

# SURVEY OF ILLINOIS LAW: REAL ESTATE LAW

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## I. INTRODUCTION

With the rising tide of foreclosures and predatory lending dominating the news during 2008, it is not surprising that the majority of the new legislation and reported cases dealt with these high-priority issues. The development of case law, and new and amended legislation passed in 2008 covers areas including mortgage lending practices, foreclosure procedures, fraudulent conveyances and adverse possession. This article first covers new legislation and cases which address mortgage lending and foreclosures. The article then highlights some of the other recent case decisions involving real estate transactions, including mechanic liens, condominium/townhome association immunity, contract drafting and adverse possession.

## II. MORTGAGE LENDING AND FORECLOSURES

### A. Predatory Lending

#### 1. *Anti-Predatory Lending Database Program*<sup>1</sup>

In response to the avalanche of homeowners losing their homes to foreclosure, on July 1, 2008, the legislature passed the revised Anti-Predatory Lending Database Program (“APLDP”).<sup>2</sup> The defined purpose of the APLDP

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1. 2007 ILL. LAWS 9239 amended the Residential Real Property Disclosure Act by changing Sections 70, 72, and 74 and adding Sections 73 and 78. 765 ILL. COMP. STAT. ANN. 77/1 (West 2008).

2. *Id.* at 77/70(a-5); *see also* State of Illinois Anti-Predatory Lending Database Program, <https://www.ilapltd.com/> (last visited Mar. 19, 2009).

is to vigorously discourage predatory lending practices,<sup>3</sup> by mandating counseling to educate borrowers for certain types of loan products.<sup>4</sup> The counseling was instituted in hope of reducing the number of foreclosures resulting from inappropriate loans which borrowers cannot afford.<sup>5</sup> The APLDP is a permanent program that houses data on loans closing in Cook County only.<sup>6</sup> Given the unprecedented number of foreclosures in Cook County alone, predatory lending practices are attributed as one of the main reasons for bank foreclosures.<sup>7</sup> The domino effect of foreclosure causes displaced families to abandon their property. The property then becomes dilapidated leading to overall property devaluation in communities and, ultimately, the loss of tax revenue for municipalities that then must pay the cost to maintain abandoned property.<sup>8</sup>

The Illinois Department of Financial and Professional Regulation (the “Department”) is responsible for implementing the APLDP and maintaining the database.<sup>9</sup> For loans that meet certain criteria discussed below, after information about the borrower and the loan terms are entered into the database, the Department makes a determination as to whether the borrower must take counseling.<sup>10</sup> If counseling is required, the lender must assure that the borrower takes the mandatory counseling.<sup>11</sup> Access to the database is limited to authorized users who are trained to use the database, including loan

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3. Predatory lending is referred to as “unfair, deceptive or negligent lending practices” which have caused a record number of families to lose their homes to foreclosure. State of Illinois Anti-Predatory Lending Database Program, <https://www.ilapltd.com/> (last visited Mar. 19, 2009).
  4. While the only chance for homeownership for low-income borrowers may be subprime lending, the APLDP is primarily designed to educate prospective borrowers and to protect them from predatory lending practices, not prohibit or discourage subprime lending. *See* State of Illinois Anti-Predatory Lending Database Program, <https://www.ilapltd.com/> (last visited Mar. 19, 2009).
  5. *See id.*
  6. 765 ILL. COMP. STAT. ANN. 77/70(a–5) (West 2008). In its original inception in January 2005, the legislature created the APLDP. 2005 ILL. LAWS 2537. The APLDP was initially created to tract the type of loans being made by lenders in certain areas of Chicago in an attempt to monitor lending practices. As a pilot program, the 2007 version of APLDP was limited to 10 zip code areas in which borrowers were primarily black and hispanic, covering contiguous areas defined by ten southwest Chicago zip codes: 60620, 60621, 60623, 60628, 60629, 60632, 60636, 60638, 60643 and 60652. However, the 2007 version of the APLDP caused a major uprising in the real estate industry from numerous real estate constituents, particularly mortgage brokers, Realtors and appraisers because of the extra regulation that was added to already time-consuming closings and the narrow scope of the areas covered by the law, to say the least. 2005 ILL. LAWS 2537, 765 ILL. COMP. STAT. ANN. 77/1 (West 2008); *see* Illinois Association of Realtors Fact Sheet Predatory Lending Database Pilot Program, <http://www.lifesuccesses.com/resources/predatorylending.pdf> (last visited Mar. 19, 2007).
  7. State of Illinois Anti-Predatory Lending Database Program, <https://www.ilapltd.com/>.
  8. *Id.*
  9. 765 ILL. COMP. STAT. ANN. 77/70 (a), (b) (West 2008).
  10. 765 ILL. COMP. STAT. ANN. 77/70(c) (West 2008).
  11. *Id.*

originators licensed by the Division of Banking, HUD-certified housing counselors and closing agents.<sup>12</sup>

As of July 1, 2008, in order to record any mortgage against a property in Cook County, a certificate must be attached to the mortgage.<sup>13</sup> If the loan is identified through the database, a Certificate of Compliance must be attached to the mortgage.<sup>14</sup> For all other loan transactions, a Certificate of Exemption must be attached to the mortgage for recording.<sup>15</sup> The Certificate of Compliance is needed only for collateral property that is one- to four-unit property which the borrower occupies as a primary residence.<sup>16</sup> The responsibility for compliance with the APLDP falls on loan originators who must enter the information about the borrower and loan terms into the database,<sup>17</sup> and closing agents who must attach the appropriate certificate to the mortgage before recording.<sup>18</sup>

The APLDP exempts certain property, transactions, and entities. The program exempts property that is (1) non-owner occupied, (2) commercial, (3) residential with more than four units, and (4) government owned.<sup>19</sup> Reverse mortgage transactions are also exempt.<sup>20</sup> Exempt entities include national banks and other depository financial institutions not required to be licensed under the Illinois Residential Mortgage License Act of 1987 as well as certain limited private lenders.<sup>21</sup>

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12. 765 ILL. COMP. STAT. ANN. 77/70(b) (West 2008).

13. 765 ILL. COMP. STAT. ANN. 77/70(a-5), (g) (West 2008).

14. 765 ILL. COMP. STAT. ANN. 77/70(g). Mortgages executed prior to July 1, 2008, but recorded on or after July 1, 2008, do not require either certificate but loan applications taken prior to July 1, 2008 but closed after July 1, 2008 required only a Certificate of Exemption. State of Illinois Anti-Predatory Lending Database Program, <https://www.ilapltd.com/> (last visited Mar. 19, 2009).

15. State of Illinois Anti-Predatory Lending Database Program, <https://www.ilapltd.com/> (last visited Mar. 19, 2009).

16. *Id.*

17. The process begins when the loan originator enters information into the database within ten days after the loan application is taken from the borrower. After the required information is entered into the database, the database determines whether the loan transaction is subject to the program, whether the borrower will need to obtain counseling, or whether the transaction is exempt. 765 ILL. COMP. STAT. ANN. 77/70(d), 77/72 (West 2008).

18. 765 ILL. COMP. STAT. ANN. 77/70(g).

19. State of Illinois Anti-Predatory Lending Database Program, <https://www.ilapltd.com/> (last visited Mar. 19, 2009).

20. 765 ILL. COMP. STAT. ANN. 77/78 (West 2008).

21. 765 ILL. COMP. STAT. ANN. 77/70(a) (West 2008). "Exempt person" means that term as it is defined in subsections (d)(1) and (d)(1.5) of section 1-4 of the Residential Mortgage License Act of 1987, 205 ILL. COMP. STAT. 635/1-4 (West 1987). An example of a private lender includes an individual making a loan to a family member. While exempt entities are not required to enter information into the database, they must obtain a Certificate of Exemption from the closing agent to record their mortgages. State of Illinois Anti-Predatory Lending Database Program, <https://www.ilapltd.com/> (last visited Mar. 19, 2009).

The most essential aspect of the APLDP is the education component which requires borrowers to take mandatory housing counseling.<sup>22</sup> For those borrowers, who can barely afford to pay the mortgage at its inception, even a slight jump in the loan's interest rate, and therefore, the payment, makes the monthly mortgage payment impossible to afford—not to mention any increase in the property taxes.<sup>23</sup> Borrowers subject to foreclosure have often entered into loans with adjustable interest rates where the monthly mortgage payment increases after a fixed time period.<sup>24</sup> Weary borrowers often complain that they were unaware or did not clearly understand the effect of the adjustable rate mortgage.<sup>25</sup> With most foreclosures arising from defaults on mortgages because of borrowers' inability to pay, HUD-certified counselors review and explain to the borrower the loan terms the loan originator entered in the database along with a series of questions required by the APLDP.<sup>26</sup> Counseling at least provides some assurance that an independent counselor has discussed the loan terms with the borrower without the pressure of the lender convincing the borrower to enter into a certain loan product.

In order for housing counseling to trigger, the purchase transaction must fall under the following circumstances:

- a. first-time borrowers or borrowers refinancing a primary residence; and
- b. mortgages that include one or more of the following characteristics:
  1. interest-only payments;
  2. negative amortization;
  3. total points and fees to the lender at or before closing exceeds 5% of the loan amount;
  4. prepayment penalty; or

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22. 765 ILL. COMP. STAT. 77/70(c) (stating that “the borrower may not waive counseling”).

23. Most subprime mortgages involve 2/28 and 3/27 hybrid adjustable rate mortgages. Hybrid mortgage loans of this nature account for the majority of the loans in foreclosure. The interest rates on these loan reset to a higher rate either two or three years after the loan was originated. Once the high interest rate takes effect, consumers are left with the inability to pay the higher monthly mortgage payment. Report and Recommendations by the Majority Staff of the Joint Economic Committee, *The Subprime Lending Crisis: The Economic Impact on Wealth, Property Values and Tax Revenues and How We Got Here*, Senator Charles E. Schumer, Chairman and Representative Carolyn B. Maloney, Vice-Chair, page 6 (October 2007) (referenced hereafter as the “Joint Economic Committee Report”). Report on file with author.

24. *Id.*; State of Illinois Anti-Predatory Lending Database Program, <https://www.ilapl.com/> (last visited Mar. 19, 2009).

25. See 765 ILL. COMP. STAT. 77/74(7)(D) (requiring a statement to the borrower regarding whether the borrower understands the transaction).

26. 765 ILL. COMP. STAT. 77/74(7)(D); State of Illinois Anti-Predatory Lending Database Program, <https://www.ilapl.com/> (last visited Mar. 19, 2009).

5. adjustable rate mortgages that allow adjustments of the interest rate in the first three years of the loan.<sup>27</sup>

When counseling is required, the borrower receives a list of all participating counseling agencies.<sup>28</sup> The main function of the housing counselor is to compare the loan terms entered in the database by the loan originator with the initial set of loan disclosures the originator provides to the borrower.<sup>29</sup> The housing counselor's recommendations are only advisory and the borrower still has the final decision as to whether to proceed with the loan or not.<sup>30</sup> After counseling, if the borrower chooses to proceed with the loan, the loan now moves to the closing.

The closing agent assesses the loan terms at closing and determines whether the loan being closed has similar characteristics to the loan terms entered into the database by the loan originator and the housing counselor.<sup>31</sup> If there has been no material change, the closing agent indicates in the database that the loan is ready to close<sup>32</sup> and a Certificate of Compliance is issued at the closing.<sup>33</sup> In the event that the closing agent discovers material changes in the loan terms such that additional counseling would be required, the loan cannot close and additional counseling will be required.<sup>34</sup>

While semiannual reporting to the Governor and the General Assembly are mandated by the APLDP,<sup>35</sup> how the information will be used is not outlined in the law. How useful the program will be is yet to be determined but deterrence of predatory lending and methods to decline foreclosures should be welcomed by the real estate community.

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27. 765 ILL. COMP. STAT. 77/73.

28. 765 ILL. COMP. STAT. 77/70(d). If the transaction is exempt and counseling is not required, the loan may proceed to closing. State of Illinois Anti-Predatory Lending Database Program, <https://www.ilapltd.com/> (last visited Mar. 19, 2009).

29. *Id.*

30. 765 ILL. COMP. STAT. 77/70(I); State of Illinois Anti-Predatory Lending Database Program, <https://www.ilapltd.com/> (last visited Mar. 19, 2009).

31. 765 ILL. COMP. STAT. ANN. 77/70(c) (West 2008).

32. *Id.* However, the closing agent may only make non-material changes to correct errors.

33. 765 ILL. COMP. STAT. ANN. 77/70(g) (West 2008).

34. 765 ILL. COMP. STAT. 77/70(c). Violations of the APLDP are brought under the Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. ANN. 505/1 (West 2007). 765 ILL. COMP. STAT. ANN. 77/70(j) (West 2008).

35. 765 ILL. COMP. STAT. ANN. 77/70(k) (West 2008).

## 2. *Loan Modifications and Defaults*

The decrease in the housing demand has forced many owners and developers into default on their loans. Defaulting borrowers face the inevitable consequence of foreclosure because courts are reluctant to deny lenders their rights under the loan agreement. This is true even despite the fact that a lender may have been previously willing to work with a borrower and renegotiate the original loan terms but no longer wishes to negotiate with the borrower. The next case deals with a developer who the lender gave a chance to complete and revive a project to sell units but ultimately foreclosed on the loan.

In *Tower Investors, LLC v. 111 East Chestnut Consultants, LLC*,<sup>36</sup> 111 East Chestnut Consultants, LLC (“Chestnut Consultants”) received a loan from Tower Investors, LLC (“Tower Investors”) in January 1995,<sup>37</sup> in the amount of \$350,000 for a condominium conversion project.<sup>38</sup> On September 1999, the loan matured and Chestnut Consultants requested that Tower Investors enter into a forbearance agreement to extend the loan until December 18, 2001, in which its parent, Invsco, would guarantee the payment of the principal on the note.<sup>39</sup> Invsco’s general counsel prepared the note and forbearance agreement on behalf of Tower Investors.<sup>40</sup> Tower Investors agreed not to prosecute any claims against Chestnut Consultants or Invsco until December 18, 2001.<sup>41</sup> Because neither Chestnut Consultants nor Invsco made any payment under the forbearance agreement, Tower Investors filed a single count complaint for breach of contract related to the forbearance agreement.<sup>42</sup>

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36. *Tower Investors, LLC v. 111 East Chestnut Consultants, LLC*, 371 Ill. App. 3d 1019, 864 N.E.2d 927 (1st Dist. 2007).

37. Some fact of interest is that Tower Investors consisted of several partners of the Sonnenschein, Nath and Rosenthal law firm in Chicago, Illinois who also performed legal work for Chestnut Consultants for the condominium conversion. Chestnut Consultants was formed for the purpose of the conversion by its parent company Invsco Group, Ltd, the sole shareholder of Chestnut Consultants. Sonnenschein had also represented Invsco and related entities for over fifteen years, and one of its partners (a principal of Tower Investors) had done between thirty and fifty projects for Invsco principals. At trial, testimony revealed that Tower Investors was operated by a management committee consisting of Sonnenschein lawyers but the firm had no input in the Tower Investors committee and Tower Investors had no input in the Sonnenschein’s management as a law firm. *Id.* at 1024–26, 864 N.E.2d at 934–35.

38. *Id.* at 1022, 864 N.E.2d at 932–33.

39. *Id.*

40. *Id.* at 1036, 864 N.E.2d at 944.

41. *Id.* at 1022, 864 N.E.2d at 932.

42. *Id.*

In their response to Tower Investor's motion for summary judgment, Chestnut Consultants' and Invsco's defense was three-fold.<sup>43</sup> First, they purported that the forbearance agreement was not enforceable at least against Invsco because there was no consideration.<sup>44</sup> Second, the forbearance agreement lacked consideration because Tower Investors knew that Chestnut Consultants was insolvent when it executed the agreement.<sup>45</sup> Third, Tower Investors was an "alter ego" of the Sonnenschein, Nath and Rosenthal law firm (the "Sonnenschein firm") and, therefore, the forbearance agreement promise that Tower Investors would not prosecute any claims against them was breached when the Sonnenschein firm sued Invsco and Chestnut Consultants for attorneys fees, relating to work it had done for them, a majority of which were projects unrelated to Chestnut Consultants.<sup>46</sup>

In affirming the trial court's ruling in favor of Tower Investors, the appellate court explained its findings on each of the defenses raised by the defendants. First, valid consideration for the forbearance agreement existed between the parties because the forbearance itself was valid consideration to support the contract.<sup>47</sup> Second, Chestnut Consultants was solvent because it was operating and had assets greater than its indebtedness at the time it executed the forbearance agreement through the time of trial.<sup>48</sup> Third, the court rejected the defendants' "alter ego" argument against the Sonnenschein firm because the defendants created the present situation with the full knowledge of the relationship between Tower Investors, its members and the Sonnenschein firm.<sup>49</sup>

## B. Mortgage Foreclosures

### 1. *Confirmation of Sales and Expiration of the Redemption Period*

Rarely do court decisions in foreclosure actions mutually benefit both lenders and borrowers. The Supreme Court's unanimous decision in the case that follows establishes law that benefits both the borrower and lender in the foreclosure area but may create angst for potential bidders at foreclosure sales.

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43. *Id.* at 1022, 864 N.E.2d at 933.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 1029, 864 N.E.2d at 938.

48. *Id.*

49. *Id.* at 1034-35, 864 N.E.2d at 942.

In *Household Bank, FSB v. Lewis*,<sup>50</sup> at issue was whether the Illinois Mortgage Foreclosure Law (“IMFL”)<sup>51</sup> permits a circuit court to vacate a judicial sale at the mortgagee's request where the mortgagor has succeeded in finding a private buyer for the subject property, with the mortgagee's approval, after the statutory redemption period has expired but before the judicial sale has been confirmed.<sup>52</sup> The judge in the circuit court believed that it did and allowed the mortgagee to withdraw its confirmation of the sale to allow the property to be sold for a higher price to a private third party the mortgagor identified and not the high bidder at the foreclosure sale.<sup>53</sup> The judge ordered the foreclosure sale vacated.<sup>54</sup> The appellate court reversed the circuit court's decision in favor of the high bidder at the foreclosure sale holding that the circuit court's refusal to confirm the sale constituted an abuse of discretion. The mortgagee appealed to the Supreme Court.<sup>55</sup>

By a unanimous decision, the Supreme Court agreed with the circuit court's decision.<sup>56</sup> The Supreme Court reviewed the issue involved in this case under the de novo standard of review because it rested on a question of statutory construction.<sup>57</sup>

First, the Court looked at the language of the IMFL governing confirmation of judicial sales.<sup>58</sup> The Court found that while the IMFL's language mandated that the court conduct a hearing and confirm the sale, the provisions of section 5/15-1508(b) had been construed as conferring on the circuit court broad discretion in approving or disapproving judicial sales and the decision of the court would not be disturbed absent an abuse of discretion.<sup>59</sup> The Court noted that the appellate court's focus on whether the circuit court abused its discretion was misguided because the exercise of

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50. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 890 N.E.2d 934 (2008).

51. 735 ILL. COMP. STAT. 5/15-1105 (West 2004).

52. *Household Bank*, 229 Ill. 2d at 174-75, 890 N.E.2d at 935.

53. *Id.* at 175, 890 N.E.2d at 935.

54. *Id.*

55. *Id.*

56. *Id.* at 184, 890 N.E.2d at 940.

57. *Id.* at 178, 890 N.E.2d at 937.

58. *Id.* Section (b) of the IMFL provides that:

“Upon motion and notice in accordance with court rules applicable to motions generally, which motion shall not be made prior to sale, the court shall conduct a hearing to confirm the sale. Unless the court finds that (I) a notice required in accordance with subsection (c) of section 15-1507 [735 ILL. COMP. STAT. 5/15-1507] was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently or (iv) that justice was otherwise not done, the court shall then enter an order confirming the sale.” 735 ILL. COMP. STAT. 5/15-1508(b) (West 2004).

59. *Household Bank*, 229 Ill.2d at 178, 890 N.E.2d at 937.



discretion in applying section 5/15–1508(b) was not necessary after the mortgagee withdrew its motion for confirmation.<sup>60</sup> Under the terms of the IMFL, the confirmation provision did not become operative until the mortgagee had invoked it by a motion requesting confirmation of the sale.<sup>61</sup> So once the statutory necessity for confirmation was eliminated when the mortgagee withdrew its motion for confirmation of the sale, the circuit court's discretion was not necessary.<sup>62</sup> The Court stated that the requirements of that law become mandatory only when the terms of the statute become operative.<sup>63</sup>

Second, the Court noted that precedent supported the plaintiff dictating the course of its own litigation.<sup>64</sup> Thus, the plaintiff mortgagee was free to forego the confirmation and its claim against the property.<sup>65</sup>

Third, the Court rejected the high bidder's argument that the mortgagee's decision not to confirm the sale would discourage bidders at foreclosure sales.<sup>66</sup> The Court noted that the high bidder at a judicial foreclosure sale only has an irrevocable right to acquire the property, not an absolute right.<sup>67</sup>

Lastly, the Court also found that the appellate court's interpretation of the language of the IMFL, as precluding a private sale after the statutory redemption period, was also misplaced.<sup>68</sup> Although the IMFL itself does not address whether a mortgagee can grant a grace period to the mortgagor after the exemption period has expired, the Court found that the mortgagee may do so.<sup>69</sup> Based on these findings, the Supreme Court affirmed the circuit court's decision.<sup>70</sup>

The Supreme Court's interpretation of the IMFL is good news for unstable mortgage lenders and distressed homeowners trying to protect themselves in a troubled market. This outcome gives mortgagors hope of selling their property even at the very last minute. The outcome from this case also helped the mortgagor avoid a deficiency judgment and possible tax

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60. *Id.* at 179, 890 N.E.2d at 937.

61. *Id.* at 179, 890 N.E.2d at 937–38.

62. *Id.*

63. *Id.*

64. *Id.* at 180, 890 N.E.2d at 938.

65. *Id.*

66. *Id.* at 179, 890 N.E.2d at 939.

67. *Id.*

68. *Id.* at 182, 890 N.E.2d at 939–40.

69. *Id.* at 183, 890 N.E.2d at 940.

70. *Id.* at 184, 890 N.E.2d at 940.

consequences from forgiveness of debt<sup>71</sup> from the mortgagee which would have been reported to the IRS as taxable income.

## 2. *Deceased Mortgagors—Subject Matter Jurisdiction and Special Representatives*

The result of this next decision gives guidance to mortgagee attorneys foreclosing against deceased mortgagors. At the pleading stage where there is no probate estate opened, attorneys need to know whether they need to have a special representative appointed or whether the process of naming “unknown heirs and legatees” of a deceased mortgagor in the complaint and publishing notice is sufficient.<sup>72</sup>

Not yet published by the court when this article was submitted, the first district appellate court in *ABN AMRO Mortgage Group, Inc. v. Nona L. McGahan*<sup>73</sup> held that foreclosures are *in rem* rather than *quasi in rem* proceedings. The court noted that a foreclosure determines the rights to a piece of property not only against a particular person, which would be the case in a *quasi in rem* proceeding, but against the whole world (such as other banks holding second mortgages or individuals with a security interest in the property). The court classified foreclosures as *in rem* proceedings consistent with those concepts. The court reiterated that any dictum that exists mentioning foreclosures are *quasi in rem* is not controlling authority. Therefore, the trial court in this case erred in finding that foreclosures are *quasi in rem* proceedings, and thus, the need for employing a special representative is not necessary.<sup>74</sup>

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71. In foreclosure actions, when property is sold at a judicial sale for less than the loan value, lenders report the difference between the loan value and the sale price to the IRS as taxable income. For example, if the value of the loan payable at the time of foreclosure is \$85,000 and the property only sales for \$60,000 at the judicial sale, the borrower is liable for \$15,000 as taxable income. The mortgagor then suffers from not only a possible deficiency judgment but tax consequences. For further explanation and details see Internal Revenue Service, Home Foreclosure and Debt Cancellation, <http://www.irs.gov/newsroom/article/0,,id=174034,00.html> (last visited Mar. 19, 2009) or contact your tax professional.

72. This case would overturn the decision of the court in *Wells Fargo v. McQueen*. In this case, the court found that a foreclosure case is a *quasi in rem* proceeding which requires suing the mortgagor or a person claiming through a mortgagor for jurisdiction purposes. Naming “unknown heirs and legatees” in the complaint could hardly satisfy the requirement of suing a mortgagor. The court, therefore, held that a deceased person cannot be a party to an action. Any action commenced against a deceased person is a nullity and invokes no jurisdiction of the court. (Case No. 2005 CH 12846, Circuit Court of Cook County) (A foreclosure bench ruling by Judge Simko).

73. *ABN AMRO Mortgage Group, Inc. v. Nona L. McGahan*, 2009 WL 679473 (1st Dist. December 19, 2008). This opinion was unpublished when this article was submitted for publication.

74. *Id.*

### 3. *Lender's Standing and Assignment of Notes*

Often arising in foreclosure actions, attorneys must find out who holds the note and the underlying security interest and, therefore, has the right to foreclose. The result of this is that defense attorneys in foreclosure actions have resorted to attacking foreclosure complaints on the basis of an apparent lack of standing by the plaintiff mortgagee, especially when there is no true chain of assignments or notes with endorsements leading to the named plaintiff set forth on the complaint. The case that follows is a good example of mortgagees who become confused about the chain of the assignment of notes.

In *Bayview Loan Servicing, L.L.C. v. Nelson*,<sup>75</sup> the original mortgagee was Old National Bank.<sup>76</sup> The note was subsequently assigned to Bayview Financial Trading Group, L.P. (“Partnership”).<sup>77</sup> Bayview Loan Servicing, L.L.C. (“LLC”), the servicer of the loan, commenced the foreclosure action in its name instead of the Partnership’s name.<sup>78</sup> In its reply to the LLC’s motion for summary judgment, the defendant alleged that in his amended answer he denied specific facts such that genuine issues of facts existed, including three affirmative defenses alleging that the LLC was not the proper party to the proceeding.<sup>79</sup> Particularly, in the defendant’s fourth affirmative defense, he alleged that the LLC did not include a copy of the assignment from Old National Bank as required by the Code of Civil Procedure.<sup>80</sup> The LLC did not file a response to any of the affirmative defenses.<sup>81</sup> The trial court ruled in favor of the LLC anyway and the defendant filed a motion to reconsider on the basis that the LLC was not the proper party and never established how it came into possession of the note.<sup>82</sup> The trial court entered a docket order denying the defendant’s motion for reconsideration and granted the LLC’s motion for judgment of foreclosure.<sup>83</sup> The defendant appealed.<sup>84</sup>

On appeal, during the oral argument by the LLC’s counsel, the attorney acknowledged that the Partnership, not the LLC, was the true legal owner of

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75. *Bayview Loan Servicing, L.L.C. v. Nelson*, 382 Ill. App. 3d 1184, 890 N.E.2d 940 (5th Dist. 2008).

76. *Id.* at 1185, 890 N.E.2d at 942.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1186, 890 N.E.2d at 943.

83. *Id.* at 1187, 890 N.E.2d at 943.

84. *Id.*

the indebtedness.<sup>85</sup> The appellate court, therefore, reversed the trial court's ruling finding that in the event the plaintiff is not the correct legal entity to bring a foreclosure action, the entry of summary judgment and order of foreclosure and sale are improper as a matter of law.<sup>86</sup> Therefore, there was no basis for entry of summary judgment in favor of the LLC who was a stranger to the mortgage.<sup>87</sup>

#### 4. *Recent Legislation Related to Foreclosure Actions*

The impact of rising foreclosures has led the legislature to provide more protection for owner occupants and tenants by amending the Code of Civil Procedure.<sup>88</sup> These amendments provide additional rights for defaulting mortgagors and new protections for tenants who are leasing the mortgaged property.

The first amendment deals with the pleading stage of foreclosure actions. During the pleading stage of a foreclosure, defaulted mortgagors often proceed pro se or fail to appear at all. In some cases, mortgagors still attempt to sell their property during the pending foreclosure on the advice of a Realtor or friend in hope of avoiding a foreclosure judgment. Public Act 95-961<sup>89</sup> addresses matters related to the pleading stage of the foreclosure. First, it provides, for all residential foreclosure actions, that the mortgagee must attach a Homeowner Notice to the summons.<sup>90</sup> The Homeowner Notice contains certain information specifying the mortgagor's rights during the foreclosure proceeding.<sup>91</sup> Second, in the event the mortgagor does find a buyer during the foreclosure proceeding, to avoid delay in the sale of the property, the law further requires that upon the written demand of a mortgagor,<sup>92</sup> the mortgagee must prepare and deliver an accurate statement of the total outstanding balance of the mortgagor's obligation that would be required to satisfy the obligation in full as of the date of preparation.<sup>93</sup> A mortgagee who willfully fails to prepare and deliver an accurate payoff demand statement within ten business days of a written demand by the mortgagor, or its agent, is liable to the mortgagor for actual damages sustained for failure to deliver the statement, or

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85. *Id.*

86. *Id.*

87. *Id.* at 1187-88, 890 N.E.2d at 943-94.

88. 735 ILL. COMP. STAT. ANN. 5/1-101 (West 2004).

89. 735 ILL. COMP. STAT. ANN. 5/15-1504.5, 5/15-1505.5, 5/15-1510 (West 2008) (The amendments became effective on January 1, 2009).

90. 735 ILL. COMP. STAT. ANN. 5/15-1504.5 (West 2008).

91. *Id.*

92. *Id.*

93. 735 ILL. COMP. STAT. ANN. 5/15-1505.5(a) (West 2008).

\$500 if there are no actual damages.<sup>94</sup> In addition, the law permits the court to award reasonable attorneys' fees and costs to a mortgagor who prevails in a motion, an affirmative defense or counterclaim in the foreclosure action.<sup>95</sup>

The second amendment gives mortgagors who occupy the property additional notice before the mortgagee takes possession. Many mortgagors in foreclosure actions do not appear in the case at all. Therefore, attorneys representing mortgagees typically enter a default judgment against the mortgagor because of the failure to appear in the action. As a result, many mortgagors are caught by surprise when the sheriff comes to vacate their family because they were not aware of the various stages of the foreclosure process. Public Act 95-826 requires that the mortgagee notify the mortgagor when the actual end is near and possession will be terminated.<sup>96</sup> The law requires that after a judicial sale of residential real estate, the mortgagee must send notice of the confirmation of the sale by first class mail to the mortgagor, even if the mortgagor was previously defaulted.<sup>97</sup> The notice must notify the mortgagor of the right to remain in possession for thirty days after the entry of an order of possession, unless that right was previously terminated by the court.<sup>98</sup>

The legislature next sought to protect tenants-in-possession. Tenants are not often served in foreclosure actions because mortgagees may not be aware of whom they are. Public Act 95-933<sup>99</sup> provides that when a tenant occupies the mortgaged property and where the mortgagee does not give the tenant timely written notice or the tenant makes a good effort to stay current on the lease, the order of possession must permit the tenant to retain possession under the existing lease.<sup>100</sup>

The legislature through these amendments appears to be sympathetic to displaced homeowners and tenants subjected to the intimidating legal process of foreclosure.

### C. Fraudulent Conveyances

The legislature passed new law in an effort to discourage individuals who prepare fraudulent conveyance documents. The new law requires notary

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94. 735 ILL. COMP. STAT. ANN. 5/15-1505.5© (West 2008).

95. 735 ILL. COMP. STAT. ANN. 5/15-1510 (West 2008).

96. 735 ILL. COMP. STAT. ANN. 5/15-1508 (West 2008).

97. 735 ILL. COMP. STAT. ANN. 5/15-1508(b-5) (West 2008).

98. *Id.*

99. 735 ILL. COMP. STAT. ANN. 5/15-1701 (West 2008). (The amendment became effective on August 28, 2008).

100. 735 ILL. COMP. STAT. ANN. 5/15-1701(h)(1)-(5) (West 2008).

publics to account for each notary act involving the conveyance of real estate in Cook County.<sup>101</sup>

*1. Fraudulent Transfer of Title and the Notary Public Act*

In some circumstances legislative changes and judicial action go hand-in-hand. The revisions to the Notary Public Act<sup>102</sup> and the decision in *Vancura v. Katris*<sup>103</sup> might prevent fraud and forgery as the Notary Public Act intended.<sup>104</sup> The law allows for preservation of a record of conveyances to be retained for future reference in the event an issue arises regarding the validity or suspicion of the conveyance document.<sup>105</sup>

In an effort to curtail the rising number of forged deeds being recorded in Cook County notarized by notary publics, who do not remember the transaction or are duplicitous in the bad act, the legislature passed Public Act 95–988, which amends the Notary Public Act (“NPA”).<sup>106</sup> The law requires that all notary publics keep a notarial record of every notarial act in Illinois involving the conveyance transferring title to residential real property located in Cook County.<sup>107</sup> The notarial record must contain for each document notarized<sup>108</sup>: (1) the date of the notarial act; (2) the type or description of the instrument being notarized and the property tax identification number; (3) the signature, printed name and address of each person whose name is notarized; (4) a description of the identification presented for satisfactory evidence of the person identified as the grantor whose signature the notary public is attesting

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101. 2008 Ill. Legis. Serv. P.A. 95–988 (West) (hereinafter P.A. 95–988).

102. Public Act 95–988 amending 5 ILL. COMP. STAT. 312/3–101, 3/102, 3/104, 6/102 (West 2008). Effective on June 1, 2009, the NPA will automatically repeal on July 1, 2013, after a five-year trial period. 5 ILL. COMP. STAT. ANN. 312/3–102(k) (West 2008).

103. *Vancura v. Katris*, No. 1–06–2750, 2008 WL 5423357, at \*1 (1st Dist. December 26, 2008).

104. *Id.* at \*2.

105. *See* P.A. 95–988.

106. 5 ILL. COMP. STAT. ANN. 312/3–101 (West 2008).

107. 5 ILL. COMP. STAT. ANN. 312/3–102(a) (West 2008). When the notary public is an employee of an attorney or title insurance company, the notary public must deliver the notarial records to that employer within fourteen days and the employer must maintain the record for seven years. Where no attorney or title insurance company is involved, the notary public must deliver the notarial record to the Cook County Recorder within fourteen days and the Recorder’s office must retain the record for seven years. While the notary public may not keep a copy of the notarial record, attorneys or title insurance companies can make and keep copies of the notarial record. 5 ILL. COMP. STAT. ANN. 312/3–102(d), (e), (9) (West 2008).

108. Several transactions are exempt from the new law and cover matters as follows: (a) court ordered and court authorized transfers; (b) judicial sales deeds; (c) deeds in trust where the grantor is a beneficiary; (d) deeds to the grantor changing the form of the tenancy; (e) deeds to a mortgagee in lieu of foreclosure; and (f) deeds to a revocable or irrevocable trust where the grantor is the beneficiary. 5 ILL. COMP. STAT. ANN. 312/3–102(b)(1)(i)–(vii) (West 2008).

and a right thumb or finger print of the grantor; (5) the home or business phone number and residence address of the notary public; and (6) the correct legal name and street address of any employer or principal of the notary public.<sup>109</sup> Although these changes are meant to provide some level of protection, if a notary public fails to maintain a notarial record, the validity of the instrument is not called into question unless fraud is involved.<sup>110</sup>

If the new provisions of the NPA had been effective when the facts of this next case arose, the fraudulent conduct by the parties may have been stopped ahead of time.

In *Vancura v. Katris*, in November 2004, Richard Vancura (“Vancura”) made a loan, evidenced by a note which was secured by a first mortgage, to Glenn S. Brown (“Brown”) to purchase and rehab a residential property in Wheaton, Illinois.<sup>111</sup> Brown gave his personal guarantee to perform under the note.<sup>112</sup> When the loan matured in May 2005, Brown was unable to complete the work or sell the property to pay off the loan.<sup>113</sup> Both Brown and Vancura sought the advice of a mutual acquaintance, Randall Boatwright (“Boatwright”), who proposed a complicated multi-layered transaction where Vancura’s note would be ultimately assigned Boatwright and then sold to Peter Katris (“Katris”).<sup>114</sup> However, Vancura never agreed to this proposed transaction.<sup>115</sup> Without telling Vancura, in December 2005, Brown arranged a closing through his attorney so that Boatwright could buyout Vancura’s interest in the note.<sup>116</sup>

Before the closing with Brown, Boatwright presented the assignment of the note, purportedly executed by Vancura as grantor, to a Kinko’s employee who notarized the document without ever seeing Vancura or any form of identification.<sup>117</sup> Unbeknownst to Vancura, Boatwright forged his name on the assignment of the note and, thereby, fraudulently transferred the note to Katris.<sup>118</sup> After Brown sold the property, Vancura inquired of Brown about the unpaid note.<sup>119</sup> Brown informed Vancura that the debt had been settled through the transaction with Boatwright and Katris which Brown thought

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109. 5 ILL. COMP. STAT. ANN. 312/3–102(c)(1)–(6) (West 2008).

110. 5 ILL. COMP. STAT. ANN. 312/3–102(h) (West 2008).

111. *Vancura*, 2008 WL 5423357, at \*2.

112. *Id.* at \*3.

113. *Id.* at \*2.

114. *Id.* at \*3.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at \*4.

119. *Id.* at \*9.

Vancura was aware of.<sup>120</sup> Vancura sued Brown, Boatwright and Katris based on forgery fraud, sued the notary public for official misconduct,<sup>121</sup> and his employer, Kinko's, Inc., based on the common law theory of negligent training and statutory claims under the NPA.<sup>122</sup> The trial court rendered judgment in Vancura's favor and awarded damages against all parties.<sup>123</sup>

The issue on appeal was whether Kinko's was liable for the damages to Vancura resulting from its employee's notarization of the forged signature on the assignment of note.<sup>124</sup> Kinko's challenged both the common law and statutory judgments.<sup>125</sup> The appellate court affirmed the trial court's decision against Kinko's under the common law theory of negligent supervision and training.<sup>126</sup> However, it reversed the statutory liability based upon the consent requirement of the NPA.<sup>127</sup>

With regard to the common law negligent supervision and training theory, the appellate court found that Kinko's failed to meet the standard of reasonableness.<sup>128</sup> Under this standard, Kinko's should have assured that its employees understood the notary requirements and were supervised in a manner that ensured they would perform their duty in accordance with the law, so to prevent harm to the public.<sup>129</sup> Kinko's trained its employee through a layperson who was not even a notary public and its employee did not properly secure his seal or keep the journal Kinko's instructed him to keep.<sup>130</sup> Given these facts, the appellate court held that Kinko's was liable under this theory.

However, the appellate court found that the statutory liability based on the consent claim under the NPA did not impose liability against Kinko's based on actual or implied consent.<sup>131</sup> The court reasoned that Kinko's did not actively participate in or have actual knowledge of its employee's conduct and no prior acts of improper notarization had occurred to which Kinko's needed

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120. *Id.*

121. *Id.* at \*4. The notary public settled with Vancura for \$30,000 before the trial began. *Id.*

122. *Id.* at \*9.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at \*12.

127. *Id.* at \*20.

128. *Id.* at \*12.

129. *Id.*

130. *Id.* at \*11. Kinko's employee was suspected of leaving his notary seal unattended giving rise to anyone having access to it being able to use the seal. *Id.*

131. *Id.* Actual consent is where the employer actively participates or has actual knowledge of the conduct while implied consent is where the employer is aware of at least one prior improper notarization and takes no action to curb future acts. *Id.*



to curb the conduct.<sup>132</sup> Therefore, Kinko's did not actively consent to its employee's official misconduct.<sup>133</sup>

## 2. *Fraudulent Conveyances and Bona Fide Mortgagees*

In cases where the lender fails to investigate red herrings indicating fraud, the lender may no longer be considered a bona fide mortgagee. Homeowners have traditionally reserved the equity in their homes for business, education and home improvement related purposes. In these economically difficult times, the equity one has in one's home is all the financial security one has left. The fraud in the following case is a classic example of a predatory equity stripping, but from a lawyer who defrauds his client. Unfortunately, the lender indirectly perpetuated the fraud because of its lenient lending standards.

In *LaSalle Bank v. Ferone*,<sup>134</sup> Catherine Ferone ("Ferone") engaged her attorney Marc J. Biagini ("Biagini") to assist her in getting a line of credit on her residence because of her failing business. Biagini had represented her previously in an estate planning matter and a real estate closing. Biagini asked Ferone for a short term power of attorney so he could arrange an appraisal of her property. Instead of preparing a power of attorney, Biagini presented Ferone with a deed in trust to convey her home into a trust known as the 6604 Langley Court Trust of which Biagini named himself as the sole beneficiary. When Biagini presented Ferone with the deed in trust, she signed the deed under the belief that it was a short term power of attorney. Ferone admitted that she never read the document. After the deed was executed, Biagini recorded it then delivered it to the Trustee bank. Biagini then applied for a mortgage with LaSalle Bank ("LaSalle"). During the course of processing Biagini's loan, LaSalle sent an appraiser to assess the value of the property. Ferone was home when the appraiser arrived which she believed was consistent with her conversation with Biagini about obtaining a line of credit on her property. LaSalle closed the loan and Biagini retained the proceeds. This subsequent foreclosure action ensued when Biagini defaulted on the loan.<sup>135</sup>

LaSalle filed a motion for summary judgment on the issue of whether it was bona fide mortgagee because there was no material issue of fact that would have put the lender on notice to inquire into Ferone's status or the

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132. *Id.* at \*20.

133. *Id.* at \*19.

134. *LaSalle Bank v. Ferone*, 384 Ill. App. 3d 239, 892 N.E.2d 585 (2d Dist. 2008).

135. *Id.* at 241-42, 892 N.E.2d at 586-87.

existence of the fraud in the transaction. In granting LaSalle's motion, the trial court noted that it is unusual for a Trustee of a deed in trust to actually live in the residence so possession by a tenant did not give notice to the lender. Plus, LaSalle clearly established that Ferone signed a document she had not read, even though the law obligated her to read and know the content of the document. Therefore, the trial court found that summary judgment was appropriate and that LaSalle was a bona fide mortgagee. In reaching its determination the trial court further stated that "the standard that you're [Ferone] urging upon the lender would require them to be clairvoyant."<sup>136</sup>

On appeal, Ferone argued that LaSalle was not a bona fide mortgagee for value because it had actual or constructive notice of her interest in the real estate and the fraud perpetrated upon her. The appellate court held that the deed in trust was fraud in its execution and, therefore, the conveyance into the trust was void *ab initio*. The appellate court noted that under the circumstances it did not agree with the trial court's position that the lender would have to be clairvoyant, but rather LaSalle needed to investigate the claims of property ownership by Ferone and Biagini more carefully given the transaction Biagini was engineering. The fact that Ferone disclosed to the appraiser LaSalle sent to the property that she was the owner, coupled with the mortgage application misrepresenting Biagini's assets and income, should have notified LaSalle that something was amiss in the transaction. These facts were enough to create a material factual issue of whether the lender disregarded its duty to conduct further inquiry to keep it from being a bona fide mortgagee. Therefore, these findings gave rise to an issue of fact that made summary judgment reversible. The appellate court reversed the trial court's decision and remanded.<sup>137</sup>

Unfortunately, lenders who instituted lack lending standards and fail to scrutinize loan information provided by scam borrowers leave actual homeowners victimized by the scam, and sometimes become victims themselves.

### *3. Fraudulent Redemption of Real Estate Taxes*

Given the specific facts of the next case, the tax buyer would not have otherwise had much recourse on its petition to challenge the redemption of the real estate taxes, absent the claim for quiet title between two unscrupulous players here.

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136. *Id.*

137. *Id.* at 243–44, 892 N.E.2d at 588–89.

In *M.L. Lah, as Trustee v. Chicago Title Land Trust Company, as Trustee*,<sup>138</sup> Nancy Kwiatkowski (“Kwiatkowski”) did not pay her real estate taxes which were subsequently sold by the county at a tax sale.<sup>139</sup> Before expiration of the redemption period to buy her taxes back, John Waters (“Waters”), the beneficiary of the M.L. Lah Trust, contacted Kwiatkowski and offered to buy the property from her for \$10,000.<sup>140</sup> Although she refused his initial offer, she ultimately agreed to sale the property for \$25,000 to Waters.<sup>141</sup> Waters actually redeemed the taxes on the final day of the redemption period but before the closing on the purchase from Kwiatkowski.<sup>142</sup> Waters back dated the deed from Kwiatkowski to a date prior to his redemption of the taxes.<sup>143</sup> In doing so, he intentionally hoped to avoid any issue with the redemption of the taxes because only title holders to the property are allowed to redeem taxes.<sup>144</sup> Even though Waters and his partner Nathan Edmond (“Edmond”) paid to redeem the taxes, Waters’ name was the only grantee listed on the deed from Kwiatkowski.<sup>145</sup>

The tax buyer from the county tax sale contested Waters’ redemption on the basis that he was not in title when the taxes were redeemed.<sup>146</sup> The court dismissed the tax buyer’s petition contesting the redemption because Waters presented the back dated deed showing he was the owner when the taxes were redeemed.<sup>147</sup> At the hearing on the contest of the redemption, Edmond first learned that his name was not on the deed Kwiatkowski transferred to Waters.<sup>148</sup> Sometime thereafter, Edmond had Kwiatkowski execute another deed to Chicago Title Land Trust Company (“Chicago Title”) in which Valerian Simirica (“Simirica”) claimed to be the beneficiary.<sup>149</sup>

The trial court ruled that Chicago Title was not a bona fide purchaser because it was not without notice of Waters’ adverse claim and that the quit claim deed obtained by Edmond from Kwiatkowski was fraudulently

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138. *M.L. Lah, as Trustee v. Chicago Title Land Trust Company, as Trustee*, 379 Ill. App. 3d 933, 885 N.E.2d 481 (1st Dist. 2008).

139. *Id.* at 934, 885 N.E.2d at 483.

140. *Id.*

141. *Id.* at 934–35, 885 N.E.2d at 483.

142. *Id.* at 935, 885 N.E.2d at 483.

143. *Id.*

144. *Id.*

145. *Id.* at 935, 885 N.E.2d at 483–84. Waters obtained a deed at the March 16, 2001 closing which he back dated to February 13, 2001 but did not record until September 2002. *Id.*

146. *Id.* at 935, 885 N.E.2d at 483.

147. *Id.*

148. *Id.* at 935, 885 N.E.2d at 484.

149. *Id.* at 935–36, 885 N.E.2d at 484–85. The Chicago Title trust was not actually created until June 26, 2002. *Id.*

acquired.<sup>150</sup> Despite Waters' unlawful behavior in regard to back dating the deed to establish his ownership in the property to avoid legal claims preventing him from redeeming the taxes, the trial court could not impose a remedy in favor of Simirica against Waters on the claim of unclean hands because Waters' conduct was directed to the tax buyer, not Simirica.<sup>151</sup> Because Waters was the only person in title under a valid deed from Kwiatkowski, the bill to quiet title was adjudicated in favor of M.L. Lah Trust.<sup>152</sup>

Even though the appellate court affirmed the trial court's finding that Simirica was not a bona fide purchaser,<sup>153</sup> it remanded the case to allow joinder of the tax buyer and any other party necessary to complete an equitable resolution of the title dispute.<sup>154</sup> The appellate court noted that the tax buyer had an interest in the real estate that had been improperly defeated when his petition challenging the redemption was dismissed.<sup>155</sup> Therefore, the appellate court permitted the tax buyer to be joined as a party to the quiet title action to address the defeat of Waters' redemption of the taxes.<sup>156</sup>

### III. OTHER REAL ESTATE RELATED TRANSACTIONS

#### A. Contractor Liens and Enforcement

Although all homeowners may not be facing financial crises with their lenders, such as foreclosure, many of them may still be faced with challenges from contractors who perform services at their property and later find themselves defending a lien claim. Homeowners, however, must be mindful that the laws protecting them from unscrupulous contractors are also there to provide protection for contractors. The Mechanics Lien Act and the recently enacted Home Repair and Remodeling Act set forth the rights and remedies for both parties.

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150. *Id.* at 934, 885 N.E.2d at 485.

151. *Id.* at 938, 885 N.E.2d at 486.

152. *Id.*

153. *Id.* at 939, 885 N.E.2d at 486. The appellate court came to this decision primarily because Simirica through Edmond did not: (1) purchase the home; (2) inspect the property; and (3) receive keys to or possess the home. *Id.*

154. *Id.* at 940, 885 N.E.2d at 488.

155. *Id.* at 940, 885 N.E.2d at 487.

156. *Id.* at 939, 885 N.E.2d at 487.

### 1. Mechanics Lien Act and Pleadings

In the Supreme Court case of *Inter-Rail Systems, Inc. v. Ravi Corp.*,<sup>157</sup> the plaintiff was a contractor engaged in the activity of removing and disposing of drums containing hazardous waste from the defendants' property. The plaintiff filed a complaint containing multiple counts: first, two counts seeking foreclosure of mechanic liens filed against two properties owned by the defendants; and, second, other counts based on causes of action for breach of contract and quantum meruit.<sup>158</sup>

The Court reviewed the order granting the motion for summary judgment under the de novo standard of review.<sup>159</sup> The Court relied on the plain language of the Mechanics Lien Act ("MLA") and precedent related to whether the plaintiff was covered under the MLA.<sup>160</sup> The Court found that mechanic liens "should not be extended to cases not provided for by the language of the [A]ct even though they may fall within its reason."<sup>161</sup> Under the MLA, a covered contractor<sup>162</sup> is "one whom the owner has authorized . . . , to improve the lot or tract of land or for the purpose of improving the tract of land."<sup>163</sup> Because there was no evidence that the plaintiff's work was part of an overall plan to *improve the property*, it could not file a lien under the MLA against the property.<sup>164</sup> The Court further noted that "even if it were to determine that some of the activities performed by the plaintiff were lienable, Illinois case law supports the proposition that 'where a lump sum contract includes both lienable and non-lienable work, and such items cannot be separated, the entire lien must fail.'"<sup>165</sup> Because the plaintiff did not amend its complaint, even though the trial court granted the plaintiff the opportunity

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157. *Inter-Rail Systems, Inc. v. Ravi Corp.*, 326 Ill. Dec. 771, 900 N.E.2d 407 (1st Dist. 2008).

158. *Id.* at 772, 900 N.E.2d at 408. As to the two mechanic lien counts of the complaint, the circuit court granted the defendants' motion for partial summary judgment and found that there was no just reason to delay enforcement or appeal of its order. *Id.* at 774, 900 N.E.2d at 410.

159. *Id.* at 775, 900 N.E.2d at 411.

160. *Id.*

161. *Id.*

162. In order to assert a lien under the MLA, a party must meet the statutory definition of the term "contractor." Section 1 of the MLA defines a "contractor" as: "[a]ny person who shall by any contract or contracts, express or implied, or partly expressed or implied, with the owner of a lot or tract of land, or with one whom the owner has authorized or knowingly permitted to contract, to improve the lot or tract of land or for the purpose of improving the tract of land." 770 ILL. COMP. STAT. ANN. 60/1(a) (West 2006).

163. *Inter-Rail Systems*, 326 Ill. Dec. at 775–76, 900 N.E.2d at 411–12 (quoting 770 ILL. COMP. STAT. 60/1(a) (West 2006)) (emphasis added).

164. *Id.* at 778, 900 N.E.2d at 414 (emphasis added).

165. *Id.*

to do so, the Supreme Court held that the plaintiff had waived this argument.<sup>166</sup>

## 2. *Mechanics Lien Act and Constructive Fraud*

Many contractors, especially subcontractors, prepare and file their own lien claims. Sometimes when they prepare liens without following the letter of the statute, the enforceability of the lien claim can be jeopardized.

However, in *Springfield Heating and Air Conditioning, Inc. v. 3947–55 King Drive at Oakwood, LLC*,<sup>167</sup> the lien claimant's error could have, but did not, cost it the right to enforce its lien claim under the Mechanics Lien Act ("MLA"). Plaintiff, Springfield Heating and Air Conditioning, Inc. ("Springfield"), was the plumbing subcontractor for general contractor Southeast Contractors, LLC ("Southeast") who worked with the defendant owner of the property.<sup>168</sup> The original contract between Springfield and Southeast was for \$465,000 but Springfield alleged an additional \$121,302 in extras.<sup>169</sup> Springfield was eighty-five percent complete with a balance due for work completed and extras of \$289,302 when Southeast terminated the contract with the defendant owner.<sup>170</sup> Within ninety days of the termination, Springfield timely recorded a separate Notice of Claim for Lien against each of the two parcels involved in the project and, subsequently, filed a timely mechanic's lien foreclosure action.<sup>171</sup> The defendant owner filed a motion to dismiss the foreclosure of the lien claim on the basis that the subcontractor/lien claimant was guilty of constructive fraud when it recorded separate lien claims on two parcels, each for the total amount due under the contract.<sup>172</sup> The trial court dismissed the claims.<sup>173</sup>

The appellate court reversed the trial court's decision dismissing the enforcement of the mechanic's lien claim and found that the allegations did

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166. *Id.*; see *Purmal v. Robert N. Wadington & Associates*, 354 Ill. App. 3d 715, 730, 820 N.E.2d 86, 100 (1st Dist. 2004) (the plaintiff waived right on appeal to seek leave to amend her complaint where she chose to stand on her complaint and did not seek leave to amend it in the circuit court).

167. *Springfield Heating and Air Conditioning, Inc. v. 3947–55 King Drive at Oakwood, LLC*, Case No. 1–07–2987, 2009 WL 113455, \*1 (1st Dist. January 15, 2009).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at \*2.

173. *Id.*

not support the argument for constructive fraud.<sup>174</sup> The appellate court found that the only evidence was the overstatement of the amount of the liens and no evidence to demonstrate Springfield's intent to defraud which is an essential element to a constructive fraud claim.<sup>175</sup> The law requires that there be some other evidence from which fraudulent intent can be inferred in addition to the overstatement of the sum of the claim to invalidate the lien.<sup>176</sup> Therefore, the subcontractor was allowed to proceed with the enforcement of its lien claim against the owner.<sup>177</sup>

### 3. Home Repair and Remodeling Act and Subcontractors

Appellate courts interpreting the Mechanics Lien Act ("MLA") have established that this MLA is the sole avenue for recovery for subcontractors. This Supreme Court has affirmed this determination by finding that subcontractors can find no protection under the recently enacted Home Repair and Remodeling Act ("HRRRA").<sup>178</sup> In a matter of first impression, the Supreme Court considered the issue of whether HRRRA applied to subcontractors.

In *MD Electrical Contractors, Inc. v. Abrams*,<sup>179</sup> the plaintiff was a subcontractor who provided electrical work at the Abrams' home in Naperville, Illinois through a general contractor. The general contractor was not a party to the action.<sup>180</sup> The subcontractor did not have a contract with the Abrams but presented plans to them for approval.<sup>181</sup> The trial court granted the Abrams' motion to dismiss on the basis that the subcontractor could not pursue a quantum meruit claim when to do so would be in derogation of the

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174. *Id.* at \*4. The appellate court affirmed the trial court's dismissal of the counts based on unjust enrichment and quantum meruit, stating that "generally, a subcontractor's exclusive remedy against a property owner is provided for through the MLA because the subcontractor has no contractual relationship with the owner which would give rise to a legal recovery." *Id.*

175. *Id.* at \*5, \*6.

176. *Id.* at \*6 (citing *Cordeck Sales, Inc. v. Constr. Sys., Inc.*, 382 Ill. App. 3d 334, 378, 887 N.E.2d 474, 516 (1st Dist. 2008) (holding the presence of some lien claim alone is not sufficient to defeat the claim but requires some other evidence that the error was made with the intent to defraud)). Under section 7 of the Act, no lien shall be defeated because of an error or overcharging on the part of any person claiming a lien unless it shall be shown to be made with the intent to defraud. 770 ILL. COMP. STAT. ANN. 60/7 (West 2006).

177. *Id.* at \*6.

178. 815 ILL. COMP. STAT. ANN. 513/5, 10, 15, 20, 30 (West 2005) (setting forth that section 5 (policy), section 10 (definitions of "home repair and remodeling" and "person"), section 15 (requirements of written contracts and the contents thereof), and section 20 (the consumer rights brochure), and section 30 (unlawful acts)).

179. *MD Elec. Contractors, Inc. v. Abrams*, 228 Ill. 2d 281, 888 N.E.2d 54 (2008).

180. *Id.*

181. *Id.* at 285, 888 N.E.2d 57.

HRRA because the court stated “how can the court imply a contract when the law prohibits one?”<sup>182</sup>

The Supreme Court reviewed the issue of whether the HRRA applied to subcontractors under the *de novo* standard of review because it involved an issue of statutory interpretation.<sup>183</sup> The appellate court found that the HRRA did not apply to subcontractors,<sup>184</sup> but that subcontractors, by virtue of the fact that they work through a general contractor, do not directly contract with homeowners.<sup>185</sup> In reaching its finding, the Supreme Court stated that, under the HRRA, the intended goal of the legislature of enhancing consumer confidence through the regulation of subcontractors could not be met given that the business practices of subcontractors are not ones that engage the consumer/homeowner.<sup>186</sup> The Court also stated that the finding that the HRRA does not include subcontractors is also consistent with the MLA<sup>187</sup> because the MLA is designed to provide, among other things, a remedy for wronged subcontractors.<sup>188</sup> The Court stated that if the HRRA applies to subcontractors, portions of the MLA would be rendered superfluous.<sup>189</sup>

182. *Id.*

183. *Id.* at 286, 888 N.E.2d 58 (citing 815 ILL. COMP. STAT. 513/5 (West 2006)) (emphasis added.) The Court found that when the HRRA is considered in its entirety, it is clear that the statute unambiguously applies only to the regulation of those who “directly contract” with a homeowner. The entire focus of the HRRA is on regulating the direct contact and contracting between the person and the homeowner or consumer. Section 5 of the HRRA sets forth the policy statement of the General Assembly in enacting the Act which states in relevant part, “[T]he business of home repair and remodeling is a matter affecting the public interest. . . . [A]ccurate representations between persons engaged in the business of making home repairs or remodeling and their consumers will increase consumer confidence . . . .” *Id.*; 815 ILL. COMP. STAT. ANN. 513/5 (West 2008).

184. *MD Elec. Contractors*, 288 Ill.2d at 286, 888 N.E.2d at 58 (based on its finding, the court did not reach the issue of whether quantum meruit applied).

185. *Id.* at 287, 888 N.E.2d 58–60.

186. *Id.* at 291, 888 N.E.2d at 60.

187. *Id.* at 293–94, 888 N.E.2d at 62 (citing 770 ILL. COMP. STAT. 60/5 (West 2006)) (stating that a subcontractor’s recovery against a homeowner is usually governed by the Mechanics Lien Act). *See also* 815 ILL. COMP. STAT. 513/20(c).

188. *Id.* at 294, 888 N.E.2d at 62.

189. *Id.* In his dissenting opinion, Justice Freeman noted that given the plain language of the statute, “I believe the analysis on the question of whether the Act is, in fact, an affirmative defense as defendants assert is warranted. This is particularly so in this case which marks this court’s first opportunity to interpret this recently enacted legislation. Rather than provide that analysis, the court chooses to confine the focus of this case to the issue of whether the terms of the Act apply to subcontractors such as plaintiff.” *Id.* at 307, 888 N.E.2d at 69.

The dissent noted that a thorough, fact-based opinion from the Court would have been helpful to those who work in the home repair and remodeling industry as well as to the consumers the HRRA intended to protect. *Id.* at 294, 888 N.E.2d 72.



## B. Condominium/Townhome Association Immunity

Under the Snow and Ice Removal Act (“SIRA”), the immunity from liability for condominium and townhome associations, and their agents, has been extended from sidewalks to driveways.<sup>190</sup>

In *George Divis v. Woods Edge Homeowners’ Association*,<sup>191</sup> Divis, an owner in the building, sued the condominium association, its management agent and the snow removal company (“Company”) when he slipped and fell on the sidewalk outside his building.<sup>192</sup> Divis alleged that the Company negligently undertook to remove the natural accumulation of snow and ice, but did so in an “incomplete and improper manner.”<sup>193</sup> The Company filed a motion to dismiss based on the SIRA which the trial court granted.<sup>194</sup> Divis appealed.<sup>195</sup>

The appellate court affirmed the trial court’s decision, rejecting the contention that the exculpatory provisions of the SIRA do not apply to parties who enter into contracts with others to remove snow and ice.<sup>196</sup> Given the public policy of the SIRA, owners and others residing in residential units are encouraged to clean the sidewalks abutting their residences of snow and ice.<sup>197</sup> The plain language of the SIRA extends the protection to an owner, lessor, occupant, or “any agent of or other person engaged by any such party.”<sup>198</sup> Therefore, all the defendants, including the Company who were agents or other persons engaged by the owner, were immune from liability under the SIRA.<sup>199</sup>

Extending the interpretation of the SIRA from sidewalks to driveways, the court in *Donald E. Flight v. American Community Management, Inc.*<sup>200</sup> ruled in the association’s favor. This case involves townhomes which have their own separate and adjacent driveways to the townhome units.<sup>201</sup> An

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190. 745 ILL. COMP. STAT. ANN. 75/1 (West 2004).

191. *George Divis v. Woods Edge Homeowners’ Association*, 385 Ill. App. 3d 636, 897 N.E.2d 375 (1st Dist. 2008).

192. *Id.* at 637, 897 N.E.2d at 376.

193. *Id.*

194. *Id.* at 638, 897 N.E.2d at 376.

195. *Id.*

196. *Id.* at 638, 897 N.E.2d at 377.

197. *Id.*

198. *Id.*; 770 ILL. COMP. STAT. ANN. 60/1 (West 2006).

199. *Id.* at 639, 897 N.E.2d at 377.

200. *Donald E. Flight v. American Cmty. Mgmt., Inc.*, 384 Ill. App. 3d 540, 893 N.E.2d 285 (1st Dist. 2008).

201. *Id.* at 542, 893 N.E.2d at 272.

owner sued his homeowners' association, its management agent and the snow removal company ("Company") when he slipped and fell in his driveway.<sup>202</sup> Flight sought a strict construction approach under the SIRA, arguing that the SIRA's immunity provisions only applied to sidewalks, not driveways.<sup>203</sup> The trial court granted summary judgment in favor of the defendants.<sup>204</sup> The trial court based its decision on the natural accumulation rule finding that there was no evidence that Flight slipped on anything other than natural accumulation of ice.<sup>205</sup> The appellate court held that summary judgment was proper because no issue of fact existed and there is no distinction between a sidewalk and driveway under the SIRA because a driveway was "sufficiently akin to a sidewalk such that the application of the SIRA was proper."<sup>206</sup> Therefore, the defendants would be immune from liability.<sup>207</sup>

### C. Real Estate Contracts

Several recent developments in case law are of paramount importance to attorneys involved in real estate closings because they address issues that arise at two very important stages of the deal, particularly, the contract/attorney review and closing stages of the transaction.

#### 1. *Contract Modifications and Attorney Review Provisions*

In *Patel v. McGrath*,<sup>208</sup> the second district appellate court held that proposed modifications of a valid contract were not a revocation or counteroffer of the contract. On March 11, 2006, McGrath accepted the Patels' offer to buy real estate in Burr Ridge, Illinois. The contract contained an attorney clause that provided, in relevant part:

Attorney Review: The respective attorneys for the parties may approve, disapprove, or make modifications to this Contract, other than stated Purchase Price, within five (5) business days after the Date of Acceptance . . . Any notice of disapproval or proposed modification(s) by any Party shall be in writing . . .<sup>209</sup>

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202. *Id.*

203. *Id.* at 542, 893 N.E.2d at 273.

204. *Id.*

205. *Id.*

206. *Id.* at 544-45, 893 N.E.2d at 288-89.

207. *Id.*

208. *Patel v. McGrath*, 374 Ill. App. 3d 378, 872 N.E.2d 537 (2d Dist. 2007).

209. *Id.* at 379, 872 N.E.2d at 555.

Within five business days, the Patels' attorney sent a letter to McGrath's attorney requesting modifications. The end of the letter stated the language as follows: "Please be advised that the above modifications should not be construed as a revocation of the current Contract, nor should they be construed as a counteroffer." On the same day the Patels' attorney sent the modification letter, McGrath's attorney sent a letter rejecting the modification and disapproving the contract pursuant to the attorney review provision but his letter did not explain the reason for the rejection. The next day, the Patels' attorney sent a letter revoking the proposed modifications and demanding to proceed under the original contract terms. The trial court found that the modification letter from the Patels' attorney constituted a counteroffer and dismissed the complaint with prejudice. The Patels appealed.<sup>210</sup>

Relying on settled precedent, the appellate court noted that a contract containing an attorney approval clause should be construed as a condition subsequent, not as a conditional acceptance, to the terms of that contract.<sup>211</sup> In reaching its findings, the appellate court applied the holding in its decision in *Hubble v. O'Connor*,<sup>212</sup> where it found that an unconditional contract had been formed and the attorney review did not render the contract illusory.<sup>213</sup>

The appellate court found that the attorney review language allowed for three things to happen under the contract: "The respective attorneys for the parties may approve, disapprove, or make modifications to this Contract."<sup>214</sup> Based on the court's interpretation of attorney review provisions, the appellate court noted that "simply because a communication discusses the possibility of modification does not necessarily mean the communication is a demand for modification."<sup>215</sup> Because the Patels' attorney attempted to communicate about the modifications in a timely fashion and expressly stated that the letter

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210. *Id.* at 378–79, 872 N.E.2d at 538–39. The court noted that the property was relisted for \$1,800,000, the original listing was \$1,299,900. The contract specifically precluded rejection of the contract based on price. Given this fact, the court agreed with the Patels that McGrath's rejection letter precluded their acceptance of the rejection because the seller conduct of relisting the property at a higher price was a wrongful disapproval of the contract based on the price although the letter did not state it. *Id.*

211. *Id.* at 381–82, 872 N.E.2d at 538–39.

212. *Hubble v. O'Connor*, 291 Ill. App. 3d 974, 980–81, 684 N.E.2d 816 (1st Dist. 1997).

213. *Id.* at 381–82, 872 N.E.2d at 539–40 (citing *Groshek v. Frainey*, 274 Ill. App. 3d 566, 570, 654 N.E.2d 467 (2d Dist. 1995)); see *Anand v. Marple*, 167 Ill. App. 3d 918, 920, 522 N.E.2d 281, 282 (2d Dist. 1988); see *Olympic Rest. Corp. v. Bank of Wheaton*, 251 Ill. App. 3d 594, 599, 622 N.E.2d 904, 908 (1st Dist. 1993).

214. *Id.* at 381; 872 N.E.2d at 540.

215. *Id.*

was not a revocation or counteroffer, the appellate court held the current contract remained in effect.<sup>216</sup>

## 2. Residential Real Property Disclosure Act

As the next case indicates real estate contracts must contain all legislative mandated disclosures which must be delivered in accordance with the law.

In *Muir v. Merano*,<sup>217</sup> a case of first impression before the fifth district appellate court involving the Residential Real Property Disclosure Act (“Act”),<sup>218</sup> a seller did not deliver the required disclosure document regarding the condition of the property prior to signing the contract. The parties entered into a contract for the sale and purchase of a house, but the defendant seller failed to deliver to the plaintiffs the disclosure document required by section 20 of the Act.<sup>219</sup> The plaintiffs made repeated requests for the disclosure document.<sup>220</sup> When the seller refused to provide the disclosure, the plaintiffs requested their earnest money back.<sup>221</sup> However, the defendant offered to refund only one-half of the earnest money deposit.<sup>222</sup> Accordingly, the plaintiffs notified the defendant of their intent to exercise their right under section 55 of the Act to terminate the contract and receive a full refund of their \$10,000 earnest money deposit.<sup>223</sup> The trial court held that the seller violated

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216. *Id.* at 382, 872 N.E.2d at 541–42. The court noted that its decision is not contrary to its prior decisions because the well-established rule is that a counteroffer rejects an offer only when made *before* a contract is formed. See *Hubble*, 291 Ill. App. 3d at 980; 684 N.E.2d at 816. From the buyer’s point of view, if the buyer’s letter was a rejection of the original contract, it would constitute a counteroffer. See *Olympic Restaurant*, 251 Ill. App. 3d at 601, 622 N.E.2d at 904.

217. *Muir v. Merano*, 378 Ill. App. 3d 1103, 882 N.E.2d 715 (5th Dist. 2008).

218. *Id.* at 1104, 1107, 882 N.E.2d at 718 (citing 765 ILL. COMP. STAT. ANN. 77/20, 35, 40, 55 (West 2006)). Section 20 of the Act requires the seller of residential real property to complete a “disclosure document” and deliver it to the prospective buyer “before the signing of a written agreement by the seller and prospective buyer.” 765 ILL. COMP. STAT. ANN. 77/20 (West 2006). The disclosure document is described in section 35 of the Act. 765 ILL. COMP. STAT. ANN. 77/35 (West 2006). Section 40 of the Act provides that in the event this disclosure document is not delivered to the prospective buyer until after the signing of a written agreement, then upon the receipt of a disclosure document revealing a material defect in the home, the prospective buyer has three business days within which to terminate the contract and receive a full refund of any earnest money deposit or down payment. 765 ILL. COMP. STAT. ANN. 77/40 (West 2006). Finally, section 55 of the Act provides that if the seller fails or refuses to provide the disclosure document prior to the conveyance of the property, the buyer shall have the right to terminate the contract. 765 ILL. COMP. STAT. ANN. 77/55 (West 2006).

219. *Muir*, 378 Ill. App. 3d at 1104, 882 N.E.2d at 716–17.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

the Act and ordered that the earnest money be returned to the buyer.<sup>224</sup> The seller appealed.<sup>225</sup>

The appellate court reviewed the question on appeal as one of statutory construction and purely a question of law under the de novo standard of review.<sup>226</sup> The appellate court stated that it found that the Act requires the seller to deliver the disclosure document prior to the signing of the contract.<sup>227</sup> Therefore, the appellate court held that the buyer is free at any time prior to the conveyance of the deed to terminate the contract and receive a full refund of any earnest money deposit paid.<sup>228</sup> The appellate court stated that the buyer should not be held hostage by the seller's refusal to comply with the Act.<sup>229</sup>

This lawsuit is one that could have been avoided had the seller simply complied with the law. Even though the court did not create any new law from this decision, this case is important because it reiterates to parties involved in the transaction that they must comply fully with the law concerning the contract because courts are not hesitant to enforce the law to give relief to the aggrieved party.

### 3. *Contract Reformation and Closings*

The facts of *Wheeler-Dealer Ltd. v. Christ*<sup>230</sup> are a classic example of why attorneys and sellers must stay apprised throughout the transaction of all the details surrounding the deal.

At the bench trial, the defendant who was the purchaser, “testified that he attended a real estate auction on October 9, 2004, and received a bid brochure at that time. He stated that he was interested in purchasing the land and building at 12531 S. Vincennes in Blue Island, Illinois, which was listed by that address as parcel No. 54 in the bid brochure.”<sup>231</sup> “According to the defendant, the auctioneer made no disclosure prior to the bidding that the seller intended to retain any part of the property listed as 12531 S. Vincennes.”<sup>232</sup> The brochure stated that “it and all other auction related materials are subject to and superceded by the real estate contract which had been made available to all potential bidders prior to the auction.”<sup>233</sup> In the real

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224. *Id.* at 1105, 882 N.E.2d at 717.

225. *Id.*

226. *Id.*

227. *Id.* at 1106, 882 N.E.2d at 718.

228. *Id.*

229. *Id.*

230. *Wheeler-Dealer Ltd. v. Christ*, 379 Ill. App. 3d 864, 885 N.E.2d 350 (1st Dist. 2008).

231. *Id.* at 866, 885 N.E.2d at 353.

232. *Id.*

233. *Id.* at 867, 885 N.E.2d at 353.

estate contract signed by the defendant on October 9, 2004, the address of 12531 S. Vincennes did not appear anywhere in the document. “Rather, the contract contains a legal description of the property as the east 165 feet of Lot 4 and gave approximate dimensions of fifty feet by 165 feet.”<sup>234</sup> At the closing with plaintiff, by a special warranty deed dated December 27, 2004, all of Lot 4 was delivered to defendant’s nominee along with a survey of Lot 4 showing the entire dimensions of Lot 4. Both the receipt given to the defendant when he posted his earnest money on the day of the auction and the closing statement from the closing listed 12531 S. Vincennes as the address of the property he purchased.<sup>235</sup>

At trial, David Gray, Jr.,<sup>236</sup> the attorney who represented the seller at the closing, testified that he made a mistake when he prepared the special warranty deed containing the legal description conveying all of Lot 4. According to Gray, “about one month prior to the closing, he received a title commitment showing Lot 4 as the property involved in the transaction, but he stated that he would not have reviewed the legal description, only the title exceptions listed on schedule B of the title commitment.”<sup>237</sup> Gray testified that he used a “cut and paste” method and mistakenly took the entire legal description from the title commitment and inserted it into the deed. It was not until several months after the closing that Gray discovered the error about the legal description on not only the deed but other closing documents such as the affidavit of title and the state and county tax declarations.<sup>238</sup>

“Timothy Gray, the president of the plaintiff corporation, testified that” he was present at the auction on October 9, 2004, and did not make any statements to the defendant about selling less than the entire parcel of property listed as 12531 S. Vincennes, nor did he instruct the auctioneer to announce to the bidders that it was only the east 165 feet of the property listed as 12531 S. Vincennes that was being sold.<sup>239</sup> “He admitted that the address of 12531

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234. *Id.*

235. *Id.* at 865–70, 885 N.E.2d at 353–55.

236. *Id.* Gray, Jr. testified that he authorized his father, David R. Gray, Sr., to prepare the contract of sale and Gray Jr. prepared the deed and all other documents necessary for a closing. *Id.*

237. *Id.* at 867, 885 N.E.2d at 354.

238. *Id.* A law clerk employed by Gray testified that, prior to the closing, he received a call from the defendant’s attorney regarding concerns that “the legal description of the property as set forth on the sale contract did not match the legal description on the title commitment.” However, after consulting with Gray, he informed the person that the legal description on the contract was correct. The employee of the law firm that represented the defendant testified that, “although she assisted in the transaction, she did not remember having a discussion with anyone regarding a discrepancy between the legal description in the sales contract and the description in the title commitment.” *Id.* at 868, 885 N.E.2d 354.

239. *Id.* at 868, 885 N.E.2d at 354.

S. Vincennes was painted on the door of the metal building located on the property.”<sup>240</sup> Furthermore, while Timothy Gray stated that “he never authorized the preparation of a deed or closing documents that contained a legal description” disposing of the entire property, “he acknowledged that 12531 S. Vincennes appeared on the earnest money receipt given to the defendant on the day of the auction as the address of the property purchased and the same address appears on the closing statement” both parties executed.<sup>241</sup>

The judge, after a bench trial, ruled in favor of the defendant purchaser.<sup>242</sup> The seller appealed.<sup>243</sup> The appellate court affirmed the trial judge’s decision, finding that there was no mutual mistake of fact for a reformation or an unjust enrichment claim.<sup>244</sup>

The appellate court stated that in order to prevail in a claim for reformation, the mistake involved must be in the expression of an agreement between parties whose minds have met. The appellate court found that because there was no meeting of the minds regarding the deed, reformation was not appropriate. The inference being that the plaintiff prepared a contract for the sale of one parcel of land, and the defendant signed the contract contemplating that he was purchasing nothing less than the entire parcel commonly known as 12531 S. Vincennes. The appellate court agreed with the trial judge that the record was absent of any facts to the contrary to rule that its determination was against the manifest weight of the evidence.<sup>245</sup>

For practitioners, this case illustrates (1) the utmost importance of communications between clients and attorneys so that both parties are clear as to their expectations in the transaction, and (2) the necessity of a well documented real estate closing file, especially for special circumstances, such as the one presented in this case.

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240. *Id.*

241. *Id.*

242. *Id.* at 865–66, 885 N.E.2d at 352.

243. *Id.* The purpose of an action for reformation is to change a written instrument by inserting some omitted provision or deleting some existing provision so that the document conforms to the original agreement of the parties. *Id.*; see *Schaffner v. 514 West Grant Place Condo. Ass’n*, 324 Ill. App. 3d 1033, 1044, 756 N.E.2d 854 (1st Dist. 2001).

244. *Wheeler-Dealer*, 379 Ill. App. 3d at 872, 885 N.E.2d at 357–58. The court found that unjust enrichment may only form the basis of recovery in the absence of an agreement between the parties; whereas, reformation may only be awarded in order to conform a writing to an actual agreement between the parties. The court concluded, therefore, that the doctrine of unjust enrichment may not form the basis of a claim for reformation. *Id.*

245. *Id.* at 872, 885 N.E.2d at 357.

D. Adverse Possession<sup>246</sup>

The issue of hostile possession in this case is relevant because this case outlines that it is not enough that a land owner knows that someone is using the land but must take affirmative action to negate permission to use the land.

In *Davidson and Storm v. Perry*,<sup>247</sup> a case involving two adjacent parcels of farmland, plaintiffs Davidson and Storm, the daughters and heirs of the Vanderhoofs, asserted that their father had acquired a tract of adjacent land fifty-four feet north and west of the property line of the parcel since 1950. Davidson attested that she and her family lived with her parents since 1950 and that no one besides her father had been in possession of the land in dispute.<sup>248</sup>

In November 2001, the defendant Perry purchased a parcel of adjacent land, north and east of the Vanderhoof parcel which include the tract claimed by the plaintiffs. In 1977, the prior owner of the land now owned by Perry had a survey of the property prepared which showed that there was an existing fence fifty-four feet north of the parcel's boundary line and extending the Vanderhoofs' parcel by fifty-four feet north onto the parcel Perry now owned. Perry also argued that iron stakes defined in the survey showed sufficient possession to negate Vanderhoof's claim to the tract. Perry challenged the "exclusive possession" element of adverse possession, alleging that the Vanderhoofs failed to establish this element because the 1977 survey was sufficient evidence of "possession" over the disputed tract enough to disrupt the exclusive possession of the Vanderhoofs during the period that followed. The trial court granted summary judgment for the plaintiffs' and Perry appealed.<sup>249</sup>

The appellate court affirmed the trial court's ruling, noting that "we fail to see how two pins at ground level in a rural area is in itself indicative of possession . . . the claimant's mere survey of land is insufficient to establish

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246. 735 ILL. COMP. STAT. ANN. 5/13 (West 2004). The adverse possession statute sets forth the circumstances under which continuous possession can be established. Section 101 requires mere occupation for twenty years. *Id.* at 5/13–101. Section 107 requires occupation for seven years with some connected title. *Id.* at 5/13–107; see *Elston v. Kennicott*, 46 Ill. 187 (1867) (indicating that the "connected title" under section 107 is prima facie evidence of title such that a reasonable person would pay money for it.) Section 109 requires seven years occupation with color of title and payment of taxes for 7 years. *Id.* at 5/13–109. For vacant land only, Section 110 requires one to pay taxes for 7 years and hold color of title. *Id.* at 5/13–110.

247. *Davidson and Storm v. Perry*, 386 Ill. App. 3d 821, 898 N.E.2d 785 (4th Dist. 2008).

248. *Id.* at 821, 898 N.E.2d at 786–87.

249. *Id.* at 821, 898 N.E.2d at 788. Furthermore, when the plaintiffs' father died in 2005, Perry erected a new fence around the tract. *Id.*



possession.”<sup>250</sup> The appellate court further held that based on established law the “notice of a survey and its results are not considered possession.” Thus, the notice of survey results were insufficient to establish the use was “permissive” rather than “hostile” and, therefore, established adverse possession.<sup>251</sup>

#### IV. CONCLUSION

As demonstrated by the development of legislation and case law responding to these economically difficult times for homeowners and lenders, dealing with foreclosures, fraudulent practices in conveyances and addressing how existing law can aid aggrieved parties, the legislature and courts are likely to be very busy addressing more of these issues given the sluggish improvements and ongoing financial struggles in the economy.

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250. *Id.* at 821, 898 N.E.2d at 789. On the procedural issue, Justice Cook’s dissent noted that the establishment of adverse possession and the issue of abandonment are always a question of fact and, therefore, it should hardly ever be resolved by summary judgment. Furthermore, there was such factual disputes, including Davidson’s affidavit stating that when she was three years old she remembered that her dad constructed the fence, that she remembered her dad harvesting hay on the parcel when other evidence stated that the land was overrun with roses, and that Storm’s affidavit suggested the Vanderhoofs had abandoned the land shortly after the 1977 survey because the land was no longer used as a pasture after 1979. *Id.* at 821, 898 N.E.2d at 792–93.

251. *Id.* at 821, 898 N.E.2d at 791.

