

The demons of consent foreclosures: What every bank should know

By Amber L. Michlig

I. Introduction

With the growing trend in Illinois of more and more mortgagors willing to admit that they cannot pay their mortgage and that they have no defense to non-payment, the banks who own the obligation are having to make the decision of what kind of work-out plan to offer the mortgagors. These banks have two very different options to consider for receiving the property back more quickly than the normal foreclosure method: a Deed in Lieu of foreclosure¹ and Consent Foreclosure.² Even though both possibilities have their own concerns and intricacies, the topic of this Article will be the process of Consent Foreclosures and the roadblocks and warnings that an Illinois bank client should be familiar with when considering a Consent Foreclosure in order to fully protect their interests or an attorney advising its bank clients should know to advise them to be aware of.

II. The Consent Foreclosure process under the Illinois Mortgage Foreclosure Law ("IMFL")

The Consent Foreclosure Process is a fairly simple process and can save a bank time and money if it is a viable option for the bank. It is also becoming a more well-known and widely used process. The first step in the Consent Foreclosure process begins the same way that a normal foreclosure starts; a Complaint must be filed. The only difference in the Complaint is that the Complaint may state that a Consent Foreclosure is being offered.³ If the bank does not know in advance of filing the Complaint that a Consent Foreclosure will be offered, the bank can reserve the section in the Complaint offering a Consent Foreclosure and make the offer of a Consent Foreclosure later in a motion with notice to all parties.⁴

After the Complaint is filed, the mortgagors and the bank or the bank's attorney will need to execute a consent to the entry of judgment to be filed with the court presiding over the case. The consent should include an agreement by the mortgagor to vest absolute title in the bank free and clear of all liens, claims, and interests.⁵ It should also include that pursuant to section 15-1402 of the IMFL, the bank is waiving any deficiency, which will

be discussed in depth *supra*.⁶

After the Complaint is filed and the consent is executed, then the bank will need to schedule a motion for the entry of consent foreclosure and file the consent executed by the mortgagors and the bank or the bank's attorney. Once this is done, any junior lien holders or claimants have a chance to object, but it must be for "good cause."⁷ If none of the junior lien holders object or they do object but do not have "good cause" or the objector refuses to pay the amount to redeem,⁸ then the judge should sign a judicial deed transferring the property to the bank free and clear of all liens, claims, and interests. Some judges, however, are not comfortable signing judicial deeds; in such cases, an order specifically laying out the transfer, consent to entry of judgment, and waiver of deficiency will have the same legal effect as a judicial deed and a certified copy can be recorded to show the transfer if a judicial deed cannot be obtained. It is important to know the judge's preference so that the case is not held up by this detail.

Sounds pretty simple, right? Normally, it is this simple, but there are still factors that a bank needs to consider when making the decision to pursue a Consent Foreclosure or an attorney needs to be aware to advise its client when they are considering a Consent Foreclosure.

III. Consent Foreclosure may not always be the best option for protecting the interest of the bank

A. Waiver of Deficiency

Consent Foreclosures can be a great tool for an attorney to advise its bank client to employ in a work-out situation. It allows the bank to receive the property being foreclosed upon back in a few simple steps as discussed *infra* and considerably quicker than the normal foreclosure process. However, the first consideration that an attorney needs to advise its client of or the bank needs to be aware is that if the bank chooses to move forward with a Consent Foreclosure, no personal deficiency can be sought against the mortgagor(s).⁹ Waiving the deficiency is not optional in a Consent Foreclosure; it must be done in order to complete a Consent Foreclosure. When the deficiency is waived,

a bank cannot later go after any amount owed to them on the Note secured by the Mortgage that was foreclosed by a Consent Foreclosure. A bank may want to seek a deficiency against its customer if the customer has assets that the bank can use to satisfy a deficiency judgment, and in such cases a Consent Foreclosure cannot be used. Other times, a deficiency might not be a possibility at all, such as, if the customer filed for bankruptcy and receives a discharge, so this may not be an issue.¹⁰ Either way, the waiver of a deficiency as provided by the IMFL is an item that the bank must consider in choosing the best option for it.

B. Federal Tax Liens not Eliminated

It is always important to have a title report run on the property to determine what liens, claims, or interest other parties may have in the property before making a decision on how to proceed since some liens are not eliminated in the Consent Foreclosure process. If a Consent Foreclosure is initiated and the property has a junior federal tax lien, the federal tax lien cannot be extinguished via a Consent Foreclosure due to federal law not allowing a lien of this nature to be removed without a judicial sale. The relevant section of the federal statute states, ". . . an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale."¹¹ The federal statute is very clear. The party must seek judicial sale; thus, a federal tax lien is not extinguished without a sheriff's sale, and a Consent Foreclosure does not result in a sale. Further, 735 ILCS 5/15-1402, makes it clear that absolute title will be vested in "the mortgagee free and clear of all claims, liens (except liens of the United States of America which cannot be foreclosed without judicial sale)..."¹² Thus, the only way to eliminate a federal tax lien in Illinois is for a bank to employ the normal foreclosure process.

If the federal tax lien is not eliminated in the Consent Foreclosure, the bank would then own the property subject to the junior federal tax lien. Then, the bank would have to turn around and foreclose on its mortgage after the completion of the Consent Foreclosure to properly eliminate the federal tax lien or pay off the federal tax lien to get it removed. Consequently, the bank would

be paying twice to get a property back free and clear of all liens if an attorney were to advise the bank to proceed with a Consent Foreclosure when a federal tax lien was present on the property if a Consent Foreclosure was executed, which is clearly not practical or cost-effective for the bank.

IV. Conclusion

Consent Foreclosure can be a time and money saving tool that a bank can use in a work-out situation with a mortgagor who is willing to work with the bank. However, if the bank is not properly advised of the risks and roadblocks of Consent Foreclosures, problems can occur that will cost the bank even more time and money than they have already lost from the mortgagor not paying on their loan. Banks need to be aware that they are waiving any and all deficiencies if they are proceeding with a Consent Foreclosure and federal tax liens cannot and will not be removed via a Consent Foreclosure. Once the bank has these warnings, then they will be able to make an informed decision on

what would be the best way for them to proceed. ■

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1. 735 Ill. Comp. Stat. 5/15-1401.

2. 735 Ill. Comp. Stat. 5/15-1402; See Michael G. Cortina, The answer is in the minutes, Ill. St. B. Ass'n (Com. Banking, Collections & Bankr. L. Sec. Council Newsl., Vol. 55, No. 1), December 2010, for a discussion of the differences between Consent Foreclosures and Deed in Lieu of foreclosure agreements.

3. 735 ILL. COMP. STAT. 5/15-1402 (a)(2); see also 735 Ill. Comp. Stat. 5/15-1504. This general section of the Illinois Mortgage Foreclosure Law sets out the form of a foreclosure complaint, and specifically subsection (S) states, "Offer to mortgagor in accordance with Section 15-1402 to accept title to the real estate in satisfaction of all indebtedness and obligations secured by the mortgage without judicial sale, if sought." Thus, in a Consent Foreclosure, this section of the Complaint will need to be modified to state that the mortgagee is offering a Consent Foreclosure if the Plaintiff knows in ad-

vance that a Consent Foreclosure will be offered.

4. 735 ILL. COMP. STAT. 5/15-1402 (a)(2).

5. See 735 Ill. Comp. Stat. 5/15-1402 (a).

6. See section III of this Article.

7. See 735 Ill. Comp. Stat. 5/15-1402 (b) and (b)(1). The statute and case law do not provide a definition of "good cause." Thus, "good cause" must be determined by the discretion of the trial judge during a hearing on a case by case basis if a party objects.

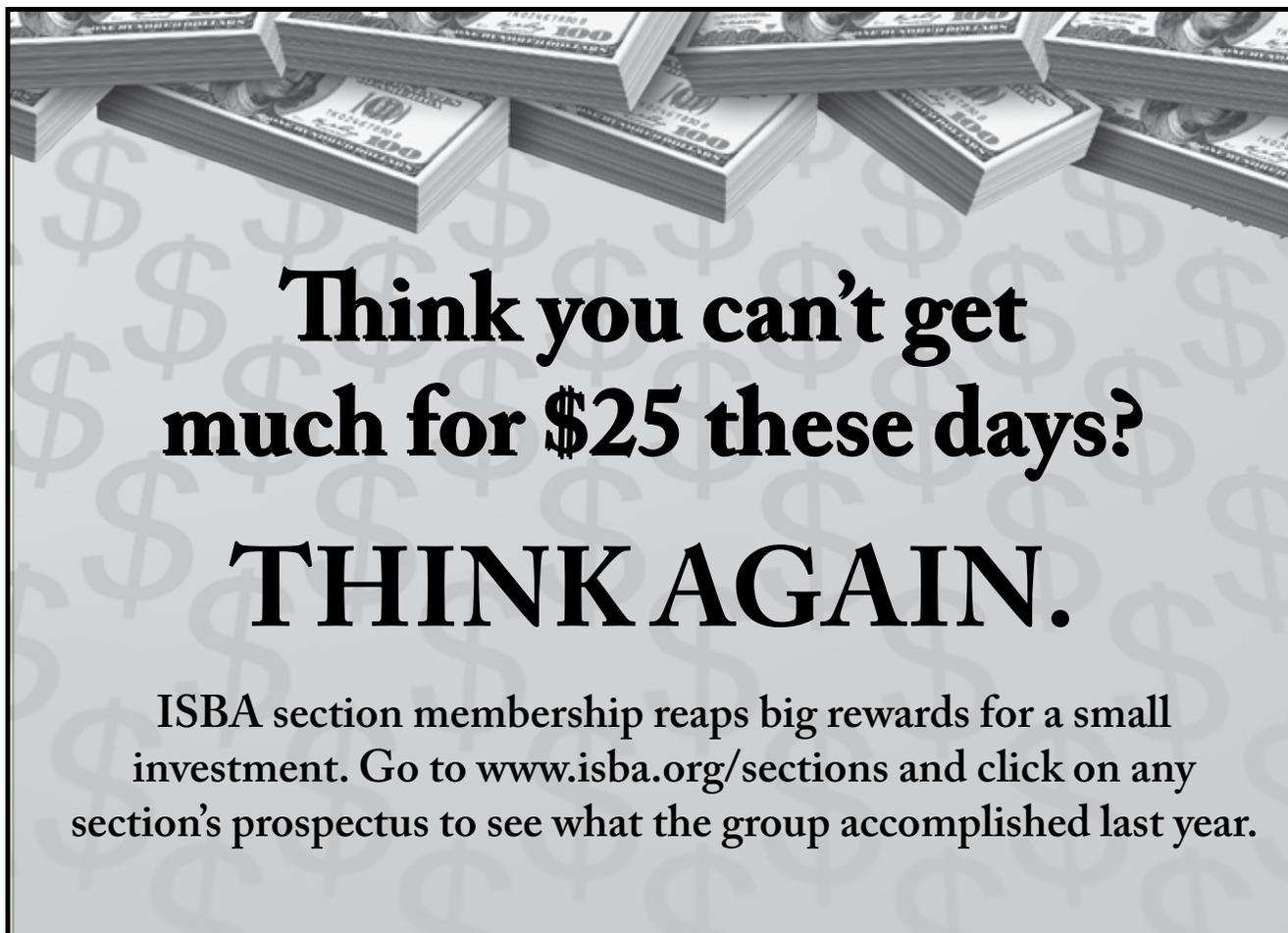
8. 735 Ill. Comp. Stat. 5/15-1402 (b)(2); See 735 Ill. Comp. Stat. 5/15-1603(d), for a discussion of the amount required to redeem.

9. 735 Ill. Comp. Stat. 5/15-1402 (a)(1). This section states that a consent foreclosure will be allowed if the "mortgagee . . . offers to waive any and all rights to a personal judgment for deficiency . . ."

10. 11 U.S.C. § 524(a). Liens flow through bankruptcy and can still be foreclosed after a discharge, but the debt is no longer personally owed by a mortgagor who files bankruptcy and receives a discharge. Thus, a deficiency cannot be sought if the debt is eliminated through a discharge.

11. 28 U.S.C. § 2410 (c). Subsection (a) of this statute allows the United States to be a named party in a civil action to foreclose a mortgage or other lien along with a few other permitted suits despite the normal immunity the government enjoys from being sued.

12. 735 Ill. Comp. Stat. 5/15-1402 (a) and (b)(3).



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