

April 13, 2012

**PUBLIC COMMENT TO  
THE PROPOSED RECOMMENDATIONS  
FOR IMPROVING THE PRACTICES AND  
PROCEDURES FOR  
MORTGAGE FORECLOSURE  
PROCEEDINGS IN ILLINOIS**

The Judicial Sales Corporation, a Subsidiary of Attorneys' Title Guaranty Fund, Inc., Respectfully Submits the following written comment to the Committee's proposed Rule number four.

Mitchell Lieberman  
James V. Noonan  
Noonan and Lieberman Ltd  
105 W. Adams #1100  
Chicago, IL 60603

## **BACKGROUND TO THE FORECLOSURE BACKLOG AND THE COMMITTEE'S RECOMMENDATION**

The Judicial Sales Corporation (TJSC) is the leading provider of judicial sales services in Illinois. Founded in 1991, TJSC has earned its position as the market leader by conducting sales at a price and level of service far superior than that of the sheriff, who was the traditional provider of these services. In recent years some counties, viewing judicial sales as a revenue source, have unilaterally dictated that the sheriff conduct all sales regardless of the wishes of the parties or with regard to service, quality, and price. For the reasons articulated below, not only is this contrary to law, it has the unintended consequence of perpetuating the ongoing housing crisis.

The housing and foreclosure crisis represents one of the single greatest challenges facing our nation. We applaud Justice Theis, Chief Justice Kilbride and the other members of the Illinois Supreme Court for their part in trying to find solutions to these challenges. The Illinois Supreme Court Mortgage Foreclosure Committee's work on amending the foreclosure rules will no doubt alleviate some of the significant problems that have arisen in Illinois mortgage foreclosures in the last few years; particularly the backlog resulting from the increasing delays in completing foreclosures. It has been reported in the *New York Times* that Illinois courts handle the fifth largest foreclosure volume in the United States. The increase in volume has resulted in a significant backlog of cases. According to the Woodstock Institute's September 2011 study of key trends in foreclosure activity, the foreclosure backlogs experienced in Kane and Will Counties were the greatest.

The backlog in foreclosures is not merely an administrative problem. It negatively impacts the local communities in our state and damages the fabric of entire neighborhoods. Once a foreclosure judgment is entered, the chance that the property is abandoned increases. Vacant

properties become targets for negative activities such as crime and drugs. At least 25% of long-held properties are complete losses (Source: “*Overvaluing Residential Properties and the Growing Glut of REO.*” Fitzpatrick and Whittaker, Cleveland Federal Reserve Bank 2012.) Our communities and neighborhoods suffer each day a property languishes in the court system and does not proceed to judicial sale.

In a well intentioned effort to address the backlog, the Committee has recommended to the Supreme Court to change the Illinois Mortgage Foreclosure Law (“IMFL”) to mandate that all foreclosure sales be held within forty-five (45) days from the expiration of the redemption period. The proposed rule is laudable as it recognizes that there are significant delays in scheduling sales in which competition has been eliminated, but will not achieve the result sought by the committee. Even were the sale held within the 45 day period, nothing in the rule addresses the delays caused by the failure in placing the motion to approve the sale on the court dockets

A solution to this problem is embedded within the current version of IMFL. As it presently reads, IMFL bestows on the plaintiff the right to appoint and employ private selling officers who, experience has shown, will conduct a foreclosure sale well before 45 days following redemption, and allow greater flexibility in presenting the order approving the sale.

**THE CURRENT VERSION OF THE ILLINOIS MORTGAGE FORECLOSURE LAW BESTOWS THE POWER TO NAME THE SELLING OFFICER ON THE PLAINTIFF.**

This comment focuses directly on the time period after the court enters a judgment of foreclosure through the entry of the order approving sale. This comment does not address any time periods regarding the time from filing the complaint to judgment, as a borrower can and should implement any and all rights regarding the substantive issues regarding a mortgage foreclosure defense prior to the judgment of foreclosure being entered.

As it is currently written, IMFL allows the plaintiff-mortgagee to employ private selling officers to conduct the sale. By allowing competition between sheriffs and private selling officers, the statute encourages a more efficient and economical solution to transferring ownership and responsibility for maintaining the property, whether it be to the mortgagee or a third-party buyer. Where private selling officers have been banned, in Kane County for instance, the time between the expiration of the redemption period and the sales date currently exceeds, on average nine months. This is largely because the sheriff only schedules sales once a week. Private selling officers conduct hundreds of sales a day. In addition, Kane County has recently raised prices for sales from \$375.00 to \$600.00. This is clear evidence that when competition is eliminated, prices rise.

Section 15-1507(b) of IMFL was enacted in 1987 to end the monopoly that county sheriffs had in handling the foreclosure sales. The purpose of the legislation was to create competition between private selling officers and county sheriffs so that the person who can get the job done most efficiently and at the best price would be selected to conduct the sale.

Section 15-1507(b), as it now reads, provides that the foreclosure sale “may” — not “shall” — “be conducted by any judge or sheriff.” Use of the term “may” means that a sheriff need not be employed. 735 ILCS 5/15-1105. Thus, the judge may designate “an official or other person who shall be the officer to conduct the sale other than the one customarily designated by the court.” However, the selection of that person in the first instance belongs to the plaintiff. 735 ILCS 1506(f)(3) (“the official or other person who shall be the officer to conduct the sale” . . . “may be included in the judgment of foreclosure if sought by a party in the complaint”). The right of the plaintiff to appoint the selling officer has been recognized by the appellate court. *See, e.g., Mountain States Mortgage Center, Inc. v. Allen*, 257 Ill.App.3d 372, 628 N.E.2d 1052 (1st

Dist. 1993). That right has been further enshrined in a recent pronouncement by this Court that the plaintiff in a foreclosure is “the master of his or her cause of action”. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 180, 890 N.E.2d 934 (2008). See discussion, *infra*.

The introduction of private selling officers has resulted in significant pricing and service improvements. Prior to 1987 the sheriff’s office charged \$600.00 and provided no service beyond calling the sale. Private selling officers can and do set sales within one day of the expiration of the redemption period, if so requested, at a cost of only \$350.00 to \$400.00. Unlike the sheriff, TJSC sends the notice of sale to the appropriate paper to be published pursuant to Statute, sends notice to defendants and/or attorneys by mail, files proof of mailing of the notice to the clerk of the county where the case is filed, conducts the foreclosure sale and enters a bid pursuant to written bidding instructions, prepares the report of sale and distribution, certificate of sale and the receipt of sale, and prepares and executes the Judicial Deed conveying title. Counties with monopolistic practices charge much higher prices: Will County charges \$662.75 for sales, McLean County charges \$607.00, Lake County charges \$500.00, and Kane County charges \$600.00 without providing the services outlined above

Despite this statutory right, several counties currently bar plaintiffs from appointing private selling officers and require instead that the county sheriff be used to conduct the sale. While it is understood the counties want this revenue, eliminating competition by banning private selling officers is damaging the communities and adds costs to the borrower. This action directly interferes with the right reserved to plaintiffs in IMFL and the common law right of the plaintiff to manage its case as it sees fit. But of greater importance to this Committee is that in those counties where private selling officers are banned, the time from judgment it takes to complete a foreclosure has dramatically increased. The ban on private selling officers has

exacerbated the problem this Committee has set out to remediate. Although there is no question courts have discretion in the foreclosure process; the discretion should be applied on a case by case analysis and a uniform county decree to ban private selling officers is improper.

IMFL's limitation on the court's powers in a foreclosure proceeding – and the paramount powers of the plaintiff in a foreclosure – is intrinsic to IMFL. The best example is the elimination under IMFL of the court's discretion in the confirmation process. 735 ILCS 5/15-1508(b); *Grubert v. Cosmopolitan National Bank of Chicago*, 269 Ill.App.3d 408, 645 N.E.2d 560 (2d Dist. 1995). Indeed, this limitation was recognized recently by the Supreme Court in *Household Bank, FSB v. Lewis*, 229 Ill.2d 173, 890 N.E.2d 934, 939 (2008). The Supreme Court held that under IMFL a trial court is powerless to even consider a motion to approve a foreclosure sale until the plaintiff files a written motion requesting confirmation. If the plaintiff does not file a motion, or the motion is withdrawn before any action on it was taken, the “statutory prerequisite to the confirmation process [is] thereby eliminated.” 890 N.E.2d at 938. The circuit court may not proceed with the confirmation process on its own or at the behest of any other party. *Id.*

In *Lewis*, the court observed that the power the plaintiff exercises in its case is grounded in the principle that the plaintiff is the master of his or her cause of action. *Id.* Subject to applicable rules of civil procedure and the Supreme Court, the plaintiff is free to manage and conduct its case as it sees fit. In the same vein, IMFL has bestowed on the plaintiff the right to name a selling officer and it should be free to exercise that right unless the court has good reason why it shouldn't.

The fact that Section 1506(f) provides that a party may include the use of a private selling officer as part of the judgment of foreclosure does not mean the court is obliged to appoint the selling officer that the Plaintiff selects. It only means that the court may allow that a private

selling officer be used. Because the court “may” do so means it has discretion and where it has discretion it must use that discretion reasonably. See, *Central Wisconsin Motor Transp. Co. v. Levin*, 66 Ill. App. 2d 383, 214 N.E.2d 776 (1966) (statute providing that court “may” enter final order as to one or more but fewer than all parties or claims only on express finding that there is no just reason for delaying enforcement of appeal is matter calling for careful exercise of court's discretion.); *Hoffman v. Hoffman*, 37 Ill. App. 3d 415, 346 N.E.2d 114 (1976) (same); *Morning v. Morning*, 9 Ill. App. 3d 555, 559, 291 N.E.2d 875, 879 (1973) (same).

A circuit court abuses its discretion when it acts arbitrarily without the employment of conscientious judgment or if its decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice has resulted. *Venzor v. Carmen's Pizza Corp.*, 235 Ill. App. 3d 1053, 1059, 602 N.E.2d 81 (1992); *Zurich Insurance Co. v. Raymark Industries, Inc.*, 213 Ill.App.3d 591, 594-95, 572 N.E.2d 1119 (1991). Stated another way, an abuse of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view. *Favia v. Ford Motor Co.*, 381 Ill. App. 3d 809, 816, 886 N.E.2d 1182 (2008).

To deny a party's request for the appointment of a private selling officer without giving any reason or considering the merits of each request, or just overruling each request *sua sponte* is both arbitrary and unreasonable. In *People v. Patrick*, 233 Ill. 2d 62, 908 N.E.2d 1 (2009) the Supreme Court held that a trial court's application of a blanket policy – and not based on any specific facts - amounted to an abuse of discretion because it was tantamount to a refusal to exercise any specific discretion at all. *Id* at 74. See also, *People v. Hogan*, 388 Ill. App. 3d 885, 904 N.E.2d 1036 (2009) (same). This is precisely why it is occurring in some of the circuit courts of the counties that have eliminated private selling officers by fiat.

Finally, a de facto ban on private selling officers increases the costs to the borrower, as those costs can be included in a deficiency judgment. In instances where the property is vacant, abandoned, or where a borrower is looking to preserve costs to move, any additional amounts that can be attributed to the borrower is a hardship.

#### **PROPOSED RULE**

For the housing market to recover, the inventory of foreclosed homes must be sold to qualified purchasers. The current practices of counties stifle this recovery by allowing homes to languish in between judgment and order approving sale. These homes go vacant, the neighborhood becomes blighted and the housing prices continue a free fall. Competition for the judicial sales is a powerful solution to address the issue.

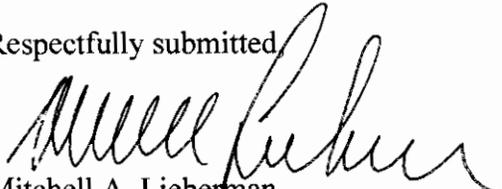
Set forth is our proposed rule that addresses the problem:

- (1) Whenever the unopposed appointment of an official or other person who shall be the officer to conduct the sale is sought in the complaint, by separate motion or in the judgment, the party seeking the appointment shall be entitled to designate the selling officer. If the Court or any party to the foreclosure objects to the appointment or designation and shows good cause; the party seeking the appointment shall be entitled to make another designation.

We understand that the Intercounty Judicial Sales Corporation has an alternative rule (the “Jeffrey Liss Rule”) it proposes. For the record, in the alternative, we can support that proposal.

In conclusion, competition for judicial sales has fulfilled the legislative intent when it enacted IMFL in 1987. We ask the Committee and the Court reaffirm the rights of parties to freely choose among these competitive providers.

Respectfully submitted,



Mitchell A. Lieberman

Mitchell A. Lieberman  
James V. Noonan  
Noonan & Lieberman, Ltd.  
105 W. Adams, Suite 1100  
Chicago, IL 60603