



COMMERCIAL BANKING, COLLECTIONS & BANKRUPTCY LAW

The newsletter of the Illinois State Bar Association's Section on Commercial Banking, Collections & Bankruptcy Law

Taking deficiency judgments in foreclosure

By Stephen J. Butler

The Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-101, *et seq.*, ("IMFL") allows for entry of a personal deficiency judgment against a borrower when the lender does not receive all amounts due it from the foreclosure sale of the property. Although obtaining a personal judgment may often be a pyrrhic victory, it is an option for collection that should often be pursued by foreclosure counsel.

In today's economic climate, however, courts are becoming increasingly reluctant to entering such personal judgments, most often on the grounds of fairness and equity. On one occasion, the only reason given to this author was that "we don't do that in this county." Assuming that the statutory requirements are met by the lender,

however, the IMFL does not give the court the discretion to refuse to enter deficiency judgments.

The first part of this article will discuss the legal standard for entry of a deficiency judgment. The second part will address several of the common roadblocks thrown up by courts in denying such judgments, and will suggest the legal arguments that should be made to overcome these roadblocks.

Legal standard for deficiency judgment

It is undisputed that trial courts have broad discretion in approving or disapproving a mort-

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Banks are debtors too—Attorneys beware

By Michael McKenzie

The housing crisis has had a cascading effect on banks in the United States. While the crisis had its roots long before 2008, the Lehman Brothers bankruptcy on October 15, 2008 is the dividing line between boom and bust. Since October 15, 2008, the FDIC has closed 365 banks, a little over 5% of the 6,914 banks the FDIC regulated in 2008. By way of reference, from 1921 through 1930, over 1,200 banks failed and were liquidated while during the savings and loan crisis from 1986 to 1995 1,043 institutions failed.

The number of FDIC problem banks continues to grow, from 76 at the beginning of 2007 to 888 at the end of May 2011. Most of the FDIC problem banks have assets of less than \$1 billion.

Problem banks have more problem loans, higher levels of collection efforts and place greater reliance on collection counsel than non-

problem banks. When these problem banks go into FDIC receivership, the loss exposure for both billed and unbilled time increases exponentially, and the probability of recovering legal fees from an FDIC receivership are practically nil. There are several steps attorneys can take, however, to minimize loss, mitigate risk, and preserve the client relationship.

The first step is to determine if your client bank is at risk. Short of expert financial analysis, the fastest and easiest way to identify problem banks is to use the internet to check three separate data bases for pending enforcement actions. The three sites are at the Federal Reserve Bank (FRB), The Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corpo-

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(Notice to librarians: The following issues were published in Volume 55 of this newsletter during the fiscal year ending June 30, 2011: January, No. 1; February, No. 2; June, No. 3).



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Taking deficiency judgments in foreclosure

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gage foreclosure sale. See, e.g. *JP Morgan Chase Bank v. Fankhauser*, 383 Ill. App. 3d 254 (2nd Dist. 2008). However, once the court approves the sale it does not, then, have the discretion to deny a deficiency judgment.

735 ILCS 5/15-1508 ("Report of Sale and Confirmation of Sale") states, in part:

(e) *Deficiency Judgment*. In any order confirming a sale pursuant to the judgment of foreclosure, the court shall also enter a personal judgment for deficiency against any party (i) if otherwise authorized and (ii) to the extent requested in the complaint and proven upon presentation of the report of sale in accordance with Section 15-1508.

(Emphasis added).

Further, 735 ILCS 5/15-1511 ("Deficiency") states:

Except as expressly prohibited by this Article, foreclosure of a mortgage does not affect a mortgagee's rights, if any, to obtain a personal judgment against any person for a deficiency.

As to 5/15-1508(e)(i), although the language utilized is different from mortgage to mortgage, one common clause is "[i]f permitted by applicable law, Lender may obtain a judgment for any deficiency remaining in the Indebtedness due to Lender after application of all amounts received from the exercise of the rights provided in this section" In the absence of specific deficiency language, the "Rights and Remedies on Default" clause may simply give to the Bank "...any other rights or remedies provided by law" upon default.

It is important to note that a request for a deficiency judgment should be specifically included in the Complaint. Cases have held that a prayer for general relief is sufficient to authorize any judgment warranted by the facts alleged in the pleadings. *Heritage Standard Bank and Trust Co. v. Heritage Standard Bank and Trust Co.*, 149 Ill. App. 3d 563 (2nd Dist. 1986). However, with courts scrutinizing every pleading and attached document to ensure that the plaintiff has met the requirements of the statute, the better practice is to include a prayer in the complaint for a deficiency judgment.

As to 5/15-1508(e)(ii), the amount of the

judgment sought must be "proven upon presentation of the report of sale." It is standard that at the time the motion for judgment of foreclosure and sale is filed, plaintiff's counsel will obtain the affidavit of a duly authorized representative of the financial institution to set forth the amounts due and owing under the loan. Those amounts then are reflected in the Sheriff's Report of Sale and Distribution, which gets filed at the time of the confirmation of sale. If the plaintiff has followed this procedure, then a deficiency judgment should be entered by the court.

Thus, at the hearing to confirm the sheriff's sale, counsel should not only come fully prepared with the loan documents and copies of the supporting affidavits, but should also repeatedly stress to the judge the mandatory "shall" language of the statute. The court, then, has no legal basis for denying the entry of the deficiency judgment.

Judicial roadblocks and how to overcome them

1. "It isn't fair!"

There is case law from both before and after the enactment of the Illinois Mortgage Foreclosure Law that holds that fairness and equity are not factors to be considered when a deficiency judgment is sought. For instance, the Court in *Eiger v. Hunt* held that "the right to a personal judgment in foreclosure proceedings does not rest on general equity principles, but upon the legal obligation of the maker of the note." 282 Ill. App. 399 at 402-403 (1st Dist. 1935), citing *Metz v. Dionne*, 250 Ill. App. 369 (1st Dist. 1928). (Emphasis added).

The *Eiger* case was cited favorably by the court in *Farmer City State Bank v. The Champaign National Bank*, which held that a court has *express statutory authority* to render a personal judgment for a deficiency against any defendant over whom it has personal jurisdiction, or any defendant who has appeared in the foreclosure action. 138 Ill. App. 3d 847 at 850 (4th Dist. 1985). Accordingly, the fairness and equity of granting a deficiency judgment are not factors to be considered by a court, regardless of how sympathetic it may be to the defendant's plight.

Further, case law is rich with language stating that a deficiency judgment is a *right*

when authorized and properly proven. See, e.g., *Bank of Benton v. Cogdill*, wherein the court held that "[t]he *right* to secure such a deficiency judgment in any foreclosure proceeding is clear, provided the mortgagee receives only one full satisfaction." 118 Ill. App. 3d 280 (5th Dist. 1983), citing *Emerson v. LaSalle National Bank*, 40 Ill. App. 3d 794 (2nd Dist. 1976) and *In re Estate of Folksdorf*, 304 Ill. App. 463 (1st Dist. 1940). (Emphasis added).

2. The loan documents were signed under a Power of Attorney

One circuit court recently took issue, *sua sponte*, with the fact that one of the borrowers had signed for the other borrower as her power of attorney. The borrowers never filed an answer to the Complaint, and the court had not raised any issues regarding the execution of the note and mortgage at the time that it entered the Judgment for Foreclosure and Sale.

In this instance, the argument must be made that it is undisputed that a person signing for another as power of attorney legally binds that person as though he or she had signed the document himself or herself. Further, there are no standards in either the IMFL or the Power of Attorney Act that delineate the exact manner in which a person must sign as Power of Attorney.

In addition, 755 ILCS 45/2-8 ("Reliance on document purporting to establish an agency") states, in part:

Any person who acts in good faith reliance on a copy of a document purporting to establish an agency will be fully protected and released to the same extent as though the reliant had dealt directly with the named principal as a fully competent person.

Accordingly, whether the borrower physically put pen to paper herself or whether someone signed for her under a power of attorney, that borrower is legally bound by the loan documents.

3. Service was obtained via abode service

Another circuit court denied this author a deficiency judgment on the grounds that the borrower had been served via abode service and not personally. However, it is clear that abode service still gives the court personal jurisdiction over the defendant. 735 ILCS 5/2-

203(a) sets forth the mechanism by which abode service must be obtained, upon which personal jurisdiction over the defendant is obtained. This mechanism, however, must be strictly complied with in order to obtain personal jurisdiction. *See, e.g., Nibco, Inc. v. Johnson*, 98 Ill. 2d 166 (1983).

4. “Things would be different if this were a commercial property”

One court, in denying the deficiency on a residential foreclosure, noted that “it would be different if this were a commercial property” before stating his unwillingness to remove the borrowers from their home and also subject them to wage deduction or account garnishment. However, the IMFL distinguishes between commercial and residential properties only in reference to reinstatement and redemption. 735 ILCS 5/15-1602 through 5/15-1604. Nowhere is a distinction made in either 735 ILCS 5/15-1508 or 5/15-1511,

quoted *supra*, between residential and commercial property relative to the entry of a deficiency judgment. Counsel should proactively point out the unambiguous language of these statutes at the confirmation hearing.

Conclusion

Although foreclosure attorneys face an uphill battle when it comes to obtaining deficiency judgments, the law is clearly on their side. Even though some courts are unwilling to enter such judgments, plaintiff’s counsel can prevail by being persistent and prepared. It is sometimes necessary to force courts to reconsider their denials in the presence of a court reporter in order to obtain the best results for the plaintiff, but such persistence often works well. Armed with the law and dogged persistence, attorneys can obtain positive results for their bank clients. ■

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Published at least four times per year.

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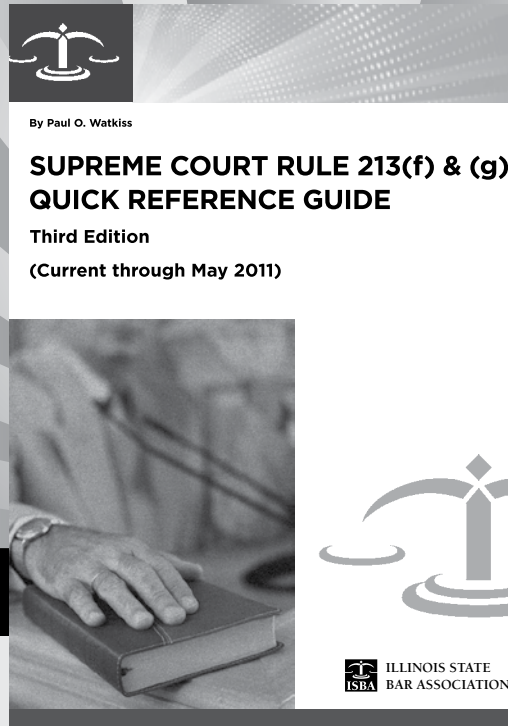
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Banks are debtors too—Attorneys beware

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ration (FDIC).

- The Web site of the Federal Reserve Bank (FRB) can be found at: <<http://www.federalreserve.gov/apps/enforcementactions/search.aspx>>.
- The Web site of the Office of the Comptroller of the Currency (OCC) can be found at <<http://apps.occ.gov/EnforcementActions>>.
- The Web site of the Federal Deposit Insurance Corporation (FDIC) can be found at <<http://www.fdic.gov/bank/individual/enforcement/begsrch.html>>.

The key enforcement action to look for and identify is the Prompt Correction Authority ("PCA"). The PCA should be interpreted to mean that an institutions failure is highly likely and could be imminent within the next 60 days. This is the time to take immediate steps to bring your billings current, collect your outstanding invoices and consider requesting a retainer to insulate your firm from potential financial exposure and loss.

Once a failed bank is placed in FDIC receivership, the probability of receiving payment of unpaid legal fees is remote. Since October 17, 2000 the FDIC has closed 391 banks and FDIC receiverships have declared 507 dividends on 329 failed banks. Of the 507 FDIC receivership dividends, 504 were paid to depositors and three were paid to general trade creditors. The most recent dividend to a general trade creditor was issued on February 5, 2007, in connection with the March 1, 2002, failure of Net First National Bank, Boca Raton, Florida, yielding the general trade creditor 28.8% for their hard work and patience after five years.

The second step is to shorten the billing cycle by bringing bills current. Most banks, unlike other clients, tend to pay their trade creditors very quickly. There are exceptions, but generally this is true of banks. Given that banks manage enormous amounts of liquidity, making disbursements is not unusual for banks as they generally have the money.

Consider increasing the billing cycle to semi-monthly or weekly billings on individual case matters. While this increases the administrative load for the unpleasant task of billing, it increases cash flow and realization. Reducing the size of the invoice can

also reduce the level of authority necessary to approve the billing thereby expediting the collection process. Remember that as the bank moves closer to FDIC receivership, officers and employees may be less focused on either the case file or approving payments.

Towards the final days, some banks take a position of preserving liquidity at all costs, including delaying payment to trade creditors. Other banks take a position of preserving their general creditor relationships, mindful of the future relationship. Your client relationships and the level of candid communication will reveal which type of bank you are dealing with.

When the bank goes into FDIC receivership, the FDIC has typically made arrangements for the sale of certain, agreed upon assets and assumption of liabilities to another bank, often referred to as the assuming bank. Generally, unless there is a serious case file management issue, the FDIC as receiver or the assuming financial institution will stay with assigned counsel and recognize that the efficiency of maintaining assigned counsel on the matter until its conclusion. Do not expect either the FDIC or the assuming institution to assign further matters unless there is a pre-existing relationship with either the FDIC or the assuming financial institution.

The third step is to request a retainer. This will depend on the policy of the client bank, as well as the area or division of the bank, as well as who you are dealing with. Most

banks are very sensitive to any questioning about their credit worthiness or viability, therefore requesting retainers is tricky in that such requests can provoke strong reactions.

Larger law firms with multiple partner relationships and many associates charging time to assigned files may rationalize the loss of one or two month's billings as a small price to pay for ongoing matters at a time when more chargeable hours are tough to find. Smaller firms for which a bank is a significant component of billings (and risk), may have more difficult decisions to make as the loss of two months billings together with uncertain future billings may have greater impact.

The FDIC receiver's broad and largely unilateral statutory powers require that general creditors, including law firms, evaluate their credit risks to their bank client and take steps to minimize loss and mitigate risk by requesting retainers to backstop the credit risk in an FDIC Receivership. The infrequency of FDIC Receiver dividends to general creditors, together with very low recovery rates only compound the risks of repudiation. Moreover, as banks edge closer to FDIC receivership, they begin to behave far more like debtors than the credit granting institutions that they were designed to be. ■

Michael McKenzie is the Managing Partner of McKenzie Partners, a financial consulting firm based in Chicago specializing in turnarounds, crisis management and restructurings. The firm's Web site is www.mckenziepartners.com

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Wednesday, 8/10/11- Teleseminar—Business Torts, Part 2. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 8/23/11- Teleseminar—Drafting Employee Handbooks. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 8/30/11- Teleseminar—Buying, Selling & Exchanging LLC and Partnership Interests. Presented by the Illinois State Bar Association. 12-1.

September

Tuesday, 9/6/11- Teleseminar—Social Media Issues and Employer Liability in the Workplace. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 9/13/11- Teleseminar—Joint Venture Agreements in Business, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 9/14/11- Teleseminar—Joint Venture Agreements in Business, Part 2. Presented by the Illinois State Bar Association. 12-1.

Friday, 9/16/11- Webcast—ThalP 101: An Intellectual Property Primer for In-House Attorneys. Presented by the ISBA Corporate Law Section. 12-2.

Friday, 9/16/11- Galena, Eagle Ridge Resort and Spa—Hot Topics in Consumer Collection. Presented by the ISBA Commercial Banking, Collections and Bankruptcy Section; co-sponsored by the ISBA Young Lawyers Division. 8:45-4:30.

Tuesday, 9/20/11- Teleseminar—Franchise Law: What You Need to Know Before Your Client Buys. Presented by the Illinois State Bar Association. 12-1.

Thursday, 9/22/11- Teleseminar—Generation Transfer Tax Planning. Presented by the Illinois State Bar Association. 12-1.

Friday, 9/23/11- Fairview Heights, Four Points Sheraton—Current DUI, Traffic and Secretary of State Related Issues- Fall 2011. Presented by the ISBA Traffic Laws/Courts Section. 9-4.

Tuesday, 9/27/11- Teleseminar—Metadata: The Hidden Digital World of Client Files in Litigation. Presented by the Illinois State Bar Association. 12-1.

October

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Thursday, 10/6/11- Teleseminar—Environmental Liability in Real Estate Transactions. Presented by the Illinois State Bar Association. 12-1.

Monday, 10/10/11- Chicago, UBS Towers—Advanced Workers' Compensation. Presented by the ISBA Workers' Compensation Law Section. 9-5.

Monday, 10/10/11- Fairview Heights, Four Points Sheraton—Advanced Workers' Compensation. Presented by the ISBA Workers' Compensation Law Section. 9-5.

Tuesday, 10/11/11- Teleseminar—Drafting LLC Operating Agreements, Part 1. Presented by the Illinois State Bar Association. 12-1.

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Friday, 10/14/11- Springfield, INB Conference Center—Divorce Basics for Pro Bono Attorneys- 2011. Presented by the ISBA Delivery of Legal Services Council. 1:00-4:45.

Friday, 10/14/11- Chicago, ISBA Chicago Regional Office—Family Law Nuts and Bolts Chicago 2011. Presented by the ISBA Family Law Section. 8-5.

Monday, 10/17/11- Chicago, ISBA Chicago Regional Office—Hot Topics in Con-

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Tuesday, 10/18/11- Teleseminar—2011 Americans With Disabilities Act Update. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 10/18/11- Chicago, ISBA Chicago Regional Office—What You Need to Know About LLCs. Presented by the ISBA Corporation Securities and Business Law Section. 12:30-4:45.

Thursday, 10/20/11- Chicago, ISBA Chicago Regional Office—The IMDMA and the Welfare of Pets. Presented by the ISBA Animal Law Section; co-sponsored by the ISBA Family Law Section and the ISBA Human Rights Section. 1:00-4:30pm.

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Friday, 10/21/11- Chicago, ISBA Chicago Regional Office—Pre-Trial Considerations. Presented by the ISBA Tort Law Section. TBD.

Friday, 10/21/11- Bloomington-Normal, Marriott—Real Estate Law Update-2011. Presented by the ISBA Real Estate Section. 9-4:45.

Friday, 10/21/11- Chicago, John Marshall Law School—Impact and Opportunities of the Affordable Care Act. Presented by the ISBA Health Care Section. 1-2:15.

Monday, 10/24/11-Friday, 10/28/11- Chicago, ISBA Chicago Regional Office—40 Hour Mediation/Arbitration Training. Presented by the Illinois State Bar Association. 8-5 daily.

Thursday, 10/27- Saturday, 10/29/11- Springfield, Hilton Hotel—7th Annual Solo & Small Firm Conference. Presented by the Illinois State Bar Association. TBD. ■

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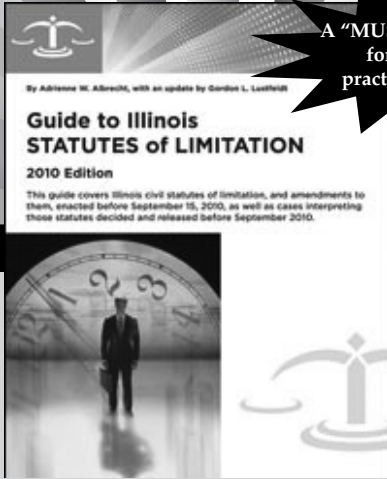
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JULY 2011
VOL. 56 NO. 1