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Deficiency Judgments after Real Estate Foreclosures in Missouri: Some Modest Proposals

Grant S. Nelson

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DEFICIENCY JUDGMENTS AFTER REAL ESTATE FORECLOSURES IN MISSOURI: SOME MODEST PROPOSALS

GRANT S. NELSON*†

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I. INTRODUCTION

When a deed of trust or mortgage is foreclosed, the mortgagee is frequently the only purchaser at the foreclosure sale. There are several reasons for this phenomenon. First, because the mortgagee can bid up to the amount of the mortgage debt without putting up new cash, he has a distinct bidding advantage over a third party bidder, who will have out-of-pocket expense from the first dollar bid. Second, while foreclosure statutes require notice by publication to potential third party bidders, the notice, especially in urban areas, is published in legal newspapers of limited circulation. Moreover, because the publication is technical in nature, a potential third party purchaser has little idea what real estate is being sold. Third, many potential third party purchasers are reluctant to buy land at a foreclosure sale because

*Visiting Professor of Law, University of Minnesota, 1981-1982. Enoch H. Crowder Professor of Law, University of Missouri-Columbia. B.A., 1960, University of Minnesota; J.D., 1963, University of Minnesota.

†At the author's request, the *Missouri Law Review* wishes to note that its editorial policy of using only masculine pronouns is intended to be gender-neutral.

of the difficulty of ascertaining if a purchaser will receive good and marketable title. Fourth, when a mortgagee forecloses on improved real estate, potential bidders often find it difficult to inspect the premises prior to sale. While it may be in the self-interest of the mortgagor to allow third party inspection of the premises, mortgagors who are about to lose their real estate through a foreclosure sale understandably are reluctant to cooperate.

For the above reasons, the mortgagee usually purchases at the sale for the amount of the mortgage debt. Even when the successful bid is less than the mortgage debt, the mortgagee often does not seek a deficiency judgment. Some mortgagees who purchase for less than the debt, however, do seek deficiency judgments, and judging from the author's contacts with Missouri attorneys, this practice is increasing. This Article will explore the procedural and substantive principles governing deficiency judgments in Missouri and will propose suggestions for legislative and judicial change in this area.

II. AVAILABILITY OF DEFICIENCY JUDGMENTS

A mortgagee has at least two options when collecting the mortgage debt. First, he may obtain a judgment at law for the amount of the debt and seek to enforce it by levying on the debtor's property. If he cannot satisfy the judgment in this manner, he still can foreclose on the mortgaged real estate to collect the balance.¹ Alternatively, the mortgagee may foreclose and sue for any deficiency after the foreclosure sale.²

Deficiency judgments usually are available for judicial and power of sale foreclosures. Traditionally, the amount of the deficiency judgment following either method of foreclosure has been the difference between the mortgage debt and the foreclosure sale price. The procedures for obtaining a deficiency judgment, however, have varied according to the method of foreclosure. If a judicial foreclosure sale yields less than the mortgage debt, the mortgagee usually obtains the deficiency judgment from the court that entered the foreclosure decree.³ If a power of sale foreclosure results in a deficiency, the mortgagee must sue at law for the deficiency.⁴

III. LEGISLATIVE REGULATION OF DEFICIENCY JUDGMENTS

The majority of states limits the mortgagee's right to a deficiency judgment. Some limitations are procedural. For example, many states impose

1. G. OSBORNE, G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* § 8.1, at 524 (1979).

2. *Id.* at 625. Usually, the mortgagee may pursue these options concurrently or consecutively. *See, e.g.,* *Foothills Holding Corp. v. Tulsa Rig, Reel & Mfg. Co.*, 155 Colo. 232, 235, 393 P.2d 749, 751 (1964); *Skach v. Lydon*, 16 Ill. App. 3d 610, 614, 306 N.E.2d 482, 485 (1973). *Contra, D'Agostino v. Wheel Inn, Inc.*, 65 Misc. 2d 227, 231, 317 N.Y.S.2d 472, 476 (Rockland County Ct. 1970); N.Y. REAL PROP. ACTS. LAW § 1301 (McKinney 1979).

3. G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 1, § 8.1, at 525.

4. *Id.*

strict notice requirements⁵ and time limits⁶ on the mortgagee. Failure by the mortgagee to comply with these limitations can destroy the right to obtain a deficiency judgment.⁷

Likewise, failure to comply with "one action" rules also can destroy the mortgagee's right to a deficiency judgment. Under such rules, the mortgagee's only remedy on default is foreclosure, and he must obtain any deficiency judgment incident to the foreclosure proceeding.⁸ Two justifications are often cited for this rule:

One is to protect the mortgagor against multiplicity of actions when the separate actions, though theoretically distinct, are so closely connected that normally they can and should be decided in one suit. The other is to compel a creditor who has taken a mortgage on land to exhaust his security before attempting to reach any unmortgaged property to satisfy his claim.⁹

Similar restrictions sometimes apply to power of sale foreclosures.¹⁰ In such situations, the exercise of the power of sale is a condition precedent to a subsequent action at law for a deficiency. Some commentators refer to this restriction as the "security first" principle.¹¹

5. *See, e.g.*, ME. REV. STAT. ANN. tit. 14, § 6203-E (1980).

6. *See, e.g.*, NEV. REV. STAT. § 40.455 (1979) (three months after sale); N.J. STAT. ANN. § 2A:50-2 (West Cum. Supp. 1981-1982) (three months after sale or confirmation); N.D. CENT. CODE § 32-19-06 (1976) (ninety days after sale). Some states limit the time for completing execution on a deficiency judgment. *See, e.g., id.* (three years).

7. *See* N.Y. REAL PROP. ACTS. LAW § 1371(3) (McKinney 1979); OKLA. STAT. ANN. tit. 12, § 686 (West 1960).

8. CAL. CIV. PROC. CODE § 726 (West 1980) provides:

There can be but one form of action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct the sale of the encumbered property

Four other states—Idaho, Montana, Nevada, and Utah—have one action statutes copied from California. *See* IDAHO CODE § 6-101 (1979); MONT. CODE ANN. § 71-1-222 (1981); NEV. REV. STAT. § 40.430 (1979); UTAH CODE ANN. § 78-37-1 (1977).

9. G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 1, § 8.2, at 526.

10. *See, e.g.*, Walker v. Community Bank, 10 Cal. 3d 729, 733-34, 518 P.2d 329, 331-32, 111 Cal. Rptr. 897, 899-900 (1974); Nevada Land & Mortgage Co. v. Hidden Wells Ranch, Inc., 83 Nev. 501, 504, 435 P.2d 198, 200 (1967).

11. G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 1, § 8.2, at 527. Many states also have "election of remedies" statutes under which the mortgagee can foreclose and seek a deficiency judgment or sue on the note and then foreclose, but cannot bring both actions simultaneously. *See, e.g.*, N.Y. REAL PROP. ACTS. LAW §§ 1301, 1401 (McKinney 1979). For a complete compilation of the 15 states with such statutes, see Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. CAL. L. REV. 843, 928 n.467 (1980).

There also are important substantive limitations on deficiency judgments. As a result of the depression of the 1930s, many states enacted "fair value" legislation, and most of this legislation is still in force. Fair value statutes usually define the deficiency as the difference between the mortgage debt and the fair value of the foreclosed land, rather than as the difference between the mortgage debt and the foreclosure sale price of the land.¹² Depending on the statute, a court¹³ or a jury¹⁴ may determine the fair value. Most of these statutes were designed to deal with depression conditions, when foreclosure sales typically yielded nominal amounts. This legislation, however, also assumes that even in a stable economic climate, a forced sale of real estate will yield a price significantly lower than otherwise would be obtained by private sale.

Closely related to the fair value approach are the appraisal statutes used in a few states.¹⁵ This legislation requires the court or the person conducting the foreclosure sale to appoint an appraiser, who determines the value of the property. For example, in South Carolina, a statute reduces the deficiency by the difference between the foreclosure sale price and the appraisal amount.¹⁶ Other state appraisal statutes establish two-thirds of the appraisal value as an upset price and prohibit deficiency judgments if the upset price satisfies the mortgage debt and costs.¹⁷

Numerous other types of antideficiency legislation are common. For example, some states prohibit deficiency judgments after a power of sale¹⁸ or a purchase money mortgage¹⁹ foreclosure. Some of these latter statutes limit the definition of a purchase money mortgage to those held by the vendor as the mortgagee,²⁰ while others also include purchase money mortgages held by a variety of third party lenders.²¹ Many such statutes also apply only to purchases of residential property.²²

12. See, e.g., CAL. CIV. PROC. CODE § 726 (West 1980); N.Y. REAL PROP. ACTS. LAW § 1371 (McKinney 1979); UTAH CODE ANN. § 57-1-32 (1974).

13. See, e.g., N.Y. REAL PROP. ACTS. LAW § 1371 (McKinney 1979).

14. See, e.g., N.D. CENT. CODE §§ 32-9-04, -06, -07 (1979). For an analysis of this statute, see *First State Bank v. Ihringer*, 217 N.W.2d 857, 859-63 (N.D. 1974).

15. See, e.g., ARK. STAT. ANN. § 51-1112 (1971); LA. CODE CIV. PROC. ANN. art. 2336-2337 (West 1961); S.C. CODE § 29-3-660 to -760 (1976).

16. S.C. CODE § 29-3-740 (1976).

17. See, e.g., OHIO REV. CODE ANN. § 2329.19 (Page 1981); WYO. STAT. § 1-17-316 (1977).

18. See, e.g., CAL. CIV. PROC. CODE § 580d (West 1976); WASH. REV. CODE ANN. § 61.24.100 (Cum. Supp. 1981). For a discussion of the Washington statute, see *Helbing Bros. v. Turner*, 14 Wash. App. 494, 496-98, 542 P.2d 1257, 1258-59 (1975).

19. See, e.g., N.C. GEN. STAT. § 45-21.38 (1976); S.D. COMP. LAWS ANN. §§ 44-8-20 to -24 (1967).

20. See, e.g., N.C. GEN. STAT. § 45-21.38 (1976).

21. See, e.g., ARIZ. REV. STAT. ANN. § 33-729(A) (1974).

22. See, e.g., *id.* §§ 33-729, -814; OR. REV. STAT. §§ 88.070 -.075 (1979).

A few states have pervasive antideficiency schemes that incorporate almost all of the above procedural and substantive concepts. For example, in California, a mortgagee's sole judicial remedy is a foreclosure action, and he must obtain any deficiency judgment in that action.²³ The mortgagee's right to a deficiency judgment is further limited in a wide variety of purchase money mortgage situations.²⁴ Finally, even if the mortgagee surmounts the foregoing obstacles, the court will assess the deficiency judgment in accordance with fair value legislation.²⁵ If the mortgagee chooses power of sale foreclosure, a deficiency judgment is prohibited altogether.²⁶

IV. DEFICIENCY JUDGMENTS IN MISSOURI

A. *Current Missouri Statutory and Case Law*

Recently enacted Missouri legislation may require some second mortgagees who sue for a deficiency judgment to notify the mortgagor. Missouri Revised Statutes section 408.557(1)²⁷ provides, "When a lender sells or otherwise disposes of collateral in a transaction in which an action for a deficiency may be commenced against the borrower," he must notify the borrower by personal delivery or by mail. This notice must delineate the goods sold or otherwise disposed of, the sale price, the amount of the deficiency, and other related information.²⁸ "[U]nless the context requires otherwise," the notice

23. CAL. CIV. PROC. CODE § 726 (West 1980).

24. *Id.* § 580b (West 1976) provides in part:

No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to the vendor to secure payment of the balance of the purchase price of real property, or under a deed of trust, or mortgage, on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of such dwelling occupied, entirely or in part, by the purchaser.

25. *Id.* § 726 (West 1980). For a consideration of miscellaneous federal legislation and regulation concerning deficiency judgments, see Washburn, *supra* note 11, at 932-34.

26. CAL. CIV. PROC. CODE § 580d (West 1976).

27. (Cum. Supp. 1981).

28. MO. REV. STAT. § 408.557(2) (Cum. Supp. 1981) provides:

The notice shall be in writing and conspicuously state:

(1) The name, address and telephone number of the lender to whom payment of any deficiency is to be made;

(2) An identification of the goods sold or otherwise disposed of;

(3) The date of sale or other disposition;

(4) The nature of the disposition if other than a sale, or, if a sale, whether or not the goods were sold at public auction and the name and address of the person who conducted the auction;

(5) The amount due the lender immediately prior to the disposition

requirement applies to "any second mortgage loan as defined by section 408.231."²⁹ Missouri Revised Statutes section 408.231³⁰ defines a "second mortgage loan" as "a loan secured solely by a lien upon any interest in residential real estate . . . which residential real estate is subject to one or more prior mortgage loans." Residential real estate includes "any real estate used or intended to be used as a residence by not more than four families, including the borrower."³¹

Based on the foregoing provisions, it could be argued that to obtain a deficiency judgment following foreclosure of a second mortgage on real estate described above, a second mortgagee must comply with section 408.557. There are, however, strong arguments against such an interpretation. First, real estate mortgagees in Missouri normally do not "sell or otherwise dispose of" mortgaged real estate; rather, a trustee conducts a public foreclosure sale.³² Second, real estate mortgage security is rarely, if ever, referred to as "collateral." Consequently, the context suggests that the legislature intended that the notice requirements apply only to secured transactions in-

after deducting the amount of any refund of interest and, if known to the creditor, insurance premiums;

(6) The sale price;

(7) Expenses incurred by the lender permitted to be deducted from the sale price before application to the debt pursuant to sections 400.9-501 through 400.9-507, RSMo, itemized and identified to show the nature of each such expense; and

(8) The remaining deficiency, or surplus, as of the date of sale, computed by subtracting item (7) from item (6) and subtracting the difference so determined, if more than zero, from item (5).

29. *Id.* § 408.551.

30. (Cum. Supp. 1981).

31. MO. REV. STAT. § 408.015(6) (Cum. Supp. 1981).

32. *See id.* §§ 443.290-.440 (1978). A foreclosure sale conducted by the mortgagee is probably voidable if the mortgagee purchases. *See* Dingus, *Mortgages—Redemption After Foreclosure Sale in Missouri*, 25 MO. L. REV. 261, 282 (1960).

The statutes discussed in notes 27-31 and accompanying text *supra* were part of broader consumer protection legislation enacted in 1979 and amended in 1980 that dealt primarily with chattel transactions. This legislation, however, does regulate some nondeficiency aspects of certain real estate second mortgage transactions. For an excellent analysis of those aspects, see Eckhardt, *Second Mortgages on Residential Real Estate*, 36 J. MO. B. 355 (1980).

MO. REV. STAT. § 408.556(4) (Cum. Supp. 1981) possibly prohibits deficiency judgments altogether in second mortgage foreclosures when the amount financed is \$500 or less and the amount of the debt at default is less than \$300. This prohibition, however, is triggered by "any disposition of collateral pursuant to . . . [*id.* § 400.9-504 (1978)]." *Id.* § 408.556(4) (Cum. Supp. 1981). Because section 400.9-504 deals with the disposition of chattel security, the context probably indicates that the above deficiency prohibition is inapplicable to any real estate finance situations.

volving personal property. In view of the ambiguity of the above statutes and the relative ease of compliance with the notice requirements, however, prudent mortgagees should comply with them in any deficiency actions involving the second mortgage transactions described above.

Other than the possible application of section 408.557, Missouri has largely avoided legislative regulation of deficiency judgments.³³ The basic case law presumption in all foreclosure contexts, whether judicial or by power of sale, is that the deficiency will be measured by the difference between the mortgage debt and the foreclosure sale price, unless circumstances showing fraud or unfairness justify setting aside the foreclosure sale.³⁴ Indeed, in *Drannek Realty Co. v. Nathan Frank, Inc.*,³⁵ the Missouri Supreme Court expressly declined to incorporate the fair value concept into Missouri case law. During the depression of the 1930s, the *Drannek* mortgagee foreclosed under a power of sale and purchased the mortgaged property at the foreclosure sale for \$47,500. The mortgage debt was approximately \$80,000. When the mortgagee later sued for a deficiency judgment, the trial court admitted the mortgagor's evidence that the fair value of the land at the time of the foreclosure sale was at least \$141,000. As a result, the court found that a deficiency judgment was inappropriate. The supreme court reversed and directed the entry of a judgment for the mortgagee based on the difference between the foreclosure sale price and the mortgage debt. While the supreme court's reasoning is not entirely clear, it appeared to hold that a deficiency judgment based on the traditional measure must stand, at least in the absence of proof that would otherwise be sufficient to set aside the original foreclosure sale.

Normally, it is extremely difficult to set aside a foreclosure sale based on inadequacy of the sale price alone.³⁶ As one commentator has noted, "sales have been upheld where the price paid for the property was only one-half, one-third, one-fourth, or even one-twentieth of its reasonable market value at the time of the sale."³⁷ Such price inadequacy, however, may be an important factor in setting aside a sale if the circumstances of the sale also indicate fraud or unfair dealing by the trustee or mortgagee.³⁸ Such circum-

33. MO. REV. STAT. §§ 443.240-.260 (1978) provide for deficiency judgments after judicial foreclosure, but these sections appear simply to restate the common law principle that such judgments are available when the value of the property is not sufficient to satisfy the mortgage debt.

34. *Drannek Realty Co. v. Nathan Frank, Inc.*, 346 Mo. 187, 193, 139 S.W.2d 926, 928 (1940); *Carondelet Sav. & Loan Ass'n v. Boyer*, 595 S.W.2d 744, 747 (Mo. App., E.D. 1980); *Reed v. Inness*, 102 S.W.2d 711, 714 (Mo. App., K.C. 1937).

35. 346 Mo. 187, 139 S.W.2d 926 (1941).

36. *Dingus*, *supra* note 32, at 264-65.

37. *Id.* at 263-64. *See also* *Trotter v. Carter*, 353 Mo. 708, 714-15, 183 S.W.2d 898, 902 (1944).

38. *Dingus*, *supra* note 32, at 265.

stances may include chilled bidding by the mortgagee or trustee, an unusual hour or unauthorized place of sale, or trustee self-dealing,³⁹ but these circumstances usually are difficult for the mortgagor to prove.

While the application of such a standard may be appropriate in a suit to set aside a foreclosure sale, using it to determine the availability of a deficiency judgment is unsound. When a foreclosure sale is set aside, the court may upset third party expectations.⁴⁰ A third party may have acquired title to the foreclosed real estate by purchase at the sale or by conveyance from the mortgagee-purchaser. Such a third party may have substantially relied to his detriment on the validity of his purchase. Thus, a strong presumption against setting aside the foreclosure sale is sensible. Moreover, it probably is justified in such a setting to deny a mortgagor's claim for relief based solely on price inadequacy. On the other hand, the interests of third parties are not prejudiced in a deficiency proceeding. Because such a proceeding is an in personam action against a mortgagor for money, a deficiency judgment will not divest title from a foreclosure purchaser. Consequently, it seems inappropriate to use in a deficiency context a rule that was developed to make divestiture of title relatively difficult.

The foregoing discussion, however, does not imply that mere foreclosure sale price inadequacy should be a defense to a deficiency action. Moreover, it seems inappropriate for Missouri courts to adopt a fair value restriction on deficiency judgments when most other jurisdictions that have adopted such a restriction have done so by legislation. In the absence of appropriate legislation, however, the courts should re-evaluate judicial deficiency judgment requirements or, at least, should exhibit greater flexibility in applying the requirements.

39. See, e.g., *Smith v. Haley*, 314 S.W.2d 909 (Mo. 1958) (trustee purchase at sale and other trustee misdealings); *West v. Axtell*, 322 Mo. 401, 17 S.W.2d 328 (1929) (unusual hour); *Borth v. Proctor*, 219 S.W. 72 (Mo. 1919) (collusion between trustee and mortgagee); *Schanewerk v. Hoberecht*, 117 Mo. 22, 22 S.W. 949 (1893) (unauthorized place).

40. Some defects render foreclosure sales void, while others render them merely voidable. If the defect results in a void sale, no legal or equitable title passes to the purchaser or subsequent grantee, except perhaps by adverse possession. A forged mortgage or the absence of a mortgage default, for example, would render a sale void. Most defects, however, render a sale merely voidable; thus, legal title passes to the sale purchaser, subject to the redemption rights in equity of the mortgagor. In such a situation, the rights of the mortgagor will be cut off if the purchaser at the sale or a subsequent purchaser is a bona fide purchaser for value. This status, however, is relatively difficult for a purchaser to obtain because often he may have constructive notice of what occurred at the sale or of information contained in recorded instruments. For further discussion of the above problems, see G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 1, § 7.20. See also *Donovan v. Frick*, 458 S.W.2d 282, 287 (Mo. 1970); *Hrovat v. Bingham*, 341 S.W.2d 365, 371 (Mo. App., Spr. 1960).

A recent decision of the Kansas City Court of Appeals, *Regional Investment Co. v. Willis*,⁴¹ represents an interesting and encouraging development in this area. In that case, the mortgagee foreclosed on a deed of trust and purchased the land at the foreclosure sale for approximately \$21,000, which was over \$6,000 less than the mortgage debt. The mortgagee then sued for a deficiency judgment. The mortgagor alleged that prior to the foreclosure sale, the mortgagee had contracted to sell the lot for \$29,000, an amount greater than the mortgage debt. The trial court granted summary judgment for the mortgagee. The court of appeals reversed and stated:

If the trier of fact found that . . . [the mortgagee] bid the sum of \$21,083.94 on . . . [the mortgaged lot] after binding itself to a contract by which it would receive \$29,000 immediately after the foreclosure sale, and if the bid was made for the purpose of creating a deficiency, then a sufficient factual basis could be established on which to deny . . . [the mortgagee] recovery for such deficiency. The basis of such a denial would be the legal conclusion that the sale was rendered fundamentally unfair to . . . [the mortgagor] and as such, the trustee's sale price could not be the basis by which to measure a deficiency.⁴²

The *Willis* court's reasoning follows the traditional Missouri approach of requiring that a deficiency defense be based on the unfairness of the sale, rather than on the inadequacy of the foreclosure sale price. Indeed, the court suggested that if the mortgagee went to the sale with the property already sold and with the intent to bid less than the mortgage debt, the sale itself would be fundamentally unfair. Logic, however, hardly compels such an automatic result because the trustee, not the mortgagee, conducts the sale. If the trustee is not closely connected to the mortgagee, there is no reason to assume, absent other evidence of trustee misconduct, that the sale is unfair. Absent improper advertising, attempted chilled bidding, or similar traditional bases for upsetting a foreclosure sale,⁴³ third parties, in theory, have an opportunity to bid. If the property is worth more than what the mortgagee had planned on bidding, third party bidding could destroy the mortgagee's scheme in a *Willis*-type situation. In short, the true focus of the *Willis* court probably was not on the fairness of the sale. Rather, the probable basis for the decision was the unfairness in allowing the mortgagee to recover more than the mortgage debt. The court must have been concerned more with the unjust enrichment of the mortgagee than with the fairness of the sale.

Even if the mortgagor can establish the substantive requirements for defeating a deficiency claim, he may encounter another roadblock. Two Missouri courts of appeals have held that unless the defects in the exercise of the power of sale render the foreclosure sale void, the mortgagor cannot raise such defects as a defense to an action at law for a deficiency judgment,

41. 572 S.W.2d 191 (Mo. App., K.C. 1978).

42. *Id.* at 193.

43. See notes 36-39 and accompanying text *supra*.

but instead must sue in equity to set aside the sale.⁴⁴ The underlying rationale is that if the sale is merely voidable, legal, but not equitable, title passes to the foreclosure sale purchaser. Since the action for the deficiency judgment is at law, equitable defenses cannot be raised; to allow such defenses would permit an unwarranted collateral attack on the foreclosure sale.⁴⁵ If, however, the defects render the sale void, those defects presumably could be raised as a defense in an action at law for a deficiency judgment.

The foregoing reasoning at best is highly questionable. Prior to the 1849 procedural merger of law and equity in Missouri, such an approach may have been logical because equitable defenses or counterclaims could not be raised in an action at law.⁴⁶ Because of the procedural merger of law and equity and its accompanying modern pleading rules, however, the mortgagor should be able to raise almost any legal or equitable defense in any civil action.⁴⁷ Because the mortgagor can interject legal or equitable claims by way of counterclaim, he can avoid the foregoing problems by objecting to the deficiency judgment in a counterclaim to set aside the foreclosure sale rather than as a defense to the deficiency action.⁴⁸

B. *Should the Missouri Legislature Change the Foreclosure Sale Process?*

As noted above, Missouri has adopted none of the traditional statutory methods used in other states for regulating deficiency judgments. Moreover, in view of the problems and complexities inherent in such statutes, the Missouri legislature should not enact them. Fair value legislation, for example, clearly protects the mortgagor. Such legislation may be desirable in the common situation in which the mortgagee purchases at the foreclosure

44. *Gempp v. Teiber*, 173 S.W.2d 651, 653-54 (Mo. App., St. L. 1943); *South Side Bank v. Ozias*, 155 S.W.2d 519, 526 (Mo. App., K.C. 1941).

45. *Gempp v. Teiber*, 173 S.W.2d 651, 653 (Mo. App., St. L. 1943).

46. See R. LEAVELL, J. LOVE & G. NELSON, *EQUITABLE REMEDIES AND RESTITUTION* 5 (3d ed. 1980); Comment, *Defenses—Legal and Equitable: Merged in Missouri?*, 32 MO. L. REV. 109 (1967).

47. See Comment, *supra* note 46, at 109. The author criticizes the hesitancy of Missouri courts to accept, as a consequence of merger, the ability of parties to raise equitable defenses in actions at law. *Id.* at 117-18.

48. See MO. SUP. CT. R. 55.32. In *Pension Fund of the Christian Church v. Younge*, 74 F.R.D. 155 (E.D. Mo. 1977), the court rejected the "no collateral attack" concept. The mortgagee sued for a deficiency judgment, and the mortgagor counterclaimed to set aside the foreclosure sale. The court stated:

[The mortgagee] has cited several Missouri cases which hold that such a claim is a "collateral attack" on the foreclosure and may not be considered in an action on the note. . . . As . . . [the mortgagor] has noted these cases are based in large part on the now de-emphasized distinction between law and equity. To the extent this is true, they do not control this case.

Id. at 156 (citation omitted). The mortgagor was unable to pursue his counterclaim because it did not involve enough money to satisfy federal jurisdiction requirements. *Id.* at 156-57.

sale because he ultimately may realize the amount of the debt or more by the resale of the property. When a third party purchases, however, fair value statutes "tend to protect the mortgagor at the expense of the nonpurchasing mortgagee, who receives the sale price rather than the market value for credit against the debt."⁴⁹ Appraisal legislation, on the other hand, has been plagued by disputes concerning the accuracy of appraisals.⁵⁰ Moreover, "in times of local or national economic depression, the appraisal, which establishes value at the sale date, merely reflects the depressed market value and thus fails to protect the mortgagor fully."⁵¹

Prohibitions on deficiency judgments in a variety of purchase money transactions also raise substantial problems. An important purpose of such legislation, at least in the residential context, is to protect the mortgagor against the double misfortune of both losing his home in a foreclosure proceeding and incurring a deficiency judgment.⁵² Although these statutes "discourage land sales that are unsound because the land is overvalued,"⁵³ they also may discourage vendor financing of residential sales today, when such financing is becoming more crucial in the sale of residential housing. Because high interest rates and tight money now prevent most purchasers from obtaining conventional financing, more vendors must finance all or part of the sale of their residences. To deny such vendor-mortgagees deficiency judgments in the event of a foreclosure may deter the use of such socially useful financing. Moreover, it is also undesirable to deny a deficiency judgment to a third party purchase money mortgagee. Indeed, it is especially anomalous to penalize the person or institution who enabled the mortgagor to obtain the real estate in the first place.

Nor should Missouri enact legislation that prohibits deficiency judgments in power of sale foreclosures. It can be argued that because power of sale foreclosure is summary and less protective of the mortgagor than judicial foreclosure,⁵⁴ it is fair to offset this disadvantage to the mortgagor by protecting him from a deficiency judgment. While power of sale foreclosure in Missouri usually does not attract many third party bidders, it has been efficient and effective in most other respects. To prohibit deficiency judgments in power of sale foreclosure simply may increase mortgagee use of judicial foreclosure, a more time-consuming and costly process.⁵⁵

49. Washburn, *supra* note 11, at 940.

50. *Id.* at 906.

51. *Id.* at 907.

52. *Id.* at 916.

53. *Bargioni v. Hill*, 59 Cal. 2d 121, 123, 378 P.2d 593, 594, 28 Cal. Rptr. 321, 322 (1963).

54. See G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 1, § 7.19.

55. See McElhone & Cramer, *Loan Foreclosure Costs Affected by Varied State Regulations*, 36 MORTGAGE BANKER 41 (Dec. 1975); Comment, *Cost and Time Factors in Foreclosure of Mortgages*, 3 REAL PROP., PROB. & TR. J. 413 (1968).

The Missouri legislature also should not adopt the one action or security first concept,⁵⁶ even though it may be desirable to force the mortgagee to foreclose on the encumbered property before proceeding against other assets of the mortgagor. Most Missouri mortgagees probably follow such a course of action anyway, at least when the mortgaged real estate was intended to be the primary security for the loan transaction. Many mortgagees, however, rely primarily on the debtor's personal net worth rather than on real estate security. Indeed, the mortgage often is a minor part of the loan transaction. In such a setting, it seems unfair to require the lender to foreclose on the real estate before proceeding against the debtor personally.

Finally, traditional antideficiency legislation also has caused the courts complex and persistent problems of interpretation. Does fair value legislation, for example, protect a guarantor of the mortgage debt as a "party personally liable on the debt"?⁵⁷ To what extent do purchase money deficiency prohibitions apply to construction mortgages,⁵⁸ to mortgages incident to an exchange of real estate,⁵⁹ or to mortgages securing exchanges incident to a marriage dissolution?⁶⁰ To what extent does antideficiency legislation bar not only a deficiency judgment but also any personal judgment against the mortgagor?⁶¹ To what extent are guarantors protected by such legislation?⁶²

56. Missouri case law indicates that the mortgagee need not proceed against the mortgaged real estate prior to a suit on the debt. *See Allen v. Dermott*, 80 Mo. 56, 59 (1883); *Kansas City Sav. Ass'n v. Mastin*, 61 Mo. 435, 438 (1875); *Thornton v. Pigg*, 24 Mo. 249, 251 (1857); *Meyer v. MFA Mut. Ins. Co.*, 543 S.W.2d 822, 825 (Mo. App., St. L. 1976). To what extent, however, is such case law inconsistent with the common law restrictions against splitting a cause of action? Missouri case law in this area is complex and confusing, but courts have barred the second action in a variety of nonmortgage situations concerning two claims arising out of a single occurrence and separately commenced by a single plaintiff. *See Grue v. Hensley*, 357 Mo. 592, 600, 210 S.W.2d 7, 12 (1948). *But see Bush v. Block*, 193 Mo. App. 704, 709, 187 S.W. 153, 156 (Mo. App., K.C. 1916) (judgment on debt does not bar lien foreclosure on insurance policy that was security for debt). In power of sale foreclosure, the most common foreclosure method in Missouri, this theory is irrelevant because power of sale foreclosure is nonjudicial; one cause of action is not being divided into two judicial actions.

57. *See, e.g., Mariners Sav. & Loan Ass'n v. Neil*, 22 Cal. App. 3d 232, 99 Cal. Rptr. 238 (1972); *Bank of Kirkwood Plaza v. Mueller*, 294 N.W.2d 640 (N.D. 1980).

58. *See, e.g., Prunty v. Bank of America*, 37 Cal. App. 3d 430, 112 Cal. Rptr. 370 (1974).

59. *See, e.g., Christopherson v. Allen*, 190 Cal. App. 2d 848, 12 Cal. Rptr. 658 (1961).

60. *See, e.g., Nickerman v. Ryan*, 93 Cal. App. 3d 564, 155 Cal. Rptr. 830 (1979).

61. *See, e.g., Ross Realty Co. v. First Citizens Bank & Trust Co.*, 296 N.C. 366, 250 S.E.2d 271 (1979).

62. *See, e.g., Thomas v. Valley Bank of Nevada*, ____ Nev. ____, 629 P.2d 1205 (1981).

Does such legislation cover installment land contracts?⁶³ Should one action or security first legislation make foreclosure a condition precedent to an action on the debt when the security is relatively valueless?⁶⁴

Legislative intervention in Missouri should not focus on regulating deficiency judgments directly, but rather on mechanisms that will increase the likelihood that the foreclosure sale will yield a fair price. Such mechanisms will result not only in fewer deficiency judgments, but also in more frequent foreclosure surpluses, which benefit junior lienholders as well as mortgagors.

Currently, most deeds of trust are foreclosed by power of sale. Under this process, a trustee sells the property at a public sale after mailing notice to the mortgagor and certain other interested parties and publishing notice to all others.⁶⁵ It is not designed to bring a fair price for the mortgaged real estate. The published notice provides neither a physical description of the property nor its post office address. Potential third party purchasers often cannot ascertain the nature of the title to the property. Physical inspection of improved real estate is often difficult, if not impossible. Moreover, the trustee often is connected closely to the foreclosing mortgagee and may not act to force the bidding above the mortgage debt. The current system, therefore, lacks a seller who wants the highest possible price and a sale procedure that reasonable persons would use to dispose of real estate in a non-foreclosure context.

A legislative solution to these problems should incorporate at least two components. First, the sale should be conducted by customary commercial methods used in the sale of real estate in a nonforeclosure setting, including the use of real estate brokers and normal commercial descriptive and pictorial advertising. Second, the trustee should be truly independent. To implement this component, each county could have a public trustee to conduct foreclosure sales. This person should have substantial experience and expertise in real estate matters.⁶⁶ To implement the first component, the legislation should specify a reasonable time, *e.g.*, ninety days, during which the trustee could sell the property by usual commercial means. The method of compensating the trustee should encourage him to obtain the highest possible sale price. For example, if the sale price does not exceed the mortgage debt, the trustee's fee should be relatively low, perhaps a fixed amount. If

63. *See, e.g.*, *Glacier Campground v. Wild Rivers Inc.*, ____ Mont. ____, 597 P.2d 689 (1979); *Renard v. Allen*, 237 Or. 406, 391 P.2d 777 (1964).

64. *See, e.g.*, G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 1, § 8.2, at 526.

65. MO. REV. STAT. §§ 443.320-.325 (1978).

66. *See, e.g.*, COLO. REV. STAT. §§ 38-37-101 to -139 (1973 & Cum. Supp. 1980). The governor appoints the trustee in first and second class counties. In smaller counties, the county treasurer is the public trustee. *Id.* § 38-37-102 (1973). Under the author's proposal, the local county court or the governor should appoint the public trustee to ensure adequate expertise and experience; he should not be elected.

the foreclosure sale price exceeds the mortgage debt, the trustee should receive a percentage of the excess that increases as the excess increases.⁶⁷

Under the scheme outlined above, a prospective purchaser would deal with the trustee in much the same way as he would deal with a seller of real estate in a normal sale context, using the customary earnest money contract and title examination procedures. If the trustee could not sell the property during the statutory time period, he would be required to order a public auction of the real estate in the manner currently used in Missouri power of sale foreclosures. On the other hand, if the trustee and a potential purchaser agree on sale terms, the trustee would be required to notify the mortgagor and junior lienholders of the proposed sale price. If neither the mortgagor nor any junior lienholders object, the transaction between the trustee and the purchaser would be consummated. If, however, the mortgagor or a junior lienholder object to the sale, the trustee would be required to hold a public auction, and the proposed sale price would be the minimum acceptable bid at the sale. If the public sale yields no bid above the minimum amount, the proposed sale between the trustee and the purchaser would be completed. If the bidding goes beyond the minimum acceptable bid, the property would

67. The methods of compensation could vary widely within this broad framework. One possible method would operate as follows. When mortgaged real estate is sold for the amount of the debt or less, the trustee's fee would be \$200. For up to the first \$20,000 by which the sale price exceeds the debt, the trustee also would receive 1% of the excess. For the next \$20,000, the trustee would receive 1.25%. The percentages could then increase by .25 with each \$20,000 increment. For example, if the total price negotiated by the trustee is \$230,000 and the mortgage debt is \$150,000, the fee would be calculated as follows:

- \$ 200—Flat fee for \$150,000 (the amount of the debt)
- \$ 200—1% of the first \$20,000 in excess of the mortgage debt
- \$ 250—1.25% of the second \$20,000
- \$ 300—1.5% of the third \$20,000
- \$ 350—1.75% of the fourth \$20,000
- \$1,300—Total trustee's fee

To avoid inordinately high trustee's fees in cases of expensive real estate, such a system could limit the trustee's total compensation to 3% of the total foreclosure sale price.

An alternative method of compensating the trustee would be to tie the fee to the amount by which the sale price exceeds a certain percentage of the appraised value of the real estate. This percentage could be 70% or higher. Under such a system, the trustee could collect more than the minimum or fixed fee only when the sale price exceeds 70% of the appraised value of the property. This would prevent windfall trustee's fees when the mortgage debt is especially low compared to the value of the foreclosed property.

The Colorado public trustee is compensated by a fixed salary, which would not provide an economic incentive for the trustee to obtain the highest possible price for the foreclosed real estate. *See id.* § 38-37-105 (Cum. Supp. 1980). Accordingly, that feature of the Colorado system should not be adopted.

be sold to the highest bidder. This procedure would estop the mortgagor or junior lienholders from subsequently attacking a sale between the trustee and a purchaser. If the real estate sells for less than the mortgage debt, the mortgagee could seek a deficiency judgment. The amount of the deficiency would be the difference between the sale price and the mortgage debt and would not be subject to other antideficiency limitations.⁶⁸

Such a system would have weaknesses. It would be more time-consuming and costly than current Missouri power of sale foreclosure practice. Mortgagors, notwithstanding their self-interest in obtaining the highest possible price for the mortgaged real estate, may discourage physical inspection of improved real estate. Moreover, in economically depressed periods, the proposed system probably would not yield a higher price than would result under the current practice. Nevertheless, under most economic conditions, the proposed system should result in foreclosure sale prices that more closely approximate the fair market value of the foreclosed real estate. Such higher prices not only would compensate for the increased costs of the system but also might provide a surplus that would benefit the mortgagor and junior lienholders.⁶⁹ In addition, higher prices should substantially reduce the incidence of deficiency proceedings. Even in the worst case, the proposed system would not result in prices below those obtained under current practices.

Such a system would, however, probably prove impractical in states with pervasive statutory redemption schemes. In these states, the mortgagor and, in some instances, junior lienors, have an additional time period in which

68. The author's proposal is similar in some respects to UNIFORM LAND TRANSACTIONS ACT § 3-508, which was promulgated by the National Conference of Commissioners on Uniform State Laws, but has not been adopted by any state. According to *id.* § 3-508(a), in power of sale foreclosures, the sale may be made at public sale or by private negotiation, by one or more contracts, as a unit or in parcels, at any time and place, and on any terms including sale on credit, but every aspect of the sale, including the method, advertising, time, place, and terms, must be reasonable.

Unlike the author's proposal, however, the uniform act "does not require that the sale be conducted by a disinterested third party such as a trustee." *Id.* § 3-508, Comment 1. Thus, the mortgagee could conduct the sale under the uniform act. Commentators have criticized the uniform act's assumption that the mortgagee's interest is always to maximize the foreclosure price. See Kuklin, *The Uniform Land Transactions Act: Article 3*, 11 REAL PROP., PROB. & TR. J. 12 (1976); Washburn, *supra* note 11, at 938.

Although judicial foreclosure is relatively uncommon, the sale method contained in the author's proposal could be used in judicial foreclosure as well as in power of sale foreclosure. As is true with trustees' sales, sales by a sheriff under a judicial order seldom yield the fair market value of the foreclosed real estate.

69. Normally, junior lienholders have priority over the mortgagor with respect to any foreclosure surplus. G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 1, § 7.31.

to redeem the property after a valid foreclosure sale by paying the sale purchaser the foreclosure sale price.⁷⁰ Moreover, during this statutory period the mortgagor often will have the right to possess the foreclosed property.⁷¹ Consequently, the prospect of receiving a defeasible title probably would substantially discourage third party bidding.⁷²

Statutory redemption in Missouri, however, is much more limited than in other states and thus poses fewer problems for the proposed system. In Missouri, only the mortgagor has the right to redeem, and then only from the mortgagee as the foreclosure sale purchaser.⁷³ Consequently, third party bidding is not deterred. Moreover, because the right to redeem is conditioned on the posting of a bond,⁷⁴ mortgagors exercise it infrequently.

Adoption in Missouri of the proposed system, together with retention of the current statutory redemption procedure, could nevertheless create problems for potential mortgagee-purchasers. Because a Missouri mortgagor redeems from a mortgagee by paying the mortgage debt rather than the foreclosure sale price,⁷⁵ a mortgagee would be deterred from bidding more than the mortgage debt for the mortgaged property; an important potential purchaser thus would not participate fully in the foreclosure process.

Retention of the mortgagor's right to redeem from a mortgagee-purchaser would necessitate at least two changes in the Missouri statutory redemption procedure. First, the redemption right should not exist when the mortgagor fails to object to a trustee's proposal for a private sale to the mortgagee. Second, if the mortgagor objects to a private sale and the mortgagee ultimately purchases at a public sale, the redemption amount should be the greater of the mortgage debt and the foreclosure sale price. This provision would prevent the mortgagor from objecting to a private sale to the mortgagee for an amount greater than the mortgage debt and later attempting to redeem by paying the mortgage debt to the mortgagee-purchaser at a public sale who has paid more than the debt. Better still, if the proposed system is enacted, statutory redemption should be eliminated.⁷⁶

C. *Two Suggested Judicial Standards for Deficiency Judgments*

In the absence of legislative regulation of the foreclosure sale process,

70. See G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 1, § 8.4.

71. See *Cross Cos. v. Citizens Mortgage Inv. Trust*, 305 Minn. 111, 232 N.W.2d 114 (1975); MINN. STAT. ANN. § 580.23 (West Cum. Supp. 1982).

72. See Comment, *The Statutory Right of Redemption in California*, 52 CALIF. L. REV. 846, 848 (1964).

73. See MO. REV. STAT. § 443.410 (1978) (mortgagor, his heirs, devisees, executors, administrators, grantees, or assigns may redeem).

74. *Id.* § 443.420.

75. See *id.* § 443.410.

76. A substitute for postsale redemption might be the extension of the minimum time period the mortgagee must wait before the foreclosure sale can be held.

Missouri courts can improve the deficiency process significantly by re-evaluating the rule that a deficiency judgment is measured by the difference between the mortgage debt and the foreclosure sale price, in the absence of grounds to set aside the foreclosure sale itself. As discussed above, in order to set aside the sale, the mortgagor not only must show that the foreclosure price was grossly inadequate but also that the foreclosure process was substantially defective.⁷⁷ The court should not impose this heavy burden of proof on a mortgagor in a deficiency proceeding. The application of such a standard is understandable when a sale purchaser is divested of title. In a deficiency proceeding, however, title to the foreclosed real estate is not affected—the proceeding is simply an in personam action for money.

A better approach to the deficiency problem is a judicial determination of the fairness of the recovery of a deficiency, rather than the fairness of the sale itself. As emphasized above, this approach should not incorporate the fair value concept.⁷⁸ Fairness should not be gauged by mere inadequacy of the sale price because foreclosure sales rarely bring the fair market value of the land. Rather, two standards should govern the availability of a deficiency judgment. Under the first standard, a court should deny a deficiency judgment if the foreclosure sale price is *grossly* inadequate. Under the second standard, a court should deny a deficiency judgment if the mortgagee-purchaser has resold or has previously contracted to resell the property for an amount greater than the mortgage debt.

Under the first standard, “grossly inadequate” admittedly is not self-defining.⁷⁹ In order to avoid undue subjectivity in such a standard, Missouri courts could, for example, deny a deficiency judgment if the mortgagor convinces the court that the mortgaged real estate sold for less than sixty percent of its fair market value.

Some may argue that the sixty percent rule is unduly harsh on mortgagees when a third party purchases at the foreclosure sale for less than the mortgage debt. Such an argument, however, fails to consider that because the mortgagee can bid up to the amount of the mortgage debt without having out-of-pocket expense, he may control who purchases and the amount of any deficiency. The mortgagee can preserve his right to a deficiency judgment simply by bidding at least sixty percent of the land’s fair market value. For example, if the mortgage debt is \$20,000, the mortgaged real estate has a fair market value of \$10,000, and the mortgagee causes the bidding to go to \$6,000 (sixty percent of the fair market value), he can obtain a deficiency judgment for \$14,000. The mortgagee should bid in excess of sixty percent of his estimate of the fair market value to ensure the sale’s validity if the court places a higher fair market value on the property.

Under the second standard, courts should deny a deficiency judgment

77. See notes 36-39 and accompanying text *supra*.

78. See note 49 and accompanying text *supra*.

79. See Washburn, *supra* note 11, at 862-69.

when the mortgagee would be unjustly enriched. For example, a mortgagee might contract to resell the land for more than the mortgage debt, purchase the land at the foreclosure sale for less than the debt, and thereafter seek a deficiency judgment. The court should deny a deficiency judgment even if the foreclosure sale price was substantially in excess of sixty percent of the land's fair market value. *Regional Investment Co. v. Willis*,⁸⁰ considered above,⁸¹ exemplifies this situation, and the result in that case, if not its reasoning, is consistent with the proposed standard. The same result is appropriate when a mortgagee who purchases at the foreclosure sale contracts to sell the land after the foreclosure sale, but prior to the action for the deficiency judgment. Indeed, in reaching its result, the *Willis* court relied on a Tennessee decision denying a deficiency judgment in a situation involving a postforeclosure contract to resell.⁸² In each situation, the mortgagee is unjustly enriched, even though the foreclosure sale price may not have been grossly inadequate. Thus, the court should deny a deficiency judgment because to rule otherwise would allow the mortgagee to obtain more than the mortgage debt.⁸³

Some may argue that the second standard is unfair because it treats mortgagee-purchasers less favorably than third party purchasers. Indeed, one commentator has stated, "If the mortgagee stands in the same position as any other bidder, the mortgagee should be able to buy at a bargain price and hope for resale at a profit. The mortgagee, as a buyer, should not be treated differently from a stranger who buys."⁸⁴ This argument is vulnerable for several reasons. It does not consider the fundamental purpose of the foreclosure process: satisfaction of the mortgage debt.⁸⁵ To allow the mortgagee to use this process to accomplish more than that purpose is to give him a windfall. To permit the mortgagee to obtain a deficiency judgment when a third party purchases, however, is reasonable because the deficiency judgment, if collected, simply will make the mortgagee whole. Purchase

80. 572 S.W.2d 191 (Mo. App., K.C. 1978).

81. See notes 41 & 42 and accompanying text *supra*.

82. The *Willis* court relied on *Union Joint Stock Land Bank v. Knox County*, 20 Tenn. App. 273, 97 S.W.2d 842 (1936). For a similar case, see *Chemical Bank & Trust Co. v. Adam Schuman Assocs.*, 150 Misc. 2d 221, 268 N.Y.S. 674 (Sup. Ct. 1934). See also *DeFuniak, Right to Deficiency Judgment Where Mortgagee Purchasing at Foreclosure Sale Has Later Resold at a Profit*, 27 KY. L.J. 410 (1939). For the contrary view that a profitable resale alone should not prevent the mortgagee-purchaser from obtaining a deficiency judgment, see *Kentucky Joint Stock Land Bank v. Farmers Exch. Bank*, 274 Ky. 525, 119 S.W.2d 873 (1938); Washburn, *supra* note 11, at 889-90.

83. Other Missouri decisions have emphasized unjust enrichment in limiting mortgagee recovery in a slightly different deficiency context. See, e.g., *Randolph v. Simpson*, 500 S.W.2d 289 (Mo. App., K.C. 1973) (mortgagee not permitted to recover for both waste and deficiency).

84. Washburn, *supra* note 11, at 890.

85. See G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES 663 (2d ed. 1970).

of the mortgaged land by a third party at a bargain is irrelevant. The third party participates in the foreclosure sale not primarily as a debt collector, as does the mortgagee, but simply as an investor seeking a bargain. Moreover, if the third party purchases at a low price, it is a price that the mortgagee could easily have made less attractive by using his prerogative to bid up to the amount of the debt without having out-of-pocket expense.

Courts generally have suspected unfair advantage more when the mortgagee purchases than when a third party purchases.⁸⁶ This heightened suspicion probably is justified because the mortgagee possesses advantages over third party bidders. Because the mortgagee loaned the money on the strength of the mortgage security, he often has greater insight into its value than does the third party. More important, however, is the mortgagee's ability to control the foreclosure process.

In some situations, however, courts should apply the second standard cautiously. The strongest case for denial of a deficiency judgment exists when the mortgagee-purchaser has resold the mortgaged property for a cash price that exceeded the mortgage debt prior to seeking a deficiency judgment. In such a situation, the mortgage debt has been satisfied. In order to deny a deficiency judgment when the mortgagee finances the resale, however, the court may need to determine that the mortgagee-seller is likely to collect the future installments of the resale price.⁸⁷ When the contract to resell is for cash, but the mortgagee has not yet conveyed the property, the court should continue the deficiency proceeding until the resale is consummated.

In addition, in certain limited circumstances, the application of the second standard in a deficiency action will require the court to focus on more than the mortgagee's resale price. If, for example, between the foreclosure sale and the deficiency proceeding, the mortgagee substantially improves the property, the court should subtract the reasonable value of those improvements from the resale price to determine if a deficiency judgment is justifiable.⁸⁸

Absent legislation that focuses on mechanisms which will increase the likelihood that the foreclosure sale will yield a fair price, any purely judicial approach to deficiency judgments inevitably will involve significant appraisal problems. The adoption of the suggested judicial standards will require Missouri courts to evaluate conflicting appraisals of the value of the foreclosed real estate. The adoption of the suggested judicial standards also will signal

86. Washburn, *supra* note 11, at 887.

87. See Kentucky Joint Stock Land Bank v. Farmers Exch. Bank, 274 Ky. 525, 119 S.W.2d 873 (1938).

88. See Washburn, *supra* note 11, at 890. To the extent that the resale price merely reflects increased market prices, however, such increases should not be subtracted from the resale price in making the determination. *But see id.* To do so would magnify the unjust enrichment of the mortgagee that the second part of the proposed standard seeks to avoid.

lenders that deficiency judgments will be significantly harder to obtain and will deter potential deficiency claimants.

V. CONCLUSION

Under current case law, Missouri courts test foreclosure deficiency judgment claims by a standard that normally is applied to suits to set aside foreclosure sales. Application of this standard to a deficiency judgment imposes too heavy a burden on the mortgagor in a situation in which the consequences of mortgagor success are much less drastic than in a suit to set aside a sale. The Missouri legislature should consider changing foreclosure proceedings to increase the likelihood that the sale itself will yield the fair market value of the land. Such a basic change would substantially reduce the incidence of deficiency actions. Absent such a legislative reform, judicial adoption of the two standards suggested by this Article would at least avoid unjust enrichment of the mortgagee in certain clearly delineated situations and, in many other cases, discourage mortgagees from seeking deficiency judgments.