IBA
ILLINOIS BANKERS ASSOCIATION
Leading the way

April 13, 2012

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

Re: Discussion Points Submitted for Public Comment and Hearing on April 27, 2012

Honorable Members of the Mortgage Foreclosure Committee:

The Illinois Bankers Association[1] (the "IBA") is writing on behalf of its members to comment on the discussion points submitted for public hearing on April 27, 2012. We support the Supreme Court's objectives to modernize and bring statewide uniformity and greater utility to its rules regarding mortgage foreclosure proceedings, and we appreciate this opportunity to share our comments with you.

We agree without question that our state and most states are facing an "explosion of foreclosures," as the Supreme Court noted in its press release on April 11, 2011, when announcing the formation of the Mortgage Foreclosure Committee (the "Committee"). According to statistics compiled by RealtyTrac Inc., more than 75,000 foreclosure actions were filed in Illinois in 2011 alone, and the average length of a foreclosure proceeding in the first quarter of 2012 grew to 628 days in our state. Again according to RealtyTrac, only three states have longer average foreclosure periods: New York (1,056), New Jersey (966) and Florida (861).

It is fair to say that these inordinate time frames are largely attributable both to the unprecedented volume of foreclosures caused by the recent financial crisis and to the inherent and very understandable interests of defendants in foreclosure actions (and their advocates in the legislative process) to prolong the foreclosure period as long as possible. In addition – putting aside arguments as to who shares blame for the "explosion of foreclosures" (at least for the purpose of this Committee) – we believe most people would agree that the vast network of legacy laws, systems, practices, procedures and personnel relating to foreclosures, which worked well enough on a national and state level for many decades, is now facing a range of questions of first impression which are adding to the delay and creating new uncertainties in the foreclosure process. Ultimately, the resolution of many of these issues will have major practical and public policy consequences reaching far beyond the court room and defendants in foreclosure actions. We respectfully urge the Committee (and the Court) to keep sight of the broader consequences of any decisions it may make in the course of its deliberations.

[1] Founded in 1891, the IBA is a not-for-profit industry trade association dedicated to advancing a positive business climate for Illinois banks and the communities they serve. The IBA's members are state and national banks and savings banks of all sizes in Illinois. Over 80% of IBA members are community banks with less than $500 million in assets, and collectively the IBA represents almost 90% of the assets of the Illinois banking industry, which employs approximately 100,000 men and women in over 5,000 offices across the state.

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As to the nine discussion points on the agenda for the April 27th hearing, the Practice and Procedure Subcommittee already has recommended adoption of seven of these points for new rules,[2] while it is seeking input on the other two.[3] Some appear to be aimed at streamlining and bringing uniformity to the foreclosure process (points 1 and 4), some clearly are aimed at protecting defaulted borrowers, especially with respect to providing information through notices (points 5, 6 and 8), and some appear intended to benefit both the courts and defaulted borrowers (points 2, 3, 7 and 9) in ways unexplained other than in the Court's press releases.

We are particularly concerned with the implications of the Subcommittee's recommendations in point 3 requiring that "a copy of each assignment of the mortgage be attached to the foreclosure complaint, and that a copy of the note, as it currently exists, including all endorsements and allonges" also be attached to the complaint. Our concern is further heightened by the statement in footnote 1 of the second proposed version of the "Affidavit of Amounts Due and Owing" that the affidavit "is not intended to relieve the foreclosing party from establishing . . . the party's right to enforce the instrument of indebtedness if applicable."

To be clear, in no way do we mean to suggest that the plaintiff in a foreclosure action should not be required to establish to the satisfaction of the court that the plaintiff (or the plaintiff's principal if an agent) is the proper holder of the note which is the subject of the complaint, and also the rightful party for enforcing the property lien reflected in the mortgage document. Rather, our concern stems from a range of arguments being put forth today by some defense counsel and commentators around the country which could very well be reinforced, or

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[2] The points recommended by the Subcommittee for adoption as rules (as numbered in the hearing notice) would:

(1) establish a model foreclosure prove up affidavit;

(3) require 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 [an addendum fixed to the note for additional endorsements], be attached to the foreclosure complaint;

(4) require 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;

(5) require that, upon entry of a judgment of foreclosure and sale, plaintiff send notice to all defendants, including defendants in default, of the foreclosure sale date, time and location;

(6) require court clerks to send a notice to all defaulted borrowers advising them that: (a) the court has entered a default order of foreclosure and sale, (b) the borrower may file a motion to vacate that order as soon as possible, (c) the borrower may redeem the property from foreclosure by paying the total amount due plus fees and costs, by a specific calendar day, (d) referring the borrower to local resources for legal assistance in preparing a motion to vacate; and (e) the borrower should act immediately. The notice should be to the property address and to any secondary address at which the borrower was served with process, with proof of this service placed in the court file;

(7) amend the Illinois Code of Civil Procedure to require that a special representative be appointed to stand in the place of deceased mortgagors in cases where no estate has been opened; and

(8) 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, require the plaintiffs' attorney to 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.

[3] The points for which the Subcommittee is seeking input (as numbered in the hearing notice) would by rule:

(2) require plaintiffs to attach a payment history to prove up affidavits.

(9) require 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.

even be viewed as codified by some courts in this state, by reason of the above-quoted language being ensconced in a rule or form affidavit. It is not our intent to litigate these arguments in this comment letter or otherwise before this Committee, but neither do we think that a newly adopted rule or required affidavit should presuppose elements that are central to these arguments, which effectively would "pre-litigate" their issues.

A case in point would be arguments asserting that many if not most mortgage notes which conform to the fixed requirements of Fannie Mae and Freddie Mac are not negotiable instruments because they contain undertakings and conditions that disqualify them from the definition of "negotiable" in Article 3 of the Uniform Commercial Code.[4] Similar arguments are being made with reference to mortgages recorded under the Mortgage Electronic Registration Systems (MERS), which eliminated certain traditional paperwork when assigning notes and mortgages. According to these arguments, when plaintiffs are holding such notes (and/or when MERS is the mortgagee of record, depending on the state), these parties are precluded as a matter of law from asserting that they are holders in due course of the note (or that they have a beneficial interest in the mortgage). And, the arguments go, when a party cannot provide documentary evidence of a chain of title leading from the originating lender to that party (and likewise as to a transfer of the beneficial interest in the mortgage to that party, if applicable) – which parties frequently cannot do given the liquid nature of how assignments are made in the secondary market – the foreclosure lawsuit must be dismissed as a matter of law.[5]

Advocates of this result apparently are not concerned with its implications beyond the context of a given lawsuit or class of lawsuits, but the rest of us should be, for obvious reasons. Fannie Mae and Freddie Mac together hold over $5.3 trillion in home mortgages, nearly half the entire residential mortgage market in the United States. Viewed on a prospective basis, Fannie and Freddie presently are issuing more than 95% of all mortgage-backed securities in the country.[6] The notion that defaults on these notes cannot effectively be pursued in Illinois courts is untenable. To suggest that tens of thousands of seriously delinquent borrowers should retain their properties in *de facto* fee simple – which is what would happen, since there would be no other parties to foreclose on these loans (a result that also would encourage many thousands more to strategically default on their loans) – would be to accept a future in which almost no residential mortgages could or would be underwritten in the state of Illinois.

This is one example using only Fannie- and Freddie-related mortgages. There are many more. Our point is that the Subcommittee's recommendation in point 3 (along with the inference in footnote 1 in the second version of the proposed affidavit) is overbroad and poses serious

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[4] The genesis of this argument appears to be from a now frequently cited 1997 law review article (although the author goes on to argue that negotiability has become irrelevant in the liquid secondary market of residential mortgage transactions). Robert J. Mann, *Searching for Negotiability in Payment and Credit Systems*, 44 UCLA LAW REVIEW 951, 968 - 973 (1997). *See also* Dale A. Whitman, *How Negotiability Has Fouled Up the Secondary Mortgage Market, and What to Do About It,* 37 PEPPERDINE LAW REVIEW 737, 748 - 756 (2010) (noting the difficulty of determining whether a note is negotiable given the inherent ambiguity of mortgage notes and the rarity and "unsatisfying" quality of the analysis in the case law on the issue).

[5] The Internet is rich with websites of legal commentators who are advancing these arguments, one of which is particularly quoteworthy: "I don't know of anyone making this argument in Illinois state courts. I also don't know of anyone who has won on this argument in Illinois state courts. I am tempted to try it, but am waiting for the right case. The tough part is convincing a judge who is used to thinking in terms of negotiability that what has been commonly accepted practice is actually completely ineffective. We shall see." http://foreclosureblog.bankruptcylawyersolutions.com/foreclosue-defense/

[6] Conservator's Report on the Enterprises' Financial Performance, Federal Housing Finance Agency (Third Quarter 2011), at page 5.

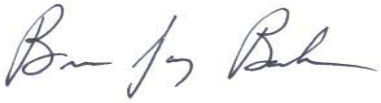
public policy issues that we respectfully submit extend beyond the purview of the judiciary. Accordingly, we respectfully urge the Committee to rewrite the Subcommittee's recommendation. We believe the proposed rule should simply require a showing of evidence that is sufficient to establish to the satisfaction of the judge hearing the case that the plaintiff (or the plaintiff's principal if an agent) is the proper holder of the note. If a dispute arises between two or more lenders and/or servicers as to which is authorized to enforce the note, only then should it be necessary to require evidence establishing the chain of assignments leading to the plaintiff.

With respect to the Subcommittee's recommendations for new notices, we wish to note that, under current law, lenders already must provide borrowers in default with up to seven (or more) notices related to the foreclosure process.[7]

We do not object to reasonable notice proposals (notwithstanding their added costs), and we do not object to the content of the notices recommended in points 5, 6 and 8. However, it has been the consistent experience of our members that there is a saturation point in foreclosure actions beyond which additional notices are rarely effective and can even be confusing and counterproductive. Not coincidentally, in our experience at the legislative level, we find that most notice proposals appear to have merit when considered in isolation, but often little or no consideration has been given to the existence and interplay of other notices and the cumulative effect of adding even more. We urge the Committee when considering these (or any other) new notices to also consider whether and how the information in such notices might be combined with existing notices or pleadings, or even provided through other means of delivery.

Again, on behalf of our members, the IBA sincerely appreciates the goals and efforts of the Court and this Committee, and we appreciate this opportunity to provide our comments to you. Please let us know if you have any questions for us.

Very truly yours,



Bruce Jay Baker
Executive Vice President
and General Counsel

[7] As follows: (i) a Grace Period Notice, giving borrowers 60 to 90 days before initiating a foreclosure [735 ILCS 5/15-1502.5], (ii) a federal delinquency notice informing the borrower of the availability of home ownership counseling and rights under the Servicemembers Civil Relief Act, among other rights [12 USC 1701x(c)(5)], (iii) the notice and service of the foreclosure complaint [735 ILCS 5/15-1503], (iv) a separate Homeowner Notice with information on the homeowner's rights [735 ILCS 5/15-1504.5], (v) a Notice of Entry of Default, when applicable [735 ILCS 5/15-1506(c)], (vi) the Notice of Sale, published for three consecutive weeks [735 ILCS 5/15-1507], and (vii) a notice of the motion for court confirmation of the sale, with information on the borrower's right to possession [735 ILCS 5/15-1508(b-5)]. In addition, the lender must send a payoff demand statement at the borrower's request any time during the foreclosure proceeding [735 ILCS 5/15-1505].