IN THE
SUPREME COURT OF MISSOURI

No. SC 91951

FIRST BANK,

Plaintiff-Respondent,

v.

FISCHER & FRICHTEL, INC.,

Defendant-Appellant.

Appeal from the St. Louis County Circuit Court
Hon. John F. Kintz

BRIEF OF AMICUS CURIAE MISSOURI BANKERS ASSOCIATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

ARGUMENT 2

I. THE 'WINDFALL' PROBLEM DESCRIBED BY FISCHER & FRICHTEL IS NEITHER ACCURATE NOR COMMON 2

A. Lenders Suffer Significant Losses from Foreclosures. 2

B. Borrowers Usually Are Not Affected When Lenders 'Profit' from Reselling Collateral. 4

II. A CHANGE IN THE LAW WILL ADVERSELY AFFECT ALL BORROWERS, INCLUDING THOSE THAT NEVER DEFAULT. 7

A. Existing Law Appropriately Allocates the Risk that a Foreclosure Sale Yields Less than Fair-Market Value. 7

B. The Change in the Law Proposed by Fischer & Frichtel Will Affect Many Foreclosures and Many Borrowers. 9

C. Obstacles to Lenders' Recovery Produce Restrictions of Credit and Higher Costs for All Borrowers. 11

III. ANY MODIFICATION TO FORECLOSURE OR DEFICIENCY PROCESSES SHOULD BE ENACTED BY THE LEGISLATURE. 13

A. The Legislature Is Best Suited To Balance Competing Policy Considerations. 14

B. The Non-Judicial Foreclosure Statutes Are Not Designed To Produce Fair-Market Value. 15

C. The General Assembly Has Declined To Enact Numerous Proposed Reforms in the Past. 17

CONCLUSION 22

CERTIFICATE OF COMPLIANCE 23

CERTIFICATE OF SERVICE 24

TABLE OF AUTHORITIES

Page

Cases

BFP v. Resolution Trust Corp., 511 U.S. 531 (1994) 11, 16

Drannek Realty Co. v. Nathan Frank, Inc., 139 S.W.2d 926 (Mo. 1940) 7, 8, 18

Federal Nat'l Mortgage Ass'n v. Howlett, 521 S.W.2d 428 (Mo. banc 1975) 17

Lipscomb v. New York Life Ins. Co., 39 S.W. 465 (Mo. 1897) 8

Medicine Shoppe Int'l, Inc. v. Director of Revenue, 156 S.W.3d 333 (Mo. banc 2005) 20

Powell v. American Motors Corp., 834 S.W.2d 184 (Mo. banc 1992) 15

Statutes

§ 443.310, RSMo. 16, 18

§ 443.325, RSMo. 18

11 U.S.C. § 524(a) 5

11 U.S.C. § 727(b) 5

Other Authorities

Jeremy Berkowitz & Richard Hynes, *Bankruptcy Exemptions and the Market for Mortgage Loans*, 42 J.L. & Econ. 809 (1999) 12

Amy Crews Cutts & Richard K. Green, *Innovative Servicing Technology: Smart Enough to Keep People in Their Houses?*, Freddie Mac Working Paper #04-03 (July 2004), *available at* http://www.freddiemac.com/news/pdf/ fmwp_0403_servicing.pdf 3

House Bill 721, 96th Gen. Ass., 1st Reg. Sess. (Mo. 2011)........ 20

Lawrence D. Jones, *Deficiency Judgments and the Exercise of the Default Option in Home Mortgage Loans*, 36 J.L. & Econ. 115 (1993) 12

Mark Meador, *The Effects of Mortgage Laws on Home Mortgage Rates*, 34 J. Econ. & Bus. 143 (1982) 12

Missouri Approved Instruction 16.02 (2008 Revised)........ 16

Grant S. Nelson, *Deficiency Judgments after Real Estate Foreclosures in Missouri: Some Modest Proposals*, 47 Mo. L. Rev. 151 (1982)........ 18

Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 Duke L.J. 1399 (2004) 20

Karen M. Pence, *Foreclosing on Opportunity: State Laws and Mortgage Credit*, Board of Governors of the Federal Reserve System (May 13, 2003)........ 2

Karen M. Pence, *Foreclosing on Opportunity: State Laws and Mortgage Credit*, 88 Rev. Econ. & Stat. 177 (2006)........ 12

Restatement (Third) of Property: Mortgages (1997)........ 9, 10, 19

Debra Pogrund Stark, *Facing the Facts: An Empirical Study of the Fairness and Efficiency of Foreclosures and a Proposal for Reform*, 30 U. Mich. J.L. Reform 639 (1997)........ 5, 6

Uniform Land Security Interest Act (1985), *available at* http://www.law.upenn.edu/bll/archives/ulc/ulc_final.htm 19

Uniform Nonjudicial Foreclosure Act, 14 U.L.A. 123 (2002) 19, 20

Steven Wechsler, *Through the Looking Glass: Foreclosure by Sale as* De Facto *Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 Cornell L. Rev. 850 (1985) 5

David C. Wheelock, *Changing the Rules: State Mortgage Foreclosure Moratoria During the Great Depression*, 90 Fed. Res. Bank St. Louis Rev. 569 (2008) 11

INTEREST OF AMICUS CURIAE

The Missouri Bankers Association is a not-for-profit trade association that advocates for commercial banks and savings associations in federal and state legislative, legal, and regulatory forums. The Association was founded in 1891 in Lebanon, Missouri and is headquartered in Jefferson City. The Association's member banks and savings associations operate more than 2,000 locations and employ more than 30,000 people in Missouri.

Members of the Association regularly conduct foreclosure sales in Missouri and, much less often, pursue deficiency claims against borrowers and guarantors. The Court's decision on the principal point in this appeal will have a direct effect not only on Missouri lenders' enforcement of remedies but also on their underwriting of the thousands of real-estate loans they make each year.

ARGUMENT

Fischer & Frichtel's first Point Relied On expressly requests this Court to overturn decisions that are more than 70 years old. This argument rests on several unsound premises: first, that there is a widespread problem that requires a judicial solution; second, that the proposed change in the law will not impose substantial burdens on lenders or others; and third, that this Court is the appropriate institution to change the law in the circumstances of this case.

I. THE "WINDFALL" PROBLEM DESCRIBED BY FISCHER & FRICHTEL IS NEITHER ACCURATE NOR COMMON.

Fischer & Frichtel argues that this Court should change the law governing deficiency actions so that a lender cannot obtain a "windfall" by reselling foreclosed property at a markup while collecting a deficiency from a borrower or guarantor, a situation that it describes as "commonplace in lending" (Subst. Br. 36). Before the Court adopts Fischer & Frichtel's proposed solution, it should first be confident that there is, in fact, a problem.

A. Lenders Suffer Significant Losses from Foreclosures.

Foreclosures produce enormous losses for lenders. One paper summarizes estimates of lenders' losses as 30% to 60% of the outstanding loan balance. *See* Karen M. Pence, *Foreclosing on Opportunity: State Laws and Mortgage Credit*, Board of

Governors of the Federal Reserve System (May 13, 2003), at 1.[1] Another paper reports average losses of nearly $59,000 per loan. *See* Amy Crews Cutts & Richard K. Green, *Innovative Servicing Technology: Smart Enough to Keep People in Their Houses?*, Freddie Mac Working Paper #04-03 (July 2004), at 5.[2] Although reliable data from the present economic downturn will not be available for some time, the length and severity of the current decline in real-estate prices may well produce losses that are greater than those observed in earlier research.

It is possible for a lender to "profit" on the resale of real estate in the sense that the lender resells for a gross price that is greater than the foreclosure-sale price, particularly if market prices rise rapidly as a recession ends.[3] That simple calculation, however, does not take into account the other expenses incurred by the lender during its ownership, including costs for repair and refurbishment, taxes, property insurance, maintenance

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[1] A copy of this paper is included in the Appendix, along with most of our other authorities that are not readily available in typical law libraries or legal databases.

[2] This paper is available at http://www.freddiemac.com/news/pdf/fmwp_0403_servicing.pdf.

[3] In the interest of simplicity, we use the term "profit" in this brief in the oversimplified sense in which Fischer & Frichtel uses it—that is, a lender's resale of collateral at a gross price that is higher than the lender's bid at a foreclosure sale. For the reasons explained in this brief, the difference in prices does not mean that such a transaction actually produces a profit for the lender.

costs, closing costs, and brokers' fees.[4] Moreover, even if a lender "profits" in this simplified sense, the borrower is adversely affected only if the lender also pursues and collects a deficiency claim. These circumstances occur extremely rarely.

B. Borrowers Usually Are Not Affected When Lenders "Profit" from Reselling Collateral.

For a number of reasons, lenders often do not pursue deficiency claims following foreclosures. First, many residential loans are insured by government programs or private mortgage insurance. Second, many commercial real-estate loans are non-recourse, so that no deficiency is available. Third, borrowers, and particularly homeowners, generally attempt in good faith to repay their debts. By the time a borrower defaults and the lender forecloses, the borrower is likely to have few non-exempt assets available to satisfy a deficiency judgment, so that it does not make sense for the lender to incur legal fees in pursuit of one. Fourth, the financial fortunes of a guarantor often are closely tied to the borrower's, and home loans rarely are guaranteed. Finally, after a home or commercial property has been foreclosed, there is little downside to the

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[4] The mere existence of a lower purchase price and a higher sale price also does not demonstrate that the former is below fair-market value. Because market prices for real estate fluctuate regularly, an owner that purchases property at an above-market price may still "profit" if the market drives the value of the property even higher before the owner sells.

borrower in commencing a Chapter 7 bankruptcy case, which ordinarily discharges any deficiency liability. *See* 11 U.S.C. §§ 524(a), 727(b). Because of these factors, lenders tend to pursue deficiency claims only in rare circumstances, such as fraud, strategic behavior by a borrower (such as a decision to default notwithstanding the ability to pay), or the existence of a guarantor with unrelated wealth.

Data indicate that the "windfall" scenario described by Fischer & Frichtel is not common (Subst. Br. 36). For example, one well-known study found that lenders that purchased at foreclosure sales resold at a "profit" in about half of the transactions examined. *See* Steven Wechsler, *Through the Looking Glass: Foreclosure by Sale as* De Facto *Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 Cornell L. Rev. 850, 880 (1985). The median profit, however, was only about $5,000, and the calculations did not account for carrying or disposition costs. *See id.* Third parties that purchased at foreclosure sales were far more likely to resell at a profit than were lenders, and their profits were larger. *See id.* at 883. For purposes of this case, the most important finding of Wechsler's study is that only one lender obtained a deficiency judgment against a borrower, and that judgment was not satisfied. *See id.* at 878. Thus, even if it could fairly be said that the lenders profited from their foreclosure purchases, they did not do so at the expense of their borrowers.

Another study found limited evidence of lenders' pursuing deficiency claims despite reselling collateral at a higher price. *See* Debra Pogrund Stark, *Facing the Facts: An Empirical Study of the Fairness and Efficiency of Foreclosures and a Proposal for Reform*, 30 U. Mich. J.L. Reform 639, 665 (1997). Stark's data showed that in 6% to 7%

of cases, the lender resold the property for more than its foreclosure price within one year of the sale and also brought a deficiency action against the borrower, although she did not report the outcome of deficiency litigation. *See id.* She also noted that a large percentage of lenders did not resell at all within one year of foreclosure. *See id.* & n.111. Using a figure of 10% of the loan balance as an estimate of carrying and resale costs reduced the number of "profitable" resales materially. *See id.* at 666-68. As in Wechsler's study, the data showed that third-party buyers were far more likely than lenders to resell property at a profit. *See id.* at 667-68. Stark concluded that "unconscionable results are rare" and that "it does not seem sensible to require cost-laden reforms." *Id.* at 668-69.

In contrast to this empirical evidence of foreclosures and resales, Fischer & Frichtel offers only an assertion that "this is commonplace in lending—to foreclose on property, purchase it for well below fair market value, and pursue the exaggerated deficiency from the borrower" (Subst. Br. 36). Fischer & Frichtel's support for its argument consists only of what it supposes to be First Bank's motivation for opposing a change in the law (*id.*). In fact, as explained in the following section of this brief, there are good reasons why the current state of the law better serves the interests of Missourians than would the revision proposed by Fischer & Frichtel. If this Court is to overrule decades-old precedents, it should do so on the basis of something more substantial than one party's unsupported attribution of improper motives to the other party.

II. A CHANGE IN THE LAW WILL ADVERSELY AFFECT ALL BORROWERS, INCLUDING THOSE THAT NEVER DEFAULT.

Existing law places the risk of a mismatch between foreclosure value and fair-market value on the particular borrower and lender involved in the transaction. If the Court were to overrule its precedents, the consequences would be felt across the spectrum of lending transactions. Research clearly demonstrates that restrictions on the availability of deficiency judgments, as well as increased costs and procedural burdens on lenders seeking to recover, adversely affect the availability and cost of credit. This Court should not lightly conclude that responsible borrowers should suffer because of defaulting borrowers' disputes over their liability.

A. Existing Law Appropriately Allocates the Risk that a Foreclosure Sale Yields Less than Fair-Market Value.

Under current law, if a foreclosure sale "is fairly conducted the amount bid must stand" as the credit to be applied to the borrower's obligation. *Drannek Realty Co. v. Nathan Frank, Inc.*, 139 S.W.2d 926, 928 (Mo. 1940). If the sale brings less than fair-market value, the borrower is responsible for the difference between the sale price and fair-market value (in addition to the difference between fair-market value and the loan balance). On the other hand, if the lender purchases the collateral at foreclosure for more than its fair-market value, the borrower receives credit for the full purchase price even if the lender recovers less upon resale of the property.[5] Neither of these outcomes is unfair or inappropriate.

In an ordinary lending situation, the borrower has the potential to earn returns that dwarf the maximum recovery of the lender. This is particularly true of a homebuilder such as Fischer & Frichtel, but other commercial and residential borrowers also have the opportunity to multiply their investments as a result of improvements to property and market trends. Indeed, the leverage provided by a lender permits a borrower to obtain a higher return on investment than a cash purchaser of real estate could obtain in the same transaction. By contrast, the lender's interest rate and any fees are negotiated at the outset of the relationship and do not increase with the value of the collateral or upward trends in the market.

In past cases, this Court has recognized this dynamic and concluded that the speculative nature of much real-estate investment counsels against judicial adjustment of foreclosure-sale prices. *See Lipscomb v. New York Life Ins. Co.*, 39 S.W. 465, 466 (Mo. 1897) (holding that "courts cannot and ought not to be made the instruments of speculation in the future values of property, even for the benefit of the unfortunate."); *Drannek*, 139 S.W.2d at 927 ("Had times been good this purchase may have proven a highly profitable venture.").

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[5] Neither Fischer & Frichtel nor the authors of the Restatement suggest that borrowers should have any additional liablity in this scenario.

In short, a borrower, with the use of a lender's funding, obtains the upside of an investment in real estate. The borrower also agrees, in advance, to be subject to a statutory non-judicial foreclosure process that permits property to be brought to market in a manner that bears little resemblance to a negotiated transaction between willing parties. Considering the realities of real-estate financing and the statutory overlay, it is reasonable for the law to place on borrowers the risk that a foreclosure sale will yield less than an appraiser's assessment of the property's fair-market value.

B. The Change in the Law Proposed by Fischer & Frichtel Will Affect Many Foreclosures and Many Borrowers.

As discussed above, lenders rarely "profit" from foreclosures and even less rarely pursue deficiency claims that are inflated—to use Fischer & Frichtel's characterization—by such "profits." That does not mean, however, that the effects of a change in the law will be limited to a narrow class of cases.

If the Restatement rule applied, disputes over deficiency claims, and particularly over the amount to be credited to the borrower's obligations after a foreclosure sale, likely would arise only when several circumstances coincided. First, the deficiency would need to be sufficiently large that it made sense for the lender to incur the cost of pursuing it. Second, the difference between the sale price and the borrower's understanding of the fair-market value would have to be sufficiently large that the borrower would prefer to retain attorneys rather than pay the deficiency as calculated by the lender. Third, both the lender and the borrower would need to believe that the borrower had the ability to pay the deficiency, or at least that the borrower would have a reasonable prospect of being able to pay in the future; otherwise, it would not make sense for either party to litigate. But the existence of these circumstances is not necessarily clear before a lender proceeds to foreclosure. For example, a lender has no ready mechanism to determine if a borrower has secreted or fraudulently transferred assets in an effort to appear judgment-proof, and a guarantor's financial condition often is not obvious.

A reasonable lender pursuing foreclosure under the Restatement rule thus would find it necessary to retain an appraiser, and possibly to seek legal advice, so that the lender had contemporaneous evidence that could be used in later litigation over a deficiency. The associated costs would then increase the loan balance, leading to one of two inefficient results. If the lender decided to pursue a deficiency claim and the borrower were able to pay it, the borrower would pay for the cost of the procedures that were, in theory, intended to protect its interests. If the lender did not pursue a deficiency, or if the borrower could not pay it, the expenses of the appraisal and any legal advice would only increase the lender's loss on the transaction.

There also is a third possibility. Because appraisers can and do disagree about property values, a lender would not necessarily avoid a dispute even if it purchased collateral at the price identified by its appraiser. The dueling-appraiser problem that is common in other types of litigation might well be magnified in the foreclosure context, because the lender's appraiser is not likely to have access to the interior of the property or, in the case of commercial real estate, reliable information about the income generated by the property. In addition, as the United States Supreme Court has recognized, "market value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is the very antithesis of forced-sale value." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994). The purely hypothetical nature of the assessment that the appraisers, and ultimately the factfinder, would be required to undertake would only increase the opportunity for, and the costs of, litigation.

C. Obstacles to Lenders' Recovery Produce Restrictions of Credit and Higher Costs for All Borrowers.

The costs and losses that lenders would bear under the change to the law requested by Fischer & Frichtel would impact all borrowers in Missouri, not merely those who default. A large body of scholarship demonstrates that substantive and procedural restrictions on lenders' ability to recover from defaulting borrowers adversely affect the availability and cost of credit for all borrowers. Examples including the following:

- Foreclosure moratorium laws passed during the Great Depression both reduced the supply of loans and increased interest rates. *See* David C. Wheelock, *Changing the Rules: State Mortgage Foreclosure Moratoria During the Great Depression*, 90 Fed. Res. Bank St. Louis Rev. 569, 580 (2008).
- In states that require lenders to pursue judicial foreclosure, loan sizes are 3% to 7% smaller than in states that permit non-judicial foreclosure. *See*

Karen M. Pence, *Foreclosing on Opportunity: State Laws and Mortgage Credit*, 88 Rev. Econ. & Stat. 177, 180 (2006).

- Requiring judicial foreclosure increases mortgage interest rates. *See* Mark Meador, *The Effects of Mortgage Laws on Home Mortgage Rates*, 34 J. Econ. & Bus. 143, 146 (1982).
- Lengthening the time required for foreclosure increases mortgage interest rates for both new and existing homes. *See* Meador at 146.
- Eliminating a lender's right to a deficiency also increases interest rates. *See* Meador at 146; *see also* Lawrence D. Jones, *Deficiency Judgments and the Exercise of the Default Option in Home Mortgage Loans*, 36 J.L. & Econ. 115, 127 (1993) (reporting that lenders required higher down payments in Alberta, where deficiency judgments were not available for mortgages secured by owner-occupied residences, than in neighboring British Columbia, where deficiencies were available).
- Larger homestead exemptions, which do not affect a mortgagee's right to recover from the mortgaged real estate, increase mortgage-approval rates and decrease interest rates. *See* Jeremy Berkowitz & Richard Hynes, *Bankruptcy Exemptions and the Market for Mortgage Loans*, 42 J.L. & Econ. 809, 826 (1999). But increased exemptions in personal property, which place assets beyond the reach of a lender's deficiency claim, are correlated with a reduction in the supply of mortgage credit, increased interest rates, and higher down-payment requirements. *See id.* at 824, 826.

There is no reason to believe that the restrictions proposed by Fischer & Frichtel in this case will produce a result different from the restrictions described in the research cited above. Faced with delay, expense, and risk in collecting from borrowers, and unable in most cases to collect from the insolvent borrowers who are directly responsible for that delay, expense, and risk, lenders will be forced to spread the cost across all borrowers in Missouri. Such a result will harm the large majority of borrowers who do not default and will benefit only those who do not repay their obligations. That outcome is not desirable in the abstract; it is even less appropriate in the present economic situation, in which increasing the availability of credit and business growth are imperative.

III. ANY MODIFICATION TO FORECLOSURE OR DEFICIENCY PROCESSES SHOULD BE ENACTED BY THE LEGISLATURE.

If the law is to be changed—and the Association suggests that it should not be—the modifications should be made by the General Assembly. That branch of government is institutionally equipped to investigate the effects of the proposed change and to address matters of policy. Moreover, because the General Assembly has enacted a non-judicial foreclosure system that differs significantly from the process used by willing buyers and sellers to transfer real estate and has since declined to adopt any of various proposals for reform, this Court should hesitate to act.

A. The Legislature Is Best Suited To Balance Competing Policy Considerations.

This case presents important policy issues. Fischer & Frichtel argues that borrowers in Missouri require greater protection from what it describes as "manufactured deficiency" claims (Subst. Br. 32). The evidence discussed above demonstrates that such results occur rarely, if ever, and that efforts to protect a few defaulting borrowers will adversely affect all borrowers. Fischer & Frichtel may quibble with the methodology or age of one or more of the studies cited above or suggest that the results in Missouri would, for some reason, differ. Alternatively, Fischer & Frichtel may acknowledge the economic realities of its proposal but argue that its impacts are nevertheless justified.

This Court is not institutionally suited to resolve these competing considerations. The Court cannot take testimony. Although this Court regularly reviews evidentiary records developed elsewhere, there is no evidence on this subject in the record, because the issue was not a matter of factual dispute in the trial court. The Court cannot hold hearings or otherwise consult members of the public for their views. It cannot inquire of economists or other academics how altering the law of deficiency judgments is likely to affect lenders, the supply of credit, or interest rates. The General Assembly can do all of these things. One of its roles in the government of the State is to protect the citizens, which includes modifying the law where it appears to be inequitable. At the same time, the Legislature must weigh the costs of proposed legislation against its consequences.

This Court faced a similar question in 1992, when litigants asked the Court to establish a cause of action for loss of consortium by the parents or children of the injured party. The Court concluded unanimously that the decision to create such a claim should be made by the Legislature and not by the judicial branch. *See Powell v. American Motors Corp.*, 834 S.W.2d 184, 185-86 (Mo. banc 1992). Among the reasons cited by the Court for its decision were the fact "that there are meritorious policy arguments on opposing sides of these issues" and the recognition that the decision to establish a cause of action "carries with it a vast array of ancillary issues as to how these separate claims will proceed." *Id.* at 189.

Faced with the arguments and evidence that are now before this Court, the General Assembly might well conclude that Fischer & Frichtel's efforts to protect defaulting borrowers are not justified in light of the implications for the availability and cost of credit for other borrowers. For the reasons described below, the Legislature's inaction following other reform proposals suggests that it may have reached that conclusion already. But in any event, the General Assembly should be given the opportunity to do its job. This Court should leave to the legislative branch the resolution of the policy issues presented by this case.

B. The Non-Judicial Foreclosure Statutes Are Not Designed To Produce Fair-Market Value.

Fischer & Frichtel seeks to make lenders responsible, directly or indirectly, for producing fair-market pricing from foreclosure sales. Although the Legislature has not chosen to act directly on the subject matter of this case—*i.e.*, the conduct of a deficiency action—the foreclosure statutes that it has enacted are not structured to produce sales at fair-market value. This Court should not require by judicial decision that a statutory system produce an outcome that the General Assembly could not have intended.

A foreclosure sale, by definition, involves an unwilling seller, which is inconsistent with fair-market value. *See* MAI 16.02 (2008 Revised) ("offered for sale by one willing but not obliged to sell it"). The General Assembly also has authorized trustees to sell encumbered real estate on 20 days' notice, *see* § 443.310, RSMo., notwithstanding Fischer & Frichtel's contention that no third-party borrower would be in a position to purchase in less than 45 days (Subst. Br. 30). Few buyers would elect to purchase real estate without title warranties or detailed opportunities to inspect the property, yet the Legislature has not required either in the foreclosure context. As the United States Supreme Court has recognized, property sold within the strictures of foreclosure "is simply *worth less*." *BFP*, 511 U.S. at 539. There is, therefore, no reason to believe that the General Assembly expected non-judicial foreclosure sales to yield fair-market value.

The same reasoning answers Fischer & Frichtel's contention that it is appropriate to incorporate a market-value concept in deficiency litigation because that is "the value the bank actually receive[s]" when it purchases at a foreclosure sale (Subst. Br. 36). In fact, the lender does not receive the fair-market value of property at foreclosure unless one or more third-party bidders behave irrationally. Instead, the lender receives the opportunity to recover the value of the property as it may be set by the market at a later date, which may be higher or lower than the foreclosure price or the price the property would fetch in a voluntary transaction on the foreclosure date. In the interim, the lender must incur expenses to carry, maintain, and resell the property that are not captured in an appraiser's analysis of fair-market value.

A reasonable lender that contemplates purchasing its collateral at a foreclosure sale must anticipate these expenses and assume that they will continue over what may be a lengthy period. At the same time, the lender ordinarily has limited information about the condition of the property, which may have deteriorated from neglect or intentional waste by its owner. The lender also is not likely to obtain any use or enjoyment of the property in the interim, unlike the sort of consumer or business owner that would factor into an appraiser's determination of fair-market value. Considering the structure of the legislatively-enacted foreclosure system and the uncertainty inherent in the processes of foreclosure and resale, it should not be surprising that either a lender's credit-bid or a third party's cash bid may be less than an appraiser's assessment of fair-market value on the date of foreclosure.

In sum, Fischer & Frichtel asks this Court to limit, by judicial decision, the rights of lenders on the theory that a non-judicial foreclosure ought to produce a sale at fair-market value. Because such an outcome would be inconsistent with the foreclosure system enacted by the Legislature, the Court should reject Fischer & Frichtel's request.

C. The General Assembly Has Declined To Enact Numerous Proposed Reforms in the Past.

Missouri statutes have authorized and regulated non-judicial foreclosures since 1885. *See Federal Nat'l Mortgage Ass'n v. Howlett*, 521 S.W.2d 428, 431 (Mo. banc

1975). From time to time since then, the General Assembly has modified the laws governing non-judicial foreclosures. *See, e.g.*, § 443.310, RSMo. (governing location of sale and notice period) (revised 1989); *id.* § 443.325 (requiring notice to various persons by registered or certified mail) (enacted 1973). Although this Court decided *Drannek* in 1940, the General Assembly has not seen fit to alter the rule set forth in that case or to adopt any of various prominent reform suggestions since that time. Among the proposals that the legislative branch has not enacted are the following:

- In 1982, Professor Nelson of the University of Missouri-Columbia School of Law reviewed various restrictions on deficiency judgments that had been enacted in other states. *See* Grant S. Nelson, *Deficiency Judgments after Real Estate Foreclosures in Missouri: Some Modest Proposals*, 47 Mo. L. Rev. 151 (1982). Although he concluded that Missouri should not adopt what he called "fair value legislation," he recommended that a deficiency be denied if the foreclosure price was grossly inadequate or if the lender had resold or agreed to resell the collateral for an amount greater than the loan balance. *See id.* at 160, 167.[6]

[6] Professor Nelson also remarked that "it seems inappropriate for Missouri courts to adopt a fair value restriction on deficiency judgments when most other jurisdictions that have adopted such a restriction have done so by legislation." *Id.* at 158.

- The National Conference of Commissioners on Uniform State Laws promulgated the Uniform Land Security Interest Act (ULSIA) in 1985.[7] That act proposed to relieve protected parties of liability for deficiency judgments on purchase-money security interests. *See* ULSIA § 511(b). The term "protected party" included an individual who borrowed against residential property that he or she occupied as a residence. *See* ULSIA § 113.
- The Restatement (Third) of Property: Mortgages was published by the American Law Institute in 1997. Professor Nelson served as co-reporter for this component of the Restatement, along with Professor Dale Whitman, the former dean of the law school at the University of Missouri-Columbia. *See* Restatement (Third) of Property: Mortgages at v.
- NCCUSL adopted the Uniform Nonjudicial Foreclosure Act (UNFA) in 2002. Professor Whitman, who had by then returned to the University of Missouri, was the reporter for the UNFA. *See* 14 U.L.A. 123. Professor William Henning, also of the University of Missouri, was the executive director of NCCUSL at the time. *See id.* Under the UNFA, a residential borrower is not liable for a deficiency unless the borrower does not act in

[7] Because ULSIA has been superseded, it is no longer included in Uniform Laws Annotated. Copies of the sections cited are included in the Appendix. A complete copy is available at http://www.law.upenn.edu/bll/archives/ulc/ulc_final.htm.

good faith. *See* UNFA § 607(b)(2). In all other situations, a borrower receives credit in a deficiency action for 90 percent of the fair-market value of the collateral at the time of the foreclosure sale. *See id.* § 608. Professors Nelson and Whitman advocated for the enactment of the UNFA in a law-review article in 2004. *See* Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 Duke L.J. 1399 (2004).

- Earlier this year, Representative Vicki Schneider introduced House Bill 721. That bill would have provided a borrower in a deficiency action with a credit if the lender resold real property with one year after purchasing it at a foreclosure sale. *See* H.B. 721, 96th Gen. Ass., 1st Reg. Sess. (Mo. 2011).

None of these proposals were enacted by the General Assembly.

This Court has recognized that legislative inaction does not always demonstrate legislative approval. *See Medicine Shoppe Int'l, Inc. v. Director of Revenue*, 156 S.W.3d 333, 334 (Mo. banc 2005). This case, however, involves more than simple inaction by the General Assembly. Fischer & Frichtel seeks to have the Court reverse its longstanding precedent and embrace a legal fiction—that a non-judicial foreclosure sale produces or should produce fair-market value—despite a comprehensive statutory scheme that is inconsistent with the concept of fair-market value. Considering the tension between Fischer & Frichtel's position and the General Assembly's existing work product, as well as the policy considerations involved, this Court should stay its hand and permit the Legislature to act if it believes that the change proposed by Fischer & Frichtel is necessary and justified.

CONCLUSION

For the foregoing reasons, this Court should decline Fischer & Frichtel's invitation to overrule its precedents and should affirm the trial court's grant of a new trial to First Bank.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the limitations contained in Rule 84.06(b)(1). The foregoing brief contains 4,985 words, exclusive of the cover, the certificate of service, this certificate, the signature block, the tables of contents and authorities, and the appendix.

/s/ Brian C. Walsh
Brian C. Walsh

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2011, I electronically filed this Brief of Amicus Curiae and the accompanying Appendix with the Clerk of the Court using the electronic-filing system. Pursuant to Rule 103.08, service on registered users will be accomplished by the electronic-filing system. I understand that at least one attorney of record for each party is a registered user.

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