9-11-1992

Deficiency and In Rem Judgments in Iowa Mortgage Foreclosure Proceedings: A Preliminary Survey

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DEFICIENCY AND IN REM JUDGMENTS IN IOWA MORTGAGE FORECLOSURE PROCEEDINGS: A PRELIMINARY SURVEY

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I. INTRODUCTION

A. Historical Problems in Determining the Content of Mortgage Foreclosure Law

Mortgage foreclosure law consists largely of batches of statutes and cases from disconnected periods of economic distress. During the sometimes lengthy intervals between such periods, however, surrounding elements of law and finance may change dramatically.

Most recently, the half-century between the Great Depression of the 1930s and the Farm Credit Crisis of the 1980s involved major changes in basic parameters of civil practice and in the normal sources and common terms of mortgage credit. As a result, the present implications of cases from the earlier period may be influenced by such interim developments as the adoption of the Iowa Rules of Civil Procedure in 1943, the transformation of the rules of territorial jurisdiction inaugurated by International Shoe Co. v. Washington, 326 U.S. 310 (1945), or modern expansions of the effects of both claim and issue preclusion. In a somewhat more indirect fashion, the soundness of results reached in contexts involving individual mortgagees and short-term balloon mortgages may be lessened in later times when most mortgagees are institutions and many mortgages are long-term and fully amortized.

The fitful development of mortgage foreclosure law also frequently presents situations where the outcome may turn on a resolution of the sometimes conflicting effects of old and new statutory provisions. The difficulty of the task often is compounded by the absence of any appreciable number of cases addressing the scope and effect of the new statute and by the opposite problem of an overabundant set of cases which interpret and apply the sometimes evolving provisions of the older statute.

In such circumstances, the guidance that the past commonly offers in other areas of the law may be weakened by the two-way effects of anachronistic reasoning. A modern reader may easily overlook the ongoing effects of an earlier authority, or may mistakenly afford the earlier authority an ongoing effect which may no longer be justified. Furthermore, the practical utility of properly reading the past ultimately turns on the degree to which that reading can accurately and effectively be communicated to opposing counsel and/or a judicial decision-maker.

B. The Two Basic Elements of the Standard Mortgage Transaction

Consideration of deficiency and in rem judgments in mortgage foreclosure proceedings must begin with an explication of the two basic elements of the standard mortgage transaction. Conceptually, the more fundamental of the two elements is the existence of a debt, most commonly represented by and embodied in a promissory note. The debt/note is an in personam obligation which can be enforced against any non-exempt assets owned by the obligor. The second element of a lien is most commonly created by and embodied in a mortgage, and the lien/mortgage is an in rem obligation which can only be enforced against the mortgaged property.

The second element ordinarily is derivative of the first in the sense that the function of the mortgage is to secure repayment of the debt. Thus, if the debt is not paid when due, the land encumbered by the mortgage can be sold and the proceeds of the sale will be applied towards satisfaction of the debt. Conversely, if the debt is fully paid at any point in time prior to the sale, the mortgage is discharged from the land and ceases to exists.

Consistent with the mortgage's security function, any proceeds of a sale of the land in excess of the debt belong to the previous owner of the land. Conversely, however, any portion of the debt not satisfied by the sale of the land ordinarily persists as an obligation enforceable against the
II. SUBSTANTIVE DIMENSIONS OF THE MORTGAGE DEBT

A. Liability of Persons Having Interests in the Mortgaged Land

Although one early case seemingly suggested that a personal judgment could be entered against a mortgagor who hadn't joined in the note pursuant to the terms of a predecessor version of Iowa Code § 654.6 (1991) ("If the mortgaged property does not sell for sufficient to satisfy the execution, a general execution may be issued against the mortgagor, unless the parties have stipulated otherwise," (emphasis added)), see Deland v. Mershon, 7 Iowa 70 (1858), the general rule to the contrary quickly was reaffirmed by a decision which squarely held that personal judgments are not proper against persons who have joined in the mortgage but have not done anything to render themselves liable upon the mortgage debt. Cooper v. Miller, 10 Iowa 532 (1860). See also, e.g., Chittenden & Co. v. Gossage, 18 Iowa 157 (1864) (improper to enter personal judgment against co-mortgagor who had not joined in the mortgage note); Anderson v. Reed, 11 Iowa 177 (1860) (improper to enter personal judgment against wife who signed mortgage but not the note).

In one case where no mortgage note had ever been executed, however, the covenants of the mortgage were found to be sufficient to establish a debt upon which a personal judgment could be entered. Newbury v. Rutter, 38 Iowa 179 (1874). Cf. Des Moines Sav. Bank v. Arthur, 163 Iowa 205, 143 N.W. 556 (1913) (obligation concerning payment of taxes contained in mortgage but omitted from note to preserve negotiability thereof can only be enforced through foreclosure of the mortgage and cannot be enforced through entry of a judgment upon the note). In other instances, moreover, the personal liability of persons who did not formally join in execution of the mortgage note has been established through principles of agency. See, e.g., Daries v. Hart, 214 Iowa 1312, 243 N.W. 527 (1932) (members of association liable upon note executed by trustee); Bond v. O'Donnell, 205 Iowa 902, 218 N.W. 898 (1928) (joint venturer liable for debt under agency theory).

Although their frequency presumably has been reduced by the advent of due-on-sale clauses, conveyances of encumbered property may enlarge the set of obligors personally liable for payment of the mortgage debt if the conveyance involves an assumption of such liability by the grantee. See, e.g., Goff v. Milliron, 221 Iowa 998, 266 N.W. 526 (1936) (personal judgment against grantee upon assumption provision of extension agreement); Ross v. Kennison, 38 Iowa 396 (1874) (personal judgment can be entered against assuming grantee); Thompson v. Bertram, 14 Iowa 476 (1863) (same). Such liability, however, may be limited by distinctions similar to those previously mentioned in connection with initial liability for the original indebtedness. See, e.g., Richardson v. Short, 201 Iowa 561, 207 N.W. 610 (1926) (no personal judgment against assuming purchaser's wife); McGlaughlin v. O'Rourke, 12 Iowa 459 (1861) (same). More importantly, personal liability for the mortgage debt will entirely unaffected if the conveyance to the grantee is merely subject to the mortgage debt. Norwest Bank Marion, N.A. v. L T Enterprises, Inc., 387 N.W.2d 359 (Iowa Ct. App. 1986) (no personal judgment against non-assuming grantee); Carleton v. Byington, 24 Iowa 172 (1867) (same). See generally Nelson & Whitman, Real Estate Finance Law 270-80 (2d ed. 1985).

Consistent with Iowa Code § 654.6 (1991) ("If the mortgaged property does not sell for sufficient to satisfy the execution, a general execution may be issued against the mortgagor, unless the parties have stipulated otherwise," (emphasis added)), personal liability for the mortgage debt may be negated at the outset by provisions which restrict the mortgagor to the remedy of a sale of the mortgaged land. See, e.g., Wells v. Flynn, 191 Iowa 1322, 184 N.W. 389 (1921) (installment land contract which allowed for foreclosure but negated personal liability for anything beyond initial down payment held preclusive of personal judgment for principal balance, interest, taxes, and insurance); Weil v. Churchman, 52 Iowa 253, 3 N.W. 38 (1879) (transaction construed to be non-
recourse); Elmore v. Higgins, 20 Iowa 250 (1866) (note construed to be non-recourse); Kennion v. Kelsey, 10 Iowa 443 (1860) (mortgage contained non-recourse language, and because note and mortgage considered as one contract, note construed to same effect). Similarly, initially existing personal liability upon the mortgage debt subsequently may be released as part of consensual resolutions of the mortgage relationship. See, e.g., Northwestern Mut. Life Ins. Co. v. Steckel, 216 Iowa 1189, 250 N.W. 476 (1933) (jury question as to whether mortgagee's agent had authority to release deficiency in exchange for partial payment and deed in lieu of foreclosure); Renwick v. Wheeler, 48 F. 431 (C.C.D. Iowa 1880) (agreement for friendly foreclosure sufficient consideration to support release of deficiency).

Somewhat differently, the right to obtain a personal judgment upon the mortgage debt may be abrogated by the death of the debtor, Kraner v. Chambers, 92 Iowa 681, 61 N.W. 373 (1894) (judgments upon notes and mortgages which were not entered until after mortgagor's death do attach as liens to any other property owned by the decedent at the time of his death); Hodgdon v. Heidman, 66 Iowa 645, 24 N.W. 257 (1885) (personal judgment may be entered against mortgagor's administrator only in his representative capacity), or by the debtor's receipt of a bankruptcy discharge, 11 U.S.C. § 524(a)(1)-(2); Scott v. Ellery, 142 U.S. 381 (1892) (right to deficiency judgment lost upon mortgagor's receipt of a discharge); McKay v. Funk, 37 Iowa 661 (1873) (no personal judgment proper upon motion to stay pending outcome of bankruptcy proceeding).

B. Liability of Persons Not Having Interests in the Mortgaged Land

Personal liability on a mortgage note may exist in situations where the debtor lacked any interest in the land ostensibly encumbered by the mortgage, Mannat v. Starr, 72 Iowa 677, 34 N.W. 784 (1887) (personal judgment against mortgagor who did not own land described in the mortgage), or where the mortgaged interest subsequently was extinguished by the foreclosure of a senior mortgage, LeValley v. Buckles, 206 Iowa 550, 221 N.W. 202 (1928) (personal judgment to junior creditor who lost lien on land by failure to redeem and lien on rents by failing to properly institute receivership action until after loss of lien on land).

Third parties without any interest in the mortgaged land may become liable for payment of a mortgage debt where they have signed the note as an accommodation party, see generally White & Summers, Uniform Commercial Code 576-598 (3rd ed. 1988), or where they have executed a separate contract guaranteeing payment of some part or all of the mortgage debt, see generally Calhoun, Suretyship for the Iowa Lawyer, 67 Iowa L. Rev. 219 (1982).

III. PROCEDURAL DIMENSIONS OF ACTIONS UPON THE MORTGAGE LIEN AND THE MORTGAGE DEBT

A. Nonjoinder of Lien and Debt Actions

Although the maintenance of separate actions upon the mortgage lien and the mortgage debt may entail various problems of claim and issue preclusion, see infra Outline § IX, the Iowa Code recognizes the possibility of a separate action upon the debt or separate and concurrent actions upon the and the lien:

"An action on a note, together with a mortgage or deed of trust for the foreclosure of the same, shall be by equitable proceedings. An action on the bond or note alone, without regard therein to the mortgage or deed of trust, shall be by ordinary proceedings." Iowa Code § 611.5 (1991)
"If separate actions are brought in the same county on the bond or note, and on the mortgage given to secure it, the plaintiff must elect which to prosecute. The other will be discontinued at the plaintiff's cost."  Iowa Code § 654.4 (1991)

The contention that actions upon mortgage debts are improper in advance of any action to foreclose an appurtenant mortgage lien has been rejected rather consistently. See, e.g., Iowa Title & Loan Co. v. Clark Bros., 213 Iowa 875, 237 N.W. 336 (1931) (mortgagees can obtain judgment on mortgage notes and enforce same against the mortgagor's non-mortgaged property); In re Estate of Butterfield, 196 Iowa 633, 195 N.W. 188 (1923) (mortgagee may file claim against estate without first exhausting homestead mortgage security); Banta v. Wood, 32 Iowa 469 (1871) (failure to proceed against non-resident's mortgaged property does not prevent attachment of non-mortgaged property in action on note alone); Newbury v. Rutter, 38 Iowa 179 (1874) (judgment may be obtained upon covenant contained in mortgage without first foreclosing the mortgage).

A judgment in an action on the debt alone presently results in a mere judgment lien upon property of the debtor which is effective only from the date the judgment is entered. See Iowa Code § 624.24 (1991). From 1851 to 1873, however, a judgment on a mortgage note could provide for a lien relating back to the date of the mortgage, and thus effect results largely approaching those accomplished by an ordinary foreclosure action. See generally Mayer v. Farmers' Bank, 44 Iowa 212 (1876) (procedure effective to cut off equitable redemption rights of junior lienholders); Bauer, Judicial Foreclosure and Statutory Redemption: The Soundness of Iowa's Traditional Preference for Protection over Credit, 71 Iowa L. Rev. 1, 290 n. 111 (1985).

B. Joinder of Lien and Debt Actions

The joinder of claims upon a mortgage lien and an attendant mortgage debt in the same proceeding presently is in accordance with Iowa R. Civ. P. 22 ("A single plaintiff may join in the same petition as many causes of action, legal or equitable, independent or alternative, as he may have against a single defendant.") and previously was specifically authorized by predecessor versions of Iowa Code §§ 611.5 ("An action on a note, together with a mortgage or deed of trust for foreclosure of the same, shall be by equitable proceedings.") and 654.5 ("When a mortgage or deed of trust is foreclosed, the court shall render judgment for the entire amount found to be due ..."). See, e.g., Cooley v. Hobart, 8 Iowa 358 (1859) (rejecting claim that petition for judgment on note and foreclosure of mortgage involves impermissible mixture of law and equity). Joinder of interested parties likewise is authorized by both rule and statute. Iowa R. Civ. P. 25 ("Any number of defendants may be joined in one action which asserts against them, jointly, severally or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, when any question of law or fact common to all of them is presented or involved."); Iowa Code § 613.1 (1991) ("Where two or more persons are bound by contract or by judgment, decree, or statute, whether jointly only, or jointly and severally, or severally only, ... the action thereon may, at the plaintiff's option, be brought against any or all of them."); Bennett Sav. Bank v. Smith, 171 Iowa 405, 152 N.W. 717 (1915) (action on note against mortgagor can be joined with action against assuming grantee on deed pursuant to predecessor version of § 613.1).

If claims upon the lien and the debt are joined in the same action, however, a general execution upon the debt ordinarily cannot be issued unless and until a unsatisfied balance remains after enforcement of the lien by sale under a special execution. See, e.g., Iowa Code §§ 654.5-.6 (1991) ("When a mortgage ... is foreclosed, the court shall render judgment for the entire amount found to be due, and must direct the mortgaged property ... to be sold to satisfy the judgment. A special execution shall issue accordingly .... If the property does not sell for sufficient to satisfy the execution, a general execution must be entered against the mortgagor ..."); Moore v. Crandall, 146 Iowa 25, 33, 124 N.W. 812 (1910) ("The decree directed sale on special execution against the emises
and general execution for any unsatisfied balance, or, at plaintiff's option, she was allowed to waive any right under the foreclosure, and cause to be issued general execution against all defendant's property. The portion allowing the exercise of the option was contrary to [the predecessor of § 654.5], and should have been omitted.

Ayers v. Rivers, 64 Iowa 543, 547, 21 N.W. 23 (1884) (same). The judgment upon the debt, however, presumably is a lien from the date of its entry on any other non-exempt real estate owned by the debtor in the county where the judgment was entered, and similarly may become a lien from the date of its transcription on any non-exempt real estate owned by the debtor in any county into which the judgment has been transcribed. Iowa Code §§ 624.23(1) & .24 (1991). Moreover, a showing that the mortgaged land will not be sufficient to satisfy the mortgage debt can provide a basis for pre-judgment attachment where the ordinary grounds for such remedy (e.g., non-residency or fraudulent behavior) otherwise exist. See Coffin v. Younker, 196 Iowa 1021, 195 N.W. 591 (1923) (attached property of non-resident not to be sold where mortgaged property sufficient to satisfy the mortgage debt); Baldwin v. Buchanan, 10 Iowa 277 (1859) (attachment can issue in foreclosure proceedings in equity as well as in actions at law upon allegations of improper conduct and inadequate mortgage security).

C. Territorial Jurisdiction

The periods of widespread mortgage foreclosure activity occurring prior to the Farm Credit Crisis of the 1980s were governed by the classical geographical notions of territorial jurisdiction elucidated by Pennoyer v. Neff, 95 U.S. 714 (1878). Perhaps because farm mortgages normally involve resident mortgagors, the most recent period of foreclosure activity did not produce any reported cases addressing the effects of the changing principles of territorial jurisdiction adopted and applied in cases such as International Shoe Co. v. Washington, 326 U.S. 310 (1945) and Shaffer v. Heitner, 433 U.S. 186 (1977).

Under the earlier regime, a forum ordinarily did not have power to adjudicate personal liabilities of non-residents, but did have power to adjudicate the interests of non-residents in property situated within the forum. See generally Friedenthal, Kane, & Miller, Civil Procedure 99-102 & 114-118 (1985). Under the modern regime, a forum may have power to adjudicate the personal liabilities of non-residents who have sufficient "minimum contacts" with the forum, but the mere presence of property in the forum may not itself be sufficient "minimum contacts" to support adjudications of the interests of non-residents in the property. Id. 123-139 & 147-156.

In cases decided prior to the advent of the modern regime, it was recognized that in rem judgments entered against Iowans in out-of-state foreclosure actions did not have any preclusive effect on subsequent in-state actions to enforce such person's personal liabilities upon the underlying mortgage debts. Pfeffer v. Corey, 211 Iowa 203, 209, 233 N.W. 126 (1930) ("If the foreclosure suit in Minnesota resulted in a judgment in rem only, there was no merger of the note in the judgment .... "); Smith v. Moore, 112 Iowa 60, 83 N.W. 813 (1900) (same). Cf. Hunter v. Porter, 133 Iowa 391, 109 N.W. 283 (1906) (prior in-state decree of foreclosure, to which note obligor hadn't become a party by personal service or appearance, held not preclusive of later suit upon the note); Hansen v. Haagensen, 178 N.W.2d 325 (Iowa 1970), cert. denied, 401 U.S. 912 (1971) (judgment in Minnesota action commenced quasi-in-rem cannot be enforced directly in subsequent Iowa proceeding).

Although jurisdiction over in-state mortgagors might conceptually provide a basis for foreclosure of a mortgage on out-of-state land, such relief is not available in Iowa in the absence of exceptional circumstances. Beach v. Youngblood, 215 Iowa 979, 989-990, 247 N.W.2d 545 (1933):

"[T]he order of the district court directing the sheriff of Cerro Gordo county to sell the Minnesota lands was utterly void. The court could only determine the amount due the plaintiff from the defendants [mortgagor and assuming grantee], fix and determine the rights and
priorities of the parties in regard to the mortgage on the Minnesota lands, establish the lien thereof as between the parties, and preserve the same as between the parties over which it had personal jurisdiction. ... The decree should be supplemented or amended, providing for the issuance of a general execution upon the judgment and preserving the plaintiff's right to foreclose in the courts of the state of Minnesota."

The long-standing notion that a forum has jurisdiction to foreclose mortgages upon in-state property would not seem to be undermined by the minimum contacts standard required by Shaffer v. Heitner, 433 U.S. 186, 207-208 (1977):

"[T]he presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State." (footnotes omitted)

However, in most instances, the utilization of modern long-arm jurisdictional provisions such as Iowa Code § 617.3 (1991) or I.R.C.P. 56.2 may allow the entry of personal judgments against any non-resident defendants who are liable upon the mortgage debt. See generally 2 Casad, Jurisdiction in Civil Actions §§ 8.02 (Negotiable Instruments), 8.03 (Loan Transactions), 8.04 (Guaranty Agreements), & 9.01[2] (Lien and Mortgage Foreclosure Actions) (2d ed. 1991).

D. **Venue**

Since 1884, venue of actions to foreclose mortgage liens has been governed by the provision presently codified as Iowa Code § 654.3 (1991):

"An action for the foreclosure of a mortgage of real property, or for the sale thereof under an encumbrance or charge thereon, shall be brought in the county in which the property to be affected, or some part thereof, is situated."

Although one early case (Orcutt v. Hanson, 71 Iowa 514, 32 N.W. 482 (1887)) strongly suggested that mortgage venue requirements were jurisdictional and thus not waived by an absence of timely objection, a later case (McDonald v. Second Nat. Bank, 106 Iowa 517, 76 N.W. 1011 (1898)) squarely held that improper venue of a mortgage foreclosure action is waived if an objection is not timely raised in accordance with the requirements of the procedure presently embodied in Iowa R. Civ. P. 175:

"(a) An action brought in the wrong county may be prosecuted there until termination, unless a defendant, before answer, moves for its change to the proper county. Thereupon the court shall order the change at plaintiff's costs, which may include reasonable compensation for defendant's trouble and expense, including
attorney's fees, in attending in the wrong county.

"(b) If all such costs are not paid within a time to be fixed by the court, or the papers are not filed in the proper court within twenty days after such order, the action shall be dismissed."

Consistent with the statutory provision, the court of the county where one part of the mortgaged land is situated has jurisdiction over the remaining part located in another county, Newton v. Knox, 234 Iowa 1095, 13 N.W.2d 795 (1944), and all of such property may be sold by the sheriff of the former county pursuant to a writ of execution issued by the clerk of such county, Tice v. Tice, 208 Iowa 145, 224 N.W. 571 (1929).

IV. STATUTES OF LIMITATION

The separate quality of the mortgage lien and the mortgage debt leads a majority of jurisdictions to hold that the two are subject to separate and distinct statutes of limitation. See generally Nelson & Whitman, Real Estate Finance Law 450-456 (2d ed. 1985). This position commonly is supported by such considerations as the distinction between title and lien theories of mortgages, notions that limitations periods applicable to actions at law are not fully effective upon proceedings in equity, or the existence of a limitations period for contracts shorter than that applicable to property claims. Id. Perhaps because these considerations largely are absent from its law, Iowa earlier on adopted the minority position that a mortgage cannot be enforced after the underlying debt has become barred by the statute of limitations. Newman v. DeLorimer, 19 Iowa 244 (1865). See also Day v. Baldwin, 34 Iowa 380 (1872) (foreclosure of land contract as mortgage barred ten years after cause of action accrued). Accord, Anderson v. Anderson, 234 Iowa 277, 12 N.W.2d 571 (1944); Jarl v. Pritchett, 190 Iowa 1268, 179 N.W. 945 (1920); Fitzgerald v. Flanagan, 155 Iowa 217, 135 N.W. 738 (1912).

The principle that the mortgage is barred when the debt is barred has been applied to related situations. Gower v. Winchester, 33 Iowa 303 (1871) (equitable redemption right of omitted junior lienholder lapses upon expiration of limitations period applicable to its debt); Smith v. Foster, 44 Iowa 442 (1876) (equitable mortgagee's redemption right lapses with equitable mortgagee's ability to sue upon the debt). Although dicta in one case suggested that the general principle might not be applied in a case involving the provisions of a predecessor version of Iowa Code § 615.3 (1991), see Beckett v. Clark, 225 Iowa 1012, 282 N.W. 724 (1938); Note, Mortgages -- Barring of the Debt by Special Statutes of Limitations, 25 Iowa L. Rev. (1939), there otherwise is not much reason to suppose that the general principle would yield in such circumstances, see Monast v. Manley, 228 Iowa 641, 293 N.W. 12 (1940); Note, Limitations on Post Judgment Proceedings by the Plaintiff, 42 Iowa L. Rev. 299, 303-304 (1957).

The Iowa rule generally results in the limitations period applicable to the mortgage being extended by circumstances which extend the limitations period applicable to the note. See, e.g., Brown v. Rockhold, 49 Iowa 282 (1878) (nonresidency tolling action on note defers limitations period applicable to mortgage); Clinton County v. Cox, 37 Iowa 570 (1873) (same); Mahon v. Cooley, 36 Iowa 479 (1873) (revival of note by written admission). The same reasoning was utilized in a case which held that the limitations period applicable to the mortgage when the note had been reduced to judgment was the twenty-year limitations period applicable to judgments. Hendershott v. Ping, 24 Iowa 134 (1867). Cf. Jenks v. Shaw, 99 Iowa 604, 68 N.W. 900 (1896) (action to foreclose mortgage against mortgagee's grantee can be initiated where action on debt timely commenced against the mortgagor).

Since 1906, however, the special twenty-year limitations provision for ancient mortgages has had the effect of barring some mortgages even though the underlying debt still may have been
"No action shall be maintained to foreclose or enforce any real estate mortgage, bond for deed, trust deed, or contract for the sale or conveyance of real estate, after twenty years from the date thereof, as shown by the record of such instrument, unless the record of such instrument shows that less than ten years have elapsed since the date of maturity of the indebtedness or part thereof, secured thereby, or since the right of action has accrued thereon, or unless the record shows an extension of the maturity of the instrument or of the debt or a part thereof, and that ten years from the expiration of the time of such extension have not yet expired. The date of maturity, when different than as appears by the record of the instrument, and the date of maturity of any extension of said indebtedness or part thereof, may be shown at any time prior to the expiration of the above periods of limitation by the holder of the debt or the owner or assignee of the instrument filing an extension agreement, duly acknowledged as the original instrument was required to be acknowledged, in the office of the recorder where the instrument is recorded, or by noting on the margin of the record of such instrument in the recorder's office an extension of the maturity of the instrument or of the debt secured, or any part thereof; each notation to be witnessed by the recorder and entered upon the index of mortgages in the name of the mortgagor and mortgagee."

See, e.g., Ramiller v. Ramiller, 236 Iowa 323, 18 N.W.2d 622 (1945) (§ 614.21 not qualified by general limitations provisions allowing revival of debt by written admission); Lackey v. Melcher, 225 Iowa 698, 281 N.W. 225 (1938) (same). Although § 614.21 is given full effect even in situations involving the initial parties to the original mortgage transaction, its impact in such circumstances may not extend beyond a potential loss of priority if the enforcement of the debt is not otherwise obstructed by the applicability of a homestead exemption or the existence of a bankruptcy discharge. See Willow Tree Investments, Inc. v. Wilhelm, 465 N.W.2d 849 (Iowa 1991). The general rule that the mortgage is barred when the debt is barred, however, continues to be applicable in situations where the general limitations period applicable to the debt has expired before the specialized limitations period established by § 614.21. Monast v. Manley, 228 Iowa 641, 293 N.W. 12 (1940).

V. EFFECTS OF DEFICIENCY JUDGMENTS IN SPECIFIC SITUATIONS

A. Effects of Deficiency Judgment as a Lien on the Mortgaged Land

Both the mortgage lien and the lien of a judgment upon the mortgage debt are divested from the mortgaged land by the foreclosure sale. Clayton v. Ellis, 50 Iowa 590, 592 (1879). As a result of this effect, any unsatisfied portion of the debt cannot serve as the basis for a redemption from the sale, id., and such debt similarly cannot be enforced against the land following its redemption either by a grantee of the mortgagor, id. at 595, or by a junior lienholder, Hays v. Thode, 18 Iowa 51, 54-55 (1864).

Although this same effect was not itself sufficient to prevent a deficiency judgment from attaching to the land upon its redemption by the mortgage debtor, Clayton v. Ellis, 50 Iowa at 590, 595 (1879), such result was accomplished in 1934 by an enactment presently codified as part of Iowa Code § 628.3 (1991) ("Any real property redeemed by the judgment debtor shall thereafter be
free and clear from any liability for an unpaid portion of the judgment under which said real property was sold."). See Jim White Agency v. Clark, No. 91-590 [1-556] (Iowa Ct. App. June 25, 1992) (applying § 628.3 in circumstances where debtor had sold land on contract between judgment and first general execution sale, and after redemption from such sale, had obtained a sheriff's deed to the land through a foreclosure of the contract).

Note, however, that the enactment is limited to "judgment[s] under which said real estate was sold," and thus the judgments of junior lienholders which otherwise are divested from the land at the end of the lienholder redemption period presumably will reattach as liens if the land is redeemed by the debtor. See Paulsen v. Jensen, 209 Iowa 453, 228 N.W. 357 (1929). But cf. Farmers Production Credit Ass'n v. McFarland, 374 N.W.2d 654 (Iowa 1985) (junior liens not divested if assignee of debtor redeems prior to beginning of lienholder redemption period).

B. Effects of Deficiency Judgment on Rights of Redemption, First Refusal, Possession, and Rents and Profits

A right of statutory redemption is not itself subject to execution sale. Harrison v. Wilmering, 72 Iowa 727, 32 N.W. 279 (1887). Based on substantially the same policy considerations, a mortgage foreclosure deficiency judgment cannot be levied against the mortgagor's statutory right of first refusal. Citizens State Bank v. Hansen, 449 N.W.2d 388 (Iowa 1989).

Somewhat similarly, the debtor's right to possession of the mortgaged land during the redemption period afforded to the debtor by Iowa Code § 628.3 (1991) ("The debtor may redeem real property at any time within one year from the date of the sale, and will, in the meantime, be entitled to possession thereof ... .") cannot itself be levied upon by a judgment creditor, Sayre v. Vander Voort, 200 Iowa 990, 205 N.W. 760 (1925), nor can it be reached through equitable proceedings commenced upon a deficiency judgment, Howe v. Briden, 201 Iowa 179, 206 N.W. 814 (1926).

Rather curiously, however, a general execution issued upon a mortgage deficiency judgment can be levied against grain that is redemption period crop-share rent after it has been harvested from the mortgaged land, Starits v. Avery, 204 Iowa 401, 213 N.W. 769 (1927), and judgment creditors similarly can reach cash rent owing upon a lease of the mortgaged land during the redemption period, Clouse v. Reeves, 205 Iowa 154, 217 N.W. 833 (1928). But see Connell & Duffy, P.C. v. Veninga, 439 N.W.2d 203 (Iowa 1989) (execution cannot be levied against rents and profits in hands of a receiver).

C. Effects of Deficiency Judgments on Receiverships

A mortgagor's right to possession of the mortgaged land during the pendency of the debtor redemption period can be encumbered by a mortgage pledge of rents and profits. See generally Note, Mortgage Receiverships in Iowa, 27 Iowa L. Rev. 626 (1942); Doerr, Mortgage Clauses, Specific Performance and the "Rent-Grabber", 25 Iowa L. Rev. (Bar Assn. Sec.) 29 (1940); Note, Mortgagee's Rights in Iowa to Rents and Profits During the Year of Redemption, 18 Iowa L. Rev. 251 (1933). The enforcement of such a pledge through the appointment of a receiver, however, is conditioned upon a showing that such action is necessary either because a sale of the land has not fully satisfied the mortgage debt, see, e.g., Fellers v. Sanders, 202 Iowa 503, 210 N.W. 530 (1926), or because the mortgagee has established in advance of the sale that the land probably will be sold for less than the amount of the mortgage debt, see, e.g., Cooley v. Will, 212 Iowa 701, 237 N.W. 315 (1926). Despite indications in some early cases that a receiver cannot be obtained if the deficiency judgment can be satisfied from other assets, a showing of the mortgagor's insolvency no longer is required. See, e.g., Prudential Ins. Co. v. Puckett, 216 Iowa 406, 249 N.W. 142 (1933); Travelers Ins. Co. v. Tritsch, 438 N.W.2d 863 (Iowa Ct. App. 1989). Although attachment and perfection of
"habendum clause" pledges of rents and profits may occur prior to the filing of a request for the appointment of a receiver in a judicial proceeding, see Federal Land Bank v. Lower, 421 N.W.2d 126 (Iowa 1988), inadequacy of the mortgage security presumably remains a necessary element to their enforcement.

Consistent with the notion that a receivership is warranted only when such action is necessary to satisfy a deficiency, a receivership properly is terminated when the mortgagee bids in the full amount of the judgment at the foreclosure sale, Stamp v. Eckhardt, 204 Iowa 541, 215 N.W. 609 (1927), or when the mortgage debt otherwise is subsequently satisfied, Price v. Howsen, 197 Iowa 324, 197 N.W. 62 (1924). The requirement that a receiver cannot be appointed in the absence of a potential or actual deficiency, however, can be waived by the mortgagor, see Federal Land Bank v. Herren, 398 N.W.2d 839 (Iowa 1987), and the mortgagor similarly may stipulate that a mortgagee may receive receivership proceeds even after the mortgage debt has been satisfied, Community State Bank v. Cottington, 444 N.W.2d 484 (Iowa 1989).

The inadequacy of security requirement can be satisfied in circumstances involving an in rem judgment where an in personam judgment was not possible because the mortgage had died or received a bankruptcy discharge. See Interstate Business Men's Acc. Ass'n v. Estate of Nichols, 213 Iowa 12, 238 N.W. 435 (1931); Moad v. Neill, 451 N.W.2d 4 (Iowa Ct. App. 1989).

VI. SPECIAL LIMITATIONS UPON THE ENFORCEMENT OF FORECLOSURE JUDGMENTS AND JUDGMENTS UPON MORTGAGE DEBTS

A. Initial Enactment and Essential Rationale

The Great Depression of the 1930s prompted the enactment of special limitations upon the enforcement of mortgage foreclosure judgments and judgments upon mortgage debts. Such judgments previously had been subject to the same provisions as all other judgments, and accordingly, could attach as liens to other nonexempt real property for a period of ten years, see Iowa Code § 624.23(1) (1991), could be enforced through execution against any other nonexempt real and personal property for a period of twenty years, Iowa Code § 626.2 (1991), and could be renewed by action within that same twenty-year period, Iowa Code § 614.1(6) (1991). In 1933, however, the General Assembly enacted an array of mortgagor relief measures which included provisions presently codified as Iowa Code § 615.1 & .2 (1991):

"From and after January 1, 1934, no judgment in an action for the foreclosure of a real estate mortgage or deed of trust ... shall be enforced and no execution issued thereon and no force or vitality given thereto for any purpose other than as a setoff or counterclaim after the expiration of a period of two years from the entry thereof." § 615.1

"After January 1, 1934, no action or proceedings shall be brought in any court of this state for the purpose of renewing or extending such judgment or prolonging the life thereof. Provided, however, that nothing herein shall prevent the continuance of such judgment in force for a longer period by the voluntary written stipulation of the parties, filed in said cause." § 615.2

The same session of the General Assembly had considered a number of other bills imposing various kinds of restrictions on the enforcement of deficiency judgments, see Bauer, Farm Mortgagor Relief Legislation in Iowa During the Great Depression, 50 Annals of Iowa 23, 32 n. 26 (1989), and on
four occasions in succeeding sessions, bills abolishing or restricting the size of deficiency judgments were passed by the House of Representatives, id. at 56 n. 94.

Although the terms of these initial provisions did not extend to judgments on mortgage notes, such judgments were subjected to identical constraints in 1935 by the enactment of a measure presently codified as Iowa Code § 615.3 (1991):

"Judgments hereafter rendered on promissory obligations secured by mortgage or deed of trust of real estate, but without foreclosure against said security, shall not be subject to renewal by action thereon, and, after the lapse of two years from the date of rendition, shall be without force and effect for any purpose whatsoever except as a setoff or counterclaim." § 615.3

The following year, the Iowa Supreme Court rejected contract clause, due process, and equal protection challenges to the 1933 enactments in a decision which noted the following justifications for imposing a relatively short time limitation on the collection of mortgage deficiency judgments:

"Judgments for the foreclosure of real estate mortgages ... naturally belong to a class where there has been superior opportunity to collect. It is a matter of common knowledge that real estate loans are made very largely, if not entirely, upon the security of real estate. Institutions engaged in the business of making such loans have the property appraised and loan thereon only a percentage of the value of the property. Not only that, but such loans are usually made for a period of years. The maker may be dead before they mature. So that the personal liability of the borrower does not have the same relation to that type of loan as it does to an ordinary loan. Then, too, real estate is generally regarded as having a fixed and permanent value as compared to chattel property. Recent events may have somewhat shaken the popular faith in this ancient conception. The future may, however, demonstrate that the doubters may have only confused actual value with marketability. In actions to foreclose real estate mortgages, the judgment is a lien upon the real estate and the holder of the judgment is entitled at once to special execution for the sale of the real estate to pay the judgment. ... The circumstance that the judgments affected by this act are judgments as to which there are special opportunities to collect ... suggests a very reasonable and natural classification of such judgments for the purpose of imposing a shorter limitation upon the time during which they must be collected."


B. General Scope of Application

The 1933 enactment concerning judgments in an action for the foreclosure of a real estate mortgage was found to encompass a proceeding in which the plaintiff initially had requested both foreclosure of a mortgage and judgment on the note but eventually obtained only a judgment on the note. Deaton v. Hollingshead, 225 Iowa 967, 282 N.W. 329 (1938). Moreover, the 1935 enactment concerning judgments entered upon debts secured by a real estate mortgage was applied in one case where the judgment creditor was not aware that such security had existed for the debt, Shum v. Prow & Leffler, 230 Iowa 778, 298 N.W. 868 (1941), and in another case where the security consisted solely of an allegedly worthless right to redeem from a sale foreclosing a senior lien, Hell v. Schult,
Iowa Code § 615.4 (1991) expressly provides that the provisions of Iowa Code § 615.1-.3 (1991) do not apply deeds in lieu of foreclosure of mortgages on agricultural land executed pursuant to Iowa Code § 654.19 (1991), or to agreements to extend the redemption period following foreclosure sales of agricultural land executed pursuant to Iowa Code § 628.26A (1991). Moreover, judicial decisions have determined that the provisions of Ch. 615 do not apply to a claim against a decedent's estate, Grife v. Equitable Life Ass. Soc., 233 Iowa 83, 8 N.W.2d 584 (1943), or to an action to cut off the equitable redemption right of a partial grantee of the mortgagor who had not been joined as a party in the initial foreclosure proceeding, Equitable Life Ins. Co. v. Condon, 233 Iowa 567, 10 N.W.2d 78 (1943).

The provisions Ch. 615 seemingly should apply when an installment land contract is foreclosed as a mortgage pursuant to Iowa Code § 654.11-.12 (1991). An unpublished decision of the Iowa Court of Appeals, however, held that Ch. 615 is not applicable in the functionally similar setting of an action for specific performance of a land contract. Raymon v. Leefers, No. 85-1735 [6-377] (Iowa Ct. App. Nov. 26, 1986).

In accordance with the doctrine of equitable conversion, it would seem that Ch. 615 should apply to the enforcement of obligations secured by an assignment of a vendee's interest in a land contract. Correspondingly, Ch. 615 probably should not be applied to the enforcement of obligations secured only by a vendor's interest in a land contract. The logic of the latter point, however, seemingly would cease if and when the vendor reacquired legal title through forfeiture or foreclosure proceedings.

Finally, cases arising involving the deficiency judgment limitations of other states suggest that Ch. 615 may not apply to actions for waste or conversion of mortgage security. See, e.g., Cornelison v. Kornbluth, 15 Cal.3d 590, 542 P.2d 981 (1975).

C. Tolling, Extensions, Waiver, and Discharge by Motion

The two-year period may not be effected by the general tolling provisions of Iowa Code § 614.2-.13 (1991). Cf. Ramiller v. Ramiller, 236 Iowa 323, 18 N.W.2d 622 (1945) (§ 614.21 not qualified by general limitations provisions allowing revival of debt by written admission); Lackey v. Melcher, 225 Iowa 698, 281 N.W. 225 (1938) (same). In some circumstances, however, the two-year period was tolled by a 1985 enactment postponing the enforcement of certain Farm Credit System deficiency judgments. See Federal Land Bank v. Recker, 460 N.W. 480 (Iowa Ct. App. 1990). Moreover, in cases where enforcement actions are automatically stayed by the filing of a bankruptcy petition, the two-year period presumably would be extended under thirty days after notice of termination or expiration of the stay pursuant to 11 U.S.C. § 362(c)(2).

The proviso for consensual extensions of the two-year period for mortgage foreclosure judgments that appears in Iowa Code § 615.2 (1991) presumably might be extended by analogy to validate consensual extensions of the two-year period for judgments upon mortgage debts under Iowa Code § 615.3 (1991). To be fully effective as against third parties, however, such extensions must be filed in the underlying action prior to the expiration of the two-year period. Johnson v. Keir, 220 Iowa 69, 261 N.W. 792 (1935). Moreover, contractual extensions of the two-year period executed prior to default presumably are unenforceable. Cf., e.g., Schmitz v. Sondag, 334 N.W.2d 362 (Iowa Ct. App. 1983) (waiver of agricultural lease termination notice not effective if part of original lease); Nelson & Whitman, Real Estate Finance Law 605 (2d. ed. 1985) (court decisions commonly invalidate waivers of anti-deficiency protections given at time mortgage is given).

The bar of §§ 615.1-.3 may nevertheless be waived if it is not raised in response to untimely collection efforts. In re Christensen's Estate, 227 Iowa 1028, 290 N.W. 34 (1940). Conversely, the
judgment debtor seemingly may initiate a determination of such bar by motion pursuant to Iowa R. Civ. P. 256 ("Where matter in discharge of a judgment has arisen since its rendition, the defendant or any interested person may, on motion in a summary way, have the same discharged in whole or in part, according to the circumstances."). Cf Thorp Credit, Inc. v. Johnson, 257 N.W.2d 498, 499 (Iowa 1977) (Ch. 615 issue raised by persons not previously parties through motion pursuant to Rule 256); Federal Land Bank v. Recker, 460 N.W.2d 480, 481 (Iowa Ct. App. 1990) (Ch. 615 issue raised by motion pursuant to Rule 256).

D. Effects in Specific Situations

As an initial matter, the cases indicate that collection activities properly commenced before the end of the two-year period can be completed thereafter. See Beckett v. Clark, 225 Iowa 1012, 282 N.W. 724 (1938) (action for foreclosure of mortgage commenced with two years of judgment on note); Lincoln Jt. Stock Land Bank v. Bundt, 234 Iowa 1011, 14 N.W.2d 865 (1944) (receivership proceedings initiated within two-year period effective thereafter); Deaton v. Hollingshead, 225 Iowa 967, 282 N.W. 329 (1938) (proceeding against other property upon execution issued and levied prior to end of two-year period); Farm Credit Bank v. Faught, No. CV 10158-0689 (Worth Co. Dist. Ct. Oct. 13, 1989), 4 Iowa Agricultural Law Reporter 30 (commencement of equitable proceedings after two-year period is not barred if same results from execution issued before the end of such period). In the absence of appropriate action within the two-year period, however, the provisions of Ch. 615 might affect the mortgaged land, additional collateral or other assets of the mortgagor, or the obligations and assets of third-party guarantors.

Thus, Iowa Code § 615.1 (1991) could prevent the sale of the mortgaged land itself if a prevailing mortgagee failed to initiate enforcement of the foreclosure decree by obtaining the issuance of the requisite special execution prior to the end of the two-year period. Cf. Deaton v. Hollingshead, 225 Iowa 967, 282 N.W. 329 (1938) (proceeding against other property permissible upon general execution issued and levied prior to end of two-year period). But cf. Thorp Credit, Inc. v. Johnson, 257 N.W.2d 498 (Iowa 1977) (treating as preclusive prior determination allowing foreclosure sale to be initiated after two-year period where earlier issuance of execution obstructed by existence of sheriff's deed to mortgaged land produced by a separate proceeding). A similar result could be produced by Iowa Code § 615.3 (1991) if a foreclosure action was not initiated within two years after the entry of a judgment on the mortgage note. Cf. Beckett v. Clark, 225 Iowa 1012, 282 N.W. 724 (1938) (action for foreclosure of mortgage permissible where same commenced with two years of judgment on note).

Two years after entry of a judgment on a mortgage note, § 615.3 will prevent any enforcement of the debt through the redemption process following a foreclosure sale of the mortgaged land in proceedings to enforce a senior mortgage. Federal Land Bank v. Mekota, No. 90-1932 [1-440] (Iowa Ct. App. Feb. 25, 1992). The same result will occur pursuant to § 615.1 where more than two years have passed since the entry of a mortgage foreclosure judgment and the redemption process follows the sale of other land. Johnson v. Leese, 223 Iowa 480, 273 N.W. 111 (1937).

Independent of the possibility that a similar result might be produced by claim preclusion, see infra Outline § IX, the initiation of any proceedings against any collateral other than the mortgaged land seemingly would be barred two years after entry of a foreclosure judgment or a judgment upon the mortgage debt by reason of the general rule that a lien cannot be enforced after the underlying debt has become barred, see supra Outline § IV. A similar result also would follow in circumstances involving the mortgagor's other unpledged assets. See Houghton State Bank v. Peterson, 477 N.W.2d 94 (Iowa 1991) (general execution against mortgagor's non-homestead property issued in 1990 barred by § 615.3 where judgment had been entered in 1987 upon note secured by both security interest in personalty and second mortgage on homestead).
A significant unresolved aspect of Ch. 615 is its effects upon the undertakings of third-party guarantors. The issue has arisen on a number of occasions in other jurisdictions, see Nelson & Whitman, Real Estate Finance Law 606-607 (2d. ed. 1985); Annot., Mortgages: Effect Upon Obligations of Guarantor or Surety of Statute Forbidding or Restricting Deficiency Judgments, 49 A.L.R.3d 554 (1973), and its resolution sometimes involves distinctions between circumstances involving truly third-party guarantors and those where the guarantors actually or in effect are the mortgagors, see, e.g., In re Harstad, 136 B.R. 806 (Bankr. D. Minn. 1992) (debtors executed (i) mortgage note and deed and (ii) guaranties of debt evidenced by mortgage note); First Interstate Bank, N.A. v. Larson, 475 N.W.2d 538 (N.D. 1991) (general partners' personal guaranties of general partnership's mortgage debt). In Iowa, however, the issue apparently has been litigated only once. See Federal Land Bank v. Johnson, Equity No. 33616 (Clarke Co. Dist Ct. Aug. 4, 1987), 4 Iowa Agricultural Law Reporter No. 1, at 2 (Ch. 615 inapplicable to judgment on promissory note cosigned by mortgagor's parents).

Although Ch. 615 is not phrased in terms as broad as some of the deficiency limitations that have been held applicable to third-party guarantors, such a result arguably should follow from the policy implications of Ch. 615's enactment. More directly, the conclusion that Ch. 615 affords protection to the persons and property of third-party guarantors follows logically from a combination of the positions Iowa has taken with a minority of other states on two pertinent aspects of mortgage and suretyship law. First, unlike most states, in Iowa a mortgage is not enforceable after the debt has become barred. See supra Outline § IV. Second, and again unlike most states, Iowa allows a surety to assert a statute of limitations defense that is available to the principal. See State v. Bi-States Constr. Co., Inc, 269 N.W. 455, 457 (Iowa 1978); Calhoun, Suretyship for the Iowa Lawyer, 67 Iowa L. Rev. 219, 259 (1982).

The first principle alone might not be sufficient to protect a guarantor if the guarantor's obligation is considered to be a separate liability that is not affected by the entry of a judgment upon the principal's debt. Furthermore, absent the second principle, any judgment entered against the guarantor in an action commenced within two years of the entry of a judgment against the mortgagor seemingly would be either independently subject to Ch. 615 where the guaranty was itself separately secured by a real estate mortgage, or enforceable against the guarantor without regard to any of the limitations of Ch. 615 if the guaranty was itself either unsecured or secured only by a security interest in personal property.

VII. DELAY IN ENFORCEMENT OF FARM CREDIT SYSTEM DEFICIENCY JUDGMENTS

The Farm Credit Crisis of the 1980s prompted the enactment of a temporary delay in the enforcement of Farm Credit System deficiency judgments. Enacted in 1986 as part of larger of set of farm mortgagor relief measures that included such things as mandatory mediation and separate redemption of agricultural homesteads, see Chs. 1214 & 1216, 1986 Iowa Acts 323, 330, the delay was accomplished by adding two unnumbered paragraphs to the previously existing single-sentence text of Iowa Code § 654.6 (1991):

"If the mortgaged property does not sell for sufficient to satisfy the execution, a general execution may be issued against the mortgagor, unless the parties have stipulated otherwise.

"However, a deficiency judgment or general execution premised upon the deficiency judgment issued against the mortgagor shall not be enforceable until July 1, 1991 if all of the following apply:
"1. The mortgaged property is agricultural land.

"2. The mortgagor was actively engaged in farming the agricultural land upon the commencement of the action which resulted in a deficiency judgment.

"3. The action was for the foreclosure of a first mortgage on the agricultural land or for the enforcement of an obligation secured by a first mortgage on the agricultural land.

"4. The first mortgage secures a loan obligation, where a condition for the making of the loan was that the borrower purchase or own stock in the entity making the loan or in an entity related to the lending entity. This requirement is satisfied if there was such a condition at the time the original loan was made.

"5. The mortgagor does not exercise the exemptions provided under section 627.6 in relation to the deficiency judgment or a general execution premised upon the deficiency judgment.

"The running of time periods affecting the enforceability of the deficiency judgment or general execution is suspended until July 1, 1991. Assets of the mortgagor sufficient to satisfy the deficiency judgment shall be held by the mortgagor during the period of delay provided in this section. The court shall determine which assets shall be held, and a sale, disposition, or further encumbrance of these assets is not permitted without the consent of the court. The delay may not be waived before the issuance of the deficiency judgment. After the issuance of the deficiency judgment, the mortgagor may waive the delay by filing a waiver signed by the mortgagor with the court. This section applies to actions pending on June 1, 1986 and actions commenced on or after June 1, 1986 but before July 1, 1991."

The enactment's operative elements entailed various difficulties. Two reported decisions involved issues over the applicability of the enactment to "actions pending" on June 1, 1986. Federal Land Bank v. Lockard, 446 N.W.2d 808, 809 (Iowa 1989) (action pending where judgment, sale, and appointment of receiver occurred before effective date because receivership not terminated until after effective date); Federal Land Bank v. Recker, 460 N.W.2d 480, 482 (Iowa Ct. App. 1990) (action pending where sale and other proceedings held after effective date even though both original personal judgment and supplementary in rem judgment had been entered before effective date). Although the requirement that the mortgaged property be agricultural land was not an issue in any reported decision, the Court of Appeals ruled that a mortgagor who was leasing the property was not "actively engaged in farming" the agricultural land. Citizens First Nat. Bank v. Turin, 431 N.W.2d 185, 187 (Iowa Ct. App. 1988).

Still another problematic condition was the requirement that the mortgagor "not exercise the exemptions provided in section 627.6 in relation to the deficiency judgment or a general execution premised upon the deficiency judgment." As an initial matter, the quoted language literally encompassed all of the personal property exemptions contained in Iowa Code § 627.6 (1991), and not just the contemporaneously created exemptions codified as Iowa Code § 627.6(11)-(12) (1991) (emphasis added):

"A debtor who is a resident of this state may hold exempt from execution the following property:
"11. If the debtor is engaged in farming and does not exercise the delay of the enforceability of a deficiency judgment or general execution under section 654.6 in relation to the execution under which the exemption is claimed, any combination of the following, not to exceed a value of ten thousand dollars in the aggregate:

"a. Implements and equipment reasonably related to a normal farming operation. This exemption is in addition to a motor vehicle held exempt under subsection 9.

"b. Livestock and feed for the livestock reasonably related to a normal farming operation.

"12. If the debtor is engaged in farming the agricultural land upon the commencement of an action for the foreclosure of a mortgage on the agricultural land or for the enforcement of an obligation secured by a mortgage on the agricultural land, if a deficiency judgment is issued against the debtor, and if the debtor does not exercise the delay of the enforceability of the deficiency judgment or general execution under section 654.6 in relation to the execution under which the exemption is claimed, the disposable earnings of the debtor are exempt from garnishment to enforce the deficiency judgment after two years from the entry of the deficiency judgment, sections 642.21 and 642.22 notwithstanding. However, earnings paid to the debtor directly or indirectly by the debtor are not exempt."

(Notably, while the first of these provisions was a material addition to the set of exemptions previously available to agricultural debtors, the second added almost nothing to the effects theretofore produced by the existing provisions of Ch. 615.) Furthermore, the requirement that the mortgagor "not exercise" exemptions obviously could result in uncertainty in stand-off situations where a levy was not attempted because the mortgagee believed the delay was applicable and the mortgagor did not exercise any exemptions because no levy was ever made. Cf. Federal Land Bank v. Recker, 460 N.W.2d 480, 482 (Iowa Ct. App. 1990) (contention that § 654.6 inapplicable because exemptions had been exercised not reached because issue not timely raised or properly preserved). If the existence and consequences of this uncertainty were timely appreciated, however, it could be resolved by various means including the debtor's filing of a waiver of the delay with the court after the issuance of the deficiency judgment.

The requirement that the underlying loan initially had been conditioned on the borrower's ownership or purchase of stock in the lender or a related entity would ordinarily be satisfied only by loans extended by components of the cooperatively-structured Farm Credit System. See 12 U.S.C. § 2034 (1983) (purchase of stock required for federal land bank loans); 12 U.S.C. § 2094 (1983) (purchase of stock required for production credit association loans). The related requirement that the loan be secured by a first mortgage on the agricultural land further restricted the enactment's ordinary scope of application to deficiency judgments obtained by federal land banks. These limitations, however, ultimately were found to be without any rational basis in a decision which held that the entire enactment violated the equal protection provisions of the state and federal constitutions. Federal Land Bank v. Lockard, 446 N.W.2d 808 (Iowa 1989). But cf. Federal Land Bank v. Arnold, 426 N.W.2d 153 (Iowa 1988) (general application of statute preserved by invalidating only the unconstitutional classification).

The determination of the enactment's unconstitutionality was accompanied by a somewhat unusual adjustment of the consequences of the court's decision:
"Here, the land bank was caught on the horns of a dilemma. Iowa Code section 615.1 requires that enforcement procedures on a deficiency judgment be brought within two years from the date of the judgment. ... Iowa Code section 654.6, however, purported to provide that no enforcement proceedings could be commenced until July 1, 1991, and suspended the running of the statute of limitations under section 615.1. The land bank, relying on section 654.6, did not attempt to collect on its judgment before the expiration of the two-year period. The question now raised is whether the land bank may now be permitted to collect on its deficiency judgment at all. If the moratorium provisions of section 654.6 do not suspend the running of the statute of limitations, the land bank is too late under section 615.1 to enforce its deficiency judgment.

"This case is in equity, where we have considerable flexibility in framing a remedy. ... Holding the land bank to the two-year limitation under section 615.1, as urged by Lockards, would leave it without any remedy. On the other hand, a precipitous voiding of the moratorium statute without some relief to borrowers who have relied on it would be unfair to them.

"We conclude that the land bank and all other lenders covered by the moratorium provision of section 654.6 should be granted two years from July 1, 1990, to enforce their deficiency judgments. To protect Lockards and other debtors from immediate enforcement proceedings, we hold that no action to enforce such deficiency judgments shall be commenced before July 1, 1990.” 446 N.W.2d at 810.

Although the effects of delayed enforcement of Farm Credit System deficiency judgments have now lapsed, it would seem that the advantages of delays of four years or less (i.e., regardless of their individual starting points, all delays ended at the same fixed point) may well have been outweighed in a number of instances by the disadvantages of a later enforcement period in which some or all personal property exemptions may not have been available. See, e.g., Federal Land Bank v. Lockard, 446 N.W.2d 808 (Iowa 1989) (applicability of § 654.6 resisted by borrower); Federal Land Bank v. Recker, 460 N.W.2d 480, 482 (Iowa Ct. App. 1990) (same).

VIII. WAIVER OF DEFICIENCY JUDGMENTS UNDER ALTERNATIVE FORECLOSURE PROCEDURES

A. Shortened Redemption Periods

The traditional one-year period of statutory redemption established by Iowa Code § 628.3 (1991) can be shortened under the provisions of three enactments which must or may involve a waiver of the mortgagee's right to a deficiency judgment against the mortgagor. See Iowa Code §§ 628.26, .27, & .28 (1991). The first enactment occurred in 1961, is limited to mortgages that contain an authorizing provision and cover less than ten acres of land, and is conditioned upon a deficiency judgment waiver. See Iowa Code § 628.26 (1991) (emphasis added):

"The mortgagor and the mortgagee of real property consisting of less than ten acres in size may agree and provide in the mortgage instrument that the period of redemption after sale on foreclosure of
said mortgage as set forth in section 628.3 be reduced to six months, provided the mortgagee waives in the foreclosure action any rights to a deficiency judgment against the mortgagor which might arise out of the foreclosure proceedings. In such event the debtor will, in the meantime, be entitled to the possession of said real property; and if such redemption period is so reduced, for the first three months after sale such right of redemption shall be exclusive to the debtor, and the time periods in sections 628.5, 628.15, and 628.16, shall be reduced to four months."

The second enactment occurred in 1967, and involves the additional requirement of an abandonment of the land by the owner and other persons liable for the mortgage debt. See Iowa Code § 628.27 (1991) (emphasis added):

"The mortgagor and the mortgagee of any tract of real property consisting of less than ten acres in size may also agree and provide in the mortgage instrument that the court in a decree of foreclosure may find affirmatively that the tract has been abandoned by the owners and those persons personally liable under the mortgage at the time of such foreclosure, and that should the court so find, and if the mortgagee shall waive any rights to a deficiency judgment against the mortgagor or the mortgagor's successors in interest in the foreclosure action, then the period of redemption after foreclosure shall be reduced to sixty days. If the redemption period is so reduced, the mortgagor or the mortgagor's successors in interest or the owner shall have the exclusive right to redeem for the first thirty days after such sale and the times of redemption by creditors provided in sections 628.5, 628.15 and 628.16 shall be reduced to forty days. Entry of appearance by pleading or docket entry by or on behalf of the mortgagor shall be a presumption that the property is not abandoned."

The authorizing mortgage provisions required by these first two enactments ordinarily are not self-executing, and a mortgagee's right to a deficiency judgment thus is not waived until and less an affirmative election to that effect is made in the foreclosure proceeding. See Banco Mortg. Co. v. Steil, 351 N.W.2d 784 (Iowa 1984). But see id. at 788-789 (three dissenting justices would have construed mortgage provision as self-executing).

The third enactment occurred in 1984, and unlike the first two, is not conditioned upon the presence of an authorizing provision in the mortgage, does not involve any size limitation, and requires a deficiency judgment waiver in only one of three sets of circumstances. See Iowa Code § 628.28 (1991) (emphasis added):

"If real property is not used for agricultural purposes, as defined in section 535.13, and is not the residence of the debtor, or if it is the residence of the debtor but not a single-family or two-family dwelling, then the period of redemption after foreclosure is one hundred eighty days. For the first ninety days after the sale the right of redemption is exclusive to the debtor and the time periods provided in sections 628.5, 628.15 and 628.16 are reduced to one hundred thirty-five days. If a deficiency judgment has been waived the period of redemption is reduced to ninety days. For the first thirty days after the sale the redemption is exclusively the right of the debtor and the time periods provided in sections 628.5, 628.15 and 628.16 are reduced to sixty days.
"If real property is not used for agricultural purposes, as defined in section 535.13, and is a single-family or two-family dwelling which is the residence of the debtor at the time of foreclosure but the court finds that after foreclosure the dwelling has ceased to be the residence of the debtor and if there are no junior creditors, the court shall order the period of redemption reduced to thirty days from the date of the court order. If there is a junior creditor, the court shall order the redemption period reduced to sixty days. For the first thirty days redemption is the exclusive right of the debtor and the time periods provided in sections 628.5, 628.15 and 628.16 are reduced to forty-five days."

B. Judicial Foreclosure Without Redemption of Nonagricultural Land

In 1987, an alternative procedure was established under which nonagricultural mortgages may be judicially foreclosed without any rights of statutory redemption. See Iowa Code §§ 654.20-.26 (1991). The procedure allows residential mortgagors to obtain periods of delay between entry of judgment and the sale which are similar in length to the statutory redemption periods otherwise applicable in like circumstances. Thus, by filing a demand, a residential mortgagor obtains a twelve-month delay of sale unless the mortgagor has included a waiver of deficiency judgment in its petition, in which case the delay of sale is reduced to six months. Compare Iowa Code § 654.21 (1991) with Iowa Code § 628.26 (1991). Furthermore, although the sale will be held promptly after the entry of judgment in the absence of any demand for delay, a deficiency judgment cannot be entered in proceedings involving a residential mortgagor even though the mortgagee had not included a waiver of deficiency judgment in its petition. In contrast, the presence or absence of a waiver of a deficiency judgment in the mortgagee’s petition has no effect on the two-month period of delay that can be demanded by nonresidential mortgagors, and in the absence of such a waiver, a deficiency judgment can be entered against a nonresidential mortgagor even though a delay of sale is not demanded. In both residential and nonresidential settings, however, a deficiency judgment also will be waived if the parties subsequently file a stipulation terminating the effects of a previously demanded sale delay. See Iowa Code §§ 654.26, .25, & .21 (1991) (emphasis added):

"If the plaintiff has elected foreclosure without redemption, the plaintiff may include in the petition a waiver of deficiency judgment. If the plaintiff has elected foreclosure without redemption and does not include in the petition a waiver of deficiency judgment, if the mortgaged property is the residence of the mortgagor and is a one-family or two-family dwelling, and if the mortgagor does not file a demand for delay of sale under section 654.21, then the plaintiff shall not be entitled to the entry of a deficiency judgment under section 654.6." § 654.26

"The election for foreclosure without redemption is not a waiver of the plaintiff’s rights under section 654.6 except as provided in section 654.26." § 654.25

"At any time prior to entry of judgment, the mortgagor may file a demand for delay of sale. If the demand is filed, the sale shall be held promptly after the expiration of two months from entry of judgment. However, if the demand is filed and the mortgaged property is the residence of the mortgagor and is a one-family or two-family dwelling, the sale shall be held promptly after the expiration of twelve months, or six months if the petition includes a waiver of deficiency judgment, from entry of judgment. If the demand is filed,
the mortgagor and mortgagee subsequently may file a stipulation that
the sale may be held promptly after the stipulation is filed and that
the mortgagee waives the right to entry of a deficiency judgment. If
the stipulation is filed, the sale shall be held promptly after the filing.

" § 654.21

See also Iowa Code § 654.20 (1991) (notice required if petition does not include waiver of
deficiency judgment must include statement that "[i]f the mortgaged property is not your residence
or is not a one-family or two-family dwelling, then a deficiency judgment may be entered against
you whether or not you file a written demand to delay the sale.").

The only reported opinion involving the provisions of the alternative procedure for judicial
foreclosure without redemption of nonagricultural land clearly indicates that a petition seeking only
in rem relief will not be treated as the equivalent of a petition containing a waiver of deficiency

"The plaintiff ... point[s] out that it asked, in its petition, for a
deficiency judgment in rem only, and that is obvious it was not asking for a
deficiency judgment against the defendants, since a judgment in rem
is against the property only. We do not agree. Merely seeking
judgment in rem does not meet the intent of the statute. ..."

" ... Here, plaintiff did not include a waiver of deficiency judgment.

"

C. Nonjudicial Voluntary Foreclosure and Nonjudicial Foreclosure of
Nonagricultural Mortgages

A 1985 enactment established an alternative nonjudicial voluntary foreclosure procedure that
can be used for all types of mortgages. Its use, however, is conditioned upon the consent of both
the mortgagee and the mortgagor, and necessarily precludes any deficiency judgment. See Iowa
Code § 654.18 (1991) (emphasis added):

"1. Upon the mutual written agreement of the mortgagor and
mortgagee, a real estate mortgage may be foreclosed pursuant to this
section by doing all of the following:

"a. The mortgagor shall convey to the mortgagee all interest in the real
property subject to the mortgage.

"b. The mortgagee shall accept the mortgagor's conveyance and
waive any rights to a deficiency or other claim against the mortgagor
arising from the mortgage.

"c. The mortgagee shall have immediate access to the real property
for the purposes of maintaining and protecting the property.

"...

A separate procedure for nonjudicial foreclosure of nonagricultural mortgages was enacted
in 1987. The procedure can be used "at the option of the mortgagee," Iowa Code § 655A.2 (1991),
but its effectiveness can be nullified if a rejection notice is served and filed by the mortgagor or a
successor in interest within thirty days after service of the notice by which the procedure is initiated,
Iowa Code § 655A.6 (1991). The initiating notice may specify any default other than "any
obligation arising from an acceleration of the indebtedness secured by the mortgage," Iowa Code
§ 655A.3 (1991), and in the absence of a rejection notice, the failure of the mortgagor to fully
perform all specified defaults in thirty days will effect both a transfer of the mortgaged property to the mortgagee and an extinguishment of the mortgage debt. See Iowa Code § 655A.8 (1991) (emphasis added):

"Upon completion of the filings required under section 655A.7 [copy of initiating notice and proofs of service if defaults not performed within thirty days] and if no rejection of notice has been filed pursuant to section 655A.6 [rejection notice must be filed and served within thirty days of service of initiating notice], then without further act or deed:

"1. The mortgagee acquires and succeeds to all interest of the mortgagor in the real estate.

"2. All liens which are inferior to the lien of the foreclosed mortgage are extinguished.

"3. The indebtedness secured by the foreclosed mortgage is extinguished."

D. Possible Effects of Deficiency Judgment Waivers

The deficiency judgment waivers that appear as part of six distinct alternative foreclosure procedures have been the subject of only a few reported decisions. See Banco Mortg. Co. v. Steil, 351 N.W.2d 784 (Iowa 1984) (mortgage provision authorizing use of § 628.27 not self-executing); Morris Plan Co. v. Bruner, 458 N.W.2d 853 (Iowa Ct. App. 1990) (petition seeking only in rem relief is not the equivalent of a petition containing a waiver of deficiency judgment). In some areas of the state, the deficiency judgment waivers that are required in connection with the use of two forms of shortened redemption periods apparently are not thought to be inconsistent with sale bids of less than the amount of the mortgage debt. See Bauer, Statutory Redemption Reconsidered: The Operation of Iowa's Redemption Statutes in Two Counties Between 1881 and 1980, 70 Iowa L. Rev. 343, 410 n. 200 (1985) (deficiencies ranging from $1 to $6,859 occurred between 1966 and 1980 in 15 of 36 shortened redemption period mortgage foreclosure sales of nonfarm land and in one of five shortened redemption period mortgage foreclosure sales of farm land). In some instances, moreover, challenges to obvious or arguable departures from the requirements for or consequences of an alternative procedure involving a deficiency judgment waiver may be procedurally barred. See Brenton State Bank v. Tiffany, 400 N.W.2d 576, 578 (Iowa 1987) (default judgment providing for shortened redemption period under §§ 628.26 & .27 cannot be vacated in its entirety on ground mortgage encompassed more than ten acres); Milwaukee Western Bank v. Cedars of Cedar Rapids, Inc., 170 N.W.2d 670, 672 (Iowa 1969) (declining to determine whether receivership barred by terms of § 628.26 because contention not properly preserved).

1. Receiverships

An initial issue is the extent to which a deficiency judgment waiver stands as an obstacle to receiverships under a mortgage pledge of rents and profits. As previously discussed, receiverships ordinarily cannot be obtained in the absence of an actual or potential deficiency, but have been allowed in circumstances where only an in rem judgment has been awarded because of the mortgagor's death or receipt of a bankruptcy discharge. See supra Outline § V.C.

Under one alternative procedure, a receivership arguably is inconsistent with specific language expressly affording a right of possession to the mortgagor. See Iowa Code § 628.26 (1991) (redemption period may be reduced to six months if, inter alia, "the mortgagee waives ... any rights to a deficiency judgment against the mortgagor," but "[i]n such event the debtor will, in the
meantime, be entitled to the possession of said real property ... " (emphasis added)). But cf. Moad v. Neill, 451 N.W.2d 4 (Iowa Ct. App. 1989) (receivership clause overcomes provision of Iowa Code § 628.3 (1991) affording right of possession to debtor during year of redemption). Conversely, receiverships seemingly are not necessary under the two nonjudicial foreclosure procedures because the mortgagee immediately receives both title and possession of the property. See Iowa Code § 654.18(1)(a) & (c) (1991); Iowa Code § 655A.8(1) (1991).

The availability of receiverships under Iowa Code § 628.27 (1991) might be supported by the combined effects of the presence of restrictive language ("the mortgagee shall waive any rights to a deficiency judgment against the mortgagor"), the absence of an express provision affording a right of possession to the mortgagor similar to that contained in the otherwise largely parallel provisions of Iowa Code § 628.26 (1991), and the presumptive need for a receiver in circumstances involving abandoned property. In contrast, the language and structure of the remaining two alternative procedures do not provide any additional guidance concerning the relationship between a deficiency judgment waiver and the availability of a receivership. See Iowa Code § 628.28 (1991) (redemption period reduced to ninety days "[i]f a deficiency judgment is waived"); Iowa Code § 654.26 (1991) (mortgagee's petition may include "a waiver of deficiency judgment," and if residential mortgagor does not demand delay of sale, mortgagee "shall not be entitled to the entry of a deficiency judgment under section 654.6.").

2. Additional Collateral

A deficiency judgment waiver under any of the six alternative foreclosure procedures presumably should be an unavoidable bar to the issuance of a general execution against any nonexempt property of the mortgagor that has not been pledged as additional collateral for the mortgage debt. Less clear, however, is whether a deficiency judgment waiver will preclude further action against any additional collateral upon which the mortgagee previously has received a lien from the mortgagor. Cf. Brenton State Bank v. Tiffany, 440 N.W.2d 583 (Iowa 1989) (in rem judgment against mortgaged land does not preclude subsequent judgment for possession of contemporaneously encumbered personal property).

Once again, the terms of the procedures vary in ways which might be viewed as pointing towards or away from the continued enforceability of previously existing liens upon additional collateral. Under Iowa Code §§ 628.26 & .27 (1991), for example, the use of shortened redemption periods is conditioned upon the mortgagee waiving "any rights to a deficiency judgment against the mortgagor" (emphasis added). One reading of this language might support the idea that the required waiver extends to any additional collateral owned and pledged by the mortgagor, while another reading might conclude that the waiver is confined to the mortgagor's personal liability for the mortgage debt and does not encompass liens previously upon additional collateral. Similar ambiguities exist under the somewhat more generally phrased terms of Iowa Code § 628.28 (1991) (redemption period available "[i]f a deficiency judgment has been waived ...") and Iowa Code § 654.26 (1991) (petition may include "a waiver of deficiency judgment," but if deficiency judgment not waived and residential mortgagee does not file demand for sale, mortgagee "shall not be entitled to the entry of a deficiency judgment under section 654.6" (emphasis added)). Recourse against additional collateral, however, might be relatively more incompatible with the somewhat broader language of Iowa Code § 654.18 (1991) (mortgagee must accept conveyance of mortgaged land and "waive any rights to a deficiency or other claim against the mortgagor arising from the mortgage" (emphasis added)) and Iowa Code § 655A.8 (1991) (upon completion of nonjudicial procedure, "[t]he indebtedness secured by the foreclosed mortgage is extinguished" (emphasis added)).

Any ability to proceed against other collateral after a deficiency judgment waiver presumably would be subject to the provisions of Ch. 615. See supra Outline § VI. Thus, under the Iowa rule that a mortgage cannot be enforced after the debt is barred, see supra Outline § IV., the possibility of any action against additional collateral seemingly would become barred two years after the entry of a judgment in any proceeding in which the right to a deficiency judgment was waived.
3. Third-Party Guarantors

As an initial matter, the effects of deficiency judgment waivers upon the undertakings of third-party guarantors involve textual considerations similar to those mentioned in connection with the effects of waivers on the mortgagee's ability to proceed against additional collateral. See supra Outline § VIII.D.3. Thus, for example, subsequent action against a third-party guarantor arguably might not be inconsistent with the waiver of "any rights to a deficiency judgment against the mortgagor" (emphasis added) required under Iowa Code §§ 628.26 & .27 (1991), but the same action might conflict more directly with the effects specified by Iowa Code § 655A.8(3) (1991) (upon completion of nonjudicial foreclosure, "[t]he indebtedness secured by the foreclosed mortgage is extinguished").

The effect of deficiency judgment waivers on third-party guarantors also involves policy considerations paralleling those previously mentioned in connection with the more long-standing uncertainty about the effects Ch. 615 might have upon the enforcement of guarantor liabilities. See supra Outline § VI.D. A mortgagee's optional use of an alternative procedure, however, conceivably might warrant more restrictive effects than those produced by the unavoidable operation of Ch. 615.

Once again, the applicability of Ch. 615 to the judgment entered in any proceeding in which a deficiency judgment was waived might require any otherwise available action against a third-party guarantor to be brought within two years after entry of the judgment in accordance with Iowa's rule that a surety may assert any limitations defense available to the principal. See supra Outline § VI.D.

X. CLAIM AND ISSUE PRECLUSION

The existence and scope of the preclusive effects of a judgment upon a mortgage lien or a mortgage debt always have involved some significant complexities. The debt and the lien are separate elements with distinct effects, but their creation and their operation often involve overlapping events and functions. See supra Outline § I.B. Moreover, while a mortgagee generally is free to pursue only one or the other element, see supra Outline § III.A., most commonly both are asserted in a single proceeding, see supra Outline § III.B. Some difficulties may be presented, however, if the two elements are asserted in separate proceedings, or if the parts of single element are asserted in multiple proceedings. Moreover, since the nature and proper resolution of these difficulties may be significantly effected by changes in various aspects of civil practice, the continuing soundness of earlier precedents may be not be certain. See supra Outline § I.A.

A. Issue Preclusion

The determination of an issue in one proceeding between two parties often may be preclusive of any relitigation of that same issue in a later proceeding between the same two parties. See generally 2 Vestal, Willson, & Lindahl, Iowa Practice § 65.03 (1984 rev.). Furthermore, a party who has had an issue determined against it in a prior proceeding may be bound by that determination in a later proceeding by or against a person who had no involvement in the earlier proceeding. Id. The first effect has not changed all that dramatically over time, but the second effect results from a relatively recently abandonment of a previously requirement of mutuality. In mortgage foreclosure situations where its effects are not eclipsed by the consequences of claim preclusion, the operation of issue preclusion should not involve any special difficulties.
B. Claim Preclusion Against Third Parties

Multiple persons may initially or subsequently incur liability for a mortgage debt through a wide range of direct or indirect actions. See supra Outline § II.A. & B. Similarly, through an equally wide range of subsequent encumbrances or conveyances, multiple persons may acquire interests in the mortgaged land that are subject to and thus can effect by the enforcement of a mortgage lien.

Although the presence of multiple liabilities and interests in many mortgage transactions increases the potential for application of nonmutual issue preclusion, Iowa seemingly remains committed to the traditional notion that claim preclusion cannot be applied where the second action is against someone who was not a party to the first action. See, e.g., Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398, 402 (Iowa 1982) (claim preclusion cannot be invoked by person that was not a party to the prior litigation); Williamson v. Kelley, 271 N.W.2d 727, 730 (Iowa 1978) (same). See also Iowa Code § 613.2 (1991) ("An action against any one or more of several persons jointly bound shall not be a bar to proceedings against the other."); Warnecke v. Foley, 234 Iowa 348, 351, 11 N.W.2d 457 (1944) (rule against splitting cause of action applies only when the several actions are between the same parties, and has no application where later action by mortgagee is against persons jointly liable upon note and mortgage with another against whom mortgagee previously had recovered a judgment upon the note); Nelson v. First Nat. Bank, 199 Iowa 804, 202 N.W.2d 847 (1925) (rule against splitting cause of action limited to suits between same parties, and has no application to proceedings against junior mortgagee inadvertently omitted from prior foreclosure action).

C. Multiple Notes and Multiple Mortgages

Two separate groups of cases involve sets of principles which seemingly do not extend beyond the specialized circumstances in which they were developed. The first group of cases involves situations where multiple notes secured by a single mortgage are held by different persons. See, e.g., Iowa Title & Loan Co. v. Clark Bros., 213 Iowa 875, 237 N.W. 336 (1931) (because each note is a separate cause of action, holders of two of four notes secured by mortgage may bring action on notes and levy on other property while holders of other two notes are foreclosing on the mortgaged land); Morgan v. Kline, 77 Iowa 681, 42 N.W. 558 (1889) (ordinary rule that proceeds applied to notes in order of maturity and that mortgage is exhausted by sale under one note not applied where original payee assigns last maturing notes, subordinates early maturing notes, and then forecloses, with result that redeeming grantee of mortgagor holds subject to lien of last maturing notes).

A second group of cases involves situations where a single person holds multiple mortgages. Some of these cases deal with the possibility that the enforcement of one mortgage might cause it to merge with the other. See, e.g., Wells v. Ordway, 108 Iowa 86, 78 N.W. 806 (1899) (merger does not occur when the holder of first and second mortgages purchases at a sale enforcing only the first mortgage by bidding in the amount of such mortgage, but in the absence of a timely junior lienholder redemption upon the second mortgage, the mortgagor's grantee subsequently may redeem for only the amount of the first mortgage); McDonald v. Magirl, 97 Iowa 677, 66 N.W. 904 (1896) (guarantor of first mortgage released by merger that occurred when holder of first and second mortgages purchased at a sale enforcing only the second mortgage); Spurgin v. Adamson, 62 Iowa 661, 18 N.W. 293 (1883) (because merger did not occur where purchaser at sale enforcing first lien subsequently acquired second lien, exercise of equitable redemption right by holder of third lien not joined in first lien foreclosure requires payment of both first and second liens). Other cases consider somewhat similar concerns arising in the context of the operation of Iowa's redemption statute. See, e.g., Stephens v. Mitchell, 103 Iowa 65, 72 N.W. 434 (1897) (acquisition of junior lien and purchase at sale enforcing same by person previously purchasing at sale enforcing senior lien treated as
equivalent of junior lienholder redemption from first sale such that redemption therefrom by mortgagor's grantee requires payment of the amount of both liens; Citizens' Sav. Bank v. Percival, 61 Iowa 183, 16 N.W. 76 (1883) (junior judgment creditor purchasing at senior's sale may redeem from himself).

D. Compulsory Counterclaims

A relatively modern form of claim preclusion is derived from procedural rules that require defendants to assert counterclaims that relate to the claim being advanced by a plaintiff. See Iowa R. Civ. P. 29:

"A pleading must contain a counterclaim for every cause of action then matured, and not the subject of a pending action, held by the pleader against any opposing party and arising out of the transaction or occurrence that is the basis of such opposing party's claim, unless its adjudication would require the presence of indispensable parties of whom jurisdiction cannot be obtained. A final judgment on the merits shall bar such a counterclaim, although not pleaded."

This form of preclusion has been applied rather vigorously in mortgage foreclosure situations. See Walters v. Iowa-Des Moines Nat. Bank, 295 N.W.2d 430 (Iowa 1980) (mortgagor's claim against original mortgagee barred by failure to assert same as compulsory counterclaim in prior foreclosure proceedings even though (i) original mortgagee had assigned note and mortgage to another after commencement of prior proceeding and (ii) amount of mortgagor's claim exceeded amount of assigned mortgage debt); Harrington v. Polk County Fed. Sav. & Loan Ass'n, 196 N.W.2d 543 (Iowa 1972) (judgment denying foreclosure of mortgage bars mortgagor's separately pending law action for damages occasioned by events surrounding mortgagee's initial commencement of foreclosure proceeding); Raymon v. Norwest Bank Marion, N.A., 414 N.W.2d 661 (Iowa Ct. App. 1987) (claim barred where it had been asserted as a compulsory counterclaim in a prior action, but had been dismissed as untimely).

E. Action on Mortgage Lien after Judgment on Mortgage Debt

The separate dimensions of the mortgage debt and the mortgage lien traditionally allowed an action on the lien to be maintained after entry of a judgment upon the debt. The rule initially may have reflected such things as the difference between law and equity, possible gaps between jurisdiction over the person of the debtor and jurisdiction over the mortgaged land, and the discreetness of the functions performed by each suit. In any event, its application allowed the action on the debt to stop with a determination of the existence and amount of the mortgagor's obligation to the mortgagee, and allowed determinations of the lien's priority in relation to the interests of other persons to be resolved in later proceedings to foreclose the lien. See, e.g., Hendershott v. Ping, 24 Iowa 134, 137 (1867) (mortgage lien survives expiration of judgment lien obtained upon foreclosure of note and mortgage).

"The judgment did not merge the lien of the mortgage, but was simply a means of effectuating and enforcing that lien. The judgment did merge the mortgage debt; but a merger of the debt, or any change of the evidence of it, as by giving a note for the account secured by mortgage, by renewal of note, by giving a bond or other thing, short of payment, does not destroy the lien of the mortgage -- that continues until the debt is paid or discharged."

In 1929, the soundness of the traditional rule was questioned by dicta in a decision involving
the reverse circumstance of an action upon the mortgage debt after the entry of a judgment foreclosing the mortgage lien. See Schnuettgen v. Mathewson, 207 Iowa 294, 301, 222 N.W. 893 (1929):

"To give full effect to [the predecessor of Iowa Code § 654.4 (1991) under which a mortgagee may be compelled to elect between suits on the debt and the mortgage when they are simultaneously pending in the same county], it is quite possible that we should have to hold that a decree in either of such suits would determine both."

In a later case involving a chattel mortgage, however, the suggestion of this dicta was explicitly rejected. Hamilton v. Henderson, 211 Iowa 29, 33, 230 N.W. 347 (1930):

"No case ... may be found in the decisions of this state wherein it is held that the prosecution of an action at law on the debt to judgment merges the lien of the mortgage in such judgment, or that it operates as an adjudication so as to prevent the enforcement of the mortgage lien in a proper action in equity."

See also Herrick, Action to Recover Deficiency After Mortgage Foreclosure Sale, 21 Iowa L. Rev. (Bar Ass'n Sec.) 27 (1936).

Nevertheless, the debt established by the prior judgment apparently cannot be enlarged in the subsequent action to enforce the lien. See Warnecke v. Foley, 234 Iowa 348, 11 N.W.2d 457 (1943) (mortgagee who previously obtained a judgment against one co-mortgagor for the principal amount of the mortgage note cannot commence a later action to foreclose the mortgage for an obligation to pay taxes encompassed within the mortgage note). But cf. Des Moines Sav. Bank & Trust Co. v. Littell, 209 Iowa 22, 227 N.W. 503 (1929) (judgment upon interest coupon which did not contain any provision regarding payment of principal not preclusive of later suit for foreclosure of mortgage and judgment upon principal amount of note which included a provision for payment of interest).

While no subsequent decision appears to involve any direct retreat from the traditional rule, its current importance would seem to be restricted by the two-year limitations periods presently applicable to judgments on mortgage debts, see supra Outline § VI., and the apparent persistence of Iowa's long-standing rule that a mortgage is not enforceable after the debt has become barred, see supra Outline § IV. Moreover, while the traditional rule originally may have been rather consistent with such procedural considerations as residual differences between law and equity and potential gaps in territorial jurisdiction over the person of the debtor and the mortgaged land, its logic presently may be limited to the fact that each suit performs a somewhat distinct function (i.e., the initial action on the note determines the existence and amount of the debt, and the subsequent foreclosure of the mortgage determines the priority of its lien in relation to the interests of other persons).

Recent expansions of issue and claim preclusion, however, reflect goals of judicial efficiency which certainly are not advanced by allowing two actions where one ordinarily would be entirely sufficient. To avoid the risk of becoming the vehicle for an abandonment of the traditional rule, cautious counsel probably should avoid an action on the debt alone in the absence of a affirmative determination that the mortgage lien is not of any present or future benefit.

F. Action on Mortgage Debt After Judgment on Mortgage Lien

In contrast to its traditional rule allowing an action on the mortgage lien after a judgment on the mortgage debt, Iowa generally does not allow an action on the mortgage debt after judgment on
a mortgage lien. See Schnuettgen v. Mathewson, 207 Iowa 294, 300, 222 N.W. 893 (1929):

"We have held that a mortgagee may maintain a personal action on his note against the debtor, and may, after judgment therein, foreclose his mortgage. But we have never held that a mortgagee who has foreclosed his mortgage have afterwards maintain a separate action upon his promissory note. Indeed, we have held affirmatively to the contrary. [Citing Kenyon v. Wilson, 78 Iowa 408, 43 N.W. 227 (1889) (judgment foreclosing chattel mortgage against transferees preclusive of later suit against transferees for conversion of collateral).] ...[W]hen the mortgagee forecloses his mortgage upon personal service, he exhausts the full measure of remedy available to him against such defendant."

See also Herrick, Action to Recover Deficiency After Mortgage Foreclosure Sale, 21 Iowa L. Rev. (Bar Ass'n Sec.) 27 (1936).

The foregoing principle did not control in a case involving an action upon a note where it appeared that the Iowa debtors may not have been subject to the jurisdiction of the Minnesota court where the earlier foreclosure had occurred. See Pfeffer v. Corey, 211 Iowa 203, 209, 233 N.W. 126 (1930) ("If the foreclosure suit in Minnesota resulted in a judgment in rem only, there was no merger of the note in the judgment ... .

In a more recent case, however, the principle was applied to bar any later personal judgment for the unpaid balance of the mortgage debt where the earlier in rem foreclosure judgment had been entered during the pendency of the debtors' subsequently dismissed bankruptcy proceeding. See Federal Land Bank v. Faught Bros., Inc., 468 N.W.2d 793 (Iowa 1991).

Although the entry of an in rem judgment may bar a later personal judgment, it may not bar a later in rem recovery against additional collateral. See Brenton State Bank v. Tiffany, 440 N.W.2d 583, 586 (Iowa 1989) ("[W]e held in Tiffany I [Brenton State Bank v. Tiffany, 400 N.W.2d 576 (Iowa 1987)] that the foreclosure judgment precluded a subsequent money judgment on the same indebtedness. ... However, ... the doctrine of merger [is] not applicable to the seizure of additional personal property collateral evidenced by a separate security agreement."). But cf. Federal Land Bank v. Faught Bros., Inc., 468 N.W.2d 793, 795 (Iowa 1991) (mortgagee not entitled to receivership proceeds where personal judgment precluded by prior entry of in rem judgment). An in rem judgment also may not be preclusive of a subsequent personal judgment if the earlier determination expressly preserved the mortgagee's right to seek the later relief. See Citizens First Nat. Bank v. Turin, 431 NW.2d 185 (Iowa Ct. App. 1988)

G. Reservation of Right to Further Relief, Waivers, and Other Limiting Considerations

In a variety of foreclosure circumstances, preclusive effects have been avoided by express reservations of the right to obtain further relief. Compare, e.g., Lincoln Jt. Stock Land Bank v. Williams, 216 Iowa 659, 246 N.W. 841 (1933) (reservation in decree preserved lien for subsequently maturing installments) with Cadd v. Snell, 219 Iowa 728, 259 N.W. 590 (1935) (lien for subsequently maturing installments lost when same not preserved by decree of foreclosure upon earlier installments); Equitable Life Ins. Co. v. Rood, 205 Iowa 1273, 218 N.W. 42 (1928) (receiver can be appointed after sale pursuant to continuance of earlier application) with Wenstrand v. Kiddoo, 222 Iowa 284, 268 N.W. 574 (1936) (in absence of prior request or reservation in judgment, receiver ordinarily should not subsequently be appointed); Olson v. Abrahamson, 214 Iowa 150, 241 N.W. 454 (1932) (later award of reimbursement for interest and taxes proper where same reserved in decree) with Day v. Brenton, 102 Iowa 482, 71 N.W. 538 (1897) (later suit to recover taxes barred by prior foreclosure of mortgage containing obligation to pay taxes).

Furthermore, a party's conduct may result in a waiver of preclusive effects which otherwise
might have been controlling. See, e.g., Noel v. Noel, 334 N.W.2d 146 (Iowa 1983) (party defending two actions cannot invoke claim preclusion in second action after entry of judgment in first action in the absence of some prior objection to maintenance of both actions); Wenstrand v. Kiddoo, 222 Iowa 284, 268 N.W. 574 (1936) (untimely assertion of otherwise meritorious claim preclusion objection to appointment of receiver).

Finally, the effects of preclusion may sometimes be limited by "equitable concerns." See Brenton State Bank v. Tiffany, 440 N.W.2d 583, 586 (Iowa 1989) ("[T]he doctrine of merger is limited by concerns of justice. ... Although it is meant to prevent excessive litigation, its application to deprive a litigant of a cause of action is limited by equitable concerns."). In declining to bar the mortgagee from proceeding against additional collateral, the Tiffany court mentioned the mortgagee's inability to join replevin and foreclosure proceedings, the general availability of cumulative remedies under Article 9 of the Uniform Commercial Code, the incorporation of such remedial options in the parties security agreement, and the fact a contrary result would not serve the "ends of justice" since "the Tiffanys would receive a considerable windfall ... at the expense of the Bank and the other bankruptcy proceeding creditors." Id. at 586-588. But cf. Federal Land Bank v. Faught Bros., Inc., 468 N.W.2d 793, 795 (Iowa 1991):

" ... FLB originally petitioned for routine relief, seeking sequentially the foreclosure and any deficiency. To this end it originally sought both in rem and in personam judgments. FLB argues that it was driven from this position by the federal bankruptcy court and it was for this reason that it amended its petition [to seek only in rem relief]. We are far from convinced that the stay ordered by the federal bankruptcy court drove FLB quite so far; it seems FLB could have obeyed the federal mandate by leaving the prayer for in personam relief intact and, so long as the modified stay persisted, limited its immediate efforts in this action to seek foreclosure."
Ch. 1115, 1994 Iowa Acts 256:

AN ACT PROVIDING FOR LIMITATIONS ON JUDGMENTS

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

H.F. 307

Section 1. Section 615.1, Code 1993, is amended to read as follows:

615.1. Execution on certain judgments prohibited
From and after January 1, 1934, no judgment in an action for the foreclosure of a real estate mortgage, or deed of trust, or real estate contract upon property which at the time of judgment is either used for an agricultural purpose as defined in section 535.13 or a one-family or two-family dwelling which is the residence of the mortgagor, or in any action on a claim for rent or judgment assigned by a receiver of a closed bank or rendered upon credits assigned by the receiver of a closed bank when the assignee is not a trustee for depositors or creditors of the bank, the reconstruction finance corporation or any other federal governmental agency to which the bank or the receiver is or may be indebted shall be enforced and no execution issued thereon and no force or vitality given thereto for any purpose other than as a setoff or counterclaim after the expiration of a period of two years from the entry thereof. As used in this section, "mortgagor" means a mortgagor or a borrower executing a deed of trust as provided in chapter 654 or a vendee of a real estate contract.

Sec. 2. Section 615.3, Code 1993, is amended to read as follows:

615.3. Future judgments without foreclosure
Judgments A judgment hereafter rendered on a promissory obligations obligation secured by a mortgage, or deed of trust of real estate upon property which at the time of the judgment is either used for an agricultural purpose as defined in section 535.13 or a one-family or two-family dwelling which is the residence of the mortgagor, but without foreclosure against said security, shall not be subject to renewal by action thereon, and, after the lapse of two years from the date of rendition, shall be without force and effect for any purpose whatsoever except as a setoff or counterclaim. As used in this section, "mortgagor" means a mortgagor of a mortgage or a borrower executing a deed of trust as provided in chapter 654 or the vendee of a real estate contract.

Approved April 26, 1994
H.F. 2786

AN ACT RELATING TO CIVIL ACTIONS AND THE FORECLOSURE OF REAL ESTATE MORTGAGES, AND PROVIDING FEES AND APPLICABILITY PROVISIONS

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

*          *          *

Sec. 2. Section 615.1, Code 2005, is amended to read as follows:

615.1. Execution on certain judgments prohibited. From and after January 1, 1934, no judgment in an action for the foreclosure of a real estate mortgage, deed of trust, or real estate contract upon property which at the time of judgment is either used for an agricultural purpose as defined in section 535.13 or a one-family or two-family dwelling which is the residence of the mortgagor, or in any action on a claim for rent or judgment assigned by a receiver of a closed bank or rendered upon credits assigned by the receiver of a closed bank when the assignee is not a trustee for depositors or creditors of the bank, the reconstruction finance corporation or any other federal governmental agency to which the bank or the receiver is or may be indebted shall be enforced, null and void, all liens shall be extinguished, and no execution shall be issued thereon and no force or vitality given thereto for any purpose other than as a setoff or counterclaim after the expiration of a period of two years, exclusive of any time during which execution on the judgment was stayed pending a bankruptcy action, from the entry thereof. As used in this section, "mortgagor" means a mortgagor or a borrower executing a deed of trust as provided in chapter 654 or a vendee of a real estate contract.

Sec. 3. Section 615.2, Code 2005, is amended to read as follows:

615.2. Revival of certain judgments prohibited. After January 1, 1934, no action or proceedings shall not be brought in any court of this state for the purpose of renewing or extending such judgment or prolonging the life thereof. Provided, however, that nothing herein shall prevent the continuance of such judgment in force against the property subject to foreclosure only for a longer period by the voluntary written stipulation of the parties judgment creditor and the equitable titleholders, filed in said cause the action or proceedings.

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Approved May 24, 2006
Ch. 51, 2009 Iowa Acts xxx:

S.F. 364

AN ACT RELATING TO CIVIL ACTIONS INCLUDING CERTAIN LIMITATIONS ON ACTIONS, JUDGMENTS, AND EXECUTIONS AND INCLUDING ACTIONS RELATING TO THE FORECLOSURE OF REAL ESTATE MORTGAGES, AND PROVIDING EFFECTIVE DATE AND APPLICABILITY PROVISIONS

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

* * *

Sec. 2. Section 615.1, subsection 1, Code 2009, is amended to read as follows:

1. After the expiration of a period of two years from the date of entry of judgment, exclusive of any time during which execution on the judgment was stayed pending a bankruptcy action or order of court, a judgment entered in either any of the following actions shall be null and void, all liens shall be extinguished, and no execution shall be issued for any purpose other than except as a setoff or counterclaim:
   a. (1) An action for the foreclosure of a real estate mortgage, deed of trust, or real estate contract executed prior to July 1, 2009, an action for the foreclosure of the real estate mortgage, deed of trust, or real estate contract upon property which at the time of judgment the foreclosure is commenced is either for an agricultural purpose as defined in section 535.13 or as a one-family or two-family dwelling which is the residence of the mortgagor.
   (2) For a real estate mortgage, deed of trust, or real estate contract executed on or after July 1, 2009, an action for the foreclosure of the real estate mortgage, deed of trust, or real estate contract upon property which at the time of the execution of the mortgage, deed, or contract is either used for, or is being acquired for, an agricultural purpose as defined in section 535.13 or as a one-family or two-family dwelling which is the residence of the mortgagor.
   b. An action on a claim for rent.

* * *

Sec. 4 NEW SECTION

654.1A. Maintenance of mortgagor protections--discontinuation of occupation

For purposes of sections 615.1, 615.3, 628.28, 654.2D, 654.20, 654.21, and 654.26, property shall be deemed the residence of and occupied by the mortgagor where occupation has ceased because of the effects of natural disaster, injury to the property not willfully caused by the mortgagor, or the mortgagor's state military service or federal military service as those terms are defined in section 29A.1.

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Approved April 9, 2009.