Tennessee Commercial Lending Law

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I. Introduction

This chapter is designed to provide an overview to lenders and businesses involved in extending commercial credit to Tennessee borrowers. It does not attempt to address issues of law governing consumer lending transactions or issues of federal law except where the context expressly so indicates. This chapter is not comprehensive nor designed to cover all nuances for each topic presented.

II. Basic Legal Structure

A. Constitution and Statutory Law

While laws governing various aspects of lending transactions may be found throughout Tennessee’s Constitution, Code Annotated, Administrative Code and case law, this guide covers only major topics governing Tennessee lending. The general law of Tennessee is found in the state Constitution and in the Tennessee Code Annotated (“Tenn. Code Ann.” or “Code”). The Code is divided into seventy-one titles. Titles of particular interest to commercial lenders include:

- Title 16—Courts
- Title 17—Judges and Chancellors
- Title 18—Clerks of Court
- Title 19—Civil Procedure in General Sessions Courts
- Title 21—Proceedings in Chancery
- Title 25—Judgments
- Title 26—Execution
- Title 28—Limitations of Actions
- Title 29—Remedies and Special Proceedings
- Title 30—Administration of Estates
- Title 31—Descent and Distribution
B. Administrative Law

A number of Tennessee agencies have rule-making and regulatory authority, including the Department of Commerce and Insurance, the Department of Revenue, the Department of Financial Institutions, Secretary of State, Collection Services Board, and the Department of Environment and Conservation. Each of these departments posts regulations and bulletins on its respective website. Administrative rules and regulations are also periodically consolidated in the Tennessee Administrative Code. The Tennessee Department of Financial Institutions publishes administrative rules for regulated financial institutions at: www.tennessee.gov/sos/rules/0180/0180.htm.

C. Courts

Tennessee courts, jurisdictions and proceedings are described in Titles 16 through 24 of the Tennessee Code. General Sessions Courts are located in some, but not all, counties in the state. General Sessions Courts are small claims courts with dollar jurisdictional limits of $25,000. General Sessions Courts are not courts of record and appeal *de novo* is available to Circuit Court. General Sessions Courts have unlimited jurisdiction for recovery of personal property (formerly replevin), or wrongful entry and detainer, including suits for deficiency amounts (no single action rules). Each county has its own forms for use in actions seeking the recovery of personal property or detainer, although the Administrative Office of the Courts also has forms that should be useable state-wide.

Circuit Courts were originally designed to hear cases sounding in law and Chancery Courts heard cases sounding in equity. These distinctions are generally no longer applicable. Typically, Chancery Courts hear commercial law cases but this jurisdiction is not exclusive. Each of the Chancery and Circuit Courts are courts of record with appeals being taken to the intermediate appellate court, the Tennessee Court of Appeals.

The Court of Appeals has appellate jurisdiction in civil cases brought in courts of record, and is split into three grand divisions, one each for West Tennessee, sitting in Jackson, Middle Tennessee, sitting in Nashville, and...
East Tennessee, sitting in Knoxville. The Tennessee Supreme Court sits in Nashville, is the highest court in Tennessee and has purely discretionary appellate jurisdiction, except in worker’s compensation cases, which are heard as a matter of right.

The federal courts in Tennessee are the U.S. District Court for the Western District of Tennessee, the U.S. District Court for the Middle District of Tennessee and the U.S. District Court for the Eastern District of Tennessee. Tennessee sits within the Sixth Circuit Court of Appeals.

D. Court Rules and Rules of Evidence

The Tennessee Rules of Civil Procedure are modeled on the corresponding federal rules, and govern all Tennessee civil actions in all Circuit and Chancery Courts, and in other courts exercising the jurisdiction of Circuit and Chancery Courts. They do not apply to (1) appeals or (2) General Sessions actions. The Tennessee appellate courts and local courts have their own procedural rules as well. They can be found at http://www.tsc.state.tn.us/courts/court-rules/rules-appellate-procedure.

The Tennessee Rules of Evidence are, likewise, modeled on the federal rules. They can be found at http://www.tsc.state.tn.us/courts/supreme-court/rules/rules-evidence.

E. Local Law

For commercial lending purposes, local ordinances principally affect sales tax rates, ad valorem taxes, zoning and other real property collateral issues. Tennessee municipalities are prohibited from passing predatory lending ordinances, although Memphis and Shelby County have been particularly active in attempting to make lenders’ realization of their collateral more difficult.

III. Authority to Do Business and Taxation

A. Required Qualification to Do Business—The Tennessee Foreign Corporations and Limited Liability Companies Laws

Generally, lenders that are not organized in Tennessee do not need to qualify to do business in Tennessee to:

- maintain, defend, or settle any proceeding, claim, or dispute;
- maintain bank accounts;
- sell through independent contractors;
- solicit or obtain orders, whether by mail or through employees, agents, or otherwise, if the orders require acceptance outside the state before they become contracts;
• create or acquire indebtedness, deeds of trust, mortgages, and security interests in real or personal property;
• secure or collect debts or enforce mortgages, deeds of trust, and security interests in property securing debts;
• own, without more, real or personal property; provided, that for a reasonable time the management and rental of real property acquired in connection with enforcing a mortgage or deed of trust is not considered transacting business if the owner is attempting to liquidate the owner’s investment and if no office or other agency therefor, other than an independent agency, is maintained in the state;
• conduct an isolated transaction that is completed within one month and that is not one in the course of repeated transactions of a like nature; or
• transact business in interstate commerce.

This list of activities is not exhaustive, and is applicable solely to determine whether a foreign corporation must procure a certificate of authority and for no other purpose. Tenn. Code Ann. § 48-25-101 et seq.

Foreign corporations and limited liability companies (LLCs) transacting business without a certificate of authority, if required, may not maintain lawsuits but may defend lawsuits. They risk having proceedings stayed by a court until it is determined whether a certificate of authority is required and must pay treble the costs of obtaining the certificate of authority, plus treble the taxes, penalties, and interest owed for the period of time the certificate of authority would have been required. Failure to obtain a certificate of authority does not invalidate prior acts of the foreign entity. Tenn. Code Ann. §§ 48-25-102 and 48-249-902.

B. Qualification to Do Business in Tennessee—Foreign Limited Partnerships

A foreign limited partnership doing business in Tennessee may not maintain any action, suit or proceeding in Tennessee until it has registered and has paid all fees for the years or parts thereof during which it did business without having registered.

Failure to register does not, however, affect the validity of any contract or act of the foreign limited partnership or the right to appear and defend any action brought against it in any court in Tennessee.

Any foreign limited partnership doing business in Tennessee without first having registered shall be fined and shall pay to the Secretary of State two hundred dollars ($200) for each year or part thereof during which the foreign limited partnership failed to register in Tennessee. Tenn. Code Ann. § 61-2-907.

C. Licensing Requirements and Regulation of Financing

As a general rule, out-of-state commercial lenders and equipment lessors transacting business in Tennessee are not subject to licensing requirements, nor are
they required to register with the Tennessee Department of Financial Institutions. Some lenders are able to take advantage of certain most favored lender provisions (for instance 12 USC § 85 for national banks). For the purpose of “rate exportation”; however, the Department of Financial Institutions will require what is referred to as “cloning.” For instance, should a financial institution seek to charge interest at a rate of 24 percent, as is allowed by Tennessee law for Tennessee Industrial Loan and Thrift Companies, Tenn. Code Ann. § 45-5-101 et seq. (the “Thrift Act”), the department will require the lender to observe loan charges limitations found in the Thrift Act, including the general prohibition against prepayment penalties. Thus, to export the rate, the Department of Financial Institutions will expect the lender to observe other applicable limitations, for that type of licensee or registrant (e.g., limitations on “loan charges” found in Tenn. Code. Ann. § 45-5-403, for thrifts).

Licenses from the Department of Financial Institutions are required for the following entities (other than banks and credit unions), typically making commercial loans:

- Tennessee Industrial Loan and Thrift Company. Tenn. Code Ann. § 45-5-101 et seq. (The Department of Financial Institutions views these as consumer lenders, yet there is no prohibition against them making commercial loans.)
- Tennessee’s Premium Finance Company Act of 1980. Tenn. Code Ann. § 56-37-101 et seq. (While a license is not required for financing insurance premiums in connection with another lending transaction, this act should be read carefully.)
- Tennessee BIDCOs (Business and Industrial Development Companies). Tenn. Code Ann. § 45-8-101 et seq. (Available to only Tennessee corporations and provides opportunities for combinations of debt and equity financing outside Tennessee’s Equity Participation law, $500,000 minimum amount. Tenn. Code Ann. § 47-24-101 et seq.)

Of course, Tennessee banks, savings and loan associations, and credit unions are entities with charters issued under Tennessee law; thus, these are Tennessee financial institutions by definition. Most “financial institutions” are covered in Title 45 of the Tennessee Code.

D. Taxation

A transferee of a business may become liable for the predecessor’s liability for delinquent sales tax proceeds to the state. Tenn. Code Ann. § 67-6-513. Where a bank held a security interest on the inventory, furniture, fixtures and equipment of store and when the owner of the store defaulted on the note, the bank, rather than foreclosing, accepted a bill of sale for the store, operated the store for a short time and later sold it to a third party, the bank became liable for the sales taxes owed by the original store owner although bank used no “purchase money” to obtain the store. Bank of Commerce v. Woods, 585 S.W.2d 577
The clear intention of [Tenn. Code Ann. § 67-6-513] is to provide that the ‘tax debt . . . follow the business, its assets or any portion of them.’” Bank of Commerce, 585 S.W.2d at 580 (citations omitted). Had the bank foreclosed its security interest rather than purchasing the store, successor liability would have been avoided. Id. at 582. A national or state bank that acquires or merges with a state bank must assume the liabilities, including lawsuits, of the acquired or merged bank. See Culbreath v. First Tennessee Bank, N.A., 44 S.W.3d 518 (Tenn. 2001); see also 12 U.S.C. § 215a.

IV. Interest and Usury; Promissory Notes

A. Compound Interest
Compounding interest is generally permissible in Tennessee provided the compounded rate does not exceed the maximum permitted rate when the interest calculation is converted to a simple interest. See Woods v. Rankin, 49 Tenn. (2 Heisk.) 46, 48 (1870); Hale v. Hale, 41 Tenn. (1 Cold.) 233, 236 (1860); Waid v. Greer, 56 S.W. 1028, 1029 (Tenn. Ct. App. 1900). Whether a promissory note accrues simple or compound interest is determined by the cardinal rule of contract interpretation: ascertaining the intention of the parties and giving effect to that intention by, when there is no ambiguity, attributing the ordinary meaning to the words used in the note. Estate of Hawkins v. Murchison, 2004 Tenn. App. LEXIS 847, *29-*30 (Tenn. Ct. App. Dec. 16, 2004). At least one case, not involving a loan, has held that compound interest cannot be part of a court’s discretionary award of prejudgment interest. Reed v. Cracker Barrel Old Country Store, 171 F.Supp.2d 751, 768 (M.D. Tenn. 2001). Interest can be added to the principal amount of a debt by agreement or by court order with the total amount accruing interest.

B. Promissory Notes
Tennessee law applicable to negotiable promissory notes and their default and collection is generally found in revised Articles 3 and 4 of the UCC as adopted in Tennessee. Tenn. Code. Ann. §§ 47-3-101 et seq. and 47-4-101 et seq. Commercial promissory notes in Tennessee customarily include provisions regarding the recovery of reasonable attorneys’ fees, late charges, default interest, and prepayment premiums. Waivers of presentment, demand, protest, notice of dishonor, and jury trial are all enforceable waivers under Tennessee law applicable to commercial lending.

C. Interest Versus Time-Price Differential
Interest is defined as compensation for the use of money over a period of time. Tenn. Code Ann. § 47-14-102(8). By statute “interest” does not include “loan charges,” “commitment fees” and “brokerage commissions.” Interest is not to
be confused with “time-price differential,” which is the difference between
the sales price of property or services and the amount paid over time when the
contract is between a buyer and a seller. Tenn. Code Ann. § 47-14-102(12). For
instance, a retail installment sales contract between the buyer and seller of a
motor vehicle would charge time-price differential. Owner occupied residences
are excluded from time-price differential and charges with respect thereto as
considered “interest.” Time-price differential limitations are found elsewhere,
§ 47-11-101 et seq. There is no limitation on time-price differential charged
for the installment sale of a motor vehicle or mobile home. Tennessee’s General
Usury Statute does not limit or restrict the manner of method of contracting for
interest, whether by way of add-on, discount or otherwise, so long as the max-

D. Usury; Interest Rate Limitations

1. Elements of a Usury Claim

In Tennessee, the law of usury is that:

Usury imports the existence of four elements: (1) A loan or forbear-
ance, either express or implied; (2) an understanding between the par-
ties that the principal shall be repayable absolutely; (3) the exaction
of a greater profit than allowed by law; and (4) an intention to violate
the law.

The last may be implied if the first three are present. . . .

A contract is usurious when there is any contingency by which the lender
may receive, rather than “charge,” more than the lawful rate of interest. In order
to determine whether a transaction is usurious, the inquiry must always be
directed to what the lender is to receive, not what the borrower is to pay. See
10, 1994) (citing Jenkins v. Dugger, 96 F.2d 727, 729 (6th Cir. 1938)).

2. Formula Interest Rate

Tennessee Code Annotated § 47-14-101 et seq., governs the rates of interest
and the amounts of “loan charges,” “commitment fees” and “brokerage com-
missions,” which generally may be charged in commercial lending transac-
tions. The general interest rate limitation is known as the “formula rate.” Tenn.
Code Ann. § 47-14-102(7). The formula rate is 4 percent (400 basis points)
over the average prime rate (as published by the board of governors of the
Federal Reserve System.) Id. The formula rate is published monthly in the Ten-
nessee Administrative Register by the Tennessee Department of Financial Insti-
Tenn. Code Ann. § 47-14-103. The formula rate can be derived by converting
all other methods of calculating interest to simple interest, called an “effective
rate of interest.” Tenn. Code Ann. § 47-14-102(6). In the absence of a separate rate described in a Tennessee statute, the formula rate is the usury limit.

3. **Specific Usury Limits**

Generally, the usury limit in Tennessee is the lesser of 24 percent or the “formula rate.” Tenn. Code Ann. § 47-14-103, however, makes allowances for rates set by other statutes (such as banking and thrift statutes), as well as rates applicable to the state of Tennessee and political subdivisions of the state.

(a) **Tennessee State Banks**

The interest rate on installment loans made by Tennessee state chartered banks can vary based on the term of the loan, with a maximum interest rate of 18 percent for installment loans with a term of seven years or longer. Tenn. Code Ann. § 45-2-1106. However, “credit card state banks” can charge 21 percent under certain circumstances. Tenn. Code Ann. § 45-2-1904. Essentially then, the rate applicable to Tennessee state chartered banks is 21 percent, although some experts utilize the Tennessee Thrift Company rate of 24 percent.

(b) **Credit Unions**

The interest rate on loans made by Tennessee-chartered credit unions may not exceed the formula rate or the rate permitted to be charged by federally chartered credit unions. Tenn. Code Ann. § 45-4-602.

(c) **Thrift Companies**

The interest rate on loans by Tennessee-chartered thrifts may not exceed 24 percent. Tenn. Code Ann. § 45-5-301. However, thrifts—which are primarily consumer lenders, though not limited to consumer lending—have a somewhat complicated scheme governing loan charges, service charges, maintenance fees, etc.

(d) **Qualified Commercial Financing Entity**

A qualified commercial financing entity may charge interest at a rate of up to 24 percent. Tenn. Code Ann. § 67-4-2004(40). This is part of the Tennessee

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1For each type of financial institution discussed, the interest rate charged can be associated with the type of loan and specific limitations on loan charges and service charges. Before adopting a rate higher than the “formula rate,” careful legal analysis is required.

2But see “Most Favored Lender Doctrines” section, infra at Section IV.Q.

3Tenn. Code Ann. § 67-4-2004(40) reads: “‘Qualified commercial financing entity’ means a person that qualified for the credit in § 67-6-224 that primarily finances wholesale and retail transactions related to the purchase or lease of industrial equipment, machinery, vehicles, or goods manufactured by its affiliates and is certified for that designation by the commissioner of revenue and the commissioner of economic and community development.”
tax code and generally limited to large operation captive finance companies that spend more than $10 million locating their headquarters in Tennessee, employ more than 100 people and are certified for certain tax advantages.

4. **Interest on Judgments**

Interest on judgments accrues at a statutory rate calculated and published by the Tennessee Administrative Office of the Courts, unless the “judgment is based on a statute, note, contract, or other writing that fixes a rate of interest within the limits provided in § 47-14-103 for particular categories of creditors, lenders or transactions, [in which case] the judgment shall bear interest at the rate so fixed. Tenn. Code Ann. § 47-14-121 (amended in 2012). Currently, the judgment rate is fixed at 2 percent less than the “formula rate.”

E. **Loan and Other Charges⁴ (Generally)**

“Loan charges” is defined as compensation services or expenses directly incident to a loan or contract to make a loan, excluding “interest,” “brokerage commissions” and “commitment fees.” Tenn. Code Ann. § 47-14-102(9). “Brokerage commissions” is defined to include all fees paid to mortgage bankers, banks, savings and loan associations, savings banks and other parties regularly engaged in originating or placing real estate loans, whether closed in such person’s name or the name of another and provided these services were rendered within one year of closing or completion of construction, whichever is later. Tenn. Code Ann § 47-14-102(4). “Commitment fees” is defined as compensation to a lender in return for a conditional or unconditional commitment to make a loan. Tenn. Code Ann. § 47-14-102(5). Basically, each such charge is required to be fair and reasonable compensation for the detriment suffered or commitment made, exclusive of the lender’s overhead. Brokerage commissions have a broader standard for reasonableness. Limitations are set forth in Tenn. Code Ann. § 47-14-113.

F. **Prepayment Premiums**

Prepayment of a commercial loan is a privilege in Tennessee (i.e., there is no right to prepay a loan unless the loan documents so provide). Tenn. Code Ann. § 47-14-108. Thus, prepayment premiums are allowed, including upon default, foreclosure, and so on. It is preferable that these be referred to as “premiums for the privilege of prepayment” as opposed to “penalties.” These may be limited by principles of equity and common law limitations on liquidated damages. Prepayment penalties may not be assessed by Tennessee Thrifts. Some bankruptcy courts have specifically disallowed prepayment penalties.

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⁴Note that there is also a statutory scheme governing allowable charges for different types of financial institutions as well as types of loans.
G. Capitalization of Interest/“Spreading”

Tennessee law measures usury limitations by an “effective rate of interest” analysis. The “effective rate of interest” is derived by converting all other methods of charging or interest accrual to a simple rate of interest. See Tenn. Code Ann. § 47-14-102(5). Tennessee courts tend to uphold usury savings provisions in commercial lending contracts. Tennessee case law, somewhat inconsistently, allows up front charges such as points and fees to be recharacterized as interest and “spread” over the life of the loan for purposes of determining whether the loan exceeds usury limitations.

H. Equity Participations

Tennessee allows lenders to participate in (take equity in) a borrower or a venture without the dividends paid for the “equity” portion, or earnings thereon being considered “interest.” Tennessee’s Equity Participation statute is found at Tennessee Code Annotated Sections 47-24-101 and 102. The basic requirements of equity participation are (1) a written agreement between the lender and the borrower stating the right to participate in the borrower’s enterprise or venture, and (2) the lender must loan the borrower a minimum principal amount of $500,000. This statute specifically provides that the lender shall not be deemed a partner or joint venturer with the borrower or otherwise be jointly liable with the borrower as a result of the participation unless the agreement between them expressly makes the lender liable. Tennessee Small Business Investment Companies, Tenn. Code Ann. § 45-8-101 et seq., are specifically allowed to take equity and are not subject to dollar limits on equity participations appearing above.

I. Acceleration

It is settled law in Tennessee that acceleration clauses generally are valid and will be enforced according to their terms. Lively v. Drake, 629 S.W.2d 900, 902 (Tenn. 1982). If a tender of the amount then due is made to the holder of a note prior to the holder’s exercise of an option to accelerate, such tender will make the option clause inoperative and will prevent acceleration of the balance. Id. A tender of the overdue amount after the exercise of an acceleration option will not reverse the acceleration except by agreement. Id. Further, the right to accelerate may be waived by the holder of an indebtedness as a result of a course of dealing between parties. Id. Unless the due date of principal has been accelerated, an instrument does not become overdue except with respect to amount past due. Tenn. Code Ann. § 47-3-304(c).

Acceleration in Tennessee implicates principles of good faith. For example, acceleration based on a breach of an insecurity clause presents a more complicated (or at least more nuanced) situation that requires strict adherence to principles of conscientiousness:

[1] In the acceleration of a debt pursuant to an insecurity clause, the party exercising that option must act out of an honest belief the other
party’s ability to perform has deteriorated since the time of contracting and must not use it as an instrument of abuse. Any evidence that the belief was not rational or that the party accelerating the debt took unconscientious advantage of the other or resorted to this severe remedy for other reasons is material. In the record before us there is ample evidence that [the creditor] took advantage of its superior position in not allowing Plaintiffs [i.e., the debtors] to apply the partial payment to preserve the most useful equipment or to protect their equity; that [creditor] felt entitled to ignore the application of those funds it had made at its own option; that [creditor] deceived [debtors] about the status of their accounts and the disposition of the equipment after repossession; and that the insecurity clause is an after-the-fact justification for a wrongful declaration of default for non-payment.

_Lane v. John Deere Co._, 767 S.W.2d 138, 142 (Tenn. 1989) (examining former UCC 1-203 and 1-208).

Tennessee case law appears to be silent as to whether indebtedness evidenced by a promissory note can be accelerated in the absence of an acceleration clause. However:

[I]n matters of installment notes containing acceleration clauses, the cause of action as to future non-delinquent installments does not accrue until the creditor chooses to take advantage of the clause and accelerate the balance . . . the cause of action accrues on each installment when it becomes due and the Statute begins to run from that moment on that installment. Further, suit may be brought in successive actions upon each default in an installment for the amount of that defaulted installment. Whether or not the note contains an acceleration clause, exercised or not, is of no moment to the defaulted installment. All the acceleration clause does is accelerate the due date of future installments to the date of the exercise of the right of acceleration.


**J. Demand Notes**

Demand notes are can be negotiable instruments. _See_ Tenn. Code Ann. § 47-3-104; _Hamilton Nat’l Bank v. McCanless_, 176 Tenn. 570, 144 S.W.2d 768 (Tenn. 1940) (a demand note is negotiable while a past due note is not negotiable). “A promise or order is ‘payable on demand’ if it (i) states that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder, or (ii) does not state any time of payment.” Tenn. Code Ann. § 47-3-108(a). Interest on demand notes is payable from the date of the instrument. Tenn. Code Ann. § 47-14-109; Tenn. Code Ann. § 47-3-112; _see In re Estate of Myers_, 397 S.W.2d 831 (Tenn. Ct. App. 1965). Demand notes in
Tennessee are due on the day after the day demand for payment is duly made or “when the instrument has been outstanding for a period of time after its date which is unreasonably long under the circumstances of the particular case in light of the nature of the instrument and usage of the trade.” Tenn. Code Ann. § 47-3-304. Accordingly, whether a demand note is stale may vary a great deal depending upon the facts of the particular case.

K. Application of Payments

There is no general statutory requirement in Tennessee as to the order of application of payments for a commercial loan. Article 9 of the UCC, of course, provides rules governing the order for the application of payments in connection with the disposition of collateral. Tenn. Code Ann. § 47-9-610.

L. Interest Rate Not Stipulated

Under Tennessee law, the charging of interest is strictly a matter of contract unless a court awards discretionary interest prior to a judgment. Such an award is unusual. Tenn. Code Ann. § 47-14-103(3) may be interpreted to say that a rate of 10 percent may be applied in the event the contract indicates interest will be charged but doesn’t state a rate.

M. Post-Judgment Interest

Interest on judgments where an interest rate is not stated in a contract—such as tort claims—accrues at a statutory rate calculated and published by the Tennessee Administrative Office of the Courts, unless the contract for interest specifies a higher rate (or specifically denominates a lower post judgment interest rate). Tenn. Code Ann. § 47-14-121.

N. Statutory Penalties; Excessive Interest and Charges

Several penalties exist under Tennessee law for charging excessive interest or charges. The most typical of which is to refund the excessive interest or credit against principal the excess amount. Tennessee Code Annotated § 47-14-117 provides for refund of excess “loan charges,” “commitment fees” and “brokerage commissions” as well. A contract that on its face requires the payment of excessive interest, loan charges, brokerage commissions, or commitment fees is not enforceable as to the excessive interest or charges, but the lender generally may sue to recover all amounts that are lawful. Thus, courts have generally enforced savings clauses that modify these rates and charges to amounts allowable under Tennessee law. If the lender is guilty of “unconscionable conduct” a “calculated violation of the statutory limitations . . . with full awareness [of them]” the lender may be forced to forego and refund all interest and charges. Tenn. Code Ann. §§ 47-4-117(c)(1)–(2). The willful collection of usury is a Class A misdemeanor.” Tenn. Code Ann. § 47-14-112.
O. Interest Rate Choice of Law

Tennessee’s General Usury Act has a choice of law section. Tenn. Code Ann. § 47-14-119. It provides that the lender and borrower may choose the laws of any state or nation bearing a reasonable relationship to the transaction, unless the loan is a consumer loan governed by Federal Consumer Credit Protection Act (Reg. Z); see also, Goodwin Bros. Leasing v. H&B, Inc., 597 S.W.2d 303 (Tenn. 1980).

P. Statute of Limitations

Tennessee has conflicting statutes setting the statute of limitations on usury claims: Tenn. Code Ann. § 28-3-107 (enacted in 1903) states that there is a two-year statute of limitations (running from “the date of the payment of the debt upon which such claim for usury shall be based”); whereas Tenn. Code Ann. § 47-14-118 (enacted in 1979) states that there is a three-year statute of limitations (measured “from the date of last payment of the same or foreclosure or court action, whichever ensues first”).

Q. Most Favored Lender Doctrines

Tenn. Code Ann. § 45-2-1108 provides that a Tennessee chartered bank may charge any rate that a national bank in Tennessee may charge. See also 12 U.S.C. § 85, which provides that a “National Association” (i.e., a national bank) may charge any rate that an entity licensed in Tennessee may charge. Accordingly, two federal district courts interpreting Tennessee law have found that a Tennessee bank may charge what any other licensed Tennessee lender may charge. For the purpose of “rate exportation” the Tennessee Department of Financial Institutions will typically require what is referred to as “cloning.” For instance, should a financial institution seek to charge interest at a rate of 24 percent per year, as is allowed by Tennessee law for Tennessee Industrial Loan and Thrift Companies (Thrift Act) (Tenn. Code Ann. § 45-5-101 et seq.), the department will typically require the lender to observe certain loan charge limitations. These may include, by example, the general prohibition against prepayment penalties applicable to Tennessee Thrifts and other limitations on loan charges.

V. Types of Borrowers

A. Corporations

nonprofit corporations are subject to the Tennessee Nonprofit Corporation Act, which is codified as Chapters 51 through 58 of Title 48 of the Tennessee Code. Tenn. Code Ann. § 48-51-101.

Specialized types of corporations and business associations are provided for in the following statutes:


Tennessee profit and nonprofit corporations must file a charter or certificate of incorporation with the Tennessee Secretary of State. The necessary forms are available online at the Secretary’s website and may be found at http://www.tennessee.gov/sos/bus_svc/forms.htm. A corporate formation document or charter must include the corporation’s name, number of authorized shares, name and address of initial registered agent, name and address of incorporators, address of principal office, and a statement that the corporation is for profit.

Lenders customarily will obtain a certificate of existence from the Tennessee Secretary of State as evidence of the corporation’s status and powers in connection with obtaining a loan. Tennessee does not offer certificates of good standing. Also, the Secretary of State will indicate the history of the registered entity, whether it is active or has been formally or administratively dissolved and whether it has filed annual reports, and so on, online. Certificates of existence for corporations, LLCs, limited partnerships (LPs), and limited liability partnerships (LLPs) can be requested at http://www.tn.gov/sos/forms/ss-4238.pdf. The Tennessee Secretary of State does not maintain copies of corporate bylaws. Lenders customarily obtain a resolution of the board of directors or shareholders, certified by the secretary of the corporation, authorizing the corporation to borrow the funds.

Certificates of existence are also available for all corporations qualified as foreign corporations with the Tennessee Secretary of State.

B. Partnerships

Tennessee recognizes three types of partnerships: (1) general partnerships (“GPs”), (2) limited partnerships (“LPs”) and (3) registered limited liability partnerships (“LLPs”). Title 61 of Tennessee Code Annotated covers all three

Lenders to a general partnership customarily obtain a copy of the partnership agreement, if one exists. 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, including a certificate that the partnership is controlled by the partnership agreement and has not dissolved. While not required for its formation or existence, a general partnership may “register” with the Tennessee Secretary of State to provide a record of certain incumbency issues. This form can be found at http://www.tn.gov/sos/bus_svc/forms.htm#gp.

When lending to a Tennessee LP or registered LLP, lenders customarily obtain from the Tennessee Secretary of State a certificate of existence and a certified copy of the LP’s certificate of LP or the registered LLP’s application for registration. In the case of a foreign LP or a foreign registered LLP, lenders customarily obtain from the Secretary of State certificates of existence and certified copies of the foreign LP’s or the foreign LLP’s application for registration to do business in Tennessee, as well as appropriate certificates from the partnership’s home state. Tennessee does not provide certificates of good standing.

General partners in a general partnership or a LP are jointly and severally liable for all obligations of the partnership arising in contract or tort. An action may be brought by a lender against the entire partnership or any and all individual general partners. Tenn. Code Ann. §§ 61-1-306 and 307. Although each general partner is personally and individually liable for the entire amount of partnership debts, a partner compelled to pay more than that partner’s pro rata share of the debt is entitled to contribution from the other partners.

Limited partners are not liable for partnership debts beyond their contributions and partners in a registered LLP are not personally liable for the obligations of the LLP.

Lenders looking to individual partners for full repayment of a partnership loan customarily require the individual partners to sign a personal guaranty with respect to the loan amount.

C.  Limited Liability Companies

The Tennessee Limited Liability Company Act of 1994 (Tenn. Code Ann. § 48-201-101 et seq.) authorizes the use of limited liability companies (“LLCs”) to carry on a business in Tennessee. The Tennessee Revised Limited Liability Company Act (Tenn. Code Ann. § 48-249-101 et seq.) became effective on January 1, 2006, and applies to all LLCs formed in Tennessee after that date, and to LLCs formed prior to that date that choose to file an amendment to the
articles of organization electing to be governed by the new act. The primary differences between the Limited Liability Act of 1994 and the new act in the context of commercial lending are that LLCs governed by the new act may be member managed, director managed or manager managed, as opposed to the options of member managed and governor managed of the earlier act. The LLC’s operating agreement should explain the manner in which the company is managed. Lenders customarily require a 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 and member approval is not required).

A Tennessee LLC must file articles of organization with the Secretary of State containing the name of the LLC; the street address of the LLC’s registered office and the name of its registered agent for service of process; the name and address of each organizer; an indication whether the LLC will be member, manager, or director managed; and the number of members. The Tennessee Secretary of State provides articles of organization at http://www.tn.gov/sos/forms/ss-4270.pdf.

Lenders customarily obtain a copy of the LLC’s articles of organization, and a certificate of existence from the Tennessee Secretary of State. The Tennessee Secretary of State does not maintain copies of Tennessee LLC operating agreements. Lenders will typically obtain these from the company in support of diligence concerning the authority of the LLC to borrow funds.

Individual members of an LLC are generally not liable for company debts though they can make that election in connection with formation or by amendment. This will typically save the imposition of Tennessee Franchise and Excise Tax. Tenn. Code Ann. § 67-4-201 (Franchise) and Tenn. Code Ann. § 67-4-2001 (Excise). Generally however, Lenders looking to individual members for full repayment of an LLC loan must have the members separately obligate themselves with respect to the loan through guarantees.

An LLC organized under the laws of another state may be required to register with the Tennessee Secretary of State to do business in Tennessee. Lenders customarily obtain a certified copy of the foreign LLC’s application for registration and a certificate of existence from the Tennessee Secretary of State, as well as a copy of the LLC’s formation documents and, if available, a good standing certificate from the state in which it is organized. The new allows foreign LLCs to convert to Tennessee LLCs provided that the laws of the foreign jurisdiction allow such conversions.

It is important to determine whether a Tennessee LLC is governed by the old or new act, as it may have various implications for the transaction. The new act adopts many of the concepts that exist in Delaware. It adds the director managed LLC, which is analogous to a corporation, and the family LLC, which is similar to the family LP. Although the new act represents a major revision of the prior law, many of the procedural aspects of creating an LLC in Tennessee remain the same.

Professional Limited Liability Companies are governed by Tennessee Code Annotated Section 48-249-1101 et seq.
D. Proprietorships and Individuals

1. Marital Property Laws

A married couple will hold real property conveyed to both of them (as well as personal property) as tenants by the entireties unless specified otherwise. Tenancy by the entireties is a joint tenancy characterized by a right of survivorship. Generally, real property held by tenants by the entireties cannot be reached by a creditor of only one of the spouses; however, the creditor can reach that individual spouse’s interest in the property. Should that spouse be the second to die, the creditor’s interest will be complete. Typically, a creditor of only one spouse has no right to partition the property. Lenders should 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. In addition, Tennessee Code Annotated section 47-18-805 exempts a spouse from liability on a debt unless the spouse has executed the credit application. At the time of this publication regulators enforcing provisions of Reg. B have been somewhat inconsistent in its application. It is best that only owner spouses guarantee commercial loans and/or non-owner spouses who have joined in loan applications state clearly that their intent to guarantee an obligation is informed and voluntary. Provided other requirements are met (e.g., joint application) insisting on a spouse’s guaranty is generally supported under Regulation B, if the spouse is an owner of the business of the borrower.

2. Property Held in Joint Tenancy with Right of Survivorship; Other Tenancies

Tennessee recognizes tenancies in common and tenancies by the entireties, as well as life estates and other lesser estates. Although joint tenancies without the right of survivorship exist in Tennessee, joint tenancies with the right of survivorship have been abolished in Tennessee, per Tenn. Code Ann. § 66-1-107. Tenants-in-common can expressly reserve a right of survivorship. Listing husband and wife as “grantees” in a deed or conveyance creates a tenancy by the entireties, without need for additional words. Title 66 further provides basic guidance as to the language conveying various estates in property. Several specific provisions are of note. Estates in “tail” are abolished and deemed to be fee simple absolute. Tenn. Code Ann. § 66-1-102. The term “heirs” is not required to convey an estate in fee. The Rule in Shelley’s Case has been abolished by Tenn. Code Ann. § 6 6-1-103. In other words, heirs of the body of the holder of a life estate are determined on the date of termination of the life estate.

3. Property Exempt from Claims of General Creditors

Certain assets of individual debtors in Tennessee are exempt by statute from seizure to satisfy claims of general unsecured creditors. These assets include one parcel or item of real property not to exceed $5,000.00 in value per individual,
or $7,500.00 for a couple, which the individual/couple uses as a residence. In the event one spouse is 62 or older, the exemption is increased to $12,500.00 for an individual and $20,000.00 for a married couple. Tenn. Code Ann. § 26-2-301. In addition, individuals may select for exemption up to the aggregate value of $10,000.00 of personal property, including money and funds on deposit with a bank or other financial institution. Tenn. Code Ann. § 26-2-103. Tennessee absolutely exempts social security, veterans and disability benefits, and accident, health, or disability insurance benefits. Tenn. Code Ann. §§ 26-2-110 and 111. Also absolutely exempt are clothing and the trunks or receptacles necessary to carry them, family portraits and pictures, and the family bible. Tenn. Code Ann. § 26-2-104. Tennessee has opted out of the federal exemption scheme under the Bankruptcy Code, 11 U.S.C. Section 522, so that only Tennessee exemptions may be asserted.

4. **Age of Majority**

The age of majority in Tennessee is 18 years of age. Tenn. Code Ann. § 1-3-113(a).

E. **Trusts and Estates**

1. **Trusts**


2. **Estates**

All claims against a probate estate must be filed within the period set forth in the notice published or posted in accordance with Tenn. Code Ann. § 30-2-306(b) if the estate is probated creditors must file claims within four months after receipt the statutory notice. Tenn. Code Ann. § 30-2-306 (statutory form included), but only sixty days if the creditor received the notice more than sixty days prior to the expiration of the four-month period.

VI. **Real Estate Lending**

A. **Property Rights**

Rights in real property are generally governed by Title 66 of the Tennessee Code Annotated and by common law. Title 66 covers conveyances, statutory forms of deeds, partition, condominiums, conveyances of land, leases and lien rights to name a few. Tennessee is not a community property jurisdiction.
Dower and curtesy have both been abolished. Homestead and statutory rights of redemption have not been abolished and must be waived in a deed of trust or other document. The following waiver should be sufficient:

Waiver of Redemption Rights, Exemptions, etc. Any sale of any or all of the Property pursuant to the power of sale or judicial sale provided for herein or in realization of the security interests granted herein shall be made free from the equity of redemption, statutory right of redemption, homestead, dower, curtesy, elective share, appraisment, exemption rights and all other rights and interests of Grantor, all of which are hereby expressly waived and/or assigned to the Trustee.

Unless each of the statutory right of redemption and equity of redemption are waived in a deed of trust, any real estate sold for debt shall be redeemable any time within two years following such sale. Tenn. Code Ann. § 66-8-101.

1. **Timber Rights**

Timber rights may be included, excluded or reserved to the seller in a deed of conveyance of real property. Standing timber may be conveyed by timber deed. See, e.g., Remote Woodyards, LLC v. Ex rel. Romie Neiser, et al., 340 S.W.3d 411 (Tenn. App. 2009). Once removed/cut, timber is generally considered personal property.

2. **Mineral Rights**

Likewise, mineral rights may be included, excluded or reserved to the seller in a deed of conveyance of real property. Courts of general jurisdiction have the authority to determine mineral rights. The Oil and Gas Board, however has concurrent jurisdiction with Tennessee courts including the authority to determine unit participation. Freels v. Northrup, 678 S.W.2d 55 (Tenn. 1984). Conversely, Crawford v. Tennessee Consol. Retirement System, 732 S.W.2d 293 (Tenn. App. 1987) indicated that the doctrine of original jurisdiction required litigants first to exhaust their administrative remedies with the Oil and Gas Board before turning to the courts.

3. **Water Rights**

Water rights, too, may be conveyed by deed or reserved to the grantor in a deed. Wolfe v. Hammer, 303 S.W.2d 716 (Tenn. 1957) (reserving rights to a spring) and to a well in Lynn v. Turpin, 215 S.W.2d 794 (Tenn. 1948). In Johnson v. Ford, 245 S.W. 531 (Tenn. 1922) rights to take water (riparian rights) from a stream granted by downstream residents for the construction of an Eastman Kodak plant were upheld. The issue of depleting subsurface water rights has been considered in Tennessee. Nashville, Chattanooga & St. Louis Ry. v. Rickert. 89 S.W.2d 889 (Tenn. App. 1935). Tennessee has a Waters, Waterways Drains and Levees Board as well as a Water Qualities Board. See, Tenn. Code
This is generally under the Tennessee Department of Environment and Conservation. Associated rules have been adopted. Tennessee primarily regulates groundwater that impacts surface water. Drilling permits are required for the drilling of wells. Often impact and feasibility studies are done in connection with well drilling, particularly for commercial use. The State of Tennessee essentially claims ownership to all water in the state. Tenn. Code Ann. §§ 68-221-702, 69-3-102(a), and 69-3-103 (unless water is contained in/upon only one property and its use does not interfere with other properties’ use). Water has been plentiful in Tennessee and laws concerning its ownership and use are still developing.

B. **Leases**

Leases constitute an interest in real property in Tennessee generally considered an appurtenance or incorporeal hereditament. Other than recording and execution requirements, commercial leases are not governed by statute and so are negotiated like any other form of contract. A lease, or memorandum thereof, for a term of more than three years may be recorded, in the office of the county Register of Deeds for the county in which the real property is located. Recodardation is required in order for the leasehold interest to be valid against anyone other than the lessor or persons with actual notice. Tenn. Code Ann. § 66-7-101. An assignment of a lease for security purposes that is recorded constitutes a valid assignment of the lease and resulting rents without the necessity of seizing, constructively or otherwise, the rents (although there is no provision under Tennessee for proceeds of real estate).5 Tenn. Code Ann. § 66-26-116.

C. **Condominiums**


A condominium may be created only by recording a declaration executed in the same manner as a deed. Tenn. Code Ann. § 66-27-301. The requirements for the contents of the declaration or master deed are set forth at Tennessee Code Annotated § 66-27-305, and include detailed descriptions of development and declarant rights. Liens for condominium assessments and dues under the 2009 Condominium Act are controlled by Tennessee Code Annotated § 66-27-415, which establishes certain priorities, in pertinent part:

(b)(1) A lien under this section is prior to all other liens and encumbrances on a unit, except: (A) Liens and encumbrances recorded before the recordation of the declaration; (B) A first mortgage or

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5No statutory law in Tennessee extends a security interest in real estate to its proceeds as exists with respect to personal property collateral. See e.g., UCC §§ 9-203, 9-305.
deed of trust on the unit recorded before the date on which the assessment sought to be enforced became delinquent; and (C) Liens for real estate taxes and other governmental assessments or charges against the unit.\textsuperscript{6}

D. Types of Real Property Security Instruments


Accordingly, in real property sales and transactions, equitable title to the real property is conveyed to the grantee via a deed, while legal title is conveyed to a trustee, on behalf of the beneficiary (usually a lender) via a deed of trust. While Tennessee recognizes mortgages, which may only be foreclosed judicially, they are not widely used. The statutes governing foreclosure of a properly executed and recorded deed of trust do not require a judicial proceeding. Tenn. Code Ann. § 35-5-101 \textit{et seq}. The trustee may convey complete title through the trustee’s power of sale contained in the trust deed.

1. Deeds of Trust

The trustee on a Tennessee deed of trust must be: (i) a Tennessee resident; (ii) a person whose principal place of employment is in Tennessee; or (iii) a Tennessee corporation or foreign corporation whose principal place of business is in Tennessee. Further, a Trustee may be a resident of another state only if that state accords equivalent authority to Tennessee “residents.” Tenn. Code Ann. § 66-24-123. There is some concern as to whether a valid deed of trust has been formed if the trustee does not meet one of the above requirements. Each deed of trust must provide the name and address of the trustee. A street address is not required if the deed of trust states the city or town and county of the trustee’s residence. Tenn. Code Ann. § 66-24-123(c)(1). This portion of the Tennessee Code provides exceptions for out of state trustees where the other state provides reciprocal rights.

Somewhat inconsistently with this general requirement, Tenn. Code Ann. § 35-5-114(d) (foreclosures) sets forth special notice requirements if a substitute trustee is not a resident of the state; however, a proper reading of the foreclosure statute would imply that this means the trustee merely is “located” out of state for notice purposes. If a substitute trustee is not a “resident” of Tennessee, there is a process to notice the debtor (and co-debtor, if any, together with “interested parties”) of the name and address of the substitute trustee or registered agent of the substitute trustee who is located in the state of Tennessee. Tennessee’s nonjudicial foreclosure statutes are codified in Title 35 of

\textsuperscript{6}This statute essentially codifies the language found in most condominium documents prior to January 1, 2009. There are certain exceptions found in the 2009 Condominium Act.
the Tennessee Code; Title 35 is titled “Fiduciaries and Trust Estates.” Tenn. Code Ann. § 35-5-101 et seq. There is little or no guidance from courts as to the scope of a trustee’s fiduciary duty to the beneficiary versus the scope of a trustee’s fiduciary duty to the grantor. Cases like Hawkins v. Spicer, indicate that, at a minimum, a trustee’s “relations to the mortgagor or debtor impose upon him the observance of fairness and good faith, and if he makes an improper use of the power and becomes the purchaser, he can retain the property only as security for his debt.” 101 S.W.2d 151, 153 (Tenn. Ct. App. 1936). Tennessee follows the minority rule that a trustee may bid for his or her own account at a trustee’s sale that he or she conducts. Id. Regular practitioners in Tennessee seem to agree with the notions that if fiduciary duties are owed to both the grantor and the beneficiary, they are less extensive than those of trustees in other fiduciary settings, with likely greater responsibilities to the beneficiary, and that the Trustee’s fiduciary duties are to ensure the foreclosure process is fair and follows the processes and procedures set forth in Tennessee foreclosure laws including adequate notice, equality in bidding and efforts to avoid chilling bidding at the sale.

2. **Mortgages**

Tennessee recognizes mortgages through common law; however, they are so rarely used that there is no useful authority as to what should be contained in one. Typically, a grant from the mortgagor directly to the lender/mortgagee should suffice provided other formal requirements for recordation of instruments are met. Mortgages must be foreclosed judicially.

3. **Real Estate Installment Contracts**

There is no restriction in Tennessee on the use of an installment contract for the purchase of real estate, except that:

any difference in such [cash and deferred payment] amounts charged with respect to the sale of real property to be owned and occupied by the purchaser as the purchaser’s principal place of residence for family residential purposes shall be considered to be interest rather than time-price differential.

Tenn. Code Ann. § 47-14-102(12). This statute comports with the more general notion that if real property is purchased in Tennessee via a real estate installment contract, interest, rather than time-price differential, should be used, to avoid the potential charge of usurious rates. As long as the same legends, acknowledgments and formalities required of other recordable documents are included, a real estate installment contract may be recorded. A real estate installment contract functions like a mortgage with title remaining in the seller until the full contract amount is paid. As a practical matter, real estate installment contracts are almost never encountered in Tennessee.
E. **Formal Requirements of Deeds of Trust and Mortgages**

1. **Preparer Legend**

   In order to be eligible for registration with a public office (Register of Deeds) each instrument to must contain a preparer’s legend on the face page. For example, it could read:

   This instrument was prepared by: Ernest B. Williams IV, PLLC (ebw)  
   P.O. Box 159264  
   Nashville, Tennessee 37215  
   Erniewilliams@ewivlaw.com  
   615 372-0997


2. **Description of Property**

   A deed of trust must include a sufficient legal description of the real property. A metes and bounds description, or other appropriate formal legal description, is not required but is recommended. A street address is probably not sufficient. At a minimum, the description must identify the parcel with plat reference. Surveys, while recommended, are not required under Tennessee law.

   Each instrument conveying an interest in real property (including deeds of trust) should contain a derivation clause showing how the current owner obtained the property (immediately preceding conveyance(s)):

   “Being the same property conveyed to [Grantor] by deed recorded at Book _____, page ____ [or Instrument No. ____________], Register’s Office for _______ County, Tennessee.”


F. **Assignments of Leases and Rents**

   Either a collateral or an absolute assignment of leases and rents may be accomplished within the deed of trust or by separate instrument, and both practices are common and equally effective. See Tenn. Code Ann. § 66-26-116. This assignment will be effective to create, at minimum, a collateral assignment of leases, valid against a trustee in bankruptcy without the need of gaining actual or constructive possession of the leases, rents or real property. See e.g., *In re Chestnut Hill Apts.*, 115 B.R. 116 (Bankr. M.D. Tenn. 1990). If by separate instrument, the assignment must be executed with the same formalities as a deed of trust and must include a legally sufficient description of the real property and Tennessee recording tax statement.

   Absolute assignments of leases (actually one specific absolute assignment’s language) have been recognized to create an absolute assignment of leases and rents in all three federal bankruptcy districts in Tennessee. See e.g., *In re
Kingsport Ventures, 251 Bankr. 841 (Bankr. E.D. Tenn. 2000); In re JP Realty II, Inc., 2003 Bankr. Lexis 1719 (Bankr. M.D. Tenn. 2003). Counsel should be consulted to provide the specifics as to what is required to create a valid absolute assignment. Courts in all three federal judicial districts in Tennessee have held that the rents subject to an absolute assignment do not constitute cash collateral under the Bankruptcy Code.

Tennessee law contains no concept protecting or extending security interests in real property to proceeds. While a lease is an interest in real estate, proceeds, called rents, are typically paid with negotiable instruments and later, deposited into a deposit account. Both are Article 9 collateral.

G. Recordation and Acknowledgments

Real property security instruments are filed with the Register of Deeds for the county in which the property is located. If the real property is located in two or more counties, perfection is accomplished by recording in any of the counties in which the property is located, although taxes do not have to be paid more than once.

1. Transfer and Recording Tax

Tennessee imposes two types of tax on the recordation of instruments: transfer tax and recording tax.

(a) Transfer Tax

Transfer tax is imposed on conveyances of real property. It is in the amount of thirty-seven (00.37) cents per $100.00 value of the property. Tenn. Code Ann. § 67-4-409(a). Use this formula: actual consideration or value, whichever is greater times 0.0037 equals the amount of tax.

The following legend must appear on instruments (typically deeds) conveying interests in real property:

STATE OF TENNESSEE
COUNTY OF: ______________

THE ACTUAL CONSIDERATION OR VALUE WHICHEVER IS GREATER FOR THIS TRANSFER IS $_________

________________________________________
Affiant

SWORN TO AND SUBSCRIBED BEFORE ME, THIS ____ DAY OF _________, 20__

Notary Public

MY COMMISSION EXPIRES:

Transfer tax is not paid on: (i) a lease; (ii) conveyances from one spouse to another; (iii) conveyance by one or more spouses to a revocable trust; (iii) release of a life estate to the beneficiaries of a remainder trust; (iv) deeds executed by as personal representative to implement a testamentary device; and (v) divorce decrees. Tenn. Code Ann. § 67-4-409(a)(3). Transfer tax is payable on a quitclaim deed.

(b) Recording Tax

Recording tax (technically indebtedness tax) must be paid on each instrument filed to perfect/register a consensual security interest or deed of trust. Recording tax is calculated at a rate of eleven and one-half cents per $100.00 of indebtedness with an exemption for the first $2,000.00.

Each instrument must have on its face the following legend:


Tenn. Code Ann. § 67-4-409(b). The amount inserted in the blank, however, should be the maximum principal indebtedness prior to subtracting $2,000.00, as opposed to the amount of tax.

“Indebtedness” means the principal debt or obligation that is reasonably contemplated by the parties to be included within the terms of the agreement. “Indebtedness” does not include any amount of interest, collection expense (including, but not limited to, attorney’s fees), and expenses incurred in preserving, protecting, improving, or insuring property which serves as collateral for the indebtedness, or any other amount, other than the principal debt or obligation. Tenn. Code Ann. § 67-4-409(b)(5)(A).

If the instrument is given to secure the performance of an obligation other than the payment of a specific sum of money, recording tax is paid the value of the property covered by the instrument. In this case recording tax must be supported by a sworn statement by the owner of the property. Tenn. Code Ann. § 67-4-409(b)(5)(B).

For lines of credit or construction loans, recording tax is paid on the credit limit whether or not drawn. Tenn. Code Ann. § 67-4-409(b)(D).

Where the collateral is located in more than one state, tax may be apportioned and paid on the basis of the ratio of the value of the Tennessee collateral to the value of all collateral wherever located (including in Tennessee), by applying the following mathematical formula:

\[
\text{value of Tennessee collateral/value of total collateral} = \frac{\text{value of Tennessee collateral}}{\text{value of total collateral}} = \frac{\text{value of Tennessee collateral}}{\text{value of total collateral}} \times \text{indebtedness} = \text{taxable Tennessee indebtedness.}
\]


For all increases in indebtedness, additional tax without the $2,000.00 exemption/deduction must be paid within sixty days.
Failure to pay indebtedness tax can prohibit or stay a suit on a deficiency or on the debt until the failure is cured by paying the amount of the tax originally due plus with twice that amount (for a total of three times the tax) plus $250.00. If this provision is raised as a defense to an action on the indebtedness, the action is subject to dismissal without prejudice until tax plus the penalty is paid. Once raised in a motion or other responsive pleading, the Lender cannot force the borrower to pay the tax plus penalty. Tenn. Code Ann. § 67-4-409(b)(13).

Further, Tenn. Code Ann. § 67-4-409(b)(11) imposes a lien for unpaid recording taxes in favor of the Department of Revenue.

No recording/indebtedness tax is due upon the recordation of: judgment liens, contractors’ liens, subcontractors’ liens, furnishers’ liens, laborers’ liens, mechanic’s and materialmen’s liens, or financing statements filed pursuant to the Uniform Commercial Code, compiled in title 47, that secure an interest solely in “investment property.” Tenn. Code Ann. § 67-4-409(b)(1).

2. **Torrens System**

Tennessee does not employ a Torrens system.

3. **Notary Acknowledgments**

In order to be eligible for recordation, each signature generally should be acknowledged by a notary public. Tennessee Code includes statutorily prescribed notary forms. Tenn. Code Ann. § 66-22-101 et seq. While statutory law includes various additional methods of authentication including witnesses physically appearing before the clerk of a court, notary acknowledgment is the common method of authenticating any instrument transferring an interest in real estate. Various decisions have struck down a notary acknowledgment that either did not follow the statutory forms or, in one case, because it was scanned by the Register of Deeds, returned to the mortgagee and lost. The impressed notary seal was not visible. An “ink” seal is highly recommended in Tennessee.

Tennessee law recognizes and gives effect to notary forms of other states for acknowledgments taken in other states. Tenn. Code Ann. § 66-26-103. Tenn. Code Ann. § 66-26-113 provides omission of words in a notary acknowledgment do not render it ineffective provided the substance required by law is there. Nonetheless, it is recommended to utilize statutory notary acknowledgment forms in Tennessee.

4. **Recording Fees**

Recording fees for releases, deeds, deeds of trust, amendments, leases, restrictions, agreements, liens, judgments and assignments are twelve dollars for the first two pages and five dollars per each page thereafter. For releases the twelve dollars will ordinarily be assessed for each document released. For instance, if the release releases two deeds of trust, then twenty-four dollars will be
assessed. Financing statements are fifteen dollars for the first ten pages, and fifty cents for each page thereafter. There is an additional fee of fifteen dollars for each additional party indexed (husband and wife are considered two parties). A twelve-dollar release fee is charged for each real estate instrument being released. For any instrument requiring the receipt for the payment of transfer tax or mortgage tax, an additional one dollar, is required.

H. Priority Issues

1. Future Advances

Tennessee’s Open End Mortgage Act sets forth statutory requirements for future advances made with respect to deeds of trust, and protects most obligatory future advances, including construction advances, provided the appropriate language is stated on and contained in the deed of trust. Tenn. Code Ann. § 47-28-101 et seq. The Open-End Mortgage Act distinguishes between “obligatory advances,” which have priority from the time of recording, and “optional advances,” which can become subject to later filed liens. Tenn. Code Ann. §§ 47-28-102 and 103. Optional future advances, such as those contingent on a later event such as an increase in a credit limit as opposed to obligatory advances (for instance up to the stated credit limit in a construction mortgage but subject to property inspection and approval), are not entitled to priority if the advancing mortgagee has “actual notice of the intervening conveyance or encumbrance prior to exercising the mortgagee’s option to make the advance.” Tenn. Code Ann. § 47-28-103(c); JPMorgan Chase Bank v. Fifth Third Bank, N.A., 222 Fed. Appx. 444, 449 (6th Cir. 2007). Advances, costs, fees and expenses in connection with collection and foreclosure are typically accorded priority and not considered optional.

In order to ensure that the future advances are entitled to priority, the deed of trust must contain: (a) a statement conspicuously identifying the instrument as an open-end mortgage or other identification such as a commercial line of credit or construction loan; (b) a provision fixing a stated term for the duration of the open-end credit agreement (consumer), not to exceed a total of thirty years; (c) a provision stating the credit limit; (d) a conspicuous notice to the borrower of the borrower’s right to reduce the credit limit (consumer provision—this requirement may also be satisfied by a separate agreement); and (e) a provision, either in the instrument or in a separate credit agreement, governing the duty of the borrower to return the devices used to obtain further advances (consumer). Tenn. Code Ann. § 47-28-104(a). In commercial loans, the instrument “must contain a statement or other notice identifying the mortgage as securing obligatory advances and as being for commercial purposes.” Tenn. Code Ann. § 47-28-104(b). Each future advance deed of trust should state, by legend, generally on the face page the nature of the future advances (e.g., “Line of Credit” or “Construction Mortgage”) and should contain, internally, a provision concerning the priority of future advances. Special rules apply for consumer home equity lines of credit.
2. **Modifications of Deeds of Trust and Mortgages**

Deeds of trust, mortgages and other instruments may be modified in writings executed by the parties and, in order to be effective against (subsequently recorded) third parties, must be made of record. Caution should be observed concerning the use of so called “scrivener’s error” notices. For instance, should the original deed of trust fail to contain a description of the property, contain a description of the wrong property or fail to contain the signature of a conveyancer, such a defect cannot be corrected only by the preparer of the instrument. The corrective instrument should be executed by each party to be bound.

3. **Purchase Money Priority**

Tennessee employs a race notice system respecting mortgages/deeds of trust. There is no specific purchase money priority for deeds of trust executed in connection with a purchase.

4. **Priority of Options to Purchase**

Generally, an unrecorded option to purchase is invalid against a prior or subsequent mortgagee without actual knowledge of the option. However, if the mortgagee has knowledge and accepts the return of the real property through a deed in lieu rather than foreclosure, it takes subject even to the rights of even an option to purchase executed after the deed of trust. *Budensiek v. Williams*, 1988 Tenn. App. Lexis 623 (Tenn. App. 1988). A prior recorded option to purchase, however remains a cloud on title exercisable following the foreclosure of the deed of trust.

5. **Priority of Rights of Reverter**

Under Tennessee law, a mortgagee can only be granted the right the mortgagor possesses. For instance, a mortgage on a life estate will terminate upon the death of the life tenant. *See e.g., Collins v. Smithson et al.*, 585 SW2d 598 (Tenn. 1979). A provision in a Will that prevented a 10 year restriction on alienation following the testator’s death was found to be void as a total restriction on alienation. *Hawkins v. Matthews* 425 S.W.2d 608 (Tenn. 1968).

6. **Equitable Subrogation**

The Tennessee Supreme Court has defined equitable subrogation as:

the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debts. The doctrine is one of equity and benevolence, and like contribution and other similar equitable rights was adopted from the civil law, and its basis is the doing of complete, essential, and perfect justice between all the parties without regard to
form, and its object is the prevention of injustice. The right does not necessarily rest on contract or privity, but upon principles of natural equity, and does not depend upon the act of the creditor, but may be independent of him and also of the debtor.


Equitable subrogation is an exception to the general rule, set forth in Tenn. Code Ann. § 66-26-105, that a first-filed document has priority over a later-filed document. Since “[t]he object of subrogation is to promote and accomplish justice and to prevent injustice,” a court must balance the equities of the parties competing for priority status. **Castleman Constr. Co.**, 432 S.W.2d 669, 673 (Tenn. 1968). “Since subrogation is a remedy invented by courts of equity, they will move to administer it where the result will be an equitable one, but not to work an injustice to another in the defeat of an equal equity. . . . [T]he doctrine of subrogation [is] to be enforced only in favor of a meritorious claim where the equities and countervailing equities must be weighed.” **Id.** Subrogation is not to be enforced against superior equities. **Id.** at 676. “Culpable negligence”—which occurs when failing to perform a duty owed to another—acts as a bar to equitable subrogation, but if a lender has a duty to record its lien, this duty is to itself. **Bank of N.Y. Mellon v. Goodman**, 2014 Tenn. App. LEXIS 217, *19 (Tenn. Ct. App. Apr. 16, 2014) (citing Dixon v. Morgan, 285 S.W.558, 562 (Tenn. 1926)). Tennessee courts seem to be less forgiving of recording mistakes by large, sophisticated financial institutions, **Bank of N.Y. Mellon v. Goodman**, 2014 Tenn. App. LEXIS 217, *27-*28 (Tenn. Ct. App. Apr. 16, 2014), although new purchase money paid to satisfy a first judgment lien may be sufficient to create priority over a second and third judgment lien, as in **Trustmark National Bank v. Deutsche Bank National Trust Company**, 2010 Tenn. App. LEXIS 525, *15 (Tenn. Ct. App. Aug. 19, 2010).

7. **Subordination Agreements**

Subordination agreements are generally effective as written in Tennessee. Subordination of lien priority may be effective between parties without recordation; however, recordation is required as to third parties without actual notice.

1. **Title Insurance**

In Tennessee commercial lending transactions a lender’s policy of title insurance is typical, although title guaranties are common in northeast Tennessee. Attorney opinions are often accepted but are not insurance. The American Land Title Association (ALTA) forms of title insurance policies (typically ALTA 2006) and endorsements are in use. The Tennessee Department of Commerce and Insurance regulates title insurers, title agencies and premiums for policies and most endorsements, making strength of the underwriter and service the principal considerations when selecting a title insurance agency. Each title insurance agency is required to be duly licensed and registered with the Department of Commerce.
and Insurance and maintain a surety bond. Agencies are required to maintain separate errors and omissions policies (malpractice insurance) which is required by all title underwriters. Tennessee maintains a modified grantor/grantee indexing system. Each title search should reference plat maps, and reference to all plats, maps, surveys, and drawings should be carefully observed.

J. **Due on Sale/Due on Encumbrance Clauses**

Due on sale and due on encumbrance clauses are generally enforceable in a commercial setting.

K. **Transfer of the Mortgaged Property; Assumption Agreements**

Assumption agreements are generally enforceable.

L. **Transfer of Deeds of Trust and Mortgages**

A deed of trust is may assigned by a separate instrument that includes an acknowledgment; however, this is not a requirement under Tennessee law. The instrument must be recorded in the office of the county recorder in the county where the original deed of trust was recorded. Under Tennessee law, the deed of trust follows the note, *Thompson v. Bank of America, N.A.*, 773 F.3d 741, 751 (6th Cir. 2014); Tenn. Code Ann. § 47-9-203(g). No instrument needs to be recorded for the mortgage to be conveyed to a new lender. *W.C. Early Co. v. Williams*, 186 S.W. 102, 103 (Tenn. 1916). However, one very widely criticized Sixth Circuit decision interpreting Tennessee law has held an assignment to be necessary and created the possibility of separating the note from the underlying indebtedness. *In re Maryville Sav. & Loan Corp.*, 760 F.2d 119 (6th Cir. 1985). This case generally is considered overruled by adoption of revised Article 9 of the Uniform Commercial Code in 2001.

M. **Cancellation of Deeds and Trust and Mortgages**

When a debt secured by a deed of trust (or by a lien) has been fully paid or satisfied, the mortgagee or other legal holder of the debt must satisfy the record by a formal release. Tenn. Code Ann. § 66-25-101(a). This is typically done by the beneficiary of the deed of trust, rather than by reconveyance by the trustee. Tennessee specifically penalizes a mortgagee’s or lienholder’s failure to timely release a deed of trust, mortgage or other lien securing obligations that have been satisfied. If more than forty-five days passes after a written request to release, the lienholder must pay a penalty of $100.00. Tenn. Code Ann. § 66-25-102(a) If the deed of trust remains unreleased after thirty days from a second written request, the lienholder must pay $1,000.00 plus additional costs, court costs and attorneys’ fees. Tenn. Code Ann. § 66-25-102(b). The lienholder may not charge the grantor the costs and expenses of releasing a lien.
N. Default and Foreclosure Remedies

1. Types of Foreclosure Proceedings

Tennessee recognizes two types of foreclosure proceedings: judicial and non-judicial proceedings. Nonjudicial power of sale foreclosures are overwhelmingly the norm in Tennessee. Judicial foreclosures are usually limited to unusual situations, such as the existence of a civil judgment lien (as opposed to a federal tax lien) in favor of the U.S. Government, or an M&M lien. (Realization on a judgment lien as against real property is accomplished by a sheriff’s sale, discussed infra.) A deed of trust in Tennessee should have a waiver clause to ensure that redemption and other rights are extinguished at the foreclosure sale. Such a waiver clause may read, as set forth in Section VI.A.

An uncontested nonjudicial foreclosure is relatively speedy in Tennessee, sometimes even as short as thirty days after the default has been noticed.

2. Receivership Provisions in a Deed of Trust

Receivership is an equitable remedy, generally available in Tennessee, see infra. A provision giving the lender the right to appoint a receiver in a Tennessee deed of trust is generally enforceable. *Equitable Life Assurance Society v. Ellis*, 16 Tenn. App. 551, 65 S.W.2d 250, 255 (1933); see also *United States v. Berk & Berk*, 767 F.Supp. 593, 597 (D. N.J. 1991) (“factors a court may consider [in whether to appoint a receiver] include: . . . the mortgage contract contains a clause granting the mortgagee the right to a receiver . . . .”). Under appropriate circumstances, the appointment of a receiver may be made on an ex parte basis. *Tennessee Pub. Co. v. Carpenter*, 100 F.2d 728, 732 (6th Cir. 1938). The receiver becomes an officer of the court. The receivership order must specify the specific powers and duties of the receiver. *Gibson’s Suits in Chancery*, § 24.20. “The receiver must be careful to function within his or her powers, and to fully, prudently and faithfully discharge his duties.” *Id.* § 24.22.

3. Deed of Trust Foreclosures Through Power of Sale

(a) Generally

Foreclosures are covered at Tenn. Code Ann. § 35-5-101 et seq.

(b) Appointment of a Substitute Trustee

Generally, the beneficiary of a deed of trust may appoint a successor or substitute trustee by recording such an appointment in the land records of the county where the property is located. Tenn. Code Ann. § 35-5-114(b). Most Tennessee deeds of trust grant this power to the beneficiary in the beneficiary’s sole discretion. In the event the substitution of a trustee is not recorded prior to the first date of publication, the beneficiary must include in the substitution of trustee instrument, which must be recorded prior to the
Beneficiary has appointed the substitute trustee prior to the first notice of publication as required by T.C.A. § 35-5-101 and ratifies and confirms all actions taken by the substitute trustee subsequent to the date of substitution and prior to the recording of this substitution.

Further:

If the name of the substitute trustee is not included in the first publication, then, not less than ten (10) business days prior to the sale date, the substitute trustee shall send notice by registered or certified mail to the debtor or any co-debtor, as provided in § 35-5-101, and to any interested parties [see infra], giving the name and address of the substitute trustee. If the trustee is not a resident of the state of Tennessee, the notice shall include the name and address of a registered agent of the substitute trustee who is located in the state of Tennessee. Record notice of the mailing provided in this subsection (d) shall be evidenced by the substitute trustee’s recordation of an affidavit recorded prior to the deed evidencing the sale or by recitation on the substitute trustee’s deed.

Tenn. Code Ann. § 35-5-114(d). Note that Tenn. Code Ann. § 66-24-123, supra, requires that a Trustee be a Tennessee resident. This discrepancy is an unexplained inconsistency between Tennessee statutes.

(c) Procedure and Timeline for Foreclosure

A foreclosure sale of real estate under a deed of trust must be advertised at least three “different times in some newspaper published in the county where the sale is to be made.” “Published” means any newspaper “published.” It need not be of general or daily circulation. The sale must be made between the hours of 10:00 A.M. and 4:00 P.M., but cannot occur on a Sunday or any state or federal holiday. Tenn. Code Ann. § 35-5-109. Practitioners should to check the deed of trust to see if there are additional requirements. “The first publication shall be at least twenty (20) days previous to the sale.” Tenn. Code Ann. § 35-5-101(b). If no newspaper is published in the county, the publication requirement is dispensed with and replaced by the physical posting of notices in “five (5) of the most public places in the county, one (1) of which shall be the courthouse door, and another in the neighborhood of the defendant; if of realty, in the civil district where the land lies.” Tenn. Code Ann. §§ 35-5-102 and 103.

Copies of the notice must be sent by registered or certified mail, return receipt requested, on or before the first day of publication to the debtor and any co-debtor at the property’s mailing address and, depending on circumstances written into the statute, the last known mailing address of the debtor and any co-debtor. Tenn. Code Ann. § 35-5-101(e). As a practical matter, it is common
for a foreclosing trustee to send foreclosure notices to a debtor both by certified
mail, return receipt requested, and regular U.S. Mail, so that if the certified
mail is returned as undelivered, the non-return of the letter by U.S. Mail indi-
cates physical receipt of the notice.

The foreclosure notice should repeat the waiver of any redemption rights
found in the deed of trust. These may include statutory rights of redemption,
equity of redemption rights, homestead, marital rights, dower, curtesy,
appraisement, etc., though some such rights have been abolished under Ten-
nessee law. The primary right is the statutory right of redemption.

The advertisement or notice must include the following: (1) the names of
the plaintiff and defendant, or parties interested. Tenn. Code Ann. § 35-5-
104(a)(1). “Parties interested” includes, without limitation, the record holders
of any mortgage, deed of trust, or other lien that will be extinguished or
adversely affected by the sale and which mortgage, deed of trust, or lien, or
notice or evidence thereof, was recorded more than ten (10) days prior to the
first advertisement or notice in the register’s office of the county in which the
real property is located. Tenn. Code Ann. § 35-5-104(d). (2) “[A] concise
description of the land; such description shall include a legal description,
which means a reference to the deed book and page that contains the com-
plete legal description of the property, and common description, which means,
if available, the street address and map and parcel number of the property. In
the event no street address exists, a subdivision, lot or tract number may be
used. A metes and bounds description may be, but is not required to be,
(3) The time and place of sale, which is frequently the courthouse steps of the
county courthouse where the property is located. Tenn. Code Ann. § 35-5-
104(3). (4) Identification of federal and state tax liens, a statement that the
requisite notice has been given, and a statement that the sale of the land is sub-
ject to the right of the United States or of the State of Tennessee to redeem the

As a preliminary matter, the foreclosing trustee must obtain a title search
of the property or title commitment as to the property in order to identify
“interested parties,” which may include a homeowners’ association, and the
existence of any state or federal tax liens. If federal tax liens exist, the trustee
must send the documentation required by 26 U.S.C. § 7425, and must do so
within 25 days of the date of the title commitment, or a down date of the title
commitment. If the title search reveals the existence of a Tennessee state tax
lien or liens, a similar procedure is set forth in Tenn. Code Ann. § 67-1-1433.
Failure to send appropriate state tax lien and IRS lien notices will result in a
sale subject to these liens, even if later filed. To extinguish such liens, gener-
ally, the sale itself, infra, must occur within thirty days of the title commitment,
or any down date thereof.

On the morning of the sale, the lender or trustee should check PACER or
other sources to confirm that neither the debtor nor any co-debtor is in bank-
rupcy. The trustee may appoint an agent to physically conduct the sale. Tenn.
Code Ann. § 35-5-114(a). While not necessarily required, practitioners are
advised to make an audio or video recording of the sale. The sale is typically an auction “at public outcry.” Practitioners are advised to get names and signatures of anyone attending the sale. The sale is conducted by reading the foreclosure notice to the assembled people, who then bid. The foreclosing trustee/lienholder is allowed to credit bid the amount of its lien. Liens inferior to the deed of trust being foreclosed are likewise entitled to credit bid with respect to any equity over the amount owed on foreclosing deed of trust, but must satisfy the lien of the foreclosing deed of trust in cash. The foreclosure is subject to superior liens, which remain in effect. The completion of the sale itself vests in the trustee both legal and equitable title to the property.

Because a bid at foreclosure sale can be considered a contract requiring compliance with the statute of frauds, the trustee at the sale often requires the execution of a contract by the high bidder. See Watson v. McCabe, 527 F.2d 286 (6th Cir. 1975). The terms of the contract vary, but typical provisions include specific performance language and delivery of 10 percent of the purchase price in good funds, to the trustee by the close of business on the day of the sale. Again, practices vary widely, the terms of the closing on the sale are negotiable, and final closing may be after the date of the auction. If the sale to the highest bidder falls through, the sale is typically made to the second highest bidder.

Contemporaneously with or after the receipt of sale proceeds, the trustee executes a trustee’s deed memorializing the sale and conveying the foreclosed property to the purchaser. Tenn. Code Ann. 35-5-114(a). The trustee’s deed must comply with the recordation requirements for other deeds and, in the event that notice of the sale was required to be sent to federal or state authorities due to the existence of a federal or state tax lien, copies of the notice(s) and any written response(s) from federal or state authorities must be attached to the trustee’s deed. Tenn. Code Ann. § 35-5-104(b). In form and content, trustee’s deeds in Tennessee closely resemble quitclaim deeds and are similarly free of warranties, but contain recitations concerning notice and details concerning the sale itself. Where there are tax liens that are foreclosed, the trustee’s deed must contain copies of all notices to taxing authorities and responses received from them.

Unless the deed of trust or another contract prohibits the practice (which would be unusual in Tennessee), the sale may be adjourned and rescheduled one or more times without additional newspaper publication, as long as: (1) the rescheduled sale is within one year of the original date; (2) each postponement or adjournment is made to a specified date and time, and announced at the date, time and location of each scheduled sale date; and (3) if the postponement or adjournment is for more than thirty days, notice of the new date, time and location is mailed, via regular mail, no less ten calendar days prior to the sale date to the debtor (and co-debtor, if applicable). Tenn. Code Ann. § 35-5-101(f).

When the debtor refuses to leave the foreclosed property, ordinary eviction procedures—a detainer warrant filed in General Sessions Court—are used to secure possession. Interestingly, wrongful foreclosure can be raised as an

Like most states, Tennessee allows the Trustee to sell both real and personal property in a single real estate foreclosure. Tenn. Code Ann. § 47-9-604(a)(2) and (b)(2). Foreclosure advertisements should be careful to note that the sale is for both. “Mobile homes” are considered personal property in Tennessee unless the certificate of title has been surrendered. Tenn. Code Ann. § 55-3-138.

It is important to note that Tennessee law allows a very short period of time in which to advertise and conduct a power of sale foreclosure. Accordingly, it is strongly suggested that such sales be handled by qualified local practitioners. Numerous cases have stricken sales or disallowed deficiencies based on chilling the bidding at the sale. Trustees have been held liable for conducting improper sales. The most common alleged defect is the trustee not being available to respond to debtors or interested parties. Trustees should be careful to provide equal access to information and to provide the same information to all interested parties. The trustee, however, is under no duty to indicate the amounts of liens against the property or to disclose the amount the foreclosing mortgagee will bid.

4. **One-Action and Anti-deficiency Statutes**

Tennessee does not have a “one-action” or “single action” rule. No Tennessee law precludes a secured creditor from foreclosing its security interest while simultaneously or later suing on the indebtedness. Tennessee does, however, have a statutory limitation on deficiency amounts respecting the foreclosures of deeds of trust and mortgages. Tenn. Code Ann. § 35-5-118.

Tennessee law on post-foreclosure deficiency amounts culminated in the 2006 Tennessee Court of Appeals’ holding in *Lost Mountain Development Company v. King*, 2006 Tenn. App. LEXIS 810, *28 (Tenn. Ct. App. Dec. 19, 2006), requiring that the sale price obtained at a foreclosure not be “materially less than the fair market value of property at the time of the foreclosure sale.” This holding was a departure from the previous standard which employed a “grossly inadequate” standard; a borrower disputing the amount of a post-foreclosure deficiency now only has to prove that the sales price at foreclosure was “materially less” than the property’s “fair market value.” In 2010, the Tennessee legislature codified the new rule from *Lost Mountain*, *id.* at Tenn. Code Ann. § 35-5-118.

In Tennessee, a creditor is entitled to bring suit against a debtor to recover a post-foreclosure deficiency balance in an amount sufficient to fully satisfy the indebtedness. Tenn. Code Ann. § 35-5-118(a). In all such actions, absent a showing of fraud, collusion, misconduct or irregularity in the process, the deficiency balance shall be for the amount of the indebtedness prior to the sale, plus costs of the foreclosure and sale (including reasonable attorneys’ fees), less the “fair market value” of the property on the date of the sale.
Code Ann. § 35-5-118(b). The creditor is entitled to a rebuttable presumption that the sale price of the property is equal to the fair market value of the property at the time of the sale. Tenn. Code Ann § 35-5-118(b). To overcome the presumption, the debtor must prove by a preponderance of the evidence that the property sold for an amount materially less than the fair market value of property at the time of the foreclosure sale. Tenn. Code Ann. § 35-5-118(c). If the debtor overcomes the presumption, the deficiency is the total amount of the indebtedness prior to the sale plus the costs of the foreclosure and sale, less the fair market value of the property at the time of the sale as determined by the court. Tenn. Code Ann. § 35-5-118(c).

So, what is fair market value? Since Lost Mountain, several courts have addressed this issue. In State of Franklin Bank v. Riggs, 2011 Tenn. App. LEXIS 584 (Tenn. Ct. App. Oct. 27, 2011), the debtors could not demonstrate that the lender’s credit bid of 86 percent of the highest appraised value was “materially less” than fair market. In Commercial Bank v. Lacy, 371 S.W.3d 121 (Tenn. Court App. 2012), the Court of Appeals held that when loan documents allow the lender to add to the indebtedness the property taxes paid by the lender, the tax amounts are properly part of the deficiency. In Greenbank v. Sterling Ventures, LLC, the lender made a credit bid of 89 percent of the highest appraised value of the property. 2012 Tenn. App. LEXIS 848 (Tenn. Ct. App. Dec. 7, 2012). The court found this was not “materially” or “significantly” less than the foreclosed property’s “fair market value,” but expressly stated that it could not “establish a bright-line percentage, above or below which the statutory presumption [of fair market value] is rebutted.” Greenbank, 2012 Tenn. App. LEXIS 848. In Capital Bank v. Brock, 2014 Tenn. App. LEXIS 382 (Tenn. Ct. App. June 30, 2014), the 15.8 percent difference between the foreclosure sale price and the price set forth in an appraisal made nine months after the foreclosure (that purported to value the property as of the date of the foreclosure sale) was insufficient to overcome the presumption that the foreclosure sale price represented the property’s “fair market value.”

5. Statute of Limitations for Seeking Post-Foreclosure Deficiencies

Tennessee Code Ann. § 35-5-118(d) establishes a two-year statute of limitations to collect a post-foreclosure deficiency, commencing the day after the date of the foreclosure sale and exclusive of any period of time in which a petition for bankruptcy is pending. While the statute refers to the statute addressing accrual of a right to bring suit and the state’s period of validity of liens (generally ten years), this new section seems to completely ignore the six-year statute of limitations for suing on a note after demand is made, as set forth in Tennessee Code Annotated § 47-3-118(b), although it specifically cites the statute governing accrual of a claim, Tenn. Code Ann. § 28-1-102. Accordingly, the Tennessee anti-deficiency statute appears to be aimed at ensuring that lenders seeking a post-foreclosure deficiency file suit within two years from the date of the foreclosure sale.
6. **Restraint of Trustee’s Sale**

Tennessee has a little known prohibition on courts’ issuance of injunctive relief to prevent a properly noticed and advertised foreclosure sale:

(a) No judge or chancellor shall grant an injunction to stay the sale of real estate conveyed by deed of trust or mortgage, with a power of sale, executed to secure the payment of a loan of money, unless the complainant gives five (5) days’ notice to the trustee or mortgagee of the time when, place where, and of the judge or chancellor before whom, the application for injunction is to be made.

(b) No judge or chancellor shall act upon the application unless the same is accompanied by proof, evidenced by return of a sheriff, constable, or attorney, that notice has been served on the trustee or mortgagee, or that the trustee or mortgagee is not to be found in the county of usual residence, or is a nonresident.


7. **Irregularities in Trustee’s Sale; Post-Sale Matters**

In Tennessee, a foreclosure sale that does not comply with the foregoing foreclosure statutes “shall not, on that account, be either void or voidable,” but the individual who failed to comply commits a Class C misdemeanor and is, moreover, liable to the party injured by the noncompliance, for all damages resulting from the failure. Tenn. Code Ann. §§ 35-5-106 and 107. Thus, generally, the trustee will pass good title to a *bona fide* purchaser but may incur personal risk.

8. **Junior Liens**

A junior lienholder does not have an obligation to mitigate its damages when a senior lien is foreclosed by bidding at the senior lender’s foreclosure sale and capturing any excess value that may exist over the balance owed to the senior lienholder. Proceeds obtained at a foreclosure which exceed the amount of the foreclosing lien are to be distributed according to the priorities established by law. For instance, assuming the foreclosing mortgagee is the first mortgagee, excess proceeds are to be distributed to parties “as their interests may appear.” This may mean proceeds may go first to payment of *ad valorem* taxes, which are a lien superior to any and all consensual mortgage interests, then to second mortgagees and so on with the ultimate excess proceeds paid to the mortgagor(s). It is not uncommon for a foreclosing trustee to interplead excess proceeds into the registry of a court of competent jurisdiction for a final determination of priorities. At the time of publication, legislation has been proposed to govern the order of priorities for disbursing excess proceeds.
9. **Deeds in Lieu of Foreclosure**

Tennessee recognizes deeds in lieu of foreclosure, with no special requirements or limitations. Deeds in lieu should be supported by valid policies of title insurance, as the opportunity to foreclose is generally lost once the mortgagee becomes the owner of the real property.

O. **Environmental Indemnities**

Environmental indemnities are typical in commercial real estate transactions and loans and are generally enforceable according to their terms.

P. **Mechanic’s Liens**

A contractor, subcontractor, laborer, or materialman for an improvement to nonresidential real property has lien rights under Tenn. Code Ann. § 66-11-101 et seq.

Mechanic’s and materialmen’s liens ("M&M liens") relate back to the time of "visible commencement of operations" by the individual lienholder, which excludes demolition, surveying, excavating, clearing, filling, grading, placement of sewer or drainage lines or other utility lines or work preparatory therefor, erection of temporary security fencing and delivery of materials therefor. Tenn. Code Ann. § 66-11-101(16).

Thus, each construction lender should assure itself that no visible commencement has occurred before funding and filing the construction deed of trust. An M&M lien attaches at the time of visible commencement of operations and continues unless there is a cessation of operation for more than ninety days.

To preserve an M&M lien, the lienholder must serve, by registered mail, a notice of nonpayment containing specific information. The lienholder may serve the notice on the addresses appearing on the building permit for the construction. The lien of a primary contractor continues for a period of one year from the date of the provision of the materials or services and such additional time as is necessary to resolve any lawsuit brought for enforcement of the lien. Tenn. Code Ann. § 66-11-106. A remote contractor must provide notice no later than ninety days after work is performed or materials are furnished. Tenn. Code Ann. § 66-11-115.

Numerous additional requirements are established concerning notice to parties, recordation of notices of lien, courts having jurisdiction, posting of bonds and filing or lawsuits respecting M&M liens. See, e.g., Tenn. Code Ann. § 66-11-126.

Q. **Collection of Property Tax and Insurance Impounds by Lenders**

There is little or no law in Tennessee relating to impound accounts for property taxes and insurance premiums in commercial mortgage transactions. Although there is no case or statute addressing the issue, loan document should expressly
allow the lender to apply amounts held in such impounds to the secured debt upon default.

VII. Personal Property Lending and Equipment Leasing

A. UCC Article 9 (Generally)

Tennessee has adopted Revised Article 9, eff. July 1, 2001, without material variation. Tenn. Code Ann. § 47-9-101 et seq. There are some nonstandard provisions of Article 9, which can be found at our website, www.ewivlaw.com, and include: (i) a modification to UCC § 9-311(a)(2) to preserve Tennessee’s temporary perfection with respect to titled vehicles; (ii) cross reference added to Food Security Act’s protection of buyers farm products in § 9-320(j); (iii) UCC § 9-516(b) failure to pay Tennessee indebtedness tax (§ 67-4-409(b)) is cause for the filing officer to refuse to accept the record; (iv) § 47-9-520 counties may reject filings for specific enumerated reasons but the Secretary of State may not; (v) § 47-9-253 response to search request by counties is optional but required for SOS; (vi) UCC § 9-612(b) ten-day predisposition notice is deemed reasonable for both consumer and commercial transactions (there are numerous obvious exceptions in case law); (vii) § 9-625(e)(3), statutory damages for failure to file termination statement cannot be recovered absent ten days authenticated demand for termination; § 9.503(A)(4) Tennessee has chosen alternative A under 2010 amendments—name on individual’s drivers license, § 9.317(e), 9.324(a) PMSI filing period is 30 days, not 20.

B. Possessory Liens

Tennessee Code Annotated Section 47-9-333 provides that a possessory lien on goods takes priority over a prior perfected security interest, unless the lien is created by a statute that provides otherwise. A “possessory lien” is an interest, other than a security interest or an agricultural lien, that is created by statute or rule of law, that secures the payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of his or her business, and whose effectiveness depends on the person’s possession of the goods.

C. Titled Motor Vehicles and Watercraft

The Tennessee Certificates of Title Act governs the perfection of security interests in motor vehicles not held as inventory. Tenn. Code Ann. § 55-3-101 et seq. Notation of the lienholder’s name on the face of the certificate of title is the exclusive method of perfection of motor vehicles, motorized bicycles, trailers, mobile homes and house trailers. Secured creditors may choose to surrender title on a manufactured home affixed to real property owned by the title owner of the manufactured housing unit by utilizing the procedure set forth in Tennessee Code Annotated Section 55-3-138. Watercraft are not titled
in Tennessee. While a boat trailer or utility trailer meets the definition of “semi-trailer” (Tenn. Code Ann. § 55-1-105(d)) one cannot title or register these in Tennessee.

D. **Duration of Financing Statements**

As under former Article 9, a filed financing statement under Revised Article 9 generally remains effective for five years. Tenn. Code Ann. § 47-9-515(a). There are exceptions to this general rule for public finance transactions and manufactured homes transactions providing up to thirty-year duration (Tenn. Code Ann. § 47-9-515(b)). In cases where the debtor is a transmitting utility (Tenn. Code Ann. § 47-9-515(f)), a financing statement remains valid until a release is filed. Unlike former Article 9, Revised Article 9 does not provide for the extended effectiveness of a financing statement that states that it relates to an obligation secured by a mortgage on Tennessee real estate and a security interest in collateral. A recorded deed of trust or mortgage that satisfies Revised Article 9’s fixture filing requirements will remain effective as a fixture financing statement until the mortgage is released, satisfied, or its effectiveness otherwise terminates as to the real property. Tenn. Code Ann. §§ 47-9-502(c) and 47-9-515(g).

E. **Termination Statements**

A termination statement must be filed within twenty days after the secured party receives an authenticated demand from a debtor, if (1) there is no remaining secured obligation (except for accounts or chattel paper that are sold or goods that are consigned); (2) the financing statement covers accounts or chattel paper that have been sold, but the underlying obligation has been discharged; (3) the financing statement covers goods that were the subject of a consignment to the debtor, but are not in the debtor’s possession; or (4) the debtor did not authorize the filing of the initial financing statement notice. Tenn. Code Ann. § 47-9-513(c). A debtor may seek actual damages for the secured party’s failure to file a termination statement, as well as supplemental damages of $500.00. Tenn. Code Ann. §§ 47-9-625(b) and (e).

F. **Filing and Other Fees**

The fee for filing and indexing a record, including a financing statement, with the Tennessee Secretary of State, under Tennessee Code Annotated Sections 47-9-5(a)(1) and (2) is fifteen dollars ($15.00). Tenn. Code Ann. § 47-9-525.

G. **Equipment Leasing**

1. **UCC Article 2A**

Tennessee has adopted without material variation the 1990 official text version of Article 2A of the UCC (which governs leases of personal property).
Personal property leases, while subject to Article 2A, are also subject to certain Tennessee taxation, real estate, certificate of title, and consumer protection statutes.

H. Miscellaneous Statutory Liens

Tennessee has enacted a variety of unusual liens for specific groups of people, entities or things, most but not all of which are possessory in nature; the exceptions are the employees’ and conveyances liens, described infra.

1. Vendor’s Liens

Tennessee’s vendor’s lien statutes are set forth at Tenn. Code Ann. § 66-10-101 et seq. This applies only to the credit sale of real estate. “The vendor of land, as each payment of the purchase money becomes due, may bring an action to enforce such vendor’s lien as vendor, and may have so much of the land sold as may be necessary to pay the money then due.” Tenn. Code Ann. § 66-10-101. This section was enacted to provide for those cases where no acceleration option had been given by the contract, a situation formerly quite common when purchase money was secured by vendor’s liens, as distinguished from the more modern practice of using a trust deed. Lawman v. Barnett, 177 S.W.2d 121 (Tenn. 1944). The land can be sold in parcels or in whole, and is subject to the right of redemption. Tenn. Code Ann. §§ 66-10-105 and 105.

2. Crop Liens

Tennessee’s crop lien statutes are set forth at Tenn. Code Ann. § 66-12-101 et seq. A landlord and one controlling the land (and his or her assignee) has a lien on all crops grown on the leased property for the payment of the rent for the year, whether the contract of rental be verbal or in writing. Tenn. Code Ann. § 66-12-101. The lien extends to all crops grown by the tenant for the payment of necessary food, household fuel, money and clothing supplied during the year to such tenant, as well as for the payment of necessary fertilizer, implements, work stock, feed for stock, seed, labor and insecticide, furnished to and used by such tenants. Tenn. Code Ann. §§ 66-12-102 and 103. The lien is superior to all encumbrances, liens, levies and contracts on the crops. Tenn. Code Ann. § 66-12-304. The lien expires after July 1 following the crop year, unless a proceeding for its enforcement be commenced before that date. Tenn. Code Add. § 66-12-105. Tenn. Code Ann. § 66-12-106 sets out the procedure for enforcement of crop liens.

In an action by a landlord against a purchaser of crop from a tenant, an itemized statement must be filed and sworn to. Rochelle v. Mullins, 12 Tenn. App. 363 (1930). The landlord is entitled to recover from person who takes (with or without notice of the lien) from the tenant the lien encumbered crop, sells it, and appropriates to his own use the proceeds, but a suit must be filed within one year from the date of delivery or date of possession by the purchaser.
Tenn. Code Ann. § 66-12-107; *Hunter v. Harrison*, 288 S.W. 355 (Tenn. 1926). A factor, broker or commission merchant may be similarly liable. Tenn. Code Ann. § 66-12-108. Anyone who disposes of an encumbered crop with the intent to deprive the creditor of its indebtedness commits a Class C misdemeanor, although criminal liability can be avoided by paying the amount needed to satisfy the lien. Tenn. Code Ann. §§ 66-12-109 and 110. Purchasers may pay the purchase price for the crop to the tenant and landlord jointly. Tenn. Code Ann. § 66-12-112. “When any person shall perform any labor or render services to another in accordance with a contract, written or verbal, for cultivating the soil, and shall produce a crop, such person shall have a lien upon the crop produced, which shall be the results of such person’s labor, for the payment of such compensation or wages as agreed upon in the contract,” which lien continues for three months from November 15 of the year in which the labor is performed and is subordinate to the landlord’s lien. Tenn. Code Ann. §§ 66-12-113—115.

3. **Employees’ Lien**

Tennessee’s basic employees’ lien statute provides:

All employees and laborers of any corporation, or firm, carrying on any corporate or partnership business shall have a lien upon the corporate or firm property of every character and description, for any sums due them for labor and service performed for the corporation or firm, and such lien shall prevail over all other liens, except the vendor’s lien or the lien of a mortgage, or deed of trust to secure purchase money.

Tenn. Code Ann. § 66-13-101. The lien extends to and protects only those claims as may have accrued within three months of the bringing of any suit for the enforcement of the lien, and shall continue during the pendency of any suit brought for its enforcement. Tenn. Code Ann. §§ 66-13-12 and 103.

4. **Artisans’ Lien**

Tennessee’s artisans’ lien statutes are codified at Tenn. Code Ann. § 66-14-101 et seq. Silversmiths, locksmiths, gunsmiths, blacksmiths, watchmakers and repairers, cobblers, and persons with whom are left goods or products to be repaired, developed, processed, or improved, have the common law lien and the right, at the expiration of six months from the time of the contract and the leaving with them of the goods, if not claimed or called for by the owner, to sell the same at public outcry. Tenn. Code Ann. § 66-14-101. The artisan must provide written notice to the customer and, after making a reasonable inquiry, anyone else who claims an interest, via hand delivery or registered mail to the person’s last known address; in the case of motor vehicles, “reasonable inquiry” means an inquiry of the title and registration division of the department of revenue or a county clerk as agent for the division. Tenn. Code § 66-14-102.
5. **Manufacturers’ and Processors’ Liens**

Cotton giners, textile processors and printers and binders all have possessory statutory liens, as set forth at Tenn. Code Ann. §§ 66-15-101—103. The charges and tolls of giners are secured by a lien on all cotton ginned and baled by them; the lien is second only to the landlord and furnishers liens; and continues for six months after such tolls and charges become due and payable, and until the termination of any and all litigation pertaining thereto, commenced before the expiration of the six months. Tenn. Code Ann. § 66-15-101. All persons or corporations engaged in the business of processing textiles are entitled to a lien upon the goods and property of others that comes into their possession for the purpose of being processed, for the amount that may be due from the owners; the lien is not waived, suspended or impaired by the recovery of any judgment, or the taking of any bill or note, for the money due, for such work, labor or materials and such lien may be enforced as though such judgment had not been recovered or such bill or note taken; when such a lien arises and the amount due on the goods or property remains due and unpaid for two months after it becomes due, the lienholder can sell the textiles at public auction, upon a notice of sale being first published in a newspaper published in the county in which the goods or property are located, and also posted in three or more public places in the county, as well as mailed to the textiles’ owner. Tenn. Code Ann. § 66-15-102. Tenn. Code Ann. § 66-15-103(a) states:

Typographers, printers, lithographers, photoengravers, electrotypers, stereotypers, bookbinders, and/or book manufacturers are given a lien on all type set by them, electrotype, stereotype, photoengraved or lithographic plates or stones made by them and on all plates, dies, engravings and/or materials of any sort prepared or supplied by the manufacturer, or furnished by the customer to facilitate production, so long as the items shall remain in the plant warehouses, vaults or custody of the manufacturer, which the lien or liens shall act to secure amounts owing by the customer to such manufacturer, and remaining unpaid on any part of the work performed and materials or services supplied by the manufacturer, and shall be a prior lien on same.


6. **Molders’ Lien**

Tool and die makers and any other tradesman who “fabricates, casts, or otherwise makes or uses a die, mold, form, or pattern for the purpose of manufacturing, assembling, casting, fabricating, or otherwise making a product or products,” has a possessory lien “on all dies, molds, forms or patterns in their hands belonging to a customer, for the balance due them from such customer for any manufacturing or fabrication work, and in the value of all material related to such work,” which attaches upon the commencement of work and subject to
any prior perfected security interest in such property; the molder may retain
possession of the property until paid or it is repossessed by a superior lien-
holder, following written notice. Tenn. Code Ann. §§ 66-18-101 and 102(a)-(b). Subject to federal patent or copyright law, if the molder has not been paid
the amount due within sixty days after the notice is received by the customer
the molder may sell the die, mold form or pattern in a commercially reasonable
manner pursuant to Article 9 of the UCC. Tenn. Code Ann. § 66-18-103.

7. **Liens for Repairs to Conveyances**

Non-possessory liens for repairs to conveyances, including transportation
devices by land, air or water, are described in Tenn. Code Ann. § 66-19-101.
These liens are for twelve months after the work is finished and do not require

8. **Other Liens**

Launderers’, cleaners’ and storage liens are covered by Tennessee Code Anno-
tated Section 66-16-107 *et seq*. An innkeeper’s lien is governed Tenn. Code
Ann. § 66-17-101 *et seq*. A garage keeper’s or towing firm’s lien is governed
by Tenn. Code Ann. § 66-19-103. Liens on abandoned vehicles on camp-
grounds are covered by Tenn. Code Ann. § 66-19-105. Liens on boats are gov-
erned by Tenn. Code Ann. § 66-19-201 *et seq*. Liens on aircraft are set forth at
§ 66-19-301 *et seq*. Liens on animals are governed by Tenn. Code Ann. § 66-
20-101 *et seq*.

**VIII. Guaranties and Suretyship**

A. **General Principles**

Tennessee recognizes general principles of suretyship. Tennessee has a sin-
gle statutory scheme directly governing the law of guaranties. Tenn. Code
Ann. § 47-12-101 *et seq*. (discussed infra, at §VIII.F.1). There are no statu-
tory provisions governing the content, terms or enforceability of guaranties.
Courts interpreting Tennessee law have relied upon the Restatement of the
Law, Security, see, e.g., *Cook v. Crabtree*, 733 S.W.2d 67, 69 (Tenn. 1987);
*Hickory Springs Mfg. Co., Inc. v. Mehlman*, 541 S.W.2d 97, 99 (Tenn. 1976);
*Kincaid v. Alderson*, 354 S.W.2d 775, 778 (Tenn. 1962), as well as the Restate-
ment of the Law, Third, Suretyship and Guaranty. *Acuity v. McGhee Eng’g,
Inc.*, 297 S.W.3d 718 (Tenn. Ct. App. 2008); *Cumberland Bank v. G & S Imple-
ment Co.*, 211 S.W.3d 223 (Tenn. Ct. App. 2006). No Tennessee decision indi-
cates that Tennessee has formally or informally adopted either.
B. Types of Guaranties

Tennessee recognizes absolute (or unconditional) guaranties (typically a guaranty of payment), as well as guaranties of collection. A guaranty of payment of a debt is materially different from a guaranty of collection; the former being regarded as absolute and the latter as conditional. The guaranty of payment binds the guarantor to pay the debt at maturity in the event the money has not been paid by the principal debtor; and upon default by the latter, the obligation of the guarantor becomes fixed. “[A]n absolute guaranty is an ‘unconditional undertaking on the part of the guarantor that he will pay the debt or perform the obligation immediately upon the debtor’s default without any necessity to first exhaust the principal.’” In re: Winters, 2012 Bankr. LEXIS 1030, *8 (Bankr. E.D. Tenn. Mar. 12, 2012). The guaranty of collection obligates the guarantor to make payment upon the condition that the obligee or creditor has prosecuted the debtor without success. Hassell-Hughes Lumber Co. v. Jackson, 232 S.W.2d 325, 329 (Tenn. Ct. App. 1949); see also, 24 Am. Jur. 886, Guar., Sec. 17.

A guaranty is a contract of secondary liability under which the guarantor has an obligation to pay only upon default by the primary obligor. This relationship can be altered by contract under Tennessee law, such that the guarantor is made primarily liable. Commerce Union Bank v. Burger-In-A-Pouch, Inc., 657 S.W.2d 88, 92 (Tenn. 1983).


C. Structuring Tennessee Guaranties

1. General Principles

(a) Strict Construction

The principle of strictissimi juris guides the interpretation of the terms of a Tennessee guaranty: a Tennessee court (allegedly) will strictly construe the obligations of a guarantor. In construing a commercial guaranty, the guarantor will be held to the full extent of his or her engagements, and the rule in construing guaranties is that the “words of guaranty are to be taken as strongly against the guarantor as sense will admit.” Crossville, Inc. v. Kemper Design Center, Inc., 758 F.Supp.2d 517, 526 (M.D. Tenn. 2010). This has been the
law in Tennessee since at least 1853, *Bright v. McKnight*, 33 Tenn. (1 Sneed) 158 (Tenn. 1853), yet there appear to be many defenses and exceptions. Each commercial guaranty should be carefully constructed, thorough, clear, specific and unambiguous.

(b) **Acceptance**

Generally, no notice of acceptance is required in a commercial guaranty but it is suggested that notice be waived. Lenders should be careful that guaranties are executed substantially contemporaneously with the making of the loan, a renewal, or other event at which present consideration can be found. In a somewhat confusing but often cited opinion, *S.M. Williamson & Co. v. Ragsdale*, the Tennessee Supreme Court adopted—in the guaranty context—the basic rule of contracts that past consideration cannot support a current promise. *S.M. Williamson & Co. v. Ragsdale*, 95 S.W.2d 922, 924-25 (Tenn. 1936).

(c) **Revocation**

Tennessee law is somewhat inconsistent as to revocation of a guaranty. An absolute or continuing guaranty may only be canceled or terminated as specifically stated in the guaranty or by accepting a new guaranty as a replacement for a prior one. *First American Nat’l Bank v. Hall*, 579 SW.2d 864, 868 (Tenn. Ct. App. 1978). A non-continuing guaranty that is “irrevocable” may not be revoked with respect to transactions entered into by the primary obligor prior to the revocation.

Whether a “continuing” guaranty is revocable may depend on various factors, including: (i) whether the primary obligor has changed; (ii) whether a series of guaranteed obligations was reasonably anticipated by the principal obligor, the guarantor and the obligee; (iii) whether the guaranty can be construed as a series of offers and whether each offer may be revoked before it is accepted. *Stearns v. Jones*, 199 S.W. 400 (Tenn. 1917); *Consumer Credit Union v. Hite*, 801 S.W.2d 822, 824 (Tenn. Ct. App. 1990).

2. **Fraudulent Transfer and Conveyance**

The sufficiency of consideration may be tested under fraudulent transfer standards, pursuant to the Tennessee Uniform Fraudulent Transfer Act, Tenn. Code Ann. § 66-3-301, *et seq.*, as well as Section 548 of the U.S. Bankruptcy Code. Among other things, fraudulent transfer laws provide that if the guarantor received less than “reasonable equivalent value” or “fair consideration” and the guarantor was insolvent at the time or rendered insolvent by the guaranty, then the guaranty may be avoided. Questions can arise when an entity guarantees the obligations of its equity owner, particularly if the underlying obligation is unrelated to the entity’s business activities. This is commonly referred to as an upstream guaranty and is potentially subject to avoidance.
D. **Defenses of the Primary Obligor**

Defenses available to the primary obligor—such as fraud, duress, and undue influence, *FDIC v. Turner*, 869 F.2d 270, 274 (6th Cir. 1989); negligence, *First Tennessee Bank Nat’l Ass’n v. Barreto*, 268 F.3d 319, 329 (M.D. Tenn. 2001); and usury, *Parker v. Bethel Hotel Co.*, 34 S.W. 209, 289 (Tenn. 1895)—are also available to the guarantor in Tennessee. A guarantor may show that the obligee failed to perform such that there is a partial or complete failure of consideration. *Volunteer State Bank v. Dreamer Productions, Inc.*, 749 S.W.2d 744, 747 (Tenn. Ct. App. 1987).

E. **Defenses Available to the Guarantor Exclusive of the Primary Obligor**

1. **Modification of the Underlying Obligation, Including Release**

Under Tennessee law, absent an appropriate waiver, modifications to the underlying obligation may permit the guarantor to raise certain defenses to liability.

   First, “a renewal note does not discharge the original note unless all of the parties thereto agree that the renewal will have this effect.” *Commerce Union Bank v. Burger-In-A-Pouch, Inc.*, 657 S.W.2d 88, 90 (Tenn. 1983) (citing *First Nat’l Bank of Sparta v. Yowell*, 294 S.W. 1101, 1103-04 (Tenn. 1926)). However, a Tennessee appellate court reached a different result when it was found that the “renewal” note, in fact, “refinanced” the original note such that the original note was paid off by the new note. *Cumberland Bank v. G & S Implement Co.*, 211 S.W.2d 233, 230-32 (Tenn. Ct. App. 2006). In addition “where the renewal note is invalid it does not operate to discharge the original note.” *First Nat’l Bank of Sparta v. Yowell*, 294 S.W. 1101, 1104 (Tenn. 1926)

   Second, fundamentally increasing the principal due from the borrower in an amount that exceeds a mere “modification” (as that word is defined and has been interpreted by the courts, *Crossville, Inc. v. Kemper Design Center, Inc.*, 758 F.Supp.2d 517, 524 (M.D. Tenn. 2010) (citing *Weaver v. Ogle*, 2 Tenn. App. 563, 579 (Tenn. Ct. App. 1926) (evaluating whether a treble increase in principal was as a mere “modification” of the principal amount))) may require execution of a new guaranty, and “once a creditor has applied a payment to a particular debt, it may not unilaterally change the application of that payment, particularly to the detriment of a guarantor.” *Crossville, Inc. v. Kemper Design Center, Inc.*, 758 F.Supp.2d 517, 527 (M.D. Tenn. 2010). At least one case has held that an obligee’s reliance on guaranties’ provision that they applied to “all renewals, extensions and modifications” was insufficient to extend the guaranty to additional principal indebtedness; language specifically stating that the guarantor is guaranteeing repayment of any additional indebtedness incurred by the primary obligor in the future is, therefore, strongly recommended. *Crossville, Inc. v. Kemper Design Center, Inc.*, 758 F.Supp.2d 517, 524 (M.D. Tenn. 2010). Likewise, *Bank of Waynesboro v. Ghosh*, 576 S.W.2d 759, 761-62 (Tenn. 1979),
held that a deceased guarantor’s estate was discharged when the creditor and the principal obligor agreed to extend the time for payment of principal without the guarantor’s consent, although recent cases suggest that Ghosh is no longer good law. See, e.g., Cumberland Bank v. G & S Implement Co., 211 S.W.3d 223, 232 n. 17 (Tenn. Ct. App. 2006). Accordingly, express contractual terms applying the guaranty to additional notes, increases in indebtedness, extensions in payment dates, cross-collateralization, and default, as well as extensions in maturity dates, are recommended.

Third, “[u]nder the general principles of suretyship law, a release of the principal also releases the surety to the extent that the principal is released . . . [t]he surety is not released, however, if the creditor in the release reserves [its] rights against the surety or if the surety consents to remain liable notwithstanding release of the principal,” in which case the liability of the surety is preserved. Hickory Springs Mfg. Co., Inc. v. Mehlman, 541 S.W.2d 97, 99 (Tenn. 1976) (citing Becker v. Faber, 19 N.E.2d 997, 999 (N.Y. 1939); Continental Bank & Trust Co. v. Akwa, 206 N.W.2d 174, 181 (Wisc. 1973); and Shows v. Steiner; Lobman & Frank, 57 So. 700, (Ala. 1911). That is, if the terms of the guaranty specifically include that the guarantor remains liable for the full amount of the indebtedness following the creditor’s and obligor’s settlement or compromise, the guarantor is not discharged from performance of his or her obligations.

2. **Release or Impairment of Security [Collateral] for the Underlying Obligation**

There is a recognized exception to the general rule of discharge upon release of collateral where there is consent to the release. Suntrust Bank v. Dorrough, 59 S.W.3d 153, 157-58 (Tenn. Ct. App. 2001); see Ottenheimer Publishers v. Regal Publishers, Inc., 626 S.W.2d 276, 280 (Tenn. Code Ann. 1981). The general rule in Tennessee is that when a creditor has consented to the release of collateral, a guarantor is discharged from his or her obligations. FDIC v. Associated Nursery Systems, Inc., 948 F.2d 233, 240 (6th Cir. 1991) (citing 38 Am.Jur.2d Guaranty § 84 (1968); Union Planters Nat’l Bank of Memphis v. Markowitz, 468 F.Supp. 529, 533 (W.D.Tenn.(1979). However, this rule is subject to an important exception: the guarantor’s consent, as determined by the terms of the guaranty agreement. FDIC v. Associated Nursery Systems, Inc., 948 F.2d 233, 240 (6th Cir. 1991). Similarly, the general rule is that a guarantor is discharged to the extent of any loss caused by a creditor’s failure to perfect a security interest. Union Planters Nat’l Bank of Memphis v. Markowitz, 468 F.Supp. 529, 533-34 (W.D. Tenn. 1979); see Tenn. Code Ann. § 47-3-605(e). Again, this rule is not unqualified, because the terms of a guaranty, executed by a guarantor “who is not a party to the instrument,” are determinative in the cases of unlimited and continuing guaranties. Union Planters Nat’l Bank of Memphis v. Markowitz, 468 F.Supp. 529, 535 (W.D. Tenn. 1979). Courts have ruled that even in the absence of specific language consenting to the release of collateral, guarantors may “implicitly consent” to such changes by execut-

3. **Failure to Notify Guarantor of Article 9 Foreclosure**

Tennessee’s enactment of the UCC defines “debtor” as “a person having an interest, other than a security interest or other lien in the collateral, whether or not that person is an obligor. Tenn. Code Ann. § 47-9-102(28) (2012). “Obligor” is defined as a person that . . . owes payment or other performance of the obligation . . . has provided collateral for the obligation . . . or is otherwise accountable in whole or in part for the obligation. Tenn. Code Ann. § 47-9-102(59) (2012).

UCC Article 9 requires notice of an impending foreclosure to be sent to the “debtor” and any “secondary obligor.” Tenn. Code Ann. § 47-9-611(c) (2012).

The penalty for failure to provide notice can be the loss of any deficiency and thus the loss of a guaranty.

4. **Failure to Hold a Commercially Reasonable Sale of Collateral (Article 9)**

One of the most litigated defenses to payment of an obligation and therefore a guaranty is the failure to conduct a commercially reasonable sale of collateral under Article 9 of the UCC. Tenn. Code Ann. § 47-9-610(b) (2012). Like failure to provide notice to the guarantor, one penalty for failure of commercial reasonableness is loss of the ability to collect some or all of a deficiency amount. See Tenn. Code Ann. §§ 47-9-610, 615 and 616 (2012).

F. **Additional Defenses**

1. **Tennessee Statutory Defenses**

Tennessee Code Annotated Section 47-12-101, entitled “Notice requiring creditor to sue—Creditor’s inaction,” while subject to some interpretation, provides that a surety [or guarantor]:

who perceives that the principal [primary obligor] is likely to become insolvent, or to migrate from the state, without previously discharging the debt or obligation, the surety may, if the debt or security be due, by notice in writing, require the creditor forthwith to put it to suit. . . . Unless, within thirty (30) days thereafter, the creditor [obligee] commences an action, and proceeds with due diligence in the ordinary course of law to recover judgment for the debt or obligation, and by execution to make the amount due thereon, the creditor shall forfeit the right which the creditor would otherwise have to recover it from the surety.

There have been no reported decisions interpreting this statute for some time. The surety or guarantor must clearly and unambiguously state the appropriate
statutory elements in the notice, the delivery of which upon the obligee must be attested by two witnesses. The statute may be used as a defense to endorsement of an instrument. At least one case indicates that the statute is ineffective and cannot be used to the guarantor’s advantage if the principal [primary obligor] lives outside Tennessee and the lawsuit by the obligee would have to be brought outside the state. *Hill v. Planter’s Bank*, 22 Tenn. 670, 671-72 (Tenn. 1842). However, if a non-resident primary obligor has property subject to execution in Tennessee, the creditor must still proceed to suit against the primary obligor within thirty days following the guarantor’s statutory notice in order to preserve the guaranteed obligation.

2. **Violation of Tennessee’s Anti-Deficiency Statute**

As set forth above at Section VI. N. 4., Tennessee law requires that the foreclosing mortgagee at a real property foreclosure sale must bid fair market value in order to obtain a deficiency. Tenn. Code Ann. § 35-5-118. In the event the debtor shows by a preponderance of the evidence that the bid amount was materially less than fair market value” the amount of the deficiency will be reduced by the difference between the bid amount and the fair market value as determined by the court. The statute does not specify how fair market value is to be determined. It is unclear whether this anti-deficiency statute is applicable only to the primary obligor (i.e., guarantors remain liable for the entire deficiency).

3. **Modification of the Guaranty/New Guaranty**

In one case, the Tennessee court of appeals found a later guaranty released the guarantor from former guaranties when it appeared that the later one was accepted as a substitute for the earlier. *First American Nat’l Bank of Nashville v. Hall, et al.*, 579 SW.2d 864 (Tenn. Ct. App. 1978) citing, 38 C.J.S. Guaranty § 80 p.1249.

4. **Failure to Pursue Primary Obligor**

Since Tennessee courts distinguish between the guaranty of payment and the guaranty of collection, a conditional guaranty, which only guarantees collection, necessarily requires at least a preliminary effort to pursue the primary obligor before pursuing the guarantor. *Hassell-Hughes Lumber Co. v. Jackson*, 232 SW.2d 325, 329 (Tenn. Ct. App. 1949). This defense is not, however, available or applicable to unlimited or continuing guaranties. Id. at 325, 330.

5. **Failure to Provide Notice of Acceptance or Notice of Default**

When the guarantor makes the mere “offer” to provide the guaranty, the creditor must provide notice of acceptance, and the failure to do so makes the guaranty vulnerable under ordinary contract analysis. *Hassell-Hughes Lumber Co. v. Jackson*, 232 S.W.2d 325, 332 (Tenn. Ct. App. 1949) (citing Mountain
City Mill Co., 8 Tenn. App. 337, 349 (Tenn. Ct. App. 1928)). However, when it is the creditor who requests the guaranty from the guarantor, notice of acceptance is not necessary and this defense is not available to the guarantor. Hassell-Hughes Lumber Co. v. Jackson, 232 SW.2d 325, 332 (Tenn. Ct. App. 1949).

Likewise, if a guaranty is absolute or unconditional, in that it guarantees payment and not merely collection, notice of the primary obligor’s default is not required to activate the guarantor’s liability. Id. A defense based on the creditor’s failure to provide notice of default is, therefore, generally only available to a guarantor who has executed a conditional guaranty, guaranteeing only collection. Id. Notice, however, is recommended.

6. Statute of Limitations

The limitations period for suits on guaranties and leases is six years from the date of accrual. Tenn. Code Ann. § 28-3-109(a)(3) (2012); First American Bank of Nashville, N.A. v. Woods, 734 S.W.2d 622, 630 (Tenn. Ct. App. 1987). “When a right exists, but a demand is necessary to entitle the party to an action, the limitation commences from the time the plaintiff’s right to make the demand accrues, and not from the date of the demand.” Tenn. Code Ann. § 28-1-102 (2012); FDIC v. Cureton, 842 F.2d 887, 890, n. 3 (6th Cir. 1988). The cases are silent as to when a claim on a breach of a written guaranty accrues if demand is not necessary, but case law seems to suggest that the claim accrues either upon the earlier of the gratuitous provision of demand or at the time of the breach. See FDIC v. Cureton, 842 F.2d 887, 890, n. 3 (6th Cir. 1988); Beal Bank, S.S.B. v. RBM Co., 1999 Tenn. App. LEXIS 790, *23-26 (Tenn. Ct. App. Nov. 30, 1999) (guarantors not notified of default, with substantive issues resolved under Georgia law, but procedural limitations period decided under Tennessee law); Consumer Credit Union v. Hite, 801 S.W.2d 822, 824 (Tenn. Ct. App. 1990).

A waiver in a guaranty, Hardeman County Bank v. Stallings, 917 S.W.2d 695, 699 (Tenn. Ct. App. 1995)—or even in a letter, First American Bank of Nashville, N.A. v. Woods, 734 S.W.2d 622, 631 (Tenn. Ct. App. 1987)—of the right to plead the statute of limitations as a defense is enforceable, and the statute of limitations may be inapplicable to a properly drafted “continuing, absolute and unconditional” guaranty. Hardeman County Bank v. Stallings, 917 S.W.2d 695, 699 (Tenn. Ct. App. 1995) (citing Union Planters Nat’l Bank v. Markowitz, 468 F.Supp. 529, 532 (W.D. Tenn. 1979)). Thus, as even a limited guaranty or guaranty of a specific obligation may apply to an underlying obligation payable in installments for more than six years, it is important to provide either a waiver of statutes of limitations within the guaranty or that the statute is applicable for six years following the due date of any obligation including by acceleration.

7. Statute of Frauds

While cases recognizing oral promises or ambiguous writings that reflect an intent to stand for the debt of another exist, Tennessee’s statute of frauds
requires that each guaranty be in writing in order to bring an action on the guaranty. Tenn. Code Ann. § 29-2-101(2) (2012).

G. Waiver of Defenses by the Guarantor

The overriding principle concerning a waiver of defenses in a guaranty is that specificity, whether in boilerplate or otherwise, is determinative. General and non-specific waivers are less enforceable.

1. Defenses That Cannot Be Waived

Tennessee cases are mostly silent as to what defenses cannot be waived in a guaranty contract. However, as discussed, infra at § VIII(H)(3), one relatively recent case has indicated that waiver of certain formation-related defenses requires some measure of specificity. Further, a 1979 federal case, Union Planters Nat’l Bank v. Markowitz, 468 F. Supp. 529, 535 (W.D. Tenn. 1979), held that the negligence of a secured creditor obligee can be waived by agreement, including a “duty of reasonable care to preserve collateral,” notwithstanding language to the contrary in UCC Article 9. Tenn. Code Ann. § 47-9-207. However, a subsequent Sixth Circuit case observed that, “as a matter of federal law, the lack of notice and commercial unreasonableness defenses extend to an unconditional guarantor after the debtor has defaulted,” and determined that, if asked, the Tennessee Supreme Court would adopt the rule that guarantors are entitled to step into the shoes of debtors and raise the defense of commercial unreasonableness. First Heritage Nat’l Bank v. Keith, 902 F.2d 33, *12 (6th Cir. 1990). The same court, id., also noted that “[t]he trend in state court decisions is to recognize unconditional guarantors as UCC debtors entitled to the non-waivable defenses,” which is consistent with the UCC, as adopted by Tennessee:

(T)he obligations of good faith, diligence, reasonableness and care prescribed by chapters 1 through 9 of this title may not be disclaimed by agreement . . .

Tenn. Code Ann. § 47-1-302(b). Further, Tennessee Code Annotated § 47-9-602 generally specifies obligations that cannot be waived; the list is applicable to “obligors,” which is defined to include guarantors. Tenn. Code Ann. § 49-9-102(59) (2012).

2. Election of Remedies

A creditor need not dispose of collateral under Article 9 of the UCC (even if the collateral is repossessed and held by the creditor) prior to pursuit of the guarantor if the guaranty provides for the creditor’s election of remedies. Suntrust Equip. Fin. & Leasing Corp. v. A&E Salvage, Inc., 2009 U.S. Dist. LEXIS 99561, *13-*14 (E.D. Tenn. Oct. 26, 2009) (applying Maryland’s adoption of the UCC). Tennessee’s anti-deficiency statute applicable to the foreclosure of
real property is inapplicable when the obligee only proceeds to collect the underlying debt and elects not to foreclose on the real property collateral. Tenn. Code Ann. § 35-1-118(d)(2) (2012).

3. **“Catch-All” Waivers**

Though catch-all waiver language may be effective, it is advisable for drafters to include waivers to specific suretyship defenses.

Citing older Tennessee case law to the effect that “a guarantor in a commercial transaction shall be held to the full extent of his engagements and . . . the words of a guaranty are to be taken as strongly against the guarantor as the sense will admit,” *Farmers-Peoples Bank v. Clemmer*, 519 S.W.2d 801, 804-05 (Tenn. 1975), Tennessee cases adopt both the principle that the (ambiguous or “boilerplate”) language in a guaranty should be construed strictly against the maker, and the principle that so called “catch-all” waivers may not be enforceable unless stated with specificity. *Shelby Elec. Co. v. Forbes*, 205 S.W.3d 448, 455 (Tenn. Ct. App. 2005), perm. app. den. *Shelby Elec. Co. v. Forbes*, 2006 Tenn. LEXIS 827 (Tenn. Sept. 5, 2006). The inherent dichotomy in the law is reflected in *Shelby Electric Company*, where the Tennessee Court of Appeals evaluated an issue of first impression—whether a defense of fraud or fraudulent inducement can be waived under the general waiver of “any defenses” in a guaranty—and explored the reasoning of New York courts in adjudicating boilerplate and non-boilerplate catch-all waivers executed by the guarantor. The Tennessee Court of Appeals ruled that the agreement “[to waive] any defenses given to guarantors at law or in equity other than actual payment and performance of the indebtedness” contained in a bank’s nonnegotiable form guaranty, and lacking a precise reference to a waiver of the defenses of fraud or fraudulent inducement, was insufficiently specific to waive them. *Shelby Elec. Co. v. Forbes*, 205 S.W.3d 448, 455 (Tenn. Ct. App. 2005). The court did not reach the issue of whether a specific waiver of those defenses would be enforceable. *Id.* at 448, 455, n. 4.

4. **Use of Specific Waivers**

As stated above, Tennessee case law supports the idea that while catch-all waivers may be partially enforceable, express waivers are preferred. Further, although implied waivers have been recognized, including specific waivers in a Tennessee guaranty is always preferable.

H. **Jointly and Severally Liable Guarantors—Contribution and Reduction of Obligations Upon Payment by a Co-Obligor**

There are few cases specifically addressing joint and several liability for the guaranteed debt. Tennessee generally follows the common law with respect to contribution among guarantors. Under Tennessee Law, the creditor is not obliged to seek full payment from each guarantor. If one guarantor has paid out
more than its proportional share, it may recover from other guarantors in proportion to their liability and amounts paid to the creditor. Between guarantors, this is determined by principles of contract, tort and property law and equitable principles. *Cook v. Crabtree*, 733 S.W.2d 67, 68 (Tenn. Ct. App.1987). A person is not entitled to contribution until he or she has paid more than his or her fair share of a joint obligation. *Frazier v. Frazier*, 430 S.W.2d 655, 660 (1968); *Young v. Kittrell*, 833 S.W.2d 505, 508 (Tenn. Ct. App. 1992).

Guarantors who are jointly and severally liable are presumed to share contribution equally among themselves. *Hardy v. Miller*, 2001 Tenn. App. LEXIS 898, *15-*16 (Dec. 10, 2001); see also *Anderson v. May*, 57 Tenn. 84, 87 (Tenn. 1872).

In one of the few modern Tennessee cases to address liability among multiple guarantors, *Cook v. Crabtree*, supra., the Tennessee Court of Appeals concluded that a divorced wife whose signature was forged on one guaranty instrument but was genuine on a later guaranty was a mere “sub-surety,” who bore no duty of contribution to the principal sureties, three owners of a borrowing corporation. *Cook v. Crabtree*, 733 S.W.2d 67, 70 (Tenn. Ct. App.1987). The *Cook*, id. at 67, 69-70, court relied heavily on the Restatement of the Law, Security § 144, et seq. (1941) and the comments thereto, such that following test to distinguish co-sureties and sub-sureties is relied on by courts interpreting Tennessee law:

§ 146. Determination of the Relation Between Sureties.

Where there are two or more sureties for the same duty of the principal, the following rules apply to the determination of the relation between themselves:

(a) The sureties may conclusively determine their relation by agreement.

(b) The sureties are co-sureties in the absence of agreement or stipulation of either to the contrary or of duties or equities imposing the principal liability on one of them.

(c) A surety is a sub-surety if he has so stipulated and is not under a duty to assume a greater liability, except to the extent that his stipulation will inequitably increase the obligation of another surety.

In the comments to Section 146(b) it is said that absent an agreement, where two or more sureties are bound to a common duty, they are assumed to be co-sureties “unless there is some positive reason for making one a principal and the other a sub-surety.”

*Cook v. Crabtree*, 733 S.W.2d 67, 69 (Tenn. Ct. App.1987) (quoting Restatement of the Law, Security § 146, comment b, § 147(2) (1941)). *Cook* and the Restatement recognize two exceptions to the assumption of co-suretyship: first, that one surety has such a business interest in the transaction that he will be the principal surety; and,
second, when the surety assumes his obligation at the request of another surety who is already bound.

Unfortunately, in the 2001 opinion of *Hardy v. Miller*, the Court of Appeals of Tennessee muddied the waters with a different approach. 2001 Tenn. App. LEXIS 898, *12 (Dec. 10, 2001). In *Hardy*, a joint venture of 10 individuals borrowed $1.4 million, and each member executed a suretyship agreement guaranteeing payment up to $280,000 per member. The joint venture expelled a member, and the venture subsequently executed a renewal and modification, followed by a forbearance agreement. Three members paid the creditor $280,000 each, and the expelled member paid approximately $23,000, satisfying the debt. The three members filed suit against the expelled debtor for his prorated share of the debt. The trial court ruled that the members of the venture were co-sureties, “bound to answer for the same duty of the principal,” and ordered the expelled member to pay the others up to his prorated share. The Court of Appeals reversed, first holding that “a partner cannot also be a surety or guarantor of partnership debt,” and second, that:

the so-called suretyship agreements executed by [the venture’s] members had the legal effect of altering what otherwise would have been each member’s unlimited joint and several liability for the joint venture’s debts. As a result of these agreements, each member’s individual liability was made several only and was capped at $280,000. Accordingly, these agreements actually served as “limitation of liability” agreements benefitting the individual members of the joint venture. Because no suretyship was ever created, the trial court erred by classifying the members of [the venture] as “co-sureties” and by basing its decision on suretyship principles.

*Id.* at *12-*13.

1. **Subrogation**

Subrogation is an equitable remedy that generally requires total satisfaction of the underlying obligation to the obligee prior to its exercise, and a paying surety’s right to enforce a creditor’s lien originates in the contract between the surety and the obligee. Subrogation is defined as:

Subrogation: The substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies or securities that would otherwise belong to the debtor. For example, a surety who has paid a debt is, by subrogation, entitled to any security for the debt held by the creditor and the benefit of any judgment the creditor has against the debtor, and may proceed against the debtor as the creditor would.
Black’s Law Dictionary 1563-64 (9th ed. 2009) (emphasis added); see Blankenship v. Estate of Bain, 5 S.W.3d 647, 650 (Tenn. 1999) (subrogation is defined as “the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt”).

Although traditionally, “a mere volunteer who pays the debt of another is not entitled, without more, to be substituted to liens held by the original creditor,” Durant v. Davis, 57 Tenn. 522 (Tenn. 1873, Tennessee cases recognize a historic expansion of the equitable doctrine of subrogation. See, e.g., Old Nat’l Bank v. Swearingen, 72 S.W.2d 545, 546 (Tenn. 1934); Harrison v. Harrison, 259 S.W. 906, 907 (Tenn. 1923). The cases are clear that a surety who pays an obligor’s indebtedness pursuant to contract, steps into the creditor’s shoes, and assumes the creditor’s rights and remedies, including its security interests and the priority thereof, as against the debtor whose debt the surety paid. Third Nat’l Bank v. Highlands Ins. Co., 603 S.W.2d 730, 733 (Tenn. 1980) (surety on contractor’s performance bond had unrecorded right of subrogation that defeats intervening creditors); Old Nat’l Bank v. Swearingen, 72 S.W.2d 545, 547-48 (Tenn. 1934) (bank seeking lien on subrogation theory); Maryland Cas. Co. v. McConnell, 257 S.W. 410, 412 (Tenn. 1923) (surety of state school funds on deposit with liquidated bank, following payment of deposit balance to state, obtained same rights and priority as state depositor initially had). The rule is that “if a volunteer pays the debt of a third party, although it is a lien upon property, with the intention of extinguishing the debt . . . he is not entitled to subrogation.” Old Nat’l Bank v. Swearingen, 72 S.W.2d 545, 547-48 (Tenn. 1934). Indeed:

A surety, by paying the debt of his principal, becomes entitled to be substituted to all the rights of the creditor, and to have the benefit of all the sureties which the creditor had for the payment of the debt, without any exception; and is entitled to all his rights to any fund, lien, or equity, against any other person or property, on account of the debt.


The rule is not as clear, however, for an ordinary guarantor who is not made primarily liable under the terms of the guaranty contract, Commerce Union Bank v. Burger-In-A-Pouch, Inc., 657 S.W.2d 88, 92 (Tenn. 1983), though there is little doubt that a waiver of subrogation rights in a guaranty will divest the guarantor of any rights to step into the lender’s shoes and exercise the lender’s remedies against the primary obligor.
J. **Indemnification—Whether the Primary Obligor or Primary Guarantors Have a Duty**

The principal obligor has a duty of indemnification to the guarantor. The extent of this duty can be altered by contract.

A primary guarantor owes a duty of indemnification to a subsurety who satisfies the obligation. *Cook v. Crabtree*, 733 S.W.2d 67, 69 (Tenn. Ct. App. 1987) (quoting Restatement of the Law, Security § 146, comment a (1941)). Indeed, as it relates to the indemnification of a sub-surety by a primary guarantor:

The most important incident of the relation is that if the sub-surety performs he is entitled to reimbursement from the principal surety. If the principal surety performs, he is not entitled to contribution from the sub-surety.


K. **Enforcement of Guaranties**

There is nothing peculiar in Tennessee law or procedure with respect to litigating liability under a written guaranty.

As in federal courts, a party seeking to enforce payment or performance of an obligor’s duties under a written guaranty is advised to attach a copy of the guaranty agreement to the initial pleading, so that the agreement becomes part of the pleading. Tenn. R. Civ. P. 10.03. Although suit can be initiated in either Circuit or Chancery Court, Chancery Court is the traditional venue for such suits, and the chancellors may have a greater understanding of the applicable law than do Circuit Court judges. Local rules may prefer verified complaints, as well.

An excellent decision regarding the enforceability of a choice-of-law provision in a guaranty agreement is *Wallace Hardware Co. v. Abrams*, 223 F.3d 382 (6th Cir. 2000). In this case, the U.S. Court of Appeals for the Sixth Circuit reversed the district court and upheld the Tennessee choice-of-law clause governing personal guaranties of a commercial debt. *Wallace Hardware Co. v. Abrams*, 223 F.3d 382, 387 (6th Cir. 2000). Each guarantor was a Kentucky resident, and the transaction bore a stronger relationship to Kentucky than to Tennessee, and the Tennessee guaranties would not have been effective under Kentucky law. *Id.* at 391.

The *Wallace* court adopted § 187 of the Restatement of the Law (Second) of Conflict of Laws (1988 Revisions), indicating that the parties’ choice of law should be honored “unless (1) ‘the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice,’ or (2) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater
interest than the chosen state.’” Wallace Hardware Co. v. Abrams, 223 F.3d 382, 398-400 (6th Cir. 2000). The Sixth Circuit added that there seemed to be a reasonable relationship to Tennessee; each side was represented by counsel; and there appeared to be no inequality in bargaining power between the parties. Id.

Further,

The choice of law provision must be executed in good faith. The jurisdiction whose law is chosen must bear a material connection to the transaction. The basis for the choice of another jurisdiction’s law must be reasonable and not merely a sham or subterfuge. Finally, the parties’ choice of another jurisdiction’s law must not be “contrary to ‘a fundamental policy’ of a state having [a] ‘materially greater interest’ and whose law would otherwise govern.”


Tennessee has also adopted the maxim that parties may choose the law that will lend validity to the transaction if it is otherwise logical. See Deaton v. Vise, 210 S.W.2d 665, 669 (Tenn. 1948).

IX. Insolvency Laws

A. Receivership

Tennessee Code Annotated Section 29-1-103 vests Tennessee trial courts with the authority to appoint receivers “for the safekeeping, collection, management and disposition of property in litigation in such court, whenever necessary to the ends of substantial justice . . .” Receiverships are actions in equity that look to the discretion of the court. In re Liquidation of United American Bank, 743 S.W.2d 911, 916 (Tenn. 1987); Tennessee Pub. Co. v. Carpenter, 100 F.2d 728, 732 (6th Cir. 1938). A bond will be required by the party seeking appointment of a receiver. The receiver itself becomes an officer of the court, which supervises the receiver’s activities. Tennessee and federal courts applying Tennessee law have traditionally appointed receivers to curtail waste of property in order to protect the rights of secured parties. Gwynne v. Memphis Appeal Avalanche, 93 Tenn. 603, 30 S.W. 23 (1894); Carpenter, 100 F.2d at 732. Tennessee case law supports that provisions in a loan document stating that the lender has the right to seek and obtain the appointment of a receiver over collateral should be enforced. Equitable Life Assurance Society v. Ellis, 16 Tenn. App. 551, 65 S.W.2d 250, 255 (1933). Under appropriate circumstances, the appointment of receivers may be made on an ex parte basis, which may be
provided for in the loan documents. *Tennessee Pub. Co. v. Carpenter*, 100 F.2d 728, 732 (6th Cir. 1938). The decision whether to appoint a receiver ex parte is left to the discretion of the court. *Id.*

B. **Assignment for Benefit of Creditors**

Assignments for the benefit of creditors are rare under modern Tennessee law; however, they do occur. There is no Tennessee statutory scheme governing assignments for the benefit of creditors. Except for its use as a quoted event of default or other quoted provision from a contract, the phrase “assignment for the benefit of creditors” does not appear in Tennessee cases after 1950.

C. **Fraudulent Transfer Law**

Tennessee has ancient statutes governing fraudulent conveyances and fraudulent devises, at Tennessee Code Annotated Sections 66-3-101 *et seq.*, and 201 *et seq.*, respectively, and these statutes are still relied upon and cited by Tennessee practitioners and courts. They deal with devises and conveyances by actual fraud and for no consideration beginning with a presumption that they can be absolutely void.


As Tennessee has adopted the Uniform Act, decisions from Tennessee courts should be similar to those in other states that have adopted the Uniform Act.

Remedies include: avoidance of the transfer, an attachment against the asset transferred, an injunction against further disposition by the debtor and/or a transferee, appointment of a receiver and a levy against proceeds of a transfer. Tenn. Code Ann. § 66-3-308. A transfer is not voidable against a person purchasing in good faith and for reasonably equivalent value. Tenn. Code Ann. § 66-3-309(a). In some cases, fraudulently transferred property can be recovered from subsequent transferees.

Generally, a four-year statute of limitations applies to claims under the Uniform Act, commencing at the time of the transfer. Tenn. Code Ann. § 66-3-110. Under the Uniform Act, a “transfer” is defined, with respect to both statutes, as including “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.” Tenn. Code Ann. § 66-3-302(12); *Stoner v. Amburn*, 2012 Tenn. App. LEXIS 684 at *19.
In order to establish a claim of a fraudulent transfer pursuant to Section 66-3-305(a)(1), it must be shown that the transfer was made with the “actual intent to hinder, delay, or defraud any creditor of the debtor.” *Stoner v. Amburn*, 2012 Tenn. App. LEXIS 684 at *21. In making this determination, the courts are guided by a consideration of the following factors, including whether:

1. The transfer or obligation was to an insider;
2. The debtor retained possession or control of the property transferred after the transfer;
3. The transfer or obligation was disclosed or concealed;
4. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
5. The transfer was of substantially all the debtor’s assets;
6. The debtor absconded;
7. The debtor removed or concealed assets;
8. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
9. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
10. The transfer occurred shortly before or shortly after a substantial debt was incurred; and
11. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Tenn. Code Ann. § 66-3-305(b).

X. Litigation and Arbitration

A. Lender Liability

1. Duty of Good Faith

The duty of good faith and fair dealing is implied into every contract in Tennessee under both the common law and Tennessee’s adoption of the Uniform Commercial Code. In one of the most famous cases of lender liability for the breach of the covenant of good faith and fair dealing, *K.M.C. Co. v. Irving Trust Co.*, the lender refused to advance to the borrower an amount that would increase the total indebtedness to the borrower’s credit limit after promising to do so. 757 F.2d 752 (6th Cir. Tenn. 1985). Despite the existence of a jury waiver, a federal court in Eastern Tennessee empaneled a jury, which found the lender liable for damages in the amount of $7,500,000.

Tennessee law implies a duty of good faith and fair dealing into all contracts made, performed or enforced in Tennessee or pursuant to Tennessee law. “Good faith imposes an honest intention to abstain from taking any unconscientious advantage of another, even through the forms and technicalities of the law.” *Lane v. John Deere Co.*, 767 S.W.2d 138, 140 (Tenn. 1989). The duty of good faith and fair dealing varies depending upon the contract in question. *TSC Industries, Inc. v. Tomlin*, 743 S.W.2d 169, 173 (Tenn. Ct. App. 1987). Under Tennessee law, courts look to the language of the contract to determine what is fair and reasonable with respect to the intention of the parties. *Covington v. Robinson*, 723 S.W.2d 643, 645 (Tenn. Ct. App. 1986). “The determination of what is required by the duty of good faith in a given case turns on an interpretation of the contract at issue,” and “courts look to the language of the instrument and to the intention of the parties ‘[to] impose a construction which is fair and reasonable.’” *Lamar Advertising Co. v. By-Pass Partners*, 313 S.W.3d 779, 791 (Tenn. Ct. App. 2009) (citation omitted). Tennessee state and federal courts will look to the Restatement of Contracts for guidance on contract interpretation, and “[a]ccording to the Restatement (2d) Contracts § 205, comment a, ‘[g]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness.’” *Savers Federal Sav. & Loan Ass’n. v. Home Federal Sav. & Loan Ass’n*, 721 F. Supp. 940, 945 (M.D. Tenn. 1989); see, e.g., *Dick Broad. Co. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 660-61 (Tenn. 2013) (citing Restatement (2d) of Contracts § 205 (1979), and recognizing that every contract includes an implied duty of good faith and fair dealing in its performance and enforcement).

The duty of good faith and fair dealing, in essence, limits the method of performance of a contract, rather than its expressed terms. *Sanders v. First*

Examples of Tennessee’s codification of the duty of good faith contained in the UCC include, but are not limited to, the following statutes: Tenn. Code Ann. § 47-1-304 [UCC § 1-304] (“[e]very contract or duty within chapters 1-9 of this title imposes an obligation of good faith in its performance and enforcement”. . .this duty is sometimes referred to as the implied duty of good faith and fair dealing); Tenn. Code Ann. § 47-2-103(1)(b) [UCC § 2-103] (defining “good faith” as “in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade”); Tenn. Code Ann. § 47-2-203(2) “[a] price to be fixed by the seller or by the buyer means a price for him to fix in good faith”); Tenn. Code Ann. § 47-2-306(1) (as to output, requirements and exclusive dealings); Tenn. Code Ann. § 47-2-311 (good faith required by a party who is entitled to specify particulars of performance); Tenn. Code Ann. § 47-2-323 (with respect to the tender of a bill of lading); and Tenn. Code Ann. § 47-2-328 (auctions).

2. **Fiduciary Duty**

Generally speaking, lenders do not owe a fiduciary duty to borrowers in Tennessee. With respect to state and federal savings and loan associations and savings banks, Tennessee has adopted the Uniform Fiduciaries Act (the “UFA”). Tenn. Code Ann. § 35-2-101 et seq. “The UFA was designed to facilitate banking transactions by relieving depositary banks of the responsibility of assuring that an authorized [depositor’s] fiduciary used entrusted funds for proper purposes.” C-Wood Lumber Co. v. Wayne County Bank, 233 S.W.3d 263, 274 (Tenn. Ct. App. 2007) (citations omitted).

While few cases in Tennessee have imposed a fiduciary duty on a lender in a commercial transaction, it is nonetheless advisable that practitioners include in any loan documents specific disclaimers of both any fiduciary duty and partnership with the borrower. Such a disclaimer may read:

*Not Partners; No Fiduciary Duty; No Third-Party Beneficiaries. Nothing contained herein or in any related document shall be deemed to*
render Lender a partner or fiduciary of Borrower for any purpose. Lender and Borrower expressly agree that Lender does not owe any fiduciary duty to Borrower. This Agreement has been executed for the sole benefit of Lender, and no third party is authorized to rely upon Lender’s rights hereunder or to rely upon an assumption that Lender has or will exercise its rights under this Agreement or under any document referred to herein.

Further, although case law on lender liability for breach of a fiduciary duty is not as well developed in Tennessee as it is elsewhere, there is a line of decisions clearly imposing lender liability for breach of a fiduciary duty: when a lender, or the lender’s representative, deliberately misuses the borrower’s confidential information for the benefit of the lender or the lender’s representative.

In *Boling v. Tennessee State Bank*, the Tennessee Supreme Court addressed a situation where: hotelier borrowers approached a bank about a commercial loan to purchase a hotel out of bankruptcy; borrowers requested absolute confidentiality because some of the bank’s board members were competitors in the hotel industry and might be interested in the deal themselves; and the lender’s officer promised that though the board would have to approve any loan, any board member who had interest in purchasing the hotel would not see any of the information provided by the borrowers or participate in the loan decision. 890 S.W.2d 32, 33 (Tenn. 1994). The Tennessee Supreme Court applied a fraudulent misrepresentation damages and proximate cause analysis to the facts, approved the award of punitive damages, and fashioned a rule that “where there is a definite fiduciary relationship between a bank and its customer [because of the existence of a confidential relationship], the bank is under a duty to disclose relevant material facts regarding the transaction, and concealment of or failure to disclose the facts at issue is fraudulent.” *Id.* at 35-37.

In *First American National Bank v. Bransford*, a borrower on numerous business and personal loans with a bank started experiencing serious economic distress, of which the bank knew or should have known. 1995 Tenn. App. LEXIS 598, *5-*10 (Tenn. Ct. App. Sept. 13, 1995); see *Macon County Livestock Market v. Kentucky State Bank, Inc.*, 724 S.W.2d 343, 350 (Tenn. Ct. App. 1986). The borrower approached a business associate (who did not have knowledge of the borrower’s financial difficulties) with a request to sign a promissory note, as a co-maker, to fund one of the borrower’s failing business entities; the co-maker did not receive any proceeds from the closing and received nothing of value in exchange for executing the note. 1995 Tenn. App. LEXIS 598, at *10, *12, *17. The note went into default, and the bank brought a suit on a note, with the co-maker asserting the affirmative defense of duty of the bank to disclose, but actual non-disclosure by the bank. 1995 Tenn. App. LEXIS 598, at *17. On appeal of the judgment for the bank, the Tennessee Court of Appeals reversed, holding that, “the bank had a duty to tell the truth and not to mislead or not to answer at all.” *Id.* at *17. Citing and
relying upon Mason County Livestock Market, 724 S.W.2d at 349, the Bransford Court explained that:

concealment or failure to disclose becomes fraudulent when “it is the duty of a party having knowledge of the facts to disclose them to the other party.” There are three such circumstances under which a lender has such a duty.

1. Where there is a previous definite fiduciary relation between the parties.
2. Where it appears one or each of the parties to the contract expressly reposes a trust and confidence in the other.
3. Where the contract or transaction is intrinsically fiduciary and calls for perfect good faith. The contract of insurance is an example of this last class.


3. Consumer Protection Act as Applicable to Commercial Loans


In recent years, there have been large scale changes to the use of the TCPA as a sword in commercial lending and litigation contexts, including lender liability situations. For many years, a catch-all provision for “engaging in any other act or practice which is deceptive to the consumer or to any other person,” was used to make the TCPA applicable to commercial disputes. Tenn. Code Ann. § 47-18-104(b)(27) (emphasis added). By legislative amendment in 2011, the catch-all provision is enforceable only by the Tennessee Attorney General’s office. See, e.g., Wyndham Vacation Resorts, Inc. v. Consultant Group, 2014 U.S. Dist. LEXIS 66163, *41, n. 22 (M.D. Tenn. May 14, 2014). “Thus, § 104(b)(27) does not confer a private cause of action for unfair or deceptive practices that do not fit within one of the specific acts or practices enumerated in § 104(b).” Id. at *41-*42 (citing Brewer v. Kitchen Designs & Cabinetry, 2013 Tenn. App. LEXIS 233, *7 n.11 (Tenn. Ct. App. Apr. 5, 2013)). Nevertheless, commercial parties assert TCPA claims, presumably for the statute’s treble damages and attorney fee components. Tenn. Code Ann. § 47-18-104(b)(8); see Tenn. Code Ann. § 47-18-109(a)(3) and 109(e)(1).
4. **Construction Lenders’ Liability**

With respect to Tennessee-chartered savings and loans associations, Tenn. Code Ann. § 45-3-704, which is entitled “Construction lenders liability,” states:

An association that makes a loan, the proceeds of which are used or may be used by the borrower to finance the design, manufacture, construction, repair, modification, or improvement of real property for sale or lease to others, shall not be held liable to third persons for any loss or damage occasioned by any defect in the real property so designed, manufactured, constructed, repaired, modified, or improved, or for any loss or damage resulting from the failure of the borrower to use due care in the design, manufacture, construction, repair, modification, or improvement of the real property, unless the loss or damage is a result of an act of the association outside the scope of the activities of a lender of money that is tantamount to assuming direct and active responsibility for, or assuring the structural integrity of, the design, manufacture, construction, repair, modification, or improvement of the property or unless the association has been a party to misrepresentation with respect to the real property.

No cases have been found that examine, address or cite this statute.

5. **Jury Waivers**

Tennessee Rule of Civil Procedure 39.01 allows jury waivers. In *Gregory Poole v. Union Planters Bank, N.A.*, 337 S.W.3d 771 (Tenn. Ct. App. 2010), the Tennessee Court of Appeals, interpreting commercial loan agreements, affirmed that pre-dispute jury waivers are enforceable. *K.M.C. Co., Inc. v. Irving Trust Co.*, supra., 757 F.2d 752, 758 (6th Cr. 1985), continues to be cited by courts around the country for the proposition that contracting parties may waive their right to a jury trial, but the waiver must be knowing and voluntary. *Tillman v. Macy’s, Inc.*, 735 F.3d 453, 460 (6th Cir. 2013). Accordingly, practitioners are advised to conspicuously place any jury waiver in a part of the contract where the signatories will see it, such as near the signature line, and to set it out in boldface type, all capital letters, underlined text or some combination of the same.

6. **Only Written Loan Contracts Enforceable**

Tennessee Code Section 47-50-112(a) provides:

(a) All contracts, including, but not limited to, notes, security agreements, deeds of trust, and installment sales contracts, in writing and signed by the party to be bound, including endorsements thereon,
shall be prima facie evidence that the contract contains the true intention of the parties, and shall be enforced as written; provided, that nothing herein shall limit the right of any party to contest the agreement on the basis it was procured by fraud or limit the right of any party to assert any other rights or defense provided by common law or statutory law in regard to contracts.

(b) Any contract, security agreement, note, deed of trust, or other security instrument, in writing and signed or endorsed by the party to be bound, that provides that the security interest granted therein also secures other provisions or future indebtedness, regardless of the class of other indebtedness, be it unsecured, commercial, credit card, or consumer indebtedness, shall be deemed to evidence the true intentions of the parties, and shall be enforced as written; provided, that nothing herein shall limit the right of any party to contest the agreement on the basis that it was procured by fraud or limit the right of any party to assert any other rights or defense provided by common law or statutory law in regard to contracts.

(c) If any such security agreement, note, deed of trust, or other contract contains a provision to the effect that no waiver of any terms or provisions thereof shall be valid unless such waiver is in writing, no court shall give effect to any such waiver unless it is in writing.

Tennessee’s statute of frauds is set forth at Tennessee Code Annotated § 29-2-101, and provides, in pertinent part:

(a) No action shall be brought:
   (1) To charge any executor or administrator upon any special promise to answer any debt or damages out of such person’s own estate;
   (2) To charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person;

* * *

unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person lawfully authorized by such party.

* * *

(b) (1) No action shall be brought against a lender or creditor upon any promise or commitment to lend money or to extend credit, or upon any promise or commitment to alter, amend, renew, extend or otherwise modify or supplement any written promise, agreement or commitment to lend money or extend credit, unless the promise or agreement, upon which such action shall be brought, or some mem-
orandum or note thereof, shall be in writing and signed by the lender or creditor, or some other person lawfully authorized by such lender or creditor.

(2) A promise or commitment described in subdivision (b)(1) need not be signed by the lender or creditor, if such promise or commitment is in the form of a promissory note or other writing that describes the credit or loan and that by its terms:

(A) Is intended by the parties to be signed by the debtor but not by the lender or creditor;
(B) Has actually been signed by the debtor; and
(C) Delivery of which has been accepted by the lender or creditor.

(c) For purposes of this section, a writing, or some memorandum or note thereof, includes a record.

One statutory exception to the statute of frauds is set forth at Tennessee Code Annotated Section 47-8-113, which permits a contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one (1) year of its making. This statutory exception is arguably applicable with respect to derivatives such as interest rate swaps.

B. Recovery of Attorneys’ Fees; Liquidated Damages and “Reasonable” Attorneys’ Fees

In Tennessee, as in most jurisdictions, attorneys’ fees are only recoverable under the provisions of a contract or statute (such as the TCPA or the Tennessee Financial Records Privacy Act) providing for their recovery. Nonetheless, attorneys’ fees must still be reasonable in order to be collectible. Tennessee law frowns on liquidated damages provisions, although these are enforced if deemed reasonable.

C. Statutes of Limitations

1. Applicable Periods of Limitations

The statute of limitations applicable to written contracts is six years. Tenn. Code Ann. § 28-3-109(a)(3). Generally, “[w]hen a right exists, but a demand is necessary to entitle the party to an action, the limitation commences from the time the plaintiff’s right to make the demand was completed, and not from the date of the demand.” Tenn. Code Ann. § 28-1-102. Tennessee has, in limited circumstances, adopted the discovery rule, Teeters v. Currey, 518 S.W.2d 512 (Tenn. 1974), but its applicability to claims for breach of contract has historically been narrow. See Nelson v. Metric Realty, No. 2002 Tenn. App. LEXIS 698, at *52-*55 (Tenn. Ct. App. Sept. 26, 2002) (applicability of
statute of limitations for claim of intentional interference with a settlement contract); compare Pero’s Steak & Spaghetti House v. Lee, 90 S.W.3d 614, 624 (Tenn. 2002) (discovery rule does not apply to toll the statute of limitations for claims of conversion of negotiable instruments). In 2005, the Tennessee Court of Appeals, in Goot v. Metropolitan Government of Nashville and Davidson County, set forth the Tennessee judiciary’s threshold opinion governing the applicability of the discovery rule to breach of contract claims; the wrong (i.e., the breach) must be inherently undiscoverable during the limitations period, despite due diligence. 2005 Tenn. App. LEXIS 708, at *38-*40, n. 31 (Tenn. Ct. App. Nov. 9, 2005).

An action on a demand note must be commenced within six years after demand for payment. If no demand is made, enforcement will be barred if neither principal nor interest on the note has been paid for a continuous period of ten years. Tenn. Code Ann. § 47-3-118(b); Slaughter v. Slaughter, 922 S.W.2d 115 (Tenn. Ct. App. 1995).

For installment notes, the statute of limitation is six years. A cause of action accrues on an installment when it is due and on the entire amount of the note at maturity or acceleration. Tenn. Code Ann. § 47-3-118(a); Tenn. Code Ann. § 28-3-109(a)(3); Consumer Credit Union v. Hite, 801 S.W.2d 822, 824 (Tenn. Ct. App. 1990), (citing Farmers & Merchants Bank v. Templeton, 646 S.W.2d 920, 923 (Tenn. Ct. App. 1982)).

“Liens on realty, equitable or retained in favor of vendor on the face of the deed, also liens of mortgages, deeds of trust, and assignments of realty executed to secure debts, shall be barred, and the liens discharged, unless suits to enforce the same be brought within ten (10) years from the maturity of the debt.” Tenn. Code Ann. § 28-2-111(a).

The statute of limitations for injuries to property is three years. Tenn. Code Ann. § 28-3-105.

2. 

Tennessee Savings Statute

Tennessee has adopted a unique “savings statute,” which permits the voluntary dismissal and re-filing of a suit within one year of dismissal, if the original suit was timely filed. Tenn. Code Ann. § 28-1-105. This procedural oddity is commonly referred to as a “non-suit” by Tennessee practitioners, and is not available when a motion for summary judgment as to the claim is pending. The savings statute usually comes into play in personal injury and wrongful death cases, due to the unusually short statute of limitation—one year—applicable to such actions. The savings statute is only applicable when the original complaint and the new complaint allege substantially the same cause of action, which includes identity of the parties. See Turner v. Aldor Co. of Nashville, 827 S.W.2d 318, 321 (Tenn. Ct. App. 1991). It is not necessary that the two complaints be identical, only that the allegations arise out of the same transaction or occurrence. See Energy Sav. Prods., Inc. v. Carney, 737 S.W.2d 783, 784-85 (Tenn. Ct. App. 1987) (holding that the savings statute was applicable to the second complaint, which had been amended to add a new claim, because the
claim arose out of the same conduct, transaction, or occurrence alleged in the original action and the plaintiff, therefore, could have added the claim to the first action under Tennessee Rule of Civil Procedure 15). In certain circumstances, it can be pled in federal court following removal from state court.

3. **Extension by Voluntary Payment**


4. **Use of Time-Barred Claim as a Defense**


5. **Waiver of the Limitations Period**

*First American Bank v. Woods* holds that the statute of limitations “may be waived by express contract or by necessary implications.” 734 S.W.2d 622, 630 (Tenn. App. 1987), (quoting *Jackson v. Kemp*, 365 S.W.2d 437, 439 (Tenn. 1963)). “A promise not to plead the statute, made before the remedy is barred, may be given in exchange for the creditor’s forbearance to bring suit. Actual forbearance or a promise to forbear, so given, is a sufficient consideration for the debtor’s promise.” *Jackson v. Kemp*, 365 S.W.2d 437, 439 (Tenn. 1963) (quoting Corbin on Contracts, Vol. I, sec. 218). Modern distinctions between consumer and commercial indebtedness may make it more difficult to effectuate a waiver of a statute of limitation by a consumer debtor.

D. **Conflicts and Choice of Law**

Conflict of laws rules in Tennessee are largely established by common law rather than by statute. In contract cases, a fundamental issue is whether the parties have designated in their contract the state whose law governs their contract rights and duties. Tennessee does not apply a center of gravity test, but rather weighs contacts. Common law places particular importance on the *situs* of the last act necessary to make the agreement effective between the parties or *lex loci*. Accordingly a contract is presumed to be governed by the laws of the jurisdiction in which it was executed absent a contrary intent. Such an intent may be the inclusion of a choice of law clause. In order for a choice of law clause to be effective, it must (i) be executed in good faith; (ii) the chosen law must bear a material connection to the transaction; (iii) the choice must be
reasonable and not a sham; and (iv) the chosen law must not be contrary to
the fundamental policy of a state having a materially greater interest and whose
law would govern otherwise. In *Goodwin Bros Leasing, supra.*, the court took
note of the relative sophistication of the parties and that they recognized they
were choosing the law of a state that allowed higher interest rates. Moreover
choice of Kentucky Law would uphold the validity of the transaction.

If no state’s law is chosen, Tennessee follows Restatement (First) of the
Law, Conflict of Laws, and looks to the law of the place of making of the con-
tract. In usury cases, Tennessee courts tend apply the law that upholds the
contract by referring to either the place of performance or the place of mak-
ing. *Goodwin Bros Leasing, supra.* If the issue is performance of the contract,
Tennessee courts generally refer to the law of the place of performance of
the contract. Numerous additional “contacts” have been considered by Ten-
nesse courts.

Of course, Tennessee has codified UCC § 1-105 at Tenn. Code Ann. § 47-
1-105, providing that for all transactions governed by the UCC the parties
may choose the law bearing a reasonable relationship to the transaction.

E. Forum and Venue Selection Provisions

Generally, forum selection clauses are *prima facie* valid under Tennessee law,
and should be enforced unless the party resisting application of the clause can
clearly show that enforcement would be unreasonable and unjust. *Carefree
Annotated Section 20-4-101 governs venue in Tennessee, but “implicitly rec-
ognizes that parties can stipulate to a particular venue for resolution of transi-
tory actions,” which are actions based a cause of action of a type that can arise
anywhere, such as breach of contract or negligence. *Kampert v. Valley Farmers
Forum and venue selection provisions may be invalid in fraud cases and claims
arising under the Tennessee Consumer Protection Act. In addition, local
actions, such as quiet title, trespass and claims asserting an injury to real prop-
erty, generally must be brought in the courts of the county where the property
is located. *Kampert v. Valley Farmers Coop.*, 2010 Tenn. App. LEXIS 657,
send litigation involving contracts for the improvement of real property in Ten-
nessee to forums in other states are void. Tenn. Code Ann. § 66-11-208.

F. Arbitration Agreements

Arbitration agreements are favored in Tennessee by both statute and case law.
*Benton v. Vanderbilt Univ.*, 137 S.W.3d 614, 617 (Tenn. 2004). The Tennessee
Uniform Arbitration Act (the “TUAA”), Tenn. Code Ann. §§ 29-5-301 to
-320, governs the extent of judicial involvement in the arbitration process. *See
Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 447-48 (Tenn. 1996). The
TUAA establishes that written agreements to arbitrate are “valid, enforceable
and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract.” Tenn. Code Ann. § 29-5-302(a). By enacting the TUAA, the legislature has adopted a policy favoring the enforcement of arbitration agreements. _Buraczynski v. Eyring_, 919 S.W.2d 314, 317-18 (Tenn. 1996). The TUAA explicitly confers jurisdiction on the trial court to enforce the arbitration agreement and to enter judgment on the arbitration award. Tenn. Code Ann. § 29-5-302(b).

Practically, the advisability of arbitration in commercial loan documents is matter-specific. Often, arbitration, especially arbitration compliant with the rules and procedures of the Judicial Arbitration and Mediation Services or the American Arbitration Association, is more expensive, more complicated and less predictable than seeking judicial remedies. Lenders may want to consider limiting arbitration to matters such as lender liability.

### G. Judgments

Judgments are governed by Title 25 of the Tennessee Code Annotated. Entry of a final judgment in Tennessee courts is controlled by Tennessee Rules of Civil Procedure 54, 56, 57 and 58, in the same manner that Rules 54 through 58 of the Federal Rules of Civil Procedure control entry of judgment in federal court.

Unlike a federal court ruling on a motion for summary judgment, where the trial court “should state on the record the reasons for granting or denying the motion,” Fed. R. Civ. P. 56(a) (emphasis added), a Tennessee state court ruling on a motion for summary judgment “shall state the legal grounds upon which the court denied or grants the motion, which shall be included in the order reflecting the court’s ruling.” Tenn. R. Civ. P. 56.04 (emphasis added).

1. **Confession of Judgment**

“Any power of attorney or authority to confess judgment which is given before an action is instituted and before the service of process in such action, is declared void; and any judgment based on such power of attorney or authority is likewise declared void,” but the foregoing does not apply when “any power of attorney or authority given after an action is instituted and after the service of process in such action.” Tenn. Code Ann. 25-2-101. “No surety shall be permitted to confess judgment, or allow judgment to go by default, if the principal will be made a defendant to the suit, and tender to the surety, for the principal’s indemnity, sufficient collateral security, to be approved by the court before whom the suit is pending.” Tenn. Code Ann. § 25-2-102.

2. **Interest on Judgments**

Interest on judgments accrues at a statutory rate calculated and published by the Tennessee Administrative Office of the Courts, unless the judgment is based on a statute, note, contract, or other writing that fixes a rate of interest within the limits provided in § 47-14-103 for particular categories of creditors,
lenders or transactions, [in which case] the judgment shall bear interest at the rate so fixed. Tenn. Code Ann. § 47-14-121 (amended in 2012). Currently, the judgment rate is fixed at 2 percent less than the “formula rate” (essentially 2 percent over the prime rate). See Section IV(D)(2), supra.

3. **Survival of Judgments**

A properly recorded judgment giving rise to a judgment lien, discussed infra., will last for ten years from the date of the judgment. Tenn. Code Ann. § 25-5-105. However, a judgment creditor “whose judgment remains unsatisfied may move the court for an order requiring the judgment debtor to show cause why the judgment should not be extended for an additional ten years,” and this process may be repeated until the judgment is satisfied. Tenn. R. Civ. P. 69.04; Harris v. Hall, 2012 Tenn. App. LEXIS 421, *4-*6 (Tenn. Ct. App. June 25, 2012) (plaintiff’s motion to extend an agreed order for ten years was properly denied because there was no monetary judgment awarded, so she was not a judgment creditor). “When a judgment creditor extends a judgment, he or she merely is prolonging the judgment’s existence an additional ten years, and since an extended judgment is not a new judgment, the lifespan of that extended judgment begins to run at the expiration of the first ten years from the effective date of the judgment . . . thus, the new ten year period is ‘tacked on’ to the previous ten years, and does not begin to run from the date of the entry of the order granting the extension.” Cook v. Alley, 419 S.W.3d 256, 260 (Tenn. Ct. App. 2013).

4. **Judgment Liens and Post-Judgment Remedies**

Post-judgment execution remedies in Tennessee are governed by the not-always consistent provisions of Tennessee Rule of Civil Procedure 69 and Titles 25 and 26 of the Tennessee Code. These provisions present a number of challenges for those unfamiliar with this area of law, and the actual process of making use of these execution remedies varies greatly from county to county, especially with respect to execution upon real property. Generally, in larger counties, sheriff’s offices are familiar with the processes, while in the smaller counties there is less such experience.

In Tennessee, a judgment lien is perfected by recording a certified copy of the judgment with the register of deeds office of any county where the judgment debtor owns real property. Tenn. Code Ann. § 25-5-101 (emphasis added); Tenn. R. Civ. P. 69.07. An often overlooked statute requires that in order to execute against a judgment debtor’s personal property, the judgment, or “a similar abstract or memorandum [must be] registered within sixty (60) days from rendition of the judgment or decree, in the county where the debtor resides, if the debtor lives in this state, or, if not, then in the county in which the property is located.” Tenn. Code Ann. § 25-5-103. Judgment creditors should immediately record the judgment, regardless of the pendency of an appeal (unless a sufficient appellate bond has been filed), in order to preserve the ability to execute against the judgment debtor’s personal property.
Certain protections for judgment debtors have been enacted that apply to both executions and garnishments. “Upon requesting the issuance of an execution or garnishment, the judgment creditor, or the judgment creditor’s agent or attorney, shall file a statement showing the judgment debtor’s last known address, the amount owed on the judgment, and the judgment creditor’s address for mailing any notice required under this part. If a clerk issues an execution or a garnishment without demand, the clerk shall ascertain such information from the court records.” Tenn. Code Ann. § 26-2-402. Notice to the judgment debtor is required for both executions and garnishments. Tenn. Code Ann. §§ 26-2-403 and 404. The sheriff or other officer who levies an execution or summons a garnishee must provide the judgment debtor with a copy of the execution or garnishment. Tenn. Code Ann. §§ 26-2-405 and 406. A judgment debtor may file a motion to quash the garnishment or execution within twenty (20) days from the mailing of the notice of a levy of execution, the withholding of wages by a garnishee/employer, the day of the mailing of notice for any other garnishment. Tenn. Code Ann. § 26-2-407. “No sheriff or other officer shall conduct an execution sale, and no clerk shall pay out funds received pursuant to an execution or garnishment until the judgment debtor’s time has expired for filing a motion to quash, or until a judicial determination has been made on such motion.” Tenn. Code Ann. § 26-2-408.

(a) **Execution Upon Real and Personal Property by Sheriff’s Sale**

To foreclose a judgment lien on real property, the judgment creditor initiates a sheriff’s sale. Tenn. Code Ann. § 26-5-101; Tenn. R. Civ. P. 69.07. There are some inconsistencies between the requirements for a sheriff’s sale under the Tennessee Rules of Civil Procedure—at Tenn. R. Civ. P. 69.07—and the Tennessee Code—at Tenn. Code Ann. § 26-5-101: for example, the rule requires publication in a newspaper of general circulation, while the statute requires publication only in a newspaper published in the county where the property is located. In addition, since a sheriff’s sale of realty, from a practical perspective, will also include the sale of fixtures and other personal property contained on the real property, Tenn. Code Ann. § 26-5-101(b)(1) requires that the notice also be physically posted by the sheriff in five places in the county, one of which must be the courthouse and another must be “the most public place in the neighborhood” of the judgment debtor. Rule 69.06 as to executions upon personalty, is silent as to this requirement, but practitioners are advised to post the additional five notices as contemplated by the statute.

The sale itself is conducted largely in the same manner as a nonjudicial foreclosure. “Proceeds of the sale shall be applied first to the sheriff’s statutory fees and reasonable expenses, then to court costs, then to the judgment creditor, and then any remaining balance to the judgment debtor,” with one very large exception: unpaid ad valorem taxes. Tennessee Code Annotated § 26-5-108 mandates that before the court confirms the sale to the purchaser, the court must determine the amount of unpaid taxes as of the day of the sale, and pay them with the first dollars out of the money paid into court. The sheriff’s sale
of real and personal property is subject to a two-year right of redemption. Tenn. Code Ann. § 26-5-113. The purchaser is entitled to receive a certificate from the sheriff evidencing the purchase, Tenn. Code Ann. § 26-5-109, and is also entitled to a deed from the sheriff evidencing the conveyance, Tenn. Code Ann. § 26-5-100. Obtaining title insurance for real property acquired by a sheriff’s sale may be difficult, for the same reasons obtaining title insurance to a property acquired by a tax sale is often difficult.

(b) Execution Against Trust Assets

Effective July 1, 2013, Tennessee adopted sweeping amendments to Tennessee Uniform Trust Code. Revised Tenn. Code Ann. § 35-15-501 (creditor’s rights) provides a general rule that creditors can reach a beneficiary’s interest by attachment of present or future distributions or other means. However, the general rule is rendered toothless by its exceptions. Section 35-15-502 (spendthrift provisions) provide that, if a trust has a spendthrift provision, a creditor cannot reach anything in the trust, even mandatory distributions, with the trustee explicitly allowed to withhold “mandatory” distributions or to make mandatory distributions to third parties on the beneficiary’s behalf, rather than to the beneficiary. Revised section 35-15-506 (distributions relative to support) goes further by saying, even if the trust contains no spendthrift provision, a beneficiary’s mandatory interest is not a property right (so a creditor cannot reach it) and the trustee may make distributions on the beneficiary’s behalf rather than to the beneficiary. Under revised section 35-15-504, if the trustee has discretion whether to make distributions to a beneficiary, the beneficiary’s creditor cannot reach trust assets whether or not the trust includes a spendthrift provision. Revised section 35-15-506 says if a beneficiary’s interest is a support interest, meaning the trustee is directed or has discretion to distribute for some combination of health, support, maintenance, and education, then whether or not the trust contains a spendthrift provision the beneficiary’s creditor cannot force distributions and cannot reach amounts distributed for those purposes even after the beneficiary receives them. Sections 35-15-508 (removal powers are not reachable by creditors) and -509 (judicial foreclosures of beneficial interests prohibited) provide that a creditor cannot reach trust assets solely because the debtor-beneficiary is a fiduciary, may remove and replace a fiduciary, has a power of appointment, or has reserved a power over the trust. However, if the trust has no spendthrift provision, a creditor can reach (1) amounts actually distributed to a beneficiary other than pursuant to a support standard, (2) amounts contributed by the beneficiary in certain circumstances.

(c) Bank and Other Levies

Bank (and other) levies are controlled by Tennessee Code Annotated §§ 26-1-101 et seq. and 26-3-101 et seq., and Tennessee Rule of Civil Procedure 69.06, and consist of two concepts: the writ of execution and the levy of execution. See Keep Fresh Filters, Inc. v. Reguli, 888 S.W.2d 437 (Tenn. Ct. App. 1994).
A writ of execution is an order directing the sheriff to levy upon and sell the judgment debtor’s property identified in the writ that is not statutorily exempt. Tenn. Code Ann. § 26-1-104. The writ of execution is usually directed at bank accounts, but can be aimed at any other personalty, including vehicles. Clerks of the courts of record are supposed to issue writs of execution thirty days after the entry of a judgment as a matter of course or sooner if requested by the judgment creditor. Keep Fresh Filters, Inc. v. Reguli, 888 S.W.2d 437, 443 (Tenn. Ct. App. 1994) (citing Tenn. Code Ann. §§ 26-1-201, -203, -206, -207; Tenn. R. Civ. P. 62.01). In practice, the judgment creditor applies to the clerk of the court that issued the judgment for a writ of execution, using forms that may vary from county to county. In recent years, strides have been made to adopt a form, also used for wage garnishments, that is uniform across the state.

A levy of execution is the officer’s act of appropriating the debtor’s property for the satisfaction of a debt McMillan v. Gaylor, 35 S.W. 453, 454-55 (Tenn. Ch. App. 1895). It is accomplished by the officer’s asserting dominion over the property by actually taking possession of it or doing something that amounts to the same thing, and results in the actual divestiture of the judgment debtor’s title. Keep Fresh Filters, Inc. v. Reguli, 888 S.W.2d 437, 443-44 (Tenn. Ct. App. 1994) (citations omitted). Judgment creditors who have acquired their liens by execution and levy are non-consensual lien creditors for the purpose of Tenn. Code Ann. § 47-9-301(3), do not need to comply with Article 9’s filing requirements, and in the case of motor vehicles, do not need to comply with vehicle title and registration statutes. The date the lien arises continues to be a matter of debate in Tennessee, but the leading case suggests that it arises on the day that the clerk issues the writ. Keep Fresh Filters, Inc. v. Reguli, 888 S.W.2d 437, 444-45 (Tenn. Ct. App. 1994). An execution cannot be suspended once commenced by proper process. Cook v. Smith, 9 Tenn. (1 Yer.) 148, 148 (1829); Overton v. Perkins, 8 Tenn. (Mart. & Yer.) 367, 371 (1828).

A judgment creditor has a right to have its judgment satisfied by sale of the levied goods unless it abandons its right. Evans v. Barnes, 32 Tenn. (2 Swan) 291, 293-94 (1852); Overton v. Perkins, 8 Tenn. at 371. The sale is conducted in accordance with Tennessee Rule of Civil Procedure 69.06, which reads, in its entirety,

The sheriff shall sell personalty by auction. At least ten days before the sale a notice generally describing the personalty and stating the time, place, and terms shall be published in a newspaper of general circulation at the judgment creditor’s expense, taxable as court costs. If the personalty is perishable no notice of sale is required.

Proceeds of the sale shall be applied first to the sheriff’s statutory fees and reasonable expenses, then to court costs, then to the judgment creditor, and then any remaining balance to the judgment debtor.

Again, this Rule differs from the sale procedure for personal property set forth at Tennessee Code Annotated 26-5-101 et seq., discussed supra. The
officer is expressly permitted to sell the judgment debtor’s corporate stock. Tenn. Code Ann. § 26-5-106. A judgment debtor’s LLC interest is not totally subject to execution; the execution is limited to the extent of a charging order against the member’s financial rights. Tenn. Code Ann. § 48-249-509. A judgment debtor’s partnership or limited partnership interests are also not completely subject to execution; they are limited to a charging order against the judgment debtor’s share of profits and losses and right to receive distributions. Tenn. Code Ann. §§ 61-1-504 and 61-2-704. Persons asserting abandonment by a judgment creditor must prove distinctly and clearly that the creditor abandoned its lien rights. *Evans v. Barnes*, 32 Tenn. (2 Swan) 291, 294 (1852).

(d) Garnishments

Most (or all) Tennessee courts of record now utilize a standard form that applies to both levies and garnishments, the latter of which is governed by Tennessee Code Annotated Section 26-2-201 *et seq.* and Rule 69.05 of the Rules of Civil Procedure. Functionally, Tennessee court clerks and sheriffs follow the procedures set forth in Rule 69.05.


5. Assignments of Judgments

Judgments, like other indebtedness, can be sold or assigned in Tennessee, and the owner of the judgment likewise takes the collateral for the judgment, if any. There is no statutory process for the assignment of judgments in Tennessee.
6. **Enforcement of Foreign Judgments**

Tennessee has enacted the Uniform Enforcement of Foreign Judgments Act at Tennessee Code Annotated Section 26-6-101 *et seq.* As in other jurisdictions, an authenticated copy of the judgment is filed with the appropriate Tennessee state court and becomes “enrolled.” A summons reflecting the enrollment is served upon the judgment debtor. Once thirty days have passed from the date of service and the judgment debtor has not challenged enrollment for one of the reasons set forth in the Uniform Act, the enrolled judgment becomes enforceable.

XI. **Other Laws of Interest**

A. **Prompt Pay Act**

Tennessee has enacted the Prompt Pay Act of 1991 (“Prompt Pay Act”), Tenn. Code Ann. § 66-34-101 *et seq.*, to ensure timely payments to contractors, subcontractors, materialmen, furnishers, architects and engineers. Practitioners are cautioned to engage Tennessee counsel experienced with the Prompt Pay Act when preparing construction contracts containing retainage provisions. Generally, the Prompt Pay Act applies to all governmental construction contracts and all private construction contracts other than “contracts for the construction of, or home improvement to, any land or building, or that portion thereof which is used or designed to be used as a residence or dwelling place for one (1), two (2), three (3) or four (4) single family units.” Tenn. Code Ann. §§ 66-34-701 and 702. The Prompt Pay Act does not apply to any bank, savings bank, savings and loan association, industrial loan and thrift company, other regulated financial institution or insurance company. Tenn. Code Ann. § 66-34-703. Tennessee Code Annotated Sections 66-34-601 and 602 address the remedies for delinquent payment or nonpayment.

Retainages are not required in a Tennessee construction contract, but if the contract requires such a withholding, the maximum amount is 5 percent of the contract amount. Tenn. Code Ann. § 66-34-103(a). In such case, the owner releases and pays all retainages for completed work to the prime contractor within ninety days after completion of the work or within ninety days after substantial completion of the project, whichever occurs first. Tenn. Code Ann. § 66-34-103(b). “Work completed” is construed to mean the completion of the scope of the work and all terms and conditions covered by the contract under which the retainage is being held. Tenn. Code Ann. § 66-34-103(b). The prime contractor must pay all retainages due any subcontractor within ten days after receipt of the retainages from the owner. Tenn. Code Ann. § 66-34-103(b). Any subcontractor receiving retainage from the prime contractor must pay subcontractors and material suppliers all retainages due to them within ten days after receipt of the retainage. Tenn. Code Ann. § 66-34-103(b). A violation of the foregoing provisions of the Prompt Pay Act is a Class A Misdemeanor and subject to a $3,000 fine for each day of non-compliance. Tenn. Code Ann. § 66-34-103(c)-(d).
In prime contracts for construction equal to or exceeding $500,000 that include a retainage provision, any “retained amount shall be deposited in a separate, interest-bearing, escrow account with a third party.” Tenn. Code Ann. § 66-34-104(a) and (i). The funds become the sole and separate property of the prime contractor or remote contractor to whom they are owed, subject to the rights of the person withholding the retainage in the event the prime contractor or remote contractor otherwise entitled to the funds defaults on or does not complete its contract. Tenn. Code Ann. § 66-34-104(b). The failure to deposit the funds into an escrow account results in paying the owner of the retained funds an additional $300 per day penalty per day for each day that such retained funds are not deposited. Tenn. Code Ann. § 66-34-104(c). “The party with the responsibility for depositing the retained amount in a separate, interest-bearing, escrow account with a third party shall have the affirmative duty to provide written notice that it has complied with the requirements of this section to any prime contractor upon withholding the amount of retained funds from each and every application for payment, including” identification of the: financial institution; account number; and amount of retained funds that were deposited. Tenn. Code Ann. § 66-34-104(d). “Upon satisfactory completion of the contract, to be evidenced by a written release by the owner or prime contractor owing the retainage, all funds accumulated in the escrow account together with all interest on the account shall be paid immediately to the prime contractor or remote contractor to whom the funds and interest are owed.” Tenn. Code Ann. § 66-34-104(e). Remedies for disputed amounts or disputed withholding release forms are set forth in Tenn. Code Annotated § 66-34-104(f). The foregoing requirements are mandatory and may not be waived by contract, Tenn. Code Ann. § 66-34-104(j), and the “failure to deposit the retained funds into an escrow account as provided herein, within seven (7) days’ receipt of written notice regarding such failure, is a Class A misdemeanor.” Tenn. Code Ann. § 66-34-104(k).

Tennessee Code Annotated § 66-34-201 et seq. narrows the above and governs payments from owners to general contractors. If a contractor has performed its contractual obligations, then the owner pays to the contractor the full amount earned by the contractor, less the contractually agreed upon retainage amount, in a schedule in the contract and within thirty days after application for payment is timely submitted by the contractor to the owner, regardless of the failure of an architect, engineer or other agent employed by the owner to review and approve an application for payment for work that has been performed in accordance with the but not if an architect has certified that a contractor has not completed performance. Tenn. Code Ann. §§ 66-34-202 and 203. The owner pays to the contractor all withheld retainage amounts when the owner has received a use and/or occupancy permit, has received a certificate of substantial completion from an architect charged with supervision of the construction of an improvement, or begins to use or could have begun to use an improvement; the owner may reasonably withhold in accordance with provisions of the written contract between the owner and the contractor; provided, however, that the retainage must be paid within ninety days after the date of the occurr-
rence of an event included in the first clause of this sentence. Tenn. Code Ann. § 66-34-204. Except for government contracts, “any sums allocated by the owner or provided or committed to the owner by a third party which are intended to be used as payment for improvements made to real property by virtue of a written contract between the owner and the contractor shall be held by the owner or third party in trust for the benefit and use of the contractor and shall be subject to all legal and equitable remedies.” Tenn. Code Ann. § 66-34-205. These rules apply to an architect and/or engineer furnishing design or contract administration services to an owner, contractor, subcontractor, materialman or furnisher if the architect and/or engineer contracts in writing with the owner. Tenn. Code Ann. § 66-34-501.

Tennessee Code Annotated Section 66-34-301 et seq. narrows the general rules and governs payments from contractors to subcontractors, materialmen or furnishers. If a subcontractor, materialman or furnisher has performed its contractual obligations, then the contractor pays to the sub the full amount earned by the sub, subject to any condition precedent for payment under the contract, less the contractually agreed upon retainage amount, in a schedule in the contract and within thirty days after application for payment is timely submitted by the sub to the contractor, plus the sub’s pro rata share of any interest received by the contractor. Tenn. Code Ann. §§ 66-34-302 and 303. Subcontractors, materialmen or furnishers enjoy a parallel benefit as to sums received by the contractor as payment for work, services, equipment and materials supplied by the subcontractor as that received by the contractor from the owner. Tenn. Code Ann. § 66-34-304. These rules apply to payments between subcontractors, materialmen and furnishers. Tenn. Code Ann. § 66-34-401. These rules also apply to an architect and/or engineer furnishing design or contract administration services to an owner, contractor, subcontractor, materialman or furnisher if the architect and/or engineer contracts in writing with a contractor, subcontractor, materialman or furnisher. Tenn. Code Ann. § 66-34-501.

B. **Uniform Electronic Transactions Act and Article 4A of the Uniform Commercial Code—Funds Transfers**

Tennessee has adopted the Uniform Electronic Transactions Act, Tenn. Code Ann. § 47-10-101 et seq. 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 traditional signatures. The act does not require electronic contracting. Instead, parties to a transaction must mutually agree to conduct a transaction or form a contract electronically. Whether the parties agree to conduct a transaction by electronic means is determined from the context and circumstances surrounding the parties’ conduct. The act does not apply to a transaction to the extent it is governed by a law governing the creation and execution of wills, codicils, or testamentary trusts or by the UCC as adopted in Tennessee (with the exception of Tenn. Code Ann. §§ 47-1-107, 47-1-206, and title 47, chapters 2 and 2A).
Tennessee has adopted article 4A of the UCC governing electronic funds transfers at Tennessee Code Annotated Section 47-4A-101 et seq.

XII. Conclusion

Anyone interested in exploring commercial lending in Tennessee, or related disciplines such as bankruptcy, consumer finance, consumer finance regulation, and real estate, are encouraged to visit the authors’ website, at www.ewivlaw.com, subscribe to their periodic blogs, or contact them at erniewilliams@ewivlaw.com, mikeschwegal@ewivlaw.com or (615) 372-0993.