

# THE COMMERCIAL FORECLOSURE PROCESS IN ILLINOIS

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From time to time commercial litigation counsel may be called upon to render commercial foreclosure advice to a client. With its own code of procedures and rules, and the interplay with various aspects of secured transaction issues, some lawyers may find the task of rendering such advice daunting. To facilitate a better understanding of the basic process and highlight some issues that may arise during a commercial foreclosure, this article presents a review of the mortgage foreclosure process in Illinois.<sup>1</sup>

## Nature of the Proceeding

A mortgage foreclosure is legal proceeding, instituted by the mortgage lender (*i.e.*, the "mortgagee" or one of its assignees) to terminate the borrower's (*i.e.*, the "mortgagor's" or one of its assignee's) interest in property. In Illinois, the process of instituting and prosecuting a commercial foreclosure action is set forth in the Illinois Mortgage Foreclosure Law (IMFL), 735 ILCS 5/15-1101 *et seq.* Once a foreclosure proceeding is completed, a foreclosing lender is able to

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acquire title to the property (including in many circumstances personal property) free and clear of liens and encumbrances.<sup>2</sup>

The decision to commence a commercial foreclosure proceeding often follows a period marked by an owner unable to satisfy principal and interest obligations, or a real estate investment that has ceased being profitable. Whatever the unique circumstances giving rise to the need to foreclose, mortgage lenders, now more than ever, must be prepared to confront and successfully navigate the judicial foreclosure process.<sup>3</sup>

### **Default**

The right to foreclose only arises if the borrower has defaulted on the mortgage. "Where there is no default, there is no right to institute a foreclosure proceeding."<sup>4</sup> The mortgage and loan documents relating to the property at issue will often define the conduct giving rise to a default – *e.g.*, failing to make a monthly payment, filing for bankruptcy, or breaching a material contractual obligation under the loan documents. Generally, after a default, the lender has the option to call due (*i.e.*, accelerate) any outstanding balance on the loan, commence an action at law or in equity, including the commencement of foreclosure proceedings, or exercise some other remedy provided under the loan agreement, to collect the unpaid balance.<sup>5</sup> In short, the lender or one standing in

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<sup>2</sup> See, *e.g.*, 735 ILCS 5/15-1404 (providing that the interest in the mortgaged real estate of all parties and nonrecord claimants shall be terminated upon sale and confirmation of a judicial foreclosure) (all references hereinafter to Chapter 735, Article 15 of the Illinois Compiled States will be to "IMFL"); see also IMFL § 1504(e)(5) (parties to a foreclosure proceeding and all duly noticed nonrecord claimants, all persons claiming by, through or under them, are deemed "forever barred and foreclosed of any right, title, interest, claim, lien, or right to redeem in and to the mortgaged real estate").

<sup>3</sup> The focus of this review is on *judicial* foreclosures and not other varieties of foreclosure which are available in Illinois, including: deed-in-lieu of foreclosure, consent foreclosure, and common law strict foreclosure.

<sup>4</sup> *Fed. Nat. Mortgage Ass'n v. Bryant*, 62 Ill. App. 3d 25, 28 (5th Dist. 1978) (citations omitted).

<sup>5</sup> See *Markus v. Chicago Title & Trust Co.*, 373 Ill. 557, 561 (1940). Also, note that many mortgage documents create secured interests in both real and personal property. Thus, enforcing creditor rights implicates not only the foreclosure provisions of the IMFL, but secured transaction issues under Article 9, 810 ILCS 5/9 *et seq.* Illinois law permits creditors wide latitude in enforcing security interests that cover both real and personal property. For example, where a security agreement covers both real and personal property, Illinois law permits (but does not

his shoes "may at one time pursue all the current remedies available to him or he may pursue all or some of those remedies concurrently or successively."<sup>6</sup> Although a secured party's remedies, which are often spelled out in the loan and mortgage documents, may be exercised concurrently, the secured party is "limited to one satisfaction."<sup>7</sup> In short, a lender's right to foreclose on property pursuant to a commercial mortgage begins with a debtor's default, and occurs in conjunction with other, cumulative rights a lender has vis a vis the defaulted debtor.

### **Due Diligence**

In connection with the decision to foreclose, the lender may want to consider a due diligence investigation to learn as much about the subject property as possible. For example, a search of court records may reveal the existence of a lawsuit filed against the property by a current or former employee, creating a potential lien claimant with which the mortgagee must contend. Likewise, it may be revealed that while the subject property is fixed in Illinois, there may be additional property assets located in another state. If that is the case, the lender will need to take steps to ensure that those assets are identified and accounted for, if not in an Illinois action, then in a separate non-Illinois proceeding. Counsel should become knowledgeable about the target property to ensure that the entire property is properly foreclosed on, and to eliminate the chance that unforeseen

require) a secured party to exercise its remedies as to both real and personal property under the Illinois real property law, or simply exercise its remedies as to personal property without prejudicing any rights with respect to the real property interests. See 810 ILCS 5/9-604. See also 810 ILCS 5/9-604 cmt. 2.

<sup>6</sup> 27 Ill. Law & Practice: Mortgages § 325 (2002); *Skach v. Lydon*, 16 Ill. App. 3d 610, 614 (1st Dist. 1973) ("the holder of a note secured by a mortgage may, on default, sue to foreclose the mortgage and also sue separately on the note itself"). By contrast, in some states (California, for example), the mortgage creditor is, in certain instances, prevented from pursuing multiple remedies against the debtors. See, e.g., *Scalese v. Wong* 84 Cal. App. 4th 863, 869 (2d Dist. 2000) (noting that under California's so-called "one form of action" rule, "where the creditor sues the debtor, seeking a money judgment before foreclosing on the property, the creditor has elected a personal action and has given up the right to a security interest in the property"); see also *Kinsmith Fin. Corp. v. Gilroy*, 105 Cal. App. 5th 447, 453 (1st Dist. 2003) (noting that the purpose of California's one form of action rule is to "protect debtors from multiple collection actions").

<sup>7</sup> *Skach*, 16 Ill. App. 3d at 614; see also *Abdul-Karim v. First Fed. Sav. and Loan Assoc. of Champaign*, 101 Ill. 2d 400, 406-407 (1984) (same); *Farmer City State Bank v. Champaign Nat'l Bank*, 138 Ill. App. 3d 847, 852 (4th Dist. 1985) (same).

claimants could later derail or slow-down the foreclosure process. Taking this important step will allow counsel to make the most beneficial decisions on behalf of its client in the foreclosure proceeding.

More specifically, counsel's due diligence could include uncovering or obtaining some or all of the following: (1) copies of all underlying loan and mortgage documents, including security agreements, such as assignment of leases, assignment of rents, UCC filings, guaranties, or letters of credit; (2) any letters or other documents altering or terminating these agreements; (3) title commitment documents; (4) appraisals of the property; (5) any environmental, asbestos, soil and other physical inspection reports; (6) all relevant correspondence between the debtor and lender; (7) statement of debt due; (8) notice of default and demand for payment; (9) notice of election to accelerate debt; (10) all property and liability insurance policies; (11) operating statements for the entire history of the property's operation; (12) detailed operating and capital budget; (13) rent rolls; (14) all past tax and utility bills; (15) zoning documents; (16) outstanding litigation or administrative claims against the property.<sup>8</sup>

### **Who to Name In a Foreclosure Action**

Once it is determined that a foreclosure action against a property will be commenced, the lender must determine who to name in the foreclosure complaint.

#### *Necessary Parties*

Under the IMFL, the mortgagee need only name (1) "the mortgagor" and (2) "other persons (but not guarantors) who owe payment of indebtedness or the performance of other obligations secured by the mortgage and against whom personal liability is asserted."<sup>9</sup>

#### *Permissive Parties*

The IMFL also sets forth a non-exhaustive list of "permissible parties" who may be joined in a foreclosure lawsuit. These permissible parties include:

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<sup>8</sup> See, e.g., Illinois Real Property Service, *Foreclosure and Redemption*, in *Mortgage Foreclosures* § 54.33 (1989).

<sup>9</sup> IMFL § 1501(a).

(1) persons having a possessory interest in the mortgaged real estate; (2) a trustee holding an interest in the mortgaged real estate or the beneficiary of such trust; (3) the owner or holder of a note secured by a trust deed; (4) guarantors; (5) the State of Illinois or any political subdivision thereof where the state would have an interest or claim for lien; (6) the United States of America or any agency or department thereof who would have an interest or claim for lien; (7) any other mortgagee or claimant.<sup>10</sup>

"Unknown owners" and "nonrecord claimants" may be joined as permissible parties to a foreclosure action as well. A nonrecord claimant is any person having an interest in the property but whose name or interest in the property is not disclosed at the time the notice of foreclosure is filed.<sup>11</sup> Nonrecord claimants under the IMFL are limited to: judgment creditors, land trust beneficiaries (except those in actual possession), and mechanic's lien claimants.<sup>12</sup> An "unknown owner" is a term broadly defined to cover any person "interested" in the subject property "whose names are unknown."<sup>13</sup>

Numerous parties may be joined in the foreclosure complaint, and these individuals or entities can be found in the property's title commitment. However, counsel should give considerable thought to those persons it actually names, and this determination should be made on a case-by-case basis. For example, to the extent there is a dispute regarding the priority of a senior lien holder (a non-necessary party and ordinarily one unaffected by a foreclosure judgment)<sup>14</sup>, counsel may decide to join the senior lien holder as a permissive party to adjudicate priority.<sup>15</sup> Counsel should also note that failure to name a person with an interest in the property could allow the unexpected intervention of a party well

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<sup>10</sup> See IMFL § 1501(b).

<sup>11</sup> See IMFL § 1210.

<sup>12</sup> See IMFL § 1210.

<sup>13</sup> IMFL § 1221 (adopting the definition of "unknown owner" as used in Section 2-413 of the Illinois Code of Civil Procedure).

<sup>14</sup> See *Heritage Fed. Credit Union v. Giampa*, 251 Ill. App. 3d 237, 239 (2d Dist. 1993)

<sup>15</sup> See Karlin & Emmerman at 6—39; see generally IMFL § 1501(a) (final disposition of property in foreclosure action remains subject to "interests of all other persons not made a party).

into the foreclosure process, causing undue delay and expense.<sup>16</sup> On the other hand, and again by way of example, in the foreclosure of a commercial building commenced merely to transfer underlying fee ownership, counsel for the mortgagee may think it unwise to name the tenants in the lawsuit: such a move could cause undue alarm and thus unnecessarily delay the foreclosure proceedings. In short, counsel is well served to determine on a fact-specific basis which of the potential pool of permissive parties should be joined in the foreclosure litigation.

### **Contents of the Foreclosure Complaint**

After identifying the parties to be named, counsel must draft the foreclosure complaint. To facilitate this step, Section 15-1504 of the IMFL sets forth in detail the form of the complaint. The contents of the foreclosure complaint should substantially track those items listed in this section. These items include: averments as to the existence and ownership status of the note and mortgage, common and legal description of the real estate, identification of all parties, the nature and status of the default, and prayer for relief.<sup>17</sup>

### **Service of Process**

Valid service of process on all parties, including unknown owners and nonrecord claimants, is necessary for the court to assert personal jurisdiction over defendants, and ultimately, to terminate the rights of the mortgagor and any potential lienholders.<sup>18</sup> Unless stated otherwise under the IMFL, the Illinois Code of Civil Procedure and Supreme Court Rules govern the service of pleadings in a

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<sup>16</sup> See IMFL § 1501(e) (persons not made a party but claiming an interest in the real estate may intervene as of right prior to foreclosure judgment, or with court approval at any time prior to confirmation of sale).

<sup>17</sup> See IMFL § 1504(a).

<sup>18</sup> See *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 308 (1986).

foreclosure action.<sup>19</sup> Counsel should also consult the court's local rules which may dictate specific procedures to follow in Chancery proceedings.<sup>20</sup>

### **Serving Unknown Owners and Nonrecord Claimants**

Effective service on unknown owners and nonrecord claimants in an Illinois foreclosure proceeding is governed by a separate set of rules. Serving unknown owners and nonrecord claimants can be done at the same time, and involves two related steps: (1) filing with the court an affidavit stating that these defendants and their whereabouts are unknown and (2) effecting service to the same by publication. These steps are described more fully below.

#### *Affidavit*

In Illinois, nonrecord claimants can be made parties to the foreclosure action if the mortgagee files with the court an affidavit stating, among other things, that on information and belief: the existence, names, and the present or last known place of residence of nonrecord claimants are unknown.<sup>21</sup> Under the IMFL, the mortgagee need not make any inquiry into the names or residences of nonrecord claimants, nor swear that such inquiry has even been made.<sup>22</sup>

Unknown owners are made parties to a foreclosure action by the filing of an affidavit. However, the relaxed standard governing nonrecord claimants – whereby the mortgagee need only state on information and belief that the names and last known residence of nonrecord claimants are unknown – does not apply to the affidavit concerning unknown owners. As to unknown owners, Illinois law requires diligent inquiry into the names and residence of unknown owners, and counsel for the mortgagee must swear to having made the necessary effort.<sup>23</sup> For

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<sup>19</sup> See IMFL § 1107.

<sup>20</sup> See, e.g., [www.cookcountycourt.org/rules/index.html](http://www.cookcountycourt.org/rules/index.html) (providing a link to the local rules for Chancery proceedings in the Circuit Court of Cook County).

<sup>21</sup> See IMFL § 1502(c).

<sup>22</sup> See IMFL § 1502(c).

<sup>23</sup> See 735 ILCS 5/2-206 & 413; see also Local Rule 7.3 of the Circuit Court of Cook County, Under that Rule, and pursuant to 5/2-206, the individual(s) making such due inquiry must, by affidavit, set forth "with particularity the action taken to demonstrate an honest and well directed effort to ascertain the whereabouts of the defendant(s) by inquiry as full as circumstances permit prior to placing any service of summons by publication." LR 7.3.

example, Illinois courts require that "an honest attempt" or "well-directed effort" be made to identify and provide notice to unknown owners, and the inquiry "must be as full as the circumstances of the situation permit".<sup>24</sup> If the mortgagee or his counsel signs an affidavit absent a representation concerning this due diligence inquiry, that affidavit, if challenged, could be deemed invalid as to unknown owners.<sup>25</sup>

The affidavits required by the IMFL dealing with nonrecord claimants and unknown owners can be combined into a single affidavit – *e.g.*, "Affidavit as to Unknown Owners and Nonrecord Claimants." If the affidavits are so combined, counsel should confirm that the proper averments are made.

#### *Publication*

In addition to filing the affidavit described above, the mortgagee must also file with the Court where the foreclosure action is pending an affidavit for service by publication. The affidavit must state that the defendant "on due inquiry cannot be found . . . so that process cannot be served upon him or her, and stating . . . that upon diligent inquiry his or her place of residence cannot be ascertained."<sup>26</sup> Under Illinois rules, when this affidavit is filed, "the clerk shall cause publication to be made in some newspaper published in the county in which the action is pending."<sup>27</sup>

The publication shall contain: "notice of the pendency of the action, title of the court and case, names of the first named plaintiff and first named defendant, the number of the case, the names of the parties to be served by

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<sup>24</sup> *Applegate Apartments Ltd. Partnership v. Commercial Coin Laundry Sys.*, 276 Ill. App. 3d 433, 440 (1st Dist. 1995) (citations omitted).

<sup>25</sup> *See, e.g., Applegate*, 276 Ill. App. 3d at 442 s (affidavit did not assert due diligence inquiry and was thus deemed insufficient as to unknown owner/tenant-in-possession).

<sup>26</sup> 735 ILCS 5/2-206(a). The Affidavit for Service by Publication is a stock form that should be available at the clerk's office at the Court.

<sup>27</sup> Section 5/2-206(a). In Cook County, the Affidavit for Service by Publication is usually first presented to the Legal Publication Department, which is a branch of the Chicago *Daily Law Bulletin*, in Room 802 of the Daley Center. This step triggers the publication process. The Legal Publication Department then forwards the Affidavit to the Clerk for filing and processing.

publication [*i.e.*, Unknown Owners and Nonrecord Claimants], and the date on or after which default may be entered against such party."<sup>28</sup>

### **Notice of Foreclosure**

To protect against claims made (or liens recorded) against the mortgaged property after a foreclosure action has commenced, a notice of foreclosure must be recorded in the county in which the real estate is located. The notice of foreclosure (also called "notice of *lis pendens*") "shall be constructive notice" to "every person claiming an interest in or lien on the mortgaged real estate, whose interest or lien has not been recorded prior to the recording of such notice of foreclosure."<sup>29</sup>

The notice of foreclosure serves several salutary purposes as recognized by Illinois courts:

One purpose of *lis pendens* is the avoidance of endless litigation ... achieved by conclusively binding one who obtains an interest in the property during the pendency of a suit ... to the result of that litigation as if he had been a party from the outset. In this respect the filing of *lis pendens* notice is designed to protect a plaintiff from third persons who might acquire, during the pendency of litigation, interest in the subject matter of the litigation such as would preclude the court from granting the plaintiff the requested relief. \*\*\* Another less widely recognized purpose of the doctrine is to protect purchasers by giving them notice that the land which they are buying might be affected by a judgment later entered in a pending action, by which they would be bound.<sup>30</sup>

Under the IMFL, the form of the notice of foreclosure must include: (1) the names of all plaintiffs; (2) the court in which the action was brought; (3) the names of title holders of record; (4) a legal description of the real estate; (5) a

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<sup>28</sup> Section 5/2-206(a); IMFL § 1502(c)(2) (expressly adopting for Nonrecord Claimants Section 206's rules concerning service by publication); *see also* Mortgage Foreclosure Treatise § 54:51 (providing a form of Affidavit for Service by Publication as to both Unknown Owners and Nonrecord Claimants).

<sup>29</sup> IMFL § 1503.

<sup>30</sup> *Admiral Builders Corp. v. Robert Hall Village*, 101 Ill. App. 3d 132,136 (1st Dist. 1981) (citations omitted).

common address or description of the location of the real estate; and (6) identification of the mortgage sought to be foreclosed.<sup>31</sup>

When the lender files its foreclosure complaint and records its notice of foreclosure in accordance with Illinois law, the interest in the mortgaged real estate of nonrecord claimants is "barred and terminated by any judgment of foreclosure to the same extent as if such claimant had been a party."<sup>32</sup>

### **Reinstatement**

In the foreclosure context, "reinstatement" is a statutory right of the mortgagor to avoid foreclosure by curing all existing defaults. Section 1602 of the IMFL governs this important statutory right.

Under the IMFL, the mortgagor has 90 days after being "served with summons or by publication" to "reinstate" a defaulted mortgage.<sup>33</sup> Reinstatement occurs when a mortgagor cures "all defaults then existing, other than payment of such portion of the principal which would not have been due had no acceleration occurred, and by paying all costs and expenses required by the mortgage to be paid in the event of such defaults."<sup>34</sup> Thus, in a commercial foreclosure, a mortgagor has a statutory right of 90 days from (1) the date of service or (2) the submission of all mortgagors to the court's jurisdiction, to reinstate or cure all existing defaults and outstanding costs and expenses.

If the mortgagor exercises its reinstatement rights within the 90-day window, the foreclosure action "shall be dismissed" and the mortgage documents remain in full force and effect as if no acceleration or default had occurred.<sup>35</sup> If the mortgagor reinstates, and the court dismisses the action, counsel for the mortgagee should obtain language in the dismissal order that the mortgagor has exercised its statutory right to reinstatement. Doing so will prevent the mortgagor

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<sup>31</sup> See IMFL § 1503.

<sup>32</sup> See IMFL § 1502(b).

<sup>33</sup> IMFL § 1602; *Fed. Nat'l Mortgage Ass'n v. Schildgen*, 252 Ill. App. 3d 984, 991 (1st Dist. 1993).

<sup>34</sup> IMFL § 1602.

<sup>35</sup> See IMFL § 1602.

from reinstating again for another 5 years. Absent such a finding by the Court, the mortgagor could, if it were to fall back into arrears, reinstate again within 5 years.<sup>36</sup>

### **Obtaining a Foreclosure Judgment**

To obtain a foreclosure judgment, the lender has essentially three options. It can: (1) file a motion for summary judgment using provisions of the Illinois Code of Civil Procedure; (2) proceed to trial on the merits; or, (3) proceed directly by motion for judgment of foreclosure if the allegations are uncontested.<sup>37</sup> If the lender moves directly for a judgment of foreclosure in an uncontested case, the court, "upon motion and supported by an affidavit stating the amount due the mortgagee, shall enter a judgment of foreclosure as requested in the complaint."<sup>38</sup> Counsel will likely find that the degree of motion practice by the lender from the filing of the complaint to the entry of judgment will vary with the degree to which the borrower contests the foreclosure proceeding.

### **Contents of the Judgment of Foreclosure**

In most cases, counsel for the mortgagee will be responsible for preparing the Judgment of Foreclosure, which the court must approve. By statute, the judgment "shall include the last date for redemption and all rulings of the court entered with respect to each request for relief set forth in the complaint."<sup>39</sup> Counsel should also take care to include relevant factual findings with regard to the subject real estate. Thus, mirroring aspects of the complaint, the judgment of foreclosure should recite key findings of the court. Some of these findings should include at least the following items: the description of the mortgaged property; the identity of the parties to the litigation; the nature of the indebtedness; the status of the default (including all accrued interest to date); and the status of any related

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<sup>36</sup> See IMFL § 1602.

<sup>37</sup> See IMFL § 1602.

<sup>38</sup> See IMFL § 1506. See also Lawrence M. Karlin & Howard C. Emmerman, *Offense in Mortgage Foreclosures*, in Illinois Institute for Continuing Legal Education (1994) (hereinafter "Karlin & Emmerman") at 6—73 – 6—74.

<sup>39</sup> ILCS § 1506(e).

procedural events (*e.g.*, appointment of a receiver or a trustee, assignment of rights, etc.).

The judgment of foreclosure should also include a section of the court's conclusions of law. The following is a non-exhaustive list of items which counsel may wish to include:

- that jurisdiction and service are proper;
- that any loan documents reflect valid obligations of the mortgagor;
- that the mortgagee has the right to enforce those obligations by virtue of the mortgage;
- that reinstatement rights have expired and that the right of redemption has been waived or has expired;
- that attorneys' fees and costs have been incurred and are collectible under the terms of the mortgage;
- that judgment shall be entered in favor of the mortgagee for the foreclosure of the mortgage (and any other property identified under the loan and mortgage documents);
- that the judgment amount reflect the sum any unpaid principal, accrued interest, and costs.<sup>40</sup>

The IMFL provides that "special matters" may be included in the judgment.<sup>41</sup> Some of these special matters may include provisions relating to:

- manner of sale other than public auction;
- sale by sealed bid;
- designating someone other than one customarily designated by the court to conduct the sale;
- permitting a duly licensed real estate broker to list the real estate for sale;
- fee schedules for any brokers or auctioneers that are used;

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<sup>40</sup> For an example of the form of Judgment of Foreclosure, *see* Karlin & Emmerman at 6-81 – 6-87.

<sup>41</sup> IMFL § 1506(f).

- whether and in what manner signs shall be posted on the real estate to be offered for sale;
- the time and place at which bids shall be received;
- newspapers in which notice of sale will be published;
- format for the advertising of such sale.

### **Redemption**

Redemption is an important statutory right which gives mortgage debtors one final chance to stave off foreclosure by paying off, within a certain window of time, the entire balance of the mortgage, including all unpaid interest and applicable fees and costs borne by the creditor. In commercial foreclosures, the mortgagor has the later of 6 months from the date of service of summons or 3 months from the date of entry of judgment of foreclosure to "redeem" – or pay off – the mortgage in full, including all necessary interests and costs.<sup>42</sup>

Importantly, where the foreclosed property is commercial real estate, the mortgagor's right of redemption can be (and often is) waived.<sup>43</sup> The mortgagee should be able to quickly determine if the mortgage documents provide for a waiver of redemption.

If redemption has not been waived, counsel should be aware that the redemption period must expire before commencement of the foreclosure sale.<sup>44</sup> This feature of the IMFL lends greater certainty to the foreclosure process: the

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<sup>42</sup> IMFL § 1603. Under the IMFL, the amount required to redeem includes the sum of the amount specified in the judgment of foreclosure, which shall consist of all principal and accrued interest as of the date of the judgment; all costs and expenses allowed by law or approved by the court; reasonable attorneys' fees incurred by the mortgagee; per diem interest from the date of judgment to the date of redemption calculated at the mortgage rate of interest applicable as if no default had occurred. IMFL § 1603(d).

<sup>43</sup> IMFL § 1601(b) (providing that the mortgagor "may waive [its] right of redemption ... by express waiver stated in the mortgage" or "by any other waiver in writing which has been acknowledged by the mortgagor and recorded"); *Benjamin Franklin Federal Sav. Ass'n v. Dwinn*, 1990 WL 141451, \*2 (N.D. Ill. Sept. 20, 1990) ("clear waiver of redemption provisions" in mortgage was given full force and effect in bank's successful motion for judgment of foreclosure). By contrast, a mortgagor of residential real estate may not waive this right, and any such waiver is deemed void. *See* IMFL § 1601(a).

<sup>44</sup> *See* IMFL § 1507(b).

fact the debtor's redemption period must expire before the judicial sale minimizes the uncertainty for purchasers at auction who no longer have to risk having their purchase defeated by an 11th-hour redeemer.<sup>45</sup> Most commercial loan transactions will include provisions in the loan documents expressly waiving the borrower's right to redeem, and thus, as a practical matter, the mortgagee will likely not have to deal with post-sale redemption scenarios.

### **The Foreclosure Sale**

Once judgment of foreclosure is entered and the reinstatement and redemption periods have expired (or have been waived), then the real estate may be sold at a judicial sale.<sup>46</sup> The mortgagee may want to consider engaging a private, court-authorized judicial sale officer to perform most of the administrative leg-work required by the judicial sale. Sale officers can be of enormous help in preparing the necessary paperwork and sale documents (as set out below) required in connection with a judicial sale.

### **Notice of Sale**

The mortgagee is responsible for giving public notice of the sale. These requirements, which are set forth below, are intended to provide detailed information regarding the property so as to stimulate competitive bidding and capture the fair market value of the property.<sup>47</sup> The contents of the Notice of Sale must include the following:

- Name, address, and telephone number of the person to contact regarding the real estate;
- Common address and other common description (other than legal description), if any, of the real estate;
- Legal description of the real estate;

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<sup>45</sup> See, e.g., *Supreme Savings and Loan Assoc. v. Lewis*, 130 Ill. App. 2d 16 (1st Dist. 1970) (after a mortgage foreclosure sale, owner of redemption properly tendered redemption payment to winning bidder thus upsetting winning bidder's plan to obtain title to the property). See Catherine A. Gnatek, *The New Mortgage Foreclosure Law: Redemption and Reinstatement*, 1989 U. ILL. L. REV. 471, 485 (1989) (noting how at one time Illinois permitted post-sale redemption periods of up to 15 months)).

<sup>46</sup> IMFL § 1507.

<sup>47</sup> See Karlin & Emmerman at 6-88.

- Description of improvements on the real estate;
- Times specified in the judgment, if any, when the real estate may be inspected prior to sale;
- Time and place of sale;
- Terms of the sale;
- Case title, case number and the court in which the foreclosure was filed; and
- Other such information ordered by the court.<sup>48</sup>

### **Publication of Notice of Sale**

Under Section 1507 of the IMFL, notice of sale must be published once a week for 3 consecutive calendar weeks prior to the sale. The following are rules to keep in mind in connection with the notice of sale requirement.

The first of the three notices must not be published more than 45 days before the sale and the last notice not less than 7 days before the sale.<sup>49</sup>

Notice must be given in a newspaper circulated to the general public in the county in which the real estate is located, both in the legal notice section and in the regular real estate section. (If the real estate is located in a county with a population in excess of 3 million, a separate notice in the real estate section is not necessary.)

Notice must also be given to all parties "who have appeared and have not theretofore been found by the court to be in default for failure to plead."<sup>50</sup>

### **Failure to Give Notice of Sale**

If sale is not conducted in accord with the notice rules set out in section 1507(c), then "any party entitled to notice" who was not so notified may, by motion supported by affidavit, and prior to confirmation, "ask the court ... to set aside the sale."<sup>51</sup> Even after the sale has been confirmed by the court, a party entitled to notice who fails to receive notice can recover from the mortgagee "any

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<sup>48</sup> IMFL § 1507(c).

<sup>49</sup> IMFL § 1507(c)(2).

<sup>50</sup> IMFL § 1507(c)(3).

<sup>51</sup> IMFL § 1508(c).

damages" caused by failure to serve notice, plus attorneys' fees and expenses.<sup>52</sup> It is therefore imperative that the mortgagee give notice, as prescribed by the IMFL, to all parties entitled to receive it.

### **Sale and Receipt Upon Sale**

Upon expiration of the reinstatement and redemption periods, or "upon the entry of a judgment of foreclosure after the waiver of all rights of redemption," a sale of the mortgaged property is conducted.<sup>53</sup> Importantly, the highest bid at a judicial sale is "merely an irrevocable offer to purchase the property and acceptance of the offer takes place when the court confirms the sale."<sup>54</sup> As a result, it is not until judicial confirmation of the sale that title to the property will pass to the successful bidder.

Upon the sale of the mortgaged estate, the person conducting the sale shall give to the purchaser a "receipt of sale." Such receipt shall describe the property purchased and show the amount bid, amount paid, total amount paid to date, and the amount still to be paid.<sup>55</sup>

### **Certificate of Sale**

Upon payment in full of the amount bid, the person conducting the sale shall issue, in duplicate, and give to the purchaser a "Certificate of Sale."<sup>56</sup> The Certificate shall be in a "recordable form," describing the real estate purchased, indicate the date and place of sale and show the amount paid therefore. The Certificate shall indicate that it is still subject to confirmation by the court. The certificate of sale "does not transfer title, but only assures to the purchaser a conveyance of the legal title if the premises are not redeemed."<sup>57</sup> In other words,

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<sup>52</sup> IMFL § 1508(d).

<sup>53</sup> IMFL § 1507(b).

<sup>54</sup> *Citicorp Sav. Of Illinois v. First Chicago Trust Co. of Illinois* 269 Ill. App. 3d 293, 300 (1st Dist. 1995) (citing *Straus v. Anderson*, 366 Ill. 426 (1937)); see also *Commercial Credit Loans, Inc. v. Espinoza*, 293 Ill. App. 3d 915 (1997) (same).

<sup>55</sup> IMFL § 1507(e).

<sup>56</sup> IMFL § 1507(f).

<sup>57</sup> *Van Fleet v. Van Fleet* 126 Ill. App. 3d 448, 451 (3d Dist. 1984).

if a deed is never issued to the holder of the certificate of sale, the title remains in the holder of the right to redeem[.]<sup>58</sup>

### **Report and Confirmation of Sale**

The IMFL spells out the steps to take to finalize the sale. The person conducting the sale must "promptly make a report to the court," and include a copy of all receipts and, if any, certificate of sale.<sup>59</sup> The judicial sales officer is responsible for generating the certificate of sale and sale report documents. Although generation of these documents by the judicial sales officer are largely formalities, counsel must ensure their accuracy and verify such things as the property identification number (PIN), legal and common description of the property, the amount of the winning bid, and the proper identification of the parties.

### **Hearing and Confirmation**

Once the judicial sale is complete, and upon motion and notice, the court conducts a hearing to confirm the sale. Following the hearing, and in most cases, the court will enter an order confirming the sale.

However, the IMFL does vest the court with discretion to not confirm a judicial sale.<sup>60</sup> The court's power court to void a sale is limited to four grounds. Under the IMFL, the court can void the sale if it finds: (1) notice of sale was not given; (2) the terms of the sale were unconscionable; (3) the sale was conducted fraudulently; or (4) if "justice was otherwise not done."<sup>61</sup>

For example, a the trial court properly refused to confirm a sale (on grounds of both unconscionability and that justice was not otherwise done) when it was shown that a non-English speaker who attempted to redeem her mortgage was "shrugged off" by the mortgagee, and the sale price of the property at auction

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<sup>58</sup> *Id.*

<sup>59</sup> IMFL § 1508(a).

<sup>60</sup> *See generally Grubert v. Cosmopolitan Nat'l Bank of Chicago*, 269 Ill. App. 3d 408 (2d Dist. 1995).

<sup>61</sup> IMFL § 1508(b).

was determined to be one-sixth the value of the property.<sup>62</sup> In another case, the court granted relief to owners of property who relied on representations by the bank that the judicial sale date would be moved back to March 16 (from March 10) and that they could reinstate the mortgage by March 15.<sup>63</sup> In the "interests of justice," the court refused to confirm the sale when it determined that, to the detriment of the property owners, the sale mistakenly proceeded as originally scheduled on March 10 and was sold to a third party.<sup>64</sup> In general, a judicial sale will fail because of some irregularity in the process or conduct of the parties that yields an unfair result.

In addition to approving the judicial sale, the confirmation order may contain: an award of the mortgagee's fees and costs arising between the entry of judgment and the confirmation hearing; and a judgment against the mortgagor for any deficiency.<sup>65</sup> Thus, entry of the Order of confirmation marks the end of the foreclosure process, giving validity to the sale, and affirming the right of the purchaser to move into title.

### **Transfer of Title**

After confirmation of the sale, and payment of the purchase price, the court "shall upon the request of the holder of the certificate of sale (or the purchaser if no certificate of sale was issued) promptly execute a deed to the holder or purchaser sufficient to convey title."<sup>66</sup>

Delivery of the deed is considered sufficient to pass title to the real estate, and shall operate as "an entire bar" of all claims of parties to the foreclosure; and all claims of any nonrecord claimants who are given notice of the foreclosure.<sup>67</sup>

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<sup>62</sup> *Commercial Credit Loans, Inc. v. Espinoza*, 293 Ill. App. 3d 915, 927-28 (1st Dist. 1997).

<sup>63</sup> *Citicorp Sav. of Illinois v. First Chicago Trust Co. of Illinois*, 269 Ill. App. 3d 293, 295 (1st Dist. 1995).

<sup>64</sup> *Id.* at 300-301.

<sup>65</sup> IMFL § 1508(b).

<sup>66</sup> IMFL § 1509(a).

<sup>67</sup> IMFL § 1509(b).

## Bankruptcy

Bankruptcy represents a special problem for a mortgagee seeking to obtain title to real estate through the foreclosure process. When a mortgagor files for bankruptcy, an automatic stay suspends for a period of time all judgments, collection activities and foreclosures that arose prior to the filing of the bankruptcy petition.<sup>68</sup> Under certain circumstances – for example, if the debtor has no equity, or the property is not necessary to an effective reorganization – a secured creditor can move to have the automatic stay lifted, and proceed with the collection or foreclosure process.<sup>69</sup>

Relief from the stay, however, is not guaranteed. Moreover, in bankruptcy, the debtor has the right to cure a default on an existing mortgage *prior to the judicial* sale on terms that are favorable to the debtor.<sup>70</sup> Indeed, in the reorganization context, a principal characteristic of the debtor's "plan" in bankruptcy, consistent with federal bankruptcy policy generally, is a rescheduling of all its debt to "afford the debtor with a meaningful opportunity to regroup."<sup>71</sup> Thus, up to the time of the judicial sale, the debtor holds an important "trump" card through its ability to file for bankruptcy, halt the foreclosure process, and potentially disrupt plans of the secured party to acquire title.

Federal bankruptcy law grants the mortgagor a substantive right to cure (or redeem) a default up until the time the property "is sold at a foreclosure sale that is conducted in accordance with *applicable nonbankruptcy law*."<sup>72</sup> As the Seventh Circuit Court of Appeals recently concluded, that federal right is

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<sup>68</sup> See generally 11 U.S.C. § 362.

<sup>69</sup> 11 U.S.C. § 362(d).

<sup>70</sup> This is true whether the mortgagor files for bankruptcy under Chapter 11, which deals principally with reorganization by corporate entities, or under Chapter 13 which extends relief to individuals and those who fall within prescribed debt limits. See 11 USC § 1322(c)(1) (under chapter 13, default on debtor's principal residence "may be cured ... until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law"); 11 USC §§ 1123, 1124; *Matter of Madison Hotel Assocs.*, 749 F. 2d 410, 418 (7th Cir. 1984) (in chapter 11 case, debtor could properly cure default prior to foreclosure sale).

<sup>71</sup> Paula A. Franzese, *Secured Financing's Uneasy Place in Bankruptcy: Claims for Interest in Chapter 11*, 19 HOFSTRA L. REV. 1, 16 (1990).

<sup>72</sup> 11 U.S.C. § 1322(c)(1) (emphasis added).

extinguished once the judicial sale is conducted.<sup>73</sup> In an opinion interpreting "applicable nonbankruptcy law" (*i.e.*, the judicial sale provisions of the IMFL) in the context of an Illinois debtor who had filed for bankruptcy after the judicial sale but before confirmation, the court held that even though the IMFL requires that a judicial sale be confirmed by the court, the debtor's right to cure a default terminates once the sale is conducted, and does *not* (as a growing body of cases had held) continue up until the time of confirmation.<sup>74</sup> Although the threat of a debtor's filing for bankruptcy poses potential hazards for secured parties in the foreclosure process, that threat is greatly reduced once the judicial sale is completed. In the event a mortgagor does seek protection by filing for bankruptcy after the judicial sale, the mortgagee will have strong grounds to have the automatic stay lifted.

### **Conclusion**

The IMFL is a comprehensive statute that governs an important but often overlooked feature of corporate and commercial transactions: the foreclosure process. Understanding the various substantive portions of the IMFL, including the relevant timing and procedural checkpoints, is critical to a successful foreclosure action under the statute. As described in this article, special attention should be paid to ensuring that appropriate parties are identified, proper service on unknown owners and non-record claimants is effected and the mortgagor's reinstatement and redemption rights are tracked. (See the attached "Timeline" which marks some of the critical events in a judicial foreclosure). Although this article cannot prepare you for every possible circumstance that may arise, it will assist practitioners new to the field in obtaining a basic understanding of how the

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<sup>73</sup> *Colon v. Option One Mtg.*, 319 F.3d 912, 920-21 (7th Cir. 2003).

<sup>74</sup> Prior to *Colon*, Illinois courts were split on the question whether a debtor could redeem a default where the petition for bankruptcy was filed after completion of the judicial sale, but before confirmation. See *Colon*, 319 F.3d at 916 n.2 (comparing Illinois cases holding that a mortgagor could cure arrearage up until entry of the order confirming sale with cases holding that cure rights terminated at the conclusion of the judicial sale, *i.e.*, when the highest bid is accepted by the selling officer).

foreclosure process works in Illinois, and most importantly, in performing an important service to their clients.