

Overview of the Illinois Mortgage Foreclosure Process

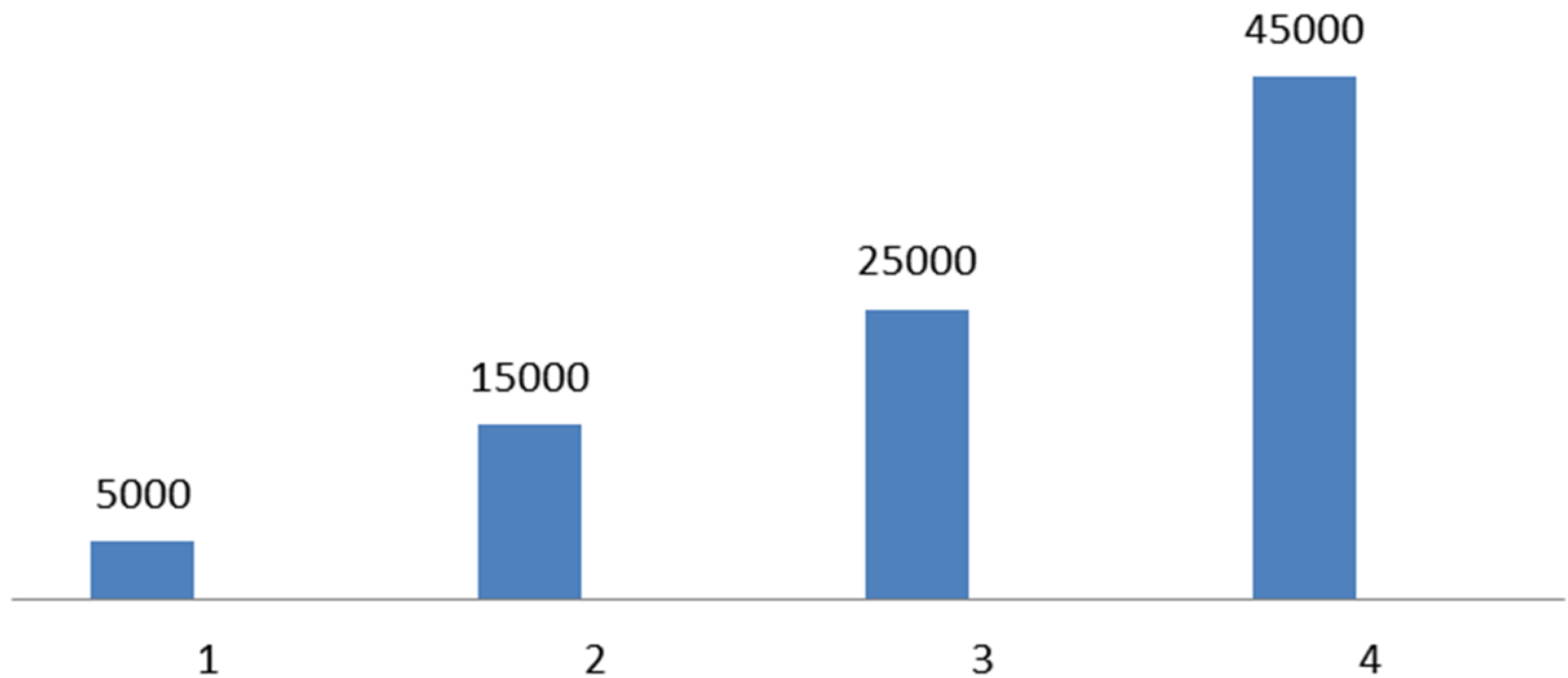
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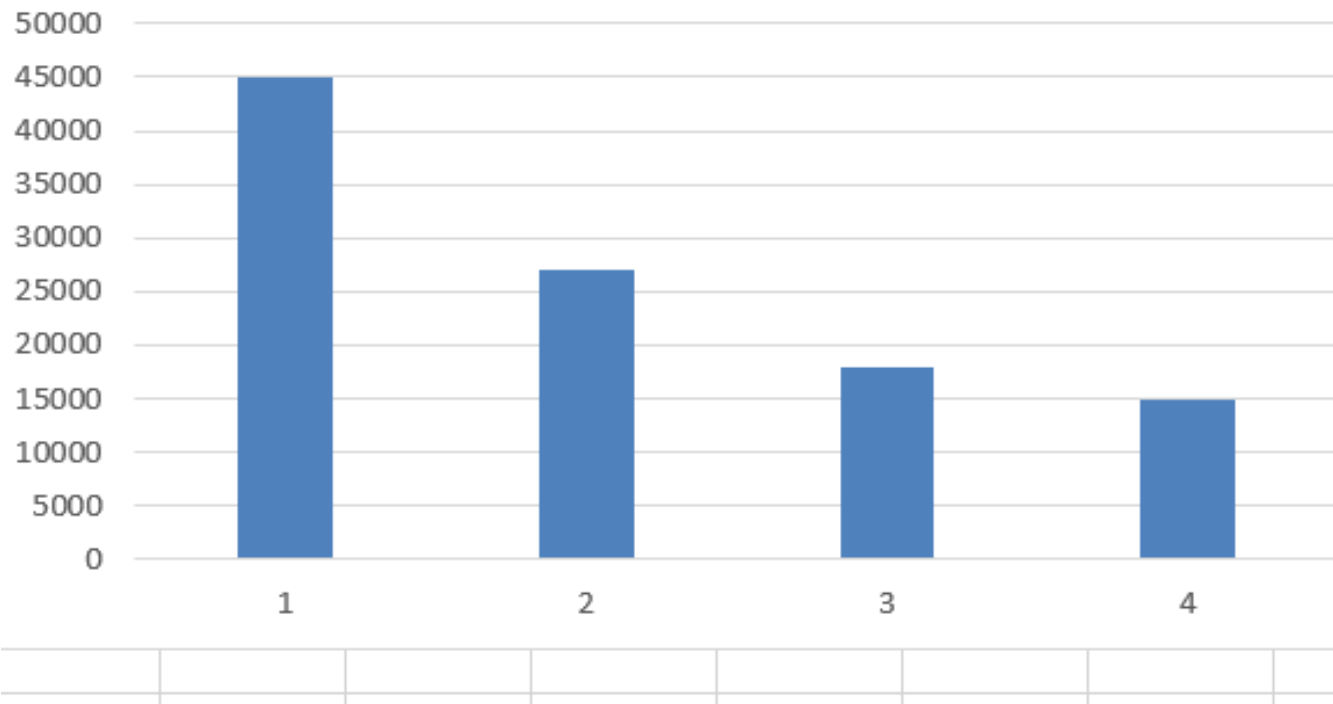
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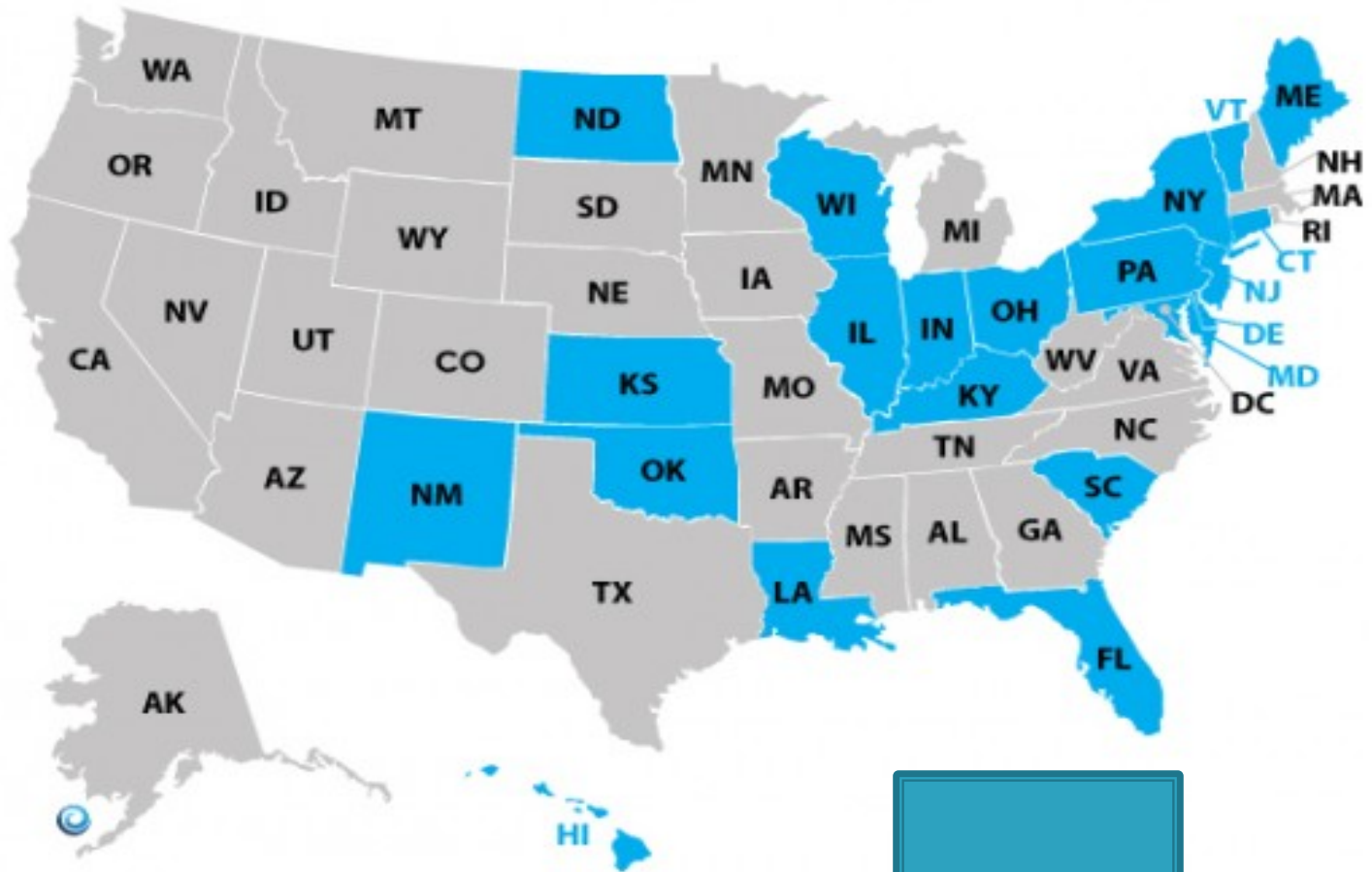


Foreclosures filed in Cook County, Illinois (1994-2012)



Foreclosures filed in Cook County, Illinois (2012-2015)

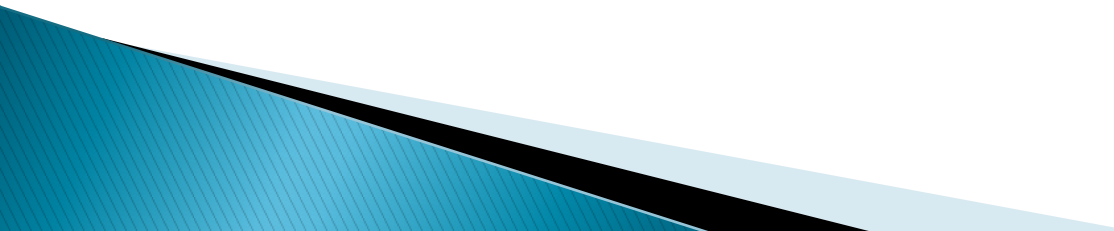




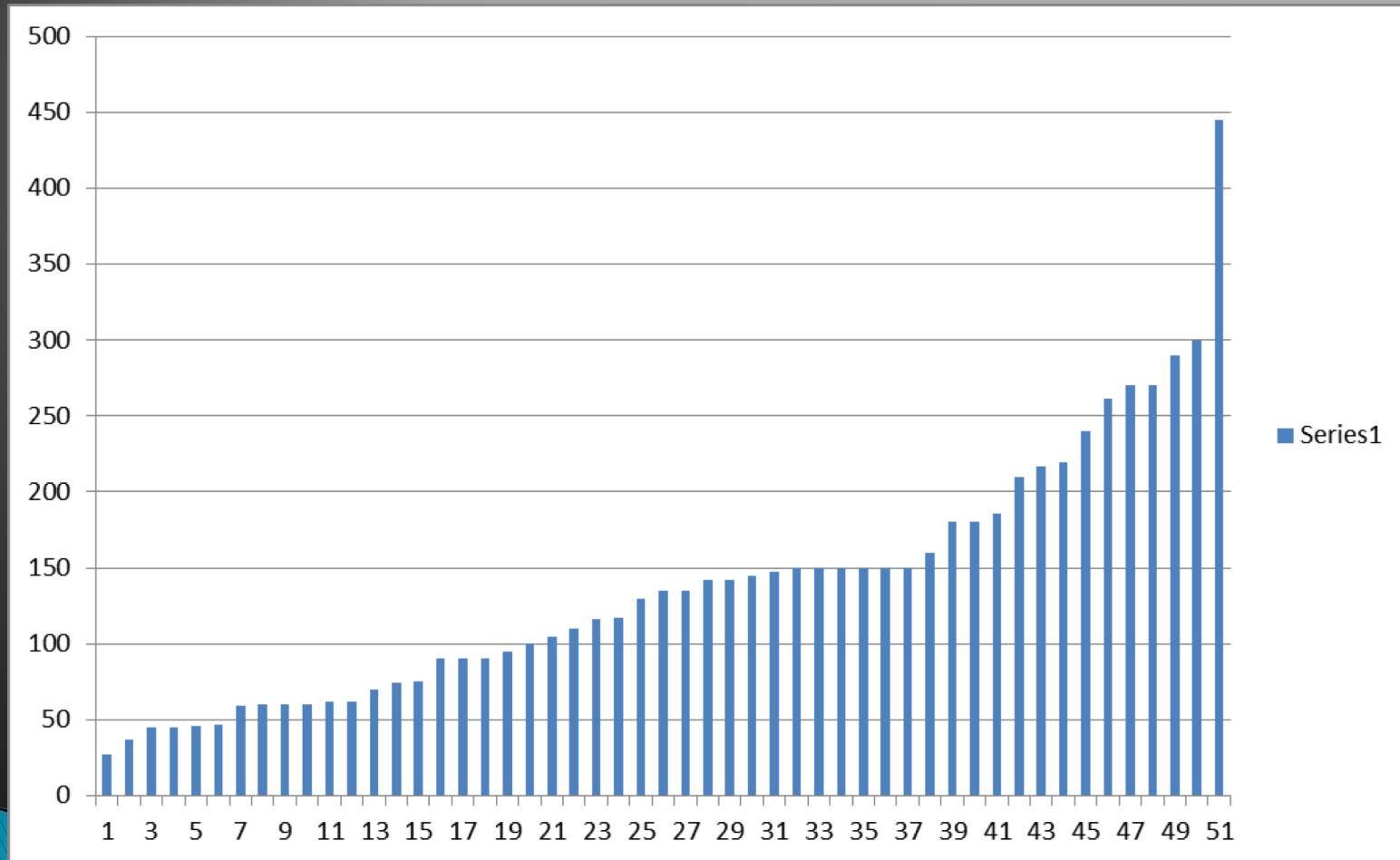
Source: MBA

Poll #1

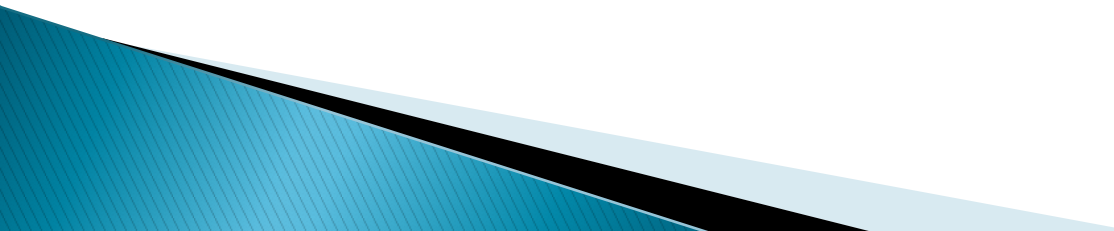
What do the blue states have in common?

- ▶ a. They trend Democratic in presidential elections.
 - ▶ b. They have the highest numbers of foreclosures per capita.
 - ▶ c. They have the longest foreclosure timelines.
 - ▶ d. They require judicial foreclosures.
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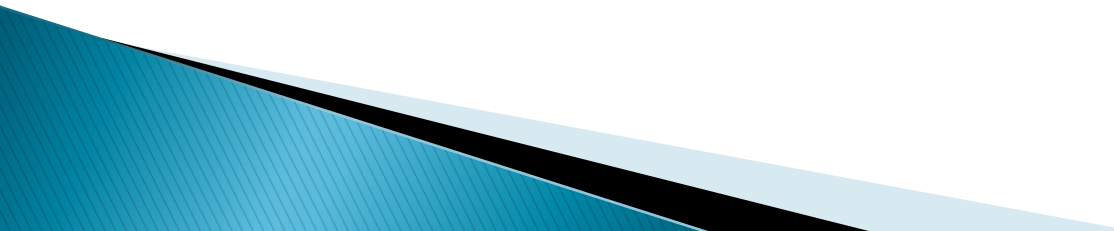
State Foreclosure Process Timelines




What is a Mortgage Foreclosure?

- ▶ Collection action (on a note)
 - ▶ Enforcing a security instrument (mortgage)
 - ▶ By the mortgagee, i.e., the entity which holds the indebtedness or its servicing agent
 - ▶ After an event of default
 - ▶ Notice of default/acceleration
 - ▶ Acceleration of debt
 - ▶ Forced sale of home if borrower does not come current on or pay off debt
- 

Poll #2

- ▶ How many types of default are there (different reasons why a lender can foreclose)?
 - ▶ a. 2
 - ▶ b. 4
 - ▶ c. 6
 - ▶ d. 8
- 

Types of Default

- ▶ Failure to make payment of principal/interest (by date due, regardless of any grace period)
 - ▶ Failure to pay real estate taxes
 - ▶ Failure to pay homeowner's insurance
 - ▶ Waste
 - ▶ Abandonment
 - ▶ Non-occupancy of reverse mortgagor
 - ▶ Sale/transfer to buyer not protected by Garn St. Germain Act, 12 U.S.C. § 1701j-3 (spouse, child, heir)
 - ▶ Fraud in loan application
- 

Foreclosure Timeline

- ▶ January 1, 2018 1st payment missed
- ▶ February 1 2nd payment missed
- ▶ March 1 3rd payment missed; notice of acceleration sent
- ▶ May 1 Foreclosure attorney prepares complaint
- ▶ June 1 Complaint filed
- ▶ June 15 Borrower served
- ▶ July 15 Answer due
- ▶ August 1 Case Management Status
- ▶ August 15 Motion for default filed
- ▶ September 1 Default judgment of foreclosure entered
- ▶ September 15 Expiration of right to reinstate
- ▶ January 15, 2019 **Expiration of right to redeem**
- ▶ January 16 Judicial sale (expiration of right to file BK)
- ▶ February 1 Order approving (confirming) sale entered
- ▶ March 2 Expiration of special right to redeem
- ▶ March 3 Order of possession can be enforced

Pre-foreclosure Requirements

(January 1 – June 1, 2017)

- ▶ (Note: 90-day Grace Period Notice expired in 2016)
- ▶ Notice of acceleration
- ▶ FHA-insured loans: loss mitigation efforts, e.g., effort to have a face-to-face interview with the mortgagor
- ▶ RESPA Loss Mitigation Procedures – Foreclosure Brake #1 (eff. 01/14):
 - Servicers cannot make the first notice or filing required for the foreclosure process until a mortgage loan account is more than 120 days delinquent
 - No foreclosure if pending loan mod application

Complaint

(June 1, 2017)

- ▶ Summons must include notice including homeownership protection info set forth in 735 ILCS 5/15-1504.5 (expired?)
- ▶ Form complaint allowed as per 735 ILCS 5/15-1504
- ▶ Will contain a lot of information about the case including:
 - Name of the mortgagee and mortgagor(s)
 - Capacity in which mortgagee is suing – must be specific as per Sec. 1504(a)(3)(N)
 - Legal description w/PIN
 - Date of default, principal balance due, per diem
 - Secondary liens
- ▶ Must include note and mortgage (but not assignments)
 - you have to have both to foreclose

Capacity/right party in interest/standing issues

- ▶ As per Sec. 1504(a)(3)(N): “Capacity in which plaintiff brings this foreclosure (here indicate whether plaintiff is the legal holder of the indebtedness, a pledgee, an agent, the trustee under a trust deed or otherwise, as appropriate)”
- ▶ As per S. Ct. Rule 113(b): “a copy of the note, as it currently exists, including all indorsements and allonges, shall be attached to the mortgage foreclosure complaint at the time of filing.”
- ▶ *Deutsch Bank v. Gilbert*, 2012 IL App (2d) 120164 (2nd Dist. Sept. 25 2012). “[S]tanding must exist when the suit is filed.” Here, it did not. Complaint filed March 10, 2008; Assignment of Mortgage executed August 25, 2008 (claiming to document a prior assignment on November 1, 2005). Not good enough.
- ▶ *But see Rosestone Investments v. Garner*, 2013 IL App (1st) 123422 (1st Dist. Dec. 12, 2013) (rejecting *Gilbert*’s burden-shifting approach and forcing defendant to prove date of transfer of mortgage loan)

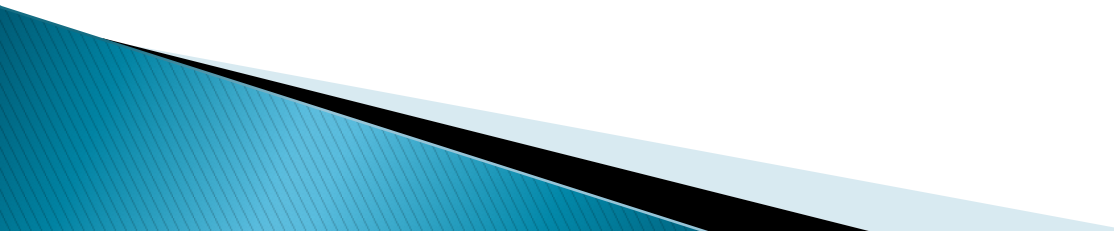
Answer

(July 1, 2017)

- ▶ Don't admit capacity to sue unless you're sure (Sec. 1504(a)(3)(N))
- ▶ Don't admit amount of default, or, in appropriate cases, fact of default (Sec. 1504(a)(3)(J))
- ▶ Raise any applicable affirmative defenses including lack of notices or lack of pre-foreclosure loss mitigation
- ▶ This includes standing – if you don't raise lack of standing before judgment it is waived. *Nationwide v. Ortiz*, 2012 IL App (1st) 112755 (1st Dist. 2012); *Deutsch Bank v. Gilbert*, 2012 IL App (2d) 120164 (2nd Dist. Sept. 25 2012).

Foreclosure Judgment

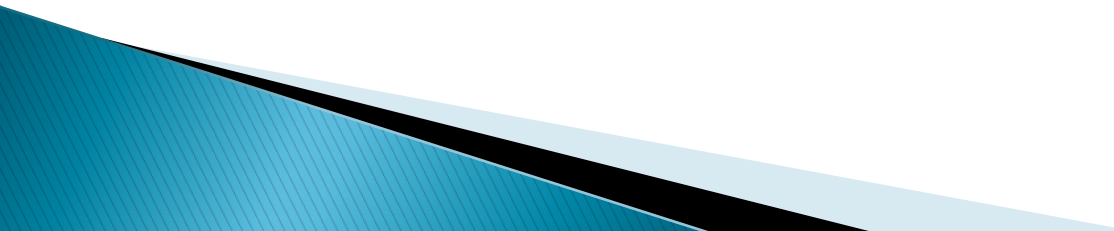
(September 1, 2017)

- ▶ 735 ILCS 5/15-1506
 - ▶ Determines that plaintiff can foreclose
 - ▶ Determines lien priority
 - ▶ Will state the full amount owing at that time, including costs and attorney fees, as supported by a valid affidavit (S. Ct. Rule 191)
 - ▶ Will disclose the last date for redemption
 - ▶ Will say if personal deficiency allowed
- 

Who is this?



Poll #3

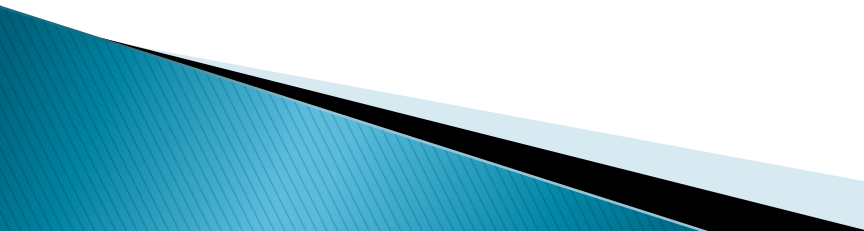
- ▶ Who is this?
 - ▶ a. Jeffrey Dahmer
 - ▶ b. Jeffrey Skilling
 - ▶ c. Jeffrey Stephan
 - ▶ d. Jeffrey Tambor
- 

Prove-up Affidavit (Rule 113(c))

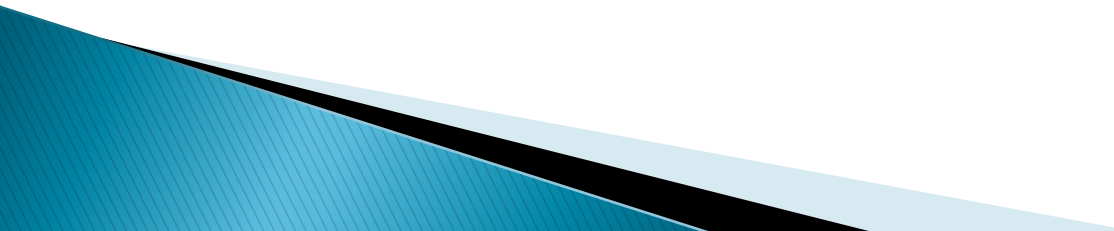
Principal	\$ _____
Interest	\$ _____
Pro Rate MIP/PMI	\$ _____
Escrow Advance	\$ _____
Late Charges	\$ _____
NSF Charges	\$ _____
Property Maintenance	\$ _____
Property Inspections	\$ _____
BPO	\$ _____
GROSS AMOUNT DUE	\$ _____
Less/Plus balance in reserve accounts	\$ _____
NET AMOUNT DUE	\$ _____

(Plaintiff will have to submit a separate itemization for attorney's fees and court costs.)

(Also, affidavit must contain other necessary information, e.g., proof that servicer has right to sue on behalf of investor, and, where defendant has appeared, the motion must include a payment history.)

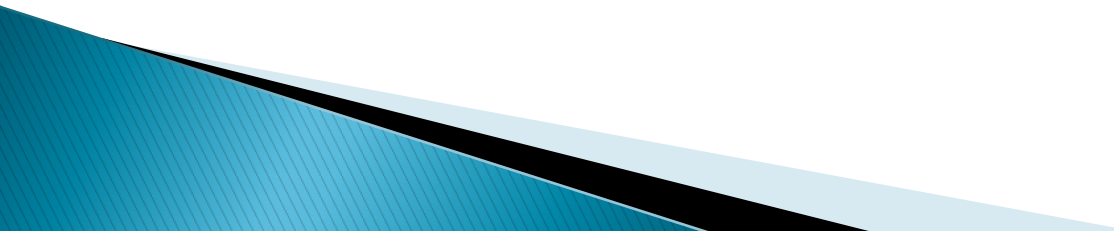


Loss Mitigation Affidavit (Rule 114)

- ▶ Where defendant has appeared or filed an answer or other responsive pleading, plaintiff must file an affidavit stating:
 - What loss mitigation programs apply
 - What was done by lender to comply
 - Current status of loss mitigation efforts
 - ▶ Rule allows court to stay or deny motion for judgment if lender is in non-compliance with any applicable loss mitigation program
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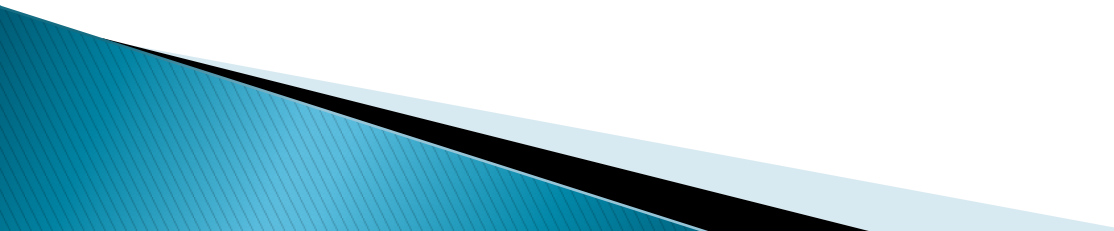
Notice of Sale

(January 16, 2018)

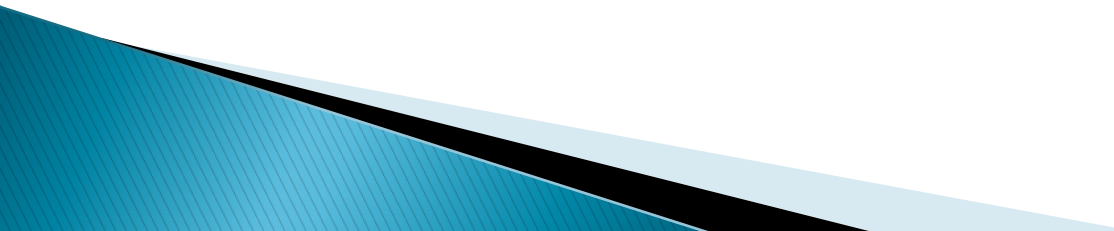
- ▶ Sets time and place of sale
 - ▶ Must be published 3 consecutive weeks
 - ▶ b/t 45 and 7 days prior to sale date
 - ▶ Must be served on all non-defaulting parties
 - ▶ Also: as per Rule 113(f) Notice of Sale mailed 10 business days prior to sale to all defendants
- 

Court Approves Sale Unless

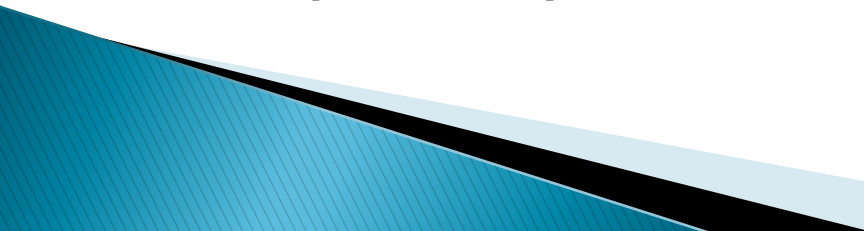
(February 1, 2018)

- ▶ Notice of sale was not given to all answering parties (and *a//* defendants under Rule 113)
 - ▶ Terms of sale were unconscionable
 - ▶ Sale was fraudulent
 - ▶ Justice was not otherwise done (“JNOD”)
- 

What can be done to postpone (or vacate) a sale?

- ▶ RESPA Loss Mitigation Procedures – Foreclosure Brake #2 (eff. 01/14):
 - ▶ Servicers must consider and respond to a borrower's application for a loan modification if it arrives at least 37 days before a scheduled foreclosure sale and must act on application before seeking judgment or going to sale.
- 

Loan mods post-HAMP

- ▶ HAMP ended in 2016 – available only if completed application submitted by 12/30/16
 - ▶ FHA-HAMP still exists
 - ▶ Fannie and Freddie Standard Modification, transitioning to Flex Modification (b/t 03/01/17 and 10/01/17)
 - ▶ For details of Flex Mod Program see: <http://www.fanniemae.com/resources/file/mb/pdf/flex-mod-faqs.pdf>
 - ▶ Proprietary mods
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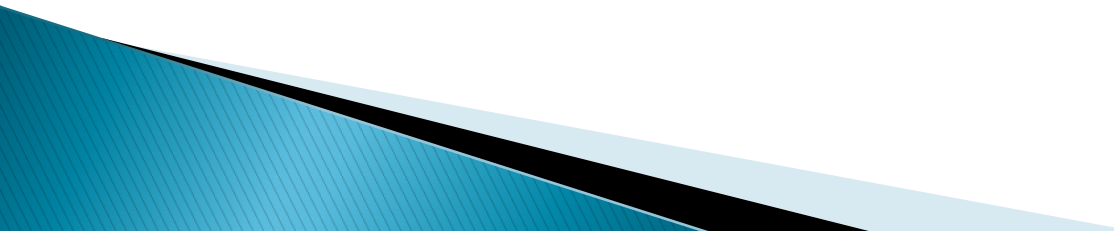
What else can be done to postpone (or vacate) a sale?

- ▶ May also be able to postpone or vacate a sale if application pending for HHF.
- ▶ Or if borrower makes some other concrete effort to reinstate or pay off loan where such effort is frustrated by the lender.

JNOD

- *Commercial Credit Loans v. Espinoza*, 293 Ill. App. 3d 923 (1st Dist. 1997) (lender had agreed to extend the period of reinstatement and to postpone the judicial sale, but it then proceeded with the sale)
- *Fleet Mortgage v. Deale*, 287 Ill. App. 3d 385 (1st Dist. 1997) (lender agreed to accept payment of the redemption amount even though the homeowner had not complied with the statutory notice requirements, but then the lender decided to proceed with the sale)
- *Citicorp Savings v. First Chicago Trust Company*, 269 Ill. App. 3d 293 (1st Dist. 1995) (homeowner was told she could redeem at the judicial sale, but when she came to the sale she was sent away and the sale proceeded to a third-party bidder).

What Happens Next

- ▶ Personal (v. in rem) deficiency stated, if any
 - ▶ Order of possession stayed 30 days under Section 1508(g)
 - ▶ Beginning of minimum 90-day notice period for tenants covered by Chicago's KCRO (Keeping Chicago Renting Ordinance)
 - ▶ (Note: federal Protecting Tenants at Foreclosure Act expired in 2014)
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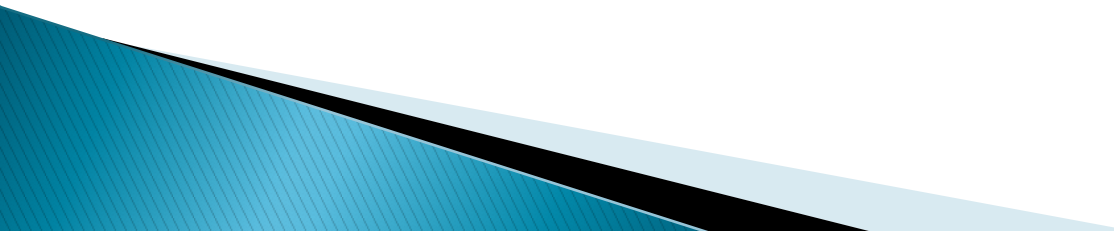
Jurisdictional Issues

- ▶ Subject matter jurisdiction – can't sue dead mortgagors – *ABN AMRO Mortg. Group, Inc. v. McGahan*, 237 Ill.2d 526 (2010)
- ▶ Personal jurisdiction – can't prove up service with third-person affidavit – *Deutsche Bank v. Brewer*, 2012 IL App (1st) 111213 (1st Dist. May 9, 2012)
 - IMFL Sec. 1505.6 – must challenge personal jurisdiction within 60 days of participation in case
- ▶ 2-1301 good until motion to confirm sale; after that you are in Section 1508 land. *Wells Fargo Bank v. McCluskey*, 999 N.E.2d 321 (Ill. 2013)

HECMs – Part 1 – Death

- ▶ Surge in foreclosures on HECMs, upon both death and default of borrower
- ▶ Death
 - Estate can sell to heirs for 95% of appraised value
 - Surviving spouses can remain under HUD's MOE (Mortgagee Option Election) program – but must act fast to apply for MOE (within 120 days of death of spouse)

Poll #4

- ▶ Which of the following is NOT a requirement for a surviving spouse to remain in the home?
 - ▶ a. Have a credit score of at least 650
 - ▶ b. Be on or quickly get on title
 - ▶ c. Be current or quickly get current on taxes
 - ▶ d. Be current or quickly get current on insurance
- 

HECMs – Part 2 – Default

- ▶ Default
 - Non-repair
 - Non-occupancy
 - Taxes
 - Insurance
- ▶ For defaults, what do we do?
 - Seek reinstatement plan
 - Discretionary, but have gotten plans up to 3 years
 - No attorney's fees
 - No > 1 inspection fee
 - Seek (discretionary) one-year deferral (“at-risk extension”) if borrower is 80 and faces medical hardship (also, this can be renewed)
 - File c. 13 BK

When it makes sense to make a legal referral

- ▶ Foreclosure filed when loan mod pending
- ▶ Judgment sought when loan mod pending
- ▶ Sale sought when loan mod pending (for more than 37 days)
- ▶ Loan mod shenanigans
- ▶ Reverse mortgage foreclosures
- ▶ Fraud
- ▶ Bankruptcy
- ▶ But for all of the above (at least for LAF), there must also be basic financial feasibility to afford the home

Contact Info

- ▶ For a “hard” referral or consult:

Daniel P. Lindsey
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dlindsey@lafchicago.org

- ▶ For a “soft” referral:

LAF @ 312.341.1070
Illinois Legal Aid On-line @
<https://www.illinoislegalaid.org/get-legal-help>