

Summary of Mortgage Law

U.S. Virgin Islands

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For: The American College of Mortgage Attorneys

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## I. FORM

**1. SECURITY INSTRUMENT USED:** The U.S. Virgin Islands (hereinafter “USVI”) is a lien theory and mortgage jurisdiction. 28 V.I.C. § 290; *see also Royal Bank of Canada v. Clarke*, 373 F. Supp. 599 (DVI 1974).

Under USVI law, there is no specific language required to create a mortgage. In practice, mortgages in the USVI are typically form documents which include, *inter alia*, the following information: (1) name(s) and address(es) of the mortgagor(s); (2) name(s) and address(es) of the mortgagee(s); (3) the principal amount secured; (4) a description of the real property securing the loan; (5) signature(s) of mortgagor(s); (6) signatures of two subscribing witnesses; and (7) acknowledgment of the mortgagor(s)’s signatures.

Pursuant to title 28, section 10 of the Virgin Islands Code (hereinafter “the Code”), a mortgage does not imply a covenant for the payment of the sum thereby intended to be secured. Without an express covenant for payment in the mortgage or in a separate instrument, the remedies of the mortgagee are confined to foreclosure of the mortgage lien and the mortgagor will have no personal liability. Most mortgages in the USVI secure a debt evidenced by a separate unrecorded note that usually provides for personal liability.

**2. RECORDING REQUIREMENTS:** In the USVI, mortgages must be in writing and executed in the presence of two witnesses who must subscribe their names to the same as such. 28 V.I.C. § 241 et seq. If executed in the USVI, the mortgagor’s signature must be validly acknowledged by a notary public authorized to perform notarial acts in the USVI. *Id.* at § 81. For mortgages and other documents executed outside the USVI, compliance with the requirements for recording in the jurisdiction of execution will suffice to allow for recording in the USVI; alternatively, compliance with USVI requirements (two witnesses and an acknowledgement by a notary from the jurisdiction of execution) will entitle the instrument to be recorded. *Id.* at § 90. The notary may act as a witness, but if doing so, must sign as such in addition to the notarial acknowledgement. *See Alexander v. Alexander*, 65 V.I. 372 (VI 2016) (where notary did not sign deed as a witness until seven years after deed was originally signed, deed was invalid).

The USVI places great importance on the valid execution and acknowledgement of a mortgage. Valid witnessing and acknowledgement is required to convey or secure an interest in real property under USVI law, and defects will render the conveyance (or mortgage) void, even as between the parties. The witnesses and notary must be physically present at the time a mortgage is executed; omission of these formalities is “fatal to the validity of the instrument, even as to the parties, and such an instrument conveys nothing.” *Milligan v. Khodra*, No. 1999-136, 2004 WL 3383654 at 8 (DVI 2004). A deed subscribed by only one witness was void, even where the notary had belatedly subscribed as a witness seven years after the deed’s original execution. *See Alexander v. Alexander*, 65 V.I. 372 (VI 2016).

The USVI is a “race-notice” jurisdiction. The USVI’s recording statute states: “Every conveyance of real property hereafter made within the Virgin Islands which is not filed for record shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance is first duly recorded.” 28 V.I.C. § 124. While the USVI’s recording statute appears to be a “race statute,”

courts have interpreted it as a “race-notice statute,” at least with respect to mortgages. *See Morris v. Ernest*, 44 V.I. 153, 2002 V.I. LEXIS 3 (Terr. Ct. 2002); *Chase Manhattan Bank v. Miller*, 39 V.I. 123, 1998 V.I. LEXIS 21 (Terr. Ct., 1998). Though the USVI recording statute makes reference only to conveyances, the entirety of section 124 applies to mortgages, including the notice provisions. *See Royal Bank of Canada v. Clarke*, 373 F. Supp. 599 (DVI 1974). In the USVI, a subsequent innocent mortgagee is analogous to a “subsequent innocent purchaser.” *See Beachside Assocs. v. Bayside Resort, Inc.*, 2011 V.I. LEXIS 68 (V.I. Super. Ct. Nov. 25, 2011).

Mortgages and other instruments affecting title to real property are recorded in the Office of the Recorder of Deeds in the judicial division in which the property is located. 28 V.I.C. § 121. The Office of the Recorder of Deeds is a division of the Office of the Lieutenant Governor and has two districts: the St. Thomas – St. John District located on the island of St. Thomas, which keeps records for the islands of St. Thomas, St. John, Water Island and the surrounding smaller islands, and the St. Croix District located on the island of St. Croix, which keeps records for the island of St. Croix and surrounding smaller islands. If a mortgage affects real property located in both judicial districts, it must be recorded in both offices. *Id.*

In 2009, the USVI legislature enacted the Uniform Real Property Electronic Recording Act, 28 V.I.C. § 151 et seq., to allow for electronic submission of instruments affecting title to real estate to the Recorder for approval. The provisions of this Act have not yet been implemented. At present, only original (hard copy, wet ink) documents are accepted by the Recorder for recording.

**3. STATUTES TO BE WAIVED:** None.

**4. UNUSUAL TREATMENT OF STANDARD PROVISIONS:**

- a. Powers of sale are not enforceable under USVI law. A provision for power of sale applicable to timeshares only has been proposed but not yet enacted as of the date of this survey.
- b. While confessions of judgment are permitted by statute, 5 V.I.C. §421, 422, it is unclear whether a confession of judgment given at the time of, or as part of, the mortgage would be enforceable. Confessions of judgment are not typically included in USVI mortgages, though they are sometimes used after defaults.
- c. Under USVI law, a mortgagee may not charge a mortgagor a fee, penalty, or other form of payment for prepayment of all or part of the balance of a mortgage, however, there are numerous exceptions to this rule, which in effect means it only applies to certain residential loans to natural persons. 11 V.I.C. § 951.
- d. Attorney's fees, although usually less than actual costs, are routinely awarded to a prevailing party in a foreclosure action, although the decision whether to award fees is within the court's discretion. 5 V.I.C. § 541 and 543; *see also El Fenix De Puerto Rico v. Dallas*, 30 V.I. 339, 1994 U.S. Dist. LEXIS 21228 (DVI 1994).

**5. SECURING FUTURE ADVANCES:** Future advances will have the same priority as advances made at the time the mortgage is executed, but only if the mortgage or loan agreement (which need not be recorded) explicitly so provides. 28 V.I.C. § 1032. This applies whether such

advances are obligatory or to be made at the option of the lender. Though the total amount of the indebtedness may decrease or increase from time to time, the total unpaid balance secured cannot exceed the maximum principal amount specified in such mortgage, plus interest thereon, service charges and any disbursements made for the payment of taxes, assessments, or insurance on the property covered by the lien, with interest on such disbursements. *Id.* A construction loan mortgage should be denominated a “construction security interest” and meet the requirements set forth in 28 V.I.C. § 258(i) and (j) in order for advances under the mortgage to have priority over certain construction liens. *See* section of this survey discussing construction liens.

## **6. SECURING ADDITIONAL ADVANCES TO PROTECT THE COLLATERAL:**

Except for 28 V.I.C. § 1032 dealing with future advances as discussed above, there are no special requirements under USVI law in order for a mortgage to secure contingent advances to protect the collateral so long as the mortgage clearly states that it secures all such amounts.

### II. TRUSTEE UNDER DEED OF TRUST: N/A.

### III. FORECLOSURE

**1. BRIEF DESCRIPTION OF PROCEDURE:** Foreclosure in the USVI is accomplished exclusively by filing and prosecuting a civil action for foreclosure. 28 V.I.C. § 290; *see Lucerne Inv. Co. v. Estate Belvedere, Inc.*, 7 V.I. 275, 1969 U.S. Dist. LEXIS 4163 (DVI 1969). Foreclosure actions are equitable in nature. 28 V.I.C. § 531.

A foreclosure action is started by filing a complaint in the Superior Court of the Virgin Islands or, if there is diversity jurisdiction, in the federal District Court of the Virgin Islands. Plaintiffs in foreclosure actions are required to name all junior lienors who have filed any liens or encumbrances subsequent to the plaintiff's mortgage. 28 V.I.C. § 532; *see Chase Manhattan Bank, N.A. vs. James E. Ruan, Inc.*, 18 V.I. 380 (DVI 1981). Senior lienholders may be named, but this is not required. *Id.* Service of process is governed by Rule 4 of the Virgin Islands Rules of Civil Procedure or Rule 4 of the Federal Rules of Civil Procedure depending on whether the foreclosure action is filed in the local or federal court. Personal service of process is recommended. After good faith attempts at personal service are established by affidavit to the court, the ownership of real property in the USVI is a basis for allowing substituted service by publication in a local newspaper of general circulation that is reasonably calculated to give notice to the defendant. 5 V.I.C. § 112. Publication may be made by an internet only publication (the *Virgin Islands Source*, [www.visource.com](http://www.visource.com)) or by traditional print newspaper (e.g., *Virgin Islands Daily News*). *Hernandez v. Alcorta*, 45 V.I. 305, 310 (Terr. Ct. 2003).

Once defendants are served with process, they have twenty-one (21) days to respond. Depending on the responses of the defendants, and if mediation is unsuccessful, creditors typically will file a motion for default judgment or motion for summary judgment. Unless a non-defaulting defendant raises some unexpected or novel issue in its opposition to a summary judgment motion, the court usually deals with these motions without a hearing.

Early on in the case, the parties are required to exchange voluntary disclosures. The parties may employ other discovery devices, such as interrogatories and requests for production of

documents. Although extensive discovery in debt and foreclosure matters is uncommon, it may be used depending on the issues raised in the defendants' responsive pleadings.

Pursuant to 28 V.I.C. § 531(b), “[p]rior to the entry of any judgment of foreclosure, the parties must provide the Court with evidence that a good faith effort was made to settle the matter through mediation.” Although the routine practice in the Superior Court is to enter mediation referral orders early in the case, this statute effectively mandates mediation before any judgment of foreclosure can be entered. See *Webster v. FirstBank Puerto Rico*, 2017 WL 1476338 (V.I. April 24, 2017).

Upon entry of a judgment of foreclosure, the mortgage and the promissory note will merge into the judgment. The judgment, which is typically prepared by counsel for the mortgagee, should include, *inter alia*, the following: (1) the terms which adjudge the outstanding amount(s) of the debt(s); (2) principal, interest and the per diem; (3) a legal description of the real property which secured the loan; (4) the priority of the liens; (5) a directive to conduct a Marshal’s sale of the mortgaged property; (6) the expenses that are payable out of the proceeds; (7) the amounts of any insurance premiums advanced; (8) fees and costs awarded the foreclosing creditor; and (9) applicable language extinguishing the junior liens and rights of redemption subject to the statutory right of redemption. Failure to incorporate the aforementioned may provide grounds for the defendant to set aside the Marshal’s sale. See *Thornberg v. Jorgenson*, 1 V.I. 606, 60 F. 2d 471 (3rd Cir. 1932).

Upon receipt of the final judgment from the court, the creditor must wait 14 days after entry of judgment before seeking a writ of execution enforcing the final judgment. V.I.Civ. P. 62 (a); Fed. R. Civ. P. 62(a). Rule 62(a) automatically stays execution upon judgment for 14 days after entry of judgment to afford the defendant an opportunity to determine if there are grounds to appeal the decision and/or seek a new trial or reconsideration of the judgment. Since the mortgage and the note merge into the final judgment, it is common to record the judgment against the judgment debtor’s property creating a judgment lien pursuant to 5 V.I.C. § 425(a). Whenever a period of ten (10) years elapses after the entry of judgment without execution being issued on such judgment, the lien expires. 5 V.I.C § 425 (d).

Upon issuance of the writ of execution by the clerk, it is delivered to the Marshal who then executes it by attaching the property (literally posting the writ of execution on some structure on the property). Once the property is attached, the Marshal will provide a sale date. Notice of the sale must then be published by the judgment creditor once a week for four consecutive weeks before the auction sale in a newspaper (including an online newspaper) of general circulation in the Territory.

Immediately after the auction sale, the creditor can move the court for confirmation of the sale and for entry of a deficiency judgment against the borrower and guarantors, as may be appropriate depending on the amount of the high bid. Unless it can be shown that there were substantial irregularities in the proceedings concerning the sale, the marshal’s sale will be confirmed by the court. 5 V.I.C. § 489(2). Entry of the sale confirmation order starts the 60 day time period for junior lien creditors to redeem, 5 V.I.C. § 494 and the six month redemption period given to the mortgagor. 5 V.I.C. § 496. Once the redemption periods expire, the successful purchaser (usually the foreclosing lender via a credit bid) is entitled to a Marshal’s Deed, which the creditor must prepare and submit to the Marshal’s office for signature. Ordinarily, the successful purchaser at the marshal’s

sale is entitled to possession of the purchased property or the rents due from tenants under unexpired leases from the date of sale. 5 V.I.C. § 500.

If a writ of execution has not been issued within five years after entry of judgment, thereafter an execution will not issue without leave of court. The judgment debtor will have to be served with the motion seeking leave to execute and can raise additional defenses to further delay the proceedings. See 5 V.I.C. § 488.

**2. REDEMPTION PERIOD AND PRICE** In the USVI, there is a statutory right of redemption that allows the mortgagor to redeem up to six months after the court's confirmation of the Marshal's sale. 28 V.I.C. § 535. Any equitable rights of redemption apart from the statutory right are usually extinguished by the judgment of foreclosure.

Payment of mortgage indebtedness extinguishes the lien regardless of any formal entry to that effect on record. See *Federal Deposit Insurance Corporation v. Griffith* 15 V.I. 351 (Terr. Ct. 1978). A foreclosure action will be dismissed any time the debtor pays the full amount due plus the costs of the action. 28 V.I.C. § 538. If the amount due plus costs is tendered after judgment but before sale, the effect of the judgment as to the amount then due and paid is terminated and the execution, if any has issued, is recalled by the clerk. *Id.* A court may give a judgment for future installments, which may be reduced to present value. *Id.*

**3. WAIVER OF REDEMPTION; REDUCTION OF REDEMPTION PERIOD:** The right of redemption may be waived in writing by the judgment debtor or his successor in interest provided such waiver is not in or was not created contemporaneously with the underlying mortgage. Section 535 of title 28 provides that deeds in lieu of foreclosure may convey the statutory right of redemption. A voluntary conveyance by the mortgagor to the mortgagee in lieu of foreclosure shall be deemed to convey the full estate of the mortgagor, including the right to redeem. 28 V.I.C. § 535.

**4. DEFICIENCIES:** The right of foreclosure is a right separate from the right to sue on the debt. *Bank of Nova Scotia v. St. Croix Drive-in Theatre, Inc.*, 552 F. Supp. 1244, 1245–46 (DVI 1982), *aff'd*, 728 F.2d 177 (3d Cir. 1984). In foreclosure actions, in addition to the judgment of foreclosure and sale, if a promissory note or other personal obligation for the payment of the debt has been given by the mortgagor or other debtor, the court will also render a judgment of debt against such person or persons. 28 V.I.C. § 531. Where an *in personam* judgment has been taken and there is a deficiency after the foreclosure sale, so long as the lender has not waived its rights to a deficiency, that deficiency can be collected pursuant to post-judgment procedures established by USVI statutes and trial rules. 5 V.I.C. § 471 et seq.

It is important that a mortgagee carefully plan its bid at Marshal's sale and not underbid in an effort to secure a larger deficiency judgment. In a noteworthy case regarding the consequences of improper bidding, the District Court of the Virgin Islands held that, where a mortgagee's bid at foreclosure sale equaled one-third of her judgment against the mortgagor, resulting in a deficiency judgment for the remaining balance, the deficiency judgment was not a lien against the property in the hands of an assignee of the mortgagor's right of redemption; the mortgagee creditor could enforce the deficiency judgment only against the mortgagor, not the successful bidder: "[T]he rule in this jurisdiction is that a good faith assignee of the statutory right to redeem after a mortgagee

foreclosure takes the right free of any lien of the mortgagee based upon the extinguished mortgage or a deficiency judgment. After the right of redemption is exercised, the assignee will hold the property free of any such liens.” *Coben v. Ortzsik*, No. CIV. 7-1973, 1974 WL 383711, at \*2 (DVI 1974).

**5. EFFECT OF FORECLOSURE ON LEASES:** When property is leased subject to a (presumably unrecorded) mortgage, the mortgage has priority over the lease and the lease is extinguished by a foreclosure. *Kline v. Khan*, No. CIV. 1983-32, 1983 WL 890018, at \*3 (DVI 1983). This is true even where the foreclosing mortgagee has accepted a deed in lieu of foreclosure in full satisfaction of the debt. Under those circumstances, the lender is still able to foreclose out a lease. *Land Holdings (St. Thomas) Ltd. v. Mega Holdings, Inc.* 1999 WL 1044836 at \*5 (DVI 1999) (citing Restatement (Third) of Property (Mortgages) § 8.5 cmt. b, at 612). While the *Land Holdings* case allowed foreclosure of a lease of which the mortgagee may have had notice, the lease was unrecorded and was expressly subordinate to mortgages of record. With respect to recorded leases, the usual rules of priority will apply under the USVI’s race notice statute.

#### IV. USURY

**1. USURY CEILING:** Although the USVI has extensive usury statutes outlined in 11 V.I.C. § 951 et seq., the only mortgages subject to usury limitations are those securing amounts of \$100,000.00 or less. On such loans, the maximum rate of interest per annum is 1.5% above the Federal Home Loan Mortgage Corporation's posted yield on the last business day of the month on thirty-year standard conventional fixed rate mortgages committed for delivery within sixty (60) days, rounded to the nearest quarter percent. Such loans are also subject to a maximum of a \$150 application fee, 50 percent of which must be refunded to the borrower unless the application is approved. Finally, first priority mortgage loans under \$100,000 are subject to an origination fee cap of 1.5%. First priority mortgages in excess of \$100,000 are exempt from any maximum interest rate limitation, 11 V.I.C. § 951, and first priority mortgage loans under \$100,000 will also be exempt if they meet any of the usury exemptions discussed below.

Since the USVI’s usury statutes are devoid of an intent requirement, usury is a strict liability offense and even the most innocent of lenders is guilty of usury if the loan agreement calls for excessive interest. *Gillivan v. Austin*, 640 F. Supp. 1325, 22 V.I. 349, 1986 U.S. Dist. LEXIS 21329 (DVI 1986). If usurious interest, as defined by sections 951 and 952, is received or collected, the person or persons paying the same may bring suit to collect double the amount of the interest so received or collected by the mortgagee. 11 V.I.C. § 953.

In addition to the rules applicable to mortgage loans under \$100,000, loans of any type for \$9,000 or less are subject to a maximum rate of 18.5%. 11 V.I.C. § 951.

**2. USURY EXEMPTIONS:** The USVI has opted out of the federal preemption of usury.

The usury statutes are subject to the following exemptions:

- variable rate mortgage loans;
- loans where the type of interest rate is subject to conversion
- loans to entities other than natural persons
- loans for business or commercial purposes

- home equity loans
- loans for the purchase of timeshare(s). 11 V.I.C. § 951(f).

Note that these exemptions also apply to the prohibition on prepayment penalties/fees.

## V. FINANCING STATEMENTS

**1. LOCATIONS FOR FILING:** The USVI has adopted revised Article 9 of the UCC, which is codified in Title 11A Art. 9 of the Code. If the collateral is as-extracted collateral or timber to be cut, or if the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures, the financing statement is to be filed in the Office of the Recorder of Deeds. 11A V.I.C. Art 9 § 9-501(a)(1)(A) & (B). The filing should be made in the judicial district in which the collateral is located.

In all other cases, the financing statement is filed in the Division of Corporations and Trademarks of the Office of Lieutenant Governor. *Id.* at (a)(2) & (a)(2)(b). Filing in the office of either judicial district should be effective to secure collateral regardless of its location in the USVI, however, some lenders will file in the district where the collateral is located, or both districts if collateral is located in both districts.

**2. SECURITY INSTRUMENT AS FIXTURE FILING:** A mortgage may operate as a fixture filing to cover goods that are or are to become fixtures or covering as-extracted collateral or timber to be cut. The mortgage must indicate it is also to serve as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut; or that the goods or collateral are or are to become fixtures related to the real property described in the mortgage. The mortgage satisfies the requirements for a financing statement if the mortgage sufficiently provides the name of a debtor, and the mortgage is properly recorded. Notwithstanding the foregoing, many lenders record a separate UCC-1 Fixture Filing in addition to the mortgage.

## VI. GUARANTY

**1. UNUSUAL PROVISIONS OR REQUIREMENTS:** None.

**2. STATUTES TO BE WAIVED:** None.

**3. SPECIAL PROBLEMS IN ENFORCEMENT:** None.

**4. ISSUES AND GUIDELINES RELATED TO SEEKING AND OBTAINING DEFICIENCY JUDGMENTS:** If a mortgagee makes a credit bid for the entire amount of the judgment plus interest and costs at a Marshal's sale, the bid constitutes a complete satisfaction of the judgment, leaving no deficiency to collect. This is the case even if the property is worth less than the bid amount. If the judgment has been satisfied, then the judgment debt is discharged.

If the amount of the credit bid at Marshal sale is less than the full amount of the judgment plus interest and any costs or fees awarded, a deficiency judgment will result. Generally, if appropriate language is included in the judgment, no additional order is required for a deficiency judgment. Note that the deficiency judgment may not attach to the property sold if it is redeemed, as discussed above in the section of this survey regarding deficiencies



## VII. GENERAL

**1. STATUTE OF LIMITATION PERIOD:** There is a twenty (20) year statute of limitation period for actions for the recovery of real property, or for the recovery of the possession thereof. 5 V.I.C. § 31. While there does not appear to be a case on point, this statute is presumably applicable to foreclosures of mortgages. There is a six (6) year statute of limitation period for an action upon a contract or liability. *Id.* Thus, in cases where the six (6) year statute has run, it may still be possible to seek a judgment of foreclosure, but no personal liability will be imposed and no deficiency judgment will be available.

**2. REQUIREMENTS FOR RELEASE OF LIEN:** In the USVI, there are two methods to extinguish a mortgage: by recording a release of mortgage or by foreclosing. In the case of foreclosure, the mortgage merges into the judgment of foreclosure. Note that there is no merger of the mortgage with the fee in cases where the owner of the property and the mortgagor are the same. *Balbo Corp. v. Enighed Condominiums, LLC*, No. ST-09-CV-399, 2013 WL 978976, at \*4 (V.I. Super. Mar. 8, 2013).

The penalty for not releasing a mortgage within ten (10) days of satisfaction is a sum not to exceed \$100 in damages, plus actual damages occasioned by such neglect or refusal, to be recovered in an action. 28 V.I.C. § 128. Notwithstanding this statute, lenders frequently fail to deliver the release within the 10 day deadline.

Releases must comply with the recording requirements for mortgages, as described above. Releases should describe the real property being released and be executed by the mortgagee. Releases are subject to recording fees in the amount of one-quarter of the original recording fee for the mortgage.

**3. HOMESTEAD ISSUES:** The USVI has a homestead exemption for properties up to \$300,000.00, however properly executed mortgages are exempt from homestead claims. Homestead exemptions are outlined in title 5, section 478 of the Code, which provides that the homestead of any family, or the proceeds thereof, are exempt from judicial sale to satisfy judgments and liabilities of the owners if they meet the homestead requirements. Such homestead must be the actual abode of and owned by the family claiming the exemption or some members thereof. If the property exceeds \$300,000.00 in value, or five acres in extent (or 0.25 of an acre if located in a town laid off into blocks or lots), the property may be sold to satisfy the creditor's claim, but the first \$300,000 is exempt from creditor claims. The homestead exemption does not apply to judgments for the foreclosure of any mortgage properly executed, but if the owners of the homestead are married, it does apply, unless the mortgage is executed by both spouses. 5 V.I.C. § 478.

**4. COMMUNITY PROPERTY:** The USVI is not a community property territory.

**5. MORTGAGE TAX:** Recording fees for mortgages are as follows, based on the maximum principal amount of the mortgage:

- (1) not more than \$400 - \$11.00
- (2) more than \$400 and not more than \$600 - \$12. 00

- (3) more than \$600 and not more than \$1,000- \$13.00
- (4) more than \$1,000 and not more than \$2,000 -\$14.00
- (5) more than \$2,000 and not more than \$3,000 -\$15.00
- (6) for each additional \$1,000 - \$1.00.

In addition, mortgages are subject to a charge of \$1.00 for each page of the mortgage, and \$4.00 for each parcel or lot encumbered, after the first. Attachments to the mortgage (including exhibits) are subject to a \$2.50 fee in addition to the per page fee. 28 V.I.C. § 133. For all mortgages over \$3,000, the formula for calculating fees is \$1.00 per thousand, plus \$12.00, plus \$1.00 per page, plus any extra parcel or attachment fees.

**6. DOCUMENTARY STAMP TAX:** There is no stamp tax on mortgages in the USVI. In addition, deeds in lieu are able to claim an exemption from stamp tax. 33 V.I.C. 128(a)(2); *see also BA Props. v. Gov't of the United States V.I.*, 29 F.3d 207 (3d Cir. 2002). With respect to Marshal's Deeds, there is a stamp tax imposed at the rate of two percent for property valued up to \$350,000, 2.5% for property valued over \$350,000 and up to \$1,000,000, 3% for property valued at more than \$1,000,000 and up to \$5,000,000, and 3.5% for property valued over \$5,000,000. 33 V.I.C. § 121. Note that the rates are not graduated – the applicable rate applies to the full value. Thus, for example, a property sold for \$1,000,100 will be subject to a tax of 3% (\$30,003.00), while a property sold for \$1,000,000 will be subject to a tax of 2.5% on the full amount (\$25,000.00). The values are based on the actual consideration paid or the property tax assessed value, whichever is higher.

**7. TRANSFER TAX:** None, but see above regarding documentary stamp tax .

**8. ENFORCEABILITY OF AGREEMENT AS TO CHOICE OF LAW:** Although mortgage documents frequently contain choice of law provisions selecting the laws of another state/territory to govern the enforceability of the documents, USVI law governs matters relating to the creation, validity, priority and enforcement of the liens of, and security interest created by, the loan documents.

**9. RECEIVERSHIP:** To determine if appointment of a receiver is appropriate, the court is required to weigh the following factors: (1) whether the security is adequate to cover the debt; (2) whether the mortgagor is insolvent; (3) whether the mortgage instrument contains a pledge of rents and profits to the mortgagee; (4) whether waste has been committed; or (5) whether the security is endangered by nonpayment of taxes. *MB Fin. Bank, N.A. v. World Fresh Mkt., LLC*, No. 2012-92, 2013 WL 870103, at \*1 (DVI Mar. 6, 2013). It appears that this standard will prevail over the standard set forth in the Restatement Third of Property (Mortgages), which provides for the appointment of a receiver as long as the mortgage provides for it and the loan is in default. However, the Virgin Islands Supreme Court has not yet decided this issue.

**10. ANY PROHIBITION OR SPECIAL RULES REGARDING LOAN APPLICATION, LOAN FEES OR COMMITMENT FEES:** None, except \$150 maximum application fee on certain first priority mortgage loans under \$100,000. *See* the above section of this survey on usury.

**11. LENDER QUALIFICATION AND/OR LICENSURE:** Persons making mortgage loans who are subject to qualification and licensing requirements will be regulated either as “mortgage lenders,” banks or credit unions. Other than federally chartered lenders, any person “doing business” by making mortgage loans in the USVI will be subject to qualification and licensing requirements. A lender making an isolated transaction in the USVI is generally considered not to be “doing business” for purposes of qualification and licensure. The extent of business conduct in the USVI (number of mortgage loans) that will result in qualification and licensure being required is unclear.

“Mortgage lenders” are, generally speaking, persons or companies making mortgage loans in the USVI who do not qualify as banks or credit unions. They are regulated pursuant to 9 V.I.C. § 361, et seq., which defines “mortgage lender” as any person who makes a mortgage loan to any person or engages in the business of servicing mortgage loans for others or collecting or otherwise receiving mortgage loan payments directly from borrowers for distribution to any other person. 9 V.I.C. § 361. A mortgage lender does not include a financial institution that accepts deposits and is regulated as a bank. *Id.* No person may engage in business as a mortgage lender or mortgage broker, or both, or hold himself out to the public to be a mortgage lender or mortgage broker unless such person has first obtained a license. *Id.*

Licensing requirements in the USVI are extensive. In general, to qualify for a license, an applicant must satisfy the Banking Board that the applicant, including its members, officers, directors, and principals, is of good moral character and has sufficient financial responsibility, business experience, and general fitness to:

- (1) engage in business as a mortgage lender or mortgage broker;
- (2) warrant the belief that the business will be conducted lawfully, honestly, fairly, and efficiently; and
- (3) in the case of an applicant for license to act as a mortgage lender, capitalize the business by maintaining at least \$500,000 of funds available, and in the case of an applicant for a license to act as a mortgage broker, capitalize the business by maintaining at least \$25,000 of funds available. *Id.*

A bank making mortgage loans in the USVI will be subject to local banking regulations in lieu of the mortgage lender licensing requirements (although those may be preempted in the case of a National Association). Note that a bank only need register as a bank if it will be accepting deposits in the USVI. If it will only be making mortgage loans, it can register as a mortgage lender instead.

**12. MODIFICATION:** The USVI does not have any unusual provisions or requirements with respect to modifications of existing mortgage loans. In order to place a modification agreement of record, the modification must comply with USVI recording statutes and reference the modified mortgage either by cross-reference to the document number of the original mortgage or by attaching and incorporating the legal description of the property encumbered by the modified mortgage. If the modification increases the principal amount secured, additional mortgage recording fees will be required based on the amount of the increase. If there is no increase, a \$25 fee plus \$1.00 per page applies.

**13. ENVIRONMENTAL LIEN LAW ISSUES:** None.

**14. LEGAL OPINIONS:** Legal opinions provided for mortgage transactions tend to be similar to those provided in other U.S. jurisdictions.

### VIII. LABOR AND MATERIALMEN'S LIEN CLAIMS—PRIORITY ISSUES

**1. INCEPTION OF LIEN:** In accordance with title 28, section 252 of the Code, a real estate improvement contract that produces a change in the physical condition of land or of a structure will allow the following professionals to file a construction lien: (1) builders, plumbers, tillers; (2) carpenters, landscapers; and (3) urban planners, architects, and engineers. The aforementioned professionals may generally be classified as prime contractors, subcontractors, or sub-subcontractors. However, a person making an improvement or change pursuant to a real estate contract with the Government of the Virgin Islands is not entitled to claim a lien 28 V.I.C. § 254.

To preserve a construction lien, a contractor is required to record a Notice of Construction Lien “not later than 90 days after his final furnishings of materials or services.” *Id.* at § 264. After recording notice of the construction lien, the contractor must commence a lawsuit to foreclose the lien within “ninety (90) days after the recording of the notice of lien,” and must record a notice of commencement within that time. *Id.* at § 271. Failure to timely record the Notice of Lien or the Notice of Commencement of Action will result in the loss of lien rights.

No lien rights are available to subcontractors or sub subcontractors if the prime contractor has furnished a payment bond that meets certain statutory requirements. *Id.* at § 259. The bond must be for at least 50% of the total contract price, up to \$1,000,000, plus 40% of the price between \$1,000,000 and \$5,000,000, plus 35% of the contract price in excess of \$5,000,000. Notice of the bond must be recorded. *Id.*

An owner whose property is subject to a construction lien may obtain and file notice of a surety bond, which, provided it complies with the statutory requirements, will take the place of the construction lien. *Id.* at § 260. The bond must be in an amount equal to 150% of the amount of the lien claimed. *Id.*

**2. PRIORITY OF LIEN:** A construction lien is accorded priority over other interests in the subject real property recorded after the earlier of the date a “Notice of Commencement” or a “Notice of Claim of Lien” is recorded. A Notice of Commencement may be recorded by the owner of the property. If such a notice is recorded, all claims of construction liens will have priority relating back to the date of filing of the Notice of Commencement. 28 V.I.C. 258. However, if no Notice of Commencement is recorded, claims of construction liens will only have priority as of the date a Notice of Claim of Construction Lien is recorded. *Id.*

A mortgage recorded prior to a Notice of Claim of Construction Lien or a Notice of Commencement will have priority over construction liens recorded after the Notice of Claim of Construction Lien or the Notice of Commencement. However, for such a mortgage to provide priority for advances made after the recording of a Notice of Claim of Construction Lien or Notice of Commencement, the mortgage must be a “construction security interest,” and the advance must be used to pay for real estate improvements to the property, or for a lien or encumbrance with priority over the construction lien, or for maintenance or preservation of the property. *Id.* at 258(i).

A mortgage is a “construction security interest” if the mortgage so denominates it, and the loan is made for the purposes of making improvements to real property.

**3. PRIORITY AS TO REMOVABLE FIXTURES:** The USVI accords no special treatment to construction lien holders with respect to removable fixtures.

#### IX. TITLE INSURANCE

**1. FORM USUALLY REQUIRED BY LENDER:** Current ALTA forms are used in the USVI for mortgage policies and leasehold mortgage policies.

**2. ENDORSEMENTS AVAILABLE:** All forms used and rates charged by title insurance companies must be filed and approved by the Division of Banking, Insurance and Financial Regulation. Title insurance companies can only issue the endorsements that have been filed with the Division of Banking, Insurance and Financial Regulation. Lenders will need to verify with the title insurance company what endorsements are filed and available.

**3. CLOSING PROTECTION COVERAGE:** Though available, closing protection letters are not required by law in the USVI and are not routinely requested by most mortgagees in the USVI.

#### X. OTHER MATTERS OF SIGNIFICANCE TO MORTGAGE LENDERS WITHIN USVI

**1. LEGAL HISTORY:** The USVI is a group of islands in the Caribbean, consisting of the main islands of St. Croix, St. John, and St. Thomas. It is an unincorporated territory of the United States, 48 U.S.C. § 1541, and was purchased by the United States from Denmark pursuant to the Convention Between The United States and Denmark, Jan. 25, 1917, 39 Stat. 1706 (1917) on August 4, 1916. 39 Stat. 1 (1916). Per Article 1 of the Convention, Denmark ceded to the United States all territory, dominion, and sovereignty that was possessed or claimed by Denmark in what is now the USVI. Private property rights were not impaired or otherwise affected by the transfer. Title to public lands not otherwise reserved to the United States by the Secretary of the Interior as part of the National Park System (which is largely on the island of St. John) prior to June 22, 1937 was conveyed from the United States to the Government of the Virgin Islands pursuant to Public Law 93-435 Sec. 3 enacted on October 5, 1974.

The Revised Organic Act of the Virgin Islands, 48 U.S.C. § Ch. 12, passed on July 22, 1954, functions as the USVI’s constitution and provides for an executive branch, a legislative branch, and a judicial branch and is the body of law that defines the jurisdictional boundaries of Virgin Islands courts.

Prior to a relatively recent decision of the Virgin Islands Supreme Court, the rules of the USVI common law, as expressed in the Restatements of the Law approved by the American Law Institute were “the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.” 1 V.I.C. § 4 (repealed). On December 15, 2011, the Virgin Islands Supreme Court decided the case of *Banks v. International & Leasing Corp.*, 55 V.I. 967 (VI 2011), which effectively repealed title 1 section 4 of the Code and has significantly impacted the development of the common law of the USVI.

Pursuant to *Banks*, courts entertaining matters of first impression of USVI law must conduct what is referred to as a “Banks analysis.” A *Banks analysis* consists of three factors: (1) whether any local courts have considered the issues and rendered any decisions upon which litigants may have grown to rely; (2) the position taken by the majority of courts from other jurisdictions; and (3) the best rule for the USVI. The third factor is the most important in the *Banks analysis*. See *Government of the Virgin Islands v. Connor*, 60 V.I. 597 at 603 (V.I. 2014).

**2. ASSIGNMENT OF MORTGAGE:** The recording of the assignment of a mortgage shall not in itself be deemed notice of such assignment to the mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them or either of them to the mortgagee. 28 V.I.C. § 126.

**3. REAL PROPERTY TAX LIENS:** Taxes levied by the Tax Assessor on real property are a first lien against the real property including any improvements. The lien is prior to all other liens on the property whether they attached before or after the mortgage or other lien. However, the lien on each parcel of real estate is only for the taxes due on such parcel and its improvements. 33 V.I.C. § 2331. Real Property tax clearance letters or certificates, issued by the Office of the Tax Collector, are required to be recorded with a deed, and are generally relied on by title insurance companies as proof of payment of real property taxes through the date stated on the letter.

**4. CONDOMINIUM LIENS:** Condominium liens in the USVI, for all practical purposes, constitute a “floating” lien for all sums assessed by the Association that are unpaid for the share of the common expenses chargeable to any unit. The condominium lien will prime all other liens except (i) liens for unpaid property taxes on the apartment in favor of the Government of the USVI, and (ii) all sums unpaid on a first mortgage of record. 28 V.I.C. § 922. It is not necessary for the condominium association to record notice of its lien in order to claim a lien, although recording such notices is commonplace. Title insurance companies will require an estoppel letter from the condominium association confirming that all dues are paid before insuring a mortgage or other transaction.

**5. HOMEOWNERS ASSOCIATION LIENS:** The USVI has no homeowners’ association statute, however, declarations of covenants, conditions and restrictions imposing dues payment obligations on homeowners are common. The Declarations typically provide for lien rights similar to those provided by the condominium statute. Title companies will require an estoppel letter from the homeowners’ association prior to insuring.

**6. CREDIT UNIONS:** Recent changes to USVI law on credit unions broadly prohibit non-federal credit unions from doing business in the USVI: “All credit unions doing business in the Virgin Islands must be federally-chartered and regulated by the National Credit Union Administration. The shares of members of credit unions must be insured by the National Credit Union Shares Insurance Fund.” VI LEGIS 7960 (2016), 2016 Virgin Islands Laws Act 7960 (B. 31-0369). Although all credit unions are financial cooperatives, not all financial cooperatives are credit unions. It is unclear whether the Division of Banking will interpret the prohibition on non-federal credit unions as extending to all non-federal financial cooperatives or whether non-federal financial cooperatives that are not classified as credit unions are regulated by the Cooperative Corporations Act, 13 VIC §551 et. seq.

7. **TAXES:** The United States Internal Revenue Code (the “Code”) of 1986, as amended, together with Treasury regulations promulgated thereunder, apply in the USVI under what are called “mirror principles,” which means the term “Virgin Islands” is substituted for the term “United States,” and vice versa, where appropriate. See *Johnson v. Quinn*, 821 F.2d 212 (3d. Cir. 1987); 48 U.S.C.S. § 1397. Therefore, while the majority of the Internal Revenue Code applies in the USVI under this mirror system, the USVI tax system is administered and enforced separately by the Virgin Islands Bureau of Internal Revenue. One consequence of the mirror principles is that a U.S. corporation is considered “foreign” for the purposes of USVI tax laws, and would ordinarily be subject to the withholding of thirty percent (30%) on any interest received by any foreign lender under section 881 of the Code. However, the USVI has specifically eliminated this withholding where the interest received is from sources within the USVI for loans secured by a mortgage of real estate located in the USVI. 33 V.I.C. § 543. This exemption applies both to lenders who are truly foreign and those U.S. lenders who are considered foreign under the mirror principles.