

New Supreme Court Foreclosure Rules (99.1, 113 & 114)



LAF

Equal justice starts here.

Special Supreme Court Rules Committee on Mortgage Foreclosures



- Convened in April 2011
- 14 members appointed by Illinois Supreme Court (2 per Justice: judges, plaintiff's and defense counsel, bank reps, AG, law professor)
- 15th member added later: Manny Flores, Director, Division of Banking, Illinois Department of Financial and Professional Regulation (IDFPR)
- Purpose was “to study and formulate proposals to help those facing the loss of their homes and improve the judicial process in mortgage foreclosures throughout Illinois”

Timeline



- June 2011- spring 2012: met, formed subcommittees, studied various foreclosure programs and initiatives, drafted proposed rules
- Spring/summer 2012: held public hearings
- Summer/fall 2012: met, amended rules, sent consensus recommendations to Illinois Supreme Court
- February 2013: rules approved by Supreme Court
- March 1, 2013: initial effective date (and final effective date for Rule 99.1)
- May 1, 2013: deferred effective date for Rules 113 and 114

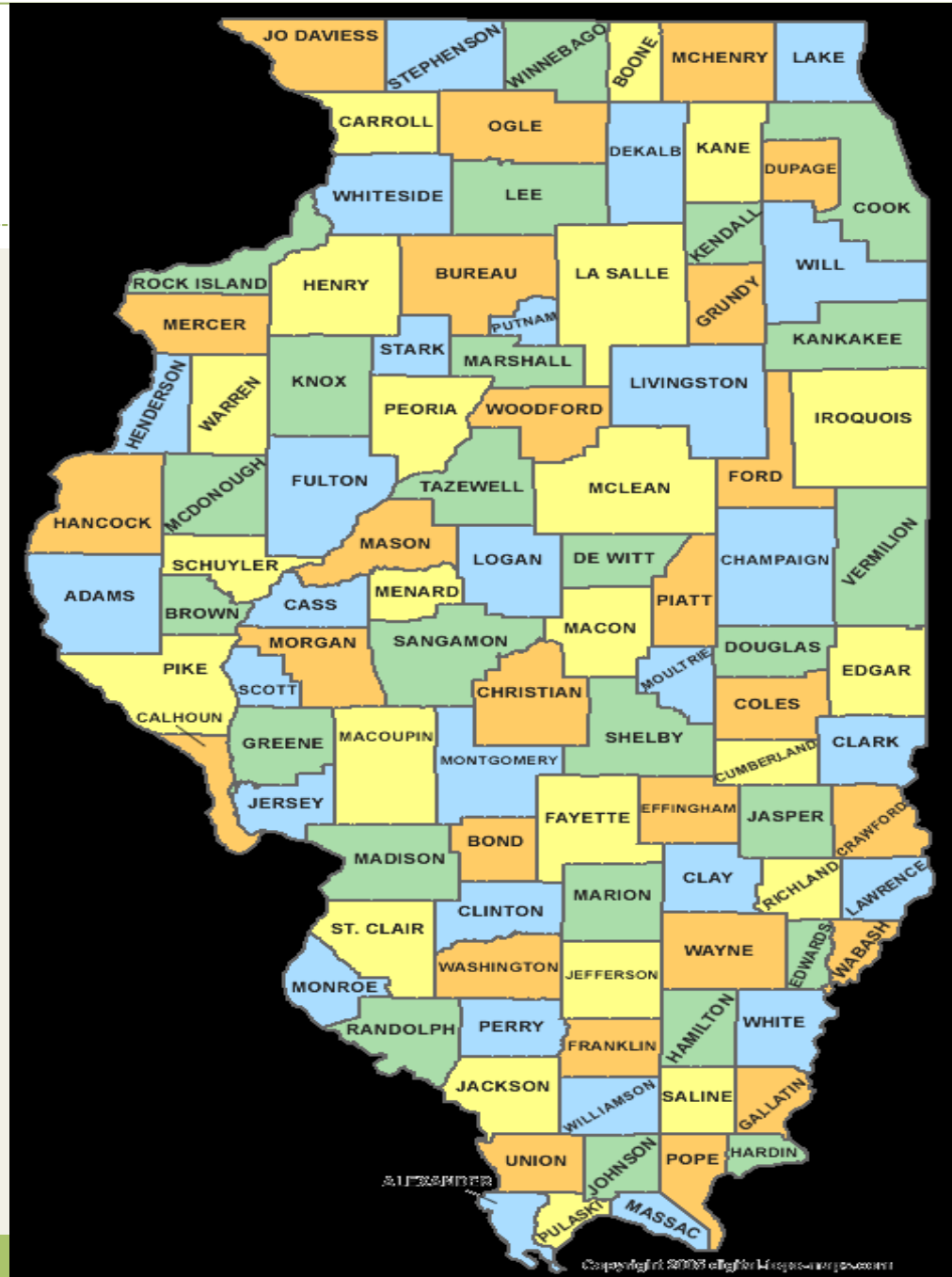
Rule 99.1



- Effective date of March 1, 2013
- Gives Illinois Supreme Court a sort of check-list of items to look for in approving mediation programs

Existing Mediation Programs

- Cook County
- Will County
- Peoria County
- Bond County
- Madison County
- McLean County



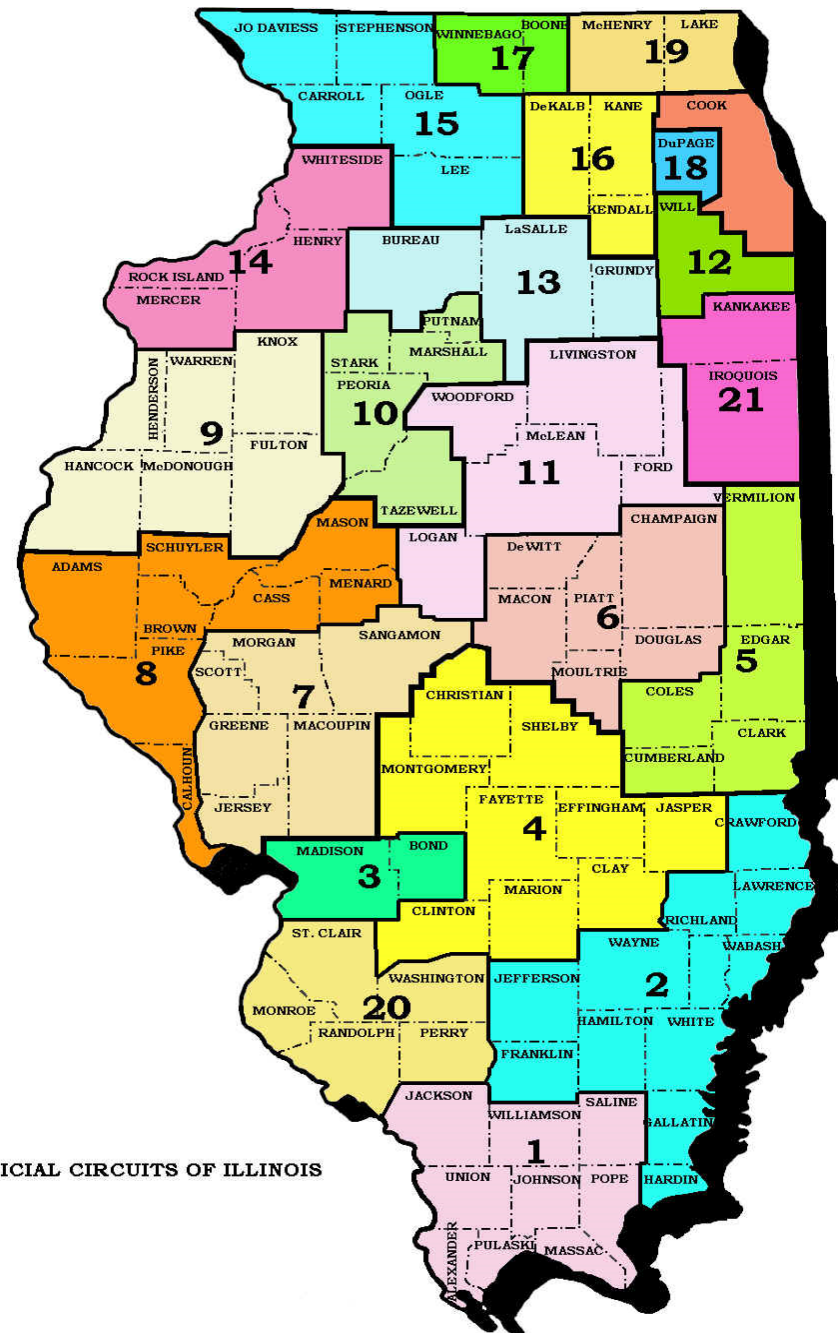
Attorney General Grants



- \$5 m in new grants to set up mediation programs
- To be administered by NIU and Resolution Systems Institute (North), University of Illinois (Central), and Dispute Resolution Institute (South) to:
 - Work with judges to develop rules and documents the judicial circuit needs to implement a mediation program;
 - Recruit and train mediators;
 - Develop case coordination systems;
 - Work with housing counselors and legal aid attorneys to assist homeowners who participate in the foreclosure mediation programs;
 - Develop an online monitoring system to permit the mediation programs to input data for tracking and evaluation; and
 - Evaluate and report outcomes and efficiency of the mediation programs and develop ways to improve the programs when needed.

Judicial Districts Targeted

- Targets 1st, 2nd, 5th, 6th, 7th, 16th, 17th, 19th, 20th and 21st judicial districts



Mediation Programs (Rule 99.1)



- Local circuits submitting mediation program plan for approval to Supreme Court must address:
 - HUD-certified housing counseling
 - Pro bono legal representation
 - Language access for program participants
 - Costs charged to any participants in program
 - Financial sustainability of program
 - Training of program personnel
- Above list is suggestive, not mandatory - sets a sort of rebuttable presumption of what a program should look like, within applicable financial/other parameters

Issues not addressed by Rule 99.1



- Voluntary or mandatory
- Whether lender representative must be physically present
- Data and outcome tracking systems
 - But AG grant asks grantees to:
 - ✦ Develop an online monitoring system to permit the mediation programs to input data for tracking and evaluation; and
 - ✦ Evaluate and report outcomes and efficiency of the mediation programs and develop ways to improve the programs when needed.

Interaction with other new rules



- Rule 113
 - Not so much – mostly Rule 113 regulates content and notices filed after mediation would occur
- Rule 114
 - Loss mitigation affidavit can (and should be) a tool used as part of a county's mediation program

Practice and Procedure in Mortgage Foreclosure Cases (Rule 113)



- Effective date of May 1, 2013 – will only apply to cases filed on or after May 1, 2013
- Implements a few helpful changes in terms of
 - what must be attached to complaint (section (b))
 - form of prove-up affidavit (section (c))
 - Required notices (sections (d), (f))
 - Protections for surplus funds (sections (g), (h))
 - Deceased mortgagors (section (i))

Note attached to complaint (Rule 113(b))



- Let's play lawyer!
- Plaintiff must attach to the complaint “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.” *How is that different?*
- Adds to current requirement which states only that “a copy of the note” must be attached. *What about the mortgage?*
- Does not require copy of mortgage *as it currently exists* because mortgage follows note. *So will plaintiff now always = name on note as endorsed?*
- No, plaintiff may still be different from name on note because agent, e.g., loan servicer, can be plaintiff

Caveat: bearer paper



- Note may be “paid to the order of _____” – if so, the bearer of the paper is generally entitled to foreclose

Prove-up affidavit (Rule 113(c))



- Identify affiant & job description
- Identify records relied upon
 - Payment history attached if defendant “filed an appearance or responsive pleading”
- Identify computer software used
- Provide additional evidence as necessary to show right to sue
- Follow form affidavit provided in Rule 113

Prove-up affidavit (Rule 113(c))



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

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

Required notices (Rule 113 (d), (f))



- Rule 113(d) – Notice of default and judgment filed and mailed within 2 business days, sent to property address or address on appearance or other document filed by defendant
 - Form notice informs of right to file motion to vacate, gives redemption amount and legal referral
 - But Rule 113(e) says failure to send notice does not provide basis for vacating judgment
- Rule 113(f) – Notice of sale mailed 10 business days prior to sale to all defendants

Protections for surplus funds



- Required notice (Rule 113(g))
- Required form (Rule 114(h))
- These changes are intended to protect borrowers entitled to judicial sale surplus proceeds from predatory “surplus fund collectors”
- As per *Crown v. Young*, decided March 18, 2013, by the Illinois Appellate Court (Unclaimed Funds had client assign right to surplus of \$14,000 in exchange for 1/2 of proceeds plus \$50 – voided by the court as unconscionable)

Deceased mortgagors (Rule 113(i))



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

Loss Mitigation Affidavit (Rule 114)



- Effective date of May 1, 2013 – applies to all cases in which no judgment of foreclosure entered as of May 1, 2013
- Where defendant has appeared or filed an answer or other responsive pleading, plaintiff must file a loss mitigation affidavit evidencing compliance with any applicable loss mitigation program

Rule 114(a)



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

Rule 114(b)



- (b) Affidavit Prior to or at the Time of Moving for a Judgment of Foreclosure. In order to document the compliance required by paragraph (a) above, Plaintiff, prior to or at the time of moving for a judgment of foreclosure, must file an affidavit specifying:
 - (1) Any type of loss mitigation which applies to the subject mortgage;
 - (2) What steps were taken to offer said type of loss mitigation to the mortgagor(s); and
 - (3) The status of any such loss mitigation efforts.

Rule 114(c)



- (a) The subject mortgage loan is eligible for the following loss mitigation programs :
 - _____

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

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

Rule 114(d)



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

Rule 114 & Mediation



- From the Committee Comments:

“Where counties have mediation programs in place, it is advisable that the county adopt procedures to incorporate the loss mitigation affidavit into the mediation process.”

Issues to look for (i.e., in making referrals to LAF/other legal aid agencies)



- Foreclosure filed against deceased mortgagor w/no special representative appointed
- Motion for Judgment of Foreclosure filed
 - w/thin prove-up affidavit
 - w/no loss mitigation affidavit
- Sale set but borrower did not receive notice
- Surplus scams

Contact Info



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