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FORECLOSING ON THE AMERICAN DREAM: AN EVALUATION OF STATE AND FEDERAL FORECLOSURE LAWS

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*Introduction*¹

Approximately sixty-five million Americans own their homes and were able to purchase these homes with loans secured by real estate mortgages (in 1995 lenders loaned more than three trillion dollars secured by residential real estate).² The purchase of these homes represents the largest single financial investment that most individuals will make. In addition, individuals often experience a strong emotional attachment to their homes. Consequently, the prospect of losing one's home in a real estate foreclosure is both financially and emotionally devastating. On the other hand, in order to make this dream affordable it is important for lenders to be able to provide financing for these purchases at rates which provide a profit to the lender but which borrowers can afford to pay. The more expensive the process to collect on bad debt, the higher the interest rates or loan fees to future borrowers because lenders pass along their collection costs to new borrowers. Recognizing these two sides of the coin, each state has enacted foreclosure laws which attempt to balance the interests of the defaulting borrower (protecting any equity she has in her property) with the interests of the lender and future non-defaulting borrowers (a foreclosure process which is as quick and inexpensive as possible).

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1. Portions of this article first appeared in Debra Pogrun Stark, *Facing the Facts: An Empirical Study of the Fairness and Efficiency of Foreclosures and a Proposal for Reform*, 30 U. MICH. J.L. REFORM 639 (1997) [hereinafter Stark, *Facing the Facts*]. This study will be referred to in the text as the "Empirical Study."

2. To get a sense of the amount of residential real estate foreclosures occurring recently in the United States, it should be noted that in the fourth quarter of 1996, one percent of this debt (i.e., \$30 billion) was delinquent to such an extent that the mortgagee elected to foreclose upon the real estate mortgage which secured the debt. See *Delinquencies on the Rise at Year-end*, MORTGAGE MARKETPLACE, Mar. 10, 1997, available in 1997 WL 7938104.

Lenders charge that the foreclosure process in many states is too long and costly. Due to the federal government's role as the insurer of many real estate loans and provider of financing, Congress has also been concerned with the impact of disparate state foreclosure laws on the many programs administered by the federal government through its Department of Housing and Urban Development (HUD) and has enacted certain federal foreclosure laws which preempt state foreclosure laws in certain circumstances, with the goal of reducing the time it takes to foreclose on bad debts and to reduce the costs associated with the foreclosure process. In the meantime, borrowers and their proponents claim that the current state foreclosure laws are grossly unfair to borrowers. They claim that because third parties rarely attend real estate foreclosures, the foreclosing lender is able to bid less than the amount due to the lender at the foreclosure sale, recover the difference as a deficiency judgment against the borrower, and then resell the property for a profit.

While many have criticized the foreclosure laws as unfair and inefficient, few have collected data to test how fair and efficient foreclosure laws are in reality. This author has conducted an empirical study of judicial foreclosures in Cook County, Illinois (the Empirical Study)³ to test the accuracy of the conflicting conventional wisdom with an eye towards utilizing the data collected to arrive at an approach which can further the legitimate interests of both lenders and borrowers. Illinois was chosen as the state from which to collect data because Illinois law falls in the middle of the balancing approaches taken by the fifty states.⁴ Based upon the results from the Empirical Study, this author contends that the federal government's initiatives into this area of law are misguided and that there is a better way to achieve efficiency without sacrificing the goal of fairness.

Part One of this article summarizes the basic laws and procedures for real estate foreclosures in the fifty states, describes the foreclosure process and special features in the State of Illinois (the location of the Empirical Study), and identifies the key criticisms leveled at current foreclosure laws and procedures. Part Two describes the two federal nonjudicial foreclosure laws and the proposed third federal nonjudicial foreclosure bill. Part Three evaluates all of these foreclosure laws in light of the results of the Empirical Study and certain data collected with respect to powers of sale exercised by HUD. Part Four provides a proposal on how to reform the foreclosure laws with respect to residential⁵ real estate to better promote both

3. The author collected data with respect to every judicial foreclosure case filed in the Chancery Court of Cook County, Illinois, in July 1993 and July 1994, ascertaining the percentage of cases which were dismissed (through reinstatement, redemption, modification of the loan or bankruptcy filing) and collecting data on the cases which sold at a foreclosure sale, including any resales of the property within one year of the foreclosure sale. See Stark, *Facing the Facts*, *supra* note 1.

4. Illinois requires a judicial foreclosure and provides for a seven month redemption period for residential properties which must be exercised before the sale, rather than after. 735 ILL. COMP. STAT. 5/15-1603(b)(1) (West 1993). Among the fifty states, the median period which passes prior to the judicial foreclosure sale is eight months and the median post-sale redemption period is six months for both judicial and nonjudicial sales. See *infra* tbl. 1.

5. The author's reform proposal is confined to the setting of foreclosures of non-income producing properties (i.e., "residential real estate"). There are many reasons for this limitation. First, the data collected in the Empirical Study came overwhelmingly from residential real estate. Second, the dynamics

fairness to the defaulting borrower (i.e., a realistic opportunity to protect any equity she has in the mortgaged property) and efficiency to the lender (a process which is as quick and inexpensive as possible consistent with the former goal of fairness) based upon the results of the Empirical Study. Because the proposal promotes the legitimate interests of both borrowers and lenders, it better reflects what a rational lender and borrower would bargain for ex ante than do the current real estate foreclosure laws in the fifty states or the federal foreclosure laws.

I. State Real Estate Foreclosure Laws and Procedures

A. Summary of the Foreclosure Procedures Typically Utilized in the United States

A real estate mortgage is a pledge of the mortgagor's interest⁶ in the real estate, as described in the mortgage document, which secures a specified debt.⁷ When the mortgagor defaults in the payment of the debt or the performance of any other obligations which the mortgagor has agreed to perform according to the terms of the note, the mortgage, or any other loan documents, the loan documents usually contain an acceleration clause which causes the entire indebtedness to become due and payable. In the absence of the common law development of the equitable right of redemption and statutory foreclosure laws, a lender and borrower could theoretically agree that upon such default and acceleration the lender becomes the fee title holder of the property pledged. English courts of equity, however, developed the concept of an equitable right of redemption to prevent the harsh result of a person who borrowed funds from losing his property if he was one day late in paying the debt. Under the equitable right of redemption, a borrower has a certain amount of time to pay off the debt and redeem the property, notwithstanding any agreement to the contrary between the borrower and the lender. The foreclosure process is the lawful process by which a lender can terminate this equitable right of redemption, and the process is governed by state statute in each state in the United States.

While each state has its own peculiar foreclosure laws and procedures, there are certain basic features present in each state's statutory scheme. There exist two dominant forms of foreclosure laws in America: a judicial foreclosure sale and a nonjudicial foreclosure sale (known as a power of sale). In a judicial sale, the mortgagee must bring a court action in order to foreclose the borrower's equitable right to redeem the mortgaged property; in a nonjudicial or power of sale, the mortgagee (or trustee under a deed of trust) may foreclose the borrower's equitable right to redeem the mortgaged property without bringing a court action.

of commercial real estate are far different from residential real estate (the bankruptcy law protections widely differ in the commercial context) (chapter 11 laws are quite different from chapter 13), appraisals (a linchpin to the reform proposal) are more prone to variation in results in a commercial context than in a residential one, and the issue of measuring the borrowers equity in the property is more complicated in the commercial context.

6. This pledge is usually of an ownership interest, but it can also be a leasehold interest.

7. This debt is usually a debt of the mortgagor to the mortgagee.

The following is the typical process followed in a jurisdiction whose statutes require a judicial foreclosure sale: (1) the mortgagee or trustee records a notice of default and sends to the mortgagor and any other party required pursuant to the applicable state statute notice of the default and acceleration of the debt; (2) if the mortgagor or other party allowed to cure the default fails to cure the default within the specified statutory period after the notice of default, the mortgagee or trustee sends out a notice of sale, which must be sent a certain period of time before the date of the sale and must advertise the sale in a manner as required by statute; (3) the foreclosure sale occurs in the manner prescribed by statute, unless the borrower redeems or reinstates the loan.⁸ Sometimes a mortgagor is not entitled to any post-sale redemption rights in a nonjudicial sale and the mortgagee is not entitled to seek a deficiency action against the mortgagor if the mortgagee has availed itself of this quicker and less expensive process.⁹

From the lender's perspective, the nonjudicial sale is preferable to the judicial sale because the nonjudicial sale can be performed more quickly¹⁰ and at less expense. Indeed, the fact that the lender can more quickly recover the collateral in a nonjudicial foreclosure saves the lender not only the costs associated with the time value of money but also may reduce the costs of restoring the property due to the deterioration of the property that commonly occurs when property is in foreclosure. The only negative aspects of the power of sale from the lender's perspective are that sometimes the lender is unable to obtain a deficiency judgment when this form of foreclosure is elected and the greater uncertainty with the validity of the foreclosure action taken caused by the lack of court involvement.

From the borrower's perspective, the judicial sale is preferable. First, it generally takes longer to perform a judicial sale than a power of sale and the borrower may be able to reinstate or redeem the property during this longer time period. Second, the borrower can raise any defenses to the foreclosure action to further delay the procedure or, if successful with the defenses raised, have the foreclosure action dismissed.¹¹

In only three jurisdictions (Connecticut, Illinois and Vermont) can a lender, under certain limited circumstances, recover on the mortgaged property through what is known as a "strict foreclosure."¹² Under a strict foreclosure, the mortgagee must bring a court action to foreclose on the property (unlike a power of sale which can

8. See A.B.A. SECTION ON REAL PROPERTY, PROBATE & TRUST LAW, FORECLOSURE LAW & RELATED REMEDIES: A STATE BY STATE DIGEST (Sidney A. Keyles ed., 1995) [hereinafter STATE BY STATE DIGEST].

9. See *id.*; *infra* tbl. 1.

10. Table One reflects a median time period of fifty-six days to complete a power of sale and eight months to complete a judicial sale according to the reports in STATE BY STATE DIGEST, *supra* note 8. These periods not only cover statutory redemption periods, but also any other delays which arise like court delays.

11. Although a borrower in a nonjudicial sale can seek some type of injunctive relief from the power of sale if the borrower can show that the lender is not entitled to the power of sale, the burden of proof shifts from the lender to the borrower to show that the lender is not entitled to this remedy.

12. See PAUL GOLDSTEIN & GERALD KORNGOLD, REAL ESTATE TRANSACTIONS 470-71 (3d ed. 1993).

be accomplished without court involvement). In all three jurisdictions, the mortgagor has a period of time to redeem the property after the court's judgment of foreclosure and decree of the mortgagee as the owner of the property. There is no public or private sale of the property.

In Connecticut, a strict foreclosure is permitted if, based on an appraisal of the mortgaged property, it appears that the property is worth less than the debt and the mortgagee is entitled to a judgment for the difference.¹³ The Vermont statute does not require an appraisal of the property to do a strict foreclosure.¹⁴ In both Vermont and Connecticut, the lender can sue the borrower for a deficiency even when using a strict foreclosure (based on the difference between the amount of debt and appraised value of the property).¹⁵

In Illinois, a mortgagee can seek a strict foreclosure if the mortgagee can show that the mortgagor is insolvent and the amount of the debt is greater than the value of the mortgaged property.¹⁶ Under Illinois law, if the mortgagee seeks a strict foreclosure, the mortgagee has no right to a deficiency judgment.¹⁷ Perhaps because of the requirement to show that the mortgagor is insolvent and the lack of guidelines in the Illinois statute on how to accomplish a strict foreclosure, the process of strict foreclosure is rarely utilized.¹⁸

B. Basic Features of the Illinois Law

Illinois law requires a judicial sale and does not permit a power of sale.¹⁹ The Illinois statute provides for a six month redemption period for a commercial mortgage and a seven month redemption period for a residential mortgage which runs prior to the foreclosure sale.²⁰ A mortgagor in a non-residential mortgage may waive the statutory right of redemption at the time the commercial mortgage is first made,²¹ but a mortgagor under a residential mortgage may not.²² A residential

13. See CONN. GEN. STAT. ANN. § 49-24 (West 1994) (requiring a foreclosure by sale if the fair market value of the property exceeds the debt due the foreclosing lender).

14. VT. STAT. ANN. tit. 14, § 4528 (1997); VT. R. CIV. P. 80.1; Dieffenbach v. Attorney General, 604 F.2d 187 (2d Cir. 1979); see GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 487-88 (3d ed. 1993). A foreclosure by sale can, however, be ordered if the mortgage authorizes this and if either the plaintiff or any defendant requests this. *Id.* at 487.

15. See CONN. GEN. STAT. ANN. § 49-14 (West 1994); NELSON & WHITMAN, *supra* note 14, at 487.

16. See GOLDSTEIN, *supra* note 12, at 471.

17. See *id.*

18. See Stark, *Facing the Facts*, *supra* note 1, at 695. The results from the Empirical Study reflect that not one of the 161 sales from the July 1993 foreclosure cases nor one of the 115 sales from the July 1994 foreclosure cases involved a strict foreclosure.

19. See 735 ILL. COMP. STAT. 5/15-1405 (West 1993). However, efforts are ongoing in the State of Illinois to enact legislation which would permit a power of sale for large commercial loans.

20. To be more precise, the Illinois statute provides for a redemption period to run for the greater of seven months from the date the court acquired jurisdiction over all mortgagors or three months after the judgment of foreclosure for a residential mortgage, see *id.* at 5/15-1603(b)(1), and the greater of six months from the date the court acquired jurisdiction over all mortgagors or three months after the judgment of foreclosure for non-residential mortgages, see *id.* at 5/15-1603(b)(2).

21. See *id.* at 5/15-1601.

22. See *id.*

mortgagor may waive the right of redemption or reinstatement after the commencement of the foreclosure action but only if the mortgagee waives the right to a deficiency.²³ A residence is defined by the statute as containing six or fewer dwelling units, at least one unit of which is occupied by the mortgagor or the spouse of the mortgagor as his or her principal place or residence, except a single tract of agricultural real estate larger than forty acres.²⁴ The mortgagor may exercise the right of redemption, but other interested persons or entities (such as a junior lienholder) may not exercise the right of redemption.²⁵ The mortgagor also enjoys a right of reinstatement (a right to cure the default and reinstate the loan by paying only the amount in default plus costs, rather than paying the entire accelerated loan amount) which begins upon the filing of the foreclosure action and which must be exercised before the earlier of the entry of the judgment of foreclosure and ninety days after the mortgagor is served.²⁶

If the mortgagor fails to redeem or reinstate the loan, a judicial sale occurs following advertising and notice of the sale in the manner required by statute. It is customary for the party bidding to be required to deposit ten percent of the bid price upon the making of the bid and to pay the balance of the amount bid within forty-eight hours. If the amount of the successful bid at the sale is less than the final judgment amount, the lender can sue for a deficiency; there is no prohibition on pursuing a deficiency, no one-action rule and no fair value limitation.²⁷ However, a court must confirm the sale first²⁸ and can refuse to confirm a sale if proper notices were not given, the terms of the sale were unconscionable, or justice was not otherwise done.²⁹ In addition to these statutory grounds to invalidate a foreclosure sale, cases reflect the possibility of a setting aside of the foreclosure sale if a grossly inadequate amount is bid combined with a defect in complying with the foreclosure process.³⁰ With respect to residential real estate, if the mortgagee elects to sue the mortgagor for a deficiency, then the mortgagor is given a thirty day redemption period after the foreclosure sale.³¹ With respect to residential real estate, the mortgagor is entitled to possession until thirty days after the confirmation of the sale. The mortgagee can seek possession prior to this date if the mortgagee can satisfy certain requirements.³²

23. See *id.*

24. See *id.* at 5/15-1219.

25. See *id.* at 5/15-1603; 5/15-1402(b). Only the "owner of redemption" (defined in 5/15-1212 as the mortgagor) may redeem from the foreclosure (unless the foreclosure is a consent foreclosure, in which case a party other than the mortgagor who has an interest in the real estate and who objects to the consent foreclosure may redeem in accordance with 5/15-1603(d)).

26. See *id.* at 5/15-1602. The right of reinstatement can only be exercised once every five years unless good cause is shown to the court to be permitted to exercise the right more often than that.

27. See *id.* at 5/15-1504(f); 5/15-1511.

28. See *id.* at 5/15-1508(e).

29. See *id.* at 5/15-1508(b).

30. See Debra Pogrund Stark, *The Emperor Still Has Clothes: Fraudulent Conveyance Challenges After the BFP Decision*, 47 S.C. L. REV. 563, 583-98 (1996) [hereinafter Stark, *Fraudulent Conveyance Challenges*].

31. See 735 ILL. COMP. STAT. 5/15-1604 (West 1993).

32. See *id.* at 5/15-1701. The mortgagee must (1) object during the foreclosure and show good cause

Because of the redemption periods and court calendar delays, the foreclosure process in Illinois usually takes nine months to complete even when no defenses are raised.³³ Even assuming no court delays, no defenses raised, and waiver of the redemption period, the quickest the process can be completed is ninety days, due to the time allowed to answer the complaint (thirty days from the service of summons) and the publication requirements prior to the sale (a minimum of three publications, each one week apart, the first notice being not more than forty-five days prior to the sale and the last not fewer than seven days prior to the sale).³⁴

C. Criticisms of the Foreclosure Process

Two basic criticisms of the foreclosure process are that it is unfair and inefficient. These criticisms are based upon the assumption that third parties rarely bid at a foreclosure sale. As a result, the argument goes, the lender is able to bid far below the fair market value of the property, resell the property at a profit and sue the borrower for the difference between the amount bid and the final judgment amount.³⁵ If this is how the foreclosure system routinely operates, the system would clearly be unfair to borrowers and seriously flawed. If third parties rarely bid at a foreclosure sale and the lender ends up with the property almost all of the time, then the foreclosure sale process is also inefficient since the sale's process is costly and time consuming with no corresponding gains to lenders or borrowers. As previously mentioned, one of the key purposes of the Empirical Study is to test which of these criticisms is well founded.

Assuming for the moment that third parties rarely bid at or close to the fair market value of the property at a foreclosure sale (prior studies and this study confirm this as fact),³⁶ it is not difficult to speculate why this is the case. First, typical home purchasers may not even know that the property is for sale because no signs are posted on the property and the sale is not advertised in the real estate section of the newspaper (it is advertised in the legal section).³⁷ Second, the bidder is not given the opportunity to inspect the property prior to bidding on it. Third, at the sale the bidder is customarily required to pay ten percent of the bid price immediately and the balance in forty-eight hours (making it impossible to finance the payment of the property with a conventional loan). Finally, in a number of jurisdictions, the mortgagor can redeem the property within six months or more after

to be entitled to possession, (2) the mortgagee must be entitled to possession according to the loan documents, and (3) the court must be satisfied that there is a reasonable probability that the mortgagee will prevail on a final hearing of the cause. *See id.*

33. *See* Graphs, *infra* app. A, fig. A-15.

34. *See* STATE BY STATE DIGEST, *supra* note 8, at 155.

35. *See, e.g.,* Steven Wechsler, *Through the Looking Glass: Foreclosure by Sale as De Facto Strict Foreclosure — An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 CORNELL L. REV. 850, 853 (1985).

36. *See id.* at 875.

37. The Illinois Mortgage Foreclosure Act was modified in 1987 to require publication in both the legal section of a newspaper and in the ordinary real estate sales section of a newspaper. *See* 735 ILL. COMP. STAT. 5/15-1507(c)(2) (West 1993).

the foreclosure sale. These standard features of a foreclosure sale drive the typical home purchaser out of the market. To the extent that third parties come to a foreclosure sale and bid at the sale, they tend to be real estate investors who are experienced in investing in real estate and are either cash rich or enjoy a line of credit so that they can bid at the foreclosure sale and pay off the balance in forty-eight hours. These investors, commonly referred to as "scavengers," are aware that risks inhere in purchasing property in this manner (such as the inability to inspect the property prior to bidding at the foreclosure sale and the lack of warranties regarding the physical condition of the house) and will, consequently, only bid when they think they are bidding much less than the fair market value of the property.

Yet, the fairness issue is sometimes even more broadly construed. Some would criticize a foreclosure process in which a lender or a third party is able to bid any amount less than the fair market value of the property, even if this result occurred infrequently.³⁸ The foreclosure sale should be reformed, according to those who hold this view, to make the sale commercially reasonable so that the amount bid reflects the fair market value, or the borrower should be able to recapture any gain made upon a resale within a short period of time after the foreclosure sale.³⁹ When this article refers to a "fair" foreclosure process, it is not referring to a process where the defaulting borrower's interest is considered to the exclusion of the interests of the lender and all non-defaulting borrowers. A "fair" foreclosure system is one that attempts to balance the interest of lenders and all non-defaulting borrowers in an efficient foreclosure process against the interest of borrowers who default in a process which provides a true opportunity and means to protect any equity they have in the property in foreclosure. To the extent that the lender is not made whole through the foreclosure process, the lender will transfer those costs to all borrowers in the form of higher fees or interest rates and, consequently, lenders and non-defaulting borrowers share an interest in keeping the costs of the foreclosure process as low as possible.

D. Special Features of the Illinois Law

In order to address these problems, Illinois foreclosure law was modified in 1987. The general purpose of the modifications to the Illinois foreclosure process was to make the process more attractive to third parties in order to generate bids which more closely approximate the fair market value of the mortgaged property. Two of the key modifications made to encourage third party bidding were (i) to have the statutory redemption period expire before rather than after the foreclosure sale and (ii) to require that the sale be advertised not only in the legal notices section of a newspaper but also in the real estate section of a newspaper.⁴⁰ In addition, the Illinois Mortgage Foreclosure Act provides for fifteen "special matters" or provisions in the judgment regarding the sale which may be sought, which were intended to make the sale process more commercially reasonable and to result in

38. See, e.g., Wechsler, *supra* note 35, at 886.

39. See *id.* at 884.

40. See 735 ILL. COMP. STAT. 5/15-1507(c)(2) (West 1993).

more and higher third party bidding.⁴¹ The following are the special matters which may be sought (these special matters do not automatically apply; the mortgagee may request them in the complaint or the mortgagor may request them by separate motion, in order for any of them to apply):

- (1) a manner of sale other than public auction;
- (2) a sale by sealed bid;
- (3) an official or other person who shall be the officer to conduct the sale other than the one customarily designated by the court;
- (4) provisions for non-exclusive broker listings or designating a duly licensed real estate broker nominated by one of the parties to exclusively list the real estate for sale;
- (5) the fees or commissions to be paid out of the sale proceeds to the listing or other duly licensed broker, if any, who shall have procured the accepted bid;
- (6) the fees to be paid out of the sale proceeds to an auctioneer, if any, who shall have been authorized to conduct a public auction sale;
- (7) whether and in what manner and with what content signs shall be posted on the real estate;
- (8) a particular time and place at which such bids shall be received;
- (9) a particular newspaper or newspapers in which notice of sale shall be published;
- (10) the format for the advertising of such sale, including the size, content and form of such advertising, and additional advertising of such sale;
- (11) matters or exceptions to which title in the real estate may be subject at the sale;
- (12) a requirement that title insurance in a specified form be provided to a purchaser at the sale, and who shall pay for such insurance;
- (13) whether and to what extent bids with mortgage or other contingencies will be allowed;
- (14) such other matters as approved by the court to ensure sale of the real estate for the most commercially favorable price for the type of real estate involved.⁴²

The Act also states:

If all of the parties agree in writing on the minimum price and that the real estate may be sold to the first person who offers in writing to purchase the real estate for such price, and on such other commercially reasonable terms and conditions as the parties may agree, then the court

41. *See id.* at 5/15-1506(f).

42. *Id.*

shall order the real estate to be sold on such terms, subject to confirmation of the sale⁴³

Theoretically, if the mortgagor or mortgagee moved the court to order that the sale be done in accordance with some of these special matters, the result would be a foreclosure sales price more closely reflecting the "fair market value" of the property than the price which would be received in a typical foreclosure sale, because these special matters were designed with the goal of attracting average home purchasers to purchase the property foreclosed upon.

The special matters added to the Illinois act were an attempt to make the foreclosure sales process more similar to a voluntary sale situation. Hence as mentioned above, under the act, a broker can be hired to market and advertise the sale in the conventional manner, the purchaser can be afforded the opportunity to inspect the property, receive title insurance on the property, and have his bid be subject to the condition that he is able to receive a loan commitment to finance the purchase of the property. One catch, however, to these special matters was that none of these special matters automatically applied; either the mortgagor or the mortgagee had to motion the court for any of them to apply. The proponents of the reform hoped that either the mortgagor or the mortgagee would move to utilize some of these features in order to maximize the level of bidding at the foreclosure sale.⁴⁴ As previously mentioned, the Empirical Study collected data on the extent to which mortgagors and mortgagees sought to utilize any of these special features and the impact, if any, that such special features had on bidding.

II. Federal Foreclosure Laws

Congress was also dissatisfied with the foreclosure laws in many states and enacted legislation to preempt state foreclosure laws. Congress' concerns included (1) long foreclosure procedures in many states which can lead to deterioration in the condition of the properties, causing further management expenses, (2) the availability of state redemption periods following the foreclosure sale in many states, which discourages rehabilitation and improvements of the property, and (3) high litigation expenses and overcrowded court calendars.⁴⁵

As a result of these concerns about the expensive and time consuming nature of the foreclosure process in many states (indeed, the foreclosure process, including redemption periods, can take as long as one year in many jurisdictions),⁴⁶ Congress enacted the Multifamily Mortgage Foreclosure Act of 1981 (MFMA),⁴⁷ which permits HUD to perform a quick, nonjudicial sale with respect to multifamily mortgage loans held by HUD. Due to the same concerns applying in the context of

43. *Id.* at 5/15-1506(g).

44. See Jeffrey Liss, *Notices of Foreclosure Sales Under the New Law*, CHI. DAILY L. BULL., Oct. 8, 1987, reprinted in FORECLOSURES IN ILLINOIS 1-25, 1-28 (Ill. Inst. for Continuing Legal Educ. ed., 1988).

45. 12 U.S.C. § 3701 (1994).

46. See STATE BY STATE DIGEST, *supra* note 8; *infra* tbl. 1.

47. Pub. L. No. 97-35, 95 Stat. 422 (codified as amended at 12 U.S.C. §§ 3701-3715 (1994)).

single family residential mortgages and an escalating backlog in the handling of judicial foreclosures for HUD,⁴⁸ Congress, in 1994, enacted the Single Family Mortgage Foreclosure Act (SFMFA).⁴⁹ The SFMFA permits HUD to perform a nonjudicial sale with respect to single family mortgage loans held by HUD. In an effort to expand the application of the federal nonjudicial foreclosure process, Congress, in 1995, almost successfully amended the House Budget Bill to add yet a third federal nonjudicial foreclosure law, the Federal Nonjudicial Foreclosure Act (FNFA),⁵⁰ which would have permitted certain defined "federal agencies" to engage in a similar nonjudicial sales process with respect to real estate mortgage loans they hold to be in default. This section of the article will address what transactions are covered by these laws and proposed bill and the impact on state foreclosure laws.

A. Application of the Multi-Family Mortgage Foreclosure Act

The Multifamily Mortgage Foreclosure Act applies to mortgages held by the Secretary of Housing and Urban Development (Secretary) pursuant to various federal insurance and development programs.⁵¹ Although the statute does not define "multifamily," the Rules and Regulations to the MFMFA state that with two exceptions, "multifamily mortgage" does not include a property on which there is located a one- to four-family residence.⁵² Courts have enforced the MFMFA with respect to mortgages entered into prior to the effective date of the law (i.e., retroactively).⁵³

B. Application of the Single Family Mortgage Foreclosure Act

The Single Family Mortgage Foreclosure Act applies to mortgages covering property on which there is located a one- to four-family residence, which are held by the Secretary pursuant to certain programs administered by HUD.⁵⁴ Probably the largest source of loans which would be subject to the SFMFA is FHA insured loans assigned to HUD before foreclosure. In 1996, the number of mortgage loans

48. This backlog in the handling of judicial foreclosures for HUD was apparently caused by staffing problems in the U.S. Attorney Offices. See Nelson A. Diaz, *HUD's New Foreclosure Act: Cutting Losses and Improving Business Management*, 68 N.Y. St. B.J. 30 (1996).

49. Pub. L. No. 103-327, 108 Stat. 2316 (codified at 12 U.S.C. §§ 3751-3768 (1994)).

50. H.R. 2234, 104th Cong. (1995).

51. See 12 U.S.C. § 3702(2)(A)-(E) (1994). This section refers to various sections of various statutes pertaining to the following programs: War Housing Insurance, Armed Services Housing Mortgage Insurance, Mortgage Insurance under the National Housing Act, Mortgage Insurance for Land Development and New Communities, Urban Renewal Projects, Demolition Programs and Code Enforcement Programs, section 202 of the Housing Act of 1959, and Section 811 of the Cranston-Gonzalez National Affordable Housing Act (covering congregate housing services).

52. See 61 Fed. Reg. 48,546, 48,553 (1996). The two exceptions are for one- to four-family residences subject to a mortgage pursuant to section 202 of the Housing Act of 1959 or subject to a mortgage pursuant to section 811 of the National Affordable Housing Act.

53. See *Lisbon Square v. United States*, 856 F. Supp. 482, 490 (E.D. Wis. 1994).

54. See 12 U.S.C. § 3751(b)(1)-(2) (1994). This section refers to the following programs administered by HUD: home improvements under Title I or mortgage insurance under Title II of the National Housing Act; and slum clearance, urban renewal projects, demolition programs, and code enforcement programs under 42 U.S.C. § 1452b.

under the Title II insurance program was estimated at 92,000.⁵⁵ The SFMFA does not expressly indicate whether it applies to mortgages entered into before the effective date of the law, but it appears that Congress intended this retroactive application in light of the definition of mortgage loans contained in the bill which does not exclude mortgages entered into prior to the law's effective date.

C. Application of the Proposed Federal Nonjudicial Foreclosure Act

The proposed federal foreclosure law applies to all federal loans and loans held by federal agencies.⁵⁶ Under the proposed federal foreclosure law, "agency" is defined as an executive department, an independent establishment, a military department, or a wholly owned government corporation.⁵⁷ An executive department is defined as one of the fourteen departments in that branch.⁵⁸ Therefore, a loan held by one of these departments, regardless of whether the department originated the loan, is covered as a federal agency under the proposed federal foreclosure bill. An independent establishment is defined as "an establishment in the executive branch (other than the U.S. Postal Service) which is not an executive department, military department, government corporation, or part thereof."⁵⁹ The third possible category of agency applies to loans held by a military department. The Army, Navy, and Air Force are considered to be military departments.⁶⁰ Therefore, any loans held by the military department would be subject to the proposed federal foreclosure bill. Lastly, the proposed federal foreclosure law applies to foreclosed property which is held by wholly owned government corporations. Examples of such corporations include, but are not limited to, the Community Credit Corporation, the Community Development Federal Institutions Fund, and the Government National Mortgage Association.⁶¹

Thus, while the proposed federal foreclosure law would apply to all loans held by the above described federal agencies (including HUD, SBA, VA, FmHA, and GNMA),⁶² the bill does not cover loans held by federally related or partly federal

55. See Diaz, *supra* note 48, at 30.

56. See H.R. 3019, 104th Cong. § 3402 (1996).

57. See *id.* § 3401.

58. See 5 U.S.C. § 101 (1994). An executive department includes the following: Department of State, Department of Treasury, Department of Defense, Department of Justice, Department of Interior, Department of Agriculture, Department of Commerce, Department of Labor, Department of Health and Human Services, Department of Housing and Urban Development, Department of Transportation, Department of Energy, Department of Education, and the Department of Veterans Affairs.

59. See *id.* § 104.

60. See *id.* § 102.

61. See *id.* § 9101. The remaining wholly owned government corporations include the Export-Import Bank of the United States, the Federal Crop Insurance Corporation, the Federal Prison Industries, Inc., the Corporation for National and Community Service, the Overseas Private Investment Corporation, the Pension Benefit Guaranty Corporation, the Saint Lawrence Seaway Development Corporation, the Secretary of Housing and Urban Development when carrying out duties and powers related to the Federal Housing Administration Fund, the Tennessee Valley Authority, the Uranium Enrichment Corporation, the Panama Canal Commission, and the Alternative Agricultural Research and Commercialization Corporation.

62. See Patrick Randolph, Jr., *The New Proposed Federal Foreclosure Law*, 1996 PLUREAL 451,

entities, such as FDIC, FSLIC, FNMA, or FHLMC.⁶³ The FNFA expressly states that it will apply to mortgages executed both prior and subsequent to the proposed effective date of the bill.⁶⁴

D. A Comparison of the Procedures Under the Federal Nonjudicial Foreclosure Laws to State Foreclosure Laws

The two existing federal foreclosure laws and the proposed bill contain basically the same nonjudicial foreclosure process which would preempt any state foreclosure law to the contrary.⁶⁵ In all three bills, a notice of default and foreclosure sale must be sent to the borrower at least twenty-one days before the sale; the sale must be advertised once each week for three weeks before the sale; the sale must be conducted by a commissioner appointed by HUD or other appropriate federal agency; the borrower can reinstate the loan up to three days before the sale and can redeem at anytime before but not after the sale; the borrower can contact the commissioner to contest the notice of default and sale but the commissioner is granted discretion to respond to any contest as well as to accept an attempted offer to reinstate the loan if the borrower had at anytime earlier reinstated the loan; the sale is conclusively presumed to be valid; and HUD or the other appropriate federal agency can bring a deficiency action against the borrower.

In short, these federal nonjudicial foreclosure laws combine the harshest features of foreclosure processes currently in existence under state laws and together provide the least protection to defaulting borrowers in comparison with the laws in each of the fifty states. The laws provide no requirement for a commercially reasonable sale, no post-sale redemption rights, no protection against deficiency judgments, no judicial process to ensure that the lender is indeed entitled to the remedy of foreclosure for the amount claimed, and a conclusive presumption that the sale is valid, and only eighteen days to reinstate the loan and twenty-one days to redeem the loan after the notice of default and sale is sent.

States have almost universally enacted much longer redemption periods than twenty-one days (most states' redemption periods are at least three months to six months),⁶⁶ have sometimes enacted anti-deficiency legislation when a lender exercises a statutory power of sale,⁶⁷ and, in the many states which require a judicial sale, have often required judicial review of the right of the lender to foreclose as well as judicial review of the validity of the sale⁶⁸ (with courts

453-54 (1996).

63. *See id.* at 454.

64. Proposed Amendment to Debt Collection Improvement Act of 1996, § 3402D, 142 CONG. REC. S2132 (Mar. 13, 1996).

65. Although there is no express preemption language in the MFMFA or the SFMFA, the purpose of Congress in enacting these laws was precisely to preempt state law to the contrary and this intent to revise the process in reaction to cumbersome and problematic state foreclosure laws is mentioned in the findings of fact sections of the acts. *See* 12 U.S.C. §§ 3701a-3701b, §§ 3751a-3751b (1994).

66. *See* STATE BY STATE DIGEST, *supra* note 8; *infra* tbl. 1.

67. *See* STATE BY STATE DIGEST, *supra* note 8.

68. *See id.*

invalidating sales based upon unconscionable bids or a procedural defect combined with a grossly inadequate bid).⁶⁹ States have enacted these protections to defaulting borrowers in an effort to provide such borrowers with a meaningful opportunity to protect any equity they have in their property.

Each state's foreclosure laws contain that state's legislative determination of how best to balance the defaulting borrower's interests with the interest of the lender and all future non-defaulting borrowers in an efficient realization of the collateral after the mortgage loan goes into default. The federal nonjudicial foreclosure laws eradicate the balance struck by each state legislature.

While one can argue that many states have done an inadequate job at properly balancing the competing interests of the defaulting borrower and lender and that providing a uniform federal standard would be easier to administer, the federal initiatives unnecessarily sacrifice the interests of the defaulting borrower to promote the lender's interest in a quicker and cheaper foreclosure process. As will be discussed in the next part of this article, the Empirical Study underscores the unfair nature of the federal foreclosure laws and, surprisingly, underscores the inefficiency of the federal foreclosure process as well.⁷⁰

III. An Evaluation of Federal and State Foreclosure Laws in Light of Empirical Data

This part of the article will evaluate whether the federal nonjudicial foreclosure processes are fair and efficient by focusing on certain key aspects of these laws: (i) the short reinstatement and redemption period, (ii) the right to pursue a deficiency, and (iii) the use of a power of sale. Further, in evaluating these aspects of the federal foreclosure procedures, this article will focus on whether these features are fair and efficient in light of the results of the Empirical Study.

A. The Short Reinstatement and Redemption

One of the most surprising results from the Empirical Study was the large percentage of cases filed which did not go to foreclosure sale. The data from the Empirical Study reflected that in over two-thirds of the cases the borrower was able to prevent a sale of the property by exercising a statutory ninety day right of reinstatement, by exercising the right to redeem (a seven month period for

69. See Stark, *Fraudulent Conveyance Challenges*, *supra* note 30, at 563.

70. In addition to the inefficiency of imposing a forced sale of the mortgaged property when the borrower lacks any equity in the property (a point which will be developed in the next portion of this article), it is ironic that Congress' most recent efforts (a proposed bill that has not yet been enacted) to expedite and reduce the costs of the foreclosure process went so far that some claim their efforts may backfire; that the lack of a hearing and lack of adequate notice to junior lienholders could render the proposed act susceptible to constitutional challenge. See Randolph, *supra* note 62, at 458-59. Indeed, title insurers have been wary to afford title insurance with respect to foreclosures even under the existing federal foreclosure laws, but will do so if the foreclosure commissioner executes an affidavit that the statutory requirements have been met. See Steven Bashaw, *Federal Nonjudicial Foreclosure Laws: Are We Moving Towards a National Foreclosure Law* 16 (Aug. 3, 1997) (ABA Annual Meeting Program) (on file with author).

residential properties in Illinois) prior to the sale (which borrowers accomplished often times by refinancing or selling the property), by entering into a workout with the lender, or by filing a bankruptcy action to stay the foreclosure sale. Figures A-5 and A-6, following the text of this article, detail how borrowers in over two-thirds of the cases filed were able to prevent the foreclosure sale from occurring.

By providing only twenty-one days to redeem and only eighteen days to reinstate the loan, the federal legislation deprives borrowers of a meaningful opportunity to exercise those rights, rights which in two-thirds of the cases in Illinois borrowers utilized to preserve their equity in the property and save their homes (the vast majority of the cases in the data sample were residential). In the 1994 cases in the Empirical Study, the median period to redeem was four months and in the 1993 cases the median period to redeem was nine months.⁷¹

In defending the limited time period under the federal nonjudicial foreclosure bills, one could argue that since HUD has in the past typically refrained from commencing the foreclosure for a very long period after a default has occurred (it was not uncommon for years to pass between the default and the foreclosure sale)⁷² it is thus fair to allow it a very quick process to foreclose once it elects to foreclose. However, if these delays were due to lack of resources to handle the default or mismanagement by HUD, with no meaningful efforts to assist the borrower in converting a defaulted loan into a performing loan, then these delays did not serve any party's interest and instead merely lulled the borrower into a false sense of security. As a point of comparison, lenders in the Empirical Study waited a median of six to seven months from the default until they filed a foreclosure action.⁷³ A review of the files for the 53 cases reflect that HUD has been successful in very quickly moving from the Notice of Default and Foreclosure sale in these cases to completion of the sale, with a median period of thirty days between the notice and the sale.

B. The Right to Pursue a Deficiency

The federal foreclosure procedures, similar to the laws in the states (including Illinois) do not require that the sale procedure be "commercially reasonable" (i.e., the property to be sold does not have to be marketed by a broker and sold under

71. See Stark, *Facing the Facts*, *supra* note 1, at 690.

72. This author filed a Freedom of Information Act Request with HUD and was given access to the files it keeps in its Chicago, Illinois office with respect to completed foreclosures under the SFMFA (a total of 53 cases). Of these 53 cases which were foreclosed under the SFMFA, the median period HUD waited from the default until it sent a notice of default and of the nonjudicial foreclosure sale was three years and eight months. In explaining this long period, it should be noted that the default occurred in the bulk of these cases between 1992 and 1996 but that the SFMFA was not enacted until 1994 and the regulations implementing the SFMFA were not in effect until 1995. This author was not given access to its "active" files (i.e., files involving loans currently in default and in which the foreclosure sale has not yet been completed) and was advised that HUD did not keep records of loans in default where the loan default was cured or the loan paid off. Thus, this author could not ascertain the percentage of cases where a loan was in default and the borrower able to prevent a foreclosure sale as was ascertained in the Empirical Study.

73. See Stark, *Facing the Facts*, *supra* note 1, at 711.

terms which mirror the way property would be sold in a voluntary sale). The data from the Empirical Study reflects that in approximately ninety percent of the cases that went to sale the debt on the property exceeded the fair market value of the property at the time of the foreclosure, and in approximately ten percent of the cases the fair market value of the property exceeded the outstanding debt (i.e., in only approximately ten percent of the sales cases was a third party the successful bidder at the sale, and the lender made a profit upon resale in only twelve percent of the cases).⁷⁴ In ninety percent of the cases, where the amount of the debt exceeded the fair market value of the property, it does not matter whether the foreclosure sale was commercially reasonable in terms of protecting the borrower's equity in the property (assuming that the lender does not pursue a deficiency action against the borrower). As previously indicated, the federal nonjudicial foreclosure procedures also permit the lender to pursue a deficiency action based upon the difference between the amount bid at the sale and the outstanding debt. This author was told by an official at HUD that HUD does not pursue deficiencies against borrowers after a foreclosure sale under SFMFA,⁷⁵ but this author was unable to independently verify this. Once again, however, there is nothing preventing HUD or any other federal agency from changing its practices and beginning to pursue deficiencies, since single family residential loans are typically structured as recourse loans. Admittedly, this would occur rarely since HUD correctly assumes that in the vast majority of the cases if a borrower has assets she would use those assets to prevent the foreclosure sale. Lenders in Illinois also have the right to pursue a deficiency based upon the difference between the foreclosure sale amount and the outstanding debt. Lenders brought a deficiency action within one year after the foreclosure sale in approximately six to seven percent of the foreclosure sale cases of the Empirical Study and in approximately two percent of the cases did so even after profiting after a resale of the property.⁷⁶ Thus, the fact that the sale is not required to be commercially reasonable caused a loss of the borrower's equity in its property in only a small percentage of the cases examined in the Empirical Study, but the study does confirm that the use of a non-commercially reasonable sale and the right to a deficiency can lead to highly inequitable results in some cases.

C. The Use of a Power of Sale

The third key facet of the federal foreclosure process this article analyzes is the use of a power of sale, as opposed to a judicial proceeding. In only one percent of the 1993 cases and in none of the 1994 cases in the Empirical Study did the borrower raise a defense to the foreclosure action in the judicial proceeding (all of the defaults in the cases in the Illinois Study were monetary as opposed to non-monetary defaults).⁷⁷ Thus, one could argue that, because borrowers rarely take

74. *See id.* at 692.

75. Conversation with Bill Walls, Supervisor, Single Family Asset Management, Department of Housing and Urban Development (Feb. 5, 1998).

76. *See Stark, Facing the Facts, supra* note 1, at 665.

77. *See id.* at 695.

advantage of the judicial process, lenders should be able to foreclose without a judicial process, especially one involving federal agencies where one is less likely to find bad faith actions than one might if the lender is the provider of a home improvement loan. However, as a matter of public perception, it does appear incongruous that a court action is required to recover on a credit card balance of fifty dollars but is not required to foreclose a mortgage on a house. There is also the issue of the fairness of shifting the burden of proof from the lender to the borrower when the borrower has to bring an action to enjoin the power of foreclosure sale.⁷⁸ Finally, some argue that borrowers do not really take notice of the serious nature of their situation until they receive a summons to appear in court (though this assertion has not been tested, to this author's knowledge). For all of these reasons, if there were a way to reduce the time and costs of the foreclosure process without resorting to a power of sale, this alternative would be preferable.

D. Are the State or Federal Foreclosure Laws Efficient?

The inadequacy of the federal nonjudicial foreclosure process in protecting any equity of the borrower in the mortgaged property is obvious (especially in light of empirical data which reflects that most borrowers will exercise rights of reinstatement and redemption if given an adequate time period), but less obvious is how the federal nonjudicial foreclosure process and state foreclosure procedures are inefficient. The data from the Empirical Study reflects that in approximately ninety percent of the cases that actually did go to foreclosure sale, the borrower had no equity in the property (i.e., in only approximately ten percent of the sales cases was a third party the successful bidder at the sale, and the lender made a profit upon resale in only twelve percent of the cases).⁷⁹ Thus, in the vast majority of the cases that went to foreclosure sale there was no reason to require a forced sale of the property (i.e., in ninety percent of the cases the borrower had no equity in the property worth protecting through the requirement of an involuntary sale), and in none of the fifty-three SFMFA cases was a third party the successful bidder (HUD was the successful bidder in each of the fifty-three cases). By continuing to require a forced sale of the mortgaged property in all cases, both the federal nonjudicial foreclosure process and state foreclosure laws add an unnecessary expense. Hence, the federal nonjudicial foreclosure laws and the state foreclosure laws are inefficient as well as unfair. The same criticism could be leveled at the Uniform Land Security Interest Act (a proposal to reform the foreclosure process that has not been enacted in any state), which attempts to reduce the costs of the foreclosure process by allowing a nonjudicial sale to take place with respect to residential real estate in as few as ten weeks (with no post-sale redemption period), but which would also require a forced sale of the property even when there is no equity in the property.⁸⁰

78. *See id.* at 685.

79. *See id.* at 692, 695.

80. *See James M. Pedowitz, Uniformity in Mortgage Foreclosures*, PROB. & PROP., Feb. 7, 1993, at 56, 58. On the other hand, the Uniform Land Security Interest Act does require a "reasonable" sale (providing bidders with five weeks to pay the balance of the bid price after the foreclosure sale).

Based upon the data collected from the Empirical Study and the data collected with respect to foreclosure sales by HUD under the SFMFA, the largest component of costs in the foreclosure process was the accrued interest.⁸¹ Indeed, in the fifty-three HUD nonjudicial cases studied, the accrued interest is much higher than in the judicial foreclosure cases in the Empirical Study because the median time period between default and the foreclosure sale was so much longer in the HUD cases than in the Empirical Study cases.⁸² The principal additional costs in the judicial foreclosures examined in the Empirical Study which could be identified from a review of the court files were the following: title examination costs, filing fees and summons charges, recording charges, publishing costs, copying costs, and attorney's fees.⁸³ The principal additional costs which could be identified from a review of the HUD files with respect to SFMFA sales were: advertising costs, title insurance costs, recording fees, and the foreclosure commissioner's fee. Because the median mortgage amounts for the Empirical Study are very close to the median mortgage amounts in the fifty-three cases examined where HUD utilized the SFMFA,⁸⁴ it is useful to compare the median dollar amounts expended in the Empirical Study cases (excluding accrued interest and additional advances since those figures relate to the timing of the decision to foreclose after the default; a topic covered in the next section of this article) against the median dollar amounts for the costs identified in the HUD files regarding SFMFA sales cases (which also excludes accrued interest and additional advances). The median total amount of these costs in the 1993 judicial foreclosure cases was \$2,422.25 and the median total amount of these costs in the 1994 judicial foreclosure cases was \$2,484.98.⁸⁵ Surprisingly, the total median amount of the costs identified above for the HUD nonjudicial sales was \$1,806, a number which is close to the judicial sales figures. Expressed as a percentage of the original amount of the mortgage loan, these costs amounted to approximately five percent of the original mortgage amount for the judicial cases and 3.4% of the original mortgage amount for the HUD nonjudicial cases. The lack

81. See Stark, *Facing the Facts*, *supra* note 1, at 709; *infra* fig. A-14. While the median mortgage amount for the HUD, SFMFA loans was \$52,362, the median foreclosure sales price (a price that is reflective of the total debt due in light of accrued interest and certain other charges later described which amounted to the median amount of \$1806) was a much larger \$91,798. By comparison, the median original mortgage amount for the 1993 judicial sales cases in the Empirical Study was \$48,600 and the median final judgment amount for those cases was only \$62,646. See Stark, *Facing the Facts*, *supra* note 1, at 667. The main component for this difference must be the larger accrued interest in the HUD loans due to the longer forbearance period for these loans. See *id.* at 711.

82. See Stark, *Facing the Facts*, *supra* note 1, at 711; see *supra* note 72 (comparing a three year, eight month median forbearance period by HUD in the SFMFA loans to the six- to seven-month median forbearance period in the Empirical Study cases); *infra* app. A, fig. A-14.

83. The costs for additional advances is excluded for purposes of the comparison since that figure is tied to the amount of time the lender waits between the default and the sale (similar to the accrued interest figure) and this figure could not be ascertained from the HUD files reviewed.

84. The median mortgage amount for the HUD SFMFA cases was \$52,362; the median mortgage amount for the 1993 cases in the Empirical Study was \$48,000 and for the 1994 cases was \$49,000. See Stark, *Facing the Facts*, *supra* note 1, at 667.

85. See Stark, *Facing the Facts*, *supra* note 1, at 709.

of a larger savings for these secondary costs (i.e., costs not including accrued interest and additional advances) in the nonjudicial process is due in part to the median fee charged by the foreclosure commissioner (\$800), which is almost identical with the legal fees the lender's attorneys charge to do the judicial foreclosure (thus leaving a savings based primarily upon the filing fees, service charges and sales fee).⁸⁶

In summary, there is a savings of only 1.6% when comparing the costs of performing a judicial foreclosure in Illinois to performing a nonjudicial foreclosure under the SFMFA (exclusive of the additional interest and additional advance costs). The means to reduce these costs consistent with basic concerns of fairness to the defaulting borrower are addressed in the next section of this article.

IV. Is There a Better Way to Promote Both Fairness to the Defaulting Borrower and Efficiency to the Lender?

The data collected in the Empirical Study suggest a better way to handle residential⁸⁷ real estate foreclosures — one which would better protect the borrower's equity in the property, if any, and would provide a more efficient process than is found in the fifty states or even in the federal procedures. This author recommends a bifurcated foreclosure process. Foreclosures would either be judicial strict foreclosures or judicial foreclosures with a required commercially reasonable sale of the property. After (i) the foreclosure action is filed and the mortgagor is served, and (ii) a ninety day reinstatement period has expired, the court⁸⁸ will order an appraisal of the value of the mortgaged property which must be completed before the judgment of foreclosure.⁸⁹ If the amount of the appraisal reflects a value of the property which is less than the debt due on the date of the judgment of foreclosure plus a percentage of said judgment amount as set forth in the statute,⁹⁰ the property is decided to the lender on the date of the judgment of foreclosure (i.e., a judicial strict foreclosure with no public sale). The statute would require the passage of a four month period from service of the mortgagor before the judgment of foreclosure

86. The Sheriff's office charge for conducting the sale went down to \$250 after Illinois modified its foreclosure laws to permit a private entity to perform the sale. *See id.* This added competition has driven down the prices charged for this service.

87. *See supra* note 5 for an explanation of why the proposal is confined to the context of residential real estate as opposed to income producing property.

88. The court rather than the lender should order the appraisal and the standards for how the appraisal should be prepared should be spelled out in the statute (such as a "blind" appraisal where the appraiser is not given a goal number and is instructed to appraise the fair market value of the property, instead of the value as affected by the foreclosure process) to avoid the fudging that sometimes occurs with an MAI (sometimes referred to in derision as a "Made As Instructed" Appraisal).

89. The statute would permit a judgment of foreclosure within four months after service of summons, giving one month to obtain the appraisal.

90. The percentage set forth in the statute would be based upon studies collecting data on the median costs lenders incur to carry the property, the median time period for carrying property until it can be sold in a commercially reasonable manner, and the median costs of the sale of the property. The Illinois study roughly estimated this percentage at 14% based upon an assumed carrying time of six months and an assumed median resale price of \$75,000. Stark, *Facing the Facts*, *supra* note 1, at 676.

could occur and would give no discretion to a court to postpone the judgment date without agreement of the borrower and lender. The borrower would have a ninety day statutory right of reinstatement and a statutory redemption which can be exercised anytime before the expiration of said four month period.⁹¹ There would be no right of redemption after the judgment of foreclosure.

If, however, the amount of the appraisal exceeds the judgment amount by more than the required specified percentage, then if the borrower failed to exercise the ninety day reinstatement right and failed to redeem within four months (and if any junior mortgagees fail to redeem within said four month period), the property must be sold in a manner which is commercially reasonable,⁹² and the borrower and any junior mortgagees would have no further redemption rights after the sale.

The purpose of requiring that the appraisal reflect a value of the property which is a specified percentage in excess of the judgment amount is to make certain that the borrower has sufficient equity in the property before requiring the lender to undergo the more expensive and time consuming commercially reasonable sales process. For example, if, after study, it becomes apparent that on average it costs a lender ten percent of the judgment amount to pay for performance of the commercially reasonable sale and the costs the lender incurs in carrying the property from the date of the judgment of foreclosure until the property sells, then unless the appraisal reflects a value of the property which exceeds ten percent of the judgment amount, the borrower does not have any true equity in the property worthy of requiring the more costly process of a commercially reasonable sale. Prior to reforming the foreclosure process, further data should be gathered to determine what these costs typically would amount to calculated as a percentage of the judgment amount and that figure should be applied in the statute as the amount by which the appraised value exceeds the judgment amount in order to require the commercially reasonable sale as opposed to a strict foreclosure.

Lenders would benefit from a reform which bifurcates the foreclosure process since the more expensive and commercially reasonable foreclosure process will only be required when an appraisal reflects that the borrower has sufficient equity in the property and the borrower still fails to reinstate or redeem the loan prior to the judgment of foreclosure (according to the data from the Empirical Study, this should rarely occur). When the appraisal reflects that the borrower has no equity in the property (which should be the majority of the cases which go to foreclosure sale according to the data from the Empirical Study), the lender will be able to take title to the property in a more cost efficient manner than is currently required in the fifty states.

While requiring an appraisal and sometimes a commercially reasonable sale appears to add to the costs of the foreclosure process, in light of the data collected in the Empirical study, it should actually operate to reduce costs. Based upon surveys of appraisers in Chicago who handle residential real estate appraisals, the

91. Any junior mortgagees would also be served and given an opportunity to redeem the property.

92. See Stark, *Facing the Facts*, *supra* note 1, at 677-85 (detailing the two different methods to accomplish a "commercially reasonable sale").

cost of the appraisal should typically run from \$200 to \$300 and can be prepared in a few days.⁹³ If the appraisal shows that the borrower has insufficient equity in the property, the property will be deeded to the lender on the date of the judgment of foreclosure, thereby reducing the timing of the process by between four and five months⁹⁴ (according to the Empirical study, it took a median of nine months from the date the case was filed until the judicial sale was completed) and saving over five percent of the judgment amount in costs (based upon saving approximately four percent in accrued interest and advances which would otherwise accrue during the period from the judgment until the sale and saving approximately one percent of the judgment amount which would otherwise be expended in connection with costs to perform the public sale).⁹⁵ In addition, allowing the lender to retake the property more quickly when the borrower has no equity in the property may also lead to less deterioration to the property, which commonly occurs during the foreclosure process.

Borrowers would benefit from this bifurcated process because it would require a commercially reasonable sale (and thus a bid price much more closely approximating the fair market value of the property) when the borrower has equity in the mortgaged property and is unable to protect its equity by reinstating the loan or paying off the loan prior to the foreclosure sale.⁹⁶ If the property is worth \$100,000 and the debt and sales costs together equal \$90,000, the borrower's true equity in the property is ten thousand dollars. Under the proposed process, the property would sell for at or very near its market value of one hundred thousand dollars, the lender would be paid off due to the commercially reasonable sale, and the borrower

93. The difference in cost is based upon how unique the house is that is being appraised. If there are many unique features to the house then the appraisal cost could increase to as high as \$600. Stark, *Facing the Facts*, *supra* note 1, at 681 n.183.

94. See Stark, *Facing the Facts*, *supra* note 1, at 711.

95. See *infra* app. A, fig. A-12, A-13a, and A-13b for details on the costs associated with the foreclosure process in the Empirical Study.

96. In some cases from the Empirical Study, resales of the property within one year after the foreclosure sale reflect that some borrowers failed to protect their significant equity in their property (some resales resulted in profits ranging from 32% to 326%). Stark, *Facing the Facts*, *supra* note 1, at 667. One possible explanation is that some borrowers are too ill or otherwise incompetent to protect their interests in any of the ways that borrowers typically protect their equity such as through a sale of the property, refinancing or reinstatement of the loan, or the filing of a bankruptcy action. It is important to require a commercially reasonable sale to protect such borrowers. It would also be helpful to require by statute that at the time the borrower is served with the summons, the borrower also be supplied with an explanation of the options available to a borrower in connection with the loan default. The exact wording of the form could be prescribed by statute and would encourage the borrower to seek legal counsel to advise the borrower on its options and to provide a summary of the options the borrower could consider such as exercising the right of reinstatement, attempting to refinance or sell the property before the redemption period expires, negotiating a loan work-out or deed-in-lieu of foreclosure with release of personal liability, and bankruptcy options. The Uniform Land Security Interest Act takes a similar approach and requires that the lender advise the borrower of various rights and options of the borrower (such as any rights to cure the default and how to do so, the possibility of a deed-in-lieu of foreclosure, any rights to sell the property subject to the debt or to refinance the debt) when the lender sends the notice of default and intent to perform a foreclosure sale of the property. See Pedowitz, *supra* note 80, at 58.

would receive the net proceeds from the sale.⁹⁷ Under the proposed process, lenders and third parties will be less likely to reap large profits in the occasional situation where the borrower in fact has significant equity in the property but was unable to reinstate or redeem the loan before the foreclosure sale. Furthermore, since the costs to perform the appraisal are relatively minor (far less than the typical current sales costs in Illinois for the selling officer and costs to advertise the sale), it should not pose a barrier to the borrower being able to redeem the property prior to the judgment of foreclosure or prior to the commercially reasonable sale, if applicable. It is important for the law to require a commercially reasonable sale because the Empirical Study reflects that the optional foreclosure features are rarely utilized.⁹⁸ In none of the cases examined in the Empirical Study did the borrower petition the court for any of the optional features allowed by the Illinois statute to make the foreclosure sale more commercially reasonable. Lenders in the cases in the study only petitioned for one feature, which related to having a private entity rather than the Cook County Sheriff's Office conduct the foreclosure sale (to reduce the costs of the foreclosure sale).

This proposal purposely leaves open the issue of recovering a deficiency, mainly because the bifurcated process should work on its own to protect the borrower's equity in the property. However, some states enact anti-deficiency legislation for reasons other than protecting the borrower's equity in the property (e.g., to prevent a double loss to the borrower when property values decline generally). Whether federal concerns should preempt a state's policies on this issue is beyond the scope of this article.

The proposed bifurcated foreclosure process would satisfy the federal government's desire for a quick and inexpensive process (the proposal would lead to a four month process in most cases without the costs associated with a sale of the property), but would at the same time provide a meaningful opportunity for the borrower to protect any equity it has in its property (by providing a judicial wake up call, a ninety day reinstatement period, a four month period to redeem, and a commercially reasonable sale if an appraisal reflects true equity in the property).

This author strongly urges Congress to replace the existing federal foreclosure laws and to enact any new federal foreclosure laws based upon the bifurcated foreclosure process outlined in this article and urges state legislators to consider revising their residential foreclosure laws along the lines of the proposal outlined in this article. Enactment of the reform proposal outlined in this article will promote the interests of the federal government and lenders in a uniform and inexpensive process and will simultaneously promote the legitimate interests of defaulting borrowers in a realistic opportunity to protect their equity in their investment.

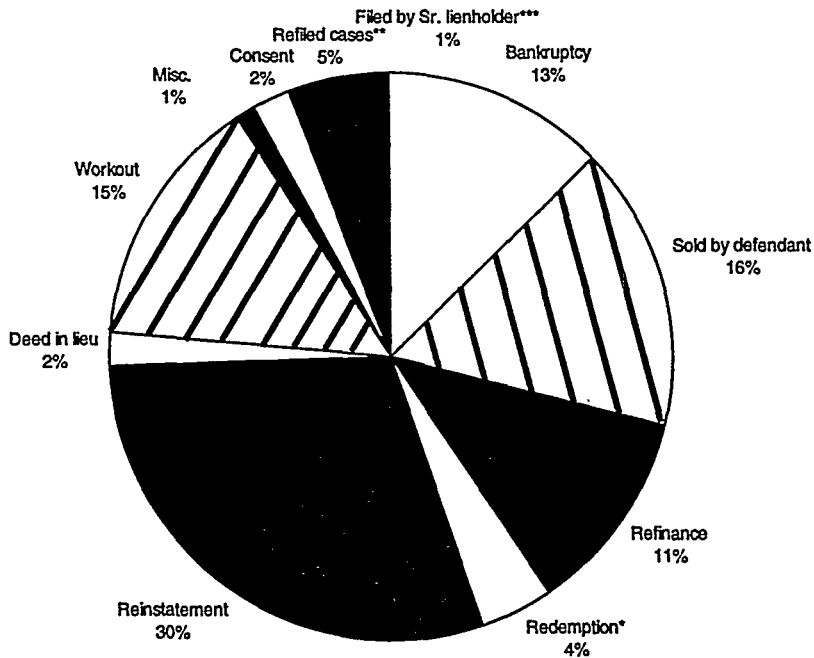
97. The statute should require a process to notify the borrower that the borrower is entitled to this surplus amount and a procedure to collect this amount. Currently in Illinois, a borrower will not know when a surplus is bid unless the borrower is at the foreclosure sale. Based on anecdotes from those who represent lenders in the foreclosure process it appears that in a number of instances the borrower does not in fact claim the surplus amount (presumably due to not knowing that a surplus was bid and that it was entitled to it).

98. See Stark, *Facing the Facts*, *supra* note 1, at 670-71.

APPENDIX A

FIGURE 5

1993 DISMISSED CASES



	1993
Bankruptcy	37
Sold by defendant	46
Refinance	33
Redemption*	12
Reinstatement	86
Deed in lieu	5
Workout	42
Misc.	3
Consent	6
Refined cases**	15
Filed by Sr. lienholder***	2
Total	287

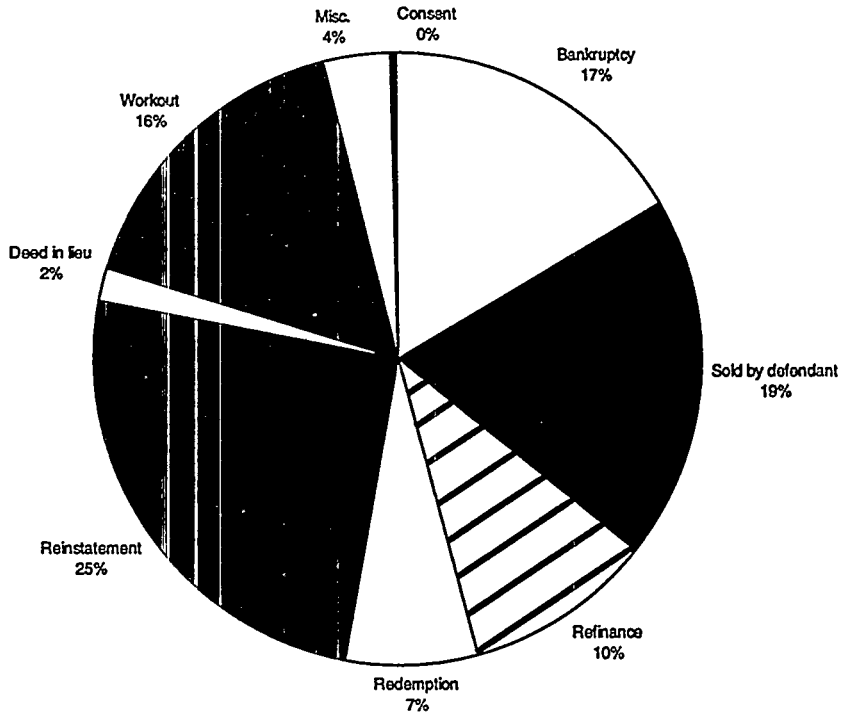
* Mortgagee's motion to dismiss based on mortgagor's exercise of the right of redemption.

** Mortgagee refiled complaint for foreclosure several months later, reflecting an earlier dismissal of the case.

*** Complaint for foreclosure was filed by Senior lienholder, reflecting a dismissal of the foreclosure case by the junior lienholder.

FIGURE 6

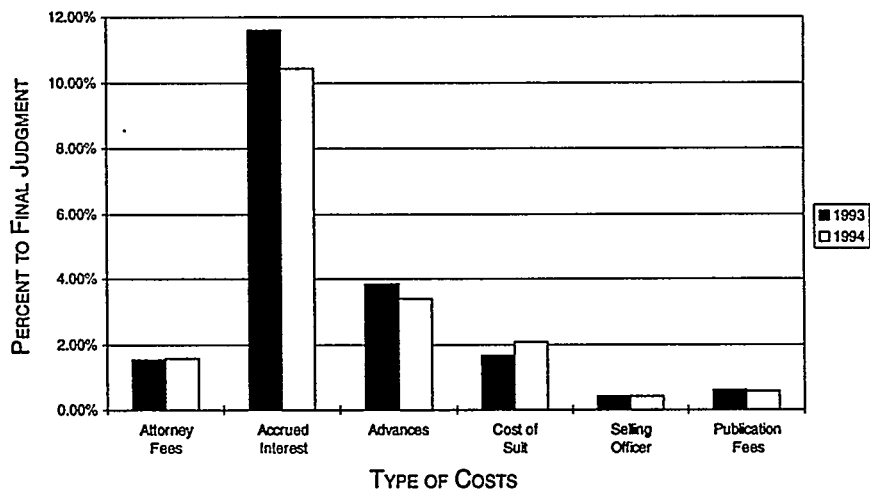
1994 DISMISSED CASES



	1994
Bankruptcy	51
Sold by defendant	59
Refinance	31
Redemption	21
Reinstatement	78
Deed in lieu	5
Workout	50
Misc.	11
Consent	1
Total	307

FIGURE 12

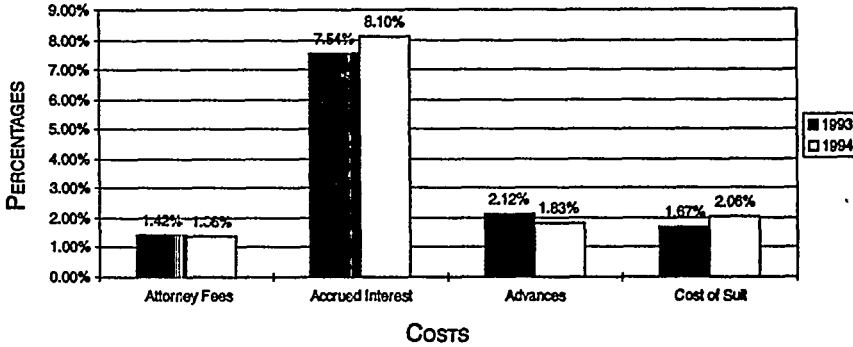
PERCENT OF COSTS RELATIVE TO FINAL JUDGMENT*



	1993	1994
Attorney Fees	1.52%	1.56%
Accrued Interest	11.59%	10.44%
Advances	3.85%	3.41%
Cost of Suit	1.66%	2.05%
Selling Officer	0.40%	0.40%
Publication Fees	0.59%	0.57%

FIGURE 13A

COMPARISON OF RATIO OF COSTS TO FINAL JUDGMENT
(DEFAULT TO JUDGMENT)



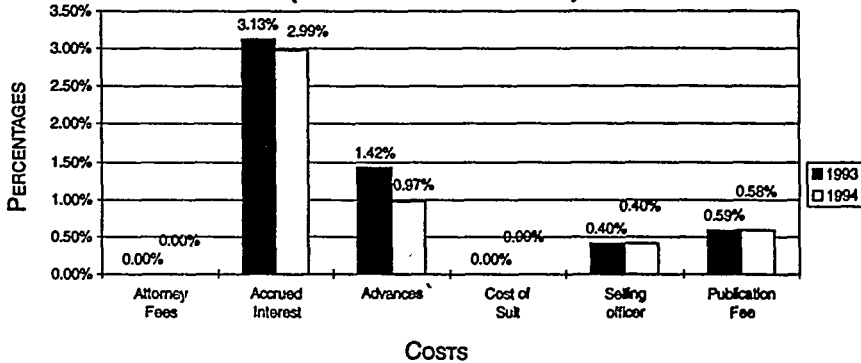
Costs up to Judgment*

	1993	1994
Attorney Fees	1.42%	1.36%
Accrued Interest	7.54%	8.10%
Advances	2.12%	1.83%
Cost of Suit	1.67%	2.06%
Total	12.75%	13.35%

*See Figure 12

FIGURE 13B

COMPARISON OF RATIO OF COSTS TO FINAL JUDGMENT
(JUDGMENT TO JUDICIAL SALE)



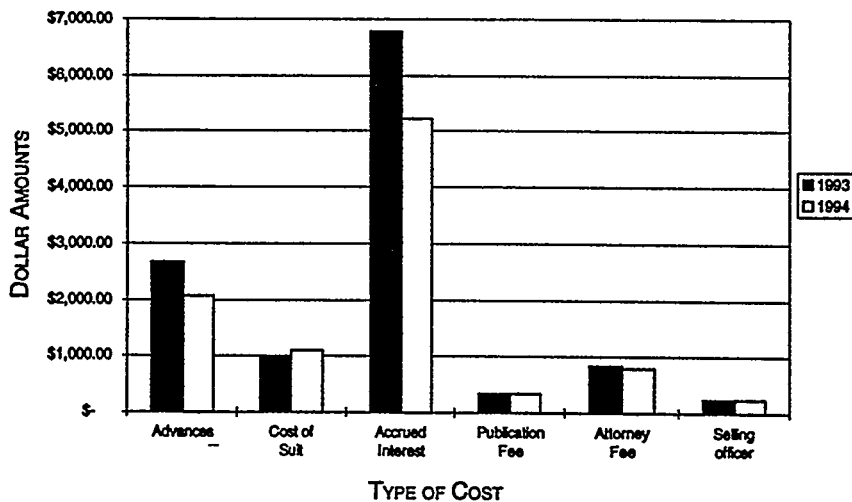
Costs Judgment to Judicial Sale*

	1993	1994
Attorney Fees	0.00%	0.00%
Accrued Interest	3.13%	2.99%
Advances	1.42%	0.97%
Cost of Suit	0.00%	0.00%
Selling officer	0.40%	0.40%
Publication Fee	0.59%	0.58%
Total	5.54%	4.94%

*See Figure 12

FIGURE 14

COMPARISON OF VARIOUS COSTS*

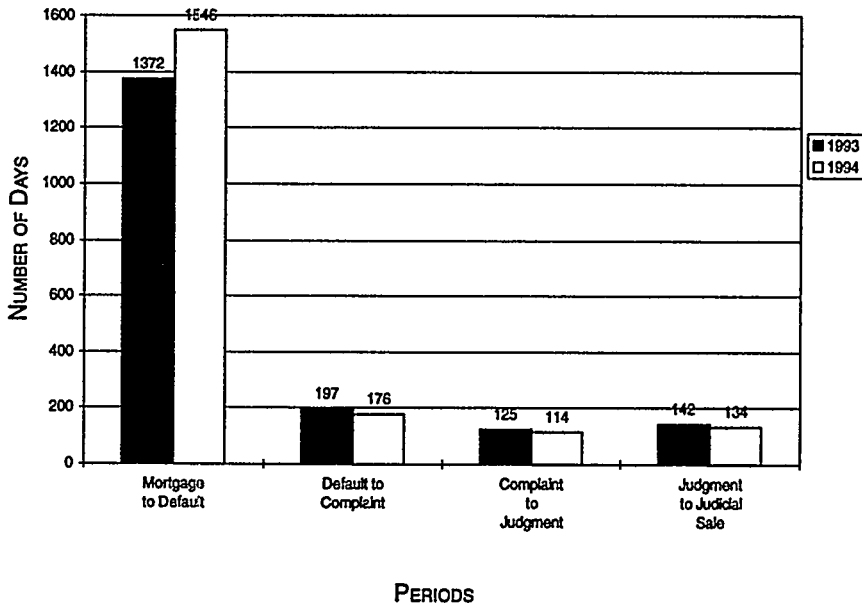


	1993	1994
Advances	\$ 2,658.29	\$ 2,067.01
Cost of Suit	\$ 994.25	\$ 1,106.98
Accrued Interest	\$ 6,786.76	\$ 5,215.41
Publication Fee	\$ 328.00	\$ 328.00
Attorney Fee	\$ 850.00	\$ 800.00
Selling officer	\$ 250.00	\$ 250.00

* These amounts do not equal the summation of the amounts in Fig. 14a and Fig. 14b because we did not have the same data for all the cases, thus resulting in minor discrepancies. See footnote 73 of the article.

FIGURE 15

COMPARISON OF NUMBER OF DAYS



PERIODS	1993	1994
Mortgage to Default	1372	1546
Default to Complaint	197	176
Complaint to Judgment	125	114
Judgment to Judicial Sale	142	134

TABLE 1[†]
Nonjudicial and Judicial Foreclosure

STATE	Time to Complete From Receipt of Notice to Foreclose*	Statutory Redemption Rights / Time Period**	Reinstatement Rights/ Time Period***	Anti-Deficiency Statutes****	One-Action Rule*****
Alabama -Nonjudicial	30 days	1 year post-sale	No	No (NJ)(J)	No (NJ)(J)
-Judicial	4-6 months if not contested	1 year post-sale	No		
Alaska -Nonjudicial	90 days	No	Yes, pre-sale	Yes ¹ (NJ)	No (NJ)
-Judicial	6-8 months if no defenses asserted 12-14 months if defenses asserted	1 year from order confirming sale	Yes, pre-sale	No (J)	No (J)
Arizona -Nonjudicial	90 days	No	Yes, pre-sale	No ² (NJ)(J)	No (NJ)(J)
-Judicial	4-18 months	6 months post-sale (if not agricultural <i>and</i> abandoned, then 30 days post-sale)	Yes, pre-sale		

†. Information derived from the Fifty State Digest.

* As a practical matter - court delays, etc. Median time for Nonjudicial proceeding is two months. Median time for judicial proceeding is eight months. To the extent the reports for a state provided a range of time, these median figures are calculated using the average time within the reported range.

** Median - six months post-sale.

*** "Pre-sale" means any time up to the date of sale.

**** "Anti-Deficiency Statute" means, as used herein, that if a foreclosure sale yields less than the mortgage debt, the mortgagee is not permitted to obtain a judgment for the difference against the mortgagor (unless stated otherwise in a footnote).

***** "One-Action Rule," as used herein, means that a creditor is required to pursue its remedies against a defaulting borrower in a single action, and cannot sue the debtor for personal liability until the security has been exhausted (unless stated otherwise in a footnote).

1. The statute prohibits an action or judgment against the maker, surety, or guarantor on the obligation secured by the deed of trust.

2. However, deficiency judgments are prohibited with respect to loans for the payment of the balance of the purchase price or to secure a loan to pay all or part of the purchase price of residential property of 2.5 acres or less.

STATE	Time to Complete From Receipt of Notice to Foreclose*	Statutory Redemption Rights/ Time Period**	Reinstatement Rights/ Time Period***	Anti-Deficiency Statutes****	One-Action Rule*****
Arkansas -Nonjudicial	60 days	No	Yes, pre-sale	No ³ (NJ)	No (NJ)
-Judicial	At least 50 days	Pre-sale and Post-sale within 1 year (Waivable)	Yes, pre-sale	No (J)	Yes (J)
California -Nonjudicial	90 days	Yes, 3 months pre-sale.	Yes, 5 days prior to sale.	Yes (NJ)	Yes (NJ)
-Judicial	3months to 5 years	Yes, 1 year post-sale	Yes, presale.	No ⁴ (J)	Yes ⁴ (J)
Colorado -Nonjudicial	4-8 months	60 days pre-sale	Yes, up to 1 day prior to sale	No (NJ)(J)	No (NJ)(J)
-Judicial	Minimum 6 months if contested 3 months if uncontested	75 days post-sale; however, 6 months post-sale if "agricultural real estate"	Yes, pre-sale		

3. However, a deficiency action must be filed within 12 months of sale date.

4. However, no deficiency is available after foreclosure, whether by judicial sale or by trustee's sale, if (1) the debt is one that was given to a vendor to evidence the unpaid balance of the sales price or (2) the property being foreclosed upon is a one-to-four unit dwelling occupied by the borrower and the debt was incurred to pay all or part of the purchase price therefor. No deficiency is available "upon a note secured by a deed of trust or mortgage upon real property or an estate for years therein" after a sale of the property or estate for years pursuant to the trustee's power of sale. In addition, if a deficiency is permitted, it is subject to a fair value limitation.

5. Section 726, subdivision (a) provides in part: "There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property ... in accordance with the provisions of this chapter." "As judicially construed, section 726 is both a 'security-first' and 'one-action' rule: "It compels the secured creditor, in a single action, to exhaust his security judicially before he may obtain a monetary 'deficiency' judgment against the debtor." *O'Neil v. General Security Corp.* 4 Cal. App.4th 587, 597 (1992). In operation, the one form of action rule applies to any proceedings or action by the beneficiary for the recovery of the debt, or enforcement of any right, secured by a mortgage or deed of trust. The only "action" that is permitted is foreclosure; any other "action" is a violation of the rule that invokes severe sanctions." If the secured creditor seeks a personal money judgment against the debtor without seeking foreclosure of the mortgage or deed of trust, this is an election of remedies, and the creditor thereby waives the right to foreclose on the security or sell the security under a power of sale. *See Walker v. Community Bank*, 10 Cal.3d 729, 733 (1974).

STATE	Time to Complete From Receipt of Notice to Foreclose*	Statutory Redemption Rights / Time Period**	Reinstatement Rights/ Time Period***	Anti-Deficiency Statutes****	One-Action Rule*****
Connecticut -Nonjudicial	Not Available	N/A	N/A	N/A (NJ)	N/A (NJ)
-Judicial	Approximately 100 days	At least ⁶ 20 days pre-sale	No	No ⁷ (J)	Yes (J)
Delaware -Nonjudicial	Not Available	N/A	N/A	N/A (NJ)	N/A (NJ)
-Judicial	3-4 months	At least ⁸ 3 weeks pre-sale.	No	No (J)	No (J)
D.C. -Nonjudicial	40 days	At least ⁹ 30 days pre-sale.	Yes, pre-sale	No (NJ)	No (NJ)
-Judicial	Generally not done	N/A	N/A	N/A (J)	N/A (J)
Florida -Nonjudicial	Not Available	N/A	N/A	N/A (NJ)	N/A (NJ)
-Judicial	3-6 months	Before the sale to 10 days after the sale	No	No (J)	No(J)
Georgia -Nonjudicial	4 weeks	1 year post-sale	No	No ¹⁰ (NJ)(J)	No (NJ)(J)
-Judicial	1-3 years	1 year post-sale	No		
Hawaii -Nonjudicial	1 month minimum	No statutory right of redemption	Yes, approx. 5 weeks pre-sale	No (NJ)(J)	No (NJ)(J)
-Judicial	5-6 months	No statutory right of redemption	Yes, at least 3 weeks pre-sale		

6. Where the table states "at least" a certain length of time, this is done because no time period is set forth in the statute for the redemption. However, there is a minimum time period set forth in the statute between the time notice is sent up to the date of sale, and also the publication time period.

7. A deficiency judgment may be obtained if the person having an obligation to pay in connection with the underlying note was cited as a defendant in the foreclosure action.

8. See *supra* note 6.

9. See *supra* note 6.

10. No deficiency can be obtained unless confirmed by superior court action finding that sale was fairly held and that property brought its fair market value.

STATE	Time to Complete From Receipt of Notice to Foreclose*	Statutory Redemption Rights / Time Period**	Reinstatement Rights/ Time Period***	Anti-Deficiency Statutes****	One-Action Rule*****
Idaho -Nonjudicial	125-140 days	No	Yes, within 115 days from date notice of default is recorded.	Yes (NJ)(J)	Yes (NJ)(J)
-Judicial	60 days or more	6 months for real property of 20 acres or less post-sale. Above that acreage is 1 year post-sale.	Yes, within 115 days from date notice of default is recorded.		
Illinois -Nonjudicial	Not Available	N/A	N/A	N/A (NJ)	N/A (NJ)
-Judicial	9 months to 1 year with a minimum of 90 days	7 months residential pre-sale; 6 months commercial pre-sale (Waivable) ¹¹	Yes, pre-sale	No (J)	No (J)
Indiana -Nonjudicial	Not Available	N/A	N/A	No (NJ)(J)	No (NJ)(J)
-Judicial	6 weeks to 6months	At least ¹² 20 days pre-sale	Yes, pre-sale		
Iowa -Nonjudicial	60 days	30 days post-sale	No	No (NJ)(J)	No (NJ)(J)
-Judicial	12-18 months	Up to 1 year post-sale	No		
Kansas -Nonjudicial	Not Available	N/A	N/A	N/A (NJ)	N/A (NJ)
-Judicial	6- 18 months	12 months post-sale (Waivable)	Yes, pre-sale	No (J)	Yes ¹³ (J)

11. If the mortgagee, as the purchaser, bids less than the debt amount, the borrower is granted a 30 day post-sale redemption period. This is for residential only.

12. See *supra* note 6.

13. A form of one-action exists. This rule uses the doctrine of *res judicata* to preclude a party from suing another party more than once on the same claim. Bringing an action to enforce a promissory note without simultaneously seeking to foreclose under the mortgage securing the note may result in a waiver of the lender's right to enforce the mortgage.

STATE	Time to Complete From Receipt of Notice to Foreclose [†]	Statutory Redemption Rights / Time Period ^{**}	Reinstatement Rights/ Time Period ^{***}	Anti-Deficiency Statutes ^{****}	One-Action Rule ^{*****}
Kentucky -Nonjudicial	Not Available	N/A	N/A	N/A (NJ)	N/A (NJ)
-Judicial	4- 6 months at a minimum	1 year post-sale	No	No (J)	No (J)
Louisiana -Nonjudicial	Not Available	N/A	N/A	N/A (NJ)	N/A (NJ)
-Judicial	45-90 days	No	No	No (J)	No (J)
Maine -Nonjudicial	Power of sale -- 30 to 45 days (only used with corporations). Foreclosure by notice ¹⁴ - 60 days (rarely used).	Power of sale -- No; Foreclosure by notice - 1 year post-sale	No	No (NJ)(J)	No (NJ)(J)
-Judicial	6-9 months	90 days from date of judgment	No		
Maryland -Nonjudicial	60-75 days for sale ratification plus 40-60 days for audit ratification.	No	Yes, pre-sale	No(NJ)(J)	No (NJ)(J)
-Judicial	60-75 days for sale ratification plus 40-60 days for audit ratification.	No	Yes, pre-sale		

14. "Foreclosure by notice" means that, after breach of the condition, the mortgagee or any person claiming under him may proceed for the purpose of foreclosure in either of the following modes: (1) By giving public notice in a newspaper of general circulation in the county or adjoining county for 3 weeks successively of his claim by mortgage on such real estate, to be recorded within 30 days after such notice. (2) By causing an attested copy of such notice to be served on the mortgagor(s), if he lives in the State, by the sheriff of the county where the mortgagor resides, by delivering it to him in hand or leaving it at his last and usual place of abode, to be recorded within 30 days after such service. *See* ME. REV. STAT. ANN. tit. 14, § 6203.

STATE	Time to Complete From Receipt of Notice to Foreclose*	Statutory Redemption Rights / Time Period**	Reinstatement Rights/ Time Period***	Anti-Deficiency Statutes****	One-Action Rule*****
Massachusetts -Nonjudicial	5-12 weeks	At least ¹⁵ 3 weeks pre-sale	No, unless document states otherwise	No (NJ)(J)e	No (NJ)(J)
-Judicial (rarely used)	2 months	6 months post-sale	No		
Michigan -Nonjudicial	7 1/2 months	6 months, post-sale	No	No(NJ)(J)	Yes (NJ)(J)
-Judicial	Minimum 13 months	6 months post-sale	Yes, pre-sale		
Minnesota -Nonjudicial	2 months	6 mos post-sale	Yes, pre-sale	No (NJ)	Yes (NJ)
-Judicial	11 months	6 mos post-sale	Yes, pre-sale	No (J)	No (J)
Mississippi -Nonjudicial	6 weeks	No	Yes, if an installment obligation, pre-sale.	No (NJ)(J)	No (NJ)(J)
-Judicial (rarely used)	Lengthy proceeding	Yes, if installment obligation, pre-sale. (Terms set by the court.)	No		
Missouri -Nonjudicial	45-60 days	1 year post-sale	No, unless stated otherwise in the loan documents.	No(NJ)(J)	No (NJ)(J)
-Judicial (rarely used)	Lengthy proceeding	6 months post-sale	No		
Montana -Nonjudicial	1 month	1 year post-sale	No	Yes (NJ)	Yes (NJ)
-Judicial	Minimum 3 months	1 year post-sale	No	No (J)	Yes (J)

15. See *supra* note 6.

STATE	Time to Complete From Receipt of Notice to Foreclose [†]	Statutory Redemption Rights / Time Period ^{**}	Reinstatement Rights/ Time Period ^{***}	Anti-Deficiency Statutes ^{****}	One-Action Rule ^{*****}
Nebraska -Nonjudicial	3-4 months. Farm property - 4-5 months	No	Yes, w/in 1 month of notice of default. Farm prop w/in 2 months.	No (NJ)(J)	Yes (NJ)(J)
-Judicial	4-6 months	Yes, at least ¹⁶ 4 months pre-sale.	Yes		
Nevada -Nonjudicial	3 months	No	Yes, within 35 days of notice of default	Yes (NJ)(J)	Yes (NJ)(J)
-Judicial	Rarely used.	1 year post-sale	No		
New Hampshire -Nonjudicial	25 days	No	Yes, pre-sale	No(NJ)(J)	No (NJ)(J)
-Judicial	1 year and several months	No	No		
New Jersey -Nonjudicial	Not available	N/A	N/A	N/A (NJ)	N/A (NJ)
-Judicial	Not specified	10 days post-sale. ¹⁷	Yes, pre-sale	Yes ¹⁸ (J)	No (J)
New Mexico -Nonjudicial	180 days, does not include residential property	No	Yes, up to 1 day prior to sale.	No(NJ)(J)	No (NJ)(J)
-Judicial	90-120 days	9 months post-sale	Yes, pre-sale		

16. See *supra* note 6.

17. A deficiency judgment revives the post-sale redemption period for another 6 months.

18. Pertains only to residential.

STATE	Time to Complete From Receipt of Notice to Foreclose ^o	Statutory Redemption Rights / Time Period ^o	Reinstatement Rights/ Time Period ^o	Anti-Deficiency Statutes ^o	One-Action Rule ^o
New York -Nonjudicial	4-6 months	Yes, at least ¹⁹ 12 weeks pre-sale	No	No ²¹ (NJ)(J)	Yes ²² (NJ)(J)
-Judicial	12-18 months	Yes, at least ²⁰ 3 ½ weeks pre-sale	No		
North Carolina -Nonjudicial	40 days	10 days post-sale	No, unless stated otherwise in the loan documents. No	No ²³ (NJ)(J)	No (NJ)(J)
-Judicial	2-3 years	Yes, 30 days pre-sale			
North Dakota -Nonjudicial	Not available	N/A	N/A	N/A (NJ)	N/A (NJ)
-Judicial	3-4 months	1 year post-sale	Yes, pre-sale	No ²⁴ (J)	Yes (J)
Ohio -Nonjudicial	Not available	N/A	N/A	N/A (NJ)	N/A (NJ)
-Judicial	6 mos. - 1 year	2-4 weeks post-sale	No	No(J)	No (J)

19. See *supra* note 6.

20. See *supra* note 6.

21. If mortgagee elects to foreclose, it may recover any deficiency from the maker or guarantor of the note by (1) naming the maker or guarantor as a defendant in the foreclosure action and properly serving it; and (2) moving for a judgment for the deficiency within 90 days after foreclosure sale is completed. Failure to seek deficiency judgment in the foreclosure action bars any further action for the deficiency.

22. According to the Fifty State Digest, a mortgagee is generally not permitted to sue at law on the note or on any guaranty at the note and *at the same time* to sue in equity to foreclose the mortgage (the foreclosure proceeding would have to be by leave of the court unless final judgement has been rendered and at execution [which may only be directed at the property of the defendant other than the mortgaged premises] has been returned wholly or partly unsatisfied). Some New York real estate attorneys argue that New York law does not have a "one-action rule" and disagree with the Fifty State Digest on this issue.

23. The anti-deficiency statute relates only to purchase money mortgages given by buyers of real estate to their sellers to secure the purchase money debt, and protects the purchaser / borrower, including a co-maker who has an interest in the real estate. The statute does not exclude commercial transactions. In a non-purchase money context, action for deficiency must be commenced within one year of foreclosure.

24. The action to obtain the deficiency judgment must be brought within ninety days after the sale. The amount of the deficiency judgment actually does not have a direct connection to the amount bid at the sheriff's sale but rather is an amount determined by a jury to be the difference between the fair value of the mortgaged premises and debt previously adjudged due.

STATE	Time to Complete From Receipt of Notice to Foreclose*	Statutory Redemption Rights / Time Period**	Reinstatement Rights/ Time Period***	Anti-Deficiency Statutes****	One-Action Rule*****
Oklahoma -Nonjudicial	75 days - 9 months	Yes, at least ²⁵ 35 days pre-sale	No, unless stated in the loan documents	Yes (NJ)(J)	Yes (NJ)(J)
-Judicial	90 days - 9 months	Yes, at least ²⁶ 6 months pre-sale	No		
Oregon -Nonjudicial	150 days	No	Yes, up to 5 days prior to sale.	Yes (NJ)(J)	No (NJ)(J)
-Judicial	120 days - 1 year	180 days post-sale	Yes, pre-sale		
Pennsylvania -Nonjudicial	Not available	N/A	N/A	N/A (NJ)	N/A (NJ)
-Judicial	1 - 3 years	At least ²⁷ 30 days pre-sale	No	No (J)	No (J)
Rhode Island -Nonjudicial	41 days	No	No	No (NJ)	No (NJ)
-Judicial	Not available	N/A	N/A	N/A (J)	N/A (J)
South Carolina -Nonjudicial	Not available	N/A	N/A	N/A (NJ)	N/A (NJ)
-Judicial	Minimum of 100 days	No	No	No (J)	Yes ²⁸ (J)
South Dakota -Nonjudicial	30-50 days	Under 40 acres - 180 days post-sale; over 40 acres - 1 year post-sale	Yes, pre-sale	Yes (NJ)(J)	Yes (NJ)(J)
-Judicial	75-90 days	Under 40 acres - 180 days post-sale; over 40 acres - 1 year post-sale	Yes, pre-sale		

25. See *supra* note 6.

26. See *supra* note 6.

27. See *supra* note 6.

28. Not clear, but case law suggests the existence of a one-action rule with respect to suits on notes and mortgages.

STATE	Time to Complete From Receipt of Notice to Foreclose*	Statutory Redemption Rights / Time Period**	Reinstatement Rights/ Time Period***	Anti-Deficiency Statutes****	One-Action Rule*****
Tennessee -Nonjudicial	21 days	Yes, at least ²⁹ 25 days pre-sale (Waivable)	Yes, only if prior to acceleration	No (NJ)(J)	No (NJ)(J)
-Judicial (rarely used)	6 months- 1 year	2 years post-sale	No		
Texas -Nonjudicial	1-3 months	No, except for IRS, which has 120 days post-sale	No, unless stated otherwise in the loan documents.	No (NJ)(J)	No (NJ)(J)
-Judicial (rarely used)	3 years	No	No, unless stated otherwise in the loan documents.		
Utah -Nonjudicial	120 days	No	Yes for 90 days after filing of default notice.	Yes (NJ)(J)	Yes (NJ)(J)
-Judicial	5-6 months	6 months, post-sale (Not waivable)	Yes		
Vermont -Nonjudicial	Not available	N/A	N/A	N/A (NJ)	N/A (NJ)
-Judicial	6 months - 1 year	6 months pre-sale	No	No (J)	No (J)
Virginia -Nonjudicial	4-8 weeks	Yes, at least ³⁰ 40 days pre-sale	No, unless provided for in loan documents	No (NJ)	No (NJ)
-Judicial	Not available	N/A	N/A	N/A (J)	N/A (J)
Washington -Nonjudicial	190 days	No	Yes, up to 11 days prior to sale.	Yes (NJ)(J)	Yes (NJ)(J)
-Judicial	18-24 months	1 year post-sale	Yes, pre-sale		

29. See *supra* note 6.

30. See *supra* note 6.

STATE	Time to Complete From Receipt of Notice to Foreclose*	Statutory Redemption Rights / Time Period**	Reinstatement Rights/ Time Period***	Anti-Deficiency Statutes****	One-Action Rule*****
West Virginia -Nonjudicial	Information not available	Yes, at least ³¹ 50 days pre-sale	No No	No (NJ)(J)	No (NJ)(J)
-Judicial	Information not available	Yes, terms set by the judge			
Wisconsin -Nonjudicial	Abolished in WI.	N/A	N/A	N/A (NJ)	N/A (NJ)
-Judicial	6 months - 1 year	6 months post-sale	No	Yes (J)	Yes (J)
Wyoming -Nonjudicial	6 months (or less)	90 days post-sale	Yes, pre-sale	No(NJ)(J)	No (NJ)(J)
-Judicial	6-12 months	90 days post-sale	Yes, pre-sale		

31. See *supra* note 6.

