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Real Estate Law

Distressed Homeowners Need Lawyers, Not Legislation

By Steven B. Bashaw and Joseph R. Fortunato

What do homeowners faced with foreclosure need? Not more legislation, these authors argue, but more legal advice, including pro-bono help from lawyers.

Thus far in 2010, the foreclosure glut has inspired administrative responses (e.g., foreclosure mediation programs in Cook, Will and Kane Counties) and case law (e.g., *ABN AMRO Mortgage Group, Inc v McGahan*¹ from the Illinois Supreme Court).

Perhaps it was inevitable that the Illinois legislature would get into the act. Some foreclosure-related legislative initiatives appear well-intentioned, most are ill-conceived, and none promises to be truly effective. They leave us still wondering how to get out of the foreclosure rabbit-hole we have fallen into during this recession.

The legislative proposals

Senate Bill 3067 (Sen. Jacqueline Y. Collins) seeks to amend parts of the Code of Civil Procedure. It would require that a foreclosure complaint include copies of the documents the plaintiff will use to show it holds the mortgage indebtedness or is otherwise entitled to foreclose as an agent, pledgee, or trustee. Additionally, the amendment provides that the court include at the entry of judgment specific findings of fact about the plaintiff's standing to bring the suit, and that evidence of the debt be marked as exhibits.

House Bill 6951 (Rep. Marlow H. Colvin) would require that a plaintiff comply with any applicable federal, state, local, or contractual loss mitigation program (i.e., loan modification programs such as HAMP) before filing foreclosure and include a

"loss mitigation affidavit" in its pleadings setting forth the steps taken to assess the loan's eligibility for modification. It would also require that the judgment include a finding by the court that the plaintiff met the mitigation investigation requirements, and, if the note is "missing," that the plaintiff must file a detailed affidavit describing efforts to actually locate the note. Finally, each affidavit filed in a foreclosure proceeding would have to describe in detail the basis of the affiant's claimed personal knowledge of the matters asserted.

These bills address three common issues in residential foreclosures: whether the plaintiff has standing to sue, whether the lender/servicer has responded appropriately to efforts to modify the loan, and whether the plaintiff at the time of the entry of judgment has supplied the original mortgage documents and met the proof requirements of Illinois Supreme Court Rule 191 for affidavits in civil cases. They would not make new law but simply clarify existing law.

Foreclosure defendants need *you*

These same objectives can be met without resort to over-exuberant legislation, but doing so would require a commitment by members of the bar. In my experience, most plaintiffs' counsel in foreclosure cases will produce the original mortgage and note if called upon to do so. Likewise, loan modifications will be responded to by lenders if defendant's counsel advises the judge that a request for modification is pending without response.

Moreover, plaintiff's counsel - in contested cases, at least - typically support their case with ledger histories, receipts, and affidavits signed by responsible people ready to testify when required to do so by a worthy adversary.

When plaintiffs fail to prove their standing, accounting, and proofs, it is usually a result not of fraud but of "situational incompetence" - overwhelmed operators taking shortcuts because the system lets them. We need not legislation, which further complicates a broken system, but action by individual foreclosure-defense attorneys who keep the plaintiff/lender/servicer "honest."

Perhaps the best solution is to assure that defendants in foreclosure know their rights, understand the process, and are represented by counsel who will keep the plaintiffs and their counsel from becoming "situationally incompetent." What if every member of the Illinois State Bar Association and other bar groups agreed on a pro-bono basis to be the much needed "worthy adversary" in a foreclosure case for just two of his or her neighbors?

Defendant homeowners in foreclosure cases are just as "situationally incompetent" and overwhelmed as their lenders and servicers. Simply determining whether you are entitled to a loan modification under HAMP (depending on modification of interest rate, term, or principal based on 31 percent of gross income) is very difficult when you are confused about the system, paperwork, and deadlines.

What layperson could understand the timetable of a foreclosure - seven months from jurisdiction or 90 days from judgment, whichever is longer in a residential case (but don't forget to factor in confirmation of the sale, the 30-day stay, and a delay in scheduling that varies by county)? People in foreclosure need, but can't afford, good counsel who can walk them through the process. Competent legal advice will keep the plaintiffs "honest" far more surely than legislation can.

There are ample volunteer opportunities available at Chicago Volunteer Legal Services (<http://www.cvlvs.org/>), the Center for Disability and Elder Law (<http://www.probonocdel.org/>), and countless other organizations around the state. They will provide you with training, mentoring, and even malpractice coverage if you volunteer through them.

What it will take to get back up out of the foreclosure rabbit-hole we have managed to fall into during this recession? Administrative measures have reduced but not solved the problem. Case law is developing, but all too slowly. Legislative initiatives too often throw out the baby with the bathwater.

What we need on both the lender and borrower's side is for committed professionals to bring themselves to the table, keep the promise of due process alive, and help their neighbors negotiate this process in a dignified manner. Are you willing to help?

Lisle attorneys Joseph R. Fortunato and Steven B. Bashaw are past chairs of the ISBA Real Estate Section Council and current directors of the Illinois Real Estate Lawyers Association.

1. 237 Ill 2d 526, 931 NE2d 1190 (2010).

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