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## Illinois Mortgage Foreclosure Reform

Recent media coverage portrays the nation's mortgage foreclosure process as utter chaos. Mortgage servicers are accused of signing false affidavits to foreclose on mortgages in which they have no interest. The shadowy organization known as "MERS" has supposedly destroyed borrowers' notes and mortgages as part of some grand scheme to deprive ordinary hard-working American citizens of their homes. With scant evidence, these stories suggest that admitted but generally harmless procedural issues in a limited number of foreclosures have caused actual harm to struggling homeowners. Politicians, sensing the opportunity to grab a headline or two of their own, have responded, adding additional fuel to the fire of rhetoric and misinformation surrounding these stories.

On November 16, 2010, Illinois Attorney General Lisa Madigan and several Illinois legislators proposed legislation that, if adopted, would make Illinois the latest state to engage in "foreclosure reform" intended to address purported irregularities in the foreclosure process, both real and imagined. The proposed legislation addresses three issues that have been the subject of a great deal of news coverage as well as borrower lawsuits:

1. Pre-foreclosure loan modification efforts;
2. Proof that the plaintiff in a foreclosure is entitled to foreclose; and
3. The accuracy of affidavits offered in foreclosure proceedings.

Some of what the bill proposes is already required (for example, proof that the plaintiff is entitled to foreclose), some is not already required but is not particularly problematic (for example, pre-foreclosure review under applicable loss mitigation programs), and some is unnecessarily burdensome and would seem to accomplish little or nothing (for example, requiring a detailed description of the

application of every payment received in the preceding 36 months).

### The Four Proposed Changes to Illinois Foreclosure Procedure

The Bill contains four key changes to existing foreclosure procedure in Illinois:

- Prior to initiating a foreclosure on residential real estate, a plaintiff must comply with any federal, state, local or contractual loss mitigation program, or if no such program exists, any loss mitigation program that exists under its own policies. Each foreclosure complaint must contain an affidavit stating the efforts made to comply with this requirement, and each foreclosure judgment must contain findings that this requirement was met. Foreclosure proceedings must be stayed until the requirement is met.
- If no copy of the promissory note evidencing the debt is available, the plaintiff must file a "detailed affidavit" describing efforts to locate the note and the note's terms and riders.
- Additional documents and information must be included with the foreclosure complaint. A detailed description of each payment made by the borrower in the last 36 months, and copies of all assignments or endorsements showing the plaintiff's right to foreclose must be attached to the complaint.
- Every affidavit offered in a foreclosure proceeding must include a detailed description of the affiant's personal knowledge.

### Loss Mitigation & Loan Modification Efforts

Perhaps the greatest misconception among the public and politicians is that lenders have no interest in mitigating loss or modifying loans. The

truth is that none of the various participants in the mortgage process – from the investors to the trustees to the servicers – want non-performing loans. None of them are interested in incurring the time and expense of taking a property by foreclosure. Nor are they interested in incurring the additional costs of owning, preserving and insuring a foreclosed property until it can be sold—most likely at a loss. All of them would prefer to have a performing loan, even if it requires modification of the loan terms. Unfortunately, borrowers and their counsel often fail to appreciate the limitations servicers and trustees have on their ability to modify loan terms, and the practical inability to modify loan terms beyond limits imposed by the contracts that govern how a pool of loans is to be handled. However, within those contractual limits, it is almost always in *everyone's* best interest to modify the terms of a loan if that will avoid foreclosure and result in a performing loan.

Regardless, there is a commonly held belief that servicers intentionally do not consider borrowers for loan modifications pursuant to Home Affordable Modification Program (“HAMP”) and other programs. Lawsuits challenging servicers’ purported failure to consider borrowers for HAMP modifications have uniformly failed; courts have held that HAMP contains no private right of action, and borrowers lack standing to sue to enforce the HAMP participation agreement between servicers and the government. Earlier this year, Illinois amended its mortgage foreclosure law to allow courts to set aside foreclosure sales prior to confirmation if the borrower can show that he or she has applied for assistance under the federal Making Home Affordable Program (under which HAMP is one of the loss mitigation alternatives) and that the foreclosure sale was in material violation of the program’s requirements.

House Bill 6951 takes this idea a step further by providing courts with the ability to force servicers to comply with those requirements by denying them the ability to proceed past the pleading stage of a foreclosure unless they can prove compliance. The bill would not give plaintiffs a private right of action to sue servicers who allegedly fail to consider borrowers for loan modifications, but it would give those borrowers a defense in foreclosure proceedings.

### Proving Standing to Foreclose

The provisions of the bill that require a plaintiff in a foreclosure proceeding to establish its entitlement to enforce the note and mortgage are not particularly problematic nor do they technically add anything new to Illinois law. All foreclosure plaintiffs have always been required to prove to the court that they are the party with the right to enforce the note and mortgage before a judgment could be entered. The proposed legislation simply requires that a copy of the note be attached to the complaint or, if no copy is available, that the plaintiff file an affidavit stating that no copy is available, the efforts to locate it and a detailed description of its terms. Additionally, copies of any assignments or endorsements of the mortgage or note, establishing the plaintiff’s right to foreclose, must be attached to the complaint.

Once again this appears to be a legislative response to the near universal failure of “produce the note” lawsuits that have been popular among the plaintiffs’ bar in recent years. Neither the Uniform Commercial Code nor any other authority requires a plaintiff to “produce the note” in order to foreclose, much less produce the original note, whether “wet ink,” “blue pencil” or any other particular type of original. A promissory note is evidence of

a debt, nothing more. A borrower has a contractual obligation to repay his or her debt regardless of whether he or she has been presented with the original promissory note. However, it is true that a plaintiff in a foreclosure lawsuit must prove that it is the party entitled to enforce that contractual obligation. The requirement of such proof is nothing new. The proposed Illinois legislation simply provides detail about how that obligation must be satisfied.

### Affidavit Requirements

The most recent “scandal” to hit the mortgage industry is the news that so-called “robo-signers” at a number of servicers were signing thousands of affidavits each week to be submitted in mortgage foreclosure cases in some states. Critics argue that such assembly line processing of affidavits is unlawful, insofar as statements about the “personal knowledge” of the affiants, or that the affiants actually reviewed the records on which their testimony was based would necessarily be incorrect if the reported volume of affidavits they signed were correct. Few, if any, material inaccuracies in affidavits have been identified. That is, the affidavits correctly stated that the loans were in default and correctly identified the amount of the outstanding debt. Nevertheless, the media, politicians and the plaintiffs’ bar howled for reform.

The proposed Illinois legislation would address this latest issue by requiring plaintiffs to include a “detailed description” of the basis for any affiant’s claimed personal knowledge. The description must include:

- A statement of the “specific data systems” the affiant reviewed and relied upon;

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- A “detailed factual statement” of the reasons the affiant believes the system is accurate; and, if applicable,
- A “detailed description” of the basis for the affiant’s description of the terms of the note and mortgage.

Of course, the requirement that an affiant have personal knowledge of the facts set forth in the affidavit is nothing new. The proposed legislation simply adds specific requirements designed to enhance the credibility of the testimony contained in affidavits offered in foreclosure cases.

**Conclusion**

House Bill 6951 appears well-intentioned, but is an unnecessary overreaction to technical issues that have not affected the reliability of the foreclosure process. Most of its provisions will add specific additional requirements that may make foreclosure proceedings appear more accurate and dependable, but at a potentially increased cost. Whether that increased cost is worth the added security remains to be seen.

**About the Authors**

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