

April 10, 2012

Supreme Court Mortgage Foreclosure Committee  
c/o The Administrative Office of the Illinois Courts  
3101 Old Jacksonville Road  
Springfield, Illinois 62704

To Whom It May Concern:

We are enclosing herewith our comment to the Supreme Court Mortgage Foreclosure Committee recommendation for improving loss mitigation. We are also requesting the opportunity to present these views before the Committee at its hearing on June 8, 2012.

With increasing frequency "short sales" are the preferred loss mitigation strategy for banks and borrowers. Innocent homeowners fall prey to unauthorized practitioners in foreclosure proceedings particularly companies offering short sale or exit strategies. These practices have expanded exponentially with the foreclosure crisis. The public must be protected from these practices.

Thank you in advance for your consideration.

Very truly yours,



Peter J. Birnbaum  
President  
Attorneys' Title Guaranty Fund, Inc.  
One South Wacker Drive – 24<sup>th</sup> Floor  
Chicago, IL 60606  
pjb@atgf.com



John G. O'Brien  
Chairman of the Board  
Illinois Real Estate Lawyers Association  
2340 South Arlington Heights Road  
Arlington Heights, IL 60005  
jobattny@aol.com

PJB/JOB:sw  
Enclosure

**COMMENT  
TO  
THE ILLINOIS SUPREME COURT  
SPECIAL COMMITTEE  
ON FORECLOSURES**

**Respectfully Submitted,**

**April 10, 2012**

**Peter J. Birnbaum  
President  
Attorneys' Title Guaranty Fund, Inc.  
One South Wacker Drive  
24<sup>th</sup> Floor  
Chicago, IL 60606**

**John G. O'Brien  
Chairman of the Board  
Illinois Real Estate Lawyers Assoc.  
2340 S. Arlington Heights Road  
Suite 400  
Arlington Heights, IL 60005**

We applaud Justice Mary Jane Theis for asking Chief Justice Thomas Kilbride to form a Special Committee to help families cope with financial and emotional burdens in foreclosure proceedings.

In announcing the formation of the committee, Justice Kilbride stated that, "The Supreme Court has a keen interest in programs with a strong promise of achieving timely and lasting resolution to tough problems and we believe this select committee can come up with specific solutions to help families cope with the emotional and financial burden of those facing such a devastating loss."

There can be no doubt that the mortgage foreclosure crisis has created market conditions not seen since the Great Depression. Today the courts hearing foreclosure cases in Illinois are overwhelmed with their caseload. In 2010, it was estimated that it would take approximately 500 days from filing to judgment in a foreclosure proceeding in Cook County, Illinois.

The process came to a standstill last October when it was discovered that a large number of cases were filed without properly researched or attested affidavits. This "robo signing" scandal spurred investigation by attorneys general in all fifty states and has created a backlog of cases that, when files are released, will undoubtedly overwhelm the already over-burdened courts.

The *New York Times* reported in its June 19, 2011 edition that it would take as long as 10 years for the Illinois courts (the fifth highest foreclosure volume state in the U. S.) to clear its backlog of cases.

However, the cases that are now in the Circuit Court belie an even deeper problem that has emerged: due to the overwhelming volume of cases, Fannie Mae, Freddie Mac, and others have pressed lenders to seek alternative solutions to foreclosure proceedings by utilizing short sales and deeds in lieu of foreclosure. The volume of short sales has tripled in the past two years alone and will likely grow exponentially over the next few years.

The number of borrowers who owe more on their mortgage than their property is worth is presently estimated at 21 million nationwide. Those "underwater" borrowers often do not have the assets to satisfy their obligations, and those who must sell increasingly turn to short sales as a solution. Short sales are complex transactions fraught with pitfalls for the uninformed and unrepresented. And with these circumstances has emerged a cottage industry of service providers who seek to push these transactions through the closing process without regard to the best interests of the consumer.

In 1966, the Illinois Supreme Court in **Chicago Bar Ass'n v. Quinlan & Tyson, Inc.**, 34 Ill. 2d 116, 214 N.E.2d 771 (1966), held that the transfer of real property is an expensive and complex transaction that requires the skill of a licensed Illinois lawyer.

Since that time, Illinois has embraced the goal of giving consumers access to legal counsel for what is assuredly the largest transaction of their lives. A Memorandum detailing the Illinois Law on this topic is attached as Exhibit 1.

But the short sale process could undermine those protections entirely.

National banks and Realtors® often partner with or own service companies that conduct short sales on a mill-like basis.

Illinois consumers are increasingly confronted with the service providers telling lawyers (who are already representing consumers in the transaction and who have already spent months working on their clients' behalf) that the lawyer is unnecessary; that they will not be paid; and, that they require an out-of state short sale coordinator to handle "documentation and negotiation".

This conduct puts the consumer at considerable risk from a credit and personal liability standpoint. To deny these consumers access to legal counsel for these transactions will have the effect of significantly damaging Illinois consumers. The short sale negotiators, retained by the lender or Realtor®, have no duty to the consumers that are selling short. These consumers need an advocate to ensure that they will not be saddled with a lifetime of obligations dealing with a deficiency created by the short sale, and that they are relieved of all obligations after the short sale is complete. To allow this practice to continue will imperil those already struggling to keep a roof over their head or purchase a new home they can afford and maintain. Illinois consumers deserve to be represented by competent legal counsel when trying to salvage an already dire financial situation. To leave this process in the hands of those hired by the lender or Realtor® and with interests opposed to those of the consumer, will wreak havoc on the homeowners of Illinois.

We urge the Special Committee to conclude that it is improper for a non-lawyer to:

1. Evaluate or give an opinion as to the legal significance of the documents submitted by the property owner to the lender;
2. Evaluate or give an opinion on documents from the lender to the homeowner relating to short sale approval or deficiency;
3. Provide advice regarding the legal ramifications of a short sale, deed in lieu, bankruptcy, foreclosure, or other legal recourse.

We urge the Committee to take a strong position in opposition to these providers and to require the use of counsel in these transactions, much like it did in the Quinlan & Tyson decision. Short sales are evolving as the predominant form of alternative dispute resolution and consumers deserve the same protection in these transactions as those afforded by the Courts in foreclosure mediation.

Sincerely,



Peter J. Birnbaum



John G. O'Brien

**To: The Illinois Supreme Court Committee on Mortgage Foreclosures**

**From: Karen G. Courtney, Staff Attorney, Attorneys' Title Guaranty Fund, Inc.**

**HOMEOWNERS NEED THE ADVICE OF INDEPENDENT COUNSEL  
WHEN SHORT SELLING REAL ESTATE**

**Introduction**

As mortgage delinquencies continue to rise and property values fall, many distressed homeowners find themselves in the difficult position of being "underwater," that is, owning a home with mortgage debt that exceeds the value of the home. In Illinois, distressed homeowners regularly seek the guidance and counsel of attorneys to help them navigate the legal and financial implications of the various solutions that are available to resolve distressed property issues. One common and often desirable option is a "short sale." A short sale allows an underwater seller to transfer property for a price that is less than the amount needed to pay all liens, encumbrances (including mortgages and property taxes) and closing costs (including the transfer taxes, brokers' commission, title insurance fees, and attorneys' fees and costs). The short sale process is extremely complicated, can have long lasting legal and financial implications and involves the coordination of many parties (*e.g.*, servicers, investors, subordinate lien holders, and mortgage insurance companies).

Homeowners and short sale lenders benefit from an attorney's involvement in a short sale transaction. When an attorney is involved in the short sale approval process, homeowners are provided with critical legal advice and assistance on a real estate transaction that will have legal and financial implications that last far beyond the conclusion of the short sale. When an attorney is engaged in the short sale approval process, the transaction is less likely to involve fraud schemes, such as those perpetrated by short sale flippers, mortgage rescue scam companies, and unscrupulous third party negotiators. Homeowners and short sale lenders benefit from having counsel at the table.

Today, many lenders, servicers and investors, including The Federal Home Mortgage Loan Corporation (FHLMC or *Freddie Mac*), refuse to allow for the payment of attorneys' fees in Illinois short sale transactions. They argue that it is the responsibility of the Illinois real estate broker to negotiate the

terms of the short sale on behalf of the seller and that the real estate commission provides the compensation for those services. This argument is against public policy, fails to recognize the local practices in Illinois and directly contradicts Illinois law regarding the scope of the real estate broker's role in the negotiation of real estate transactions. Many lenders, servicers and investors also argue that Illinois is not an "attorney state" and that homeowners should be able to negotiate their own short sales or that the real estate broker is best suited to handle the intricacies of the short sale process. Another common justification given by servicers for refusing to pay attorneys' fees is that the lender and/or investor has not listed attorneys' fees as an approved fee in its short sale approval guidelines. As a result, attorneys frequently spend months working on a complex short sale transaction, only to be told at the eleventh hour—after the services have been rendered—that their services were unnecessary and that they will not be paid. Consequently, a cottage industry of third party short sale negotiation companies has emerged, and these negotiators often do not possess the requisite skill, knowledge and training necessary to negotiate a short sale and do not have the duty that arises from the attorney-client relationship. These third party negotiators push transactions through the short sale approval and closing process without regard to the best interest of the homeowner. Real estate agents are also often tasked with negotiating the short sale in order to get the deal closed. Without a competent legal advocate on their side during the short sale negotiation process, homeowners are often harmed by the activities of untrained and/or unscrupulous real estate agents and/or third party negotiators. The unrepresented homeowner is unaware of the legal and financial consequences of the short sale approval issued by the short sale lender.

This brief will show that (1) short sale negotiation constitutes the practice of law in Illinois because only attorneys have the necessary skill, knowledge and training needed to negotiate short sales for the benefit of homeowners and lenders, (2) real estate agents and third party negotiators should be prohibited from engaging in short sale negotiation activities that reach beyond the mere supplying of factual data and administrative and clerical tasks and (3) the Illinois Supreme Court, by and through its Special Supreme Court Committee on Mortgage Foreclosures, and the Illinois Attorney Registration and

Disciplinary Commission are vested with authority to take action to preserve the role of the attorney in short sale transactions in Illinois, for the benefit and protection of homeowners.

**I. Short sale negotiation constitutes the practice of law in Illinois because only attorneys possess the requisite skill, knowledge and training needed to negotiate short sales for the benefit of homeowners and lenders.**

The law in Illinois is well settled regarding what real-estate-related activities or services constitute the practice of law in real estate transactions. In *People ex rel. Illinois State Bar Ass'n et al. v. Schafer*, 404 Ill. 45, 87 N.E.2d 773 (1949), a licensed real-estate broker was held in contempt of court for preparing contracts, deeds, notes and mortgages for which he received a broker's commission. *See id.* The broker contended that the preparation of such instruments was proper because it was done in connection with his real estate business and that those acts are more or less mechanical or routine, requiring no legal knowledge or skill. *See id.* at 53. The court disagreed and stated as follows:

Many titles are complex and complicated. They have grown more so from time to time and will not likely become less complex in the future. Those who prepare instruments which affect titles to real estate have many points to consider. A transaction which at first seems simple may, upon investigation, be found to be quite involved. One who merely fills in certain blanks when other pertinent information should be elicited and considered is rendering little service but is acting in a manner calculated to produce trouble.

*Id.* at 53-54.

In *Chicago Bar Association et al. v. Quinlan and Tyson, Inc.*, 34 Ill.2d 116; 214 N.E.2d 771 (1966), the court stated that "the real estate broker may properly fill in usual form of earnest money contract or offer to purchase where this involves merely the supplying of simple factual data." *Id.* at 121. The court further stated that when the real estate broker has secured signatures on the usual form of preliminary contract or offer to purchase, completed by insertion of necessary factual data, he has fully performed his obligation as broker. *See id.* at 121-122. The court held that "[t]he drawing or filling in of blanks on deeds, mortgages and other legal instruments subsequently executed requires the peculiar skill of a lawyer and constitutes the practice of law." *Id.* at 122. The court concluded that "[s]uch instruments are often muniments of title and become permanent record. They are not ordinarily executed and

delivered until after title has been examined and approved by the attorney for the purchaser. Their preparation is not incidental to the performance of brokerage services but falls outside the scope of the broker's function." *Id.* at 122. The court also pointed out that "it is the character of the acts that determines the issue. If by their nature they require a lawyer's training for their proper performance it does not matter that there may have been a widespread disregard of the requirement or that considerations of business expediency would be better served by a different rule." *Id.* at 120.

Applying the foregoing case law to real estate brokers and other non-lawyers who engage in short sale negotiation activities in Illinois, it is clear that short sale negotiation activities that involve more than the providing of factual data to the short sale lender constitutes the practice of law. Accordingly, short sale negotiation activities that involve more than the providing of factual data to the short sale lender fall outside the scope of services that can legally be performed by real estate brokers, third party short sale negotiators and other non-lawyers. The negotiation of a short sale involves more than the mere supplying of factual data to the short sale lender. The negotiation of a short sale involves many tasks that require the peculiar skill, knowledge and training of a lawyer. For example, only an attorney has the peculiar skill, knowledge and training necessary to properly analyze a title search so as to understand the correct order of priority of liens and judgments that are recorded against the real estate and name of the distressed homeowner and to negotiate each lien and judgment accordingly. Also, only an attorney has the peculiar skill, knowledge and training necessary to prepare (or direct a settlement agent to prepare) a HUD-1 Settlement Statement to include all customary fees and costs in accordance with Federal, State and Municipal law that will be required to close the transaction as of an estimated closing date. Additionally, only an attorney has the requisite skill, knowledge and training necessary to persuade all lenders and creditors to come to a mutual agreement regarding the amount each lien holder will receive as part of the short sale approval, including agreement to waive any deficiency balance on the note(s) and/or judgment(s) that may remain after the real estate closing and release of the lien on the land. Also, since short sale negotiation often occurs on a timeline that is parallel with a mortgage foreclosure proceeding, only an attorney has the requisite skill, knowledge and training to be able to appear in the foreclosure

proceeding to ask for more time to structure and obtain approval of a homeowner's short sale request if needed. Lastly, only an attorney has the requisite skill, knowledge and training to be able to advise a homeowner of the possible legal consequences of a short sale, such as the possible consequences in the event a short sale lender refuses to waive the deficiency balance on the note or the consequences of the failure to comply with conditions contained in the short sale approval letter, such as a restriction on the buyer's ability to transfer the property after closing. For the foregoing reasons, only attorneys have the requisite skill, knowledge and training needed to negotiate short sales and are entitled to be compensated with reasonable attorneys' fees approved by the short sale lender on the final HUD-1 Settlement Statement.

**II. Real estate agents and third party negotiators should be prohibited from engaging in short sale negotiation activities that reach beyond the mere supplying of factual data and administrative and clerical tasks.**

As stated above, many of the tasks involved in the negotiation of a short sale involve more than the mere supplying of factual data, which is the extent of the activity permitted to be performed by real estate agents and other non-lawyer negotiators under the holdings reached in the *Schafer* and *Quinlan and Tyson* opinions. Real estate agents and other non-lawyer negotiators do not possess the requisite skill, knowledge and training to be able to properly analyze a title report, negotiate multiple liens, prepare and revise HUD-1 Settlement Statements to include all fees and costs as of an estimate closing date, or advise homeowners on the legal consequences involved in the closing of the short sale based upon the provisions included in the short sale approval letter. Nor do they have the requisite duty to zealously represent their clients that is created by the attorney-client relationship. Accordingly, real estate agents and other non-lawyer negotiators should be prohibited from engaging in short sale negotiation activities that reach beyond the mere supplying of factual data and administrative and clerical tasks.

**III. The Illinois Supreme Court, by and through its Special Supreme Court Committee on Mortgage Foreclosures, and the Illinois Attorney Registration and Disciplinary Commission**

**are vested with authority to take action to preserve the role of the attorney in short sale transactions in Illinois, for the benefit and protection of homeowners.**

The Illinois Supreme Court and Illinois Attorney Registration and Disciplinary Commission (“ARDC”) are vested with authority to address the issues discussed in this memorandum involving the unauthorized practice of law and refusal of short sale lenders to pay attorneys’ fees in short sales. For example, Rule 752 of the Illinois Supreme Court Rules were amended and a new rule adopted on December 1, 2011 to vest the ARDC with “authority to investigate allegations of the unauthorized practice of law, including investigations involving disbarred lawyers and other persons, entities or associations that are not authorized to practice law by this court,” and to “prosecute unauthorized practice of law proceedings pursuant to new Rule 779 of the Illinois Supreme Court Rules.” *See Ill. Sup. Ct. R. 752 et seq.; see also* Rule 5.5 of the Illinois Rules of Professional Conduct. Based upon this authority, the ARDC is authorized to investigate and prosecute allegations of the unauthorized practice of law and, therefore, has authority to investigate and prosecute the activities of persons, entities or associations that may constitute the unauthorized practice of law, such as real estate agents and other non-lawyer third party negotiators that are engaging in short sale negotiation activities.

The Illinois Supreme Court has also established a Special Supreme Court Committee on Mortgage Foreclosures, which is charged with the task of 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, and recommending mortgage foreclosure rules for statewide implementation, with a view for ensuring fair and efficient foreclosure proceedings. Because short sales are often conducted on a parallel time frame with the foreclosure proceeding, this committee could pursue as part of its activities, rules aimed at ensuring that distressed homeowners are not further burdened by the acts of unscrupulous and unlicensed third party short sale “negotiators”.. This committee could pursue rules or other initiatives that would prohibit short sale lenders from refusing to pay reasonable attorneys’ fees to attorneys that have negotiated the short sale, as well as rules aimed at

prohibiting non-lawyers, including real estate agents, from engaging in short sale negotiation activities that reach beyond basic administrative and clerical tasks.

Based upon the authority vested in the Supreme Court and ARDC pursuant to the foregoing rules and committee, the Supreme Court and ARDC are in a position to take action to address problems involving the unauthorized practice of law by real estate brokers and other non-lawyer third party negotiators and short sale lenders' reduction of or refusal to pay attorneys' fees. These problems are driving attorneys away from representing homeowners in short sales and other distressed property resolution issues, resulting in inadequately trained real estate agents and other non-lawyer third party negotiators seeking to engage in short sale negotiation activities, to the detriment of both homeowners and short sale lenders. The Supreme Court and ARDC should take action to address these problems to ensure that homeowners have access to quality legal representation in short sales and to ensure that attorneys can be paid for the important representation that they provide.

#### **Conclusion**

A short sale is a complicated real estate transaction, and Illinois homeowners need access to competent legal counsel when short selling. Counsel will negotiate with lien holders to relieve homeowners of their financial obligations, including any deficiency balance on the note, will ensure that homeowners understand the implications of the transaction, and will protect homeowners from the unscrupulous activities of third party non-lawyer negotiators. Illinois law prohibits non-lawyers from "representing" consumers in these complex legal matters. For nearly 65 years our courts have held that only attorneys have the requisite skill, knowledge and training necessary to engage in such activities. Attorneys are entitled to be paid reasonable attorneys' fees for the important legal services that they provide to homeowners. The Special Supreme Court Committee on Mortgage Foreclosures and the ARDC are vested with authority to take action to address the problems that are preventing homeowners from gaining access to competent legal counsel and can be a positive force for change that would benefit and protect homeowners.