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Jon W. Backes

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## MORTGAGES — NORTH DAKOTA'S ANTI-DEFICIENCY STATUTE DEFINED

Harold J. Bergquist (Bergquist) defaulted on a note to the Federal Land Bank of St. Paul (Land Bank) which was secured by a mortgage on his farmland in Walsh County, North Dakota.<sup>1</sup> After the Land Bank foreclosed its mortgage, Bergquist's land was sold at a sheriff's sale for \$139,000.00.<sup>2</sup> The Land Bank then sued Bergquist in a separate action for a deficiency judgment.<sup>3</sup> The Land Bank asserted that after the sheriff's sale there remained a balance due on the note of \$138,160.55.<sup>4</sup> A jury trial was held to determine the fair value of the land pursuant to section 32-19-06 of the North Dakota Century Code.<sup>5</sup> At trial Bergquist testified

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1. Federal Land Bank v. Bergquist, 425 N.W.2d 360, 361 (N.D. 1988). In 1982 Bergquist applied for and received a loan for the purpose of refinancing existing debt. Brief of Appellee at 1, Federal Land Bank v. Bergquist, 425 N.W.2d 360 (N.D. 1988)(No. 870245).

2. *Bergquist*, 425 N.W.2d at 361.

3. *Id.* Under section 32-19-06 of the North Dakota Century Code, known as the Anti-Deficiency Statute, a deficiency judgment is calculated by subtracting the fair value of the mortgaged property as determined by a jury from the amount adjudged due in the foreclosure action plus interest and costs. N.D. CENT. CODE § 32-19-06 (1976). For the relevant text of section 32-19-06, see *infra* note 4. Section 32-19-06 also requires that a lawsuit in which a lender seeks a deficiency be brought in an action separate from the foreclosure action. N.D. CENT. CODE § 32-19-06 (1976). Section 32-19-06 of the North Dakota Century Code provides in part:

[W]here a note or other obligation and a mortgage upon real property have been given to secure a debt. . . and the sale of the mortgaged premises has failed to satisfy in full the sum adjudged to be due and the costs of the action, the plaintiff may, in a separate action, ask for a deficiency judgment, if he has so indicated in his complaint, against the party or parties personally liable for that part of the debt and costs of the action remaining unsatisfied after the sale of the mortgaged premises.

*Id.*

4. *Bergquist*, 425 N.W.2d at 361. The amount of the deficiency is generally calculated by subtracting the amount of money received at the sheriff's sale from the total amount due on the note at the time of default, plus any costs of the foreclosure action. See generally Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. CAL. L. REV. 843, 845-46 (1980). For purposes of granting a deficiency judgment in North Dakota, however, the amount of the deficiency is calculated by subtracting the fair value of the mortgaged property as determined by a jury from the amount of the debt unpaid plus costs and interest. See N.D. CENT. CODE § 32-19-06 (1976) (anti-deficiency statute). Section 32-19-06 of the North Dakota Century Code provides in part:

The court. . . may render a deficiency judgment against the party or parties personally liable, but such deficiency judgment shall not be in excess of the amount by which the sum adjudged to be due and the costs of the action exceed the fair value of the mortgaged premises. . . . [T]he determination of the fair value of the mortgaged premises shall first be submitted to a jury. . . and no deficiency judgment can be rendered against the party or parties personally liable unless the fair value of the mortgaged premises is determined by such jury to be less than the sum adjudged to be due and the costs of the action.

*Id.*

5. *Bergquist*, 425 N.W.2d at 361. See N.D. CENT. CODE § 32-19-06 (1976) (anti-deficiency statute). For the relevant text of section 32-19-06 of the North Dakota Century Code, see *supra* notes 3 and 4.

that in his opinion the land was worth \$277,180.55; however, Bergquist was not allowed to introduce testimony about the amount of the mortgage, the amount of debt due and owing on the note to the Land Bank, or the existence of a second mortgage which also encumbered the land.<sup>6</sup> The Land Bank's expert witness, a real estate appraiser, stated that the fair market value of the land was \$139,000.00.<sup>7</sup> The real estate appraiser was allowed to testify that there was no difference between the terms "fair value" and "fair market value."<sup>8</sup> Fair value was not defined by the court for the jury, nor was the jury advised of the effect of the fair value determination.<sup>9</sup> The jury set the fair value of the land at \$210,000.00.<sup>10</sup> Accordingly, the district court entered a deficiency judgment in the amount of \$67,160.55 plus costs, disbursements, and interest.<sup>11</sup> Bergquist appealed, alleging that the trial court erred in failing to adequately instruct the jury on the concept of fair value, in allowing the Land Bank's expert to testify that fair value is the same as fair market value, and in refusing to allow the parties to advise the jury of the effect of its determination of fair value.<sup>12</sup> The North Dakota Supreme Court *held* that the term "fair value" is the value that will produce a fair and equitable result between the parties and that fair value is determined by looking at all the evidence bearing on the value of the land and the circumstances underlying the debt.<sup>13</sup> *Federal Land Bank v. Bergquist*, 425 N.W.2d 360 (N.D. 1988).

Prior to the Depression of the 1930s, the Federal Land Bank and other real estate lenders, in North Dakota and in other states, were allowed to foreclose on mortgaged property and seek a deficiency judgment from the debtor if the foreclosure sale did not

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6. *Bergquist*, 425 N.W.2d at 361-63. For a discussion of factors which the court in *Bergquist* stated were valid for consideration by the jury in a deficiency action, see *infra* notes 55-56.

7. *Bergquist*, 425 N.W.2d at 361.

8. *Id.* at 363. Q. (Mr. Ramrud) "Is there any difference between market value and fair market value?" A. (John V. Botsford) "No, there isn't." Record at 19, *Bergquist* (No. 12579).

9. *Bergquist*, 425 N.W.2d at 363. Under section 32-19-06 of the North Dakota Century Code, the Land Bank could only receive a deficiency judgment if the fair value of the land was determined to be less than the amount remaining due on the loan. See N.D. CENT. CODE § 32-19-06 (1976) (anti-deficiency statute). For the relevant text of section 32-19-06 of the North Dakota Century, see *supra* notes 3-4.

10. *Bergquist*, 425 N.W.2d at 361.

11. *Id.* To arrive at the amount of the deficiency judgment, the district court apparently added the total debt which was alleged to be due after the sheriff's sale (\$138,160.55) to the sale price of the property at the sheriff's sale (\$139,000.00) and subtracted the amount determined by the jury to be the fair value of the land (\$210,000.00). *Id.*

12. *Id.*

13. *Id.* at 364.

completely satisfy the debt.<sup>14</sup> In the 1930s however, many states passed statutory enactments to limit or prohibit deficiency judgments.<sup>15</sup>

The North Dakota Legislature passed the first North Dakota anti-deficiency statute in 1933.<sup>16</sup> This enactment, found in chapter 155 of the 1933 Session Laws (1933 anti-deficiency statute), provided that the courts would have no power to render a deficiency judgment.<sup>17</sup> In 1934 the North Dakota Supreme Court in *Burrows v. Paulson*<sup>18</sup> construed the 1933 anti-deficiency statute as being procedural in that it merely required lenders to foreclose on the property and then bring a separate action against the debtor for a deficiency judgment.<sup>19</sup> The result of the decision in *Burrows* was that deficiency judgments were prohibited as a part of a foreclosure action; however, separate actions for deficiency judgments were permitted.<sup>20</sup>

In response to the *Burrows* interpretation of the 1933 anti-deficiency statute, the North Dakota Legislature amended the 1933 anti-deficiency statute in 1937 by enacting chapter 159 of the 1937 Session Laws (1937 anti-deficiency statute).<sup>21</sup> In the 1937

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14. See *East Grand Forks Fed. Sav. & Loan Ass'n v. Mueller*, 198 N.W.2d 124, 129 (N.D. 1972) (reviewing the historical background of section 32-19-06 of the North Dakota Century Code); Washburn, *supra* note 4, at 843 (during the Depression, properties foreclosed upon were sold for nominal amounts, resulting in the borrower losing the property while remaining liable for any deficiency judgment). See generally, Skilton, *Assessing the Mortgage Debtor's Personal Liability*, 90 U. PA. L. REV. 440 (1942) (discussing measures for the relief of debtors).

15. Washburn, *supra* note 4, at 843. Washburn notes that during the Depression property regularly sold for nominal amounts at foreclosure sales resulting in the debtor losing the property and remaining liable for a large deficiency judgment. *Id.* State legislatures therefore enacted statutes limiting or prohibiting deficiency judgments to resolve this problem. *Id.*

16. See *First State Bank v. Ihringer*, 217 N.W.2d 857, 858 (N.D. 1974) (reviewing the legislative history of North Dakota Century Code section 32-19-06). See also Act of March 7, 1933, ch. 155, 1933 N.D. Laws 223-24 (amended in 1937 and 1951) (codified at N.D. CENT. CODE § 32-19-06 (1976)). Chapter 155 of the 1933 Session Laws provided in part: "Whenever an action shall be brought for the foreclosure or satisfaction of a mortgage, . . . the court shall have no power to render a deficiency judgment." *Id.*

17. Act of March 7, 1933, ch. 155, 1933 N.D. Laws 223-24 (amended 1937 and 1951) (codified at N.D. CENT. CODE § 32-19-06 (1976)).

18. 64 N.D. 557, 254 N.W. 471 (1934).

19. *Burrows v. Paulson*, 64 N.D. 557, 559, 254 N.W. 471, 473 (1934). *Burrows* concerned the cancellation of a land sale. *Id.* at 557, 254 N.W. at 472. The plaintiff, Burrows, had sold land to the defendant, Paulson. *Id.* at 557, 254 N.W. at 472. The contract for sale contained a clause which stated that the contract could be canceled if the laws of the State of North Dakota were such that a mortgagor might not be held personally liable for the mortgage debt. *Id.* at 557, 254 N.W. at 472. Burrows sought to have the land sale contract canceled because of the enactment of the 1933 anti-deficiency statute. *Id.* at 557, 254 N.W. at 472. The North Dakota Supreme Court construed the 1933 anti-deficiency statute to be merely procedural and thus held that to obtain a deficiency judgment under the statute, the mortgagor was merely required to bring a separate action at law. *Id.* at 560, 254 N.W. at 473.

20. *Burrows*, 64 N.D. at 563, 254 N.W. at 474.

21. *First State Bank v. Ihringer*, 217 N.W.2d 857, 858 (N.D. 1974). See Act of March 1,

anti-deficiency statute the legislature made it clear that its intention was to abolish deficiency judgments.<sup>22</sup> Thus, the 1937 anti-deficiency statute precluded courts in the State of North Dakota from granting a deficiency judgment, making the holding of the North Dakota Supreme Court in *Burrows* inapplicable to notes secured by mortgages and land contracts entered into after July 1, 1937.<sup>23</sup>

In 1951 the North Dakota Legislature responded to the state agricultural industry's need for long-term low-interest loans secured by real estate mortgages by amending the 1937 anti-deficiency statute.<sup>24</sup> The 1951 amendments put the North Dakota anti-deficiency judgment law in substantially its present form.<sup>25</sup> The 1951 changes, currently found in chapter 32-19 of the North Dakota Century Code, changed the 1937 anti-deficiency law by allowing deficiency judgments to be entered under limited conditions.<sup>26</sup> However, several safeguards were placed in the statute for the protection of the mortgagor.<sup>27</sup> One of the principal safeguards for the mortgagor in the 1951 amendments was the con-

1937, ch. 159, 1937 N.D. Laws 296-97 (amended 1951) (codified at N.D. CENT. CODE § 32-19-06 (1976)).

22. See Act of March 1, 1937, ch. 159, 1937 N.D. Laws 296-97. The 1937 anti-deficiency statute provided in part:

[T]he Court shall under no circumstances have power to render a deficiency judgment for any sum whatever. . . . § 2. OTHER SUITS PROHIBITED. That neither before or after the rendition of the judgment and decree herein provided for, shall the mortgagee or contract holder, or their successors [in] interest, be authorized or permitted to bring any action in any Court in this State for the recovery of any part of the debt secured by said mortgage or contract so foreclosed.

*Id.* For the relevant text of the current codification of this act as amended in 1951, see section 32-19-06 of the North Dakota Century Code, *supra* notes 3 and 4.

23. *East Grand Forks Fed. Sav. & Loan Ass'n v. Mueller*, 198 N.W.2d 124, 129 (N.D. 1972) (Teigen, J., dissenting).

24. See N.D. CENT. CODE § 32-19-06 (1976) (anti-deficiency statute). See also *Ihringer*, 217 N.W.2d at 859 (reviewing the statutory history of North Dakota Century Code section 32-19-06). The North Dakota Supreme Court in *Ihringer* noted that the reason for the change in the statutory scheme regarding deficiency judgments was due to the fact that the Federal Land Bank, one of the principal lenders in the State, was refusing to make loans unless deficiency judgments were permitted. *Id.* See also 1951 REPORT OF THE LEGISLATIVE RESEARCH COMM. ON H.B. 541, at 37 (1951) [hereinafter 1951 REPORT] (Federal Land Bank would return to business in North Dakota if absolute prohibition of deficiency judgments was removed).

25. *Ihringer*, 217 N.W.2d at 859. Compare N.D. REV. CODE §§ 32-1904 to -1907 (Supp. 1957) (1951 anti-deficiency statutes) with N.D. CENT. CODE §§ 32-19-04 to -07 (1976) (current anti-deficiency statutes).

26. *Ihringer*, 217 N.W.2d at 859-60. See N.D. CENT. CODE § 32-19-06 (1976) (anti-deficiency statute).

27. See N.D. CENT. CODE §§ 32-19-04 to -07 (1976) (original version at 1951 N.D. Laws 300-03). The North Dakota Legislative Research Committee in its discussion of the proposed 1951 changes stated: "That while the proposed bill technically makes deficiency judgments possible, it surrounds the mortgagor with safeguards which in actual practice would make a deficiency judgment almost impossible except in a very deserving case." 1951 REPORT, *supra* note 24, at 38-39. The report produced by the Legislative Research

cept of fair value as determined by a jury.<sup>28</sup>

The concept of fair value as used in North Dakota's statutory scheme appears to have been adopted from several other states which had implemented a fair value approach in Depression-era deficiency judgment statutes.<sup>29</sup> The principal purpose of the fair value concept is to safeguard mortgagors from unreasonably high deficiency judgments due to the absence of competitive bidding at mortgage foreclosure sales.<sup>30</sup>

Several states, including California, continue to use the fair value concept in their deficiency judgment statutes.<sup>31</sup> The California Court of Appeal for the Third District interpreted the meaning of "fair value" as it applied to California's deficiency judgment statute in *Rainer Mortgage v. Silverwood Ltd.*<sup>32</sup> The

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Committee also summarized the most important phases of the bill containing the changes proposed in 1951:

1. [W]here a mortgage is foreclosed the fair value of the mortgaged property must be credited against the . . . indebtedness . . . and . . . a deficiency judgment can be entered only where the amount of the debt exceeds the fair value of the mortgaged premises;
2. The determination as to the fair value of the mortgaged premises is to be made by a jury;
3. [I]n the event a deficiency judgment is obtained, it cannot be enforced by execution after three years from the date of the rendition of such judgment.

*Id.* at 39.

28. 1951 REPORT, *supra* note 24, at 39. For the relevant text of the 1951 Report, see *supra* note 27.

29. See 1951 REPORT, *supra* note 24, at 36. At the time House Bill 541 was being considered, Wisconsin, Michigan, Texas, California, and New York required that fair value be used in determining the amount of a deficiency judgment. *Id.* The 1951 Report noted: "Some states . . . require that the *fair value* instead of the *bid price* in the foreclosure sale be used in determining the amount to be applied against the debt." *Id.* (emphasis original).

30. See Washburn, *supra* note 4, at 908 (purpose of anti-deficiency statutes is to prevent the injustice resulting from a sale below market value). See also Skilton, *supra* note 14, at 451-54 (anti-deficiency statutes result in more good than harm because of the widespread practice of nominal bidding and latent unfairness in the system allowing credit for the foreclosure price).

31. See CAL. CIV. PROC. CODE § 726(b) (West Supp. 1989) (anti-deficiency statute); Washburn, *supra* note 4, at 908 (seventeen states provide that a deficiency judgment must be based on the greater of a statutorily determined fair market value or the foreclosure sale price).

32. 163 Cal. App. 3d 359, 362, 209 Cal. Rptr. 294, 295 (1985). See CAL. CIV. PROC. CODE § 726(b) (West Supp. 1989) (anti-deficiency statute). In *Rainer Mortgage v. Silverwood Ltd.* the plaintiff/mortgagee, Rainer Mortgage, foreclosed on two deeds of trust given by the defendants/mortgagors, Silverwood Ltd. and Golden Oaks Ltd., in return for two promissory notes. *Rainer*, 163 Cal. App. 3d at 362, 209 Cal. Rptr. at 294. The defendants had defaulted on the notes and the parties had stipulated to judgments on the notes of \$442,798.33 to Golden Oaks and \$294,726.86 to Silverwood. *Id.* at 362, 209 Cal. Rptr. at 295. The two properties given as security were sold for \$290,445.60 and \$211,700.00 respectively. *Id.* at 362, 209 Cal. Rptr. at 295. Rainer then made an application for deficiency judgments pursuant to section 726 of the California Civil Procedure Code. *Id.* at 362, 209 Cal. Rptr. at 295; CAL. CIV. PROC. CODE § 726(b) (West Supp. 1989) (anti-deficiency statute). Section 726(b) of the California Civil Procedure Code provides in part:

In the event that . . . it is decreed that any defendant is personally liable for the debt, then upon application of the plaintiff and after a hearing thereon at which

plaintiff/mortgagee, Rainer Mortgage (Rainer), argued that fair value must take into consideration the value of the property as affected by the foreclosure sale.<sup>33</sup> The defendant/mortgagor, Silverwood Limited (Silverwood), contended that fair value meant fair market value, undiminished by any of the disabilities that attend a judicial foreclosure sale.<sup>34</sup> The California statute required the court to render a deficiency judgment for the amount by which the indebtedness with interest and costs exceeded the fair value of the property as of the date of the sale.<sup>35</sup>

The court in *Rainer* reviewed the legislative history of section 726 of the California Civil Procedure Code and found that the reason for using fair value was to protect the defaulting mortgagor.<sup>36</sup> To accomplish this legislative end, the court held that fair value was to be determined by all the circumstances affecting the intrinsic value of the property at the time of the sale of the property.<sup>37</sup>

The court in *Rainer* noted that the legislature had allocated the risk of loss due to over-valuation of the property to the lender.<sup>38</sup> With this allocation of risk in mind, the court reasoned that the lender, who makes a conscious decision as to the value of the property prior to making a loan, cannot upon default of the loan shift the burden of such a loss to the borrower.<sup>39</sup> Thus, the court concluded that a lender could not seek a deficiency for any amount greater than that amount by which the debt exceeds the

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the court shall take evidence and at which hearing either party may present evidence as to the fair value of the property . . . the court shall render a money judgment . . . for the amount by which the amount of the indebtedness with interest and costs of levy and sale and of action exceeds the fair value of the property. . . as of the date of the sale.

*Id.*

33. *Rainer Mortgage v. Silverwood Ltd.*, 163 Cal. App. 3d 359, 363, 209 Cal. Rptr. 294, 295 (1985).

34. *Id.* at 363, 209 Cal. Rptr. at 295.

35. *Id.* at 363, 209 Cal. Rptr. at 295. See CAL. CIV. PROC. CODE § 726(b) (West Supp. 1989) (anti-deficiency statute). For the relevant text of section 726(b) of the California Civil Procedure Code, see *supra* note 32.

36. *Rainer*, 163 Cal. App. 3d at 366, 209 Cal. Rptr. at 297.

37. *Id.* at 365, 209 Cal. Rptr. at 297. The court noted that the anti-deficiency statute was a product of the Great Depression. *Id.* at 365, 209 Cal. Rptr. at 297. During the Great Depression, mortgagees could buy property on which they had foreclosed for a nominal sum at the foreclosure sale because of the depressed property values and realize a double recovery by holding the mortgagor liable for a large deficiency. *Id.* at 365, 209 Cal. Rptr. at 297.

38. *Id.* at 369, 209 Cal. Rptr. at 300. The court reviewed the legislative history of the California anti-deficiency statute and found that the limitation on deficiency judgments was intended to benefit the borrower, not to insulate commercial lenders from the risk of loss where encumbered property declines in value. *Id.* at 369, 209 Cal. Rptr. at 300.

39. *Id.* at 369, 209 Cal. Rptr. at 300. The court stated that "[i]f the lender overvalues property for purposes of a loan, or misjudges the commercial viability of a real estate project, it is entirely proper that the risk of loss be with that lender." *Id.* at 367-68, 209 Cal. Rptr. at 299.

intrinsic worth of the property.<sup>40</sup> Therefore, the court held that fair value within the meaning of section 726(b) of the California Civil Procedure Code included all circumstances which affect the underlying worth of the property at the time of the sale.<sup>41</sup> The court noted that under this definition of fair value, consideration of the impact of the foreclosure proceeding on the value of the property was necessarily excluded.<sup>42</sup>

The court in *Rainer* stated that under normal conditions the intrinsic value of the property will often coincide with the fair market value of the property.<sup>43</sup> However, this is not usually the case when property is sold at a foreclosure sale. During the one year redemption period, the court noted, the marketability of the property is depressed because of the ability of the mortgagor to redeem the property.<sup>44</sup> Therefore, a buyer will be less willing to purchase the property during this time period for its fair value.<sup>45</sup> Thus, based upon these considerations, the court in *Rainer* found that any effect a foreclosure sale might have on the value of the property should be excluded from a determination of fair value.<sup>46</sup> The court thus remanded the case with instructions to the trial court to determine whether the fair value of the property was equal to the fair market value of the property, excluding any

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40. *Id.* at 369, 209 Cal. Rptr. at 300. The court noted that limiting recovery of a deficiency judgment to the amount by which the debt exceeds the intrinsic worth of the property may not precisely achieve the goal of encouraging the mortgagee to bid up the property to its market value. *Id.* at 369, 209 Cal. Rptr. at 300. However, the court stated that this limitation on the recovery of a deficiency judgment was a reasonable method of achieving the legislature's goal of protecting the borrower from an excessive deficiency judgment. *Id.* at 369, 209 Cal. Rptr. at 300.

41. *Id.* at 365, 209 Cal. Rptr. at 297. See CAL. CIV. PROC. CODE § 726(b) (West Supp. 1989). In determining that fair value within the meaning of section 726(b) of the California Civil Procedure Code included all circumstances which affect the underlying worth of the property at the time of the sale, the court relied on the legislative purpose of section 726(b) which the court found to be protection of the debtor. *Id.* at 366, 209 Cal. Rptr. at 297. See CAL. CIV. PROC. CODE § 726(b) (West Supp. 1989).

42. *Rainer*, 163 Cal. App. 3d at 367, 209 Cal. Rptr. at 298-99. The court rejected the lender's argument that defining fair value in terms of the intrinsic worth of the property precluded full recovery of the debt. *Id.* at 367, 209 Cal. Rptr. at 298. The court stated: "Concededly, the lender who bids in the property is temporarily deprived of the difference between the property's 'fair value' and its market value as encumbered. However, this difference is negated in a year, when the right of redemption expires." *Id.* at 367, 209 Cal. Rptr. at 298-99. The court noted that if it were to hold otherwise the lender could achieve a double recovery by simply waiting one year before selling. *Id.* at 367, 209 Cal. Rptr. at 299.

43. *Id.* at 366, 209 Cal. Rptr. at 298. The court defined fair market value as the value a willing purchaser will pay to a willing seller in an open market. *Id.* at 366, 209 Cal. Rptr. at 298. The court noted that the correlation between market price and intrinsic value, however, is not fixed and that market value is only one factor to consider when determining fair value. *Id.* at 367, 209 Cal. Rptr. at 298.

44. *Id.* at 367, 209 Cal. Rptr. at 298.

45. See *id.* at 367, 209 Cal. Rptr. at 298.

46. *Id.* at 367, 209 Cal. Rptr. at 298.



effects of the foreclosure sale.<sup>47</sup>

In a case of first impression, the North Dakota Supreme Court addressed the meaning of the term "fair value" in North Dakota's deficiency judgment statute in *Federal Land Bank v. Bergquist*.<sup>48</sup> The Land Bank brought an action against Bergquist for a deficiency judgment based on its allegation that the fair market value of the property was less than the amount remaining on the debt.<sup>49</sup> Bergquist contended that determination of fair value included more than a mere inquiry into fair market value.<sup>50</sup>

The North Dakota Supreme Court based its decision largely on the statutory history of the deficiency judgment laws in North Dakota.<sup>51</sup> The supreme court stated that the legislature had intended fair value to have a broad meaning embracing many factors.<sup>52</sup> Thus, the court concluded that fair value meant the value that would "produce a fair and equitable result between the parties."<sup>53</sup>

The supreme court recognized that the statute and its history

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47. *Id.* at 369, 209 Cal. Rptr. at 300. The issue before the court in *Rainer* was whether the effect of a foreclosure sale on the value of foreclosed property could be considered for purposes of determining fair value in calculating the amount of a deficiency judgment. *Id.* at 361, 209 Cal. Rptr. at 294. After determining that the effect of a foreclosure sale could not be used, the appellate court remanded the case to the trial court for a new determination of fair value. *Id.* at 369, 209 Cal. Rptr. at 300.

48. 425 N.W.2d 360, 363 (N.D. 1988).

49. *Federal Land Bank v. Bergquist*, 425 N.W.2d 360, 361 (N.D. 1988). Section 32-19-06 of the North Dakota Century Code provides that a mortgagee may seek a deficiency judgment in the amount by which the debt adjudged to be due and owing exceeds the fair value of the property as determined by a jury. N.D. CENT. CODE § 32-19-06 (1976) (anti-deficiency statute). For the relevant text of the section 32-19-06, see *supra* notes 3-4.

50. *Bergquist*, 425 N.W.2d at 361.

51. *Id.* at 362-63. The North Dakota Supreme Court also relied on the California case of *Rainer Mortgage v. Silverwood Ltd.* in making its decision in *Bergquist*. *Id.* at 363; *Rainer*, 163 Cal. App. 3d 359, 209 Cal. Rptr. 294 (1985). The court in *Bergquist* found the California case relevant because the North Dakota anti-deficiency statute was derived from the section of the California Civil Procedure Code which was construed in *Rainer*. *Bergquist*, 425 N.W.2d at 363. See N.D. CENT. CODE § 32-19-06 note on derivation (1976) (statute derived from Harston's (Cal.) Practice 726). Compare N.D. CENT. CODE § 32-19-06 (1976) (North Dakota statute which controls deficiency judgments in all mortgage foreclosures) with CAL. CIV. PROC. CODE § 726(b) (West Supp. 1989) (California statute which controls deficiency judgments in commercial mortgage foreclosures). For the relevant text of N.D. CENT. CODE § 32-19-06, see *supra* notes 3-4. For the relevant text of CAL. CIV. PROC. CODE § 726(b), see *supra* note 32.

52. *Bergquist*, 425 N.W.2d at 364. The court referred to a North Dakota case which had recounted the legislative history of North Dakota's anti-deficiency laws including section 32-19-06 of the North Dakota Century Code. *Id.* at 362. See *First State Bank v. Ihringer*, 217 N.W.2d at 857 (N.D. 1974). While the court in *Bergquist* did not find *Ihringer* helpful in determining the meaning of fair value, it did find the history of the anti-deficiency statutes helpful in determining how broadly to construe section 32-19-06 of the North Dakota Century Code. *Bergquist*, 425 N.W.2d at 362.

53. *Bergquist*, 425 N.W.2d at 364. The supreme court, noting its agreement with the California decision in *Rainer Mortgage v. Silverwood Ltd.*, stated that the legislative protection afforded a foreclosed mortgagor did not depend upon the vagaries of the marketplace. *Id.* at 363 (quoting *Rainer*, 163 Cal. App. 3d at 366, 209 Cal. Rptr. at 298). Thus, fair market value may be one factor in determining the fair value of the property; fair

authorized the jury to balance the competing interests of the mortgagor and mortgagee in determining the fair value of property which had been foreclosed.<sup>54</sup> To effectively accomplish this balancing of competing interests, the court concluded that all evidence bearing on the value of the property and all of the circumstances of the underlying transaction should be presented to the jury.<sup>55</sup> The supreme court also recognized that under these circumstances it was appropriate to advise the jury of the effect of its determination.<sup>56</sup>

The supreme court also considered the Land Bank's argument that allowing the jury to be advised of the outcome of its determination may cause juries to over-sympathize with debtors, resulting in deliberately erroneous determinations of fair value which would prevent deficiency judgments.<sup>57</sup> The court pointed out that the legislative intent of the anti-deficiency statutes was to afford protection to the mortgagor.<sup>58</sup> Thus, the supreme court concluded that the legislature intended to let the jury decide, on the basis of the facts in each case, what value would produce a fair and equitable result between the parties and whether a deficiency judgment would be appropriate.<sup>59</sup> Since the jury did not use this standard in *Bergquist*, the supreme court remanded the case to

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market value is not, however, an appropriate standard for determining the amount of deficiency due after foreclosure. See *Bergquist*, 425 N.W.2d at 364.

54. *Bergquist*, 425 N.W.2d at 364. Although the supreme court found that the jury was authorized to balance the competing interests of the debtor and the mortgagee in reaching its determination of fair value, the court implied that the interest of the debtor will generally outweigh that of the mortgagee because "the intent of the statute is to afford every protection to the mortgagor." *Id.*

55. *Id.* The supreme court, in deciding what kind of evidence relating to fair value the jury should be allowed to hear, stated the evidence allowed "would include, among other things, the amount of the mortgage, the amount of any subsequent mortgages, fluctuations in land values, and the remaining amount claimed to be due on the debt." *Id.* The court recognized that market value was admissible as one factor for consideration by the jury but that it was not the controlling factor. *Id.*

56. *Bergquist*, 425 N.W.2d at 364. The North Dakota Supreme Court noted that advising the jury of the effect of its determination required that the jury be allowed to hear evidence regarding the amount owed on the mortgage. *Id.* The court also stated that the jury should be instructed that the mortgagee would be entitled to a deficiency judgment only for the difference between the amount owed on the debt and the fair value of the property as determined by the jury. *Id.* The court stressed that its decision did not require juries in other types of cases to be advised of the effect of their determination of specific fact issues. *Id.* n.3. However, the court concluded that because the jury in a deficiency judgment action is to balance the competing interests of the parties, it was important to inform the jury of the effect that its determination would have on the mortgagee's ability to obtain a deficiency judgment. *Id.*

57. *Id.* at 364.

58. *Id.* The supreme court, quoting the 1951 Report of the Legislative Research Committee, stated that the legislature also intended that "in actual practice" the deficiency judgment statute should "make a deficiency judgment almost impossible except in a very deserving case." *Id.* (quoting 1951 REPORT, *supra* note 24, at 37-38).

59. *Bergquist*, 425 N.W.2d at 364.

the trial court for a new determination of fair value.<sup>60</sup>

Prior to the North Dakota Supreme Court's decision in *Bergquist*, a mortgagee could expect that the mortgagor would bear at least some of the risk of real estate market fluctuations.<sup>61</sup> *Bergquist*, however, reallocates the risk of loss to lenders, who must now bear the burden of fluctuations in market value because lenders may no longer look to the mortgagor for a deficiency judgment simply because the fair market value of the property is less than the amount remaining due on the debt.<sup>62</sup> After *Bergquist*, a lender can seek a deficiency judgment only if the fair value of the property is less than the amount remaining due on the note.<sup>63</sup> This reallocation of risk may reduce the willingness of lenders to extend loans secured by real property in the State of North

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60. *Id.*

61. *Cf.* Washburn, *supra* note 4, at 908 (discussing fair market value statutes as a restriction on deficiency judgments). Washburn states: "Seventeen states [including North Dakota] have legislation providing that the amount of a deficiency judgment must be based on the greater of statutorily determined fair market value or sales price." *Id.* *Contra Bergquist*, 425 N.W.2d at 362. The court in *Bergquist* determined that a deficiency judgment must be based upon the difference between the fair value (not necessarily the current fair market value or sales price) and amount of the debt remaining after the foreclosure sale. *Id.* (quoting N.D. CENT. CODE § 32-49-06 (1976)). Under a fair market value statutory scheme, a determination of the availability and amount of a deficiency judgment is made by calculating the amount of the debt due and owing on the date of foreclosure, less the foreclosure sale price or fair market value, whichever is greater. Washburn, *supra* note 4, at 908. Thus, where the real estate market is fluctuating downward and the fair market value of the property is decreasing, the amount of the deficiency for which the defaulting mortgagor is liable increases. *See id.* Because the mortgagor's debt to the lender will only be credited with the greater of the sale price or the fair market value, and because the foreclosure sale price will rarely if ever exceed the fair market value of the property, the mortgagor bears the risk of downward market fluctuations under a fair market value anti-deficiency statutory scheme. *See id.* While the *Bergquist* decision does not overtly redistribute the risk of downward market fluctuations from the mortgagor to the mortgagee, the *Bergquist* interpretation of fair value as that value which "produces a fair and equitable result between the parties" changes the nature of the risk born by the mortgagor from a risk of decrease in market value to a risk of being unable to convince a fully informed jury that the amount of debt due was equal to or less than the fair value of the property. *See Bergquist*, 425 N.W.2d at 364 (defining fair value as it applies to North Dakota's anti-deficiency statute).

62. *See Bergquist*, 425 N.W.2d at 364 (N.D. 1988). Whether, and in what amount, a lender is entitled to a deficiency judgment is no longer determined by the fair market value of the property; it is determined by the fair value ("the value of the property which will produce a fair and equitable result between the parties"), and although market value may be one factor which affects the fair value, the lender can no longer rely on a deficiency judgment to make up for decreases in market value. *Id.* Although the possibility remains that a jury could determine that the fair value of the property is less than the amount of the debt remaining on the mortgage, the probability of this type of determination seems slight in light of the mortgagor's argument that the fair value must be equal to the amount of the debt. *See id.* If it were not, why would the lender have borrowed the debtor that amount of money with only the land as security. *See id.* Faced with this argument, it seems likely that a jury will find that the fair value of the land is equal to the amount of the remaining debt. *See Federal Land Bank v. Bergquist*, No. 12579 (N.E. Dist. Ct. Nov. 23, 1988) (on remand the jury found the fair value to be \$277,160.55, a value exactly equal to the amount of Bergquist's debt).

63. *See Bergquist*, 425 N.W.2d at 364; N.D. CENT. CODE § 32-19-06 (1976). For the relevant text of section 32-19-06 of the North Dakota Century Code, see *supra* note 4.

Dakota.<sup>64</sup> Furthermore, it is likely that the *Bergquist* decision will move lenders who do business in North Dakota to pressure the 1989 North Dakota Legislature to amend section 32-19-06 of the North Dakota Century Code to require that the risk of loss due to market fluctuations be borne, at least in part, by the mortgagor.<sup>65</sup>

The North Dakota anti-deficiency statute as interpreted by the North Dakota Supreme Court in *Bergquist* places the decision whether a deficiency judgment should be granted squarely upon the shoulders of the jury.<sup>66</sup> Thus, a lender seeking a deficiency judgment is faced with the difficult prospect of convincing a jury that a deficiency judgment is required to produce a fair and equitable result between the parties.<sup>67</sup> In light of this burden it is likely that lenders who operate in North Dakota will place a greater emphasis on property valuation before making loans secured by real property.<sup>68</sup>

*Jon W. Backes*

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64. The purpose of the 1951 amendment to North Dakota's deficiency judgment scheme was to entice lenders such as the Federal Land Bank to return to business in North Dakota. 1951 REPORT, *supra* note 24, at 37. The decision in *Bergquist* is not limited to agricultural and commercial lenders such as the Federal Land Bank. Recently the North Dakota Supreme Court read *Bergquist* as applicable to all lenders which hold promissory notes secured by real estate mortgages. *Schiele v. First Nat'l Bank*, No. 880277, slip op. at 3 (N.D. Feb. 20, 1989) (fair value standard as determined in *Bergquist* applicable in foreclosure on personal residence).

65. See S. 2346, 51st Leg. § 2 (1989) (bill which would have changed the "fair value" language of section 32-19-06 to read "fair market value," thus changing the standard on which a deficiency judgment is based, failed to pass by a vote of 19 for to 32 against); N.D. CENT. CODE § 32-19-06 (1976) (anti-deficiency statute). For the relevant text of section 32-19-06, see *supra* notes 3-4.

66. *Bergquist*, 425 N.W.2d at 364. The court in *Bergquist* stated that the jury is to balance the competing interests of the debtor and the mortgagee in determining fair value. *Id.* The court also noted that in order to affect this balancing, the jury could be presented with "all evidence bearing on the value of the property and the circumstances of the underlying transaction." *Id.*

67. See *id.* To be granted a deficiency judgment, the lender must convince the jury that the fair value of the property, the value which will produce a fair and equitable result between the parties, is less than the amount remaining due on the loan. *Id.* The difficulty in accomplishing this task would seem to be greatly increased by the fact that the jury will know that the effect of such a determination will be to grant a deficiency judgment against the borrower to whom juries seem to be more sympathetic. See *id.*

68. Cf. *Rainer Mortgage v. Silverwood Ltd.*, 163 Cal. App. 3d 359, 367-68, 209 Cal. Rptr. 294, 299 (1985) (lenders who overvalue property at the time of making a loan cannot shift the consequences of this decision to the borrower by seeking a deficiency judgment).

