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The Iowa Foreclosure Moratorium Law of 1985: A Preliminary Analysis and Proposed Changes

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THE IOWA FORECLOSURE MORATORIUM LAW OF 1985: A PRELIMINARY ANALYSIS AND PROPOSED CHANGES

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I. INTRODUCTION

In adopting Senate File 459, later signed into law on May 31, 1985, by Governor Terry Branstad, the Iowa Legislature adopted the first new piece of mortgage moratorium legislation since the Depression.¹ This legislation amended section 654.15(1) of the 1985 Iowa Code and added new section 654.15(2). Section 654.15(1), as amended, deals only with moratoriums triggered by climatic or other natural circumstances, and is outside the scope of this article. The focus of this article will be section 654.15(2), which allows certain classes of applicants to obtain continuances of foreclosure actions if the Governor of Iowa has previously declared an "economic emergency" to exist.²

On October 1, 1985, Governor Branstad invoked his authority under this new law and declared the existence of an economic emergency with respect to real estate used for farming.³ As of that date, any owner of farm real estate may seek a continuance of a foreclosure action proceeding against him if he meets the criteria of the statute.

Section 654.15(2) is drafted in general language and contains many ambiguities. Such ambiguities will likely be resolved in litigation on a case-by-case basis, but to date the statute is too new to have spawned any appellate case law providing interpretive guidance. This article identifies those ambiguities which may be likely to generate litigation and, where it is possible to do so, predicts the outlines of the probable judicial resolution of those ambiguities. An assessment of the scope of the impact of the statute upon Iowa

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1. The last previous Iowa mortgage moratorium legislation was chapter 245, § 1, 1939 Iowa Acts 353-54, which was codified at IOWA CODE § 654.15(1) (1985).

2. IOWA CODE § 654.15(2) (Supp. 1985).

3. Executive Order No. 20, Governor of Iowa, October 1, 1985.

foreclosure proceedings is then offered. Finally, this article concludes with the presentation and discussion of a proposed revision of the statute. The proposed revision is intended to resolve some of the more troublesome ambiguities in a fashion which leaves the legislature's attempt to balance the interests of mortgagors and mortgagees of farm property essentially unaltered. This article does not attempt to evaluate the wisdom of that legislative balance, and will offer only textual revisions intended to communicate those prior policy choices more clearly.

II. SUMMARY OF THE STATUTORY PROCEDURES UNDER THE NEW MORATORIUM STATUTE

Under the new statute, a moratorium continuance must be applied for by the owner of farm real estate in a foreclosure proceeding.⁴ The owner must appear in the lawsuit and admit "some indebtedness and breach of the terms" of the instrument upon which the foreclosure is based, which must have been entered into before October 1, 1985.⁵ If a continuance is granted, those admissions cannot later be denied by the borrower. The borrower must apply in writing to the court for the relief provided by the moratorium, that is, a continuance of the lawsuit for a specified period. The continuance period under the gubernatorial declaration of a state of economic emergency may be for up to one year from the date the continuance is granted if the applicant's default occurred after March 1, 1985,⁶ but it will expire on March 1, 1986, if the applicant's default occurred before March 1, 1985.⁷

Once the court finds, after a hearing, that the application is based on foreclosure of a pre-October 1, 1985, instrument, is made in good faith, and the owner is unable to pay, the court may continue the foreclosure according to the statute.⁸ The court, upon granting a continuance, will appoint a receiver for the property. The receiver may be the owner. The owner is given preference to become the "tenant" or occupant under the receivership.⁹

The receiver is a fiduciary who is required to collect rents and income and to distribute those rents and income according to the method provided in the statute. The distribution of the proceeds of receivership rents and income is to be made as follows in declining order of priority: costs of receivership; taxes; insurance; remainder to the party who brought the foreclosure action.¹⁰

The termination of the receivership can occur in a number of ways. It will expire on the date that the continuance expires, unless the court exer-

4. IOWA CODE § 654.15(2) (Supp. 1985).

5. *Id.*

6. IOWA CODE § 654.15(2)(b) (Supp. 1985).

7. IOWA CODE § 654.15(2)(a) (Supp. 1985).

8. IOWA CODE § 654.15(2) (Supp. 1985).

9. IOWA CODE § 654.15(2)(c) (Supp. 1985).

10. *Id.*

cises its equitable power to maintain the receivership in force once the foreclosure proceeding resumes.¹¹ The receivership will also terminate if and when the lender is successful in persuading the court to terminate the continuance before its natural expiration, again subject to the court's equitable power to extend the receivership.¹²

For early termination of the continuance to occur, the lender must establish at a hearing that it has made reasonable efforts in good faith to work with the borrower to restructure the debt, that it has made reasonable efforts in good faith to utilize state and federal debtor relief programs, and that the borrower has failed to pay interest due on the loan.¹³

III. INTERPRETIVE ISSUES RAISED BY THE STATUTE

A. *Issues Relating to the Scope of the Moratorium*

1. *Constitutional Issues*

It is unclear to what extent federal law preempts application of the moratorium law to foreclosure proceedings to which federal agencies are a party. This complex question has been the subject of an ongoing dispute between the Federal Farm Credit Board (FFCB) and the Governor.¹⁴ The FFCB has reserved the right to challenge the statute by preemptive federal regulation if the FFCB perceives that it will so severely restrict its ability to liquidate its collateral so as to be a serious threat to its financial institutions.¹⁵

The preemption controversy may arise in either of two different contexts if, and when, the FFCB issues a preemptive regulation. For continuances sought between October 1, 1985, and the date of the publication of a preemptive regulation by the FFCB in the Federal Register, the issue is whether the federal statutes creating the Farm Credit System demonstrate a Congressional intent to thereby preempt conflicting state laws governing mortgage foreclosure even without additional FFCB regulatory action. The second and more significant question will arise with regard to continuances sought after the effective date of any FFCB rule. The issue then would be whether Congress has at least delegated sufficient authority to the FFCB to make rules preempting conflicting provisions of existing state mortgage foreclosure laws. The numerous cases involving the question of federal preemption of other kinds of state mortgage foreclosure provisions are difficult to

11. IOWA CODE § 680.1 (1985).

12. *Id.*

13. IOWA CODE § 654.15(2)(d) (Supp. 1985).

14. Officers of the FFCB at first indicated that they would abide by the moratorium, Des Moines Register, Oct. 3, 1985, at 5S, Col. 5, but later stated that they reserved the right to challenge the moratorium on federal constitutional grounds, Des Moines Register, Oct. 26, 1985, at 1A, Col. 5.

15. *Id.*, Oct. 26, 1985 at 1A, Col. 5.

reconcile,¹⁶ and do not provide clear guidance for resolving either of these issues.

Another issue the new moratorium law raises is whether it unconstitutionally impairs the obligations undertaken by farm borrowers to their lenders under their loan contracts. Although the resolution of this issue cannot be determined with certainty, it is likely that this moratorium statute would, as did earlier Iowa moratorium statutes, survive an attack, based upon the provisions of the Iowa and United States Constitutions regarding the impairment of contracts, as being an appropriate exercise of the state's police powers.¹⁷

2. Foreclosure

It is unclear whether section 654.15(2) could be construed to also apply to installment contract forfeitures taking place pursuant to Iowa Code chapter 656 as well as to foreclosures taking place pursuant to chapter 654. The section speaks only of continuances of "actions for the foreclosure" of various instruments.¹⁸ Many farmers are, however, not mortgagors under mortgages but instead vendees under installment contracts containing chapter 656 forfeiture provisions. Such farmers would obtain no protection from a moratorium limited solely to foreclosures. It appears plausible that the legislature may have intended to benefit financially pressed farmers as a class, rather than merely those farmers purchasing farms using one particular type of financial instrument, a mortgage. It may be, however, that the law was not intended to also protect installment contract vendees as against their vendors invoking forfeiture procedures, but only to protect titleholders utilizing mortgage instruments against foreclosing lenders. No clarifying legislative history exists. In our opinion, the appropriate judicial construction should be the literal one, that is, one in which forfeiture proceedings are indeed outside of the scope of the statute, since many installment contract vendors are elderly former farmers in little better financial condition than their defaulting vendees.

It is similarly unclear whether a foreclosing party can circumvent the statute by instituting an action on its promissory note and thereafter executing on its judgment rather than proceeding to foreclose its mortgage. By utilizing this approach, the foreclosing party could circumvent the restrictions of section 654.15(2) at the minimal cost of sacrificing its priority date over post-mortgage liens attaching prior to its judgment, since under this

16. See Bauer, "Recent Changes in Iowa Mortgage Law," paper presented at a continuing legal educational seminar on Examination of Abstracts, Iowa City, Iowa, Sept. 13, 1985; see also Bauer, *Judicial Foreclosures and Statutory Redemption: The Soundness of Iowa's Traditional Preference for Protection over Credit*, 71 IOWA L. REV. 1 (1985).

17. See Benton, *Iowa's Mortgage Moratorium Statute: A Constitutional Analysis*, 33 DRAKE L. REV. 303 (1984).

18. IOWA CODE § 654.15(2) (Supp. 1985).

approach the foreclosing party would become an ordinary judgment creditor. Such judgments must be executed upon within two years, however, or execution will be barred.¹⁹ This approach by lenders, if allowed, could prevent section 654.15(2) from providing the intended relief to farm borrowers.

The lender's use of such a stratagem is not prohibited by the statute, but appears to circumvent almost any plausible view of the legislative intent. Trial judges may choose to exercise their equitable powers to apply the new law to continue such suits on promissory notes just as they would foreclosures. Such actions are likely to be subjected to appellate review, however, with uncertain outcome.

3. *Real Estate Used for Farming*

Under an option available in section 654.15(2) and the Governor's declaration, the moratorium will apply only to "real estate used for farming."²⁰ The statutory definition of "farming" found in section 172C.1(6) of the Iowa Code²¹ is referred to elsewhere in the Iowa Code and will probably be applied by the courts for the purposes of the new moratorium statute as well. The new statute, however, does not specify how it is to be applied in foreclosures of mortgages simultaneously covering both farm and non-farm property. The "eligible for a moratorium" language of the statute²² appears by implication to direct an allocation in such cases, with partial foreclosure on the "real estate not used for farming" portion of the property allowed to proceed despite the granting of a continuance as to foreclosure upon the remaining real estate.

4. *Owner May Apply for a Continuation*

The new statute states that "the owner" of property eligible for a moratorium may apply for a continuance.²³ It seems likely under the authority of cases so construing the predecessor of current section 654.15(1) that where a piece of property has multiple owners, all of them must join in the application for continuance, since each of them has an ownership interest to protect.²⁴ It also seems probable that the same authority will be applied to require that the beneficial owners of property held by fiduciaries must also

19. IOWA CODE § 615.3 (1985).

20. IOWA CODE § 654.15(2) (Supp. 1985), *supra* note 3.

21. Under that section "farming" is defined as "the cultivation of land for the production of agricultural crops, the raising of poultry, the production of eggs, the production of milk, the production of fruit or other horticultural crops, grazing or the production of livestock. Farming shall not include the production of timber, forest products, nursery products, or sod and farming shall not include a contract where a processor or distributor of farm products or supplies provides spraying, harvesting or other farm services." IOWA CODE § 172C.1(6) (1985).

22. IOWA CODE § 654.15(2) (Supp. 1985).

23. *Id.*

24. Prudential Ins. Co. v. Kraschel, 222 Iowa 128, 226 N.W. 550 (1936).

join in the application, not only the legal owners, since the beneficial owners are the true parties in interest affected by any modification of their rights.²⁵

5. *Actions for the Foreclosure*

The scope of the new statute is expressly limited to applications for continuances filed in an "action for the foreclosure" of one of a class of various instruments.²⁶ It is left unclear whether an owner may apply for a moratorium continuance during the statutory redemption periods following a foreclosure sale. It is similarly unclear whether such a continuance, if granted, would affect the running and expiration of those redemption periods. It seems logical, however, that once the foreclosure action has reached judgment, it has ceased to be an "action" that can be "continued." The courts should allow an application for continuance only at or before the final decree, since the mortgagor has ample prior opportunity to apply for a continuance before the issuance of the final decree, although this result is not clearly compelled by the language of the statute.

B. *Issues Relating to the Required Grounds for Obtaining A Continuance*

1. *Application is Made in Good Faith*

Section 654.15(2) requires that the continuance application be "made in good faith."²⁷ It is not at all clear what "good faith" means as the phrase is used in section 654.15(2). The statute requires both a finding of "good faith" and that "the owner is unable to pay or perform,"²⁸ which taken together imply that mere inability to pay or perform alone is not adequate to prove "good faith." Alternatively, the "unable to pay or perform" clause may be construed as merely providing a definition of "good faith." "Good faith" could also be construed as requiring a showing of meaningful participation in prior restructuring efforts, or perhaps only to require mere honesty in fact.²⁹ It is not clear what would constitute "bad faith" under this last construction. Whatever standards for "good faith" ultimately are applied, it is clear that under section 654.15(2) it is much easier for the applicant to obtain a continuance than it is for the foreclosing party to terminate a continuance once obtained.³⁰

25. *Id.*

26. IOWA CODE § 654.15(2) (Supp. 1985).

27. *Id.*

28. *Id.*

29. *Nora Springs Coop. Co. v. Brandau*, 247 N.W.2d 744, 750 (Iowa 1976) (UCC definition of good faith).

30. *See infra* text accompanying notes 38-40.

2. *Resisting a Continuance at the Initial Hearing*

Section 654.15(2)(d) sets forth a list of required criteria that a foreclosing party must satisfy to have a continuance terminated.³¹ It is unclear whether the grounds listed in section 654.15(2)(d) for *termination* of a continuance may be asserted by the party seeking foreclosure to prevent the initial *granting* of a continuance, or whether a second, separate termination hearing is required. The prior construction should be adopted by the courts in the interests of judicial economy, since all of the issues can be adequately raised in a single proceeding. If a second hearing will be required, a question exists as to how long a foreclosing party must wait after the grant of a continuance before acting to terminate the continuance, and whether additional good faith efforts to work with the borrower will be required to be shown to have taken place during the period of continuance.

C. *Issues Relating to the Length of the Period of Continuance*

1. *Duration of the Moratorium*

The Governor's declaration, which under the statute is to be in effect for one year at most, could be rescinded by the Governor after less than one year.³² Such rescission apparently would not alter the status of continuances granted while the declaration had been in force, although its impact on pending continuance applications is, perhaps, debatable. There is, however, nothing expressly prohibiting the Governor from declaring a new economic emergency each year, and thereby transforming section 654.15(2) into a permanently effective law. An applicant is expressly permitted to apply for a continuance "under each declaration,"³³ and a de facto permanent continuation of some foreclosures is at least a theoretical possibility. It is unlikely that the courts would scrutinize the basis for the declarations by the Governor, as the assessment of economic circumstances appears to be well within the scope of his discretion. It is similarly unlikely that the legislature would interfere with specific court continuance-granting decisions. The true check upon the use of section 654.15(2) as a permanent foreclosure bar seems to be the power of the legislature to repeal that subsection over a gubernatorial veto, should it be so used.³⁴

2. *Length of a Continuance*

The statute states that if the "default or breach . . . occurs on or before the first day of March of the year in which the governor declares a state of economic emergency, then the continuance shall terminate on the first day

31. IOWA CODE § 654.15(2)(d) (Supp. 1985).

32. IOWA CODE 654.15(2) (Supp. 1985).

33. IOWA CODE § 654.15(2)(b) (Supp. 1985).

34. IOWA CONST., art. III, § 16.

of March of the succeeding year."³⁵ This raises several issues. It seems highly likely that the "year" of declaration will be construed to refer to the calendar year rather than a fiscal year commencing on the date of declaration, although the statute's language does not seem to compel this result. More problematically, does "occurs" refer to the occurrence of the default or breach alleged by the party seeking foreclosure, or does it refer to the default or breach admitted? What if the owner "admits" to an act of breach not alleged by the foreclosure party? The time of breach would have to be first determined by the court in order to ascertain the proper duration of the continuance.

If the default or breach occurs after March 1 of the "year" of the Governor's declaration it appears that under section 654.15(2)(b) a court may grant a continuance for a period of less than a year as well as for a full year.³⁶ If the Governor subsequently declares another economic emergency on October 1, 1986, it is not clear whether 1985 or 1986 is the year of declaration for length of continuance purposes under section 654.15(2)(a). It seems most reasonable that 1986 would qualify as the year, so that the treatment of pre-March 1, 1986, defaults under a 1986 declaration would parallel the treatment of pre-March 1, 1985, defaults under the 1985 declaration. This would limit the duration of continuances based on pre-March 1, 1986, defaults to March 1, 1987.

D. *Issues Relating to the Receivership*

The new statute calls for the owner or person in possession of the property to be given a "preference in the occupancy of the property."³⁷ It is an open question how strong a "preference" the receiver is to give the owner or person in possession of the property when leasing it during the continuance, as against an outside potential lessee with stronger qualifications or with a willingness to pay a greater rent. It is uncertain whether the receiver must rent to the owner only when all other things are equal, or whether the receiver is required to favor the owner over a more qualified potential lessee, or one offering higher rental payments. It is also uncertain whether the receiver has the discretion to lease the property on either a non-cash or deferred rent basis rather than only on a cash basis, although the receiver probably would be held to have that authority subject to the usual fiduciary obligations imposed on receivers under Iowa law.³⁸

It is unclear whether the foreclosing party has any right to control the actions of the receiver. It is possible that the foreclosing party may have different tenant preferences than the receiver, or that the lender may prefer

35. IOWA CODE § 654.15(2)(a) (Supp. 1985).

36. IOWA CODE § 654.15(2)(b) (Supp. 1985). See also note 52, *infra*.

37. IOWA CODE § 654.15(2)(c) (Supp. 1985).

38. *Sprague, Warner & Co. v. Iowa Mercantile Co.*, 186 Iowa 488, 172 N.W. 637 (1919).

that the property not be rented during the continuance due to the possible application of the farm tenancy provisions of Iowa Code sections 562.5-7 (1985). These provisions require a tenant to be given notice of cancellation of his tenancy for a crop year by September 1 of the previous year.³⁹ If sections 562.5-7 are deemed to apply to a continuance period lease signed in, for example, November 1985, the tenant would be entitled to possession of the property through the end of the 1986 crop year on February 28, 1987, regardless of the term of the lease, and regardless of any foreclosure or forfeiture proceedings, since notice of termination of the lease was not delivered by September 1, 1985, as required by section 562.7. *Ganzer v. Pfab*,⁴⁰ which in broad language held that under sections 562.5-7 a farm tenancy survives the forfeiture of the landlord's interest in the property, compels the latter construction.⁴¹ If the foreclosing party sees an early termination of the continuance as a strong possibility, it may well prefer that a tenancy not be initiated during the period of continuance, so as to facilitate sale of the property pursuant to a foreclosure decree.

The statute requires that the receiver is to tender the "proceeds" of all "rents and income" to the foreclosing party, after payment of costs, taxes, and insurance.⁴² This provision poses a very serious question concerning whether creditors who have loaned on security of equipment, crops, or livestock will be denied payments during a mortgage foreclosure continuance, despite having security on property other than the farm real estate. Such a result would differ from the law governing receiverships prior to the enactment of section 654.15(2).⁴³ Unfortunately, the statute is silent as to the rights of other creditors when the continuance of the real estate foreclosure action is in place. The result most consistent with prior receivership law would appear to be to honor prior perfected security interests in the course of making the required section 654.15(2)(c) payments.⁴⁴

E. *Issues Relating to Termination of the Receivership*

There are a number of unresolved interpretive issues regarding the showing which the foreclosing party must make to obtain termination of a continuance, and what actions by the owner are required to prevent such termination. How much willingness to sacrifice must be demonstrated by the foreclosing party to show "reasonable efforts in good faith to work with

39. IOWA CODE §§ 562.5-7 (Supp. 1985).

40. 360 N.W.2d 754, 756 (Iowa 1985).

41. *Id.*

42. IOWA CODE § 654.15(2)(c) (Supp. 1985).

43. *Citizens Banking Co. v. Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944); *Andrew v. Union Savings Bank and Trust Co.*, 225 Iowa 929, 282 N.W. 299 (1938).

44. *Norwest Bank Mason City, N.A. v. Mason City Prod. Credit Assoc.*, (No. 15307, Dist. Ct. for Hancock County, July, 1984) (Sullivan, J.) (unpublished; summarized in 1 Iowa Ag. Law. Rep., No. 2, P.2 (1985)).

the applicant to restructure" his debt, as required by the new statute?⁴⁵ Which way does "the financial strength and the long-term survivorship potential" of the applicant cut? Can the foreclosing party satisfy the court with a lesser showing of restructuring efforts for a financially weaker applicant, or is it intended to be the other way around? Which federal and state programs are "designed and implemented to provide debtor relief"⁴⁶ as opposed to having other primary objectives? What degree of constructive knowledge of such programs is to be imputed to foreclosing parties who may lack actual knowledge?

When has an applicant "failed to pay interest due on the written instrument?"⁴⁷ Suppose the applicant has tendered some or all of the interest due, but not the principal payment due, and this tender was rejected by the foreclosing party. Does this tendering bar termination of the continuance? Suppose the applicant has paid all of the interest due, but has paid it consistently late. Does this bar termination?

F. *Bankruptcy Issues Raised by the Moratorium Law*

The new law does not specify the effect on the continuance if the debtor files for federal bankruptcy protection during the period of the continuance. Would the filing of the petition stay the running of the continuance period? What if the debtor files for relief under the Bankruptcy Code, after the granting of the continuance, but prior to the appointment of the receiver? May the court make the appointment despite the filing? If so, what happens to the rents and income?

IV. THE IMPACT OF THE NEW MORATORIUM STATUTE

The section 654.15(2)(a) March 1, 1986, expiration date for continuances based on pre-March 1, 1985, defaults has now passed. After March 1, 1986, only foreclosures based upon post-March 1, 1985, defaults under pre-October 1, 1985, instruments are eligible for continuances.⁴⁸ Unless the Governor issues a new declaration of economic emergency, such continuances can be sought only until the expiration of the current declaration on October 1, 1986.

If one makes the restrictive but seemingly reasonable assumptions that section 654.15(2) will be construed so as not to apply to forfeitures, or to foreclosures involving federal agencies, and that parties seeking to foreclose will comply with the seemingly modest "working with" requirements necessary to obtain termination of continuances granted to applicants who are not paying all of the interest due on their instruments, and assuming section

45. IOWA CODE § 654.15(2)(d)(1) (Supp. 1985).

46. IOWA CODE § 654.15(2)(d)(2) (Supp. 1985).

47. IOWA CODE § 654.15(2)(d)(3) (Supp. 1985).

48. IOWA CODE § 654.15(2)(a) (Supp. 1985). *But see note 52, infra.*

654.15(2)(d)(3) is construed to require full interest payments, then only that small class of farmers first defaulting after March 1, 1985, on only the principal portions of their obligations to only non-federal foreclosing parties will be eligible for continuances. Despite the publicity section 654.15(2) has received, the vast majority of pending foreclosures of farm real estate involve either federal lenders, pre-March 1, 1985, defaults, or defaults upon interest payments as well as upon principal payments and will then probably be unaffected by its provisions.

It is possible that the federal lenders will elect not to raise the preemption issue as a defense to continuance applications, and that only partial payment of the interest due will be required of applicants to defeat efforts to terminate their continuance. Courts should not allow *de minimis* partial interest payments to defeat continuance termination efforts, for this would vitiate the termination procedure set forth in section 654.15(2)(d). If they do allow partial interest payments to defeat termination efforts, and if the preemption issue is not raised or is resolved in favor of applicants, a somewhat larger class of foreclosures may be affected by the statute. The limitation to foreclosure actions and to post-March 1, 1985, defaults, however, would still significantly limit the scope of impact of this statute, and prevent it from providing relief to most currently distressed Iowa farmers. Of course, if the Governor continues to renew his declaration in succeeding years, over time an increasingly large proportion of foreclosures will be subject to continuance under section 654.15(2).

V. PROPOSED REVISIONS

Many of the interpretive ambiguities present in section 654.15(2) may be relieved by amending the statute with the following language in which additions to or deletions from existing law are indicated by italics and strikeouts, respectively:

2. In all actions for the foreclosure of real estate mortgages, deeds of trust of real property, and contracts for the purchase of real estate, an owner of real estate may apply for a moratorium as provided in this subsection if the governor declares a state of economic emergency. The declaration by the governor of a state of economic emergency shall be valid for no more than one year for the purposes of this subsection. The governor shall state in the declaration whether a moratorium is applicable to real estate used for farming, real estate not used for farming, or all real estate. Only property of the type specified in the declaration which is subject to a mortgage, deed of trust, or contract for purchase entered into before the date of the declaration is eligible for a moratorium. In an action for the foreclosure of a mortgage, deed of trust, or contract for purchase of real property eligible for a moratorium, the owner may apply for a continuation of the foreclosure if the owner has entered an appearance and filed an answer admitting some indebtedness and breach of the terms of the designated instrument, *and if the sale of the property pur-*

suant to the foreclosure has not yet taken place. The admissions cannot be withdrawn or denied after a continuance is granted. Upon the filing of an application as provided in this subsection, the court shall set a date for hearing and provide by order for notice to the parties of the time for the hearing. If the court finds that the *applicant has participated* ~~application is made~~ in good faith in prior efforts to restructure his debt obligations and the owner is unable to pay or perform, the court may continue the foreclosure proceeding as follows:

a. If the application is made in regard to real estate used for farming, and if the default or breach of terms of the written instrument occurs on or before the first day of March of the year in which the governor declares a state of economic emergency, then the continuance shall terminate on the first day of March of the succeeding year.

b. Only one continuance shall be granted the applicant or petitioner for each written instrument or contract under each declaration. Except as provided in paragraph "a", the continuance shall not exceed one year.

c. The court shall appoint a receiver to take charge of the property and to rent the property. The owner or person in possession of the property shall be given preference in the occupancy of the property *over others not willing to pay greater rents to occupy the property.* The receiver, who may be the owner or person in possession, shall collect the rents and income, and distribute the proceeds as follows:

- (1) For the payment of the costs of receivership.
- (2) For the payment of taxes due or becoming due during the period of receivership.
- (3) For the payment of insurance on the buildings on the premises.
- (4) ~~The remaining balance shall be paid to the owner of the written instrument upon which the foreclosure was based, to be credited against the written instrument, and distributed as determined by the court in accordance with the principles governing receiverships generally.~~

d. A continuation ~~sought~~ ~~granted~~ under this subsection may be *denied at the initial continuation hearing, or if granted then terminated at a subsequent hearing,* if the court finds, after notice and a hearing, all of the following:

(1) The party seeking foreclosure has made reasonable efforts in good faith to work with the applicant *either before or after his default* to restructure the debt obligations of the applicant.

(2) The party seeking foreclosure has made reasonable efforts in good faith to work with the applicant to utilize state and federal programs *of which it is aware and which are* designed and implemented to provide debtor relief options. For the purposes of subparagraphs (1) and (2), the determination of reasonableness shall take into account the financial condition of the party seeking foreclosure, *a party in stronger financial condition relative to other similarly situated persons requiring greater efforts,* and the financial strength and long-term financial survivorship potential of the applicant, *a party with greater long-term financial survivorship potential requiring greater efforts.*

(3) The applicant has failed to pay *the full amount of interest due on the written instrument since his default.*

The above proposed amendments are designed to clarify some of the more troublesome ambiguities in the new law without significantly altering the political balance there struck between mortgagors and mortgagees. There is presently considerable sentiment among lenders for complete abolition of section 654.15(2).⁴⁹ There is also much support among mortgagors and others for a liberalization of the eligibility criteria for obtaining continuances under this law.⁵⁰

An evaluation of the merits of the principles of moratorium legislation as such would presuppose certain value judgments as to the relative social importance of the interests of mortgagors as against those of mortgagees and is beyond the scope of this Article. The political balance struck by the Iowa Legislature in adopting this statute is accepted as given. This proposal seeks only to clarify that statute within those constraints so as to avoid unnecessary litigation over its terms. It must be conceded, however, that such clarifications may on balance favor foreclosing parties, in that, by making it clearer exactly when continuances are appropriate, they may reduce the "nuisance value" of relatively meritless continuance applications filed in foreclosure procedures. Certainty in interpretation could, however, make credit more available at lower cost by making creditors more confident of their protections when making loans secured by agricultural real estate.

These proposed amendments to the statute will be explained in the order in which they appear. The first amendment to the statute adds language to section 654.15(2), designed to expressly limit continuances to the period before a foreclosure sale, making them unavailable during the post-foreclosure redemption period. Allowing such continuances to be obtained during the redemption period would give no significant additional protection to an owner who could just as easily request a continuance before foreclosure, and would increase the uncertainties facing prospective purchasers at foreclosure sales.

The second amendment to the statute rewords and clarifies the applicant's "good faith" requirement under section 654.15(2) so as to give some reasonable operational content to the concept of good faith behavior on his part. "Good faith" under this amendment would specifically mean good faith participation in prior restructuring efforts.

The third amendment to the statute attempts to make more clear the degree of "preference" to be given owners in the occupancy of the property under section 654.15(2)(c) so as to avoid litigation over this issue and to limit it to application in an "other things being equal" context. Concededly, such an amendment does limit a receiver's flexibility to favor owners, but only as against other potential lessees, rather than as against the foreclosing party.

49. Consider the controversy surrounding efforts made in the 1986 Iowa Legislature to broaden the scope of section 654.15(2).

50. *Id.*

The fourth amendment to the statute expressly incorporates the established principles of Iowa law governing priorities under receiverships into the statute when making distributions under section 654.15(2)(c). Under these principles, creditors secured by crops and livestock have a prior claim to the proceeds from those items of personal property over a party foreclosing its real estate interest.⁵¹ Any contrary interpretation of the statute could have devastating and obviously unintended effects upon the availability of farm operating credit, since borrowers would no longer be able to utilize their crops and livestock as security for such loans.

The fifth amendment to the statute is designed to promote judicial economy by expressly allowing under section 654.15(2)(d) consolidation of the continuation granting and termination hearings into one proceeding at the option of the court, thus reducing the number of such hearings by up to one-half.

The sixth amendment to the statute is intended to make clear that under section 654.15(2)(d)(1) the foreclosing party's reasonable restructuring efforts can be carried out either before or after the applicant's default.

The seventh amendment to the statute is intended to limit the responsibility of the party seeking foreclosure under section 654.15(2)(d)(2) to the utilization of those programs of which it has actual knowledge.

The eighth amendment and ninth amendment to the statute are intended together to make clear what effect an applicant's degree of financial strength is to have upon the level of required efforts of the party seeking to terminate a continuance under section 654.15(2)(d). These amendments attempt to insure that lenders will make greater restructuring efforts for the borrowers most likely to ultimately benefit from such efforts.

The final amendment to the statute is intended to clarify the current requirement under section 654.15(2)(d)(3) that an applicant who seeks a continuance must pay the interest due after his default in order to necessarily defeat an attempt to deny or to subsequently terminate that continuance. Under this amendment, such an applicant must pay the full amount of unpaid interest accrued since his default to defeat the attempt to terminate the continuance. Such an amendment is concededly pro-mortgagee relative to an amendment requiring that only some of the interest be paid to defeat termination attempts, and departs from the neutrality sought by the previous amendments. The latter construction, however, would vitiate section 654.15(2)(d) entirely, which does not appear to be a reasonable result given the detailed requirements set forth in section 654.15(2)(d)(1), and (2) by the Iowa Legislature.

VI. CONCLUSION

The new Iowa moratorium law contains many potentially troublesome

51. See *supra* note 36.

ambiguities. At this date, one can only speculate as to how the courts will resolve these ambiguities, although in some instances the probable resolution seems relatively apparent. It does not appear that the new law is expansive enough in scope, even if liberally construed, to affect a significant proportion of Iowa farm real estate foreclosures, at least not unless the Governor's declaration of economic emergency is periodically renewed.⁵² We do believe, that the law is, however, likely to provoke unnecessary litigation over its requirements unless some of its more opaque provisions are amended and clarified.

52. The 1986 Iowa Legislature amended section 654.15(2) to include small businesses, extend the period of continuances on farm real estate, and rework the collection of rents and income and distribution of proceeds section of the statute.

The collection of rents and income and distribution of the proceeds was amended to read as follows:

C. The court shall appoint a receiver to take charge of the property and to rent the property. The applicant shall be given preference in the occupancy of the property. The receiver, who may be the applicant, shall collect the rents and income and distribute the proceeds as follows:

(1) For the payment of the costs of the receivership, including the required interest on the written instrument and the costs of operation.

(2) For the payment of taxes due or becoming due during the period of receivership.

(3) For the payment of insurance deemed necessary by the court including but not limited to insurance on the buildings on the premises and liability insurance.

(4) The remaining balance shall be paid to the owner of the written instrument upon which the foreclosure was based, to be credited against the deferred interest and then against the principal due on the written instrument.

This reworking of the statute does not give the court the flexibility to allocate proceeds of the rents and income as suggested in this article. Further, the amendments to the distribution system paragraph probably served to confuse the issue of who gets paid when. The terms "required interest" and "deferred interest" are not defined and most written instruments would not make such a distinction. The statute does not state whether required interest on the written instrument takes preference over cost of operation of the farm. Both are lumped in the category of "costs of receivership." In most farming operations, after deducting "costs of operation," whatever they might be, and interest on the written instrument, there would be little money left for payment of taxes, insurance or principal if the debtor was already in economic distress at the time the moratorium continuance was granted.

The 1986 amendments also appear to be one step on the road to a perpetual moratorium with farm real estate already being granted a two-year extension without additional action by the Governor, other than to sign the bill.