



The Supreme Court Mortgage Foreclosure Committee Recommendations

As caseloads threaten to overwhelm the system, the committee makes specific recommendations for expediting and otherwise improving the foreclosure process.

As 2011 ended and 2012 began, the Illinois Supreme Court appointed a foreclosure committee made up of practicing attorneys, retired and active judges, and others with a stake in the foreclosure process. (For more about the foreclosure crisis, see last month's IBJ cover story.) The committee is charged with

investigating the procedures currently used throughout Illinois in mortgage foreclosure proceedings; studying relevant Supreme Court Rules and local rules that directly or indirectly affect such proceedings; analyzing the procedures adopted in other states in response to the unprecedented number of foreclosure filings nationwide; reviewing legislative proposals pending in the Illinois General Assembly that may impact the present statutory scheme for mortgage foreclosures; and ultimately recommending to this Court mortgage foreclosure rules for statewide.

The committee proposed some procedural changes to the foreclosure process, and conducted a public hearing on these recommendations on

April 27, 2012 (a second hearing on related issues was held June 8). The recommendations, plus a couple of ideas about which the committee seeks input, are as follows.

1. The Committee recommends that the Supreme Court adopt a rule establishing a model foreclosure prove up affidavit.

2. The Committee seeks input on whether plaintiffs be required [sic]

to attach a payment history to prove up affidavits.

3. The Committee recommends that the Supreme Court adopt a rule requiring that a copy of each assignment of the mortgage being foreclosed be attached to the foreclosure complaint, and that a copy of the note, as it currently exists, including all endorsements and allonges, is attached to the foreclosure complaint.

4. The Committee recommends that the Supreme Court adopt a rule requiring that all foreclosure sales be held within forty-five (45) days of the expiration of

In fact, most trial courts in the high volume circuits surrounding Cook County follow most of these recommendations already.

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the redemption period unless extended by direction of the plaintiff or by court order.

5. The Committee recommends that the Supreme Court adopt a rule requiring that upon entry of a judgment of foreclosure and sale, plaintiff be required to send notice to all defendants, including defendants in default, of the foreclosure sale date, time and location.

6. The Committee recommends that the Supreme Court adopt a rule requiring court clerks to send a notice to all defaulted borrowers. The notice should advise defaulted borrowers that: (1) the court has entered a default order of foreclosure and sale; (2) the borrower may file a motion to vacate that order as soon as possible; (3) the borrower may redeem the property from foreclosure by paying the total amount due plus fees and costs, by a specific calendar day; (4) referring the borrower to local resources for legal assistance in preparing a motion to vacate; and (5) advising the borrower to act immediately. The court clerk should be required to send the notice of default to the property address and to any secondary address at which the borrower was served with process and to place proof of this service in the court file.

7. The Committee recommends that the Supreme Court adopt a rule, or that the Illinois Code of Civil Procedure be amended to require that a special representative be appointed to stand in the place of deceased mortgagors in cases where no estate has been opened.

8. The Committee recommends that the Supreme Court adopt a rule that in instances where the sale of a foreclosed property generates a surplus over the amount owed to lien holders as set forth in the judgment, the plaintiffs' attorney send a special notice to the mortgagors advising them of the surplus and enclosing a simple form to file with the court clerk to claim the surplus, and that any person claiming a surplus be required to appear in open court to be examined under oath and identified on the record as being the same person as the one authorized to claim the surplus.

9. The Committee seeks input on whether the Supreme Court adopt a rule requiring plaintiffs' attorneys to file a separate affidavit along with the prove up affidavit stating that they had spoken to a specifically-named person who worked for their client and verified, through that conversation, that the figures were correct and the foreclosure was justified.¹

Reaction to the recommendations

Recommendation 1 – the proposed adoption of a model foreclosure prove-up affidavit – might be expected to be

the most controversial, because it appears to establish a “safe-harbor” and remove the strict application of Supreme Court Rule 191 (evidentiary affidavits). In fact, though, it was actually fairly well received.

Though some defendant's attorneys argue that the current prove-up requirements (foundation, personal knowledge, attaching the business records) are necessary despite the volume of cases, there is clear support for streamlining the system.

Recommendation 3 – that assignments and fully endorsed notes be attached to the complaint – is designed to make the system more transparent and generally has been lauded.

Recommendation 4 – the “45 day sale” limit – resulted in a renewed call from plaintiffs that selling officers be appointed to help lower the sale backlog in counties now only appointing the sheriff. This is perceived as a way to expedite sales and is even embraced by some defense lawyers as a way to bring certainty to the foreclosure process, though it may mean reduced occupancy periods for their clients.

Everyone seems to agree that requiring notices to be issued by the clerk, protecting the borrower's right to recover a surplus, and requiring appointment of a special representative for deceased mortgagor in accord with *ABN AMRO Mortgage Group, Inc. vs. McGahan, et al*, 231 Ill.2d 577, 910 N.E.2d 1126 (2010) (Recommendations 6 and 7) are steps worth taking. Recommendation 8 – the last recommendation, which is that the plaintiff's attorney specify that a specific person confirms the figures on behalf of the plaintiff – was objected to by some in the plaintiffs' bar as duplicative of protection accorded by Supreme Court Rule 137, but the “robo-signing” controversy may overcome that resistance.

In fact, most trial courts in the high volume circuits surrounding Cook County follow most of these recommendations already, and only when the sheer volume of cases overwhelms the courts do the safeguards fail. There are days when the trial courts have too many cases to carefully inspect the affidavits and receive the original mortgage and note into evidence.

Does this mean that the Code of Civil Procedure should be amended to create safe harbors and exceptions to help deal with the volume? We all hope the day comes when the economy revives

and the number of foreclosure cases declines. If and when that happens, we can consider whether we still need the process put into place to take through this dark time. The best way to address this “situational incompetence” is to have a committed court system, seasoned trial judges, and capable lawyers who provide good counsel to their neighbors. ■

1. The recommendations are on the Illinois Supreme Court website at http://www.state.il.us/court/SupremeCourt/Public_Hearings/Mortgage_Foreclosure/Practice_Procedures/2012/042712_Proposals.pdf.

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