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chapter 10

Legal Aspects of Real Estate Finance

Objectives

After reading this chapter, you should be able to:

• Prepare a promissory note
• Prepare a guaranty
• Understand the basic provisions contained in a promissory note
• Understand the basic provisions contained in a guaranty
• List the legal requirements for a mortgage, deed of trust, or security deed
• Understand the risks inherent in a second mortgage
• Identify the various legal remedies available to both the borrower and the lender in the event of a default on a mortgage loan

Outline

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   E. Florida Mortgage
   F. North Carolina Deed of Trust
   G. Georgia Commercial Deed to Secure Debt
Real estate mortgage loans involve large sums of money and numerous risks for both the borrower and the lender. The borrower may be unable to pay the debt and may lose the real property pledged as security for the debt. The lender may not be repaid as promised and may resort to the real property security or other measures to collect on the debt. Over the years, several legal documents have been created to evidence and secure mortgage loan transactions. Paralegals are actively involved in the preparation of these documents and need to be familiar with the different legal documents required to make a loan secured by real property. The main legal documents are a promissory note and a security instrument, which, depending on the location of the real property, may be a mortgage, deed of trust, or security deed. A promissory note is the written promise made by a property owner to repay the money borrowed from a lender or creditor; the security instrument (mortgage, deed of trust, or security deed) is the instrument conveying real property as security for the repayment of the money.

**PROMISSORY NOTE**

A **promissory note** is a promise by one party to pay money to another party. The parties on a promissory note are referred to as **payor** or **maker** (the party who promises to pay) and **payee** (the party to whom the promise is made). A note may be negotiable or nonnegotiable. The term **negotiable** means that the note is capable of being transferred from the original payee to another person, referred to as a **holder**. A negotiable note can be transferred to a holder in due course. A holder in due course has a privileged status in the ability to collect payment on a note. A holder in due course of a promissory note usually defeats any defenses to payment that the maker of the note may have. For example, Ajax Realty Company sells a home to Mary Stewart. Ajax agrees, as part of the purchase price, to take a note from Mary Stewart in the amount of $100,000 payable over the next 10 years. Ajax Realty Company also warrants to Mary Stewart that the roof of the house will not leak for 10 years. After the sale of the home, the note from Mary Stewart to Ajax Realty Company is transferred to First Bank and Trust, a holder in due course. A year after the closing, the roof begins to leak, causing damage to Mary Stewart’s personal possessions. Mary Stewart stops payment on the note. First Bank and Trust sues Mary Stewart for $100,000. Mary Stewart countersues, arguing that the roof is leaking and has damaged her possessions in the amount of $20,000. She argues that she should be entitled to pay only $80,000 on the note. If First Bank and Trust were not a holder in due course, Mary Stewart would be able to set off the $20,000 leaking-roof damages against the payment of the note. Because First Bank and Trust is a holder in due course, Mary Stewart is not able to set off the leaking-roof damages against the payment of the note. First Bank and Trust, as a holder in due course, can collect the full $100,000 from Mary Stewart.

A holder in due course defeats most defenses that a maker on a note would have to the payment of the note. Exceptions to this rule are (a) incapacity of the maker, (b) illegality of the purpose of the note, (c) duress of the maker in signing the note, (d) discharge of the maker in bankruptcy, (e) forgery of the maker’s signature, (f) fraud in factum, and (g) material alteration of the note. **Fraud in factum** is a situation in which a party signing the note did not have enough knowledge or reasonable opportunity to determine that a note was being signed. Except for these seven defenses, a holder in due course is entitled to collect payment on a note from a maker.

It is in the best interest of investors and purchasers of promissory notes to be a holder in due course. For a holder in due course situation to exist, the note being held must be a negotiable note, and the holder must have possession of the original note with all
the necessary endorsements to establish title in the holder. The holder also must have purchased the note for value and in good faith without notice of any defenses or without notice that the note was overdue or dishonored.

Investors who purchase notes, such as Fannie Mae, Freddie Mac, and other investors in the secondary mortgage market, have a strong interest in being a holder in due course. This strong interest in being a holder in due course means that most notes that are prepared to secure a loan are negotiable. Lawyers and paralegals, therefore, make every effort in the drafting of a note to make the note negotiable.

A negotiable note, by definition, is written, signed by the maker, and contains an unconditional promise to pay a certain sum of money on demand or at a definite time. If any part of this definition is missing, the note is not negotiable. For example, you have a written note in which the maker agrees to pay $100,000 on the completion of a contract. Because it is unknown when and if the contract will be completed, the promise to pay is conditional, and the note is not negotiable.

Negotiability should not be confused with enforceability. As discussed previously, a negotiable note can be transferred to a holder in due course. A nonnegotiable note may be enforceable; that is, a holder of a nonnegotiable note may be able to collect the money from the maker. A nonnegotiable note may be transferred, but it cannot be transferred to a holder in due course. Collection of a nonnegotiable note is subject to whatever defenses the maker may have toward the collection of the note.

**Endorsement**

Notes often are transferred by the payees. It is not uncommon in a real estate transaction for the original lender—for example, a savings bank—to sell the note to another investor, such as Fannie Mae. A note is transferred and sold by **endorsement.** An endorsement is simply a direction, usually printed on the back of the note or attached to the note, ordering that the money be paid to the order of the new owner of the note. Sample endorsements are shown in Example 10–1.

<table>
<thead>
<tr>
<th>Example 10–1</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Unqualified Endorsement</strong></td>
</tr>
<tr>
<td>FOR VALUE RECEIVED, pay to the order of:</td>
</tr>
<tr>
<td>By: (SEAL)</td>
</tr>
<tr>
<td><strong>Qualified Endorsement No. 1</strong></td>
</tr>
<tr>
<td>FOR VALUE RECEIVED, without recourse, pay to the order of:</td>
</tr>
<tr>
<td>By: (SEAL)</td>
</tr>
<tr>
<td><strong>Qualified Endorsement No. 2</strong></td>
</tr>
<tr>
<td>FOR VALUE RECEIVED, without recourse and warranty, pay to the order of:</td>
</tr>
<tr>
<td>By: (SEAL)</td>
</tr>
</tbody>
</table>

An endorser who transfers a note by endorsement incurs certain contractual and warranty liabilities to the new owner of the note. The contractual liability is that the endorser will pay the note according to its terms in the event the maker does not. Contractual liability of an endorser to pay a note is secondary. The holder of the note must first present the note to the maker for payment, and the maker must dishonor (refuse or fail to pay) the
note. Once the note has been presented to the maker and the maker has refused or failed to pay, a notice of dishonor must be sent to the endorser within three business days from the date of dishonor. If all these steps are performed by the holder of the note, an endorser is then responsible to pay the note. These three steps—presentment, dishonor, and notice of dishonor—can be waived by an endorser, and this waiver can be contained in the note that is endorsed. The purchaser of a note usually wants the waiver because the waiver will make it easier to collect the note from an endorser. An example of language contained in a note that waives presentment, dishonor, and notice of dishonor is shown in Example 10–2.

### Example 10–2

**Waiver.** Demand, presentment, notice, protest, and notice of dishonor are hereby waived by Borrower and by each and every co-maker, endorser, guarantor, surety, and other person or entity primarily or secondarily liable on this note.

In addition to a contractual obligation to pay the note, an endorser has warranty liabilities to the new owner of the note. An endorser who sells the note by endorsement warrants the following: (a) the endorser has good title to the note; (b) all signatures are genuine and authorized; (c) the note has not been materially altered; (d) there are no defenses to payment of the note; and (e) the endorser has no knowledge of any bankruptcy proceedings against the maker.

An endorser of a note may not want the obligation to pay the note. For example, a savings bank closes a number of residential loans for the purpose of selling the loans to a life insurance company investor. The understanding between the savings bank and the life insurance company is that the life insurance company will rely solely on the credit risks of the individual homeowners for repayment of the notes. There is no intent on the part of the life insurance company to look to the savings bank for payment of the homeowners’ notes.

An endorser can escape the contractual liability by giving a qualified endorsement. One type of qualified endorsement is the “without recourse” endorsement, shown as Qualified Endorsement No. 1 in Example 10–1. The “without recourse” endorsement negates contractual liability but still imposes warranty liability on the endorser, with the exception that in connection with the warranty of no defenses, the endorser who makes a “without recourse” endorsement warrants only that he or she has no knowledge of any defenses to the payment of the note.

An endorsement “without recourse and warranty” negates all contractual and warranty liabilities. This endorsement is shown as Qualified Endorsement No. 2 in Example 10–1. This type of endorsement is similar to a quitclaim deed in that it transfers whatever title the endorser has to the note but makes no warranties.

Few investors will purchase notes that contain a “without recourse and warranty” endorsement, and this endorsement seldom is used.

### Payment

A maker’s promise on a negotiable note is unconditional, and the maker is not released by the sale of the security securing the note. For example, a homeowner signs a note promising to pay $100,000 secured by her home. The homeowner later sells the home. The sale of the home does not release the homeowner from the promise to pay the $100,000 on the note.

In some situations, there is more than one maker on a note, such as in the case of a husband and wife signing a note for the purpose of purchasing a home. In such an event, each maker of the note, referred to as a co-maker, is fully responsible for the payment of the note.
The note can be collected from each of the co-makers in full. This is known as joint and several liability. For example, Stanley White and Martha White purchase a home. As part of the purchase, they borrow $100,000 from First Bank and Trust and sign a note promising to pay the $100,000. The bank can collect the $100,000 in full from either Stanley White or Martha White.

The holder of a note is the only person entitled to payment, and a maker, when paying a note, should be careful to pay only the holder. Another risk arises when the maker leaves the note with the holder after it has been paid. What, other than honesty and integrity, is to prevent the holder from selling the note to a holder in due course after it has been paid? The holder in due course, if unaware that the note has been paid, is entitled by law to collect again from the maker. Therefore, to avoid multiple payments of the same note, it is not uncommon for makers of notes to demand that the original note be returned marked “paid” or “satisfied” at the time of payment.

Prepayment

A note cannot be prepaid before the date established in the note for payment. If the maker of the note wants the privilege to prepay, this privilege must be provided for in the note. It is not unusual for a lender to condition prepayment on the payment of an additional premium or penalty. Some lenders, such as life insurance companies that desire to have their loans outstanding without prepayment for a fixed period of time, may establish a prepayment privilege that is closed for a certain period of time and then is available with a penalty. The prepayment clause is typically used on commercial loans held by life insurance companies and other commercial mortgage loan investors. The prepayment clause basically provides that the lender will receive a sum of money sufficient to invest in an alternate investment, such as a Treasury bill, which will provide the same yield to maturity as the mortgage loan would have yielded without prepayment. An example of such a prepayment clause is shown in Example 10–3.

Example 10–3

Prepayment Privilege. This note may not be prepaid in whole or in part except as herein specifically provided. No prepayment of the principal of this note shall be permitted or allowed prior to the end of the third (3rd) Loan Year, as hereinafter defined. After the end of the third (3rd) Loan Year, this note may be prepaid in whole, but not in part, upon any principal and interest payment date as provided herein, provided that (a) no later than sixty (60) days prior to the date of such prepayment, Borrower delivers written notice to Payee that Borrower intends to prepay the note in full on the date specified in the notice; and (b) Borrower pays to Payee at the time of such prepayment a percentage of the prepaid principal amount of the indebtedness as a prepayment premium. The amount of the prepayment premium shall be the product obtained by multiplying the prepaid principal amount of the indebtedness by the product of the following: (i) the amount obtained by subtracting the annualized yield on a United States Treasury Bill, Note, or Bond with a maturity date that occurs closest to the maturity date of this note, as such annualized yield is reported by The Wall Street Journal, on the business day preceding the date of prepayment, from 6.50% multiplied by (ii) the number of years and any fraction thereof remaining between the date of prepayment and the maturity date of this note.

Notwithstanding the foregoing, however, in the event of acceleration of this note at any time, including the period of time prior to the end of the third (3rd) Loan Year, and subsequent involuntary or voluntary prepayment, the prepayment premium as calculated above shall be payable, however, in no event shall it exceed an amount equal to the excess, if any, of (i) interest calculated at the highest applicable rate permitted by applicable law, as construed by courts having jurisdiction thereof, on the principal balance of the indebtedness.
The case of Acord v. Jones, 211 Ga. App. 682, 440 S.E.2d 679 (Ga. 1994), is a good indication of the need for lenders such as life insurance companies to use a prepayment clause in the note.

Usury

Most states have statutes that establish a ceiling or maximum rate of interest to be charged on a loan. These statutes are called usury statutes. The penalty for usury varies from state to state. It usually is the loss of all interest on the loan, but it can be as extreme as the forfeiture of the entire loan amount. Lenders, therefore, are careful to establish an interest rate that does not violate the usury laws. Most notes contain what is known as a “usury savings clause.” This is an attempt by the lender to credit any excess interest to either a reduction of principal or a refund to the borrower. An example of a usury savings clause appears in Example 10–4.

Example 10–4

This note and all provisions hereof and of all documents securing this note conform in all respects to the laws of the State of Georgia so that no payment of interest or other sum construed to be interest or charges in the nature of interest shall exceed the highest lawful contract rate permissible under the laws of the State of Georgia as applicable to this transaction. Therefore, this note and all agreements between Borrower and Payee are limited so that in no contingency or event whatsoever, whether acceleration of maturity of the indebtedness or otherwise, shall the amount paid or agree to be paid to the Payee for the use, forbearance, or detention of the money advanced by or to be advanced hereunder exceed the highest lawful rate permissible under the laws of the State of Georgia as applicable to this transaction. In determining whether or not the rate of interest exceeds the highest lawful rate, the Borrower and Payee intend that all sums paid hereunder that are deemed interest for the purposes of determining usury be prorated, allocated, or spread in equal parts over the longest period of time permitted under the applicable laws of the State of Georgia. If, under any circumstances whatsoever, fulfillment of any provision hereof, or of any other instrument evidencing or securing this Indebtedness, at the time performance of such provision shall be due, shall involve the payment of interest in excess of that authorized by law, the obligation to be fulfilled shall be reduced to the limit so authorized by law, and if under any circumstances Payee shall ever receive as interest an amount that would exceed the highest lawful rate, the amount that would be excessive shall be either applied to the reduction of the unpaid principal balance of the Indebtedness, without payment of any
prepayment fee (and not to the payment of interest), or refunded to the Borrower, and Payee shall not be subject to any penalty provided for the contracting for, charging, or receiving interest in excess of the maximum lawful rate regardless of when or the circumstances under which said refund or application was made.

**Execution**

A note is signed by the maker, but the signature is not required to be witnessed or notarized. A note usually is not recorded, but in some states, such as Louisiana, a copy of the note is attached as an exhibit to the deed of trust and is recorded.

**Practice Tips for the Paralegal**

A note is an important legal document, and the original of the note is the best evidence of the note at the time of collection. Special care should be taken in preparing a note to make sure it correctly reflects the terms of the loan and the repayment of the money. Corrections on notes should be avoided. If an error on a note is corrected by whiting it out or using some other typing correction technique, the correction should be initialed by the maker. For notes that are more than one page long, the maker should initial each page of the note.

Three note forms are included at the end of this chapter: Exhibit 10–1, Fannie Mae/Freddie Mac Residential Fixed-Rate Note; Exhibit 10–2, Fannie Mae/Freddie Mac Residential Adjustable-Rate Note; and Exhibit 10–3, Commercial Loan Note. The following is a checklist to assist in the preparation of a note.

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**CASE**

**Acord v. Jones**


JOHNSON, Judge.

Acord appeals from the trial court’s grant of Jones’ motion for judgment on the pleadings.

Acord gave Jones two promissory notes which were secured by real property. The interest-bearing notes, which were payable in monthly installments and matured in five and ten years, were silent on the issue of prepayment. Acord attempted to pay them off prior to maturity by tendering the outstanding principal plus accrued interest. Jones refused the tender, maintaining that the notes did not allow prepayment and that, even if they did, the amount tendered did not cover the full indebtedness since it did not include unaccrued interest. Acord filed suit to force cancellation of the notes and security deeds since he had tendered what he considered to be the full amount due. Acord filed a motion for summary judgment and/or for judgment on the pleadings. Jones apparently filed a cross-motion for judgment on the pleadings. The trial court denied Acord’s motion and granted judgment on the pleadings to Jones. Acord appeals. We reverse the trial court’s decision.

In his sole enumeration of error, Acord contends that the trial court erred in holding that the terms of the contract did not allow prepayment. He argues that because the notes contain the phrase “[i]f not sooner paid,” there is the implication that the notes may be paid prior to maturity. Neither party has cited, and our research has failed to uncover, any cases in which Georgia courts have been called upon to decide whether that language has the effect of allowing prepayment, and if so, whether the lender would be entitled to recover unearned interest.

“In construing contracts . . . the language used must be afforded its literal meaning and plain ordinary words given their usual significance.” (Citations and punctuation omitted.) Twin Oaks Assoc. v. DeKalb Venture, 190 Ga. App. 854, 855(1) (380 S.E.2d 469) (1989). In its plain ordinary sense, the phrase “if not sooner paid” clearly contemplates the possibility of early repayment. Further, the phrase would have to be construed against Jones as the drafter. Roswell Properties v. Salle, 208 Ga. App. 202, 206(3) (430 S.E.2d 404) (1993). Thus, we hold that Acord was entitled to prepay the indebtedness.

However, the issue of whether unaccrued interest can be required as part of the prepayment remains. In the absence of a contractual provision addressing the issue, we must apply existing law. See State Farm Mutual Automobile Insurance Co. v. Hodges, 111 Ga. App. 317, 321 (141 S.E.2d 586) (1965); Jenkins v. Morgan, 100 Ga. App. 561 (112 S.E.2d 23) (1959). The trial

(continued)
court and Jones rely upon *Cook v. Securities Investment Co.*, 184 Ga. 544 (192 S.E. 179) (1937), for the proposition that the payee of an installment note cannot be compelled to accept prepayment of the principal with interest to date only. *Id.* at 548. A careful reading of that case, however, reveals that it is not dispositive of the issues in the instant case. We note that what Jones refers to as the holding in *Cook* is merely dicta. There is nothing in the opinion in *Cook* which indicates that that case involved language comparable to the “if not sooner paid” phrase in the contracts which are the subject of the instant case. *Cook* involved the rights of a judgment creditor where legal title to the property of the debtor had been conveyed to a third party to secure a debt to the third party; accordingly, that case was decided pursuant to § 39-201 of the Code (now OCGA § 9-113-60), a section which is inapplicable here. *Id.* at 546-548.

Since *Cook* was decided fifty-six years ago, we have held that a contract which provides for the payment of purchase money notes “on or before maturity” does allow the maker to pay principal plus accrued interest at any time prior to maturity and relieves the maker of having to pay unearned interest. *Kuttnor v. May Realty Co.*, 220 Ga. 163, 164 (137 S.E.2d 637) (1964). In addition, the legislature has enacted several statutes, such as the Motor Vehicle Sales Finance Act (OCGA § 10-1-30 et seq.), the Retail Installment and Home Solicitation Sales Act (OCGA § 10-1-1 et seq.), and the Industrial Loan Act (OCGA § 7-3-1), all of which, among other things, relieve consumers of the obligation to pay unearned interest when debts are paid off prior to maturity. While not applicable here, these statutes do show consistent recognition of a public policy in favor of allowing prepayment of loans without penalty. To require payment of unearned interest in this case would effectively impose a prepayment penalty where none has been contemplated by the terms of the contracts. The law does not favor penalties. See generally *Southern Guaranty Corp. v. Doyle*, 256 Ga. 790, 792 (353 S.E.2d 510) (1987); *Wasser v. C & S Nat. Bank*, 170 Ga. App. 872, 873 (318 S.E.2d 518) (1984). We hold that, in the absence of an express contractual provision to the contrary, a maker may prepay principal plus accrued interest, without being required to tender unaccrued interest or pay any other penalty. Because Acord was entitled to prepay the debts and since he made a valid tender, Jones was required to accept the payment as satisfaction of the debts and cancel the security deeds.

Judgment reversed. McMurray, P.J., and Blackburn J., concur.

“The notes set forth the amount borrowed, interest rates, dates and amounts of installments and provide for payment of “a like amount on the same day of each succeeding month thereafter to be applied first to any interest due, then to principle [sic] until the total of said indebtedness shall be paid in full. If not sooner paid the total balance due hereunder shall be paid at the expiration of ten years from date.”

- **CHECKLIST**

  - **Preparation of a Note**
    - **I. Parties**
      - A. Maker (borrower)
      - B. Payee or holder (lender)
    - **II. Amount of Note**
    - **III. Interest Rate to Be Charged on Note**
      - A. Fixed rate
      - B. Adjustable rate
        1. Identification of index to be used for adjustment (e.g., prime lending rate, three-year Treasury security)
        2. Intervals of adjustment (e.g., daily, monthly, annually)
        3. Indication of any minimum or maximum interest rates
IV. Payments
   A. Time and place of payments
   B. Amount of payments

V. Maker’s Right to Prepay
   A. May prepay in whole or in part at any time
   B. May prepay in whole at any time after reasonable notice
   C. No prepayment allowed
   D. No prepayment allowed for a certain period of time
   E. Prepayment allowed but on payment of prepayment fee
   F. No prepayment allowed for a certain period of time and after that period of time prepayment allowed only on payment of prepayment fee

VI. Maker’s Failure to Pay as Required
   A. Late charge for overdue payment
      1. Time for late charge to commence (e.g., 10 days, 15 days after due date)
   B. Amount of late charge (e.g., 4 percent of late payment)
   C. Default for failure to pay
      1. Grace period
      2. Notice of default and period of time to cure default
      3. Acceleration of loan on default
         a. Optional acceleration
      4. Payment of holder’s cost and expenses for collection of note
         a. Attorney’s fees
         b. Court costs and other reasonable expenses
         c. Default interest rate is higher during periods of default than normal note rate.

VII. Identify Security Given for Note
   A. Mortgage or deed of trust
   B. Assignment of leases and rents
   C. Security agreement
   D. Other documents

VIII. Usury Savings Clause

IX. Choice of Applicable Law

X. Waiver of Homestead Exemption or Other Debtor’s Rights

XI. Joint and Several Liability

XII. Waiver of Notice of Default, Presentment of Notice of Dishonor

XIII. Signatures
   A. Only maker signs note
      1. Corporate maker
         a. Identify name of corporation
         b. Identify the officers of the corporation signing the note by name and by title
         c. Affix corporate seal
   B. Partnership maker
      1. Identify partnership by name
      2. Identify all partners signing the note by name
   C. Names of all people signing the note should be typed underneath the signature line
   D. Notes are not witnessed or notarized
GUARANTY

A mortgage lender may require a person other than the debtor to guarantee the payment of the debtor's note. For example, when making a loan to a corporate debtor, a mortgage lender may require the shareholders of the corporation to guarantee the loan. This guaranty gives the mortgage lender the right to sue the shareholders for payment of the note and, if necessary, the right to recover the debt from the personal assets of the shareholders.

A guaranty of a note must be written. The written guaranty form is closely interpreted by the courts, and the guarantor's liability is not extended by implication or interpretation. A guaranty may be a "payment guaranty" or a "collection guaranty." The guarantor who signs a payment guaranty unconditionally guarantees to pay the note when due without resort to any other party, including the maker of the note. The holder of a note may go directly to a payment guarantor for payment once the note becomes due and payable.

The guarantor who signs a collection guaranty promises to pay the note only after the holder of the note has sued the original maker of the note, has reduced the claim to a judgment, and has attempted to collect against the assets of the maker. A guarantor who signs a collection guaranty is required to pay the note only in the event the maker of the note is insolvent or otherwise lacks assets sufficient to pay the note.

Under the terms of both the payment guaranty and a collection guaranty, a change in the terms of the note being guaranteed without the guarantor's consent releases the guarantor. Therefore, any time that the note is modified or amended in any way, it is necessary that all guarantors consent to the modification and amendment.

A form of a payment guaranty is shown in Exhibit 10–4 at the end of this chapter.

MORTGAGES, DEEDS OF TRUST, AND SECURITY DEEDS

The companion legal document to a promissory note secured by real estate is the security instrument. Depending on the state in which the real property is located, the security interest may be a mortgage, deed of trust, or security deed. Regardless of the form of security instrument being used, its main purpose is to convey real property as security for the repayment of the debt evidenced by the note.

The three basic types of security instruments are (1) mortgage, (2) deed of trust, and (3) deed to secure debt. Mortgage, deed of trust, and deed to secure debt forms are included at the end of this chapter as Exhibit 10–5, Florida Mortgage; Exhibit 10–6, North Carolina Deed of Trust; and Exhibit 10–7, Georgia Commercial Deed to Secure Debt.

Mortgage

A mortgage is a pledge of land as security for a debt. The ancient term for this pledge combined the words for dead ("mort") and pledge ("gage"). A mortgage was a dead pledge. This was based upon the thought that it was doubtful whether the mortgagor would pay on the day the debt was due and if the mortgagor did not pay, then the land he had pledged would be taken away from him forever and would therefore be dead to him. If the mortgagor did pay the money, then the pledge would be dead to the mortgagee.

Early mortgages required the mortgagor to give possession of the pledged land to the mortgagee during the payment of the debt. Once the debt had been paid, possession of the land was returned to the debtor. As the law evolved, it became practice that more debts were paid than were unpaid, and therefore, a theory evolved that the mortgage was no more than a security for a debt and that the mortgagee's rights to the land must be so limited as to insure that he obtained only a security interest in the mortgage. This idea that a mortgage...
was but a security device was accompanied by the practice of allowing the mortgagor to
remain in possession of the land until he defaulted on the payment of the debt. This right to
remain in possession while the debt was repaid was called the mortgagor's equity of redemption,
which was recognized as a property right in ancient English law. The mortgagor's
equity of redemption could be terminated by the mortgagee in the event the debt was not
paid when due. This body of mortgage law, which became very common at the end of the
sixteenth century in England, is similar to the modern mortgage law that currently exists in
the United States. Mortgages are still used in a number of states.

**Deed of Trust**

Several states use a deed of trust form for real estate loans. A deed of trust is a document
wherein the owner of the real property conveys title to the real property to a third party,
known as a trustee. The trustee then holds the title in trust for the benefit of the lender.
If the debt being secured by the deed of trust is not paid, the trustee has the power to sell
the title to the real property and to use the proceeds from the sale to pay the debt owed to
the lender.

**Deed to Secure Debt**

A deed to secure debt is a security instrument wherein the owner of the real property con-
veys legal title directly to the lender as security for the repayment of the debt. The lender is
given the power to sell the real property in the event the debt is not paid.
Regardless of which security instrument is used, the owner stays in possession of the
real property and can use and enjoy the real property so long as the debt is being paid.

For simplicity of reference, all three security instruments are referred to as a mortgage
throughout this chapter. Please keep in mind that, depending on the state in which the real
property is located, the security instrument may be a mortgage, deed of trust, or deed to
secure debt.

**Requirements of a Mortgage**

A mortgage must meet all the requirements of a deed, together with a description of the
debt being secured. These requirements are (a) names of the parties, (b) words of convey-
ance or grant, (c) valid description of the property conveyed, (d) proper execution and
attestation, and (e) effective delivery to the lender.

The mortgage may grant to the lender the power to sell the property in the event of a
default under the mortgage, as well as numerous other provisions designed to protect the
lender in every conceivable situation.

**Parties to a Mortgage**

A mortgage is entered into by two parties: the mortgagor and the mortgagee. The mort-
gagor is the owner of the property (the debtor), or borrower, and the mortgagee is the
lender, or creditor. A mortgage is given by the owner to the lender. In the case of a deed of
trust, the instrument may be entered into by three parties, with the addition of the trustee.
Because it is a fundamental rule that only the owner of real property can pledge the real
property as security for a loan, it is important that the title to the real property be examined
to determine the correct owner and that the owner be made the mortgagor. If the mort-
gagor is a corporation, proper corporate authority must be presented not only to authorize
the loan and the pledge of real property as security, but also to authorize the corporate offi-
cers to sign the mortgage. A mortgage signed by a partnership requires that all partners sign

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**terms**

- **mortgage**
- **mortgagor**
  - Person who signs a mortgage
  - pledging real property to secure a debt.
- **mortgagee**
  - Person who receives a mortgage, that is, a lender.
the mortgage or that a partner authorized by all the partners sign the mortgage. Mortgages
given by co-owners of property require the signatures of all owners.

Secured Debt

A valid debt must exist to have a valid mortgage. A mortgage must describe in words and
figures the debt secured. The date of the final maturity of the debt also is identified.

A mortgage may be given to secure any and all debt between the mortgagor and the
mortgagee, including past debt, present debt, and even future debt incurred after the mort-
gage is in place. These mortgages are called open-end or dragnet because of the unlimited
amount of debt that can be secured.

For example, on March 15, a borrower enters into a mortgage loan transaction with a
lender wherein the borrower borrows $100,000 to buy a parcel of land. The mortgage given
to the lender contains an open-end or dragnet provision that makes the mortgage secure
any and all debts between the borrower and the lender. At the time the loan is entered on
March 15, the borrower only owes $100,000 to the lender, and therefore, the mortgage only
secures $100,000. On August 10 of the same year, the borrower goes to the lender and obtains
another loan for an unrelated purpose in the amount of $25,000. The borrower signs a note
to evidence the debt, but there is no discussion regarding the mortgage or any amendments
to the mortgage. Despite the fact that the note does not refer to the mortgage and there are
no amendments to the mortgage, the dragnet or open-end effect of the mortgage causes the
mortgage to secure the additional $25,000, for a total of $125,000. Furthermore, any future
loans the borrower receives from the lender will be secured by the mortgage.

An open-end or dragnet mortgage can create a problem for the borrower because a
default under any of the separate loans secured by the mortgage can give the lender the
right to foreclose and have the real property sold. In addition, at the time the mortgage is to
be paid and satisfied, the lender can require that all the debt between the borrower and the
lender be paid in full before the mortgage is released.

A lender may make separate loans to a borrower secured by separate parcels of prop-
erty. The lender may feel insecure regarding each loan and require that the property for
each loan secure the debt of all the loans. This method of collectively securing all loans by
all the mortgages is known as cross-collateralization. Each mortgage, in order to have an
effective cross-collateralization, must have an open-end or dragnet clause, which is shown
in Example 10–5.

Example 10–5

This mortgage is made and intended to secure all indebtedness now or hereafter owing
by Mortgagor to Mortgagee, however or whenever created, incurred, arising or evidenced,
whether direct or indirect, joint or several, absolute or contingent, or due or to become due,
and any and all renewal or renewals, extension or extensions, modification or modifications or
any substitution or substitutions for said indebtedness, either in whole or in part.

Secured Property

Any land or interest in land that can be conveyed by ordinary deed may be conveyed by a
mortgage. Real property in a mortgage is described with the same degree of accuracy as in
a deed. The description usually is prepared from a land survey. Real property can be added
to the mortgage by amendment or modification. The priority of the mortgage with respect
to the added real property is determined as of the date of the addition and not as of the date
of the original mortgage.
For example, a mortgage is given on Tract A on March 15. The priority of the mortgage as to Tract A is determined as of March 15. This means that the mortgage is subject to any outstanding property interests, such as other mortgages or easements, that occur before March 15, but it is superior and senior to any property interests created after March 15. On October 10, Tract B is added by amendment to the mortgage. Even though the mortgage is originally dated March 15, it only has priority, as to Tract B, from October 10. Any easements, mortgages, or other property interests that are created or exist against the Tract B project before October 10 have priority over the mortgage.

Assignment of Mortgage

Mortgages are freely assignable and often are assigned. A person who buys a mortgage may exercise any and all powers contained in the mortgage. A transfer of mortgage conveys the real property and the secured debt, even though both may not be mentioned in the transfer. A transfer of the note usually includes a transfer of the mortgage, and a transfer of the mortgage includes a transfer of the note.

Most mortgages are assigned either by the inclusion of transfer or assignment language on the mortgage or by a separate assignment that is executed by the assigning lender and recorded. An example of an assignment is shown in Example 10–6.

Example 10–6

TRANSFER AND ASSIGNMENT
FOR VALUE RECEIVED, the undersigned hereby transfers, assigns and conveys unto ___

all of its right, title, interest, powers and options in, to and under the within and foregoing Mortgage as well as the Premises described therein and the Indebtedness (without recourse) secured thereby.

IN WITNESS WHEREOF the undersigned has caused this transfer and assignment to be executed by its officer and its seal affixed hereto this ___ day of ___, 20___.

Signed, sealed and delivered in the presence of:

Unofficial Witness

Attest:

Notary Public

(Seal)

Helping Families Save Their Homes Act of 2009, Public Law 111-22 that passed into law May 20, 2009 requires a creditor that purchases or takes by assignment a mortgage loan that is secured by the principal dwelling of the consumer, to provide the consumer within thirty days after the date on which the loan was sold or assigned, a written disclosure notifying the consumer of: (i) the identity, address, and telephone number of the new creditor; (ii) the date of transfer; (iii) how to reach an agent or party having authority to act on behalf of the new creditor; (iv) the location of the place where transfer of ownership of the debt is recorded; and (v) any other relevant information regarding the new creditor.

Transfer of Property Encumbered by a Mortgage

The fact that real property is mortgaged does not in itself prohibit the owner from selling the real property. However, close attention should be paid to the actual mortgage document.
**due on sale clause**

Clause found in a mortgage that prohibits the sale of the real property described in the mortgage without the lender’s consent. A sale in violation of this provision is a default of the mortgage.

A provision known as a **due on sale clause** commonly is found in mortgages. This provision prohibits the sale of real property without the mortgagee’s consent. A sale in violation of this provision is a default of the mortgage and could result in a foreclosure of the real property.

Example 10–7 shows a mortgage due on sale provision.

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**Example 10–7**

If all or any part of the property or any interest in it is sold or transferred without mortgagee’s prior written consent, mortgagee may, at its option, require immediate payment in full of all sums secured by this mortgage.

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When the borrower is not a natural person, but instead is a corporation or a partnership, a lender may have a broadened definition of what constitutes a sale. An example of this type of mortgage due on sale provision is shown in Example 10–8.

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**Example 10–8**

Unless the written consent of mortgagee is first obtained, mortgagee shall have the right, at its option, to declare all sums secured hereby immediately due and payable if (a) mortgagor (by deed or contract of sale or otherwise) sells, conveys, transfers, or further encumbers the mortgaged property or any part thereof; or (b) mortgagor suffers its title or interest therein to be divested, whether voluntarily or involuntarily; or (c) mortgagor changes or permits to be changed the character or use of the mortgaged property; or (d) if mortgagor is a partnership and any of the general partner’s interests are transferred or assigned, whether voluntarily or involuntarily to an entity that the general partner of the mortgagor is not also a general partner therein; or (e) if mortgagor is a corporation with fewer than 100 stockholders at the date of execution of this mortgage and more than 10% of the capital stock thereof is sold, transferred, or assigned during a twelve (12)-month period. If any of the events enumerated in (a) through (e) above, inclusive, occurs, and if mortgagee consents to the same or fails to exercise its right to declare all sums secured hereby to be due and payable, such consent or failure shall not be deemed or construed as a waiver, and the consent of mortgagee shall be required on all successive occurrences.

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**“Subject to” versus “Assumption”**

Real property may be sold “subject to” or with an “assumption” of an existing mortgage. A purchaser who buys the real property “subject to” a mortgage does not have personal liability for payment of the debt. The new owner will make the loan payments to protect the real property from foreclosure, but the owner cannot be personally sued to recover on the debt. A lender in a “subject to” sale can foreclose and sell the real property in the event the debt is not paid, and the lender can sue the original mortgagor for payment of the debt because a sale of the real property does not release the original mortgagor.

A purchaser who buys real property and “assumes” the mortgage becomes personally liable for the debt. If the loan is in default, the lender can (a) foreclose on the real property, (b) sue the new owner of the real property who has assumed the debt, and (c) sue the original mortgagor. The express words used in the transfer from the original mortgagor to the new owner are determinative of whether the real property has been sold “subject to” or “assumption of” the mortgage. If the words “assume and agree to pay” appear in the deed or any other document that has been signed in connection with the deed, then there is an assumption, and the new owner becomes personally liable.
The original mortgagor who sells the real property is not released from the obligation to pay the debt and will not be released unless a separate, written release from the mortgagee lender is obtained. This assumption of the loan by the new owner and release of the old owner may constitute a novation. A novation is a substitution of parties to a contract to such an extent that the law declares that a new contract has been entered into. A novation can result in a loss of priority of a mortgage lien. The mortgage lien will be deemed to take priority from the date of the novation, not from its original date. To avoid this problem, a lender usually obtains an endorsement to its title insurance policy insuring that the assumption of the loan and the release of the original borrower will not in any manner affect the priority of the mortgage lien.

If the original mortgagor pays the mortgage in a “subject to” transaction, the mortgagor can recover only against the real property. The original mortgagor is substituted or subrogated in place of the lender and has the right to foreclose on the real property to recover on the debt. If the original mortgagor pays the lender in a “loan assumption” transaction, the original mortgagor can recover the payments by foreclosing against the real property, suing the current owner personally for recovery on the debt, or both, until payment is received in full.

Selling real property subject to a prior mortgage or with an assumption of a prior mortgage is a matter of negotiation between the purchaser and the seller. Purchasing real property subject to a mortgage is to the advantage of the purchaser, and purchasing property with a loan assumption is to the advantage of the seller. A lender benefits if the mortgage is assumed because an additional person is obligated on the debt. If the mortgage contains a due on sale provision and the lender’s consent to the sale is necessary, it is not unusual for the lender to require that the purchaser assume the mortgage. The chart shown as Example 10–9 illustrates the different remedies a lender has when property is sold “subject to” or with an “assumption” of a mortgage.

**Example 10–9**

*Sale Subject to Existing Mortgage*
- The old borrower (seller) remains liable on the debt secured by the existing mortgage.
- The new owner (purchaser) makes payments on, but is not liable for, the debt secured by the existing mortgage.
- The lender may, if mortgage payments are not paid, foreclose on the property or sue the original borrower (seller) for the unpaid debt. The lender cannot sue the new owner (purchaser) for the debt.

*Sale with Assumption of Existing Mortgage*
- The old borrower (seller) is not released from liability on the debt secured by the existing mortgage unless an express release of liability is obtained from the mortgage lender.
- The new owner (purchaser) makes payments on the debt secured by the existing mortgage and is liable for the debt secured by the mortgage.
- The lender may, if mortgage payments are not paid, foreclose on the property and sue the new owner (purchaser) and/or the old borrower (seller) for the unpaid debt.

**Cancellation or Satisfaction of Mortgage**

A mortgage is automatically released by full payment of the debt. Full payment of the debt, however, does not release the mortgage of record, and the mortgagee has a duty to file a cancellation or satisfaction of mortgage in the deed records where the mortgage has been recorded. In many states, failure to satisfy or cancel the mortgage of record can result in imposition of a fine on the mortgage lender. Example 10–10 shows mortgage cancellation or satisfaction.
Practical Real Estate Law

Second Mortgage Loans

A borrower, unless prohibited by the express terms of the mortgage, can mortgage the real property more than once. In fact, a person can mortgage the real property as many times as a lender is willing to take the real property as security for a loan. Today, it is not unusual for home and commercial properties to have more than one mortgage.

A lender who makes a second mortgage loan assumes some risk. The main risk is that the first mortgage (first in time on the real property and superior to the second mortgage) will not be paid. If the first mortgage is not paid, goes into default, and is foreclosed, the second mortgage will be terminated at the foreclosure sale. It is, therefore, not unusual for second mortgage lenders to receive estoppel certificates from the first mortgage lender concerning the nature of the outstanding debt. The estoppel certificate provides that the first mortgage lender will not foreclose the loan without first giving a notice of default to the second mortgage holder and providing the second mortgage holder with time to cure the default. A form of estoppel certificate is shown in Example 10–11.

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**Example 10–10**

Satisfaction

The indebtedness which this instrument was given to secure having been paid in full or other arrangements for payment of the indebtedness having been made to the satisfaction of mortgagee, this instrument is hereby cancelled and the clerk of the Superior court of _____ County _____ is hereby authorized and directed to mark it satisfied of record.

This ____________ day of ____________, 20__________

By: ______________________________________________

Title: ______________________________________________

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**Example 10–11**

STATE OF __________________
COUNTY OF __________________

ESTOPPEL CERTIFICATE

The undersigned hereby certifies as of the date of execution hereof as follows:

(a) That the undersigned (the “Lender”) is the holder of a certain Promissory Note dated ____________ from ______________, in the original principal amount of $______________ (the “Note”).

(b) The Note is secured by a Mortgage from ______________ to Lender dated ______________ and recorded in Deed Book ______________, Page __________, ______________ County, ______________ located in ______________ County, ______________ (the “Property”) more particularly described on Exhibit “A” attached hereto and made a part hereof;

(c) True and correct copies of the Note and Mortgage are attached hereto as Exhibits “B” and “C”;

(d) That the Note and Mortgage are in full force and effect and there have been no events of default in connection therewith;

(e) That all payments of interest and principal under the Note and Mortgage are current; that as of this date, the outstanding principal balance due on the Note is $ ______________, that the last payment received on the Note was on the ____________ day of ________, 20__________; and that the next payment is due on ______________.
A second mortgage lender also wants to provide in the mortgage that a default under any prior mortgage shall constitute an event of default under the second mortgage. The second mortgage lender wants the right to cure any defaults under a prior mortgage and add the cost of curing the defaults to the debt secured by the second mortgage. The lender of a second mortgage takes the assignment of any excess proceeds that may be generated from the foreclosure and sale of a prior mortgage. An example of a mortgage provision providing these safeguards is shown in Example 10–12.

Example 10–12

This Mortgage is subject to a prior mortgage held by ________________ (hereinafter called the “Prior Mortgage”). Mortgagor covenants and agrees that it will at all times fully perform and comply with all agreements, covenants, terms, and conditions imposed on the Mortgagor under the Prior Mortgage, and if Mortgagor fails to do so, Mortgagee may (but shall not be obligated to) declare such failure to be an event of default hereunder and or may take any action Mortgagee deems necessary or desirable to prevent or to cure any default by Mortgagor in the performance and compliance with any of Mortgagor’s covenants or obligations under the Prior Mortgage. Any sums of money advanced by Mortgagee to cure Mortgagor’s defaults under the Prior Mortgage shall be added to the Indebtedness secured hereby. Mortgagor shall immediately on receiving any knowledge or notice of any default under the Prior Mortgage give written notice to Mortgagee. Mortgagor assigns any proceeds that may belong to Mortgagor resulting from the foreclosure sale of the property by the holder of the Prior Mortgage.
FORECLOSURE AND OTHER MORTGAGE REMEDIES

Mortgage documents would be unnecessary if all borrowers voluntarily paid debts on time. It is only in the situation when the borrower fails or is unable to pay the debt that the mortgage lender and its attorneys begin to carefully examine the mortgage documentation to see what rights and remedies the lender has. A holder of a mortgage on real property has a number of rights against the property and the borrower in the event the debt is not paid.

Foreclosure

Foreclosure is the most drastic remedy that a mortgage holder can invoke against the debtor property owner. Historically, a holder of a mortgage who did not receive payment of the debt when due had a right to foreclosure. The foreclosure terminated the debtor’s equity of redemption in the property pledged in the mortgage. Under the early method of mortgage foreclosure, called *strict foreclosure*, the mortgagee could obtain a court decree awarding the mortgagor’s interest in the property to the mortgagee. This procedure, however, had several problems, one of which was that the mortgagor faced the possibility of forfeiting all of his property to the creditor even though the property was worth more than the unpaid balance on the debt.

In order to ameliorate the harshness of the strict foreclosure rules, the law of foreclosure evolved over time into a concept of *foreclosure by sale*. The property, rather than being given to the mortgagee, was sold to the highest bidder at a public sale, and the mortgagee had first claim to the proceeds received from the sale. Any excess proceeds were given to the debtor-mortgagor.

Grounds for Foreclosure

A holder of a mortgage does not have rights to foreclose or exercise other remedies unless the landowner (borrower) is in default under the mortgage. In addition to failure to pay the debt as it becomes due, most mortgages contain other provisions, the violation of which will result in default. These provisions include failure to pay taxes on the property, failure to insure the property, selling the property without the permission of the mortgagee, and failure to keep the property in good repair. The breach of any mortgage covenant gives the holder of the mortgage the right to foreclose or exercise its remedies.

Types of Foreclosure

Foreclosures take place either judicially or through a *power of sale* contained in the mortgage. Foreclosure procedures vary from state to state, and the state in which the real property is located will determine which type of foreclosure will be used. States that use mortgages generally require judicial foreclosure. States that use deeds of trust or deeds to secure a debt generally use the power of sale foreclosure.

Judicial Foreclosure

A judicial foreclosure is a lawsuit. The mortgage holder files a complaint against the debtor alleging that a debt is owed, the debt is in default, and the debt is secured by real property given in a mortgage. The creditor then asks the court to grant relief by ordering the real property sold to pay the debt. The debtor is given an opportunity to answer, and a hearing is held on the merits to decide if foreclosure should occur. If the court agrees that the creditor has a right to foreclose, the court will then order the real property sold, usually by a public official such as a sheriff. The sale will be a public sale and will be held after proper notice has been given in the newspaper. Once a sale is held, it is then reported back to the court for approval, and on the court’s approval, the sale is final.
A judicial foreclosure is time consuming but does afford the debtor numerous opportunities to avoid foreclosure by refinancing and paying the debt or defending in the event the foreclosure is wrongfully filed.

**Power of Sale Foreclosure** A power of sale foreclosure is a nonjudicial foreclosure right that is given to the mortgage holder in the mortgage document. Under a power of sale procedure, the mortgage lender or its agent will conduct a nonjudicial but public sale of the real property. Generally, there are strict state law procedures governing power of sale foreclosures. These procedures usually set forth the time of day the property can be sold in a public sale and perhaps even the day of the month. In addition, it requires that a published notice of the sale be placed in a newspaper some three to six weeks before the sale. The lender, as well as the debtor, may purchase at the sale.

**Effect of a Valid Foreclosure Sale**
A valid foreclosure sale, whether judicial or nonjudicial, has the effect of extinguishing all ownership rights of the debtor in and to the real property. It also has the effect of divesting all junior encumbrances on the real property. Any mortgages, easements, or other encumbrances that were created after the date of the mortgage that is being foreclosed will be terminated at the foreclosure sale. For example, a parcel of real property is encumbered by a mortgage dated December 10, 2008, to First Bank and Trust Company and a mortgage dated March 15, 2009, to Second Bank and Trust. A foreclosure sale of the mortgage held by First Bank and Trust will terminate the mortgage on the real property held by Second Bank and Trust.

A mortgagor has the right to pay the debt secured by the mortgage in full at any time prior to the property being foreclosed. This right to pay the debt in full and to prevent a foreclosure is known as the mortgagor’s equity of redemption. This equity (right) of redemption cannot be waived by the mortgagor, nor can a mortgagee refuse to accept payment in full and therefore defeat the mortgagor’s right of redemption.

Many states only recognize the mortgagor’s right to redeem prior to a foreclosure sale. In these states, the final foreclosure sale will have a result of terminating or extinguishing the mortgagor’s right of redemption. The mortgagor will have no further rights in the property subsequent to the date of the foreclosure sale.

Several states, however, have statutes that permit a mortgagor to redeem or recover his or her property after a foreclosure sale. Postforeclosure redemption was not part of the English common law, and this right exists only by statute and only in some states. Each state’s statute will control the terms for a redemption subsequent to the foreclosure sale. Usually postforeclosure redemption can only be exercised during a fixed period of time, typically six months to a year after the sale. The redemption price may be the amount bid at the sale plus a penalty; in some states the debtor must pay the full amount of the debt if the foreclosure price was less than the amount of the debt.

In some states, certain junior creditors, such as holders of second priority mortgages, are also permitted to redeem the property following a foreclosure sale.
A waiver of postforeclosure redemption rights is permissible in some states, but other states provide that redemption rights cannot be waived.

A foreclosure sale does not automatically terminate a federal tax lien that is filed against the real property. Federal tax liens that are filed after the date of the mortgage being foreclosed are not terminated at the time of the foreclosure sale unless the Internal Revenue Service receives a written notice of the foreclosure sale 25 days before the date of the sale. If the required 25 days notice is given to the Internal Revenue Service, then the tax lien is terminated at the time of sale. The Internal Revenue Service has a 120-day right of redemption.

redemption
Right of a property owner to buy back his property after a foreclosure.
to redeem the property after the date of the sale. The redemption price is the purchase price at the sale together with interest and a penalty, if applicable. Failure to give the required 25 days notice permits the Internal Revenue Service tax lien to survive the foreclosure of the sale, and the purchaser at the sale takes the property subject to the tax lien.

Distribution of Money in a Foreclosure Sale
The money received at a foreclosure sale commonly is used to pay the expenses of the sale and the debt. If there is excess money, this money belongs either to the debtor or to the holders of junior mortgages. Most mortgage lenders interplead the money into court to avoid liability. The interpleader proceeding is a means by which the money is paid into the court, and the debtor and all junior mortgage holders who may have an interest in the money are notified of the proceeding. The debtor and junior mortgage holders will then go into court and try to convince the court that they are worthy to receive the money. The interpleader has the effect of releasing the lender from any liability in making the decision as to where the excess money should go.

Antideficiency Laws
The balance of a mortgagor’s debt that is unpaid from the proceeds received from the foreclosure sale of the property secured by the mortgage is known as a deficiency. A deficiency can become a problem in jurisdictions where the method of foreclosure is a trustee sale or power of sale. A power of sale foreclosure generally does not involve the filing of any civil proceeding by the creditor, nor does it involve supervision of the sale by the courts. Power of sale foreclosures are typically carried out privately either by the creditor or by a trustee appointed by the creditor. These power of sale foreclosures involve the posting of a notice advertising the date of the sale either in a newspaper or on a courthouse bulletin board. The sale is a public sale and is usually held at the courthouse in the country where the real property is located.

A power of sale foreclosure, although a quick remedy for the creditor, is subject to abuse. A creditor may find that it is the only bidder at the sale and decide to bid less than the fair market value of the property. The low bid price does not pay the debtor’s debt. Following the sale, the power of sale creditor then brings a civil proceeding, sometimes called a deficiency action against the debtor for the balance of the debt. Many states that permit power of sale foreclosures have enacted antideficiency laws to protect the borrower. These antideficiency laws generally provide that following a power of sale foreclosure, the creditor is prohibited from suing the debtor for any deficiency owed on the debt unless the creditor establishes in court that the property sold for fair market value at the foreclosure sale. This postforeclosure judicial proceeding, generally called a confirmation proceeding, requires the creditor to prove in court that the sale was properly conducted in accordance with the laws regarding private power of sale foreclosures and that the amount bid at the sale was the approximate fair market value of the property.

Fair market value is generally established by an expert opinion of a real estate appraiser who prepared an appraisal of the property prior to the date of the foreclosure sale. If the mortgage creditor is unable to establish that the fair market value of the property was received at the foreclosure sale, then the court will deny the creditor the right to seek a deficiency judgment against the debtor and, in some instances, if the amount is grossly inadequate, may order the property to be resold.

Remedies Other Than Foreclosure
A lender, on an event of default under a mortgage, may exercise certain remedies other than foreclosure. These remedies usually are taking possession of the mortgaged real property or having a receiver appointed to take possession of the property.
Mortgagee (Lender) in Possession
Most mortgages grant the mortgage holder the right to seize possession of the real property in the event of a default. This right to seize possession may become important if the real property is income-producing, such as an apartment project, because it gives the mortgage holder a chance to collect the rents from the tenants. A mortgagee in possession is an agent of the mortgagor, and income collected from the real property must be used to pay the debt. Mortgagees usually are permitted to deduct reasonable expenses of management and maintenance of the real property from income.

Appointment of a Receiver
A receiver is a third party appointed by a court to take possession of the real property in the event of a mortgage default. A receiver acts similar to a mortgagee in possession in that the receiver is responsible to take care of the real property, collect rents and income from the real property, and make sure this money is properly applied to the debt or to the expenses of the upkeep of the real property. Most mortgages give a mortgagee the right to have a receiver appointed. The appointment of a receiver is a court action, and the mortgagee will have to prove that the mortgage is in default and the mortgagee has a right under the mortgage for the appointment of a receiver.

Waiver of Default
If the mortgagee, on notice that there has been a default under the mortgage, does not act promptly to exercise its remedies or acts in such a manner as to indicate to the landowner that being in default is acceptable, the holder of the mortgage may, by these actions, waive the default and not be entitled to exercise its remedies. A good example of this is acceptance of late payments by the mortgage holder. Acceptance of late payments estops the mortgage lender from declaring a default unless ample notice is given to the landowner of the intention to require prompt payments in the future.

Federal and State Limits on Foreclosure
In reaction to the recent severe real estate recession and the increased number of home loan foreclosures, many states have passed laws that limit the rights of lenders to foreclose residential mortgages. Generally, these laws slow down the process for foreclosure, especially in states that have power of sale foreclosure procedures. The new laws generally impose upon lenders a waiting period of somewhere between 60 and 120 days before a foreclosure can take place. Michigan, for example, provides that before a lender can foreclose on a residential mortgage, it must first send a notice to the borrower stating that the loan is in default and provide the borrower with information, including a list of approved housing counselors. Fourteen days after the notice is mailed, the borrower may ask for a meeting with the lender to work out a loan modification to avoid foreclosure. If the borrower requests a meeting, the power of sale foreclosure by advertisement, which is permitted in Michigan, may not begin until 90 days from the day the debtor requested a meeting. During this 90-day period, the lender and debtor are to make good faith efforts to modify the loan to avoid the foreclosure. Another example is Nevada, which requires that a delinquent residential borrower has a right to request a mediation with the lender before the mortgage can be foreclosed. The mediation is an attempt to see if there are probable grounds for a modification of the loan to avoid the foreclosure. The mediation process also delays the foreclosure for about 120 days. A borrower’s economic situation may favorably change during this period and therefore make a loan modification feasible.
The federal government has also passed laws to assist lenders and homeowners who are in need of a loan modification to avoid foreclosure. The Federal Homeowner Affordability and Stability Plan ("Plan"), under the direction of the Treasury Department, provides access through its refinancing program to low cost financing for certain homeowners who are current on their mortgage payments, but who are unable to refinance their mortgage due to falling home prices. In order to participate in the refinancing program, the mortgage loan must be a first lien on a primary residence and the homeowner must be current in his or her payments. Also, the new mortgage loan, including refinancing costs, cannot exceed 105% of the current market value of the home. In addition, the homeowner must have sufficient income to make the new loan payments.

The Plan also contains a program to provide mortgage loan modifications to homeowners who are in default or at risk of imminent default. In order to participate in the modification program, the homeowner must have a mortgage debt-to-income ratio greater than 31%, and the mortgage balance of the loan must exceed the current market value of the home. The homeowner will not be eligible for modification if the total expected cost of the modification to the lender, taking into account government subsidized payments, is expected to be higher than the direct cost of putting the homeowner through foreclosure.

The objective of the modification program is for a mortgage loan to be modified to a sustainable payment level. A lender is required to reduce the mortgage interest rate until a borrower’s monthly mortgage payment falls to at least 38% of the borrower’s monthly income. Further reductions of the borrower’s interest rate can be shared equally by the lender and the Treasury Department to bring the percentage down from 38% to 31%. The new interest rate must be kept in affect for five (5) years, after which it can be gradually stepped up to the conforming loan interest rate at the time of the modification.

Federal and state government programs to address the rising problems of foreclosures are continuously being passed or being modified. A paralegal working on a residential loan foreclosure will need to carefully research both federal law and his or her own state’s law concerning requirements placed upon lenders in the foreclosure process of residential homes.

DEBTOR’S REMEDIES AND DEFENSES TO FORECLOSURE

A debtor may have a number of defenses to a lender’s foreclosure action. A debtor may be able to show that the loan was not in default, or that the default had been waived by the lender, or that the default had been cured by timely action of the debtor. A debtor may also defend on the basis that the foreclosure sale is not being conducted in a manner required by law.

If a debtor believes that the foreclosure is not justified, the debtor’s main remedies are to seek an injunction of the sale or if the sale has been completed to sue the lender for wrongful foreclosure or conversion. A debtor may also file for bankruptcy, which will temporarily stop the foreclosure sale.

Injunction

If a debtor believes a foreclosure is not justified, the debtor has a right to seek an injunction to stop the sale. Grounds for injunctive relief are, for example, invalidity of debt, absence of default, payment of debt, and improperly conducted sale.

The debtor also may void a sale that has already been held on the same grounds as would support a claim for injunctive relief. In some states, a foreclosure sale can be voided if the property brought an inadequate price at the sale.
Suit for Conversion or Wrongful Foreclosure

Foreclosing on real property without the legal right to do so is the tort of **conversion** or wrongful foreclosure. A debtor can sue for conversion and recover not only actual damages, but also punitive damages from the foreclosing lender. Generally, the damages for wrongful foreclosure is the value of the debtor's equity in the foreclosed property. For example, if the home that is being foreclosed has a market value of $400,000 and the unpaid balance of the debt secured by the mortgage is $300,000, then the damages for wrongful foreclosure would be $100,000, the value of the debtor’s equity.

Bankruptcy

Bankruptcy is the debtor’s main defense to a foreclosure because the filing of a bankruptcy petition has the effect of an automatic injunction stopping the foreclosure sale.

Bankruptcy law is federal law designed to protect debtors and to give debtors a fresh start. Bankruptcy petitions can be filed voluntarily or involuntarily. Once the bankruptcy petition is filed, the act of filing the petition operates as an automatic injunction, commonly called an “automatic stay,” of all litigation against the debtor and efforts to collect claims or enforce liens against the debtor’s property, including foreclosure sales. This automatic stay remains in force throughout the bankruptcy proceeding and is not terminated until the case is either closed or dismissed or the debtor’s discharge is granted or denied. A creditor, such
as a mortgage lender, who wants to seek relief from the automatic stay can bring an action in the bankruptcy court requesting that the court remove the injunction so that the mortgage lender can foreclose against the real property. The grounds for lifting the automatic stay in a bankruptcy proceeding are as follows:

- The mortgage holder is not being “adequately protected” within the bankruptcy proceeding. Loosely defined, this term means that the mortgage security is declining in value in the bankruptcy proceeding. Adequate protection can be achieved by requiring the debtor to maintain the property or make payments on the mortgage loan, keep the property insured, and so on.
- The debtor has no equity interest in the real property (the value of the property is equal to or less than the amount of the debt). For example, an apartment building securing a mortgage loan has a market value of $850,000, but the outstanding balance on the mortgage loan, including accrued and unpaid interest, is $950,000. Since the debt secured by the property exceeds the value of the property, a debtor would not receive any money in the event the property was sold at its fair market value. The debtor in this situation is deemed to have no equity interest in the property.
- The real property is not necessary to an effective reorganization or liquidation of the debtor’s estate. For example, the bankrupt debtor is an apartment owner who has four apartment buildings. Three of the apartment buildings are fully rented and generate income that exceeds the expenses incurred in connection with the operation of the apartment building. The fourth building is largely vacant, and the income produced from the rent does not even pay insurance premiums, taxes, and other expenses in connection with the property. This building, because it is a financial drain on the debtor, would not be a property deemed necessary to the effective reorganization of the debtor’s estate.

The burden of proof is on the debtor to prove that the stay should remain in full force and effect. The issue of whether the debtor’s real property is equal to or less than the value of the debt is an evidentiary burden of the creditor.

SUMMARY

The basic loan documents used to secure a real estate loan are a note and a security instrument, generally referred to as a mortgage. The note is the promise to pay money and is the main document that evidences and enforces the payment of the debt. All notes are written and generally set forth the amount of the debt, the interest rate payable on the debt, and the payment terms for the debt. On some loan transactions, the payment of the note may be secured by a separate loan document known as a guaranty. A guaranty is the promise to pay the debt of another person. For example, an individual majority shareholder of a corporation may promise to pay the debt of a loan made to the corporation. The corporation would sign the note in connection with the debt, and the individual majority shareholder would sign a guaranty promising to pay the note in the event the corporation did not pay.

The companion document to a note on a real estate transaction is the security instrument that conveys or grants an interest in real property to secure the payment of the note. Depending on where in the country the loan originated, this security instrument may be a mortgage, deed of trust, or deed to secure debt. Although each instrument varies slightly in form and in operation, all perform the same function of conveying an interest in real property and securing the repayment of the note. Failure to pay the note could result in the property being sold or foreclosed by the lender for purposes of paying the note. Although the legal concepts behind a note and mortgage are simple, the actual forms in many instances are complex and vary in format from state to state. Paralegals are actively involved in the preparation of mortgage loan documents and assist attorneys in the mortgage loan closing process.

It is important that the paralegal be familiar with the different forms used in the state in which he or she practices and that the paralegal be aware of the many provisions that can be included in these forms. A more thorough discussion of loan documents and mortgage provisions follows in Chapter 11.
HELPFUL WEBSITES

State Foreclosure Laws

KEY TERMS
conversion guaranty open-end or dragnet
deed of trust holder payee
deed to secure debt interpleader power of sale
due on sale clause maker promissory note
endorsement mortgage receiver
estoppel certificate mortgagor redemption
foreclosure negotiable note usury
guarantor

REVIEW QUESTIONS

1. Why is the negotiability of a promissory note important?
2. Explain the endorsement process, with its accompanying contractual and warranty liabilities.
3. What is an open-end or dragnet mortgage?
4. What is the importance of being a holder in due course?
5. What is the difference between purchasing real property subject to a mortgage and assuming a mortgage?
6. What risks are inherent in second mortgage loans?
7. What is the difference between a promissory note and a guaranty?
8. What is the difference between a judicial and a nonjudicial power of sale foreclosure?
9. Why is bankruptcy a good debtor’s defense to a foreclosure?
10. What remedies other than foreclosure are available to a real estate lender in the event of a default?

CASE PROBLEMS

1. Margo Maker executed and delivered a negotiable promissory note for $10,000 to Acme Bank and Trust. The note, while in Acme’s possession, was altered from $10,000 to $100,000. Acme sold the altered note to Wherever Life Insurance Company for $95,000. The endorsement from Acme to Wherever is without recourse. Wherever Life Insurance Company then sells the note to Harrison Holder for $95,000. Wherever’s endorsement to Harrison Holder is without recourse and warranty. At maturity, Harrison Holder presents the note to Margo Maker for payment. Can Harrison Holder recover $100,000 from Margo Maker? Does Harrison Holder have a right to recover against Acme Bank and Trust? Does Harrison Holder have a right to recover against Wherever Life Insurance Company?
2. You are a paralegal assisting in the representation of a maker of a negotiable promissory note. The maker wants to pay the note in full and has asked you to obtain the original note marked “paid and satisfied” from the holder of the note. On contact with the holder of the note, you learn that the holder cannot find the original note, claiming that it has been lost. Would you advise the maker of the note to pay the holder anyway?
3. You are assisting in the representation of a lending institution as the holder of a promissory note from the Good Earth Land Company. The note is personally guaranteed by the principal shareholder of Good Earth Land Company, Gooden Earth. The note is being modified to extend the final term for repayment for an additional five (5) years. Is there documentation that you should receive from Gooden Earth in regard to this extension of the note?

4. Ruth Thomas owns a home that has been pledged to First Bank and Trust to secure a mortgage debt of $60,000. Ruth Thomas sells her home to John Kendall, who purchases the home and assumes the mortgage held by First Bank and Trust. John Kendall subsequently sells the home to Mark Murphy, who purchases the home subject to the First Bank and Trust loan. The First Bank and Trust loan goes into default. Can First Bank and Trust Company foreclose on the home? Can First Bank and Trust Company sue Mark Murphy for the debt? Can First Bank and Trust Company sue John Kendall for the debt? Can First Bank and Trust Company sue Ruth Thomas for the debt? In the event Ruth Thomas pays the bank in full, what remedies does she have against John Kendall or Mark Murphy or against the real property?

5. You are assisting a mortgage lender who specializes in making second mortgage loans to homeowners. You have been requested to prepare an estoppel certificate to be signed by the first mortgagee on the home. What types of things would you include in the estoppel certificate to be signed by the first mortgagee?

6. You are a paralegal working for a law firm that represents a lender who specializes in making second mortgage loans. You have been asked to prepare some special stipulations to be contained in the lender’s mortgages to protect them against possible problems caused by the first mortgage holders on the secured properties. What types of provisions would you be including in the second mortgage documents?

7. You are a paralegal working for a law firm that represents a large shopping center developer. The developer has come to the firm with a problem with one of its major lenders. It appears that the lender is foreclosing on one of the shopping centers. The developer insists that the loan is not in default and that the foreclosure is being made because of some bad feelings between the developer and the lender. What types of actions can the developer take to stop the foreclosure sale?

8. You are working for a law firm that represents a lender who specializes in second mortgage loans. It has come to your attention that the holder of a first mortgage on one of the properties securing this lender’s loans has commenced foreclosure proceedings. Should the second mortgage lender be concerned? If so, what steps could the second mortgage lender take to protect its interest in the property?

9. You are a paralegal in a law firm that handles foreclosures for mortgage lenders. You are attending a power of sale foreclosure. The bidder at the sale bids and buys the property for $100,000 more than the debt owed to the foreclosing lender. You are standing there with the $100,000 in hand and are approached by an individual. The individual tells you that he has a second mortgage on the property in the amount of $50,000 and that he is entitled to that amount of the excess proceeds. Should you give this person the money? What should you do with the excess money?

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**PRACTICAL ASSIGNMENTS**

1. You are a paralegal working for a law firm that represents the American Eagle Mortgage Company. American Eagle Mortgage Company is making a real estate mortgage loan to Constance Morton and Samuel Morton. The purpose of the loan is to enable the Mortons to purchase a home located at 1000 Riverview, Anytown, United States 27333. The legal description for the home is as follows:

   All that tract or parcel of land lying and being in Land Lot 6 of the 8th District of Madison County, Your State, and being more particularly described as Lot 3, Block A, Riverview Subdivision, as shown on plat of subdivision recorded at Plat Book 23, Page 19, Madison County, Your State Records.

   The amount of the loan is $75,500 payable at an annual interest rate of 8 percent per annum over a period of 30 years. The monthly payment of $553.95 is due and payable on the first day of each month. The note is to be signed on February 23, 20___, with the first payment being due and payable on April 1, 20___. American Eagle Mortgage Company charges a late fee equivalent to 5 percent of the overdue payment if the payment is more than 10 days late. American Eagle Mortgage Company’s address is 1050 Cumberland Circle, Anytown, United States 27333.
Prepare a note and deed to secure debt for this loan transaction. You may either use Exhibits 10–1 and 10–7 found at the end of this chapter as forms or the appropriate note and security instruments used in your state as the forms.

2. Research your state’s method of foreclosure of a mortgage. Is it a judicial proceeding or a nonjudicial proceeding? Prepare a brief memorandum discussing the procedures for the foreclosure of a mortgage. Attach as an addendum any statutory or case authority you were able to find through your research.

3. Research the usury statutes of your state. Write a brief report indicating the maximum rate of interest that can be charged under these statutes for a mortgage loan. Attach copies of the statutes used to form the conclusions set forth in the report.

4. Research your state’s law to determine if it recognizes post-foreclosure redemption rights for mortgagors. If so, what is the redemption price that must be paid? What is the period of time for redemption following a foreclosure sale? Can a right of redemption be waived prior to the foreclosure sale? Can it be waived after the foreclosure sale?

5. Research your state’s law to see if there have been any recent statutes passed that limit the rights of lenders to foreclose residential mortgages. Copy the provisions of these laws and discuss in class.

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**ADDENDUM**

Exhibit 10–1 Fannie Mae/Freddie Mac Residential Fixed-Rate Note
Exhibit 10–2 Fannie Mae/Freddie Mac Residential Adjustable-Rate Note
Exhibit 10–3 Commercial Loan Note
Exhibit 10–4 Payment Guaranty
Exhibit 10–5 Florida Mortgage
Exhibit 10–6 North Carolina Deed of Trust
Exhibit 10–7 Georgia Commercial Deed to Secure Debt

**Student StudyWare™ CD-ROM**
Interactive Student CD in the book includes additional quizzing, case studies, and key terms flashcards.

**Online Companion™**
For additional resources, please go to www.paralegal.delmar.cengage.com
EXHIBIT 10–1
Fannie Mae/Freddie Mac Residential Fixed-Rate Note

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[Date]  [City]  [State]

[Property Address]

1. **BORROWER’S PROMISE TO PAY**
   In return for a loan that I have received, I promise to pay U.S. $______________ (this amount is called “Principal”), plus interest, to the order of the Lender. The Lender is ________________________. I will make all payments under this Note in the form of cash, check or money order.
   I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the “Note Holder.”

2. **INTEREST**
   Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of ___________%.
   The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. **PAYMENTS**
   (A) **Time and Place of Payments**
   I will pay principal and interest by making a payment every month.
   I will make my monthly payment on the _______ day of each month beginning on ___________________. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on __________, 20____, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the “Maturity Date.”
   I will make my monthly payments at ________________ or at a different place if required by the Note Holder.

   (B) **Amount of Monthly Payments**
   My monthly payment will be in the amount of U.S. $__________________.

4. **BORROWER'S RIGHT TO PREPAY**
   I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a “Prepayment.” When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.
   I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes.

5. **LOAN CHARGES**
   If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.
### EXHIBIT 10–1
Fannie Mae/Freddie Mac Residential Fixed-Rate Note (continued)

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.</td>
<td><strong>BORROWER’S FAILURE TO PAY AS REQUIRED</strong></td>
</tr>
<tr>
<td></td>
<td>(A) <strong>Late Charge for Overdue Payments</strong></td>
</tr>
<tr>
<td></td>
<td>If the Note Holder has not received the full amount of any monthly payment by the end of ________ calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be ____% of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.</td>
</tr>
<tr>
<td></td>
<td>(B) <strong>Default</strong></td>
</tr>
<tr>
<td></td>
<td>If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.</td>
</tr>
<tr>
<td></td>
<td>(C) <strong>Notice of Default</strong></td>
</tr>
<tr>
<td></td>
<td>If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.</td>
</tr>
<tr>
<td></td>
<td>(D) <strong>No Waiver By Note Holder</strong></td>
</tr>
<tr>
<td></td>
<td>Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.</td>
</tr>
<tr>
<td></td>
<td>(E) <strong>Payment of Note Holder’s Costs and Expenses</strong></td>
</tr>
<tr>
<td></td>
<td>If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys’ fees.</td>
</tr>
<tr>
<td>7.</td>
<td><strong>GIVING OF NOTICES</strong></td>
</tr>
<tr>
<td></td>
<td>Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.</td>
</tr>
<tr>
<td></td>
<td>Any notice that must be given to the Note Holder under this Note will be given by delivering it or by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.</td>
</tr>
<tr>
<td>8.</td>
<td><strong>OBLIGATIONS OF PERSONS UNDER THIS NOTE</strong></td>
</tr>
<tr>
<td></td>
<td>If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.</td>
</tr>
<tr>
<td>9.</td>
<td><strong>WAIVERS</strong></td>
</tr>
<tr>
<td></td>
<td>I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. “Presentment” means the right to require the Note Holder to demand payment of amounts due. “Notice of Dishonor” means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.</td>
</tr>
<tr>
<td>10.</td>
<td><strong>UNIFORM SECURED NOTE</strong></td>
</tr>
<tr>
<td></td>
<td>This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the “Security Instrument”), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:</td>
</tr>
<tr>
<td></td>
<td>If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender’s prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.</td>
</tr>
</tbody>
</table>
EXHIBIT 10–1
Fannie Mae/Freddie Mac Residential Fixed-Rate Note (continued)

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED

________________________________________ (Seal)
- Borrower

________________________________________ (Seal)
- Borrower

________________________________________ (Seal)
- Borrower

[Sign Original Only]
EXHIBIT 10–2
Fannie Mae/Freddie Mac Residential Adjustable-Rate Note

ADJUSTABLE RATE NOTE
(1 Year Treasury Index -- Rate Caps)

THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY
INTEREST RATE AND MY MONTHLY PAYMENT. THIS NOTE LIMITS
THE AMOUNT MY INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE
MAXIMUM RATE I MUST PAY.

[Date] [City] [State]

[Property Address]

1. BORROWER’S PROMISE TO PAY
In return for a loan that I have received, I promise to pay U.S. $________ (this amount is called
“Principal”), plus interest, to the order of the Lender. The Lender is __________________________. I will make
all payments under this Note in the form of cash, check or money order.
I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is
entitled to receive payments under this Note is called the “Note Holder.”

2. INTEREST
Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly
rate of ________%. The interest rate I will pay will change in accordance with Section 4 of this Note.

The interest rate required by this Section 2 and Section 4 of this Note is the rate I will pay both before and after any
default described in Section 7(B) of this Note.

3. PAYMENTS
(A) Time and Place of Payments
I will pay principal and interest by making a payment every month.
I will make my monthly payment on the first day of each month beginning on __________, ______. I will make
these payments every month until I have paid all of the principal and interest and any other charges described below that
I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest
before Principal. If, on __________, 20__, I still owe amounts under this Note, I will pay those amounts in full
on that date, which is called the “Maturity Date.”

I will make my monthly payments at __________________ or at a different place if required by
the Note Holder.

(B) Amount of My Initial Monthly Payments
Each of my initial monthly payments will be in the amount of U.S. $__________. This amount may change.

(C) Monthly Payment Changes
Changes in my monthly payment will reflect changes in the unpaid principal of my loan and in the interest rate that I must pay. The Note Holder will determine my new interest rate and the changed amount of my monthly payment in accordance with
Section 4 of this Note.

4. INTEREST RATE AND MONTHLY PAYMENT CHANGES
(A) Change Dates
The interest rate I will pay may change on the first day of __________, ______, and on that day every
12th month thereafter. Each date on which my interest rate could change is called a “Change Date.”

(B) The Index
Beginning with the first Change Date, my interest rate will be based on an Index. The “Index” is the weekly average yield
on United States Treasury securities adjusted to a constant maturity of one year, as made available by the Federal Reserve Board.
The most recent Index figure available as of the date 45 days before each Change Date is called the “Current Index.”

If the Index is no longer available, the Note Holder will choose a new index which is based upon comparable information.
The Note Holder will give me notice of this choice.
EXHIBIT 10–2
Fannie Mae/Freddie Mac Residential Adjustable-Rate Note (continued)

(C) Calculation of Changes
Before each Change Date, the Note Holder will calculate my new interest rate by adding __________ __________ percentage points (_________% to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

(D) Limits on Interest Rate Changes
The interest rate I am required to pay at the first Change Date will not be greater than ________% or less than ________%. Thereafter, my interest rate will never be increased or decreased on any single Change Date by more than one percentage point (1.0%) from the rate of interest I have been paying for the preceding 12 months. My interest rate will never be greater than ________%.

(E) Effective Date of Changes
My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

(F) Notice of Changes
The Note Holder will deliver or mail to me a notice of any changes in my interest rate and the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

5. BORROWER'S RIGHT TO PREPAY
I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a “Prepayment.” When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due dates of my monthly payment unless the Note Holder agrees in writing to those changes. My partial Prepayment may reduce the amount of my monthly payments after the first Change Date following my partial Prepayment. However, any reduction due to my partial Prepayment may be offset by an interest rate increase.

6. LOAN CHARGES
If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

7. BORROWER'S FAILURE TO PAY AS REQUIRED
(A) Late Charges for Overdue Payments
If the Note Holder has not received the full amount of any monthly payment by the end of __________ calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be ________% of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default
If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default
If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder
Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses
If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right...
EXHIBIT 10–2
Fannie Mae/Freddie Mac Residential Adjustable-Rate Note (continued)

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by delivering it or by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

10. WAIVERS

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. “Presentment” means the right to require the Note Holder to demand payment of amounts due. “Notice of Dishonor” means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

11. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the “Security Instrument”), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender’s prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender’s security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender’s consent to the loan assumption. Lender may also require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.
EXHIBIT 10–2
Fannie Mae/Freddie Mac Residential Adjustable-Rate Note (continued)

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

__________________________ (Seal)
-Borrower

__________________________ (Seal)
-Borrower

__________________________ (Seal)
-Borrower

[Sign Original Only]

MULTISTATE ADJUSTABLE RATE NOTE--ARM 5-1--Single Family--Fannie Mae/Freddie Mac UNIFORM INSTRUMENT Form 3501 1/01 (page 4 of 4 pages)
REAL ESTATE NOTE

FOR VALUE RECEIVED, the undersigned HARRIS OFFICE PARK LIMITED PARTNERSHIP, an Ohio limited partnership, hereinafter referred to as "Borrower," promises to pay to the order of WHEREVER INSURANCE COMPANY, an Ohio corporation, hereinafter referred to as "Payee," at the main office of Payee located at ___________________________ or at such other place as Payee shall designate in writing, in lawful money of the United States of America which shall at the time of payment be legal tender for payment of all debts, public and private, the principal sum of ONE MILLION SIX HUNDRED THOUSAND AND NO/100 DOLLARS ($1,600,000.00), together with interest thereon at the rate of ten and one-half percent (10.50%) per annum in two hundred seventy-six (276) consecutive monthly installments, installments 1 to 275 both inclusive, being for the sum of FIFTEEN THOUSAND THREE HUNDRED EIGHTY NINE AND 88/100 DOLLARS ($15,389.88) each, and installment number 276 being for the balance of the principal and interest then owing.

Interest only on the outstanding principal balance of the indebtedness shall be due and payable on October 1, 20___ and the first of said monthly amortized installments of principal and interest shall be due and payable on November 1, 20___, and continue to be due and payable on the first day of each month thereafter, with the final installment of all unpaid principal and unpaid and accrued interest, unless sooner paid, being due and payable on the 1st day of October, 20 ____. Each such amortized installment of principal and interest, when paid, shall be applied first to the payment of interest accrued on the unpaid principal balance and the residue thereof shall be applied toward the payment of principal.

Notwithstanding anything contained in this note to the contrary, Payee shall have the right, at its sole option and discretion, to declare the entire outstanding principal balance of this note and all accrued and unpaid interest thereon to be due and payable in full at the end of the seventh (7th), twelfth (12th), seventeenth (17th), or twenty-second (22nd) Loan Years (hereinafter defined) and each date is hereinafter referred to as a "Call Date." Payee shall give notice of the exercise of such option to Borrower at least six (6) months in advance. In the event Payee shall elect to so declare this note due, then this note shall be and become due and payable in full on the due date of the eighty-fourth (84th), one hundred forty-fourth (144th), two hundred fourth (204th), or two hundred sixty-fourth (264th) installment of principal and interest due hereunder, depending upon whether or not Payee elects to declare this note due, and upon which Call Date Payee exercises the option to declare this Note due. No prepayment premium as hereinafter described shall be due and payable if this Note is prepaid because of Payee's exercise of its rights to declare the Note due pursuant to this paragraph.

Late Charge. Borrower shall pay a late charge of four percent (4%) of any payment of principal and interest which is not paid within fifteen (15) days of the due date thereof. The collection of any such late charge by Payee shall not be deemed a waiver by Payee of any of its rights hereunder or under any document or instrument given to secure this note. During the entire term of this note, Borrower shall pay all costs of collection, including reasonable attorney's fees not to exceed fifteen percent (15%) of the principal and interest due, if collected by or through an attorney-at-law.

Prepayment Privilege. This note may not be prepaid in whole or in part except as herein specifically provided. No prepayment of the principal of this note shall be permitted or allowed prior to the end of the third (3rd) Loan Year, as hereinafter defined. After the end of the third (3rd) Loan Year, this note may be prepaid in whole, but not in part, upon any principal and interest payment date as provided herein, provided that (a) no later than sixty (60) days prior to the date of such prepayment, Borrower delivers written notice to Payee, that Borrower intends to prepay the note in full on the date specified in the notice; and (b) Borrower pays to Payee at
the time of such prepayment, a percentage of the prepaid principal amount of the indebtedness as a prepayment premium. The amount of the prepayment premium shall be the product obtained by multiplying the prepaid principal amount of the indebtedness by the product of the following: (i) the amount obtained by subtracting the annualized yield on a United States Treasury Bill, Note or Bond with a maturity date which occurs closest to the next applicable Call Date of this note, as such annualized yield is reported by The Wall Street Journal, on the business day preceding the date of prepayment, from 10.50% multiplied by: (ii) the number of years and any fraction thereof remaining between the date of prepayment and the next applicable Call Date of this note.

Notwithstanding the foregoing, however, in the event of acceleration of this note at any time, including the period of time prior to the end of the third (3rd) Loan Year, and subsequent involuntary or voluntary prepayment, the prepayment premium as calculated above shall be payable, however, in no event shall it exceed an amount equal to the excess, if any, of (i) interest calculated at the highest applicable rate permitted by applicable law, as construed by courts having jurisdiction thereof, on the principal balance of the indebtedness evidenced by this note from time to time outstanding from the date hereof to the date of such acceleration; over (ii) interest theretofore paid and accrued on this note. Any prepaid amounts specified in any notice shall become due and payable at the time provided in such notice. Under no circumstances shall the prepayment premium ever be less than zero. The amount of prepayment shall never be less than the full amount of the then outstanding principal indebtedness and accrued interest thereon.

A Loan Year for the purposes of this note shall mean each successive twelve (12) month period, beginning with the date of the first installment payment of principal and interest hereunder, provided, however, that the first (1st) Loan Year shall include the period from the date of this note to the date of such first installment payment of principal and interest.

Borrower further agrees to pay in addition to the above-described prepayment premium, a reinvestment fee of one-half of one (1/2%) percent of the outstanding prepaid principal indebtedness evidenced by this note to Payee. Borrower agrees that the reinvestment fee together with the prepayment premium shall be due and payable regardless of whether the prepayment is made involuntarily or voluntarily.

Collateral. This note is secured by, among other instruments, (i) a Deed of Trust of even date herewith executed by Borrower in favor of Payee (the “Security Deed”), conveying and covering certain real property lying and being in Land Lot 50 of the 17th District, of Simkin County, Ohio, as the same is more particularly described in the Security Deed (the “Premises”), (ii) Security Agreement of even date herewith executed by Borrower in favor of Payee (the “Security Agreement”), conveying a security interest in certain personal property as more particularly described in the Security Agreement, (iii) Assignment of Leases and Rents of even date herewith executed by Borrower in favor of Payee (the “Rent Assignment”) covering the Premises.

Default. If Borrower fails to pay when due any amount payable under this note or if Borrower shall be in default under the Security Deed, Security Agreement or Rent Assignment, then Borrower shall be in default under this note. In the event Borrower shall be in default under this note, at the option of Payee and without further demand or further notice of any kind, the entire unpaid principal balance of this note together with accrued interest thereon, may be declared and thereupon immediately shall become due and payable, and the principal portion of such sum shall bear interest at the rate of two percent (2%) per annum in excess of the highest rate of interest then being charged under this note from the date of default until paid, and Payee, at the option of Payee and without demand or notice of any kind, may exercise any and all rights and remedies provided for or allowed by the Security Deed, Security Agreement, Rent Assignment or provided for or allowed by law or inequity. Any acceleration of payment of the indebtedness evidenced by this note pursuant to the terms hereof or pursuant to the terms of the Security Deed shall be considered prepayment of such indebtedness.
authorizing Payee, upon any such acceleration, and in addition to the balance of principal and interest accrued thereon and all other amounts due under this note and the Security Deed, to the extent permitted by applicable law, to recover any amount equal to the prepayment premium provided for hereinabove as if such indebtedness has been prepaid otherwise.

Time. Time is of the essence of this note.

Waiver. Demand, presentment, notice, protest, and notice of dishonor are hereby waived by Borrower and by each and every co-maker, endorser, guarantor, surety, and other person or entity primarily or secondarily liable on this note. Borrower and each and every co-maker, endorser, guarantor, surety, and other person or entity primarily or secondarily liable on this note: (i) severally waives, each for himself and family, any and all homestead and exemption rights by which any of them or the family of any of them may have under or by virtue of the Constitution or laws of the United States of America or of any state as against this note or any and all renewals, extensions, or modifications of, or substitutions for, this note; (ii) hereby transfers, conveys, and assigns to Payee a sufficient amount of such homestead or exemption as may be allowed, including such homestead or exemption as may be set apart in bankruptcy, to pay the indebtedness evidenced by this note in full, with all costs of collection; (iii) does hereby direct any trustee in bankruptcy having possession of such homestead or exemption to deliver to Payee a sufficient amount of property or money set apart as exempt to pay the indebtedness evidenced by this note, and any and all renewals, extensions, and modifications of, and substitutions for, this note; and (iv) does hereby appoint Payee attorney in-fact to claim any and all homestead exemptions allowed by law.

Third Party Liability. With the consent of Payee, this note may be extended or renewed, in whole or in part, without notice to or consent of any co-maker, endorser, guarantor, surety or other person or entity primarily or secondarily liable on this note and without affecting or lessening the liability of any such person or entity, and each such person or entity hereby waives any right to notice of or consent to such extensions and renewals. Failure of Payee to exercise any rights under this note shall not affect the liability of any co-maker, endorser, guarantor, surety or other person or entity primarily or secondarily liable on this note.

Forbearance. Payee shall not be deemed to waive any of Payee’s rights or remedies under this note unless such waiver be express, in writing and signed by or on behalf of Payee. No delay, omission, or forbearance by Payee in exercising any of Payee’s rights or remedies shall operate as a waiver of such rights or remedies. A waiver in writing on one occasion shall not be construed as a waiver of any right or remedy on any future occasion.

Governing Law and Severability. This note shall be governed by, construed under, and interpreted and enforced in accordance with the laws of the State of Ohio. Wherever possible, each provision of this note shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this note shall be prohibited by or invalid under the applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this note.

This note and all provisions hereof and of all documents securing this note conform in all respects to the laws of the State of Ohio so that no payment of interest or other sum construed to be interest or charges in the nature of interest shall exceed the highest lawful contract rate permissible under the laws of the State of Ohio as applicable to this transaction. Therefore, this note and all agreements between Borrower and Payee are limited so that in no contingency or event whatsoever, whether acceleration of maturity of the indebtedness or otherwise, shall the amount paid or agree to be paid to the Payee of the use, forbearance, or detention of the money advanced by or to be advanced hereunder exceed the highest lawful rate permissible under the laws of the State of Ohio as applicable to this transaction. In determining whether or not the rate of interest exceeds the highest lawful rate, the Borrower and Payee intend that all sums paid hereunder which are deemed interest for the purposes of determining usury be prorated, allocated, or spread in equal parts over the longest period of time permitted under the applicable laws of the State of Ohio. If, under any circumstances whatsoever, fulfillment of
any provision hereof, or of any other instrument evidencing or securing this Indebtedness, at
the time performance of such provisions shall be due, shall involve the payment of interest
in excess of that authorized by law, the obligation to be fulfilled shall be reduced to the limit
so authorized by law, and if under any circumstances Payee shall ever receive as interest an
amount which would exceed the highest lawful rate, the amount which would be excessive
shall be either applied to the reduction of the unpaid principal balance of the Indebtedness,
without payment of any prepayment fee, (and not to the payment of interest) or refunded to
the Borrower, and Payee shall not be subject to any penalty provided for the contracting for,
charging, or receiving interest in excess of the maximum lawful rate regardless of when or the
circumstances under which said refund or application was made.

Notices. All notices, requests, demands, and other communications of this note shall be
in writing and shall be deemed to have been duly given if given in accordance with the provi-
sions of the Security Deed.

Terms. The word "Borrower" as used herein shall include the legal representatives, succes-
sors, and assigns of Borrower as if so specified at length throughout this note, all of which shall
be liable for all indebtedness and liabilities of Borrower. The word "Borrower" as used herein
shall also include all makers of this note, and each of them, who shall be jointly and severely
liable under this note, should more than one maker execute this note; and shall include all
endorsers, guarantors, sureties, and other persons or entities primarily or secondarily liable on
this note, and each of them; and shall include the masculine and feminine genders, regardless
of the sex of Borrower or any of them; and shall include partnerships, corporations, and other
legal entities, should such an entity be or become primarily or secondarily liable on this note.
The word "Payee" as used herein shall include the transferees, legal representatives, successors,
and assigns of Payee, as if so specified at length throughout this note, and all rights of Payee
under this note shall inure to the successors and assigns of Payee.

IN WITNESS WHEREOF, Borrower by its duly authorized general partner has executed this
note under seal and has delivered this note to Payee, this ______ day of September, 20_____.

BORROWER:

HARRIS OFFICE PARK LIMITED
PARTNERSHIP, an Ohio limited
partnership

General Partner:

____________________________(SEAL)

Veronica F. Harris
Guaranty

_____________________________ 20____

(City)                                                    ,    (State)

FOR VALUE RECEIVED, the sufficiency of which is hereby acknowledged, and in consider-
ation of any loan or other financial accommodation heretofore or hereafter at any time made
or granted to _____________________________________________ (hereinafter called the
“Debtor”) by ___________________________ (hereinafter, together with its successors and
assigns, called the “Bank”), the undersigned hereby unconditionally guarantee(s) the full and
prompt payment when due, whether by declaration or otherwise, and at all times hereafter,
of all obligations of the Debtor to the Bank, however and whenever incurred or evidenced,
whether direct of indirect, absolute or contingent, or due or to become due (collectively
called “Liabilities”), and the undersigned further agree(s) to pay the following (herein called
“Expenses”): (a) all expenses paid or incurred by the Bank in endeavoring to collect the Liabili-
ties or any part thereof from the Debtor, including attorney’s fees of 15% of the total amount
sought to be collected if the Bank endeavors to collect from the Debtor by law or through an
attorney at law; and (b) all expenses paid or incurred by the Bank in collecting this guaranty,
including attorney’s fees of 15% of the total amount sought to be collected if this guaranty is
collected by law or through an attorney at law. The right of recovery against the undersigned
is, however, limited to ______________________ Dollars ($____________________) of the
principal amount of the Liabilities plus the interest on such amount and plus the Expenses as
applicable thereto and as applicable to this guaranty.

Undersigned hereby represents that loans or other financial accommodations by the Bank
to the Debtor will be to the direct interest and advantage of the undersigned.

Undersigned hereby transfers and conveys to the Bank any and all balances, credits,
accounts, items and monies of the undersigned now or hereafter with the Bank, and
the Bank is hereby given a lien upon security title to and a security interest in all property of the
undersigned of every kind and description now or hereafter in the possession or control of the
Bank for any reason, including all dividends and distributions on or other rights in connection
therewith.

In the event of the death, incompetency, dissolution or insolvency (as defined by the
Uniform Commercial Code as in effect at the time in Georgia) of the Debtor, or if a petition in
bankruptcy be filed by or against the Debtor, or if a receiver be appointed for any part of the
property or assets of the Debtor, or if any judgment be entered against the Debtor, or if the
Bank shall feel insecure with respect to Liabilities and if any such event should occur at a time
when any of the Liabilities may not then be due and payable, the undersigned agrees to pay
to the Bank upon demand the full amount which would be payable hereunder by the under-
signed if all Liabilities were then due and payable.

Bank may, without demand or notice of any kind, at any time when any amount shall be
due and payable hereunder by any of the undersigned, appropriate and apply toward the pay-
ment of such amount, and in such order of application as the Bank may from time to time elect,
any property, balances, credits, deposits, accounts, items or monies of such undersigned in the
possession or control of the Bank for any purpose.

This guaranty shall be continuing, absolute and unconditional and shall remain in full force
and effect as to the undersigned, subject to discontinuance of this guaranty as to any of the
undersigned (including, without limitation, any undersigned who shall become deceased, incom-
petent or dissolved) only as follows: Any of the undersigned, and any person duly authorized and
acting on behalf of any of the undersigned, may given written notice to the Bank of discontinu-
ance of this guaranty as to the undersigned by whom or on whose behalf such notice is given,
but no such notice shall be effective in any respect until it is actually received by the Bank and

(continued)
no such notice shall affect or impair the obligations hereunder of the undersigned by whom or on whose behalf such notice is given with respect to any Liabilities existing at the date of receipt of such notice by the Bank, any interest thereon or any expenses paid or incurred by the Bank in endeavoring to collect such Liabilities, or any part thereof, and in enforcing this guaranty against such undersigned. Any such notice of discontinuance by or on behalf of any of the undersigned shall not affect or impair the obligations hereunder of any other of the undersigned.

The Bank may, from time to time, without notice to the undersigned (or any of them), (a) retain or obtain a security interest in any property to secure any of the Liabilities or any obligation hereunder, (b) retain or obtain the primary or secondary liability of any party or parties, in addition to the undersigned, with respect to any of the Liabilities, (c) extend or renew for any period (whether or not longer than the original period), alter or exchange any of the Liabilities, (d) release or compromise any liability of any of the undersigned hereunder or any liability of any other party or parties primarily or secondarily liable on any of the Liabilities, (e) release its security interest, if any, in all or any property securing any of the Liabilities or any obligation hereunder and permit any substitution or exchange for any such property, and (f) resort to the undersigned (or any of them) for payment of any of the Liabilities, whether or not the Bank shall have resorted to any property securing any of the Liabilities or any obligation hereunder or shall have proceeded against any other of the undersigned or any other party primarily or secondarily liable on any of the Liabilities.

Any amount received by the Bank from whatever source and applied by it toward the payment of the Liabilities shall be applied in such order of application as the Bank may from time to time elect.

The undersigned hereby expressly waive(s): (a) Notice of the acceptance of this guaranty, (b) notice of the existence or creation of all or any of the Liabilities, (c) presentment, demand, notice of dishonor, protest, and all other notices whatsoever, and (d) all diligence in collection or protection of or realization upon the Liabilities or any thereof, any obligation hereunder, or any security for any of the foregoing.

The creation or existence from time to time of Liabilities in excess of the amount to which the right of recovery under this guaranty is limited is hereby authorized, without notice to the undersigned (or any of them), and shall in no way affect or impair this guaranty.

The Bank may, without notice of any kind, sell, assign or transfer all or any of the Liabilities, and in such event each and every immediate and successive assignee, transferee, or holder of all or any of the Liabilities, shall have the right to enforce this guaranty, by suit or otherwise, for the benefit of such assignee, transferee or holder, as fully as if such assignee, transferee or holder were herein by name specifically given such rights, powers and benefits, but the Bank shall have an unimpaired right, prior and superior to that of any such assignee, transferee or holder, to enforce this guaranty for the benefit of the Bank, as to so much of the Liabilities as it has not sold, assigned or transferred.

No delay or failure on the part of the Bank in the exercise of any right or remedy shall operate as a waiver thereof, and no single or partial exercise by the Bank of any right or remedy shall preclude other or further exercise thereof or the exercise of any other right or remedy. No action of the Bank permitted hereunder shall in any way impair or affect this guaranty. For the purpose of this guaranty, Liabilities shall include all obligations of the Debtor to the Bank, notwithstanding any right or power of the Debtor or anyone else to assert any claim or defense, as to the invalidity or unenforceability of any such obligation, and no such claim or defense shall impair or affect the obligations of the undersigned hereunder.

This guaranty is cumulative of and shall not effect, modify or limit any other guaranty executed by the undersigned with respect to any Liabilities.

This guaranty shall be binding upon the undersigned, and upon the heirs, legal representatives, successors and assigns of the undersigned. If more than one party shall execute this guaranty, the term "undersigned" shall mean all parties executing this guaranty, and all such parties shall be jointly and severally obligated hereunder.
This guaranty has been made and delivered in the State of Georgia, and shall be governed by the laws of that State. Wherever possible each provision of this guaranty shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this guaranty shall be prohibited by or invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this guaranty.

IN WITNESS WHEREOF the undersigned have hereunto set their hands and affix their seals the day and year above written.

________________________ (SEAL)
________________________ (SEAL)
________________________ (SEAL)
THIS INDENTURE, made this _______ day of _________________ in the year of our Lord two thousand and __________________________, by and between ___________________________, hereinafter called the Mortgagor; and ___________________________, hereinafter called the Mortgagee:

Whereas the said Mortgagor is justly indebted to the said Mortgagee in the principal sum of ___________________________, Dollars, as evidenced by a certain promissory note of even date herewith, executed by ___________________________, payable to the order of the Mortgagee, with interest and upon terms as provided therein.

Said note provides that all installments of principal and interest are payable in lawful money of the United States of America, which shall be legal tender for public and private debts at the time of payment, at the office of ___________________________, or at such other place as the holder thereof may from time to time designate in writing. Said note also provides that the final installment of principal and interest shall be due and payable on the _________ day of _________________, 20_____.

Said note provides that each maker and endorser, jointly and severally, shall pay all costs of collection, including a reasonable attorney’s fee, on failure to pay any principal and interest when due thereon, and that all principal due thereunder shall bear interest at the maximum permissible rate per annum from due date until paid.

Said note further provides that if any installment of principal and/or interest shall not be paid when due, then the entire principal sum and accrued interest shall become due and payable at once, at the option of the holder thereof.

NOW THIS INDENTURE WITNESSETH, that the said Mortgagor, to secure said indebtedness and interest thereon, and also for and in consideration of the sum of One Dollar paid by Mortgagee, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed and by these presents does grant, bargain, sell and convey unto the Mortgagee all that certain lot, parcel or piece of land lying and being in the County of _____________________________________ and State of Florida, more particularly described as _________________________________.

ALSO TOGETHER WITH all buildings and improvements thereon situate or which may hereafter be erected or placed thereon and all and singular the tenements, hereditaments, appurtenances and easements thereunto belonging or in anywise appertaining, and the rents, issues and profits thereof, and together with all heating, ventilating and air conditioning equipment, all plumbing apparatus, fixtures, hot water heaters, water and sprinkler systems and pumps, all lighting fixtures and all screens, awnings, venetian blinds, built-in equipment, and built-in furniture (whether or not affixed to land or building) now or hereafter located in or on said premises, including all renewals, replacements and additions thereto.

TO HAVE AND TO HOLD the above granted and described premises unto the said Mortgagor; its successors or assigns, forever.

And the said Mortgagor hereby covenants with the Mortgagee that the said Mortgagor is indefeasibly seized of said land in fee simple; that the said Mortgagor has full power and lawful right to convey the same in fee simple as aforesaid; that it shall be lawful for the Mortgagee at all times peaceably and quietly to enter upon, hold, occupy and enjoy said land and every part thereof; that the land is free from all encumbrances, except as aforesaid; that said Mortgagor will make such further assurances to prove the fee simple title to said land in said Mortgagor as may be reasonably required, and that said Mortgagor does hereby fully warrant the title to said land and every part thereof and will defend the same against the lawful claims of all persons whomsoever.
Provided always, and these presents are on this express condition, that if said mortgagor shall well and truly pay said indebtedness unto the said mortgagee, and any renewals or extensions thereof, and the interest thereon, together with all costs, charges and expenses, including a reasonable attorney’s fee, which the said mortgagee may incur or be put to in collecting the same by foreclosure, or otherwise, and shall perform and comply with all other terms, conditions and covenants contained in said promissory note and this mortgage, then these presents and the estate hereby granted shall cease, determine and be null and void.

And the said mortgagor hereby jointly and severally covenants and agrees to and with the said mortgagee as follows:

1. To pay all and singular the principal and interest and the various and sundry sums of money payable by virtue of said promissory note and this mortgage, each and every, promptly on the days respectively the same severally become due.

2. To pay all and singular the taxes, assessments, levies, liabilities, obligations and encumbrances of every nature and kind now on said described property, and/or that hereafter may be imposed, suffered, placed, levied or assessed thereupon and/or that hereafter may be levied or assessed upon this mortgage and/or the indebtedness secured hereby, each and every, before they become delinquent, and in so far as any thereof is of record the same shall be promptly satisfied and discharged of record and the original official document (such as, for instance, the tax receipt or the satisfaction paper officially endorsed or certified) shall be placed in the hands of said mortgagee within ten days after next payment.

3. To keep the buildings now or hereafter situate on said land and all personal property used in the operation thereof continuously insured against loss by fire and such other hazards as may from time to time be requested by mortgagee, in companies and in amounts in each company as may be approved by and acceptable to mortgagee; and all insurance policies shall contain the usual standard mortgagee clause making the loss under said policies payable, without contribution, to said mortgagee as its interest may appear, and each and every such policy shall be promptly delivered to and held by said mortgagee; and, not less than ten (10) days in advance of the expiration of each policy, to deliver to said mortgagee a renewal thereof, together with a receipt for the premium of such renewal. Any insurance proceeds, or any part thereof, may be applied by mortgagee, at its option, to the indebtedness hereby secured or to the restoration or repair of the property damaged.

4. To keep said land and the buildings and improvements now or hereafter situate thereon in good order and repair, and to permit, commit or suffer no waste, impairment or deterioration of said property or any part thereof.

5. To comply, as far as they affect the mortgaged property, with all statutes, laws, ordinances, decrees and orders of the United States, the State of Florida and of any political subdivision thereof.

6. In case mortgagor shall fail to promptly discharge any obligation or covenant as provided herein, the mortgagee shall have the option, but no obligation, to perform on behalf of the mortgagor any act to be performed by mortgagor in discharging such obligation or covenant, and any amount which mortgagee may expend in performing such act, or in connection therewith, with interest thereon at the rate of ten (10) percent per annum and together with all expenses, including reasonable attorney’s fees, incurred by mortgagee shall be immediately payable by mortgagor and shall be secured by this mortgage, and mortgagee shall be subrogated to any rights, equities and liens so discharged.

7. That if the principal or interest on the note herein described or any part of the indebtedness secured by this mortgage or interest thereon, be not paid within ten (10) days after they are due, or if default be made in the full and prompt performance of any covenant or agreement herein contained, or if any proceeding be instituted to abate any nuisance on the mortgaged property, or if any proceeding be instituted which might result to the detriment of the use and enjoyment of the said property or upon the rendering by any court of last resort of a decision that an undertaking by the mortgagor as herein provided to pay any tax, assessment,
EXHIBIT 10–5
Florida Mortgage
(continued)

levy, liability, obligation or encumbrance is legally inoperative or cannot be enforced, or in the
event of the passage of any law changing in any way or respect the laws now in force for the
taxation of mortgages or debts secured thereby for any purpose, or the manner of collection of
any such tax, so as to affect this mortgage or the debt secured hereby; or if the Mortgagor shall
make an assignment for the benefit of creditors, or if a receiver be appointed for the Mortgagor
or any part of the mortgaged property, or if Mortgagor files a petition in bankruptcy, or is adju-
dicated a bankrupt or files any petition or institutes any proceedings under the National Bank-
ruptcy Act, then on the happening of any one or more of these events, this conveyance shall
become absolute and the whole indebtedness secured hereby shall immediately become due
and payable, at the option of the Mortgagee, and this mortgage may thereupon be foreclosed
for the whole of said money, interest and costs; or Mortgagee may foreclose only as to the sum
past due, without injury to this mortgage or the displacement or impairment of the remainder
of the lien thereof, and at such foreclosure sale the property shall be sold subject to all remain-
ing items of indebtedness; and Mortgagee may again foreclose, in the same manner, as often
as there may be any sum past due.

8. Except during such period or periods as the Mortgagee may from time to time designate
in writing, the Mortgagor will pay to the Mortgagee on the first day of each month through-
out the existence of this mortgage a sum equal to the Mortgagee’s estimate of the taxes and
assessments next due on the mortgaged property and premiums next payable on or for poli-
cies of fire and other hazard insurance thereon, less any sums already paid the Mortgagee
with respect thereto, divided by the number of months to elapse before one month prior to
the date when such taxes, assessments and premiums become due and payable, such sums
to be held by the Mortgagee, without interest, to pay such items. If at any time the estimated
sum is insufficient to pay an item when due, the Mortgagor shall forthwith upon demand pay
the deficiency to the Mortgagee. The arrangement provided for in this paragraph is solely for
the added protection of the Mortgagee and entails no responsibility on the Mortgagee’s part
beyond the allowing of due credit, without interest, for sums actually received by it. Upon the
occurrence of a default under this mortgage, the Mortgagee may apply all or any part of the
accumulated funds then held, upon any obligation secured hereby. Upon assignment of this
mortgage, any funds on hand shall be turned over to the assignee and any responsibility of
the assignor with respect thereto shall terminate. Each transfer of the mortgaged property
shall automatically transfer to the grantee all right of the grantor with respect to any funds
accumulated hereunder.

9. That in case of default or the happening of any event which would enable the Mort-
gagor to declare the whole indebtedness secured hereby immediately due and payable, the
Mortgagee shall be entitled to the appointment of a receiver of all the rents, issues and profits,
regardless of the value of the mortgaged property and the solvency or insolvency of the Mort-
gagor and other persons liable to pay said indebtedness.

10. That the Mortgagee may collect a “late charge” not to exceed four cents (4¢) for each
dollar of each payment due hereunder made more than fifteen (15) days in arrears to cover the
extra expense involved in handling delinquent payments.

11. That the words “Mortgagor” and “Mortgagee” when used herein shall be taken to
include singular and plural number and masculine, feminine or neuter gender, as may fit the
case, and shall also include the heirs, administrators, executors, successors and assigns of the
parties hereto. Each and all of the terms and provisions hereof shall extend to and be a part of
any renewal or extension of this mortgage.

12. That this mortgage and the note secured hereby constitute a Florida contract and shall
be construed according to the laws of that state.

IN WITNESS WHEREOF, the said Mortgagor has hereunto set his hand and seal the day and
year first above written.
EXHIBIT 10–6
North Carolina Deed of Trust

NORTH CAROLINA DEED OF TRUST

THIS DEED OF TRUST made this day of , 20 , by and between:

GRANTOR

TRUSTEE

BENEFICIARY

SOUTHERN NATIONAL BANK OF NORTH CAROLINA, a national banking association

Enter in appropriate block for each party: name, address, and, if appropriate, character of entity, e.g. corporation or partnership.

WITNESSETH: The Grantor is indebted to the Beneficiary in the sum of $ .

The party or parties executing this Deed, for consideration (the “Debt”) for money loaned, as evidenced by promissory notes of even date herewith, the terms of which are incorporated herein by reference.

NOW, THEREFORE, as security for the Debt, together with interest thereon, and as security for all renewals, extensions, deferments, amortizations and re-amortizations thereof, in whole or in part, together with interest thereon whether at the same or different rates, and for a valuable consideration, receipt of which is hereby acknowledged, the Grantor has bargained, sold, granted and conveyed and does by these presents bargain, sell, grant and convey to the Trustee, his heirs, or successors, and assigns, the real property situated in the City of , Township, , County, State of North Carolina, particularly described as follows:

DESCRIPTION SET FORTH HEREINBELOW AND ON SCHEDULE "A", IF ANY, ATTACHED HERETO AND MADE A PART HEREOF.

(continued)
EXHIBIT 10–6
North Carolina Deed of Trust

(continued)

TO HAVE AND TO HOLD said real property, including all buildings, improvements and fixtures now or hereafter hereon existing, with all the rights, privileges and appurtenances thereto belonging, to the Trustee, his heirs, assigns, and successors, and unique forever, and all the covenants, terms and conditions, and for the use hereinafter set forth.

If the Grantor shall pay the Debt secured hereby in accordance with the terms of the Note evidencing the same, and all renewals, extensions, defeasances, amortizations and reconveyances thereof, in whole or in part, together with interest thereon, and shall comply with all the covenants, terms and conditions of this deed of trust, then this conveyance shall be null and void and may be canceled of record at the request of the Grantee. If, however, there shall be any default in any of the covenants, terms, or conditions of the Note(s) secured hereby, or any failure or neglect to comply with the covenants, terms, or conditions contained in this deed of trust, then in any of such events, if the default is not made good within (30) days, the Note(s) shall, at the option of the Beneficiary, at once become due and payable without notice, and it shall be lawful for and the duty of the Trustee, upon request of the Beneficiary, to sell the land herein conveyed at public auction for cash, after having first given such notice of hearing as is to commencement of foreclosure proceedings and obtaining such findings or loss of court as may be then required by law and giving such notice and advertising the time and place of such sale in such manner as may be then provided by law, and upon such and any other terms and upon compliance with the tenor relating to foreclosing proceedings to convey title to the purchaser in the usual manner.

The proceeds of the Sale shall, after the Trustee retains his commission, be applied to the amount due on the Note(s) hereby secured and otherwise as required by the then existing law relating to foreclosures. The Trustee's commission shall be five per cent of the gross proceeds of the sale or the minimum sum of $5, whichever is greater, for a completed foreclosure. In the event foreclosure is commenced, but not completed, the Grantor shall pay the expenses incurred in connection with the partial commission equitably apportioned on the basis of the proportionate indebtedness or the above stated minimum sum, whichever is greater, in accordance with the following schedule, to wit: one-fourth thereof before the Trustee issues a notice of hearing on the right to foreclose; one-half thereof after issuance of said notice; three-fourths thereof after such hearing; and the greater of the full commission or minimum after the initial sale.

And the said Grantor does hereby covenant and agree with the Trustee and with the Beneficiary as follows:

1. INSURANCE. Grantor shall keep all improvements on said land, now or hereafter erected, insured for the benefit of the Beneficiary against loss by fire, lightning, and such other casualties and contingencies, in such manner and to such companies as may be satisfactory to, or required by, the Beneficiary. Grantor shall purchase such insurance, pay all premiums therefor, and shall deliver to Beneficiary such policies along with evidence of payment of premiums as long as the Note(s) secured hereby remains unpaid. If Grantee fails to accept such insurance, pay the premiums therefor or deliver said policies with mortgage clause satisfactory to Beneficiary attached thereto, along with evidence of payment of premiums thereof, then Beneficiary, in its option, may purchase such insurance. Such amounts paid by Beneficiary shall be added to the Note(s) secured by this Deed of Trust, and shall be due and payable upon demand by Beneficiary to Beneficiary.

2. TAXES, ASSESSMENTS, CHARGES. Grantor shall pay all taxes, assessments and charges as may be lawfully levied against said premises within thirty (30) days after the same shall become due. In the event that Grantor fails to pay all taxes, assessments and charges as herein required, then Beneficiary, at its option, may pay the same and the amount so paid shall be added to the Note(s), secured by this Deed of Trust, and shall be due and payable upon demand by Beneficiary to Beneficiary.

3. PARTIAL RELEASE. Grantor shall not be entitled to partial release of any of the above described property unless a specific provision providing therefor is included in this Deed of Trust. In the event a partial release provision is included in this Deed of Trust, Grantor must strictly comply with the terms thereof. Notwithstanding anything herein contained, Grantor shall not be entitled to any release of property of Beneficiary if Grantor is not in default and is in full compliance with all of the terms and provisions of the Note(s), this Deed of Trust, and any other instrument that becomes a part of this Deed of Trust.

4. WASTE. The Grantor covenants that he will keep the premises herein conveyed in good order, repair and condition as they now, reasonable wear and tear excepted, and that he will not commit or permit any waste.

5. WARRANTIES. Grantor covenants with Trustee and Beneficiary that he is the owner of the premises in fee simple, has the right to convey the same in fee simple, and title to the same free and clear of all encumbrances, and that he will warrant and defend the title to the benefit of all persons whomsoever, except for the exceptions hereinafter stated. Title to the property hereinbefore described is subject to the following exceptions:

6. CONVEYANCE, ACCELERATION. If Grantor sells, conveys, transfers, assigns or disposposes of the hereinbefore described real property, or any part thereof or interest therein, by any means or method, whether voluntary or involuntary, without the written consent of Beneficiary, then in the option of Beneficiary and without notice to Grantor, all sums of money secured hereby, both principal and interest, shall immediately become due and payable in default, notwithstanding anything herein or in the Note(s) secured hereby to the contrary.

7. SUBSTITUTION OF TRUSTEE. Trustee and Trustee covenant and agree to and with Beneficiary that in case the said Trustee, or any successor trustee, shall die, become incapable of acting, remove his trust, or for other similar or dissimilar reason become unacceptable to the holder of the Note(s), then the holder of the Note(s) may appoint, in writing, a trustee to take the place of the Trustee; and upon the publication and registration of the same, the trustee thus appointed shall succeed to all the rights, powers, and duties of the Trustee.

8. CIVIL ACTION. In the event that the Trustee is named as a party to any civil action as Trustee in this Deed of Trust, the Trustee shall be entitled to employ an attorney at law, including himself if he is a licensed attorney, to represent him in said actions and the reasonable attorney’s fees of the Trustee in such actions shall be paid by Beneficiary and charged to the Note(s) secured by this Deed of Trust.

9. PRIOR LIENS. Default under the terms of any instrument secured by a lien to which this deed of trust is subordinated shall constitute default hereunder.

IN WITNESS WHEREOF, the Grantor has hereunto set his hand and seal, and if corporate, has caused this instrument to be signed by its duly authorized officers and its seal so to be hereunto affixed by authority of its Board of Directors, the day and year first above written.

(Corporate Name)

By: ___________________________ (SEAL)

__________________________ (President)

ATTEST:

__________________________ (SEAL)

__________________________ (Secretary of Corporate Seal)

______________________________________________ (SEAL)

SEAL-STAMP

STATE OF NORTH CAROLINA, COUNTY OF ________________, on a notary public of said county do hereby certify that

________________________________________________________________________

Grantee, personally appeared before me this day and acknowledged the execution of the foregoing instrument. Witness my hand and official stamp or seal, this __________ day of ______________, 20___.

My commission expires:

______________________________________________ (Notary Public)

SEAL-STAMP

STATE OF NORTH CAROLINA, COUNTY OF ________________, a Notary Public of the County and State aforesaid, certify that

________________________________________________________________________

is a corporate corporation, and that by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its __________ (President, Vice President, Secretary, Treasurer, etc.), the holder of the Note(s) secured by this Deed of Trust.

My commission expires:

______________________________________________ (Notary Public)

The foregoing instrument is true and correct. This instrument and this certificate are duly registered at the date and time and in the Book and Page shown on the first page hereof.

By: ___________________________ (Registration of Deeds)

______________________________________________ (Deputy/Assistant - Registration of Deeds)
STATE OF GEORGIA  
COUNTY OF  

SECURITY DEED AND AGREEMENT  

THIS INDENTURE is made this ___ day of ___, by 
and between  
party of the first part, hereinafter referred to as “Grantor”; and  
party of the second part, hereinafter referred to as “Grantee”; 

WITNESSETH:  

FOR AND IN CONSIDERATION of the financial accommodations to Grantor by Grantee resulting in the obligation which is hereinafter more particularly described, and in order to secure that obligation, Grantor hereby grants, bargains, conveys, transfers, assigns and sells unto Grantee the following described land:  

TOGETHER WITH ANY AND ALL of the following: (i) all buildings, structures and other improvements now or hereafter located thereon or on any part or parcel thereof and all fixtures affixed or attached, actually or constructively, thereto; (ii) all and singular the covenants, easements, and appurtenances belonging thereto or in any wise appearing thereto and the reversion and reversions, remainder or remainders thereof; (iii) all rents, issues, income, revenues and profits accruing therefore, whether now or hereafter arising; (iv) all accounts and contract rights now or hereafter arising in connection with any part or parcel thereof or any buildings, structures or improvements now or hereafter located thereon, including without limitation all accounts and contract rights in and to all leases or leases or subleases or subleases or any interest therein, or in any part or parcel thereof; (v) all equipment, machinery, apparatus, fittings, fixtures whether actually or constructively attached thereto, and every kind or description whatsoever now or hereafter located thereon, or in or on the buildings, structures and other improvements thereon, and used in connection with the operation and maintenance thereof, and all additions thereto and replacements thereof; and (vi) all building materials, supplies, goods and equipment delivered thereto and placed thereon for the purpose of being affixed to or installed or incorporated or otherwise used in the buildings, structures or other improvements now or hereafter located thereon or any part or parcel thereof. All of the foregoing are hereinafter sometimes referred to collectively as the “Premises.” 

GRANTOR WARRANTS that Grantor has good title to the Premises, that Grantor is lawfully seized and possessed of the Premises, that Grantor has the right to convey the Premises, that the Premises are unencumbered except as may be herein expressly provided and that Grantor shall forever warrant and defend the title to the Premises unto Grantee against the claims of all persons whosoever. 

THIS INSTRUMENT IS A DEED passing legal title pursuant to the laws of the State of Georgia governing deeds to secure debt and a security agreement granting a security interest pursuant to the Uniform Commercial Code of the State of Georgia; and it is not a mortgage. This deed and security agreement is made and intended to secure: (1) an obligation of Grantor to Grantee evidenced as follows: 

(iii) any and all renewal or renewals, extension or extensions, modification or modifications thereof, and substitution or substitutions thereof, either in whole or in part; and (iii) all interest, rents, taxes, and annual taxes, whether now or hereafter to be levied or paid, on the Premises, or on any part or parcel thereof; (v) any and all renewal or renewals, extension or extensions, modification or modifications thereof, and substitution or substitutions thereof, either in whole or in part. The obligations which this deed and security agreement is given to secure are hereinafter sometimes referred to collectively as the “Indebtedness.” This deed and security agreement is hereinafter sometimes referred to as this “Security Deed.” 

GRANTOR COVENANTS AND AGREES: (1) Junior Encumbrances: Grantor shall not create or permit to exist any liens or encumbrances on the Premises which are junior and inferior in terms of priority to this Security Deed. (2) Payments by Grantor: Grantor shall pay, when due and payable: (i) the Indebtedness in accordance with the terms and conditions of the instrument evidencing the same; (ii) all taxes, assessments, general or special, and all other charges levied on or assessed or placed or made against the Premises, this Security Deed, the Indebtedness or any interest of Grantee in the Premises, this Security Deed or the Indebtedness; (iii) premiums on all life insurance policies now in force or hereafter pledged as collateral for the Indebtedness or any part thereof; (v) premiums for all liability, rental, mortgage and flood insurance policies required by this Security Deed or now or hereafter required by Grantee in connection with the Premises or the Indebtedness or any part of the Premises; and (vi) all ground rents, lease rentals and other payments respecting the Premises payable by Grantee. Grantor shall promptly deliver to Grantee, upon request by Grantee, receipts showing payment in full of all the foregoing items; provided, however, that Grantee shall not require a receipt showing payment in full of the Indebtedness. In the event any state, federal, municipal or other governmental law, order, rule or regulation becomes effective subsequent to the date hereof and in any manner changes or modifies the laws in force on the date hereof governing the taxation of the Indebtedness or the manner of collecting the taxes thereon so as to adversely affect Grantee by requiring that a payment or payments be made or other action be taken to protect Grantee’s interest under this Security Deed or the Indebtedness, Grantor shall promptly pay any amounts required or due before the date the same are due or take any other action required on or before the date such action must be taken. (3) Grantor’s Acts on Behalf of Grantee: In the event Grantor shall either fail or refuse to pay or cause to be paid, the same shall be subject to the same specified in Paragraph (2) immediately above, which Grantor is required to pay hereunder or which Grantor may pay to cure an event of default hereunder, then Grantee, at Grantor’s option, may make such payment or do or perform such act on behalf of Grantor. All such payments made by Grantee and all costs and expenses incurred by Grantee in doing or performing all such acts shall be and shall become part of the Indebtedness secured hereby and shall bear interest at the highest rate per annum then being charged with respect to any part of the Indebtedness secured hereby from the date paid or incurred by Grantee, and such interest thereon shall also be part of the Indebtedness secured hereby. (4) Further Assurances: Grantor shall, at any time and from time to time upon request by Grantee, make, execute and deliver, or cause to be made, executed and delivered, any and all other and further instruments, documents, certificates, agreements, letters, representations and other writings which may be necessary to more effectively, completely, correct, perfect or continue the present security or any of the obligations of Grantor under the Indebtedness and the lien and security interest of Grantee hereunder. Grantor shall upon request by Grantee certify in writing to Grantee, or to any proposed assignee of this Security Deed, the amount of principal and interest then owing on the Indebtedness and whether or not any offsets or defenses exist against all or any part of the Indebtedness.

(continued)
(5) Rents and Leases: Grantor hereby transfers, assigns and conveys unto Grantee all of Grantor's right, title and interest in and to all leases or in any agreement or lease existing or made, and all other agreements for use or occupancy, with respect to the Premises or any part thereof, and all easements, rights of way, rights to purchase, and future lease rights granted to Grantor or any other person, which easements, rights of way, rights to purchase, and future lease rights, if any, may become effective after the date hereof, to Grantor's successors and assigns, to said Premises, subject to and in accordance with the terms and conditions of said leases or agreements, in each case, to the extent of the interest of Grantor thereto or thereunder. 

(6) Maintenance and Repair: Grantor shall maintain the Premises in good condition and repair, shall not commit or suffer injury to the Premises, and shall not, without the consent of Grantee, alter, change, repair, reconstruct or otherwise change the Premises except as provided in the agreements of record affecting the Premises. 

(7) Hazard and Liability Insurance: Grantor shall keep the Premises insured against loss or damage by fire and other such perils as Grantor shall determine. 

(8) Indemnification: Grantor shall indemnify and save harmless Grantee from and against any losses, costs, expenses, or damages that may be imposed upon or suffered by Grantee by reason of any defect, deficiency, or non-compliance with the requirements of this instrument. 

(9) Easements: Grantor shall grant to the Government of the United States, and its successors or assigns, an easement to access the Premises for the purpose of conducting surveys and inspections related to the Flood Protection Act of 1973 and as otherwise required by law.

(10) Covenant Against Obstructing: Grantor shall covenant and agree with grantee that Grantor will not do, nor permit to be done, any act or thing which will interfere with the right of way granted to grantee.
EXHIBIT 10–7
Georgia Commercial Deed to Secure Debt

(continued)