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Rex J. Zedalis

CLAIMS IN OKLAHOMA BY A MORTGAGOR TO A CONDEMNATION AWARD: THE EFFECT OF FORECLOSURE

Rex J. Zedalis*

I. INTRODUCTION

Over the years, legal analyses have appeared in the literature about a mortgagor's ability to insist upon an interest in a condemnation award granted against property mortgaged by the indebted.[1] The analyses have been based upon, and have received support from, extensive case law maintaining essentially that any condemnation award stands in the place of mortgaged property considered "taken" by relevant government action. As such, an interest on the part of the mortgagor proves indubitable, though as the mortgagee/lender also possesses a parallel interest, repayment of the loan extended by the mortgagee is subject to satisfaction out of the proceeds of the condemnation award.[2]

In contradistinction to that ample literature, the matter on which I now propose to offer some preliminary thoughts, with particular focus on Oklahoma, is the rarely addressed issue of a mortgagor's interest in a condemnation award after the mortgage

* Professor of Law and Fellow, Sustainable Energy and Resources Law, University of Tulsa; Phyllis Hurley Frey Professor (2010-2013); J.S.D (1987) and W.B. Cutting Fellow (1980-81), Columbia University. Work on this article was supported by the University of Tulsa College of Law's Summer Stipend program.

1. For what is perhaps the leading survey of this area of the law, penned in the mid-1960s, *see generally* Harold Don Teague, *Condemnation of Mortgaged Property*, 44 TEX. L. REV. 1535 (1965-66). For other surveys, focusing heavily on a mortgagee's interest in a condemnation award, *see* Annotation, *Protection of Rights of Mortgagee in Eminent Domain Proceedings*, 58 A.L.R. 1534 (1927); Annotation, *Protection of Rights of Mortgagee in Eminent Domain Proceedings*, 110 A.L.R. 542 (1937); Annotation, *Right of Mortgagee in Award in Eminent Domain Proceedings*, 154 A.L.R. 1110 (1945). For a survey focusing on the significance for mortgagors and mortgagees of when the condemnation occurred, in relation to the foreclosure on the mortgage, *see* H.D. Warren, Annotation, *Rights in Respect of Proceeds of an Award in Eminent Domain Proceedings made after Mortgage Foreclosure Sale*, 170 A.L.R. 272 (1947).

2. For cases illustrative of the mortgagor and mortgagee's interests, *see* Owen County v. Morgan, 59 S.W.2d 18 (Ky. 1900) (noting the mortgagee has interest when total taking of property occurs); Collector of Taxes of City of Boston v. Revere Bldg. Inc., 177 N.E. 577 (Mass. 1931) (same proposition as preceding case); Snyder v. Chicago, S.F. & C. Ry. Co., 20 S.W. 885 (Mo. 1892) (noting mortgagor has interest when total taking of property occurs); State v. Holland, 367 S.W.2d 791 (Tenn. App. 1962) (same proposition as preceding case, but saying mortgagee has equitable claim for satisfaction of its loan balance); City of Chicago v. Salinger, 52 N.E.2d 184 (Ill. 1943) (mortgagee has interest when partial taking of property occurs); In re Dillman, 267 N.W. 623 (Mich. 1936) (same proposition as preceding, and applied in context of mortgagee having to foreclose on mortgagor and seek recovery from condemnation award as well); Swanson v. United States, 156 F.2d 442 (9th Cir. 1946) (same proposition as preceding case, but saying interest is only to extent of payments then presently due on loan); Aggs v. Shackelford County, 19 S.W. 1085 (Tex. 1892) (mortgagor has interest when partial taking of property occurs); Carson Redevelopment Agency v. Adam, 186 Cal. Rptr. 615 (Cal. Ct. App. 1982) (eminent domain award seen as substitute collateral for securing mortgagee's loan to mortgagor).

that secures the mortgagor's debt has actually been foreclosed, the subject property sold, and its sale confirmed.[3] Clearly, a situation of this sort would not arise in the event the nature of the government action resulting in a "taking" involved the entirety of the mortgaged property being placed in the hands of the government. For in such an instance, there would remain in the hands of a mortgagor no mortgaged property to be subjected to foreclosure and subsequent sale. Instead, the situation with which I am here concerned would involve a condemnation award granted in the context of either a "taking" by the government resulting, more commonly, from a physical invasion of only a part of a mortgaged piece of property, or resulting, much less commonly, from government regulatory measures considered to so extensively interfere with the mortgagor's interest in the subject property that compensation is constitutionally mandated.[4] In both situations, a mortgagor would continue to possess property subject to a mortgage upon which a foreclosure action, sale, and confirmation could be executed.

With focus on such narrow situations, the interest of the mortgagor remaining in the mortgaged property necessarily presents the question of whether what is transformed into an interest in a condemnation award survives a foreclosure sale and court confirmation, so as to allow the mortgagor to maintain a cause of action for proceeds of the award? Concern is not with whether the foreclosure sale and confirmation somehow end an interest on the part of a mortgagee/lender in a condemnation award, since its debt must be satisfied notwithstanding foreclosure.[5] Rather, concern is with the ability of the mortgagor, who has experienced a foreclosure and sale, to insist on an interest in an antecedent condemnation award representing property "taken" by earlier governmental physical or regulatory invasion. Presumably, such an interest could be said to remain in a sort of inchoate form, by virtue of the above referenced mortgagee/lender being able to get at the award in order to satisfy the debt owed by the mortgagor. That would especially seem to be so in the usual instance of the foreclosure sale resulting in a purchase of the subject property by a third-party buyer.

3. For some of the important Oklahoma cases addressing the general matter of condemnation awards and access to such awards by the mortgagor or the mortgagee, see Morse v. Bd. of Comm'rs of Marshall Cty., 38 P.2d 945 (Okla. 1934); Binding-Stevens Seed Co. v. Local Bldg. & Loan Ass'n, 45 P.2d 132 (Okla. 1935); Miller v. Durrill, 55 P.2d 953 (Okla. 1936); Muller v. McCann, 151 P. 621 (Okla. 1915); Gourley v. Williams, 149 P. 229 (Okla. 1915); Bruner v. Ft. Smith & W.R. Co., 127 P. 700 (Okla. 1912); Crowell v. Young, 64 S.W. 607 (Ct. App. Ind. T. 1901); Ferguson v. City of Hooker, 36 P.2d 18 (Okla. 1934); Diel v. Blanchard, 225 P. 962 (Okla. 1924); State ex rel. Dept. of Transp. v. Pendergraft, 919 P.2d 451 (Okla. Civ. App. 1996); City of Stilwell v. Ozarks Rural Elec. Coop., 870 F. Supp. 1025 (E.D. Okla. 1994).

4. For the distinction between physical invasions amounting to a taking, and regulatory measures that affect property in a manner that might constitute a taking, *see especially* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (Holmes, J., recognizing that "takings" can come through government regulation, as well as direct appropriative action); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (Scalia, J., recognizing the same distinction). It should be observed that both these cases, and others that draw the foregoing distinction, are not concerned, as we are in this essay, with takings in the context of foreclosures of mortgages on the affected property, and consequent claims being made to the taking awards by the mortgagor suffering the foreclosure.

5. Obviously, this statement would have to be qualified by the possibility of so-called anti-deficiency legislation limiting the extent of mortgagee recovery for a deficiency resulting from a foreclosure sale producing less than what the mortgagor has remaining as their outstanding mortgage balance.

But what if the sale at foreclosure is to the very governmental entity whose actions precipitated the "taking" suit and eventuated in the condemnation award? Is it possible such a purchaser could insist that, since the earlier condemnation award stands in the place of the property that was under mortgage, when the mortgage was foreclosed and sale made and confirmed to the government body whose actions precipitated the award, the government bought both the relevant property and the condemnation award itself? Clearly, the consequence of such would suggest that, perhaps, the award is now to be viewed as owned by the acting governmental body. Additionally, as such, the effect is, essentially, to extinguish the need to make payment on the award, for, in the final analysis, one never really owes money to oneself.[6]

The consequence of any such argument would be to affect both the mortgagor who has suffered foreclosure, and the mortgagee/lender who has exercised foreclosure in order to assert its rights to receive a return of monies loaned to the mortgagor to consummate the mortgagor's original purchase of the subject property. If purchase of a foreclosed property by the governmental entity, whose actions earlier resulted in a condemnation award, eventuates in that entity holding both the affected property and the condemnation award, it could be suggested that no interest remains on which either the mortgagor or the mortgagee/lender could rely in order to seek recourse against the award itself.

In thinking about any such situation, and a mortgagor's rights, the place to begin involves the terms and conditions of the usual mortgage or deed of trust instrument securing the loan to the mortgagor. By way of illustration, take what is said in the mortgage used in a recent Oklahoma trial court case,[7] and in both the Fannie Mae/ Freddie Mac Uniform Deed of Trust and their Uniform Mortgage.[8] Among other things, these will provide for certain obligations and duties, including the duty to

6. For a case in which this problem and suggestion of that sort of reasoning, *see* Smith v. State ex rel. Dept. of Transp., CV-11-47, Order (Dist. Ct. Delaware Cnty., OK, Filed Feb. 11, 2016) (on file with author) (indicating "ODOT maintains that its purchase of the property on March 26, 2013 included the $310,000.00 judgment and that it therefore did not have to pay the judgment . . . .") (hereinafter "Smith v. ODOT"). However, the *Restatement*, *infra* note 38, indicates in section 7.1, cmt. a., that the purchaser at foreclosure sale takes the property in exactly the same status it had prior to the existence of the mortgage, and as the condemnation award post-dated the mortgage, it is difficult to accept any argument that would allow a government entity responsible for a taking to suggest that its foreclosure purchase also resulted in a purchase of the condemnation award. *Restatement*, *infra* note 38, § 7.1 cmt. a. After all, if what the purchaser gets at foreclosure sale is the property in exactly the condition it was in at the time of the mortgage, since there had yet to be any taking and condemnation award at that time, how could the purchaser claim its acquisition gave it the condemnation award. For case law supporting the *Restatement*'s position, *see* Scharaga v. Schwartzberg, 149 A.D.2d 578 (N.Y. App. Div. 1989) (purchaser acquires title as it stood at the time of the mortgage). It should be noted that Oklahoma would appear to allow someone other than the property's owner at the time of the suffering of the taking—*e.g.*, purchaser at foreclosure—to claim the condemnation award in two circumstances: (1) the owner at taking was unaware of such because the taking was not apparent; (2) the owner at taking specifically transfers the right to recover to the foreclosure purchase. *See* Consolidated Gas Service Co. v. Tyler, 63 P.2d 88 (Okla. 1936); Rogers v. Okla. City, 120 P.2d 997 (Okla. 1942), (overruled in 1976) and Drabek v. City of Norman, 946 P.2d 658 (Okla. 1996). It should also be noted, however, in Smith v. ODOT neither of these exceptions to the basic rule applied. *See also* text accompanying *infra* notes 55-57 regarding the significance of the timing of the taking and who then owns the property.

7. *See Smith* v. ODOT, *supra* note 6 (actually, the two mortgages used in that case, both on file with the author, are typical of the mortgage instruments used at that time by the mortgagee, Arvest Bank).

8. For reference to the language of the relevant Fannie/Freddie Uniform security instruments, *see* GRANT S. NELSON, DALE A. WHITMAN, ANN M. BURKHARDT, R. WILSON FREYERMUTH, REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT, App. A at 1237, 1240-60 (8th ed. 2015).

make regular and timely payments on the promissory note that accompanies the mortgage or deed of trust. In the context of addressing other complex and sundry matters, the mortgage instrument or deed of trust typically contains language speaking to the possibility that the property to which the mortgage or deed of trust relates could, during the lifetime of the mortgage or deed of trust, suffer damage or physical harm for which an obligated casualty insurer may be forced to make payment. That same, or another companion provision in the mortgage or deed of trust, will typically contain as well additional language speaking to the matter of a governmental taking of the relevant property that results in a condemnation award.

Classic language on that score, found in paragraph eleven of both the Fannie Mae/Freddie Mac Uniform Deed of Trust and the Fannie Mae/Freddie Mac Uniform Mortgage, reads: "In the event of a total taking . . . of the Property . . . Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower."[9] The Uniform Deed of Trust defines "Miscellaneous Proceeds" to mean "any compensation, settlement, award of damages, or proceeds paid by any third party[,]" including for "condemnation or other taking of all or part of the Property."[10] Paragraph eleven also notes that

> In the event of a partial taking . . . in which the fair market value of the Property immediately before the partial taking . . . is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking . . . unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds . . . .[11]

And, when a partial taking involves property which immediately before the taking has a value less than the sums secured, the "Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due."[12] The only exception in the latter case would be if the Borrower and Lender other agree in writing.[13]

As an interesting comparison, but with an import replicating that of both the Uniform Mortgage and Uniform Deed of Trust, at least with regard to the interest of the mortgagee/lender in getting at the proceeds of a taking award, there is the language of a mortgage involved in an Oklahoma trial court case in which a mortgagor who suffered a taking and then had the affected property foreclosed upon and sold to the offending government entity, later sought to make a claim for recovery under the taking award.[14] Paragraph eighteen of the mortgage in that case, a paragraph entitled "Condemnation," obligates the mortgagor to provide the mortgagee/lender

9. *Id.* at 1249.
10. *Id.* at 1241.
11. *Id.* at 1249.
12. *Id.* at 1250.
13. *See* NELSON ET AL., *supra* note 8, at 1250.
14. *See* Smith v. ODOT, *supra* note 6.

with prompt notice of actions by public entities to take all or any part of the mortgaged property.[15] It then continues by further indicating the mortgagor authorizes mortgagee/lender intervention in any such action. And, most significantly, in the paragraph's third sentence it provides: "Mortgagor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the [mortgaged] Property."[16]

With the foregoing as contextual background, there would appear to be at least three reasons to believe that, once a mortgagor who has incurred a government taking of its mortgaged property finds the affected property foreclosed upon and sold to the government entity whose actions constituted the taking, any award of compensation for that governmental action no longer remains subject to a successful claim by the mortgagor. While each of the three reasons will be explored in some detail below, it must be noted that inability of the original mortgagor to be able to press a claim to the compensation award does not suggest that the government, in making a purchase of the affected property at the foreclosure sale buys the earlier award itself. Nor does the original mortgagor's ability to be able to press a claim to the compensation award after a foreclosure sale mean that the mortgagee/lender who financed the original purchase finds itself in the same position as the mortgagor. The mortgagee/lender extended credit for the purchase and remains entitled to have the obligation owed to it fully satisfied. Indeed, that very point would seem reflected in the language quoted above and appearing in the referenced mortgage and deed of trust instruments. Though not speaking to satisfaction of the mortgagee/lender's debt in the context of a foreclosure sale, in emphasizing the ability of the mortgagee/lender to get at taking awards, the language makes clear the priority position accorded the mortgagee/lender.

II. THE TERMS OF THE MORTGAGE OR DEED OF TRUST INSTRUMENT

The first of the three reasons to believe the original mortgagor who has suffered a foreclosure sale has no demonstrable legal interest in an earlier pre-foreclosure condemnation award in which the government entity responsible for the taking purchased at the sale itself, can arise from the terms of the original lending instrument binding upon the mortgagor.

As indicated above, the Fannie Mae/Freddie Mac Uniform Deed of Trust and Mortgage instruments, as well as the illustrative mortgage instrument utilized in the referenced Oklahoma case, contain language that tie the hands of mortgagors.[17] With regard to the former, both the Uniform Deed of Trust and the Uniform Mortgage make clear that a borrower who enters into such is to expect that, in the event of a total taking of the financed property, compensation awarded for such taking, goes to the lender to be applied to satisfying the borrowed amount, whether or not then

15. *Id.*
16. *See id.* at ¶ 18.
17. *See* NELSON ET AL., *supra* note 8; Smith v. ODOT, *supra* note 6.

due.[18] Only in the event that the amount of the award exceeds the amount due and owed by the borrower, is the borrower in a position of expecting that the residual will be forwarded in their direction.[19] And again, if the taking is partial, such as we are interested in here, because of the existence of foreclosure after a taking, the sums resulting from the condemnation are to be applied to satisfying the debt incurred by the borrower in originally purchasing the subject property.[20] Contractually, any borrower entering into a lending instrument in the form of the Uniform Deed of Trust or Mortgage binds themselves to having the proceeds of a condemnation award, concerning the property that is the subject of the lending instrument, applied to satisfying the debt owed to the lender.

Though much less comprehensive in its expressions on the matter of condemnation awards, the illustrative mortgage instrument employed in the cited Oklahoma trial court case has much the same thrust as the language in the Uniform Fannie Mae/Freddie Mac security instruments. Essentially, it calls for the mortgagee/lender to have a priority position regarding sums awarded in condemnation claims concerning mortgaged property.[21] Of some significance, the illustrative mortgage, unlike the Uniform Fannie and Freddie instruments, speaks not at all to the possibility that a condemnation award may exceed the outstanding loan balance on the mortgaged property. Rather than indicating, as those Uniform instruments do, that in such an instance the excess of the award over the loan balance is to be paid to the mortgagor on the original loan, the only thing noted in the language of the illustrative instrument is that, when one agrees to the instrument's terms, the borrower automatically and instantly assigns all claims to condemnation awards to the lender.[22] The implication, of course, is that the only mortgage party that has any interest in sums from a condemnation award is the lender. By the very terms of the third sentence of paragraph eighteen of the illustrative mortgage contract, the entering into of the mortgage contract itself transfers any potential interest of the mortgagor/borrower in a condemnation award to the lender alone.[23]

It is clear that neither the language of the illustrative mortgage, nor that of the Fannie and Freddie Uniform instruments speaks directly to the question of whether

18. *See* NELSON ET AL., *supra* note 8, at 1249.

19. *See id.*

20. *See id.*

21. *See* Smith v. ODOT, *supra* note 6., at ¶ 18.

22. *See id.*

23. *See id.* Again, it bears noting that the Fannie Mae/Freddie Mac Uniform instruments provide the mortgagor/borrower with at least some potential argument about having a continuing interest in property affected by a taking and then sold in a foreclosure sale. Specifically, that springs from the pertinent language of those Uniform instruments providing for any excess of a condemnation award over a mortgage balance to be paid to the mortgagor. Not only does no such language appear in the illustrative mortgage contract at issue in the referenced Oklahoma case, Smith v. ODOT, *supra* note 6, the language of that very contract seems emphatic that, once the contract has been consummated between the lender and the borrower, the effect is that of the mortgagor/borrower "assign[ing]" all interests in the proceeds of a condemnation award to the mortgagee/lender. *See* illustrative mortgage language in Smith v. ODOT, *supra* note 6. That could suggest that, unlike with the Fannie/Freddie instruments, the illustrative Oklahoma case mortgage is much clearer in indicating that no mortgagor/borrower interest remains in a condemnation award. All such interests have been assigned with entry into of the security instrument itself. The Fannie/Freddie instruments, on the other hand, stress the mortgagor's retention of an interest by virtue of their reference to how the excess of a condemnation award over the mortgage balance is to be handled.

a mortgagor who has suffered a partial taking and then had the mortgaged property foreclosed on and sold to the government entity responsible for the taking continues to have a sufficient interest in property to maintain a claim against the sum awarded as compensation for the taking itself. It is one thing to indicate that the entering into of a security instrument transfers to the mortgagee/lender the opportunity to receive compensation following a condemnation award. And it is another thing entirely to provide that a condemnation award granted on the heels of a government taking, and then followed by a foreclosure and sale of the subject property to the government entity executing the taking, renders the mortgagor/borrower without any remaining interest in the monies awarded for the condemnation. Likewise, the same can be said about providing that a taking of property secured by a Fannie or Freddie Uniform security instrument results in the deed of trust or mortgage lender having a superior claim to use of the condemnation award to satisfy the original loan, with any portion of that award being available to distribute to the borrower only in the event of the award exceeding the outstanding balance on the loan. Providing for such speaks not at all to the matter of whether a mortgagor retains any interest in an earlier condemnation award after suffering a foreclosure and sale of the remainder of the mortgaged property to the government entity whose acts resulted in the condemnation itself.

There are two points that can be made at this juncture, however. First, neither the language of the illustrative mortgage in the referenced Oklahoma case, or that of the Fannie and Freddie Uniform security instruments addresses our particular question of concern. Despite this, it would not seem entirely unreasonable to draw an inference of significance from the language they do contain. Specifically, there can be little doubt that the language of either of these instruments is designed to communicate that, once accepted by a mortgagor/borrower, the relationship of the mortgagor to the subject property and any condemnation award that stands in its place is changed. Whereas the usual state of things may find a mortgagor as the owner of a mortgaged property, as well as of any condemnation award representing the property, language such as that in the sample security instruments alters that usual state—advancing the claim of the mortgagee/lender to a position of superiority over the mortgagor. In view of such an altered situation, it would not distend reason too wildly to imagine that, if a mortgagee/lender is placed in a superior position to a mortgagor in relation to a condemnation award connected with a mortgaged property, then in the event the mortgagee has to subsequently foreclose and sell a property affected by an earlier condemnation award, perhaps the mortgagor's ability to assert a successful claim against the condemnation award is to be seen as even more inferior. After all, the mortgagor's position of subordination to the mortgagee/lender by virtue of the language in the security instrument regarding condemnation awards is magnified by the fact the mortgagor subsequently defaults on its security, resulting in foreclosure sale, and extinguishment of the mortgagor's interest in the subject property. With the language in the security instrument subordinating the mortgagor/borrower to the lender, and confirmed foreclosure sale ending all interest in the subject property, there would seem little upon which the original borrower could rest a claim to any such earlier condemnation award.

The second point worth mentioning has to do with the possible contention that, as a result of any foreclosure sale purchase of the sort just referenced being made to the very government entity whose actions had precipitated the earlier condemnation award, the government managed to acquire both the foreclosed property, as well as the condemnation award itself. The implication flowing from the acquisition of the condemnation award being that, with such now held by the government, nothing exists upon which the poor suffering mortgagor/borrower can rest its claim to proceeds of the earlier award. Having lost title to the mortgaged property in the foreclosure sale, it also lost the basis upon which to assert a continuing claim to the condemnation award standing in its place.

Yet there seems no particular reason to believe the only way to reach the conclusion a mortgagor so situated has no legitimate claim to an earlier condemnation award is to rest it on the notion that, at foreclosure, the acting government entity bought both the subject property and the earlier award itself. Were that not the case, what would prevent a government entity from acting in a fashion constituting a partial taking of a mortgagor's property, with the effect being that if, what remained in the mortgagor were property used for a business enterprise, it would be so imperiled by the taking as to prevent sufficient income activity necessary to meet full payment on the mortgage obligation itself? At such a juncture, the government entity precipitating the taking that led to complicating the business enterprise could then complete a foreclosure sale purchase at a price, when added to the sum of the earlier condemnation award, considerably below the original loan amount. The result effectively would be to reward the government for behavior considered sufficiently troublesome under the Constitution to require the payment of just compensation. Were the government to have purchased the property in a fair market, arms-length transaction, it would have settled at a price higher than ultimately paid. But by acting in a fashion that both constituted a partial taking—for which compensation was ordered—and also had the effect of stressing the on-going business enterprise conducted thereon and leading to an eventual foreclosure sale, it might acquire the property at a considerable reduction.

The alternative route for arriving at the conclusion that, once a foreclosure sale of property that has suffered a partial taking has been confirmed, there remains no ongoing basis for the original mortgagor/borrower to assert a claim to the earlier condemnation award, is found in the language of either the Uniform Fannie/Freddie or illustrative security instruments reviewed several paragraphs above. Though it is beyond question that such language does not directly and explicitly speak to the matter, it is crystal clear that such language provides that the contractual commitment of the mortgagor/borrower from the moment of execution of the security instruments is the assignment to the mortgagee/lender of the proceeds from a condemnation award. Nowhere in such instruments is reference made to the possibility that, in the event the purchaser at a subsequent foreclosure sale of the subject property winds-up being the government entity that precipitated the taking award, then the proceeds from such are to be considered as held by the government itself. And it is equally as clear that nowhere in the relevant language of such instruments is provision made for the original mortgagor/borrower having some kind of continuing claim to such proceeds in the event of experiencing a subsequent foreclosure sale.

All this makes sense, in light of the fact the mortgagor and the mortgagee are the original interested parties—interested in the property used as security, the repayment of the loan used to purchase the property, and any proceeds that might be seen as representing the property due to a condemnation or government taking. The mortgagee/lender should always expect to receive satisfaction on the loan it made, whether or not the subject property has been confiscated or taken by government action. If that comes from payment being made by the mortgagor/borrower, or from having a priority claim to the proceeds of a condemnation award, is immaterial. In the event payment comes via the priority claim approach, and arises by virtue of language such as that appearing in the Fannie or Freddie Uniform instrument, or the illustrative mortgage involved in the cited Oklahoma trial court case, it would seem the original mortgagor relinquishes, from the outset, all interest in sums flowing from condemnation awards.

III. MORTGAGOR'S INTEREST TO SUE EXTINGUISHED AFTER FORECLOSURE SALE

A complete paucity of case law exists both in Oklahoma and elsewhere on the matter of a mortgagor's ability to maintain a cause of action for sums paid in an earlier condemnation award once that mortgagor has suffered a foreclosure sale of the mortgaged property.[24] The Missouri appellate court's 2001 decision in *City of Brentwood v. Barron Holdings International, Ltd.*, a decision left standing by that state's Supreme Court refusal to grant rehearing, comes closest to that particular factual configuration and provides a second reason for believing that a mortgagor who has suffered a foreclosure sale has no claim to the proceeds of an earlier partial taking condemnation award.[25] The only caveat, however, is that *City of Brentwood* involved not a situation in which the mortgagor advanced a claim on its own behalf against the proceeds of an earlier condemnation award, but rather a claim that the court, which was then actually holding the proceeds of the condemnation award, distribute the award to the mortgagee/lender for application against the principal due on the mortgage obligating the mortgagor.[26]

Factually, it appears that the mortgagor, Barron Holdings, owed somewhere in the vicinity of $3 million on mortgaged property it then owned within the limits of the City of Brentwood.[27] The City then took eminent domain action against the property, resulting in the City being compelled, in accordance with the requirements of Missouri law, to pay into the registry of the court the sum of $1.24 million following a determination of value on November 22, 2000.[28] A month later, on December 21,

24. *See In re Dillman*, 267 N.W. 623 (Mich. 1936), for a case of a *mortgagee* seeking access to condemnation award in context of a foreclosure against a mortgagor.
25. 66 S.W. 3d 139 (Mo. Ct. App. 2001).
26. *Id.*
27. *See id.* at 142.
28. *See id.* at 141.

2000, at noon, the mortgagee/lender then sold the property at a foreclosure sale, with Barron Holdings neither being present at the sale, nor filing a court challenge thereto.[29]

On the exact same date as the foreclosure sale, at precisely thirty-seven minutes past noon, Barron Holdings, the mortgagor, made its request, *ex parte*, to the court to distribute the proceeds of the condemnation award to the mortgagee/lender for the benefit of the account owing by the mortgagor.[30] Barron's *ex parte* request was granted, but on January 9, 2001, in response to various motions of procedural objection filed by the mortgagee/lender on January 5, 2001, and a subsequent hearing associated therewith, the court reversed itself and set aside the December 21 *ex parte* distribution order.[31] The court's position, as expressed in a February 13, 2001, order and decree quoted in the Missouri appellate court's decision of interest here, was that, because the mortgagee/lender had foreclosed on Barron, it was the mortgagee, and not the mortgagor, that was deemed "superior both in title and in right to claim . . . distribution . . . ."[32]

On February 23, 2001, Barron filed an appeal.[33] The appellate court decision of interest here noted that the appeal could only be heard in the event the appellate court was vested with jurisdiction, which required an aggrieved party be maintaining the cause of action. In line with the earlier view expressed by the trial court, the decision on appeal went against the mortgagor/borrower on the basis that loss, through the foreclosure sale, of any claim to the property affected by the earlier condemnation award served to divest the mortgagor of the essential basis for insisting upon a continuing interest in that award. In the words of the appellate court's opinion: "When Bank [i.e., mortgagee/lender] foreclosed on the property and Barron allowed this to go unchallenged, Barron lost the opportunity to complain about the distribution."[34] In terms of the ability of the mortgagor to appeal the determination of the trial court not to accede to the mortgagor's request that it be permitted to direct that court to distribute the condemnation award to the mortgagee/lender in favor of the mortgagor's account, the effect differs not at all from the effect that would result from a situation in which a mortgagor sought to make a claim to have direct recourse to an earlier such award. That is to say, once a mortgagor has suffered a foreclosure sale of property earlier hit by a government taking resulting in a condemnation award, the Missouri appellate court seems to have held the mortgagor has lost any interest in the property sufficient to warrant the appropriateness of permitting it to maintain an action regarding that award.[35]

29. *See id.*
30. *City of Brentwood*, 66 S.W.3d at 141.
31. *See id.*
32. *See id.* at 142.
33. *See id.*
34. *Id.* at 143.
35. For that interpretation of the case by leading mortgage scholars, *see* GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 162, n.4 (5th ed., 2007) (discussing *City of Brentwood*, 66 S.W.3d 139 and noting, "the mortgagee completed a foreclosure against the mortgagor after the condemnation award was deposited into the court. The court held that the mortgagor had no standing to pursue an appeal of the condemnation proceeding, since its rights had been destroyed by the foreclosure.").

Again, our focus is only on the ability of a mortgagor who has earlier experienced a compensable taking to get at the proceeds associated with a condemnation determination, once the mortgagor has experienced a foreclosure sale. On that score, *City of Brentwood* can be read as suggesting that, whether concerned about the ability of a mortgagor so situated to maintain an appeal of a trial court determination denying the mortgagor to direct how the proceeds of the award are to be distributed, or concerned about the ability of a mortgagor to make a direct claim against the proceeds of such an award, once a foreclosure sale has been executed, the mortgagor loses the very connection essential to maintain such an action. Without straying beyond the narrow focus of this essay, it must nonetheless be acknowledged that, this does not mean such a mortgagor is somehow estopped from receiving the benefit of a distribution to a mortgagee/lender. Clearly, the mortgagee is entitled to receive compensation for its loan. It should not, however, be able to expect compensation beyond the amount of its security. Thus, not only must distributions made to a mortgagee be attributed or credited to the account of the mortgagor, to the extent condemnation award distributions exceed the outstanding mortgage balance, it would seem most appropriate for such excess to be forwarded by the mortgagee/lender to the mortgagor.

To reemphasize the principal point, however, a foreclosure sale, whether made to a third party, or to the very government entity involved in the earlier taking award, removes from the mortgagor the *sine qua non* essential for claiming any sums from the earlier award. It is the existence of the legal interest in the mortgaged property that is the subject of the taking by a government entity that provides the mortgagor with claim against the proceeds of the condemnation award. As long as the mortgagor retains that legal interest in the property, it retains an interest in sums awarded due to the taking. With a confirmation of a foreclosure sale, the mortgagor's interest is extinguished—just as is the mortgagor's equity of redemption.[36] Being then left without any remaining interest in the mortgaged property, nothing exists upon which to rest a claim by the mortgagor to either be permitted to direct how the proceeds of the condemnation award should be distributed—as the mortgagor asserted in *City of Brentwood*—or, implicitly, as well, that the mortgagor should have the proceeds of an earlier such award then held by the court paid into the hands of the mortgagor. In the absence of a legally recognized interest in the property, nothing is present upon which to rest any claim advanced by the mortgagor.

36. *See* NELSON ET AL., *supra* note 35, at 569 (noting the mortgagor's equity of redemption can be exercised "at any time until a *valid* foreclosure sale."); *see also*, Portland Mortg. Co. v. Creditors Protective Ass'n, 262 P.2d 918, 922 (Or. 1953) (indicating "equity of redemption is the right to redeem from the mortgage . . . until this right is barred by a decree of foreclosure") (quoting Sellwood v. Gray, 5 P. 198 (Or. 1884)). It is typically understood that the finality of a determination of the validity of a decree of foreclosure occurs upon the issuance by the court of an order of confirmation of a foreclosure sale. An illustration of this in Oklahoma appears in the language of the typical "Journal Entry of Judgment" of foreclosure, *see* Vol. 5A Vernon's Oklahoma Forms 2d Real Estate, 378, § 5.65 (2000) (it is further ordered, adjudged, and decreed that "from and after the said [foreclosure] sale . . . Defendants . . . are hereby forever barred and foreclosed of and from any and all . . . equity of redemption") and "Order Confirming Sheriff's Sale and Disbursing Sale Proceeds," *id.* 382, § 5.68 (final acknowledgment of the validity of the foreclosure sale).

It should not be thought that, just because the appellate court's decision in *City of Brentwood* dealt specifically with the absence of a mortgagor who has suffered a foreclosure sale to be able to successfully challenge a lower court determination denying that mortgagor's request to designate how monies from a condemnation award should be distributed, means the decision lacks relevance when it comes to the distinct matter of such a mortgagor being able to directly make a claim against such an award for its own immediate and personal benefit.[37] After all, if subsequent to suffering a foreclosure sale of property that had earlier been affected by a compensable government taking, a mortgagor then so situated is considered to lack sufficient legal interest in the property to entitle it to prosecute an appeal regarding such an unfavorable lower court decision, it would seem hard to imagine a mortgagor situated in precisely the same position being able to successfully assert a claim on its own part to the proceeds of the earlier condemnation award. Having insufficient interest in the subject property after foreclosure sale to permit maintaining an appeal of an unfavorable lower court determination on the matter of directing how a condemnation award should be distributed, a mortgagor so situated would seem to face an even more significant lack of interest when it comes to making a claim to have the proceeds of such an award paid immediately and directly to it. Surely, if one who has suffered a foreclosure sale cannot expect to have a court heed its request to pay such proceeds to the mortgagee/lender, how could it expect heed to be accorded its request to pay the proceeds directly to the mortgagor? With foreclosure sale confirmation extinguishing the mortgagor's interest in the subject property, lost are the authority to direct the court to pay such proceeds to the mortgagee/lender, appeal any lower court refusal to follow such a request from the mortgagor, or request that such proceeds be paid directly to the mortgagor itself.

IV. APPROACH CONSONANT WITH HOW CASUALTY INSURANCE AWARDS TREATED

The third reason for believing that a mortgagor who has suffered a foreclosure sale has no ability to successfully advance a claim against the proceeds of an earlier condemnation award has to do with the way in which mortgagor claims to casualty insurance awards have been treated. Essentially, the law of mortgages views proceeds from casualty insurance awards and those from condemnation determinations much the same. What is said regarding the former, would thus seem to offer insight regarding the latter. Concerning insurance awards and condemnation awards, both the *Restatement of the Law (Third) of Property: Mortgages*,[38] and the prominent 1995 Oklahoma Supreme Court case of *Wilson v. Glancy* prove instructive.[39]

With respect to the Restatement, sections 4.7 and 4.8 provide particular illumination. Both sections quite clearly indicate that casualty insurance awards and awards arising from eminent domain (or taking/condemnation) actions are treated in precisely the same manner. Section 4.7(a) notes that, "[u]nless a different disposition is

37. *See City of Brentwood v. Barron Holdings International, Ltd*., 66 S.W.3d 139 (Mo. Ct. App. 2001).

38. *Restatement of the Law (Third) of Property: Mortgages* (1997) (hereinafter "*Restatement*").

39. 913 P.2d 286 (Okla. 1995).

provided in the mortgage, the mortgagee has a right to the following funds . . . to the extent that the mortgagee's security has been impaired[,]" then referencing "(1) the proceeds paid by a casualty insurer due to the occurrence of an insured loss to the real estate . . . and (2) an award resulting from a taking of all or part of the real estate under power of eminent domain . . . .[40] From such language, section 4.7 leaves no doubt that, in the absence of some other disposition being contractually agreed to by the parties, it is the mortgagee—not the mortgagor—who has the priority claim, to the extent necessary to preserve the security for the loan it has given, against casualty insurance awards and taking awards. When this simple rule is supplemented with language in a security instrument, like the language reviewed above in the Uniform Fannie/Freddie instruments[41] or that in the mortgage in the illustrative Oklahoma case mentioned earlier,[42] the priority nature of a claim by a mortgagee/lender over that of a mortgagor/borrower would appear incontrovertible.

Section 4.8 of the Restatement Third is also informative. The section itself addresses the effect of foreclosure on a right to the proceeds of a casualty insurance policy or those of an eminent domain action.[43] Unfortunately, however, the insight it offers centers not on the rights of the mortgagor, which is what is of direct interest to us, but rather on those of the mortgagee/lender. Even taking this limitation into consideration, it is clear that the section treats proceeds from insurance awards and those from eminent domain actions in precisely the same way. Essentially, section 4.8 provides that, assuming a mortgagee has rights to either the proceeds of an insurance or eminent domain award pursuant to section 4.7, then foreclosure does not somehow impair the mortgagee's rights and transfer such to the mortgagor/borrower.[44]

More specifically, section 4.8 provides that when a mortgagee/lender has rights to casualty insurance or eminent domain proceeds, and a mortgagor/borrower has defaulted and is subject to foreclosure, the mortgagee has a choice of how to proceed: it can, if such an amount is available, recover from the insurance of eminent domain proceeds the full amount of the outstanding loan balance; or, it can foreclose on the subject property and, if such fails to satisfy the remaining loan obligation, recover the residual owed from the insurance or eminent domain proceeds.[45] The section further provides that, in the event the mortgagee decides to first move against the insurance or condemnation proceeds, the mortgagee may not access those funds beyond the amount of the remaining loan balance.[46] Likewise, if the mortgagee decides upon foreclosure first, subsequent access by the mortgagee to the proceeds of a casualty insurance policy or an eminent domain award shall not be in excess of what continues

40. *See Restatement*, *supra* note 38, at 286, § 4.7.
41. *See* text accompanying *supra* notes 15-21.
42. *See id.*
43. *See Restatement*, *supra* note 38, at 301, § 8.
44. The rights of the mortgagee extend to either getting at insurance or eminent domain proceeds to satisfy the full outstanding amount of the loan obligation, or foreclose on the property to satisfy such, and, if the latter is unsatisfactory, then proceed against the insurance or eminent domain award for the difference.
45. *See Restatement*, *supra* note 38, at 301, § 4.8(a).
46. *See id.*

to be owed by the mortgagor given the sales revenues generated by the foreclosure action.[47]

Corroborating this understanding of the Restatement's equivalent treatment of insurance and condemnation awards is the above referenced Oklahoma case of *Wilson v. Glancy*.[48] In that 1995 Oklahoma Supreme Court case, a second mortgage was the subject of the dispute. Following a default on the mortgage by the mortgagor/borrower, the second mortgagee commenced a foreclosure action. During that lengthy process, the mortgaged property suffered fire damage, with both the mortgagor and the second mortgagee disputing how the proceeds of the casualty insurance policy should be distributed. In time, the foreclosure action on the second mortgage was completed with the property being sold to the second mortgagee, who had bid the full debt amount of the second mortgagor. No mention was made, in the foreclosure action on the second mortgage, of either the fire damage or the casualty insurance policy.[49] Thereafter, the second mortgagee and the original mortgagor became embroiled in a dispute regarding the casualty insurance proceeds. Though the trial court, in the case, directed that the insurance company pay the proceeds to the mortgagor, both the appellate court and the Supreme Court agreed that it was the second mortgagee, and not the mortgagor who had the superior claim against the proceeds.[50]

While, once again, *Wilson* involves a claim to insurance proceeds, and not proceeds from a condemnation award, it does contain some interesting language, assuming one starts from the premise in the Restatement, that the two awards are entitled to equivalent treatment. The Supreme Court opinion states that the casualty insurance policy at issue in the case was the usual so-called union or standard insurance policy—that is to say, one that provides payments resulting from a claim shall be to both the mortgagor, who would typically contract for the policy, as well as the mortgagee (here, second mortgagee), who would seek to have its security protected. It then noted that, until a foreclosure sale and subsequent confirmation of such under Oklahoma law, the mortgagor/borrower continues to have an interest in the subject property in the form of a right of equitable redemption. And, as long as such a redemptive right remains extant, the mortgagor continues to have a right to casualty insurance proceeds. But once foreclosure occurs, a sheriff's sale is made, and the court issues an order confirming the sale, the effect is to divest the mortgagor/borrower, leaving an interest remaining only in the mortgagee/lender (here, the second mortgagee).

In the words of the Supreme Court's opinion, "inherent in the present case was the mortgagor's right to redeem the property which would have entitled the mortgagor to the insurance proceeds. The mortgagor may not be divested of title until the

47. *See id.*
48. 913 P.2d 286.
49. *See id.*
50. *See id.*

right to redeem is extinguished by foreclosure decree and foreclosure sale."[51] It further declares that "the right to redemption is not foreclosed until the sheriff's sale is confirmed."[52] And finally it observes that "[t]he rights of the mortgagor to redeem the property were divested in the present case when the sheriff's sale was confirmed. Therefore, the mortgagor is not entitled to any of the insurance proceeds."[53] As a consequence, the decision was to hold that the second mortgagee/lender, who had purchased the property at the foreclosure sale, was the party most appropriately entitled to the proceeds of the casualty insurance.

The *Wilson* case leaves little doubt that, once a foreclosure sale has been confirmed, any interest in the property that would entitle the mortgagor to make a claim against casualty insurance proceeds representing that property effectively terminates.[54] The fact the sale results in a purchase by the mortgagee/lender precipitating the foreclosure action strengthens that mortgagee's interest in insurance proceeds, simultaneously undercutting any interest on the part of the mortgagor. When the teachings of *Wilson* are taken in conjunction with the Restatement's indication of equivalency between the handling of insurance proceeds and proceeds from condemnation, ample reason exists to believe that, whenever the subject property has undergone a foreclosure, a mortgagor whose property is sold at foreclosure sale is not in an especially desirable position to make a claim to proceeds of an earlier condemnation award. If the linchpin for a claim by a mortgagor to casualty insurance proceeds is the presence of a redemptive right, confirmation of a foreclosure sale would thus eliminate any claim by a mortgagor to sums earlier awarded in satisfaction of a government taking. It also cannot be stressed strongly enough that the teaching of *Wilson* regarding casualty insurance proceeds comports perfectly with that of *City of Brentwood* regarding proceeds of a condemnation award.[55]

V. DISTINGUISHING *POPULAR MORTGAGE SERVICING, INC. V. AMES*

As has just been seen, *Wilson* holds it is the mortgagee (there, the second mortgagee), and not the mortgagor/borrower, who has the claim to casualty insurance proceeds flowing from a compensable hazard incurred by mortgaged property prior to that property being sold at a foreclosure sale. In a later 2009 Oklahoma Court of Civil Appeals decision in *Popular Mortgage Servicing, Inc. v. Ames*, a case involving quite similar facts, it was the mortgagor who was held to have a superior claim to proceeds of a casualty insurance policy.[56] That decision, however, is distinguishable on a couple of significant grounds, and it does not undercut any of the three reasons for holding foreclosure sale confirmation as cutting off a mortgagor's ability to directly claim access to proceeds of an earlier condemnation award.

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51. *Id.* at 290.
52. *Id.*
53. *Wilson*, 913 P.2d at 290.
54. *See id.*, 913 P.2d at 286, citing an Oklahoma statute, requiring any excess of casualty insurance proceeds over the outstanding balance on the foreclosed mortgage to be paid to the mortgagor/defendant suffering foreclosure.
55. *See* text accompanying *supra* notes 24-35.
56. 212 P.3d 495, 498 (Okla. Civ. App. 2009).

The facts in *Popular Mortgage* involved a default and commencement of foreclosure action against a couple of mortgagors. Subsequent to the foreclosure action beginning, the mortgaged property suffered damage as a result of a fire, with the casualty insurance company issuing a check covering the loss payable to the mortgagors and the mortgagee.[57] Roughly one month later the foreclosure process was completed, with the subject property being sold at foreclosure sale, and an order issued confirming the sheriff's sale to independent, third-party purchasers.[58] Thereafter, the mortgagors and the purchasers at the foreclosure sale fell into disagreement regarding access to the casualty insurance proceeds. The mortgagee, Popular Mortgage Servicing, then brought court action requesting a determination regarding the competing claims of the mortgagors and the foreclosure sale purchasers.[59] The trial court held in favor of the mortgagors, with the Court of Civil Appeals affirming that determination.

In understanding the appellate court decision in favor of the mortgagors in *Popular Mortgage*, and the Oklahoma Supreme Court decision in favor of the mortgagee in *Wilson*, two matters must be fully appreciated. Both serve to indicate why the former is distinguishable from the latter. First, the timing of the loss to the property triggering the casualty insurance policy occurred prior to the confirmation of the foreclosure sale. Second, the dispute over the funds in controversy in *Popular Mortgage* was not a dispute between the mortgagee/lender and the mortgagors/borrowers, as was the case in *Wilson*; rather, it was a dispute between the mortgagors and the third-party purchasers at the foreclosure sale.

With respect to the first of these—the timing of the loss in relation to the confirmation of foreclosure sale—there seems every reason to believe that the only parties positioned to be able to make a claim to the proceeds of a casualty insurance policy should be those that had an interest in the insured property at the time the loss to the property occurred. Clearly, that would include only the mortgagor, who owned the subject property and paid insurance premiums to insure it, and the mortgagee/lender, who loaned the mortgage money permitting the property to be purchased, and had an interest in assuring that its security for the repayment of the loan would not be compromised by loss or damage to the property. No interest in the property existed at all, at the time the property was damaged, in the independent, third-party foreclosure sale purchaser.[60] In view of that, in a dispute over the casualty insurance proceeds concerning a loss occurring prior to a foreclosure being confirmed, where a mortgagor is paired against a third-party foreclosure sale purchaser, the mortgagor is to be preferred.

The language of the appellate court in *Popular Mortgage* makes that very point. It notes that, "where the covered property suffers an insured loss after proceedings to

57. *See id.* at 496.
58. *See id.*
59. *See id.* at 496-97.
60. This is an idea reminiscent of what has already been stated *supra* note 6.

foreclose . . . have been commenced, but *before* confirmation of the sale . . . the insured mortgagor is entitled to payment of the insurance proceeds . . . ."[61] The court continues by noting that the mortgagor's claim is nonetheless "subject to the equitable claim of the secured mortgagee."[62] The key, in the opinion's estimation, is the fact the loss is suffered prior to the confirmation of the foreclosure sale. After all, not until such confirmation does any purchaser at foreclosure have an interest in the property that would support a argument that loss of or damage thereto would entitle it to advance a claim to casualty insurance or condemnation proceeds standing in the stead of the property itself.

With respect to the second point of distinction between *Popular Mortgage* and *Wilson*—the parties whom the dispute involved—there can be no question that, from the language of the decision, this is also significant. As the opinion provides: "The purchaser at sheriff's sale acquires an interest which, prior to confirmation, the purchaser may insure, but a sheriff's sale purchaser ordinarily has no claim to the proceeds of the mortgagor's insurance until the rights of both the mortgagor and mortgagee are fixed by confirmation of the sale."[63]

It makes sense to see a mortgagor and a mortgagee, prior to a confirmed foreclosure sale, as having an interest in the proceeds of a casualty insurance award, or a condemnation award. To the mortgagor, the proceeds of such an award stand in the place of the property on which a mortgage has been given. To the mortgagee, such proceeds represent substitute security for the repayment of the loan. While the ability of a mortgagor to claim an interest in such proceeds is affected by a foreclosure sale, as long as no such sale has been completed and confirmed, the mortgagor retains rights to the proceeds. However, in a situation where a controversy regarding such proceeds involves not the mortgagor and mortgagee, but rather the mortgagor and an independent, otherwise not involved, third-party purchaser at the foreclosure sale, the situation is radically altered.[64] Whereas in a mortgagor/mortgagee dispute, a mortgagor's ability to claim insurance or condemnation proceeds turns on whether confirmation of a foreclosure sale has extinguished the mortgagor's right of redemption, in the event of a dispute between a mortgagor and a third-party purchaser at foreclosure, the existence of a confirmed foreclosure sale becomes less important than precisely when the operative event giving rise to the relevant proceeds actually occurred.

The other thing worth calling attention to in connection with *Popular Mortgage* concerns the fact the appellate court opinion makes no mention of the earlier Oklahoma Supreme Court decision in *Wilson*. This stands to reason, given that the two factual features just addressed indicate its separation and distinguishability from the facts confronted by the appellate court in *Popular Mortgage*. The case most heavily

61. *Popular Mortgage*, 212 P.3d at 498 (emphasis added).
62. *Id.*
63. *Id.* at 498-99.
64. It is worth noting that in the *Wilson* case, the purchaser at the foreclosure sale was not an independent, third-party purchaser, but the mortgagee (albeit second mortgagee) whose price was the full value of the property. *See* 913 P.2d 286.

relied upon by that appellate court decision was *Willis v. Nowata Land and Cattle Co., Inc.*,[65] handed down by the Oklahoma Supreme Court half a dozen years prior to the same court's decision in *Wilson*. Without going into extensive detail regarding that earlier decision, suffice it to say that, as in *Wilson*, the casualty insurance proceeds dispute it involved pitted the mortgagor/borrower against the mortgagee/lender. What distinguishes that earliest of cases from even *Wilson* concerns the fact it dealt with fire damage to mortgaged property after confirmation of a foreclosure sale had been stayed. The effect of such stay, according to Justice Opala's opinion for the majority, was to leave intact the pre-existing mortgagor/mortgagee relationship, thus permitting the mortgagor to expect a credit against any insurance proceed payments, and the mortgagee to see all such payments as an indemnity for the property lost that represented security for the loan it had extended.[66]

VI. CONSIDERATIONS CAUSING CONCERN

As examined in the preceding pages, there seems good reason to believe that, after a confirmation of a foreclosure sale, a mortgagor is not in a position to make a claim against casualty insurance or condemnation proceeds for damage, loss, or taking occurring prior thereto. The language of many security instruments indicate such rights transfer to the mortgagee upon entering into the borrower/lender relationship. And while there is no case law clearly determining a mortgagor loses the right to successfully advance such a claim after confirmation of a foreclosure sale, at least one case indicates a mortgagor has an insufficient interest in a condemnation award to direct its disbursement after a foreclosure sale has been confirmed, and a variety of cases in Oklahoma indicate that the same kind of approach applies, though to a wide number of circumstances, when it comes to mortgagor claims against the proceeds of a casualty insurance award. Despite all of this, and corroboration received from sections 4.7 and 4.8 of the *Restatement*, any impartial legal scholar would have to acknowledge that there are a couple of reasons to be nervous about the accuracy of the conclusion that the law cuts off the mortgagor's rights after foreclosure confirmation.

One reason has to do with the possible perception that it is unfair to prevent a mortgagor, who after all through no fault of its own, but rather solely because of action of a government entity, has suffered a loss while title was still in the mortgagor's hands, from making a claim against the proceeds of a condemnation award, simply because the claim it advances is brought subsequent to the confirmation of a foreclosure sale. The basic problem with this argument, however, is that, even though the mortgagor might be prevented from directly advancing a claim for the sums payable due to condemnation, presumably the amount paid at foreclosure sale represents the property's value as reduced by the extent of the government taking, and, since the condemnation award will go to reducing the debt owed to the mortgagee/lender,

65. 789 P.2d 1282 (Okla. 1989).

66. *See id.* at 1285 ("Had the lenders pressed for a deficiency judgment, the borrower clearly would not have been barred from counterclaiming for surplus or any other credit."); *id.* at 1287 ("[I]nsurance proceeds under standard mortgage clause represent indemnity for loss or harm to lenders' own interest.") (emphasis omitted).

the mortgagor, nonetheless, indirectly benefits. In other words, though the mortgagor, following a foreclosure confirmation, cannot expect the court to permit it to advance a successful claim to the condemnation award, funds from the award collected by the mortgagee/lender are to be applied to reducing the extent of the financial obligation owed by the mortgagor on the original loan. For purposes of conservation of judicial resources, courts might be inclined to ignore the absence of interest on the part of the mortgagor following a foreclosure confirmation and, thus, allow a direct claim by the mortgagor.[67] Though this may seem a trifle, it would appear preferable, especially for purposes of maintaining a degree of consistency in the law, for the mortgagor to be denied direct access to proceeds from a condemnation award, forcing access to be gotten indirectly as a result of participation by the mortgagee/lender, and application of such proceeds to a reduction of the debt owed by the borrower to the lender.

In the event that the proceeds of a condemnation award have already been paid into the court by the government entity responsible for the taking, this would not present a difficulty. Already having control over those monies, the court could disburse it to the mortgagee/lender with instructions that it be credited against the outstanding loan balance of the mortgagor. Doing such would both remove those proceeds from access by the mortgagor and still eventuate in the mortgagor receiving the benefit of those same proceeds. On the other hand, in the event such proceeds are not under the court's physical control—such as where the purchaser at the foreclosure sale may be the very same government entity responsible for the taking determination that led to the condemnation award being ordered, and that entity, for whatever reason, has yet to transmit such proceeds for disbursement[68]—it may thus be imperative that the mortgagee/lender be involved in any proceedings concerning the access to or payment of the awarded sums. As has been argued throughout, once there has been confirmation of any foreclosure sale, the mortgagor/borrower lacks any interest sufficient to permit it to seek direct control over the earlier condemnation award.

Putting aside what has just been said, the other reason that might give rise to some general nervousness about the accuracy of viewing foreclosure sale confirmation as cutting off claims by a mortgagor to an earlier condemnation award concerns one of the specific illustrations utilized in the above referenced section 4.8 of the *Restatement*.[69] As will be recalled from the discussion of the *Popular Mortgage* decision in the preceding section of this essay,[70] occasional indications in the law that a mortgagor/borrower continues to have a legal right to condemnation or casualty insurance proceeds subsequent to a confirmed foreclosure sale of that mortgagor's interest

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67. This seems to be the result the court was attempting to reach in the Oklahoma case referenced for its illustrative mortgage. *See* Smith v ODOT, *supra* note 6 (opinion indicating that the mortgagee in the case, Arvest Bank, had already sought and obtained a deficiency judgment against the mortgagor since the foreclosure sale brought insufficient funds to satisfy the remaining outstanding mortgage balance).

68. This was the circumstance in Smith v. ODOT, *supra* note 6.

69. *See supra* notes 39-43 and accompanying text.

70. *See* text accompanying *supra* notes 51-61.

in the subject property prove nettlesome when it comes to suggestions that confirmation of such a sale extinguishes the mortgagor's right to access those proceeds. *Popular Mortgage*, however, is explicable for being not only a dispute between the mortgagor and an independent, third-party purchaser at the foreclosure sale, but also for it involving a claim by such a purchaser to a property in which it had absolutely no interest at the time the harm triggering the casualty insurance claim was suffered.[71]

Section 4.8 of the *Restatement*, particularly in its comment (c), contains an illustration 10 that, like *Popular Mortgage*, indicates a circumstance under which a mortgagor would be entitled to proceeds from a casualty insurance or condemnation award.[72] As a consequence, illustration 10 would appear to contradict the notion that has been advanced throughout this essay. It will be recalled that section 4.8 focuses on a mortgagee/lender getting at the proceeds of a casualty insurance policy or an eminent domain award in the context of a foreclosure. In that context, the full language of illustration 10 provides for a condemnation award of $80,000 and a mortgage balance of $70,000. It then continues by stating that, under such circumstances, the

> Mortgagee may recover $70,000 of the award. Upon receipt . . . the mortgage obligation is satisfied and Mortgagee has no further recourse against either the remainder of [the property serving as security] or Mortgagor. Absent a valid claim by a junior lienholder . . . the remainder of the *condemnation award is payable to Mortgagor*.[73]

The italicized language makes clear that circumstances do indeed exist in which the mortgagor/borrower can access the proceeds of a condemnation award in the context of having their loan foreclosed. This, however, should in no way be seen as somehow in conflict or inconsistent with the basic notion expressed throughout that, once a mortgagor has suffered a foreclosure sale, and it has been confirmed by the court, all interest on the part of the mortgagor that would otherwise entitle it to advance a direct claim against condemnation proceeds has been extinguished. Apart from the language of illustration 10 placing absolutely no significance on access sought prior to or following confirmation of a foreclosure sale, it is indubitable that it recognizes access only under a particular set of very limited circumstances. Specifically, the illustration requires that the proceeds earlier awarded in condemnation exceed the amount of the remaining mortgage obligation.

This makes total sense. If a mortgagor holds title to a piece of property that suffers a government taking, it should be the mortgagor that benefits from proceeds awarded for the government's action. The mortgagee/lender has every right to expect that the proceeds of the award are to be used to pay off the mortgage balance. Any excess beyond that balance, though, is to be expected not by the mortgagee, but by the mortgagor. To recognize, as illustration 10 does, that such excess is to be paid to the mortgagor, does not at all acknowledge that under every set of factual conditions the mortgagor has direct access to the proceeds of a condemnation award. It is consonant with the notion that a mortgagor cannot have direct access to the proceeds of

71. *See* 212 P.3d 495.

72. *See Restatement*, *supra* note 38, at 306, § 4.8(c), illustration 10.

73. *See id.* (emphasis added).

an earlier government taking after confirmation of a foreclosure sale to conclude that such a mortgagor can expect to receive the benefit of the amount by which such proceeds exceed the loan balance then owed. Where would be the fairness in permitting the mortgagee/lender to benefit from such excess, the government entity whose actions precipitated the taking claim to expect such excess to be refunded to it, or the purchaser at the foreclosure sale to secure a windfall by the acquisition of a property suffering a taking while the property was not then under its ownership?

VII. CONCLUSION

The usual posture in which a dispute between a mortgagor and mortgagee over proceeds of a condemnation award comes before the courts does not involve a foreclosure and sale of the affected property after the government taking triggering the award. Our attention here has been on just such a dispute, with the question addressed concerning whether a foreclosure sale and subsequent confirmation extinguishes the interest of the mortgagor to advance a successful claim to control the proceeds of the earlier condemnation award? A distinct paucity of case law exists on this narrow, technical matter. What little can be found strongly suggests, however, that the mortgagor retains a sufficient interest to advance a direct claim to the earlier award up until there has been a court confirmation of the foreclosure sale. The analogue between proceeds of a casualty insurance award, and those incident to a condemnation award, provide solid corroboration for this view. And while there may be admitted points of hesitancy regarding this position, ample reason is present to believe the position's basic soundness is not thereby undermined. In no event, however, should it be thought the original mortgagor/borrower is left without protection. Even though the mortgagor may have no ability to submit a direct claim to the condemnation award, the award is to be applied to reducing the balance of debt owed on the security instrument binding the original mortgagor/borrower.