

# **QUATTLEBAUM, GROOMS, TULL & BURROW PLLC**

A PROFESSIONAL LIMITED LIABILITY COMPANY

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## **ARKANSAS COMMERCIAL LENDING LAW**

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*Commercial Lending Law, A State-by-State Guide*

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# Arkansas Commercial Lending Law

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# Arkansas Commercial Lending Law

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## Introduction

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This survey is designed to provide commercial lenders and businesses contemplating the extension of credit to Arkansas borrowers a general overview of various issues of Arkansas law which affect commercial lending relationships. Neither Arkansas law governing consumer lending transactions nor issues of federal law are addressed in this survey. Because of the breadth of the topic, we cannot in this limited survey deal comprehensively with every issue that may arise in the context of a commercial lending transaction. Therefore, lenders should not rely solely on this survey for answers to questions involving the application of Arkansas law to a specific set of facts.

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## I. Basic Legal Structure

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### A. General Law

The law of Arkansas is contained in its constitution, the Arkansas Code of 1987 Annotated, Administrative Code, and common law. The Constitution contains basic foundations of law, including the establishment of a homestead exemption of any Arkansas resident who is married or the head of a family from legal process and a usury provision providing that the maximum lawful rate of interest on any contract entered into within the State of Arkansas shall not exceed five percent per annum above the Federal Reserve Discount Rate at the time of the contract. Statutes and regulations, however, provide specifics.

The Arkansas Code of 1987 Annotated consists of twenty-nine titles, each divided into chapters and sections and arranged by subject. Relevant titles include

- Title 2—Agriculture
- Title 4—Business and Commercial Law
- Title 11—Labor and Industrial Relations
- Title 18—Property
- Title 26—Taxation
- Title 27—Transportation

## **B. Procedural Law**

Arkansas procedural laws are contained in the Arkansas Inferior Court Rules, Administrative Code, Rules of Civil Procedure, Rules of Criminal Procedure, Rules of Appellate Procedure, the Rules of the Supreme Court and the Court of Appeals of the State of Arkansas, and the Arkansas Rules of Evidence.

## **C. Administrative Law**

A number of Arkansas agencies have rule-making and regulatory authority, including the Arkansas Department of Finance and Administration, Motor Vehicle Commission, Savings and Loan Association Board, Commissioner of State Lands, and the Arkansas Development Finance Authority. Administrative rules and regulations are codified in *Code of Arkansas Rules and Regulations* published by Weil Publishing Company, Inc. Weil's *Code of Arkansas Rules* is the complete collection of Arkansas' administrative rules. The *Code of Arkansas Rules*, published since 2000, is the only complete edition of the rules available, in print or online.

## **D. Local Law**

Arkansas is a Dillon's Law state. Dillon's Law requires that localities must obtain express permission from the state before enacting certain kinds of legislation. Legislation required by Dillon's Law is often called "enabling" legislation, meaning local governments have limited autonomy, and therefore, the exercise of power by municipalities is limited to self-government, local police, sanitary, and other similar regulations, which means local law is unlikely to affect commercial lending practices.

## **E. Arkansas Courts**

The judicial power of the state is vested in the Arkansas Supreme Court, circuit courts, district courts, and justices of the peace.

The jurisdiction and power of the Arkansas Supreme Court is controlled by article 7, section 4 of the Arkansas Constitution. Under this section, the Arkansas Supreme Court generally has only appellate jurisdiction, meaning it typically hears cases that are appealed from trial courts. The Arkansas Supreme Court also has general superintending control over all inferior courts of law and equity. Until 2000, Arkansas remained one of the few states with separate courts for law (circuit court) and for equity (chancery court). In November 2000, the voters of Arkansas approved amendment 80 to the Arkansas Constitution. The Circuit and Chancery Courts were merged into Circuit Courts, and Municipal Courts were given countywide jurisdiction and were renamed District Courts.

Circuit Courts are general jurisdiction trial courts. Effective January 1, 2002, Circuit Courts shall consist of five subject matter divisions: criminal, civil, probate, domestic relations, and juvenile.

District Courts, formerly known as Municipal Courts before passage of amendment 80 to the Arkansas Constitution, exercise countywide jurisdiction over misdemeanor cases, preliminary felony cases, and civil cases in matters of less than \$5000. A small claims division of District Court provides a forum in which citizens represent themselves to resolve minor civil matters. The city courts operate in smaller communities where District Courts do not exist and exercise citywide jurisdiction.

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## II. Authority

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### A. Required Qualifications to Do Business: The Arkansas Foreign Corporations Law

Lenders and businesses not based in Arkansas generally *do not* need to qualify to “do business” in Arkansas to

- sell goods to Arkansas customers through the mails and other means of interstate commerce;
- make loans or extensions of credit to Arkansas debtors or create or acquire security interests in real or personal property, as long as the lender or business is not continuously carrying on or transacting through them some substantial part of its ordinary or customary business;
- collect debts owed by Arkansas debtors or enforce mortgages and security interests in property located in Arkansas (*See Ark. Code Ann. §§ 4-27-1501(B)(8), 4-31-201, and 4-33-1501 [1987]*); or
- own real or personal property in Arkansas, without more.

Lenders and businesses not based in Arkansas generally *do* need to qualify to do business in Arkansas to have access to Arkansas courts. This can be accomplished by requesting from the Arkansas Secretary of State a certificate of authority as a foreign corporation, general partnership, limited liability company (LLC), limited partnership (LP), limited liability partnership (LLP), limited liability limited partnership (LLLLP), or business trust doing business in the State of Arkansas.

### B. Licensing Requirements

As a general rule, out-of-state commercial lenders and equipment lessors doing business in Arkansas are not subject to any special licensing requirements. Licenses are required for the following within the state of Arkansas:

- a real estate broker (*Ark. Code Ann. § 17-42-101, et seq. [1987]*);
- a mortgage broker, mortgage banker, loan officer, or mortgage servicer (*Ark. Code Ann. § 23-39-503 [1987]*);

- a captive insurance company, if permitted by its articles of incorporation or charter (Ark. Code Ann. § 23-63-1602 [1987]);
- a motor vehicle manufacturer, distributor, second-stage manufacturer, importer, or converter (Ark. Code Ann. § 23-112-310 [1987]).

### **C. Taxation of Entities**

No corporation, institution or entity confining its business operations in Arkansas to the types of activities provided in Arkansas Code of 1987 Annotated section 4-31-201 is required to qualify to do business in Arkansas or to pay any tax or fee required to be paid by foreign corporations under any law of this state.

However, the exemption does not include (1) ad valorem taxes assessed against any real property that the corporation, institution, or entity may own in the State of Arkansas; (2) Arkansas income, franchise, and privilege tax that may result from the sale, ownership, or control after acquisition of the property by foreclosure, or acquisition in lieu of foreclosure, either by virtue of the value of the specific piece of property so foreclosed or to which title is taken in lieu of foreclosure, or by virtue of the rental or other income realized from the property; or (3) Arkansas income taxes that may be levied upon financial institutions pursuant to section 26-51-1401 *et seq.* Ark. Code Ann. § 4-31-205 (1987).

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## **III. Fundamentals**

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### **A. General Arkansas Contract Law**

Basic contract law in Arkansas derives from common law principles and is similar to the law of other common law states. As in most states, the Uniform Commercial Code (UCC) establishes basic rules in the areas of sale and leasing of goods and secured transactions. Arkansas has adopted all of the UCC, including the most recent revisions of articles 3, 4, 5, 8, and 9, with only slight variations from the uniform laws.

### **B. Arkansas Promissory Notes**

The Arkansas law applicable to negotiable promissory notes is found in revised article 3 of the Arkansas UCC. *See* Ark. Code Ann. § 4-3-101, *et seq.* (1987). Commercial promissory notes in Arkansas customarily include provisions regarding the recovery of reasonable attorneys' fees (Ark. Code Ann. § 4-56-101 [1987]), acceleration, late charges, delinquency fees, default interest, and prepayment penalties.

### **C. Statute of Frauds**

Under Arkansas law, no claim can be brought on any agreement or promise to lend money between a financial institution and a debtor unless the agreement is



in writing and signed by the party to be charged or by the debtor and accepted by the financial institution.

## **D. Arkansas Guaranty and Suretyship Law**

General principles of the common law of guarantees and suretyship apply in Arkansas. For purposes of commercial paper, the Arkansas UCC establishes that the term *surety* includes a guarantor. *See* Ark. Code Ann. § 4-1-201(40) (1987). Regarding the issue of release of a guarantor from his obligation, unless the guarantor is notified and consents to any material changes, the determining factor in Arkansas is whether there was a “material alteration” of the agreement, to discharge the guarantor. *Worthen Bank & Trust Co. v. Utley*, 748 F.2d 1269 (8th Cir. 1984).

## **E. Arkansas Electronic Transactions Act**

Article 4A of the Arkansas UCC provides the rules for wholesale wire transfers of funds between business and financial institutions. *See* Ark. Code Ann. § 4-4A-101, *et seq.* (1987). Additionally, Arkansas enacted the Uniform Electronic Transactions Act, as approved and recommended for enactment in all of the states by the National Conference of Commissioners on Uniform State Laws in 1999. Its purpose is to facilitate electronic commerce and to ensure that contracts and signatures that are executed electronically have the same legal effect as paper contracts and pen and ink signatures. This chapter does not apply to a transaction to the extent it is governed by a law governing the creation and execution of wills, codicils, testamentary trusts, or the UCC other than sections 4-1-107 and 4-1-206, chapter 2 and 2A. *See* Ark. Code Ann. § 25-32-103(b) (1987). Pursuant to section 102(a) of the Electronic Signatures in Global and National Commerce Act, this Act modifies, limits, or supersedes the provisions of section 101 of the Electronic Signatures in Global and National Commerce Act to the extent therein authorized. Ark. Code Ann. § 25-32-103(e) (1987).

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# **IV. Interest and Usury**

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## **A. Interest Rate and Usury Law**

Arkansas has strict usury laws. Article 19, section 13 of the Arkansas Constitution, as amended by Arkansas constitutional amendment 60 in 1982, provides in relevant part that “[t]he maximum lawful rate of interest on any contract entered into after the effective date hereof shall not exceed five percent per annum above the Federal Reserve Discount Rate at the time of the contract.” However, under amendments to Regulation A of the Federal Reserve Board (12 C.F.R. 201), which became effective January 6, 2003, the Federal Reserve Board discontinued the Federal Reserve Discount Rate, and in its place implemented a multitiered interest rate structure, with a “primary credit” rate and a “secondary credit” rate. The term “Federal Reserve Discount Rate” is not

utilized in amended Regulation A. The Arkansas Supreme Court, in *Pakay v. Davis*, 367 Ark. 421, 2006 WL 2884473 (2006), held that the “primary credit” rate should be applied in place of the Federal Reserve Discount Rate for determination of the maximum available rate of interest.

The Gramm-Leach-Bliley Act (GLBA, 15 U.S.C. § 6801, *et seq.*) provides a rate override for state and national banks if the bank’s principal place of business is located in Arkansas. GLBA allows qualified banks to charge substantially higher interest than Arkansas usury law allows a nonbank to charge.

Under Arkansas law, many items characterized as “fees” may be classified as interest for purposes of calculating usury. Depending on the context, the following could be classified as interest: application fees, commitment fees, rate-lock fees, lender points, loan fees and discounts, title abstract fees, title examination fees, title insurance fees, closing costs, credit report fees, document preparation fees (this term should be used only if an attorney is preparing the documents), official fees, notary fees, certain insurance premiums, appraisal fees, survey fees, escrow fees, flood certification fees, appraisal fees, mortgage broker’s fees, late charges, insufficient fund fees, deferral fees, assumption fees, collection costs, attorneys’ fees incurred to collect/foreclose/repossess (customarily, these fees are limited to ten percent of the debt), pay-by-phone fees, overnight shipping fees, fees to obtain tax searches and bills at consumer’s request, payoff statement or expedited payoff statement fees, fees to provide consumer requested additional information, or name change fees. As a general rule, if a fee is paid to a bona fide third party, then the fee will not be considered interest for purposes of usury calculations. All fees retained by the lender or a subsidiary run the risk of being classified as interest.

## **B. Post-Judgment Interest**

Interest on any judgment entered by any court or magistrate on any contract may bear interest at the rate provided by the contract or ten percent per annum, whichever is greater, and on any other judgment at ten percent per annum, but not more than the maximum rate permitted by the Arkansas Constitution, article 19, section 13, as amended. Notwithstanding the fact that article 19, section 13 of the Arkansas Constitution makes no reference to post-judgment interest, “[I]t is clear from a review of § 16-65-114(a)’s history, the plain language of the statute, and the emergency clause of Act 782 of 1985 that the General Assembly intended to limit the amount of interest awarded in all judgments by the rate set forth in the constitution.” *Hartford Fire Insurance Co. v. Sauer*, 358 Ark. 89, 97 (2004).

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## **V. Conflict of Laws Rules**

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### **A. Arkansas Choice of Law Covenants**

Arkansas choice of law is governed by common law and by statute. When a transaction bears a reasonable relationship to this state and also to another state

or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Where one of the following provisions specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

- rights of creditors against sold goods;
- applicability of the chapter on leases;
- applicability as to bank deposits and collections;
- governing law in the chapter on funds transfers;
- letters of credit;
- applicability of the chapter on investment securities; and
- law governing perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens.

*See* Ark. Code Ann. § 4-1-301 (1987). In determining whether a multistate contract is usurious, it is proper to apply the law of the state that the parties intended to govern the contract, provided that state has a substantial connection with the contract. *U.S. Manganese Corp. v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 576 F.2d 153 (Arkansas 1978).

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## VI. Types of Borrowers

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### A. Corporations

Arkansas corporations are subject to either the Arkansas Business Corporation Act of 1965 (Ark. Code Ann. § 4-26-101, *et seq.* [1987]) or the Arkansas Business Corporation Act of 1987 (Ark. Code Ann. § 4-27-101, *et seq.* [1987]). The 1965 Act applies only to business corporations existing prior to midnight, December 31, 1987, that do not elect to be covered by the 1987 Act. Ark. Code Ann. § 4-27-1701 (1987). Title 4, subchapter 3 of the Arkansas Code of 1987 Annotated also contains separate chapters applicable to foreign (Ark. Code Ann. § 4-27-1501, *et seq.* [1987]) and nonprofit (Ark. Code Ann. § 4-28-201, *et seq.* [1987]) corporations.

No domestic or foreign corporation may conduct any business in Arkansas under a fictitious name unless it first files with the Secretary of State, and, in case of a domestic corporation, with the county clerk of the county in which the corporation's registered office is located (unless it is located in Pulaski County), a fictitious name form. *See* Ark. Code Ann. §§ 4-26-405, § 4-27-404 (1987).

Arkansas profit and nonprofit corporations must file articles of incorporation with the Arkansas Secretary of State. Lenders customarily obtain a certificate of good standing and a certified copy of the articles of incorporation from the Secretary of State before making a loan to a corporation organized under Arkansas law. The Arkansas Secretary of State does not maintain copies of corporate bylaws of Arkansas corporations. Lenders also customarily obtain

a resolution of the board of directors, certified by the secretary of the corporation, authorizing the corporation to borrow funds.

If a borrower is incorporated under the laws of another state, lenders customarily obtain from the Arkansas Secretary of State a certificate of good standing, as well as formation documents and a certificate of good standing from the state of its formation.

## B. Partnerships

Arkansas recognizes four types of partnerships: (1) general partnerships, (2) LPs, (3) LLPs, and (4) LLLPs. Title 4, subtitle 4 of the Arkansas Code of 1987 Annotated covers these types of partnerships. The law governing foreign partnerships doing business in Arkansas is addressed in Arkansas Code of 1987 Annotated sections 4-46-1101 and 4-47-901 for foreign LLPs established after September 1, 2007. Before transacting business in this state, a foreign LLP must file a statement of foreign qualification. Ark. Code Ann. § 4-46-1102 (1987). For those foreign LPs filing after September 1, 2007, a certificate of authority must be filed with the Secretary of State prior to transacting business in the state. Ark. Code Ann. § 4-47-904 (1987).

Lenders to a partnership customarily obtain a copy of the partnership agreement, if any. If fewer than all of the general partners execute a loan document or an instrument, lenders customarily obtain the consent of all of the partners to the loan.

Lenders to an Arkansas LP, LLP, or LLLP customarily obtain from the Arkansas Secretary of State a statement of qualification along with a copy of the partnership agreement from the partnership. In the case of a foreign partnership, lenders customarily obtain a copy of the partnership agreement from the partnership, a statement of foreign qualification from the Arkansas Secretary of State, and appropriate certificates from the partnership's home state.

No domestic or foreign registered LP or LLP may conduct any business in Arkansas under a fictitious name unless it first files with the Arkansas Secretary of State a fictitious name form. *See* Ark. Code Ann. §§ 4-42-707, 4-47-201 (1987). This certificate lists the fictitious name under which business is being, or will be, conducted by the applicant registered LLP, a brief statement of the character of business to be conducted under the fictitious name and the name of the registered LLP, state of organization, and location, giving city and street address, of the registered office in the state of the applicant partnership.

## C. Arkansas LLCs

Arkansas LLCs are governed by the terms of the Small Business Entity Tax Pass Through Act codified in Arkansas Code of 1987 Annotated section 4-32-101, *et seq.* One or more persons may form a LLC by signing or causing to be signed articles of organization and delivering the signed articles to the Arkansas Secretary of State for filing. The person or persons who sign the articles of organization causing the formation of a LLC need not be members of

the LLC at the time of formation or after formation has occurred. Ark. Code Ann. § 4-32-201.

Arkansas LLCs can be managed either by their members or by one or more managers, who may or may not be a member. Ark. Code Ann. § 4-32-204. Under either structure, management can take many forms, including election of a board of directors and election of officers. The LLC's operating agreement should explain the manner in which the company is managed should the articles of organization fail to do so. Lenders customarily require an Arkansas LLC to provide a resolution authorizing the borrowing, signed by all of the members (if the LLC is managed by the members) or signed by all of the managers (if the LLC is managed by one or more managers).

Regarding the agency powers of members and managers, Arkansas Code of 1987 Annotated section 4-32-301 establishes the following:

- (a) Except as provided in subsection (b) of this section, every member is an agent of the LLC for the purpose of its business or affairs, and the act of any member, including but not limited to the execution in the name of the LLC of any instrument, for apparently carrying on in the usual way the business or affairs of the LLC of which he or she is a member, binds the LLC, unless the member so acting has, in fact, no authority to act for the LLC in the particular matter, and the person with whom the member is dealing has knowledge of the fact that the member has no such authority.
- (b) If the articles of organization provide that management of the LLC is vested in a manager or managers: (1) No member solely by reason of being a member is an agent of the LLC; and (2) Every manager is an agent of the LLC for the purpose of its business or affairs, and the act of any manager, including but not limited to the execution in the name of the LLC of any instrument, for apparently carrying on in the usual way the business or affairs of the LLC of which he is a manager binds the LLC, unless the manager so acting has, in fact, no authority to act for the LLC in the particular matter, and the person with whom the manager is dealing has knowledge of the fact that the manager has no such authority.
- (c) An act of a manager or a member which is not apparently for the carrying on in the usual way the business or affairs of the LLC does not bind the LLC unless authorized in accordance with an operating agreement, at the time of the transaction or at any other time.
- (d) No act of a manager or member in contravention of a restriction on authority shall bind the LLC to persons having knowledge of the restriction.

Regarding liability of members to third parties, generally a person who is a member, manager, agent, or employee of a LLC is not liable for a debt, obligation, or liability of the LLC, whether arising in contract, tort, or otherwise or for the acts or omissions of any other member, manager, agent or employee of the LLC. Ark. Code Ann. § 4-32-304 (1987). Lenders looking to individual

members of a LLC in Arkansas for full repayment of a LLC loan must have the members separately obligate themselves with respect to the loan.

No LLC, domestic or foreign, shall conduct any business in Arkansas under a fictitious name unless it first files with the Secretary of State a fictitious name form. Ark. Code Ann. § 4-32-108 (1987).

A LLC organized under the laws of another state is required to register with the Arkansas Secretary of State to do business in Arkansas. Ark. Code Ann. § 4-32-1002 (1987). Lenders customarily obtain a certified copy of the foreign LLC's application for registration from the Arkansas Secretary of State, as well as a copy of the company's formation documents and, if available, a certificate of good standing from the state in which it is organized.

## D. Proprietorships and Individuals

Arkansas law treats loans to sole proprietorships in the same manner as loans to individuals. An Arkansas sole proprietorship that operates under an assumed name or under any designated name or style, corporate or otherwise, other than the real name of the individual conducting or transacting such business must file a certificate in the office of the county clerk of the counties in which the person conducts transactions or intends to conduct the business. The certificate shall set forth the name under which the business is, or is to be, conducted or transacted and the full name or names of each person conducting or transacting the business, with the post office address of each. Ark. Code Ann. § 4-70-203 (1987). Lenders may obtain certified copies of the certificate from the county clerk located in the counties where the business is or is to be conducted.

## E. Tenancies of Married Borrowers

Real property held by married persons as "joint tenants" or "tenants in common" can be reached by creditors of either of the spouses. In addition to tenancy in common and joint tenancy, Arkansas recognizes tenancy by the entirety. *See* *Kinghorn v. Hughes*, 297 Ark. 364, 367 (1988). Tenancy by the entirety is a method of owning property available to only married persons. When a married couple owns property by the entirety, the law essentially recognizes ownership in the husband and wife as singular unit rather than two individuals with rights of survivorship. Arkansas law presumes any conveyance to a married couple is a conveyance to the entirety unless the conveyance includes specific language to the contrary. *See generally* *Gardner v. Bullard*, 241 Ark. 75, 79-81 (1966). Under Arkansas law, each of the tenants by the entirety is secure against the impairment of their property rights through the sole act of the other. *See Kinghorn* at 367. This means, as a general rule, a lender must have rights against both the husband and the wife before a lender may enforce a judgment against property owned by the entirety.

Under Arkansas law, a tenancy by the entirety is not exempt from bankruptcy but is, however, subject to the rights of a non-debtor spouse. This can

have profound implications in a debt collection setting where only one spouse is liable for the debt because the other spouse can effectively shelter property owned by the entirety since a spouse cannot unilaterally terminate a tenancy by the entirety during marriage. *See* *Morris v. Solesbee*, 48 Ark. App. 123, 125 (1995). Execution against a spouse's interest in a tenancy by the entirety is permitted even though partition is not. *Id.* Real property owned by entirety may be sold under execution to satisfy a judgment against one spouse, subject to the other spouse's right of survivorship. *Id.* A purchaser of the interest of one tenant by the entirety cannot oust the other tenant from possession and can claim only one-half of the rents and profits. *Id.* at 126. Therefore, while a lender may be entitled to one-half the rents and profits deriving from property held by the entirety, the non-debtor spouse is entitled to retain possession (the property cannot be partitioned and sold), the right of survivorship is not extinguished and, if the debtor spouse dies first, the lender's interest is extinguished. *See* *Sieb's Hatcheries, Inc. v. Lindley*, 111 F. Supp. 705, 716 (W.D. Ark. 1953).

Therefore, under Arkansas law, a lender should require both the husband and wife to sign all mortgage related documents. Lenders should also be mindful of the rules set forth in the Federal Equal Credit Opportunity Act (15 U.S.C. §§1691, *et seq.*), and Federal Reserve Regulation B (12 C.F.R. §§202.1, *et seq.*), which restrict the ability of lenders to require the signature of non-applicant spouses on loan documents.

## F. Arkansas Dower and Curtesy

Arkansas law recognizes dower and curtesy. Technically, common law dower and curtesy have been abolished in Arkansas. In its place, Arkansas has adopted statutory dower and curtesy. Unlike common law dower and curtesy, husbands and wives are treated identically under Arkansas law. Dower and curtesy extends to all property of an estate of inheritance owned during a marriage. *See* Ark. Code Ann. § 28-11-301 (1987).

Under Arkansas law, no act, deed or conveyance by one spouse without the assent of the other spouse, evidenced by an acknowledgment, escapes dower or curtesy. Ark. Code Ann. § 28-11-201(a) (1987). No judgment, default, or crime of one spouse prejudices the right of the other spouse to curtesy or dower. Ark. Code Ann. § 28-11-201(b) (1987). A conveyance by one spouse, without the signature of the other spouse, does not extinguish dower or curtesy. *See* Ark. Code Ann. § 28-11-301 (1987). However, the inchoate right of dower or curtesy of any spouse in real property is barred in all cases when the real property is conveyed by the husband or wife without the signature of the other spouse and the conveyance has been of record for a period of seven years or more. Ark. Code Ann. § 28-11-203 (1987). If a mortgage existed on property before marriage, the surviving spouse is entitled to dower or curtesy as against every person except the mortgagee and those claiming under the mortgagee. Ark. Code Ann. § 28-11-303(a) (1987). If a married person receives a purchase money mortgage to purchase land without the other

spouse's joinder, the surviving spouse is entitled to dower or curtesy as against every person except the mortgagee and those claiming under the mortgagee. Ark Code Ann. § 28-11-303(b)(1) (1987). However, in such a case, after the death of the mortgagor, the mortgagee must sell the mortgaged property either under a power contained in the mortgage or by the decree of a circuit court. After the payment of money due on the mortgage and the costs of the sale, the surviving spouse shall be entitled to the interest or income of one-third of the surplus for life, as his or her curtesy or dower. Ark. Code Ann. § 28-11-303(b)(2) (1987). Nevertheless, all mortgage documents should require a specific waiver of all dower and curtesy rights.

A dower or curtesy interest is an inchoate interest and does not become possessory until the death of one spouse. The extent of a person's dower or curtesy interest depends on whether the decedent spouse was survived by descendants. If a spouse dies leaving descendants, the surviving spouse is entitled to a one-third life estate in all real property and one-third absolute in all personal property. *See* Ark. Code Ann. §§ 28-11-301 and 28-11-305 (1987). If a spouse dies leaving no descendants, as against creditors, the surviving spouse is entitled to one-third of all real estate, except ancestral estates, in fee simple plus one-third absolute of all personal property. Ark. Code Ann. § 28-11-307(a)(2) (1987). For ancestral real property, as against creditors, the surviving spouse is entitled to a one-third life estate. Ark. Code Ann. § 28-11-307(b) (1987). The surviving spouse's share is higher as against non-creditors (i.e., other family members) of the deceased spouse.

## G. Arkansas Homestead Exemption

Under Arkansas law, a person who is married or the head of a family is entitled to a homestead exemption for owned property which is occupied as the person's residence. *See* Ark. Const. Art. 9 § 3. The size of the homestead is equal to the greater of (i) \$2500 in value (but in no event to exceed one urban acre or 160 rural acres); or (ii) one-quarter acre of urban property or 80 acres of rural property without regard to value. *See* Ark. Code Ann. § 16-66-210 (1987). Municipal limits do not control the determination of whether property is urban or rural, but rather, the use and character of the property is usually determinative. *Id.* and *Farmers Cooperative Assoc. v. Stevens*, 260 Ark. 735, 736 (1976).

The law shelters homestead property from any lien arising from any judgment or decree of any court. *See* Ark. Code Ann. § 16-66-210 (1987). However, homestead property is not exempt from purchase money liens, tax liens, laborers' or mechanics' liens for improving the homestead and certain limited fiduciary liens. *Id.* Furthermore, a conveyance, mortgage, or other instrument executed by one spouse, without the joinder or acknowledgment of the other spouse, is invalid as to homestead property unless the conveyance, mortgage, or other instrument creates purchase money liens, tax liens, laborers', or mechanics' liens. *See* Ark. Code Ann. § 18-12-403 (1987). Nevertheless, all mortgage documents should require a specific waiver of all homestead rights.



## H. Marital Property

Arkansas is a separate property state. Property that a married person owns at the time of marriage; that comes to the person by gift, bequest, descent, or transfer from any other person; or that the person has acquired by trade, business, labor, or services carried or performed on the person's sole or separate account, and income and proceeds from all such property remains his or her separate property. *See* Ark. Code Ann. §§ 9-11-503–505 (1987). The separate property may be used, collected, and invested by the spouse, in his or her own name, and is not subject to the interference or control of the other spouse and is not liable for the spouse's debts, except as may have been contracted for the support of the spouse, or support of the children of the marriage by the spouse. Ark. Code Ann. § 9-11-505 (1987).

However, property received by both spouses, or conveyed from one spouse into the joint ownership of both spouses becomes marital property. Marital property means all property acquired by either spouse after marriage except: property acquired by gift, bequest, devise, or descent; property acquired in exchange for that acquired before marriage or in exchange for that acquired by gift, bequest, devise, or descent; property acquired after a decree of divorce from bed and board (which is a unique form of quasi-divorce recognized in Arkansas); property excluded by valid agreement of parties; the increase in value of property acquired before marriage or by gift, devise, or descent, or in exchange therefor; benefits received or to be received from a workers' compensation claim, personal injury claim, or social security claim when those benefits are for any degree of permanent disability or future medical expenses; and income from property acquired prior to marriage, or by gift, devise, or descent, or in exchange therefor. Ark. Code Ann. § 9-12-315 (1987). In *Schumacher v. Schumacher*, 66 Ark. App. 9, 18-19 (Ark. App. 1999), the court held that credit card debts incurred by a spouse during legal separation were marital debts that the chancellor had the discretion to divide among the parties.

However, Arkansas courts frequently find commingled property becomes marital property. Arkansas presumes property titled to both spouses is marital property unless the challenging spouse can rebut the presumption by clear and convincing evidence. *See* *Jablonski v. Jablonski*, 71 Ark. App. 33, 39 (2000). Furthermore, whenever one spouse deposits funds into a joint account, a presumption, which can be controverted only with clear and convincing evidence, arises that the spouse made a gift to the marital entirety. *See* *Creson v. Creson*, 53 Ark. App. 41, 45 (1996). To overcome either presumption, the party seeking to rebut the presumption

must do so by proof so clear, direct, weighty, and convincing that the fact finder is able to come to a clear conviction, without hesitation, of the matter asserted. Clear and convincing evidence is that degree of proof that will produce in the trier of fact a firm conviction respecting the allegation sought to be established.

*Id.*

## I. Adverse Possession in Arkansas

Arkansas has an unusually short period for adverse possession. Without undue elaboration, it is sufficient to note adverse possession in Arkansas requires only seven years for real property and three years for personal property. *See* Ark. Code Ann. §§ 18-61-101, 16-56-105 (1987).

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# VII. Real Estate Lending

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## A. Property Rights

Rights in real property generally are governed by title 18 of the Arkansas Code of 1987 Annotated and by common law. Arkansas real property law closely follows common law real estate principles, with certain modern modifications and improvements. Title 18 covers conveyances, horizontal property regimes, eminent domain, landlord/tenant, personal property, mortgages, liens, and foreclosures.

## B. Leases

Arkansas has adopted without material variation the 1990 Official Text version of article 2A of the UCC (which governs leases of personal property). Article 2A is comprehensive and applies to “true” leases. It incorporates the detailed definition of “security interest” set forth in Arkansas Code of 1987 Annotated sections 4-1-201(b)(35) and 4-1-203 (UCC §§ 1-201(b)(35) and 1-203), which distinguishes between a true lease and a security interest.

## C. Arkansas Mortgages and Deeds of Trust

Arkansas follows a title theory of mortgages. *See* Norton v. J. T. Fargason Co., 166 Ark. 455 (1924). Therefore, Arkansas lenders typically use mortgages as opposed to deeds of trust. Deeds and mortgages must be recorded in the county where the property lies. *See* Ark. Code Ann. § 18-40-101 (1987).

It is important to note that Arkansas has ten counties with two county seats. In these ten counties, one must be sure the documents are recorded in the proper county seat having jurisdiction over the property. Otherwise, the documents are not properly recorded. The ten counties and county seats are as follows:

1. Arkansas County—DeWitt and Stuttgart
2. Carroll County—Berryville and Eureka Springs
3. Clay County—Corning and Piggott
4. Craighead County—Jonesboro and Lake City
5. Franklin County—Charleston and Ozark
6. Logan County—Paris and Booneville
7. Mississippi County—Blytheville and Osceola
8. Prairie County—Des Arc and Devalls Bluff

9. Sebastian County—Fort Smith and Greenwood
10. Yell County—Danville and Dardanelle

Deeds and other instruments conveying an interest in real estate must be executed in the presence of two disinterested witnesses or acknowledged by a notary public. *See* Ark. Code Ann. §§ 18-12-104, 18-12-203 (1987). Unless the spouse is also a grantor, special mention should be made in a deed releasing dower or curtesy and homestead rights.

Arkansas is a race-notice state for deeds, but a pure race state for mortgages. Therefore, to be effective as against third persons without notice, a deed must be recorded. *See* Ark. Code Ann. § 14-15-404 (1987). Furthermore, to be effective against third persons, a mortgage must be recorded prior to the recording of another interest, regardless of notice. Except for mortgages and deeds of trust, when a person files a conveyance of real estate, the county recorder must obtain from the person tendering the instrument the name of the grantee and the address to which the grantee wants future tax statements mailed. *See* Ark. Code Ann. § 26-26-709 (1987). The first page of the deed must contain the name and address of the person who prepared the deed. Ark. Code Ann. § 14-15-403 (1987). Furthermore, mortgages must contain a maturity date or third parties may assume the mortgage has expired after being of record for five years. *See* Ark. Code Ann. § 18-40-103 (1987). *See also* Clark v. Shockley, 205 Ark. 507, 508 (1943).

The term *heirs*, or other words of inheritance, are not necessary to create or convey an estate in fee simple, but all deeds are construed to convey a complete estate of inheritance in fee simple unless expressly limited by appropriate words in the deed. *See* Ark. Code Ann. § 18-12-105 (1987). The words *grant*, *bargain*, and *sell* are an express covenant to the grantee and his or her heirs, and assign that the grantor is seized of an indefeasible estate in fee simple, free from encumbrance done or suffered from the grantor, except rents or services that may be expressly reserved by the deed, as also for the quiet enjoyment thereof against the grantor and his or her heirs, and assigns and from the claim and demand of all other persons, unless limited by express words in the deed. Ark. Code Ann. § 18-12-102 (1987).

## D. Recording Fees

Arkansas has a statute establishing uniform recording fees. For recording deeds, deeds of trust, mortgages, release deeds, powers of attorney, plats, survey plats, notary bonds, foreign judgments, writs of execution, writs of garnishment, materialman's liens, and other recordable instruments, with a few exceptions, the cost is fifteen dollars for the first page (one side only) and five dollars for each additional page. Ark. Code Ann. § 21-6-306 (1987).

## E. Statutory Form of Instruments

Recorded instruments must have an area reserved on the top right of the first page for the file mark of the recorder and contain the title of the document

and the name of the grantor and grantee. Ark. Code Ann. § 14-15-402 (1987). All recorded instruments must be legibly printed on eight and one-half by eleven inch–paper, have a two and one-half–inch margin at the right top of the first page, a half-inch margin on the sides and bottom of all pages, and a two and one-half–inch margin at the bottom of the last page. *Id.* Presumably, the statutory margins are “minimum” margins. However, the statute is phrased as “shall have,” which could be interpreted as absolutely mandating the stated margins. *Id.* The statute has only been in effect since January 1, 2004, so there are no judicial interpretations, and the local legal community has not developed a clear course of performance.

## F. Transfer Taxes

In addition to recording fees, Arkansas requires the payment of transfer taxes for certain transactions. With a few exceptions, any transactions involving consideration in excess of \$100, except transactions solely for the purpose of securing a debt, require the payment of transfer taxes. *See* Ark. Code Ann. § 26-60-105 (1987). The total tax rate is \$3.30 per \$1000 of consideration, or fractional portion thereof. *Id.* Unless otherwise agreed by the parties, the seller is required to pay one-half of the transfer taxes and the buyer is required to pay the other one-half. *See* Ark. Code Ann. § 26-60-106 (1987).

Documentary stamps must be affixed to the instrument, prior to recording, evidencing the amount of transfer tax paid. *See* Ark. Code Ann. §§ 26-60-107, 26-60-110 (1987). Unless an instrument is on its face clearly exempt from transfer taxes, the instrument must be accompanied by either (i) three copies of an officially prepared affidavit available in the recorder’s office; or (ii) a statement on the instrument itself stating, “I certify under penalty of false swearing that the legally correct amount of documentary stamps have been placed on this instrument.” *Id.* Such statement must include the grantee’s address and be signed by the grantee or the grantee’s agent. Ark. Code Ann. § 26-60-110 (1987).

Besides transactions involving consideration of less than \$100, the following transactions are exempt from transfer taxes:

1. Transfers to or from the United States, the State of Arkansas, or any of the instrumentalities, agencies, or political subdivisions thereof;
2. Any instrument or writing given solely to secure a debt;
3. Any instrument solely for the purpose of correcting or replacing an instrument that has been previously recorded with full payment of tax having been paid at the time of the previous recordation;
4. Instruments conveying land sold for delinquent taxes;
5. Instruments conveying a leasehold interest in land only;
6. Instruments, including timber deeds, that convey or grant the right to remove timber from lands if the instruments grant or convey the right to remove the timber for a period of not to exceed twenty-four months;

7. Instruments given by one party in a divorce action to the other party to the divorce action as a division of marital property whether by agreement or order of the court;
8. Instruments given in any judicial proceeding to enforce any security interest in real estate when the instrument transfers the property to the same person who is seeking to enforce the security interest;
9. Instruments given to a secured party in lieu of or to avoid a judicial proceeding to enforce a security interest in real estate;
10. Instruments conveying a home financed by the Federal Housing Administration, the United States Department of Veterans Affairs, or the United States Department of Agriculture (USDA) Rural Development, if the sale price of the home is \$60,000 or less and the seller files with the county recorder of deeds a sworn statement by the buyer stating that neither the buyer nor the spouse of the buyer has owned a home within three years of the date of closing and also stating the sale price of the home;
11. Instruments conveying land between corporations, partnerships, LLCs, or other business entities or between a business entity and its shareholders, partners, or members incident to the organization, reorganization, merger, consolidation, capitalization, asset distribution, or liquidation of a corporation, partnership, LLC, or other business entity; and
12. A beneficiary deed under section 18-12-608.

Ark. Code Ann. § 26-60-102 (1987).

## **G. Satisfaction**

Once a mortgage is paid in full, the mortgagee must cause an acknowledgment of satisfaction to be recorded within sixty days of receipt of a request for acknowledgment by the party who paid the mortgage in full. Ark. Code Ann. § 18-40-104 (1987). If any person receiving satisfaction does not, within sixty days after being requested, acknowledge satisfaction as stated in Arkansas Code of 1987 Annotated section 18-40-104(a), he or she shall forfeit to the party aggrieved any sum not exceeding the amount of the mortgage money, to be recovered by a civil action in any court of competent jurisdiction. Ark. Code Ann. § 18-40-104(d) (1987). Lenders and borrowers usually contract for the mortgagor to pay the recording fees for the acknowledgment of satisfaction.

## **H. Assignment**

Arkansas mortgages are typically assigned by a separate instrument that includes an acknowledgment. The assignment must be signed by the transferor or assignor, giving the name of the transferee or assignee, together with the date of the transfer or assignment, the signature to be attested and dated by the clerk. Ark. Code Ann. § 18-40-106 (1987). The assignee's mailing address must be included.

A note and mortgage are inseparable and an assignment of the note will carry the mortgage, although an assignment of a mortgage alone is a nullity, and accordingly, a garnishment may take priority over an assignment only of a mortgage without the accompanying note. *See* *Bryan v. Easton Tire Co.*, 262 Ark. 731, 561 S.W.2d 79 (1978) and Ark. Code Ann. § 18-40-109 (1987). Inclusion of a legal description of the property on the face of the assignment is recommended. The instrument must be recorded in the county where the original mortgage was recorded.

## I. Remedies upon Default

Foreclosures in Arkansas may be done judicially or statutorily. The procedure for *judicial foreclosure* in Arkansas is found at Arkansas Code of 1987 Annotated section 18-49-101, *et seq.* An action to foreclose a mortgage or deed of trust must be brought within the period of limitation for a suit on the underlying obligation. Ark. Code Ann. § 18-49-101 (1987). Foreclosure is an equitable action that, in Arkansas, is filed in the county in which the property, or some part thereof, is located. Ark. Code Ann. § 16-60-101 (1987). If the mortgaged lands lie separately and distinctly in two different counties, the mortgagee should obtain judgment in one of the counties and request foreclosure of both properties with appointment of a commissioner in each county to sell the respective properties at separate sales. *See* *Steelman v. Planters Production Credit Association*, 287 Ark. 464, 701 S.W.2d 119 (1985).

In conjunction with the foreclosure action, the filing of a notice of lis pendens in the land records of the county in which the property is located is deemed to be constructive notice of the pendency of the suit to any subsequent purchaser, mortgagee, or other such person. *See* Ark. Code Ann. § 16-59-101 (1987). All persons known to have a legal or equitable interest in the property must be named as defendants in the foreclosure action if their interests are to be foreclosed or otherwise determined. *Porter v. Clements*, 3 Ark. 364 (1841). Any heirs of a deceased mortgagor should also be named if their interests are to be foreclosed. *Hill v. Brittain*, 178 Ark. 784, 12 S.W.2d 869 (1929). Prior mortgagees are not necessary parties to a foreclosure, but holders of subsequent liens or the right of redemption are. *White v. Holman*, 32 Ark. 753 (1878); *Dickinson v. Duckworth*, 74 Ark. 138, 85 S.W. 82 (1905). The foreclosure complaint should assert the execution of the note and mortgage along with the terms thereof, including any provisions for attorneys' fees and other expenses, recordation of the mortgage, the debtor's default, acceleration of the indebtedness and amounts due, and the interests that might be claimed by other named defendants. The prayer for relief should ask for monetary judgment against the debtor, for declaration of priorities, that the debtor's interest be foreclosed, and for sale of mortgaged property.

Arkansas law provides for *statutory foreclosure* (i.e. nonjudicial foreclosure) in Arkansas Code of 1987 Annotated section 18-50-101, *et seq.* pursuant to a power of sale if the mortgagee or the beneficiary under the deed of trust is a mortgage company, bank, or savings and loan and if the mortgaged property

is not used primarily for agricultural purposes. *See* Ark. Code Ann. § 18-50-116 (1987). A power of sale is implied in every mortgage. Ark. Code Ann. § 18-50-115 (1987). The power of sale may be exercised by a qualified trustee under a deed of trust or a mortgagee under a mortgage once certain conditions have been met: (1) The deed of trust or mortgage, any assignment thereof, and any substitution of trustee must be filed of record in the county in which the property is located; (2) a default must have occurred in the underlying obligation on which the sale is authorized; (3) the trustee or mortgagee must file for record in the county in which the property is located an acknowledged notice of default and intention to sell containing the information required by Arkansas Code of 1987 Annotated section 18-50-104; (4) no action may previously have been instituted to recover on the secured obligation or, if instituted, the action has been dismissed; and (5) a period of at least sixty days has elapsed since the recording of the notice of default and intention to sell. *See* Ark. Code Ann. § 18-50-103 (1987).

The duly acknowledged notice of default and intention to sell must be filed within the time that a judicial foreclosure could have been filed. Ark. Code Ann. § 18-50-116(b) (1987). The notice must include the names of the parties to the mortgage or deed of trust; the legal description of the property; the book and page number (or document number) where the mortgage or deed of trust is recorded; the nature of the default; the amount due; the time, date, and place of sale; and a warning, in conspicuous type, stating, “*You may lose your property if you do not take immediate action.*” Ark. Code Ann. §§ 18-50-103(3), 18-50-104(a) (1987). The filing of the notice has the same effect as the filing of a *lis pendens* in a judicial proceeding. Ark. Code Ann. § 18-50-108(c) (1987).

The notice must be mailed within thirty days of recordation by certified mail, postage prepaid, and by first-class mail, postage prepaid, to the last known address of the following persons: the mortgagor or grantor; any successor in interest to the mortgagor or grantor; any person having a lien or interest subsequent to the interest of the mortgagee or trustee; and to any person properly requesting notice. Ark. Code Ann. § 18-50-104(b) (1987). In this context, thirty days constitutes thirty consecutive calendar days. *See* *Union Nat’l Bank v. Nichols*, 305 Ark. 274, 807 S.W.2d 36 (1991). The notice must also be published in a newspaper of general circulation in the county in which the property is located or in a newspaper of general statewide daily publication once a week for four consecutive weeks prior to the date of the sale, the last publication no more than ten days prior to the sale. Ark. Code Ann. § 18-50-105 (1987). A duly acknowledged affidavit of the mailing and publication of the notice must be filed for record with the recorder of the county in which the property is located on or before the date of sale. Ark. Code Ann. § 18-50-106 (1987).

A case was recently decided by the Arkansas Supreme Court that is worth noting. In *Bevans v. Deutsche Bank Nat’l Trust*, 373 Ark. 105 (Ark. 2008), the plaintiff, Deutsche Bank, filed a complaint in foreclosure against defendant, Jane Bevans. Bevans then filed several compulsory counterclaims against Deutsche Bank, which were later nonsuited without prejudice by Bevans. *Id.* Following a trial on Deutsche Bank’s claims, the court entered an order and

decree of foreclosure. Bevans appealed. *Id.* The Arkansas Supreme Court determined that the circuit court's order and decree of foreclosure was not a final and appealable order because Bevans had nonsuited all of her compulsory counterclaims against Deutsche Bank and the court's subsequent order addressed only Deutsche Bank's claims against Bevans. An order or judgment is not considered final and appealable unless it disposes of all the parties and all the claims. *See* Ark. R. Civ. P. 54 (2007). Pursuant to Rule 41 of the Arkansas Rules of Civil Procedure, a claim may be dismissed without prejudice to a future action by the plaintiff before final submission of the case to the jury. Plaintiff has the right to file a new action within one year following the dismissal. In *Bevans*, the Court reasoned that the order and decree of foreclosure was not a final, appealable order because Bevans had nonsuited her compulsory counterclaims and she could have refiled her claims. *Bevans v. Deutsche Bank Nat'l Trust*, 373 Ark. 105 (Ark. 2008). Therefore, if a borrower files a counterclaim in a foreclosure action that is later nonsuited without prejudice, the lender's order of foreclosure will not be a "final" order and the lender will have to wait for a year for the foreclosure sale or the foreclosure sale could be impacted for up to a year after completion.

## **J. Deficiency Rights**

For judicial foreclosure, if the whole of mortgaged property does not sell for a sum sufficient to satisfy the amount due, an execution for the deficiency may be issued against the defendant as on ordinary judgments. *See* Ark. Code Ann. § 18-49-105 (1987).

For statutory foreclosure, at any time within twelve months after a sale, a money judgment may be sought for the balance due on the obligation for which a mortgage or deed of trust was given as security. *See* Ark. Code Ann. § 18-50-112 (1987).

## **K. Redemption Rights**

In all cases where real property is sold under an order or decree of the circuit court or a court exercising circuit jurisdiction in the foreclosure of mortgages and deeds of trust, the mortgagor or his heirs or legal representatives shall have the right to redeem the property so sold. This may be done at any time within one year from the date of sale, by the payment of the amount for which the property was sold, together with interest thereon, at the rate borne by the decree or judgment, and the cost of foreclosure and sale. The mortgagor may waive the right of redemption in the mortgage or deed of trust so executed and foreclosed. Ark. Code Ann. § 18-49-106 (1987).

## **L. Deed in Lieu of Foreclosure**

A deed may be given in lieu of foreclosure. The mortgagee should consider that such an act will discharge the entire debt if not otherwise agreed and that there may be liens against the property that may follow the property.



## M. Mechanics' Liens

Every contractor, subcontractor, or material supplier who supplies labor, services, material, fixtures, engines, boilers, or machinery in the construction or repair of an improvement to real estate, or any boat or vessel of any kind, by virtue of a contract with the owner, proprietor, contractor, or subcontractor, or agent thereof, on compliance with applicable guidelines, shall have, to secure payment, a lien on the improvement and on up to one acre of land on which the improvement is situated, or to the extent of any number of acres of land on which work has been done or improvements erected or repaired. Ark. Code Ann. § 18-44-101 (1987).

Under Arkansas Code of 1987 Annotated section 18-44-110(a)(1), the liens for labor performed or material or fixtures furnished have equal priority toward each other without regard to the date of filing the account or lien or the date when the particular labor or material was performed or furnished. All such liens shall date from the time that the construction or repair first commenced.

Mechanics and materialmen who have a lien, as set forth, in property being foreclosed under the lien of a mortgage, should be named as defendants in any foreclosure action so that their interests might be foreclosed or otherwise determined.

## N. Assignment of Leases and Rents

The right to collect rent is considered an interest in realty under Arkansas law. *See* First Federal Savings of Arkansas v. City Nat'l Bank of Fort Smith, 87 B.R. 565, 566 (W.D. Ark. 1988). An assignment of rent is perfected either by taking possession via appointment of a receiver or through a mortgage of rent. *Id.* at 566-567.

Prior to passage of revised article 9 of the UCC, prudent real estate lenders for income properties obtained and recorded an assignment of rents and leases, particularly after amendment to the United States Bankruptcy Code sections 363 and 552, to allow for post-petition lien perfection in "rents," if the lender had a perfected security interest in rents prior to the bankruptcy filing. Revised article 9 became effective in Arkansas on July 1, 2001. Revised article 9 altered the definition of the term "account" to include "a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of." Ark. Code Ann. § 4-9-102(a)(2) (1987).

For all loans after July 1, 2001, real estate lenders must consider "rents" as possibly subject to revised article 9 and perfect security interests in rents by complying with the revised article 9 filing requirements. Continuation of the practice of filing is recommended within the mortgage or deed of trust or by recording a separate instrument, such as an assignment of rents and leases filed in the county real estate records, in addition to the specific description of rents being pledged, and the UCC category of "accounts" in a financing statement filed with the Secretary of State. Revised article 9, as with the former article 9,

typically governs interests in personal property. Arkansas Code of 1987 Annotated section 4-9-109(d)(11) may exclude real property rents from the scope of revised article 9, but the suggested filing procedure should be considered until clarification from an Arkansas court is obtained.

## O. Title Insurance

The usual title evidence in commercial lending transactions is a loan policy of title insurance, also called a mortgagee's title insurance policy. The American Land Title Association (ALTA) 1970, revised 1984, and ALTA 1992 forms of title insurance policies and endorsements are currently in use in Arkansas. Also, the ALTA 2006 policy and endorsements are now available.

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# VIII. Personal Property Lending

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## A. UCC Article 9

Arkansas has adopted the UCC including the most recent version of article 9, with only minor variations. Revised article 9 establishes the rules for acquiring and perfecting a lien on personal property. *See* Ark. Code Ann. § 4-9-101, *et seq.* (1987).

## B. Attachment

Under the UCC, a security interest attaches to collateral when it becomes enforceable against the debtor unless an agreement expressly postpones the time of attachment. Ark. Code Ann. § 4-9-203 (1987). With a few exceptions, a security interest is enforceable against the debtor and third parties only when the lender has given value, the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party, and one of the following conditions is met: (1) The debtor has authenticated a security agreement providing a description of the collateral; (2) the collateral is not a certificated security and is in the possession of the secured party under Arkansas Code of 1987 Annotated section 4-9-313 pursuant to the debtor's security agreement; (3) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Arkansas Code of 1987 Annotated section 4-8-301 pursuant to the debtor's security agreement; or (4) the collateral is deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents, and the secured party has control under Arkansas Code of 1987 Annotated sections 4-7-106 or sections 4-9-104 through 4-9-107 pursuant to the debtor's security agreement. Ark. Code Ann. § 4-9-203 (1987). Once a lender has an attached and enforceable security interest, the lender must perfect the security interest to preserve the security interest as against third parties.

## C. Duration

With a few exceptions, under revised article 9 a filed financing statement is effective for five years after the date of filing. *See* Ark. Code Ann. § 4-9-515 (1987). The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed. *Id.* Upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise. *Id.* If the security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value. *Id.* A continuation statement may be filed only within six months before the expiration of the five-year period already specified. *Id.*

Upon filing of a continuation statement in a timely manner, the effectiveness of the initial financing statement continues for a period of five years commencing on the day on which the financing statement would have become ineffective in the absence of the filing. *Id.* Upon the expiration of the five-year period, the financing statement lapses in the same manner as provided, unless, before the lapse, another continuation statement is filed. *Id.* Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the initial financing statement. *Id.*

## D. Deposit Accounts and Investment Property

Revised article 9 includes “deposit accounts” within the scope of revised article 9. Ark. Code Ann. § 4-9-102(29) (1987). Inclusion of deposit accounts (along with the similar “investment property,” concerning brokerage accounts) provides specific requirements for creation and perfection of a security interest in a deposit account or brokerage account. *See* Ark. Code Ann. § 4-9-102(49) (1987). Under prior law, lenders had to rely on common law, which varied from state to state, and the terms of deposit agreements, signature cards, and similar documents to determine rights and interests in these accounts, often leading to uncertainty and, in some cases, harsh results for misunderstanding lenders.

Under revised article 9, a lender wishing to perfect a security interest in investment property may do so by filing a financing statement or by obtaining “control” of the collateral. *See* Ark. Code Ann. §§ 4-9-312(a), 4-9-314(a) (1987). A lender wishing to perfect a security interest in a deposit account must take “control” of such collateral. *See* Ark. Code Ann. § 4-9-312(b)(1) (1987). As to deposit accounts, “control” is obtained in one of three ways: (1) the lender is the bank where the deposit account is maintained; (2) the debtor, lender and the bank where the account is maintained enter into a “control agreement,” where the bank agrees to hold the account for the benefit of and subject to direction of the lender; or (3) the lender becomes the bank’s customer with respect to the deposit account, and the bank agrees to hold the debtor’s account pursuant to a “lock box” arrangement for the benefit of the lender. *See* Ark. Code Ann. § 4-9-104 (1987). Similar rules apply to investment property accounts. *See* Ark. Code Ann. §§ 4-9-106, 4-8-106 (1987).

## E. Agricultural Liens

The Arkansas Acts of 2003, act 32, section 1, effective February 3, 2003, provided,

The General Assembly has determined that by the enactment of Act 1439 of 2001 it inadvertently changed the law regarding landlords' liens on crops. It is the intent of this act to correct that inadvertent change, remove landlords' liens on crops from the application of the Uniform Commercial Code, reestablish Arkansas Code 18-41-101 and 18-41-103 as the law applicable to landlords' liens on crops, and thereby make landlords' liens under Arkansas Code 18-41-101 and 18-41-103 superior to all other liens on the same collateral.

Landlords relying on statutory liens for unpaid crop land rental "shall have a lien upon the crop grown upon the demised premises in any year for rent that shall accrue for the year." *See* Ark. Code Ann. § 18-41-101(a) (1987). The lien is perfected and shall have priority over a conflicting security interest in or agricultural lien on the crop regardless of when the conflicting security interest or agricultural lien is perfected. Ark. Code Ann. § 18-41-101(b)(1) (1987). The lien shall continue for six months after the rent shall become due and payable, and no longer. Ark. Code Ann. § 18-41-101(b)(2) (1987). Landlord advances to tenants or employees are covered in Arkansas Code of 1987 Annotated section 18-41-103.

As to equipment used in farming operations, farm products, or accounts arising from the sale of farm products, the Arkansas General Assembly decided to require a filing of a financing statement in the office of the circuit clerk in the county where the debtor is "located" to perfect an agricultural lien. Ark. Code Ann. § 4-9-501(a)(2) (1987). This requirement seems simple; however, revised article 9 provides specific rules to determine where a debtor is "located," but makes such rules applicable to portions of revised article 9 *other* than the part dealing with farm filings, and does not identify a "location" of farmer debtors. *See* Ark. Code Ann. § 4-9-307 (1987). For farmer debtor filings, it is recommended the creditor file a financing statement: (1) in all counties where the debtor has a farming operation, (2) with the Arkansas Secretary of State, and (3) if the debtor is an entity formed by filing (e.g., corporation, LLC, etc.), with the Secretary of State in the organizational state of the debtor. Compare to *In re Curtis*, 363 B.R. 572 (Bkrtcy. E.D. Ark. 2007) discussing under Arkansas law creditors properly perfected their security interest in debtors' farm equipment and crops; each county in which debtors' farming operation grew crops constituted a "place of business," and creditors perfected their security interest in the county that was considered the operation's chief executive office.

## F. Commercial Tort Claims

For years, Arkansas lenders faced difficulty in obtaining and perfecting a security interest in lawsuits involving borrowers. *See* Arkansas Code of 1987

Annotated section 16-65-120 (replacing Ark. Stat. Ann. § 29-123), interpreted by the U.S. Court of Appeals for the Eighth Circuit in *Brown & Root, Inc. v. Hempstead County Sand & Gravel, Inc.*, 767 F.2d 464 (8th Cir. 1985). Revised article 9 may supersede section 16-65-120, but cautious lenders may wish to comply with the provision.

Revised article 9 specifically provides for attachment and perfection of a security interest in “commercial tort claims,” defined as suits (other than suits involving contracts) by organizations or individuals that arose in the course of business (as to individual plaintiffs, such claims cannot include damages for personal injury or wrongful death). See Ark. Code Ann. § 4-9-102(13) (1987). Lenders wishing to obtain and perfect a security interest in commercial tort claims must take particular care to specifically identify the claim, because revised article 9 disallows “generic” descriptions. See Ark. Code Ann. § 4-9-108(e)(1) (1987). Presumably, if a suit has been filed, description of the case by inclusion of the pleading style and case number will suffice. In other instances, legal counsel should be obtained to reasonably identify the cause of action. Banks should be aware “after-acquired property” clauses are ineffective as to future commercial tort claims, necessitating new or amended security agreements and financing statements for each new cause of action (and perhaps even variations from the initial claim) acquired by the borrower. Ark. Code Ann. § 4-9-204(b)(2) (1987).

## G. Real Estate Lending

Prior to passage of revised article 9 of the UCC, prudent real estate lenders for income properties obtained and recorded an assignment of rents and leases, particularly after amendment to the United States Bankruptcy Code sections 363 and 552, to allow for post-petition lien perfection in “rents,” if the lender had a perfected security interest in rents prior to the bankruptcy filing. Revised article 9 became effective in Arkansas on July 1, 2001. Revised article 9 altered the definition of the term “account” to include “a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of.” Ark. Code Ann. § 4-9-102(a)(2) (1987).

For all loans after July 1, 2001, real estate lenders must consider “rents” as possibly subject to revised article 9 and perfect security interests in rents by complying with the revised article 9 filing requirements. Continuation of the practice of filing is recommended within the mortgage or deed of trust or by recording a separate instrument, such as an assignment of rents and leases filed in the county real estate records, in addition to the specific description of rents being pledged, and the UCC category of “accounts” in a financing statement filed with the Secretary of State. Revised article 9, as with the former article 9, typically governs interests in personal property. Arkansas Code of 1987 Annotated section 4-9-109(d)(11) may exclude real property rents from the scope of revised article 9, but the suggested filing procedure should be considered until clarification from an Arkansas court is obtained.

## H. Financing Statement Formalities

According to Arkansas Code of 1987 Annotated section 4-9-502, a financing statement is sufficient only if it provides the name of the debtor, the name of the secured party or a representative of the secured party and indicates the collateral covered by the financing statement. Except as otherwise provided in Arkansas Code of 1987 Annotated section 4-9-501(b), to be sufficient, a financing statement that covers as extracted collateral or timber to be cut, or which is filed as a fixture filing and covers goods that are or are to become fixtures, must satisfy the above requirements and also indicate that it covers this type of collateral, indicate that it is to be filed for record in the real property records, provide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under the law of this state if the description were contained in a record of the mortgage of the real property and if the debtor does not have an interest of record in the real property, provide the name of a record owner. Ark. Code Ann. § 4-9-502(b) (1987). A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. Ark. Code Ann. § 4-9-502(d) (1987).

## I. Filing Fees for Financing Statements

According to Arkansas Code of 1987 Annotated section 4-9-525, the fee for filing and indexing a financing statement or termination statement, other than an initial financing statement described in Arkansas Code of 1987 Annotated section 4-9-502(c), with the Secretary of State of Arkansas will cost sixteen dollars from July 1, 2001, through June 30, 2013, if the record consists of one page. On and after July 1, 2013, the cost will be twelve dollars, for filing and indexing the initial financing statement and termination statements, if the record consists of one page. Ark. Code Ann. § 4-9-525(a)(1) (1987).

Records filed with circuit clerks pursuant to Arkansas Code of 1987 Annotated section 4-9-501(a)(2) will cost twelve dollars, for filing and indexing the initial financing statement and termination statements. Ark. Code Ann. § 4-9-525(a)(2) (1987).

If the record consists of more than one page, the fee is \$0.50 per additional page up to a maximum of \$100. Ark. Code Ann. § 4-9-525(a)(3) (1987).

The fee for filing a continuation, whether with the Arkansas Secretary of State or a circuit clerk, is six dollars. Ark. Code Ann. § 4-9-525(b)(1) (1987).

The fee for filing a termination statement, whether with the Arkansas Secretary of State or a circuit clerk, is six dollars if it pertains to the filing of a financing statement before July 28, 1995. Ark. Code Ann. § 4-9-525(b)(2) (1987). There is no fee for filing a termination statement if it pertains to the filing of a financing statement on or after July 28, 1995, the fee for filing the termination having been incorporated into the fee for the initial filing.

The fee for each separate search, whether by the Arkansas Secretary of State or a circuit clerk, is six dollars. Ark. Code Ann. § 4-9-525(b)(3) (1987).

The fee for filing an assignment, whether with the Arkansas Secretary of State or a circuit clerk, is six dollars. Ark. Code Ann. § 4-9-525(b)(4) (1987).

The fee for filing a release, whether with the Arkansas Secretary of State or a circuit clerk, is six dollars. Ark. Code Ann. § 4-9-525(b)(5) (1987).

The fee for filing an amendment, whether with the Arkansas Secretary of State or a circuit clerk, is six dollars. Ark. Code Ann. § 4-9-525(b)(6) (1987). The fee for issuing a certificate or for furnishing a copy of any record on file naming a particular debtor, is \$6 if the record consists of one page and \$0.50 per page for each additional page up to a maximum of \$100. Ark. Code Ann. § 4-9-525(d) (1987).

Arkansas Code of 1987 Annotated section 4-9-525 does not fix the fee with respect to a record of a mortgage which is effective as a financing statement filed as a fixture filing or as a financing statement covering as extracted collateral or timber to be cut under section 4-9-502(c). However, the recording and satisfaction fees that otherwise would be applicable to the record of the mortgage apply. Ark. Code Ann. § 4-9-525(e) (1987).

## **J. Fixture Filings**

Revised article 9 allows a mortgage to be effective as a financing statement filed as a fixture filing or as a financing statement covering as extracted collateral or timber to be cut only if (1) the record indicates the goods or accounts that it covers; (2) the goods are or are to become fixtures related to the real property described in the record or the collateral is related to the real property described in the record and is as extracted collateral or timber to be cut; (3) the record satisfies the requirements for a financing statement in section 4-9-502 other than an indication that it is to be filed in the real property records; and (4) the record is recorded. Ark. Code Ann. § 4-9-502(c) (1987).

## **K. Reasonable Identification of Collateral**

Specific collateral descriptions are preferred in security agreements and financing statements. As for security agreements, Arkansas Code of 1987 Annotated section 4-9-108(a) states that a description of personal or real property is sufficient if it reasonably identifies what is described. Collateral, except as otherwise indicated, is reasonably identified if it identifies the collateral by specific listing, category, or type of collateral defined in the UCC, to name a few. *See* Ark. Code Ann. § 4-9-108(b) (1987). It is recommended secured parties follow specific collateral descriptions in commercial security agreements with all applicable UCC categories (e.g., accounts, deposit accounts, etc.). A description of collateral as “all the debtor’s assets” or “all the debtor’s personal property” or using words of similar import does not reasonably identify the collateral. Ark. Code Ann. § 4-9-108(c) (1987). Interestingly, such terms are allowed in a financing statement. *See* Ark. Code Ann. § 4-9-504(2) (1987).

## **L. Name of Debtor**

Revised article 9 states, “A financing statement substantially satisfying the requirements [of revised article 9] is effective, even if it has minor errors or

omissions, unless the errors or omissions make the financing statement seriously misleading.” Ark. Code Ann. § 4-9-506(a) (1987). A financing statement that fails sufficiently to provide the name of the debtor in accordance with Arkansas Code of 1987 Annotated section 4-9-503(a) is seriously misleading unless a search of the records under debtor’s correct name would disclose the financing statement that did not provide the correct name. Arkansas Code of 1987 Annotated section 4-9-503(a) requires the following: (1) If the debtor is a registered organization, then the financing statement must provide the name of the debtor indicated on the public record of the debtor’s jurisdiction of organization; (2) if the debtor is a decedent’s estate, the financing statement must provide the name of the decedent and indicate that the debtor is an estate; (3) if the debtor is a trust or a trustee, then the financing statement must provide the name specified for the trust (or the name of the settlor) and indicate that it is a trust or a trustee; and (4) in all other cases, if the debtor has a name, then the individual or organization name of the debtor must be provided and if the debtor does not have a name, the financing statement must provide the names of partners, members, associates, or other persons comprising the debtor.

Lenders should always verify with the Secretary of State, as to registered organizations, the name of their borrower. It is also suggested for both registered organizations and trusts that lenders obtain the organizational documents for their borrowers to verify names. As to decedent’s estates, a copy of the probate proceeding containing the precise name of the decedent’s estate should be obtained.

## M. Where to File Financing Statements

Under revised article 9, specific rules are established for where a debtor is “located” and, in most cases, one filing with the applicable secretary of state will be sufficient to perfect the security interest of the lender. However, a financing statement should be filed in the office designated for the filing or recording of a record of a mortgage on the related real property if the collateral is as extracted collateral or timber to be cut or the financing statement is a filed as a fixture filing and the collateral is goods that are or are to become fixtures. In addition, a financing statement should be filed in the office of the circuit clerk in the county in which the debtor is located if the debtor is engaged in farming and the collateral is equipment used in farming operations, or farm products or accounts arising from the sale of farm products. Ark. Code Ann. § 4-9-501 (1987).

Under Arkansas Code of 1987 Annotated section 4-9-307, a debtor is “located,” as follows: (1) An individual is located in the state of the debtor’s principal residence; (2) an organization (other than a registered organization) is located in the state where its place or business or its chief executive office is located (the term *organization* includes general partnerships, joint ventures, etc.); and (3) a registered organization is located in the state of formation. For example, a Delaware corporation with its sole place of business in Arkansas is “located” in Delaware for purposes of revised article 9.



Lenders may perfect a security interest in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. Ark. Code Ann. § 4-9-313(a) (1987). A security interest in instruments, chattel paper, investment property, and negotiable documents may be perfected by filing. Ark. Code Ann. § 4-9-312(a) (1987). However, a security interest in a deposit account or a letter-of-credit may be perfected only by control. Ark. Code Ann. § 4-9-312(b) (1987). As with prior law, the only way to perfect a security interest in money is by taking possession. If possession of collateral is taken by a third party on behalf of the lender, revised article 9 requires an authenticated record from the third party acknowledging bailee status on behalf of the lender. Ark. Code Ann. § 4-9-313(c) (1987). Arkansas Code of 1987 Annotated section 4-9-309 details which security interests are perfected when they attach.

Revised article 9 explicitly states that it does not affect perfection of titled vehicles and other property described in Arkansas Code of 1987 Annotated sections 27-14-801–807. Ark. Code Ann. § 4-9-311(a)(2) (1987). However, section 4-9-311 does not apply to a security interest created by a debtor who is in the business of selling such items from his inventory. Ark. Code Ann. § 4-9-311(d) (1987). Therefore, although a security interest in inventory (including vehicles) may be perfected by filing, it is important to note that a buyer in ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence. Ark. Code Ann § 4-9-320 (1987). Essentially, a buyer of inventory in the ordinary course has priority over claims of creditors who have a prior perfected security interest in the dealer's inventory.

## **N. Collection and Enforcement by Secured Parties**

Pursuant to Arkansas Code of 1987 Annotated section 4-9-607, if so agreed, and in any event after default, a secured party may notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party; may take any proceeds to which the secured party is entitled under section 4-9-315; may enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral; if it holds a security interest in a deposit account perfected by control under section 4-9-104(a)(1), may apply the balance of the deposit account to the obligation secured by the deposit account; and if it holds a security interest in a deposit account perfected by control under section 4-9-104(a)(2) or (3), may instruct the bank to pay the balance of the deposit account to or for the benefit of the secured party.

If necessary to enable a secured party to exercise the right of a debtor to enforce a mortgage nonjudicially, the secured party may record in the office in

which a record of the mortgage is recorded a copy of the security agreement that creates or provides for a security interest in the obligation secured by the mortgage and the secured party's sworn affidavit in recordable form stating that a default has occurred and the secured party is entitled to enforce the mortgage nonjudicially. Ark. Code Ann. § 4-9-607(b) (1987).

A secured party must proceed in a commercially reasonable manner if the secured party undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral and is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor. Ark. Code Ann. § 4-9-607(c) (1987).

A secured party may deduct from the collections made reasonable expenses of collection and enforcement, including reasonable attorneys' fees and legal expenses incurred by the secured party. *See* Ark. Code Ann. §§ 4-9-607, 4-9-104, and 4-9-315 (1987).

## **O. Right to Possession upon Default**

After default, under Arkansas Code of 1987 Annotated section 4-9-609, a secured party may take possession of the collateral and without removal, may render equipment unusable and dispose of collateral on a debtor's premises under section 4-9-610. A secured party may proceed under the above section pursuant to judicial process, or without judicial process, if it proceeds without breach of the peace. Ark. Code Ann. § 4-9-609(b) (1987). If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Ark. Code Ann. § 4-9-609(c) (1987).

Under Arkansas Code of 1987 Annotated section 4-9-610, after default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.

Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

A secured party may purchase collateral at a public disposition or at a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations. *See* Ark. Code Ann. § 4-9-610 (1987).

Under Arkansas Code of 1987 Annotated section 4-9-611, notification must be given prior to disposition of the collateral, unless notice is waived by the debtor. A secured party that disposes of collateral under section 4-9-610 shall send a reasonable authenticated notification of disposition to the debtor, any secondary obligor and if the collateral is other than consumer goods any other person from which the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral,

any other secured party or lienholder that, ten days before the notification date, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that identified the collateral, was indexed under the debtor's name as of that date, was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date, and any other secured party that, ten days before the notification date, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in section 4-9-311(a).

## **P. Acceptance of Collateral in Satisfaction**

Pursuant to Arkansas Code of 1987 Annotated section 4-9-620, a secured party may accept collateral in full or partial satisfaction of the obligation it secures only if (1) the debtor consents to the acceptance under subsection (c) of section 4-9-620 (i.e. debtor consents to *partial* satisfaction only if debtor agrees to the terms of acceptance in a record authenticated after default, and debtor agrees to *full* satisfaction only if the debtor agrees to the terms of acceptance in a record authenticated after default *or* the secured party sends debtor an unconditional proposal that indicates secured party will accept collateral in full satisfaction and debtor does not provide authenticated notification of objection within twenty days of when proposal was sent); (2) the secured party does not receive, within the time frame set forth in subsection (d), a notification of objection to the proposal authenticated by a person who received notice pursuant to section 4-9-621 or any other person, other than the debtor, holding an interest in the collateral subordinate to the security interest that is the subject of the proposal; (3) the collateral is consumer goods, the collateral is not in the possession of the debtor when the debtor consents to acceptance; and (4) subsection (e) does not require the secured party to dispose of the collateral or the debtor waives requirement pursuant to section 4-9-624. Ark. Code Ann. § 4-9-620 (1987).

## **Q. Right to Redeem Collateral**

According to Arkansas Code of 1987 Annotated section 4-9-623, a debtor, any secondary obligor, or any other secured party or lienholder may redeem collateral. To redeem collateral, a person must tender fulfillment of all obligations secured by the collateral and the reasonable expenses and attorneys' fees described in section 4-9-615(a)(1). Ark. Code Ann. § 4-9-623(b) (1987).

A redemption may occur at any time before a secured party has collected collateral under section 4-9-607, has disposed of collateral or entered into a contract for its disposition under section 4-9-610, or has accepted collateral in full or partial satisfaction of the obligation it secures under section 4-9-622. *See* Ark. Code Ann. § 4-9-623(c) (1987).

## **R. Transition Rules**

With the enactment of Act 1439 of 2001, Arkansas adopted revised article 9 of the UCC (revised article 9). To the extent that they are still relevant, the rules

which govern the transition from the previously enacted version of article 9 to revised article 9 are set forth in part 7 of revised article 9. Ark. Code Ann § 4-9-701 *et seq.* (1987). Part 7 of revised article 9 generally sets forth transition rules applicable to the attachment of security interests, the perfection of security interests, the continuation of existing security interests, the priority of security interests, the enforcement of security interests, and the termination of security interests.

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## **IX. Other Laws of Interest**

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### **A. Arkansas Fraudulent Transfer Act**

Arkansas has adopted the Uniform Fraudulent Transfer Act without material variation. The Arkansas Fraudulent Transfer Act is set forth at Arkansas Code of 1987 Annotated section 4-59-201, *et seq.*

### **B. Arkansas Environmental Laws**

Arkansas environmental laws and regulations are found in title 8 of the Arkansas Code of 1987 Annotated and in the Code of Arkansas Rules.