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ILLINOIS MORTGAGE FORECLOSURE: PROBLEMS AND SOLUTIONS

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ILLINOIS MORTGAGE FORECLOSURE: PROBLEMS AND SOLUTIONS

The Illinois Mortgage Foreclosure Law (“IMFL”)¹ was enacted in 1987 to integrate many applicable statutes into one governing one and to modify existing law in several respects, most importantly ending the post-sale redemption rights of owners² and terminating the redemption rights of creditors altogether.³

IMFL attempts to specify which interests survive foreclosure and which do not and to set forth various methods by which interests may be terminated in a proceeding.

This article contends that some provisions of IMFL conflict with other bodies of Illinois law and arguably permit certain parties to contend that their interests survive foreclosure when such would not be true were title conveyed in any other context. As a result, jurisdictional publications are undertaken more frequently than necessary, increasing the costs of foreclosure and redemption.

Although this article suggests that a proper reading of existing statutes and application of principles of statutory construction resolve these problems, it concludes by suggesting revisions to IMFL which would explicitly harmonize it with other elements of Illinois law and reduce the frequency of publication.

I. The Illinois Foreclosure Process

A. *The Illinois Mortgage Foreclosure Law*

Any lender foreclosing an Illinois mortgage⁴, whether commercial or residential, must comply with the provisions of IMFL. A mortgagee typically wishes to extinguish all interests subordinate to its own⁵ thereby obtaining clean title from the proceeding. This will enhance the ultimate resale value should it be the winning bidder and maximize the foreclosure sale price should a third party purchaser prevail at the judicial sale.

In order to achieve this end, the mortgagee will implead as many parties as possible, serve them properly, and then have their interests adjudicated in the foreclosure decree.

¹ Illinois Code of Civil Procedure. ILCS Chapter 735, Act 5, Article XV (West 2009)

² Post-sale redemption still exists in limited cases involving residential property. *Id.* §5/15-1604

³ Jeffrey S. Liss, *Introduction to the Proposed Illinois Mortgage Foreclosure Act*, 9 ILLINOIS FUND CONCEPT 13 (1985).

⁴ When used herein the term ‘mortgage’ shall also include references to: (a) installment land contracts and (b) collateral assignments of beneficial interests under land trusts. Installment land contracts *may* be foreclosed under IMFL and in certain circumstances must be so foreclosed. *Id.* § 5/15-1106(a) (2); *Id.* §5/15-1106(c). Collateral assignments, depending on the circumstances of their creation either *may* or *must* be foreclosed pursuant to IMFL. *Id.* § 5/15-1106(a)(3); *Id.* § 5/15-1106(b). *Id.* § 5/15-1107(c).

⁵ Such interests would not include subordinate leasehold estates in which the lender has granted nondisturbance protection pursuant to a private agreement between the mortgagee and the tenant.

B. *Parties to a Foreclosure*

1. Necessary parties

IMFL requires that the plaintiff/mortgagee name the mortgagor as a defendant, together with any other party (other than a guarantor) who owes payment on the mortgage obligation and against whom a monetary judgment will be sought as part of the foreclosure proceeding.⁶ The lender *must* name those parties else its proceeding will be defective since, at a bare minimum, the interest of the owner must be terminated in order for the lender to obtain title of any sort. Failure to name other parties will not render proceedings defective but will purportedly leave those interests unextinguished⁷.

2. Permissible Parties

A lender will typically go further, adding as defendants all parties of which it has actual, record, or constructive notice.⁸ These might include junior lenders, guarantors, mechanics lien claimants of record, a spouse who has waived homestead, or contract purchasers.⁹ Tenants are ‘parties in possession’ under the statute, whom the lender may choose to join or not. The foreclosure decree will extinguish the tenancies of subordinate tenants joined as defendants. It will leave the tenancies of non-parties undisturbed.¹⁰

3. Parties without record interests

The foreclosing mortgagor should record a Notice of Foreclosure¹¹ with the recorder of deeds of the county in which the mortgaged property is located. That notice contains statutory requirements such as the court in which the foreclosure is pending and a legal description of the property.¹² Filing imparts constructive notice of the proceeding to the world thereby relieving the lender of any continuing obligation to search the records and add new defendants. Instead, subsequent parties of record must intervene should they wish to allege interests which survive foreclosure.¹³ This notice is also referred to commonly as a ‘lis pendens’ notice.¹⁴

⁶ Id. § 5/15-1501(a)

⁷ Id.

⁸ This includes: (a) parties of which the foreclosing plaintiff (or its counsel) is actually aware; (b) parties made known to it (or which would have been made known to it) by an examination of the appropriate records and (c) parties whose interests would be revealed by a physical examination of the property.

⁹ Id. § 5/15-1501(b) sets out a non-exclusive list of such parties.

¹⁰ This option on the part of the lender makes Illinois a so-called ‘pick and choose’ state when it comes to terminating leaseholds through foreclosure.

¹¹ Id. § 5/15-1211

¹² Id. §5/15-1503

¹³ Id. § 5/15-1501(d)

¹⁴ “Lis Pendens” is Latin for ‘suit pending’. Although referring to the Notice of Foreclosure as a ‘lis pendens’ is common it is inappropriate in the IMFL context for reasons described later in this article.

4. Nonrecord claimants

The concept of non-record claimants predated-IMFL as a streamlined method of dealing with certain parties¹⁵ and IMFL retained that treatment.¹⁶ Such claimants are parties with an interest in the real estate but whose interests are disclosed neither by a recorded notice nor by a pending proceeding which would impart constructive notice. They are further limited to four classes: (1) possessor of a right of homestead; (2) judgment creditor; (3) beneficial interest in a land trust other than the beneficial interest of a trust in actual possession of all or part of the mortgaged property; and (4) mechanics' lien claimant.

5. Unknown Owners

IMFL defines a final class of defendants, unknown owners¹⁷, by adopting the previously existing definition of 'unknown owner' contained in §2-413 of the Illinois Code of Civil Procedure.¹⁸ These include persons who, as to the property in question, 'are..interested therein' but 'whose names are unknown' to the party desiring to make such persons parties defendant. §2-413 provides an example of such a person: an owner whose location, or even existence, is unknown. Such an owner may be impleaded as an 'unknown owner' under the statute and any judgment entered in the foreclosure proceeding will bind: (a) the mortgagor, (b) his or her heirs, and (c) his or her legatees.

C. *Non-parties to a foreclosure*

§15-1501(a) of IMFL provides that dispositions of mortgaged property shall be subject to the interests of: (1) all persons not made a party and (2) all interests in the mortgaged real estate not terminated in the foreclosure.¹⁹ Although the difference between these two classes is unclear, the breadth of §15-1501(a) creates potential inconsistencies between IMFL and other bodies of law discussed more fully below.

II. **Obtaining Jurisdiction over Foreclosure Defendants**

Illinois mortgagees employ different techniques to join all desired parties, its methods varying with the nature of the defendant.

A. *Necessary and Permissible Parties*

Unless such parties meet the definition of unknown owners or nonrecord claimants, all such parties must be personally served with a copy of a summons and the

¹⁵ Liss, *supra*, note 3, at 15

¹⁶ *Id.* § 5/15-1210

¹⁷ *Id.* § 5/15-1221

¹⁸ *Id.* § 5/2-413

¹⁹ *Id.* § 5/15-1501(a)

complaint pursuant to the requirements of the Illinois Code of Civil Procedure and the Supreme Court Rules.²⁰

B. *Parties Whose Interests Arise Post-Complaint*

No service is required on these parties. As discussed above, once the Notice of Foreclosure is filed, the mortgagor has no further duty of inquiry and any such parties must intervene in the foreclosure proceeding should they wish to allege their interests survive the final decree.²¹

C. *Nonrecord Claimants*

The first step in terminating the rights of these defendants is filing a nonrecord claimants affidavit with the Clerk of the Court. That affidavit must set out the names and present or last known places of address of each such claimant known to the plaintiff or its counsel or that the existence, names or residences of such parties is unknown to them. The representation as to the location of these defendants may be made solely on information and belief. No due diligence need be performed or inquiry be made.²²

All persons named in the affidavit must receive a notice of foreclosure at least thirty days prior to the entry of any foreclosure judgment. Jurisdiction over those parties is obtained by: (a) publication of statutorily required facts about the foreclosure²³ and (b) the clerk of the court sending copies of the notice to any addresses set forth in the nonrecord claimants affidavit.

No judgment may be taken against a nonrecord claimant until at least thirty days after all the publication requirements are met.²⁴ The clerk's certificate as to the date of the mailings shall be evidence that the mailings were made on such date.²⁵

D. *Unknown Owners*

The foreclosing mortgagor may also file an unknown owner's affidavit with the clerk but a higher standard of inquiry is required than that for nonrecord claimants. The affiant must assert that 'upon diligent inquiry', the plaintiff has not been able to determine the names and/or addresses of those whom it wishes to name as unknown owners.²⁶

²⁰ Id. § 5/15-1107

²¹ Id. § 5/15-1502(b)

²² Id. § 5/15-1502(c)

²³ Id. § 5/2-206(a) requires that the publication set forth: (a) the pendency of the action; (b) the title of the court; (c) the title of the case; (d) the names of the first named plaintiffs and defendants; (e) the case number; (f) the names of the parties being served by publication and (g) the first date after which a default may be taken against a party being notified by publication.

²⁴ Id. § 5/15-1502(c)(2)

²⁵ Id. § 5/2-206(a)

²⁶ Id. § 5/2-413

Upon the filing of that affidavit, the clerk causes the requisite statutory publications to be made thereby giving the chancery court jurisdiction over unknown owners.²⁷

III. Existing Publication Practice in Illinois Foreclosures

At the outset of every foreclosure, counsel for the plaintiff will typically file both a nonrecord claimant affidavit (a form of which is attached as Exhibit A) and an unknown owners affidavit (a form of which is attached as Exhibit B). Some combine the form and file a ‘joint’ or ‘consolidated’ affidavit as to both classes. If asked, most lawyers would say their reason for doing so is to bind the interests of the world in this *in rem* proceeding and thereby achieve clear title. *But these affidavits affirmatively assert the existence of nonrecord claimants and unknown owners whether or not such parties actually exist.*

Publication is arranged in a newspaper of general circulation at least once a week for three successive weeks.²⁸ The cost of that publication depends on the length of the legal description and will vary widely from \$553 for the simplest ‘lot-and-block’ legal description to many thousands of dollars for a more complex ‘metes-and-bounds’ description of an unsubdivided assemblage of vacant land.²⁹

IV. Problems with Existing Practice as to Unknown Owners

A. *Its Application is Inconsistent with the Fundamental Principles of the Illinois Conveyances Act.*

Illinois, as does every other state, has a Conveyances Act³⁰ which imposes a duty on any party acquiring an interest in real estate to record notice of that interest.³¹ §28 of the Illinois act requires that deeds, mortgages and other instruments relating to title “shall be recorded in the county in which such real estate is situated.”³²

Every state has long recognized the possibility, for example, that an unscrupulous owner could convey his property twice thereby leaving two innocent parties each of whom paid value for the land but only one of whom can ultimately own it. The solution has been to impose an obligation to record on any party acquiring a real estate interest *lest that interest be cut off upon a subsequent conveyance to a bona fide purchaser.* (“BFP”) The Conveyancing Act codifies this result in Illinois by providing that:

²⁷ Id. § 5/2-206(a); Id. § 5/2-207

²⁸ Id. §5/2-207

²⁹ As of the fall of 2009, the rates of the *Chicago Daily Law Bulletin* were \$553 for the first five lines and \$20 for each additional five lines thereafter. The author was advised in his conversations that these rates are not published.

³⁰ Conveyances Act ILCS Chapter 765, Act 5 (West 2009)

³¹ Other states frequently refer to such an act as a “recording act.”

³² Id. § 5/28

“..all deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, *and not before* [emphasis added], as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged to be void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record.”³³

For well over a century, holders of unrecorded interests in Illinois have seen their interests expunged when realty is conveyed to a BFP. In 1896, the Illinois Supreme Court reviewed a case where a judgment creditor levied on certain property owned of record by George Williams, resulting in a sheriff’s sale at which John Willard was the successful purchaser. Shortly thereafter, Mr. William’s wife asserted that she had been the true owner of the property all along since it had been purchased with her funds. She petitioned the court to set aside the sheriff’s sale and impose a constructive trust. Mrs. Williams produced a deed from her husband, dated prior to the levy, but recorded subsequent to it. The Court declined to afford her relief, citing the very Conveyancing Act we have today, concluding that Mr. Willard was a BFP as of the date of the levy and therefore cutting off any claim the wife might have to the realty. Smith v. Willard 174 Ill.538, 51 N.E. 835 (Ill. Sup.Ct.1896).

Cases consistently uphold this basic precept of the Conveyancing Act. Illinois courts have invalidated mortgages³⁴, unrecorded purchase contracts³⁵ and other types of interests.

Similar principles apply in cases brought under the Federal Bankruptcy Code.³⁶ When a debtor files for bankruptcy protection, the trustee in bankruptcy or a debtor-in-possession obtains the rights of one who: (a) extends credit to the debtor as of the date of filing and receives a judicial lien on all its assets, or (b) extends credit to the debtor as of filing and obtains a judicial execution or (c) becomes a BFP as of the case’s commencement date.³⁷ The Bankruptcy Code looks to underlying state law in order to determine whether a particular unrecorded interest (or otherwise unsecured claim) would be voidable by a perfect hypothetical lien creditor or a bona fide purchaser. Accordingly the Bankruptcy Code will apply Illinois law and invalidate unrecorded real estate interests in a bankruptcy case even in the absence of an actual bona fide purchaser.

But could the holder of an unperfected interest (who does not meet the definition of nonrecord claimant) successfully argue its interest was not extinguished if there were no publication against unknown owners? A fundamental principle of statutory

³³ Id. § 5/30

³⁴ E.g. Trustees of Zion Methodist Church v. Smith 335 Ill. App. 233, 81 N.E. 2d 233 (Ill. App. Ct. 1948)

³⁵ E.g. Farmer’s State Bank v. Neese 216 Ill. App. 3d 98 (Ill. Sup. Ct. 1996)

³⁶ United States Bankruptcy Code, Title 11 U.S.C.A. (West 2006)

³⁷ 11 U.S.C.A. §544(a) (West 2006) These powers are also commonly known as the ‘strong arm powers’ of the trustee.

construction is that, wherever possible, statutes are to be construed so as not to conflict with one another.³⁸ If the holder of a realty interest elects not to record his or her interest as required by the Conveyances Act, why should he or she lose to a bona fide purchaser (be it a grantee or a mortgagee), to a trustee in bankruptcy, to a debtor-in-possession, in short to any good faith transferee *except one who obtains title through a deed from a foreclosure?* In short, holders of unrecorded interests should protect themselves through recording not by relying on foreclosure publications.

At least one federal decision has implicitly held that unknown owners (and nonrecord claimants) are not required defendants. In General Electric Credit Corporation v. American National Bank as trustee et. al. 562 F. Supp. 456 (N.D. Ill.1983), the district court for the Northern District concluded that such parties were not necessary because their only interest ‘is their right to redeem the mortgaged property.’³⁹ This case was decided before IMFL, when parties other than the owner had a right to redeem. Now that IMFL has abolished those rights so that only the owner may redeem,⁴⁰ this reason for naming such defendants no longer exists.

B. *Its Application is Inconsistent with the Language and Intent of the Publication Statute.*

§15-1501(c) of IMFL permits unknown owners to be made parties “in accordance with Section 2-413 of the Code of Civil Procedure.” §2-413 is generically entitled “Unknown Parties” and provides that “if...**there are persons** interested whose names are unknown, it shall be lawful to make them parties to the action..[emphasis added]” The statute contemplates that the party naming the unknown owner *has actual knowledge* of the existence of a particular claimant yet does not know whether such claimant is dead or alive (in the case of an individual), the claimant’s existence (in the case of some form of corporate entity), or lacks knowledge of such person or entity’s whereabouts.

The statute’s reference to the ‘heirs or legatees of any deceased person’ fortifies this view since it contemplates that an actual deceased defendant may have parties claiming through him or her by operation of law. The foreclosing plaintiff and attorney will often not know the names or addresses of such persons so the law affords the mortgagee the option of impleading those parties by publication.

Finally, the inquiry standard for the affidavit makes this reading of ‘existence’ dispositive. An affiant must perform ‘diligent inquiry’ into the existence or location of parties it joins as unknown owners. But diligence of *any* sort is impossible by definition if one does not know whether a party exists since one can have no idea what persons or interests to investigate.

³⁸ E.g. Lily Lake Road Defenders v. County of McHenry 156 Ill.2d 1, 619 N.E.2d 137 (Ill. Sup. Ct. 1993); State of Illinois v. Mikusch 138 Ill.2d 242, 562 N.E.2d 168 (Ill Sup. Ct.1990)

³⁹ Id. at 459

⁴⁰ 735 ILCS § 5/15-1603

C. *Existing Practice Increases the Costs of Foreclosure and Redemption.*

Blanket publication against unknown owners has become routine practice in virtually every Illinois foreclosure and adds significant expense to each case. Should a defendant wish to redeem its property IMFL permits publication costs to be included in the amount required to redeem.⁴¹ Restricting publication to cases where it is needed will reduce the costs of foreclosure to lenders and the costs of redemption to borrowers.

D. *Blanket publications do not necessarily extinguish all interests.*

Even when a plaintiff makes a blanket publication, a third party may still successfully attack the jurisdiction of the court if the publication was made without sufficient inquiry and the party's interest was known, or should have been known to the plaintiff. In Applegate Apartments Ltd. Partnership v. Commercial Laundry Systems, 212 Ill.Dec. 827; 276 Ill. App. 3d 433, 657 N.E. 2d 1172 (Ill. Ct. App.1995), appeal denied 216 Ill. Dec. 1; 664 N.E. 2d 638, the appellant had executed a 'laundry room lease' approximately two years after the execution and recordation of the appellee's mortgage. The tenant was not named in the foreclosure. The foreclosing attorney filed an unknown owners affidavit, deleted the phrase 'upon diligent inquiry' where it appeared, instead substituting the phrase 'upon information and belief', then published.

The tenant argued that it was a party in possession of which the mortgagee had constructive notice.⁴² It did not fall into one of the four classes of nonrecord claimant so as a result of the plaintiff's lack of due diligence, the court never obtained jurisdiction over the tenant and its tenancy survived foreclosure. The First District Appellate Court agreed.

Similarly in Romain v. Lambros 7 Ill.2d 206, 129 N.E.2d 739 (Ill Sup. Ct.1955), the Supreme Court concluded that the lower court might have erred in concluding that the mortgagee's counsel investigated thoroughly enough. The defendant, Peter Lambros, died intestate in April 1947. The plaintiff-appellee commenced its foreclosure on October 16, 1952, named Mr. Lambros and his wife as defendants, filed an affidavit that Mr. Lambros and his wife could not be located upon diligent inquiry, and then proceeded to publish. The last known address cited by the plaintiff was one known to the attorney to be a non-residential building. The clerk's mailing to that address was returned in two days with the recipient marked 'deceased'. The defendant's death certificate was on file with the Bureau of Vital Statistics yet the plaintiff undertook no efforts to determine the heirs or their locations. The Supreme Court held that the trial court never obtained jurisdiction over the Lambros heirs.

The Illinois Supreme Court permitted a junior mortgagee to overturn a foreclosure sale and afforded it the right to redeem in Callner vs. Greenberg 376 Ill. 212, 33 N.E.2d 437 (Ill. Sup. Ct. 1941) after concluding that the mortgagee improperly tried to obtain

⁴¹ 735 ILCS §15-1603(d)(1)

⁴² The tenant also asserted that the mortgagee had actual notice as a result of its periodic inspections of the property.

jurisdiction over a junior mortgagee by using the unknown owners technique, rather than attempting to locate the junior lender and serve it personally.

Note that in each of these instances the reviewing court concluded that the mortgagee had actual or constructive knowledge of the claim in question but had failed to discharge its obligation of inquiry, the condition precedent to employing the technique of last resort: publishing. The blanket publications had not terminated ‘unknown interests’.

E. *Foreclosing attorneys routinely file false affidavits under oath.*

The unknown owners affidavit required by the terms of §2-413 requires the affiant to state under oath that there *are* unknown owners and that he or she has conducted due diligence to find them. Under current practice, affiants typically know no such thing and accordingly undertake no inquiry whatever, rendering their statements perjurious. Supreme Court Rule 137 requires that all pleadings, motions or papers filed with the court by an attorney ‘be well grounded in fact’ or the attorney may face sanctions from the court.⁴³

F. *Blanket publications rarely serve their intended purpose.*

Not surprisingly, blanket publications rarely if ever result in a defendant intervening.⁴⁴ This should come as no surprise. Such notices, whether in publications of limited circulation such as The Chicago Daily Law Bulletin or in papers of general circulation are rarely read and do not contain information which would put any reasonable third party on notice of the foreclosure. Neither the contents of a long metes and bounds description nor a generic reference to ‘unknown owners’ rate to attract attention or induce action. One must question whether the costs incurred for blanket publications outweigh the potential benefits they are intended to confer.

V. **Problems with Existing Practice as to Nonrecord Claimants**

Similar problems exist with respect to blanket publications against nonrecord claimants.

A. *The current ‘existence’ requirement is either misread or read too expansively.*

As with unknown owners, the language of IMFL implies that nonrecord claimants should be known to the mortgagor or its counsel before publication is made. §15-1502(c) of IMFL has two prongs, requiring that the nonrecord claimants affidavit either (i) set forth the names and addresses of known claimants specifically (in which event the foreclosing party has actual notice of such interests) or, (ii) recite that ‘the existence,

⁴³ Illinois Supreme Court Rules; Rule 137

⁴⁴ The author interviewed four long-standing title examiners, none of whom was aware of an instance in which a blanket publication spurred the intervention of a third party.

names or the present or last known places of residence, or both, if such...claimants are unknown.” It goes on to provide that the affidavit need not state that “inquiry has been made to ascertain the names or present or last known places of residence of such nonrecord claimants.”

IMFL requires that notice be provided as per §§9-206 and 9-207 of the Illinois Code of Civil Procedure⁴⁵ which require that in any action for the ‘specific performance, reformation, or rescission of a contract for the conveyance of land’, the plaintiff may file an affidavit that ‘the defendant resides or has gone out of state, or on due inquiry cannot be found, or is concealed within this State.’⁴⁶ This clause implies that an affiant must know such a claimant exists. Nothing about the language suggests it is a vehicle for terminating interests of hypothetical parties.

It is the second prong of the nonrecord claimants affidavit that creates the problem. IMFL’s §15-1502(c)(1)(ii) permits an affiant to assert that the ‘existence’ and names of nonrecord claimants are unknown to it. This is apparently routinely read to mean “the affiant does not know whether such claimants exist or not.” The author submits that the better reading is: “the affiant asserts that there is a claimant meeting the criteria of nonrecord claimants but on information and belief does not know whether such person or entity is still in existence or alternatively, their present or last known locations.” This article concludes by proposing draft language which makes this reading explicit.

The suggested reading is given even more credence when considered with the requirements for jurisdiction over unknown owners. If a mortgagee must have actual knowledge of the existence of unknown owners as a precondition to publishing, how could it be required to publish to extinguish rights of nonrecord claimants when lacking all knowledge?

B. *Current practice exposes foreclosing parties to liability.*

§1502(4) of IMFL provides that nothing in the act shall affect the rights of any nonrecord claimant “to bring an action against any party to the foreclosure on whose behalf the affidavit was filed, on account of the filing of an inaccurate affidavit.”⁴⁷ Accordingly, a ‘routine’ publication without regard to the facts can expose the foreclosing counsel’s client to civil liability.

⁴⁵ 735 ILCS §5/15-1502(c)(2)

⁴⁶ 735 ILCS §5/2-206(a)

⁴⁷ Id. §5/15-1504(4)

C. IMFL's *treatment of such claimants can be inconsistent with that afforded them under other well established bodies of law.*

Should some type of publication or service be required in order to extinguish the interests of non-record claimants? In other words, what should be the effect of a foreclosure which does not seek to implead such parties? Consider each of the four classes of nonrecord claimants:

1. Possessor of a right of homestead

Every individual in Illinois is entitled to an 'estate of homestead' in the amount of \$15,000 per individual (and \$30,000 per couple) in his or her residence. Such homestead is exempt from "attachment, judgment, levy..." as well as "conveyance."⁴⁸ This right is enforceable against third parties with or without notice of the homestead right, for example in the case of a spouse unknown to a grantee or mortgagee. Homestead rights may be waived in writing however⁴⁹ and are routinely done so in Illinois, in both deeds and mortgages.

This category of claimant by definition exists only on residential property. It becomes relevant in foreclosure only when the homestead holder is not an owner of record (since otherwise the holder would be a necessary party). By labeling a homestead holder a 'nonrecord claimant', IMFL permits a mortgagee to serve the non-liaible spouse directly or employ service by publication as a matter of convenience. There is no conflict here between IMFL and other statutes. The holder of a homestead right should be able to assert it against the holder of a sheriff's deed unless that right has been terminated in the foreclosure.

2. Judgment Creditor

Under Illinois law a judgment operates as a lien against the real estate of a judgment debtor "only from the time a transcript, certified copy or memorandum of the judgment is filed in the office of the recorder in the county in which the real estate is located."⁵⁰ The Conveyancing Act, discussed above, cuts off the rights of any judgment creditor who fails to record against any bona fide purchaser of the property.

Such creditors should be impleaded if known to the mortgagor and, if not known, no publication should be required. There is no reason why a judgment creditor who fails to record might be able to claim its interest survived a foreclosure (because of a failure to publish) but would have been extinguished had title been conveyed to a BFP by any other method.

⁴⁸ Id. § 5/12-901

⁴⁹ Id. § 5/12-904

⁵⁰ Id. § 5/12-101

Should the statute instead be read only to provide a simpler, less informative means to cut off the interest of a judgment creditor known to the plaintiff (i.e. the lender may resort to publication notwithstanding its actual knowledge), then the statute should be amended. If the mortgagor has actual knowledge of a judgment creditor, the mortgagor should be required to undertake the normal steps of due diligence to locate the creditor, not simply rely upon publication. §15-1210(iii) (2) of IMFL should be deleted so that judgment creditors are no longer afforded nonrecord claimant status.

3. Beneficial interest in a land trust other than the beneficial interest of a trust in actual possession of all or part of the mortgaged property

The major issue with this subset of nonrecord claimants is that it is unclear which beneficial interests are terminable by publication. The statute purports to permit *any* beneficial interest to be terminated by publication except those of “a beneficial interest of a trust in actual possession.”⁵¹ Whether the phrase ‘in actual possession’ modifies the phrase ‘beneficial interest’ or the word ‘trust’ is ambiguous but may be irrelevant. Neither a ‘beneficial interest’ nor a ‘trust’ can physically possess real estate.

Land trust beneficiaries voluntarily choose to hold title in a land trust and, once they do so, their individual interests are generally treated as personal property under Illinois law.⁵² Perfection of security interests in such items are governed by the Uniform Commercial Code.⁵³ Indeed, one of the primary reasons for the use of land trusts is to keep secret the identities of the beneficiaries.

The standard form of recorded deed in trust conveying title to a land trust recites that the world may deal with the land trust solely through the trustee and never need concern itself with beneficiaries. The Illinois land trust statute reaffirms this result by providing that persons dealing with the trustee have no obligation to inquire about the trustee’s powers and are entitled to assume that the trust is in full force and effect and that the trustee has full power and authority to act on behalf of the trust.⁵⁴ Once a land trust is served, the trustee is obligated to deliver copies of the summons and complaint to the beneficiaries together with a letter advising the beneficiaries that the trustee will be taking no action, that any appearances on behalf of the land trust must be undertaken by the beneficiaries themselves, and warning of the possibility of a default judgment against the trust should no action be taken.

Perhaps §15-1510(iii)(3) of IMFL could be read to mean that beneficiaries in possession must be made parties (but may not be impleaded by publication), but Illinois case law is to the contrary *even for owners in possession*. In Chicago Title and Trust Company, as trustee v. Exchange National Bank of Chicago, as trustee et.al. 19 Ill.App. 3d 565, 312 N.E.2d 11 (Ill. App. Ct. 1974), the appellate court for the Second District held that, while a tenant in possession must be joined for its interest to be terminated, the

⁵¹ Id. §5/15-1210(iii)(3)

⁵² Land Trust Beneficial Interest Disclosure Act ILCS Chapter 765 Act 405 §1

⁵³ Illinois Uniform Commercial Code. ILCS Chapter 810 Act 5 §9-312(a)

⁵⁴ Trusts and Trustees Act, ILCS Chapter 760, Article V §8

same does not hold true for a beneficiary in possession because the beneficiary “is bound by the acts of his trustee.”⁵⁵ The decision holds squarely that the beneficiary need not be joined ‘if the trustee can fully protect the beneficiary’s interest.’

So if beneficiaries in possession need not be served, why must a foreclosing mortgagor concern itself with beneficiaries not in possession?⁵⁶ Individuals or entities may choose to hold title in a land trust for various valid reasons but if they do not want to rely on a trustee forwarding a summons and complaint, they should protect themselves by taking title of record thereby affording themselves the strongest status of all: necessary parties. There is no need for IMFL to afford protection when other, directly applicable, areas of the law provide means for doing so. IMFL’s treatment of trust beneficiaries conflicts with the stated terms of deeds in trust of record, with the terms of the trust instruments themselves, and with the provisions of the Illinois land trust statute. Accordingly, §15-1210(iii)(3) of IMFL should be deleted so that land trust beneficiaries are no longer afforded nonrecord claimant status.

4. Mechanics Lien Claimants

The status and treatment of mechanics lien claimants is the most complex part of jurisdictional publication analysis.

a. Mechanics Lien Claims of Record

A foreclosing plaintiff must name any mechanics lien claimant of whom it has constructive notice as of the date it files its Notice of Foreclosure. Constructive notice in this context means that the claimant has either: (a) recorded its claim for lien; or (b) commenced a foreclosure of its lien. Any such party will not qualify as a nonrecord claimant against whom publication could be effective for the simple reason that its claim *is* of record. Nor will the notice of foreclosure procedure set out in §1503 be helpful since that mechanism is intended only to absolve the lender from joining future parties of record, not ones already of record. Such claimants must therefore be named and served personally.

b. Mechanics Lien Claims not of Record

i. The effect of the Notice of Foreclosure

⁵⁵ Chicago Title 312 N.E.2d at 16

⁵⁶ It would be unusual for any land trust to be involved that was not the mortgagor. One rare example might be the holder of an easement over the mortgaged property, but an easement which was subordinate to the lien of the mortgage.

A strong argument can be made that the foreclosing lender need do no more than file its Notice of Foreclosure.⁵⁷ Once it has done so, the statute provides that filing constitutes constructive notice to ‘every person claiming an interest in or lien on the mortgaged real estate.’⁵⁸

One possible objection to that approach is that IMFL’s §1503 refers to the *lis pendens* statute⁵⁹ which provides that a recorded notice of pending litigation (including in cases filed for *in rem* actions other than mortgage foreclosures) shall constitute constructive notice only to all parties who ‘**acquire** an interest in or lien on’ the real estate in question subject to the date of recording the *lis pendens*.” [emphasis added] Under Illinois law a mechanics’ lien claim (for both the general contractor and for all tiers of subcontractors) dates from the date of the owner’s original contract with the contractor⁶⁰ whether or not the contractor has yet given notice of its claim. According to this competing view, filing the Notice of Foreclosure should *not* constitute constructive notice because such claimants did not acquire their interests after the recording of the Notice of Foreclosure but instead as of the date of a pre-existing construction contract.

Nevertheless, the Notice of Foreclosure should be sufficient to bar such claims, absent intervention, for at least two reasons. First, the plain language of §1503 provides that any notice complying with its terms shall automatically be deemed to comply with the *lis pendens* statute. It is clear that, at least as to foreclosure publications, the legislature intended that IMFL control, meaning that the Notice of Foreclosure binds persons who are ‘claiming’ an interest or a lien (as in IMFL) rather than only persons ‘subsequently acquiring’ such items (as in the *lis pendens* statute). The mechanics lien claimant is thus bound without regard to when its unrecorded claim might have arisen.

Second, even if one were to conclude (in the author’s mind wrongly) that the *lis pendens* standards were still applicable, an unrecorded mechanics’ lien claimant is still an entity ‘subsequently acquiring’ a lien. Contractors and subcontractors have rights to liens under the Mechanics Lien Act but those rights do not spring into existence full-blown the moment the contract is signed or work commences. Several preconditions exist, the most important of which (in the case of a subcontractor) is delivering a notice to the owner and the lender⁶¹ and in the case of all lien claimants recording a notice of lien within four months of completion in order to perfect against third parties.⁶² Only then will the lien date back to the date of the contract. Until then, many cases have deemed the lien only ‘inchoate’ or given it some similar characterization. As far back as 1908, the Illinois court referred to a subcontractor’s lien as an ‘incipient or inchoate lien’ which will not attach to the property ‘in the sense of becoming a fixed lien’ until notice is given.

⁵⁷ The interplay between IMFL and the Illinois Mechanics Lien Act is examined in Stanley P. Sklar, *Does the Mortgage Foreclosure Law’s Notice Provision End the Relation-Back Doctrine?* 82 ILLINOIS BAR JOURNAL 324 (1994).

⁵⁸ 735 ILCS §5/15-1503

⁵⁹ *Id.* §5/2-1901

⁶⁰ Mechanics Lien Act ILCS Chapter 770 Act 60, §1

⁶¹ 770 ILCS §60/24. The requirement of a 90 day notice to the owner and lender is not required if the subcontractor has been listed on the sworn statements provided by the general contractor. *Id.*

⁶² 770 ILCS §60/7

W.W. Brown Construction Co. v. Central Illinois Constr. Co. 234 Ill. 397, 84 N.E. 1038 (Ill. Sup. Ct. 1908).

ii. The effect of the lender's knowledge

(1) The lender with knowledge

A lender may obtain actual knowledge of a mechanics' lien claimant in various ways. It may discover such a claim when it searches the records prior to filing its complaint or it may acquire knowledge through routine loan monitoring procedures. This is particularly true for construction loans where lenders periodically examine sworn statements from the contractor, statements which not only show funds to become due the general contractor but also set forth in detail the names of each subcontractor together with the amounts still owing to such parties.⁶³ Construction lenders also routinely visit the site, whether personally, by an inspecting architect, or both.

One might then expect that a foreclosing lender with such knowledge would be required to name all mechanics lien claimants as defendants, not only based on fundamental principles of actual notice but also because in most cases the lender could not truthfully complete an affidavit that the existence or whereabouts of those parties could not be ascertained.

But things are not always as they seem. IMFL defines any mechanics lien claimant as a 'nonrecord claimant' (assuming that the claimant has neither filed its Notice of Lien nor commenced a mechanics lien foreclosure as of the date the notice of foreclosure of the mortgage is recorded)⁶⁴ and goes on to provide that

"The classification of any person as a nonrecord claimant ...shall not be affected by any actual notice or knowledge of or attributable to the mortgagee."⁶⁵

That is to say that a lender with actual notice of non-record lien claimants may still obtain jurisdiction over them by publication (and without due diligence) and not by actual service. This type of service is obviously less onerous on a lender than naming each claimant. It was provided for because, although a lender may indeed have knowledge of 'construction' and of the identity of many subcontractors (if the sworn statements have been completed honestly), it may not know the addresses of the

⁶³ Lenders rely on title insurer reviews, and the resulting interim endorsements, for affirmative coverage over liens arising for work performed through the date of the most recent contractor's sworn statement. Although it might be asserted that the insurer is the lender's agent, and that knowledge should thereby be imputed to the lender, it is generally accepted that the title insurer is acting solely for its own account in reviewing the statements (in order to determine whether to issue insurance) and, in any event, has no power to bind the lender in any way and thus the lender-insurer relation is not a principal-agent one. Nonetheless, lenders periodically review the statements primarily so that they can satisfy themselves generally about the status of the project and, more specifically, that the loan is 'in balance' and that the project can be completed for the undisbursed amounts of equity and debt remaining.

⁶⁴ 735 ILCS §5/15-1210 (iii) (4)

⁶⁵ Id. § 5/15-1210

subcontractors and almost certainly will be unaware of third or fourth tier materialmen or suppliers. It was therefore considered impractical to require a lender to identify all mechanics lien claimants then personally serve them.⁶⁶

The primacy of IMFL was upheld in Teerling Landscaping, Inc. vs. Chicago Title and Trust Company, as trustee, et.al. 271 Ill.App.3d 858, 208 Ill.Dec. 482 (Ill. App. Ct. 1995). The plaintiff, Teerling, a landscaping subcontractor, attempted to foreclose a mechanics lien after the completion of a mortgage foreclosure by Irving Federal, a senior mortgagee. The mortgage loan appears to have been a construction loan because a construction escrow agreement had been established with a title insurer and, according to the plaintiff, at least twenty-eight sworn statements were delivered by the contractor to Irving Federal, each of which scheduled the landscaper as a lien claimant. Teerling further alleged that the mortgagee made numerous periodic inspections of the job site and knew that substantial landscaping work was being performed.

Nonetheless, on October 8, 1991, Irving Federal commenced its foreclosure naming 'nonrecord claimants' as parties defendant, but not Teerling personally. Teerling continued supplying material and labor until its completion on December 2, 1991. The next day, December 3, the lender recorded its Notice of Foreclosure.

On February 7, 1992 Irving Federal filed its affidavit for service by publication and commenced publishing against unknown owners and nonrecord claimants. On March 24, the sheriff's sale occurred and on March 31, the plaintiff recorded its mechanics lien claim.

The trial court held that the specific language of §1502 of IMFL trumped the general language of the publication statutes and dismissed Teerling's claim. The Second District appellate court concurred in that dismissal. The court followed the statutory framework, noting that Teerling was a 'nonrecord claimant' over whom jurisdiction could be obtained by publication and that such publication could proceed without regard to the knowledge of the mortgagee. While the court acknowledged that the Mechanics Lien Act generally gives contractors lien rights it noted crucially that:

“when the legislature enacted the Mortgage Foreclosure Law...it allowed a party in a mortgage foreclosure action to bar and terminate a contractor's right to a mechanic's lien if the lien claim was not recorded or the party had no constructive notice of the claim when the notice of foreclosure was given..”⁶⁷

Publication will therefore be required where the lender is aware of existing construction lienors (who qualify as nonrecord claimants) but elects to obtain jurisdiction over them by publishing instead of direct service.

This article suggests no amendments to IMFL in this regard so mechanics lien claimants should continue to be treated as nonrecord claimants under §15-1210(iii)(4).

⁶⁶ Liss, *supra*, note 3, at 15.

⁶⁷ Teerling at 544.

(2) The lender without knowledge

Should a lender with no knowledge of construction also be required to publish? For many of the reasons previously set forth, this article contends it should not.

First, the nature of the nonrecord claimant affidavit suggests otherwise, requiring the plaintiff to list the names and addresses of such claimants or, if it is unaware of their continuing existence or location, then the last known names and addresses. Such language implies such parties exist and are known to the lender. Further, the language of §1502(c) permitting the lender to publish notwithstanding its actual knowledge buttresses the presumption that it has knowledge. Filing an affidavit which states otherwise is to file a false affidavit under oath, something which IMFL should not be construed to require.

The second argument is familiar: why should an unrecorded mechanics lien claimant not have its rights cut off under the Conveyancing Act as would any other claimant? Here the mechanics lienor might have a unique response – that unlike other claimants it is afforded a statutory window of opportunity to make its claim, one not cut off by conveyance to a BFP.

Contractors have the appropriate ninety day and four month periods discussed above to perfect their lien claims. Such claims are valid against grantees taking title as BFPs and are thus the impetus for title insurers requiring sellers to execute ALTA affidavits affirming there has been no recent construction (so that sellers may be pursued on such affidavits if the insurer must subsequently defend a valid claim asserted against its new insured purchaser).

The problem with this reply is that title obtained through foreclosure is subject to a special set of rules: in particular the application of the notice of foreclosure procedure in IMFL's §1503. Once the foreclosing lender files that notice, it is constructive notice to all persons claiming an interest not of record and places the impetus on such parties to intervene. To read a contrary requirement for mechanics lien claimants runs afoul of the plain language of §1503.

Third, at least as to subcontractors, there is a significant chance that such claimants will obtain actual notice of the foreclosure anyway. §24 of the Mechanics Lien Act requires the subcontractor, in order to preserve its lien, not only to record it within ninety days of completion but also to serve its notice by registered or certified mail on the owner and 'to the lending agency, if known.'⁶⁸ To comply with these requirements, subcontractors routinely order title searches so that they may deliver their notices to the proper parties. Those title searches should disclose any Notice of Foreclosure and induce mechanics lienors to intervene.

⁶⁸ Id.

Finally, as a practical matter it is unlikely that a blurb publication naming ‘nonrecord claimants’ affords lien claimants meaningful notice. Far more likely is word of mouth on the job. Unpaid contractors do not waste time determining whether an owner is in financial distress. In the face of IMFL provisions which cut off the rights of mechanics lien claimants it behooves claimants to file their claims of record earlier rather than later and, if unpaid, to search the public records (even if one is a general contractor who does not have a duty to deliver notices to third parties). When one keeps in mind that a lender *with actual notice* of lien claimants need not add them directly as parties, any mechanics lienor should take aggressive early steps to put its claims of record, particularly when the lender may not even know of the construction activities.

VI. Insurability of Title

The foreclosing practitioner could well be excused for agreeing with the foregoing analysis yet continuing his or her current practice of blanket publication if deemed necessary to obtain insurable title. But title insurers have already dealt with the more restrictive publication practices suggested here for years as a result of rulings in the Illinois federal courts.

A. Federal Diversity Foreclosures

Mortgagees sometimes bring foreclosures in the federal district court in which their collateral resides. Perceived reasons for doing so include possible easier standards for appointment of a receiver, the quality of federal court judges, and disposition costs.⁶⁹ Judge Shadur remarked in one of his decisions that the District Court for the Northern District of Illinois was perhaps the only one in the federal system with a large foreclosure docket, a phenomenon he attributed to the difference in the costs and fees incurred in federal as opposed to state proceedings.⁷⁰

Such cases are brought under 28 U.S.C. §1332(a)(1) under claims of federal diversity and require an amount in controversy exceeding \$75,000 as well as complete diversity of citizenship between the parties. But in February of 1983, in the case of John Hancock Mutual Life Insurance Company v. Central National Bank of Chicago 555 F. Supp 1026 (N.D. Ill. 1983), Judge Shadur complicated federal foreclosure practice in Illinois when he dismissed an action *sua sponte* for incomplete diversity noting that ‘unknown owners’ and ‘nonrecord claimants’ were defendants in the proceeding. Plaintiffs have the burden of establishing complete diversity, and thereby federal jurisdiction, and the court concluded that that no plaintiff could ever do so for entities such as ‘unknown owners’ or ‘nonrecord claimants’ because the citizenship of such entities can never be established. Judge Shadur cited approvingly a 1970 Ninth Circuit

⁶⁹ John C. Murray, *Federal Foreclosure Actions – Advantages and Disadvantages for Lenders*, <http://www.firstam.com/content.cfm?id=2842>.

⁷⁰ BancBoston Mortgage Corp. v Pieroni 765 F. Supp 429 (ND Ill 1991)

case dismissing a foreclosure action on jurisdictional grounds where the plaintiffs had named various “John Does” as defendants, thereby destroying diversity.⁷¹

Only months later, in July of 1983, Judge Leighton reached a different conclusion in John Hancock Realty Development Corporation v. Harte 568 F. Supp. 515 (N.D. Ill. 1983). Based in material part on Judge Shadur’s earlier ruling, the defendants had moved to dismiss the foreclosure for want of diversity because of the inclusion of nonrecord claimants and unknown owners as defendants. Judge Leighton however characterized such entities as only ‘nominal parties’ whose citizenship (or lack thereof) did not defeat diversity.

This divergence within the Northern District continued as Judge Shadur subsequently dismissed two more foreclosures *sua sponte* after Harte⁷² in both cases based on the inclusion of non-record claimants and unknown owners.

All these cases preceded the passage of IMFL. The enactment of that law in 1987 afforded Judge Parsons in Metropolitan Life Insurance Company vs. LaSalle National Bank et. al. 1990 WL 71301 (N.D. Ill. 1990) the opportunity to analyze this issue anew. Since nonrecord claimants and unknown owners were now only permissible and not necessary, plaintiffs could proceed in federal court so long as they did not name the offending parties as defendants. Interestingly Judge Parsons went on to note that “the title search lays no foundation for this once ‘traditional’ method of assuring the purchaser of the property that the title to be passed would be a clean one.”⁷³ In other words, the title insurers did not consider nonrecord claimants and unknown owners to be necessary parties in their minutes of necessary parties for a federal foreclosure. Clean title could then be obtained without naming such defendants.⁷⁴

The issue came full circle when Judge Shadur permitted a diversity foreclosure to proceed which had carefully omitted nonrecord claimants and unknown owners as defendants. BancBoston Mortgage Corp. v. Pieroni 765 F. Supp. 429 (N.D. Ill. 1991).

Title insurers in federal foreclosures will issue ‘clean’ commitments on a case-by-case basis, notwithstanding the failure to name nonrecord claimants or unknown owners, provided they are made comfortable that no ‘actual’ parties fitting those descriptions exist in the case at bar.⁷⁵

⁷¹ Fifty Associates v. Prudential Insurance Company of America 446 F.2d 1187 (9th Cir. 1970)

⁷² Government Employees Corporation vs. Buggs No. 85 C 06774, 1985 WL 2237 (N.D. Ill. August 1, 1985) and Ozark Financial Corporation v. Faletti No. 85 C 09489, 1985 WL 4244 (N.D. Ill. Nov. 29, 1985)

⁷³ Metropolitan at 71302

⁷⁴ Similarly in *General Electric Credit Corporation v. American National Bank* 562 F. Supp 456, 458 the court noted that the lender had obtained a clean title commitment despite its failure to join unknown owners and nonrecord claimants.

⁷⁵ This conclusion is based on conversations of the author with representatives of Chicago Title Insurance Company, Near North National Title Insurance Company, River West National Title, and Ticor Title Insurance Company.

2. *State Court Insurability*

Under the well-known *Erie* doctrine, a federal court sitting in diversity must apply the substantive internal laws of the state in which it sits (absent being pointed to some other state's law by the internal conflicts laws of the state or perhaps by a contractually agreed choice of law provision). *Erie Railroad Co. v. Tompkins* 304 U.S. 64, 58 S. Ct. 817 (1938).

Accordingly, Illinois federal district courts decide foreclosure cases based on the underlying substantive law of the state of Illinois: the situs of the property. The same reasons which would persuade title insurers to issue clean title policies in federal proceedings should produce the same result for state proceedings.

VII. Publication for Sale

Once a judgment of foreclosure has been entered, IMFL sets out a list of requirements for a public sale of the mortgaged real estate. While the statute affords the foreclosing lender flexibility (with the court's consent) about the methodology of the sale, it details with specificity the necessary contents of the notice, the places and frequency of its publication and the procedures for delivering personal notice to all defendants who entered appearances.⁷⁶

Ultimately, a judge must enter an order confirming that the sale has been conducted appropriately and ordering the sheriff (or other agreed upon official) to deliver a deed to the successful purchaser at the sale.

In the federal bankruptcy context, the U.S. Supreme Court has ruled that the sale price obtained at a properly conducted judicial sale (or nonjudicial foreclosure sale in other states which permit such dispositions) will be deemed 'reasonably equivalent value' under §548(a)(2) of the Federal Bankruptcy Code, thereby protecting such conveyances from attack as a fraudulent transfer.⁷⁷

This article restricts itself to the claim that blanket jurisdictional publications are wasteful. It does not contend, nor should it be read to imply, that there should be anything other than a robust publication of the judicial sale. Not only is one statutorily required but such practice minimizes the loss to both lender (by maximizing sales proceeds and avoiding fraudulent conveyance challenges) and borrower (by minimizing any deficiency judgment).

VIII. Suggested Changes in IMFL

A. *Rights of non-parties*

⁷⁶ 735 ILCS 5/15-1507

⁷⁷ *BFP v. Resolution Trust Company* 114 S.Ct. 1757, 128 L.Ed. 556 (1994)

Most, if not all, the potential conflicts between IMFL and other bodies of law spring from §5-1501(a) which provides, in essence, that interests not terminated in a foreclosure survive it. §5-1501(b) then provides a non-exhaustive list of potential claimants, listing them as ‘permissible parties.’ The thesis of this article is that, once a deed from the selling officer has been delivered pursuant to a foreclosure action, non-parties should have rights against the grantee which are no greater than, and no less than, those they would have against any other grantee.

This article previously recommended two amendments to IMFL: the deletion of judgment creditors and land trust beneficiaries as non-record claimants under §15-1210. Homestead holders and mechanics lien claimants would continue to be so treated.

In order to harmonize IMFL with existing law, §15-1501(a) should be amended to read as follows:

“The court may proceed to adjudicate their respective interests, but any disposition of the mortgaged real estate shall be subject to the interests of all persons not made a party *provided however* that such persons could assert their interests against a bona fide purchaser of the real estate who acquired title on the date of the foreclosure decree and a judgment lien creditor who obtained the lien of its judgment on the date of the foreclosure decree. Any party who has not perfected its rights in the real estate as of the date of the recording of the Notice of Foreclosure must timely exercise its rights under Section 15-1501(d) in order to preserve any claim it might have.”

Let us examine how this change would affect the other permissible parties mentioned in IMFL, always assuming no blanket publication.

(1) §15-1501(b)(1): parties having possessory interests

Third parties are charged with constructive notice of parties in possession so such persons or entities must be named in order for their interests to be terminated. Illinois would remain a ‘pick and choose’ state when it comes to a lender’s rights against tenants. The exception would be land trust beneficiaries in possession whose interests are terminable by proper inclusion of the land trustee as party defendant.

(2) §15-1501(b)(3): trustee holding an interest in the mortgaged real estate or a beneficiary of such trust.

Any trustee with a record interest in the mortgaged property must be made a defendant or its interest will survive the foreclosure. Service on a trustee will bind the beneficiary so failure to name the beneficiary should *not* (as IMFL might presently imply) suggest that a beneficiary's interest would survive a foreclosure even after the land trustee has been made a defendant. A trustee with an unrecorded interest in the mortgaged property (and unknown to the lender) should find its interest cut off by the conveyance.

(3) §15-1501(b)(4): The owner or holder of a note secured by a trust deed

The fate of such a party will depend on: (a) whether that instrument was of record or known to the lender, and (b) whether it is superior or subordinate to the mortgage. Unrecorded trust deeds will be cut off without regard to publication.

(4) §15-1501(b)(5): Guarantors

A guarantor will often be a defendant so that a deficiency judgment can be obtained against it concurrently with any judgment against the maker of the note. To the extent however that a guarantor has an interest in the real estate itself, whether as a beneficiary, a junior lienor or member of a title-holding entity, its interest should be treated as would that of any holder of a similar interest in the real estate not held by a guarantor.

(5) §15-1501(b)(6): The State of Illinois

The State of Illinois may claim a lien on real estate in the event a seller, outside the course of its normal business, conveys all or substantially all of its real property.⁷⁸ This lien could be for unpaid income taxes, withholding taxes, sales taxes or other types of levy. If the state's lien is already of record, the foreclosing party must obviously implead the state in order to extinguish its lien. If the state discovers the Notice of Foreclosure when recording its lien claim, it should intervene. But what if no lien is filed and yet the foreclosure proceeds?

Outside the foreclosure context, in the course of a voluntary conveyance of the property, a buyer must obtain a release from the Illinois Department of Revenue stating that no unpaid taxes exist or, they do, the amount of them. Buyers do so because the authorizing statute imposes an obligation to do so and to withhold amounts due the state from sums owed the seller under the purchase contract *lest the state enforce its lien personally against the buyer*. In other words, the revenue statute does not extend BFP protection to a purchaser of real estate.

⁷⁸ Illinois Income Tax Act ILCS Chapter 35, Act 5 §5/902

It is not the practice of foreclosing lenders to seek releases nor would purchasers at a foreclosure sale be likely to do so given they have no assurance they will be the successful bidder. In short, the procedure appears designed for consensual transfers, not involuntary ones.

No Illinois decisions discuss this statute in a foreclosure context. Is the State bound by an unknown owners publication even though the lender does not know of the state's lien and thus cannot truthfully attest that it has performed due diligence? The State is not a nonrecord claimant so a nonrecord claimant publication serves no purpose. As before, even if some publication were deemed applicable, what practical good would it do?

The author submits that, in the foreclosure context, the State must have filed its claim for lien prior to the Notice of Foreclosure or, in the alternative, discover the Notice and intervene in a proceeding in order to preserve its rights. The only logical alternative would be to require all foreclosing lenders to make inquiry of the Illinois Department of Revenue as is the case for voluntary conveyances but this would make little sense. First, the required notice to the Department of Revenue must set forth the purchase price⁷⁹, information unknowable prior to the sale. Second, it does not seem cost effective to put lenders to this burden since in the overwhelming majority of foreclosure cases the taxpayer/mortgagor will have no proceeds due from the foreclosure so withholding obligations are extremely unlikely to arise.

(6) §15-1501(b)(7): The United States of America

The United States of America may perfect its federal tax lien against the mortgagor's real estate by recording a notice of such lien with the recorder of deeds in the county of the real estate.⁸⁰ Federal law provides that the rights of the United States may be terminated in a foreclosure proceeding⁸¹ provided, among other things, the complaint sets forth with particularity the interests of the United States and the foreclosure occurs by judicial sale. If the United States has not filed its notice of lien at the time "the [foreclosure] is commenced"⁸², and the United States is not joined as a party, then the foreclosure decree shall have the same effect against the United States "as may be provided with respect to such matters by the local law of the place where such property is situated."⁸³

Since the United States Code defers to local law, IMFL would not appear to require naming the United States as a party if its federal tax lien is not of record as of the

⁷⁹ Id.

⁸⁰ 770 ILCS §110/2(b)

⁸¹ 28 U.S.C.A. §2410(a)(2) (West 2006)

⁸² 28 U.S.C.A. §2410(a)(2) (West 2006)

⁸³ Id.

date the plaintiff files its Notice of Foreclosure.⁸⁴ No change is recommended in the treatment of the United States.

(7) §15-1501(b)(8): Assignees of leases or rents relating to the mortgaged real estate

Whether a foreclosure terminates the rights of a holder of an assignment of leases and/or rents would depend on whether the mortgagor had actual or constructive notice of that security interest and whether the holder of such an interest arising after the Notice of Foreclosure was filed intervened in the proceeding.

(8) §15-1502(b)(10): Any other mortgagee or claimant

If such claimants are actually known to the lender they must be joined (or served by publication after due inquiry). If the claimants are unknown to the lender, their interests will be terminated by the foreclosure decree if they have not perfected their claim in some fashion imparting constructive notice under Illinois law.

B. Publication Practice

Before suggesting changes to IMFL's publication requirements, it bears repeating that publication will always be required when a plaintiff or its counsel has actual knowledge of the existence of a claim, wishes to terminate it in the foreclosure, but does not know whether the claim or the claimant still exists and/or where the claimant resides. One example previously cited is that of a deceased mortgagor. The mortgagee must perform due diligence as to the mortgagor's heirs or legatees and, barring success on that front, may obtain jurisdiction by publication. Other examples include holders of subordinate interests of record, such as liens or interests in gas and oil, but whose locations are unknown after due inquiry.

1. Unknown Owners

IMFL defers to other sections of the Illinois Code of Civil Procedure in its treatment of unknown owners. While the author believes that the statute is presently clear that publication against 'hypothetical' unknown owners is not required, §2-413 of the Code could be amended to read:

⁸⁴ Although the federal statute would appear to permit an unrecorded federal tax lien to be cut off if not recorded when the foreclosure is commenced, it is likely a court would conclude that the United States must be joined if its interest were of record after the foreclosure were 'commenced' but before the Notice of Foreclosure was filed. To hold otherwise would be to place the United States in a weaker position than that of other state creditors when the purpose of the federal act would appear to be to put the United States on the same footing as other creditors.

“If in any action there are persons interested therein [*whose existence is known to the plaintiff*] but whose names are unknown, it shall be lawful to make them parties to the action” [Italicized language added].

The statute then becomes explicit that ‘blanket publications’ are not required. Parties who have failed to record or otherwise perfect their interests under other provisions of Illinois law will be treated the same in foreclosure as out, and will no longer be armed with a potential argument that failure to publish permitted their hidden interest to survive a foreclosure.

2. Nonrecord claimants

The potential confusion surrounding the concept of ‘existence’ can be clarified by amending §15-1502(c)(1) to read as follows:

“...stating (i) the names of such nonrecord claimants or, if a name is not known, the basis for the affiant’s belief that such a nonrecord claimant exists, (ii) which of the four categories set forth in Section 15-1210 each nonrecord claimant’s interest falls in, and (iii) either (A) each nonrecord claimant’s present or last known place of residence or, if the claimant is not a living person, place of business or (B) that such addresses are unknown to the party or the party’s attorney..”

This change makes clear that publication need be employed only against known (or formerly existing) claimants who fit one of the four enumerated classes in §15-1210.

IX. Conclusion

IMFL has stood the test of time as a major improvement over prior mortgage law in Illinois. It could be argued however that it has, perhaps unintentionally, expanded the rights of third parties who fail to take basic steps required to protect their claims or interests under other law. As a result, existing jurisdiction publication practice is needlessly expansive and expensive.

This article argues that there is no problem if one carefully reads the jurisdictional statutes and obeys the common law axiom to read statutes in harmony. Nonetheless, title insurers are willing to underwrite these results only on a case-by-case basis and not as a routine matter. The suggested statutory amendments will eliminate potential conflicts between IMFL and other laws, reduce the time and expense involved in routine foreclosures, and should permit title insurers to issue clean title commitments to foreclosing plaintiffs and prospective purchasers, all without abridging the rights of existing claimants on real estate.

EXHIBIT A

Nonrecord Claimant Affidavit

**IN THE CIRCUIT COURT OF [COOK] COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

FIRST NATIONAL BANK,)	
Plaintiff)	
)	
Vs.)	
)	No. 09 CH 1234
JOHN OWNER, SECOND)	
NATIONAL BANK, NONRECORD)	
CLAIMANTS, UNKNOWN)	
OWNERS, et.al.)	
)	
Defendants)	

AFFIDAVIT AS TO NONRECORD CLAIMANTS

The undersigned hereby certifies the following:

1. This affidavit is made pursuant to the provisions of 735 ILCS 5/15-1509(c) for the purposes of terminating the rights of nonrecord claimants in and to the mortgaged real estate.
2. This affidavit is made on information and belief.
3. ABC Excavation Company, whose present address is 100 S. Oak Street; Chicago Illinois, is a nonrecord claimant who, on information and belief, provided materials, labor or other improvements to the mortgaged real estate.
4. Upon information and belief, the existence, names, and present or last known places of residence of all other nonrecord claimants are unknown to the plaintiff and to the plaintiff's attorneys.
5. The clerk of the court is requested to publish a Notice of Pendency of Action in accordance with 735 ILCS 5/15-1502(c) and with 735 ILCS 5/2-207 and to mail copies of such notice in accordance with 735 ILCS 5/2-206.

Mary Smith, counsel for Plaintiff

EXHIBIT B

Unknown Owners Affidavit

**IN THE CIRCUIT COURT OF [COOK] COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

FIRST NATIONAL BANK,)	
Plaintiff)	
)	
Vs.)	
)	No. 09 CH 1234
JOHN OWNER, SECOND)	
NATIONAL BANK, NONRECORD)	
CLAIMANTS, UNKNOWN)	
OWNERS, et.al.)	
)	
Defendants)	

AFFIDAVIT FOR SERVICE BY PUBLICATION AS TO UNKNOWN OWNERS

The undersigned certifies the following:

1. This affidavit is made pursuant to the provisions of 735 ILCS 5/2-206 for purposes of obtaining jurisdiction over the real estate described in the Complaint for Foreclosure and the following defendant: Unknown Owners.
2. Upon diligent inquiry, the last known place of residence of all unknown owners is unknown to the plaintiff and to the plaintiff's attorneys.
3. All unknown owners cannot be found on diligent inquiry, and process cannot be served upon them.
4. The clerk of the court is requested to publish a Notice of Pendency of Action in accordance with 735 ILCS 5/15-1502(c) and with 735 ILCS 5/2-207 and to mail copies of such notice in accordance with 735 ILCS 5/2-206.

Mary Smith, counsel for Plaintiff

Verification

Under penalties as provided by law under §1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth herein, except where limited to knowledge and belief, are true and correct and, as to such matters, the undersigned certifies that she verily believes the same to be true.

Mary Smith, counsel for Plaintiff

Prepared by and after recording return to:

Mary Smith, Esq.
Smith & Jones
123 Main Street
Chicago, IL

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