



Grace to Mortgagees and Grief to Mortgagees: The Illinois Homeowner Protection Act



By Ryan R. Van Osdol

On April 5, 2009, Governor Pat Quinn signed the Homeowner Protection Act into law, instantly affecting

borrowers and lenders in the residential real estate market. The Act attempts to mitigate both the impact of the current economic strain on homeowners and the influx of mortgage foreclosure filings by providing a grace period for defaulting borrowers to develop a payment plan with their lender and the help of a housing counselor.

To Whom Does The Act Apply?

The Act applies to residential real estate that is occupied by the borrower as his/her principal residence. Lenders only need to comply with the provisions of the Act when the mortgage they seek to foreclose is secured by the borrower's principal residence.

What Does The Act Require?

After a borrower becomes 30 days delinquent in their mortgage payment, the Act requires the lender to send a "Grace Period Notice" to the borrower. The statutory notice states that payment on the loan is 30 days overdue, that the borrower has a 30 day grace period to obtain housing counseling, that the 30 day grace period may be extended by an additional 30 days if the borrower obtains housing counseling from an approved housing counseling agency, and that the lender will not take any legal action during the grace period. The notice must also list the Department of Financial

Jury Awards Thrift Store 1.3 Million Dollars For Loss Of Business

By Chester A. Lizak



About 5 years ago, one of our clients was operating a number of thrift stores in the Chicagoland area. One of its most profitable stores was located at 23rd and Kedzie in Chicago.

Unfortunately, for our client, the City of Chicago decided to use its eminent

domain powers to condemn the property where the thrift store was located, together with adjoining properties, for a new fire station. Our client was a tenant in the building. The commencement of the eminent domain proceedings would mean that the client would have to vacate the premises once a jury decided the value of the property. In the interim, our client could remain as a tenant of the property.

The City of Chicago successfully settled with the adjoining property owners. Having gained title to the adjoining properties, the City of Chicago hired ACS, a demolition contractor, to tear down the adjoining buildings. All of the adjoining buildings were torn down except for the wall of one building which was about 31/2 feet from the back wall of the thrift store building. It appears that the demolition contractor in order to speed up demolition decided to tear down the wall with a backhoe. Previously it had removed other parts of the wall by hand demolition.

In the course of tearing down the remaining wall, it collapsed and fell into the cement block wall of the thrift store building. As a consequence, nearly one-half of the existing walls and roof collapsed. Heavy equipment was brought in to look for possible victims. Fortunately, no customers were injured, and three employees suffered very slight injuries.

It became immediately evident that in light of the pending condemnation action, that the building would not be rebuilt. Fixtures and inventory in the thrift store were a total loss. The cost of removing, cleaning, and returning the used clothes and racks to other thrift stores was greater than any anticipated

sale price. The thrift store inventory consisted of used clothing and small appliances. The value of the inventory and store fixtures was relatively small. However, the thrift store was a profitable operation and it would be entitled to recover the lost profits that it would suffer through the date a judgment would be entered in the eminent domain proceedings. That took 3 1/2 years.

Shortly after the collapse of the building, it became apparent that a settlement of the thrift store's claim in the near future was unlikely. Di Monte & Lizak was hired to file a lawsuit for damages. The demolition contractor, the City of Chicago Public Building Commission, and a subcontractor [Cotter] that was hired to do some supervision on the site were sued. Another subcontractor was sued by the supervising subcontractor. Many theories of recovery were alleged. The subcontractors argued that they should be dismissed because they did not have a sufficient degree of responsibility under their contracts with the City.

After many years of litigation, we decided to pursue only the demolition contractor and the City of Chicago. The reasons for that decision were that it was clear that the demolition contractor and the City of Chicago were liable for the damages caused and that they had sufficient insurance to cover a large judgment. We had secured a summary judgment on the issue of liability against the demolition contractor and the City of Chicago because Illinois law provides that demolition work is considered to be "ultra hazardous activity" if performed in an urban setting. Accordingly, we were able to convince the court to enter summary judgment on the issue of liability in favor of the thrift store and against the City of Chicago and the demolition contractor. However, the supervising subcontractors were not held to be strictly liable. Accordingly, their negligence would have to be established by evidence at trial. That would mean at least another year of depositions and other discovery practices for getting the case ready for trial.

We decided to voluntarily dismiss the supervising contractor and to dismiss the



Working on Your Business

By Dennis S. Nudo



You may recall that I wrote an article entitled "Ready, Set, Sell" in the July 2008 issue of our newsletter. Coincidentally, a friend and business acquaintance of mine was working on a business consideration directly related to the concept of preparing one's business for sale.

His perspective was not necessarily "the sale of the business" but the ability of the business to function without the entrepreneur who conceived and raised this brain child to be a successful business. My friend and I talked about the difference between working "on" your business and working "in" your business.

For many years you have worked "in" your business to create a successful enterprise. The focus of this article is how to work "on" your business to protect and enhance the value of the business for your family if you are no longer able to be there and if you should decide to sell the business.

If you decide to sell your business, the purchaser will, in all likelihood, look for a strong management team. If something happens to you, the business must continue to be managed even if you are not there to do the managing. The only way to preserve value in the event of your absence – either as a result of a sale or other unforeseen circumstances – is to depend upon the other key employees staying with the business. If you do not return to the business because of death or disability, your key employees will be concerned about their futures. Without you and without them,

the business stands very little chance of continuing. Likewise, a possible purchaser of the business will be evaluating the business as a "going concern" and will be "concerned about it going on."

A strategic purchaser may place less emphasis on the management team, but that buyer will also place less value on the business knowing that there is a smaller market for the business because other buyers will not compete for a business that does not have a strong management team. Your goal is to keep key employees.

How do you prevent the key employees from leaving? Make them an offer that they can't refuse, either a compensation or participation incentive. Have a plan in place that will financially reward the key employees for staying with the business when unforeseen circumstances arise.

Your family will need these key people to stay for some period of time whether they liquidate, sell or retain the business. Additional compensation needs no explanation. Employees work for money. Participation in a sale by giving the employee an equity look-alike (sometimes referred to as "phantom stock") is more complicated, but may be of greater interest to the employee and be of greater value to the entrepreneur. An employee that believes that he or she has a vested interest in the growth of the business or an interest in obtaining the best sale price will be more inclined to work for that end.

You must put the plan in writing. We refer to this as a "Stay Put Contract." This contract will promise a bonus if the key employee(s) will stay put for a defined period of time in the

case of the sale of the business, your death or your disability. We want that employee's next best job to be the one they currently have. This contract is not binding on the employee, but if the incentive is adequate and structured properly, the employee will stay.

The next thing you need to do is put your continuity instructions in writing. Communicate to your employees, family and advisors what they are going to need to know if you are no longer here. Who is responsible for day-to-day operations? Who should make the financial decisions? Who is in charge of administration decisions? List the names and phone numbers of your advisors. Who can assist the family with the business transition? Should the business be sold, liquidated or retained? If sold, who would be potential buyers? Make these choices during your lifetime so your family does not make the wrong choices when you are not here.

Your death or disability may create immediate and immense problems including: significant financial interruption; lack of a successor; loss of key talent, you; and emotional distress.

Many business owners leave more written instructions for babysitters when they go out on the town than they provide to their employees, family and advisors about emergency business transitions. Don't miss the opportunity to provide your family and employees with the benefit of your thoughts, knowledge and experience. Don't pass up this opportunity! Doesn't your surviving spouse and family deserve as much consideration as the occasional babysitter? ■

Jury Awards Thrift Store 1.3 Million Dollars For Loss Of Business

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other claims. We would be proceeding on the strict liability claim where we had secured a summary judgment on liability. The jury would only have the responsibility of assessing the amount of damages.

Each side hired a forensic expert to prepare a report setting forth their opinion as to the amount of damages suffered by the thrift store owners. The thrift store's expert concluded that the thrift store had lost profits of \$1,287,901 along with damage to business property of \$76,253 and miscellaneous costs in the amount of \$113,409. Total damages claimed were \$1,476,753.

The expert for the defendants placed a value of about \$700,000 on lost profits, \$50,807 for

damage to business and personal property, and other costs of \$8,147.

Shortly before trial, the defendants offered \$250,000. The offer was rejected. No counteroffer was made in light of the fact that the initial offer to settle was grossly unrealistic. At trial, the defendants argued that the thrift store should only be entitled to about one year's loss of profits because they should have found another location. However, they ignored the uncontradicted evidence presented by plaintiffs that they were engaged in an exhaustive search for a new location. However, an appropriate location could not be found in the same neighborhood. The neighborhood is mostly made up of small mom and pop stores.

The jury returned a verdict of \$1,322,383.

The substantial verdict is attributable to many factors including:

- a. A solid liability claim arising from the wrongful conduct of the demolition contractor;
- b. A well documented evaluation of loss prepared by the expert witness;
- c. Active involvement by the client who was very responsive to requests for information. The client also made many valuable suggestions.
- d. An intelligent jury that did a good job of analyzing the evidence.

Chet Lizak and Margherita Albarello tried the case on behalf of the thrift store. ■

Our Dearly Indebted: Timing is Important in Paying the Debts of the Recently Deceased

By Adam J. Poteracki



The New York Times recently reported that one of the strongest segments of the debt collection industry is collecting on the accounts of the deceased. One collection tactic highlighted in the article

is the pursuit of payment from relatives of the deceased who are not always legally responsible for paying the debt.

When a person has died owing money to creditors, there is often confusion and uncertainty over who must pay the debts of the decedent and what debts must be paid. It is important, as a creditor, to know how to be paid on the debts of the deceased and, as a relative of a decedent, what payments you are legally required to make.

Upon the death of a debtor, most claims against the debtor for debts owed become claims against the deceased debtor's estate. In other words, a debtor's family members are generally not individually responsible for paying the debtor's debts out of their own money.

Rather, the deceased debtor's debts are

usually paid out of his or her estate. All property titled individually in the decedent's name is gathered into a pot called the decedent's estate. All claims and inheritances or bequests are paid out of this pot.

When an estate is probated, the key to whether or not a creditor will be paid out of the estate is the claims filing period. Generally, only claims filed during the claims filing period and approved by the court are legally required to be paid from the estate.

If a claim is known to or is readily ascertainable by the representative of the estate, the time period in which that claim may be filed ends upon the later of: 1) a date stated in a published notice that states the death of the decedent, the name and address of the representative of the estate and of his or her attorney of record, and that claims may be filed on or before the date stated in the notice which is not less than six months after the date of the first publication; or 2) three months from the date of delivery of a letter from the personal representative to the creditor giving the same notice.

If a claim is not known to the representative of the estate, claims may be filed until the date stated in the published notice that states the death of the decedent, the name

and address of the representative of the estate and of his or her attorney of record, and that claims may be filed on or before the date stated in the notice which is not less than six months after the date of the first publication.

Even where a person's estate is not formally probated, claims against them that might have been barred by providing notice may be barred two years after the person's death, regardless of notice.

Therefore, it is vitally important to be aware of the deadlines for the filing of claims under the Illinois Probate Act. A claim filed after the claim period may be barred under the Act and made uncollectable.

If a creditor contacts you about arranging payment on the accounts of a deceased friend or relative or if you are a creditor of a recently deceased individual, contact your DiMonte & Lizak attorney to discuss how the Illinois probate claim process can be used to help you achieve your goals. ■

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and Professional Regulation's consumer hotline and website, as well as the lender's telephone number, fax number and mailing address. The Act's requirements only apply once per mortgage and cannot be waived by the borrower.

What Should Happen During The Grace Period?

During the grace period, the borrower and housing counselor should prepare a proposed sustainable loan workout plan. The lender has the authority to determine whether to accept the proposed plan. The parties may negotiate all relevant terms, but the lender is under no duty to accept any workout plan. Any agreed upon plan and any modifications thereto must be in writing and signed by both the lender and the borrower. The borrower may change counseling agencies during the grace period, but such a change does not extend the borrower's grace period.

What Is The Act's Practical Effect?

All lenders must comply with the requirements of the Act before filing a complaint to foreclose a mortgage secured by the borrower's primary residence. First, these lenders must wait until the borrower's loan payment becomes 30 days past due. Then, the lender must send the statutory notice to the borrower, creating a 30 day grace period for the borrower to seek housing counseling. If during that 30 day grace period an approved counseling agency provides written notice to the lender that the borrower is seeking its services, then the grace period extends for an additional 30 days from the date of the notice. During the additional grace period, the borrower and the counseling agency may offer proposed loan workout plans to the lender. However, the Act does not require the lender to accept any workout plan. Rather, it simply provides the borrower with additional time and resources to negotiate a plan with the lender.

If the lender accepts the workout plan, then it may not file a foreclosure action while the borrower complies with the terms of the plan. However, the lender may immediately foreclose the mortgage if the borrower fails to comply with the workout plan. If the lender does not accept the workout plan, then it may file a foreclosure suit as soon as the grace period expires.

All-in-all, the Act provides up to a 90 day grace period for borrowers whose loans are secured by their primary residences to create a loan payment plan that they can afford and the lender can live with. Borrowers should be aware of the additional time and resources this statute provides and use its benefits to avoid foreclosure proceedings on their homes. Lenders should be aware of this statute because it sets up additional hurdles that must be cleared before they can foreclose on mortgages secured by borrowers' primary residences. ■

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