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April 13, 2013

Judge Lewis M. Nixon, Chairman
Supreme Court Mortgage Foreclosure Committee
c/o Administrative Office of the Illinois Courts
3101 Old Jacksonville Road
Springfield, Illinois 62704

Re: Proposed Foreclosure Sale Recommendations / Hearing April 27, 2012

Dear Judge Nixon and Members of the Committee:

I am writing as a drafter of the Illinois Mortgage Foreclosure Law (IMFL) and on behalf of my client Intercounty Judicial Sales Corporation (Intercounty), to comment on the Practice and Procedures Subcommittee's Discussion Point 4 – the proposal to adopt a Rule requiring that all foreclosure sales be held within 45 days of the expiration of the redemption period.

While neither I nor Intercounty has an objection to the proposal, I feel that this proposed Rule alone is insufficient to alleviate the backlog of sales clogging the mortgage foreclosure process in Illinois. The reason is that it fails to address the major cause of this backlog, viz., the refusal of judges in a few of the busiest circuits to appoint private selling officers pursuant to IMFL Section 1506(f)(3).

The proposed Rule needs to be expanded to confirm that persons other than Sheriffs may conduct such sales. Such an expanded Rule – or a separate Rule – (a) would be in furtherance of both the intent and specific language of IMFL and (b) would give judges an additional basis for resisting improper, and growing, local political pressures that impinge upon the independence of the Judiciary.

Background

In 1981 the Real Estate Law Section of the Illinois State Bar Association assembled a special committee to undertake a comprehensive revision of Illinois law governing mortgage foreclosures. That committee was composed of lawyers experienced in representing all the different parties involved in foreclosures. George Olsen served as Chair and I served as Vice Chair. After six years of work and at least nine Drafts circulated over four years to hundreds of attorneys and interest groups involved in all the different aspects of the foreclosure process, IMFL was enacted by the Legislature in 1987 – almost unanimously and in the first year introduced.

IMFL was “intended to provide more certainty for all the parties and more statewide uniformity in court decisions involving foreclosures.”¹ Another primary purpose was to reduce the costs of foreclosure.² One of IMFL’s most significant reforms, and the subject of this letter, is Section 1506(f), the initial version of which appeared as early as Draft No. 1³ and thereafter remained in all eight subsequently circulated Drafts. Section 1506(f) provides that any party to a foreclosure may propose virtually unlimited alternatives to the formerly mandated Sheriff’s sale, specifically including “(3) an official or other person who shall be the officer to conduct the sale other than the one customarily designated by the court.” Under prior law, the customary person was the Sheriff.

As Committee Chairman George Olsen wrote to Senator Beverly Fawell, sponsor of the IMFL legislation, “[IMFL] tries to give the court sufficient options to structure remedies which may in fact be less costly to the foreclosed mortgagor. . . .”⁴ Likewise Chairman Olsen also explained to Senator LeRoy W. Lemke that the parties may propose an alternative form of sale “. . . such as a semi-private sale conducted by someone other than the Sheriff. Such sales may then foster higher sale prices out of foreclosure, as well as greater satisfaction with the sale procedures by the parties to the foreclosure proceeding.”⁵

After the enactment of IMFL, a number of private selling officers emerged to fulfill the intent of IMFL’s drafters by offering mortgage foreclosure sale services which are better, faster and more economical than those offered by county Sheriffs. The costs associated with the use of a private selling officer have been far less than the costs incurred when using the Sheriff, and private selling officers have provided a promptness of service that county Sheriffs can seldom meet. The emergence of private selling officers is one of the great success stories of IMFL.

One other major benefit – one totally unforeseen by the IMFL drafters – was the role private selling officers would play in educating foreclosure attorneys and providing a substantial upgrading in the quality of foreclosure documentation. Before IMFL, every lawyer arranging a foreclosure sale (experienced and otherwise) had his or her own forms and checklists and, frankly, a lot of them were not properly drafted or filed. The very good thing that has happened is that the specialized private selling officers, in addition to conducting sales at lower prices, have provided at no extra charge additional services that Sheriffs cannot, e.g.:

	<u>Intercounty</u>	<u>Kane</u>	<u>Lake</u>	<u>Will</u>	<u>McLean</u>
Sale Fee	\$300	\$600	\$500	\$650	\$607
Prepare Notice of Sale	Yes	No	No	No	No
Publication of Notice of Sale	Yes	No	No	No	No
Serve Notice of Sale	Yes	No	No	No	No
Prepare Receipt(s) of Sale	Yes	No	No	No	No

¹ Liss, Introduction to the Proposed Illinois Mortgage Foreclosure Act, *Chicago Daily Law Bulletin* (April 15-19, 1985) (5 parts); 9 *The Illinois Fund Concept* 13, 14, 16 (May 1985)

² Lindberg & Bender, The Illinois Mortgage Foreclosure Law, 76 Ill.B.J. 800 (1987)

³ Draft No. 1, Article VIII. C.11.a, pp.42-43

⁴ Letter to Senator Beverly Fawell from IMFL Drafting Committee Chairman, George H. Olsen, June 9, 1986

⁵ Letter to Senator LeRoy W. Lemke from IMFL Drafting Committee Chairman, George H. Olsen, October 2, 1985

Prepare Certificate of Sale	Yes	No	No	No	No
Prepare of Report of Sale	Yes	No	No	No	No
Prepare draft Motion Approving Sale	Yes	No	No	No	No
Prepare draft Order Approving Sale	Yes	No	No	No	No
Prepare Notice of Motion Approving Sale	Yes	No	No	No	No
Serve Notice of Motion Approving Sale	Yes	No	No	No	No
Prepare Deed	Yes	No	No	No	No

As a result, parties to mortgage foreclosures routinely request and judges routinely appoint private selling officers to conduct foreclosure sales -- *that is, when they have been allowed to do so.*

Why is a Rule needed?

The problem is that in many circuit courts, by either circuit court rule, general order, county ordinance or just local custom, *it is not possible to have a private selling officer appointed!*

Will County is an egregious example of judges ignoring Section 1506(f)(3) of IMFL. Since the enactment of IMFL in 1987, though numerous motions to appoint selling officers have been made, Will County judges have, to Intercounty's knowledge, *never* appointed a private selling officer.

With ever tighter local government budgets, a number of Illinois county executives, emboldened by the example of Will County, have persuaded circuit court judges to deny motions to appoint private selling officers and require the use of the Sheriff.

For example, in a letter dated April 3, 2009, Presiding Judge Scott A. Shore of the Tenth Judicial Circuit (Tazewell County) announced that "... the Court will direct that the Sheriff, rather than a private selling officer, will conduct the sale... for which statutory fees will be paid. . . . This procedure will provide substantial new revenue to the County, previously benefiting private foreclosure sales companies." The letter was cosigned by the County Sheriff.⁶ Effective November 1, 2009, the presiding judge of McLean County required McLean County mortgage foreclosure sales be conducted by the McLean County Sheriff.⁷

Likewise, the judges of Kane County will no longer appoint a private selling officer. Further, the Sheriff of Kane County told Intercounty that he has been directed by his presiding judge to schedule no more than 90 mortgage foreclosure sales a month – recently resulting in a five month backlog in sales. Even when faced with motions on rehearing, a Kane County judge has refused to appoint a private selling officer to timely sell an abandoned gas station with leaking underground tanks. That sale still had to wait five months. (I believe that it is this Kane County situation that caused practitioners to suggest Proposal 4 that all mortgage foreclosure sales be held within 45 days.)

⁶ Letter "FOR RELEASE TO PUBLIC:" from Presiding Circuit Judge Scott A. Shore and Tazewell County Sheriff Robert Huston, April 3, 2009.

⁷ Letter addressed "Dear Counsel:" to attorneys generally, Circuit Court Judge G. Michal Prall, October 12, 2009.

The problem becomes even worse when county governments seek to co-opt the Judiciary in framing Ordinances with the intention and effect not only to allow the Sheriff to compete for foreclosure sale business but to exclude private selling officers entirely.

For example, prior to August 2009, by Lake County Sheriff Mark Curran's own admission, private selling officers conducted more than 99% of all Lake County mortgage foreclosure sales.⁸ On June 16, 2009, the Lake County Board passed Ordinance 09-1623, authorizing the Sheriff to establish a Judicial Sales Division and setting fees at \$500 (67% higher than Intercounty's). As specifically stated in the Staff Summary appended to the Ordinance, "The Sheriff's Office in conjunction with the Court Administration . . . designed the policies and procedures for the Sheriff's Office to accept all judicial sales in Lake County." (Emphasis added.)⁹ The Minutes Note of the Financial and Administrative Committee stated that the Ordinance "will provide that all Lake County foreclosure sales will be held at the Sheriff's Department" and that Lake County Administrator Barry Burton represented that "Chief Judge Booras and the courts are in agreement with this proposal." (Emphasis added.)¹⁰ Sheriff Curran also told the press: "We're taking over all the sales." (Emphasis added.)¹¹ And on August 1, 2009, Lake County Judges stopped appointing private selling officers. Today the Lake County Sheriff conducts virtually 100% of all sales.¹²

Such local practices seek to nullify statutory law in order to return to Illinois sheriffs their previous monopoly that was ended by IMFL a quarter of a century ago -- a monopoly which, as noted, cannot even be justified by merit or value provided. Such practices undermine not only the Legislature, but also the independence of the Judiciary.

The Law

The law is very clear that neither judges nor local governments have the right to disregard a state statute such as IMFL. Nonetheless, because some do so, an Illinois Supreme Court Rule emphasizing litigants' rights and a court's duty under the statute would go a long way towards achieving the statewide uniformity intended by IMFL – by giving judges extra support to resist local political pressures to disregard that statute.

The U.S. Supreme Court

In *Ward v. Village of Monroeville*,¹³ which was cited by the Supreme Court in *Caperton v.*

⁸ PioneerLocal *Highland Park News*, June 18, 2009. Sheriff Mark Curran stated that the Lake County Sheriff conducted only 30-40 sales of the 4,470 sales conducted in Lake County in 2008.

⁹ Text File, File Number 09-1623

¹⁰ Meeting Minutes of the Lake County Finance and Administrative Committee, June 3, 2009

¹¹ PioneerLocal, *Highland Park News*, June 18, 2009

¹² It should be noted that the Sheriff of Cook County has recently announced plans to compete more vigorously for foreclosure sale business in Cook County, and it may very well be that he will be able to offer sufficiently competitive prices and services that will induce foreclosure parties to begin shifting a substantial portion of their sales to him. But that is precisely the competition envisioned by IMFL. It is for the litigants to decide who wins that competition, not the county governments nor the Circuit Courts.

¹³ 409 U.S. 57, 93 S.Ct 80, 34 L.Ed.2d 267 (1972)

A.T. Massey Coal Co., Inc.,¹⁴ the U.S. Supreme Court held that diversion of funds to serve an interest other than that of the parties to a case is improper. In *Ward*, the petitioner had been denied a trial before a disinterested and impartial judicial officer and was compelled to stand trial for traffic offenses before the mayor, who was responsible for village finances and whose court provided a substantial portion of village funds through fines, forfeitures, costs, and fees. The Court held that such deference to a non-party's interest violated the petitioner's rights guaranteed by the Due Process Clause of the Fourteenth Amendment. See also *United Church of the Medical Center v. Medical Center Commission*.¹⁵

Likewise, a circuit court judge's deference to the financial concerns of county government – a non-party – in the course of adjudicating a mortgage foreclosure case would run counter to the U.S. Supreme Court's ruling.

The Illinois Supreme Court

In the recent case *Household Bank, FSB v. Lewis*,¹⁶ a unanimous Illinois Supreme Court in a mortgage foreclosure proceeding both confirmed that the plaintiff is ordinarily the "master of his or her cause of action" and stated: "As we have often held, a court may not add provisions that are not found in a statute, nor may it depart from a statute's plain language by reading into the law exceptions, limitations, or conditions that the legislature did not express."¹⁷

Judges universally and reflexively denying the motions of all plaintiffs to appoint a private selling officer are acting counter to the Illinois Supreme Court's ruling.

The Circuit Court's Rule-Making Authority

The rule-making authority of a circuit court is derived from the Illinois Constitution and the Illinois Code of Civil Procedure.¹⁸ Pursuant to its authority to promulgate rules conferred by the Constitution and Section 1-104(a) of the Code of Civil Procedure, the Illinois Supreme Court adopted Supreme Court Rule 21(a), which provides: "A majority of the circuit judges in each circuit may adopt rules . . . which are consistent with these rules and *the statutes of the State*, and which, *so far as practicable, shall be uniform throughout the State.*"

The rule-making authority of Illinois circuit courts is not without constitutional limitations.¹⁹ To be valid, a rule must not limit or deny a constitutional right or change substantive law.²⁰ In *Kinsley v. Kinsley*,²¹ the Illinois Supreme Court held a circuit court rule invalid because enforcement of the rule imposed an additional condition to the granting of a

¹⁴ 566 U.S. 868, 129 S. Ct. 2252, 173 L.Ed.2d 1208 (2009)

¹⁵ 689 F.2d 693, 700 (7th Cir. 1982)

¹⁶ 229 Ill.2d 173, 890 N.E.2d 934 940 (2008)

¹⁷ *Id.*, 229 Ill.2d at 182, 890 N.E.2d at 940 (2008)

¹⁸ Ill. Const. (1970), art. VI, sec. 1; 735 ILCS 5/1-104

¹⁹ *People v. Callopy*, 358 Ill. 11, 192 N.E. 634 (1934); *People v. Jackson*, 69 Ill. 2d 252, 371 N.E.2d 602 (1977)

²⁰ Bonaguro, *The Supreme Court's Exclusive Rulemaking Authority*, 67 Ill.B.J. 408, 411 (March, 1979)

²¹ 388 Ill. 194, 57 N.E.2d 449 (1944)

divorce in Cook County. *Kinsley* reiterated the well-established scope of the circuit courts' rule-making authority:

In all matters of practice and procedure, in facilitating the orderly disposition of business, the said courts have undoubted power to adopt rules governing the same, but they are without authority to change the substantive law of the land. Matters of form, of practice, of procedure and for the orderly regulation of the business of the court are all proper subjects for rules, but matters of substance which impose additional burdens upon a litigant, not contemplated by the statute, are invalid.²² (Emphasis added.)

In *People ex rel. Carey v. Power*,²³ the Court held that a circuit court rule is invalid if it limits the substantive rights of the parties. The court noted that although circuit courts are empowered to make rules “for the orderly disposition of business before them as may be deemed expedient, consistent with law,” the rule in question was invalid insofar as it attempted to abrogate, modify or limit the provisions of the Code of Criminal Procedure.²⁴

Citing *Kinsley*, the Court in *People ex rel. Brazen v. Finley*²⁵ invalidated a Circuit Court rule requiring attorneys in personal injury and domestic relations cases to submit an affidavit of compliance. The court held that the Circuit Court judges were not empowered to impose additional requirements on litigants.²⁶

In *People v. Bywater*,²⁷ the Court invalidated a Circuit Court rule that a petition to rescind the statutory summary suspension of driving privileges must be made in open court because the rule was contrary to Illinois Supreme Court rules and state statute. The Court stated:

Section 28 of the Circuit Courts Act (Act) (705 ILCS 35/28 (West 2002)) defines what type of rules circuit courts may enact. Specifically, circuit courts may make rules “for the orderly disposition of business before them as may be deemed expedient, consistent with law” 705 ILCS 35/28 (West 2002). In line with section 28 of that Act, Supreme Court Rule 21(a) (134 Ill.2d R 21(a)) permits circuit courts to adopt their own rules if they are consistent with the supreme court rules and Illinois statutes and if, as far as practical, the circuit court rules are uniform throughout the state. See *Phalen v. Groeteke*, 293 Ill. App.3d 469, 470 228 Ill.Dec.95, 688 N.E.2d 793 (1997). Moreover, local rules must not place additional burdens on litigants, as compared to the requirements of the corresponding statutes or Supreme Court rules. See *Phalen* [at 471]”

Thus, a *de facto* rule in counties like Will or an ordinance in counties like Lake that in effect results in requiring the use of the Sheriff to conduct mortgage foreclosure sales is impermissible, because it denies litigants a substantive right expressly granted by statute.

²² *Id.* at 197, citing *People ex rel. Barnes v. Chytraus* 228 Ill. 194 (1907)

²³ 59 Ill.2d 569, 322 N.E.2d 476 (1975)

²⁴ *Id.*, 59 Ill.2d at 574

²⁵ 146 Ill App. 3d 750, 497 N.E.2d 1013 (1st Dist. 1986)

²⁶ *Id.*, 146 Ill.App. at 757, 497 N.E.2d 1016

²⁷ 358 Ill.App.3d 191, 294 Ill. Dec 283 (2nd Dist. 2005)

The Supreme Court Rules

As noted above, Illinois Supreme Court Rule 21(a) requires that circuit court rules “so far as practicable, shall be uniform throughout the State.” The rules, unwritten, in effect in counties such as Kane, Lake and Will, force a departure from the rules and practices in most of Illinois 102 counties, and thus are not in compliance with Rule 21(a).

It is also possible that consistently ruling in a way that benefits only county governments and not any of the parties before the court could be viewed as violations of Rules 61, 62 and 63. Those Rules state, in part:

Rule 61. “A judge should . . . personally observe high standards of conduct so that the integrity and independence of judiciary may be preserved.”

Rule 62A. “A judge should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

Rule 62B. “A judge should not allow the judge’s family, social, or other relationships to influence the judge’s judicial conduct or judgment.”
and

“A judge should not lend the prestige of judicial office to advance the private interests of others;”
and

“nor should a judge convey or permit others to convey the impression that they are in a special position to influence the judge.”

Rule 63A(1). “A judge should be unswayed by . . . public clamor”

A new Supreme Court Rule that helps avoid calling Rules 61, 62 and 63 into question can only be helpful.

The Exercise of a Court’s Discretion

Although wide discretion is given a trial court, “the discretion must be exercised within the scope of the law.”²⁸ As enunciated in *Mortgage Electronic Registration System v. Thompson*.²⁹

A circuit court has abused 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. *Merchants Bank v. Roberts*, 292 Ill.App.3d 925, 930, 227 Ill.Dec. 46, 686 N.E.2d 1202 (1997), citing *Venzor v. Carmen's Pizza Corp.*, 235 Ill.App.3d 1053, 1059, 176 Ill.Dec. 774, 602 N.E.2d 81 (1992).

A court must exercise reasonable discretion in granting or denying a request. For example, when a court relies too heavily on one factor to the exclusion of others or does not take

²⁸ *Fournier v. Kitsos*, 27 Ill.App.2d 464 at 467, 169 N.E.2d 803, (1960)

²⁹ 368 Ill.App.3d 1035, 307 Ill.Dec. 332, 368, 859 N.E.2d 621, 625 (2006); see also, *Zurich Ins. Co. v. Raymark Industries, Inc.*, 572 N.E.2d 1119, 1122, 213 Ill.App.3d 591 (Ill. App. 1 Dist., 1991)

into account all of the factors necessary to make a decision reviewing courts have held that the trial court has abused its discretion.³⁰

More definitively, as the Illinois Supreme Court held in *People v. Patrick*,³¹

. . . the trial judge's blanket refusal in every criminal case to rule on any motions in limine to bar introductions of prior convictions until the defendants testified was arbitrary and without reason. When a trial court's ruling is arbitrary we will not hesitate to find an abuse of discretion. See Hall, 195 Ill.2d at 20, 252 Ill.Dec. 552, 743 N.E.2d 126.

In effect, the trial judge abused its discretion by refusing to exercise any specific discretion. There is no justification for a trial judge's blanket policy to withhold rulings on all motions

Such a blanket policy is exactly what the judges of Kane, Lake, Will and other counties are implementing.

Summary and Conclusion

Prior to the 1987 enactment of IMFL, all mortgage foreclosure sales were conducted by the county sheriff or the judge. IMFL gave parties to foreclosures the right to have non-sheriff selling officers appointed. Since 1989, private selling officers, fulfilling the intent of IMFL's drafters and of the Legislature, have offered sale services which are better, faster and more economical than those offered by county Sheriffs.

When given the opportunity to choose, parties opt to avail themselves of these services and seek the appointment of a private selling officer in 99% of mortgage foreclosure proceedings.

Any doubts about the appropriateness of appointing a private selling officer that may have existed in the early days of IMFL have been laid to rest by almost a quarter century of their regular and routine use in all parts of this State. There simply is no good reason at this time for a court to routinely refuse to appoint one.

Since the enactment of IMFL, the shift from Sheriffs' sales to sales by private selling officers has adversely impacted the political relationships and finances in various counties. As a result, a number of Illinois county executives have induced, by persuasion or ordinance, the circuit court judges in their counties to routinely deny motions to appoint private selling officers and instead to require the use of the county Sheriff.

This practice, which appears to be growing (1) abrogates the available and statutory remedies provided and encouraged by IMFL; (2) exceeds the limits of a circuit court's rule-making authority by impermissibly imposing additional substantive requirements, costs and undue delays on parties; and (3) constitutes a refusal or inability of the courts to exercise their discretion in each case before them.

³⁰ *Berbig v. Sears Roebuck & Co., Inc.*, 378 Ill. App. 3d 185, 190, 882 N.E.2d 601 (2007)

³¹ 233 Ill. 2d 62 at 69-74, 908 N.E.2d 1, 5-8 (2009)

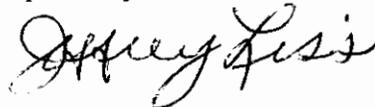
Perhaps more importantly, the practice impinges on the actual independence of the Judiciary and, in any event, gives the public the impression that the Judiciary is more responsive to local political pressures than to the requirements of statutes and the rights of particular litigants. If this practice is not curbed, other counties will undoubtedly be encouraged to similarly pressure or direct “their judges” to do the same.

If the Supreme Court were to promulgate a Rule making clear that matters external to the litigation in front of them are not to be considered when interpreting Section 1506(f) of IMFL, the judges would have additional ammunition with which to explain to their local political leaders why they cannot comply with those local leaders’ wishes.

Accordingly, I urge the Court to adopt a Rule which will make clear that the parties to a foreclosure are entitled to avail themselves of the right afforded and encouraged by Section 1506(f) of IMFL to have a non-sheriff selling officer conduct their foreclosure sales. One possible formulation of such a Rule that has been in circulation is appended as Exhibit A.

Thank you for your consideration.

Respectfully submitted,



Jeffrey G. Liss

EXHIBIT A -- One possible formulation of a Rule:

“An order denying an unopposed request by a party for a particular official or other person to be named in the judgment order to be the officer to conduct the sale shall set forth on the record good cause for such denial. Good cause shall not include the possibility that some other official or other person could perform the function as well as or better than the officer sought, nor that the appointment of that particular officer could have an adverse impact on a unit of local government or other non-party.”