

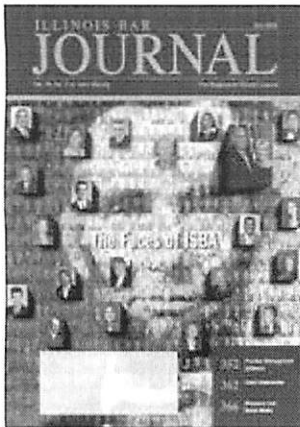


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Real Estate Law

The Foreclosure Explosion: How Illinois Courts Are Responding

By Joseph R. Fortunato and Steven B. Bashaw

Courts in the Chicago metro area are drowning in a sea of foreclosures. Here's a look at the pressure judges, lawyers, and litigants face and what they're doing in response.

Our recessionary economy continues to pressure homeowners, mortgage lenders, courts, and even attorneys as the numbers of properties in foreclosure increases. Even as the hoped-for glimmers of recovery appeared this year, case filings, judgments, sales, short sales, consent judgments, and confirmation of sales continue to mount.

Illinois courts, one of the institutions greatly affected by the foreclosure glut, have had to deal with the unprecedented volume. In her extensive report entitled "The Mortgage Foreclosure Explosion: One Court's Response," Dorothy Kirie Kinnaird, presiding judge of the Cook County Chancery Division, noted that the record-setting filings of the year 2000 (16,228) are dwarfed by the number of cases in 2009, estimated to be 53,184.

Judge Neal Cerne, the associate judge assigned to the residential mortgage foreclosure calendar in DuPage County, noted in remarks to the DuPage County Bar Association early this year that the 2,000 or so cases filed in 2006 had grown to just under 6,000 cases in 2009.

Counties in northern Illinois are the most affected, and the ways they have responded are interesting, if not unique.

Confronting the backlog county by county

"It takes three months to just get a hearing [on anything] before the uncontested [residential] fore-closure judge in McHenry County," one local practitioner noted, lamenting the delay that many pro se defendant/homeowners welcome but find mystifying. Like DuPage County, McHenry has split the foreclosure call between judges, assigning residential matters to one calendar and commercial/industrial/non-residential to another. Determining which courtroom to appear in can itself be puzzling.

Lake County's volume grew so much that at times last year the chancery courtroom of Judge Mitchell Hoffman was overflowing. Some days cases had to be moved to a larger room, where a second judge sat in a corner handling the overflow. Late last year and into 2010, the Lake County fore-closure response is to set first hearings at a field court in Park City. Contested matters are then transferred a few miles down the road to the main courthouse in Waukegan.

A number of counties have responded by setting specific days/times for cases filed by the "high volume" law firms representing plaintiffs in foreclo-sure cases. For example, if a Bank of America case is filed by a certain law firm in Will County, it will be heard only at 1:30 p.m. on Wednesdays.

In Cook County, while most foreclosure judges hear cases most days of the week, they hear contested and uncontested cases at different times, sometimes in different rooms. All cases have to be scheduled by a clerk on the 8th floor of the Daley Center.

No default motions will be scheduled on residential cases until after more than 60 days have elapsed from the date of filing. It is not unusual to hear counsel standing before the clerk say "it depends" when asked if the motion is contested or uncontested after learning that there is a three-month "first available date" for an uncontested case versus a 14-day wait for a contested matter before the same judge.

In DuPage, Will, and Kane County, the sheriff handles all foreclosure sales. The sheer number of cases in Kane County, which has many failed housing developments, caused five-month delays in scheduling sales at the end of last year (another situation defendant homeowners welcome but find mystifying).

In Cook, Will, and Kane Counties committees and task forces are considering assigning foreclo-sure cases to mediation programs. That's a reaction to the frequent response judges receive from homeowners in court that they are "working on loan modification programs" with their lender but can't get lenders to answer their queries.

Some counties, Kane and DuPage among them, have set special times for hearings on the confirmation of sales, which are presented by the sheriff. Generally the plaintiff's counsel doesn't appear at that hearing.

Deficiency judgments and stays of possession are often requested at these confirmation hearings, but how an overwhelmed court system can possibly handle these issues appropriately is a mystery. In Cook County, where there has been a history of abuse of surplus funds generated by foreclosure sales, all hearings on the distribution of those funds are heard by the presiding judge, and only after the confirmation of sale has become final after 30 days.

Courtesy copies

Not only litigants are affected by the overwhelming volume, of course. The judges hearing these matters require (appropriately, given the number of cases they hear each day) that "courtesy copies" be delivered to their chambers at least four business days prior to the hearing so they or their staff can review the pleadings in advance.

To deal with all the client affidavits and original documents, a volume firm had better have a fast copier, a law clerk with luggage on wheels, and an abundance of patience. Defendant's counsel (and pro se defendants who have taken a precious day off to come to court) all too often find that their case is not on the court's call despite the notice they received in the mail and have obsessed over for days. Moving this many cases with this much paper further stresses an already stressed-out system.

The courts are groaning under the sheer volume of cases and pages of pleadings put before them each day. The fears of those appearing before the bench in hopes of understanding what is happening to them are palpable. (Is it any wonder they're lured by Internet schemes referring to their "ancient land patent," urging them to make sure their lender has paid the filing fee in gold specie and can produce the note at trial?)

Perhaps this is simply what happens to people and financial institutions that engaged in "no doc lending," loan flipping, and 80-20 loans, but the impact is now everywhere, not just at the margins. A number of very bright judges and lawyers are trying to lessen the impact of these staggering numbers on the court system as we speak.

But the solution must go beyond simply splitting caseloads, two-month moratoriums, requiring courtesy copies, and volume scheduling. We need nothing less than a paradigm shift. Court ordered and supervised mediation of mortgage fore-closure cases may be the answer and it is in the planning stages in Cook County.

Lisle attorneys Joseph R. Fortunato and Steven B. Bashaw are past chairs of the ISBA Real Estate Section Council and current directors of the Illinois Real Estate Lawyers Association.

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