M E M O R A N D U M

TO: ILLINOIS SUPREME COURT MORTGAGE FORECLOSURE COMMITTEE

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RE: Nine Discussion Points Submitted by the Practice and Procedure Subcommittee

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I represent the law firms of Codilis & Associates, P.C., Pierce and Associates, P.C., and Fisher and Shapiro, L.L.C. (collectively "the Foreclosure Firms"), which are three of the largest residential mortgage foreclosure firms in the State of Illinois. The Foreclosure Firms understand and support the scrutiny now given to all aspects of the residential foreclosure industry, and the judicial processes in particular. This memorandum sets forth the specific comments and suggestions to the recently proposed Illinois Supreme Court Rules regarding foreclosure procedures. The Foreclosure Firms designed their comments so that the new rules will strike a balance between (1) fairness and due process to defaulted borrowers; and (2) the effects that burdensome procedures may have on the many other stakeholders, including lenders, servicers, attorneys, the judicial system, and the future population of borrowers seeking to obtain or refinance home loans.

The Foreclosure Firms' commitment to strike a proper balance is demonstrated by their virtually unqualified support for 6 of the 9 proposed rules. Each of the objections to the

other 3 proposed rules are based on the fact that such rules would add significant burden to the system in an effort to cure what can only be characterized as phantom harm to defaulting borrowers. The Foreclosure Firms' specific comments to each proposed rule follow below:

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

The Foreclosure Firms support the adoption of a model foreclosure affidavit for use in default cases. The Foreclosure Firms request that the firms most actively engaged in prosecuting residential foreclosures participate in drafting any such model affidavit, and that once adopted, substantial compliance with the model affidavit by a plaintiff constitute a safe harbor that would immunize the affidavit from an attack on its form. This model affidavit, combined with a safe harbor, would provide due process protection for borrowers and reduce meritless litigation over the form of affidavits, thereby conserving the resources of the parties and the judicial system.

2. The Committee seeks input on whether plaintiffs be required to attach payment histories to prove up affidavits.

The Foreclosure Firms submit that the extra burden of attaching detailed payment histories to affidavits in cases where payment application is not reasonably disputed does not provide a corresponding benefit to the borrower or the court.

Most foreclosure complaints follow the statutory form complaint fairly closely and include allegations as to the amount of the current principal balance and the payment due date under the note. In addition, a copy of the note is always attached, which includes the payment terms and interest rate from which a mathematical calculation of interest can be made. In a case where the borrower does not appear, these allegations are deemed admitted by the defaulted parties, and the calculation of the amounts due at judgment (other than attorney's fees,

which are generally proved up by the attorneys themselves, and advances made by the client) are really simple math.

The vast majority of foreclosure cases do not feature a dispute over the amounts due. Where there is no dispute as to payments, attaching payment histories would create an extra administrative burden that serves no useful purpose. Moreover, payment histories are often very lengthy and, given the volume of foreclosure cases filed in Illinois, would result in the use of an unwieldy amount of additional paper and additional storage resources by the Circuit Courts, resources that may not be readily available in many Circuits. Illinois Rule of Evidence 1006 contemplates the summarization of these voluminous records, in the form of the affidavits currently provided in support of foreclosure judgments. Notably, payment histories remain available not only in discovery, but at the borrower's request. Without any systematic problem regarding a borrower's access to payment histories, a rule that makes this production "automatic" is not sufficiently tailored to address a particular problem. It is those sorts of reflexive rules that should be avoided.

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, be attached to the foreclosure complaint.

The Foreclosure Firms agree that a complete copy of the note as it currently exists, including endorsements and/or allonges, should be attached to the complaint. The Foreclosure Firms do not agree that a chain of assignments of mortgage should also be attached.

It is true that the issue of mortgage assignments has created a certain amount of confusion to the foreclosure process. It is important to understand that regardless of any assignment of the mortgage, or lack thereof, the holder of a note may designate "*any person*" to foreclose on the holder's behalf. 735 ILCS 5/15-1208 (emphasis added). See also Mortgage

Electronic Registration Systems, Inc. v. Barnes, 940 N.E.2d 118, 124 (upholding MERS right to foreclose mortgage as designee of the noteholder).

The derivation of the confusion over mortgage assignments may help explain why the proposed rule would impose significant new costs on the foreclosure process without any corresponding benefit to borrowers (other than the undeserved gift of an illogical foreclosure defense). As the Committee likely knows, the industry standards for documenting residential mortgage assignments have undergone significant changes in the last 20 years. The securitization of mortgage loans has greatly increased the amount of capital available to finance home acquisitions, which in turn has dramatically increased the number of loans made and enabled greater home ownership. Investors historically unfamiliar with the residential mortgage industry increasingly became the source of this capital. It therefore became customary within the securitization process to bifurcate the risk, servicing, and payment streams of the residential mortgage transaction, so that the ownership of (1) the promissory note; and (2) the rights to service the loan, including the right to conduct a foreclosure, are typically held by different entities. This bifurcation represents a fundamental shift away from the model of mortgage finance common in earlier decades, and it has subjected the country's mortgage recording systems to intense and unsettling pressures resulting from systems incapable of handling such a high volume of transactions. This pressure has been exacerbated by the frequent transfer of mortgage servicing rights, including the right (and obligation) to foreclose a mortgage. These changes ultimately led to the introduction of MERS, a private tracking system for transferring mortgage servicing rights among banks without recording any assignments in the public record.

The combined effect of these changes often makes it extremely difficult to produce a documented chain of assignments to the entities who were provided the rights to

enforce a mortgage. In some cases, where a servicer or loan originator is out of business, it may be impossible. This difficulty in documenting a chain of mortgage assignments, however, does not affect the borrower because it does not affect the right of the noteholder's ability to designate anyone it wishes to foreclose the mortgage which secures that debt.

The standard mortgage used in virtually all residential mortgage loans expressly informs borrowers that their notes and mortgages may be assigned repeatedly without any prior notice to the borrower. The borrower is not a party to those assignments. It is "black letter law" that someone who is not a party to a contract has no standing to enforce it. Applying this principle in the context of borrowers challenging some alleged deficiency in the assignment of the mortgage, "[c]ourts have routinely found that a debtor may not challenge an assignment between an assignor and assignee." Lisa Bridge v. Aames Capital Corporation, 2010 WL 3834059 (N.D. Ohio). One court explained the issue with particular clarity:

> Borrower certainly has an interest in avoiding foreclosure. But the validity of the assignment does not effect [sic] *whether* Borrower owes its obligations, but only to *whom* Borrower is obligated. Although a debtor may assert certain defenses that render an assignment absolutely invalid (such as nonassignability of the right assigned), he generally may not assert any ground which may render the assignment voidable "because the only interest or right which an obligor of a claim has in the instrument of assignment is to insure him or herself that he or she will not have to pay the same claim twice." [Citation omitted.]

Livonia Property Holdings, L.L.C. v. 12840-12976 Farmington Road Holdings, L.L.C., 717 F. Supp. 2d 724, 735-736 (E.D. Mich. 2010), cert. den. 131 S.Ct. 1696, 179 L.Ed.2d 645 (2011) (emphasis in original). In recent years, courts in jurisdictions all over the country have repeatedly rejected the purported invalidity of an assignment of mortgage as a basis for enjoining a foreclosure or awarding borrowers relief for a wrongful foreclosure. See, e.g., Lisa Bridge, supra; Livonia, supra; Wenzel v. Sand Canyon Corporation, 2012 WL 219371 (D. Mass.);

Silving v. Wells Fargo Bank, 2012 WL 135989 (D. Ariz.); Martin v. GMAC Mortgage Corp., 2011 WL 6002617 (D. Hawaii); Schieroni v. Deutsch Bank National Trust Company, 2011 WL 3652194 (S.D. Tex.); Edwards v. Deutsche Bank National Trust Company (In re Edwards), 2011 WL 6754073 (Bkrtcy. E.D. Wis.); Kriegel v. Mortgage Electronic Registration Systems, 2011 WL 4947398 (R.I. Super.); Correia v. Deutsche Bank National Trust Company, 452 B.R. 319 (1st Cir. BAP 2011).

Finally, courts have upheld the validity of the registration system implemented by MERS. See Mortgage Electronic Registration Systems, Inc. v. Barnes, 940 N.E.2d 118, 124 (1st Dist. 2007) (upholding MERS right to foreclose mortgage as designee of the noteholder); Fontenot v. Wells Fargo Bank, 129 Cal. Rptr. 3d 467, 481 (2011) ("If MERS indeed lacked authority to make the assignment, the true victim was not plaintiff but the original lender, which would have suffered the unauthorized loss of a $1 million promissory note."); Mortgage Electronic Registration v. Azize, 965 So. 2d 151, 153 (Fla. App. 2d Dist. 2007) (holding that MERS, acting for the real party in interest, may foreclose a mortgage in its own name).

The Foreclosure Firms would support an evidentiary requirement for the presentation of documents establishing a sufficient chain of assignments leading to the plaintiff if, during a case, it becomes evident that there is a dispute among lenders and/or servicers as to whom the noteholder has authorized to foreclose the mortgage.

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

The Foreclosure Firms support this recommendation. Unreasonable delays in conducting foreclosure sales result in an increase in the number of vacant and sometimes unsecured properties throughout Illinois and the duration of the time in which they remain vacant

and/or unsecured. This situation can result in community risk and property devaluation, and should be avoided if at all possible. Since these delays, where they exist, are a result of limited resources available to county sheriffs conducting these sales, the use of private selling officers in at least a portion of cases in counties currently requiring the use of the sheriff would assist in the reduction of these delays.

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.**

The Foreclosure Firms support this recommendation and note that it is considered best practice by the Foreclosure Firms to send notice to all parties, whether in default or not, of judgment motions, sales, and sale confirmation hearings.

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.**

The Foreclosure Firms support this recommendation, provided that the rule expressly states that failure of the clerk to send the recommended notice will not be deemed to impact the validity of the foreclosure proceeding in any way, particularly because plaintiffs have already provided the type of notice described in paragraph 5. Many court clerks are currently understaffed and overburdened. The requirement that an additional notice be sent by the clerk, where not required by statute, may present difficult compliance issues for many clerks,

particularly in higher volume circuits. The clerk's failure to comply with the requirements should not adversely affect the plaintiff's rights in any way.

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.**

The Foreclosure Firms support this recommendation, provided that the proposed rule or change in code provision makes clear that such appointments are not necessary where there is a surviving joint tenant or tenant by the entirety that now owns the fee simple (or remainderman in the rare case of a life estate) – even in cases where the surviving tenant did not sign the note. To appoint representatives in such cases would be counterproductive, as they would be representing persons who have no interest in the property, thereby creating needless increase in expense and waste of court resources.

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.**

The Foreclosure Firms support adoption of such a rule, but note that such a notice requirement gives preferential treatment to borrowers claiming a right to surplus over other parties such as junior lienholders or trustees of bankruptcy estates which may also have a claim to the surplus, but who would not receive the special notice.

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.**

The Foreclosure Firms oppose adoption of such a rule.

The proposed rule conflicts with the critical and fundamental principles embodied in the attorney-client privilege and the specific ethical rules which prohibit attorneys who are evidentiary witnesses in a matter from representing a party in that same matter. Such a rule would seek to govern the communication between an attorney and require an attorney to divulge in affidavit form material protected from disclosure by the attorney-client privilege, in violation of Supreme Court Rule 201(b)(2) and Illinois Rule of Evidence 501.

The attorney-client privilege has been described as essential "to the proper functioning of our adversary system of justice." In re Marriage of Decker, 153 Ill. 2d 298, 312-313 (1992), quoting United States v. Zolin, 491 U.S. 553, 562 (1998). Moreover, "the [attorney-client] privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client." Fischel & Kahn van Straaten Gallery, 189 Ill. 2d 579, 584-585 (2000) (internal citations omitted). The Committee should not propose a rule that puts this essential privilege in jeopardy.

A rule requiring plaintiffs' attorneys to file an affidavit attesting to communications with their clients is unworkable as it either (i) waives the plaintiff's attorney-client privilege; or (ii) allows the plaintiff to use attorney-client privilege as a sword against the defendants and not a shield. The proposed rule would create an evidentiary watershed; proceedings for plaintiffs who provide such an affidavit go forward, while proceedings for those who cannot, do not.

Such a rule clearly forces plaintiffs to put attorney-client communications "at issue", an enumerated exception to, or waiver of, the attorney-client privilege. One of the most common tests to determine whether a party has waived attorney-client privilege has its roots in Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975):

> If (i) assertion of the privilege is the result of some affirmative act, such as filing suit, by the asserting party, (ii) through the affirmative action, the asserting party has placed the protected information at issue by making it relevant to the case, and (iii) application of the privilege would deny the opposing party access to information vital to its defense, the court should find that the asserting party has impliedly waived the privilege through its own affirmative conduct.

Federal Deposit Ins. Corp. v. Wise, 139 F.R.D. 168 (D. Colo. 1991), citing Hearn, 68 F.R.D. at 581. Some courts in Illinois have used or acknowledged the Hearn test to determine whether there has been an at issue waiver. See, e.g., Pyramid Controls, Inc. v. Siemens Indus. Automations, Inc., 176 F.R.D. 269, 272 (N.D. Ill. 1997) ("*Hearn v. Rhay* is the seminal case on "at issue" waiver"); Waste Management, Inc. v. International Surplus Lines Insurance Co., 579 N.E.2d 322 (Ill. 1991). However, some courts prefer the anticipatory waiver test according to which:

> a party waives the attorney-client privilege when she places the advice of counsel at issue by (i) asserting a claim or defense and (ii) then seeking to prove that claim or defense by disclosing or describing an attorney-client communication.

30 N. Ill. U. L. Rev. at 556-557. See Dexia Credit Local v. Rogan, 231 F.R.D. 268, 275-276 (N.D. Ill. 2004) (an Illinois diversity case applying the anticipatory waiver test); Grochocinski v. Mayer Brown Rowe & Maw LLP, 251 F.R.D. 316, 324 (N.D. Ill. 2008) ("[I]t is not sufficient that a party merely deny an allegation, or that the documents are relevant to the claim.").

Under either test, the proposed rule would waive attorney-client privilege. Applying the Hearn test to the proposed rule, it is clear that (i) plaintiff's initiation of a

foreclosure proceeding would be an affirmative action; (ii) the affidavit would make protected information not only relevant to the case but necessary; and (iii) application of attorney-client privilege would prevent the defendant from information necessary to defend, thereby satisfying prongs (i), (ii), and (iii) of the test, respectively. Applying the anticipatory waiver test to the new rule, it is clear that (i) plaintiff is clearly asserting a claim that it is entitled to foreclose; and (ii) plaintiff is disclosing an attorney-client communication to prove that claim, thereby satisfying both prongs of the test.

Even if the proposed rule does not trigger an "at issue" waiver, the proposed rule remains unworkable. If the plaintiff retains its attorney-client privilege after filing the attorney affidavit, there is no way to verify the veracity of the affidavit or for the defendant to attack against the affidavit. Essentially, the affidavit allows the plaintiff to enter evidence, favorable to itself, of which the defendant has no ability to discover any facts to disprove. The defendant is put in the unenviable position of arguing the plaintiff did not act diligently, while having no defense to certain admitted evidence that the plaintiff did act diligently. Unless an "at issue" waiver results, the plaintiff is being given a new weapon; a result certainly at odds with the goal of the proposed rule.

These same fundamental principles are embodied in Rule 3.7 of the Illinois Supreme Court Rules of Professional Conduct which states that:

> **LAWYER AS WITNESS**
>
> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

The comments to this rule note that "Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client." The proposed rule would require attorneys to balance advocating for the plaintiff while potentially having to attest to facts adverse to the plaintiff.

Furthermore, if the veracity of the affidavit is called into question, the only way to determine the truth would be to depose the attorney, thereby forcing him or her to act as a witness against his or her client. Such a situation is clearly in violation of Rule 3.7. Even worse, litigious foreclosure defense attorneys interested in delaying proceedings could seek to depose or obtain courtroom testimony from the attorneys executing such affidavits, potentially forcing their withdrawal from the case and depriving the plaintiffs of their attorney of choice, even though such depositions would have no probative value whatsoever.

Finally, such an affidavit, by its very nature, would be flawed. The prove up affidavits used at judgment are the sworn statements of the plaintiff's representatives based on their review of the plaintiff's applicable business records. Business records are admissible in Illinois courts because their purpose is to aid in the proper transaction of business, and they are useless for that purpose unless accurate; therefore, the motive for following a routine of accuracy is great, and the motive to falsify non-existent. See Kimble v. Earle M. Jorgenson Co., 358 Ill. App. 3d 400, 414 (1st Dist. 2005), citing M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 803.10, at 817 (7th Ed. 1999); Chicago & Alton R.R. Co. v. American Strawboard Co., 190 Ill. 268, 60 N.E. 518 (1901). The attorney cannot testify as to the client's practice of the business record retention or to its accuracy. The attorney could only aver that he or she asked the client to verify that the figures provided were correct. Such an affidavit has

little value added, as an attorney is already required to have a good faith basis for relying on the facts provided by the client under Rule 137.