

DEFICIENCIES, SURPLUSES, AND ENTITLEMENTS

by

Robert H. Rappe, Jr. and Steven C. Lindberg

I. INTRODUCTION

This Chapter is concerned with issues that arise after the conclusion of a foreclosure sale; specifically, distribution of any surplus proceeds from the sale, obtaining deficiency judgments, and any other entitlements of parties or non-parties after the conclusion of the sale.

The first part of the Chapter focuses on sale proceeds and the distribution of sale proceeds. There will be a specific focus on who may be entitled to any surplus proceeds once the foreclosing lender has been satisfied. The second part of this chapter will focus on deficiency judgments, specifically when are they appropriate and what must a foreclosing plaintiff do to obtain a deficiency judgment.

II SALE PROCEEDS AND SURPLUSES

B. Statutory Distribution under 735 ILCS 5/15-1512

Proceeds of a foreclosure sale are distributed according to statutory section 735 ILCS 5/15-1512, which states as follows:

“Proceeds resulting from a sale of real estate under this article shall be applied in the following order:

- (a) the reasonable expenses of sale;**
- (b) the reasonable expenses of securing possession before sale, holding, maintaining, and preparing the real estate for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, receivers and management fees, and, to the extent provided for in the mortgage or other recorded agreement and not prohibited by law, reasonable attorney’s fees, payments made pursuant to Section 15-1505 and other**

legal expenses incurred by the mortgagee;

(c) if the sale was pursuant to judicial foreclosure, satisfaction of claims in the order of priority adjudicated in the judgment of foreclosure or order confirming the sale; and

(d) remittance of any surplus to be held by the persons appointed by the court to conduct the sale until further order of the court. If there is a surplus, such person conducting the sale shall send written notice to all parties to the proceeding advising them of the amount of the surplus, and that the surplus shall be held until a party obtains a court order for its distribution or until, in the absence of an order, the surplus is forfeited to the State.

1. 735 ILCS 5/15-1512(a)-Expenses of Sale

A foreclosing plaintiff generally has two expenses of sale. A publication notice is required in accordance with 735 ILCS 5/15-1507 to give appropriate notice of the foreclosure sale. The selling officer, whether it be the Sheriff or a private selling officer, will also have a fee for conducting the sale.

1. 735 ILCS 5/15-1512(b)-Maintenance Expenses

Allowable maintenance expenses will generally be advances made by the foreclosing plaintiff subsequent to entry of the judgment, and for which it should rightfully be reimbursed. Some common expenses are real estate taxes that come due subsequent to entry of the judgment and the payment of any hazard insurance premiums to keep the foreclosure property insured during the pendency of the proceedings.

Other maintenance expenses include the cost of securing possession prior to sale and the payment of receiver's and management fees. These charges are more common with commercial property as it is very unusual to have a receiver appointed, or to seek possession prior to sale in a residential foreclosure.

The foreclosing plaintiff will also be allowed reimbursement for reasonable attorney's fees incurred subsequent to entry of a Judgment of Foreclosure and Sale provided that said fees are authorized by the mortgage being foreclosed.

Finally, 735 ILCS 5/15-1505 states as follows:

“During a foreclosure, and at any time prior to sale, a mortgagee or any other lienor may pay (i)

when due installments of principal, interest or other obligations in accordance with the terms of any senior mortgage, (ii) when due installments of real estate taxes or (iii) any other obligation authorized by the mortgage instrument. With court approval, a mortgagee or any other lienor may pay any other amounts in connection with other liens, encumbrances or interests reasonably necessary to preserve the status of title.”

Any amounts disbursed in accordance with this section can be recovered as maintenance expenses.

3. 735 ILCS 5/15-1512(c)-Satisfaction of Claims as Adjudicated in the Judgment of Foreclosure and Sale.

The court will adjudicate the rights of all parties to a foreclosure and the parties' interests will be appropriately set forth in a Judgment of Foreclosure and Sale. Where there are defendants who have subordinate lien interests, these interests may be set forth and proved-up at the time of the entry of the foreclosing plaintiff's judgment. Where there are numerous subordinate lienholders, the priority of subordinate lienholders can be adjudicated in the Judgment of Foreclosure and Sale, or adjudication of priority can be deferred until the order confirming the sale is entered. 735 ILCS 5/15-1506(h). Generally a foreclosing plaintiff will name only defendants whose interest it claims to be junior to that of the mortgage being foreclosed. Where this is the case, the sale proceeds will first be used to pay off the foreclosing plaintiff. The balance of the sale proceeds, if any, will be paid to the additional lienholders whose interests were adjudicated in the order of priority as determined by the court.

The necessity of a junior lienholder to prove-up its interest was exhibited in the case of Mid-America Federal Savings and Loan Association v. Liberty Bank, 204 Ill.App. 3d 995, 562 N.E.2d 1188, 15 Ill.Dec. 385 (Ill.App. 2 Dist. 1990). In this case, there were three lien holders, LaSalle Bank (first position), Liberty Bank (second position), and MidAmerica Federal Savings and Loan Association (third position). LaSalle Bank filed a foreclosure of its senior lien and Liberty Bank was defaulted. MidAmerica Federal Savings and Loan Association was diligent in proving-up its interest in LaSalle's judgment and the Judgment stated that MidAmerica held a second lien interest on the property. Following a sheriff's sale of the property, Liberty sought to vacate the default and assert its superior position over MidAmerica. The trial court granted the motion to vacate, however the Appellate Court held that Liberty had not been diligent in protecting its interest, and therefore MidAmerica jumped from third

position to second.

4. 735 ILCS 5/15-1512(d)-Surplus to be Held by Selling Officer Pending Further Order of Court.

After satisfying any amounts due pursuant to 735 ILCS 5/15-1512 (a)-(c), any surplus remaining from the foreclosure sale shall be held by the selling officer until further order of court. However, in Cook County, local rule 7.1(d) requires a private selling officer to deposit any surplus, in excess of \$100.00, with the Clerk of the Circuit Court not more than thirty (30) days after the date on which the sale took place.

The statute also requires the selling officer to provide written notice to all parties advising them of the amount of the surplus and that the surplus shall be held until a party obtains a court order for its distribution. Absent a court order for the distribution, the surplus may ultimately be forfeited to the State. The question then must be asked, who is entitled to the surplus?

B. RIGHT TO SURPLUS

3. Mortgagor's entitlement

After the satisfaction of expenses of sale, maintenance expenses, and satisfaction of any claims adjudicated in the judgment of foreclosure, it would seem that the mortgagor would have the right to receive any surplus, as this would represent whatever equity the mortgagor had in his or her property. Prior to July 1, 1990, 735 ILCS 5/15-1512(d) provided “**remittance of any surplus to the mortgagor or as otherwise directed by the court.**” Public Act 86-974, effective July 1, 1990, changed this section to the current version (see above in section II.A.). Therefore, the mortgagor now has the burden of seeking a court order to distribute the surplus proceeds.

1. Foreclosed Lien Holders.

In some cases, a foreclosed lienholder who did not prove-up its interest at the time the Judgment of Foreclosure and Sale was entered may still seek a turn over of any surplus from a foreclosure sale. In the case of Kankakee Federal Savings and Loan Association v. Mueller, 134 Ill.App.3d 943, 481 N.E.2d 332, 89 Ill.Dec.781

(Ill. App. 3 Dist. 1985), the court awarded a junior lienholder the surplus proceeds from the foreclosure sale despite the fact that the junior lienholder had been defaulted and did not prove-up its interest at the time of entry of the Judgment of Foreclosure and Sale. The court stated that even though the junior mortgagee had failed to appear, it was entitled to the surplus proceeds from the foreclosure sale where the junior lienholder's interest was set forth in the initial complaint filed by the senior mortgagee, and where the mortgagor's Answer admitted that the lienholder held a valid second mortgage against the property. The court reasoned that a foreclosure is an equity proceeding and it would be inequitable for the mortgagor to receive these proceeds where it admitted that said funds were due to a junior lienholder. Had the court ruled against the junior lienholder under these circumstances, the junior lienholder still could have filed suit on its Note, presumably obtained a judgment on said Note, and then sought a turnover of the surplus through a Third Party Citation to Discover Assets. The court's ruling essentially "cut to the chase" and avoided this unnecessary third party citation proceeding. The reasoning in Kankakee Federal may apply in a situation where a junior lienholder's interest was set forth in an initial complaint and the mortgagor fails to Answer. The Illinois Code of Civil Procedure provides that a failure to file an Answer constitutes an admission of the well plead facts in a complaint. However, this is not to suggest that a junior lienholder should rely on Kankakee Federal and wait to see if a surplus exists before it takes any action. The court also noted that as a foreclosure is an equity proceeding, it may be foreseeable for a junior lienholder to lose its lien priority to another more junior lien where the latter has been diligent and not slept on its rights. MidAmerica, supra, is a perfect example of why a lienholder should not rely on the holding in Kankakee Federal in hopes of obtaining any surplus.

Kankakee Federal was favorably cited in a more recent case, BCGS, L.L.C. v. Jaster, 299 Ill.App.3d 208, 700 N.E.2d 1075, 233 Ill.Dec 367(Ill. App.2 Dist. 1998). There, a junior lienholder had filed an Answer and Appearance, however had not proved-up its interest in the Judgment of Foreclosure and Sale. One of the mortgagors filed a counter-claim seeking to void the junior lien and the court deferred this issue until after confirmation of the sale. In a most unusual set of circumstances, the mortgagor was the successful bidder at the foreclosure sale on his own property. The court upheld the sale and terminated the junior lienholder's interest, and awarded the surplus to the mortgagor based on the fact that the junior lien had been extinguished. The Appellate Court also upheld the sale, but reversed the trial court with respect to distribution of the surplus. Citing Kankakee Federal, the Appellate Court indicated that it was unfair for the court to wait until after the confirmation of the sale

to determine the distribution of the surplus, and then deny the junior lienholder a right to the surplus based on the fact that the confirmation of sale had extinguished its lien. The case was thereafter remanded to the trial court for a hearing as to the validity of the lien after which the court would award the surplus.

5. **Application of Surplus to Prior Interests or Liens.**

An interesting issue is whether or not surplus proceeds from a junior lien foreclosure can be applied against any senior lien indebtedness. In the case of Members Equity Credit Union v. Duefel, 295 Ill.App.3d 336, 692 N.E. 2d 865, 229 Ill.Dec.876(Ill.App.3 Dist. 1998), the trial court initially awarded the surplus to the successful bidder at the foreclosure sale. The mortgagors thereafter moved to vacate the order and requested that the trial court award them the surplus. After a hearing, the trial court ordered the third party purchaser to apply the surplus against the mortgagor's first mortgage indebtedness. The sole issue on appeal was whether the trial court erred in ordering the surplus from foreclosure of the junior mortgage to be applied to payment of the first mortgage indebtedness. The Appellate Court reversed the trial court decision and awarded the surplus to the mortgagors. The third party purchaser argued that the mortgagors remain liable for the full amount of the prior mortgage and therefore they received a direct benefit when the trial court ordered the surplus applied against the first mortgage. However, the Appellate Court stated that since the mortgagors would have been personally responsible for any deficiency from the judicial sale, they should be entitled to any surplus. The Appellate Court ruled that the trial court abused its discretion by interfering with the contractual relationship between the mortgagors and the first mortgage holder.

The court also noted that the trial court's finding should not be disturbed on appeal absent a showing the trial court abused its discretion. In a well reasoned dissent, Justice Holdridge focused on whether or not the trial court abused its discretion. It was noted that an abuse of discretion occurs only when no reasonable person could find as the trial court did. Justice Holdridge cited Kankakee Federal and stated that in that decision the trial court reasoned that the distribution of surplus proceeds in a mortgage foreclosure is a matter of equity and a trial court, in its discretion, may distribute the surplus to any party shown to have an interest in the property. Justice Holdridge stated that although the majority made a good case for awarding the surplus to the mortgagors, it is well settled that under the abuse of discretion standard, the reviewing court is not to substitute its judgment for that of the trial court, or even to determine whether the trial court acted wisely, but to limit its task to determining whether the trial court's

decision is one with which no reasonable person could agree. Justice Holdridge argued that a reasonable person could conclude that equity would favor paying the excess proceeds to the first mortgage holder who still had an interest in the property, rather than to the mortgagor whose interest had been extinguished by the foreclosure.

5. **Forfeiture of the Surplus**

735 ILCS 5/15-1512 (d) states that any surplus is to be held by the person conducting the sale **“until a party obtains a court order for its distribution or until, in the absence of an order, the surplus is forfeited to the State.”** The statute also requires the person conducting the sale to provide notice to all parties of the existence of the surplus. Although the statute does not indicate when a surplus will be forfeited, practitioners should be aware of Local Rule 11.03 (subsection 7) of the Twelfth Judicial Circuit. This Rule requires the **plaintiff’s attorney** to notify all parties of the existence of a surplus (this is in conflict with state law which requires the person conducting the sale to provide this notice), and advise all parties that in the absence of an order directing payment of the surplus within sixty (60) days of the entry of the order confirming sale, the surplus will automatically be forfeited to the State. This Rule puts an extremely short time period for parties to take action concerning any surplus funds before there is a forfeiture to the state.

II **DEFICIENCY JUDGMENT**

A. **Statutory Right to Deficiency**

2. **735 ILCS 5/15-1511**

735 ILCS 5/15-1511 indicates that the foreclosure of a mortgage does not affect the mortgagee’s rights, if any, to obtain a personal judgment against any person for a deficiency.

1. **735 ILCS 5/15-1508(e)**

735 ILCS 5/15-1508 (e) states that a deficiency judgment may be entered as part of an order confirming a sale and enforcement had on said judgment the same as if it were a judgment solely for the payment of money. 735 ILCS 5/15-1508(e) states as follows:

“In any order confirming a sale pursuant to a 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. Except as otherwise provided in this article, a judgment may be entered for any balance of money that may be found due to the plaintiff, over and above the proceeds of the sale or sales, and enforcement may be had for the collection of such balance, the same as when the judgment is solely for the payment of money. Such judgment may be entered or enforcement had, only in cases where personal service has been had upon the persons personally liable for the mortgage indebtedness, unless they have entered their appearance in the foreclosure action.”

735 ILCS 5/15-1508(f) goes on to indicate that the judgment shall become a lien in the manner of any other judgment for the payment of money.

a. Entry of Deficiency Judgment as Mandatory

The statute indicates that the court shall enter a personal judgment for deficiency against any party if otherwise authorized, and to the extent requested in the complaint and proven upon presentation of the report of sale in accordance with Section 15-1508. The report of sale will show the amount of the current indebtedness being foreclosed through the date of sale, as well as the amount of proceeds received from the sale. Therefore, subtracting the sale proceeds from the amount of the indebtedness due at the time of sale would leave the court with the amount of any deficiency. The statute does not indicate that any additional proof beyond presentation of the report of sale is necessary to establish the amount of the deficiency. However, courts have not always taken such a simplistic view in determining the amount of a deficiency.

For example, in Cook County’s Chancery Division, due to a massive increase in the volume of foreclosures, a pilot project was developed for handling uncontested foreclosure matters effective October 1, 2002. As part of this project, standard procedures were implemented in order to deal with the routine matters associated with many foreclosures. One of these procedures deals with obtaining personal deficiency judgments. In addition to the statutory requirements, in order to obtain a personal deficiency judgment in Cook County, a plaintiff will have to

schedule an additional hearing date after the order confirming sale is entered at which time they should be prepared to present the following items:

1. A copy of the complaint showing the plaintiff requested a deficiency;
2. A certified appraisal (not a broker's price opinion) prepared prior to the issuance of the foreclosed mortgage;
3. A certified appraisal (not a broker's price opinion) dated within ninety (90) days of the foreclosure sale;
4. A loan history supported by affidavit;
5. A copy of the Report of Sale and the Order Approving Sale;
6. An affidavit or other testimony in support of the motion.

If these items are not presented, a personal deficiency judgment will not be entered. The standard procedures also require that any deficiency judgment is for the amount as shown in the Report of Sale.

The difficulty the authors have with this procedure is that by confirming the sale, the Court has approved the terms of the Report of Sale and approved that the plaintiff has conducted the sale in accordance with state law. The Court has also previously adjudicated the amount due to the plaintiff in the Judgment of Foreclosure and Sale, and would have approved any post judgment advances in the order confirming the sale. It would therefore seem that no additional proof should be necessary since the deficiency would be established as the difference between the sale price and the amount as adjudicated by the court. Nevertheless, courts have not limited themselves to this simple calculation. In Resolution Trust Corporation v. Holtzman, 248 Ill.App.3d 105, 618 N.E. 2d 418, 425-6, 187 Ill.Dec. 827 (Ill.App. 1st Dist. 1993) the court stated as follows:

“We do not believe that the General Assembly intended to require an extended evidentiary hearing after each sheriff's sale. To determine the extent of the hearing to be afforded the mortgagor, the court should look to the defendant's petition or motion and if there is an allegation of a current appraisal or other current indicia of value which is so measurably different than the sales price as to be unconscionable, then a hearing should be afforded the defendant. On the other hand, if the allegation of unconscionability rests on an appraisal rendered remote in time, the requisite of a formal hearing is not required under the amendatory act.”

Although this case lends support to holding an evidentiary hearing in certain circumstances where a sale is being confirmed and a deficiency sought, it may also be contrary to long standing precedent of the Illinois Supreme Court, as will be discussed later in this chapter.

b. Request in Complaint to Foreclose

If a foreclosing mortgagee wishes to preserve its right to seek a deficiency after a foreclosure sale, the initial request for a deficiency must be made in the Complaint to Foreclose.

b. Personal Jurisdiction Over Persons Liable

A personal deficiency judgment will only be entered where there is personal jurisdiction over the persons liable for the indebtedness. Personal service or service by member of household will be sufficient to confer personal jurisdiction, however, where a foreclosing mortgagee has only obtained service by publication, entry of a personal deficiency judgment will not be allowed.

b. Deficiency Judgment as Part of the Order Confirming Sale

The statute allows a deficiency judgment to be entered as part of the order confirming the sale. It should be noted though, that when the issue of a deficiency has not been adjudicated in the order confirming the sale, yet a deficiency was requested in the complaint, the issue may be resolved at a later time. In the case of Armour and Company v. MidAmerica Protein, Inc., 37 Ill.App.3d 75, 344 N.E.2d 639, 641 (Ill.App. 3 Dist. 1976), the court indicated that it had jurisdiction to enter a deficiency judgment more than thirty (30) days after the order confirming the sale since the order was not a final order and did not dispose of all the claims for relief requested in the complaint.

b. Memorandum of Judgment

When a court enters a personal deficiency judgment, it is advisable to also have the Clerk of the Circuit Court or the trial judge issue a Memorandum of Judgment to be recorded in any county where the mortgagor may

own other real estate. This may create new lien rights on behalf of the foreclosing plaintiff over other real estate owned by the mortgagor.

3. **In Rem Judgment v. In Personam Judgment**

A judgment for a deficiency in a foreclosure may be entered in rem against a property or as a personal judgment against the responsible individuals. Entry of a decree in rem against a property amounts to no more than creation of a lien against the property and the rents, issues, and profits therefrom during the period of redemption, to be paid upon account of a deficiency. St. Ange v. Chambliss, 71 Ill.App.3d 658, 390 N.E. 2d 484, 486, 28 Ill.Dec. 317 (Ill.App.1st Dist. 1979). An in rem deficiency is particularly significant in light of 735 ILCS 5/15-1604. This section gives a mortgagor a special right of redemption where a plaintiff or mortgagee, who was a party to the foreclosure, is the successful bidder and the sale price is less than the full amount due the foreclosing plaintiff. The mortgagor then has a special right to redeem for thirty (30) days after the date the sale is confirmed by the court by paying to the mortgagee the sale price and any additional costs and expenses that were set forth in the Report of Sale and approved by the court, plus interest at the statutory judgment rate from the date the purchase price was paid or credited as an offset. If a mortgagor exercises this special right to redeem, an in rem deficiency preserves the foreclosing plaintiff's lien rights against the property for any balance due on the indebtedness after the redemption.

The court in St. Ange, at 487, also noted that a creditor's remedies of an in rem lien against property and its right to a personal judgment for any deficiency are neither inconsistent nor mutually exclusive. Therefore, entry of an in rem deficiency may not necessarily preclude the subsequent entry of a personal deficiency in the foreclosure, or a future action at law to recover the amount of any deficiency. Notroma Corporation v. Miller, 292 Ill.App. 612, 11 N.E. 2d 630, 633 (Ill.App. 1st Dist. 1937).

3. **Determining the Amount of Deficiency**

In the case of Loeb v. Stern, 198 Ill.371, 383, 64 N.E. 1043 (1902), the Supreme Court indicated that in the absence of any fraud or irregularity in a foreclosure proceeding, the price at which the property is sold is the conclusive measure of its value. The court indicated that any evidence of such property value other than the foreclosure sale price was inadmissible. This position was advanced by Illini Federal v. Doering, 162 Ill.App.3d

768, 516 N.E. 2d 609, 611, 114 Ill.Dec 454(Ill.App. 5th Dist. 1987) where the court stated that absent any fraud or irregularity in a foreclosure proceeding, the price at which the property is sold is deemed to be the conclusive measure of its value for purposes of setting a deficiency judgment. The court also indicated that the mere inadequacy of price alone is not a sufficient basis for setting a sale aside. The United States Supreme Court has also weighed in to some extent on this subject. In the case of BFP v. Resolution Trust Corporation, 511 U.S. 531, 114 S.Ct. 1757 (1994), the Court dealt with a bankruptcy fraudulent transfer proceeding to avoid a mortgage foreclosure sale. Per the Bankruptcy Code, a transfer could be avoided where “reasonably equivalent value” is not received for property. The Court in BFP, at 545, stated that “reasonably equivalent value” for foreclosed property is the price in fact received at a foreclosure sale, as long as all of the requirements of the state’s foreclosure law have been met.

Based on the above holdings, it would seem elementary that in determining the amount of a deficiency judgment, it would simply be a matter of subtracting the amount of the sale price from the amount adjudicated to be due to the foreclosing plaintiff. Yet, courts still are not entirely willing to accept what appears to be black letter law, both in the Illinois Supreme Court and the United States Supreme Court.

As previously noted, Resolution Trust Corporation v. Holtzman, at 425, discussed the limited level of inquiry the court should have when determining whether to approve a sale, yet it noted that an evidentiary hearing may be allowed where there is an allegation of a current appraisal or other current indicia of value which is so measurably different from the sale price as to be unconscionable. This appears to be in direct conflict with Loeb, Illini Federal and BFP, supra. Loeb, at 383, indicated that such evidence is inadmissible. If a state foreclosure sale is conducted in accordance with the state’s procedures, state law says that it is the conclusive measure of value for purposes of setting a deficiency judgment. Loeb, at 383, Illini Federal, at 611. The United States Supreme Court has held that a state foreclosure sale conducted in accordance with the state’s procedures is “reasonably equivalent value” for purposes of a bankruptcy fraudulent transfer proceeding. Yet, Berkeley Properties, Inc. v. Balcor Pension Investors II, 227 Ill.App.3d 992, 592 N.E.2d 63, 67, 169 Ill.Dec.576 (Ill.App.1st Dist. 1992) indicated that under Illinois law, confirmation of a judicial sale may be rejected if the difference between the amount bid and the foreclosure judgment is “unconscionable”. This court indicated that the purchase price was one of the “terms of sale” as that phrase is used in 735 ILCS 5/15-1508. Again, this seems to conflict with Loeb, Illini Federal and BFP, supra. If a state’s procedures have been followed, then how can a sale price be the “conclusive measure of value”,

“reasonably equivalent value” and “unconscionable” all at the same time? This issue will be discussed in greater detail later in this chapter under “Objections to Confirmation of the Foreclosure Sale.”

B. DEFENSES TO ENTRY OF A DEFICIENCY JUDGMENT

1. Discharge in Bankruptcy.

Where a mortgagor receives a discharge in bankruptcy prior to or during a foreclosure proceeding, a personal deficiency cannot be entered. The bankruptcy discharge eliminates the mortgagor’s liability on the underlying indebtedness, and although the underlying security interest in the property remains unaffected, the mortgagee will only be entitled to the property and will not be able to proceed against the mortgagor on the underlying indebtedness.

2. Deed in Lieu of Foreclosure.

735 ILCS 5/15-1401 allows a mortgagee to accept a deed from its borrowers in lieu of proceeding with the foreclosure. The statute indicates that **“acceptance of a Deed in Lieu of Foreclosure shall relieve from personal liability all persons who may owe payment or the performance of other obligations secured by the mortgage, including guarantors of such indebtedness or obligations, except to the extent that a person agrees not to be relieved in an instrument executed contemporaneously”**.

The case of Olney Trust Bank v. Pitts, 200 Ill.App.3d 917, 558 N.E.2d 398, 146 Ill.Dec. 435 (Ill.App. 5th Dist. 1990) interpreted this statutory section in a case where a husband and wife were co-mortgagors, in the process of a divorce, and only the husband granted a Deed in Lieu of Foreclosure to the bank. At the time of the Deed in Lieu of Foreclosure, the husband agreed to remain bound to repay the indebtedness in a contemporaneous agreement. The wife did not. Olney makes reference to one of the current authors’ articles which appeared in the October, 1987 Illinois Bar Journal and which discussed at length the statutory section on Deeds in Lieu of Foreclosure. Citing the Article, the court noted that **“IMFL (Illinois Mortgage Foreclosure Law) now makes it absolutely clear that a Deed in Lieu of Foreclosure releases all mortgagors from personal liability”**. Lindberg and Bender, “The Illinois Mortgage Foreclosure Law”, 76 Ill.B.J. 800 (1987).

3. Consent Foreclosure.

735 ILCS 5/15-1402 allows the court to enter a judgment satisfying the mortgage indebtedness by vesting absolute title to the mortgaged real estate in the mortgagee free and clear of all claims, liens (except liens of the United States of America which cannot be foreclosed without a judicial sale) and interest of the mortgagor, including all rights of reinstatement and redemption, and of all rights of all other persons being parties in the foreclosure whose interests are subordinate to that of the mortgagee and who are given notice in accordance with the statute. The consent decree can be entered where there is no objection from the mortgagor and provided the mortgagee offers, in connection with such a judgment, to waive any and all rights to a personal judgment for deficiency against the mortgagor and against all other persons liable for the indebtedness or other obligations secured by the mortgage. If a foreclosing plaintiff elects to enter into a Consent Decree with a mortgagor, it will be precluded from pursuing a deficiency against all parties liable for repayment of the indebtedness.

4. Objections to Confirmation of the Foreclosure Sale.

It is axiomatic that if the foreclosure sale is not confirmed by the court, a deficiency judgment cannot be entered. 735 ILCS 5/15-1508 (b) provides that a sale shall be confirmed unless **“the court finds that a notice required by Section 15-1507 was not given, the terms of sale were unconscionable, the sale was conducted fraudulently or that justice was otherwise not done.”** Unfortunately, there is no guidance as to what the terms of sale are, when they would be unconscionable, or how to determine whether or not “justice was otherwise not done”. This leads to many creative arguments and attempts to defeat confirmation of foreclosure sales, and in some cases has resulted in case law that appears to be in conflict with the law as stated by the highest court of both Illinois (Loeb, supra) and the United States (BFP, supra).

For example, Resolution Trust Corporation v. Holtzman, supra, allowed the mortgagor to introduce evidence regarding the value of the foreclosed property based on an allegation regarding the inadequacy of the price obtained at the sheriff sale. Again, Loeb indicates that this type of evidence is inadmissible. In Holtzman, supra, the court noted that prior to the 1987 amendment to IMFL, courts consistently held that inadequacy of price was not

a sufficient reason to disturb the judicial sale unless there were some other irregularities. The court, citing Illini Federal, supra, went on to state as follows:

“...this rule is premised on the policy which provides stability and permanency to judicial sales and on the well established acknowledgment that property does not bring its full value at forced sales and that the price depends on many circumstances for which the debtor must expect to suffer loss”.

The court continued:

“The court is empowered under certain circumstances to examine whether the terms of sale were unconscionable. The legislature, however, did not intend to impose upon the court the kind of inquiry provided in the Uniform Commercial Code, that all sales “must be commercially reasonable” or in the Bankruptcy Act, which requires aggressive advertising of the proposed sale and a foreclosure sale price of “a reasonably equivalent value” for the property.”

Interestingly, Holtzman, supra, seems to indicate the level of inquiry to confirm a sale in a state court foreclosure is less than in bankruptcy court where a foreclosure sale can be set aside if it is not of “reasonably equivalent value”. Only a year after Holtzman, supra, the United States Supreme Court issued its decision in BFP, supra, which states that a state foreclosure sale conducted in accordance with state law is “reasonably equivalent value”.

The statute and decisions have created somewhat of a circular argument. While Loeb, Illini Federal, BFP, supra, all indicate that if a state’s foreclosure law has been followed in conducting a foreclosure sale, the foreclosure sale price will be the conclusive measure of value and equal to “reasonably equivalent value” for purposes of the bankruptcy fraudulent transfer proceeding. However, IMFL requires that the terms of the sale are not unconscionable and at least one court has indicated that the price at a foreclosure sale is one of the “terms” of sale. Berkeley, at 67.

5. **Res Judicata.**

As previously noted, Notroma, supra, indicated that entry of an in rem deficiency does not necessarily preclude a subsequent proceeding for a personal judgment on the balance due on the Note. However, Notroma involved a situation where there had not been personal service over the defendant so that an personal deficiency could not have been adjudicated. It is questionable whether or not this case is in conflict with the decision in Skolnik v. Petella, 376 Ill.500, 34 N.E.2d 825, 828 (1941), where the Supreme Court held that where the court had jurisdiction of the subject matter and the parties, and had the statutory power to render a personal judgment for any deficiency, and a deficiency judgment was rendered only against certain parties and not others who were liable on the indebtedness, the judgment entered was res judicata of the liability of the parties for whom the deficiency was not sought against, and even though the pleadings did not raise the question of these parties' liability for the deficiency, the plaintiff was nevertheless barred from filing a subsequent action against those parties for the deficiency. This proposition was also followed in Emerson v. LaSalle National Bank, 40 Ill.App.3d 794, 352 N.E.2d 45, 50 (Ill.App. 2nd Dist. 1976), however, the court there noted that entry of a deficiency decree against a principal is not res judicata of a guarantor's liability.

C. **LIABILITY OF GUARANTORS FOR DEFICIENCIES**

As indicated above, Emerson, at 50, entry of a deficiency against a principal is not res judicata of a guarantor's liability. This decision was also followed by the First District in a more recent case, Citicorp Savings of Illinois v. Ascher, 196 Ill.App.3d 570, 554 N.E.2d 409, 411, 143 Ill.Dec. 474 (Ill.App. 1st Dist. 1990).

These holdings flow from the fact that a guaranty is a separate contract from a note and mortgage and judgment cannot be entered against a guarantor without separately pleading for that relief. Hickey v. Union National Bank & Trust Company of Joliet, 190 Ill.App.3d 186, 547 N.E.2d 4, 7, 138 Ill.Dec. 134 (Ill.App. 3rd Dist. 1989). Further, a personal deficiency judgment under a guaranty cannot be obtained in an action to foreclose a mortgage based on a statutory short form foreclosure complaint. Farmer City State Bank v. Champaign National Bank, 138 Ill.App.3d 847, 486 N.E.2d 301, 305, 93 Ill.Dec. 200 (Ill.App. 4th Dist. 1985). An additional count for recovery on the guaranty should be added to any statutory short form complaint if a practitioner seeks to hold a guarantor responsible for any deficiency from the foreclosure sale.

To determine the extent of a guarantor's liability, one need only look to the amount of the deficiency adjudicated by the court after the foreclosure sale. In Berea College v. Killian, 304 Ill.App. 296, 26 N.E.2d 650, 652 (Ill.App. 1st Dist. 1940), the court found the measure of damages to be the amount set forth in the deficiency decree less credit given for income received during the period of redemption. The court stated as follows:

“The defendants as guarantors are not concerned legally with the steps taken to foreclose the mortgage. Plaintiff could have sued defendants for the entire balance due on the notes before the foreclosure if they had seen fit to do so and the guarantors were liable to a judgment for the full amount due on said notes. Surely they cannot be heard to complain in this cause about the foreclosure proceeding which materially decreased the amount of the indebtedness they were liable for.”

In the case of First Granite City National Bank v. Champion, 130 Ill.App.2d 970, 979, 268 N.E.2d 35 (Ill.App. 5th Dist. 1971), the court relied on Berea, supra and Loeb, supra, when it stated that absent fraud or irregularity, a court in an action against a guarantor for a deficiency following a mortgage foreclosure properly refused to hear evidence of market value other than the price for which the properties were sold at foreclosure sale.