

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 88-8

Date issued: February 26, 1988

Requested by: Robert Hoy, Cass County State's Attorney

- QUESTION PRESENTED -

Whether a judgment by the United States District Court in favor of the United States which declares that a certain sum is owed and directs foreclosure and sale of certain mortgaged real property within the state of North Dakota but does not specifically reflect that a deficiency judgment has been rendered should be docketed as a money judgment in the judgment docket pursuant to N. D. C. C. ' 28-20-13, when a state court judgment in the same format would not be docketed as a money judgment.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a federal judgment in favor of the United States which declares that a certain sum is owed and directs foreclosure and sale of certain mortgaged real property within the state of North Dakota but which does not specifically reflect that a deficiency judgment has been rendered should not be docketed as a money judgment in the judgment docket, and that only a separate judgment for a deficiency should be docketed as a money judgment in the judgment docket pursuant to N. D. C. C. ' 28-20-13.

- ANALYSIS -

I.

Background

In 1985 N. D. Op. Att'y Gen. 122, it was determined that under North Dakota law a foreclosure judgment should not be docketed as a money judgment. North Dakota law envisages two separate suits in a foreclosure action: (1) the foreclosure itself which is an equitable action against the property and results in a sale of the property; and (2) if allowed by statute, a separate action at law against the debtor for a deficiency judgment. Under North Dakota law, only a separate deficiency judgment directing the payment of money may be filed as a money judgment and docketed in the judgment docket. A foreclosure judgment is to be recorded in the judgment book but it is not a money judgment.

The issue raised is whether the state law procedure is applicable to a federal court judgment. In deciding this issue, it is necessary to analyze the practice and procedure of state law relative to deficiency judgments and then determine whether the state law process governs federal judgments.

Under North Dakota law, a creditor must bring a separate action for a deficiency judgment if the proceeds at the sheriff's foreclosure sale are inadequate to satisfy a debt. N. D. C. C. " 32-19-04, 32-19-06, and 32-19-07. Procedurally, a deficiency judgment action commences by a statement in the foreclosure complaint that a deficiency judgment may be sought. N. D. C. C. ' 32-19-04. If the foreclosure sale proceeds fail to satisfy in full the sum adjudged to be due and the costs of the action, the mortgagee may bring a separate action for a deficiency judgment within 90 days of the date of sale. N. D. C. C. ' 32-19-01. The court may render a deficiency judgment which shall not be in excess of the amount by which the sum adjudged to be due and the costs of the action exceed the fair value of the mortgaged premises. N. D. C. C. ' 32-19-06. The sale price is not presumed to reflect fair value. N. D. C. C. ' 32-19-06. A jury shall determine the fair value of the mortgaged premises. N. D. C. C. ' 32-19-06.

A deficiency judgment shall be enforced by execution as provided by law except that no such execution shall be enforced later than three years after the rendition of a deficiency judgment. N. D. C. C. ' 32-19-06. The procedure set forth in N. D. C. C. " 32-19-04 and 32-19-06 is the exclusive method to obtain a deficiency judgment in North Dakota. N. D. C. C. ' 32-19-07. Schiele v. First National Bank of Linton, 404 N. W. 2d 479 (N. D. 1987); see also First State Bank of Cooperstown v. Ihringer, 217 N. W. 2d 857 (N. D. 1974); East Grand Forks Federal Savings & Loan v. Mueller, 198 N. W. 2d 124 (N. D. 1972); Loraas v. Connolly, 131 N. W. 2d 581 (N. D. 1964).

A review of the federal judgment attached to the request for this opinion discloses that the judgment declared that a total sum of \$59,815.01 was due to the United States as of April 8, 1985, with interest accruing thereafter at the rate of 10.08% per annum. The judgment further stated that the applicable real estate mortgage was foreclosed and ordered that the real estate be sold by the United States marshal after appropriate advertisement. The judgment further ordered that the United States marshal apply the proceeds from the sale of the real estate "first to the cost of this action; second, to the cost and disbursements of the sale; and third, upon the indebtedness herein adjudged to be due and owing to the plaintiff; and if there is any balance after the payment of the aforesaid indebtedness, it shall be turned over to the Court for distribution pursuant to law." No reference was made in the judgment to a deficiency if the sales proceeds were inadequate to satisfy the total judgment amount. A supplemental document captioned "Partial Satisfaction of Judgment" and signed by an assistant United States attorney indicates that the United States government had subsequently received the sum of \$48,428.76 but does not specify the date of partial payment or the remaining balance allegedly due after the partial payment.

Independent inquiry has disclosed that the mortgage in question was an FmHA rural housing loan issued pursuant to 42 U. S. C. " 1471 through 1490h (1978).

The documents submitted with your request for an opinion are at best ambiguous

as to whether a deficiency judgment was in fact obtained. Accordingly, in Part II of this opinion I will examine first whether a deficiency judgment was obtained. Obviously, if no deficiency judgment was obtained, it is not appropriate to file the judgment as a money judgment. Part II reviews applicable law on obtaining deficiency judgments, with respect to preemption, choice of law and Fed. R. Civ. P. 69. Assuming arguendo, however, that a deficiency judgment was rendered, an analysis of the law with respect to the filing of the federal judgment submitted with your request is provided in Part III.

II.

Was a Deficiency Judgment Obtained: Preemption and Choice of Law Analysis and Fed. R. Civ. P. 69 Analysis

Pursuant to the supremacy clause of the U.S. Constitution, U.S. Const. art. VI, ' 2, congressional enactments and valid regulations promulgated by federal agencies override, or "preempt," state law when "compliance with both federal and state regulations is a physical impossibility," Florida Avocado Growers v. Paul, 373 U.S. 132, 142-143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67 (1941). In the absence of such overriding statutes or regulations, federal courts must fashion the appropriate rule of law. U.S. v. Kimbell Foods, Inc., 440 U.S. 715 (1979).

The first question therefore is whether federal law has preempted state law; that is, whether FmHA rural housing law or regulations provide a procedure for obtaining deficiency judgments that is inconsistent with state law or whether application of state law would frustrate the purposes of the federal rural housing program.

42 U.S.C. ' 1475 (1978) provides that no deficiency judgment shall be taken against an FmHA rural housing loan mortgagor if a mortgagor was granted a moratorium and faithfully tried to meet his obligation. 7 C.F.R. ' 1955.15(b) (1987) provides that no deficiency judgment is to be sought to recapture interest subsidies or where a moratorium was granted and the borrower faithfully tried to meet the loan obligations. 7 C.F.R. ' 1955.15(b)(2) (1987) provides that the FmHA staff is to assess a borrower's financial situation prior to recommending a deficiency judgment. FmHA regulations clearly distinguish deficiency judgments, 7 C.F.R. ' 1955.15(g) (1987), and foreclosure judgments, 7 C.F.R. ' 1955.15(f) (1987). 7 C.F.R. ' 1955.18(e)(1)(ii) (1987) further provides that if FmHA acquires the property at a foreclosure sale the account is deemed satisfied unless "the bid is less than the account balance and a deficiency judgment will be sought for the difference." (Emphasis added.)

In addition to the statutes and regulations specifically governing FmHA rural housing loans, 28 U.S.C. " 2001(a), (b) (1982) govern the method of sale of realty pursuant to a federal court decree. This statute, however, is silent

on the method whereby the federal government may obtain a deficiency judgment following a foreclosure sale. I could find no other federal law specifically governing the method that is to be used by the United States in obtaining a deficiency judgment.

In my opinion, 42 U.S.C. ' 1475 (1978) (which limits deficiency judgments by FmHA), the regulations implementing that law, and 28 U.S.C. ' 2001(a), (b) (1982) (which governs federal judicial sales of realty) are not inconsistent with state law governing the procedures governing the obtaining of deficiency judgments under state law. Nor does it appear that application of state law would frustrate the purposes of the federal rural housing program. Therefore, state law on deficiency judgments is not preempted by federal law.

In the absence of specific federal preemption of state law, it is necessary to determine the appropriate rule of law relative to deficiency judgments that should be followed by the FmHA in administering its nationwide program. The issue here is whether state law or federal common law would govern.

The United States Supreme Court has held that federal law governs questions involving the rights of Farmers Home Administration (FmHA) arising under their nationwide programs. Kimbell Foods, Inc., 440 U.S. 715, 726 (1979). In Kimbell Foods, the Court stated that in certain instances where Congress has failed to act and overriding interests of the federal government are at stake, "it is for the federal courts to fashion the governing rules of law according to their own standards." Id. at 726, quoting Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943). In making this determination, the court must decide whether to develop a uniform nationwide rule or adopt ready-made state law as the appropriate federal rule. Id. at 727-728.

In Kimbell Foods, the suit involved the claimed priority of contractual liens serving loans guaranteed by the Small Business Administration (SBA) and the FmHA. The Court, exercising its federal rule-making authority, rejected a uniform nationwide rule in favor of adopting ready-made state law.

Kimbell Foods set forth three considerations relevant to the determination of whether state law should be adopted as the appropriate federal rule. These three considerations are 1) whether there exists a need for a nationally uniform body of law with respect to the federal program in question, 2) whether "application of state law would frustrate specific objectives of the federal programs," and 3) the "extent to which application of a federal rule would disrupt commercial relationships predicated on state law." 440 U.S. at 728-729. I will discuss these considerations in the order presented.

The first consideration is whether there is any need for a nationally uniform body of law on the procedures used to obtain a deficiency judgment on an FmHA rural housing loan. The United States Supreme Court in Kimbell found that FmHA takes state law variations into account in loan making and processing and therefore declined to find a need for nationally uniform federal law on priority of security interests. 440 U.S. at 732-3. Similarly, I see no need

for a uniform federal rule governing the method to obtain deficiency judgments.

The second Kimbell factor is whether "application of state law would frustrate the objectives of the federal programs." 440 U.S. at 728. Applicable FMHA rural housing law and regulations (discussed above at 4) are consistent with the two step procedure provided by state law. First, a foreclosure sale occurs pursuant to a foreclosure judgment and then, if FmHA chooses to pursue a deficiency when a foreclosure sale fails to satisfy the mortgage debt, FmHA may pursue a deficiency judgment. Thus, I do not see a conflict in requiring FmHA to seek a separate decree or order specifying the amount of a money deficiency judgment. Because the North Dakota law and the federal regulations allowing deficiency judgments appear to be consistent in purpose and process, the objectives of the federal program would not be frustrated by application of state law requiring a separate deficiency judgment if the foreclosure sale proceeds are inadequate to satisfy the debt.

The third Kimbell factor is "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law." 440 U.S. at 729. Application of a different rule on the method and process governing deficiency judgments to FmHA would tend to disrupt commercial relationships predicated on state law. Under state law, the existence of and amount of a deficiency judgment is readily determined by reference to a separate document. If the FmHA were exempted from this requirement, it would be more difficult to ascertain the actual economic status of FmHA borrowers subject to prior foreclosure proceedings.

On balance, analysis of the three Kimbell factors leads me to the conclusion that the appropriate choice of law on obtaining deficiency judgments is state law. This conclusion is borne out by a number of federal court cases which have addressed similar questions.

Applying the Kimbell Foods analysis, the Fifth Circuit in U.S. v. Dismuke, 616 F.2d 755 (5th Cir. 1980), held that the SBA could not obtain a deficiency judgment when the SBA had failed to adhere to a Georgia law which required confirmation of the sale by the court ordering the sale within 30 days of the sale as a prerequisite to entry of a deficiency judgment. A pre-Kimbell Foods, case which reached the same result is U.S. v. MacKenzie, 510 F.2d 39 (9th Cir. 1975) (en__ banc) (applying to the SBA a Nevada law which allowed a deficiency only in an amount reflecting the difference between the fair market value of the property sold and the debt; the SBA had sought to recover a deficiency equal to the difference between the bid price which was under the market value and the debt). See also Johnson v. U.S. Department of Agriculture, 734 F.2d 774 (11th Cir. 1984) (applying state law on method of foreclosure does not thwart federal policy); United States v. McConkey, 430 F.2d 652 (9th Cir. 1970) (FmHA mortgage invalid under Idaho law where FmHA failed to have wife sign the mortgage.); United States v. Cless, 254 F.2d 590 (3rd Cir. 1958) (FmHA subject to Pennsylvania law and was divested of mortgage after foreclosure by first lien).

I also am of the opinion that the FmHA is required to follow state procedures on obtaining deficiency judgments based on my reading of Fed. R. Civ. P. 69.

Subsection (a) of Rule 69 states, in part, as follows:

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise.
The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

(Emphasis supplied.)

In the case of Reconstruction Finance Corp. v. Breeding, 211 F.2d 385 (10th Cir. 1954), the court held that the entry of a deficiency judgment is post-judgment relief and must be accomplished pursuant to Fed. R. Civ. P. 69 in accordance with state law. Other cases to the same effect are United States v. Inciardi, 258 F. Supp. 837 (W.D. Okla. 1966), summarily aff'd by order, No. 9502 (10th Cir. Aug 3, 1967) (Small Business Administration was subject to an Oklahoma statute providing that a deficiency judgment shall be determined by subtracting the sale price or the fair and reasonable market value of the property, whichever is greater, from the sum adjudged to be due); and International Paper Co. v. Whitson, 595 F.2d 559 (10th Cir. 1979) (applying to the Department of Housing and Urban Development an Oklahoma statute that requires a mortgagor to seek a deficiency within 90 days of a foreclosure sale.)

There appears to be a conflict in the circuits as to whether a foreclosure sale by judicial decree is subject to Rule 69. In cases involving whether state law or federal law controlled the amount of a marshal's fee, the Ninth Circuit ruled that Rule 69 required application of state law, Traveller's Insurance Co. v. Lawrence, 509 F.2d 83 (9th Cir. 1974), while the Tenth Circuit held that 28 U.S.C.A. ' 1921 governed fees for U.S. marshal sales and that Rule 69 did not cover judicial foreclosure sales, U.S. v. Petty Motor Co., 767 F.2d 712 (10th Cir. 1985). Neither case appears to apply to the issue presented here -- does a federal deficiency judgment have to be in a separate document in order to be filed under state law?

Although the Second Circuit in United States v. Merrick Sponsor Corp., 421 F.2d 1076 (2d Cir. 1970), held that a New York limitation statute similar to the Oklahoma statute in International Paper v. Whitson was deemed a statute of limitations and was inapplicable to the federal government, it is worth noting that the deficiency judgment at issue in Merrick Sponsor Corp. was a separate judgment entered after confirmation of sale and pursuant to a motion for entry of a deficiency judgment. See United

In 12 C. Wright & A. Miller, Federal Practice and Procedure ' 3012 (1973), the effect of Rule 69 is expressed as follows:

The state law controls the procedure on execution and in proceedings on and in aid of execution. It controls also in proceedings supplementary to and in aid of a judgment, such as garnishment, arrest, mandamus, contempt, and appointment of a receiver. The state law is applicable on such matters as the liability of a successor corporation, the existence of a lien, and the issuance of a deficiency judgment.

Id. at 66-8. (Footnotes omitted.) (Emphasis supplied.)

Accordingly, I am also of the opinion that Fed. R. Civ. P. 69 requires adherence to state law with respect to the requirement that a deficiency judgment be entered as a separate document.

Because FmHA failed to follow state law with respect to obtaining a separate judgment for a deficiency, it is my opinion that no deficiency judgment was rendered in the judgment attached to your request, and accordingly, it cannot be filed as a money judgment.

III.

May This Judgment be Filed as a Money Judgment?

Because the debtor against whom the judgment attached to your request was rendered has apparently not challenged the alleged existence of a deficiency judgment, I will proceed with a further

analysis which will assume arguendo that the judgment in question does reflect a deficiency judgment although it is not in a separate document. Under this assumption it is necessary to determine whether this judgment may be filed as a money judgment under state law.

Congress has specifically directed that state law procedures govern the filing of federal judgments in 28 U. S. C. ' 1962 (1982) which provides that:

States v. Merrick Sponsor Corp., 294 F.Supp. 1048, 1050 (E.D.N.Y. 1968).

As noted by C. Wright & A. Miller, Federal Practice and Procedure ' 3012 (Supp. 1987), substantial compliance with the procedural provisions of state statutes is often deemed sufficient even if every technical requirement imposed by state law is not met. Thus, this opinion does not address other closely related issues such as whether a federal agency seeking a deficiency judgment must comply with the state law requirement that a jury assess "fair value", whether the complaint must state that a deficiency may be sought, or the period of enforceability of an deficiency judgment.

Whenever the law of any State requires a judgment of a State court to be registered, recorded, docketed or indexed, or any other act to be done, in a particular manner, or in a certain office or county or parish before such lien attaches, such requirements shall apply only if the law of such State authorizes the judgment of a court of the United States to be registered, recorded, docketed, indexed or otherwise conformed to rules and requirements relating to judgments of the courts of the State.

North Dakota has adopted the Uniform Enforcement of Foreign Judgments Act, N. D. C. C. ch. 28-21, which allows federal court judgments to be docketed in the same manner as state court judgments.

N. D. C. C. " 28-20.1-01 and 28-20.1-02 provide:

28-20.1-01. Definition. -- In this chapter "foreign judgment" means any judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.

28-20.1-02. Filing and status of foreign judgments. -- A copy of any foreign judgment authenticated in accordance with the act of Congress or the statutes of this state may be filed in the office of the clerk of any district court of any county of this state. The clerk shall treat the foreign judgment in the same manner as a judgment of a district court of any county of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a district court of any county of the state and may be enforced or satisfied in like manner.

(Emphasis supplied.)

Because North Dakota law recognizes federal court judgments as foreign judgments entitled to full faith and credit and authorizes such judgments to be filed in the same manner and subject to the same procedures as state court judgments, a federal court judgment is therefore subject to the registration, recording, docketing, and indexing procedures of the state court system pursuant to 28 U. S. C. ' 1962 (1982). As was stated in 1985 N. D. Op. Att'y Gen. 122, a state court foreclosure judgment in the same format as the federal judgment submitted with your request could not be filed as a money judgment. Accordingly, it is my opinion that even if it is assumed arguendo that a deficiency judgment was rendered, the judgment submitted with your request for an opinion cannot be filed as a money judgment.

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This opinion is issued pursuant to N. D. C. C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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