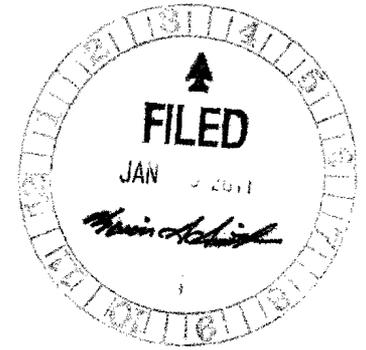


IN THE
SUPREME COURT OF INDIANA



CAUSE NO. 94 S 00-1101-MS-00003

In re
Mortgage Foreclosure Best Practices

**ATTORNEY GENERAL'S AMENDED PETITION FOR AN ORDER
REGARDING MORTGAGE FORECLOSURE PRACTICES**

Honorable Gregory F. Zoeller, Attorney General of Indiana, by Deputy Attorney General Abigail Lawlis Kuzma, respectfully petitions the Court to promulgate an order establishing best practices to be observed and enforced in actions to foreclose mortgages in Indiana courts. The Attorney General represents the following in support of his motion:

1. The Attorney General was invited and has served on the task force established by the Court to recommend best practices in mortgage foreclosure actions.
2. The Attorney General appreciates the efforts and expertise evident in the "Mortgage Foreclosure Best Practices" adopted by the task force and posted by the Court on its website on January 3, 2011. *See*, <http://www.in.gov/judiciary/admin/mortgage/docs/mortgage-foreclosure-best-practices.pdf>.
3. In addition to joining the recommendation of the task force, the Attorney General submits for consideration this petition to the Supreme Court of Indiana to establish mortgage foreclosure best practices. The recommendations outlined in this petition are a product of the

office's special authority and experience in addressing and policing the foreclosure process through the Homeowner Protection Unit and professional licensing responsibilities. Specifically,

a. The Attorney General's office has received, investigated, and/or verified allegations and admissions of negligence or fraud with respect to documents submitted in connection with mortgage foreclosures in litigation;

b. The National Association of Attorneys General (NAAG) multistate group is investigating instances where employees have admitted submitting sworn affidavits that have not been verified;

c. In some instances, employees have admitted that they: do not read the documents they sign; would not understand the documents if they did read them; permit their electronic signature to be placed on the documents without their ever seeing the document; sign as corporate officers for multiple banks but do not know how they have that authority or what it means to sign for that bank; sign as a corporate officer of a bank, even though they do not actually consider themselves officers of that company; have signed the documents solely because they have been told by their employers to sign documents where their name is printed; and

d. Legal advocates for Indiana homeowners have presented evidence of frequent mistakes within affidavits filed with Indiana courts to support motions for summary judgment and default judgment, including: failure to properly document in accordance with requirements of Indiana law whether the plaintiff in the foreclosure action is the holder of the note and has the right to sue; failure to properly list the amount of the loan or the correct interest rate; and incorrect statements as to the eligibility of the homeowner for loss mitigation.

4. The Indiana Attorney General's investigation has revealed that the practices described in Paragraph No. 3, *supra*, are widespread across the United States.

5. Indiana citizens experiencing foreclosure deserve to enter that process with full knowledge of their rights and options, and with the confidence that the laws will be followed and imposed fairly. The Attorney General believes those interests will be better served were several of the practices *recommended* by the task force made *requirements* in foreclosure actions.

WHEREFORE, the Attorney General moves the Court to adopt the task force's best practices as amended hereafter by strikethrough and boldface:

PLEADING DISCLAIMER: The negotiable instrument "best practices" apply to pleadings only, and not to the standard of proof required by the Uniform Commercial Code (UCC). Either the Defendant or the Court may require the Plaintiff to prove (A) possession of the original promissory note, *and* (B) that Plaintiff qualifies under I.C. 26-1-3.1-301(1) or (2) or (3), and other applicable law, such as trust law.

Under I.C. 3.1-301(1), to be a "holder" (as defined in I.C. 26-1-1-201), the Plaintiff must be in possession of the original promissory note which is either endorsed in blank or is endorsed specifically to the Plaintiff. As long as signatures are valid and (if applicable) there is a clear chain of endorsements to the Plaintiff or to an endorsement in blank, there is a presumption the holder, by producing the instrument, is entitled to enforce the note, subject to valid defenses.

Under I.C. 3.1-301(2), to be a "non-holder" (as defined in I.C. 26-1-3.1-203), the Plaintiff must be in possession of the original promissory note, but unlike I.C. 301(1), the note would not be endorsed in blank or endorsed to the Plaintiff. The Plaintiff would have the burden to prove (without benefit of a presumption) a chain of title to establish the fact that it has the right to enforce the note (i.e., that Plaintiff is a "non-holder" under I.C. 3.1-203), subject to valid defenses (*see* I.C. 3.1-203 comment 2).

Under I.C. 3.1-301(3), to be entitled to enforce a lost note, the person seeking enforcement must prove the terms of the instrument and the person's right to enforce the instrument. In addition, the person required to pay the note must be adequately protected against loss that might occur by reason of a claim by another person attempting to enforce the note.

Pleading Standards of Mortgage Foreclosure Complaints

If Plaintiff seeks to enforce a negotiable instrument pursuant to I.C. §26-1-3.1-101 *et seq.*, then the following “best practices” should apply with respect to the complaint:

- Plaintiff ~~should~~ **shall** specify the subsection of §26-1-3.1-301 on which it bases its assertion that it is a “person entitled to enforce” the instrument;
- If Plaintiff alleges that it is a “person entitled to enforce” the instrument under §26-1-3.1-301(1) or (2) because it is either the holder of the instrument (under §26-1-1-201(20)) or a transferee (under §26-1-3.1-203), then counsel ~~should~~ **shall**, prior to commencing the action, confirm that Plaintiff possesses the original instrument and can produce the original note in a timely manner if requested by the Court;
- If Plaintiff alleges that it is a “person entitled to enforce” the instrument under §26-1-3.1-301(1) because it is the holder of the instrument and is not the original payee, then its counsel ~~should~~ **shall** attach a copy of the instrument, including the endorsements showing the instrument is endorsed to bearer, in blank, or specially to Plaintiff;
- If Plaintiff alleges that it is a “person entitled to enforce” the instrument under §26-1-3.1-301(2) because it is the transferee of the instrument, then its counsel ~~should~~ **shall** include in the complaint an assertion that the instrument has not been endorsed to Plaintiff but has been transferred to Plaintiff for the purpose of giving Plaintiff the right to enforce the instrument.
- If Plaintiff maintains that it is a “person entitled to enforce” the instrument under §§26-1-3.1-301(3) and 26-1.3.1-309 because the original instrument has been lost, then counsel ~~should~~ **shall** attach as an Exhibit to the Complaint an affidavit setting forth the assertions required by §26-1-3.1-309.
- As an attachment to the Complaint, Plaintiff ~~should~~ **shall** provide a service list, including the name, address, and, if available, the telephone number and/or email address for each individual defendant debtor who signed the mortgage. Because many defendant debtors have been and continue to be targeted by illegal foreclosure “rescue agencies”, this service list ~~should~~ **shall** comport with the public access exclusions of Administrative Rule 9(H)(1).
- **As an attachment to the Complaint, Plaintiffs shall include a Verified Affidavit describing Plaintiff’s compliance with federal requirements to engage Defendant in loss mitigation efforts and the reason for denial of loss mitigation. Specifically, if the servicer administering the loan participates in the Making Home Affordable Program or if the loan is insured or guaranteed by the FHA, VA, or USDA, the affidavit shall**

describe compliance with loss mitigation review guidelines, including borrower notice provisions, applicable to these programs. No order of Default Judgment or Summary Judgment may be issued while a defendant is being evaluated for a loan modification under the Home Affordable Modification Program or other program.

Settlement Conferences:

- All courts ~~should~~ **shall** send a separate communication to each mortgage foreclosure defendant alerting them to their right to a settlement conference and directing them to contact the Court for further information. The notice sent by the lender as required by the statute does not routinely generate an appreciable response rate, whereas the single-sheet notice sent by our pilot courts has resulted in a settlement conference request rate of approximately 45 percent.
- If Plaintiff maintains that the Defendant does not qualify for a settlement conference under §§32-30-10.5-8(e)(1), loan secured by a dwelling not the debtor's primary residence, then Plaintiff's counsel ~~should~~ **shall** attach as an Exhibit to the Complaint an affidavit stating that the debtor does not personally reside at such address. If counsel cannot provide such evidence, the debtor ~~should~~ **shall** be sent a copy of the "Get Help – Get Hope" form prescribed by §§32-30-10.5-8(c).
- If Plaintiff maintains that the Defendant does not qualify for a settlement conference under §§ 32-30-10.5-8(e)(2), default of a prior foreclosure prevention agreement under this chapter, then its counsel ~~should~~ **shall** attach as an Exhibit to the Complaint a copy of the foreclosure prevention agreement and a record of payments substantiating default.
- If Defendant requests a settlement conference under §§32-30-10.5-9, no dispositive motions ~~should~~ **shall** be filed until a settlement conference report from Plaintiff(s), Defendant(s), or a court-appointed facilitator has been filed with the court.
- If Defendant requests a settlement conference under §§32-30-10.5-9, the court shall treat this request as an appearance in accordance with T.R. 3-1(B).
- If, at the settlement conference, the parties commence discussions regarding loss mitigation alternatives and conclude that additional information or documentation ~~should~~ **shall** be exchanged, then cause exists pursuant to §32-30-10.5-10(b) to reconvene the settlement conference at a later date, and dispositive motions ~~should~~ **may** not be considered pursuant to §32-30-10.5-9

until the settlement conference report has been submitted to the Court by the Plaintiff(s), Defendant(s), or a court-appointed facilitator.

Sanctions

- If either party fails to attend the settlement conference or fails to abide by other court directives, appropriate sanctions may be considered. Judges in St. Joseph and Allen counties have levied sanctions ranging from \$150 to \$2,500 on plaintiffs who failed to attend a settlement conference or who refused to provide documents as requested by the court-appointed facilitator. A homeowner defendant who fails to attend the settlement conference may be perceived as waiving his or her right to a settlement conference, and the foreclosure ~~should~~ **shall** proceed as otherwise allowed by law.
- Defendant ~~should~~ **may** not be asked by Plaintiff to waive his or her right to a settlement conference. Such action on the Plaintiff's behalf may be considered a sanctionable offense.
- Monetary sanctions collected by the court under this statute may be made payable to the Mortgage Foreclosure Fund, to support the efforts of pilot court facilitators. Checks should be remitted to the Indiana Housing & Community Development Authority, 30 S. Meridian Street, Suite 1000, Indianapolis, IN 46204 (Attn: Stephanie Reeve).

Post-Judgment

- Any motion to set aside a mortgage foreclosure judgment ~~should~~ **shall** state the reason for the request. The borrowers/homeowner ~~should~~ **shall** be sent notice of the request. A petition to set aside a judgment that attempts to reinstate the loan ~~should~~ **shall** be allowed because of reinstatement or modification of the loan or other foreclosure prevention or loss mitigation agreement.
- A party seeking to file a supplemental affidavit or substitute a previously filed affidavit must file a motion stating the grounds for the substitution. The motion ~~should~~ **shall** be noticed to all parties, including previously defaulted parties, and set for hearing.

The Attorney General further moves the Court for any additional relief appropriate in the premises.

Respectfully submitted,

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By: 
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Certificate of Service

I certify that the *Attorney General's Amended Petition for an Order Regarding Mortgage Foreclosure Practices* was served upon the following parties by placing a copy of the same in the U.S. First Class mail, postage prepaid this 5 day of January, 2011.

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