NO. 15-_____

In the Supreme Court of the United States

KIRKLAND TOWNSEND,

Petitioner,

–v–

HSBC BANK USA, N.A., as Trustee for NOMURA HOME EQUITY LOAN, INC., ASSET-BACKED CERTIFICATES, SERIES 2006-FM1,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a judgment that conclusively determines liability, sets forth the amount of a money judgment, and orders the sale of property is final under 28 U.S.C. § 1291.

2. Alternatively, whether such a judgment is final and appealable under the effective finality doctrine first announced in *Forgay v. Conrad*, 6 How. (47 U.S.) 201 (1848).

PARTIES TO THE PROCEEDING

1. Kirkland Townsend, petitioner on review, was the defendant-appellant below.

2. HSBC Bank, as Trustee for Nomura Home Equity Loan, Inc. Asset-Backed Certificates, Series 2006-FM1, respondent on review, was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Kirkland Townsend respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion is published in the *Federal Reporter* as *HSBC Bank USA, N.A. v. Townsend*, 793 F.3d 771 (7th Cir. 2015). Pet.App.1a-54a. The District Court's judgment is unreported. *Id.* at 59a-77a.

JURISDICTION

The Seventh Circuit entered judgment on July 16, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1291 of Title 28 of the United States Code, Final Decisions of District Courts, provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Section 15-1509(b) of Chapter 735, Part 15 of the Illinois Compiled Statutes, provides:

> *Effect Upon Delivery of Deed.* Delivery of the deed executed on the sale of the real estate, even if the purchaser or holder of the certificate of sale is a party to the foreclosure, shall be sufficient to pass the title thereto.

INTRODUCTION

When a plaintiff prevails in litigation and has nothing left to do but execute on the judgment, courts long have recognized that the judgment itself is a final and appealable order. This is so even if proceedings to execute on the judgment remain unfinished in the district court. In cases where a plaintiff seeks to foreclose or compel the transfer of property, a judgment may decide the amount to

which the plaintiff is entitled and order the sale of the property in question. The sale process, though frequently regulated by state law, is simply a means of executing the underlying judgment. The questions presented here ask the Court to determine when finality exists over merits judgments that order the sale of property. Is a judgment that determines liability, identifies a specific debt owed, and orders the sale of property final under 28 U.S.C. § 1291? And alternatively, does the effective finality doctrine first announced in *Forgay v. Conrad*, 6 How. (47 U.S.) 201 (1848), provide an alternative basis for appellate jurisdiction over such a judgment?

This Court should grant certiorari to review these questions for three reasons. *First*, the Seventh Circuit's judgment below conflicts with this Court's prior precedent. As Judge Hamilton's dissenting opinion noted, several decisions of this Court hold that a foreclosure judgment that determines liability and orders a sale of identifiable property, even if subject to a later sale-confirmation order, is appealable. Pet.App.27a-31a. The Seventh Circuit's judgment also conflicts with the Court's effective finality doctrine set forth in *Forgay* and followed in later cases such as *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962). The Seventh Circuit did not, as these cases direct, properly recognize the hardship associated with delaying the time for Townsend's appeal and did not account for the separability of the merits judgment from a later sale-confirmation order.

Second, the courts of appeal are squarely divided over this question of finality. In its decision below,

the Seventh Circuit held that a judgment that determined liability, identified the amount owed to the plaintiff, and ordered a sale of the defendant's home was not final. Three other circuit courts of appeal disagree. The Fifth, Eighth, and Ninth Circuits all have concluded that judgments similar to that at issue here are final and appealable. This Court should intervene and resolve this circuit split.

Third, the questions presented raise a frequently recurring issue of national importance. Foreclosure suits are increasingly part of the district courts' civil docket. Litigants, particularly those facing the loss of their homes, must have a clear understanding of finality principles and should not have to risk forfeiting substantive issues for review due to uncertainty in appellate jurisdiction rules.

For these reasons, this Court should grant certiorari.

STATEMENT

On September 1, 2005, Kirkland Townsend signed a $136,000 promissory note with Fremont Investment & Loan. Compl., ¶ 10, No. 12-cv-3921 (N.D. Ill. May 20, 2012), ECF Nos. 1, 1-4. As security, Townsend granted a mortgage on real estate located in the South Shore neighborhood of Chicago, Illinois. Compl., ¶ 10, No. 12-cv-3921 (N.D. Ill. May 20, 2012), ECF Nos. 1, 1-3. This security instrument identified the mortgagee as Mortgage Electronic Registration Systems, Inc. in its capacity "as a nominee for

[Fremont] and [Fremont]'s successors and assigns." *Id.* MERS later executed an Assignment of Mortgage to HSBC Bank, as Trustee for Nomura Home Equity Loan, Inc. Asset-Backed Certificates, Series 2006-FM1 ("HSBC"). Compl., ¶ 10, No. 12-cv-3921 (N.D. Ill. May 20, 2012), ECF Nos. 1, 1-5.

HSBC filed its Complaint to Foreclose Mortgage on May 20, 2012 against Townsend and Fremont. Compl., No. 12-cv-3921 (N.D. Ill. May 20, 2012), ECF No. 1. HSBC claimed Townsend defaulted on payment obligations under the note from and after March 1, 2011. Compl., ¶ 10, No. 12-cv-3921 (N.D. Ill. May 20, 2012), ECF No. 1. Townsend filed an Answer to the Complaint. Answer, No. 12-cv-3921 (N.D. Ill. July 30, 2012), ECF No. 5. HSBC then moved for summary judgment. Mot. for Summary Judgment, No. 12-cv-3921 (N.D. Ill. Aug. 29, 2012), ECF No. 10. The district court granted the motion and entered a "Judgment of Foreclosure." Pet.App.59a-77a. The judgment determined Townsend's liability, set forth a total judgment amount of $143,569.65, and ordered a sale of his home. Pet.App.59a-60a, 66a.

The judgment specifically included a certification under Federal Rule of Civil Procedure 54(b), which stated that it was "a final and appealable order." Pet.App.60a. HSBC itself requested this Rule 54(b) certification when it submitted a draft judgment to the district court. Tr. of Proc., No. 12-cv-3921 (N.D. Ill. Sept. 6, 2012), ECF No. 40. Three weeks after entry of the judgment, Townsend filed a Motion to Vacate Summary Judgment. Mot. to Vacate, No. 12-cv-3921 (N.D. Ill. Sept. 28, 2012), ECF No. 21. The Court denied Townsend's motion. Order,

No. 12-cv-3921 (N.D. Ill. Dec. 4, 2012), ECF No. 28. At that time, the court notified Townsend of his appeal rights. Tr. of Proc., No. 12-cv-3921 (N.D. Ill. Dec. 4, 2012), ECF No. 41.

Townsend then timely filed his Notice of Appeal. Not. of Appeal, No. 12-cv-3921 (N.D. Ill. Jan. 2, 2013), ECF No. 29. In an opinion by Chief Judge Wood, the Seventh Circuit dismissed the appeal for lack of jurisdiction. Pet.App.18a. The Seventh Circuit reasoned that the judgment was not final because: (a) any deficiency judgment depends on the price paid for the property at a judicial sale; (b) the validity of a judicial sale is subject to a later determination of whether it is equitable; and (c) a debtor in Townsend's position has the ability to redeem the mortgage before the property transfer becomes effective. Pet.App.5a-11a.

Judge Hamilton dissented. He noted that the Seventh Circuit's "novel decision upends about two centuries of federal precedent and practice on finality for purposes of appeal." Pet.App.21a. Judge Hamilton stated that "the majority's approach will impose confusion, uncertainty, and expense where the law is not broken and needs no fixing." *Id.* In his lengthy analysis, Judge Hamilton wrote that the majority's approach to finality created a conflict with both the Fifth and Ninth Circuits and was squarely at odds with several of this Court's prior decisions. Pet.App.27a-31a.

On August 5, 2015, the Seventh Circuit granted Townsend's Motion to Stay the Mandate Pending the Filing and Disposition of a Petition for Writ of Certiorari. Pet.App.55a-56a. After HSBC filed a

Motion to Clarify Its Order Staying the Mandate, the court of appeals issued an Order on August 12, 2015. That Order prohibited the district court from conducting further proceedings in the case until the filing and disposition of any petition for writ of certiorari. Pet.App.57a-58a.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT'S OPINION CONFLICTS WITH SEVERAL DECISIONS OF THIS COURT CONCERNING THE FINALITY OF FORECLOSURE JUDGMENTS

The court of appeals' judgment dismissing Townsend's appeal for lack of jurisdiction conflicts with this Court's prior finality decisions in two separate, but related, ways.

First, the Seventh Circuit's judgment is inconsistent with the traditional Section 1291 finality doctrine and contravenes a long line of cases concerning the finality of judgments that order the sale of property. Although the Court has established a definite and ascertainable standard of finality, the Seventh Circuit disregarded those cases and created a novel rule that examines finality through the prism of post-judgment execution measures. *Second*, the judgment dismissing Townsend's appeal is inconsistent with the effective finality doctrine described in *Forgay* and *Brown Shoe*. This doctrine, though analytically similar to traditional Section 1291 jurisdiction, calls upon courts to make a pragmatic assessment of

whether orders are final, particularly if those orders result in hardship to an appellant and are separable from matters remaining in the district court.

1. One of the enduring principles of Section 1291 jurisdiction is that a final decision is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Put another way, a district court's retention of post-judgment matters collateral to the merits does not impede finality.

The Court long has applied this basic principle to foreclosure judgments that determine the merits and order the sale of property. In *Whiting v. Bank of the United States*, 13 Pet. (38 U.S.) 6 (1839), the Court held that a "decree of foreclosure and sale" was the final appealable order even when it left as an open question the confirmation of that sale. *Id.* at 15. The Court stated the "defendants had a right to appeal from that decree, as soon as it was pronounced, in order to prevent an irreparable mischief to themselves." *Id.* Relying on *Ray v. Law*, 3 Cranch (7 U.S.) 179 (1805), the Court noted the impact of finding that a decree of foreclosure and sale lacked finality. The Court stated: "[i]f the sale had been completed under the decree, the title of the purchaser under the decree would not have been overthrown, or invalidated by a reversal of the decree; and consequently the title of the defendants to the lands would have been extinguished." *Whiting*, 38 U.S. at 15 (emphasis added).

The decision in *Whiting* set the framework for subsequent decisions in the same mold. In *Bronson v.*

Railroad Co., 2 Black (67 U.S.) 524 (1865), the Court held again that a judgment identifying a specific sum due and ordering the sale of property was final for purposes of appeal. *Id.* at 529-30. *Bronson*, like *Whiting* before it, stated that "purchasers at a judicial sale are protected" and found that finality over the foreclosure judgment existed, even though matters "collateral to the main purpose of the suit" remained. *Id.* at 530.

Ten years after *Bronson*, the Court spoke with greater force and clarity in *Railroad Co. v. Swasey*, 23 Wall. (90 U.S.) 405 (1875). *Swasey* reaffirmed the rule that parties can appeal from a decree of foreclosure and sale "when the rights of the parties have all been settled and nothing remains to be done by the court but to make the sale and pay out the proceeds." *Id.* at 409. After stating this rule of finality "has long been settled," the Court established a two-part standard for determining finality over foreclosure decrees, stating "the debt must be determined and the property to be sold ascertained and defined." *Id.* Read together, *Whiting*, *Bronson*, and *Swasey* set forth a definite and ascertainable standard on which parties are able to rely for appealing judgments compelling the sale of property: the underlying decree must establish the debt, identify the property, and order a sale.

Applying this standard, the Court later had occasion to find that certain appeals from foreclosure judgments were not, in fact, final. In *Grant v. Phoenix Ins. Co.*, 16 Otto (106 U.S.) 429 (1882), the Court dismissed an appeal for lack of jurisdiction when the underlying decree referred a case to a

receiver but neither determined the debt owed nor ordered a sale of property. *Id.* at 431. The Court in *Parsons v. Robinson*, 122 U.S. 112 (1887), also dismissed a foreclosure appeal for lack of jurisdiction when the underlying decree set forth the debt owed but did not state clearly which properties were subject to sale. *Id.* at 115. The Court in *Burlington, Cedar Rapids and Northern R.R. Co. v. Simmons*, 123 U.S. 52 (1897), again found that a foreclosure judgment lacked finality. Although the plaintiff's right to a sale of the property had been settled, a "further order of the court" was necessary to carry the decree into effect. *Id.* at 54. From these cases, a party cannot forego an appeal from an underlying judgment directing the sale of property and merely wait to appeal from a later order confirming the sale. *Leadville Coal Co. v. McCreery*, 141 U.S. 475, 478 (1891).

The Court's opinions enacted clear jurisdictional rules where an underlying judgment on the merits orders the transfer or sale of property. The Seventh Circuit's judgment in this case, while recognizing the jurisdictional question "turns out to be more complicated than usual," conflicts with the Court's established precedent. Pet.App.1a-2a. For starters, the court of appeals conflated the merits of the case with special procedures concerning the execution of foreclosure judgments. The central problem, said the Seventh Circuit, was the impact of a judicial sale on the amount of damages Townsend would have to pay. Pet.App.6a-11a. According to the court, the sale process' impact on what Townsend would have to pay as part of a deficiency judgment was "fatal to finality." Pet.App.9a. However, all foreclosure sales

are subject to judicial confirmation. *See Whiting*, 38 U.S. at 15. Nothing in this Court's applicable line of authority suggests the results of a court-ordered sale play any role in determining when a judgment becomes final.

The Seventh Circuit's opinion also fails to recognize that the special procedures afforded to mortgage foreclosure cases simply are incidental to the execution of the judgment–not the merits of whether the homeowner is liable. A defendant's ability to contest the results of a sale (such as by arguing that the procedures were flawed or the sale price unconscionably low) is unrelated to the merits analysis. Put differently, a successful challenge to a court-ordered sale does not change the fact that the homeowner is liable to a note-holder. It will not result in a reduction of the judgment amount. And it will not cause the court to forego a subsequent judicial sale. In this respect, a district court's discretion to order a new foreclosure sale has no more of an impact on a judgment's finality than does its ability to quash a wage garnishment summons. Both acts ultimately may delay the collection of any judgment proceeds, but they are subordinate to the underlying merits.

Finally, the Seventh Circuit's judgment will cause unnecessary confusion for future cases. Rather than follow the clear jurisdictional path outlined by *Whiting*, *Bronson*, and *Swasey*, courts now may view the question of finality as a reflection of unique state procedures that attend the execution of judgments. Federal Rule of Civil Procedure 69 establishes that federal courts follow state court procedures when

executing judgments. Under the Seventh Circuit's opinion below, it is unclear what sort of a standard these execution procedures must meet for merits judgments to be considered final under Section 1291.

This Court has emphasized that "[s]imple jurisdictional rules . . . promote greater predictability." *Hertz Corp. v. Friend*, 599 U.S. 77, 94 (2010); *see also Holmes v. Fisher*, 854 F.2d 229, 231 (7th Cir. 1988) (Easterbrook, J.) (noting importance of clear appellate jurisdiction rules). The court of appeals' judgment sacrifices a predictable rule outlined in *Whiting*, *Bronson*, and *Swasey* for one that lacks clear standards and depends on unique post-judgment collection procedures under state law.

2. The court of appeals' judgment is inconsistent with a second branch of this Court's finality jurisprudence: the doctrine of effective, or practical, finality. In *Forgay*, the Court declined to interpret the term "final decree" in a "strict and technical sense." *Forgay*, 47 U.S. at 203. According to the Court, a judgment is final if it decides "the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, . . . and the complainant is entitled to have such decree carried immediately into execution." *Id.* at 204.

The judgment of foreclosure in this case falls squarely within the *Forgay* doctrine. For starters, it determines liability and directs the sale of Townsend's home. Pet.App.59-60a, 66a. The judgment then outlines detailed procedures to sell the property consistent with the Illinois Mortgage Foreclosure Law. Pet.App.66a-73a. The plain language of the judgment

places the district court's directive into execution, such that no further court orders are required before a foreclosure sale occurs. Because Illinois law enables the immediate transfer of property following entry of a sale-confirmation order, 735 Ill. Comp. Stat. 5/15-1509(b), a homeowner like Townsend may suffer irreparable injury if he files a notice of appeal after a third-party purchaser obtains a judicial deed. *See Forgay*, 47 U.S. at 204 (emphasizing concept of irreparable injury when assessing finality); Pet.App.76a (requiring sale officer to "promptly execute and issue a deed" to the successful bidder upon confirmation of sale, which "shall be sufficient to pass title . . . ").

The *Forgay* rule, aside from its direct application to the district court's judgment, also set the foundation for the Court in later cases to give finality a pragmatic construction. When examining the finality of judgments, subsequent decisions from the Court have looked at factors other than hardship. In particular, several of these decisions have emphasized the concept of "separability." Relying on *Forgay*, the Court in *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), held that a state court judgment was final when it set aside a lease and restored possession of property, even though a final accounting remained in the district court. *Id.* at 125-27. The Court stated that "such a controversy is a multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled." *Id.* at 126 (emphasis added).

The Court in *Brown Shoe* again relied on the concept of separability to conclude a judgment was final. *Brown Shoe* involved the United States' challenge to a merger under Section 7 of the Clayton Act. The district court's judgment ordered Brown Shoe to divest itself of the target company's stock and assets, but it expressly left open, and did not even address, the details of Brown Shoe's divestiture plan. *Brown Shoe*, 370 U.S. at 304. Citing *Forgay*, the Court found the "order of forced sale" was final under Section 1291, even though Brown Shoe had not presented to the district court any specific plan to dispose of certain assets under the judgment. *Id.* at 309. By its plain terms, the judgment in *Brown Shoe* did not require an immediate transfer of property. However, this Court applied the final judgment rule pragmatically and emphasized the separability of the divestiture order from the specific plan of divestiture subject to later court approval. *Id.* at 308-09. In doing so, the Court emphasized that a "pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action.'" *Id.* at 306 (citing Federal Rule of Civil Procedure 1).

The Seventh Circuit's analysis, by examining the results of a judicial sale and the possibility that Townsend would satisfy the judgment by mortgage redemption, is inconsistent with this pragmatic approach to finality. Put another way, the court of appeals did not consider the separability of the issue on appeal (the merits judgment that ordered a sale of Townsend's home) from what remains in the district court (a confirmation of the judicial sale and a determination of any post-sale deficiency). If, despite

what *Whiting*, *Bronson*, and *Swasey* hold, a judgment setting forth the amount of a debt and ordering the sale of property is not technically final under Section 1291, then pragmatic considerations of the kind outlined in *Forgay* and *Brown Shoe* illustrate that the judgment of foreclosure was effectively final. *See Brown Shoe*, 370 U.S. at 309 (discussing the potential for a change in market conditions if court had to wait for Brown Shoe to submit specific plan to divest assets of target company).

The pragmatic considerations in this appeal concern both Townsend and potential buyers in a foreclosure sale. In cases ordering the sale of a debtor's property, courts should optimize judicial sales so that they command prices close to fair market value. And on this score, courts should protect third-party purchasers at judicial sales so that they will not submit below-market offers based on the fear that courts ultimately may claw back those sales. *See United States v. Buchman*, 646 F.3d 409, 410 (7th Cir. 2011) (Easterbrook, J.) (describing courts' "raw power" to rescind judicial sale of property but stating reasons why completed sale should not be upset). Requiring a party to wait and appeal the merits judgment until a court confirms a sale order interjects uncertainty into the sale process itself, which harms both defendants and potential buyers. That is to say, what purchaser will pay something close to fair value if the judgment on the merits is subject to appellate review?

For these reasons, the Seventh Circuit's judgment dismissing Townsend's appeal is inconsistent with

the pragmatic approach to finality set forth in *Forgay* and *Brown Shoe*.

II. THE SEVENTH CIRCUIT'S OPINION CREATES A CIRCUIT SPLIT WITH THE FIFTH, EIGHTH, AND NINTH CIRCUITS

The Seventh Circuit's holding directly conflicts with decisions of the Fifth, Eighth, and Ninth Circuits, resulting in an intractable circuit split concerning the finality of judgments that order the sale of property. Given the importance of clear jurisdictional rules and the unlikelihood that the circuit split will resolve on its own, the Court should act now.

1. Three separate courts of appeal have found that appellate jurisdiction exists under Section 1291 in cases where an underlying foreclosure judgment orders the sale of property. These circuit courts all addressed judgments analytically indistinguishable from the judgment in the district court below, finding they were final and appealable. Each circuit decision followed this Court's authority to reach a holding contrary to that of the Seventh Circuit here.

The Ninth Circuit, in *Citicorp Real Estate, Inc. v. Smith*, 155 F.3d 1097 (9th Cir. 1998), followed this Court's precedent and held as final a foreclosure judgment that established a homeowner's liability for defaulted loans and ordered a judicial sale. *Id.* at 1101. The court of appeals rejected Citicorp's argument that finality did not exist because the judgment leaves "the actual amount of the deficiency judgment to be determined at a fair value hearing following the judicial foreclosure sales." *Id.* The court in *Citicorp*

Real Estate did not assess the impact of incidental state-law foreclosure procedures on the underlying judgment and instead followed this Court's clear standards for determining the appealability of a judgment ordering the sale of property.

Similar to *Citicorp Real Estate*, the Fifth Circuit in *Citibank, N.A. v. Data Lease Fin. Corp.*, 645 F.2d 333 (5th Cir. 1981), held that an order directing the immediate sale of property is a final order for purposes of appeal. *Citibank*, 645 F.2d at 337-38. The case arose when Citibank sought to foreclose a security interest in stock. The bank obtained a pre-judgment sale order of the collateral. Data Lease did not appeal that order. The court later entered a separate order confirming the sale. The Fifth Circuit agreed with Citibank that Data Lease could not challenge the order to sell because it was final under Section 1291. *Id.* at 338. The court's review was limited to whether the sale confirmation was appropriate. *Id.* For its analysis, the Fifth Circuit relied on the Court's appellate jurisdiction cases discussed above, including *Whiting*, *Simmons*, and *McCreery*. *Id.*

The Eighth Circuit, in *Chase v. Driver*, 92 F. 780 (8th Cir. 1899), also held that an underlying judgment of foreclosure (which directed a sale of property) and a subsequent confirmation order were both final and appealable. *Id.* at 787. By failing to appeal either of them, the complainant waived his right to review when he appealed from a later order that settled all accounts. *Id.* Citing a long list of finality decisions of this Court, the Eighth Circuit

explained why judgments ordering the sale of property were appealable as final orders:

> The rule announced by the decisions last cited is so indispensable to the protection of the rights of litigants, and of the purchasers at judicial sales, and to a wise and just administration of the law, that it ought not to be questioned. If decrees of sale and orders of confirmation were subject to review until the last decrees upon all the accountings were entered, the uncertainty of the title to be obtained at the sales would deter parties from buying, so that fair prices could not be obtained until the final reports upon the last accounts were confirmed . . .

Id. at 784-85. The common thread among these appellate decisions is their unfailing reliance on this Court's appellate jurisdiction precedents to hold that judgments ordering the sale of property are final and appealable orders.

2. The decisions from the Fifth, Eighth, and Ninth Circuits are inconsistent with the Seventh Circuit's judgment below. This Court's intervention is important because the circuit split is unlikely to resolve itself. "[N]o responsible attorney [is] likely to renew the fray" in the Seventh Circuit. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 556 (2014); *see also Mortgage Elec. Reg. Sys., Inc. v. Estrella*, 390 F.3d 522, 524 (7th Cir. 2004) (Easterbrook, J.) (admonishing counsel for taking appeal without jurisdictional basis in foreclosure suit). Therefore, it is unlikely the Seventh Circuit will retract the jurisdictional rule announced by the

panel below. This will leave the courts of appeal with divergent views of jurisdiction in cases where a judgment orders the sale of property. This Court should act now to resolve this circuit split.

III. THE QUESTIONS PRESENTED RAISE A FREQUENTLY RECURRING ISSUE OF NATIONAL IMPORTANCE

Judgments that order the sale of property most often arise in the context of mortgage foreclosure cases. Those suits comprise a high percentage of a district court's civil docket. In 2014, for instance, litigants brought 3,928 foreclosure cases in the district courts. *Judicial Business of the United States Courts*, Annual Report of the Director, Table C-2 (2014). By comparison, the average district court judge hears fewer trademark infringement cases under the Lanham Act, 15 U.S.C. § 1051 *et seq.* (noting 3,693 trademark cases filed in 2014) and fewer employment cases under the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* (identifying 1,894 ADA employment cases filed in 2014). *Id.*

Mortgage foreclosures show no signs of slowing. Economic indicators suggest that a confluence of factors–including increased payments on home-equity lines of credit and other payment resets–may result in a further wave of home foreclosures. *See* David Dayden, *You Thought the Mortgage Crisis Was Over? It's About to Flare Up Again*, THE NEW REPUBLIC, August 24, 2014.[1] Questions concerning

[1] This article is available at http://www.newrepublic.com/article/119187/mortgage-foreclosures-2015-why-crisis-will-flare-again.

the appealability of foreclosure judgments will arise with frequency in federal district court.

And they will arise in states other than Illinois. Twenty-two states provide mechanisms for judicial, as opposed to non-judicial, foreclosure. *See* FannieMae's "Foreclosure Time Frames and Compensatory Fee Allowable Delays Exhibit," published 11/17/14.[2] Those statutes follow a common structure. Generally, they allow a mortgagee to obtain a judgment, authorize a judicial sale, provide a mechanism to confirm that sale, and enable the delivery of a deed to the third-party purchaser. *See, e.g.*, Ohio Rev. Code § 2329.36 (describing procedure for delivery of deed following entry of sale-confirmation order). Indeed, the Court's own precedents from *Whiting* to *Bronson* to *Swasey* reflect this common procedural matrix.

The finality question presented in this case, though, is not limited to mortgage foreclosures. For instance, judgments that direct the sale or transfer of property often appear in other contexts. This Court applied the *Forgay* doctrine to permit an appeal in a specific performance suit where the judgment required the defendant to transfer shares of stock to the plaintiffs. *Thomson v. Dean*, 7 Wall. (74 U.S.) 342, 344 (1868). Other cases have applied *Forgay* when the order directed the partition of real estate. *See Sekaquaptewa v. MacDonald*, 575 F.2d 239, 241-43 (9th Cir. 1978) (finding court had jurisdiction over appeal from partition judgment under *Forgay* even

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[2] This table is available at https://www.fanniemae.com/content/guide_exhibit/foreclosure-timeframes-compensatory-fees-allowable-delays.pdf.

though judgment did not effectuate immediate delivery of property). And *Forgay*, by its terms, could allow an appeal from an order that directs a court-appointed receiver to sell property before entry of final judgment. *Cf.* 28 U.S.C. § 1292(a)(2) (limiting jurisdiction over interlocutory orders involving receivers); *United States v. Antiques Ltd. P'ship*, 760 F.3d 668, 672 (7th Cir. 2014) (Posner, J.) (describing jurisdictional reach of orders concerning receivership). So whether viewed as an issue arising under traditional Section 1291 finality principles or a branch of effective finality, judgments that call for the transfer of property will arise frequently under an array of fact patterns.

The jurisdictional questions also are important ones for the Court to decide. It is crucial for litigants to know whether "[t]he Court has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered 'final.'" *Brown Shoe*, 370 U.S. at 306. For instance, does the *Forgay* doctrine still provide a "vital safeguard against improvident district court action"? *See* 15B Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 3910 (2d ed.) (discussing application of *Forgay* rule). Are questions of hardship, irreparable injury, and separability relevant to determining finality when the judgment orders the sale or transfer of property?

The circuit courts have not said, leaving the contours of the effective finality doctrine uncertain. *Compare NAIC v. CenTra, Inc.*, 151 F.3d 780, 784-85 (8th Cir. 1998) (citing *Forgay* as basis for jurisdiction in case involving order to divest stock) *and In re F.D.R. Hickory House*, 60 F.3d 724, 726-27 (11th Cir.

1995) (discussing circuit's application of *Forgay* rule) *with HBE Leasing Corp. v. Frank*, 48 F.3d 623, 632 n.4 (2d Cir. 1995) (questioning continued vitality of *Forgay* doctrine). Without clarity, litigants will be at risk of forfeiting valuable appeal rights over unique property, including their homes.

The petition, therefore, presents an important federal question concerning the finality of judgments, which merits this Court's review.

CONCLUSION

For these reasons, the Court should grant Townsend's petition for a writ of certiorari.

Respectfully submitted,

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OCTOBER 13, 2015

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OPINION OF THE SEVENTH CIRCUIT (JULY 16, 2015)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

HSBC BANK USA, N.A., as Trustee for
NOMURA HOME EQUITY LOAN, INC.,
ASSET-BACKED CERTIFICATES,
SERIES 2006-FM1,

Plaintiff-Appellee,

v.

KIRKLAND TOWNSEND,

Defendant-Appellant.

No. 13-1017

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 12 C 3921—Gary S. Feinerman, Judge.

Before: WOOD, Chief Judge, and
EASTERBROOK and HAMILTON, Circuit Judges.

WOOD, Chief Judge.

This is one of the flood of mortgage foreclosure cases that hit the country after the 2008 economic downturn. Before we can say anything about its merits, however, we must decide whether an appealable final judgment is before us. That question turns out

to be more complicated than usual, given the many steps that must take place before the foreclosure process is complete. Here, the case has reached the point where the bank seeking to foreclose has secured a judgment of foreclosure and an order of sale pursuant to Illinois law. The district court declared that its judgment was "final," but at the same time, it acknowledged that the public judicial sale could take place only after certain additional steps were completed, including the expiration of the statutory reinstatement and redemption periods to which the mortgagor was entitled under Illinois law. The court also noted that it would need to hold a hearing to confirm the sale (thereby allowing it to go to closing) upon a party's motion, and at such a hearing it could decide not to confirm the sale if, among other things, "justice was . . . not done."

Kirkland Townsend has brought an appeal from the rulings we have just described. Concerned about our appellate jurisdiction, we asked the parties for additional briefing on that point. Those briefs, plus our independent review of the case, convince us that the appeal must be dismissed for want of appellate jurisdiction.

I

In 2005, Townsend signed a promissory note for $136,000 with Fremont Investment & Loan. He needed the money to purchase a condominium in the South Shore neighborhood of Chicago. At the same time, Townsend executed a mortgage on the property, naming Mortgage Electronic Registration Systems, Inc. (MERS) as the mortgagee. (MERS was Fremont's nominee.) After Townsend ceased making payments

on his mortgage in 2011, MERS assigned the mortgage to HSBC Bank, USA; MERS remained Fremont's nominee, however, for a junior mortgage Fremont held in the amount of $34,000. Shortly thereafter, HSBC filed a complaint against Townsend in the district court asking for a judgment of foreclosure of the mortgage, sale of the condominium, and related relief under Illinois law. The district court's subject-matter jurisdiction was based on diversity. *See* 28 U.S.C. § 1332(a)(1).

Representing himself, Townsend answered the complaint. HSBC then moved for summary judgment. It supported its motion with evidence showing that Townsend was in default; that he owed $141,425.65 on the note; and that HSBC owned both the note and the mortgage. Townsend failed to respond to HSBC's motion, and so the district court granted it in open court on September 6, 2012. Later that day, it entered a written judgment of foreclosure, an order finding that Townsend owed the bank $143,569.65 (representing principal, interest, attorney's fees, and costs), and an order providing for judicial sale of the property if Townsend did not pay before the redemption period expired. The court wrote that the judgment was "a final and appealable order" that was "fully dispositive" of all defendants' interests for purposes of Federal Rule of Civil Procedure 54(b).

At the same time, the court retained "jurisdiction over the parties and subject matter of this cause for the purpose of enforcing th[e] Judgment or vacating said Judgment if a reinstatement is made as set forth in this Judgment." The court acknowledged that "[u]pon motion and notice," it would be required to hold a hearing to confirm the judicial sale

pursuant to 735 ILCS 5/15-1508. After such a hearing, it could decide not to enter a confirmation order, if it found that appropriate parties did not receive proper notice of the sale, if the terms of the sale were unconscionable, if the sale was conducted fraudulently, "or . . . justice was otherwise not done." Thirty days after the order confirming the sale, the purchaser obtains the right to possession of the property. 735 ILCS 5/15-1508(g). (This is a good time to observe that the word "sale" is used in several senses in the governing Illinois statutes: (1) as the formal judicially authorized event at which people bid for the property in foreclosure—we call this the "judicial sale" in this opinion; (2) as the confirmation of the judicial sale—the step, resembling closing, at which the purchaser's right to a deed is established; and (3) as the final transfer of possession. We have attempted to be precise about which meaning is involved at various points in our discussion.)

Elsewhere in the judgment, the district court said that it would appoint a special commissioner to conduct the judicial sale according to instructions in the order. The court concluded that HSBC's interest was superior to that of MERS (which as we have noted was still acting on Fremont's behalf as nominee for its junior mortgage). It ordered that ultimately the proceeds of the sale would be paid out according to the terms of the judgment and 735 ILCS 5/15-1512. The judgment also provided that if the proceeds of a confirmed sale came up short, a deficiency judgment would be entered against Townsend for the difference.

After the parties submitted their briefs on Townsend's *pro se* appeal of the district court's foreclosure

judgment, we ordered supplemental briefing on the question of appellate jurisdiction. We asked the parties to address whether (1) the district court improperly certified its judgment as final under Rule 54(b); (2) its judgment qualified as an appealable injunction under 28 U.S.C. § 1292(a); or (3) the doctrine of *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848), supported jurisdiction. We recruited attorney Kenneth J. Vanko to represent Townsend, and we are grateful to him for his able service to his client and the court, and to all counsel for the helpful supplemental briefs.

II

We consider first whether we may hear Townsend's appeal under the final judgment rule expressed in 28 U.S.C. § 1291. That provision states that the courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." As the Supreme Court recently reiterated, "[a] party can typically appeal as of right only from [a] final decision." *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1691 (2015). The first question before us is whether the district court's disposition of Townsend's case was final for purposes of section 1291.

Although section 1291 should be given "a practical rather than a technical construction," the law's "core application is to rulings that terminate an action." *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 902 (2015) (quotations omitted). Such a decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Several

aspects of the district court's ruling in this case convince us that it fails to meet this standard.

When all is said and done, the district court's judgment of foreclosure and order to conduct a judicial sale leave too much up in the air for us to regard the action as terminated, with nothing left but the mechanical details of collection or other enforcement measures. Illinois law specifies the various steps that must be taken; it is the governing law in this diversity action, and so we must see how the district court's actions fit into the regime Illinois creates for foreclosures. Like many states, Illinois protects mortgagors in foreclosure by giving them statutory periods of both redemption and reinstatement. The reinstatement statute permits the mortgagor to "reinstate the mortgage" by "curing all defaults then existing." At that point, "the foreclosure and any other proceedings for the collection or enforcement of the obligation secured by the mortgage shall be dismissed and the mortgage documents shall remain in full force and effect as if no acceleration or default had occurred." 735 ILCS 5/15-1602. The redemption statute speaks of the mortgagor's ability to "redeem the real estate from the foreclosure," 735 ILCS 5/15-1603(f)(1), and states that upon receiving the amount owed, the mortgagee "shall promptly furnish the mortgagor with a release of the mortgage or satisfaction of the judgment, as appropriate, and the evidence of all indebtedness secured by the mortgage shall be cancelled." 735 ILCS 5/15-1603(f)(3).

This language indicates that the exercise of the right of either reinstatement or redemption has the potential to undo the foreclosure, scuttling the need for the process of executing the judgment. The

district court was well aware of this: its foreclosure judgment explicitly incorporates these statutory rights, stating that "[t]he subject real estate shall be sold pursuant to statute at the expiration of both the reinstatement period and the redemption period." This language indicates that the expiration of both of these periods—an event that will occur if a mortgagor fails to exercise either right—is a condition that must be satisfied before the initial judicial sale of the foreclosed property may proceed; closing, confirmation, and transfer cannot take place until the successful bidder is identified. As the Supreme Court noted years ago, "[a] question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988). But if the resolution of the outstanding question will either alter the order or moot or revise the resolution of the case, finality is lacking. In every case decided under Illinois law, entry of the foreclosure judgment marks the beginning of a period in which critical matters remain to be resolved: whether the mortgagor will exercise her statutory redemption and reinstatement rights, and, should a judicial sale occur, whether it complies with all statutory requirements.

Other aspects of Illinois law point in the same direction. The law expressly provides for a post-judicial-sale inquiry into whether "justice was otherwise not done" by the auction. 735 ILCS 5/15-1508(b)(iv). The same provision directs the court on motion to determine whether proper notice of the sale was given and whether the sale was conducted fraudulently

or with unconscionable terms. If the court finds any of these things to be true, it need not confirm the sale. Confirmation is therefore a critical step. Not until the court confirms the sale triggered by the judgment of foreclosure may it enter a deficiency judgment against the mortgagor. Damages are part of the judgment and essential to finality; lack of quantified damages prevents an appeal. *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976) ("[W]here assessment of damages or awarding of other relief remains to be resolved have never been considered to be 'final' within the meaning of 28 U.S.C. § 1291.").

A number of questions remain about the damages Townsend will have to pay. The amount that the judicial sale yields depends not only on the price obtained at the auction but also on, for example, whether the auction was conducted in a commercially reasonable way to maximize the price. If it was not, the court might confirm the sale but decline to enter a deficiency judgment. *See* 735 ILCS 5/15-1508(b)(2). A mortgagor might protest that an auction delivering far below the amount specified in the foreclosure judgment was not conducted in the way most likely to attract a high bid. The district judge must then evaluate that assertion. If the judge decides that better advertising or other measures would have produced a bid closer to the full amount owed, he might either cut or deny any deficiency judgment. If there are serious defects in the auction, then the district court has the authority not to confirm the sale at all, and transfer of possession will never occur. The deficiency judgment amount might also depend on how much time elapses between the

district court's sale order (which quantifies the debt at that moment) and the purchaser's payment of the price at the auction. The longer the delay, the more prejudgment interest must be added under the terms of the note. This process is far from mechanical. No one can know the amount of this part of the court's judgment until the asset has been exchanged for money. That is fatal to finality.

Our dissenting colleague criticizes our description of Illinois law; he argues that Illinois courts have no discretion to reduce deficiency judgments. In taking the position that a deficiency judgment must, as a matter of law, be the difference between the default amount and the foreclosure sale price, however, our colleague principally relies on a case that cites a repealed section of the Illinois code. *See Illini Fed. Sav. & Loan Ass'n v. Doering*, 516 N.E.2d 609 (Ill. App. Ct. 1987) (quoting Ill. Rev. Stat. 1985, ch. 110, par. 15-112 (repealed 1987)). Even in *Illini*, the court acknowledged that the deficiency judgment should reflect the property's sale price "absent any fraud or irregularity in the foreclosure proceeding." 516 N.E.2d at 611. The potential for irregularity is exactly what concerns us here. And in any event, the current version of the law (which applied at the time of the events here) gives courts discretion over deficiency judgments. A judge's order confirming a foreclosure sale "may also . . . provide for a personal judgment against any party for a deficiency." 735 ILCS 5/15-1508(b)(2); *see also* 735 ILCS 5/15-1508(f) ("If the order confirming the sale includes a deficiency judgment . . . .") (emphases added in both). The statute uses the same discretionary language to discuss the amount of the judgment: the "judgment may be

entered for any balance of money that may be found due to the plaintiff, over and above the proceeds of the sale or sales." 735 ILCS 5/15-1508(e) (emphasis added). At most, some ambiguity may be introduced when the statute later states that a "court shall also enter" a deficiency judgment in a confirmation order. *Id.* Even that command is qualified, however, because the amount requested must be "proven" and the court must be "otherwise authorized" to enter the judgment. *Id.* The latter two safety valves logically refer back to the court's ability to evaluate the fairness of the foreclosure process.

Nothing in the district court's foreclosure and judicial-sale order in this case gives us reason to think that the remaining steps are so ministerial, inevitable, or unrelated to the merits of the case that they do not defeat finality. We take as a given that many orders confirming post-foreclosure judicial sales proceed without a hitch (at least from the bank's perspective). But that does not mean that the rights of redemption and reinstatement, or the court's review of the auction process, are meaningless. The Supreme Court of Illinois has said that the provision of section 15-1508(b)(iv) requiring review to see if "justice was otherwise not done" "acts as a safety valve to allow the court to vacate the judicial sale and, in rare cases, the underlying judgment." *Wells Fargo Bank, N.A. v. McCluskey*, 999 N.E.2d 321, 329 (Ill. 2013). Neither the percentage of cases in which this is found nor the narrowness of the legal standard matter: finality does not depend on the odds. The question is whether the existence of these rights, which are embedded within Illinois's foreclosure scheme, renders a foreclosure and judicial-sale order non-final, when

the sale is yet to be conducted and confirmation has not yet occurred. We believe that it does.

Finally, we note that our understanding of these statutes matches that of the Illinois courts. The Supreme Court of Illinois has said that it is "well settled" that a foreclosure judgment is not a final judgment "because it does not dispose of all issues between the parties and it does not terminate the litigation." *EMC Mortg. Corp. v. Kemp*, 982 N.E.2d 152, 154 (Ill. 2012). The court explained that "although a judgment of foreclosure is final as to the matters it adjudicates, a judgment foreclosing a mortgage, or a lien, determines fewer than all the rights and liabilities in issue because the trial court has still to enter a subsequent order approving the foreclosure sale and directing distribution." *Id.* Though the state's view of finality for state-law purposes does not dictate the result for federal appellate jurisdiction, the Illinois court's list of open questions is independently useful.

In sum, there are several events in Illinois that can or must occur between a foreclosure judgment entered pursuant to Illinois law and an eventual exchange of property for money and deficiency judgment. An order of foreclosure and judicial sale by itself, such as the one issued in Townsend's case, is thus not a final judgment under 28 U.S.C. § 1291.

III

Although we do not have jurisdiction to hear Townsend's appeal under traditional finality doctrine, we still must ask whether there is some other basis of appellate jurisdiction. Three theories deserve a look, as our briefing order implied: first, the possibility

that the court's order was final as a "separate claim" under Federal Rule of Civil Procedure 54(b); second, the possibility that this is in effect an injunction eligible for interlocutory appeal under 28 U.S.C. § 1292(a)(1); and third, whether it may be immediately appealable under the doctrine announced in *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848). We address each of these questions in turn.

A

The district court here certified the judgment of foreclosure and sale as final and appealable under Federal Rule of Civil Procedure 54(b). That does not dispose of the question, however; this court must consider for itself whether the judgment satisfies the requirements of that rule. *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 518 F.3d 459, 464 (7th Cir. 2008); *see also Wetzel*, 424 U.S. at 740 (rejecting Rule 54(b) certification). The operative language of Rule 54(b) is as follows: "When an action presents more than one claim for relief . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."

There are two problems with the district court's Rule 54(b) certification. First, the district court's judgment left no claims unaddressed; any issues that may arise after this judgment form part of the main claim, not an independent one. By its terms, Rule 54(b) does not apply when there is no separate claim remaining to be decided. *See Wetzel*, 424 U.S. at 742–43. Second, Rule 54(b) requires an express determination that there is no just reason for delay,

and we find none on the record. Even if there were multiple claims or multiple parties, Rule 54(b) is unavailable without that certification. *See Constr. Indus. Ret. Fund of Rockford v. Kasper Trucking, Inc.*, 10 F.3d 465, 467-68 (7th Cir. 1993).

B

The next possibility requires us to decide whether the order directing the judicial sale of the property amounts to an injunction for purposes of 28 U.S.C. § 1292(a)(1). That statute authorizes interlocutory appeals from orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." We have taken care to construe this provision narrowly to avoid opening a floodgate to piecemeal appeals. *Albert v. Trans Union Corp.*, 346 F.3d 734, 737 (7th Cir. 2003); *see also Tradesman Int'l, Inc. v. Black*, 724 F.3d 1004, 1011 (7th Cir. 2013). With that concern in mind, we have declined to characterize a decree foreclosing a mortgage and ordering sale as an injunction within the meaning of § 1292(a)(1). *See United States v. Hansen*, 795 F.2d 35, 38-39 (7th Cir. 1986). Though a decree of foreclosure is an equitable remedy, we have made clear that "[n]ot every equitable order is an injunction for purposes of section 1292(a)(1)," and have concluded that foreclosure judgments fall outside of § 1292(a)(1)'s limits. *Id.* While it is apparent that foreclosure on a residence can eventually cause irreparable harm, Illinois courts and federal courts both are empowered to use stays pending appeal to manage the risk of such harm by erroneous decisions. Compare *Bullard*, 135 S. Ct. at 1695–96 (acknowledging that some bankruptcy confirmation orders may have "immediate and

irreversible effects," but nonetheless holding that an immediate appeal was unavailable and pointing out that several mechanisms to address such harm are available). We see no reason to depart from *Hansen*'s holding and thus decline to exercise jurisdiction to hear Townsend's appeal under § 1292(a)(1).

C

We turn finally to the finality rule described in *Forgay v. Conrad*. That case, whose facts starkly remind the reader that times have changed, arose from a bankruptcy in Louisiana. The debtor had deeded away real estate and slaves in New Orleans, but the trial court had set aside those deeds as fraudulent transfers. Most importantly for present purposes, the trial court had then ordered that the real estate and slaves be delivered immediately to the person we would now call the trustee in bankruptcy. On appeal, the first issue was whether the transfer order was appealable. In an opinion by Chief Justice Taney, the Supreme Court denied a motion to dismiss the appeal. The Court held that the order was appealable because the parties in current possession of the real estate and slaves faced a threat of irreparable harm if an immediate appeal were not allowed. *Forgay*, 47 U.S. (6 How.) at 202-04.

We have interpreted *Forgay* to allow immediate review of an order "directing delivery of property where such an order would subject the losing party to irreparable harm." *United States v. Davenport*, 106 F.3d 1333, 1335 (7th Cir. 1997). The irreparable harm requirement avoids an unduly broad reading of *Forgay* under which "any order requiring immediate payment also is immediately appealable." *Cleveland*

Hair Clinic, Inc. v. Puig, 104 F.3d 123, 126 (7th Cir. 1997).

When it comes to the forced sale of a residence, we can assume that the potential for irreparable harm is great. *See Davenport*, 106 F.3d at 1335. But under the *Forgay* doctrine, the issue for us is whether and when Townsend would face an imminent threat of irreparable harm if the judgment ordering foreclosure and judicial sale were not appealable. That question calls for a close examination of Illinois law and the procedures the district court would use to carry out the foreclosure and sale. *See Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1026 (7th Cir. 2006) (looking to state law settling title to property to determine when purchaser rights irreversibly attached); *see also* FED. R. CIV. P. 69 (borrowing state procedures to execute federal court judgments).

Under Illinois law, the judgment of foreclosure and judicial sale posed no imminent threat of irreparable harm to Townsend. His interests are protected in several ways. First, a mortgagor may be able to take advantage of the redemption and reinstatement period before the judicial sale. *See Kling v. Ghilarducci*, 121 N.E.2d 752, 756 (Ill. 1954). As we already have discussed, the sale cannot be conducted until this time has run. *See* 735 ILCS 5/15-1507(b).

After the judicial sale, the mortgagor is a big step closer to loss of his residence, but still not there. The interests in the property of all persons made party to the foreclosure "shall be terminated by the judicial sale of the real estate, pursuant to a judgment of foreclosure, provided the sale is confirmed." 735 ILCS 5/15-1404; *see also McCluskey*,

999 N.E.2d at 330 (noting that it is the confirmation of sale that "divests the borrower of her property rights"). Immediately after the judicial sale and payment in full of the amount bid, the purchaser receives only a "certificate of sale." *See* 735 ILCS 5/15-1507(f). (In residential foreclosures the defaulting mortgagor-owner has a special, final thirty-day period for redemption when "the purchaser at the sale was a mortgagee who was a party to the foreclosure," *i.e.*, when a lender purchases the property, typically with a credit bid, for less than the amount needed to redeem. *See* 735 ILCS 5/15-1604(a).)

The transfer of rights memorialized by the certificate of sale becomes permanent only if the judicial sale is confirmed. Only after confirmation does the purchaser obtain a deed. 735 ILCS 5/15-1509(a). The deed passes title to the purchaser, 735 ILCS 5/15-1509(b), and serves as "an entire bar of . . . all claims of parties to the foreclosure," 735 ILCS 5/15-1509(c). Yet even then a mortgagor can delay the permanent transfer of title to the purchaser by obtaining a stay pending appeal of the order confirming sale. *See* ILL. SUP. CT. R. 305(k) (under substantive state law, non-party purchasers gain property rights that are not impaired by reversal on appeal unless the sale is stayed); *Aurora*, 442 F.3d at 1026–27 (applying Illinois law and finding that "in the absence of a stay, a sale of real property to a third party bars an appeal from the judgment authorizing the sale"); *Hansen*, 795 F.2d at 39 (suggesting that defendants could avoid irreparable harm from sale by seeking a stay of the decree of sale); *FDIC v. Meyer*, 781 F.2d 1260, 1263 (7th Cir. 1986) (in absence of stay, sale to good faith purchaser

moots appeal); *Horvath v. Loesch*, 410 N.E.2d 154, 158 (Ill. App. Ct. 1980). So long as a stay is in place, a purchaser at a foreclosure sale is obliged to return the property if the judgment of foreclosure is reversed on appeal. *See Wash. Mut. Bank, F.A. v. Archer Bank*, 895 N.E.2d 677, 680 (Ill. App. Ct. 2008) (permitting review of "all earlier nonfinal orders that produced the final judgment" embodied in the orders confirming the sale).

Thus, under Illinois mortgage foreclosure law, a mortgagor-owner who is residing in the property and taking care of it should not face the kind of immediate irreparable harm required by *Forgay* until there is time to file an appeal and to seek a stay of the final order confirming the judicial sale. Such an owner will ordinarily be entitled to retain possession of the property until thirty days after confirmation of the foreclosure sale. 735 ILCS 5/15-1701(b)(1) & (c). (The statute also provides for exceptions when needed to protect the interests of the lender.) Under the *Forgay* doctrine, the issue is whether an immediate appeal is needed to prevent irreparable harm resulting from an immediate transfer of possession of the property. Illinois law provides a number of protections against irreparable harm, even though orders of foreclosure and judicial sale are not immediately appealable in state practice. Similarly, federal courts at every level have the authority to stay the effect of a judgment pending appeal, *see* FED. R. CIV. P. 62, and so there is no need here to invoke the *Forgay* doctrine to allow an immediate appeal.

In light of this conclusion, we have no reason to reach the question whether the Supreme Court's

decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), overruled the *Forgay* doctrine. While there is some tension between the *Forgay* doctrine and *Mohawk Industries*, *see* 558 U.S. at 106, and that tension has been reinforced by *Bullard*, the Court has not told us that *Forgay* has been overruled, and only it has the prerogative of overruling its own decisions. *E.g.*, *Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago*, 567 F.3d 856, 857–58 (7th Cir. 2009), *rev'd sub nom. McDonald v. City of Chicago*, 561 U.S. 742 (2010), quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

IV

For all these reasons, we conclude that we do not have jurisdiction to hear this appeal, which is therefore DISMISSED. Because the district court's entry of the Rule 54(b) judgment compelled Townsend to appeal when he did, however, we order that the costs on appeal will be assessed against HSBC. *See* FED. R. APP. P. 39(a).

DISSENTING OPINION OF JUDGE HAMILTON (JULY 16, 2015)

Hamilton, Circuit Judge, dissenting.

I view the district court's judgment of foreclosure as final under 28 U.S.C. § 1291. Rather than dismiss the appeal, I would affirm on the merits. Under long-established finality principles, a foreclosure judgment is final if it (a) settles the merits and the total amount of the debt, (b) identifies the property to be sold to satisfy the judgment, and (c) orders the priority of competing claims to the sale proceeds. *See*, e.g., *Whiting v. Bank of the United States*, 38 U.S. (13 Pet.) 6, 15 (1839), and cases following it.

The judgment of foreclosure here does all of those things. All that remains in this litigation is executing that judgment by judicial sale of the property securing the debt and distributing the sale proceeds. For two centuries American appellate practice has distinguished between a judgment on the merits and later matters of execution, holding that open issues involving execution do not defeat finality of the underlying judgment on the merits. That settled approach to finality works. We should not upset it with the novel approach of uncertain scope adopted by the majority.

I agree with my colleagues, though, that Federal Rule of Civil Procedure 54(b), 28 U.S.C. § 1292, and the doctrine announced in *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848), do not authorize this appeal. Our disagreement is about whether the need to execute the judgment of foreclosure by carrying out the court-ordered sale prevents an immediate appeal

of the judgment of foreclosure under traditional § 1291 principles.

Part I of this opinion explains the general rule: a judgment resolving all claims on the merits is final and appeal-able even if it remains to be executed with the court's assistance. That remains true even if a second appeal regarding the execution is possible. One specialized application of that general rule is that a judgment of foreclosure that resolves the amount of the debt and orders sale of the mortgaged property is a final judgment. The Supreme Court has followed this approach to mortgage foreclosures since the earliest days of our Republic. Prior decisions of this and other circuits have long followed this approach.

With fair warning to readers, Part II digs into the weeds of the execution process under Illinois foreclosure law that have persuaded my colleagues that this judgment of foreclosure is not yet final. If we look past the jargon of mortgage cases, we see that the statutory provisions for redemption and reinstatement are merely specialized instances of the right any defendant has to satisfy a judgment voluntarily before it is executed. Potential disputes about the fairness of a judicial sale do not undermine finality here any more than do analogous disputes in other proceedings to execute judgments. The routine arithmetic needed to calculate the amount of a deficiency judgment or post-judgment interest also does not undermine finality when those calculations follow mechanically from a judgment that determines the total amount owed and the priorities of creditors.

Finally, Part III explains briefly why the district court did not err by granting summary judgment in

favor of HSBC on the merits of its claim against appellant Townsend, who defaulted on his residential mortgage loan.

Before diving into the details, though, I'll try to explain why this issue of appellate jurisdiction is worth an admittedly lengthy dissent. What difference does it make whether a borrower in Townsend's position must wait longer to appeal as long as he is able to appeal in the end?

First, the majority's novel decision upends about two centuries of federal precedent and practice on finality for purposes of appeal. Courts applying § 1291 and its cousins have recognized the difference between a judgment on the merits and the decisions needed to execute that judgment. The distinction between these phases of the litigation is established and familiar. It works.

The majority's decision adopts an uncertain standard that collapses that distinction, at least for mortgage foreclosures. In the majority's view, it is not enough for the merits of a dispute to be finally resolved. The majority also requires that all issues relating to execution be resolved in the district court before the underlying judgment on the merits is appealable. This reasoning either (a) commits our circuit to using different finality rules when we consider mortgage foreclosures, or (b) signals that appeals from other judgments that have also long been considered final will need a fresh look.

In either case, the majority's approach will impose confusion, uncertainty, and expense where the law is not broken and needs no fixing. *See Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62,

69 (1948) ("The considerations that determine finality are not abstractions but have reference to very real interests—not merely those of the immediate parties, but more particularly, those that pertain to the smooth functioning of our judicial system."). Even if future cases limit the majority's reasoning to mortgage cases, the practical effect will still be substantial. Federal district courts handle thousands of mortgage foreclosure cases every year, roughly ten per district judge per year. *See* Judicial Business of the United States Courts, Annual Report of the Director tbl. C-2 (2014).

Adding to the uncertainty, the majority bases its decision on a novel view of substantive Illinois law. When a valid foreclosure sale leaves a deficiency in the amount owed on the judgment, Illinois law entitles the lender to a judgment against the borrower personally for the deficiency. Yet the majority finds (ante at 8–9) that Illinois judges have discretion to decline to award deficiency judgments against borrowers when a foreclosure sale fails to cover the total amount of the debt. As explained below in Part II–D, I believe that view of Illinois law is mistaken and will come as quite a surprise to the Illinois bar and bench.

I would be less troubled by the majority's approach if it minimized the uncertainty by announcing a bright-line rule on the finality of foreclosure judgments. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988) (stressing the importance of adopting "bright-line" appellate jurisdiction rules to ensure uniformity and predictability); *Kennedy v. Wright*, 851 F.2d 963, 967 (7th Cir. 1988) (citing *Budinich* and collecting cases making same point in our

circuit); *Exchange Nat'l Bank of Chicago v. Daniels*, 763 F.2d 286, 292 (7th Cir. 1985) ("The first characteristic of a good jurisdictional rule is predictability and uniform application."). No such clear rule can be divined from the piecemeal approach adopted here. The majority opinion does not tell us what to do in a case presenting only one or two of the three issues it thinks defeat finality.

Second, the different approaches to appellate jurisdiction have significant practical and economic consequences for all parties in the foreclosure litigation. Let's assume that a borrower has a good defense on the merits but loses in the trial court. Under the majority's approach, she cannot obtain appellate review of the judgment until after her home has been sold at auction, after the trial court has confirmed that sale, and after a buyer has deposited cash and stands ready to take possession. To preserve her right to appeal, the borrower with the good defense must ask for and obtain a stay pending appeal. *See* Ill. Sup. Ct. R. 305(k) (under substantive state law, non-party purchasers gain property rights that are not impaired by reversal on appeal unless the sale is stayed); *Horvath v. Loesch*, 410 N.E.2d 154, 158 (Ill. App. 1980); *Aurora Loan Services, Inc. v. Craddieth*, 442 F.3d 1018, 1026–27 (7th Cir. 2006) (under Illinois law, "in the absence of a stay, a sale of real property to a third party bars an appeal from the judgment authorizing the sale"). The possibility of such stays is enough to avoid application of the *Forgay* doctrine, as the majority explains, but it remains to be seen whether district courts and our court will grant such stays routinely. I hope they will, but it is not a foregone conclusion.

Third, even if we assume that the harshest effects of the majority's approach on borrowers will be mitigated by routine stays pending appeal, I suspect the economic result will be negative for both borrowers and lenders. Consider the bidding behavior of outside buyers at auctions that take place at two different stages: (a) after the merits of the foreclosure have been settled with a final judgment and the conclusion of any appeal; or (b) while the merits of the foreclosure are still subject to appeal. Basic economic principles suggest that, all other things being equal, a buyer should be willing to pay more at stage (a) than at (b). The buyer at stage (b) may need to keep the bid open for months or even years, sharply limiting other uses of the money in the meantime. The result should be lower bid prices in auctions, to the detriment of both lenders and borrowers. *See United States v. Buchman*, 646 F.3d 409, 410 (7th Cir. 2011) ("If buyers believe that the parcels they acquire at auction can be snatched back whenever they have made a good deal, they will pay less at foreclosure sales—and borrowers such as Buchman will be worse off as a result."); *Aurora Loan Services*, 442 F.3d at 1028, citing Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 Va. L. Rev. 489, 534 (1991). And where a foreclosure is set aside on the merits after a court-ordered sale, the expense and effort of the sale and its confirmation will all be for naught. I turn now to the details of the legal analysis.

I. Merits v. Execution: Finality Doctrine Under § 1291

Section 1291 provides that the "courts of appeals . . . shall have jurisdiction of appeals from all

final decisions of the district courts of the United States." The Supreme Court has defined a final decision in general terms as "one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Ray Haluch Gravel Co. v. Central Pension Fund of Int'l Union of Operating Engineers and Participating Employers*, 571 U.S. ___, 134 S. Ct. 773, 779 (2014), citing *Caitlin v. United States*, 324 U.S. 229, 233 (1945). The judgment of foreclosure here ended this litigation on the merits and left nothing for the court to do but execute the judgment.

Finality in a mortgage foreclosure case is best understood as a specialized application of more general rules of finality that apply in the simpler case of a suit on an unsecured debt. *See In re Sorenson*, 77 F.2d 166, 167 (7th Cir. 1935) (making this comparison and holding that judgment foreclosing mortgage and ordering sale was "final decree" that barred bankruptcy injunction).

Pared down to the basics: Suppose P sues D for breach of a promissory note. P wins a judgment ordering D to pay X dollars to P. That judgment is final and appealable. It is final and appealable even though D may choose simply to pay the judgment, and even though, if D does not pay, P may need the court's help to identify D's property and then to seize and sell it to satisfy the judgment. The judgment is final even if we do not yet know exactly how the judgment will be executed. *See* Fed. R. Civ. P., Forms 70 & 71; *JPMorgan Chase Bank, N.A. v. Asia Pulp & Paper Co., Ltd.*, 707 F.3d 853, 857, 861–62, 867–68 (7th Cir. 2013) (resolving dispute about merits of claims on promissory note even though district court

in post-judgment proceedings had issued later asset discovery order that was itself not immediately appealable); *see generally* 15B Wright & Miller, Federal Practice and Procedure § 3916 (2d ed.) (discussing appellate jurisdiction over post-judgment orders).

Now suppose the promissory note is secured by collateral. The key difference is that the lender has laid the groundwork for easier, more streamlined execution of any judgment needed to collect the debt. There is no need to search out the debtor's property. By agreement, the property securing payment has been identified in advance. By the same agreement, the lender has also been granted a priority for its claim over those of other creditors who might want to seize the same property to pay off their loans to the same borrower.

With a secured loan, the fact that the property available for execution has already been identified does not prevent the underlying judgment on the merits ("D shall pay P the sum of X Dollars") from being final and appealable. Nor does it matter that the judgment in such cases stays execution for a limited time to give the defendant a chance to avoid the sale by making the plaintiff whole through reinstatement, redemption, or a settlement. Cf. Fed. R. Civ. P. 62(a) (staying execution of judgments for 14 days, without delaying time for appeal); *Soo Line R. Co. v. Escanaba & Lake Superior R. Co.*, 840 F.2d 546, 550 (7th Cir. 1988) (judgment awarding a specified amount of money was final even though plaintiff could not demand immediate payment and payment was contingent on arbitrator decision).

Over more than two centuries, the Supreme Court has applied these basic principles to hold judgments foreclosing mortgages and ordering the sale of the property securing the loans are final and appealable before a judicial sale and its confirmation take place. In *Whiting v. Bank of United States*, 38 U.S. (13 Pet.) 6, 15 (1839), a mortgage had been foreclosed and the property had been sold. Heirs of the borrower then sought to set aside both the foreclosure and the sale. Writing for the Court, Justice Story considered the question of finality and said that the issue depended on

> whether the decree of foreclosure and sale is to be considered as the final decree in the sense of a Court of Equity, and the proceedings on that decree a mere mode of enforcing the rights of the creditor, and for the benefit of the debtor; or whether the decree is to be deemed final only after the return and confirmation of the sale by a decretal order of the Court. We are of opinion that the former is the true view of the matter. The original decree of foreclosure and sale was final upon the merits of the controversy.

38 U.S. at 15 (emphasis added).

The Court had applied the same rule long before *Whiting*, holding simply that "a decree for a sale under a mortgage, is such a final decree as may be appealed from." *Ray v. Law*, 7 U.S. (3 Cranch) 179, 180 (1805). The Court has repeated the point many times since. *E.g.*, *Grant v. Phoenix Mutual Life Ins. Co.*, 106 U.S. 429, 431 (1882) ("[A] decree of sale in a foreclosure suit, which settles all the rights of the

parties and leaves nothing to be done but to make the sale and pay out the proceeds, is a final decree for the purposes of an appeal."); *McGourkey v. Toledo & Ohio Cent. Ry. Co.*, 146 U.S. 536, 545 (1892) ("[I]t is clear that a decree is final, though the case be referred to a master to execute the decree by a sale of property or otherwise, as in the case of the foreclosure of a mortgage.").

Thus, the general rule in American law has long been that once a judgment of foreclosure and sale is entered, it is final because all that remains to be done is executing the judgment to enforce the rights and obligations that have been adjudicated.

Now it's true that some foreclosure orders are not final and appealable, but that's because they leave undecided questions going to the merits of the dispute. In essence, those judgments are not final because they leave the X in "D shall pay P the sum of X Dollars" undefined or subject to change.

For example, even if liability is decided, a foreclosure order is not truly final if it "leaves the amount due upon the debt to be determined, and the property to be sold ascertained and defined." *McGourkey*, 146 U.S. at 545–46, 550 (order not final because it directed master to determine rents, profits, and damages to railroad's rolling stock, even though it also ordered turnover of property); *see also Grant*, 106 U.S. at 431 (order not final because it referred case to an auditor to "ascertain the amount due upon the debt, the amount due certain judgment and lien creditors, the existence and priorities of liens, and the claims for taxes"); *North Carolina R. Co. v. Swasey*, 90 U.S. (23 Wall.) 405, 409–10 (1874) (order not final when the amount of the debt and property

to be sold were not specified). So too when the order "merely determines the validity of the mortgage, and, without ordering a sale, directs the case to stand continued for further decree upon the coming in of the master's report." *McGourkey*, 146 U.S. at 545; *see also Burlington, C.R. & N. Ry. Co. v. Simmons*, 123 U.S. 52, 54 (1887) (order not final where validity of lien on mortgage was established but amounts due to parties had not been fixed and court expected further action before it could carry decree into effect).

If the majority's view in this case were correct, all of these cited opinions should have been much shorter: the appeals should have been dismissed simply because the foreclosure sales had not yet been carried out and confirmed. Instead, though, the Court focused on the details of the undecided merits issues. These examples are also consistent with the more general rule that a judgment is not final where it establishes the defendant's liability but the amount of damages remains undecided. *See*, e.g., *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 742 (1976).

These principles are so well established that case law addressing the finality problem is relatively scarce, but the available cases show that these principles have been healthy until now. We applied them in *United States v. Davenport*, 106 F.3d 1333 (7th Cir. 1997), where we held that an order of foreclosure and sale was not immediately appealable under traditional finality doctrine. The only reason for that conclusion, though, was that the district court had reserved judgment on some merits questions: whether tax fraud penalties were appropriate and whether a co-defendant would have any right to the

proceeds of the sale. *Id.* at 1334–35. Under our reasoning in *Davenport*, an ordinary order of foreclosure and sale like the order here would have been final. (In *Davenport*, we also found we had jurisdiction under *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848), for reasons not applicable here.)

We applied these same principles in *In re Sorenson*, 77 F.2d 166 (7th Cir. 1935), where a bankruptcy court's power to enjoin a foreclosure proceeding depended on whether a decree of foreclosure ordering a sale was a "final decree." In reasoning directly applicable here, we held that the foreclosure decree was final:

> In a foreclosure proceeding a decree which definitely fixes and adjudicates, as between the parties to the litigation, all issues relating to their mutual rights and obligations is, to all intents and purposes, a final decree. The usual decree of foreclosure does this. Those matters incident to the execution of the decree—the sale, report of sale, deficiency decree, redemption, issuance and recording of deed, and the like—are to the decree of foreclosure what at law the execution, sale, redemption, and the like are to the final judgment to which they are incidental. A decree or judgment is none the less final because of the things thereafter to be done to give it effect.

77 F.2d at 167 (emphasis added). We followed the same approach in *Central Trust Co. of New York v. Peoria, Decatur & Evansville Ry. Co.*, 118 F. 30 (7th Cir. 1902), where parties appealed an order confirming a foreclosure sale. They tried in part to challenge the

merits of the underlying judgment of foreclosure. We said the merits challenge came too late, treating the issue as needing neither citation nor explanation: "The question cannot be raised on objection to the sale." *Id.* at 32.

We have not been alone in applying the Supreme Court precedents to find that a foreclosure order is final so long as it conclusively establishes the extent of the defendant's liability for the defaulted loan and identifies the property to be sold. Both the Ninth and Fifth Circuits have read *Ray* and *Whiting* and the cases that followed to establish exactly this rule. *See Citicorp Real Estate, Inc. v. Smith*, 155 F.3d 1097, 1101 (9th Cir. 1998) (order meeting these conditions was final even though the judgment left "the actual amount of the deficiency judgment to be determined at a fair value hearing following the judicial foreclosure sale[]"); *Citibank, N.A. v. Data Lease Financial Corp.*, 645 F.2d 333, 337–38 (5th Cir. 1981) (order meeting these conditions had been final and therefore was unreviewable in later appeal of order confirming sale).

Under these principles and precedents, the judgment of foreclosure here is not incomplete or uncertain in any way that could defeat finality. It resolves the merits of the foreclosure dispute. It leaves nothing to do but execute the judgment by carrying out the sale and distributing the proceeds. The judgment establishes that Townsend is liable to HSBC for default under the note. It specifies the damages he must pay as a result of his default—$143,569.65—which includes the principal balance and specified amounts of accrued pre-judgment interest and attorney fees. The judgment also orders

that post-judgment interest accrues at the statutory rate until the judgment is satisfied through sale of the property or through reinstatement or redemption. It also resolves the rights of all lienholders claiming an interest in the property. It fixes the priority of interests by specifying that MERS's rights under a second mortgage are inferior to HSBC's, and it orders that proceeds will be distributed to both HSBC and MERS in the manner specified by 735 ILCS 5/15-1512.

The judgment also sets out the ways it can be executed. It specifies when the reinstatement and redemption periods run. In the event that Townsend would not pay the amounts needed to reinstate or redeem (and he did not), it makes clear that the judgment will be satisfied through sale of Townsend's home. The judgment identifies the property to be sold and explains the procedures by which the sale officer (appointed by a separate order that same day) must conduct the sale. The judgment also provides that the court must enter a deficiency judgment against Townsend if "the proceeds of the sale are not sufficient to satisfy those sums due the Plaintiff."[1]

In other words, the judgment resolves the merits of HSBC's request for relief and can be executed mechanically following the sale. That makes it final.

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[1] The judgment also states that the court retains jurisdiction over the parties and subject matter "for the purpose of enforcing this Judgment or vacating said Judgment." That is not the sort of "reservation" of jurisdiction that defeats finality. A court in a civil case routinely retains jurisdiction to enforce its judgment and can vacate its judgment under Federal Rule of Civil Procedure 60(b) or state analogs.

The approach I would follow raises one pragmatic consideration. Illinois courts now apply the majority's approach in foreclosure appeals, *see EMC Mortgage Corp. v. Kemp*, 982 N.E.2d 152, 154 (Ill. 2012), though that has not always been true. *See In re Sorenson*, 77 F.2d at 168, quoting *Kirby v. Runals*, 29 N.E. 697, 698 (Ill. 1892) (decree foreclosing mortgage and decreeing sale of mortgage premises is final decree even though master is ordered to make report of sale); *Chicago & N.W. Ry. Co. v. City of Chi.*, 35 N.E. 881, 883 (Ill. 1893), citing *Whiting*, 38 U.S. (13 Pet.) 6 (1839), and *Grant*, 106 U.S. 429 (1882).

Under either approach to finality, however, some inconsistency between federal and state courts is unavoidable. The two other states in our circuit follow the approach I would continue under the federal precedents. *See Anchor Savings & Loan Ass'n v. Coyle*, 435 N.W.2d 727, 729–30 (Wis. 1989) (judgment of foreclosure and sale was immediately appealable despite separate need to conduct and confirm sale and compute deficiency judgment); *Bahar v. Tadros*, 123 N.E.2d 189, 189–90 (Ind. 1954) (judgment of foreclosure was immediately appealable). In any event, the question of finality in federal courts is a question of federal procedural law, *Budinich*, 486 U.S. at 198–99, and our job is to follow throughout the circuit what has been until now a clear rule.

II. Executing the Judgment—The Open Issues

The majority does not identify any open issue regarding the merits of the district court's judgment. The majority focuses instead on three open issues regarding execution: (1) the mortgagor's ability to redeem or reinstate the mortgage before the judicial

sale; (2) the need to confirm any sale in a separate proceeding; and (3) the inability to determine the amounts of any deficiency judgment or interest until the fairness of the sale is evaluated.

None of these matters should prevent us from treating the judgment as final. They do not threaten the decisions that Townsend is in default and that HSBC is entitled to a specified amount of compensation, whether through sale of the home or other cash payment. No matter how the majority's issues turn out, all that can happen now is that HSBC's judgment will be either satisfied or abandoned. I explain first some general principles regarding execution of a judgment before addressing the specific issues that trouble the majority.

A. Executing a Judgment—General Principles

The majority concludes that the merits of a foreclosure action are not resolved until the trial court finds that the mortgaged property was properly sold and the amount of a deficiency judgment is set. The majority focuses on the uncertainty as to when and exactly how HSBC will collect its judgment against Townsend. The forced sale of a home is the most dramatic part of the typical foreclosure suit, but it's important to remember that selling the home is at bottom just one way to execute a judgment for failure to pay a debt as promised.

There is of course plenty of room for complication and controversy in executing a judgment. *See*, e.g., *Mortgage Electronic Registration Systems, Inc. v. Estrella*, 390 F.3d 522, 523 (7th Cir. 2004) (recognizing that district court can invalidate foreclosure sale when it was not conducted properly). The execution

process here is no exception. The judgment orders Townsend to pay HSBC $143,569.65, plus post-judgment interest. There are at least three ways Townsend could satisfy that judgment against him and make HSBC whole. First, he could just pay the money owed in cash by exercising his statutory redemption right, which amounts to a post-judgment settlement that the statute requires the creditor to accept. Second, he could exercise his statutory right of reinstatement, another form of statutory settlement that requires him to cure his defaults. Third and most likely, if Townsend cannot come up with the cash for either of the first two options, the court will execute the judgment by carrying out the sale of the mortgaged property and issuing a personal deficiency judgment for any balance still owing.

Having more than one choice for how to satisfy a judgment is commonplace. It does not undermine the finality of that judgment. "A question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order." *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988); *see also Parks v. Pavkovic*, 753 F.2d 1397, 1401 (7th Cir. 1985) (allowing immediate appeal when "only a 'ministerial' task remains for the district court to perform").

Deciding any of the questions remaining here, which deal with exactly how Townsend and/or the court will satisfy the judgment of default against him, would not risk affecting the decision on the merits—that Townsend owes HSBC $143,569.65 plus interest and HSBC has first dibs on his home. To be sure, resolving some of these issues could affect

whether Townsend needs to endure a forced sale of his home. But under the judgment of foreclosure, he can avoid the sale only if (1) he complies with the judgment by redeeming or reinstating his mortgage, (2) HSBC gives up on executing the judgment, or (3) the parties reach a private settlement.

The remaining post-judgment issues here are typical of a post-judgment proceeding that "must be viewed as a separate lawsuit from the action which produced the underlying judgment" and is "final . . . if it disposes completely of the issues raised" in the post-judgment proceeding. *In re Joint Eastern & Southern Dists. Asbestos Litig.*, 22 F.3d 755, 760 (7th Cir. 1994) (order authorizing discovery in aid of execution of judgment not appealable until end of case); *see also Solis v. Current Development Corp.*, 557 F.3d 772, 775–76 (7th Cir. 2009) (order in a post-judgment proceeding is treated like an order in "a freestanding lawsuit" and is final and appealable only if it resolves all issues in that proceeding); *King v. Ionization Int'l, Inc.*, 825 F.2d 1180, 1184 (7th Cir. 1987) (post-judgment proceeding treated "as a separate lawsuit;" order in post-judgment proceeding fixing priorities of competing liens was final and appealable).

As a general rule, a losing party may appeal from a final judgment determining the merits and may appeal separately from a later order that concludes a post-judgment proceeding to execute the underlying judgment. *See Resolution Trust Corp. v. Ruggiero*, 994 F.2d 1221, 1223–25 (7th Cir. 1993); *EEOC v. Gurnee Inns, Inc.*, 956 F.2d 146, 147–48 (7th Cir. 1992).

In mortgage foreclosure cases, in particular, courts have allowed separate appeals of the judgment

of foreclosure and the order confirming the sale. *See Leadville Coal Co. v. McCreery*, 141 U.S. 475, 478–79 (1891) ("[W]e cannot fail to observe that the main scope and purpose of this appeal seem to be to relitigate questions fully determined by the final decree appealed from and affirmed."); *Citibank, N.A. v. Data Lease Financial Corp.*, 645 F.2d 333, 337–38 (5th Cir. 1981) (explaining that separate appeals may be taken from both the order directing foreclosure and sale and the order confirming sale).

In such cases, each appeal deals with quite different issues. An appeal on the merits can challenge the validity of the debt, the finding of breach, and the amount owed. A later appeal of an order confirming a sale can challenge whether the sale was actually proper. There is little threat of overlap. In fact, the Fifth Circuit requires parties to appeal separately the judgment of foreclosure and the subsequent order confirming the sale. In the Fifth Circuit, which relied on the Supreme Court cases and one Seventh Circuit decision cited above, a party who follows the majority's course, appealing only after confirmation of a sale, is actually barred from challenging the merits of the judgment of foreclosure. *See Citibank*, 645 F.2d at 338; *see also Central Trust Co. of New York v. Peoria, Decatur & Evansville, Ry. Co.*, 118 F. 30, 32 (7th Cir. 1902) (appeal from order confirming sale could not challenge merits of underlying foreclosure).

This reasoning is consistent with our decision in *MERS v. Estrella*, which held that an order denying confirmation to a judicial sale is not a final decision when the district court orders another sale. 390 F.3d at 523–24; *see also Levin v. Baum*, 513 F.2d 92, 94

(7th Cir. 1975) (Stevens, J.) (order vacating prior confirmation of sale and ordering new sale was not appealable). Such an order does not end the "separate lawsuit" in the post-judgment proceeding and thus cannot be appealed immediately. But that does nothing to undermine the finality of the earlier judgment.

With these principles in mind, I turn to the specific issues that have persuaded the majority that we do not yet have a final judgment here. The specialized vocabulary of mortgage foreclosure should not distract us from the essential substance of the issues. These possible post-judgment issues pose no greater threat to finality than others that do not defeat the finality of judgments on the merits.

B. Redemption and Reinstatement Practice

The majority first contends the judgment here is not final because there is a chance the sale will never take place. Illinois law and the terms of this judgment allowed Townsend time to reinstate or redeem his mortgage before a sale could take place. The statutory options of reinstatement and redemption should not defeat finality. They merely spell out the terms of a post-judgment settlement the plaintiff is required to accept. By paying the amount of the judgment, the defendant avoids the sale and satisfies the judgment, just as any other losing defendant may: by paying the plaintiff the amount of the judgment.

For reinstatement, the defaulting borrower must cure the default. That requires paying all amounts due under the note (such as accrued interest, late fees, attorney fees) except the remaining principal. 735 ILCS 5/15-1602. The effect is to cure prior

breaches, to make the lender whole, and to reinstate the mortgage as if the default had not occurred. Redemption, on the other hand, requires payment of all principal and interest due as of the date of the judgment (which can include the entire principal, accelerated by the default), as well as the lender's costs and fees and interest. 5/15-1603(d). The effect is to make the lender whole, satisfying the note and leaving the lender with no further interest in the property. Illinois law expresses a preference for resolving mortgage disputes through redemption and reinstatement as opposed to sale. A foreclosure sale cannot occur until the time limits for both have expired. 5/15-1507(b).

These rights are far from new, so it's hard to see why their existence should only now be discovered to change our jurisdictional calculus. We reasoned in *In re Sorenson*, 77 F.2d 166, 167 (7th Cir. 1935), for example, that redemption was among the matters incident to the execution. The possibility of redemption did not defeat finality of a judgment of foreclosure.

Given the limited financial resources of most defaulting borrowers, these statutory rights are not exercised often. They usually serve only to delay the sale and thus the execution of the already-final judgment. *See* Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 Va. L. Rev. 489, 496–97 (1991); George M. Platt, *Deficiency Judgments in Oregon Loans Secured by Land: Growing Disparity Among Functional Equivalents*, 23 Willamette L. Rev. 37, 49 (1987). As a matter of law, of course, we must allow for these possibilities in each case. Nevertheless, as far as I know, the always-present possibility that the defendant might moot an

appeal by paying the amount due on the judgment has never before been deemed to destroy the finality of the underlying judgment.

The majority disagrees, relying on general language in the Supreme Court's decision in *Budinich*. Ante at 7. But *Budinich* did not say that the mere prospect that a party might moot a case defeats finality of an otherwise final judgment. The Supreme Court said: "A question remaining to be decided after an order ending the litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order." 486 U.S. at 199. That comment is best understood as applying to a remaining issue to be decided by the district court. The *Budinich* language could not extend to the prospect that a party might choose to take some action that would render moot a pending appeal or even the case itself. In virtually any civil case, a losing defendant may choose to comply with the judgment against him, or both parties may come to a post-judgment settlement. Either way an appeal may become moot. But if that possibility defeated finality, we would have jurisdiction over very few civil appeals.

The statutory rights of redemption and reinstatement merely codify this commonplace option of complying with a judgment. They do not change the essential finality of the judgment of foreclosure.[2]

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[2] Beyond these doctrinal difficulties, there is also no logical connection between the time these rights expire and the time for appeal the majority has identified: after the sale is confirmed. If these rights expire before the sale—and in this

C. Confirmation of Sale Process

When properly understood, the need to carry out the court-ordered sale and to confirm the result under 735 ILCS 5/15-1508(b) also does not undermine finality. The sale is the key step in executing the judgment on the merits. The need for a court order confirming the sale presents an opportunity to challenge the sale itself but not the underlying foreclosure judgment. This step in the execution does not undermine the finality of the judgment of foreclosure.

As noted above, in *Whiting v. Bank of United States*, 38 U.S. (13 Pet.) 6, 15 (1839), the Supreme Court expressly rejected the contention that the decree (judgment) of foreclosure ordering a sale would be "deemed final only after the return and confirmation of the sale by a decretal order of the Court." We said essentially the same thing in *Sorenson*, concluding that a "decree or judgment [of foreclosure] is none the less final because of the things thereafter to be done to give it effect," and we treated "the sale, report of sale, deficiency decree" as "incident to the execution of the decree." 77 F.2d at 167.

The Ninth and Fifth Circuits agree. See *Citicorp Real Estate v. Smith*, 155 F.3d 1097, 1101 (9th Cir.

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case they have long since expired—why must the parties wait until the sale is confirmed before they can appeal? Why wouldn't the judgment transform into an appealable judgment the moment these periods end? Or, given the special right to redeem for certain residential foreclosures for 30 days after confirmation of a sale, see 735 ILCS 5/15-1604(a), when, exactly, does the judgment become final so that the time to appeal begins to run? The lack of answers to these questions highlights the uncertainty caused by the majority's approach to finality.

1998) (holding foreclosure judgment was final even though it left "the actual amount of the deficiency judgment to be determined at a fair value hearing following the judicial foreclosure sales"); *Citibank*, 645 F.2d at 337–38 (holding that issues relating to merits of foreclosure judgment could not be appealed after confirmation of sale because earlier order had been final).

Nothing about the Illinois confirmation of sale proceeding suggests that it has a greater impact on the merits. In Illinois, confirmation of sale proceedings are designed to determine whether the sale was fair. 735 ILCS 5/15-1508(b). They are initiated by a separate post-judgment motion, *id.*, and are part of the process to satisfy the judgment of foreclosure. *See* 5/15-1508(f).

Under the Illinois statutes and case law, issues relating to the fairness of a foreclosure sale should not overlap with issues about whether it was proper to enter the judgment of foreclosure and to order the sale in the first place. After a foreclosure sale, the issue is not whether the judgment of foreclosure was correct but instead whether the sale was conducted properly. The court must "enter an order confirming the sale" unless a party establishes that the sale was invalid because "(i) a notice required in accordance with [735 ILCS 5/15-1507(c)] was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently, or (iv) justice was otherwise not done." 735 ILCS 5/15-1508(b).

The first three grounds for avoiding confirmation of a sale plainly have nothing to do with the underlying merits. Because confirmation of sale proceedings present different issues, "there will be no judicial diseconomy if they are considered in a

separate appeal." *See Parks*, 753 F.2d at 1402; *see also Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 126 (1945) ("[A] judgment directing immediate delivery of physical property is reviewable . . . because it is independent of, and unaffected by, another litigation with which it happens to be entangled."). In the typical case where the defendant demonstrates the sale is unfair, the remedy is simply to vacate the sale and to order a new one, not to set aside the foreclosure. *See Estrella*, 390 F.3d at 523–24 (remedy for unfair sale was to order second sale).

But what about the fourth ground, that "justice was otherwise not done"? That language could be read broadly to invite a judge to revisit the merits and to set aside not only the sale but also the underlying judgment of foreclosure. That prospect might weigh against finality, but both we and the Illinois Supreme Court have rejected such a broad reading of the statute.

In *Aurora Loan Services, Inc. v. Craddieth*, 442 F.3d 1018, 1029 (7th Cir. 2006), a district court had refused to confirm a foreclosure sale under Illinois law on exactly this broad theory. We reversed, noting "the confusion that would be injected into the law were the confirmation of foreclosure sales a matter of judicial whim." The Illinois Supreme Court is actually the authoritative voice on this point of law, and it has explained: "At this stage of the proceedings, objections to the confirmation under section 15-1508(b)(iv) cannot be based simply on a meritorious pleading defense to the underlying foreclosure complaint." *Wells Fargo Bank, N.A. v. McCluskey*, 999 N.E.2d 321, 328 (Ill. 2013). The state court explained that "the justice provision under section

15-1508(b)(iv) acts as a safety valve to allow the court to vacate the judicial sale and, in rare cases, the underlying judgment, based on traditional equitable principles." *Id.* at 329 (emphasis added).

In recognizing this "rare" possibility, the Illinois court made clear that the justice provision in 15-1508(b)(iv) imposes a much more restrictive standard than the general standard for vacating default judgments under 735 ILCS 5/2-1301(e). To vacate the underlying judgment of foreclosure, it is not enough under 15-1508(b)(iv) for the defendant to "have a meritorious defense to the underlying judgment." *McCluskey*, 999 N.E.2d at 329. The defendant-borrower must establish that "justice was not otherwise done because either the lender, through fraud or misrepresentation, prevented the borrower from raising his meritorious defenses to the complaint at an earlier time in the proceedings, or the borrower has equitable defenses that reveal he was otherwise prevented from protecting his property interests." *Id.* (emphases added).

The state court's authoritative interpretation of the statute shows that an objection to confirmation of a sale because "justice was otherwise not done" on the merits of the suit is analogous to a motion by a losing defendant under Federal Rule of Civil Procedure 60(b). Like the justice clause in 15-1508(b)(iv), Rule 60(b)(3) permits a party facing an already final adverse judgment to ask a court to vacate that judgment for reasons of "fraud . . . , misrepresentation, or misconduct by an opposing party."

The possibility that a defendant might seek to vacate a judgment under Rule 60(b) does not affect the finality of the judgment, of course. *See* Fed. R.

App. P. 4(a)(4)(A)(vi), (B)(i); Fed. R. Civ. P. 60(c)(2); *Stone v. INS*, 514 U.S. 386, 401–03 (1995) ("motions that do not toll the time for taking an appeal give rise to two separate appellate proceedings that can be consolidated"). In Illinois foreclosure cases, the "justice" clause as interpreted by the Illinois Supreme Court allows essentially the same sort of relief from a final judgment. This method goes by a different name, but the superficial differences should not distract us from the lack of an effect on finality. For purposes of finality under 28 U.S.C. § 1291, an Illinois confirmation of sale proceeding does not affect the finality of the underlying judgment on the merits.

D. Deficiency Judgments and Pre-Judgment Interest

The majority's final concern is that the amount of a deficiency judgment and the amount of interest due under the judgment have not yet been ascertained. This reasoning again confuses the underlying judgment on the merits with the details of executing that judgment.

1. Deficiency Judgments

By establishing the amounts owed and the priorities of lienholders, the judgment of foreclosure makes clear how the proceeds of sale will be divided among those with interests in the property. The judgment of foreclosure tells the mortgagor-defendant exactly how much money he must pay the mortgagee-plaintiff to resolve the lawsuit. Townsend is on the hook for $143,569.65, plus post-judgment interest. He owes that amount whether all the money comes from the proceeds of the sale or some also

comes from payments toward a deficiency judgment. If the sale proceeds come up short of the amount owed, the judgment requires entry of a deficiency judgment against Townsend: "If the proceeds of the sale are not sufficient to satisfy those sums due the Plaintiff, the court shall enter a Personal Deficiency Judgment pursuant to 735 ILCS 5/15-1508(e)."

The majority contends that the extent of damages owed by Townsend remains unquantified because the district court has the power to reduce the deficiency judgment Townsend owes following sale if the sale was unfair and the auction produced too low a sales price. Ante at 7–9. With respect, that argument misreads Illinois law. Some states allow such reductions, but not Illinois. *See Illini Federal Savings & Loan Ass'n v. Doering*, 516 N.E.2d 609, 612 (Ill. App. 1987). Under Illinois law, the deficiency judgment must be "in an amount equal to the difference between the sale price and the debt sued upon." *Id.* at 611. The *Illini Federal* court held that there was no "statutory authority for setting a deficiency judgment independent of the sale price of the property." *Id.* Nor was there any "provision in Illinois case law for the court, under its equity powers, to set a deficiency judgment based on a judicial determination of value rather than the sale price of the property." *Id.* at 612.

An Illinois court reviewing a sale therefore lacks discretion to deny or alter the amount of the deficiency judgment if it thinks the sales price was too low. *See id.* ("The procedure followed by the trial court in setting aside the deficiency judgment to conduct a hearing to determine the property's value for purposes of setting a new deficiency amount was

outside the court's authority in supervising judicial sales."); *Bank of Benton v. Cogdill*, 454 N.E.2d 1120, 1126 (Ill. App. 1983) ("[T]he entry of such a [deficiency judgment] was mandatory . . . and the court lacked discretion to deny the plaintiff relief on equitable grounds."). Illinois law simply does not give trial courts the power the majority believes they have to exercise discretion on the amount of a deficiency judgment.

That does not mean a court is powerless if it thinks a sale was unfair. Although "mere inadequacy of price alone is not sufficient cause for setting aside a judicial sale," a court can set aside the sale based on "mistake, fraud, or violation of duty by the officer conducting the sale." *See Illini Federal*, 516 N.E.2d at 611; *see also Resolution Trust Corp v. Holtzman*, 618 N.E.2d 418, 425 (Ill. App. 1993) (Illinois legislature "did not intend to impose upon the court the kind of inquiry provided in the Uniform Commercial Code that all sales 'must be commercially reasonable'"). But the remedy is only to order a new sale, not to deny or reduce a deficiency judgment. "[T]here is a significant difference between the court setting aside a sale to order a new sale at a minimum price and the court setting aside a deficiency judgment to establish a new deficiency amount based on the court's determination of value in the absence of a sale." *Illini Federal*, 516 N.E.2d at 612.

The majority resists *Illini Federal*'s prohibition on courts exercising discretion over deficiency judgments on two grounds. First, the majority argues that *Illini Federal* itself recognized an ability to alter deficiency judgments in the presence of "fraud or irregularity in the foreclosure proceeding." Ante at 9,

quoting *Illini Federal*, 516 N.E.2d at 611. But this is not so. The court in *Illini Federal* did not contradict itself, as the majority seems to think. Instead, as noted above, "fraud or irregularity" permit the court to consider prices other than the price at which the property was sold but only to determine whether to deny confirmation of the sale and order a new sale, not to deny or reduce a deficiency judgment. *Illini Federal* itself rejected just such an attempt to stretch a court's recognized power to refuse confirmation into a new power to deny or reduce a deficiency judgment. *Id.*; accord, *Nationwide Advantage Mortgage Co v. Ortiz*, 975 N.E.2d 178, 186–87 (Ill. App. 2012); *NAB Bank v. LaSalle Bank, N.A.*, 984 N.E.2d 154, 161–62 (Ill. App. 2013).

Second, the majority suggests that even though *Illini Federal* held that courts lack discretion to reduce or deny deficiency judgments, later statutory changes have undermined that holding. Closer examination shows this is not correct. Illinois recodified its mortgage law in 1987 to "integrate into one statute as much of the law of mortgage foreclosure as possible." Steven C. Linberg & Wayne F. Bender, *The Illinois Mortgage Foreclosure Law*, Ill. B.J., Oct. 1987, at 800, 800. Whether a deficiency judgment is mandatory or discretionary is a rather important feature of mortgage law. None of the statutory language or case law cited by the majority suggests that Illinois has made what would be a striking change in the law.

The current statute on deficiency judgments begins with the phrase "the court shall enter a personal judgment for deficiency." 735 ILCS 5/15-1508(e) (emphasis added). The majority nevertheless

justifies its interpretation by pointing to the use of some discretionary language, like the word "may," in the statute. This use of the word "may" is neither new nor a harbinger of the new discretionary relief the majority has found. Prior versions of the statute, including that applied in *Illini Federal*, also said that a plaintiff "may" obtain a deficiency judgment. *See*, e.g., Ill. Ann. Stat. ch. 110 ¶ 15-112 (1985) ("[I]f the sale of the mortgaged premises fails to produce a sufficient amount to pay the amount found due in the judgment . . . the plaintiff may have a personal deficiency judgment . . . .") (emphasis added); Ill. Ann. Stat. ch. 95, § 17 (1950) ("[A] decree may be rendered for any balance of money that may be found due to the complainant over and above the proceeds of the sale or sales . . . .") (emphasis added). These uses of "may" make perfect sense even without a grant of discretion to deny or reduce a deficiency judgment. Not every foreclosure plaintiff will seek a deficiency judgment, nor will it always be necessary to enter one—after all, the property could be sold for more than the amount owed.

Even more to the point, no one else has noticed the new and dramatic change found by the majority. Following the enactment of the new statute, Illinois courts continue to cite the principles of *Illini Federal* favorably. *See Resolution Trust*, 618 N.E.2d at 424–25 ("Even after the 1987 amendment, courts have cited *Illini Federal* with approval."). Commentators—both at the time the statute was first passed and now—have made clear that neither statute nor case law has granted courts discretion over deficiency judgments. *See* Eric T. Freyfogle, *The New Judicial Roles in Illinois Mortgage Foreclo-sures*, 19 Loy. U.

Chi. L.J. 933, 933, 937 (1987) ("Illinois retained the requirement of judicial foreclosure sale and refused to impose any limits on post-sale deficiency judgments."); 2 Michael T. Madison et al., The Law of Real Estate Financing § 22:4 ("Illinois does not restrict the recovery of a deficiency judgment by statute apart from restricting a deficiency following a consensual foreclosure decree."); *id.* § 12:73.

It is no surprise, then, that the majority has not found a single case where an Illinois court has recognized such discretion over a deficiency judgment. In view of today's decision, though, we should expect some borrowers to seek such discretionary relief, albeit without any substantive guidance from our court on how trial courts should exercise this newfound discretion.

Since Illinois law actually denies trial courts discretion over deficiency judgments, all parties can expect that any deficiency judgment—whether ordered following the first attempted sale or a later sale—will equal the amount due under the judgment less the net proceeds received from the sale. We cannot know now the precise amount of any deficiency judgment, but that detail of execution does not affect finality if the amount can be mechanically calculated. A need to do arithmetic does not defeat finality. *See Parks*, 753 F.2d at 1401–02 (finding "ministerial"—meaning "mechanical and uncontroversial"—the need to calculate the specific amount owed to each plaintiff even when the plaintiffs later had to prove with receipts how much was owed); accord, e.g., *Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062, 1064 (7th Cir. 1992) ("We think the original judgment was final, because the process of reducing

it to a sum certain was indeed mechanical."); *Citicorp Real Estate, Inc. v. Smith*, 155 F.3d 1097, 1101 (9th Cir. 1998) (holding foreclosure judgment was final even though it left "the actual amount of the deficiency judgment to be determined at a fair value hearing following the judicial foreclosure sales").

2. Interest Calculations

The majority's suggestion that "pre-judgment" interest is not yet determined is similarly flawed and just misreads the district court's judgment. Even calling this interest "pre-judgment" begs the question by assuming that the calculation of post-judgment interest begins with the sale rather than the judgment on the merits. But the face of the judgment here makes clear that the *pre*-judgment amount of accrued interest has already been calculated and awarded at the contract rate in the note. The judgment then provides for post-judgment interest: HSBC is entitled to the "Total Judgment Amount as found above, together with interest at the statutory judgment rate after entry of this judgment." ¶ 16.

The calculation of post-judgment interest is simpler and certainly does not affect finality. *See Pace Communications, Inc. v. Moonlight Design, Inc.*, 31 F.3d 587, 591 (7th Cir. 1994); cf. *Student Loan Marketing Ass'n v. Lipman*, 45 F.3d 173, 175-77 (7th Cir. 1995) (failure to calculate pre-judgment interest defeats finality). Post-judgment interest accrues at the statutory rate under 28 U.S.C. § 1961, and its calculation is a matter of arithmetic. The need to calculate both the amount of any deficiency judgment and post-judgment interest thus should not prevent

the district court's judgment of foreclosure from being a final judgment.[3]

More generally, on this issue of appellate jurisdiction, where predictability and clarity are especially prized, we should stick with the long-settled difference between a judgment on the merits and the execution of that judgment. We should exercise our jurisdiction and decide the merits.

III. Summary Judgment for HSBC

Because I believe we have jurisdiction, I turn briefly to the merits of the appeal. Townsend argues that HSBC was not entitled to summary judgment because it failed to establish that the Illinois mortgage foreclosure statute authorized it to bring the foreclosure action. To the extent the argument is framed in terms of prudential or statutory standing, the Supreme Court clarified in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, that whether a particular plaintiff has a cause of action under a statute no longer falls under the rubric of standing. *See* 572 U.S. ___, 134 S. Ct. 1377, 1386–88 & n.4 (2014) (finding it misleading when courts label the question whether a given plaintiff has a cause of action under a statute as being one of prudential or statutory standing); *see also Empress Casino Joliet*

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[3] The majority's approach to interest also creates a new uncertainty with significant economic consequences given today's interest rates. When does the interest calculation shift from the higher, pre-judgment contract rate to the lower, post-judgment statutory rate: with the judgment of foreclosure or the confirmation of sale? Which is the "entry of the judgment" under 28 U.S.C. § 1961? See generally *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827 (1990).

Corp. v. Johnston, 763 F.3d 723, 733-34 (7th Cir. 2014) (following *Lexmark*).

It is clear from the record that HSBC has constitutional standing, an issue that could not be waived. Townsend's other argument—that HSBC failed to establish that the Illinois statute permits a party in its position to seek judicial relief—was waived. Townsend made no attempt during the summary judgment proceedings to show that HSBC was the wrong party to bring suit.

Even when a plaintiff's motion for summary judgment goes unopposed, a plaintiff is not entitled to summary judgment unless it establishes that there is no issue of material fact with respect to the elements it must prove and that it is therefore entitled to judgment as a matter of law. *See*, e.g., *Hotel 71 Mezz Lender LLC v. Nat'l Retirement Fund*, 778 F.3d 593, 601–02 (7th Cir. 2015); *Johnson v. Gudmundsson*, 35 F.3d 1104, 1112 (7th Cir. 1994). Under Illinois law, though, the defendant bears the burden of proving that the statute does not permit the plaintiff to foreclose on the mortgage. A defendant waives the argument if it is not made prior to entry of the judgment of foreclosure. *See U.S. Bank, N.A. v. Avdic*, 10 N.E.3d 339, 352 (Ill. App. 2014) (plaintiff need not allege facts establishing that it is a party that can sue under the statute in order to win a judgment of foreclosure); *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 940 N.E.2d 118, 123 (Ill. App. 2010). Townsend's failure to raise this non-jurisdictional issue in the district court means that he waived it. *See Resolution Trust Corp. v. Juergens*, 965 F.2d 149, 153 (7th Cir. 1992); *see also C & N Corp. v. Gregory Kane & Ill. River*

Winery, Inc., 756 F.3d 1024, 1026 (7th Cir. 2014) (holding that defendant can waive arguments even if they might have undermined plaintiff's prima facie case).

Accordingly, I would affirm the judgment of the district court. I respectfully dissent from dismissal of the appeal for lack of appellate jurisdiction.

ORDER OF THE SEVENTH CIRCUIT STAYING MANDATE (AUGUST 5, 2015)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

HSBC BANK USA, N.A., as Trustee for
NOMURA HOME EQUITY LOAN, INC.,
ASSET-BACKED CERTIFICATES,
SERIES 2006-FM1,

Plaintiff-Appellee,

v.

KIRKLAND TOWNSEND,

Defendant-Appellant.

No. 13-1017

District Court No: 1:12-cv-03921
Northern District of Illinois, Eastern Division.
District Judge Gary S. Feinerman.

Before: Diane P. WOOD, Chief Judge.

Upon consideration of the DEFENDANT-APPELLANT'S MOTION TO STAY THE MANDATE PENDING THE FILING AND DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI, filed on August 5, 2015, by counsel for the appellant,

IT IS ORDERED that the motion is GRANTED. The mandate of this court is STAYED until the expiration of the time allowed for filing a petition for writ of certiorari. If a timely petition is filed and appellant notifies this court in writing, this stay shall remain in force until the conclusion of all proceedings before the Supreme Court of the United States. *See* Fed. R. App. P. 41(d)(2).

ORDER OF THE SEVENTH CIRCUIT CLARIFYING ORDER STAYING MANDATE (AUGUST 12, 2015)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

HSBC BANK USA, N.A., as Trustee for
NOMURA HOME EQUITY LOAN, INC.,
ASSET-BACKED CERTIFICATES,
SERIES 2006-FM1,

Plaintiff-Appellee,

v.

KIRKLAND TOWNSEND,

Defendant-Appellant.

No. 13-1017

District Court No: 1:12-cv-03921
Northern District of Illinois, Eastern Division
District Judge Gary S. Feinerman

Before: Diane P. WOOD, Chief Judge

Upon consideration of the PLAINTIFF-APPELLEE'S MOTION TO CLARIFY ITS ORDER STAYING THE MANDATE, filed on August 11, 2015, by counsel for the appellee,

IT IS ORDERED that the motion is GRANTED. In light of this court's order on August 5, 2015,

staying issuance of the mandate, the district court shall not conduct any further proceedings until the expiration of the time allowed for filing a petition for writ of certiorari. If a timely petition is filed and appellant notifies this court in writing, this stay shall remain in force until the conclusion of all proceedings before the Supreme Court of the United States *See* Fed. R. App. P. 41(d)(2).

DISTRICT COURT
JUDGMENT OF FORECLOSURE
(SEPTEMBER 6, 2012)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HSBC BANK USA, N.A., as Trustee for
NOMURA HOME EQUITY LOAN, INC.,
ASSET-BACKED CERTIFICATES,
SERIES 2006-FM1,

Plaintiff,

v.

KIRKLAND TOWNSEND, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.
as Nominee for FREMONT INVESTMENT & LOAN,

Defendant(s).

Case Number:1:12-cv-3921

District Judge: Gary FEINERMAN
Magistrate Judge: Susan E. COX.

THIS CAUSE coming on to be heard on Plaintiffs Motion for Summary Judgment, the Court HEREBY FINDS:

1. The court has jurisdiction of the parties and the subject matter, and service of process has been properly made.

2. Pursuant to Federal Rule of Civil Procedure 54(b), this judgment is a final and appealable order.

3. The last owner of redemption was served on July 11, 2012.

4. The statutory right to reinstate, pursuant to 735 ILCS 5/15-1602, shall expire October 11, 2012.

5. The statutory right of redemption, pursuant to 735 ILCS 5/15-1603, shall expire February 11, 2013, unless shortened by further order of the court.

6. This judgment is fully dispositive of the interest of all Defendants. All the material allegations of the Complaint filed pursuant to 735 ILCS 5/15-1504 (including those required by statute, are true and proven. By entry of this Judgment for Foreclosure and Sale, the Mortgage and Note which is the subject matter of these proceedings is extinguished and replaced by Judgment. By virtue of the Mortgage and the evidence of the indebtedness secured by it, of the date and execution of Plaintiffs supporting judgment affidavit, there is due and owing to Plaintiff by the Defendants, Kirland Townsend, the following amounts which shall continue to be a valid and subsisting lien upon the subject property described hereinafter.

Principal Balance, Accrued Interest and Other Amounts Due as Stated in Plaintiffs Affidavit	$141,425.65
Plaintiff's Attorneys' Fees and Costs	$2,144.00
TOTAL JUDGMENT AMOUNT	**$143,569.65**

7. Any advanced made in order to protect the lien of the judgment and preserve the real estate shall become so much additional indebtedness secured by the judgment lien. Such advances include, but are not limited to payment for property inspections, real estate taxes or assessments, property maintenance, and insurance premiums incurred by Plaintiff and not included in this Judgment, but paid prior to the Judicial sale. Such advances shall bear interest from date of the advance at the Judgment rate of interest, except in the case of Redemption or Payoff, in which case the note rate of interest shall apply pursuant to 735 ILC 5/15-1603(d).

8. Under the provisions of the Mortgage, the costs of foreclosure and reasonable attorneys' fees are an additional indebtedness for which Plaintiff should be reimbursed; such expenses and reasonable attorneys' fees are hereby allowed to the Plaintiff.

9. Pursuant to Local Rule 54.4, the court approves the portion of the lien attributable to attorneys' fees only for purposes of the foreclosure sale, and not for purposes of determining the amount required to be paid personally by Defendant in the event of redemption of a deficiency judgment, or otherwise. In the event of redemption by Defendant or for purposes of any personal deficiency judgment, this court reserves the right to review the amount of attorneys' fees to be included for either purpose. Plaintiff's counsel is required to notify Defendant of the provisions of this paragraph by mailing a copy of this Judgment to Defendant.

10. The Mortgage described in the Complaint and hereby foreclosed appears of record in the Office of the Cook County Recorder of Deeds as Document

No. 0532505016, and the subject property encumbered by said Mortgage and directed to be sold is legally described as follows:

> Unit 2C and P-2 together with its undivided percentage interest in the common elements in The Residences on the Lake Condominium, as delineated and defined in the Declaration recorded as document number 0021191163, in the east 1/2 of the southeast 1/4 of Section 24, Township 38 North, Range 14, East of the Third Principal Meridian, in Cook County, Illinois.

Commonly Known As: 6920 S. South Shore Drive, Unit 2C, Chicago, IL 60649

11. The rights and interests of all the other parties to this cause, including Mortgage Electronic Registration Systems, Inc. as nominee for Fremont Investment & Loan, in the subject property, are inferior and subordinate to the lien of the Plaintiff.

12. Copies of the Note and the Mortgage or Affidavit of Documents as are attached to Plaintiff s Complaint have been offered in evidence Plaintiff is hereby given leave to withdraw, if any, the Original Note and the Original Mortgage and substitute copies of those documents.

13. Plaintiff has been compelled to employ and retain attorneys to prepare and file the complaint and to represent and advise the Plaintiff in the foreclosure of the mortgage. Defendant is liable for the usual, reasonable and customary fees incurred by Plaintiff.

14. Plaintiff has been compelled and may be compelled after entry of this judgment, to advance, various sums of money in payment of costs, fees, expenses and disbursements incurred in connection with the foreclosure. These sums may include, without limiting the generality of the foregoing, filing fees, service of process fees, copying charges, stenographer's fees, witness fees, costs of publication, costs of procuring and preparing documentary evidence and costs of procuring abstracts of title, foreclosure minutes and a title insurance policy, costs of sale, etc. Under the terms of the mortgage, all such advances costs attorneys' fees and other fees, expenses and disbursements are made a lien upon the mortgaged real estate. Plaintiff is entitled to recover all such advances, costs, attorneys' fees, expenses and disbursements, together with interest on all advances at the Judgment rate of interest, from the date on which such advances are made, except in the case of Redemption or Payoff in which case the note rate of interest shall apply pursuant to 735 ILCS 5/15-1603(d).

15. In order to protect the lien of the mortgage, it may or has become necessary for Plaintiff to pay taxes and assessments which have been or may be levied upon the mortgaged real estate. In order to protect and preserve the mortgaged real estate, it has or may also become necessary for Plaintiff to make other payments, including but not limited to, fire and other hazard insurance premiums on the real estate or payments for such repairs to the real estate as may reasonably be deemed necessary for the proper preservation thereof. Under the terms of the mortgage, any money so paid or expended has or

will become an additional indebtedness secured by the mortgage and will bear interest from the date such monies are advanced at the judgment rate of interest except in the case of Redemption or Payoff in which case the note rate of interest shall apply pursuant to 735 ILCS 5/15-1603(d).

16. The allegations of Plaintiff's complaint are true substantially as set forth, and the equities favor Plaintiff. Plaintiff is entitled to the relief prayed for in the Complaint, including foreclosure of the mortgage upon the real estate described therein for the Total Judgment Amount as found above, together with interest at the statutory judgment rate after the entry of this judgment, and additional advances, expenses, reasonable Attorneys' fees and court costs, including, but not limited to, publication costs and expenses of sale.

17. Said real estate is free and clear of all liens and encumbrances that have been named herein, or of any claims that are subject to a recorded notice of foreclosure, subject to any rights of redemption available to a Defendant, pursuant to 735 ILCS 5/15-1603(a).

18. Plaintiff's mortgage is prior and superior to all other mortgages, claims of interests and liens upon said real estate that have been named herein, or any claims that are subject to a recorded notice of foreclosure.

19. The sum of attorney fees allowed herein as stated above is the fair reasonable and proper fee to be allowed to Plaintiff as attorney's fees in this proceeding through the date of this Judgment, in accordance with the terms of the Note and Mortgage given by said Defendants. That sum should be added

to and become a part of the indebtedness due to Plaintiff.

IT IS THEREFORE ORDERED AND DECREED AS FOLLOWS:

1. REQUEST FOR FORECLOSURE

A Judgment of Foreclosure and Sale is entered pursuant to 735 ILCS 5/15-1506 against the subject property and against all Defendants not previously dismissed. Under the direction of the court, an accounting has been taken of the amounts due and owing to Plaintiff herein.

a. In the event Defendants do not pay to Plaintiff the amounts required pursuant to the Illinois Mortgage Foreclosure Law before expiration of any redemption period (or, if no redemption period, within seven days after the date of this judgment), together with attorneys' fees, costs, advances, and expenses of the proceedings (to the extent provided in the mortgage or by law), the mortgaged real estate shall be sold as directed by the court. The proceeds of such sale will be used to satisfy the amount due to Plaintiff as set forth in this judgment, together with the interest advances, and expenses incurred after judgment at the statutory judgment rate from the date of the judgment.

b. In the event Plaintiff is a purchase of the mortgaged real estate at such sale, the Plaintiff may offset against the purchase price of such real estate the amount due

under the judgment for foreclosure and order confirming the sale.

c. If no redemption is made prior to such sale, such a sale shall forever bar and foreclose, the Defendants made parties to the foreclosure and all persons claiming by, through or under them, and each and any and all of them from any right, title, interest, claim, lien or right to redeem in and to the mortgaged real estate.

d. If no redemption is made prior to such sale, a deed shall be issued to the purchaser at sale according to law and such purchaser shall be allowed possession of the mortgaged real estate in accordance with statutory provisions relative thereto.

2. SALE

The subject real estate is ordered to be sold pursuant to 735 ILCS 5/15-1507.

3. SALE PROCEDURES

a. The subject real estate shall be sold pursuant to statute at the expiration of both the reinstatement period and the redemption period. The premises hereinabove described, covered by the security foreclosed in this action, shall be sold at public venue by a Special Commissioner appointed by this Court, hereinafter referred to as "Sale Officer").

b. The Judicial Sale to be conducted pursuant to this Judgment for Foreclosure and Sale

shall be by public auction. The opening bid shall be a verbal bid provided to the Sale Officer by Plaintiff and conducted by the Sale Officer and shall be conducted in full compliance with the statutory requirements contained in 735 ILCS 5/15-1507. In the event that Plaintiff fails to notify the Sale Officer of its initial bid, then the Sale Officer shall continue the sale to a date as mutually agreed upon by the Sale Officer and Plaintiff s counsel and in compliance with 735 ILCS 5/15-1507(c)(4). If the sale is erroneously held without Plaintiff having notified the Sale Officer of Plaintiff s initial bid, Plaintiff shall have the option to have the sale vacated and held for naught.

c. The real estate shall be sold for cash in the form of a cashier's check, certified funds, or other good bank funds, to the highest bidder, with all sums due at the time of sale unless other terms are agreed to by Plaintiff. The Sale Officer shall not accept cash in the form of currency, nor shall the Sale Officer accept personal checks or other funds that in the discretion of the Sale Officer are not "good funds". The sale terms are a down-payment of 10% in certified funds, with the remaining balance due within 24 hours in the form of a cashier's check, certified funds or other good bank funds. In the event the bidder fails to comply with the terms of the purchase as required, then upon demand by Plaintiff in a notice served on the Sale Officer and the bidder, the funds submitted

shall be forfeited to Plaintiff or, in the alternative, Plaintiff shall have the option to demand that the property be sold to the next highest bidder. In the event there is a third party bidder other than Plaintiff, the Sale Officer shall obtain the name, address *other than a post office box), and telephone number of that bidder. Notice by regular mail to the address given by the bidder and to the Sale Officer shall be deemed sufficient notification by the Plaintiff to exercise its option to forfeit the funds.

d. Any purchaser at the Judicial Sale takes subject to any and all liens, encumbrances, or existing defects in title. The subject property is offered for sale without any representation as to quality or quantity of title. Plaintiff shall not be responsible for any damages resulting from existing liens, encumbrances or title defects, nor does Plaintiff make any warranties as to the condition of title, either express or implied, by virtue of the Judicial Sale.

4. NOTICE OF SALE

a. In a foreclosure under Article 15, the mortgagee, its Attorney, the Sale Officer, or such other party designated by the court shall give public notice of the Sale pursuant to statute. The Notice of Sale shall include all information as required by 735 ILCS 5/15-1507(c) parts (A)-(H) where such information is available to Plaintiff or counsel for Plaintiff. Immaterial errors in the

information shall not invalidate the legal effect of the notice. Plaintiff shall include any information regarding improvements to the property where such information is available to the Plaintiff; provided, however, that Plaintiff is not obligated to make a determination as to such improvements where such a determination would cause the incurrence of additional cost to the Plaintiff unless otherwise ordered by the court. The Notice of Sale shall contain at least the following information:

i. The name, address and telephone of the person to contact for information regarding the real estate.

ii. The common address and other common description (other than legal description), if any, of the real estate.

iii. A legal description of the real estate sufficient to identify it with reasonable certainty.

iv. A description of the improvements on the real estate.

v. The times specified in the Judgment or separate order, if any, when the real estate may be inspected prior to sale.

vi. The time and the place of the sale.

vii. The terms of the sale.

viii. The title, case number and the court in which the foreclosure was filed.

ix. In the case of a condominium unit, to which Subsection (g) of Section 9 of the Condominium Act applies, the statement required by subsection (g)(5) of the Condominium Property Act.

x. Any other information required herein or by separate order.

b. The notice of sale shall be published in four consecutive calendar weeks (Sunday through Saturday), once in each week. The first such notice to be published not more than 34 days prior to the sale and the last such notice shall be published not less than 7 days prior to the sale. Publication shall be advertisement in a newspaper circulated to the general public in the county in which the real estate is located, in the section of that newspaper where legal notices are commonly placed. In addition, except in counties with a population in excess of 3,000,000, publication shall include a separate advertisement in the section of such newspaper which real estate other than real estate being sold as part of legal proceedings is commonly advertised to the general public. Such a separate advertisement in the real estate section need not include a legal description. However, where both advertisements could be published in the same newspaper and that newspaper does not have separate legal notices and real estate advertisement sections, a single advertisement with the legal description shall be sufficient, and that no other

publications shall be required unless otherwise ordered by the Court.

c. The party who gives notice of public sale shall also give notice of public sale to all parties in the action who have appeared and have not heretofore been found by the court to be in default for failure to plead. Such notice shall be given in the manner provided in the applicable rules of court for service of papers other than process and complaint, not more than 34 days nor less than 7 days prior to the day of sale. After notice is given as required by statute, a copy thereof shall be filed in the Office of the Clerk of this court together with a certificate of counsel or other proof of that notice has been served in compliance with this Section.

d. The party who gives notice of public sale shall again give notice of any adjourned sale; provided, however, that if the adjourned sale is to occur less than 60 after the last scheduled sale, notice of any adjourned sale need not be given.

e. Notice of the sale may be given prior to the expiration of any reinstatement period or redemption period. No other notice by publication or posting shall be necessary.

f. The person named in the notice of sale to be contacted for information about ht real estate may, but shall not be required to, provide additional information other than that set forth in the notice of sale.

5. SALE PROCEEDS

a. In the event that Plaintiff is the purchaser of the mortgaged real estate at such sale, Plaintiff may offset against the purchase price of such real estate the amounts due under the Judgment of Foreclosure together with interest at the statutory interest rate from the date of Judgment through the date of sale, plus any fees, costs and advances made after the entry of this Judgment of Foreclosure and Sale pursuant to 735 ILCS 5/15-1505 and 15-1603.

b. The proceeds of the sale shall be distributed in the following order pursuant to 735 ILCS 5/15-1512:

i. The reasonable expenses of sale.

ii. The reasonable expenses of securing possession before sale, holding, maintaining, and preparing the real estate for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, management fees, and, to the extent provided for in the mortgage or other recorded agreement and not prohibited by law, reasonable attorneys' fees, payments made pursuant to Section 15-1505, and other legal expenses incurred by the mortgagee.

iii. Satisfaction of all claims in the order of priority as set forth in the Judgment of Foreclosure and Sale. If the issue of priorities was reserved pursuant to 735

ILCS 5/15-1506(h), the proceeds will be distributed as set forth in the order confirming sale.

iv. Any balance of proceeds due after the above distribution shall be held by the Sale Officer conducting the sale until further order of the court.

6. RECEIPT UPON SALE AND CERTIFICATE OF SALE

Upon and at the sale of mortgaged real estate, the Sale Officer shall give to the purchaser a receipt of sale. The receipt shall describe the real estate purchased and shall show the amount paid or to be paid for the real estate. An additional receipt shall be given at the time of each subsequent payment. Upon payment in full of the amount bid, the Sale Officer shall issue, in duplicate, and give to the purchaser, a Certificate of Sale in recordable form, which describes the real estate purchased and states the amount paid. The Certificate of Sale shall be freely assignable.

7. REPORT OF SALE

The Sale Officer shall promptly make a report to the court. The Report of Sale may be prepared by the Plaintiff to be reviewed and executed by the Sale Officer. The Sale Officer shall submit the report, or cause it to be submitted, for review by the court at the time of Confirmation of Sale. The report shall include a copy of all receipts of sale.

8. CONFIRMATION OF SALE

Upon motion and notice in accordance with court rules applicable to motions generally, the court shall conduct a hearing to confirm the sale pursuant to 735 ILCS 5/15-1508. The Mortgagee, its Attorney, the Sale Officer or such other party designated by the court, shall send notice of such hearing.

a. Unless the court finds that a notice required in accordance with 735 ILCS 5/15-1507(c) was not given, that the terms of the sale were unconscionable, that the sale was conducted fraudulently, or that justice was otherwise not done, the court shall then enter an Order Confirming the Sale.

b. The Order Confirming the Sale may include an Order for Possession. In the alternative, the Order for Possession may be by separate order.

c. If the proceeds of the sale are not sufficient to satisfy those sums due the Plaintiff, the court shall enter a Personal Deficiency Judgment pursuant to 735 ILCS 5/15-1508(e), but only if the court finds that it has personal jurisdiction over the parties personally liable on the note and that said liability has not been discharged in bankruptcy. If the court does not have personal jurisdiction over those parties liable on the note of if there is no personal liability based on other findings by the court, the court shall enter an In Rem Deficiency Judgment.

9. SPECIAL RIGHT TO REDEEM

If the subject real estate has been found to be residential as defined by statute, and if the purchaser at the judicial sale was a mortgagee who was a party to the foreclosure or its nominee, and the sale price is less than the amount specified in 735 ILCS 5/15-1603(d), then an owner of redemption as set forth in Section 15-1603(a) shall have a special right to redeem, for a period ending by paying the mortgagee the sale price plus all additional costs and expenses incurred by the mortgagee set forth in the report of sale and confirmation by the court. The period for such a special right to redeem ends 30 days after the date the sale is confirmed. Any real property so redeemed shall be subject to a lien for any deficiency remaining with the same lien priority as the underlying mortgage foreclosed herein, without any rights of homestead.

If the United States is a party to this action by virtue of a lien of the Internal Revenue Service, the United States shall have 120 days from the date of sale within which to redeem the property from the sale. If the United States is otherwise a party to this action, the United States shall have one year from the date of the sale to redeem.

10. TERMINATION OF SUBORDINATE INTEREST

a. In the event of such sale and the failure of the person entitled thereto to redeem prior to such sale pursuant to statutory provisions, the Defendants made parties to the foreclosure in accordance with statutory provisions, all parties notified by a recorded notice of foreclosure, and all persons claiming by,

through or under them, and for each and any and all of them, shall be forever barred and foreclosed of any right, title, interest, claim, lien or right to redeem in and to the mortgaged real estate.

b. This Judgment and all orders entered pursuant to said Judgment are valid as stated above. The inadvertent failure to name a subordinate record claimant will not invalidate this Judgment. Plaintiff may amend the complaint for foreclosure to name such a party if it is made aware of the claim prior to the judicial sale without affecting the validity of the Judgment as to the other parties Defendant. If a property has gone to sale or a sale has been confirmed, Plaintiff may vacate the sale and/or confirmation of sale and then proceed to amend its complaint as noted above in this subparagraph b.

11. ISSUANCE OF DEED

After the expiration of the mortgagor's reinstatement and redemption rights, payment of the purchase price by the successful bidder and confirmation of the sale, the Sale Officer shall promptly execute and issues a deed to the owner and holder of the Certificate of Sale pursuant to 735 ILCS 5/15-1509. Delivery of the deed shall be sufficient to pass title and will bar all claims of parties to the foreclosure and parties having notice by virtue of a recorded notice of foreclosure.

12. JURISDICTION

The court retains jurisdiction over the parties and subject matter of this cause for the purpose of enforcing this Judgment or vacating said Judgment if a reinstatement is made as set forth in this Judgment.

13. EFFECT ON LEASES

The successful bidder at sale shall, upon confirmation of the sale, take its interest in the property subject to all bona fide leases or tenancies existing as of the date of initiation of this action for foreclosure, pursuant to and as defined by Protecting Tenants at Foreclosure Act of 2009, 12 U.S.C. § 5201 et seq.

Dated: 9/6/12

Entered: /s/ Gary Feinerman
Judge