THE

May 2009

DOCKET

Vol.16, No.5

The Official Publication of the Lake County Bar Association

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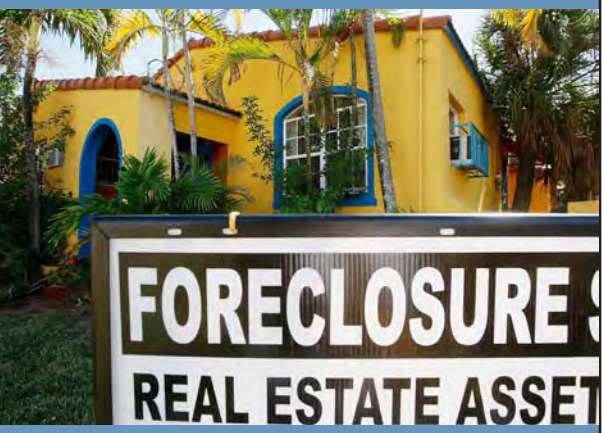

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President's Page

Committee "Start-Up" Luncheon Set for May 21, and "Tot Ziens"

by Bryan R. Winter

After the long and cold winter we have just endured, the idea of being able to eat a brat or hamburger outside in the sun overlooking the Greenbelt forest preserve seems really appealing for the last luncheon of the Spring Series. That is the plan anyway. Of course, this being the Midwest, we will have a Plan B—meeting inside the Greenbelt conference room. By the way, please assure our Executive Director, Chris Boadt, that the temperature will rise above 80 degrees at some point. He still can't believe he moved here from Las Vegas.

The Greenbelt conference room will be set up so that each committee has a table with signup sheets available. This last meeting before the summer will be used to introduce the committee chairs to the membership, and to give new and veteran members the opportunity to renew their membership in a particular committee. Incoming President Scott Gibson will be presenting his appointments to the Board for approval in advance of the May meeting, so any new Committee Chairs can be present. Hopefully, May's meeting will motivate everyone to think about the upcoming bar year and encourage everyone to sign up for at least one committee.

With the new bar year beginning shortly, that means the current bar year will soon be over. To spare you an exhaustive review of successes, I instead refer you to our website, www.lakebar.org. All of the year's past *Dockets* are now archived and the publications provide a good chronology of our achievements and events. Certainly, when members look back at our older *Docket* issues, they will see a notable change. And that change isn't just the color photographs on the covers. Thanks to the collective effort of a large number of members, the *Docket* has published many instructive and interesting articles and added more pictures of our events.

I previously wrote that the LCBA was "going pro" this year when we filled the executive director position. There are always watershed moments for organizations, and for the LCBA, one such moment was when the association hired an Executive Director back in 1978. I predict that the decision of the Board to hire an Executive Director with past professional experience in operating a bar association will probably be a similar moment. Chris has had a full plate learning all about the dynamics of our organization, and I expect members will continue to notice innovations and improved services over the next year.

The expanded Board of Directors made a difference in Board governance. Presiding over 12 well-attended board meetings required that we vote on everything. I even had to employ Robert's Rules of Order by pointing out that a motion to table an issue was non-debatable. I would never have predicted such an occurrence when I first joined the much smaller Executive

2008-2009 Board of Directors

Board, which almost always achieved consensus—sometimes after lengthy discussions—and rarely, if ever, required a vote. The fact of the matter is with 12 Board members in a monthly lunch meeting, not everyone could speak on every issue. The expanded Board certainly is an asset to the LCBA. I am happy to recognize those Board members who will be completing their terms this year: Meg Marcouiller, Meg Georgevich, and Rick Lesser each added important chemistry and leadership to our association.

That brings me back to Rembrandt and how the Board started this bar year with our group picture on the cover of *The Docket*. Just as in that photo, I can report that we are still smiling and have enjoyed serving the membership. Also, we did "engage society" as I hoped at my installation (remember the bracelets?). We brought paralegals into our membership, and perhaps as our most notable effort, we hosted the enormously successful People's Law School. I must confess that interacting with enthusiastic "students" for the four weekly class sessions was gratifying and energizing. I was impressed with the enthusiasm of our presenters, and so were the participants. As the winter ends (hopefully) and so does my term as the third Winter to have served the LCBA as President, I have great memories of the past year and it's just the right time to announce "tot ziens." You guessed it—that's Dutch for the words Presidents often say at the end of their last President's page: "so long," or literally translated "to see," which is appropriate, as I hope to see everyone at future LCBA events. ◊

Bryan Winter at
brywinter@aol.com

INSTALLATION OF OFFICERS AND BOARD MEMBERS

Friday—June 12, 2009
Deer Path Inn, Lake Forest
$90 per person

Scott B. Gibson—President
Elizabeth Rochford—First Vice President
Perry Smith—Second Vice President
Kevin Kane—Treasurer
Marjorie Sher—Secretary
Bryan Winter—Immediate Past President
Hon. Valerie Ceckowski—Board Member
Hon. Fred Foreman—Board Member
Joann Fratianni—Board Member
Thomas M. Gurewitz—Board Member
Steven P. McCollum—Board Member
Michael Ori—Board Member

Chief Judge's Page

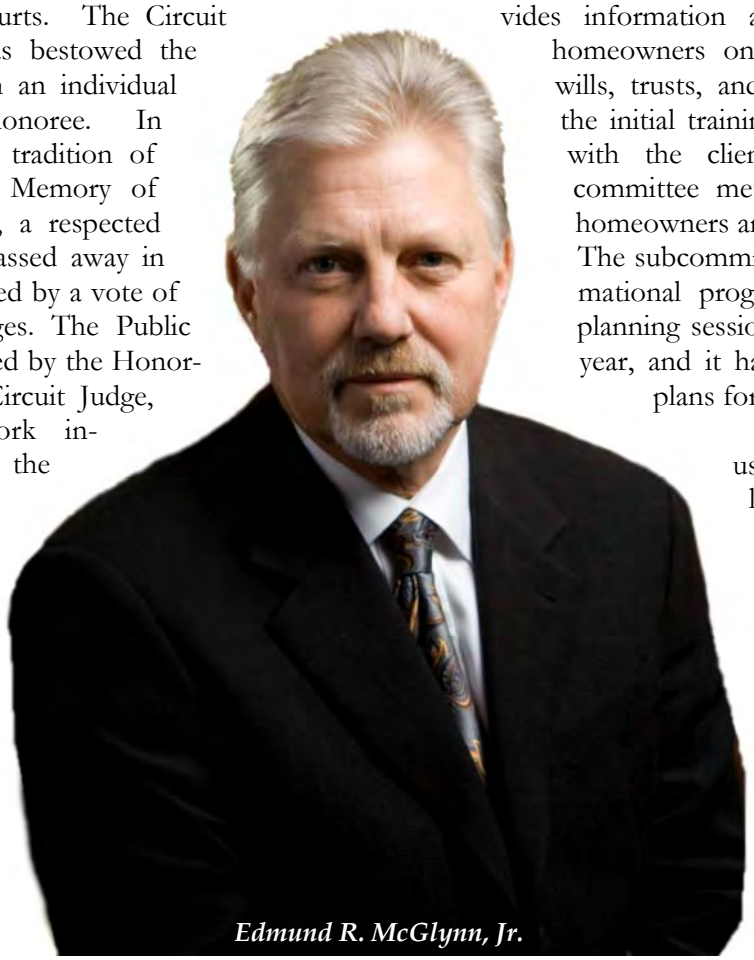
by Hon. James K. Booras

On Tuesday, April 7, 2009, I had the honor of announcing the recipients of the 2009 Liberty Bell Awards for outstanding commitment and service to the community.

The Liberty Bell Award originated in the 1960's in Michigan to honor extraordinary service to the justice system and dedication to the furtherance of the administration of justice. Such service may include taking time to educate the public about our freedoms under the law or encouraging an appreciation of the rule of law and greater respect for the courts. The Circuit Court of Lake County has bestowed the honors since 1996 to both an individual and to an organizational honoree. In 2005, the court began its tradition of presenting the awards in Memory of Judge Thomas R. Smoker, a respected Lake County judge who passed away in 2004. The awards are decided by a vote of Lake County's circuit judges. The Public Relations Committee, chaired by the Honorable Margaret J. Mullen, Circuit Judge, conducted the groundwork involved in the selection of the Liberty Bell Award recipients.

It was my sincerest pleasure to announce that the Liberty Bell Awards for 2009 go to Lake County Bar Association member Edmund R. McGlynn, Jr., and to The Coalition to Reduce Recidivism.

Edmund R. McGlynn, Jr., is a partner of the Lake Forest law firm of Lesser, Lutrey & McGlynn, LLP. Mr. McGlynn specializes in estate planning, federal taxation, and probate law, and he was honored for his work training Lake County Habitat for Humanity families in estate planning. Habitat for Humanity builds and sells homes to low-income families. In response to a request by the Lake County affiliate for Habitat for Humanity, Mr. McGlynn formed a subcommittee of the Lake County Bar Association's Wills, Trusts & Probate Committee to create a program for the benefit of Habitat clients. The program provides information and assistance to Habitat homeowners on legal documents such as wills, trusts, and powers-of-attorney. After the initial training and a general discussion with the clients, Mr. McGlynn's subcommittee met individually with Habitat homeowners and drafted their estate plans. The subcommittee has presented its informational program and conducted estate planning sessions repeatedly over the past year, and it has drafted dozens of estate plans for Habitat families.



Edmund R. McGlynn, Jr.

Programs like these make us proud to be lawyers. The law is a profession, not a job, and Ed McGlynn, through this pro bono work, shows that he is a true professional. The judges wanted to recognize his leadership in pulling together this group of dedicated probate lawyers.

When advised of the Liberty Bell Award, McGlynn pointed to the work of his colleagues

on the sub-committee. "I did it because the people of Habitat for Humanity asked me to help. Since then, I have worked closely with them and with the other lawyers on the sub-committee who did so much and whom I am proud to represent. The spirit of Habitat has really moved me and I intend to continue the work. Thank you for this award."

A ceremony to present the award to Mr. McGlynn is scheduled for the next meeting of the Lake County Bar Association.

The Coalition to Reduce Recidivism is an interdisciplinary group of social service agencies, faith-based organizations, educational and medical institutions, and criminal justice and governmental entities dedicated to reducing crime by guiding ex-offenders in their transition to productive membership in society. The Coalition was formed in 2002 under the leadership of Patricia Jones, Waukegan Township Supervisor. The Coalition offers support to the families of Lake County ex-offenders and helps persons with criminal convictions plan careers and seek employment.

This group does difficult but necessary and important work. With tougher criminal laws come harsher consequences. But once people have served their sentences, society needs to give them a chance. The Coalition is all about making the most of that chance. Lake County is a better place because of the Coalition to Reduce Recidivism. The judges of Lake County appreciate the work of the Coalition and the leadership of Patricia Jones.

Speaking for the Coalition, Ms. Jones said: "I am humbled and grateful for the recognition of the work of the Coalition. Any new adventure is always a challenge but we had several individuals in Lake County who understood the vision of moving people forward from mistake to success. I am proud to be a part of that."

Patricia Jones

The Liberty Bell Award to the Coalition to Reduce Recidivism will be presented at the Lake County Drug Court Graduation scheduled for May 15, 2009. ◊

2009 Liberty Bell Awards

for outstanding commitment and service to the community.

Mortgage Foreclosures: Process and Options

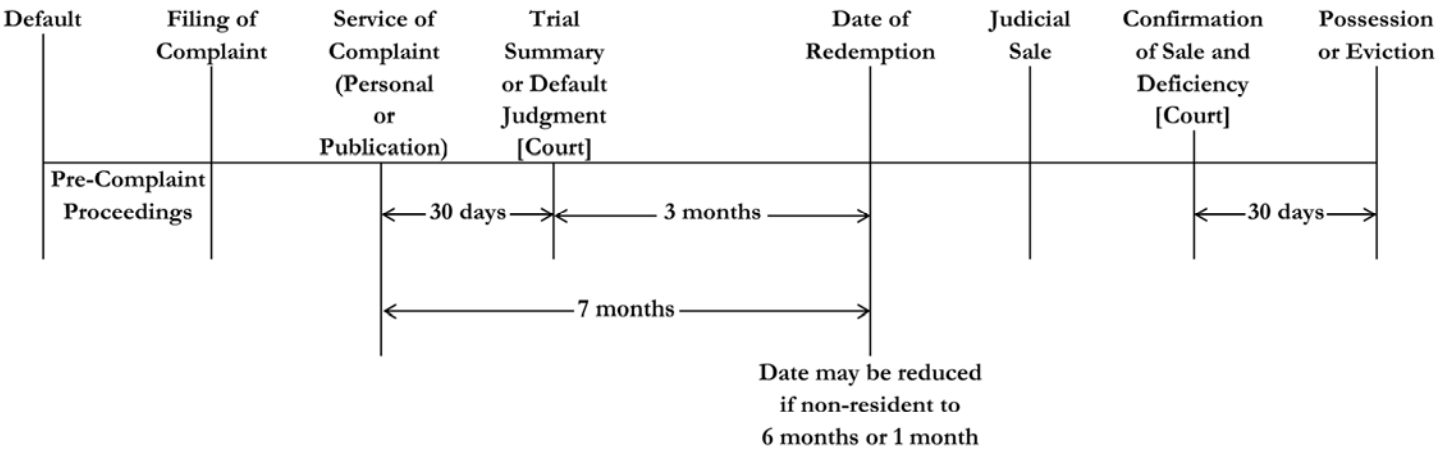
by Doug Stiles

The number of foreclosure cases filed in Cook County increased from 8,000 in 1998 to 42,000 in 2008. In Lake County, foreclosure cases nearly doubled, from 2,530 in 2006 to 4,747 in 2008. There is no doubt that mortgage defaults and foreclosure cases have been on the rise and have affected a myriad of other legal cases from divorce to probate. Therefore, all attorneys should have a basic understanding of the process and procedure surrounding foreclosures so that they may better advise their clients in all legal matters.

The Process

As in other actions involving forfeiture or loss of one's home, foreclosure is a lengthy process. Even where the defendant fails to appear or defend, it usually takes close to a year from first payment default to eviction. A summary of the action is found in the following Foreclosure Calendar:

FORECLOSURE CALENDAR



Doug Stiles is a 30-year partner in the law firm of Fuqua, Winter & Stiles, Ltd., located in Waukegan. He concentrates in probate and real estate law and has recently experienced a great increase in foreclosure litigation.

The Illinois Mortgage Foreclosure Law is found at 735 ILCS 5/15-1101 *et seq.,* which sets out the required form of the complaint and time given to the defendant for redemption. The action begins, as any other typical lawsuit, with 30 days after service for the defendant to appear and plead. After 30 days, the Plaintiff Bank will move as quickly as possible to obtain a judgment of foreclosure and sale either by default or through a motion for summary judgment in order to start the clock ticking on the redemption period and establishment of the redemption date. In most cases, the date is calculated for a resident as seven months from date of service or three months from the date of judgment, whichever is later. Thus, in order not to delay the date of redemption, the plaintiff tries to enter the judgment no later than four months from the date service is obtained. The redemption period was created to give the defendant time to avoid losing his property, and any equity, typically by sale or refinancing. During this period the defendant retains possession of the property and should not be contacted by the plaintiff. There is an exception if the plaintiff can show that the property has been abandoned and needs to be protected and secured.

In certain circumstances, the redemption period may be shortened. In the case where the defendant does not reside on the property, the court may order a redemption date, which is six months from the date of service. Where the property is proven to be abandoned, the redemption date may be set at one month from the judgment date.

The day after the redemption date, a judicial sale may take place after notice by publication. Today this is typically done by a private company rather than the sheriff. Usually, the only bidder is the Plaintiff Bank. This is especially true in today's economic climate where the value of real estate has declined and there often is no equity.

Shortly after the sale, the plaintiff will make his second required appearance in court for a confirmation of sale with an order authorizing issuance of a judicial deed and possession stayed 30 days. If the bid at sale was greater than the amount owed the plaintiff, the court may order the surplus to be paid to any subordinate lienholders and the defendant. If the bid at sale was less than the amount owed the plaintiff, the court may order a personal deficiency judgment against the defendant. The deed conveys the property free and clear of all lienholders who were made a party to the action. After 30 days, the sheriff may evict the defendant.

The Options

What should you say to a client who has defaulted on his mortgage and comes to your office for advice? First, he needs to realistically examine his position. What is the property's market value? How much are the total liens against the property? Is there any equity? How far in default is he? Why did the default occur? Is he in default because he had a job loss or unavoidable expense (e.g. medical)? Has the situation been resolved? Having answered these questions, you and your client should be able to determine whether it is worth keeping the property or giving it up.

Saving the Property

If the client only went through a temporary setback, the redemption period and even the period thereafter may be used to save the property. This may be done through redemption, reinstatement, forbearance, and loan modification.

Redemption is where the loan is paid off in full and a release and dismissal is obtained from the Plaintiff Bank. In the past, this typically occurred through refinancing or sale. With the loss of equity due to falling real estate prices, it has become harder for defendants to utilize this option.

Reinstatement occurs when the defendant becomes current on all default payments, penalties and costs. This is assuming that the defendant has corrected the problem causing his prior default and that he has enough extra money (perhaps from a relative?) to get caught up. The court is always receptive to ordering in the judgment of foreclosure and sale that the defendant is allowed until the redemption date to also reinstate the loan. This should always be requested if there is a chance of reinstatement.

Forbearance is a form of reinstatement, namely when the defendant cannot pay up front the full amount required for reinstatement. The standard requirement for most lenders is for the defendant to pay half the arrearage immediately and the rest in monthly payments over one year.

Loan modification is a refinancing with the Plaintiff Bank. Examples of modification are adding the arrearage onto the loan's back end, modifying the interest rate and extending the term of the loan. Although many banks are receptive, you have to persuade them in your application that with the new terms, you will not default in the future.

Giving the Property Up

Usually, when the defendant has come to the conclusion that he can no longer afford the property, his goal becomes to give up the property with the fewest negative economic consequences. He can do this by giving a deed in lieu of foreclosure, consent to foreclosure or short sale.

In a deed in lieu of foreclosure (735 ILCS 5/15-1401), the defendant conveys the property to the Plaintiff Bank in order for the bank to avoid the lengthy process of a foreclosure action. In return, the defendant is released from any future liability or deficiency and will not have any judgment entered against him. The most leverage for this procedure is in the beginning of the action and, of course, the bank must be persuaded that the defendant has no funds. If there are other lienholders, the defendant can execute a consent to foreclosure (735 ILCS 5/15-1402) which will clear title to the property for the bank.

A short sale occurs when the Plaintiff Bank agrees to reduce the amount owed to it in order for a sale to take place. The defendant is released from any liability for the reduction. In the present declining market, many banks are willing to agree to such a sale to cut their losses, especially when it is clear that the defendant has no assets.

For all of these options, the court has equitable powers to continue dates concerning redemption, sale confirmation and possession. However, any request for continuation should be based on realistic and rational facts. To delay the inevitable may only result in added costs and fees for which the defendant would be liable. This should also be considered if the defendant is contemplating bankruptcy.

Today's economy is, to say the least, unusual. But while of concern, it should be kept in mind that only two-thirds of all homes have a mortgage and of those, only 8% are in default. Of the subprime loans, 80-plus percent are performing and not in default. Ignore the media hype and serve your client by taking a realistic and rational examination of his position and advise accordingly. ◊

Property Tax Rates and Property Market Values

Why Property Taxes Do Not Decline at the Same Rate as Property Values and How to Appeal Anyway

by Karen D. Fox and Beth Prager

Many of the services we receive in our communities and throughout the county are funded by our property taxes. The Illinois Property Tax Code, 35 ILCS 200/1-1, *et seq.*, governs the property tax system. Property taxes are based on the assessed value of your house and on the tax rates set by law. Just as the assessed value of your house is not fixed, neither is the tax rate. The tax rate can go up as the assessed value goes down. And vice versa. This system allows taxing bodies, such as schools and park districts, to function with a relatively stable budget. Both of these factors, assessed value and tax rate, contribute each in its own way to the failure of your taxes to decline. While market values of property may be declining, these declining values do not immediately have any influence on assessed values.

Current Market Value, Past Sales and the Impact on Assessed Value

Current market values of property have been dropping. However, many taxpayers will not notice a similar drop in their tax bills. Your property taxes are based on the assessed value of your property.[1] The assessor is required by law to use three years of sales data to compute the assessed value.[2] This system promotes consistency, and provides the assessor with a statistically significant sample to value property in any given area using sales data. As a result of using three years of sales data, drops in current market values are not immediately reflected in assessed values. For example, in 2009, property owners will be paying their property taxes for 2008. The 2008 assessments were determined as of January 1, 2008, based on sales data from 2005, 2006, and 2007.

Your property taxes are based on the assessed value of your property. The assessor is required by law to use three years of sales data to compute the assessed value. . . . As a result of using three years of sales data, drops in current market values are not immediately reflected in assessed values.

To put the process in context, a descriptive time line is helpful. In January of 2008, the local township assessor collected and analyzed the sales data for the relevant area from years 2005, 2006, and 2007. Those numbers were utilized in determining the assessed values for all properties in that township. The local assessor then forwarded the township assessments to the Chief County Assessment Office (CCAO). The CCAO reviewed each township's assessments and equalized the values to ensure uniformity within the County. This assessment and equalization process takes many months to complete.

After this process is completed, the CCAO sends out notice of the assessed values and other taxing in-

1. The assessment value is 33 1/3 fair cash value of the property. 35 ILCS 200/9-145.
2. 35 ILCS 200/1-55.

Karen D. Fox and Beth Prager are Assistant State's Attorneys in the Civil Trial Division of the Lake County State's Attorney's Office. The opinions in this article are those of the authors and are not necessarily those of the State's Attorney's Office.

formation to property owners on a "blue card" and publishes the assessed values in the local newspaper. The law only requires that the values be published in the newspapers and a blue card be sent if there has been a change in an assessment. However, the CCAO sends out blue cards every year as a courtesy to property owners. These cards show both the property's assessment for the current year and what the assessment was in the prior year.

After publication of the assessment, property owners are given 30 days to file a complaint with the Lake County Board of Review if they believe their assessment is incorrect. These complaints are heard for a period of months. In our scenario, hearings on these complaints would be scheduled and held beginning in the fall of 2008 and into early 2009. After the hearings are finished, final assessment values are then certified. From this example, you can see that the assessment process is long and involved. In sum, the assessment values for tax year 2008 were based on 2005, 2006, and 2007 sales data and any current reduction in market value of property may take years to be reflected in a property's assessed value. The assessed values are then sent to the County Clerk for further processing to determine the tax rates to be used and the resulting amount of property taxes.

Tax Rates

Even if an assessment is reduced, the tax rate used to determine your tax bill may go up. Tax rates are limited, but not fixed. After the CCAO finishes the assessment process, the assessments are sent to the County Clerk. At this point, the County Clerk determines all of the tax rates for each taxing district. The taxing districts determine what their annual funding needs will be for the upcoming fiscal year. The tax rate is then calculated based on the amount of funds needed by the taxing districts to meet their expenditures and the taxing district's assessed values.

A practical example is again helpful. Assume a school district budgets $100,000 for its building fund. The school can get the money it needs if the assessed value of the properties within the taxing district total $10,000,000 and are taxed at .0l%. If the assessed value of the properties drops to $5,000,000, then the tax rate must be increased to .02% to get the same $100,000 for the school's building fund. The County Clerk can increase the rate to meet the budget amount requested unless he or she is limited by law.

The maximum rate allowed by law depends on the type of governmental unit and the type of fund.[3] In addition, the Truth in Taxation Law requires taxing districts to follow certain procedures, including publishing notice to the taxpayers and the holding of a public hearing, if the taxing district wants to increase its aggregate tax levy by more than 5%. Finally, the Property Tax Extension Limitation Law (PTELL) slows the growth of revenues a taxing district can receive. Increases in a taxing district's aggregate tax extension may be limited to the lesser of 5% or the increase in the national Consumer Price Index for the preceding year, whichever is less. This year the CPI to be applied in this calculation is .1%. As a result, PTELL will help in limiting most tax extension increases for the following year.

Property Tax Appeals

If a property owner is interested in appealing his assessment, the process is straight-forward but has strict time limitations.

Assessment

First, the property owner needs to take a look at the assessment placed on the property. Assessment information is available at http://www.lakecountyil.gov/assessments/default.htm. All that is necessary to locate an assessment is a Property

3. The tax rate limits can be found at http://tax.illinois.gov/LocalGovernment/PropertyTax/NewMaxRates.pdf (last accessed Apr. 18, 2009).

Index Number (PIN). If a property owner believes that the property assessment is incorrect, the property owner has a right to file a complaint with the Lake County Board of Review. However, before going to the Board of Review, a property owner may wish to contact the local township assessor to discuss the assessment because many times the local assessor may be able to make an adjustment if one is warranted. Also, ask to review the property record at this time. Property record cards are readily available from the local township assessor's office. The property record consists of items such as the size of the house, number of bathrooms, age of the house, and whether a basement is finished and other factors that contribute to the value of a house. If any discrepancies are discovered, they can be corrected with the local township assessor.

Lake County Board of Review

Property owners generally have a deadline of September 10 (in a county the size of Lake County) or 30 calendar days after the publication of the assessment list in which to file a complaint with the Lake County Board of Review, whichever is later. 35 ILCS 200/16-55. The Lake County Board of Review consists of a three-member panel who are appointed by the County Board. To be considered qualified, Board of Review members must have experience and training in property appraisal and property tax administration. 35 ILCS 200/6-5. Furthermore, the members must pass an examination given by the Department of Revenue to determine their competency to hold the office. 35 ILCS 200/6-10.

Before the deadline passes, a property owner needs to file a written complaint along with evidence to support a reduction in the property assessment. 35 ILCS 200/16-55. Once the complaint is received, a hearing date will be set and a property owner may represent himself or have another individual represent him at this hearing. This hearing is very informal and is held at the CCAO.

This hearing allows the property owner or his representative to present evidence in support of the complaint. There are two types of complaints that are often made. A complaint may be filed challenging the assessment because it was based on an excessive market value or because of a lack of uniformity. A challenge on the basis of a lack of uniformity must show that one kind of property within a taxing district is being valued at a certain proportion of its true value while the same kind of property in the same district is being valued at a substantially lesser or greater proportion of its true value. *DuPage County Bd. of Review v. Property Tax Appeal Bd.*, 284 Ill. App. 3d 649, 672 N.E.2d 1309 (2d Dist. 1996).

Evidence to support these challenges may include one or more of the following: (1) a copy of the Real Estate Transfer Declaration, a deed, or a contract for purchase; (2) an appraisal of the property; (3) a list of recent sales of comparable properties in the area along with property record cards and recent photos; (4) photographs of any elements that may diminish the value of the property that may not be reflected on the property record card; and (5) a copy of the property record for the appealing property. Property owners can find comparable properties on line at http://www.lakecountyil.gov/assessments/default.htm. Sales dates must be close in time to the assessment date and cannot be a result of either foreclosures or "short sales."

Once a decision is reached, a written notice of the Board of Review's decision will be sent to the property owner whether there is an increase, decrease or no change in the assessment. If the Lake County Board of Review makes no change in the assessment, the appeal process does not end there. A property owner may appeal the Board of Review's decision to the Illinois Property Tax Appeal Board or to the Circuit Court.

Illinois Property Tax Appeal Board

The Board of Review's decision must be appealed to the Illinois Property Tax Appeal Board within 30 days after the notice of decision from the Board of Review is mailed to the property owner or his representative. 35 ILCS 200/16-160. Official Rules of the Property Tax Appeal Board can be found at 86 ILAC §1910, *et seq.* A petition form is available from the Property Tax Appeal Board and must be submitted along with all of the evidence to be presented to support your case. Requests for extensions may be made in order to submit all of the evidence necessary.

The hearing is a bit less formal than a court hearing and is held before a hearing officer here in Lake County in the Chief County Assessment Office. Many property owners challenge the assessment at this level on the basis of either an excessive market value or a lack of uniformity. A challenge based on excessive market value must be proved by a preponderance of the evidence and a lack of uniformity challenge must be proved by clear and convincing evidence. *Winnebago County Bd. of Review v. Property Tax Appeal Bd.*, 313 Ill. App. 3d 179, 728 N.E.2d 1256 (2d Dist. 2000). Much of the same evidence submitted to the Board of Review may be submitted to the Property Tax Appeal Board for the hearing. All evidence must be submitted prior to the hearing. A property owner may represent himself or may be represented by an attorney. Both parties have the opportunity to do opening and closing statements and to present witnesses. The Property Tax Appeal Board may also render a decision without holding a hearing based on the evidence submitted. The decision issued by the Property Tax Appeal Board may be appealed to the Circuit Court pursuant to the Administrative Review Law.

Circuit Court

A second option for an appeal from the Board of Review's decision is to file a tax objection in the Circuit Court. 35 ILCS 200/23-15. Although this option is available, most assessment decisions seem to be appealed to the Illinois Property Tax Appeal Board. A bench trial is held and the objections to an assessment are heard de novo by the court. 35 ILCS 200/23-15(b)(3). Although an assessment is presumed to be correct and legal, the presumption may be rebutted if the property owner can show, by clear and convincing evidence, that the assessment was incorrect or illegal. 35 ILCS 200/23-15 (b)(2). If the appeal process is not successful, that is not necessarily the end of the line. Property owners should carefully review their tax bills to make sure they are receiving all of the relief available for those property owners who qualify.

Additional Available Relief for a Property Owner

While an assessment appeal may be successful, there is also other relief available to property owners. This includes, for those who qualify, a General Homestead Exemption, a Senior Citizens Homestead Exemption, a Senior Citizens Assessment Freeze Homestead Exemption, a Senior Citizens Real Estate Tax Deferral and a Homestead Improvement Exemption.

A General Homestead Exemption is available to property owners with (1) an owner-occupied residential property or (2) a leased single family residential property when a lessee is responsible for paying the taxes. 35 ILCS 200/15-175. The

maximum reduction available under this exemption is $6,000. Here in Lake County, the local township assessors identify the eligible properties and forward that information to the CCAO.

In addition to the General Homestead Exemption, seniors are also eligible for a Senior Homestead Exemption. 35 ILCS 200/15-170. This is available to a person (1) age 65 or older, (2) who is liable for paying real estate taxes on the property and (3) is an owner on record of the property or has a legal or equitable interest as evidenced by a written agreement. The maximum reduction available is $4,000. To take advantage of this exemption in Lake County, a person should apply with the CCAO by completing an application and providing any necessary documentation to substantiate his eligibility. Once the initial application is made, an annual renewal form is mailed thereafter.

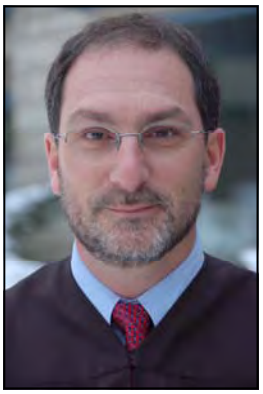
Another exemption available to seniors is the Senior Citizens Assessment Freeze Homestead Exemption. 35 ILCS 200/15-172. This exemption actually "freezes" the assessment on the property if a senior meets the qualifications. Seniors residing in an owner-occupied residence by January 1st of the year prior to application for this exemption, and who are 65 years of age or older and have an annual household income of $55,000 or less, may qualify for this exemption. This exemption, like the Senior Homestead Exemption, must also be applied for and forms are available from the CCAO. This exemption must be renewed annually.

Seniors may also qualify for a Senior Citizens Real Estate Tax Deferral. 320 ILCS 30/1 *et seq*. Taxpayers may complete an application and apply to the Lake County Treasurer's office on or before March 1 of each year requesting a deferral of all or part of their real estate taxes. To be eligible, the taxpayer (1) must be 65 years of age or older by June 1st of the year for which a tax deferral is claimed, (2) describe the property and verify that it qualifies for the deferral, (3) certify that he has owned and occupied the property as his residence for the last 3 years, and (4) specify whether the deferral is for all or part of the taxes and, if partial, the specific amount of the request. 320 ILCS 30/3. Receipt of this deferral requires a taxpayer to enter into a tax deferral and recovery agreement and a lien is then filed against the property. However, eventually this deferral must be paid back. Upon the sale of the property or the death of the taxpayer, the amount deferred plus interest becomes due.

Finally, a Homestead Improvement Exemption may be available to those property owners whose residential property has been improved by a structure or where a residential structure has been rebuilt after a catastrophic event. 35 ILCS 200/15-180. The amount of this exemption is limited to $75,000 of fair market value. The residence must be the property owner's principal residence. This exemption is initiated by the local township assessor. The amount of the exemption is limited to the fair cash value added by the new improvement or rebuilding and shall continue for four years from the date the improvement or rebuilding is completed and occupied, or until the next following general assessment of that property, whichever is later.

This article is simply meant to give a brief overview of the property tax and appeal process, as well as some additional relief available for property owners. Additional information, such as filing deadlines, forms, and rules, may be retried from the Chief County Assessment Office's webpage at http://www.lakecountyil.gov/assessments/default.htm. The office is also happy to answer any questions and can be reached by phone or by e-mail at Assessor@lakecountyil.gov or BoardofReview@lakecountyil.gov. Another helpful webpage is the Lake County Treasurer's page located at http://www.lakecountyil.gov/treasurer/. Both offices, in addition to the local township assessors, are always ready to help and answer questions from Lake County property owners. ◊

Announcement Regarding Mortgage Foreclosure Cases



by Hon. Mitchell L. Hoffman

Effective June 1, 2009, all Motions for Default Judgments of Foreclosure and Petitions for Orders Approving Sale and Routine Motions on mortgage foreclosure cases will be heard in the Park City Branch Court. The Park City Branch Court schedule has been amended to allow these matters to be heard all day on the second and fourth Tuesday of each month, and in the morning on the first four Fridays of the month.

You can access the month by month schedule for the Park City Branch Court from the Nineteenth Judicial Circuit website: http://www.19thcircuitcourt.state.il.us. From the website, on the left side of the page, click on "Calendars and Schedules," then click on "Mortgage Foreclosure" under "Law Division."

If a contested issue arises in the Park City Branch Court, the matter will be re-set on the C-302 Chancery call in the Main Courthouse on a Wednesday morning. This Wednesday morning call will be set aside for contested mortgage foreclosure matters.

The *only* exception to the rule that Default Judgments and Orders Approving Sale will initially be set in Park City Branch Court will be cases where a Mechanics Lien Claimant has filed an Answer and Appearance. Those cases should be set in C-302 on any Wednesday at 9:00 A.M. (However, agreed orders may always be presented in the Branch Court.)

In order to ensure the efficiency of the mortgage foreclosure calls in the Park City Branch Court, the Circuit Clerk will set a maximum of 200 cases for any given half day period. Stated differently, on Tuesdays, a maximum of 400 cases may be set: 200 in the morning, and 200 in the afternoon. On Friday mornings, a maximum of 200 cases may be set.

Law firms may set their cases on the Tuesdays or Fridays indicated on the Park City Branch Court Schedule. The Codilis and Pierce firms will generally use the Friday morning calls, but other firms are not prohibited from scheduling their matters on Fridays.

It is important to note that the case files will not be sent out to the Park City Branch Court for uncontested matters. Counsel are expected to be prepared with copies of all documents necessary for entry of their desired relief, regardless of whether those documents have previously been filed with the court. Complaints must be filed in the main courthouse, but original motions may be presented on the date of hearing in Park City.

Directions to the Park City Branch Court may also be found on the court's website. From the website, in the center of the page near the top, click on "Maps and Directions to Our Facilities." Notices of Motion should indicate "Park City Branch Court—Courtroom 'A,' 301 S. Greenleaf Avenue, Park City, IL 60085. You may continue to schedule your matters through the C-302 clerk in the main courthouse.

The June 2009 Park City Branch Court Schedule is attached. Thank you for your help with this transition. ◊

Nineteenth Judicial Circuit Court
http://www.19thcircuitcourt.state.il.us

Mitchell L. Hoffman is an Associate Judge currently assigned to Chancery.

PARK CITY
COURTROOM A
June 2009

Rev3

Monday	Tuesday	Wednesday	Thursday	Friday
1 9:00 AM Waukegan-Waukegan Harbor Patrol 10:30 AM Waukegan 1:30 PM Waukegan 3:00 PM Waukegan	2 9:00 AM Highwood 10:30 AM Bannockburn 1:30 PM Waukegan 3:00 PM Waukegan	3 ASSIGNED TO COURTROOM B	4 9:00 AM Deerfield-Winthrop Harbor-Wadsworth-Old Mill Creek 10:30 AM Deerfield-Winthrop Harbor-Wadsworth-Old Mill Creek 1:30 PM Deerfield 3:00 PM Deerfield	5 **9:00 AM -12:00 PM Mortgage Foreclosures** 1:30 PM Deerfield 3:00 PM Deerfield
8 9:00 AM Waukegan 10:30 AM Waukegan 1:30 PM Waukegan 3:00 PM Waukegan	9 **9:00 AM -12:00 PM Mortgage Foreclosures** **1:30 PM -5:00 PM Mortgage Foreclosures**	10 ASSIGNED TO COURTROOM B	11 9:00 AM Zion 10:30 AM Zion 1:30 PM Zion 3:00 PM Zion	12 **9:00 AM -12:00 PM Mortgage Foreclosures** 1:30 PM Waukegan 3:00 PM Waukegan
15 9:00 AM Waukegan 10:30 AM Waukegan 1:30 PM Waukegan 3:00 PM Waukegan	16 9:00 AM Highwood 10:30 AM Bannockburn 1:30 PM Waukegan 3:00 PM Waukegan	17 ASSIGNED TO COURTROOM B	18 9:00 AM Deerfield-Winthrop Harbor-Wadsworth-Old Mill Creek 10:30 AM Deerfield-Winthrop Harbor-Wadsworth-Old Mill Creek 1:30 PM Deerfield 3:00 PM Deerfield	19 **9:00 AM -12:00 PM Mortgage Foreclosures** 1:30 PM Waukegan 3:00 PM Waukegan
22 9:00 AM Waukegan 10:30 AM Waukegan 1:30 PM Waukegan 3:00 PM Waukegan	23 **9:00 AM -12:00 PM Mortgage Foreclosures** **1:30 PM -5:00 PM Mortgage Foreclosures**	24 ASSIGNED TO COURTROOM B	25 9:00 AM Zion 10:30 AM Zion 1:30 PM Zion 3:00 PM Zion	26 **9:00 AM -12:00 PM Mortgage Foreclosures** 1:30 PM Waukegan 3:00 PM Waukegan
29 9:00 AM Waukegan 10:30 AM Waukegan 1:30 PM Waukegan 3:00 PM Waukegan	30 9:00 AM Waukegan 10:30 AM Waukegan 1:30 PM Waukegan 3:00 PM Waukegan			

Fundamentals of Illinois Mortgage Foreclosure Defense

by David P. Leibowitz and Sharanya Gururajan

Any visitor to Illinois chancery courts will observe the unprecedented volume of mortgage foreclosures. Lake County classified ads show that foreclosure is a problem affecting everyone and in all areas of the county. The problem is really nationwide.

The creditors' bar tends to portray mortgage foreclosures much as the Borg portrayed itself in *Star Trek*:

> We are the Borg. Lower your shields and surrender your ships. We will add your biological and cultural distinctiveness to our own. Your culture will adapt to service us. Resistance is futile.

Resistance is not futile. There are significant and legitimate defenses to mortgage foreclosure. Even if you don't "defeat" a mortgage foreclosure, you may reduce the amount due. You may gain valuable time for your client. You may persuade the mortgagee that a modification agreement is better than a foreclosure. During the proceeding, the law may even change to your client's benefit.

Mortgage foreclosure cases seem to have the inexorable force of a freight train on the mainline. Even if it doesn't go too fast, you don't want to get in the way. However, skillful advocacy will allow you to divert the foreclosure from the mainline onto a sidetrack. You then have a chance to represent your client effectively. Resistance will no longer be futile.

Today's economic crisis has called upon consumer advocates and foreclosure defense attorneys to think harder, work better and represent their clients with diligence and dedication. Our objective is to introduce you to a comprehensive approach to defending mortgage foreclosures. As attorney, if our clients can sustain homeownership, we want them to have that chance. We want to help our clients to negotiate sustainable modification agreements. We will file chapter 13 cases for our clients if the bankruptcy court affords better options for them.

If there is doubt as to the amount owed, we want to be sure that our client does not pay more than he must. If there is a question as to whether the plaintiff is the proper party or has standing, we assert that defense. If there is a question as to whether the plaintiff is a holder in due course of the note on which the foreclosure is based, we want to challenge holder in due course status so that we can interpose real defenses such as fraud in the inducement as a recoupment

Mr. Leibowitz is managing member of Lakelaw, Waukegan, Illinois. Ms. Gururajan is an associate of Lakelaw. Information about the firm and these topics generally can be found at www.lakelaw.com.

claim. If the loan was originated in violation of the Truth in Lending Act, we want to assert that. If the loan was serviced in violation of the Real Estate Settlement Procedures Act, we want to assert that claim, too.

We raise these defenses and claims because we recognize our ethical obligation to zealously advocate for our clients within the limits of the law and also within any reasonable extension of the law.

We don't believe in quixotic efforts. If our clients cannot afford homeownership, we want to help them find the means to relocate with dignity and on a timely basis without the humiliation of being evicted. We want to help families. We want children to finish their school terms in their communities.

We believe that our work has a salutary effect on our clients and communities. We respect the work of our adversaries, who also have a duty to represent their clients zealously and within the bounds of law to enforce their legitimate contractual expectations. We expect opposing counsel and their clients to respect our work as well.

The Obama administration has promulgated a Home Affordable Refinance Program as well as a Home Affordable Mortgage Modification Program. Homeowners need time to allow these processes to work. Frequently, lenders pursue foreclosure cases aggressively through their attorneys while simultaneously purporting to negotiate loan modification agreements through their servicers. Sometimes, these efforts are sincere. Sometimes, these efforts are to collect as much money as possible from the homeowner before completing the foreclosure.

Bankruptcy options are now available under Chapter 13, and coerced mortgage modification may be possible in the future if the Helping Homeowners Save their Homes in Bankruptcy Act of 2009 if the H.H.S.H.B.A. of 2009 is enacted (HR. 1106 and S 61).

This article is intended to be a first-aid kit for Illinois foreclosure attorneys. We discuss a general approach, practices and theories that a foreclosure defense attorney should consider in defending his or her client's family home. We only address here pre-complaint considerations, answering the complaint and responding to a motion for summary judgment. There are many more issues to be considered. However, we have truncated our work due to space limitations.

Glossary

We use the following terminology throughout:

Plaintiff – named party initiating the foreclosure lawsuit.
Defendant – the Borrower/ Mortgagor.
Borrower – the Mortgagor.
Lender – the current owner of the Mortgage.
Servicer – the company to which the Borrower makes payments.
Original Lender – the entity which made the Mortgage loan to the Borrower.
Original Mortgagee – the entity to which the Borrower originally granted the Mortgage securing the loan to the Original Lender, usually Mortgage Electronic Registration Service (MERS)

I. Pre-Complaint Considerations

Before any foreclosure complaint is filed in Illinois, the Borrower should have received a notice of default and a notice that the loan has been accelerated.

Clients rarely contact attorneys at this pre-foreclosure stage. People facing foreclosure are in shock or denial. If Borrowers can't reinstate their loan by bringing it current, or otherwise coming to terms with the lender, your task is to plan your defense. Take these steps:

- Gather all documents the client received both prior to and at the mortgage loan closing. It is highly likely that the Borrower has maintained these documents in the same envelope or folder and completely intact from the closing. It is very important to maintain these documents exactly as they were received at closing. Treat these documents

with great care. You may need them for a subsequent claim or defense under the Truth in Lending Act.

- Obtain a current loan history from the Servicer. Make a Qualified Written Request to the Servicer asking who is the current Lender and detailing all payments and application of payments. You have this right under the Real Estate Settlement Procedures Act (RESPA). Look here for a sample: http://www.hud.gov/offices/hsg/ramh/res/reslettr.cfm
- Contact the Servicer to determine loan modification possibilities in general.
- Contact the Servicer to determine loan refinance possibilities or loan modification possibilities under the Home Affordable Refinance Program or the Home Affordable Mortgage Modification Program. Check options at: http://www.hud.gov and http://www.makinghomeaffordable.gov.
- Ask the client to gather records reflecting all payments made on the loan. Frequently, payments made by Borrowers are not applied by the Servicer to the loan but rather held in suspense. It is important to know the cash actually paid by the Borrower to the Servicer on the mortgage loan. You need this to defend and also for any possible RESPA claim.
- Interview the Borrower to determine the facts and circumstances under which the loan was originated, including all contacts with mortgage loan brokers or loan officers. Determine what happened at the closing and whether any statements or representations were made at or before the closing concerning the mortgage, the note, or the note's terms. You need this to defend the note on the ground of recoupment claims in the nature of fraud in the inducement, especially if the plaintiff is not a holder in due course.

Watch carefully for developments in Illinois House Bill 2004, the "Emergency Foreclosure Relief Act of 2009," for any new developments. This bill, if passed, will afford many procedural benefits to homeowners facing foreclosure.

II. Responding to the Summons and Complaint

The Borrower is usually personally served with the foreclosure complaint and summons. Service by publication is an option. If the Borrower could have been served personally, service by publication is objectionable. The Plaintiff must provide the Borrower with some rather specific warnings. We won't go into these. All major mortgage law firms now provide these as a matter of routine. 735 ILCS 5/15-1504.5.

The Borrower has 30 days to file an answer, appearance, or otherwise respond to the foreclosure complaint. The summons served on the Defendant clearly indicates that a default judgment may be obtained against the Defendant if he or she fails to respond within 30 days.

Often, Borrowers don't look for an attorney, but rather appear in court without an attorney. Usually, a court won't enter a default even against a defendant who has failed to appear, answer, or otherwise plead after having been served with the complaint and summons. Even if the 30-day period stated in the summons has run, the attorney can and should immediately file a motion to vacate defaults and for an extension of time to file an appearance and otherwise plead. Such a motion puts the Plaintiff on notice that the Borrower has engaged counsel and is seeking additional time to answer or otherwise respond to the complaint. Courts in Lake County and most counties in the Chicago metropolitan area will routinely grant these motions and continue pending motions for default, especially if this is the first extension being sought by the Borrower. At the very least, filing such a motion will avoid entry of a default judgment.

Defense counsel for the Borrower may either file a motion or an answer in response to the Complaint. We first address motions. (We will not specifically address motions to dismiss for lack of proper service, as we believe that all of our readers have had experience and feel comfortable with such motion practice. We also will not address affirmative defenses and counterclaims or cross-claims owing to space limitations.)

Watch carefully for developments in Illinois House Bill 2004, the "Emergency Foreclosure Relief Act of 2009," for any new developments. This bill, if passed, will afford many procedural benefits to homeowners facing foreclosure.

A. Motion to Dismiss for Lack of Standing

Consider the following factors regarding the standing of the Plaintiff to bring the foreclosure complaint:

- Is the Plaintiff really the holder of the Mortgage Note?
- Is the Plaintiff really the owner of the Mortgage Note?
- Is the Plaintiff really the Mortgagee of record?
- Has the mortgage actually been assigned to the Plaintiff? Very frequently, the plaintiff is named in the form of "XYZ Bank c/o ABC Servicer." What exactly does c/o mean in this context? And in what capacity is XYZ Bank acting? Is the assignment proper? Has the assignment been properly pled? Is the Plaintiff a proper party plaintiff? Is the Plaintiff even a legal juridical entity?
- By what authority does the Plaintiff bring the claim? These may be questions of standing or real-party-in-interest. Have all documents establishing authority to sue been attached to the complaint?

Some mortgage foreclosure defense attorneys have been successful in arguing that only the holder of the note or the assignee of a mortgage can bring the foreclosure under 735 ILCS 5/2-403, which states that the owner of a non-negotiable chose in action may sue in its own name but it must plead under oath that it is the actual bona fide holder of the instrument. The mortgage itself certainly is a non-negotiable chose in action.

If the Plaintiff was not the holder of Note at the time the complaint was commenced, or at the time that the mortgage and foreclosure went into default, then it might not be a holder in due course, thereby subjecting the Plaintiff to the possibility of real defenses such as fraud in the inducement, and concomitant recoupment claims.

Plaintiffs will often respond to such a motion to dismiss by submitting a one-page document termed "Assignment" contending that the mortgage and note were assigned to them by the original Lender or a subsequent intervening Lender. Scrutinize this document to determine the circumstances of the purported assignment. The date of the assignment plays a key role in determining if the Plaintiff is a holder in due course. The identity or authority of the person purporting to sign the assignment may also be important and should be examined critically.

Those economically interested in mortgages in the secondary residential mortgage market contend that they are holders in due course of the mortgage notes and related mortgages. In many instances, mortgagors were defrauded in the original extension of credit. While a holder in due course takes free of personal defenses,[1] it must take the note by negotiation, without notice that it has been dishonored, without notice of an unauthorized signature, and without notice of any defenses or claims of recoupment.[2] This may not be the case, particularly in the case of securitized mortgage transactions.

B. Answering the Complaint

It is prudent to deny all material allegations in the Complaint, including that the Plaintiff is the legal holder of the indebtedness. Deny that all sums are due under the note as pleaded. Frequently, mortgage lenders add charges to their loan balance which cannot be supported by back-up records. At the very least, neither admit nor deny allegations as to which your Defendant has insufficient knowledge and demand strict proof.

It is also crucial to deny, to the extent your client can do so, all "deemed" pleaded allegations outlined in 735 ILCS 5/15-1504(c). According to this section, the allegations outlined in §1504(c)(1) through (c)(12) are deemed to have been alleged by the Plaintiff even though they are not explicitly stated in the Complaint. Failure to deny the "deemed pled" allegations will mean that the Borrower has admitted, among other things, to being "justly indebted in the amount of the original indebtedness," "that defaults occurred as indicated,"[3] "that any and all notices of default or election to declare the indebtedness due and payable or other notices required to be given have been duly and properly given," and that "that the amounts indicated in the complaint are correctly stated."

1. Uniform Commercial Code §3-302.
2. Uniform Commercial Code §3-305(a).
3. The Borrower's attorney should investigate to see if there has truly been a default and if proper notices of default or acceleration of the note were sent to the client. If the mortgagee or Servicer has been accepting irregular payments, they may have waived their right to foreclose on the property and may be forced to start the process all over again. *See Allabastro v. Wheaton Nat'l Bank,* 77 Ill. App. 3d 359 (2d Dist. 1979); *Lang v. Parks,* 19 Ill. 2d 223 (1960).

The "deemed" allegations are material and crucial to affirmative defenses, counterclaims or third-party complaints that the Borrower anticipates bringing. Therefore, it is prudent to deny all deemed allegations to the fullest extent possible to effectively allocate the burden of proof to the Plaintiff.

C. *Responding to Motions for Summary Judgment*

Plaintiffs tend to file motions for summary judgment very early in foreclosure cases. It is vital to vigorously resist these to prevent the premature entry of a judgment of foreclosure.

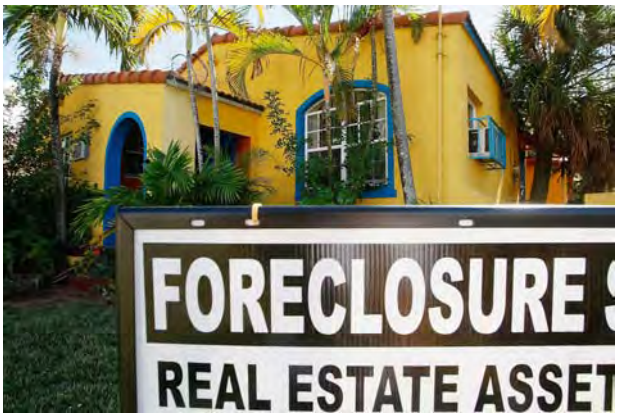
Motions for summary judgment in mortgage foreclosure cases are rarely filed with the required statement of material facts. In fact, there is a Local Rule in the Nineteenth Judicial Circuit of Illinois, Local Rule 2.04(a)(3), which requires every motion for summary judgment to be accompanied by a statement of material facts, and "failure to submit such a statement constitutes grounds for denial or striking of the motion." Before responding to the motion, the Borrower's attorney must file a motion to strike Plaintiff's Motion for failure to adhere to this Local Rule.

The first line of defense to a motion for summary judgment is to attack the sufficiency of the supporting affidavit under Illinois Supreme Court Rule 191(a). Often, Plaintiff/Mortgagee will file *pro forma* motions for summary judgment with a supporting affidavit from an employee claiming "familiarity" with the books and records of the company. In *Cole Taylor Bank v. Corrigan,* 230 Ill. App. 3d 122, 595 (2d Dist. 1992), the Vice President of the bank submitted an affidavit in support of the outstanding balance due and accrued interest on the note. The appellate court struck the affidavit, holding in part that:

1. The affidavit did not establish the Vice-President's familiarity with the records.
2. The documents relied upon in making calculations of the indebtedness and interest rates were not provided.
3. While the business record exception for hearsay allows for the admission of the underlying business record, it does not relate to the admissibility of the witness who is making reference to the business record.

It is important to remember that affidavits used by Plaintiffs in mortgage foreclosure cases are mere substitutes for live testimony, and legal conclusions emanating from the affidavits may be stricken under Rule 191(a).

To preempt motions for summary judgment, defense counsel should commence discovery promptly. By doing so, Plaintiff's pre-emptive motion for summary judgment will be premature. Your discovery plan should require not only paper documents, but also all pertinent electronically-stored information that relates to the mortgage or note, the Plaintiff, the Plaintiff's dealings with the original Lender, and the Plaintiff's dealings with the mortgage broker. Such discovery will give you the opportunity to develop facts that bear on your affirmative defenses or counterclaims. Make sure that your request for electronically stored information is broad enough to cover all metadata as well as all software necessary to evaluate the data in the native format in which it was maintained. Insist that data provided to you be in the same form in which it was originally maintained with no removal of metadata. Insist that you be provided with all correspondence and nonprivileged internal communication, including all email and all internal instant messages or other electronic messages. Consider making requests to admit facts. Find out who really was a witness to the transaction. Consider noticing depositions. Have a set of standard interrogatories ready.



Conclusion

Mortgage foreclosures are simple to file and complex to defend. In Illinois, the process can be skillfully navigated provided one has the knowledge and expertise to buy time and gain leverage to negotiate a loan modification agreement or other mutually advantageous solution to the foreclosure. ◊

The Use and Misuse of MDDPs

Part II of the Author's March *Docket* Article

by Lisa L. Dunn

The judicial driving permit, a limited license formerly granted to first-time offenders (as those offenders are defined by 625 ILCS 5/11-500) has been abolished for all persons arrested for DUI after January 1, 2009. First-time DUI offenders are still eligible to drive after the 31st day of a statutory summary suspension, but now need a Monitoring Device Driving Permit ("MDDP"). An MDDP is issued under Section 6-206.1 of the Illinois Vehicle Code (the "Code"). The length of the summary suspension for a first offender has now doubled: six months for a test failure and twelve months for a test refusal. If the statutory summary suspension is rescinded, the first offender does not participate in the MDDP program and is free to drive, pending the resolution of the criminal DUI charge.

This article will discuss: (1) the parameters of the MDDP program; (2) the MDDP offender's responsibilities in conjunction with the use of the MDDP; (3) violations of the MDDP program; (4) sanctions authorized for violations of the MDDP program; and (5) the right to a hearing to contest the cancellation of the MDDP or extension of the summary suspension.

Parameters of the MDDP Program

An MDDP will be issued to a first offender when the Secretary of State has determined that: (1) the individual is eligible for the permit; (2) the individual has paid the non-refundable monitoring fee; and (3) the statutory summary suspension has been in effect for more than 30 days. The MDDP requires a Breath Alcohol Ignition Interlock Device ("BAIID") to be installed in any vehicle the DUI offender drives during the suspension period. The BAIID is a mechanical unit installed in a vehicle and requires the operator to take a "BrAC" test prior to starting the vehicle. BrAC is the breath alcohol concentration, meaning the number of grams of alcohol per 210 liters of breath. If the unit detects a BrAC test result below the alcohol set point, the unit will allow the vehicle ignition switch to start the engine. If the unit detects a BrAC test result above the alcohol set point, the BAIID prevents the vehicle from starting.[1]

An MDDP allows the DUI offender to drive anywhere, at any time, as long as the offender's vehicle is installed with a BAIID. The Secretary of State's Office monitors the BAIID throughout the duration of the permit. The MDDP offender has 14 days from the issuance of the MDDP to submit the vehicle to a BAIID provider or installer. Until the BAIID device is installed in the vehicle(s) permitted under the MDDP, the MDDP offender is not allowed to drive anywhere other than to a BAIID provider or installer.

An individual who drives without the MDDP and is caught driving a vehicle during the suspension period, or an individual participating in the program who is caught driving without a BAIID, is subject to a Class 4 felony. Penalties include imprisonment of 1-3 years, a minimum of 30 days in jail, 300 hours of com-

1. 92 Ill. Admin. Code Sec. 1001.410, available in the Illinois Register, Volume 33, Issue 2, January 9, 2009, pages 203-500.

Lisa L. Dunn is an attorney with an office in Arlington Heights. She represents clients in criminal and traffic matters in Lake and Cook County. She is also a 14-year veteran of the Secretary of State, Department of Administrative Hearings, currently working as a part-time contractual Hearing Officer and has extensive experience with DUI license reinstatement hearings, BAIID violations, and interpretation of the rules and regulations of the Secretary of State. The views expressed in this article are not those of the Illinois Secretary of State but those of the author.

munity service, and fines up to $25,000.

Some MDDP offenders may qualify for a modification or waiver of the BAIID or an employment exemption from the BAIID. However, work exemptions are not granted if the MDDP offender is self-employed or works for a business owned by a member of the MDDP offender's family.

MDDP Offender's Responsibilities

The Code imposes numerous responsibilities upon MDDP offenders as a result of granting the MDDP. These are set forth in 92 Ill. Admin. Code Sec. 1001.444(c).

First, the MDDP offender may only operate vehicles installed with a BAIID as authorized by the Secretary of State. This includes any vehicle owned, rented, leased, loaned or otherwise in the possession of the MDDP offender. Second, the MDDP offender must take any vehicle installed with the BAIID to the BAIID provider or send the appropriate portion of the device to the BAIID provider within the first 30 days for an initial monitor report, to ensure that the offender learns how to use the device. Thereafter, the offender will only be required to take a vehicle in or send the device to the BAIID provider every 60 days for purposes of calibration and to prepare a monitor report of the device's activity, which is sent to the Secretary of State. The monitoring period is shortened to 30 days for any MDDP offender whose summary suspension is extended or who is resuspended for a violation of the MDDP program.

Third, the MDDP offender must take any vehicle installed with the BAIID to the BAIID provider or send the appropriate portion of the device to the BAIID provider within five days of **any** service or inspection notification.

Fourth, the MDDP offender must maintain a journal of events surrounding unsuccessful attempts to start the vehicle, failures to successfully complete a running retest, or any problems with the device, and record the name of the driver operating the vehicle at the time of the event, if other than the offender. If a BAIID is installed on more than one vehicle, the MDDP offender must keep a separate journal for each vehicle.

Fifth, the offender may not have the BAIID removed or uninstalled from any vehicle without first notifying the Secretary of State and surrendering the MDDP, as instructed. Finally, the offender must not commit any violations listed in subparagraph (d) of 92 Ill.Adm.Code Section 1001.444.

Violations as Defined in 92 Ill.Adm.Code Section 1001.444(d)

The Illinois Administrative Code enumerates ten actions which, when committed by the MDDP offender, may constitute a violation of the MDDP program. These violations include:

1. Conviction or supervision for any of the offenses listed in Section 6-206.1(c-1) of the Illinois Vehicle Code, 625 ILCS 5/6-206.1(c-1). The offenses listed in this section include driving with a revoked or suspended license, a violation of Section 11-501 of the Illinois Vehicle Code or a similar provision of a local ordinance or similar out-of-state offense.
2. Tampering or attempting to tamper with, or otherwise circumventing the BAIID. Tampering means an overt, conscious attempt to disable or disconnect the interlock device.[2] Circumvention means an overt, conscious effort to bypass the BAIID or any other act intended to start the vehicle without first

2. 92 Ill. Admin. Code Sec. 1001.410, available in the Illinois Register, Volume 33, Issue 2, January 9, 2009, pages 203-500.

taking and passing a breath test.[3]

3. A violation of Section 6-206.2 of the Illinois Vehicle Code, including driving a vehicle without a BAIID; soliciting or requesting another person to blow into the ignition interlock device or start a motor vehicle equipped with the device so as to provide the offender with an operable vehicle; tampering with, or circumventing the operation of an ignition interlock device; and knowingly renting, leasing, or lending a motor vehicle to a person known to have his or her driving privileges restricted with an ignition interlock device when the vehicle does not contain such an ignition interlock device.
4. Ten or more unsuccessful attempts to start the vehicle with a BAIID installed within a 30-day period, excluding a BrAC reading of 0.05 or more. An unsuccessful attempt to start the vehicle means any time the MDDP offender registers a BrAC reading of 0.025 or more on the device when attempting to start the vehicle.[4]
5. Five or more unsuccessful attempts to start the vehicle within a 24-hour period, excluding a BrAC reading of 0.05 or more.
6. A BrAC reading of 0.05 or more.
7. Failing a running retest, or failing to take a running retest. A running retest is the feature of the BAIID device that requires the driver to take additional BrAC tests after the initial test to start the vehicle.[5]
8. Removing the BAIID without authorization from the Secretary of State.
9. Failing to utilize the BAIID as required.
10. Failing to submit a BAIID for a monitor report in a timely manner.

Sanctions for Violations as Defined in 92 Ill.Adm.Code Section 1001.444(e)

If the Secretary of State determines a violation has occurred, numerous sanctions are available under the Administrative Code.

For a conviction or court supervision for any of the offenses listed in Section 6-206.1(c-1) of the Illinois Vehicle Code, the Secretary of State will immediately cancel the MDDP and authorize the immediate removal of the BAIID. If the MDDP expired prior to the Secretary of State receiving notification of the conviction, supervision or violation, the Secretary of State will re-suspend the MDDP offender. The offender will not be eligible for reinstatement when the summary suspension is scheduled to terminate, but instead will only be eligible to apply for a restricted driving permit. Any restricted driving permit issued will be conditioned upon the use of the BAIID device for a period of not less than twice the original summary suspension period.[6]

If there appears to be any evidence of a violation of Section 6-206.2 of the Illinois Vehicle Code, the Secretary of State will send the MDDP offender a letter asking for an explanation of the tampering or unauthorized circumvention. The offender then has 21 days after the date of the Secretary's letter to provide a written response. If the response reasonably assures the Secre-

3. 92 Ill. Admin. Code Sec. 1001.410, available in the Illinois Register, Volume 33, Issue 2, January 9, 2009, pages 203-500.
4. 92 Ill. Admin. Code Sec. 1001.410, available in the Illinois Register, Volume 33, Issue 2, January 9, 2009, pages 203-500.
5. 92 Ill. Admin. Code Sec. 1001.410, available in the Illinois Register, Volume 33, Issue 2, January 9, 2009, pages 203-500.
6. 625 ILCS 5/6-206.1(l).

tary that no violation occurred, no further action is taken. If a response is not received within 21 days or does not reasonably assure the Secretary, the Secretary will immediately cancel the MDDP. If the summary suspension is already terminated prior to the Secretary receiving the monitor report/physical inspection showing the violation, the Secretary will re-suspend for three months.

The Secretary of State will send the MDDP offender a letter asking for an explanation if the monitor reports show (a) ten or more unsuccessful attempts to start the vehicle with a BAIID within a 30-day period; (b) five or more unsuccessful attempts to start the vehicle with a BAIID within a 24-hour period; or (c) any single BrAC reading of 0.05 or more. If a response is received within 21 days after the date of the Secretary's letter which reasonably assures the Secretary that no violation occurred, no further action will be taken. If a response is not received within 21 days or the response does not reasonably assure the Secretary, the Secretary will extend the summary suspension for three months. If the summary suspension is already terminated prior to the Secretary receiving the monitor report showing the violations, the Secretary shall re-suspend for three months. If the monitor report shows multiple violations, each violation is considered a separate violation requiring a separate three-month extension or re-suspension.

If the monitor reports show a failure to successfully complete a running retest, the Secretary of State will send the MDDP offender a letter asking for an explanation. If a response is received within 21 days after the date of the Secretary's letter which reasonably assures the Secretary that no violation occurred, no further action will be taken. If a response is not received within 21 days or the response does not reasonably assure the Secretary, the Secretary will extend the summary suspension for three months. If the summary suspension is already terminated prior to the Secretary receiving the

monitor report showing the violation, the Secretary will re-suspend for three months.

The Secretary of State will immediately cancel the MDDP if the BAIID is removed or uninstalled without authorization, including a removal or uninstallation caused by the MDDP offender's failure to pay lease or rental fees due to the BAIID provider.

The Secretary of State will extend the summary suspension for three months if the MDDP offender does not utilize the BAIID. If the summary suspension is already terminated prior to the Secretary receiving the monitor report showing the violation, the Secretary will re-suspend for three months.

The Code further provides a specific procedure for the Secretary of State to follow in the event of a failure to submit the BAIID for a monitor report in a timely manner. All monitor reports are to be submitted to the Secretary within 37 days after installation and within 37 days thereafter, unless notified by a BAIID provider that the BAIID has been removed. The Secretary first conducts an informal inquiry, including attempting to contact the BAIID provider and MDDP offender by telephone or e-mail, if the Secretary fails to receive an MDDP offender's monitor reports within 37 days, to determine the cause of this failure. If it is determined or if it appears that the MDDP offender failed to take in a vehicle with the BAIID or send the device in for timely monitor reports, the Secretary will send a letter to the MDDP offender stating that if the BAIID is not taken in for a monitor report within ten days from the date of the letter, the Secretary will extend the summary suspension for three months. If the summary suspension is already terminated prior to the Secretary receiving the monitor report showing the violation, the Secretary will re-suspend for three months.

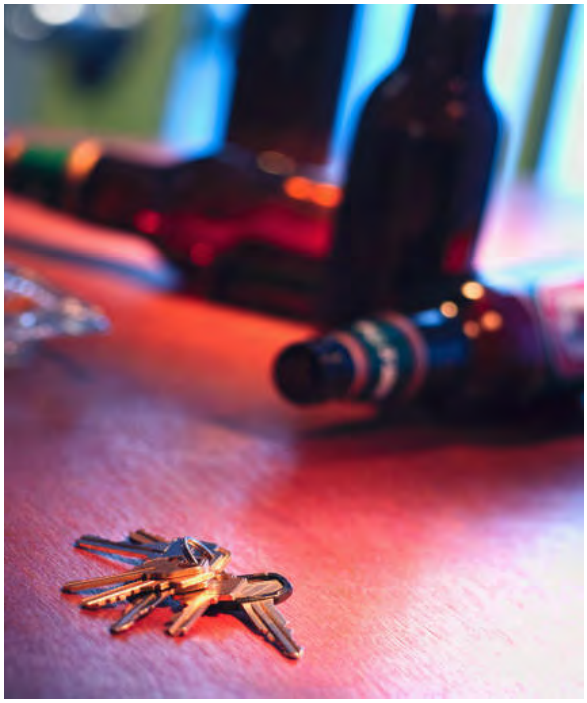
Finally, violations detected in any one monitoring period will not result in extensions or re-suspensions totaling more than six months. Three extensions per violation can result in a car being impounded for a period of at least thirty days. Four extensions per violation may result in the car being seized.[7]

Right to a Hearing to Contest Cancellation of the MDDP or Extension of the Summary Suspension

An MDDP offender whose MDDP is cancelled or whose summary suspension is extended has the right to request a hearing with the Secretary of State to contest this action. The MDDP offender has 30 days from the date the notice of extension, re-suspension or cancellation to contest the Secretary's action. This written request, including a $50 filing fee, must be either received by the Secretary or postmarked within 30 days from the date that the notice of extension, re-suspension or cancellation was mailed by the Secretary. The hearing will be conducted as any formal hearing under the Illinois Administrative Code.

Conclusion

The Illinois Vehicle Code now contains very specific requirements for an MDDP offender to follow during the term of a statutory summary suspension, or any extension of the suspension. The applicable statutes, rules and regulations of the Secretary of State address compliance with the requirements of the MDDP, methods for determining compliance, the consequences of noncompliance, and what constitutes a violation of the MDDP. ◊



7. 625 ILCS 5/6-206.1(k).

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Financial Advisers in Employment Transition; A Primer on the Protocol

In 2004, three financial services firms devised a way to ease the transition of financial advisers from one firm to another. The three firms – Citigroup Global Markets (Smith Barney), Merrill Lynch, and UBS Financial Services – signed an agreement called the Protocol for Broker Recruiting (the "Protocol"). Since then, at least 75 financial services firms have signed the Protocol. The result has been a profound increase in the number of transitions and an equally profound decrease in the number of T.R.O. litigation filings!

Pre-Protocol (and not so long ago), financial services firms retained law firms to be "on-call" nationwide for emergency court filings to enjoin departing financial advisers from leaving with "the firm's customers." Of course, the financial services firm to which the financial adviser was transitioning would argue that the adviser had every right to transition with "his or her customers." Time and time again, firms replaced Legal Brief "A" with Legal Brief "B" depending upon whether they were losing or gaining a financial adviser and his or her customers. The situation transpired this way over and over again, with no firm being a clear winner or loser, because a firm that would gain customer accounts one day might lose a different set of accounts another day. Cynics observed that the only ones making money were the lawyers. In any event, the great majority of cases settled, either for a substantial sum of money when an injunction was granted, or for a less-than-substantial sum of money when the injunction was denied.

When the three financial services firms signed the Protocol, there was much speculation as to whether it would last. The thinking was that each firm would need to reflect on whether, in the months and years ahead, it would be a "net hirer" or a "net target" of employee defections. A "net target" firm would not accept the deal because the Protocol, in effect, was a litigation forbearance agreement. Giving up the right to enjoin departing financial advisers leaving with "the firm's customers" and to seek damages was not a decision to be made lightly. Nonetheless, and despite some early delays in signing on, most major financial services firms, including all of the "wirehouse" firms, signed the Protocol. Since then, several (but clearly not all) other firms of all sizes have signed on.

The result has been an employment transition expressway! Why? Let's examine what the Protocol allows financial advisers to take with them. First, departing financial advisers may take their client names, addresses, telephone numbers, email addresses and client account names/titles. Likewise, departing financial advisers may share their personal sales production information with their new firm. On the other hand, departing financial advisers may not take other account data, such as client account numbers, account statements or tax identification numbers. Similarly, they may not share any client information with their new firm prior to resignation. Of course, it is worth noting that nothing in the Protocol alters the common law duty of loyalty as it relates to prohibiting a financial adviser from soliciting clients (to move their accounts) and staff (to join the new firm) before the adviser resigns.

Second, the Protocol details the process to be followed in transitioning. Financial advisers must resign in writing and attach copies of any client information that they are taking. While the financial adviser can and will bring a list of client account names/titles, he or she will provide that list to the former employer but will modify it to include the account numbers.

Third, the Protocol expressly does not protect against T.R.O. litigation for what the securities indus-

James J. Eccleston is a securities attorney representing investors as well as brokers and brokerage firms nationwide in arbitration, litigation and regulatory affairs. He is an equity partner with Shaheen, Novoselsky, Staat, Filipowski & Eccleston.

try calls "raiding" cases. These cases are not easily defined, but normally "you know 'em when you see 'em." They occur when a financial services firm loses so many of its advisers to a competitor that a "severe economic impact" results. That impact has been quantified as approximately 40% of a business unit's production, but the percentage varies and the determination depends upon what kind of "improper means" was employed and/or the degree of "malice/predation" that existed.

Fourth, the Protocol does not alter any contractual obligations that financial advisers may have to their former firms by virtue of promissory notes or retention bonus agreements that they signed. Likewise, the Protocol does not shift responsibility for any trading errors that might have occurred at the former firm. There may be defenses to each of those scenarios, but they will not be found in the Protocol.

Finally, by its language the Protocol protects departing financial advisers only when they are leaving a Protocol signatory firm for a Protocol signatory firm. If one or both firms is not a Protocol signatory firm, T.R.O. litigation and damages are available. That said, several courts of equity have recently refused to grant injunctive relief to financial services firms that are Protocol signatories. That case law is relatively new but a trend is developing.

Financial advisers now have one of the greatest opportunities to transition to a new firm. But they better do it right, with the assistance of capable securities employment counsel familiar with the Protocol! ◊

Annual Report of the Lake County Bar Foundation for 2008

March 24, 2009

From: Mark B. Peavey, Chairperson

To: Bryan Winter, President of the Lake County Bar Association and ex-officio Chairman of the Board of Directors of the Lake County Bar Foundation

The Lake County Bar Foundation is the charitable arm of the Lake County Bar Association. The Foundation was established by and operates under a constitution and bylaws, which are available on the Association's website.

The Chairperson is appointed by the President of the Lake County Bar Association in his capacity as the Chairman of the Board of Directors of the Foundation.

The Officers of the Bar Association are also the Directors of the Foundation.

For the year 2008, the Foundation was involved in three activities:

1. The Foundation is the repository of funds donated for the use of the Therapeutic Intensive Maintenance Court ("TIM" Court). The Foundation receives funds that are donated for specific use by the court and the probation department to purchase bus passes, grocery store gift cards and materials and food for graduation parties for those participants who make it through this difficult program. It is the belief of the Foundation and the donors that participants' success or failure in this program should not hinge on their ability to go to and from work or court, or to their ability to feed themselves or their family. As of March 19, 2008, there was $14,318.22 in the subaccount for TIM court donations. There is also a separate account for the Drug Court Alumni fund, which contains $453.52, and which is the money raised by the alumni of the drug court's cookie sale. Requests and distributions for this account are handled by the Executive Director of the Bar Association.
2. The 82nd Airborne "All Americans" funds: This endeavor was the brainchild of attorney Joy Fitzgerald, who served as the Chair of the ad hoc Committee to support the All Americans. The fundraising campaign generated over $8,500.00 in contributions to the Foundation, and those funds were earmarked for use by the All Americans Committee. I am happy to report that

the Committee was able to purchase most, if not all, of the sundries requested by the soldiers. With the assistance of the Vernon Hills Police Department, the Committee shipped 20 large boxes to Iraq.

3. The Wayne B. Flannigan Memorial Scholarship: The Wayne B. Flannigan Scholarship was established by resolution of the Bar Association and Bar Foundation on November 4, 2004. The purpose of the scholarship was to honor Wayne B. Flannigan, who was the President of the Bar Association in 2001-2002 and was taken from us prematurely in a tragic accident. Fundraisers were held October 21, 2004, and October 19, 2005, which, along with other individual contributions, resulted in more than $21,000.00 being raised for the scholarship. I met with Elaine Flannigan and her daughters to discuss the use of this money and the type of scholarship. I am happy to report that the decision was made to contribute this money to the University of Illinois Law School for an annual scholarship in Wayne's name that will go to a resident of Lake County attending that law school. If there is no recipient in any given year, the scholarship funds will roll over back into the scholarship. The agreement between the Bar Foundation, Bar Association, and the University is in the process of being finalized.

Future Goals
and Aspirations:

As soon as the dust had settled over the reorganization of the Bar Association with the addition of a board of directors, attention turned to the Foundation. The addition of the $50,000 *cy pres* donation (detailed in Bryan Winter's *President's Page* in the April issue of *The Docket*) means that some of the various ideas voiced by Bryan and the other members of the Association can be brought to fruition. The first order of business, however, is the reorganization of the Foundation. The current bylaws and constitution need what I would charitably describe as a tune-up. To that end Bryan Winter, Rick Lesser and I have volunteered to draft new bylaws to make the administration of the Foundation less cumbersome, and with the goal of getting more people involved in the decision-making and administration of the Foundation.

I strongly encourage any of our members seeking avenues to serve the bar and our community to consider serving as a director of the Foundation. The *cy pres* donation means nothing without ideas and input and effort from us. ◊

MCLE Update

The N—Z Reporting Period and Other Miscellaneous Thoughts

by Richard S. Kopsick, CLE Committee Chair

To borrow from Alfred Lord Tennyson in *Locksley Hall*, spring is the time when an attorney's fancy turns to thoughts of the two-year MCLE reporting period. In 2009, the current two-year MCLE reporting period applies to those whose last names end with N through Z, and ends on June 30, 2009.

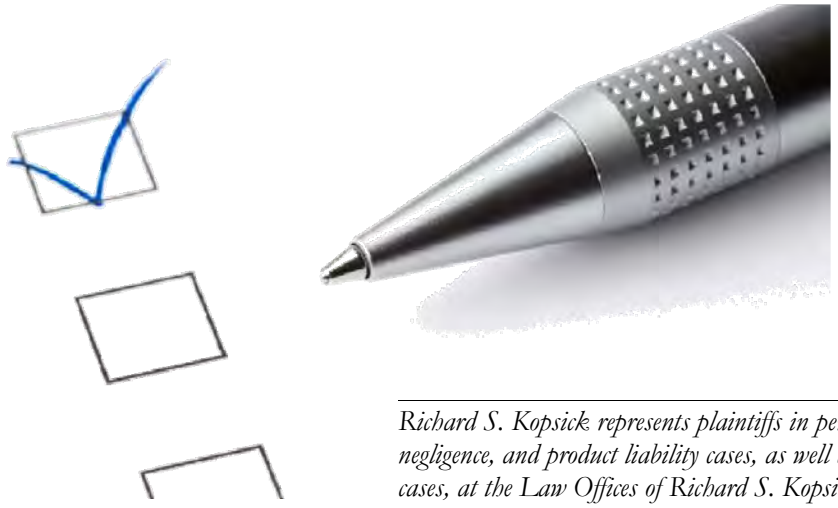
As you know, the total number of hours required for this two-year period is 20. Those hours must consist of 4 Professionalism & Ethics hours, and 16 regular MCLE hours. Remember that initially, you are simply certifying that you have complied with the 20-hour requirement for this reporting period. You do not need to provide the MCLE Board with proof of the hours you have completed unless and until you are audited.

Note: The Lake County Bar Association does not send any materials directly to the MCLE Board. You are responsible for obtaining proof of your completion of any given program, and keeping that proof so that it is available in the event of an audit.

As with the compliance process from 2008, you should expect to receive a certification form from the MCLE Board, which will be due no later than July 31, 2009 (31 days after the end of your reporting period). You must complete, sign, and submit the certification form to the MCLE Board by July 31, 2009. You are also required to include payment of a $20 fee with your certification form if you are claiming credit for "nontraditional activities." Nontraditional activities are covered by Supreme Court Rule 795(d). In my opinion, nontraditional activities do not include the LCBA "brown bag" seminars, but do include attendance at a Bar Association Committee meeting for which credit is claimed. Remember that you can view the MCLE rules at www.mcleboard.org.

One final thought: in addition to our current MCLE obligations, the next two-year reporting periods will require 4 hours of Professionalism & Ethics plus 20 regular hours. Because non-members attending LCBA seminars pay double for all programs, your completion of required MCLE hours as an LCBA member results in savings roughly equal to the amount of the annual dues you pay to be an LCBA member. Additionally, your attendance at our free "brown bag" programs allows you to complete approximately twelve hours of MCLE credits each year without any cost whatsoever. So if you are considering the LCBA from an economic viewpoint, becoming a member is the perfect way to obtain your required hours and save money doing so.

As always, please feel free to contact me with any questions at (847) 623-8700. ◊



Richard S. Kopsick represents plaintiffs in personal injury, medical negligence, professional negligence, and product liability cases, as well as clients with Criminal Court and Juvenile Court cases, at the Law Offices of Richard S. Kopsick, P.C.

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Campaign for Legal Services

The Leadership Committee of the Campaign for Legal Services wishes to thank the following contributors for helping to ensure that equal access to justice remains a reality for low-income individuals and families in Lake County. As of April 3, 2009 the donors listed below generously have contributed over $70,000 to the Campaign for Legal Services.

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Please call (847) 244-3143 to confirm date, time and location of event before you attend.

MAY 2009			
Date	**Event**	**Time**	**Location**
5/7	*Brown Bag Seminar*	12:00 p.m.	C-201
5/7	*Real Estate Committee Meeting*	5:00 p.m.	In-Laws Restaurant
5/12	*Professionalism and Office Mgmt. Com. Mtg.*	12:00 p.m.	Lovell's of Lake Forest
5/12	*Associate Member Committee Meeting*	12:00 p.m.	LCBA Office
5/12	*Wills, Trusts & Probate Committee Meeting*	12:00 p.m.	C-307
5/13	*Legal Aid Committee Meeting*	12:00 p.m.	Prairie State Legal Serv.
5/19	*Memorial Service*	12:00 p.m.	C-201
5/20	*Criminal Law Committee Meeting*	12:00 p.m.	LCBA Office
5/20	*Family Law Committee Meeting*	12:00 p.m.	C-105
5/21	*Business Lunch Meeting/Committees*	12:00 p.m.	LCBA Office
5/25	*LCBA Office Closed*		
5/28	*Civil Trial & Appeals Seminar & Golf Outing*	8:00 a.m.	Biltmore Country Club

JUNE 2009			
Date	**Event**	**Time**	**Location**
6/4	*Real Estate Committee Meeting*	5:00 p.m.	In-Laws Restaurant
6/9	*Associate Member Committee Meeting*	12:00 p.m.	LCBA Office
6/9	*Wills, Trusts & Probate Committee Meeting*	12:00 p.m.	C-307
6/12	*Installation of Officers and Directors Dinner*	6:30 p.m.	Deerpath Inn
6/16	*Brown Bag Seminar*	12:00 p.m.	C-201
6/17	*Criminal Law Committee Meeting*	12:00 p.m.	LCBA Office
6/17	*Family Law Committee Meeting*	12:00 p.m.	C-105
6/18	*Board of Directors Meeting*	12:00 p.m.	LCBA Office
6/18	*Civil Trial & Appeals Committee Meeting*	5:00 p.m.	McCormick's

If you are a Committee Chair and wish to change a meeting date or time, please contact the LCBA Office at (847) 244-3143.

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Thursday, May 28, 2009
Biltmore Country Club

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