Paralegal Section MCLE Meeting
DuPage County Bar Center
Date: April 11, 2018

11:45 AM – Noon **Welcome/Introductions**

Mary Gaertner, Section Chair

Noon – 1:00 PM **Program**

Illinois Foreclosure Overview

Berton J. Maley, Vice President of Codilis and Associates, P.C.

Speaker's Bio

Mr. Maley is a vice president and managing attorney at Codilis & Associates, P.C., concentrating in secured creditors' rights in bankruptcy, mortgage foreclosure, and related matters. He manages the firm's bankruptcy department and oversees the firm's audit and compliance functions.

Mr. Maley has served as co-chair of the American Bankruptcy Institute's Eugene R. Wedoff Seventh Circuit Consumer Bankruptcy Conference Advisory Committee, and is past Chair of the Bankruptcy Law and Practice Committee of the DuPage County Bar Association and past Chair of the Bankruptcy and Reorganization Committee of the Chicago Bar Association. Additionally, he is a member of the Bankruptcy Association of Southern Illinois, the Illinois State Bar Association, the American Bankruptcy Institute, the National Association of Chapter 13 Trustees (associate member), and Phi Alpha Delta Law Fraternity, International (International Board Member – Marshal). He has previously served as a member of the Bench Bar Liaison Committee for the U.S. Bankruptcy Court for the Northern District of Illinois and of the Model Plan Committees for the U.S. Bankruptcy Court for the Southern District of Illinois and the Springfield Division of the U.S. Bankruptcy Court for the Central District of Illinois.

Mr. Maley co-authored "Trial of the Foreclosure Case", in Illinois Foreclosure Practice, (Illinois Institute of Continuing Legal Education, 2003). His other professional published works include "Get It Filed: 7th Circuit Says Mortgage Claims Must Be Filed by Claims Deadline" appearing in the Legal League Quarterly; Stripping Off: The Supreme Court Tackles Lien Stripping in Chapter 7 Bankruptcies" appearing in DS News; "Modifying the Terms of a Residential Mortgage in Chapter 13 Bankruptcies", "Avoiding the Auctioneer's Gavel: Saving Homes From Foreclosure" and "Oh, Won't You Stay Just a Little Bit Longer: Duration and Extension of the Automatic Stay in Bankruptcy" appearing in the DCBA Brief: The Journal of the DuPage County Bar Association; "Chapters & Verse: Real Estate Professionals and the Bankruptcy Process" and "No Vacancies" appearing in REO Magazine; and "Saving Your House Through Bankruptcy" appearing in the Loyola Consumer Law Journal.

Mr. Maley also is a regular lecturer on bankruptcy, mortgage foreclosure, and related topics. He has spoken for such groups as the American Bankruptcy Institute, the Bankruptcy Association of Southern Illinois, the Illinois Institute of Continuing Education, the DuPage County Bar Association, the Chicago Bar Association, Phi Alpha Delta Law Fraternity, REOMAC (mortgage industry trade association), and the Illinois Housing Development Authority.

Education: Loyola University of Chicago College of Arts and Sciences (BA, 1990); Loyola University School of Law (JD, 1992).

Bar Admissions: State of Illinois; United States Supreme Court; United States Court of Appeals for the Seventh Circuit; and United States District Courts for the Northern, Central and Southern Districts of Illinois, the Northern and Southern Districts of Indiana, and the Eastern District of Wisconsin.

Presentation Description

An overview of Illinois Foreclosure Process including judicial foreclosure process and milestones, reinstatement and redemption rights, and foreclosure alternatives.

Next Meeting: **May 9th** – Mary Andreoni of the Illinois Attorney Registration and Disciplinary Commission. "Maintaining Confidentiality in an Age of Social Media

DCBA Events: 4/19 Happy Hour- Rock Bottom, Warrenville 5:30 p.m.

5/3 Law Day Luncheon-Le Jardin at Cantigny 11:15 a.m.

5/5 Derby Day at Arlington International at noon

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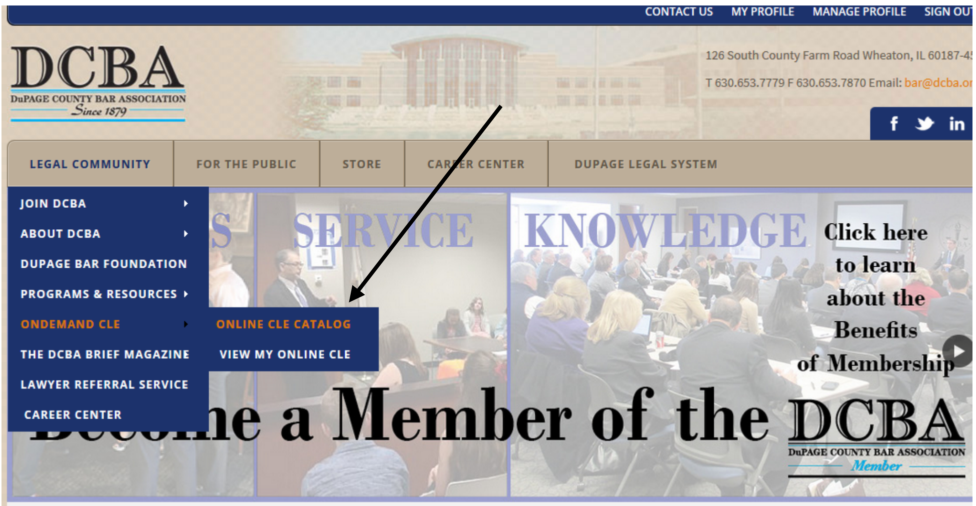

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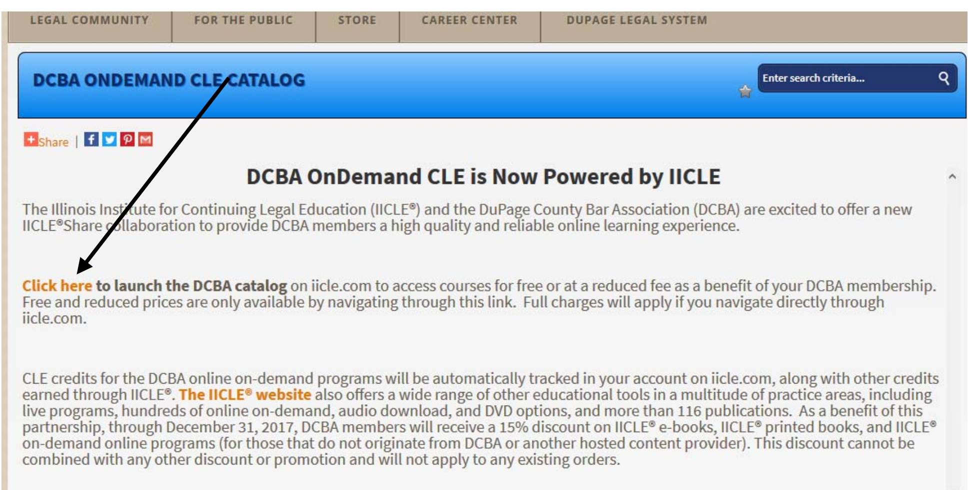

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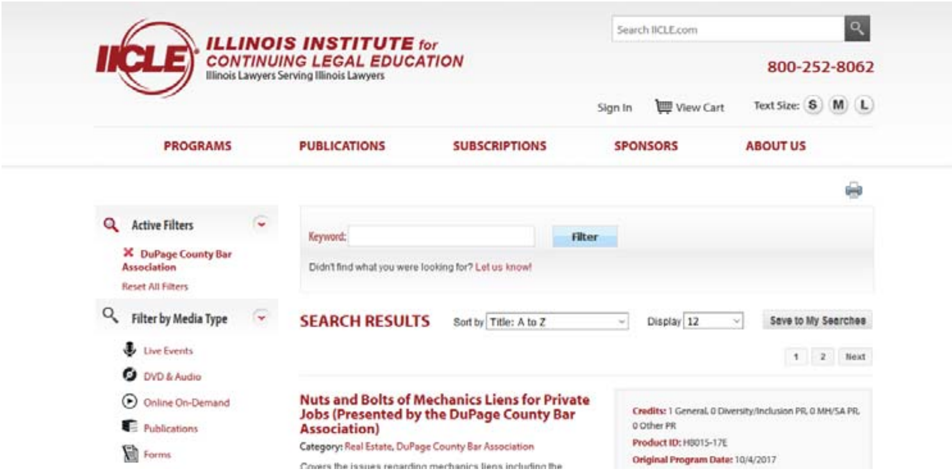

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Illinois Foreclosure

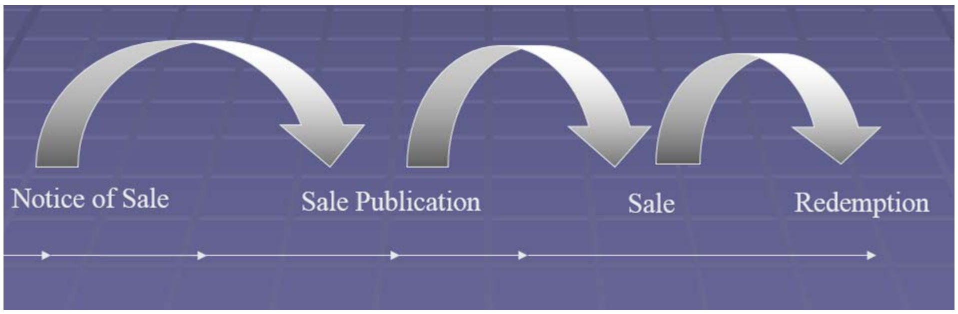
PRESENTED BY B.J. MALEY
CODILIS AND ASSOCIATES, P.C.

Types of Foreclosure

NONJUDICIAL V JUDICIAL

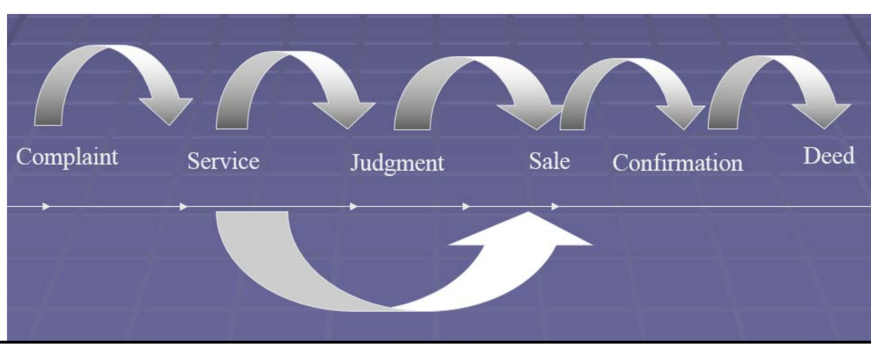
Types of Foreclosure – Non Judicial

- Non-Judicial Foreclosure (Trustee/Publication)



Types of Foreclosure –Judicial

- Foreclosures in Illinois are governed by 735 ILCS 5/15 - The Illinois Mortgage Foreclosure Law (IMFL)



Mortgage Transactions

CLOSING
NOTES AND MORTGAGES
MONTHLY INSTALLMENTS
BREACH LETTERS

Illinois Foreclosure Process - Complaint

- Necessary Parties 735 ILCS 5/15-1501(a)
  - Mortgagors
  - Other Persons Obligated on the Indebtedness other than guarantors
- Permissible Parties 735 ILCS 5/15-1501(b)
  - Persons in possession of the property
  - Spouses waiving homestead
  - Any party having on interest in the real estate
  - Guarantors of the debt

Illinois Foreclosure Process - Complaint

- Delivering Clear Title
  - The goal of the plaintiff's attorney is to name any party with an interest in the real estate which can be foreclosed to ensure that the plaintiff (should plaintiff end up with the property) receives clear title
  - Title Search / Minutes of Foreclosure are used to identify the parties with an interest in the real estate

Illinois Foreclosure Process - Complaint

- The statutory form complaint 735 ILCS 5/15-1504
- Allegations of the Complaint
- "Deemed" Allegations"

that the obligors are legally obligated , that the exhibits attached are true and correct and incorporated by reference, that the mortgagor was in title when the mortgage was made, the mortgage was properly recorded, that the default occurred, that persons identified as owners were actually owners at the time the complaint was filed, that mortgage is a valid lien superior to all those other liens identified in the complaint, that any required demand letter has been sent and the entire debtor is due, etc.

Illinois Foreclosure Process - Complaint

- Filing Fee Tiers 735 ILCS 5/15-1504.1
  - First Tier - $500.00 (175 or more complaints by plaintiff in preceding year)
  - Second Tier $250.00 (50-174 complaints by plaintiff in preceding year)
  - Third Tier ($50.00) (49 or fewer complaints filed by plaintiff in preceding year)

Illinois Foreclosure Process - Complaint

- Lis Pendens / Notice of Foreclosure 735 ILCS 5/15-1503
- The Lis Pendens Doctrine
  - Persons taking an interest in the real estate after the recording of the lis pendens are deemed to have notice of the foreclosure and any interest they obtain is subject to the foreclosure proceeding.
  - Their interest in the property can be foreclosed even if they are not actually named in the foreclosure suit.
- Effective Date of Title Search / Later Date or Gap Search

Illinois Foreclosure Process - Service

- Three Types of Service
  - Personal Service
    - Defendant is himself/herself served the papers
  - Member of Household Service/Substitute Service
    - Any member of the defendants household above the age of 13 is served on defendant's behalf and process server mails a copy directly to defendant
  - Service by Publication
    - Notice by Publication where after due diligence, defendant cannot be found to accept service
    - Does not give rise to personal liability for deficiencies

Illinois Foreclosure Process - Service

- If the process cannot otherwise be served after due diligence, publication is permitted.
- Under Publication must run for three consecutive weeks in a newspaper in circulation in the county where the property is located.
- Although the publication must run for three weeks, service is deemed to have been effected from the first run for purposes of calculation time to answer and redemption rights.

Illinois Foreclosure Process - Answer

- Time to Answer and Appear

Illinois Foreclosure Process - Judgment

- Default v. Summary Judgment
  - Default Judgment is taken against all defendants who have not filed an answer
  - Summary judgment may be taken against any defendant who answers, but whose answers do not raise any material issues of fact which would preclude judgment
  - The most common summary judgment motion is as to junior lien holders where the lien holders do not dispute priority

Illinois Foreclosure Process - Judgment

- The Judgment Order
  - Sets the payoff amount as of the judgment date
  - Establishes Priorities of claimants
  - Sets last date to redeem
  - Sets Terms for Foreclosure Sale
- The Payoff Amount will generally be proven up by affidavit and include the fees and costs incurred in connection with the foreclosure if allowed under the note and mortgage. 735 ILCS 5/15-1510

Illinois Foreclosure Process

▶Reinstatement v. Redemption

- Reinstatement means paying the amount of the mortgage that is past due (including fees, costs, and advances) as if no acceleration had occurred
- Redemption means redeeming the property from foreclosure by paying the entire amount due (pay-off)
- IMFL provides specific periods of time in which reinstatement and redemption rights are available, but the note and mortgage may provide additional rights

Illinois Foreclosure Process - Reinstatement

- Under 735 ILCS 5/15-1602, mortgagors have the right to reinstate for up to 90 days from the effective date of service.
- The underlying note and mortgage may provide additional time.
- The mortgage servicer may accept reinstatement by agreement even after these time periods have expired.

Illinois Foreclosure Process - Redemption

- Either the mortgagors or the owners of the property may exercise the right to redeem
- Complicated process to exercise the right or redemption – not generally used

Illinois Foreclosure Process - Redemption

- Residential – greater of 7 months from service or 3 months from Judgment;
- Non-Residential – greater of 6 months from service or 3 months from Judgment;
- Shortened Redemption – 90% rule and waive personal deficiency – 60 days from Judgment;
- Abandoned Property – 30 days from date Judgment entered – must have affidavit

Illinois Foreclosure Process - Sale

- Once the redemption period expires, a foreclosure sale may be held, but even before redemption expires, the sale publication notices will like start to run. (see 735 ILCS 5/15-1507)
  - The Sale must be published for three consecutive weeks – once a week, the first publication to run no more than 45 days prior to sale, the last publication to run no less than 7 days prior to sale
  - must be in a newspaper circulated to the general public in the county in which the real estate is located, in the section of that newspaper where legal notices are commonly placed and a separate advertisement in the section of such newspaper, which may be the same newspaper, in which real estate other than real estate being sold as part of legal proceedings is commonly advertised to the general public
  - In Cook County must run in two separate newspapers

Illinois Foreclosure Process - Sale

- The actual sale may be conducted by a court appointed selling officer, the county sheriff, or the judge or clerk. In DuPage County, the courts generally require that the Sheriff conduct the sale.
- In non-sheriff counties, most plaintiff will seek the appointment of selling officers such as the Judicial Sales Corporation or Lender Sales as these entities are generally less expensive.

Illinois Foreclosure Process - Sale

- Sales Terms
- The sale terms may require that the successful bidder pay 100% of the bid in certified funds at the time of sale or some smaller percentage at the time of sale and the balance within 24 hours. In some circumstances, lien holders may be permitted to make "credit bids" - that is, they must have certified funds for the amounts necessary to cover any senior lien holders but after that can bid up to the amount of their indebtedness on credit.

Illinois Foreclosure Process – Confirmation

- After the sale is conducted, the court will have a hearing to confirm the sale and approve the selling officer's report of sale. The order entered at this hearing will typically:
  - Approves the Report of Sale
  - Confirms the Sale
  - Provides for possession of the property in favor of the successful bidder against all named parties
  - Lays out any deficiency

Illinois Foreclosure Process – Confirmation

- The Order of Possession

- The order for possession in only valid against named parties
- It's effect is stayed for 30 days but that stay may be extended by the court
- Eviction can be scheduled once the 30 days elapses

Illinois Foreclosure Process – Confirmation

- Deficiencies
  - A deficiency is the balance owed plaintiff after proceeds of sale are applied
  - An in personam deficiency is a personal money judgment against the borrowers and cannot be taken if they have received a Chapter 7 discharge or were served by publication
  - An in rem deficiency is against the property only

Illinois Foreclosure Process – Confirmation

- Special Right of Redemption
  - Applies if there is a deficiency at sale and plaintiff is successful bidder
  - Gives borrowers an additional 30 days to redeem the property by paying the successful bid amount – the deficiency would remain a lien against the property.
  - Seldom exercised

Alternatives to Foreclosure - Statutory

- Deeds in Lieu of Foreclosure 735 ILCS 5/15-1401
- Mortgagor deeds property back to lender usually in exchange for waiver of deficiency
- Generally not available if there are junior lien holders

Alternatives to Foreclosure - Statutory

- Short Sale 735 ILCS 5/15-1401.1
- Lender accepts a short payoff to allow mortgagor to sell property where property is worth less than the amount owed
- Lender has 90 days to accept a written offer

Alternatives to Foreclosure - Statutory

- Consent Foreclosure 735 ILCS 5/15-1402
- Mortgagor consents to foreclosure judgment which terminates rights and waives redemption rights in return for a waiver or personal deficiency
- Entry of judgment passes title and no separate sale is conducted
- Cannot be used in cases where the United States is a defendant

Alternatives to Foreclosure – Non- Statutory

- Loan Modifications
- Repayment Agreements
- Loan Assumptions
- For more on Foreclosure alternatives: "Avoiding the Auctioneer's Gavel: Saving Homes From Foreclosure" The DCBA Brief, March 2008

Questions

Illinois Foreclosure Process

Presented to the DuPage Bar Association Paralegal Committee
by B.J. Maley, Codilis and Associates, P.C.
April 11, 2018

Types of Foreclosure

Judicial v Non-Judicial

There are generally two types of foreclosure processes in the United States – Judicial and Non-Judicial. In a judicial foreclosure, the mortgage company must file a lawsuit in order to foreclose on property securing a debt. In a non-judicial foreclosure process, the court system is not typically involved.

Non-Judicial foreclosures generally involve a notice to the borrower, a notice by publication, and a sale conducted by a trustee. (State that have a non-judicial process are sometimes call trustee states.) Non-judicial foreclosures are simpler, less expensive, and quick. In some states, a non-judicial foreclosure can be completed in 40 days.

A judicial foreclosure generally follows a similar process to other types of lawsuits – a complaint is filed, the complaint is served, and entry of judgment is sought. Assuming the judgment is obtained, a public sale of the property is then conducted and in some states (like Illinois) the court then must confirm the sale.

Illinois is a judicial foreclosure state and statutory provisions in the Code of Civil Procedure govern the process. This process can be found at 735 ILCS 5/15 – the Illinois Mortgage Foreclosure Law ("IMFL").

The Mortgage Transaction

Before we begin discussion of the foreclosure process, let's take a quick step back. What is a mortgage? A mortgage is a voluntary lien against real property granted in writing by the property owner (the mortgagor) as security for money borrowed. Generally, a mortgage transaction will involve a promissory note for the money lent and a mortgage (security document) pledging property as collateral for the note.

The Illinois Statutes provide for a statutory form of mortgage in 765 ILCS 5/11. Most residential lenders in Illinois now use the FNMA/FHLMC uniform mortgage instrument and this form complies with the Illinois statutory requirements. The Illinois form provides that the following may appear on the face of the mortgage:

a.) That the mortgagor and the mortgagee be specifically named;

b.) That the real estate be described with particularity;

c.) The amount of the indebtedness;

d.) The maturity date;

e.) The rate of interest.

In addition to certain other covenants, the note and mortgage will generally require monthly installments of principal and interest (and sometimes escrow) to retire the debt over a period of time. If the borrower fails to make these installments as they come due, the entire debt may be called due and the property foreclosed upon to attempt to recover the debt.

Generally, prior to foreclosure the lender must send a "breach letter" (sometimes referred to as a demand letter) to the borrower describing the default and allowing a certain time period (usually thirty days) to cure the default.

Initiation the Judicial Foreclosure

Pre-Complaint

Once the proper demand has been sent, the next stage is to initiate the foreclosure by filing a complaint. The first part of this process is identifying the parties to be named as defendants. IMFL describes the parties that can be named in a foreclosure at 735-ILCS 5/15-1501 and includes two classes – necessary parties and permissible parties.

Necessary parties are the parties that must be included in the lawsuit including the mortgagor and other persons who owe payment on the debt.

Permissible parties basically include any guarantors and anyone who may have an interest in the property being foreclosed including lien holders, trustees and beneficiaries of land trusts, governmental entities, tenants, mechanics lien claimants, etc.

Although a foreclosure could proceed with only the mortgagors/obligors named, its is extremely important to name all parties with an interest in the land to ensure that clean title is delivered at the conclusion of the foreclosure. In order to obtain this information, it is necessary to perform a title search of the property to be foreclosed.

Complaint

IMFL provides a statutory form complaint at 735 ILCS 5/15-1504. If the form complaint is followed correctly, the complaint is presumed legally sufficient. Moreover, there are a number of allegations that are "deemed" to have been made even though not specifically spelled out. These include things like the allegation that the obligors are legally obligated , that the exhibits attached are true and correct and incorporated by reference, that the mortgagor was in title when the mortgage was made, the mortgage was properly recorded, that the default occurred, that persons identified as owners were actually owners at the time the complaint was filed, that mortgage is a valid lien superior to all those other liens identified in the complaint, that any required demand letter has been sent and the entire debtor is due, etc.

Because these allegations are deemed to have been made, they must be responded to in any answer to the complaint or they will be deemed to have been admitted.

The filing fee: It should be noted that in addition to the normal filing fees required by the clerk, 735 ILCS 5/15-1504.1 created a tiered filing fee system for mortgage foreclosure complaints. Basically, a surcharge applies which is based on the number of foreclosures filed by the plaintiff in the prior calendar year. The increased fees were intended to fund foreclosure prevention programs and provide municipal governments relief to deal with abandoned property. The system is set to expire on January 2, 2020, and creates the following tiered fee structure:

- First Tier - $500.00 (175 or more complaints by plaintiff in preceding year)
- Second Tier $250.00 (50-174 complaints by plaintiff in preceding year)
- Third Tier ($50.00) (49 or fewer complaints filed by plaintiff in preceding year)

The Lis Pendens

Along with the filing of a complaint a lis pendens or notice of foreclosure should be recorded with the county recorder for the county in which the property is located. Under 735 ILCS 5/15-1503 this recording provides notice to any parties taking an interest in the property after its recording, that their interest is subject to the foreclosure lawsuit. They need not be named in the foreclosure in order to have their interest in the property foreclosed.

Later Date / Gap Search

Since the title search/minutes of foreclosure the plaintiff relief upon in drafting the complaint to foreclose had an effective date, it is important to obtain a title update or gap search to identify any parties who may have obtained an interest in the real estate after the effective date of the initiate title work but before the recording of the lis pendens. These parties should named in an amended complaint in order to ensure that their interests are foreclosed upon.

Service of Process

For the most part, normal service of process rules apply with respect to the foreclosure. Service can be had (1) personally by delivering the summons and complaint directly to the defendant, (2) by Member of household by delivering the summons and complaint to any member of the defendant’s household above the age of 13 and mailing a copy directly to the defendant, or (3) by publication.

Publication is available solely to obtain jurisdiction sufficient to foreclose the property. It does not give the court personal jurisdiction to award a money judgment for any personal deficiency.

Publication is available only in cases where the defendants is be found after due inquiry and must run for three consecutive weeks in the county in which the property is located. Assuming the publication runs, the service is deemed effective form the first week. The defendant’s time to answer and appear (30 days) will be calculated from the date of first run, as will his redemption rights if any.

Judgment

Assuming no answer is filed, plaintiff will be entitled to seek entry of a default judgment. In many cases, even if an answer is filed, plaintiff may be entitled to summary judgment (if no material issues of fact are raised by the answer). The most common summary judgment motions are as to junior lien holders who answer, but do not dispute their lien priority. Such lien holders generally just want to be included in any distribution should a surplus be generated at sale.

Judgments will generally set the payoff amount as of the judgment date, establish priority among claimants to the property, set the last day to redeem, and set the terms of the sale. The amount of the judgment will generally be proven up by affidavit and will usually include the fees and costs incurred in the foreclosure. Plaintiff's attorneys fees and costs will be allowed if provided for in the mortgage. 735 ILCS 5/15-1510

Reinstatement and Redemption Rights

Reinstatement occurs when the mortgage arrears (the amount of the mortgage that is delinquent plus any allowable fees, costs and corporate advances) is paid, and the borrower resumes payment under the note and mortgage as if no default has ever occurred. The IMFL provides that the mortgagor with a statutory right to reinstate the loan within ninety days of service on all mortgagors. (The underlying note and mortgage may provide additional time.) 735 ILCS 5/15-1602

Redemption rights can be exercised by either a mortgagor or an owner of the property within the statutory period called the redemption period. 735 ILCS 5/15-1603 and 5/15-1212. Redemption involves payment of the entire amount of the indebtedness rather than just the amount of default. The calculation of the redemption period is important because once judgment is entered, the redemption period must expire prior to the foreclosure sale being conducted.

The redemption period can be calculated four different ways depending on the circumstances.

- Residential – greater of 7 months from service or 3 months from Judgment;
- Non-Residential – greater of 6 months from service or 3 months from Judgment;
- Shortened Redemption – 90% rule and waive personal deficiency – 60 days from Judgment;
- Abandoned Property – 30 days from date Judgment entered – must have affidavit

Foreclosure Sale

Once the redemption period expires, a foreclosure sale may be held, but even before redemption expires, the sale publication notices will like start to run. Sales are governed by 735 ILCS 5/15-1507.

The Sale must be published for three consecutive weeks – once a week, the first publication to run no more than 45 days prior to sale, the last publication to run no less than 7 days prior to sale must be in a newspaper circulated to the general public in the county in which the real estate is located, in the section of that newspaper where legal notices are commonly placed and a separate advertisement in the section of such newspaper, which may be the same newspaper, in which real estate other than real estate being sold as part of legal proceedings is commonly advertised to the general public. In Cook County must run in two separate newspapers.

Under the statute, sales may be conducted by court appointed selling officers, the county sheriff, or the judge or clerk. In some counties, like DuPage, plaintiffs are required to use the county sheriff to conduct sales.

Sale Confirmation

Once the sale has been conducted, the court will conduct a hearing to approve the sale and the sheriff's report of sale. The order entered by the court will:

- Approves the Report of Sale
- Confirms the Sale
- Provides for possession of the property in favor of the successful bidder against all named parties
- Lays out any deficiency

It should be noted that the order for possession will only be enforceable as to parties actually named in the foreclosure. If other adults are present at the property, a separate eviction action must be filed. Also, the order for possession is generally stayed for thirty days be statute though the court may extend this stay in its discretion.

The amount of the deficiency will be the balance owed the plaintiff after applications of sale proceeds. It may be entered either in personam or in rem. In personam deficiencies are actual money judgments against the borrowers and cannot be taken if the borrower received a chapter 7 discharge or was served by publication. In rem deficiencies are against the property only and generally only come into play if the special right to redeem is exercised.

The Special Right to Redeem exists where there is a deficiency at sale and the plaintiff is the successful bidder. Basically the mortgagors/owners have an opportunity to redeem the property post sale within 30 days be paying the plaintiff the amount of the sales bid. Any deficiency would become a lien against the property in the same priority and the plaintiff's original mortgage lien. Because of this, the special right is seldom exercised as it is difficult to obtain financing.

Alternatives

Statutory Alternatives

Deeds in Lieu of foreclosure are permitted under 735 ILCS 5/15-1401. Basically, the mortgagor deeds the property back to the lender – usually in exchange for a waiver of any deficiency. Because a deed in lieu does not terminate the rights of other lien holders, it is generally not an option in cases where other parties have an interest in the property.

Short Sales have long been a non-statutory alternative, but now are included in the statute at 735 ILCS 5/15-1401.1. Basically, in a short sale the lender agrees to accept less than the amount owed and waive any deficiency in order to facilitate a sale of the property by the mortgagor and to avoid the time and expense foreclosure and resale of the property. The statute permits a 90 day period for the lender to respond to a written offer.

Consent foreclosure is permitted under 735 ILCS 5/15-1402. Basically, the mortgagor consents to entry of a foreclosure judgment and waives his/her redemption rights in return for a waiver of deficiencies. Entry of a consent judgment passes title and no separate sale need by conducted – avoiding the need for publication. Junior lien holder rights can be terminated by this process – other than liens held by the United States. Because of this, it is not generally available where the USA has liens against the property.

Non Statutory Alternatives

A wide variety of non-statutory alternatives to foreclosure may also be available including: loan modifications, repayment agreements, loan assumptions, and payment deferments.