

# KANSAS SUPREME COURT OPINION LIMITS ENFORCEABILITY OF LENDER REMEDIES UNDER MORTGAGE AGREEMENT

On Sept. 11, 2020, the Kansas Supreme Court issued an opinion that restricts lender remedies if a borrower defaults under a mortgage agreement. In *Fairfax Portfolio LLC v. Carojoto*, the Kansas Supreme Court held that a mortgage agreement alone cannot provide the express consent necessary for a lender to take possession of the mortgaged property prior to a court action. This opinion must be considered by mortgage lenders first when entering mortgage agreements and further when determining courses of action against a borrower if a borrower defaults.

In *Fairfax*, the lender took possession of the mortgaged property, over the objection of the borrower, due to a default of the borrower under the parties' loan documents. After the lender had taken possession of the property, it filed a mortgage foreclosure action. Subsequently, the lender acquired the property through a foreclosure sale authorized by the district court. The borrower then filed a lawsuit claiming that the lender improperly took possession of the property prior to a foreclosure action.

The mortgage clause reviewed by the Kansas Supreme Court provided, in part, that the borrower agreed that the lender may take possession of the mortgaged property if a borrower defaults under the mortgage. The Court analyzed the enforceability of this clause by citing K.S.A. 58-2301, which states: "In the absence of stipulations to the contrary, the mortgagor of real property may retain the possession thereof." The Court emphasized that Kansas case law provides that a lender cannot take possession of mortgaged property before filing suit against the borrower without the consent or acquiescence of a borrower. After reviewing this case law, the Court determined that the mortgage alone is unable to provide consent required for a lender to take possession of the property without a proper court action. As such, the Court concluded that the language from the mortgage that purportedly allowed the borrower to take possession of the property if a borrower defaults was unenforceable under K.S.A. 58-2301.

## PEOPLE

Beverly M. Weber

Rhys J. Williams

## SERVICES AND INDUSTRIES

Financial Services and Banking

Debt Finance

Real Estate



Armstrong  
Teasdale

*Fairfax* makes clear that under Kansas law, mortgage lenders cannot rely solely on a mortgage agreement to take possession of mortgaged property if a borrower defaults. Rather, the Kansas Supreme Court instructed that, absent subsequent consent or acquiescence of a borrower, a lender must first file an action with the district court and then seek its remedies for a borrower's default.