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Commercial real estate foreclosures in Illinois—They're not always the same

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With the proliferation of real estate foreclosures in these difficult economic times, many experienced practitioners are finding themselves involved in some aspect of foreclosure litigation for the first time. Indeed, given the dramatic increase in foreclosure filings, even experienced foreclosure attorneys may face new challenges, with only limited educational and legal resources offering practical guidance. Such is particularly true in the field of commercial foreclosures, which has traditionally represented only a small percentage of all foreclosures. However, recent economic indicators suggest that commercial foreclosure filings will see a significant increase in the near future. This article will focus on one particular issue that has recently been the subject of debate in foreclosure circles, the statutory right of reinstatement, and whether it can be waived in commercial mortgages.

The Illinois Mortgage Foreclosure Law (the "IMFL"), found at 735 ILCS 5/15-1101, *et seq.*, governs all real estate foreclosures in Illinois. The IMFL not only establishes a comprehensive set of fairly strict procedural rules, such as the manner in which a foreclosure complaint must be drafted, but also it affords parties certain substantive statutory rights, including the rights of reinstatement and redemption. These statutory rights, often confused with one another by attorneys, lenders and borrowers alike, are important to understand thoroughly, as they can greatly impact not only the ability of lenders to foreclose, but also the potential for borrowers to prevent, delay or even terminate a foreclosure action.

In order to focus on reinstatement in a commercial context, a general understanding of reinstatement and redemption is necessary. Reinstatement is a fairly easy concept to understand. Found at 735 ILCS 5/15-1602, reinstatement essentially allows a borrower to force a lender to put a real estate loan back into a non-default status, and to return to the original, regular payment schedule contemplated by the loan documents before the event of default took place. This right is conditioned upon the borrower curing all existing defaults, paying all of the lender's costs and expenses in initiating the foreclosure suit (if the loan documents so provide) and by paying all missed principal payments plus accrued regular and default interest (if applicable). The right of reinstatement exists for the first 90 days following service of process on the last mortgagor served, and it can typically be used only once every five years on the same mortgage.

Unlike reinstatement, redemption does not force a lender to place a defaulted loan back into service. Quite the opposite, in fact, the statutory right of redemption permits a borrower to stop a foreclosure by paying the lender all principal and accrued interest, costs, expenses and attorney fees (if provided for in the mortgage) as specified in the Code. 735 ILCS 5/2-1603(d). Essentially, the right of redemption creates a method by which a borrower could, quite literally, get its real estate back once the foreclosure process is underway. In some circumstances, this could occur even after a judgment is rendered, if the borrower is fortunate enough to find a new source of funding.

Many modern commercial mortgages

contain a provision under which the mortgagor waives its statutory right of reinstatement. While most lenders may allow a defaulted borrower to bring his loan current by paying, in full, all missed principal payments, accrued regular and default interest, plus attorney fees and costs, and thus return a commercial loan with a decent interest rate back into service, if that borrower regularly misses payments, forgets to timely pay real estate taxes, and has become a greater credit risk than in the past, some lenders may prefer simply to get the borrower "out of the bank." In such cases, it is important to consider whether the mortgage's reinstatement waiver is enforceable.

Section 15-1602 of the IMFL unquestionably creates a limited right of reinstatement in any modern mortgage, regardless of the type of real estate involved, although nothing in section 15-1602 prohibits a party from waiving this statutory right of reinstatement.

The preceding section, however, is titled "Waiver of Rights of Reinstatement and Redemption." 735 ILCS 5/15-1601. Subsection (a) expressly prohibits any waiver of the right of reinstatement or redemption in connection with residential and certain agricultural property.¹ This subsection voids all mortgage provisions which purport to make such waivers associated with those types of real estate. However, subsection (a) fails to reference and is completely silent as to commercial property.

Instead, the following subsection (b) is left to deal with "other real estate." This subsection provides that the right of *redemption* can be waived, under certain circumstances, in connection certain specified types of real

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estate. And while subsection (b) sets forth certain instances where the right of redemption can indeed be waived, particularly on corporate-owned agricultural land and other non-residential real estate, this section is entirely silent as to waiving the right of *reinstatement* on any type of land.

Taken together, sections 15-1601 and 15-1602 of the IMFL create an interesting question. First, the legislature created two rights: reinstatement and redemption, for all types of modern mortgages. Then, the legislature prohibited parties from waiving either of those rights on certain types of property (residential and some agricultural), and finally the legislature described how to waive one of those two rights (redemption) on certain other types of property (corporate-agricultural and commercial).

The question begs, what about waiving the other right, reinstatement, on commercial property?

The primary argument against the validity of a reinstatement waiver is that (1) by granting rights of reinstatement and redemption, but then (2) by expressly explaining how and when only the right of redemption can be waived, while remaining silent on waiving reinstatement, (3) the legislative intent must only have been to allow waivers of redemption.

Another argument focuses on the fact that the IMFL requires a plaintiff to state, in a foreclosure complaint, whether the right of redemption has been waived, but there is no requirement that the plaintiff state whether the right of reinstatement has been waived. This too could arguably signal the legislative intent that the right of reinstatement cannot be waived.

Notwithstanding these arguments which on their face seem to have some merit, a careful analysis of the IMFL in connection with the rules of statutory construction leads to a different result.

First, it is unquestionable that the legislature can enact laws which give individuals certain rights, even rights which are in derogation of the common law. *McMinn v. Cavanaugh*, 177 Ill. App. 3d 353, 356 (1st Dist. 1988). It is also true, however, that parties enjoy the freedom of contract, which

rests deeply in the common law. *Simmons v. Columbus Venetian Stevens Buildings, Inc.*, 20 Ill. App. 2d 1, 12 (1st Dist. 1958). Given the right of freedom of contract, Illinois has long recognized the right of a party to waive a statutory provision that was designed for his benefit. *Household Bank v. Lewis*, 229 Ill. 2d 173, 183 (2008), *see also*, *Gallagher v. Lenart*, 226 Ill. 2d 208, 239 (2007). Of course, the legislature may also prohibit parties from waiving specific statutory rights, regardless of any contractual language to the contrary. *Household Bank*, 229 Ill. 2d at 183-84.²

The rules of statutory construction followed by courts in Illinois tend to favor the conclusion that a waiver of the right of reinstatement on commercial mortgages is indeed valid. There are two primary reasons for such a conclusion. First, "...a court may not add provisions that are not found in a statute, nor may it depart from a statute's plain language by reading into the law exceptions, limitations, or conditions that the legislature did not express." *Household Bank*, 229 Ill. 2d at 183.

Applying this rule of statutory construction to sections 15-1601 and 15-1602 of the IMFL, it is apparent that the legislature was entirely silent on whether the right of reinstatement can be waived in commercial mortgages. While other, more specific provisions exist in the IMFL that touch upon waivers in certain contexts, there is no express statutory prohibition on granting such a waiver. Therefore, any conclusion that the legislature intended to prohibit such waivers would mean adding provisions to the IMFL which depart from a plain reading thereof.

Furthermore, while this particular issue has not been considered by any court of review in Illinois, the Appellate Court has considered a nearly identical conundrum in construing certain tax laws. In *Com. Ed. Co. v. I.P.T.A. Bd.*, the Appellate Court had to resolve a similar statutory "conflict" concerning the Illinois Property Tax Code. The court explained:

...[S]ection 9-145 of the Property Tax Code provides that property shall be valued for tax purposes as a fraction of its fair cash value. The Property Tax Code also provides for **different**

valuation procedures for special properties including solar energy systems, historic residences, airports, farmland sports stadiums, low income housing projects, and properties owned by veterans and fraternal organizations. In addition, section 10-230 of the Property Tax Code specified that, from 1997 through 1999, electrical generating plants were to be assessed using the historic-cost method. It is well established that, absent any strong indication of a contrary legislative intent, the legislature's decision to enumerate one thing in a statute implies the exclusion of all other similar non-enumerated things. Applying this rule of statutory construction to the provisions noted above, and noting that there is no contrary intent discernible in the Property Tax Code, we conclude that the legislature mandated certain specific valuation methods for "special" properties falling within the enumerated categories set forth above. Interestingly, while it set forth a method for electrical generating plants, it did not include other electrical utility real property within that particular provision. Likewise, utility transmission corridors are not included in the enumerations of special properties that are to be valued in a particular way. This omission from the list of special properties implies that transmission corridor properties are not to be valued in a particular way but, rather, their fair cash values are to be determined according to the circumstances of the case. Section 10-230 of the Property Tax Code does not change the conclusion, as it was applicable only from 1997 through 1999 and did not include electrical utility property other than electrical generating plants. The legislative intent discernible in the Property Tax Code, therefore, contradicts ComEd's contention that only the historic-cost method is available to value the subject property.

378 Ill. App. 3d 901, 915-16 (2nd Dist. 2008)

(emphasis added, internal citations omitted).

Com Ed stands for the proposition that where a general statute governs how to handle a general category of items (i.e. taxes a-z), then a more specific statute overrides the general statute but only as to a subset of items (taxes x, y and z), the remaining general items (taxes a-w) are still controlled by the more general statute.

Applying this reasoning to reinstatement, the IMFL “universe” grants borrowers a number of statutory rights (rights a-z). Within the IMFL universe, there is also a specific provision that bars borrowers from waiving some of their statutory rights within that universe: reinstatement on residential and agricultural property (rights y and z). Under *Com Ed*, nothing should prevent the borrower from

waiving his other IMFL rights (rights a-x).

When weighed against one another, the argument against the ability to waive reinstatement in a commercial mortgage is the less defensible position. No matter what arguments are made, the fact remains that such a conclusion cannot be drawn from a plain reading of the IMFL, which is silent on the issue. Any decision that a commercial borrower cannot waive his right of reinstatement would require a court to add a restrictive provision to the IMFL which is simply not there. On the other hand, by considering only the language that exists in the IMFL, and by applying the rules of statutory construction which have guided the courts for decades, the enforcement of a reinstatement waiver in a commercial mortgage is

the more logical decision. ■

1. Residential real estate under the IMFL is generally a single-family home, condominium dwelling unit, or a multi-unit structure with up to six dwelling units in which at least one mortgagor has his principal residence. 735 ILCS 5/15-1219.

2. One well-known example of the legislature forbidding parties from waiving specific statutory rights can be found in the Construction Contract Indemnification Act, which voids any agreement in a construction contract purporting to indemnify or hold harmless a party for its own negligence. 740 ILCS 35/0.01 et seq. Absent this specific prohibition, such waivers would be valid because, “Under Illinois law, contracts of indemnity against one’s own negligence are generally valid and enforceable, provided that the indemnitor’s obligations are set forth in clear and explicit language.” *B.N.R.R. Co. v. Pawnee Motor Svc., Inc.*, 171 Ill. App. 3d 1043, 1045 (1st Dist. 1988).

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