



Is the Mortgage You Are Servicing Void?

A Recent Decision by the Illinois Appellate Court May Have Significant Fallout

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The Illinois Appellate Court recently held that a residential mortgage is void if the related loan transaction was originated by an entity that was not licensed or exempt under the Illinois Residential Mortgage License Act of 1987 (the License Act). *First Mortgage Company v. Dina*, 2014 IL App (2d) 130567. The court reasoned that since the License Act states that “the purpose of this Act is to protect Illinois consumers seeking residential mortgages,” any mortgage made by an entity not licensed under the Act is void as against public policy. *Id.* at ¶¶ 19-21. This decision has potentially far-reaching consequences for the mortgage servicing and lending industries in Illinois.

The License Act requires licensing for any entity that brokers, funds, originates, services or purchases residential mortgage loans in Illinois, which means that any entity currently servicing residential mortgage loans in Illinois needs to be licensed under the License Act.¹ 205 ILCS § 635/1-3. The *Dina* decision held that a mortgage is void if the entity that originated the mortgage loan was not licensed under the License Act at the time of origination. *Dina*, 2014 IL App (2d) 130567, ¶ 16. According to the court in *Dina*, even if a servicer took all of the necessary steps to insure it was properly licensed under the License Act, it would still not be able to foreclose on the mortgage if the originating lender was not properly licensed, as the mortgage would be void ab initio as against public policy. *Id.* at ¶ 21.

Since the *Dina* decision merely overturned the granting of summary judgment in the plaintiff’s favor, the court did not expand on the consequences of voiding the mortgage and it did not specifically address whether the note was still valid and enforceable. This issue appears far from over, however, as the plaintiff petitioned the appellate court for a rehearing on April 21, 2014. In its petition for rehearing, the plaintiff argued that the court had misapprehended or overlooked the lack of individual enforceability as well as the specific statutory remedies available under the License Act.

The *Dina* decision appears to be at odds with the plain language of the License Act, as well as the Illinois Supreme Court authority it relies upon. The Act specifies that the requirements set out in the Act are to be regulated by the Commissioner of Banks and Real Estate, not private litigants. 205 ILCS § 635/4-1. It does not provide for enforcement by individuals in one-off foreclosure actions. In addition, the Act contains enumerated remedies for violations, including the imposition of fines, but none of the enumerated remedies state that a mortgage entered into in violation of the Act is void. 205 ILCS 635/4-12(h).



The court's decision relies almost entirely on the Illinois Supreme Court's decision in - *Chatham Foot Specialists, P.C. v. Health Care Serv. Corp.*, 837 N.E.2d 48 (Ill. 2005), but that reliance appears misplaced. *Chatham* dealt with the Illinois Podiatric Medical Practice Act and whether that act's registration requirement was an administrative mechanism to allow professionals to provide services in the corporate form or whether the registration requirement was a regulatory provision intended to protect the health, safety and welfare of the public. 837 N.E.2d at 57-58. The court held that the registration requirement was not enacted to protect the health, safety and welfare of the public, and that failure to register did not render contracts executed by the unregistered entity unenforceable. *Id.* at 69. In reaching its decision, the *Chatham* court reviewed the registration requirements and concluded that since registration did not assure professionalism and competence, the requirement was not for the protection of the public health, safety and welfare. *Id.* at 64. The *Chatham* court went on to state that an act should not be interpreted to achieve absurd results, and therefore, even when an act—like the License Act—states that its purpose is to protect the public health, safety and welfare, that does not mean that every provision of the act is intended to protect the public. *Id.* at 66. Instead, the *Chatham* court stated that the remedial scheme set out in the Illinois Podiatric Medical Practice Act—that allowed for the imposition of fines and the ability to revoke registration like the License Act—supported a finding that the registration requirement did not go to the public health, safety and welfare. *Id.* Moreover, the *Chatham* court noted that the act's absence of any provision suggesting that contracts executed by a nonregistered entity would be void further supports the notion that the only remedies it could impose under the act are the fines and specific damages enumerated in the act itself. *Id.* at 67.

The License Act is similar to the Illinois Podiatric Medical Practice Act, in that they both have remedial schemes that allows for the imposition of fines for failure to obtain proper licensing and make no mention of voiding contracts executed by non-licensed entities. Nevertheless, the appellate court in *Dina* applied the "protect the public" language of the License Act to every provision of the Act for public policy purposes (*Dina*, 2014 IL App (2d) 130567, ¶ 19, 21), which is precisely what *Chatham* indicated was improper. *Chatham*, 837 N.E.2d at 66.

In sum, the Illinois Appellate Court's decision in *Dina* appear unsupported by the language of the License Act itself, as well as the authority upon which it relies. Regardless, it appears this decision may have a significant impact on the mortgage lending and servicing in Illinois unless and until the decision is reversed or clarified, either on rehearing or on appeal to the Illinois Supreme Court.

Endnotes

- 1 There are specific exemptions to the licensing requirement of the License Act that should be evaluated by all residential mortgage servicers on an individual basis. 205 ILCS § 635/1-4(d).

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