

This guide is intended to introduce lenders and lawyers to the general outline of the laws of the State of Oklahoma that govern commercial lending, commercial real estate finance, equipment leasing and related areas. It does not deal with issues related specifically to consumer lending and finance although certain issues and statutes related to those topics may be mentioned. Relatively detailed treatment is given to real estate lending issues because the law in this area is more state-specific than the law in the areas of personal property-secured lending and equipment leasing.

This guide assumes a basic working knowledge of financing transactions generally. It is, by nature, general in scope and meant as a brief overview of the subjects discussed. It should not be relied upon in a specific transaction without legal advice tailored to that transaction. This guide was finalized in January, 2008 and does not consider the effect of any changes in relevant law since that time or any changes under consideration in the Oklahoma state legislature as of such date.

II. BASIC LEGAL STRUCTURE

A. General Law – The Oklahoma Constitution

The Oklahoma Constitution contains the basis for law in Oklahoma. It contains some provisions that have a direct impact on commercial lenders. The Oklahoma Constitution, in unannotated form, may be obtained from The Oklahoma Supreme Court Network website at: www.oscn.net.

B. Statutory Law – Oklahoma Statutes

The Oklahoma Statutes are organized and divided into 90 separate "Titles." Titles of particular interest to commercial lenders include the following:

<u>Title</u>	<u>Area of Coverage</u>
6	Banks and Trust Companies
12	Civil Procedure
12A	Uniform Commercial Code
14A	Consumer Credit Code
15	Contracts

16	Conveyances
18	Corporations (includes limited liability companies)
24	Debtor and Creditor
31	Homestead and Exemptions
36	Insurance
42	Liens
46	Mortgages
47	Motor Vehicles
54	Partnership
60	Property
68	Revenue and Taxation

The full text of the Oklahoma Statutes are available without charge on The Oklahoma Supreme Court Network website at www.oscn.net.

C. Administrative Law

A number of state agencies have authority to promulgate regulations. They include the Department of Banking, the Department of Consumer Credit, the Department of Commerce, the Department of Insurance and the Tax Commission. Administrative regulations are first published in The Oklahoma Register and are periodically consolidated in the Oklahoma Administrative Code (the "OAC"). The full text of The Oklahoma Registers and the OAC are available without charge on the Oklahoma Secretary of State website at www.sos.state.ok.us.

D. Local Law

Oklahoma has 77 counties, each with its own governmental authority -- a county commission, ordinances and rulemaking procedures. Municipalities also have governmental authority, ordinances and rulemaking procedures, although municipalities have adopted various forms of municipal government. It is unwise to attempt to generalize about any particular county's or municipality's ordinances and procedures, as significant variations may exist from county to county and town to town.

E. Courts

The courts of primary jurisdiction in Oklahoma are the district courts of each county, which include small claims courts. In addition, cities and towns have municipal courts. The vast majority of actions by lenders to enforce repayment of commercial loans are brought in the district courts. Judicial foreclosures of real property security instruments are usually brought in the district courts as are actions for appointment of receivers except instances in which Federal court jurisdiction requirements are satisfied and it is strategically desirable to bring or remove the action there.

The Oklahoma Court of Civil Appeals is the intermediate appellate court. It has four divisions, each composed of three judges. Two divisions of the Court of Civil Appeals are located in Oklahoma City and two are in Tulsa. The Oklahoma Supreme Court is the state's highest court. It sits in the state capital, Oklahoma City.

There are three United States District Courts in Oklahoma - the Western District based in Oklahoma City, the Eastern District based in Muskogee and the Northern District based in Tulsa. Oklahoma is part of the Tenth Circuit Court of Appeals.

III. AUTHORITY TO DO BUSINESS

A. Required Qualification To Do Business

Foreign corporations are prohibited from transacting business in Oklahoma unless they properly qualify to do so. *See* OKLA. STAT. tit. 18, § 1130. Limited liability companies, limited partnerships and limited liability partnerships organized under the laws of jurisdictions other than the State of Oklahoma are subject to similar, but not identical requirements under OKLA. STAT. tit. 18, § 2043 (limited liability companies), OKLA. STAT. tit. 54, § 350 (limited partnerships) and OKLA. STAT. tit. 54, § 1-1102 (limited liability partnerships). To qualify to transact business in Oklahoma, a foreign entity must make appropriate filings with the Oklahoma Secretary of State, and designate a registered agent for service of process in Oklahoma. Forms for such applications, with instructions, can be found at the Oklahoma Secretary of State website, www.sos.state.ok.us.

The following activities of a foreign corporation *do not* constitute transacting business within the state, and therefore do not require a certificate of authority:

- it is in the mail order or a similar business, merely receiving orders by mail or otherwise in pursuance of letters, circulars, catalogs, or other forms of advertising, or solicitation, accepting the orders outside of Oklahoma, and filling them with goods shipped into Oklahoma; or
- it employs salesmen, either resident or traveling, to solicit orders in Oklahoma, with certain limitations; or
- it sells, by contract consummated outside of Oklahoma, and agrees by the contract, to deliver into Oklahoma, machinery, plants or equipment, the

construction, erection or installation of which within Oklahoma requires technical services not generally available, and as a part of the contract of sale agrees to furnish such services, and such services only; or

- its business operations within Oklahoma are wholly interstate in character; or
- it is an insurance company doing business in Oklahoma; or
- it creates, as borrower or lender, or acquires, evidences of debt, mortgages or liens on real or personal property; or
- it secures or collects debts or enforces any rights in property securing the same.

See OKLA. STAT. tit. 18, § 1132. However, the exceptions noted above will not have any application to the question of whether a foreign corporation is subject to service of process and suit in Oklahoma or subject to taxation in Oklahoma.

Certain exceptions to registration in Oklahoma apply to other types of entities as well. Exceptions to registration available for a foreign limited liability company can be found in OKLA. STAT. tit. 18, § 2049, for a foreign limited liability partnership in OKLA. STAT. tit. 54, § 1-1104, and for a foreign limited partnership in OKLA. STAT. tit. 54, § 350(B). These vary from the exceptions available to foreign corporations.

B. Licensing Requirements and Regulation of Financing

As a general rule, non-Oklahoma based lenders and equipment lessors are not required to obtain licenses in order to engage in permissible commercial lending and leasing activities in Oklahoma. There are certain regulatory statutes of which lenders should be aware, however, including the following:

- Financial institutions are subject to regulation under OKLA. STAT. tit. 6, §§ 101-3010 (banks and trust companies),
- Credit unions are regulated under OKLA. STAT. tit. 6, §§ 2001-2027 (credit unions).

In addition, note that the Oklahoma Banking Code requires any bank, bank holding company, trust company or business association not holding a charter of authority to engage in banking or trust company business in Oklahoma to file a Registration Statement with the Oklahoma State Banking Department prior to engaging in "bank or trust related activities" and pay a registration fee, currently set at \$500, and annually thereafter. *See* OKLA. STAT. tit. 6, § 104(B) and OKLA. ADMIN. CODE § 85:10-3-20 (2007). "Bank or trust related activities" include, among other activities, the offering or making of loans directed to or offered to residents of Oklahoma in a public manner by a bank, bank holding company, trust company, or their subsidiary or affiliate, which is domiciled outside of Oklahoma. Annual statements must be filed by all registrants. The Registration Statement is available on the Banking Department's website at www.ok.gov/~osbd/.

Although federally chartered institutions and federal savings banks and thrifts are not expressly exempt from registration with the Banking Department, in our experience they have claimed the benefit of Federal preemption and not registered, which the Banking Department has so far at least not challenged.

C. Taxation

The principal non-real property Oklahoma state taxes with which out-of-state lenders and equipment lessors must be concerned are the retail sales tax and use tax, found at OKLA. STAT. tit. 68, § 1350 *et seq.* and OKLA. STAT. tit. 68, § 1401, respectively. The application of these taxes to particular lenders or lessors is complex and should be considered in the context of a lender or lessor's specific circumstances. Oklahoma also has a documentary stamp tax on deeds and a registration tax payable on mortgages.

1. Sales Tax and Use Tax

The sales tax is imposed at state, county and local levels, and therefore varies by locality, but it is generally between eight and nine percent of the taxable sales price. The use tax functions in a complementary manner to the sales tax, and taxes the storage, use, or other consumption within Oklahoma of tangible personal property purchased out of state and brought into Oklahoma. Oklahoma has enacted a Streamlined Sales and Use Tax Administration Act to simplify and modernize sales and use tax administration. *See* OKLA. STAT. tit. 68, § 1354.14 *et seq.* The tax applies to many transactions that are not sales in the common sense of the word. Both the sales tax code and the use tax code define "sale" to include the exchange, barter, lease, or rental of tangible personal property that results in the transfer of the title to or possession of the property. *See* OKLA. STAT. tit. 68, § 1352(21)(a) Therefore, tax is often payable on lease payments under equipment leases, although equipment furnished with an operator is considered a service exempt from sales tax. *See* OKLA. ADMIN. CODE § 710:65-1-11(g) (2007).

2. Real Estate Documentary Stamp Tax

Oklahoma has a real estate documentary stamp tax payable upon any sale of real estate in Oklahoma in the amount of \$0.75 for each \$500 of consideration. OKLA. STAT. tit. 68, § 3201 *et seq.* The tax can be paid by either party, although it is customary for the seller to pay. It is payable at the time the deed is presented to the county clerk for recordation, and stamps are affixed to the instrument prior to recordation. As a result, the recorded deed reflects the amount of documentary stamps purchased, and the reported purchase price of real estate becomes public information.

The tax is not payable upon, among other things: (a) a deed which secures a debt or other obligation; (b) a deed of release of property which is security for a debt or other obligation; (c) a deed executed pursuant to a foreclosure proceeding in

which the grantee is a holder of a mortgage on the property being foreclosed; or (d) a deed in lieu of such a foreclosure. OKLA. STAT. tit. 68, § 3202.

3. Mortgage Registration Tax

The Oklahoma real estate mortgage registration tax, payable under OKLA. STAT. tit. 68, § 1901 *et seq.*, is discussed in Section VI.H.

IV. INTEREST AND USURY

A. Compound Interest

Compounding of interest on commercial loans is permitted. Oklahoma does not restrict the manner of contracting for the loan finance charge, whether by way of add-on, discount, or otherwise, so long as the rate of the loan finance charge does not exceed the limits noted in OKLA. STAT. tit. 14A, §§ 3-605 and 5-107(2) discussed below.

B. Usury

Usury is generally not a major concern for commercial lenders in Oklahoma because the maximum rate of finance charge that may be contracted for in a loan is 45% per year. Oklahoma's maximum rate statute is contained in Oklahoma's Uniform Consumer Credit Code (the "U3C") at OKLA. STAT. tit. 14A, §§ 3-605 and 5-107(2). Commercial loans are generally classified as "other" loans. These include all other loans which do not qualify as consumer (OKLA. STAT. tit. 14A, §§ 3-104), supervised (OKLA. STAT. tit. 14A, §§ 3-501), low rate (OKLA. STAT. tit. 14A, §§ 3-105), or "excluded" loans (OKLA. STAT. tit. 14A, §§ 1-202(5)), and which are not otherwise made subject to the U3C by agreement (OKLA. STAT. tit. 14A, §§ 3-601). Consumer loans are subject to different limitations, and a detailed analysis is beyond the scope of this guide. The annual percentage rate (APR) of an "other" loan cannot exceed 45% per annum calculated according to the actuarial method. *See Barnes v. Helfenbein*, 548 P.2d 1014 (Okla. 1976), *Stricklin v. Investor Syndicate Life Ins. & Annuity Co.*, 391 F. Supp. 246 (W.D. Okla. 1975) and Op. Atty. Gen. No. 80-119 (July 23, 1980). Absent an express agreement as to the interest rate, the maximum rate is 6% per year. OKLA. CONST. art. XIV, §2.

Notwithstanding the 45% rate, one potential issue for commercial lenders could be whether the lender will require a "piece of the action" in the transaction, representing either a percentage of the income from the property or of its appreciation, or both, which may be in addition to normal interest and prepaid finance charges. In such situations, a rate of finance charge in excess of 45% is not beyond possibility. In addition, there may be variable, open-end or interest contingency issues that could potentially drive the interest rate above the 45% limit. Some lenders use a "savings" clause to avoid this possibility, which generally provides that no usurious intent exists and that excess interest will be remitted to the borrower. However, such a clause is not believed to be effective in Oklahoma, due to the decision in *Oklahoma Preferred Finance & Loan Corp. v.*

Morrow, 497 P.2d 221 (Okla. 1972) (a creditor may not avoid the penalty of usury by agreeing to rebate or refund interest collected in excess of the legal rate).

In addition, the defense of usury may not be pled in a court of law or equity by a corporation in any suit instituted to enforce the payment of any bond, note or other evidence of indebtedness issued or assumed by it. *See* OKLA. STAT. tit. 18, § 1129.

C. Treatment of Additional Fees and Charges

Oklahoma law does not specify any limitations on the amount of additional fees and charges that may be assessed in connection with commercial purpose loans or other commercial extensions of credit. However, it is important to note the maximum rate of finance charge described in Section IV.B. above when calculating additional fees and charges that will be assessed so that the rate of finance charge does not exceed 45%.

V. TYPES OF BORROWERS

A. Corporations

Oklahoma corporations are subject to the Oklahoma General Corporation Act, OKLA. STAT. tit. 18, § 1001 *et seq.* That Act contains separate chapters applicable to nonprofit, foreign and professional corporations.

It is advisable to obtain a "Certificate of Good Standing" from the Oklahoma Secretary of State as well as a certified copy of the Certificate of Incorporation and any amendments when making a loan to a corporate borrower, and to request a copy of the Bylaws from the corporate borrower. Corporations are subject to filing an annual franchise tax return in Oklahoma in order to remain in good standing. *See* OKLA. STAT. tit. 68, §§ 1201 *et seq.* Failure to comply with this requirement could result in forfeiture of corporate rights and the corporation being unable to sue or defend in litigation. OKLA. STAT. tit. 68, § 1212.

B. Partnerships

There are three types of partnerships recognized in Oklahoma: (1) general partnerships; (2) limited liability partnerships; and (3) limited partnerships.

OKLA. STAT. tit. 54, §§ 1-100 *et seq.* is Oklahoma's version of the Revised Uniform Partnership Act. It contains the statutory provisions governing general partnerships and limited liability partnerships. Limited liability partnerships are intended primarily for use by those engaged in the practice of the licensed professions; however, they are occasionally used for other business purposes.

OKLA. STAT. tit. 54, § 141 *et seq.* is the Oklahoma version of the Uniform Limited Partnership Act and is still in effect. The Revised Uniform Limited Partnership Act, codified at OKLA. STAT. tit. 54, § 301 *et seq.*, became effective in Oklahoma on November 1, 1984, and governs all limited partnerships formed since that time and older limited partnerships made expressly subject to the newer act.

When making a loan to a borrower that is a limited partnership or limited liability partnership, it is advisable to obtain a Certificate of Good Standing from the Oklahoma Secretary of State, as well as a certified copy of the Certificate of Limited Partnership or the Limited Liability Partnership Statement of Qualification, together with any amendments.

Partners in a general partnership, as well as general partners in a limited partnership, are individually liable for partnership debts; however, with certain limited exceptions, a creditor is generally required to exhaust its recourse against partnership assets before executing on assets of the general partners. As in other states, this extra step is most commonly avoided by having the general partners separately guarantee the debt.

As of the date of this guide, Oklahoma does not recognize the Limited Liability Limited Partnership, or LLLP, which in many states provides a liability shield for the general partners of a Limited Partnership.

C. Limited Liability Companies

The formation of limited liability companies ("LLC's") is authorized by OKLA. STAT. tit. 18, § 2000 *et seq.* An Oklahoma LLC may be managed either by its members or by one or more managers. Single-member LLC's are permitted in Oklahoma. An LLC is formed by filing Articles of Organization with the Oklahoma Secretary of State. OKLA. STAT. tit. 18, § 2004. Oklahoma LLC's are required to have a registered office and a registered agent for service of process in Oklahoma.

When making a loan to an Oklahoma LLC, it is advisable to obtain a Certificate of Good Standing from the Oklahoma Secretary of State as well as a certified copy of the LLC's Articles of Organization and any amendments. LLC's are required to file an Annual Certificate with the Oklahoma Secretary of State. Failure to file the Annual Certificate results in the LLC ceasing to be in good standing, and therefore the entity may not maintain any action, suit, or proceeding in Oklahoma courts. OKLA. STAT. tit. 18, § 2055.2. Lenders also typically obtain a copy of the current Operating Agreement for the LLC.

Individual members and managers of an LLC are not liable for its debts unless they have executed appropriate guaranties or are personally liable in tort. OKLA. STAT. tit. 18, § 2022.

D. Proprietorships and Individuals

Loans to proprietorships are treated in the same manner as loans to the individual owners of the business. Trade names are subject to registration with the Oklahoma Secretary of State pursuant to OKLA. STAT. tit. 18, § 1140. The form entitled "Trade Name Report" can be found on the Secretary of State's website, www.sos.state.ok.us, and is the same form used by corporations and other business entities.

Certain assets, up to specified values, are exempt from seizure to satisfy the claims of general unsecured creditors of individuals. These include, by way of example: (a)

generally, the principal residence of such individual; (b) furniture and personal household items; (c) tools of the trade up to \$10,000; (d) the individual's interest, up to \$7,500, in one motor vehicle; (e) pension rights and assets held in tax-deferred retirement plans and accounts; (f) 75% of all wages or earnings earned in the last 90 days; and (g) various other personal property interests. These exemptions are provided for in OKLA. STAT. tit. 31, § 1. Homestead concerns in commercial real estate lending are discussed further in Section VI.U. below.

E. Trusts and Estates

Oklahoma's basic trust statutes are OKLA. STAT. tit. 60, §§ 175.1 through 175.57.

Generally, when a trustee of a trust enters into a loan or other contract, the trustee can be held personally liable on the contract, if the contract does not exclude such personal liability. OKLA. STAT. tit. 60, § 175.18. However, the addition of the words "trustee" or "as trustee" after the signature of a trustee to a contract is deemed prima facie evidence of an intent to exclude the trustee from personal liability. *Id.* If the lender wants to ensure that a trustee or settlor of a trust borrower is personally liable for the loan, it is advisable to have the trustee or settlor execute an appropriate guaranty in his or her personal capacity.

In Oklahoma, all trusts are revocable by the settlor unless expressly declared irrevocable. A spendthrift clause is valid only to protect up to \$25,000 of income per year. OKLA. STAT. tit. 60, § 175.25(B). However, the beneficiary's income interest in a spendthrift trust is subject to enforceable claims for support of a spouse or child, and for necessary services rendered or necessary supplies furnished. *Id.* Trust principal is subject to a statutory spendthrift provision and no part of the principal of a trust is alienable or subject to the claims of a creditor. OKLA. STAT. tit. 60, § 175.25(E). A person may not create a spendthrift trust or other inalienable interest for his own benefit. OKLA. STAT. tit. 60, § 175.25(H). The interest of the settlor as a beneficiary of any trust is freely alienable and subject to the claims of his creditors. *Id.*

Generally, claims against a decedent's estate must be filed within two months after the personal representative provides the notice to creditors required by OKLA. STAT. tit. 58, § 331. Any claim not presented within the required time period is forever barred. OKLA. STAT. tit. 58, §§ 243 and 333. Contingent claims must be described with particularity. OKLA. STAT. tit. 58, § 334.

Pursuant to OKLA. STAT. tit. 58, § 264, a personal representative is authorized to borrow money to pay taxes imposed upon the estate. With certain exceptions, a personal representative may not sell, lease or mortgage real or personal property without an order of the court supervising the probate. *See, e.g.*, OKLA. STAT. tit. 58, §§ 265, 411, 482 and 929.1.

VI. REAL ESTATE LENDING

A. Property Rights

Real property rights in Oklahoma are generally governed by OKLA. STAT. tit. 16 (Conveyances), 41 (Landlord and Tenant), 42 (Liens), 46 (Mortgages), and 60 (Property), and statutes governing taxes relating to property rights and real estate lending are contained in OKLA. STAT. tit. 68 (Revenue and Taxation).

B. Leases

A lease for a period exceeding one year must be in writing and signed by the landlord, and needs to be acknowledged and recorded to be valid as against third persons, but not as between the parties to the lease. OKLA. STAT. tit. 16, §§ 4, 15. A lease for one year or less need not be in writing or acknowledged. *Id.* However, such leases are commonly not recorded and, if the lessee has possession of the premises, that possession should be effective to impart constructive notice of at least the lessee's rights to occupy the property as a tenant. The possession of real property carries with it the presumption that the possession of the occupant is rightful, and it is the duty of those dealing with others than the party in possession of the property to ascertain the claim of the party in possession. The open, actual possession of such property gives notice to the world of just such interest as the possessor actually has therein. *Wilkinson v. Stone*, 200 P. 196 (Okla. 1921).

C. Condominiums

Oklahoma's condominium law is contained in the Unit Ownership Estate Act, OKLA. STAT. tit. 60, §§ 501-530. Oklahoma case law regarding the Unit Ownership Estate Act is largely undeveloped.

D. Types of Real Property Security Instruments

1. Mortgages

Mortgages are provided for in OKLA. STAT. tit. 46, § 1. Oklahoma is not a deed of trust state. A deed of trust will be construed as a mortgage. OKLA. STAT. tit. 46, § 1.1. A typical all-inclusive commercial real property security instrument in Oklahoma could be entitled "Mortgage with Power of Sale, Assignment, of Leases, Security Agreement and Financing Statement." If oil and gas properties with their mixed real and personal property components are taken as collateral, a common name for the security instrument is "Oil and Gas Mortgage, Assignment, Security Agreement and Financing Statement."

Mortgages may be foreclosed through the judicial foreclosure process, which generally takes four to five months if uncontested, or by the non-judicial power of sale foreclosure process if provided for in the mortgage instrument itself, which generally take three months, and must be foreclosed in conformity with the Oklahoma Power of Sale Mortgage Foreclosure Act, OKLA. STAT. tit. 46, §§ 40

through 49. The different foreclosure procedures are discussed in detail in Section VI.S. of this guide. Although the power of sale statute became effective in 1986, the vast majority of real property mortgage foreclosures in Oklahoma are still done through the judicial foreclosure procedure.

2. Contracts for Deed

Contracts for deed are not a recommended form of real property security document in Oklahoma. They are construed as constructive mortgages pursuant to OKLA. STAT. tit. 16, § 11A, and therefore must be recorded and foreclosed as mortgages. As a result, the intention of the parties in the typical contract for deed for the property to be forfeited to the seller in the event of default is subject to being frustrated by an assertion of the purchaser's statutory rights and the seller's obligations under such a document.

E. Formalities of Mortgages

A mortgage must be in writing, subscribed by the grantors, recorded and acknowledged, although it may be effective between the parties even if it is not recorded or acknowledged. OKLA. STAT. tit. 16, §§ 4 and 15 and tit. 46, § 6. The formal requisites for a mortgage are to be done in the same manner and have the same effect as grants. OKLA. STAT. tit. 46, § 6. A sample form of mortgage is provided in OKLA. STAT. tit. 46, § 3, but this is a "bare bones" form without power of sale provisions.

F. Assignments of Leases and Rents

The mortgagor may assign rents and profits from the mortgaged real property as additional security for the debts secured by the mortgage, without regard to whether the assignment provides for immediate collection or collection upon future default. A mortgagee taking an assignment of rents and profits has the obligation to account and pay to the mortgagor regarding any rents and profits actually collected pursuant to such assignment, which are not applied on the indebtedness owing to the mortgagee; however, the mortgagee is not deemed to have other fiduciary obligations to the mortgagor resulting from such assignment or deemed to be in possession of the mortgaged real property, unless the mortgagee also enters into continued physical possession of the mortgaged real property and exercises exclusive operating control of the mortgaged real property. OKLA. STAT. tit. 46, § 4.

G. Recordation

Oklahoma is a mortgage lien state and the property as collateral must be described in a mortgage signed by the mortgagors. If the mortgagors are husband and wife, that designation must be included in the mortgage. If the mortgagor is a single person, that fact should likewise be indicated. Of course, the mortgage must be filed in the real estate records in the county where the property is located. To qualify for filing, the signatures of the mortgagors must be acknowledged; however, the "seal" of the borrower is not required.

Oklahoma has statutory requirements for the formatting of documents to be recorded. OKLA. STAT. tit. 19, § 298. The key requirements are set out in Exhibit A to this guide.

To be recorded in the real property records maintained by each county clerk in the 77 counties comprising Oklahoma, a document must satisfy the following requirements: (a) the document must be a writing in English bearing the original signature of the person authorized by Oklahoma law to execute the document on behalf of the person to be charged; (b) the signature of the person must be acknowledged by a notary public or other authorized person; (c) the document must contain a legal description of the real property and comply with statutory format requirements; and (d) applicable recording costs and taxes must be paid. When recorded, documents satisfying the foregoing requirements constitute constructive notice of the contents of the document to purchasers and encumbrancers for value which are subsequent to the time of recording the document. *See* OKLA. STAT. tit. 16, §§ 16, 28; OKLA. STAT. tit. 19, § 298. *See* Section VI.R. below for discussion on assignments of mortgage.

The commission number of the notary and the date of expiration of the commission are required by OKLA. STAT. tit. 49, § 5, although the failure to add the commission number or the date of expiration of the commission will not affect the recordability of the instrument or the notice given by the recording. In addition, the commission number and expiration date may be a part of the notary's stamp or seal. The acknowledgment of the execution of a mortgage before a notary public is required to record the document in the real property records and be valid as against third parties. *See* OKLA. STAT. tit. 16, § 15. Oklahoma has adopted the Uniform Law on Notarial Acts. *See* OKLA. STAT. tit. 49, §§ 111, *et seq.* A notarial act must be evidenced by a certificate signed and dated by a notarial officer. The certificate must include identification of the jurisdiction in which the notarial act is performed and the title of the office of the notarial officer and may include the office stamp or seal of office. Either an Oklahoma form or the form of acknowledgment authorized for use by the jurisdiction in which the loan documents are signed may be used. *See* OKLA. STAT. tit. 49, §§ 115 and 118.

Oklahoma has relatively nominal recording fees. The amounts are \$8 for the first page and \$2 for each subsequent page, as well as a \$5 preservation fee per instrument. There is no charge for multiple legal descriptions, unless the instrument contains more than 25 legal descriptions on a single page, at which point a \$1 fee is charged for each legal description exceeding the 25 per page limit.

H. Real Estate Mortgage Tax

Oklahoma imposes a tax on mortgages at a graduated rate determined by the collateral value of the Oklahoma mortgaged premises and the maturity of the mortgage. The tax rate varies from two cents to ten cents for each \$100 (and each remaining fraction thereof) of indebtedness secured based on the maturity of the debt. Mortgage tax and a \$5 mortgage certification fee are payable to the Treasurer of the county in which a mortgage is recorded in Oklahoma. The mortgage tax may be paid by a borrower, mortgagee or any other interested party. As indicated by OKLA. STAT. tit. 68, § 1909, a procedure is available to reduce the mortgage tax to an amount appropriately allocated to

the collateral value of the mortgaged premises in Oklahoma in multi-state transactions. That procedure requires the filing with the County Treasurer of the county in which the mortgaged premises are located of an affidavit which allocates the value of the real property collateral as between real property collateral located in Oklahoma and real property collateral located outside of Oklahoma. The affidavit can also allocate the value of real property among the counties in which real property collateral is located in Oklahoma in a multi-county situation.

Combination mortgages and security agreements are taken on oil and gas properties because of their mixed real and personal property attributes. When filed in the real estate records, such instruments are considered exempt from the mortgage tax. *See* Op. Atty. Gen. No. 66-117 (February 9, 1966).

I. Title Insurance

Institutional lenders generally obtain title insurance on mortgages on commercial property in Oklahoma. The ALTA policy forms and endorsements are available. As of early 2008, Oklahoma title companies are transitioning to use of the 2006 forms. A wide variety of endorsements is available in the state. There are no significant regulatory restrictions on title insurers' ability to issue endorsements and title companies are fairly flexible in making changes in endorsement forms. The survey exception is sometimes deleted (particularly from loan policies) without a current survey being required if an affidavit can be provided by the owner indicating there have been no new structures placed on the property.

Title policies on Oklahoma properties will have a standard Schedule B exception similar to the following arising from oil and gas activity across the state and the fact that mineral and surface estates are usually at least partially severed:

Any and all interest in and to all oil, gas, coal and other minerals and all rights pertaining thereto.

Title insurance is not available on mineral interests in Oklahoma.

Oklahoma is one of the few remaining abstract states for title insurance purposes. In Oklahoma this means that a policy must be based on the examination by a licensed attorney of either an abstract of title prepared by a bonded and licensed abstractor with a certified abstract plant in the county in which the property is located, or, as the result of a 2007 change in Oklahoma law, an existing owner's policy and a supplemental abstract from the policy's effective date forward. *See* OKLA. STAT. tit. 15, § 5001.

Commercial real estate lenders in Oklahoma may also be subject to a notice requirement regarding title insurance. A lender providing purchase money financing for real property in Oklahoma and obtaining a loan policy of title insurance (or other title protection document, such as an attorney's title opinion, title certificate or other written assurance on the status of title) must comply with statutory requirements that it give notice to the borrower/buyer at the time of application for the loan whether or not the title protection

document will also protect it, and that the borrower/buyer should seek independent competent advice as to whether any additional title protection document should be obtained by it. OKLA. STAT. tit. 46, §§ 19-21.

J. Environmental Indemnities

Although some lenders use secured environmental indemnities on properties in Oklahoma, unsecured indemnity agreements separate from the other loan documents are more common. There is no Oklahoma statute or case law that mandates the use of the separate environmental indemnity, however, as opposed to inclusion of similar provisions in the loan agreement and/or mortgage with a proviso that the representations, warranties, and indemnifications survive release of the mortgage and payment of the indebtedness. The lender should be able to enforce a properly drafted indemnity after either a judicial or nonjudicial foreclosure of a mortgage.

K. Non-Judicial Power of Sale Provisions

Oklahoma requires special language in the mortgage in order to allow lenders to foreclose through non-judicial foreclosure in the event of default. In order for a lender to take advantage of non-judicial foreclosure by power of sale under the Oklahoma Power of Sale Mortgage Foreclosure Act found at OKLA. STAT. tit. 46, §§ 40-49 (the "Power of Sale Act"), the mortgage must include a statutory power of sale legend provision in both **bold** and underlined type in "substantially the following" language set forth in § 43.A.2:

A POWER OF SALE HAS BEEN GRANTED IN THIS MORTGAGE. A POWER OF SALE MAY ALLOW THE MORTGAGEE TO TAKE THE MORTGAGED PROPERTY AND SELL IT WITHOUT GOING TO COURT IN A FORECLOSURE ACTION UPON DEFAULT BY THE MORTGAGOR UNDER THIS MORTGAGE.

Although not required by statute, it is customary to capitalize this language as well and to place it on the cover page or first page of the mortgage. Since there is no case law on what constitutes "substantially the following," we recommend that the statutory legend be used word for word, notwithstanding the possible use of different defined terms in the mortgage instrument. The mortgage must also contain a clause expressly conferring the power of sale to the lender.

L. Priority of Future Advances

In Oklahoma, in order for future advances to be secured by a mortgage securing the first advance, and to have the same lien priority as the first advance, the mortgage must indicate that future advances are contemplated by the parties and must also provide that all such future advances are *obligatory*, rather than *discretionary* on the part of the lender. While Oklahoma permits conditions to be satisfied before advances are made, the conditions may not be so burdensome as to in effect give the lender an option in the matter. Examples of permitted conditions would be failure to pay or breach of the terms

of the loan agreement, note or mortgage. *See Liberty Nat'l Bank & Trust Co. of Oklahoma City v. Kaibab Industries, Inc.*, 591 P.2d 692 (Okla. 1978); *Leche v. Ponca City Production Credit Assoc.*, 478 P.2d 347 (Okla. 1970). If the mortgage securing the loan does not indicate that future advances will be obligatory on the part of the lender, the lender runs a risk of an intervening creditor or materialman obtaining a lien on the mortgaged property between the date of the first advance under the loan and the date of a future advance.

M. Waiver of Marshalling

Oklahoma has adopted the equitable principal of marshalling. *See OKLA. STAT.* tit. 24, § 4 and tit. 42, § 17; *Vandever Inv. Co., Inc. v. Leonhardt Lumber Co.*, 503 P.2d 185 (Okla. 1972). A waiver of marshalling is probably enforceable against a mortgagor in Oklahoma because it has no basis to complain if all or less than all of the collateral securing payment of the debt is foreclosed. However, waiver of marshalling provisions are probably unenforceable against other creditors who assert marshalling in a foreclosure action.

N. Prepayment

So long as the prepayment premium does not cause the interest rate on the commercial loan to exceed the maximum rate of finance charge described in Section IV.B. above, there are no other Oklahoma restrictions on prepayment premiums. Oklahoma commercial loan documents often include prepayment and yield maintenance provisions of all types and there is no limitation on the means of calculation, term, APR at closing or APR at payoff other than as stated in Section IV.B. above.

O. Equity of Redemption and Prohibition Against Clogging

In Oklahoma the mortgagor's equity of redemption does not survive the foreclosure of the mortgage lien unless the mortgage gives greater rights to the mortgagor. In judicial foreclosure this means the equity of redemption is extinguished upon court confirmation of the sheriff's deed (*see Mills v. Reneau*, 411 P.2d 516 (Okla. 1965)), and in non-judicial foreclosure by power of sale, upon conveyance of the property by the mortgagee's deed. *See OKLA. STAT.* tit. 46, § 47.B.

Oklahoma has codified the common law prohibition against clogging the equity of redemption. *See OKLA. STAT.* tit. 42, § 11. Generally, the anti-clogging statute prohibits a lender from obtaining an interest in the mortgaged real property that is not returned to the mortgagor upon repayment of the secured indebtedness, effectively precluding the use of convertible mortgages or similar devices in Oklahoma. *See Coursey v. Fairchild*, 436 P.2d 35 (Okla. 1967), in which a leasehold estate and mineral deed given by a borrower to a lender in consideration for a renewal of a loan were cancelled.

P. Due on Sale or Encumbrance Clauses

The Oklahoma Supreme Court has upheld "due on sale" or "due on encumbrance" clauses as valid and enforceable under general principles of contract law and rejected the view that such clauses are a clog on the equity of redemption or an unreasonable restraint on alienation. See *Lincoln Mortgage Investors v. Cook*, 659 P.2d 925 (Okla. 1982); *Continental Federal Savings & Loan Association v. Fetter*, 564 P.2d 1013 (Okla. 1977). The Oklahoma Supreme Court expressly rejected the argument that the lender must demonstrate that enforcement of a due on sale clause is necessary to protect the lender against impairment of its collateral or against an increased risk of default. *Smith v. Frontier Federal Savings & Loan Association*, 649 P.2d 536 (Okla. 1982).

Q. Releases of Mortgages

When an obligation secured by a mortgage is paid in full, the holder of the mortgage is required to record a release of the mortgage within 50 days of the payment. At the end of the 50 day period, if the holder has failed to release the mortgage, the mortgagor may request in writing for the holder of the mortgage to release the mortgage. The holder then has 10 days from the date of the request to release the mortgage. If the holder fails to release the mortgage by the end of the 10 day period, the holder may be civilly liable to the borrower for up to \$100 per day, up to a maximum of 100% of the total principal debt. See OKLA. STAT. tit. 46, § 15. The statute does not apply to UCC fixture filings. *Rhynes v. EMC Mortgage Corp.*, 168 P.3d 251 (Okla. Civ. App. 2007).

This statute has been interpreted by the Oklahoma Attorney General as generally prohibiting the mortgagee from imposing the release fee on the mortgagor. When read together, two Attorney General's opinions provide that a release fee may be passed on to the mortgagor *only* in a "consumer loan," under the authority of the U3C in §§ 3-202 and 1-301(10). See Op. Atty. Gen. No. 81-226 (Sept. 8, 1981) and Op. Atty. Gen. No. 77-280 (February 22, 1978). Therefore, when §§ 3-202 and 1-301(10) do not apply, such as with commercial loans, the Attorney General has taken the position that the release fee may not be passed on to the borrower and must be paid by the mortgagee.

R. Assignments of Mortgages

Assignments of mortgages and real estate contracts must be recorded in order to be effective against third parties. OKLA. STAT. tit. 16, § 15. Until an assignment of a mortgage is properly recorded, the mortgagor or its heirs or representatives may continue to make payments to the prior mortgagee or the last assignee whose assignment is recorded. OKLA. STAT. tit. 46, § 12. Note that under UCC § 3-602, however, payment must be made to the holder (the person entitled to enforce the instrument). The Oklahoma Comment to UCC § 3-602 states:

It is unclear whether UCC § 3-602 controls over 46 O.S. § 12. UCC § 3-602 is more recent and should control over the older statute pursuant to *Travelers Insurance Co. v. Panama-Williams, Inc.*, 597 F.2d 702 (10th Cir. 1979). However, 46 O.S. § 12 is more limited, and thus arguably

should control over the broader § 3-602. See *City of Tulsa v. Smittle*, 702 P.2d 367 (Okla. 1985). This conflict is resolved by the UCC's policy of unitary construction illustrated by Section 1-104, resulting in the conclusion that § 3-602 should control over 46 O.S. § 12. Nevertheless, in real estate mortgage transactions, it is recommended that an assignment of a real estate mortgage be properly recorded at the time an instrument secured by the mortgage is negotiated.

S. Default and Foreclosure Remedies

Oklahoma has both judicial and non-judicial foreclosures of mortgages, with judicial foreclosure still being the more common method used by far due to the relative newness of the Power of Sale Act discussed in Section VI.K and resulting lack of case law, the ability of the owner of homestead property to avoid a deficiency judgment or further delay the lender if a foreclosure by power of sale is initiated as discussed in Section VI.S.2.c. below, and a continued general reluctance of the practicing bar to embrace the procedure. Judicial foreclosure is governed statutorily by a number of statutes in different parts of the civil procedure title, OKLA. STAT. tit. 12.

1. Judicial Foreclosure

a. Time

Assuming the defendants do not defend against the foreclosure, service of process is obtained without difficulty and there are no other complications, a judicial foreclosure can be accomplished in four to five months. If the action is defended, the time to foreclose is extended and the time to judgment becomes a function of the defendant's tenacity and the court's calendar.

b. Commencement of Action

An action to judicially foreclose a mortgage in Oklahoma is commenced by the filing of a complaint in Federal district court (if jurisdictional requirements are met) or a petition in the state district court of the county in which the mortgaged premises are located, and the filing of notice of pending action or *lis pendens* in the office of the County Clerk of the same county. The petition alleges the occurrence of a default and a mortgagee's right to foreclose the mortgage lien and may also include a request for the appointment of a receiver, an action to foreclose security interests and any other encumbrance held by a mortgagee, actions against guarantors of the debt, any cause of action necessary to vest title to the mortgaged premises in a mortgagee and to enforce any other right under the loan documents held by a mortgagee.

c. Judgment

Assuming that a mortgagee is successful in prosecuting the foreclosure to judgment, the court will enter a judgment establishing a mortgagee's right to foreclose the mortgage lien, the amount of the debt (to include principal, interest, late charges, court costs, attorneys' fees and expenses advanced by a mortgagee), the persons liable for payment of the debt, the priority of any other liens covering the mortgaged premises and the real and personal property which are subject to special execution by reason of the entry of the judgment.

d. Execution

After entry of the judgment, on application by a mortgagee, the Court Clerk will issue a special execution and order of sale covering the property that is the subject of the judgment. The special execution directs the sheriff of the county in which the mortgaged premises are located to advertise and sell the mortgaged premises at public auction within 60 days after the issuance of the special execution. The special execution and order of sale must be issued within one year after the date the judgment is entered to protect the priority of the foreclosed mortgage lien against competing lienholders.

e. Appraisement

If so provided in the documents, a mortgagee must elect at the time judgment is entered to sell the property at the sheriff's sale with or without "appraisement," as should be provided in the mortgage.

In the context of an Oklahoma foreclosure procedure, appraisement is an act performed by three disinterested persons who make a written estimate of the fair market value of the real property for a nominal fee. Each sheriff has a pre-selected pool of individuals (who may or may not have prior real estate experience) to serve as appraisers. The value returned by the appraisers and approved by the sheriff becomes the appraised value of the mortgaged premises for the purpose of bidding. The appraisals constitute evidence of fair market value for establishing a deficiency, but are not conclusive in that regard. If the mortgaged premises are sold with appraisement, they may not be sold for less than two-thirds (2/3) of the value established by the appraisers. If the bids offered at the sheriff's sale do not reach that minimum amount, the sheriff must reject the bids and the mortgaged premises must be re-advertised and offered at a later auction. There must be at least two offerings at the original appraisement before the mortgaged premises may be reappraised and offered for sale at a reduced appraisement.

If a mortgagee elects to sell the mortgaged premises without appraisal, it must wait six months after the entry of the judgment to seek issuance of the special execution. If the mortgaged premises are sold without appraisal, no minimum bid is required and the mortgaged premises are sold to the highest bidder. Because of the delay occasioned by a sale without appraisal, almost all foreclosure sales are made with appraisal.

f. Bidding

Any person may bid at a sheriff's sale. The foreclosing mortgagee may bid by crediting the amount bid against its judgment, but all others must bid in cash (at least to the extent of any lien prior to a lien held by the bidder). When the mortgaged premises are sold with appraisal, the usual practice is for the first mortgage holder to begin bidding with the bid of two-thirds ($2/3$) of the appraised value and, if there are no other bidders, the first mortgage holder purchases the mortgaged premises at that amount. If the person who purchases the mortgaged premises at a sheriff's sale is someone other than the first mortgage holder, the purchaser must post cash or certified funds with the Court Clerk in an amount equal to ten percent of the amount bid within 24 hours after the sale. Oklahoma statutes are silent as to when the balance of the purchase price must be paid and as a result each county's sheriff has its own procedures for this matter. If a purchaser defaults, the sheriff is authorized to accept the next highest bid.

To the extent that *Durrett v. Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980) created concern about mortgage foreclosure sales being avoided as fraudulent transfers, no reported Oklahoma case has followed it and Oklahoma has adopted the Uniform Fraudulent Transfer Act.

g. Confirmation; Sheriff's Deed

After the sheriff's sale, a mortgagee files a motion with the court to confirm the sale and to obtain a sheriff's deed. The hearing on confirmation of the sale is usually set about two weeks after the sale date. A borrower may redeem the property from foreclosure until entry of the order confirming the sale. Redemption requires payment in full of the judgment debt. The entry of the order confirming the sale finally forecloses a borrower's equity of redemption in the mortgaged premises. Upon receipt of a copy of the Order Confirming Sale, the sheriff will execute the deed prepared by the mortgagee's attorney reflecting the highest bidder or its designee as grantee.

h. Deficiency Judgment

Within 90 days after the sheriff's sale, a mortgagee may move the court to enter a deficiency judgment against the parties liable for payment of the debt. In Oklahoma, the amount of the deficiency is the difference between the total judgment debt and the greater of the proceeds received from the sheriff's sale or the fair market value of the property. Because in most instances a mortgagee purchases the mortgaged premises at the sheriff's sale for two-thirds (2/3) of the appraised value, a mini-trial is usually held to determine the fair market value of the mortgaged premises and to establish the deficiency judgment. After entry of a deficiency judgment, a mortgagee may enforce that judgment against any party determined to be liable.

2. Non-judicial Foreclosure by Power of Sale

a. Time

Assuming service of process for the notice of sale is obtained without difficulty and there are no other complications, a non-judicial foreclosure by power of sale can be accomplished in about three months.

b. Notice of Intention to Foreclose by Power of Sale

If a power of sale is to be exercised, a mortgagee must give the borrower (and any guarantor or other party obligated for payment of the debt) notice of its intent to foreclose by power of sale stating: (a) the name and address of the mortgagee; (b) the nature of the claimed default by the borrower; (c) the borrower has 35 days to cure such default and reinstate the loan; (d) the amount of money required to reinstate the loan; (e) the mortgagee's intent to accelerate maturity of the debt and foreclose the mortgage; and (f) that the notice contains important information and that the borrower should consult an attorney if it has questions. The foregoing notice cannot be waived under Oklahoma law.

c. Notice of Sale; Homestead Owner's Rights

The notice of sale is given by the mortgagee to the borrower and all other parties whose interest in the mortgaged premises is to be foreclosed, to be served in the same manner as process in litigation. The date of sale can not be less than 30 days from the date of service on a party to the proceeding. The sale can be at any place in the county in which the mortgaged premises are located and at any time between 9:00 a.m. and 5:00 p.m. on any day other than a Sunday or legal holiday.

The right to seek a deficiency judgment in a commercial foreclosure could under certain circumstances be adversely affected by use of the power of sale remedy. An individual owner has the right, with a notice given at least ten (10) days prior to the sale date stating the property is the owner's homestead, to elect either (i) to allow a foreclosure by power of sale to go forward and thereby avoid a deficiency judgment, or (2) to require judicial foreclosure instead to delay the realization on the collateral, but in which event the lender's right to a deficiency judgment remains intact.

d. Conduct of the Sale

The sale is typically conducted by an attorney for the mortgagee. No minimum bids are required. The mortgagee and the mortgagor may both bid for the mortgaged premises as can any other person. The mortgagee can require that a successful bidder (other than the mortgagee) must post at least ten percent (10%) of the purchase price within 24 hours and that the sale be completed within ten days or such longer reasonable time as agreed to by the mortgagee. Title to the mortgaged premises is conveyed by a deed executed by the mortgagee, without warranty, and will be absolute, without right of redemption and clear of all liens, claims or other interests to the extent the proper parties were notified or served with appropriate process.

e. Deficiency Judgment

Within 90 days of the sale date, a mortgagee may commence a judicial action seeking a deficiency judgment against the parties liable for payment of the debt. A mini-trial is conducted on the amount of the original unpaid indebtedness and any deficiency remaining from the sale. The mortgagee will have to prove to the court's satisfaction the amount of the indebtedness, interest and the cost and expenses of sale including the amount of attorney's fees. If the amount of attorney's fees fixed in the mortgage by agreement is determined to be unconscionable a court may instead allow reasonable attorney's fees. In determination of the deficiency, the mortgagor may establish that the fair market value of the mortgaged premises on the date of sale exceeded the sale price, which would reduce the amount of the deficiency accordingly. After entry of a deficiency judgment, a mortgagee may enforce that judgment against any party determined to be liable.

3. Self-Help Remedies; Receivers

There are no authorized self-help remedies which may be exercised by a mortgage lender under Oklahoma law without the cooperation of a borrower at the time the remedy is exercised other than those available with respect to fixtures under Revised Article 9 at OKLA. STAT. tit. 12A, §§ 9-602 and 9-604. If the lender exercises rights accorded by the loan documents as the borrower's attorney-in-

fact, the lender will be held to fiduciary standards. *See* OKLA. STAT. tit. 58, § 1081. If the lender exercises self-help remedies by taking possession of the mortgaged premises or by operating the mortgaged premises (without necessarily taking possession of the mortgaged premises), the lender can be held to be a mortgagee in possession under Oklahoma law. *See Hearn v. Yoder*, 143 P.2d 1009 (Okla. 1943); *Brown v. Leslie*, 133 P.2d 551 (Okla. 1941); *Prince v. Brown*, 856 P.2d 589 (Okla. App. 1993).

The appropriate procedure in Oklahoma is to obtain the appointment of a receiver or a writ of assistance in an action ancillary to a foreclosure of the mortgage, whether judicial or non-judicial. *See* OKLA. STAT. tit. 12, § 686; OKLA. STAT. tit. 12, § 1551; OKLA. STAT. tit. 46, § 43. Under Oklahoma law, a lender is entitled to the appointment of a receiver as a matter of right after default if the documents so provide. *See* OKLA. STAT. tit. 12, § 1551. The determination of the person appointed as receiver rests in the discretion of the trial court; however, a lender may nominate a receiver and the lender's nominee is usually appointed, if qualified. The only restriction on the person appointed is that no party, attorney or person interested in an action may be appointed receiver except by consent of all parties. *See* OKLA. STAT. tit. 12, § 1552. A receiver must procure a bond based on the amount of revenues to be managed by the receiver. *See* OKLA. STAT. tit. 12, § 1553. The bond premium and other receivership expenses may be recovered as a cost of the foreclosure proceeding.

4. Deeds-in-Lieu of Foreclosure

Assuming no junior liens encumber a property, a deed in lieu of foreclosure may be the speediest and most economic course for a lender wishing to realize upon its real estate collateral in Oklahoma. So long as adequate consideration for the transfer is given by the lender and the transfer is free from fraud, oppression and undue advantage on the part of the lender, an absolute conveyance of title by the mortgagor should be upheld as valid. *Stallings v. Little*, 130 P.2d 525 (Okla. 1942); *Speed v. Fariss*, 113 P.2d 595 (Okla. 1941); *Moore v. Beverlin*, 99 P.2d 886 (Okla. 1939).

However, a deed executed prior to default by the mortgagor in favor of the lender or its designee and delivered to the lender or into escrow will be considered defeasible and not absolute, and would instead be deemed to be a mortgage and therefore required to be recorded and foreclosed. *Moore v. Beverlin, supra.*, OKLA. STAT. tit. 42 § 11 and OKLA. STAT. tit. 46 § 1. Similarly, a deed conveyed by the mortgagor to the lender purportedly in lieu of foreclosure may be deemed conditional and therefore defeasible if, for example, the mortgagor has a right to repurchase the property or to effectively reinstate the previous mortgagor/mortgagee relationship with the lender on the property. It is not settled in Oklahoma whether or not a lender may take a deed in lieu of foreclosure and reserve an agreed deficiency balance against the borrower not secured by the property.

T. Construction Liens

Both the liens of a general contractor and any liens arising from subcontracts directly with a general contractor have priority "relating back" to the date on which material or equipment were first supplied or work was first performed on property located in Oklahoma by the general contractor or any of its subcontractors. The lien of a party contracting directly with the owner of the property and not through a general contractor will have priority as of the first date this party supplies material or equipment to or performs work on the property. In order to perfect lien rights, general contractors and other parties contracting directly for the owner must file a lien statement within four (4) months of the applicable first date, and subcontractors must file within ninety (90) days of such date. OKLA. STAT. tit. 42 §§ 141 *et seq.* A perfected lien is subject to a one year statute of limitations from the date the lien statement is filed for commencement of an enforcement action. OKLA. STAT. tit. 42 § 172.

A title insurer in Oklahoma will require a preconstruction certification by a surveyor stating that no materials have been supplied or work performed on the property as of establishment of the priority date of the mortgage in order to assure itself that it can provide affirmative coverage to a lender against mechanic's and materialmen's liens on the property. In the event work has commenced or materials have been delivered to the property prior to the recordation of the mortgage, title insurers in Oklahoma may provide lien coverage to a lender upon the provision of sufficient indemnification or other assurances from the borrower, general contractor or other parties.

U. Homestead

Oklahoma has both constitutional and statutory homestead rights which accrue to the benefit of an individual and the individual's spouse. *See* OKLA. CONST. art. XII; OKLA. STAT. tit. 31, § 2. Real property which is a homestead can only be conveyed by the execution of a single document by the husband and wife. *See* OKLA. STAT. tit. 16, § 4. Real property which is not homestead and is owned by one of the married persons may be conveyed without the joinder of the spouse. *See* OKLA. STAT. tit. 16, § 13. However, property that is not originally homestead can become homestead by subsequent occurrences. Oklahoma has consistently held that homestead rights may not be "released" or "waived," but must be subjected to the lien of a mortgage by the joinder of both spouses in the execution of the same document. *See Grenard v. McMahan*, 441 P.2d 950 (Okla. 1968); *Thomas v. James*, 202 P. 499 (Okla. 1921).

As a result, the common practice in Oklahoma is to have a spouse join in execution of a mortgage by a married person even if the property is titled in only that individual's name. The married status of the parties is recited in the mortgage. Similarly, if a property is titled in a single person, the mortgage should recite that fact. In the event the joinder of a spouse is required to avoid the homestead issue but that person is neither a co-borrower nor otherwise required to be liable on the secured obligation, there can be a statement to the effect the spouse is executing the mortgage for the limited purpose of subjecting any homestead interest of that person in the property to the lien of the mortgage.

VII. PERSONAL PROPERTY LENDING

A. UCC Revised Article 9

Oklahoma adopted Revised Article 9 of the Uniform Commercial Code (the "UCC") with the uniform effective date of July 1, 2001. It is codified in the Oklahoma Statutes in Title 12A. The Oklahoma commentary to Revised Article 9 can be found accompanying the respective statutory sections on the Oklahoma Supreme Court's website, www.oscn.net. Oklahoma's enacted version of Revised Article 9 does not substantially differ from the official text. However, there are a few variances worth noting. One difference found in Oklahoma is that, generally, filing in Oklahoma is done with the County Clerk's Office of Oklahoma County in Oklahoma City and not the Secretary of State or other office of the state government as in the great majority of states. Information concerning filing fees and filing requirements are currently located on the County Clerk's website at <http://countyclerk.oklahomacounty.org/UCC.html>.

Also, Oklahoma's version includes non-negotiable certificates of deposit in writing within the definition of "instrument" for purposes of Article 9. OKLA. STAT. tit. 12A, § 1-9-102(a)(47)(B)(ii). Therefore, such a certificate of deposit will not come within the definition of "deposit account," and so the special priority rules applicable to deposit accounts do not apply, nor can it be perfected by "control." However, uncertificated certificates of deposit are not covered under this variation, and therefore are deposit accounts as in the uniform text.

Additionally, the statutory provisions enacted to comply with the Food Security Act are codified in Oklahoma's version of Revised Article 9. The Central Filing System for agricultural liens is maintained separately at the Oklahoma Secretary of State's office. The filing of an Effective Financing Statement with the Secretary of State is in addition to the UCC filing requirements for perfection provided in Title 12A. Without filing with the Central Filing System or providing written notification from the lender to all potential buyers, farm products may be purchased free of a security interest, even if otherwise perfected under the UCC. Information can be found at the Oklahoma Secretary of State website, www.sos.state.ok.us.

B. Security Interests Excluded From Article 9

1. Insurance Policies

A transfer of an interest in or assignment of a claim under a policy of insurance, other than an assignment of a health-care-insurance receivable, is excluded from the UCC under OKLA. STAT. tit. 12A, § 1-9-109(d)(8). The Insurance Code in Title 36 provides that the terms of a policy determine whether it is assignable or not. OKLA. STAT. tit. 36, § 3624. An assignment executed by the insured and delivered to the insurer entitles the insurer to deal with the assignee as the owner or pledgee of the policy in accordance with the terms of the assignment until it receives written notice of termination of the assignment. *Id.* Individual interests

under a group life insurance policy may also be assigned. OKLA. STAT. tit. 36, § 3624.1.

The Oklahoma Supreme Court has held that an assignment of a life insurance policy is an ordinary contract between the assignor and assignee and, as such, is interpreted under general contract principles. *Prudential Insurance Co. of America v. Glass*, 959 P.2d 586 (Okla. 1998). No particular form of words is essential to effect an assignment of a life insurance policy – any writing indicating an intention to pass the interest in the policy's proceeds to the assignee is sufficient. *Id.* A policy may be pledged as collateral security for a debt. In such cases, the assignee has a right to the policy's proceeds superior to that of the beneficiary to the extent of the underlying debt, but the assignee's interest extends no further than necessary to satisfy repayment of the debt. *Id.* The assignor, and consequently, his designated beneficiary, still have an interest in a policy's proceeds that remain after the debt is satisfied. *Id.* Oklahoma does not have any specific statutes or rules in connection with the financing of insurance premiums.

2. Titled Vehicles (Including Manufactured Homes)

Oklahoma's certificate of title laws for motor vehicles are contained in OKLA. STAT. tit. 47, §§ 1105-1111, the Oklahoma Vehicle License and Registration Act (the "Certificate of Title Act"). Pursuant to § 1110(A)(1) of the Certificate of Title Act, perfection of a security interest in a motor vehicle requires notation of the lien of the secured party on the certificate of title for the motor vehicle which may only be accomplished by delivery of a lien entry form, and the existing certificate of title, if any, or application for a certificate of title and manufacturer's certificate of origin (in the case of a new vehicle) containing the name and address of the secured party, the date of the security agreement and the required fee to the Oklahoma Tax Commission (the "Tax Commission") or to a motor license agent. However, these procedures do not apply to a security interest in vehicles held by a dealer for sale or lease, a vehicle registered by a federally recognized Indian tribe and a vehicle being registered in Oklahoma which was previously registered in another state and which title contains the name of a secured party on the face of the other state certificate or title. A security interest in a vehicle registered by a federally recognized Indian tribe is deemed valid under Oklahoma law if it is either validly perfected under the applicable tribal law or procedure, or the lien is noted on the face of the tribal certificate of title within thirty (30) days after the security interest attaches. OKLA. STAT. tit. 12A, § 9-311(a)(4).

Oklahoma's certificate of title laws for vessels and motors are contained in OKLA. STAT. tit. 70, §§ 4001-4044, the Oklahoma Vessel and Motor and Registration Act.

If a manufactured home is permanently affixed to real estate, the original certificate of title may be surrendered to the Tax Commission or a motor license agent for cancellation. However, the Tax Commission may not cancel a

certificate of title if a lien has been registered or recorded. The Tax Commission is required to notify the owner and any lienholder that the title has been surrendered to it and that the Tax Commission may not cancel the title until the lien is released. Permanent attachment to real estate does not affect the validity of a lien recorded or registered with the Tax Commission before the certificate of title is cancelled, and the rights of a prior lienholder are preserved. The owner of a manufactured home on which the certificate of title has been properly surrendered, may apply to the Tax Commission for issuance of a new original certificate of title.

A security interest in a manufactured home perfected pursuant to § 1110 has priority over a conflicting interest of a mortgagee or other lien encumbrancer, or the owner of the real property on which the manufactured home became affixed or otherwise permanently attached. On default, the holder of the security interest in the manufactured home may remove the manufactured home from the real property, but the holder must reimburse the owner of the real property who is not the debtor and who has not otherwise agreed to access the real property for the cost of repair of any physical injury to the real property. In such case, the holder of the security interest is not liable for any diminution in value to the real property caused by the removal of the manufactured home, trespass, or any other damages caused by the removal. OKLA. STAT. tit. 47, § 1110(E).

3. Judgments

Oklahoma has little law on the subject of the assignment of judgments for security purposes. Such assignments are excluded from the coverage of Article 9 of the UCC by OKLA. STAT. tit. 12A, §§ 1-9-109(d)(9).

C. Statutory Liens; Priority

Oklahoma law provides for a number of statutory liens, with many of them found in Title 42 of the Oklahoma Statutes. OKLA. STAT. tit. 12A, § 1-9-333 provides that certain statutory possessory liens have priority over perfected security interests.

OKLA. STAT. tit. 42, §§ 91 (for personal property that has a certificate of title issued by Oklahoma) and 91A (for all other personal property other than farm equipment) provide that every person who, while lawfully in possession of an article of personal property, renders any service to the owner by furnishing material, labor or skill for the protection, improvement, safekeeping, towing, storage or carriage of the property has a special lien dependent on possession for the compensation due from the owner for the service. When the requirements of these statutes are complied with, these liens can take priority over existing perfected security interests. Possessory liens on farm equipment are specifically addressed in OKLA. STAT. tit. 42, § 91.2.

Possessory liens against manufactured homes are specifically addressed in OKLA. STAT. tit. 42, § 180. The Self-Service Storage Facility Lien Act provides for an earlier date of attachment of the possessory lien than does § 91 for personal property that comes under

its provisions. See OKLA. STAT. tit. 42, §§ 191 *et seq.* Additionally, a banker has a general lien, dependent on possession, against property of a customer to satisfy any amount due from such customer under OKLA. STAT. tit. 42, tit. § 32, which predates the provision for a security interest on deposit accounts under Revised Article 9.

Agricultural liens within the scope of Article 9 include a lien on crops in favor of suppliers of seed, pesticides, and fertilizers under OKLA. STAT. tit. 42, §§ 47 and 48, and a lien in favor of threshers and combiners under OKLA. STAT. tit. 42, §§ 111 and 115. Agister's liens on farm animals for feeding, grazing, herding and breeding can be found in OKLA. STAT. tit. 4, §§ 191-201.

Other statutory liens in Title 42 include oil and gas well liens (§ 144), coal miner liens (§ 148), attorney's liens (§ 34), and real estate broker's liens (§ 203). Various other statutory liens are in Title 42 and scattered throughout the Oklahoma Statutes.

Other than the lien in favor of landlords of agricultural property for unpaid rent against crops grown on the property, OKLA. STAT. tit. 41, § 23, there is no statutory or common law commercial landlord's lien in Oklahoma. Therefore, the lessor of commercial property is advised to take, perfect and enforce a security interest in a tenant's personal property in compliance with UCC Article 9.

There is a lien to secure Oklahoma's personal property tax. OKLA. STAT. tit. 68, § 3103. The lien is placed upon all of the personal and real property of the person or entity owing the delinquent tax, and is superior to all subsequently filed liens, encumbrances or conveyances. Oklahoma's retail sales tax, which is collected by the seller, is a trust fund tax. OKLA. STAT. tit. 68, § 1361. Therefore, an Article 9 security interest in a borrower's accounts receivable does not attach to the portion of the account that represents the sales tax.

VIII. EQUIPMENT LEASING

Oklahoma has adopted Article 2A of the UCC. OKLA. STAT. tit. 12A, §§ 2A-101 *et seq.* The Oklahoma version does not substantially vary from the uniform text.

The Oklahoma statutes contain two provisions specific to personal property leasing in connection with oil and gas wells. Verbal leases of personal property used in connection with an oil and gas well are void as against innocent purchasers or creditors of the lessee. OKLA. STAT. tit. 60, § 321. Additionally, a written lease of personal property used in connection with an oil and gas well is void as against innocent purchasers or creditors of the lessee unless the lease is filed in the county clerk's office in the county in which the property is kept or used. OKLA. STAT. tit. 60, § 319. For a discussion of the interaction of these provisions with the rules of Article 2A, see the Oklahoma Code Comment to sections 2A-307 and 2A-309 of Article 2A.

IX. GUARANTIES

Generally, the Oklahoma statutes relating to guaranty agreements, including Article 3 of the UCC found at OKLA. STAT. tit. 12A, §§ 3-101 *et seq.*, are not unusual and render such agreements enforceable provided that the guaranty agreement is entered into contemporaneously with the underlying obligation or is supported by independent consideration. It is now settled in Oklahoma that a guaranty agreement creates an independent obligation on which the obligee can collect without first proceeding against the primary obligor for collection of the underlying debt. *See Founders Bank & Trust. Co. v. Upsher*, 830 P.2d 1355 (Okla. 1992); *Riverside Nat. Bank v. Manolakis*, 613 P.2d 438 (Okla. 1980). Waivers of defenses and other rights in Oklahoma guaranties often include references to specific statutes to be waived by the guarantor, namely OKLA. STAT. tit. 12, § 686; tit. 12A, § 3-605; and tit. 15, §§ 323, 334, 335, 337, and 338.

There is one circumstance which might create an issue with respect to the enforceability of a guaranty agreement in a loan which is nonrecourse to the borrower, but which has been guaranteed by a third party. While nonrecourse loans are recognized in Oklahoma, OKLA. STAT. tit. 15, § 334 provides as follows:

The obligation of a guarantor must be neither larger in amount, nor in other respects more burdensome than that of the principal; and if, in its terms, it exceeds it, it is reducible in proportion to the principal obligation.

None of the guaranty cases have dealt with the foregoing statute in the context of a guaranty of a nonrecourse loan. It is unclear how an Oklahoma court will view a situation in which the liability of the primary obligor is limited to the value of the mortgaged premises and a guaranty of the deficiency has been extracted from a third party under the terms of a guaranty agreement.

X. LENDING IN INDIAN COUNTRY

According to the 2000 Census, the tribal population in Oklahoma is approximately 390,000 strong. For secured transactions that Article 9 dictates the governing law to be Indian country, the appropriate tribal law will apply. Oklahoma is home to 39 tribal governments, 38 of which are federally recognized. The 39 tribal governments in Oklahoma are as follows:

Absentee Shawnee Tribe	Alabama Quassarte Tribal Town	Apache Tribe
Caddo Tribe	Cherokee Nation	Cheyenne-Arapaho Tribes
Chickasaw Nation	Choctaw Nation	Citizen Potawatomi Nation
Comanche Nation	Delaware Nation	Delaware Tribe of Indians
Eastern Shawnee Tribe	Euchee (Yuchi) Tribe of Indians	Fort Sill Apache Tribe
Iowa Tribe of Oklahoma	Kaw Nation of Oklahoma	Kialagee Tribal Town

Kickapoo Tribe of Oklahoma	Kiowa Tribe	Miami Nation
Modoc Tribe	Muscogee (Creek) Nation	Osage Nation
Otoe-Missouria Tribe	Ottawa Tribe	Pawnee Nation of Oklahoma
Peoria Tribe of Indians of Oklahoma	Ponca Nation	Quapaw Tribe of Oklahoma
Sac & Fox Nation	Seminole Nation	Seneca-Cayuga Tribe of Oklahoma
Shawnee Tribe	Thlopthlocco Tribal Town	Tonkawa Tribe
United Keetoowa Band of Cherokees	Wichita & Affiliated Tribes	Wyandotte Nation

A. Where is "Indian Country"?

In Oklahoma, Indian country includes "Trust" and "Restricted" land. Trust land is set apart for the use of the Indians as such, under the superintendence of the Government and held in trust by the United States for the tribe or an individual Indian. Trust land status may generally be verified by looking at the deed. The grant clause may be from any person but will be to "the United States of America in trust for [tribe or Indian person]." However, the most important item to note is an approval, usually at the bottom of the page, signed by the Bureau of Indian Affairs ("BIA") Area Director. Restricted land is owned by an Indian or family but is subject to a restriction on alienation without approval by the Secretary of Interior. Restricted lands are governed by various acts of Congress but usually the deed will contain some language like "subject to restriction against alienation." The owner of a restricted allotment generally must be of at least ¼ degree of Indian blood. If the land is inherited by persons with less than ¼ degree Indian blood it becomes unrestricted.

Indian reservations may also be intact. It is important to note that the outer boundaries of Oklahoma Indian country are not always clearly defined.

B. How to File in Indian Country

Just like states, each Indian tribe may have its own law and filing system. Some Indian tribes, like the Cherokee Nation, have adopted the UCC. Other Indian tribes are adopting the Model Tribal Secured Transactions Act (the "MTSTA") which was finalized in 2005 by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). The MTSTA is available from the NCCUSL website at www.nccusl.org under the "Final Acts and Legislation" tab. If an Indian tribe does not have a properly drafted secured transactions law, the secured party may find its interest unperfected. Should the secured transactions law not be acceptable, commercial lenders can work with the legal department or Chief/Chairman/Governor of the Indian tribe.

XI. OTHER LAWS OF INTEREST

A. Recovery of Attorneys' Fees

Attorneys' fees are statutorily available in Oklahoma in a wide range of actions, including (1) any action to collect upon an obligation to repay money after default, OKLA. STAT. tit. 15, § 276; (2) an action on an insurance contract, OKLA. STAT. tit. 36, § 3629; (3) an action for negligent or willful injury to property, OKLA. STAT. tit. 12 § 940; and (4) an action on a contract for the sale of goods or services, OKLA. STAT. tit. 12, § 936. Post-judgment interest is allowed on all judgments, including costs and attorneys' fees, and is calculated based on the rate specified in the contract, if applicable, or the prime rate, set annually, plus two percent. OKLA. STAT. tit. 12, § 727.1. Additionally, the defendant can make an offer of judgment filed with the court; if the plaintiff refuses the offer and the resulting judgment is less than the offer, the plaintiff must pay the attorneys' fees of the defendant incurred after the filing of the offer. OKLA. STAT. tit. 12, § 1101.1.

B. Environmental Laws and Regulations

Oklahoma has extensive laws and regulations governing environmental matters. These laws and regulations are administered and enforced by the Oklahoma Department of Environmental Quality ("DEQ"). However, Oklahoma has not enacted the Model Toxics Control Act, nor does the DEQ have the statutory right to file a lien if it incurs remediation costs. The only exception is the DEQ's waste tire program which allows the DEQ to recover cleanup costs for an illegal tire dump. *See* OKLA. STAT. tit. 27A, § 2-11-401.7(E).

C. Punitive Damages

Punitive damages are subject to certain caps depending upon a jury's determination into which of three categories the defendant's conduct falls. OKLA. STAT. tit. 23, § 9.1. In Category I, punitive damages, capped at the greater of \$100,000 or the amount of actual damages, may be awarded if the jury finds by clear and convincing evidence that the defendant was guilty of reckless disregard for the rights of others. Category II punitive damages may be awarded if the jury finds by clear and convincing evidence that the defendant acted intentionally and with malice toward others, and are capped at the greatest of \$500,000, twice the amount of actual damages, or the financial benefit that the defendant derived from its conduct. Finally, in Category III, punitive damages may be awarded, without limitation, if the jury finds by clear and convincing evidence that the defendant acted intentionally and with malice toward others, and the court finds beyond a reasonable doubt that the defendant acted intentionally and with malice toward others and engaged in conduct life-threatening to humans. In each case the award is a two-stage procedure, the jury first determining the defendant's conduct, and then in a separate proceeding the jury determining the amount of damages.

D. Statute of Frauds

Oklahoma's primary statute of frauds is found in OKLA. STAT. tit. 15, § 136. Most significantly, it requires an agreement, or a note or memorandum thereof, to be in writing if by its terms it can not be performed within a year, or it is a lease of real property for more than one (1) year or it is for the sale of real property. The separate statute of frauds for guaranties and limited exceptions to it are at OKLA. STAT. tit. 15, §§ 324 and 325. Additionally, no lender or borrower may maintain an action to enforce or seek damages for breach of a term or condition of a credit agreement having a principal amount exceeding \$15,000 unless the term or condition has been agreed to in writing and signed by the party against whom it is sought to be enforced. OKLA. STAT. tit. 15, § 140(B).

E. Statutes of Limitation

The statute of limitation applicable to promissory notes and other written contracts is 5 years. OKLA. STAT. tit. 12, § 95. A 3 year statute of limitation applies to actions on open accounts. The statute of limitation applicable to oral contracts is 3 years. OKLA. STAT. tit. 12, § 95. The statute of limitation applicable to most torts is 2 years. A judgment in a domestic court is kept alive by execution or garnishment summons every five years. An action on a judgment from a foreign court must be commenced within 3 years. Also note that any claim to a deficiency by a lender foreclosing by power of sale must be asserted by moving for a deficiency judgment within 90 days after the confirmation of the foreclosure sale. OKLA. STAT. tit. 46, § 43. Any term or condition in a contract that attempts to limit the time within which a party may enforce its rights is void. OKLA. STAT. tit. 15, § 216. The statute of limitation under UCC § 2-725 is 5 years from the time the cause of action accrues, but may be reduced to not less than 1 year by original agreement, and supersedes other Oklahoma provisions for contracts subject to the UCC.

F. Choice of Law Provisions

It has long been acknowledged by the courts of Oklahoma that the parties to a contract can agree to the law which is to govern the contract, and a court will abide by such agreement. *See Midland Savings & Loan Co. v. Henderson*, 150 P. 868 (Okla. 1915); *Midland Savings & Loan Co. v. Evans*, 171 P. 726 (Okla. 1918); *Carmack v. Chemical Bank New York Trust Co.*, 536 P.2d 897 (Okla. 1975). More recently it has been held that the normal rule would not apply on a particular issue in Oklahoma if either (i) the governing law specified by the contract is contrary to the law and public policy of the state of enforcement with respect to the particular issue or (ii) the law of the state specified by contract is contrary on the issue to a fundamental policy of the state which has a materially greater interest in the determination of the issue. *Pate v. MFA Mutual Ins. Co.*, 649 P.2d 809 (Okla. App. 1982); *Moore v. Subaru of America*, 891 F.2d 1445 (10th Cir. 1989). Additionally, Oklahoma retained the previous UCC choice of law provision rather than adopting the one in revised Article 1, but did renumber the provision to 1-301 as in revised Article 1.

G. Forum and Venue Selection Provisions

Oklahoma courts will generally enforce forum and venue selection clauses in contracts at least where they are timely brought to the court's attention.

H. Jury Trial Waivers

Jury trial waiver provisions would likely be ineffective in Oklahoma. The Oklahoma Constitution provides that the right of trial by jury is inviolate except in civil cases where the amount in controversy does not exceed \$1,500 and that provisions waiving the benefits of the Oklahoma Constitution are void. *See* OKLA. CONST. art. II, § 19, art. XXIII, § 8. Oklahoma has no reported cases relating to a contractual waiver of jury trial. The Oklahoma statutes which address the waiver of jury trial require the filing of a consent with the court clerk, an oral consent in open court or a consent in an appearance when the opposing party fails to appear, all of which cannot occur prior to the commencement of an action. *See* OKLA. STAT. tit. 12, §§ 556, 591. *See also* OKLA. STAT. tit. 15, § 216. In light of the constitutional provisions, we do not believe an Oklahoma court would enforce a contractual waiver of jury trial outside the context of actual arbitration proceedings. We do not customarily include such provisions in loan documents because of the potential prejudice which the lender might experience by the introduction of that clause in a lender liability counterclaim tried before a jury. Under those circumstances, the lender has the worst of both worlds, the waiver is unenforceable and the Lender's defense will be adjudicated by the people the lender sought to avoid. *See e.g., K.M.C., Inc. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985). If the purpose for including the waiver of jury trial is to require a borrower to try a lender liability claim to the court, such efforts have previously failed in Oklahoma. *See e.g., Cheatham v. Bynum*, 568 P.2d 649 (Okla. App., 1977).

I. Duty of Good Faith

In addition to the duty of good faith applicable to all contracts under the UCC imposed by OKLA. STAT. tit. 12A, § 1-203, Oklahoma recognizes an independent implied covenant of good faith and fair dealing of banks to their customers. *See Beshara v. Southern Nat'l Bank*, 928 P.2d 280 (Okla. 1996); *First Nat'l Bank & Trust of Vinita v. Kissee*, 859 P.2d 502 (Okla.1993); *Rodgers v. Tecumseh Bank*, 756 P.2d 1223 (Okla. 1988). The Oklahoma Supreme Court has found that a breach of this implied covenant may be tortious in nature if the factual situation warrants. *Beshara*, 928 P.2d at 288 (a case involving a bank's hold on a customer's checking account for over three and a half years while the bank audited the account).

J. Powers of Attorney

Oklahoma has adopted the Uniform Durable Power of Attorney Act at OKLA. STAT. tit. 58, §§ 1071-1077. A power of attorney in fact for the conveyance of real estate or any interest in real estate, or for the execution or release of any mortgage in real estate, must be executed, acknowledged and recorded in the manner required by Chapter 1 of Title 16, and must be recorded in the county where the land is situated. A deed, mortgage or

release of a mortgage executed by an attorney in fact will not be received for record or recorded until the power has been filed for record in the same office. The recording of a deed, mortgage or release of mortgage will have no effect until the power under which it is executed has been filed for record in the same office. *See* OKLA. STAT. tit. 16, § 20.

When a lender accepts a signature under a power of attorney, it should obtain an affidavit complying with OKLA. STAT. tit. 58, § 1046 from the attorney-in-fact certifying that the power of attorney has not been revoked or terminated.

XII. OTHER UNIFORM LAWS

A. Arbitration

Oklahoma adopted the revised Uniform Arbitration Act, effective January 1, 2006, and codified at OKLA. STAT. tit. 12, §§ 1851 *et seq.* The Oklahoma version contains two non-uniform amendments: (i) on rendering a final decision on the merits of a case, the arbitrator must support his/her decision by rendering findings of fact and conclusions of law and (ii) the Uniform Arbitration Act should be applied and construed consistent with the Federal Arbitration Act. *See* OKLA. STAT. tit. 12, §§ 1870 and 1880.

B. Environmental Covenants

Oklahoma has adopted the Uniform Environmental Covenants Act, which is codified at OKLA. STAT. tit. 60, §§ 49.11 *et seq.*

C. Fraudulent Transfers

Oklahoma has adopted the Uniform Fraudulent Transfer Act, which is codified at OKLA. STAT. tit. 24, §§ 112 *et seq.*

D. Electronic Transactions

Oklahoma has adopted the Uniform Electronic Transactions Act (UETA), which is codified at OKLA. STAT. tit. 12A, §§ 15-101 *et seq.* An electronic document in compliance with UETA that is presented to the county clerk for recording in the real estate records is acceptable for filing. OKLA. STAT. tit. 19, §§ 298.1.

XIII. CONCLUSION

This guide is designed to provide a general overview of various aspects of Oklahoma law that affect the commercial lending relationship in order to assist commercial lenders and businesses contemplating the extension of credit to Oklahoma borrowers. This guide is current as of January, 2008. We have not attempted to address Oklahoma law governing consumer lending transactions or issues of federal law. Because of the breadth of the topic, this guide is necessarily general. Lenders should not rely on this guide for answers to questions involving the application of Oklahoma law to a specific set of facts, and we urge you to consult one of our attorneys before making important decisions that might be

governed by Oklahoma law. This guide does not constitute the rendering of legal advice for specific situations, which depend on the evaluation of precise factual circumstances, or other professional advice by Phillips McFall McCaffrey McVay & Murrah, P.C. or its attorneys.

EXHIBIT A
Formatting Requirements For Recorded Documents

The following formatting requirements for documents to be recorded in the real estate records are set out in OKLA. STAT. tit. 19, § 298. They can be enforced very strictly by county recording offices. If the document does not conform to the rules, it is considered a "nonconforming" document. While the law states that persons offering nonconforming documents may still be entitled to have them recorded, nonconforming documents are subject to an increased filing fee. The nonconforming document filing fee is \$25 for the first page and \$10 for each additional page. The fee for filing a conforming document is \$8 for the first page and \$2 for each additional page. In addition, an additional \$5 in recording costs should be added to the first page for the recording fee, both for conforming and nonconforming documents, pursuant to OKLA. STAT. tit. 28, § 32(C) regarding the records preservation fee. The records preservation fee is a one-time \$5 charge for just about every document recorded with the county clerk.

In order for a document to be considered a "conforming" document, it must be as follows:

1. It must be an original or certified copy of an original;
2. It must be clearly legible, in the English language, using "xerographically reproducible dark ink, on paper color that is xerographically reproducible by the copying equipment used by the county clerk";
3. It may not be larger than 8 ½ inches by 14 inches (i.e., "legal" size paper);
4. It must provide an area free of printed information sufficient in size to accommodate affixation of documentary stamps, certification of payment of mortgage taxes, and the recording information (such as book and page numbers); and
5. The top margin must be at least 1 inch and the other margins must be at least ½ inch.

The law states that even if a document does not meet the above requirements, the "county clerk shall accept" the nonconforming document so long as:

1. It is an original or a certified copy of an original;
2. It is legible without the aid of magnification or other enhancement of text;
3. It is xerographically reproducible by the copying equipment in use by the county clerk;
4. It meets all other statutory requirements for recordation (which would include such things as proof of the payment of mortgage taxes on a mortgage or affixing documentary tax stamps on a deed); and
5. The additional fee is paid for nonconforming documents.

Finally, although the law requires that all recorded documents have a top margin of at least 1 inch and side and bottom margins of at least ½ inch, it also requires that all recorded documents have space free from printed material which will accommodate documentary stamps, recording information and mortgage tax information.



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Phillips McFall McCaffrey McVay & Murrah, P.C. was founded in 1986 in Oklahoma City by four attorneys with one guiding vision: To empower their clients with the fresh insight, unique perspective and strategic legal counsel necessary to achieve and maintain a competitive edge.

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In the banking law and financial services law areas, Phillips McFall represents commercial banks, insurance companies, public and private pension funds, finance companies, investment and merchant banking firms, private investment funds and other institutional lenders and investors, as well as borrowers and issuers of securities, in a wide range of financing transactions. These transactions involve secured and unsecured loan agreements; letters of credit and other credit enhancement devices; note purchase agreements; project financing agreements; structured receivables arrangements and asset-backed securities transactions; leveraged buyout and other acquisition financing arrangements; aircraft, ship and manufacturer financings; leveraged lease financings; loan syndications; equity participations in the form of common and preferred stock investments; offerings of convertible securities, warrants and partnership interests; and workouts, restructurings and debtor-in-possession financings.

The principal attorneys responsible for this guide are J. Mark Lovelace, Director, Eric L. Johnson, Director, and Joshua L. Edwards, Associate. We gratefully acknowledge the contributions of our mentors and colleagues, John D. Hastie, Of Counsel and a former President of the American College of Real Estate Lawyers (ACREL), particularly in the Real Estate Lending section of this guide, and Fred H. Miller, Of Counsel, George Lynn Cross Research Professor Emeritus at the University of Oklahoma College of Law and a former President of the National Conference of Commissioners on Uniform State Laws (NCCUSL).

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