

M.R. 3140

**IN THE  
SUPREME COURT  
OF  
THE STATE OF ILLINOIS**

Order entered February 22, 2013.

Effective June 1, 2013, Supreme Court Rules 99.1, 113 and 114 are adopted, as follows.

**New Rule 99.1**

**Rule 99.1. Mortgage Foreclosure Mediation Programs.**

(a) Mortgage foreclosure specific mediation programs implemented by any judicial circuit must adhere to the requirements set forth in Rule 99 and this rule.

(b) Each judicial circuit that currently has approved local rules for a mediation program in place in accordance with Rule 99 may apply that program to mortgage foreclosure cases if applicable. Local rules amended or created to accommodate mortgage foreclosure cases consistent with this rule must be submitted to the Administrative Office of the Illinois Courts for review and approval prior to implementation.

(c) Each judicial circuit electing to establish a new mortgage foreclosure mediation program shall adopt rules for the conduct of the mortgage foreclosure mediation proceedings. If a judicial circuit elects to establish a new mortgage foreclosure mediation program, the judicial circuit shall establish a plan for starting a mortgage foreclosure mediation program that demonstrates the mediation program can be implemented for that particular county or counties at the time of submission of the local rules for approval by the Administrative Office.

(d) Based on the plan established pursuant to paragraph (c), the local circuit rules shall address:

- (i) the requirements set forth in Rule 99;
- (ii) resources to provide meaningful access to HUD-certified housing counseling services for eligible homeowners;
- (iii) resources to provide meaningful access to *pro bono* legal representation for eligible homeowners;
- (iv) resources to provide meaningful language access for program participants;

- (v) any costs charged to any participant in the mortgage foreclosure case;
- (vi) a sustainability plan that includes a long-term funding plan; and
- (vii) training of judges, key court personnel and volunteers on mortgage foreclosure mediation.

Adopted Feb. 22, 2013, eff. Mar. 1, 2013.

## **COMMITTEE COMMENTS**

(March 1, 2013)

The creation of Rule 99.1 resulted from the drastic increase in mortgage foreclosure cases and the resultant burden on judicial circuits throughout the state. Each judicial circuit faced a foreclosure crisis and began adapting its court procedures to most effectively administer the foreclosure proceedings. As a result, the judicial circuits began applying to the Illinois Supreme Court under Rule 99 for approval of mortgage foreclosure specific mediation programs. These programs varied widely in scope, capacity, and structure. To more fully understand the needs of mortgage foreclosure specific mediation, the Illinois Supreme Court appointed a committee to study and hold public hearings to address the need for uniformity among mediation programs. The Special Supreme Court Committee on Mortgage Foreclosures concluded that there was no one model that would work well for each judicial circuit but certain elements must be present to provide equal accessibility and assistance throughout the state. The intention of this rule is to incorporate more consistent elements in programs throughout the state while also allowing flexibility for changing conditions with mortgage foreclosure filings in the future.

The plan required in paragraph (c) recognizes the Supreme Court's need to understand the extent of the mortgage foreclosure problem in the county or counties in each judicial circuit applying for approval. The Supreme Court should be provided the history of the mortgage foreclosure filings in the judicial circuit, the available resources, and the staffing scope of the judicial circuit that shows that the mortgage foreclosure program is realistically attainable for the judicial circuit. The judicial circuit applying for approval should provide a plan that is comparable in scope, size and capacity to the mortgage foreclosure problem facing that circuit. Additionally, the plan should include information about available resources for qualified homeowners that will contribute to the successful implementation of such a program.

Paragraph (d) sets forth requirements specific to mortgage foreclosure mediation programs in addition to the requirements articulated in Rule 99. The Committee concluded that for residential mortgage foreclosures where a defendant was actively living in the home and facing foreclosure, access to a

HUD-certified housing counselor and *pro bono* legal representation is beneficial. However, the Committee also recognized that the availability of those resources may differ from circuit to circuit in the state. As a result, any program proposal submitted for approval shall detail the access the program will be able to provide to eligible homeowners to HUD-certified housing counseling services and *pro bono* legal representation. Lack of availability of particular resources due to financial or geographic constraints shall not preclude approval of a mediation program.

The Committee also recognized that the implementation of a mortgage foreclosure mediation program can drain a court's resources both financially and in staffing capacity. As a result, paragraphs (d)(v) and (vi) require any new mortgage foreclosure mediation program to set forth any costs charged to the parties in the litigation, as well as the sustainability funding plan. The fees charged may include, but are not limited to, mediator fees for mediation sessions and dedicated filing-fee add-ons. A sustainability plan may include those costs charged to litigants or another identifiable source of funding.

### **New Rule 113**

#### **Rule 113. Practice and Procedure in Mortgage Foreclosure Cases**

**(a) Applicability of the Rule.** The requirements of this rule supplement, but do not replace, the requirements set forth in the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 *et seq.*).

**(b) Supporting Documents for Complaints.** In addition to the documents listed in section 15-1504 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1504), a copy of the note, as it currently exists, including all indorsements and allonges, shall be attached to the mortgage foreclosure complaint at the time of filing.

**(c) Prove-up Affidavits.**

(1) Requirement of Prove-up Affidavits. All plaintiffs seeking a judgment of foreclosure, under section 15-1506 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1506), by default or otherwise, shall be required to submit an affidavit in support of the amounts due and owing under the note when they file any motion requesting a judgment of default against a mortgagor or a judgment of foreclosure.

(2) Content of Prove-up Affidavits. All affidavits submitted in support of entry of a judgment of foreclosure, default or otherwise, shall contain, at a minimum, the following information:

(i) The identity of the affiant and an explanation as to whether the affiant is a custodian of records or a person familiar with the business and its mode of operation. If the affiant is a person familiar with the business and its mode of operation, the affidavit shall explain how the affiant is familiar with the

business and its mode of operation.

(ii) An identification of the books, records, and/or other documents in addition to the payment history that the affiant reviewed and/or relied upon in drafting the affidavit, specifically including records transferred from any previous lender or servicer. The payment history must be attached to the affidavit in only those cases where the defendant(s) filed an appearance or responsive pleading to the complaint for foreclosure.

(iii) The identification of any computer program or computer software that the entity relies on to record and track mortgage payments. Identification of the computer program or computer software shall also include the source of the information, the method and time of preparation of the record to establish that the computer program produces an accurate payment history, and an explanation as to why the records should be considered "business records" within the meaning of the law.

(3) Additional Evidence. The affidavit shall contain any additional evidence, as may be necessary, in connection with the party's right to enforce the instrument of indebtedness.

(4) Form of Prove-up Affidavits. The affidavit prepared in support of entry of a judgment of foreclosure, by default or otherwise, shall not have a stand-alone signature page if formatting allows the signature to begin on the last page of the affiant's statements. The affidavit prepared shall, at a minimum, be in substantially the following form:

**Form 1**

IN THE CIRCUIT COURT OF THE \_\_\_\_ JUDICIAL CIRCUIT  
FOR \_\_\_\_\_ COUNTY, ILLINOIS

|              |   |                 |
|--------------|---|-----------------|
| _____        | ) |                 |
| Plaintiff(s) | ) |                 |
| v.           | ) | Case. No. _____ |
| _____        | ) |                 |
| Defendant(s) | ) |                 |

**AFFIDAVIT OF AMOUNTS DUE AND OWING**

I, \_\_\_\_\_, am a \_\_\_\_\_ of \_\_\_\_\_ . I have authority to make this statement on its behalf because \_\_\_\_\_ (identify whether you are a custodian of records or a person familiar with the business and

its mode of operation; if you are a person familiar with the business and its mode of operation, explain how you are familiar with the business and its mode of operation). If called to testify at the trial of this matter, I could competently testify as to the facts contained in this affidavit.

[If the loan was previously serviced by another entity, the affidavit should provide as follows for the most recent transfer of servicing rights: \_\_\_\_\_ (name of the bank) acquired the servicing rights for the Defendant's loan on \_\_\_\_\_ (date) from \_\_\_\_\_ (name of the prior institution). At the time of this transfer, the Defendant's loan was \_\_\_\_\_ (current, or state the amount by which the loan was in default at the time of the transfer).]

The amount due is based on my review of the following records: \_\_\_\_\_ . A true and accurate copy of the payment history and any other document I reviewed when making this calculation is attached to this affidavit (this sentence would only be included if applicable).

\_\_\_\_\_ (name of the bank) uses \_\_\_\_\_ (name of the computer program/software) to automatically record and track mortgage payments. This type of tracking and accounting program is recognized as standard in the industry. When a mortgage payment is received, the following procedure is used to process and apply the payment, and to create the records I reviewed: \_\_\_\_\_ (include the source of the information, method and time of preparation of the record to establish that the computer program produces an accurate record). The record is made in the regular course of \_\_\_\_\_'s (name of bank) business. In the case at bar, the entries reflecting the Defendant's payments were made in accordance with the procedure detailed above, and these entries were made at or near the time that the payment was received. \_\_\_\_\_ (name of the computer program/software) accurately records mortgage payments when properly operated. In the case at bar, \_\_\_\_\_ (name of the computer program/software) was properly operated to accurately record the Defendant's mortgage payments.

Based on the foregoing, \_\_\_\_\_ failed to pay amounts due under the Note, and the amount due and owing as of \_\_\_\_\_ is:

|                  |          |
|------------------|----------|
| Principal        | \$ _____ |
| Interest         | \$ _____ |
| Pro Rata MIP/PMI | \$ _____ |
| Escrow Advance   | \$ _____ |

|  |          |
|--|----------|
| Late Charges                             | \$ _____ |
| NSF Charges                              | \$ _____ |
| Property Maintenance                     | \$ _____ |
| Property Inspections                     | \$ _____ |
| BPO                                      | \$ _____ |
| GROSS AMOUNT DUE                         | \$ _____ |
| Less/Plus balance in reserve<br>accounts | \$ _____ |
| NET AMOUNT DUE                           | \$ _____ |

AFFIANT STATES NOTHING MORE.

BY: \_\_\_\_\_  
Affiant

Subscribed and sworn to before me this  
\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_  
By \_\_\_\_\_

\_\_\_\_\_  
Notary Public  
State of [            ]  
My Commission expires: \_\_\_\_\_, \_\_\_\_\_  
Personally Known \_\_\_\_\_ OR Produced Identification \_\_\_\_\_.  
Type of identification produced: \_\_\_\_\_.

If executed within the boundaries of Illinois, the affidavit may be signed pursuant to section 1-109 of the Illinois Code of Civil Procedure (735 ILCS 5/1-109) rather than being notarized.

**(d) Defaults.**

(1) Notice Required. In all mortgage foreclosure cases where the borrower is defaulted by court order, a notice of default and entry of judgment of foreclosure shall be prepared by the attorney for plaintiff and shall be mailed by the Clerk of the Circuit Court for each judicial circuit. The attorney for plaintiff shall prepare the notice in its entirety and deliver to the Clerk of the Circuit Court one copy for filing and one copy for mailing within two business days after the entry of default. The Clerk of the Circuit Court shall mail within five business days after the entry of default, by United States Postal Service, a copy of the notice of default and entry of judgment of foreclosure to the address(es) provided by the attorney for the plaintiff in an envelope bearing the return address of the Clerk of the Circuit Court and file proof thereof. The notice shall be mailed to the property address or the address on any appearance or other document filed by any defendant. Any notices returned by the United States Postal Service as undeliverable shall be filed in the case file maintained by the Clerk of the Circuit Court.

(2) Form of Notice. The notice of default and entry of judgment of foreclosure shall be in substantially the following form:

**Form 2**

IN THE CIRCUIT COURT OF THE \_\_\_\_ JUDICIAL CIRCUIT  
FOR \_\_\_\_\_ COUNTY, ILLINOIS

|                |                 |
|----------------|-----------------|
| _____ )        |                 |
| Plaintiff(s) ) |                 |
| v. )           | Case. No. _____ |
| _____ )        |                 |
| Defendant(s) ) |                 |

**NOTICE OF ENTRY OF DEFAULT AND JUDGMENT OF FORECLOSURE**

To: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

This notice is to advise you of recent activity in the mortgage foreclosure

lawsuit now pending in the Circuit Court. DO NOT IGNORE THIS NOTICE. YOU SHOULD ACT IMMEDIATELY.

The Circuit Court has entered an Order of Default and a Judgment of Foreclosure and Sale against you in your case concerning the property located at [insert address].

You may be entitled to file a Motion to Vacate this order. Any such motion should be filed as soon as possible.

[If applicable] You may redeem the property from foreclosure by paying \$ \_\_\_\_\_, which is the total amount due plus fees and costs, by [insert day].

[If applicable] If you need legal advice, you may contact \_\_\_\_\_ for free legal advice.

[NAME OF CLERK]

Clerk of the Circuit Court of \_\_\_\_\_ County

[Contact information]

**(e) Effect on Judgment and Orders.** Neither the failure to send the notice required by paragraph (d)(i) nor any errors in preparing or sending the notice shall affect the legal validity of the order of default, the judgment of foreclosure, or any other orders entered pursuant to the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 *et seq.*) and cannot be the basis for vacating an otherwise validly entered order.

**(f) Judicial Sales.** In addition to the requirements for judicial sales set forth in sections 15-1506 and 15-1507 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1506, 15-1507) the following will apply to mortgage foreclosure sales:

(1) Notice of Sale. Not fewer than 10 business days before the sale, the attorney for the plaintiff shall send notice by mail to all defendants, including defendants in default, of the foreclosure sale date, time, and location of the sale.

(2) Selling Officers. Any foreclosure sale held pursuant to section 15-1507 may be conducted by a private selling officer who is appointed in accordance with section 15-1506(f)(3).

(3) Surplus Funds. If a judicial foreclosure sale held pursuant to Section 15-1507 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1507) results in the existence of a surplus of funds exceeding the amount due and owing as set forth in the judgment of foreclosure, the attorney for the plaintiff shall send a special notice to the mortgagors advising them of the surplus funds and enclosing a form for presentment of the motion to the court for the funds.



**(g) Special Notice of Surplus Funds.** The special notice shall be mailed and shall be in substantially the following form:

**Form 3**

IN THE CIRCUIT COURT OF THE \_\_\_\_ JUDICIAL CIRCUIT  
FOR \_\_\_\_\_ COUNTY, ILLINOIS

|                |                 |
|----------------|-----------------|
| _____ )        |                 |
| Plaintiff(s) ) |                 |
| v. )           | Case. No. _____ |
| _____ )        |                 |
| Defendant(s) ) |                 |

**SPECIAL NOTICE OF SURPLUS FUNDS**

To: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

There is \$\_\_\_\_\_ remaining after the sale of your property at [insert address of property sold]. You may be entitled to this money.

If you want to obtain this money, you need to:

Complete the enclosed form.

Take the completed form to the Clerk of the Circuit Court [insert the information for the Clerk of the Circuit Court in which the case is pending].

Schedule a date to present the paperwork to the judge.

Mail a copy of the completed form, at least five business days before the date with the judge, to: [insert service list].

**(h) Petition for Turnover of Surplus Funds.** Each judicial circuit shall make readily available a form petition for turnover of surplus funds to be included in the Special Notice of Surplus Funds required to be mailed by the attorney for

plaintiffs. The petition shall be in substantially the following form:

**Form 4**

IN THE CIRCUIT COURT OF THE \_\_\_\_ JUDICIAL CIRCUIT  
FOR \_\_\_\_\_ COUNTY, ILLINOIS

|                |                 |
|----------------|-----------------|
| _____ )        |                 |
| Plaintiff(s) ) |                 |
| v. )           | Case. No. _____ |
| _____ )        |                 |
| Defendant(s) ) |                 |

NOTICE OF MOTION AND PETITION FOR TURNOVER OF SURPLUS FUNDS

TO: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

On \_\_\_\_\_, \_\_\_\_\_, at \_\_\_\_\_ a.m./p.m. or as soon thereafter as counsel may be heard, I shall appear before the Honorable \_\_\_\_\_ or any Judge sitting in that Judge's stead, in the courtroom usually occupied by him/her, located at \_\_\_\_\_, Illinois, and present:

PETITION FOR TURNOVER OF SURPLUS FUNDS  
(with Appearance)

Now come(s) \_\_\_\_\_, and move(s) this Court for entry of an order turning over the surplus proceeds from the foreclosure sale. In support of this Petition, Petitioner(s) state(s) as follows:

All parties to this proceeding have been given notice of this Petition.

The subject property was sold at a foreclosure sale for more than the amount owed the mortgage company and the sale was approved by the Court on \_\_\_\_/\_\_\_\_/\_\_\_\_.

There is a surplus remaining after all sums are paid in the amount of \$\_\_\_\_\_.

Petitioner(s) is/are a party/parties to the foreclosure case and has/have filed an appearance in the case.

Petitioner's/Petitioners' interest in the property is (select one, and attach any supporting documents): Owner(s)/Mortgagor(s); Judgment Creditor; Lien Holder; Other (please specify):\_\_\_\_\_.

If Petitioner(s) is/are not the Mortgagor(s), judgment for the Petitioner(s) has been proved up in the amount of \$\_\_\_\_\_.

Pick one:

- Petitioner(s) has/have a bankruptcy case pending in Bankruptcy Court and has/have ATTACHED a copy of the order from the Bankruptcy Court allowing receipt of the surplus funds ("Order Authorizing Distribution of Surplus Funds").
- Petitioner(s) DOES NOT/DO NOT have a bankruptcy case pending in Bankruptcy Court.

Wherefore, the Petitioner(s), \_\_\_\_\_, move this Court to turn over to him/her/them the surplus from the foreclosure sale.

I/We, \_\_\_\_\_, enter my/our appearance(s), *pro se*:

Signature \_\_\_\_\_

Signature \_\_\_\_\_

VERIFICATION AND PROOF OF SERVICE

I/We certify under penalty of perjury as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, that I/we have read the foregoing Verified Petition for Turnover of Surplus Funds and the statements set forth therein are true and correct and that I sent a copy of this Appearance and Answer by United States mail to the Plaintiff's attorney and any other parties who have appeared and have not heretofore been found by the Court to be in default, on \_\_\_\_\_, 20\_\_.

Signature \_\_\_\_\_

Signature \_\_\_\_\_

**(i) Deceased Mortgagors.** In all mortgage foreclosure cases where the mortgagor or mortgagors is or are deceased, and no estate has been opened for the deceased mortgagor(s), the court shall, on motion of a party, appoint a special representative to stand in the place of the deceased mortgagor(s) who shall act in a manner similar to that provided by section 13-209 of the Illinois Code of Civil Procedure (735 ILCS 5/13-209).

Adopted Feb. 22, 2013, eff. Mar. 1, 2013.

## **COMMITTEE COMMENTS**

(March 1, 2013)

On April 11, 2011, the Illinois Supreme Court created the Special Supreme Court Committee on Mortgage Foreclosures and charged it with the following tasks: investigating the procedures used throughout the State of Illinois in mortgage foreclosure proceedings; studying relevant Illinois Supreme Court Rules and local rules that directly or indirectly affect such proceedings; analyzing the procedures adopted in other states in response to the unprecedented number of foreclosure filings nationwide; and reviewing legislative proposals pending in the Illinois General Assembly that may impact the mortgage foreclosure rules for the state. To meet this charge, the Committee established subcommittees, one of which was the Practice and Procedures Subcommittee. The Practice and Procedures Subcommittee submitted proposals for changes to the practice and procedures for mortgage foreclosure cases for discussion at a public hearing held on April 27, 2012. After consideration of comments and discussion at the public hearing, the Committee proposed this new rule governing mortgage foreclosure practice and procedure.

Paragraph (b) is derived from the need to address evidentiary issues that often arise during the course of a mortgage foreclosure. The new requirement to attach a copy of the note, as it currently exists with all indorsements and allonges, supplements the Illinois Mortgage Foreclosure Law to provide this necessary document to the defendant and the court at the outset. Including this additional document will prevent unnecessary delays caused by motion practice and discovery often used by defendants.

In drafting this section of the rule, the Committee took into consideration the positions of both the judiciary and comments provided at the public hearing regarding attaching a copy of all assignments to the complaint. The Committee members recognized that with the increase in transfers of mortgages and notes, Illinois courts have seen a dramatic increase in assertions by mortgagors that the mortgagee lacks standing to bring the foreclosure complaint. Quite often, mortgagors who ignore the judicial process until after a foreclosure or sale has

occurred have raised standing issues as a defense, but have been told that their claim was forfeited by the failure to raise it in a timely manner. The Committee considered that as a matter of judicial economy, requiring that all executed assignments of the mortgage be attached at the time of filing could provide current documentation at the outset to all defendants and the circuit court demonstrating how the plaintiff has standing to file the complaint. However, due to industry changes in the documentation requirements for mortgage assignments over the past two decades, a requirement to attach all copies of assignments to the complaint at the time of filing proved to be impractical and overly burdensome for practitioners given the current volume of foreclosures statewide. This rule does not prohibit the attachment of such assignments should a plaintiff choose to do so. This rule also does not preclude the requirement of submission of all assignments at a later date in the litigation should the appropriate issues present themselves and presentation of the documents to the court and litigants becomes necessary.

Paragraph (c) addresses some of the many issues that arise from document handling procedures by lenders and servicers. Illinois courts, along with courts nationwide, have faced issues relating to “robo-signing” practices at major lenders, where affidavits were not properly notarized or where the affiant did not actually review any of the pertinent loan records. In addition to questionable document handling procedures, circuit courts have dealt with prove-up affidavits that come in varied forms, many of which do not properly address the foundational requirements necessary for establishing the accuracy of computerized business records nor the correct amount due and owing under the mortgage and note. Paragraph (c)(2) identifies the minimum requirements necessary for a prove-up affidavit submitted by the mortgagee for entry of a judgment of foreclosure and Form 1 gives a form affidavit that should be used.

No judgment of foreclosure will be entered without compliance with Paragraph (c). However, Form 1 establishes only the amounts due and owing on the borrower’s loan. Paragraph (c)(2) and Form 1 do not relieve the foreclosing party from establishing other evidentiary requirements, as necessary, in connection with proving the allegations contained in its complaint including, but not limited to, the party’s right to enforce the instrument of indebtedness, if applicable.

Paragraph (d) addresses the desire of the Illinois courts to have adequate assurance that the mortgagor is sufficiently notified when an order of default and a judgment of foreclosure are entered against the mortgagor. Many mortgagors ignore court notices, believing that they are in error because their lender is negotiating with them for a loan modification. Other mortgagors have been told by servicers that their foreclosure case is on hold, but the servicer has not told the plaintiff’s attorneys to place the file on hold. Currently, many circuit court clerks send a generic postcard that notifies any defendant, who has an appearance on file, of entry of a default order. Thus, if the mortgagor has not filed an appearance, the mortgagor may not receive notice of the default order from the

clerk. The post card may not contain any helpful information that the defendant can understand. Likewise, notice of the default order is not mailed to the property address as a matter of course. While section 2-1302 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1302) requires that a plaintiff give notice of entry of a default order to be sent to all parties against whom the order applies, failure to give such notice does not affect the validity of the order. As a result, a mortgagor may not receive notice of entry of the default order from either the Clerk of the Circuit Court or the mortgagee's counsel.

Paragraph (d) addresses this deficiency in the notification process and requires the mortgagee's counsel to prepare a specific "Notice of Entry of Default and Judgment of Foreclosure" (Form 2). Counsel for the plaintiff must prepare this notice for the property address or any other address where the defendant is most likely to receive it. A defendant may have filed an appearance or another court paper that would indicate an address that may be different from the address of service of summons and different from the property address. By preparing this notice, and having the Clerk of the Circuit Court mail the notices, any undeliverable mail will remain in the court file and defaulted mortgagors will receive a clearer notice of the order and the judgment of foreclosure than they do currently.

Paragraph (f) addresses two issues relating to judicial sales that have become substantial problems throughout the state. Paragraph (f)(1) attempts to provide adequate notice to those mortgagors who are about to lose their home. Currently, the Illinois Mortgage Foreclosure Law does not specify that a separate notice of the sale be sent to defaulted defendants, and assumes that the publication requirements are adequate for those that have not otherwise participated in the foreclosure proceedings. See 735 ILCS 5/15-1507(c)(3) (lacking a specific requirement that a separate notice of sale be sent to a defaulted mortgagor). However, in many residential cases, a lack of participation, for any reason, results in a lack of notice of the sale to the mortgagor living in the property being foreclosed. That lack of notice often results in the mortgagor learning about the sale on the eve of the sale and filing an emergency motion to stay the sale. In cases where the mortgagor finds out about the sale from a notice of confirmation of sale or through the sheriff's notice of eviction, the courts then must hear motions to vacate the sale and motions to stay possession. See 735 ILCS 5/15-1508(b-5) (requiring notice of confirmation of sale be sent to a defaulted mortgagor). Many of these motions could be avoided and judicial efficiency increased if all parties, including defaulted parties, are given notice of the sale. Accordingly, paragraph (f)(1) implements a new notice requirement to supplement section 15-1507(c)(3) by mandating a separate notice to a defaulted mortgagor presale while also complementing section 15-1508(b-5) that requires notice postsale for confirmation.

Paragraph (f)(2) addresses the selling officer. Currently, section 15-1506(f)(3) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1506(f)(3)) allows, by special motion, an official other than the one customarily designated by a court to

be appointed to conduct judicial sales. The Committee recognized that the customarily appointed selling officer is the sheriff in many counties statewide, section 15-1506 allows a court to appoint a private selling officer upon motion. Given the high volume of foreclosures throughout the state, many sales are being held nearly a year after the expiration of the redemption period. In some cases, this is due to the failure of the sheriff to promptly obey the court order commanding him to sell the property at auction. Accordingly, the loan accrues late fees and increased interest charges. These additional charges do not benefit any party to the foreclosure and do not help the communities if the property remains vacant during that idle period. In order to correct these deficiencies in the process, the Committee recommended that a rule be enacted that expressly allows the use of private selling officers throughout the state. In many instances, private selling officers have lower costs with the capacity and ability to conduct a sale in a timely manner that prevents the accrual of additional fees and facilitates the rehabilitation of properties into valuable components of neighborhoods.

Paragraph (g) implements a specific notification process for informing mortgagors about the existence of surplus funds resulting from a judicial sale. Currently, many clerks of the circuit courts are holding unclaimed surplus funds from judicial sales. Due to the lack of notice, these funds remain unclaimed. Paragraph (g) implements a specific “Special Notice of Surplus Funds” (Form 3) that the plaintiff’s counsel must send to the mortgagors and paragraph (h) includes a specific motion (Form 4) that can be completed by the mortgagors for presentment to the court without an attorney. This paragraph is intended to facilitate the ability of mortgagors to claim those funds to which they may be entitled.

Paragraph (i) addresses the issue of a deceased mortgagor and the subject matter jurisdiction issues addressed in *ABN Amro Mortgage Group, Inc. v. McGahan*, 237 Ill. 2d 526 (2010), which have not been specifically addressed by remedial legislation.

## **New Rule 114**

### **Rule 114. Loss Mitigation Affidavit**

**(a) Loss Mitigation.** For all actions filed under the Illinois Mortgage Foreclosure Law, and where a mortgagor has appeared or filed an answer or other responsive pleading, Plaintiff must, prior to moving for a judgment of foreclosure, comply with the requirements of any loss mitigation program which applies to the subject mortgage loan.

**(b) Affidavit Prior to or at the Time of Moving for a Judgment of Foreclosure.** In order to document the compliance required by paragraph (a) above, Plaintiff, prior to or at the time of moving for a judgment of foreclosure, must file an affidavit specifying:

- (1) Any type of loss mitigation which applies to the subject mortgage;
- (2) What steps were taken to offer said type of loss mitigation to the mortgagor(s); and
- (3) The status of any such loss mitigation efforts.

**(c) Form of Affidavit.** The form of the affidavit shall be as set forth below in Form 1, or shall be in a form specified by amendment to this rule, but, in any case, shall contain the information set forth in paragraph (b) above.

**Form 1**

IN THE CIRCUIT COURT OF THE \_\_\_\_ JUDICIAL CIRCUIT  
FOR \_\_\_\_\_ COUNTY, ILLINOIS

|                |  |                 |
|----------------|--|-----------------|
| _____ )        |  |                 |
| Plaintiff(s) ) |  |                 |
| v. )           |  | Case. No. _____ |
| _____ )        |  |                 |
| Defendant(s) ) |  |                 |

**LOSS MITIGATION AFFIDAVIT**

I, \_\_\_\_\_ [name] \_\_\_\_\_, hereby state as follows:

I am employed as \_\_\_\_\_ [job title] \_\_\_\_\_ of \_\_\_\_\_ [name] \_\_\_\_\_, the mortgagee as defined in section 15-1208 of the Illinois Mortgage Foreclosure Law for the residential mortgage loan that is the subject of the pending foreclosure case, and I am authorized to act on behalf of plaintiff.

With respect to the subject mortgage loan, my employer is the appropriate entity to extend loss mitigation, if any, to the mortgagor(s), as defined in Section 15-1209 of the Illinois Mortgage Foreclosure Law.

I have performed or caused to be performed a review of the records maintained in the ordinary course of the business of my employer relating to the subject mortgage loan, and based upon that review:

The subject mortgage loan is eligible for the following loss mitigation programs<sup>1</sup>:

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<sup>1</sup>Identify here all applicable loss mitigation programs including but not limited to those available under the Making Home Affordable Program, the 2012 National Attorney General



For each of the programs listed above in 3(a), the following steps have been taken by the mortgagee to comply with its obligations under such program:

For each of the programs listed above in 3(a), the current status of loss mitigation effort is as follows:

The above is true and accurate to the best of my personal knowledge and based upon my review of the records as set forth above.

Affiant states nothing more.

BY: \_\_\_\_\_

AFFIANT

Subscribed and sworn to before me this  
\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_  
by \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

State of [name]

My Commission expires: \_\_\_\_\_, 20\_\_\_\_

Personally Known \_\_\_\_\_ **OR** Produced Identification \_\_\_\_\_.

Type of Identification Produced: \_\_\_\_\_.

**(d) Enforcement.** The court may, either *sua sponte* or upon motion of a mortgagor, stay the proceedings or deny entry of a foreclosure judgment if Plaintiff fails to comply with the requirements of this rule.

Adopted Feb.22, 2013, eff. Mar. 1, 2013.

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Settlement, or the FHA, VA, or USDA insured-loan programs. Also identify any “in-house” loss mitigation regularly provided by the mortgagee for a mortgage loan of this type. “Eligible” means the loan is eligible to be considered under such programs because it meets the threshold requirements; eligible does not mean that a loss mitigation alternative to foreclosure is guaranteed.