ILLINOIS APP. COURT HOLDS MORTGAGE NOT VOID DUE TO LACK OF LICENSURE BY ORIGINATING LENDER

The Appellate Court of Illinois, Second District, recently held that even though the Illinois Residential Mortgage License Act ("IRMLA") was applicable to a lender that only made one loan in Illinois, an amendment to the IRMLA provided an exception to the law of the case doctrine and under the amendment the mortgage was not void merely because the lender was not licensed under the IRMLA at the time the loan was extended.

A copy of the opinion is available at: **Link to Opinion.**

As you may recall, in *First Mortgage Co. v. Dina*, 2014 IL App (2d) 130567 *("Dina I"),* the Illinois Appellate Court held that where the mortgage lender lacked a required license under the IRMLA, 205 ILCS 635/1-1 et seq., the mortgage was void. Based on the Court's uncertainty over the lender's licensure status, the Court vacated the foreclosure judgment and sale and remanded the case.

Following the remand, the Illinois General Assembly proposed Public Act 99-113, which amended the IRMLA to reject the holding and *Dina I*, providing that "[a] mortgage loan brokered, funded, originated, serviced, or purchased by a party who is not licensed under this Section shall not be held to be invalid solely on the basis of a violation under this Section."

While the amendment remained pending, the foreclosing mortgagee filed a new motion for summary judgment on July 8, 2015, asserting two bases: (1) that if the amendment passed it would reveal the legislative intent in enacting the statute, reversing *Dina I*, and (2) that the IRMLA did not apply to the lender, because it "only applies to entities engaged in the business of residential mortgage lending in Illinois," and the only loan the lender ever made in Illinois was the loan at issue.

On July 23, 2015, the Illinois General Assembly passed Public Act 99-113. This legislation amended section 1-3(e) of the IRMLA to provide:

"A mortgage loan brokered, funded, originated, serviced, or purchased by a party who is not licensed under this Section shall not be held to be invalid solely on the basis of a violation under this Section. The changes made to this Section by this amendatory Act of the 99th General Assembly are

declarative of existing law." Pub. Act 99-113, § 5 (eff. July 23, 2015) (amending 205 ILCS 635/1-3(e)).

On Sept. 10, 2015, the borrowers filed their response to the new motion for summary judgment, arguing: (1) that *Dina I* created law of the case that barred the mortgagee from arguing that the IRMLA was inapplicable to the lender, and (2) that the amendment was constitutionally defective to the extent it applied retroactively.

The trial court granted the mortgagee's motion, finding that the law of the case doctrine did not prevent it from finding that the IRMLA did not apply to the lender under an exception to the doctrine where the legislature makes a change in the controlling law. The trial court also held that the IRMLA did not apply to the lender because the phrase "engage in the business" excluded isolated transactions, and that the lender "presented uncontroverted evidence that the [borrowers'] mortgage loan was an isolated transaction in Illinois" for the lender. The matter then proceeded to judicial sale and confirmation of sale. The borrowers then appealed.

On appeal, the borrowers asserted four arguments: (1) the trial court erred in finding that the IRMLA did not apply to the lender, (2) the amendment "violates the Illinois constitutional prohibition against retroactive application of amendments to existing legislation, (3) because the amendment was an attempt to nullify or reverse *Dina I*, it was a violation of the separation of powers, and (4) the amendment "violate[s] the Special Legislation Clause of the Illinois Constitution . . . by attempting to create a separate class of brokers for special treatment."

The mortgagee argued that: (1) the court did not err when it ruled that the lender did not need to be licensed under the IRMLA, and (2) the borrowers' other arguments were superfluous, because "the amendment merely clarified what has always been true: there is not, and has never been, a right to void a mortgage that secures a loan made by a lender that was in violation of [the IRMLA]."

The Appellate Court first addressed the issue of the IRMLA's applicability to the lender. The Court looked to the language of the statute, which provides: "No person, partnership, association, corporation or other entity shall engage in the business of brokering, funding, originating, servicing or purchasing of residential mortgage loans without first obtaining a license

from the Commissioner." 205 ILCS 635/1-3(a). Section 1-3(h) provides that the IRMLA "applies to all entities doing business in Illinois as residential mortgage bankers, as defined by [the Old Act], regardless of whether licensed under that or any prior Act." 205 ILCS 635/1-3(h).

The mortgagee argued that section 1-3(h) created an "isolated transaction exception" to the IRMLA. The Appellate Court disagreed. Instead, it found more persuasive the borrowers' argument that section 1-4(d) expressly provides exemptions under the IRMLA, which the Court determined is an exhaustive list of exemptions, and did not include an isolated incident exemption.

After finding that the IRMLA applied to the lender, the Appellate Court next addressed the borrowers' constitutional challenge to the application of the amendment. In holding that the amendment applied, the Appellate Court determined that "the amendment can be read to avoid any constitutional defects."

First, the Court ruled that contrary to the borrowers' assertion, the amendment did not violate the special-legislation clause by giving special rights to unlicensed brokers, because it did not provide them with any special rights, it "merely prevents them from suffering forfeitures."

The Appellate Court next rejected the borrowers' argument that Illinois has a general bar on amendments with retroactive effect, noting that no such bar exists. Instead, "Illinois has adopted the basic principles of the Supreme Court's two-part retroactivity analysis in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994)." The first step is to decide whether the legislature explicitly stated the extent of the statute's retroactivity. Any express statement of intent controls, unless the retroactivity is unconstitutional for other reasons.

The second step, applicable when legislative intent is not clear, is to decide whether the amendment would "impair the rights a party possessed when acting, increase[] a party's liability for past conduct, or impose new duties with respect to transactions already completed." If the amendment has such an effect, it must not be applied retroactively.

However, the Appellate Court also noted that 5 ILCS 70/4 "supplies what amounts to a default statement on retroactivity, applicable when the General Assembly has failed to speak on the point." The section 4 default rule is that

amendments "that are procedural may be applied retroactively, while those that are substantive may not."

"Thus, the rule for an Illinois amendment is that we apply any express statement of retroactivity or, if none, apply section 4."

With respect to the amendment, the Court determined that the provision stating that "[t]he changes made to this Section . . . are declarative of existing law" stated an intent to give the amendment maximal retroactive effect.

The question then was whether the retroactivity is constitutionally objectionable.

In this case, the Appellate Court ruled that "[a]ny claim to reverse a decision stating a judicial construction . . . is constitutionally objectionable," and therefore "the amendment itself does not bar the application of *Dina I*." However, the Appellate Court has "the power to depart from [the *Dina I*] decision, and we exercise it here."

The Court concluded that "declining to apply *Dina I*, we avoid an inequitable result." The Court noted that when it decided *Dina I*, concluding that a mortgage made by an unlicensed vendor was void, "we placed great weight on what we deemed to be this state's existing public policy." However, "the amendment makes clear that this state's current public policy does not require such forfeiture." Thus, the Court affirmed the ruling of the trial court.