

## IMPORTANCE OF CURING TITLE DEFECTS BEFORE THEY REAR THEIR UGLY HEAD

While Illinois foreclosure courts continue to grapple with traditional foreclosure defenses like standing and the admissibility of affidavits and business records, 2016 has seen the rise of a new trend: title defenses. As the Illinois appellate and supreme courts continue to whittle down defenses available to mortgagors, industrious defense counsel have turned their attention to title, ownership, and homestead issues. Litigation of title issues has dominated recent Illinois appellate opinions, highlighting the importance of potential foreclosure pitfalls that are often overlooked until it is too late. For example, in *CitiMortgage, Inc. v. Parille*, 2016 IL App (2d) 150286, a husband and wife owned property not as joint tenants, but as tenants by the entirety, **meaning both spouses must consent to any encumbrance of the property**. While they both signed the mortgage, the husband signed solely for the purpose of waiving his homestead rights. In foreclosure proceedings initiated under the mortgage, **the husband argued that because he only waived his homestead rights, the mortgage did not encumber his interest in the property**. To defeat this argument, CitiMortgage pursued several avenues of recovery, including reformation, equitable lien, equitable subrogation, and unjust enrichment. **The trial and appellate courts, however, sided with the husband** and held that most of CitiMortgage's legal theories were inapplicable or barred by the statute of limitations. In effect, CitiMortgage's failure to discover the defect in the mortgage severely limited its ability to recover its damages under the mortgage.

While *Parille* serves as a drastic example, Illinois appellate courts recently issued several foreclosure opinions in which title defects played a large role. *See, e.g., M&T Bank v. Mallinckrodt*, 2015 IL App (2d) 141233 (fraudulent release); *PNC Bank, N.A. v. Patterman*, 2016 IL App (3d) 150568 (homestead interest); *Deutsche Bank National Trust Company v. Hart* (alleged error in legal description); *First Midwest Bank v. First Midwest Bank*, 2016 IL App (1st) 151930-U (**incorrect legal description**). In each instance, defects in the chain of title or in the mortgage itself caused significant litigation delays and, in some cases, limited or denied the mortgagee's ability to recover damages.

These trends continue to manifest at the trial court level, where objections to reformation, claims of homestead exemptions, and other title defenses become more common. Unlike the majority of foreclosure defenses, **title**

**defenses are highly dependent on the facts of the case and stem from events that typically took place years before the foreclosure.** Because there is no simple way to predict such claims, lenders, servicers, and their counsel must carefully and promptly review the title product for the property to identify and (hopefully) address potential title defects at the earliest possible juncture, either through litigation or a title insurance claim. As the mortgagor defense bar becomes savvier concerning title defects, the industry cannot underestimate the importance of early detection and resolution of such issues.