

Practice tips: Watch out for anything old, dead, or unlicensed

By Angela Evans

1. Check Any Old Appellate Court Case to Make Sure it is Binding

1935 was a good year for *Stare Decisis* in Illinois Appellate Courts. Illinois Appellate Court cases decided prior to 1935 were, by statute, not binding precedent. As a result, cases decided by Illinois Appellate Courts prior to 1935 are not binding authority and have no precedential value. These decisions are viewed as persuasive authority. *People v. Glisson*, 202 Ill. 2d 499, (2002); 14 Ill. Law and Prac. Courts § 85.

2. Check to Make Sure the Mortgagor is Not Dead

Until just last year, foreclosures were considered proceedings taken directly against property. Foreclosures are no longer considered in rem actions rather they are quasi in rem. A proceeding quasi in rem is an in rem action which affects only the interests of particular persons in certain property. When in rem status changed to quasi in rem, it also changed the requirements for jurisdiction. Now, the mortgagee must name a personal representative for a deceased mortgagor in a mortgage foreclosure proceeding in order for the circuit court to acquire subject matter jurisdiction. See *ABN AMRO Mortg. Group, Inc. v. McGahan*, 237 Ill. 2d 526 (2010).

When an attorney forecloses on a defaulted mortgage, a search of the public records is necessary to make sure the mortgagor is living. If deceased, then the attorney can search the files of the probate court in the county where the deceased mortgagor lived to learn the identity of any personal representative appointed. The foreclosure can be commenced against that personal representative or a motion filed to appoint a special representative.

The Code of Civil Procedure provision governing the appointment of personal representatives, 735 ILCS 5/13-209, is also applicable to the appointment of personal representatives in this circumstance. As such, see if the probate estate is open to determine if you need to move for the appointment of a special representative. If the estate is open, the personal representative from the Probate Court may be named. Where the estate has not been opened, the court may

appoint a special administrator to represent the deceased party in the action. The special administrator is not equivalent to an administrator appointed for probate and is not empowered to distribute assets. *Hannah v. Gilbert*, 565 N.E.2d 295, 298 (4th. Dist. 1990).

In sum, you really need to know if your mortgagor is dead or not, so call the circuit clerk's office and find out. Some require you to send a letter on your letterhead to the county clerk requesting a search and death certificate and charge a nominal fee.

3. Check that Privileged Corporate Communication is with Licensed Attorneys

It is not always clear whether particular communications qualify for the attorney-client privilege's protection when a corporate client communicates with in-house or outside counsel. Yet another addition to the distinction of corporate communications within control group members, whether the employee or employer intended confidentiality and others is whether the in-house counsel is licensed and/or a member of the local bar association. If the other elements of the privilege have been satisfied, courts have generally but not always allowed corporations to assert the attorney-client privilege for cor-

respondence to and from in-house counsel despite the fact that he was not a member of the bar of the state in which he was located or where advice was given.

Some courts have stated that lack of local bar membership on the part of corporate in-house counsel was indicative that counsel were not acting as attorneys, and therefore that the communications in question were not privileged. See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 360 (D. Mass. 1950); *Fin. Technologies Int'l, Inc. v. Smith*, 49 Fed. R. Serv. 3d 961 (S.D.N.Y. 2000). Others courts have held that house counsel for a corporation is protected by the privilege to the same extent that the relationship between private counsel and a non-corporate client is privileged even if the attorney is admitted to practice law in a jurisdiction other than the state of his or her employment. *Panduit Corp. v. Burndy Corp.*, 1971 WL 17100 (N.D. Ill. Nov. 1, 1971). Many factors are determinative of whether the attorney-client privilege applies to corporate communication. Whether the "attorney" is actually licensed is yet another factor to put on your radar. ■

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