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SURVEY OF ILLINOIS LAW: REAL ESTATE FINANCE

Celeste M. Hammond*

I. INTRODUCTION

This survey article concerns Illinois real estate finance cases decided between November 1, 1989, and November 1, 1991. Although it was difficult to categorize neatly all of the important or at least interesting cases, this article is organized around six general headings. Part II considers cases involving the question of whether a security interest in land was ever created. Section A reviews cases in which equity courts had the opportunity to protect unsophisticated parties by recharacterizing their transactions. Section B considers cases in which the courts had to determine whether lenders followed "standard operating procedures" entitling them to gain secured party status in real estate. Part III discusses two types of land installment contract cases: first, compliance with the Dwelling Unit Installment Contract Act; and second, forfeiture. Part IV reports upon bankruptcy cases related to real estate finance. Part V contains one Illinois Land Trust case. Part VI covers the following miscellaneous problems in mortgage defaults:

A) Deed in lieu of foreclosure—the scope of the release;
B) Mortgagee in possession under the Illinois Mortgage Foreclosure Law (IMFL);
C) Redemption period under IMFL; and
D) Due on sale clause triggering the acceleration of a mortgage.

Finally, in Part VII, this article presents a case in which the attorney for a borrower prevailed in a malpractice suit brought by a lender.

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II. CASES INVOLVING SECURITY INTERESTS IN REAL ESTATE

A. Intended Bargain Cases

The issue facing the courts in the cases in this section was whether to protect unsophisticated parties by recharacterizing their transactions in order to give them their intended bargain, even if this meant rendering the transaction legally ineffective.

*Flack v. McClure*¹ is a classic example of a court characterizing an absolute deed as an equitable mortgage.² Plaintiff had entered into a contract to sell her building to defendant for $80,000. The closing was set for October 16, 1984. On the day the contract was executed, September 11, 1984, plaintiff asked defendant for $9,000 to be used to pay her son's college tuition. Defendant, who was represented by counsel, loaned plaintiff the money in exchange for a quitclaim deed. Defendant was unable to get the financing provided for in the contract and, thus, unable to proceed with the scheduled closing. Thereafter, the current mortgagee foreclosed on the property and, at the sheriff's sale in December 1984, the property was sold to a non-litigant for $35,000. To keep that sale from being finalized, defendant recorded his quitclaim deed and redeemed the property in June 1985, on the final day of the redemption period, for $36,758. Originally, plaintiff sued for specific performance of the contract, but plaintiff later amended the complaint to include a claim that the quitclaim deed was really an equitable mortgage.

The appellate court opinion reported testimony of the parties indicating that only a loan was intended and that the parties intended the quitclaim deed would not be recorded but would instead be held as security.³ The court recited the six factors to be considered by the trial judge to determine whether an equitable mortgage exists: whether a debt exists, the relationship of the parties, whether legal assistance was available, the sophistication and circumstances of each party, the adequacy of consideration, and who retained possession of the premises.⁴ Here, a debt clearly existed; seller had no legal assistance, whereas purchaser had an attorney; and the real estate sales contract

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2. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW §§ 3.5 - 3.9 (2d ed. 1985) [hereinafter NELSON & WHITMAN].
3. Flack, 206 Ill. App. 3d at 983, 565 N.E.2d at 135.
4. Id. at 985, 565 N.E.2d at 136.
between the litigants clearly established a property valued at $80,000 being transferred for $9,000. Moreover, for a year after plaintiff gave defendant the quitclaim deed—until she was evicted by court order at defendant's insistence—plaintiff retained possession. By clear and convincing evidence, the plaintiff met the burden of proving the elements of a mortgage. The court ordered defendant to reconvey the property to plaintiff and imposed an equitable mortgage for the benefit of defendant in the amount of $45,758. This amount reflected defendant's loan to plaintiff and his purchase at the foreclosure sale.

In *Verson v. Steinberg,* the court protected an estranged wife who had co-signed a deed of trust at the urging of her husband. The wife had received no consideration from the transaction. She complied with her husband's wishes to secure his personal debt and upon his representation that her signature was a mere formality necessitated by the fact that they held title in joint tenancy. The court based its ruling on its characterization of the wife as a "stranger to the underlying transaction." The wife decided to sell the house which had been quitclaimed to her by her husband pursuant to a 1982 divorce settlement. She brought a quiet title action to remove the cloud of the trust deed. Thereafter, the defendants, secured parties, counterclaimed for foreclosure of the trust deed. Although she had signed the trust deed in 1977 to secure notes of nearly $1.5 million, plaintiff neither signed nor guaranteed the notes, had been separated from her husband for at least a year, and received no consideration for giving the security interest.

The court noted the general rule that "[c]onsideration for a mortgage or trust deed usually flows between the mortgagor and the mortgagee, but in certain situations the consideration can also flow to a third party." For example, where a wife secured notes she made to her husband and the creditor accepted the wife's note for less than the debt, a court in an 1891 case found consideration had been given for the mortgage.8

And where a woman made a mortgage on her fiance's behalf, another court found sufficient consideration for the woman's mortgage because the mortgagee bank had cancelled the man's pre-existing debt and returned the collateral it had been holding.9 There, the

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6. Id. at 855, 548 N.E.2d at 366.
7. Id. at 854, 548 N.E.2d at 365.
mortgagee's change in condition provided the consideration.\textsuperscript{10}

In contrast, in \textit{Verson} the wife had been separated from her husband for a year, and the debt was incurred solely so that the husband could complete a wholly-leveraged purchase of the businesses in which he alone worked. She was a stranger to the transaction.\textsuperscript{11}

Interestingly, there was no indication from the trial court record of any attempt by the secured party to recover on the promissory notes from the makers, one of whom was the son-in-law of the secured party. The defendants acknowledged that they never foreclosed on the real estate mortgage they had on their daughter and son-in-law's property. The husband of plaintiff had filed bankruptcy before the quiet title action was filed and discharged the debts for which the trust deed was given.\textsuperscript{12}

In situations where a party co-signs a mortgage to secure the sole debt of another, a lender would be wise to obtain some kind of written statement indicating that he signs to induce the lender to make the loan and that the making of the loan is valuable consideration to the co-signer. Such a document would serve to estop the co-signer from denying the validity of the security interest at a later time.

In a split decision, the Illinois Appellate Court, Fourth District, in \textit{Miller v. Wines,}\textsuperscript{13} refused to protect the equitable title of a land installment contract buyer who signed an instrument entitled "Subordination of Real Estate Contract" and who received no valuable consideration beyond the one dollar recited in the instrument. The short version of the facts provided by Justice Steigmann in his dissenting opinion supports the description, shared by the majority of the court, of the ruling as "harsh,"\textsuperscript{14} and the conclusion that the law should be changed.

In 1974, Miller entered into a land installment contract with Wines for five acres, including a residence, for a price of $28,000. Wines retained the right to mortgage the property to the extent of the unpaid balance. Miller took possession and resided on the property. By November of 1984, Miller had paid over $23,400 to Wines, leaving an unpaid balance of about $4,500. Wines executed a mortgage on the land contract property to the Fireman's Fund Mortgage

\textsuperscript{10} \textit{Id.} at 684, 521 N.E.2d at 594.
\textsuperscript{11} \textit{Verson}, 191 Ill. App. 3d at 855, 548 N.E.2d at 366.
\textsuperscript{12} \textit{Id.} at 854-55, 548 N.E.2d at 366.
\textsuperscript{13} 197 Ill. App. 3d 447, 554 N.E.2d 784 (4th Dist. 1990).
\textsuperscript{14} \textit{Id.} at 456, 554 N.E.2d at 790 (Steigmann, J., dissenting).
Corporation to secure a loan of $35,000. Miller signed a document by which he purportedly subordinated his $24,500 interest in the real estate to the mortgagee. Miller received nothing in exchange.

The dissent doubted whether the subordination agreement was "clear and unambiguous" as argued by the mortgage company and as characterized by the majority of the court. In distinguishing the situation here from one where a relative or friend is co-signing a note to secure a loan, the dissent argued that "the mortgage company knew that Miller was going to be asked by Wines to sign . . . and it knew that Miller would derive no benefit therefrom, while signing away what is likely to be the major financial asset of his life." At least where, as here, an institutional lender sets up the transaction, and where, as here, no third party relies on the recordation of the relevant instrument, it seems fair to impose an affirmative duty on the mortgage company to insure that a subordinated land owner, like Miller, "knowingly and voluntarily" waived his property interest before the agreement would be found binding.

Finally, a decision of the Illinois Appellate Court, First District, emphasizes how risky it is for an individual to become a party to a real estate transaction without being represented by a fairly sophisticated real estate attorney. Although the appellate court echoed the emotions of the trial court judge that the plaintiff "has been very badly treated," it affirmed the trial court. The trial court found that the plaintiff, a vendee under a land installment contract with a vendor who was only the beneficiary of a land trust that held both legal and equitable title to the land, and who had no power of direction regarding transfer of title, had no equitable title in the real

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15. Provisions of the agreement are set forth in the text of the opinion, id. at 449-50, 554 N.E.2d at 786. Justice Steigmann calls the agreement "an example of legalese at its worst, clearly (and probably eventually) beyond the ken of all but the most intelligent and financially sophisticated laymen." Id. at 455, 554 N.E.2d at 789 (Steigmann, J., dissenting).
16. Id. at 455, 554 N.E.2d at 790 (Steigmann, J., dissenting).
17. Id. at 456, 554 N.E.2d at 790 (Steigmann, J., dissenting).
18. See Nelson & Whitman, supra note 2. Nelson and Whitman discuss the enforceability of true "subordination" agreements included as part of the purchase contract in favor of the construction lender as to the lien of the vendee for any earnest money or down payment collected by developer during the construction period. As in Miller, the subordinating purchaser will ordinarily be entirely unsophisticated and is unlikely to have any concept of the significance of the subordination provision. Nelson and Whitman conclude that "it might well be argued that such subordinations by contract vendees are too vague or too unfair to enforce." Nelson & Whitman, supra note 2, § 13.3.
20. Id. at *5.
estate. Therefore, the trial court dismissed the plaintiff’s quiet title action. The court refused to protect the plaintiff by recognizing an interest in the land even though she had paid $30,000 down and another $20,000 under a novation agreement plus monthly installments over a five year period on a contract price of $50,000. The court left plaintiff to pursue a claim for money damages.

Plaintiff, who had just arrived from Korea, entered into a $100,000 land installment contract in 1981 for the purchase of property on a commercial street in Chicago. If plaintiff had been represented by competent counsel, who presumably would have required a title commitment before executing the contract, she would have learned that vendors in 1976 had transferred their title to an Illinois land trust, naming LaSalle National Bank as trustee and reserving to themselves sole beneficial interest. The trust agreement provided that the trustee had full power and authority to sell and convey the trust property. Hence, vendors would have to direct the trustee to enter into the contract for any interest in real property to flow to plaintiff, vendee. Therefore, the plaintiff acquired a right in personal property only.21

If vendee had retained competent counsel, that counsel would have advised recordation of the land installment contract to give notice to third parties. Instead, what happened was that the contract was recorded, but probably as a “wild deed” outside the chain of title,22 since vendor had no authority to transfer title. Moreover, the final payment date provided for in the contract had expired. Presumably, the contract was terminated by 1987 when the vendor directed the trustee to transfer to Hicks, an investor-buyer who purchased for $60,000, and to Affiliated Bank, which provided a purchase money loan secured by a mortgage from Hicks. Also, even if there was a valid novation between vendor and vendee extending the final payment date, it was not recorded and, therefore, did not bind subsequent parties in the chain of title without notice.

Finally, an attorney for vendee would have noticed that the installment land contract failed to state that vendor promised to convey title or deliver a warranty or trustee’s deed and also failed to reveal the existence of the land trust. The absence of these promises, which would have obligated vendor to effect a transfer of title, eliminated any basis for finding equitable title in vendee by equitable conversion or otherwise.23

21. Id.
The fact that defendants Hicks and Affiliated Bank were “aware of” plaintiff’s claim of an interest in the property, that they knew of the installment contract, and knew that a tenant on the premises paid rent to plaintiff until the time of the litigation, did not give them “notice by inquiry.” This meant Hicks never had a duty to find out who the plaintiff was because “she was never an owner” of real estate. The fact that neither Hicks nor the contract vendor sent plaintiff a notice of intent to forfeit the installment contract did not strengthen plaintiff’s basic argument that she had an equitable title. The Appellate Court, First District, held that there was no exception to the general rule that “one claiming by, through or under a beneficiary of a land trust cannot prevail over the rights of a holder of a subsequently acquired interest in the real property.”

B. Cases Dealing With Whether the Lender Performs Effectively in Its Attempt to Obtain a Security Interest in Real Estate

In *Uptown National Bank of Chicago v. Stramer*, lender argued that its complaint was sufficient to state a cause of action for an equitable lien against the real and personal property of a co-borrower/guarantor of the loan contract and appealed the trial court’s dismissal. The defendant’s deceased husband had allegedly misrepresented his assets, liabilities, and income in certain financing statements made to plaintiff in 1983 and 1985 initially to induce plaintiff to lend him money and later to extend the time for payment. Lender required defendant to be a co-borrower on some of the notes made by her husband and to guarantee other notes. The contract defendant signed stated in part that neither she nor her husband would dispose of any of their personal assets nor allow any liens to be placed thereon without the express permission of lender. Although one of the promissory notes signed by defendant’s husband specifically provided for a security interest in accounts receivable, inventory, fixtures, and equipment, none of the notes specified a security interest in the couple’s personal assets, which included Illinois and Florida residences.

24. *Id.* at *4.
25. *Id.* (quoting trial judge).
26. *Id.*
27. *Id.* at 5 (quoting Chicago Fed. Sav. & Loan Ass’n v. Cacciatore, 25 Ill. 2d 535, 547-48, 185 N.E.2d 670, 676 (1962)).
29. *Id.* at 906, 578 N.E.2d at 1166.
In February 1986, about three months prior to his death, the husband conveyed his interest in the real estate to defendant. In September 1989, defendant sold the Florida real estate and disposed of the sales proceeds (some of which she applied to a mortgage on the Illinois real estate).

In its action, plaintiff claimed a right to an equitable lien in the Illinois real estate and agreed that defendant’s 1985 agreement not to sell any personal assets created a security interest because the personal financial statement sufficiently identified the property. The court rejected lender’s agreement because the notes could have included the couple’s personal assets (as they included business assets), and such omission suggested that the parties did not intend these assets to be security.30 The court also noted that since the complaint made no allegation of fraud against the wife, unjust enrichment would not serve as a basis for an equitable lien.

The lender’s case is reminiscent of arguments made, but not successfully,31 that a negative covenant not to sell or encumber certain real estate created a security interest in favor of the creditor.32 As Professor Grant Gilmore advised in his treatise on security interests in personal property:

Negative Covenants should not, it is submitted, be allowed to operate as informal or inchoate security arrangements, even against third parties with notice. If a creditor wants security, let him take a security interest in some recognized form: mortgage, pledge, Article 9 security interest or whatnot. If he wants protection against third parties, let him take possession of the collateral or file. Nothing is to be gained by giving shadowy effectiveness to informal arrangements which conform to no recognized pattern.33

Touche! to lenders who want security interests in real property. Two courts, one a state appellate court and the other a federal bankruptcy court, reached opposite conclusions on the following issue: Whether it is necessary for a lender with a perfected security interest in a mobile home to make a “fixture filing” in the real estate records under Article IX of the Uniform Commercial Code when the mobile home later becomes attached to the land in order for the lender to have priority over a subsequent mortgagee.

30. Id. at 908, 578 N.E.2d at 1168.
32. Nelson & Whitman, supra note 2, § 3.38.
In Rock Island Bank v. Anderson, two financial institutions competed for priority status for their liens on a mobile home. The Andersons purchased the mobile home from First Federal Savings and Loan Association of Davenport, Iowa, on October 28, 1982. First Federal perfected its security interest in the mobile home by complying with state requirements for obtaining a security interest in a motor vehicle or mobile home. Three months later, the Andersons moved the mobile home to leased ground in Mercer County, Illinois, placed it on cinder block foundation, added a room, and attached a garage.

Three years later, the Andersons borrowed money from the Rock Island Bank. The bank took a trust deed along with an assignment of the leasehold interest in the county where the mobile home was situated. The Andersons defaulted on the bank loan, and the bank filed a foreclosure action against the Andersons, unknown owners, and non-record claimants. The trial court found a prior lien in the Rock Island Bank, ahead of First Federal, because the latter had failed to make a fixture filing in the county recorder of deeds office once the mobile home became attached to the real estate.

The Illinois Appellate Court, Third District, reversed and remanded on the basis of a strained interpretation of the word “perfect,” citing Black’s Law Dictionary, instead of considering the applicability of the Uniform Commercial Code. The court suggested that the Rock Island Bank could have protected itself by asking to see the motor vehicle registration because it knew that a mobile home was already on the premises. It would be too great a burden for First Federal to “continuously monitor and track the peregrinations of a mobile home.”

The dissent criticized the majority for citing only to Black's Law Dictionary (and a 1933 edition at that) and being “in direct defiance of Section 9-313 of the [Uniform Commercial] Code.” Justice Barry explained that the Code does not define “perfection” but sets forth requirements if a secured party is to maintain priority over conflicting interests of an encumbrance in personal property which is to become

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35. See Ill. Rev. Stat. ch. 95 1/2, para. 3-202(b) (1989). Illinois requires a lender to file with the Secretary of State and to obtain a notation on the title document.
37. Rock Island Bank, 178 Ill. App. 3d at 1070, 534 N.E.2d at 201-02.
38. Id. at 1070, 534 N.E.2d at 202.
39. Id. at 1071, 534 N.E.2d at 203 (Barry, J., dissenting).
a fixture. "The wary lender is advised to prefile its financing statement or mortgage in the county where the home is to become affixed . . . ."40 Yet Justice Barry may have weakened the usefulness of his dissent in construing Article IX by admitting that he might have agreed with the majority if the facts had been different. For Justice Barry, the determinative facts were that 1) First Federal knew from the beginning that the Andersons intended to affix the mobile home to real estate, and 2) the Rock Island Bank could not determine, because of the improvements, that the structure was a "mobile" home.41

In In re Beabout, a Chapter 7 bankruptcy case,42 a federal bankruptcy court criticized the majority opinion in Rock Island Bank43 and adopted the dissent's statutory construction. While the court is correct in its criticism, it would have been helpful if it had provided some explanation or authority for refusing to follow what it identifies as the "only decision of an Illinois state court dealing with the application of section 9-313 in a factual situation similar to the instant case."44 Instead, the Beabout opinion expertly interprets section 9-313 of the Code, emphasizing the plain language of the statute45 and pointing out that the revisions of the Code in 1972 were intended to change the earlier version's clear preference for chattel security interests over real estate interests.46

The facts in Beabout are somewhat different than those in Rock Island Bank. In 1979, Farm Credit Bank obtained a mortgage in the real estate. In 1983, the Bank of Casey financed the purchase of a mobile home by the debtors and perfected its lien by recording on the certificate of title issued by the secretary of state. The debtors then placed the mobile home on the land, erected a concrete foundation, put in sidewalks, built a deck, and attached a garage. The Bank of Casey argued that since it properly perfected its security interest while the mobile home was personal property, its security interest remained effective even after the mobile home became a

40. Id. at 1072, 534 N.E.2d at 203 (Barry, J. dissenting).
41. Id. at 1073, 534 N.E.2d at 203 (Barry, J., dissenting).
44. Beabout, 110 B.R. at 886.
45. "[T]he plain language of section 9-313, which requires that a security interest in fixtures be perfected by a fixture filing in the real estate records . . . makes clear that a perfected security interest in personal property is no longer effective once the property is changed into realty." 110 B.R. at 887.
46. 110 B.R. at 887-88; see also NELSON & WHITMAN, supra note 2, § 9.7.
fixture. The trustee in bankruptcy took the position that once the home became a fixture, the Bank of Casey was required to make a fixture filing within 10 days after the fixtures were affixed to the realty in order to attain priority over the existing mortgagee of the real estate.

In ruling against the purchase money lender of the mobile home, the court acknowledged the seeming unfairness to the Bank of Casey but felt bound by "statutory directives." The court left it to the legislature to make changes if the statute is unreasonable as applied to mobile home financing because the mobility of the chattels makes it difficult to determine the proper county in which the purchase money lender should file.

III. LAND INSTALLMENT CONTRACT CASES

A. Dwelling Unit Installment Contract Act

In 1991, the Illinois Supreme Court made clear the broad applicability of the requirements that installment land contract sellers must meet under the Dwelling Unit Installment Contract Act. Ruva v. Menta involved an assignment of a land installment contract by the original vendee two years after the contract was entered into.

The Dwelling Unit Installment Contract Act provides that any installment contract for the sale of a dwelling unit will be voidable by the buyer unless there is attached or incorporated by reference to the contract: 1) a certificate of compliance; or 2) an express written warranty that no notice from any city, village, or other governmental authority of any building code violation that existed before the installment contract was executed had been received by the contract seller within 10 years of the date of contract execution; or 3) if any

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47. See Nelson & Whitman, supra note 2, § 9.7.
48. 110 B.R. at 888.
49. Ill. Rev. Stat. ch. 29, para. 8.21 et seq. (1989). This was enacted in 1967 to protect buyers of "dwelling structures," defined to include "any private home or residence, or any building or structure to be occupied or resided in by 12 or less family units." Ill. Rev. Stat. ch. 29, para. 8.21(b) (1989).
51. "Certificate of compliance" is defined as "an affidavit executed by a contract seller stating that the dwelling structure was inspected within 30 days before the contract was executed by an Inspector of the Municipality or County wherein the premises is located, and that at the date of the execution of the contract the dwelling structure is not in violation of any dwelling code." Ill. Rev. Stat. ch. 29, para. 8.21(f) (1989).
such notice had been received, a list of all such notices so received with a detailed statement of all violations referred to in the notices.\textsuperscript{53}

In \textit{Ruva}, the defendants entered into an installment land sale contract for the purchase of a restaurant and a 1,200 square feet, three bedroom home in 1984. By that contract the home was to be used for residential purposes. The sale price was $180,000 with a $50,000 down payment and the balance payable in 10 years in monthly installments. Clause 7 of the contract contained an express written warranty which seemed to meet the requirements of the Act.\textsuperscript{54}

In August 1986, with the consent of the original sellers, defendants assigned their interests to the plaintiff by an assignment instrument that incorporated by reference the terms of the 1984 contract.\textsuperscript{55}

Plaintiffs operated the restaurant for about one month when they received a letter from the Department of Public Health informing them that two inspections in August 1986 revealed that the private sewer system on the property might be inadequate. The plaintiffs were unable to resolve the sewer system problem with the original seller and defendant. They vacated the premises and filed a complaint for rescission based on defendant's failure to include within the assignment a certificate of compliance or a written warranty as required by the Act.\textsuperscript{56}

The Illinois Supreme Court held that the assignment of the installment contract was itself an "installment contract" within the meaning of the Act by construing the language of the Act, "any contract or agreement,"\textsuperscript{57} to apply where, as here, the assigning document began: "THIS AGREEMENT . . . ."\textsuperscript{58} Also, the court rejected defendant's argument that the Act did not apply since a clause in the installment contract expressly provided that they "had no right, title or interest in the real estate . . . ."\textsuperscript{59} Although the parties to a real estate contract may prevent "equitable conversion," whereby the buyer becomes the owner of an equitable interest in the real estate upon executing the sales contract and seller is left with only legal title,\textsuperscript{60} from occurring,\textsuperscript{61} the court ruled that defendant

\begin{itemize}
  \item \textsuperscript{53} \textit{Id.}
  \item \textsuperscript{54} \textit{Ruva}, 143 Ill. 2d at 260, 572 N.E.2d at 890.
  \item \textsuperscript{55} \textit{Id.} at 261-62, 572 N.E.2d at 890.
  \item \textsuperscript{56} \textit{Id.} at 262, 572 N.E.2d at 891.
  \item \textsuperscript{57} Ill. Rev. Stat. ch. 29, para. 8.21(e) (1989).
  \item \textsuperscript{58} \textit{Ruva}, 143 Ill. 2d at 263, 572 N.E.2d at 891.
  \item \textsuperscript{59} \textit{Id.} at 261, 263-64, 572 N.E.2d at 890, 892-93.
  \item \textsuperscript{60} A. James Casner, III American Law of Property § 11.22 (1952).
  \item \textsuperscript{61} \textit{Ruva}, 143 Ill. 2d at 264, 572 N.E.2d at 892 (citing Eade v. Brownlee, 29 Ill. 2d 214,
owned a "beneficial interest" within the meaning of the Act.\textsuperscript{62} Defendants' possessory interest and right to convey were evidence of a beneficial interest.\textsuperscript{63}

Finally, the court distinguished \textit{Kindred v. Stuhr},\textsuperscript{64} where the Act was held not to apply. In \textit{Kindred} a motel was held not to be a dwelling unit within the meaning of the Act because "[o]rdinarily, motels are considered as transitory lodgings, not family dwellings."\textsuperscript{65} The presence of a manager's unit within the motel did not transform the motel into a dwelling structure since the unit was considered "incidental to the operation of the motel and not a family dwelling."\textsuperscript{66} In \textit{Ruva}, the Illinois Supreme Court stressed the contract's provision that the home is to be used solely for residential purposes as evidence that the home is a dwelling structure within meaning of the Act,\textsuperscript{67} and specifically held that the sale of two structures, one of which was a restaurant, did not render the home incidental to the former.\textsuperscript{68} The court did not consider any arguments concerning the primary use of the premises (residential v. commercial; personal v. investment) even though the house was not used by the plaintiff as a personal residence but was leased.\textsuperscript{69}

In spite of the Illinois Supreme Court's strong position in \textit{Ruva}, the doctrine of laches again served as a defense of the land contract vendor in a decision of the Illinois Appellate Court, Fifth District, \textit{Renth v. Krausz}.\textsuperscript{70} In this case, the plaintiff delayed in bringing the rescission action. The court measured the delay from the date of contract execution when "constructive knowledge of the statute . . . gave them a right to void the contract,"\textsuperscript{71} a period of six years.\textsuperscript{72} In addition to the delay, the court found that the action was barred due to a decrease in value of the land by $115,000, forty-two percent

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\item \textit{Ruva}, 143 Ill. 2d at 264, 572 N.E.2d at 892 (citing Eade v. Brownlee, 29 Ill. 2d 214, 193 N.E.2d 786 (1963)).
\item Id.
\item Id.
\item 155 Ill. App. 3d 194, 507 N.E.2d 1379 (3d Dist. 1987).
\item Id. at 196, 507 N.E.2d at 1381.
\item Id.
\item \textit{Ruva}, 143 Ill. 2d at 268, 572 N.E.2d at 893-94.
\item Id. at 268, 572 N.E.2d at 893-94.
\item Id. at 267, 572 N.E.2d at 893.
\item Id. at 122, at 579 N.E.2d at 13.
\item Id. at 123, 579 N.E.2d at 13-14.
\end{itemize}
of the contract sale price, and a substantial prejudice to the defendant-vendor. The court cited *Bledsoe v. Carpenter*73 and *Hay v. Albrecht*,74 both of which held that laches barred a rescission action by a vendee. The Illinois Supreme Court distinguished *Courtois v. Millard*,75 a case in which the fifth district affirmed the circuit court's rescission and held that the circuit court's refusal to impose laches was not an abuse of discretion.76 In *Millard*, there was no evidence that the property had depreciated during the five-year delay in bringing the case and, thus, the "critical fact" making it "inequitable to grant relief"77 was not present.

B. Forfeiture

Two cases during the survey period involved the question of whether forfeiture provisions in land installment contracts preclude other remedies for the vendor. In each case the court based its ruling on the language of the contract.

In *Citicorp Savings of Illinois v. Ascher*,78 defendants, as beneficiaries of certain land trusts that held title to 11 condominium units, entered into a land installment contract on April 1, 1980, with First Bank of Oak Park as trustee of a land trust, vendee. The contract provided that if vendee defaulted, sellers, at their option, could forfeit the agreement and retain payments made "in full satisfaction and as liquidated damages."79 In paragraph fifteen, it provided that "[t]he remedy of forfeiture herein given to Seller shall be exclusive of any other remedy[.]"80

In an assignment dated February 27, 1981, defendants sold their vendor interest in the installment land and their beneficial interest in the land trusts to plaintiff. "The assignment agreement . . . contained a guaranty clause where defendants guaranteed [vendee's] obligation under the installment agreement."81

74. 169 I1. App. 3d 120, 523 N.E.2d 211 (2d Dist. 1988).
76. Id. at 722-23, 529 N.E.2d at 81.
79. Id. at 572, 554 N.E.2d at 410.
80. Id.
81. Id.
On April 1, 1985, vendee failed to pay the balance under the installment contract and defendants did not pay the balance as guarantors. In November 1986, defendants were held to be in default for failure to file an appearance in an action for foreclosure filed by plaintiff. Count III of plaintiff's complaint alleged that defendants were liable for any deficiency between the foreclosure sale price and the amount due under the installment contract. The trial court entered a judgment of foreclosure and sale and provided that if there were a deficiency, vendee would be liable, as would defendants, by their guarantee. The judgment showed a balance of $595,500. Plaintiffs purchased at the sheriff's sale for $413,000, leaving a deficiency of about $191,000.82

Afterwards, defendants obtained leave of the court to file an appearance and counterclaim in March 1987. On plaintiff's motion, the trial judge dismissed Count III, from which this appeal was taken.

The Illinois Appellate Court, First District, affirmed the trial court dismissal because the guarantor "is bound only to the extent and in the matter and under the circumstances pointed out in the obligation."83 A reference in the assignment agreement to "under said contracts"84 indicated that the parties intended to limit the guarantors' liability to the obligation of vendee. Since the installment contract provided forfeiture as the sole remedy, "[d]efendants' guaranty . . . would not extend beyond forfeiture."85 Hence, defendants were not liable for any deficiency.

In contrast with the facts of Ascher,86 the installment land contract in Kohrs v. Barth87 provided that if vendee defaulted, vendor would retain all payments as liquidated damages, buyer would quit the premises, and buyer would give seller a quitclaim deed of all buyer's interest in the premises—typical forfeiture provisions. The Illinois Appellate Court, Fifth District, held that in the absence of a provision that forfeiture was the sole or exclusive remedy, the seller had a right to bring its action for specific performance. The appellate

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82. 196 Ill. App. 3d at 573, 554 N.E.2d at 410.
83. Id. at 574, 554 N.E.2d at 411 (citing Exchange Nat'l Bank v. Bergmen, 153 Ill. App. 3d 470, 473, 505 N.E.2d 1236, 1238 (1st Dist.), appeal denied, 115 Ill. 2d 540, 511 N.E.2d 427 (1987)).
84. Id. at 574, 554 N.E.2d at 411.
85. Id. at 575, 554 N.E.2d at 412.
court thus affirmed the trial court's order that vendee pay the balance of the contract plus interest, some $16,556, and that vendor convey title to vendee upon such payment. The court distinguished prior case law which held that no action for specific performance would lie where the contract provides that one of two things shall be done at the election of the party who must perform, i.e., either the performance of the act or the payment of a sum of money.

Obviously, Illinois attorneys should be precise in drafting provisions for defaults under land installment contracts. The provisions of the Illinois Mortgage Foreclosure Law (IMFL) did not apply in either of these cases because it was not effective as to land installment contracts in existence before July 1, 1987. Where IMFL applies, its foreclosure process is the exclusive method of dealing with vendees' default in some cases and a permitted one in all others. The question lingers, however, of whether IMFL by itself precludes an action for specific performance of a land contract. After all, a land contract is both a sales contract and a financing device. IMFL would seem to apply only to the latter aspect of the land contract transaction.

IV. BANKRUPTCY

A. "Lien Stripping" Under Section 506

When a mortgagor files a petition in bankruptcy, the mortgagor's claim to be a creditor with special protection because of its security interest in certain real estate will be determined under section 506 of the Bankruptcy Code. Much recent litigation has involved the question of whether the mortgagor's secured position may be limited or reduced through a process known as "lien stripping" to the fair market value of the real estate when the debtor seeks the

88. Id. at 471, 570 N.E.2d at 1275.
89. Id. at 470-71, 570 N.E.2d at 1275-76 (citing Koch v. Streuter, 218 Ill. 546, 75 N.E. 1049 (1905); Lyman v. Gedney, 114 Ill. 388, 29 N.E. 282 (1885)).
91. Id. para. 15-1106(a)(2).
92. Id. para. 15-1106(c).
protection of Chapter 7 of the Bankruptcy Code. With a general decline in real property values during the current economic downturn, fair market value is more likely to be less than the amount of the lien than would have been the case in the inflationary 1980's. The split of opinions, with a slim majority holding that the debtor could avoid the lien to the extent it exceeded the debtor's interest in the property, and a minority holding that the undersecured portion of an undersecured debt is not avoidable, has been resolved by the United States Supreme Court by a 6-2 decision in Dewsnup v. Timm. After discussing several recent bankruptcy cases in Illinois, this article will consider the effect of Dewsnup.

The bankruptcy court in In re Leavei recognized that while Chapter 7 debtors can use section 506 to strip liens, debtors may not use section 506(d) to avoid non-dischargeable tax liens. In each of the three cases combined for purposes of the adversary proceeding, the debtors owned real property against which federal tax liens had been filed and the property was encumbered by a first mortgage which exceeded the value of the property. For example, in two of the cases William and Charmaine Chenoweth owned real property subject to a first mortgage of $65,000; they filed for Chapter 7 bankruptcy relief on March 30, 1990. On November 6, 1989, an assessment for unpaid federal income taxes was made against debtors in the amount of $84,213. Further income tax assessments in amounts of $8,600 and $57,000 were made. Tax liens for these were filed in early 1990 just before debtors filed for bankruptcy. In addition a judgment debtor claimed a lien in the amount of $38,000. The debtors alleged that the appraised value of the real estate was only $55,000. They sought to avoid and discharge all security interests beyond the $55,000 value that would be security to the first mortgagee.

Because the tax debts were not dischargeable in bankruptcy and would attach to any personal or real property of the debtors

95. See discussion of cases infra.
96. See, e.g., Gaglia v. First Fed. Sav. & Loan Ass'n, 889 F.2d 1304 (3d Cir. 1989); In re Folendore, 862 F.2d 1537 (11th Cir. 1989); In re Lindsey, 823 F.2d 189 (7th Cir. 1987); In re Brouse, 110 B.R. 539 (Bankr. Colo. 1990); In re Moses, 110 B.R. 962 (Bankr. N.D. Okla. 1990); In re Tanner, 14 B.R. 933 (Bankr. W.D. Pa. 1981).
97. See, e.g., In re Dewsnup, 908 F.2d 588 (10th Cir. 1990); In re Lange, 120 B.R. 132 (Bankr. 9th Cir. 1990); In re Shrum, 98 B.R. 995 (Bankr. W.D. Okla. 1989).
100. Id. at 536 (In each case, the United States opposed avoidance of its liens under § 506(d)).
101. Id. at 540 (The tax debts were non-dischargeable as having been assessed within 240 days of the filing for bankruptcy under 11 U.S.C. §§ 523(a)(1)(A), 507(a)(7)(A)(ii) (1988).
after liquidation in bankruptcy, the court distinguished the situations here from other cases where avoidance was allowed but the tax liens may have been dischargeable. Here, the court held that avoidance of the tax liens under section 506(d) would effectuate no Bankruptcy Code policy.

In United States v. Zlogar, the federal district court affirmed a decision of the bankruptcy court which held that a Chapter 7 debtor could avoid liens on real property to the extent that they exceeded the value of debtor’s interest in the property, even though the debtor intended to retain the property. The court reasoned that the Seventh Circuit Court of Appeals in In re Lindsey approved lien stripping because it insures that secured creditors remain in the same position whether or not bankruptcy proceedings are engaged. Where secured creditors foreclose their liens and bypass bankruptcy, they receive the market value of the interest secured by the lien and a deficiency judgment for the remainder. Using section 506, secured creditors obtain a secured interest equal to the market value of such interest. They can then foreclose on this and become an unsecured creditor for the rest.

Moreover, the court expressly held that post-petition appreciation (after lien-stripping) of the real estate should inure to the benefit of the debtor consistent with the Bankruptcy Code’s policy of giving the debtor a “fresh start” after bankruptcy.

Nowhere did the court address the fact that some of the liens the debtor sought to strip were held by the IRS. Perhaps, as noted by the bankruptcy court, this was because neither the Illinois Department of Revenue nor the IRS “asserted that the debtor’s tax obligations [were] nondischargeable.”

In Goins v. Diamond Mortgage Corp., chapter 13 debtors filed a complaint seeking to scale down the mortgage debt owed to

102. Id. (citing In re Wukelic, 544 F.2d 285 (6th Cir. 1976); In re Frengel, 115 B.R. 569 (Bankr. N.D. Ohio 1989)).
103. Id. (citing In re Crawford, 115 B.R. 381 (Bankr. N.D. Ga. 1990)).
104. Id. at 541.
107. 823 F.2d 189 (7th Cir. 1987).
109. Id. at 58.
the mortgagee. Although they admitted they owed the creditor $47,000 or more, their home, the sole security for Diamond's loan, was only worth $43,000. The debtors wanted the court to hold that, under section 506, $43,000 of claim was secured and $4,000 was unsecured. They proposed to pay off the secured claim in full over sixty months (and keep the house) and pay off the unsecured claim at ten cents on the dollar over the same sixty month period.

While the court felt is was clear a debtor in Chapter 13 could bifurcate the claim of an undersecured creditor asserting a claim on personalty or a debtor's residence and other collateral, the court focused on the narrower issue of whether a debtor can bifurcate a claim when the only collateral is the debtor's residence. Creditor, relying on earlier bankruptcy court decisions and the language of section 1322(b)(2), argued that the debtor may not divide claims of home mortgagees where the only collateral is the debtor's principal residence into secured and unsecured portions. As the Fifth Circuit has noted, the section 1322(b)(2) exception to the right of debtor to modify certain secured claims was in response to perceptions, or to suggestions advanced in the legislative hearings that, home-mortgagor [sic] lenders, performing a valuable social service through their loans, needed special protection against modification.

Nevertheless, just as the Seventh Circuit had used statutory construction to hold that a debtor's deceleration of an accelerated mortgage is a permissible "cure" of a default rather than a prohibited "modification" of the mortgage, the bankruptcy court used statutory construction to reason that it is consistent "to read [s]ection 506(a) and [s]ection 1322(b)(2) independently of one another." Using this approach, Diamond, as holder of a secured claim, was not allowed to have its $43,000 secured claim altered because Diamond's only collateral was the debtor's home. However, as the holder

113. 119 B.R. at 159.
115. 11 U.S.C. § 1322(b)(2) provides that "the [Chapter 13] plan may only . . . modify the rights of holders of secured claims, other than a claim secured by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims."
117. In re Clark, 738 F.2d 869, 874 (7th Cir. 1984).
of a $4,000 unsecured claim, Diamond's rights were subject to modification by the Chapter 13 plan. The court explained that, if, instead, Diamond had been fully secured, the debtors' only remedy would have been a section 1322(b)(5) cure or a pay off in full over the plan's life.

In Dewsnup v. Timm, creditor loaned $119,000 to debtor and her husband, now deceased, and obtained a lien on two parcels of real estate in Utah in 1978. Debtor defaulted in 1979. Although creditor issued a notice of default in 1981, debtor filed several Chapter 11 bankruptcy reorganization petitions that were dismissed. In June 1984, debtor petitioned for protection under Chapter 7. Because of the pendency of these bankruptcy proceedings, creditor was unable to proceed to a foreclosure sale. In 1987, debtor sought to "avoid" a part of the creditor's lien because the value of the real estate had decreased to $39,000. The bankruptcy court refused to grant this relief. It assumed the property had been abandoned by the trustee, and, as such, the property was not covered by section 506(d). The federal district court and the Court of Appeals for the Tenth Circuit affirmed.

Noting a conflict between the Tenth Circuit and the Third Circuit, the United States Supreme Court granted certiorari. After considering the arguments of the parties and their "amici," the Court noted the "difficulty of interpreting the statute in a single opinion that would apply to all possible fact situations." It specifically limited the opinion to the facts of the case before it and "allow[ed] other facts to await their legal resolution on another day."

In Dewsnup, the Supreme Court adopted the theory of the United States government—"that [section] 506(d) does not allow petitioner to 'strip down' respondents' lien, because respondents' claim is secured by a lien and has been fully allowed pursuant to [section] 502." The Court explained that the practical effect of debtor's argument would be to freeze the secured creditor's interest at the judicially determined value, thereby allowing any appreciation

119. Id.
120. Id. at 161-62.
123. In re Dewsnup, 908 F.2d 588 (10th Cir. 1990).
124. Dewsnup, 112 S. Ct. at 776.
125. Id. at 778.
126. Id.
127. Id.
by the time of the foreclosure sale to benefit debtor — a windfall. Unsatisfied with this result, the Court held that the creditor's lien stays with the real estate until the foreclosure because that is what the mortgagor and mortgagee bargained for. Any increase in valuation inures to the benefit of the creditor—not to the benefit of debtor or to the benefit of other unsecured creditors who had nothing to do with the mortgagor-mortgagee bargain.

Clearly, Dewsnup overturns Zlogar, a federal district court decision which approved lien stripping by a Chapter 7 debtor and expressly held that post-petition appreciation would benefit the debtor and, by implication, Lindsey, on which Zlogar is based. The dicta in Leavell which recognizes a general ability of Chapter 7 debtors to strip liens is also overturned by Dewsnup.

Yet, because the Supreme Court so severely limits the scope of its rule, Goins v. Diamond Mortgage Corp. is not affected directly. Also, it is debatable whether the Dewsnup rule has any impact on cases like In re Ligon. There, the court recognized a right in a debtor first to obtain a discharge of all personal liability on his home mortgage in a Chapter 7 bankruptcy and then subsequently to use a Chapter 13 plan to force the mortgagee to accept a cure of all preexisting defaults on the mortgage during the life of the plan, allowing debtor to make mortgage payments and avoid foreclosure.

B. Curing Mortgage Default

The 1990 survey article reported the case of In re Josephs, which addresses the question of how the Illinois Mortgage Foreclosure Law (IMFL) interacts with federal bankruptcy law for the purpose of determining a cut-off for curing and mortgage default. In Josephs, a Chapter 13 debtor had defaulted on a home mortgage held by first mortgagee Federal National Mortgage Association (FNMA); FNMA filed foreclosure proceedings in state court; debtors filed their bankruptcy petition after the entry of the judgment of foreclosure, but

129. In re Lindsey, 823 F.2d 189 (7th Cir. 1987).
131. Goins, 119 B.R. 156; see supra notes 112-20 and accompanying text.
before any sale pursuant to the judgment. FNMA moved for modification of the automatic stay in order to conclude the foreclosure. The court held that debtor retained the right to cure after the foreclosure judgment was entered and during the pre-sale redemption period "until the passing of the redemption period, the execution of the judicial sale, and the entry of an order confirming the sale . . . ." when title passes to the mortgagee. The survey article pointed out that there was language in *Josephs* which might extend the debtor’s right to cure into the special redemption period after the sale. The mortgagor has such a special right to redeem after the sale and for 30 days after the confirmation of sale in very limited circumstances if the real estate is "residential"; the purchaser at the sale was a mortgagee and was a party to the foreclosure; and the sale price was less than the judgment amount.

*In re Beaty* is a 1990 bankruptcy case concerning the curing of mortgage defaults. Although *Beaty* does not involve the question of the right to cure during the special redemption period, it does involve a question, left open by the facts of *Josephs*, as to the right of debtor to cure after the sale but before confirmation of the sale. *Beaty* also clarifies the nature of the debtor’s rights during the period between the pre-petition sale and the confirmation.

In 1987, debtors obtained a $60,450 mortgage loan to buy a house. As a result of debtors’ default in making payments, mortgagee filed a foreclosure action in March 1989. In July 1989, a default judgment of foreclosure was entered with the period of redemption to end on November 2, 1989. On November 29, 1989, after the redemption period ended, a sale was held and mortgagee was the successful bidder. A confirmation hearing was set for December 20, 1989.

On December 15, 1989, debtors filed their Chapter 13 petition and a plan which proposed to cure the default over an eighteen month period. If debtors’ plan was confirmed, and if debtors complied with that plan, the default would be cured, the mortgage reinstated, and the house saved. Mortgagee objected to the plan. The bankruptcy court agreed with the mortgagee and did not confirm the plan.

137. Id.
138. Howell, *supra* note 133, at 1252.
139. ILL. REV. STAT. ch. 110, para. 15-1604(a) (1989).
141. Id. at 115 n.5.
Judge Ronald Barliant explained that the "sale substantially changes the rights of both the debtor and the mortgagee." The foreclosure sale terminates the rights of the parties under the mortgage — there was no longer either a mortgage or a default to cure. As to the provision of IMFL that the sale terminates such interests "provided that the sale is confirmed . . .", the court held that the mortgagor has only a limited right to remain in possession of the property for thirty days after the confirmation.

C. State Homestead Exemption

The trustee in In re Szekely, a Chapter 7 bankruptcy, requested that the debtors be ordered to pay "rent" while they remained in their home during the proceeding. The trustee argued that the debtors were using an asset that belonged to the bankrupt estate, not to them, and that they should be required to pay rent just as anyone else leasing estate assets would be required to pay rent. In reversing the bankruptcy judge's rent order of $4,800 for eight months accrued rent, Judge Posner commented, "[t]he argument is fine as far as it goes, but it doesn't leave much in the way of a homestead exemption."

The debtors, a married couple, declared bankruptcy (originally under Chapter 13, later converted to Chapter 7) on December 5, 1988. One of their assets was a home on which there was both a first and second mortgage. Since the State of Illinois had exercised its option to require debtors to use the state's homestead exemption in bankruptcy rather than the exemptions set forth in the Bankruptcy Code itself, each of the debtors was entitled to a homestead exemption of $7,500 for a total of $15,000. The debtors continued living in their home although they made no payments on either mortgage. In April 1989, the trustee made his requests for rent. The bankruptcy court granted the trustee's request in June and fixed rent at $600 per month. Since the debtors could not pay, it was understood

142. Id. at 115.
145. 936 F.2d 897 (7th Cir. 1991).
146. The federal district court affirmed the order of the bankruptcy court, In re Szekely, 111 B.R. 681 (N.D. Ill. 1990).
147. Szekely, 936 F.2d at 900.
that the accrued rent would be deducted from the homestead exemption when the house was sold. Although the house was not yet sold the debtors vacated the premises in September. In February 1990, the district court affirmed the rent order of $4,800. The house eventually was sold for $135,000, an amount $30,000 greater than the debt owed on the two mortgages. Thus, the proceeds were sufficient to cover the entire homestead exemption of $15,000.

The issue on appeal to the Seventh Circuit was whether the $4,800 accrued rent should be deducted from the $15,000 homestead exemption. The court agreed with the debtors’ argument that the nature of the homestead protection is basically a right of possession—"[the] right to remain in one’s home, rent-free, until the trustee either through sale or otherwise can pay the debtor the value of the exemption."

The court emphasized the language of the Illinois statute characterizing the exemption as an "estate of homestead." The court rejected the trustee’s characterization of the homestead exemption as "merely a lien—a claim to $15,000 if and when the house is sold or the claim, which is freely alienable... is otherwise transferred."

However, Szekely does not give the Chapter 7 debtor an absolute right to live in the homestead property rent-free during the pendency of the bankruptcy, or even until the house is sold. Judge Posner commented, "[b]ecause the house belongs to the estate, the trustee can pay the Szekelys their $15,000 and tell them to skedaddle, and then rent the house to whomever he pleases until he sells it."  

D. Perfection of Security Interest in Mobile Home Where the Chattel Becomes a "Fixture" After Lender Has Perfected a Security Interest

See discussion in this article at II.B.

V. LAND TRUST—FIDUCIARY DUTY OF TRUSTEE TO ASSIGNEE OF ORIGINAL BENEFICIARY

Williams v. Independence Bank of Chicago154 involved two reoccurring issues that arise when a beneficial owner of a land trust

150. Szekely, 936 F.2d. at 901.
151. Id. (quoting Ill. Rev. Stat. ch. 110, para. 12-901 (1989)).
152. Id. (citing Oixon v. Moiler, 42 Ill. App. 3d 688, 690, 356 N.E.2d 599, 602 (5th Dist. 1976)).
153. Id. at 902.
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property assigns less than his entire interest in the trust: (1) the effectiveness of the transfer document; and (2) the duty of the land trustee to the assignee of the beneficial owner. In May 1981, defendant Independence Bank of Chicago executed a land trust agreement with two persons who each held fifty percent of the beneficial interest in the property as tenants in common. According to the agreement, defendant was only to deal with the property when instructed to do so in writing or at the direction of Terrell, one of the beneficiaries. On July 12, 1982, Terrell executed an assignment of 50% of her beneficial interest to the plaintiff, who had loaned Terrell $120,000 so that she could become current on mortgage payments to First Federal Savings and Loan Association. First Federal had a first mortgage of $58,000 on the real estate that was the res of the land trust.

Terrell fell behind on her mortgage payments in spite of the loan from plaintiff. On February 8, 1983, First Federal filed a foreclosure action against defendant as trustee. Defendant notified Terrell of the foreclosure proceedings but did not notify plaintiff. On April 8, 1983, defendant filed an appearance but did not answer the foreclosure complaint. A foreclosure sale was held on November 2, 1983. A surplus of $9340 from the sale was forwarded to defendant, who then gave it to Terrell’s attorney at Terrell’s instruction. Plaintiff did not learn of the foreclosure until June 13, 1984, after the redemption period had expired. Plaintiff filed a complaint against defendant and Terrell, alleging that defendant breached its fiduciary duty to a beneficiary of the land trust when it failed to notify him of the foreclosure.

The court examined the document entitled “Assignment of Beneficial Interest,” in which Terrell purported to convey her interest to plaintiff. This document included the following language:

FOR VALUE RECEIVED, I Geraldine Terrell do hereby sell, assign, transfer, set over and convey unto Emmanuel Williams fifty percent (50%) [of] all my rights, powers, privileges and beneficial interest in and to a fifty percent (50%) undivided beneficial interest in and to that certain trust . . . excluding power of direction and all my interest in the property held subject to said Trust Agreement . . . .\(^{155}\)

The trial court found that there was no effective assignment of the beneficial interest in the res or transfer of the power of direction.

\(^{155}\) Williams, 201 Ill. App. 3d at 688, 559 N.E.2d at 203.
because the word "excluding" in the document refers to both the beneficial interest and the power of direction and, hence, plaintiff had no right to notice of the foreclosure.156

The appellate court disagreed. It looked beyond the plain language of the instrument to surrounding circumstances to derive the intention of the parties. All such evidence, including the title of the document and the language in two parts of the document reflected Terrell's intention to transfer her interest.

Furthermore, the appellate court reversed the summary judgment in favor of the land trustee on the question of defendant's fiduciary duty to notify plaintiff even though Terrell retained the exclusive power of direction. The court explained that "[t]he sole beneficiary in a land trust may assign the beneficial interest while at the same time retaining the power of direction."157 The court also distinguished and limited the rule in *Rudolph v. Gersten*.158 There, the original beneficiaries of a land trust assigned to themselves and their daughter, plaintiff, the beneficial interest in the trust. The original beneficiaries retained the power of direction. Later, one of the original beneficiaries, the father of the assignee, died. Plaintiff's mother, defendant, directed trustee to convey to a third person who reconveyed to a new land trust in which defendant was the sole beneficiary of one of the parcels of land in the trust. Plaintiffs sued claiming one-half interest in the trust. The *Gersten* court construed the trust agreement, assignment, and other documents as evidencing an intent of defendant and her husband to create a testamentary disposition of the property because plaintiff paid no consideration for the assignment and the original beneficiaries retained the sole power of direction. Thus, the court held that "the Gerstens retained the power to defeat plaintiff's interest in the trust while either of them was alive . . . ."159

The *Williams* court cited *Kenoe on Land Trusts*160 in support of limiting *Gersten* to cases in which the disappointed beneficiary paid no consideration.161 Because defendant trustee was both aware of the assignment and had accepted and acknowledged receipt of the assignment, defendant had a duty to notify plaintiff of the foreclosure proceedings.162

156. *Id.* at 689, 559 N.E.2d at 204.
157. *Id.* at 690, 559 N.E.2d at 204 (citing Dorman v. Central Nat'l Bank in Chicago, 97 Ill. App. 3d 429, 433, 422 N.E.2d 1019, 1022 (1st Dist. 1981)).
158. 100 Ill. App. 2d 253, 241 N.E.2d 600 (1st Dist. 1968).
159. *Id.* at 264, 241 N.E.2d at 605.
161. *Williams*, 201 Ill. App. 3d at 690, 559 N.E.2d at 205.
VI. MISCELLANEOUS MORTGAGE PROBLEMS

A. Deed in Lieu of Foreclosure—Scope of the Release

The issue in *Olney Trust Bank v. Pitts* is whether under IMFL the acceptance by mortgagee of a deed in lieu of foreclosure from only one of two mortgagors who held title to the real estate as joint tenants relieved the non-deeding mortgagor of her debt and precluded the mortgagee from foreclosing on her interest in the real estate.

Husband and wife owned certain real estate. Husband owned tract one solely. Husband and wife owned tract two and tract three as joint tenants. In 1981, both husband and wife gave the Olney Trust Bank first mortgages on all three tracts to secure a loan of $163,000. In January 1985, husband and wife gave Olney Trust Bank a second mortgage in all three tracts to secure a loan of $198,000. (Tract 3 was later released from both mortgages.)

When wife filed for dissolution of the marriage in June 1987, both mortgages were in default. In July 1988, husband conveyed his interest in both tracts to the bank by way of a deed in lieu of foreclosure. He also agreed to be jointly liable with wife for whatever deficiency remained after the foreclosure sale. By the same agreement, the bank agreed to take immediate steps to foreclose wife's interest and to sell the two tracts to husband's father for $120,250—$60,250 represented the husband's interest and $60,000 represented the wife's interest. Bank delivered a quitclaim deed to husband's father; wife was not a party to the deed or agreement.

In July 1988, bank filed a foreclosure action against wife. She filed a motion for summary judgment claiming that when bank accepted the deed in lieu of foreclosure from husband, pursuant to IMFL, it released her from personal liability, and, because the mortgage debt was released, bank was precluded from foreclosing her mortgage interest. The trial court denied her motion for summary judgment.

In affirming the trial court, the Illinois Appellate Court, Fifth District, held that because husband was the sole owner and sole

3d 510, 379 N.E.2d 66 (1st Dist. 1978), where the trustee had refused to accept the assignment. 201 Ill. App. 3d at 690-91, 559 N.E.2d at 205.


166. Pitts, 200 Ill. App. 3d at 920, 558 N.E.2d at 400.
mortgagor of tract one, his deed in lieu of foreclosure effectively conveyed the entire interest in that property to the bank. As to tract two, husband's deed in lieu of foreclosure severed the joint-tenancy with Wife and conveyed an undivided one-half to the bank. Wife retained her one-half undivided interest in tract two.

The appellate court reviewed the legislative history of the statute and discerned a legislative intent to codify prior statutory and case law, not to make substantial changes. The court noted that IMFL makes it absolutely clear that a deed in lieu of foreclosure releases all mortgagors from personal liability. The court agreed with the bank that the statute must be construed according to each mortgage because the term "mortgagor" is defined as "the person whose interest in the real estate is the subject of the mortgage." Moreover, the court interprets the term "personal liability" as referring to the liability for any deficiency after sale of the mortgaged property, not, as wife argued, to the existing mortgage debt on the promissory notes prior to foreclosure. Wife's interpretation would be inconsistent with prior law and would be inconsistent with the anti-merger rule of section 15-1401. A deed in lieu of foreclosure does not effect a merger of the mortgagee's interest as mortgagee and the interest mortgagee gets from the deed; hence, the mortgage debt is not satisfied or extinguished. Rather, it bars the mortgagee from obtaining or enforcing a deficiency judgment.

Finally, the court analogized the effect of the non-merger of the lien and title interest by comparing the release of the deficiency judgment in exchange for the deed in lieu of foreclosure with the discharge received by a debtor in bankruptcy. In bankruptcy, the release of a debt secured by a mortgage releases the debtor from personal liability but does not discharge the mortgage lien. The mortgagee may foreclose the mortgage after bankruptcy of the mortgagor but is forbidden to obtain a deficiency judgment.

The issues raised in Farm Credit Bank of St. Louis v. Whitlock concerned the meaning of the release terms of an "Agreement for

167. Id. at 921, 558 N.E.2d at 400.
168. Id. at 923, 558 N.E.2d at 402.
169. Id. at 924, 558 N.E.2d at 402 (citing Steven C. Lindberg & Wayne F. Bender, The Illinois Mortgage Foreclosure Law, 76 ILL. B.J. 800 (1987)).
170. Id. (citing ILL. REV. STAT. ch. 110, para. 15-1209 (1989)).
171. Id. at 926, 558 N.E.2d at 404.
172. Id. at 925, 558 N.E.2d at 403.
Deed in Lieu of Foreclosure.” The trial court, affirmed by the Illinois Appellate Court, Fourth District, with one dissent,\textsuperscript{174} granted summary judgment in favor of debtors from creditor’s foreclosure on the basis that a general release served as a bar to the foreclosure suit.

In 1976, parents and their adult children were engaged in separate farming partnerships. In late 1976, the children attempted to buy a 200 acre farm for $400,000 and asked the bank (plaintiff) for help in financing. Initially the bank refused, but after discussions with the children and parents, it agreed to loan the children the entire purchase price, provided the parents pledged their farm as security.

Two separate loans were arranged. The first loan consisted of a debt instrument in the amount of $214,200 allocating the loan proceeds as follows: $41,720 to pay off a prior lien on parents’ farm; $160,000 for use by the children in purchasing the new farm; and $12,452 for closing fees. Loan #1 was secured by a mortgage on parents’ 200 acre farm. Loan #2 consisted of a debt instrument in the amount of $255,000 to be used for the purchase of the children’s farm. It was secured by a mortgage on the children’s farm.\textsuperscript{175}

Loan #1 was executed by the parents and the children (defendants) on February 9, 1977, and Loan #2 was executed by the children alone on February 10, 1977.\textsuperscript{176} The father testified in a deposition that it was the understanding between him and the children that the parents would continue to pay what they originally owed on their preexisting mortgage and the children would pay the excess debt on both loans.

Subsequently, the children defaulted on Loan #2.\textsuperscript{177} In order to avoid foreclosure, the bank and the children negotiated a transfer of the new farm to the bank in exchange for a “Deed in Lieu of Foreclosure and Mutual Release of Liability” (release agreement). A pertinent part of the release agreement is set forth in the court’s opinion:

As a part of the consideration of this agreement, Borrower, and each of them if more than one, for Borrower and for the heirs, personal representatives, successors and assigns of Borrower, does

\textsuperscript{175} Farm Credit Bank of St. Louis v. Whitlock, 144 Ill. 2d 440, 443, 581 N.E.2d 664, 665 (1991).
\textsuperscript{176} Id. at 444, 581 N.E.2d at 665.
\textsuperscript{177} Id.
hereby remise, release and forever discharge The Federal Land Bank of St. Louis, The Federal Land Bank Association of Carrollton-Carlinville, Illinois, and the officers, employees, directors and stockholders thereof, and Bank, for itself and its successors and assigns, does hereby remise, release and forever discharge Borrower, and each of them if more than one, of and from all manner of actions, causes and causes of action, suits, debts, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands, whatsoever, at law or in equity, and particularly without limiting the generality of the foregoing all claims relating to the mortgage loan transaction aforesaid and the conveyance of title hereunder, which either party and their respective heirs, personal representatives, successors, assigns and agents ever had, now have or may have in the future, for, upon or by reason of any matter, cause of thing, whatsoever.178

In January 1987, the bank filed its foreclosure action against the parents' farm. It is unclear from either the appellate court or the Illinois Supreme Court opinion as to what triggered this foreclosure. In any event, defendants answered the complaint with an affirmative defense that the release agreement between the bank and the children precluded the suit and moved for summary judgment.

The Illinois Supreme Court does not allude to the high emotions in the early stages of the litigation where plaintiff alleged that the "pro-farming/anti-banking" sentiment of the trial judge was the basis for ruling favorably on defendants' summary judgment motion.179 Indeed, plaintiff had moved for a change of venue, albeit too late to be successful because it came after the court's ruling on defendant's motion for summary judgment.180

Instead, the Illinois Supreme Court simply found that the general release was ambiguous on its face. While there are specific references in the release agreement to Loan #2 and none to Loan #1, the agreement releases the borrower from all manner of actions, suits, debts, promises, damages, claims and demands, and, "particularly without limiting the generality of the foregoing," to all claims relating to Loan #2.181 The court interpreted this as releasing the borrowers from all actions and claims, but particularly those relating to Loan

178. Id. at 441-42, 581 N.E.2d at 665-66. (Emphasis added by the appellate court.)
180. Id.
181. 144 Ill. 2d at 448, 581 N.E.2d at 667.
Since both parties were aware of claims that might arise from Loan #1, it is not clear, on the face of the agreement, according to the court, whether the parties' intended to limit the release to Loan #2 or extend it to Loan #1. A trier of fact would have to determine the parties' intent from an examination of any extrinsic evidence. This was never done because of defendants' successful motion for summary judgment. Hence, a remand to the trial court was ordered. The court declined to decide the second issue of whether the parents were accommodation makers of the loan, who had been discharged of liability in the debt instrument as the circuit court had held.

In another farm loan case, *Dahl v. Federal Land Bank Association of Western Illinois,* the debtor farmers brought suit (1) for damages for breach of a supplemental mortgage contract with lender, (2) for damages for intentional infliction of emotional harm by defendant lender, and (3) for damages caused by lenders' duress. The Illinois Appellate Court, Fourth District, affirmed the trial court's dismissal of all three counts.

The appellate court held that the second count was barred by the statute of limitations and that no separate cause of action is recognized in Illinois for duress—rather, duress is only a defense to the claim of another.

The facts relevant to Count I are as follows. In 1985 plaintiffs were engaged in farming and, prior to that time, had obtained credit from all of the defendants—Federal Land Bank of Western Illinois, Farm Credit Bank of St. Louis, and Central Production Credit Association. Three of plaintiffs' parcels were separately mortgaged, securing separate debts to Farm Credit Bank. The plaintiffs had missed annual payments on two parcels, one in November 1984, and another in March 1985. In addition, plaintiffs owed a large sum to Central. In April 1985, fearing he would not be able to make the annual payment on the third parcel (due in June 1985), Mr. Dahl met with representatives of Federal Land Bank and Central to work out a payment plan. It was agreed that if plaintiff executed a supplemental mortgage on all three parcels and an additional 22 acre parcel he owned, and made certain payments to Federal Land Bank and Central, then defendants would forebear pursuing legal remedies

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182. Id.
183. 202 Ill. App. 3d at 616, 560 N.E.2d at 464.
185. Id. at 872, 572 N.E.2d at 314.
186. Id.
available to them. Plaintiffs executed the supplemental mortgage, it was recorded, and plaintiffs made payments according to the plan.\textsuperscript{187}

Nevertheless, in June 1985, in direct contravention of the April 1985 agreement which permitted plaintiffs five years in which to satisfy the loan, Central informed plaintiffs it was setting September 15, 1985, as a due date on its loan after which it would sue if not paid in full. Central made repeated demands including urging plaintiffs to sell personalty they had pledged as collateral. Mr. Dahl became distressed, lost 100 lbs., became ill and confused, and lost most of the use of his legs. He managed to pay most, but not all, of the debt to Central. Central continued to pursue the matter, and Mr. Dahl continued to suffer.\textsuperscript{188} By January 1986, Central released plaintiffs from liability on their loan in exchange for a sum of money, an automobile, and a baler.

Meanwhile, on December 31, 1985, an officer of Federal Land Bank telephoned Dahl and threatened legal action unless plaintiffs deeded two of the three parcels to Farm Credit Bank. This too violated the April 1985 agreement giving plaintiffs five years to pay. After repeated phone calls to Mr. Dahl, plaintiffs deeded the two parcels to Farm Credit Bank on March 16, 1986, and gave a new mortgage on the third parcel.\textsuperscript{189} In return for the two parcels, Farm Credit Bank released plaintiffs of the indebtedness remaining on those two parcels. Because plaintiffs accepted the benefits of this Agreement for Deed in Lieu of Foreclosure and Reduction and Reamortization of Loan, plaintiffs were barred from bringing Count I, regarding breach of the April 1985 agreement. The court said, "Plaintiffs will not be permitted to simultaneously treat that entire transaction as having been in breach of the earlier contract, to accept the benefits bestowed on them, and to reject its release provisions."\textsuperscript{190} The court noted that defendants had not sued to foreclose on the two parcels nor to set aside the 1986 transaction.

B. Mortgagee in Possession

The plaintiff in \textit{Federal Land Bank of St. Louis v. Bergmann}\textsuperscript{191} filed a complaint to foreclose its mortgage on June 18, 1987. On

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\textsuperscript{187} \textit{Id.} at 869, 572 N.E.2d at 312.
\textsuperscript{188} \textit{Id.} at 870, 572 N.E.2d at 313.
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Id.} at 871, 572 N.E.2d at 313.
\textsuperscript{191} 190 Ill. App. 3d 779, 546 N.E.2d 1171 (5th Dist. 1989).
\end{flushleft}
October 28, 1987, plaintiff filed a motion to place mortgagee in possession of the mortgaged premises. The trial court considered a motion to dismiss the complaint and a motion to strike the plaintiff's petition to be put in possession.\textsuperscript{192} The court entered its order on November 19, 1987, granting plaintiff's petition to be mortgagee in possession.\textsuperscript{193}

An appeal from that order considered whether the trial court erred. Since the petition of plaintiff expressly was based on the pre-IMFL law, and since it was not filed until October 1987 (and thus after IMFL became law on July 1, 1987),\textsuperscript{194} defendant argued that the petition should have been stricken and plaintiff required to refile under the new statute. The appellate court reviewed section 15-1106(f) of the new law\textsuperscript{195} that went into effect on November 23, 1987. The court held that the legislature intended section 15-1106(f) to be applied retroactively. Therefore, as to all actions filed before July 1, 1987, the law in effect prior to July 1, 1987, will apply.\textsuperscript{196} Thus, the appellate court held that the trial court properly denied defendant's motion to strike filed November 3, 1987.

The Illinois Appellate Court, Second District, labelled \textit{Travelers Insurance Co. v. LaSalle National Bank},\textsuperscript{197} a case of first impression on the meaning of "good cause" in the statutory requirement that mortgagors must show good cause in order to refute the presumption that a non-residential mortgagee has a right to be placed into possession during the pendency of the foreclosure action.\textsuperscript{198}

Here, on April 1, 1986, defendant LaSalle Bank, as trustee of a land trust, executed a mortgage in favor of plaintiff to secure a note for $15,500,000. The note matured on April 30, 1989, and was not paid on maturity. Plaintiff filed a complaint in foreclosure on August 19, 1989. The parties executed a stipulation whereby they agreed to open a joint checking account. However, a paragraph of the stipulation provided that none of the parties waived any rights, including plaintiff's right to be made a mortgagee in possession. The trial court approved the stipulation and entered an order incorporating its terms.

\textsuperscript{192} \textit{Id.} at 781, 546 N.E.2d at 1172.
\textsuperscript{193} \textit{Id.} at 781, 546 N.E.2d at 1173.
\textsuperscript{194} \textit{ILL. REV. STAT. ch. 110, para. 15-1106(f) (1989)}.
\textsuperscript{195} \textit{Id.} at para. 15-1106(f).
\textsuperscript{196} Bergmann, 190 Ill. App. 3d at 784, 546 N.E.2d at 1174-75.
\textsuperscript{197} 200 Ill. App. 3d 139, 558 N.E.2d 579 (2d Dist. 1990).
\textsuperscript{198} \textit{ILL. REV. STAT. ch. 110, paras. 15-1701(b)(1)-(2) (1989)}. 

Subsequently, plaintiff filed a motion to be placed into possession pursuant to section 15-1701 of IMFL. Plaintiff alleged that the mortgage authorized plaintiff to take possession and that there existed a probability that it would prevail in the foreclosure. The trial court approved plaintiff's motion, finding the mortgage document so provided and that the court was satisfied plaintiff would prevail.\(^\text{199}\)

The appellate court rejected defendant's arguments that because plaintiff had "failed to allege that [mortgagors] had committed any fraud, mismanagement, waste or other dissipation of the mortgaged real estate," defendants had demonstrated the statutorily required "good cause."\(^\text{200}\) The court said the defendants were confusing the provisions of section 15-1701(b)(1), which applies only in cases of residential real estate and gives mortgagor a presumption to retain possession, with section 15-1701(b)(2), which applies in non-residential situations and which reverses the presumption in favor of the mortgagee if the mortgage documents so provide and if there is a probability of the mortgagee prevailing. Only if mortgagor rebuts this strong statutory presumption by showing good cause (still undefined by this case) will mortgagee fail in efforts to be placed in possession. Here, defendants' unverified answer and affirmative defenses only went to the amount of interest owed, and the stipulation did not preclude plaintiff from being placed in possession. Therefore, the court held that no sufficient "good cause" was shown.\(^\text{201}\)

C. Redemption Period Under IMFL Cannot Be Extended by Exercise of Court's Equitable Powers

In *Margaretten & Co. v. Martinez*,\(^\text{202}\) mortgagors appealed from denial of their motion to vacate an order approving sale of their home pursuant to foreclosure and for an injunction to stay their eviction from the home. Mortgagors argued that because the trial court set the wrong deadline for redemption, they could have redeemed within the limits of the correct deadline.

Although defendant-mortgagor filed a *pro se* appearance, the defendants failed to answer or otherwise plead to a complaint for foreclosure filed by plaintiff. The trial court entered a default judg-

\(^{199}\) 200 Ill. App. 3d at 142, 558 N.E.2d at 581.

\(^{200}\) Id. at 144, 558 N.E.2d at 582.

\(^{201}\) Id. at 145-46, 558 N.E.2d at 583.

ment on September 16, 1988, and provided that the redemption period would expire on January 25, 1989.

On February 15, 1989, non-parties purchased the property at the post-redemption foreclosure sale. That same day, the trial court issued an order confirming the sale and granting possession to purchasers after 30 days. On April 3, 1989, defendants presented a motion to vacate the February 15th order and prohibit their eviction.

In support of their motions to vacate and for an injunction, defendants argued that because the husband was not residing with his wife, he was never properly served by the sheriff. Husband further argued that since he was never properly served, the seven month redemption period should have been calculated from the date he filed his appearance and submitted to the jurisdiction of the court (July 22, 1988) rather than the date of service of his wife (June 24, 1988). This would mean the redemption period ran until February 22, 1989, rather than January 25, 1989, as set forth by the trial court’s order. Moreover, husband gave an affidavit stating that he appeared in court on February 15, 1989, and advised the judge that he had the money to redeem. The trial judge advised him that he was too late.

While the appellate court agreed that the trial court was in error in setting the redemption period, it affirmed the trial court’s denial of defendants’ April 3rd motion to vacate and for permission to redeem even after the correct redemption period had expired. The court noted cases where a court of equity had permitted redemption after the statutory period had expired “if fraud, mistake, or some infirmity . . . of a public official” was present or the purchaser prevented redemption during the period. However, those cases predated IMFL. Section 15-1605 of IMFL provides: “No equitable right of redemption shall exist or be enforceable under or with respect to a mortgage after a judicial sale of the mortgaged real estate . . . .” Here, a judgment of foreclosure and judicial sale had been held before defendants presented their motions. The February 15, 1989, order confirming the sheriff’s sale was a final order. Defendants did not file their motion to vacate until forty-three days later; yet the only statutory basis for attacking final orders more than thirty days after the entry requires petitioner to show due diligence in

203. Id. at 226, 550 N.E.2d at 9 (citing ILL. REV. STAT. ch. 110, para. 15-1603(b) (1989)).
204. Id. at 227, 550 N.E.2d at 10.
206. Id. para. 2-1401.
filing the motion to vacate. Here, defendants offered no excuse for their failure to raise the errors of the trial court for more than six months after entry of the foreclosure decree and for forty-seven days after entry approving the sale. The trial court properly denied defendants' motion.

D. Acceleration of Debt—Triggered by Due on Sale Clause

Mercado v. Calumet Federal Savings and Loan Ass'n\(^{207}\) is one of those cases where one wonders what is really at stake in light of the extensive and ongoing litigation. Here, plaintiff had established a land trust in 1976 with River Oaks as trustee. The entire beneficial interest in the trust, which property consisted of a single family home in which plaintiff and her son resided, vested in plaintiff. On April 29, 1979, plaintiff made an application for re-financing for a new loan of $20,500 with a mortgage in favor of River Oaks executed on May 29, 1979. The mortgage provided:

That in the event of ownership of said property or any part thereof becomes vested in a person other than the Mortgagor *** the undersigned further agrees that in the event of the sale, assignment or pledge by the mortgagor of the property (or any interest therein) which is the subject of this mortgage, the mortgagee or its assigns may at its option, declare the entire balance of principle and interest remaining due hereunder at that time, immediately due and payable.\(^{208}\)

On May 20, 1983, defendant sent plaintiff a notice of default stating that plaintiff had breached the mortgage by selling the home to her son without obtaining its consent. Defendant reported that it had been put on notice of the alleged sale by a copy of the homeowner's insurance policy for 1983-1984 which it had received. The policy indicated that the son was a contract purchaser and beneficiary of the trust and that plaintiff no longer had the same address as her son. Defendant elected to exercise its option to accelerate the mortgage and warned plaintiff it would foreclose if it did not receive full payment within thirty days.

On November 18, 1983, plaintiff filed suit in the United States District Court for the Northern District of Illinois to stop the acceleration. Plaintiff based its intriguing action on an alleged violation of the Real Estate Settlement Procedures Act.\(^{209}\) The district

\(^{207}\) 196 Ill. App. 3d 483, 554 N.E.2d 305 (1st Dist. 1990).
\(^{208}\) Id. at 485, 554 N.E.2d at 307.
\(^{209}\) Id. at 486, 554 N.E.2d at 307.
court granted defendant’s motion to dismiss for failure to state a cause of action. The Seventh Circuit upheld plaintiff’s appeal.\footnote{210}{Mercardo v. Calumet Fed. Sav. & Loan Ass’n, 763 F.2d 269 (7th Cir. 1985).}

Following the federal lawsuits, defendant notified plaintiff that $7,500 had been added to the mortgage amount. This represented attorney fees incurred defending the federal litigation. Defendant argued that the mortgage provided that mortgagor would be liable for reasonable attorney fees for litigation concerning the mortgage document.

Thereafter, plaintiff, on December 17, 1986, tendered the balance owed on the mortgage, minus the attorney fees. Defendant would not release the mortgage without payment of the attorney fees. Plaintiff sued in the Circuit Court of Cook County asking the court to order defendant to tender the release and to deny defendant’s request for attorney fees.

Defendant claimed it was entitled to accelerate because plaintiff had misrepresented that the premises were to be owner-occupied and because plaintiff sold the home without defendant’s approval. Plaintiff filed a motion for summary judgment on May 13, 1987, asking the court to remove the attorney fee assessment and order the release of the mortgage. On June 23, 1987, defendant moved for summary judgment. Defendant filed the affidavit of a loan officer regarding circumstances surrounding the making of the loan and the revelation of the change in ownership. The trial court denied plaintiff’s motion and set the case for a bench trial on September 17, 1987, to determine whether the attorney fee assessment was reasonable. In spite of testimony at trial that the sales contract between plaintiff and her son was drawn up at defendant’s request, that defendant indicated it would recognize son as the owner if he would pay a higher interest rate, and that defendant was at all times aware of the “private agreement” between plaintiff and her son, the circuit court held that defendant’s acceleration was done with good cause and defendant’s claim for fees was reasonable.

After discussing the case law on the issue of whether a transfer of a beneficial interest in a land trust necessarily triggers a due on sale clause,\footnote{211}{Mercardo, 196 Ill. App. 3d at 488-90, 554 N.E.2d at 309-10.} the appellate court reversed on the ground that there was insufficient evidence in the record for the trial court to conclude that defendant had threatened acceleration for good cause. It also remanded the case to the trial court because the trial court judge...
had expressly and erroneously refused to hear evidence on whether the acceleration was "rightful or wrongful." 212 The appellate court also noted discrepancies in the record on the matter of reasonableness of the attorney fees. For example, the bill listed 11/2 hours of work on December 24, 1983, even though defense counsel admitted his office was closed on that date. 213 A remand on this issue was also ordered. And so it goes . . .

VII. FINAL CASE—LEGAL MALPRACTICE

The plaintiff brought an action in First National Bank of Moline v. Califf, Harper, Fox & Dailey 214 to recover money damages for the negligent preparation of mortgage documents by its borrower's attorney. The Appellate Court, Third District, affirmed the trial court’s dismissal for failure to state a cause of action.

In August 1982, business owners found it necessary to secure a business loan. They negotiated with plaintiff who agreed to lend the money if the Small Business Administration (SBA) would guarantee the loan. The borrowers hired an attorney with defendant's law firm to help in procuring and finalizing the loan. The SBA required borrowers to give a second mortgage on their home as security for the loan. Plaintiff forwarded SBA form documents to defendant attorney and asked him to fill them out and have his clients execute them. The attorney had his clients execute the mortgage individually, whereas the proper course would have been to have the document executed by a land trustee since title to the home was in a land trust. Subsequently, borrowers gave a third mortgage on the property and filed for bankruptcy protection. In the bankruptcy proceeding, plaintiff's mortgage was declared invalid because the land trustee never pledged its interest. Plaintiff was classified as a general creditor and received no benefit.

The SBA made a demand on plaintiff (settled for $22,500) because plaintiff had failed to meet one of the conditions of the loan guarantee—obtaining a second mortgage on borrower's house. Subsequently, the plaintiff sued the attorney's employer, a professional corporation, for his negligence.

Since the plaintiff was unable to allege the existence of a duty owed by defendant to plaintiff, the court followed the general rule

212. Id. at 491, 554 N.E.2d at 311.
213. Id. at 494, 554 N.E.2d at 312.
of law that an attorney owes a professional obligation only to his client.\textsuperscript{215} The court rejected plaintiff's argument that there is an exception when the attorney representation is non-adversarial and intended to benefit both the clients and the lender. The court refused to extend the exception to the general rule of Pelham \textit{v. Griesheimer},\textsuperscript{216} which required that the primary intent and purpose of the attorney-client relationship must be to benefit the third party. Here, at most, if plaintiff is correct, it benefitted \textit{both}.

\textsuperscript{215} \textit{Id.} at 85-86, 548 N.E.2d at 1363 (citing Byron Chamber of Commerce \textit{v. Long}, 92 Ill. App. 3d 864, 868, 415 N.E.2d 1361, 1364 (3d Dist. 1981)).

\textsuperscript{216} 92 Ill. 2d 13, 440 N.E.2d 96 (1982).