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May 25, 2012

Illinois Supreme Court Mortgage Foreclosure Committee
3101 Old Jacksonville Road
Springfield, Illinois 62704

Re: The June 8, 2012 Public hearing regarding proposed recommendations for improving the loss mitigation process for mortgage foreclosure proceedings in Illinois.

Dear Committee Members:

I submit these comments in advance of the public hearing on June 8, 2012, and respectfully request a short time to appear before the committee.

My firm has represented foreclosure defendants and in many cases has been able to reach a satisfactory settlement. In a great deal of our cases, however, we have noticed a lack of communication between plaintiff's attorneys and the banks they represent. The banks' attorneys often lack any idea of what the bank's goals are in the case or what the bank believes would be an appropriate resolution to the matter. In fact, often the bank's attorney has not even spoken with a bank official regarding the specific property at issue and, moreover, doesn't even know who to speak to at the bank regarding purchasing the bank note, a short sale, or other resolution.

These law firms have lacked the authority to discuss settlement. They direct all settlement discussions blindly to the financial institution itself. They decline to discuss settlement. They make it impossible to communicate with them about settlement. They do not deny that settlement is possible or even likely. They will not refuse requests for continuances while settlement is discussed. This means, however, that the foreclosure defendant is at least theoretically responsible for the attorney fees that are incurred related to a case wholly apart from the efforts necessary to resolve it. Just as significantly, this means that there is a case taking up the court's time and clogging the calendar for reasons that have nothing to do with case resolution.

Trying to find someone at the bank with decision making power, or even a human being to speak with, is an even more difficult task. For example, when you contact one bank's

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loss mitigation department, you get an automated system that requires that you input the mortgagor's social security number. If you do not enter a social security number or if you enter a social security number unrecognized by the system, the system says good-bye and hangs up. There is no option to hit zero to speak to a representative.

Our firm has also represented non-parties who were willing to purchase the bank note for the full amount owed. The theory was that, once the note was acquired, a negotiated settlement could result in the homeowner moving to another residence without any report to a credit agency and the acquirer of the note could obtain the property and use it for charitable purposes. In these cases, the mortgagor should agree to transfer any interest in the property to a third party in exchange for a full release, a scenario that represents a complete win-win for all parties. Despite diligent efforts, our firm could not find a person with decision making authority to listen to and evaluate the proposal. With no one from the bank empowered to accept the deal, these foreclosure cases, like a boat with no captain, continue to plow forward aimlessly clogging the courts. This is an egregious waste of judicial resources and also results in a highly inequitable result for the mortgagor and the bank. Instead of being able to walk away from the property and move on with their lives, the mortgagor is forced to continue in possession of the property, while the legal fees and default interest compound.

Additionally, the courts have been reluctant, slow, or unwilling to exercise their inherent power to control their own dockets, even without a rule or statute. *Link v. Wabash Rail Co.*, 370 U.S. 626, 630-31 (1962) (inherent power is "governed...by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases"); accord, (*Nicholson v. The Chicago Bar Ass'n*, 233 Ill. App. 3d 1040, 1045 (Ill. App. Ct. 1st Dist. 1992).[1] No rule currently prohibits the courts from ordering a plaintiff to bring someone to a settlement conference who has the authority to approve a short sale, a loan modification, or other settlement, and ordering the defendant to bring whatever documents are required to determine if he or she qualifies for a loan modification, a short sale, or other settlement. And no rule prohibits a court from dismissing a case or entering a judgment in the case, for failure to comply with reasonable directives of this kind.

Proposals 3, 5, 6, and 9 under discussion, therefore, are a welcome step to clearing the clogged court dockets of cases that are not in shape to be resolved and no one can doubt that the court has the power to enact these reasonable rules. In our view, however, they do not go far enough. A rule should be enacted to state that the court on its own motion or on motion by a party, can compel the attendance of parties or their representatives at a

[1] Legal research performed by Sonali Mishra.

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settlement conference upon reasonable notice, and compel the parties or their representatives to bring such documents as may be reasonably required, to allow the parties to engage in discussions that have a reasonable possibility of resolving the case. We also suggest this Committee consider enacting rules requiring that the banks in foreclosure cases appoint a representative empowered with the authority to evaluate settlement offers and act upon them. We note that this committee already alludes to this problem in topics for discussion point number 6.

The purpose of this proposed rule is to announce to the parties that such relief may be requested, to remind the individual judges that they have this power, and to encourage the parties to engage in discussions to resolve cases not only as to those cases that have yet to be filed, but also as to those cases that are now pending, without the invocation of this rule.

We have represented defendants and third parties in over forty foreclosure cases in Cook and other counties. We have at least three cases that have been pending since 2009 that could have been resolved upon filing or even before filing had we been able to speak to a live person with knowledge of what the bank wanted to accomplish. We have successfully, and quickly, resolved foreclosure cases when the mortgagee's attorney was given authority to negotiate a settlement. In addition, we have represented property owners in receivership cases in which the court refused to consider the qualifications or propriety of a receiver because it believed it lacked the authority to do so, even though the appointment of a receiver was in nobody's best interest, a fact that was explained to both the judge and the mortgagee's attorney. During the receivership hearing, the defendant testified regarding her experience managing the property, her long-standing ties to the community, and her long-standing relationships with the tenants. She testified that if a receiver was appointed most of the tenants would terminate their leases and move or that they would simply stop paying rent. She testified that she was able to consistently collect rent precisely because of her relationship with the tenants and the trust she had gained with them. The judge acknowledged that a receiver may be an ill-advised choice but was constrained by the mortgage documents and the attorney's inability to make a decision contrary to his instructions. After the receiver was appointed, tenants in the building left, the building caught on fire and it was discovered that the building's insurance was not adequately maintained. The property lost significant value and both the bank (as mortgagee) and neighborhood (through the creation of another vacant property) were harmed. Had the court been able to or encouraged to require someone with decision-making authority appear to discuss a resolution or, at least, the propriety of a receiver, prior to the receiver's appointment, hundreds of thousands of dollars could have been saved. We recognize that the proposals

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being discussed do not pertain to receivers or their appointment, but the rules pertaining to discussions of settlement or resolution would allow these types of issues to be analyzed before an ill-advised decision is made by someone with no financial or personal stake in the controversy.

Sincerely,

Scott Berends

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