April 2013 Vol. 43, No. 8

ILLINOIS STATE BAR ASSOCIATION

BENCH & BAR

The newsletter of the Illinois State Bar Association's Bench & Bar Section

Editor's note

By Hon. Alfred M. Swanson, Jr.

Effective May 1, 2013, the Illinois Supreme Court has issued three new rules that will change the manner in which Illinois courts handle mortgage foreclosure cases. In this issue, we will look at those rules changes from the perspectives of two members of the special committee the Supreme Court appointed to study the issue and make recommendations: Justice Mathias Delort of the First District Appellate Court, and Daniel Lindsey of the Legal Assistance Foundation of Chicago. The committee chair was Hon. Lewis Nixon, the supervising judge of the Mortgage Foreclosure / Mechanics Lien Section of the Chancery Division in the Circuit Court of Cook County. ■

Supreme Court adopts new foreclosure rules

By Justice Mathias W. Delort, Illinois Appellate Court, First District

In the last few years, courts across Illinois have been presented with a veritable avalanche of mortgage foreclosure cases. In 2010, the Illinois Supreme Court created a special committee on mortgage foreclosures to consider the changing needs of the court system in light of this wave of litigation and the nationwide focus on lender practices. The committee's work resulted in the adoption of several new Illinois Supreme Court rules, which were announced on February 22, 2013, and amended on April 8, 2013. This article explains the particular new rules that address practice and procedure in foreclosure cases.

Rule 113(b). State law currently requires that plaintiffs attach a copy of the mortgage and note to all mortgage foreclosure complaints. The new rule resolves an ambiguity in the statute by requiring that the copy of the note so attached must be a copy of the note as it currently exists, together with any indorsements or allonges. This change will help ensure that there is a proper memorialization of the ownership of the note on the day the case is filed, even if the loan had been transferred a number of times. The new rule does not require that copies of assignments also be attached, but there is nothing prohibiting that practice. Note that because Illinois law allows servicers and agents to be foreclosure plaintiffs on behalf of the actual mortgage holders, it is still theoretically possible for the holder of the note so indicated by the attached documentation to be different from the actual plaintiff.

Rule 113(c). The statute also requires that any plaintiff seeking a foreclosure judgment must submit an affidavit of the amount due and owing on the loan. The new rule sets forth minimum requirements for these affidavits, and provides a model affidavit to be used by plaintiffs. The rule attempts to set some ground rules to reduce the number of disputes about the level of detail in these affidavits, and responds to the national robo-signing scandal. The new rule requires the prove-up affidavit to set forth a detailed explanation of how the affidavit was prepared. The rule specifies that copies of the relevant records need not be attached in default cases.

Rule 113(d), (e). Many foreclosure defendants lose by default because they have failed to file an answer or appearance. Anecdotal reports reveal that lenders' modification efforts lull many

Continued on page 2

INSIDE

IF YOU'RE GETTING THIS NEWSLETTER BY POSTAL MAIL AND WOULD PREFER ELECTRONIC DELIVERY, JUST SEND AN E-MAIL TO ANN BOUCHER AT ABOUCHER@ISBA.ORG

Supreme Court adopts new foreclosure rules

Continued from page 1

defendants into a sense of security which, in turn, causes them to ignore the judicial process until it is too late. Under the new rule, the plaintiff's attorney must prepare a special notice of default—written in easy-to-understand language—which the clerk of the court will send to the defendant's address. Neither failure to send the notice, nor errors in the notice, can be used as a basis to vacate an otherwise valid foreclosure judgment.

Rule 113(f)(1). This new rule plugs a loophole in state law under which plaintiffs could avoid giving notice of the specific sale date to defendants who lost their case by default. Some of these defendants were active in the case, but simply failed to abide by court deadlines and extensions to answer the lawsuit in writing. The new rule requires that plaintiffs send notice of the sale date, time, and place to all defendants, regardless of their level of prior activity in the case.

Rule 113(f)(2). The Supreme Court has now provided, through this rule, that any judicial sale of foreclosed property may be conducted by a private selling officer appointed pursuant to statute, rather than by the sheriff. The committee comments explain that, in many counties, sheriffs ordered to conduct sales delayed the sales for great lengths of time, and that holding sales promptly avoids the accumulation of excessive interest, penalties, and costs.

Rule 113(f)(3), (g), (h). Applicable to the relatively rare situation where a foreclosure sale results in a surplus, this new rule requires the plaintiff's attorney to send a special notice to the defendants, and to enclose a fill-in-the-blank form motion to request release of the surplus funds.

Rule 113(i). This rule provides that in foreclosure cases where the mortgagor is deceased, and no estate has been opened, the court shall appoint a special representative to stand in the place of the decedent, in a manner similar to that provided by section 13-209 of the Illinois Code of Civil Procedure. This rule resolves the jurisdictional issues addressed in *ABN Amro Mortgage Group, Inc. v. McGahan*, 237 Ill.2d 526 (2010), which had not been specifically addressed by remedial legislation.

Rule 114. Many foreclosure defendants are confused by the practice of "dual-tracking," under which a lender negotiates with them for a possible refinancing while simultaneously prosecuting a foreclosure lawsuit. This important new rule applies when a mortgagor has filed an appearance, answer or responsive pleading and does not apply in standard "default" cases. The rule requires plaintiffs, before moving for a foreclosure judgment, to comply with the terms of any loss mitigation program which applies to the loan. It also requires that the plaintiff file an affidavit specifying: (1) any type of loss mitigation that applies to the subject mortgage; (2) what steps were taken to offer the loss mitigation to the defendant; and (3) the status of those efforts. The new rule sets forth a form affidavit which can be adapted as needed to particular facts. The rule also allows the court to stay the proceedings or deny entry of a foreclosure judgment if the plaintiff fails to comply with the rule.

Effective Date of New Rules. Rule 113(a) specifies that the changes made by new rule 113 only apply to new cases filed on and after May 1, 2013. The committee comments to new Rule 114 state that the changes made by that rule applies "to all judgments on or after the effective date of the rule, no matter the foreclosure filing date."

Chief Justice Kilbride commented that "these new rules will promote fairness in home foreclosure proceedings, curb abuses in the system, provide lenders finality when foreclosure is necessary and ensure homeowners who have been thrown out of work during the years of a troubled economy are aware of their rights and where to turn for help." Foreclosure practitioners for both plaintiffs and defendants should carefully review these rules and the accompanying detailed committee commentary to ensure that their pleadings meet all the new requirements. ■

Before his election to the Appellate Court in 2012, Justice Delort was a judge in the Mortgage Foreclosure / Mechanics Lien Section of the Chancery Division in the Circuit Court of Cook County. There, he heard primarily mortgage foreclosure cases. Justice Delort was also a member of the Supreme Court's special committee that held hearings and recommended these Rules to the Supreme Court.

Foreclosure loss mitigation & mediation rules

By Daniel Lindsey, Legal Assistance Foundation of Chicago

The Supreme Court Committee on Foreclosures drafted and recommended loss mitigation and mediation rules in the face of a historic rise in the number of foreclosure cases filed and pending in the Illinois state courts. In Cook County, for example, the last few years have seen filings in the 40,000 – 50,000 range, with pending foreclosure cases near 80,000. This stands in stark contrast to filings of less than 10,000 per year back in the 1990s.

The Committee recognized that, wherever possible, it is in the best interests of homeowners, lenders, courts, and affected communities to avoid foreclosure sales in favor of workable loss mitigation alternatives. Much research has emerged documenting the huge collateral costs incurred when homes are lost to foreclosure. Many such homes are left vacant and abandoned, are vandalized, become magnets for crime, and generally contribute to neighborhood blight, lowering property values and depressing the local housing market.

Recognizing the need for more substantial loss mitigation options, the federal government implemented in 2009 the Making Home Affordable Program, a key component of which is the Home Affordable Modification Program (HAMP), the most robust loan modification program to date. While HAMP has provided homeowners over a million loan modifications, this falls far short of the original 4 to 5 million projected. While some of that shortfall is due to economic challenges greater than originally anticipated, some is also due to the non-compliance of HAMP servicers.

Time after time, as both advocates and judges on the Committee can attest, homeowners face a confusing tangle of "dual-tracking": servicer representatives assure borrowers that their loan modification application is being processed, and yet, at the same time, plaintiff's attorneys push foreclosure cases forward. In the worst-case scenarios, cases are brought all the way to foreclosure sale.

It is clear that not all homeowners can afford loan modifications. But all homeowners who have applied for modification should be given a good faith review, and a decision, before their cases reach the final stages of the foreclosure process.

For this reason, the Committee drafted and recommended Rule 114, which has been adopted by the Supreme Court. The rule requires the plaintiff to file a loss mitigation affidavit documenting compliance with any loss mitigation requirements applicable to the subject mortgage loan. The plaintiff must file this affidavit and document compliance prior to entry of judgment. This gives the court a chance to ensure compliance with any applicable loss mitigation procedures *before* a judgment is entered.

Rule 114 is intended to prevent the all-too-frequent occurrence of borrowers who appear in court in response to a notice of motion for summary judgment, based on a *pro se* answer previously filed. Borrowers advise the court that they are responding to the bank's document requests used to evaluate qualification for a loan modification. Plaintiff's counsel is typically unaware of the ongoing modification process and stresses the need to enter judgment. Rule 114 is designed to eliminate this "dual-tracking" by requiring the lender to evaluate the borrower for any applicable loss mitigation and make a decision and notify the borrower *before* judgment is sought. The borrower will then be aware of the status of the foreclosure and may exercise other options. The Committee does not feel that a borrower should confront a pending motion for judgment of foreclosure while engaged in the process of qualifying for a loan modification.

The FHA agrees. The FHA, a unit of the U.S. Department of Housing & Urban Development (HUD), has long insured single-family loans for lenders nationwide. FHA regulations require lenders to engage in loss mitigation prior to filing foreclosure. The courts of most states, including Illinois, have recognized that failure to follow prescribed FHA loss mitigation requirements are grounds for dismissal of a foreclosure. The FHA loss mitigation regulations were one source of inspiration for Rule 114.

So, too, were the HAMP guidelines requiring lenders to process a HAMP modification request prior to foreclosing, as well as requirements imposed on the largest servicers by the National Mortgage Servicing Settlement. Regulations recently adopted by the Consumer Financial Protection Bureau (CFPB) will extend anti-dual tracking measures to many more servicers as of January 2014. The loss mitigation affidavit created by

Bench & Bar

Published at least four times per year.

Annual subscription rate for ISBA members: $20.

To subscribe, visit www.isba.org or call 217-525-1760

Office
Illinois Bar Center
424 S. Second Street
Springfield, IL 62701
Phones: 217-525-1760 OR 800-252-8908
www.isba.org

Editor
Hon. Alfred M. Swanson, Jr.

Co-Editor
Michele M. Jochner

Assistant Editor
Barbara O. Slanker
Hon. E. Kenneth Wright Jr.

Managing Editor/ Production
Katie Underwood
kunderwood@isba.org

Rule 114 will serve as a practical tool helping Illinois borrowers and courts to enforce this growing trend against dual tracking.

Another growing trend is mediation. Courts around the country are increasingly turning to mediation to help get cases off crowded litigation dockets and to help homeowners and lenders reach settlement in the nature of loss mitigation. About half a dozen Illinois counties (including Cook) currently have mediation programs, and more such programs are on the way. Studies consistently show that between one-third and one-half of homeowners who complete mediation are able to reach a settlement with their lenders. Most of these mediations result in sustainable loan modifications.

The loss mitigation affidavit can and should be used as a loss mitigation enforcement tool in conjunction with mediation, where it exists. The Committee also drafted a separate mediation rule, Rule 99.1, which gives direction to counties seeking to implement mediation programs. The rule highlights those features which have proven to be most important in making mediation effective: homeowner access to HUD-certified housing counseling services, legal services, and translation services; training of key personnel; and a viable funding plan.

These features are not mandatory. The Committee was reluctant to impose a one-size-fits-all model, and recognizes that funding sources, case volume, and other factors vary among counties, and should afford some customization. At the same time, the above list essentially sets forth a rebuttable presumption: when a county seeks permission from the Supreme Court to set up a mediation program, it is presumed that such a program will include the listed elements, unless the county can persuade the Court why some of those elements are unnecessary, or impracticable. But new funding for mediation programs is coming on line from various sources, including the National Mortgage Servicing Settlement, so financial impracticability should not be seen as a ready excuse.

As the Committee stated in Comments to Rule 114, the above two rules should work together: where there is a mediation program in place, it makes sense to fold the loss mitigation affidavit into that process. This may look different in different counties depending on the precise nature of the local mediation program.

The Committee Comments to Rule 114 also make clear that the rule is intended to apply to any case in which a judgment of foreclosure has not yet been entered on the effective date of the rule (May 1, 2013). So, presentation of the loss mitigation affidavit is required for any judgment of foreclosure entered on or after May 1, 2013. ■

The Illinois Supreme Court clarifies appellate jurisdiction during pendency of foreclosure

By Robert Handley

***EMC Mortgage Corporation v. Kemp*, 2012 IL 113409**

In this case, the Illinois Supreme Court addressed whether appellate jurisdiction exists to consider a challenge to an order issued during the pendency of a mortgage foreclosure action. The appellate court concluded that appellate jurisdiction was lacking. The Illinois Supreme Court affirmed.

Facts

In 2005, defendant Barbara Kemp mortgaged her residence in Naperville. The next year, the loan was sold to EMC Mortgage. Kemp thereafter defaulted on the loan and EMC Mortgage filed suit to foreclose in Du Page County. Eventually, EMC filed a motion for summary judgment. The motion was granted in April of 2009. The Judgment of Foreclosure and Sale Order was entered on June 2, 2009.

Thereafter, Kemp filed for bankruptcy. The bankruptcy stay was eventually lifted and the judicial sale was set for October 5, 2010. On the date of the sale, Kemp filed an Emergency Motion to Vacate the Judgment under 735 ILCS 5/2-1401, arguing that the judgment should be vacated and the case should be dismissed pursuant to 735 ILCS 5/2-619. Although a 45-day stay of the sale was granted, the trial court denied the motion to vacate and the motion to dismiss. The trial court's order denying the motions included Illinois Supreme Court Rule 304(a) language.

Thereafter, Kemp filed a motion to reconsider. On November 16, 2010, the court denied that motion and again added Illinois Supreme Court Rule 304(a) language to the order. Kemp then filed her Notice of Appeal seeking review of the court's orders of October 5, 2010, denying her motions and November 16, 2010, denying her motion to reconsider. After the case was fully briefed, the appellate court for the 2nd District dismissed Kemp's appeal for lack of jurisdiction.

Analysis

The Illinois Supreme Court began its analysis by reviewing Ill. Const. 1970, art. VI, § 6 which provides that appeals "from final judgments of a Circuit Court are a matter of right to the Appellate Court." The court further noted that the Constitution grants the Illinois Supreme Court the right to "provide by rule for appeals to the Appellate Court from other than final judgments." Therefore, the court concluded that, without an applicable rule, appellate courts are without jurisdiction to review judgments, orders, or decrees which are not final.

The court then went on to reiterate the "well settled" proposition that a judgment of foreclosure and sale is not a final and appealable order. Until a court enters an order approving the sale, all of the issues between the parties have not been resolved. Therefore, in the trial court, a Section 2-1401 motion to vacate was improper because there was no final or appealable order yet entered in the case.

The court also found a second problem with Kemp's appeal. The court stated the "while a judgment of foreclosure is a final order, without Rule 304(a) language added to it, the judgment is not appealable." Therefore, the judgment itself was not appealable. Kemp did not seek to make the judgment of foreclosure appealable by adding the Rule 304(a) language.

Although Kemp conceded the foregoing, she still contended that the Trial Court's

304(a) language granted appellate jurisdiction on those two orders. She also argued that the court's order was void and that a petition to vacate a void order may be made at any time.

The court found both of those contentions "meritless." It held that the inclusion of the special finding in the trial court's order cannot confer appellate court jurisdiction if the order is in fact not final. Also, although as a general rule a void order can be attacked at any time by a person affected by it, that fact alone does not confer appellate jurisdiction on a reviewing court, if such jurisdiction is otherwise absent. The proposition that a void order can be attacked at any time merely allows a party the ability to always raise the issue but only where the appellate court jurisdiction exists. If there is no Supreme Court Rule that permits the appeal, the appellate court has no jurisdictional basis to consider even a void order.

Justice Karmeier disagreed with the holding of the majority, and issued a lengthy dissent in which he would have reversed the appellate court. Justice Karmeier began his analysis by agreeing that a Judgment of Foreclosure and Sale is not a final order because it does not dispose of all of the issues between the parties and does not terminate the litigation. He further agreed that it is the order confirming the sale, not the judgment of foreclosure, that is the final appealable order.

However, contrary to the majority, Justice Karmeier believes that the Illinois Supreme Court Rules do permit a review in this instance. Because the trial judge made a finding under Supreme Court Rule 304(a) that there was no just reason for delaying either enforcement or appeal or both, and made such a finding twice, the appellate court, in his view, should not have invoked "various technical obstacles to preclude the use of 304(a) findings."

Justice Karmeier's dissent further noted that an interlocutory order may be reviewed, modified, or vacated at any time before a final judgment. Therefore, as long as the judgment of foreclosure was "interlocutory," Kemp had the right to ask that it be set aside. Any procedural problems attendant to her motion were not raised by EMC's counsel or noted by the trial court. The clear objective of her motion was to have the court reconsider and reject its prior ruling on the foreclosure judgment. Therefore, the dissent would treat both motions as motions to reconsider the judgment of foreclosure and not be as hypertechnical in its analysis of the 2-1401 title of the Motion.

The dissenting Justice also noted that an appeal from an order disposing of a motion to reconsider which contains Rule 304(a) language has always been treated as having been intended to cover the original judgment. Finally, the dissent noted that when the case is remanded to the trial court, Kemp will be free to file another motion to reconsider the judgment of foreclosure and sale. If it is properly denominated as such, she may again request the trial court make the appropriate findings under 304(a). Therefore, if that occurs, any procedural problems perceived by the majority would be eliminated and she would be free to proceed with her appeal to the appellate court.

Conclusion

There are several "take aways" from this opinion. Here are a few. Even though the court found that a "judgment of foreclosure is a final order," without Supreme Court Rule 304(a) language, it is not appealable. Even though a void order can be attacked at any time, that fact does not confer appellate jurisdiction. A section 2-1401 motion to vacate is improper when seeking to vacate an order that is not final and appealable.

This opinion provides an excellent refresher course on the appealability of interlocutory orders generally, and of orders in foreclosure cases particularly. In this climate where homeowners often raise technical issues that result in delays in foreclosure proceedings in order to remain in their residences rent-free as long as they can, appeals may be becoming more prevalent. Thus, a thorough understanding of the finality of orders is essential. ■

A lesson in drafting and interpreting orders: The Illinois Supreme Court rules that order dismissing complaint was not final for purposes of *res judicata* in *Hernandez v. Pritikin*

By Chelsea C. Ashbrook

In the recent case of *Hernandez v. Pritikin*, 2012 IL 113054, the Illinois Supreme Court held that defendants who sought to invoke the doctrine of *res judicata* failed to prove entry of a final adjudication necessary for the doctrine to apply.[1] Defendants won dismissal of plaintiffs' complaint on statute of limitations grounds. Due to unclear drafting and ambiguity, however, defendants ultimately lost the use of what could have been a dismissal with prejudice. The facts of this case and the Court's analysis provide valuable lessons to practitioners in drafting and interpreting circuit court orders. These include: ensure that the court's findings are in the language of the order do not assume that ambiguous oral pronouncements during the hearing will later be interpreted in your favor; and, if you want the order to have preclusive effect, make sure it is clear.

Procedural background

Jesse Hernandez ("Jesse") worked for Central Steel & Wire Company for approximately 27 years until March 1995. In the early 1990s, he developed physical problems and was ultimately diagnosed with Parkinson's disease.[2] From 1995 to 1996, law firm A represented Jesse and filed a social security disability claim on his behalf. From 1999 to 2002, law firm B ("defendants") represented Jesse and filed a workers' compensation claim for him in March 1999. In 2004, Jesse hired new attorneys who filed a lawsuit against a number of companies alleging they were responsible for the manufacture and sale of chemicals that had contributed to Jesse's disability. The personal injury lawsuit was dismissed as time-barred.

Plaintiffs' original complaint and defendants' motion to dismiss

Thereafter, Jesse and Yolanda Hernandez ("plaintiffs") filed a legal malpractice action against Firm B. The malpractice complaint alleged that Jesse hired Firm B to represent him with respect to injuries sustained at work and that Firm B was negligent in failing to advise about the potential for products liability/personal injury claims against entities other than his employer and in failing to file a suit against the other entities.

Firm B moved to dismiss the legal malpractice case arguing that the statute of limitations on Jesse's products liability claim ran before it was first retained in 1999. The trial court granted the motion. Plaintiffs' counsel, however, was granted leave to file an amended complaint to state a new theory that Firm B was negligent for failing to file a legal malpractice suit against Firm A for failing to file the product liability lawsuit on plaintiff's behalf.

The attorneys drafted an order after the August 7, 2006, hearing which read: "Defendants' motion to dismiss is granted,""plaintiffs are given 30 days to file an amended complaint or until September 7, 2006," and "Defendants are given 28 days to answer or otherwise plead or by October 5, 2006."[3] As the Supreme Court noted: "The word 'prejudice' [did] not appear in the order of dismissal; nor is there any indication that plaintiffs were precluded from pursuing any particular theory in support of recovery [in the amended complaint]," even though some of the trial judge's comments during the hearing could be considered as stating that the original theory of the case was time-barred.[4]

Plaintiffs' amended complaint and Defendants' second motion to dismiss

Plaintiffs filed an amended complaint that restated the dismissed allegations of negligence for failure of Firm B to timely file a products liability claim and added allegations of negligence relating to the failure of Firm B to file a malpractice action against Firm A. The amended complaint also added factual allegations to support application of the discovery rule to lengthen the statutory period of time in which plaintiffs could have brought the products liability action until after Firm B was retained.

Defendants again moved to dismiss on statute of limitations grounds. This motion addressed the new claims in the amended complaint and also addressed the re-pled claims of the original complaint, arguing that those allegations should be dismissed based on the August 7, 2006, order on the first motion to dismiss. At the March 28, 2007, hearing on the second motion to dismiss, a different trial judge stated that she was not reconsidering the August 7, 2006 ruling and focused solely on the new allegations of negligence. While the record is not clear what else transpired at the hearing, the March 28, 2007, written order following the motion hearing read: "Defendant's Motion to Dismiss the Amended Complaint is denied [.]"[5]

Without any effort to clarify the court's orders, the case proceeded on the amended complaint. Defendants filed an answer and affirmative defenses and then a motion for summary judgment. Before the court issued a ruling on the summary judgment motion, plaintiffs voluntarily dismissed the case.

Plaintiffs' re-filed action and dismissal for *res judicata*

Five months later, plaintiffs re-filed their malpractice action against Firm B. Defendants moved to dismiss the re-filed complaint on *res judicata* grounds arguing that the August 7, 2006, order dismissing plaintiffs' original complaint was a final judgment. The motion judge agreed. He determined that the prohibition against claim splitting required dismissal of the re-filed complaint because plaintiff was trying to re-assert the same claim in two different actions.

The appellate court reversed, ruling that the August 7, 2006, order was not final; rather, that it only barred certain allegations in support of the legal malpractice claim.[6] The appellate court distinguished the cited claims-splitting precedent on the ground that the plaintiffs had not filed a multi-count complaint.[7]

The Supreme Court finds no final adjudication

Affirming the appellate court's ruling, the Illinois Supreme Court found that defendants had not established that *res judicata* applied.

The Court reached its conclusion, not by applying the claims-splitting jurisprudence as the appellate court had, but rather on the ground that the August 7, 2006, order was not a final adjudication. The Court's analysis focused first on the written orders and oral pronouncements of the respective circuit court judges and, second, on the conduct of defense counsel after the first dismissal order was entered.

In reviewing the circuit court orders and transcripts from the motion to dismiss hearings, the Court concluded that there was nothing to indicate that there had been a final adjudication. Recognizing that a trial court has the inherent power to modify an interlocutory order, the Supreme Court reasoned that the "cursory oral pronouncements" of the circuit court during the hearings on the motions to dismiss did not "definitively and finally foreclos[e] the plaintiffs' right to attempt amendment of their complaint in such a way as to plead additional facts bearing upon application of the discovery rule to their underlying product liability claim—which in turn could affect the viability of legal malpractice actions."

Regarding the August 7, 2006, order, the Supreme Court noted that nothing the first trial judge said at the August 7, 2006, hearing indicated that further amendment to the complaint was precluded, despite the circuit court's finding that the statute of limitations on the products liability claim began to run in 1995. There was nothing in the order to foreclose the possibility that additional factual allegations impacting the commencement of the statute of limitations could be made.[8] The fact that the dismissal order also granted plaintiffs leave to file an amended complaint demonstrated that there was no absolute and final resolution of the issue.[9]

The statements by the second trial judge at the March 28, 2007, hearing did not demonstrate that the August 7, 2006, order was a final adjudication. While she stated, "I'm not reconsidering the prior judge's ruling. That's not on the table[,]" the Supreme Court noted that this statement could have been simply a way to control the arguments at the hearing. The Supreme Court concluded: "It is not necessarily—or even reasonably—interpreted as a comment on the character of [the first judge's] ruling or the finality [the second judge] would accord it."[10] While defendants attempted to argue that the second judge's statements controlled over her written ruling denying their motion to dismiss, the Court found that ambiguous statements did not alter the otherwise unambiguous denial of the second motion to dismiss.

The Supreme Court also noted that the defendants' actions, and inactions, in the circuit court supported the conclusion that the August 7, 2006, order was not a final adjudication. Defendants' motion to dismiss the amended complaint specifically requested that the court dismiss the re-pled allegations from the original complaint. While this request was not addressed by the second judge at the March 28, 2007, hearing, the order from that hearing stated only that defendants' motion to dismiss was denied. The March 28, 2007, order did not strike any portion of the amended complaint. Nor did it dismiss any portion of the amended complaint. If this ruling was at odds with the August 7, 2006, order, the defendants did not so indicate by seeking clarification from the circuit court. Instead, defendants answered the amended complaint. In their answer, Defendants "ma[d]e no answer" to the repled allegations due to the August 7, 2006, order, yet "[t]o the extent the allegations . . . [were] deemed to remain," defendants denied them.[11] The Supreme Court found that this ambivalence in defendants' answer conceded the uncertainty of the situation.[12]

In ultimately concluding that *res judicata* did not apply, the Court noted: "We believe a party claiming *res judicata*—as the party bearing the burden of showing that *res judicata* applies—has a duty to clarify the record so as to *clearly* demonstrate his entitlement to the doctrine's application. Defendants have failed to carry their burden."[13]

Lessons from *Hernandez*

The Supreme Court's analysis in *Hernandez* provides some valuable lessons to practitioners to obtain preclusive effect of circuit court orders. Include the court's findings in the written order. Specify why the court granted or denied a motion in the language of the order itself. While the judge's statements during a hearing may provide insight into the court's reasoning, those statements may not be as useful as they first appeared once counsel reviews the transcript. Do not assume that the judge's oral statements will be given preclusive effect. The meaning of a judge's statements may be subject to various interpretations. Especially in a case such as *Hernandez* where multiple judges are involved, one judge's oral pronouncements may be given a different meaning than you expected by a later judge. If the court's ruling is dispositive, clearly indicate that in the order.

Lastly, if the preclusive effect of the order is unclear, request clarification. Perhaps the result in *Hernandez* would have been different if defendants requested clarification of the first order and the judge indicated that the claim was dismissed with prejudice. As the Supreme Court noted, the party seeking to invoke *res judicata* has a duty to clarify the record to support application of the doctrine.[14] While it is possible that a clarification may not always sway in your client's favor, an ambiguous ruling will not have preclusive effect. ■

Chelsea C. Ashbrook is an associate in the Chicago office of Holland & Knight LLP and a member of the Bench & Bar Section Council.

1. *Hernandez v. Pritkin*, 2012 IL 113054, ¶ 1.
2. *Id.*
3. *Hernandez*, 2012 IL 113054, at ¶ 11.
4. *Id.* at ¶¶ 9, 11.
5. *Id.* at ¶ 25.
6. *Id.*
7. *Hernandez*, 2012 IL 113054, ¶ 38 (citing *Matejczyk v. City of Chicago*, 397 Ill.App.3d 1 (2009)).
8. *Hernandez*, 2012 IL 113054, ¶ 45.
9. *Id.* at ¶ 47.
10. *Id.*
11. *Id.* at ¶¶ 27, 51.
12. *Id.*
13. *Id.* at ¶ 52.
14. *Id.*

Recent appointments and retirements

1. The Illinois Supreme Court, pursuant to its constitutional authority, has appointed the following to be Circuit Judge:
   - Christopher E. Reif, 7th Circuit, March 22, 2013
2. The Judges of the Circuit Court have appointed the following to be Associate Judges:
   - Neil T. Schroeder, 3rd Circuit, March 1, 2013
   - Christopher T. Kolker, 20th Circuit, March 8, 2013
   - Julia R. Gomric, 20th Circuit, March 18, 2013
3. The following judge is deceased:
   - Hon. Joseph D. Christ, Associate Judge, 20th Circuit, March 10, 2013 ■

BENCH & BAR
ILLINOIS BAR CENTER
SPRINGFIELD, ILLINOIS 62701-1779
APRIL 2013
VOL. 43 NO. 8

Non-Profit Org.
U.S. POSTAGE
PAID
Springfield, Ill.
Permit No. 820