

**ILLINOIS MORTGAGE FORECLOSURE AND
EMINENT DOMAIN PROCEDURES**

FORECLOSURES

I. Applicable Law

A. What law governs?

1. Foreclosure procedure almost always determined by the situs of the property regardless of what the loan documents say
 - a. If loan documents provide that law of a jurisdiction other than the situs of the property governs, a court may look to that law to construe the loan documents, but usually will look to law of the situs of the property to determine proper foreclosure procedures
 - b. The line between substance and procedure can be murky. For example, is a right to reinstate procedural or substantive?

B. Impact

1. Some states allow non-judicial foreclosures (such as Texas, California, Missouri) while others (such as Illinois) do not
2. Some states (such as California) have single-action rules while others (such as Illinois) do not (states with single-action rules allow only one suit to collect the mortgage debt so you cannot sue to foreclose and then sue later on a guaranty)
3. Some states have anti-deficiency statutes (such as California) while others (such as Illinois) do not
4. What law governs can also have big impact on time and expense to foreclose, and length of redemption periods
5. What law governs can also have impact on receivership/mortgagee in possession rules
6. Priority vis-à-vis mechanics lien and other lien claimants vary per state

II. What Court?

A. State court

1. Always available, just have to get right one -
usually in the county where the property is located

B. Federal court

1. Available in cases of diversity jurisdiction and where United States claims interest in property (28 U.S.C. § 1346(f)) or where United States claims a lien upon the property (28 U.S.C. § 2410)

III. Illinois Foreclosure Procedure

A. Overview

1. A mortgagee must file suit to foreclose
2. Foreclosure procedure applies to all mortgages and some other transactions that resemble mortgages such as certain assignments of beneficial interest and real estate installment sales contracts (735 ILCS 5/15-1106)
 - a. for assignments of beneficial interest ("ABI"), foreclosure act apply where ABI:
 - i. made contemporaneously with creation of land trust;
 - ii. made to secure obligation to repay money; and
 - iii. where the document creating the ABI permits the real estate to be sold to satisfy the obligations secured by it
 - b. for real estate installment contracts, foreclosure act applies where:
 - i. the purchase price is to be paid in installments for a period in excess of 5 years; and
 - ii. the amount unpaid at the time of the filing of the foreclosure, including principal and unpaid interest (at the default rate), is less than 80% of the original price
3. Mortgagee does not have to sue any guarantors simultaneously, but usually elects to do so
4. Mortgagee can sue on the note rather than foreclose
 - in that case, the judgment becomes a lien on all of borrower's assets, not just the mortgaged property
5. Mortgagee can obtain a deficiency judgment against borrower if the right to a deficiency not waived in mortgage documents or during foreclosure

6. Borrower has a statutory right to redeem its property from a foreclosure, but it can waive that right to redeem if:
 - a. the property not residential (generally excludes property with 6 residential units or less);
 - b. borrower is corporation or land trust (if the property is agricultural)

(there is no restriction upon the nature of the borrower for nonresidential property)
 - c. waiver is in writing in mortgage or another writing signed by mortgagor and recorded (hence, it is a good idea to have waiver in the mortgage itself)
7. Redemption periods typically run 60 days to 7 months
 - a. for residential property is seven months from date of service of process upon mortgagor or three months from date of entry of judgment, whichever gives latest redemption date (735 ILCS 5/15-1603(b)(1))
 - b. for non-residential property is six months from date of service of process upon mortgagor or three months from date of entry of judgment, whichever gives latest redemption date (735 ILCS 5/15-1603(b)(2))
 - c. the redemption period is just 30 days after entry of judgment where court finds the property is abandoned (735 ILCS 5/15-1603(b)(4))
 - d. if value of property is less than 90% of amount required to redeem (generally, all principal, interest, and foreclosure costs) and if mortgagee waives right to deficiency, then redemption period is 60 days from date of entry of judgment (735 ILCS 5/15-1603(b)(3))
8. Borrower has a limited right to reinstate its mortgage loan by bringing it current within 90 days from date borrower was served with process or otherwise submitted by court's jurisdiction. Upon reinstatement, mortgagee must dismiss its foreclosure action. (735 ILCS 5/15-1602)

B. General Timetable

1. No opposition, valid waiver of redemption - usually takes about 6 to 8 months to complete a foreclosure
2. No opposition, no valid waiver of right to redeem - usually takes about a year
3. Heavy opposition requiring trial - usually takes 2 to 3 years to complete trial. This does not take into account the timetable for an appeal should

there be one. Even an unsuccessful appeal will add at least one year to the timetable

C. General Procedures

1. Get title report with necessary party list
 - very important to keep title company happy
 - really have two courts - Illinois court and title company
2. Choosing defendants
 - a. Must name all property owners
 - a. Do you want to terminate leasehold interests? Most lenders do not unless the lease is below market or the tenant is a problem
 - b. Usually mortgagee wants to name all mechanics and other lien claimants as well to preserve the mortgage lien's priority
3. Receiver/mortgagee in possession - the borrower stays in possession during the foreclosure unless the mortgagee is allowed to become a mortgagee in possession or unless it is entitled to have a receiver appointed to manage the property during the foreclosure. (735 ILCS 5/15-1701 - 15/1706)
4. Abbreviated summary judgment procedure available for foreclosure actions. (735 ILCS 5/15-1506)
5. The applicable redemption period, if not waived, must expire before the foreclosure sale can take place
6. Sale is by public auction (735 ILCS 5/15-1507), but such sales are very perfunctory - usually very little bidding
7. Get deed upon confirmation of sale, and possession 30 days thereafter unless otherwise ordered. (735 ILCS 5/15-1509, 15-1701(d))

D. Consent Foreclosure (735 ILCS 5/15-1402)

1. Go right to deed - no sale
2. Mortgagee has to waive right to a deficiency judgment
3. Very useful if there are no significant title problems and if lender not real concerned about deficiency judgment
4. Can go very very fast - a week or less

E. Deed-in-lieu of foreclosure

1. Illinois law favors - for example, the Illinois Mortgage Foreclosure Act specifically allows lender to retain lien for purpose of clearing title later if necessary (735 ILCS 5/15-1401)
2. Generally relieves borrower and guarantors of liability unless deed-in-lieu agreement or a contemporaneous document says otherwise

EMINENT DOMAIN

I. WHAT IS IT?

- The inherent right of a sovereign to condemn or appropriate private property for public use.

Examples - private property may be condemned for:

roads
airports
parks
utilities
public buildings

- This power predates and exists apart from our state and federal constitutions. See, e.g., Dept. of Public Works & Buildings v. Kirkendahl, 415 Ill. 214, 112 N.E.2d 611 (1953). So, those constitutions do not create this power - but they do limit it.

II. FEDERAL AND STATE CONSTITUTIONAL LIMITATIONS ON POWER OF EMINENT DOMAIN

A. Federal

Bars taking of property for public use "without just compensation." U.S. Const. amend. V.

Bars states from depriving any person of property "without due process of law." U.S. Const. amend. XIV, § 1.

B. Illinois

Private property "shall not be taken or damaged for public use without just compensation as provided by law" and such compensation "shall be determined by a jury as provided by law." Ill. Const. art. I, § 15

III. PUBLIC USE DOCTRINE

- The general rule is that private property can be condemned only for a "necessary public use."

- But, the large expansion of the range of government services has significantly diluted this requirement. This requirement is now read broadly, but courts will invalidate a taking where there is no public benefit. See, e.g. Deerfield Park District v. Progress Development Corp., 26 Ill.2d 296, 186 N.E.2d 360 (1962)

IV. WHO HAS THE POWER?

- Federal, state governments
- In addition, under Illinois law, legislature can enact laws conferring the eminent domain power upon many of its political subdivisions.
 - the current list of the Illinois political entities having such power is now quite long

V. WHAT'S THE ILLINOIS PROCEDURE?

- A. Entity seeking to exercise condemnation power must: 1) have statutory authority to do; 2) be doing so for a public purpose, and 3) be able to show that the proposed taking is necessary.
- B. The condemning entity is required by law to negotiate (in good faith) with the property owner before filing suit. 735 ILCS 5/7-102. Generally, this means that the condemning authority must offer to purchase the property at issue for its appraised value. See, e.g., Peoples Gas Light & Coke Co. v. Buckles, 24 Ill. 2d 520, 182 N.E.2d 169 (1962). The offer must remain open for a reasonable period of time.
- C. The complaint must lay out power of condemnor, and its attempts to settle. It must also describe the property at issue. See 735 ILCS 5/7-101.
- D. The complaint must name as defendants all those who have any interest in the property. See 735 ILCS 5/7-102.
- E. All defendants must be served with process.
- F. Defendants can answer or file what is commonly called a "traverse." A "traverse" is basically a motion to dismiss. The most common bases for a "traverse" are the lack of authority of the condemnor, or the failure of the condemnor to make a good faith offer to settle.
- G. The usual forms of discovery may be pursued.
- H. Trial
 - The trial is by jury unless waived.
 - The purpose of the trial is to determine the "fair cash market value" ("the amount of money which a purchaser, willing but not obligated to buy the property, would pay to an owner, willing but not obligated to sell in a voluntary sale") of the property as of the date of the filing of the complaint. 735 ILCS 5/7-121.
 - Such trials usually are battles of appraisal experts.

- I. If the party seeking condemnation is successful, the order must lay out the amount of compensation to be paid the property owner.
- J. The funds to be distributed will be distributed to all persons interested in the real estate "according to the fair value of their legal or equitable interests." 735 ILCS 5/7-127.

VI. WHAT HAPPENS IF THE CONDEMNOR NEEDS THE PROPERTY QUICKLY?

- A. Under Illinois law, some entities have the right to acquire property by "quick take procedure." See 735 ILCS 5/7-103, 517-104. Currently, about 150 entities have this right. See 735 ILCS 5/7-103.1 - 5/7-103.148.
- B. This is a drastic remedy to be used only when the immediate use of private property is necessary for a public project and the project cannot wait until a traditional condemnation is completed. Common examples are for road widenings, sewer extensions and sidewalk installations. See 735 ILCS 5/7-103.
- C. The party seeking a "quick take" must first attempt to negotiate with the property owner, and then file suit if those negotiations are unsuccessful.
- D. Then that party must file a motion for "quick take."
- E. At the initial hearing, the court must determine: 1) the authority of the condemnor to do a quick take, 2) whether the property is subject to a quick take, and 3) whether the power is properly exercised.
- F. Once the issues above are resolved in favor of the condemnor, the court must then determine whether there is a public necessity and must preliminarily determine the "just compensation" for the filing. 735 ILCS 5/7-104.
- G. Upon the determination of the amount of "just compensation," the court will enter an order vesting title in the condemnor upon the condemnor's deposit of the full amount of "just compensation" with the court. 735 ILCS 5/7-105.
- H. Thirty days after entry of the order finding that the condemnor has the authority to do a quick take (assuming that there is no appeal), the property at issue is subject to a quick take, and if the quick take power has been exercised properly, the property owner can petition the court to release the "just compensation" deposit to it. 735 ILCS 5/7-106.
- I. The preliminary finding of just compensation "shall not be evidence" in the further proceedings to ascertain finally the just compensation, and "shall not be disclosed in any manner to a jury. . ." 735 ILCS 5/7-104.
- J. If the amount of compensation determined due after a full trial exceeds the preliminary "just compensation" award, the condemning party must pay the balance due. On the other hand, if the "just compensation" deposit exceeds the

amount determined due at trial, then the property owner must refund the excess.
735 ILCS 57-106.

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