Against *Accetturo* and Beyond *Bukowski*: Litigating Notices in Illinois Foreclosures

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The Illinois Mortgage Foreclosure Law ("IMFL") is a comprehensive and highly technical statute that governs the entire foreclosure process. Key to that process are preforeclosure notices, designed to give a borrower information and time with which to engage in loss mitigation efforts. There are several different types of notices, each stemming from a different source of law, and all relatively straightforward to address on their merits. The difficulty stems from procedure: If a notice was not given as required, how should a defendant raise the issue?

The Illinois Appellate Court has offered conflicting answers to this procedural question. In 2014, Bank of America v. Adeyiga *suggested that the Grace Period Notice was properly raised as an affirmative defense. But in 2015,* CitiMortgage v. Bukowski *held that the procedurally similar Notice of Acceleration ("NOA") should be raised only through the IMFL's particular procedural mechanisms, and not as an affirmative defense. And in 2016,* Cathay Bank v. Accetturo *combined the* Adeyiga *and* Bukowski *precedents to suggest that sometimes NOA issues were affirmative defenses and sometimes they were not, without exactly explaining how or why that distinction came to be or what purpose it served.*

This Article proposes that, contrary to Accetturo*, all issues concerning the NOA should be raised as denials of the IMFL's deemed and construed allegations. The Article further suggests that this principle can be extended beyond* Bukowski*, and that most notice issues are best raised as denials of the deemed and construed allegations. Preferring deemed and construed allegations over affirmative defenses is both supported by the nature of a notice claim and is more consistent with the*

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comprehensive pleading regime for mortgage foreclosures generally.

INTRODUCTION

Residential mortgage foreclosures often boil down to a simple question: Was the mortgage paid? Most of the time the answer is "no"—making defending a foreclosure action on the merits virtually impossible. The Illinois Mortgage Foreclosure Law ("IMFL") is designed with this harsh reality in mind, providing a streamlined procedure for the entire foreclosure process.[1] Though borrowers can rarely stop legal proceedings entirely, the law offers many windows of opportunity and an extraordinarily long timeframe in which borrowers may rescue their properties through loss mitigation—letting them "win" the foreclosure out of court entirely.[2]

Preforeclosure notices are a key component of the modern foreclosure process. Intended to give the borrower information, time, and resources with which to seek and engage in loss mitigation, the notices are often mandatory: if a lender does not send them, the judge must dismiss the foreclosure. Though the lender's right of action remains intact, the lender must start the process all over again. Much fundamental foreclosure defense centers on the various notice regimes: litigating whether a given notice requirement applies or whether it was satisfied in any particular case. Both are important questions, but this Article will focus on an oft-neglected third issue: the proper procedural mechanism through which notice issues should be raised.

Prior to 2014, the proper mechanism for notice issues was somewhat of an open question: trial courts had discretion, judges had their preferences, and as long as the issue was raised in a reasonably timely fashion, that was that. In 2014, however, the Illinois Appellate Court strongly suggested in *Bank of America v. Adeyiga* that a borrower could only raise certain notice issues as affirmative defenses, and not through the IMFL's own procedural mechanisms.[3] This caused great turmoil at

1. 735 ILL. COMP. STAT. 5/15-1501–5/15-1512 (2016).

2. *See* Wells Fargo Bank, N.A. v. Simpson, 2015 IL App (1st) 142925, ¶¶ 45–46, 36 N.E.3d 266, 280 (discussing lender-borrower balances of the Illinois Mortgage Foreclosure Law ("IMFL")).

3. Bank of Am., N.A. v. Adeyiga, 2014 IL App (1st) 131252, 29 N.E.3d 60.

the trial level and led directly to *CitiMortgage v. Bukowski*, a 2015 case that held that certain notice issues could only be raised through the IMFL's procedural mechanisms, and could *not* be raised as affirmative defenses.[4] In 2016, *Cathay Bank v. Accetturo* further muddied the waters when it held that affirmative defenses were sometimes appropriate and sometimes not, resulting in a failed attempt to split the baby.[5]

This Article first discusses the role of notices in more detail, how they fit within the IMFL's broader statutory scheme, and how notice issues are often resolved. Part II provides extensive background on each of the central notices in turn: a contractual Notice of Acceleration ("NOA"); the statutory Grace Period Notice ("GPN"), now repealed; and some of the many federal notice requirements which may apply to any given loan. Part III tackles the three key cases, dissecting *Adeyiga*, *Bukowski*, and *Accetturo* in turn, examining how they build upon each other to create a technically consistent, but generally confusing, pleading regime.

Part IV then reconciles the various appellate approaches, concluding that the proper mechanism through which to plead most notice issues is through a specific denial of certain deemed and construed allegations, an IMFL-specific provision better tailored to putting notices at issue than affirmative defenses. It argues that both *Adeyiga* and *Accetturo* were wrongly decided—not knowingly, but rather because neither case entirely recognizes the full implications of, and procedural dependencies within, the IMFL, a highly technical single-purpose statute. It further argues that the rhetoric of *Bukowski* is largely accurate, but can be rationally extended to support the pleading of most notice issues as denials of deemed and construed allegations.

The Article concludes with a concession to reality: foreclosure cases can get messy, fast. Borrowers often proceed pro se at the beginning of a case, which can result in much restricted freedom of pleading from later-retained counsel. Part V highlights the most common postures in which notice issues might arise, and discusses the most efficient way to put notice at issue based on how a case may have proceeded. It concludes by suggesting that, regardless of *how* notices are raised, both public and appellate policy strongly favor resolution of notice issues on the merits, rather than by way of a purely procedural dismissal.

But procedure still matters, and recent appellate decisions have unnecessarily complicated what was formerly a relatively straightforward

4. CitiMortgage v. Bukowski, 2015 IL App (1st) 140780, 26 N.E.3d 495.
5. Cathay Bank v. Accetturo, 2016 IL App (1st) 152783, 66 N.E.3d 467.

process.[6] With luck, this Article will clarify the current pleading regime and suggest a reasonable and equitable course for pleading notices in the future.

I. THE ISSUE: LIFE AND TIMES OF A NOTICE CHALLENGE

In the realm of civil litigation, "notice" can mean a lot of things, from service of process to notice of motions to everything in between. But in the mortgage foreclosure context, "notice" also refers to certain types of communications that a lender must send to a borrower before the lender can proceed to foreclosure, and it is generally this kind of notice with which this Article concerns itself.

Like so many other aspects of foreclosures, notice challenges follow a well-worn formula. A well-pled challenge to notice will usually be supported by a borrower's affidavit denying receipt, which the lender will in turn counter with an affidavit evidencing mailing, which in turn creates a situation that will almost always be resolved in the lender's favor. The interesting question is how to get there in the first place—but this Article will address the *what* before the *how*, briefly discussing the role of notices and describing in more detail the mechanics of a typical resolution.

A. The Role of Notices

Notices generally serve dual purposes. First, they may serve a legal purpose or otherwise discharge a legal obligation (aside, that is, from the obligation to send the notice in the first place). Second, the notice may provide the borrower with information, guidance, or other resources going into the foreclosure process. The legal purpose served may be a

6. *Bank of America, N.A. v. Adeyiga*; *CitiMortgage v. Bukowski*; and *Cathay Bank v. Accetturo* are all decisions from the First District. Nevertheless, this scenario is likely the closest thing to an appellate split that foreclosure case law has seen in quite some time, as it is heavily weighted toward the First District. By way of example: as of this writing, forty-five published cases have discussed the Grace Period Notice ("GPN") statute, 735 ILL. COMP. STAT. 5/15-1502.5 (repealed July 1, 2016). Of those forty-five, twenty-six—nearly 60 percent!—come from the First District. Ten are split between the other appellate districts, with eight from the Second District and two from the Third District. The balance is from federal court, with seven in the Northern District of Illinois and two from the Central District of Illinois. Intradistrict splits are harder to identify and resolve than interdistrict splits, simply because judges are reluctant to flatly disagree with "themselves," as opposed to disregarding a separate district. *See, e.g.*, Schnepf v. Schnepf, 2013 IL App (4th) 121142, ¶ 45–48, 996 N.E.2d 1131, 1140 (displaying the Fourth District's bemoaning of the First, Third, and Fifth Districts' misunderstandings and misapplications of Fourth District holdings concerning the substitution of judge statute). The Illinois Supreme Court could, of course, definitively resolve these concerns one way or another—but it has not yet taken a GPN or Notice of Acceleration ("NOA") case, nor is it likely to do so. It is the Author's hope that this Article can shed light on what might otherwise simply be a confusing series of facially consistent holdings by exposing and exploring the procedural framework and conflicts underlying them.

crucial step; the NOA, for example, formally calls the debt and accelerates the promissory note, permitting the lender to sue for the entire outstanding principal, rather than just the missed payments.[7] But it is the informative purpose which is perhaps most important in the foreclosure process.

Foreclosure defendants, as a rule, generally do not "win" their cases in court. Defendants win out of court in any one of countless different ways: reinstating the loan, securing a forbearance, refinancing, executing a deed in lieu of foreclosure, foreclosing by consent, securing a short sale, and more—essentially, anything that does not end in a judicial sale. These options, and the negotiations between lenders and borrowers that lead to them, are collectively known as loss mitigation.[8]

But resolving a foreclosure through loss mitigation can impose a burden: lenders and servicers change, communication is difficult at best, and the process takes a very long time.[9] This is where the notices come in. By providing an initial set of accurate loan information, foreclosure assistance resources, and initial contact persons, a foreclosing lender's notices can give a borrower a definite starting point in their loss mitigation efforts.

Encouraging loss mitigation is a firmly entrenched public policy goal of the state and the foreclosure process.[10] It is no surprise, therefore, that

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7. *See generally infra* Part II.A (discussing NOA). Acceleration has been treated in different ways over the years, but it has always remained a necessary step in suing for the entire debt. *See supra* note 6 and accompanying text (discussing the history of the NOA in Illinois); *see, e.g.*, Curran v. Houston, 66 N.E. 228, 229–30 (Ill. 1903) (providing when acceleration is required to sue for a debt).

8. Much has been written about loss mitigation; indeed, the foreclosure defense bar practically revolves around it. This Article will not attempt to recapitulate the loss mitigation constellation here, other than to say it is a vast and continually shifting web of programs, procedures, and practice. *See, e.g.*, Hannah Costigan-Cowles, Note*, Negotiations for the Home: A Balanced Approach to Good Faith in Foreclosure Mediation*, 2013 U. ILL. L. REV. 1571, 1576–81 (2013) (summarizing common alternatives to foreclosure).

9. *See generally* Daniel Bahls, *Splitting the Baby: Avoiding Foreclosure When Homeowners Have Uncertain or Conflicting Interests*, 36 WESTERN NEW ENG. L. REV. 261, 263–68 (2014) (reviewing the difficulties with engaging in loss mitigation). Because foreclosure loss mitigation necessarily entails looking to the borrower's finances, loss mitigation can interact with many aspects of a borrower's life, leading to countless permutations. *See generally* A. Mechele Dickerson, *Bankruptcy and Mortgage Lending: The Homeowner Dilemma*, 38 J. MARSHALL L. REV. 19 (2004) (analyzing the effects of bankruptcy on foreclosure loss mitigation). Sometimes, a foreclosure will fall through the cracks, multiplying a borrower's loss mitigation difficulties a hundredfold. Judith Fox, *The Foreclosure Echo: How Abandoned Foreclosures are Re-Entering the Market through Debt Buyers*, 26 LOY. CONSUMER L. REV. 25, 67–71 (2013).

10. ILL SUP. CT. R. 114 (requiring certification of loss mitigation activity as part of foreclosure process); GPN Statute, 735 ILL. COMP. STAT. 5/15-1502.5 (repealed July 1, 2016); *see generally* Caroline Erol, *Consumer News: The 2009 Illinois Homeowner Protection Act: Simply a Means to*

many of these mandatory notices are causally linked to the foreclosure: a lender *must* send the notices prior to even filing its foreclosure action. Should a lender fail to send a mandatory notice, the foreclosure must be dismissed. The lender must then send the proper notices before refiling its suit, essentially resetting the foreclosure.[11]

This is not a permanent victory for the borrower, but it is a victory nevertheless: first, by restarting the foreclosure process, the borrower might have a second chance at engaging in loss mitigation; second, and perhaps more importantly, the borrower gains valuable time. Pleading notices—or, more accurately, pleading and proving that a lender did not comply with an applicable notice requirement—is understandably a significant part of foreclosure litigation.

B. Resolving Notice Disputes

For all their importance, actually resolving a notice claim is relatively simple. Notice arguments fall into two broad types: sending and content. In a sending claim, the borrower simply disputes whether the lender ever sent the notice in the first place. In a content claim, the borrower admits that the lender sent the notice, but asserts that the content of the notice does not satisfy the applicable legal requirements. Of the two notice claims, sending claims are by far the most common.

1. Sending Notices: A Battle of the Affidavits

The transmission requirements of notices are somewhat counterintuitive: the obligation on the lender is to ensure that the notices were properly *sent*. Whether a borrower *received* them is a separate issue and is, for the most part, irrelevant.[12]

The problem is immediately apparent: How can a *borrower* prove that the *lender* did not properly send a notice? Dozens of entities may be involved with the loan, including lenders, servicers, trustees, and agents, most of which will not be party to the foreclosure, and any one of which might have sent the notice at issue.[13]

Delay the Inevitable?, 22 LOY. CONSUMER L. REV. 260 (2009) (discussing the state's immediate response to housing crisis).

11. This description generally tracks both the NOA and the GPN; in broad strokes, they both operate the same way. *See infra* Parts II.A, II.B (discussing NOA and GPN, respectively).

12. Again, generally speaking. *See infra* Parts II.A, B (discussing NOA and GPN in detail).

13. Plaintiffs generally do not need to send the notice themselves, but rather ensure that the notice was sent: the duty is delegable. *See, e.g.*, FV-I v. Noonan, 2016 IL App (1st), 152485-U, ¶¶ 21–22 (discussing a NOA sent by a predecessor in interest); *infra* note 32 (summarizing a collection of cases regarding this point).

Rather than try to prove nonsending of a notice directly, a borrower must instead prove it inferentially. A borrower alleging nonsending will thus normally support it by tendering an affidavit of nonreceipt, averring that the he or she never received the notice.[14] The default presumption is that a mailing is presumed received when sent, but the borrower's evidence of nonreceipt rebuts that presumption.[15]

The borrower's affidavit of nonreceipt thereby creates a question of fact, putting the burden on the lender to prove sending.[16] The lender will almost always do so by introducing its own affidavit, executed by an employee familiar with the loan file, averring that the notice was properly sent. Such an affidavit of mailing will usually assert the affiant's familiarity with the loan file, state when the notices were sent, and lay foundation for the admission of all relevant exhibits—which can include copies of the actual notice, a copy of the envelope it was sent in, printouts from the lender's tracking software, and so forth.[17]

Once both the borrower and lender have their affidavits on file, resolving the notice issue usually becomes a matter of law. The lender's affidavit of mailing will almost always provide at least *some* evidence of sending, but some is enough: any evidence of sending will overcome evidence of nonreceipt.[18] But the issue is not *whether* a sending challenge will be resolved in the lender's favor, but *how* the issue is to be raised and litigated in the first place—and in that respect, the law is

14. Such an affidavit can range from a simple recitation of nonreceipt to a complex series of factual averments concerning the borrower's mail-checking habits, local post office functioning, and so forth. At the end of the day, though, the affidavit serves one purpose: to establish nonreceipt.

15. Chi. Patrolmen's Fed. Credit Union v. Walker, 2016 IL App (1st), 153414-U, ¶ 21 (citing City of Chi. v. Supreme Sav. & Loan Ass'n, 327 N.E.2d 5, 7–8 (Ill. App. Ct. 1975)).

16. *Walker*, 2016 IL App (1st), 153414-U, ¶ 21 (citing Winkfield v. Am. Cont'l Ins. Co., 249 N.E.2d 174, 176–77 (Ill. App. Ct. 1969)).

17. For an example of a perfectly conventional affidavit of mailing, see *Walker*, 2016 IL App (1st), 153414-U, ¶ 6 (quoting the GPN affidavit at issue). Such an affidavit will usually, but is not required to, comply with Illinois Supreme Court Rule 191, thus making the affidavit admissible for the purposes of a motion for summary judgment. ILL SUP. CT. R. 191(a). To the extent it lays foundation for the admission of business records, the affidavit must comply with rule 236. *Id.* at R. 236(a).

18. For a thorough overview of how this process usually goes, see *Walker*, 2016 IL App (1st), 153414-U, ¶¶ 20–25 (analyzing how to resolve the notice issue). The above-described resolution—affidavit of mailing trumps affidavit of non-receipt—is far and away the most common resolution of the issue. In fact, the Author can only identify one case in which a lender's affidavit of mailing was found insufficient: *CitiBank, N.A. v. Wilbern*, No. 12 C 755, 2014 WL 1292374 (N.D. Ill. Mar. 28, 2014). The facts of *CitiBank, N.A. v. Wilbern* were particularly egregious though: the lender provided a copy of the NOA at issue, the affidavit laid no foundation for its admission as evidence, and did not even *mention* the NOA attached thereto. The court struck the unsupported NOA, thus leaving the defendant's affidavit unrebutted. *Id.* at *12.

anything but settled.

2. Content Notices: A Conventional Issue of Law

Though sending challenges are much more common, a second type of notice dispute exists: a challenge to the *content* of the notice sent. In this type of challenge, a borrower admits that a notice was received, but disputes whether the content of the notice adequately complied with notice requirements.

Content challenges are few and far between, and as such, no uniform method of dealing with them exists.[19] A routine affidavit of mailing will not be enough; whereas sending is a binary question, determining sufficiency requires a court to look at the specific content of the lender's notice relative to the source of its obligation.[20]

Here, the standard is necessarily more flexible. Notices do not need to be flawless; minor imperfections that do not prejudice the borrower will be insufficient to sustain a content-based objection to the notice.[21] Because notices are well known and standardized, it is rare indeed that a notice would deviate significantly from its required contents.[22]

But content challenges are the exception, not the rule, and are heavily fact intensive. Though the same procedural issues apply to both types of claimed notice defects, for the most part, this Article discusses only sending challenges, wherein a borrower simply asserts that a notice the lender was required to give was not, in fact, given.

II. THE NOTICES: SOURCES, CAUSES, AND EFFECTS

Three principal bodies of law govern the foreclosure process: contract law, which is created between the parties; state law, which controls

19. *E.g.*, Cathay Bank v. Accetturo, 2016 IL App (1st) 152783, 66 N.E.3d 467 (challenging NOA, where five separate letters sent, each with partial and incomplete information); Aurora Loan Servs., LLC v. Pajor, 2012 IL App (2d) 110899, 973 N.E.2d 437 (challenging GPN, where notice was not sent by the then-current plaintiff, as the statute requires, but by an unrelated entity three months before the sending entity eventually acquired the mortgage debt).

20. That is, comparing a GPN against the GPN statute, a NOA against the specific acceleration clause in the mortgage, and so forth.

21. *See* Bank of Am., N.A. v. Luca, 2013 IL App (3d) 120601, ¶ 16, 999 N.E.2d 361, 364 (ruling that prejudice must be established); *Pajor*, 2012 IL App (2d) 110899, ¶ 28, 973 N.E.2d at 444 (stating that a "flawless" GPN is not required).

22. The exact content of the GPN, for example, was set by statute. *See* 735 ILL. COMP. STAT. 5/15-1502.5(c) (repealed July 1, 2016) (offering the language governing GPN); *infra* note 37 (discussing GPN typography requirements). NOAs are more fluid, and thus more susceptible to a content challenge. The most salient content-challenge case is *Accetturo*, in which the lender sent five separate letters, none of which—even taken together—were sufficient to discharge all of the acceleration clause's requirements. *Accetturo*, 2016 IL App (1st) 152783, ¶¶ 36–42, 66 N.E.3d at 477–78.

Illinois foreclosures specifically; and federal law, which may affect foreclosures in general. Notice requirements applicable to foreclosures may stem from all three sources.

As a matter of contract, mortgages impose certain standardized notice requirements: the NOA. At the state level, there was a requirement that lenders send a GPN prior to instituting foreclosure proceedings. Though the GPN statute has since been repealed, its procedural similarity to the NOA and well-developed body of case law make it worth examination. Lastly, at the federal level, there are, among other regulations, separate delinquency notice, grace period, and counseling requirements. Though the various federal requirements are not currently coupled to the foreclosure process so as to form a procedural bar, as the GPN was, the existence and potential for future expansion of the federal regulations make them important factors to consider.

A. Notice of Acceleration

The vast majority of mortgages contain an acceleration clause.[23] This provision is usually in two parts: first, permitting the lender to accelerate the debt upon a default; and second, providing for notice of same.[24] The standard acceleration clause, from the Fannie Mae Form Mortgage, provides as follows:

> 22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration

23. This little piece of common knowledge is surprisingly hard to prove. Courts treat it as a fact beyond the need for citation. *E.g.*, CitiMortgage, Inc. v. Hoeft, 2015 IL App (1st) 150459, ¶ 1, 39 N.E.3d 240, 242 ("Virtually every residential mortgage contains an 'acceleration clause' . . . ."). Such provisions have been common for the better part of a century. *E.g.*, Straus v. Turnquist, 279 Ill. App. 572, 579–80 (1st Dist. 1935) (quoting as "very clear and definite" an acceleration clause from a 1924 deed in trust). They appear most often today as part and parcel of the form mortgage instrument maintained by Fannie Mae, excerpted in relevant part below. *Illinois Single Family: Fannie Mae/Freddie Mac Uniform Instrument (Form 3014)*, FED. NAT'L MORTGAGE ASS'N, fanniemae.com/singlefamily/security-instruments (last visited May 2, 2017) [hereinafter *Form Mortgage*]. The form mortgage, and its incorporated acceleration clause, has been around in one form or another for quite some time. *See, e.g.*, Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 147 n.2 (1982) (quoting an acceleration provision of a 1978 California form mortgage).

24. Early foreclosure case law distinguishes these points, providing that though the parties needed to explicitly provide for acceleration, the choice to actually *accelerate* was the lender's alone, and could be exercised simply by filing a foreclosure action—no notice necessary. Curran v. Houston, 66 N.E. 228, 229–30 (Ill. 1903). Any further restrictions on acceleration, such as imposing a thirty-day cure period, *id.* at 446, or requiring a formal notice, *Meyer v. Levy*, 249 Ill. App. 408, 413–14, 423 (1st Dist. 1928), were matters of contract negotiated between the parties, and were not required (though, if present, would be validly enforceable).

> under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.[25]

The acceleration clause essentially marks the start of formal foreclosure proceedings.[26] Triggered upon a borrower's default, it requires the lender to send the titular NOA and then establishes a thirty-day cure period, after which the lender may file its foreclosure suit.[27]

The NOA itself must contain six pieces of information: (1) the fact of the default, (2) an opportunity to cure the default, (3) a date by which the cure must occur, (4) a warning that failure to cure will result in acceleration and foreclosure, (5) the borrower's right to reinstate, and (6) the borrower's right to assert defenses in foreclosure.[28] The NOA typically takes the form of a letter to the borrower containing a dollar figure of the amount due, and a date by which it must be paid.[29]

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25. *Form Mortgage*, *supra* note 23, ¶ 22. The clause is the first of the nonstandard covenants contained in the form mortgage, which include provisions for release, waiver of homestead, and force-placed insurance. *Id.* ¶¶ 23–25. The acceleration clause is occasionally presented entirely in boldface font, a typographical choice omitted in the present quotation.

26. Note that, while an NOA "starts" formal foreclosure proceedings, it does not "expire" in any meaningful sense of the word. If there are multiple actions on a single debt, a lender need not send multiple NOA: because a debt can logically only be accelerated once, once it is accelerated, it remains so. If an action is filed, dismissed, and then a second action filed on the already-accelerated debt, no subsequent notice need be sent. FV-I v. Noonan, 2016 IL App (1st), 152485-U, ¶ 23 (citing Fid. Bank v. Krenisky, 807 A.2d 968, 975 (Conn. App. Ct. 2002)).

27. This is contingent, of course, on the successful discharge of any other prefiling limitations, such as the thirty-day GPN period, while it was in effect, or the 120-day Real Estate Settlement Procedures Act grace period. *See infra* Part II.B (analyzing GPN); Part II.C (reviewing the Real Estate Settlement Procedures Act's requirements).

28. *Form Mortgage*, *supra* note 23, ¶ 22.

29. *See, e.g.*, CitiMortgage, Inc. v. Hoeft, 2015 IL App (1st) 150459, ¶¶ 2–3, 39 N.E.3d 240, 242–43 (quoting a NOA); Deutsche Bank Nat'l Tr. Co. v. Kopec, 2015 IL App (1st), 142310-U, ¶¶

Though the acceleration clause is fairly specific, it does offer some wiggle room for the lender.[30] The cure amount should be precise, but it does not need to account for minor day-to-day fluctuations, such as late charges or additional payments that come due.[31] The clause furthermore does not require the lender itself to send the letter; the task may be delegated to a servicer or other authorized entity.[32] And, as with other notices in foreclosure, receipt is not required: the lender's obligation is discharged by proper sending alone.[33]

The NOA is fairly straightforward in theory and application, and is equally straightforward in the breach: if a lender is required to send a NOA, but does not do so, it may not foreclose.[34] Consequently, should a borrower plead and prove that a NOA was not sent, all orders entered in the foreclosure case must be vacated as void and the case dismissed.[35] The lender would then have to properly send a NOA prior to filing a new

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22–23. Note that the acceleration clause itself does not require that the NOA necessarily be written. *Form Mortgage*, *supra* note 23, ¶ 22. The writing requirement comes from a separate provision of the form mortgage, aptly entitled "notices," which requires that *all* notices contemplated by the document must be written. *Id.* ¶ 15.

30. Unlike section 5/15-1502.5, which regulates form and content of the GPN, the acceleration clause only regulates the content of the notice, allowing for variation in form. Consequently, while there is no direct authority as to whether the "technical defect" exception from GPN case law applies, it probably would: so long as the substantive requirements of the acceleration clause are met, and no prejudice accrued to the borrower, a technical defect in the NOA should not invalidate it. *See* Bank of Am., N.A. v. Luca, 2013 IL App (3d) 120601, ¶ 16, 999 N.E.2d 361, 364 (holding that "flawless" GPN is not required); *infra* Part II.B (discussing GPN); *supra* note 48 and accompanying text (discussing the "technical defect" exception to GPN requirements).

31. *Hoeft*, 2015 IL App (1st) 150459, ¶¶ 9–10, 39 N.E.3d at 244.

32. *See, e.g.*, FV-I v. Noonan, 2016 IL App (1st), 152485-U, ¶¶ 21–22 (discussing how a NOA was properly sent by a predecessor in interest); McCormick 101, LLC v. State Bank of Countryside, 2015 U.S. Dist. LEXIS 158383, at *7–8 (discussing a NOA sent by the lender's counsel); U.S. Bank, N.A. v. Ramos, No. 11 C 2899, 2013 WL 1498996, at *5 (N.D. Ill. Apr. 11, 2014) (discussing a NOA sent by the servicer).

33. *E.g.*, *Ramos*, 2013 WL 1498996, at *5–6 (providing that a receipt is not required). *Accord* CitiMortgage v. Bukowski, 2015 IL App (1st) 140780, ¶ 19, 26 N.E.3d 495, 498–500 (holding the denial of receipt insufficient). *See also* 735 ILL. COMP. STAT. 5/15-1502.5(c) (repealed July 1, 2016) (stating actual receipt is not required for GPN). Note that, in this respect, the form mortgage's notice provisions are asymmetrical: notices to the *borrower* are deemed given when delivered or mailed by first class mail, but notices to the *lender* are not deemed to have been given "until actually received." *Form Mortgage*, *supra* note 23, ¶ 15.

34. Cathay Bank v. Accetturo, 2016 IL App (1st) 152783, ¶ 49, 66 N.E.3d 467, 480 (citing Midwest Builder Distrib. v. Lord & Essex, 891 N.E.2d 1, 23–24 (Ill. App. Ct. 2007) (collecting case law for the proposition that strict compliance with express contractual conditions precedent is required)).

35. *Id.* ¶ 55, 66 N.E.3d at 480 (vacating summary judgment, judgment of foreclosure, order approving sale, and all other orders in case). Despite its analytical failings, see *infra* Part IV.A.4 (detailing such concerns), *Accetturo* provides a relatively thorough summary of how failure to send a NOA plays out. *Accetturo*, 2016 IL App (1st) 152783, ¶¶ 2, 49–51, 53–55, 66 N.E.3d at 480–81.

foreclosure action.[36]

B. Grace Period Notice

The GPN was an informational notice required to be sent prior to initiating foreclosure. A statutory requirement in effect between 2009 and 2016, the GPN had two purposes: first, providing information to delinquent borrowers about counseling and other guidance options; and second, imposing the eponymous grace period, a thirty-day stay of foreclosure proceedings.[37]

The GPN statute was repealed by its own terms on July 1, 2016, and is thus no longer applicable to Illinois foreclosures.[38] Though it was only in force for eight years, the GPN provided fertile ground for litigation, and its case law is relatively robust—and because the GPN's mechanics and functionality were nearly identical to those of the NOA, GPN cases can still provide significant guidance on NOA issues.[39]

1. The Statute

Following the 2008 financial crisis, Illinois enacted the 2009 Homeowner Protection Act, designed to impose a sixty-day moratorium on foreclosures, so as to allow homeowners time to seek and receive

36. Presumably. Because failure to send a NOA is uniformly fatal to a foreclosure case, plaintiffs tend to not prosecute cases known to be so flawed, choosing instead to dismiss and refile. This creates an understandable lacuna in appellate case law. But because the NOA is framed as a condition precedent, the lender would need to send one *before* filing its case. *Id.* ¶ 49, 66 N.E.3d at 480. Timing is crucial: a NOA sent postfiling cannot retroactively legitimize the foreclosure suit. If no NOA was sent prior to the case's filing, then the condition precedent would not have been satisfied, and the case would remain subject to a section 5/2-619 dismissal. *See infra* note 50 and accompanying text (discussing procedural consequences stemming from GPN failure).

37. *See generally* 735 ILL. COMP. STAT. 5/15-1502.5 (repealed July 1, 2016) (discussing the purposes of the GPN statute). *See also infra* notes 51–64 and accompanying text (discussing timing of GPN enactment and repeal).

38. 735 ILL. COMP. STAT. 5/15-1502.5(f) (repealed July 1, 2016). Though there is some dispute as to whether the GPN requirement applies to cases filed *before* July 1, 2016—it does not—its inapplicability thereafter is undeniable. *See also infra* Part II.B.2 (discussing the repeal of the GPN statute).

39. *See generally infra* Part II.B.1 (discussing the GPN cases). Two main reasons exist for such utility. First is historical: the financial crisis proved a watershed moment in foreclosure litigation, and "recent" (i.e. post-financial crisis) cases tend to be more persuasive. All GPN cases are post-crisis, and consequently already take into account the changed landscape. Second is textual: because the acceleration clause is a matter of contract, it may vary from case to case, particularly with commercial loans. *See supra* note 25 (providing background on NOA). Because the GPN and its mechanism of effect remain the same, GPN case law is much more consistent. *But see generally* Bank of Am., N.A. v. Adeyiga, 2014 IL App (1st) 131252, 29 N.E.3d 60 (engaging in statutory contortionist's tricks), *see also infra* Part III.C (discussing and dissecting *Adeyiga* more generally).

counseling and work out a payment plan with the lender.[40] The GPN served as the centerpiece of the Homeowner Protection Act, providing a preforeclosure notice that gave borrowers a thirty-day grace period as well as information concerning housing counseling and other foreclosure guidance information.[41] Whereas acceleration clauses regulate content alone, the GPN statute was very explicit and required that the notice contain, word for word, the statutory block of text describing the "Grace Period Notice" to be given:

> GRACE PERIOD NOTICE
> YOUR LOAN IS MORE THAN 30 DAYS PAST DUE. YOU MAY BE EXPERIENCING FINANCIAL DIFFICULTY. IT MAY BE IN YOUR BEST INTEREST TO SEEK APPROVED HOUSING COUNSELING. YOU HAVE A GRACE PERIOD OF 30 DAYS FROM THE DATE OF THIS NOTICE TO OBTAIN APPROVED HOUSING COUNSELING. DURING THE GRACE PERIOD, THE LAW PROHIBITS US FROM TAKING ANY LEGAL ACTION AGAINST YOU. YOU MAY BE ENTITLED TO AN ADDITIONAL 30 DAY GRACE PERIOD IF YOU OBTAIN HOUSING COUNSELING FROM AN APPROVED HOUSING COUNSELING AGENCY. A LIST OF APPROVED COUNSELING AGENCIES MAY BE OBTAINED FROM THE ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION.[42]

Following the mandatory paragraph, the GPN was required to contain the referenced information, including contact information for both the Illinois Department of Financial and Professional Regulation and the lender.[43] If a borrower sought approved housing counseling, the grace period was automatically extended by an additional thirty days, giving the borrower additional time to seek and secure a loan modification or other negotiated plan.[44]

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40. 735 ILL. COMP. STAT. 5/15-1502.5 (repealed July 1, 2016). *See also* Erol, *supra* note 10, at 260 (offering a contemporary discussion on the origins of, and intent underlying, the Homeowner Protection Act).

41. 735 ILL. COMP. STAT. 5/15-1502.5(c)–(d) (repealed July 1, 2016).

42. *Id.* Note that the font's setting (all-caps), weight (bold), and size (fourteen-point) were specified by statute. The resulting notice tends to stand out.

43. *Id.* To ensure that the message was not buried, GPNs were not permitted to contain any other language: just the bare mandatory paragraph, contact information, and whatever other standard headings or footers the sender applied to its notices.

44. *Id.* at 5/15-1502.5(e); *see also id.* at 5/15-1502.5(a) (defining workout plans). Mechanically, upon intake of an applicable borrower, the housing counseling entity would send written notice to the lender at the address listed in the GPN; the additional thirty days ran from the date of the housing counselor's notice. This led to a maximum of a ninety-day grace period: thirty days of delinquency on the mortgage payment, thirty days' worth of basic GPN time, and thirty days of housing counseling time. Ninety days may seem like a long time—it may seem like an eternity to a

The GPN was broader in scope than the NOA it usually accompanied.[45] Whereas acceleration clauses are creations of contract, the GPN by its terms applied to *all* mortgages that secured residential property, so long as the mortgagor had neither abandoned the property nor filed for bankruptcy.[46] As with the NOA, the GPN's protections applied once per loan.[47] Despite the highly formal requirements of the GPN statute, a flawless notice was not always required: a small but well-regarded branch of case law held that, absent a showing of prejudice to the borrower, mere "technical defects" would not void a GPN that was otherwise substantively in compliance with the statute.[48]

The ramifications of the GPN were identical to those of the NOA: if a lender was required to send a GPN, but did not do so, it was unable to foreclose.[49] Should a borrower successfully plead and prove that the

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struggling homeowner—but as anyone familiar with the process will attest, it is not. *C.f.* 735 ILL. COMP. STAT. 5/15-1603(b)(1) (1990) (establishing a statutory redemption period of three months for residential property). The loss mitigation process will often take at least this long, if not significantly more.

45. Though the GPN's exclusivity requirement meant that a lender could not discharge both the GPN and NOA in a single mailing, 735 ILL. COMP. STAT. 5/15-1502.5(e) (repealed July 1, 2016), there was no prohibition against both clocks running concurrently. *E.g.*, Chi. Patrolmen's Fed. Credit Union v. Walker, 2016 IL App (1st), 153414-U, ¶ 33 (analyzing a GPN and NOA mailed, separately, on the same date).

46. 735 ILL. COMP. STAT. 5/15-1502.5(c), (j), (b) (repealed July 1, 2016). This is, of course, consistent with the self-evident statutory intent that the Homeowner Protection Act protects the most homeowners possible. *See* Erol, *supra* note 10, at 262–63 (discussing the purpose of the Homeowner Protection Act). Note that *any* prior bankruptcy filing mooted the GPN requirement. Boyd v. U.S. Bank, N.A., *ex rel.* Sasco Aames Mortg. Loan Tr., Series 2003-1, 787 F. Supp. 2d 747, 754 (N.D. Ill. 2011).

47. 735 ILL. COMP. STAT. 5/15-1502.5(c) (repealed July 1, 2016). *See supra* note 26 (noting only one NOA is required per loan).

48. Aurora Loan Servs., LLC v. Pajor, 2012 IL App (2d) 110899, ¶ 26, 973 N.E.2d 437, 444 (discussing a GPN sent one year before foreclosure case filed). *See also* Bank of Am., N.A. v. Luca, 2013 IL App (3d) 120601, ¶¶ 15–16, 999 N.E.2d 361, 364 (citing *Pajor*, 2012 IL App (2d) 110899, ¶ 26, 973 N.E.2d at 443 (finding the statute satisfied when a GPN was sent to the husband alone, even though the wife had actual knowledge of proceedings and had attempted loss mitigation)); Wells Fargo Bank v. Eberhardt, 2013 IL App (1st), 121114-U, ¶ 6 (finding the statute satisfied when the address to which GPNs were sent omitted the condominium number, but were still deliverable and delivered). But note that, because the content of the GPN is both strictly regulated by statute and essential to its purpose, an error in the GPN's body itself is unlikely to be considered "technical," as it might very well prejudice the recipient. *See* Casey B. Hicks, *Update to Illinois Grace Period Notice Needed for Residential Foreclosures*, WELTMAN, WEINBERG & REIS (Oct. 6, 2015), http://www.weltman.com/?t=40&an=45349&format=xml&p=7734 (noting that the Illinois Department of Financial and Professional Regulation's consumer hotline, which was a required element of any GPN, had changed, and consequently future GPNs needed to be altered to include the new number).

49. 735 ILL. COMP. STAT. 5/15-1502.5(d) (repealed July 1, 2016) provides an explicit prohibition on legal action within the initial thirty-day grace period. Section 5/15-1502.5(e) extends that prohibition to the housing counselor's thirty-day period. Section 5/15-1502.5(h)

required GPN was not sent, all orders entered in the case were required to be vacated as void, and the case dismissed.[50]

2. The Repeal

Unlike an acceleration clause, which exists as a matter of contract between the parties, the GPN was a statutory creation, and its applicability was governed by statute. The GPN requirement applied to all cases filed on or after April 6, 2009, the effective date of the Illinois Homeowner Protection Act.[51] As enacted, the GPN statute had a two-year sunset clause, and was originally set to expire in 2011.[52] The Illinois General Assembly, however, extended the sunset provision twice, initially to July 1, 2013 and then to July 1, 2016.[53] Because July 2016 came and went with no renewal, the GPN expired by its terms.[54] Though it is always possible that the General Assembly could revive the GPN, either through reimplementation of the existing (repealed) statute or through a separate provision, such action does not seem to be in the cards

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provides that the GPN's protections may not be waived.

50. Bank of Am., N.A. v. Adeyiga, 2014 IL App (1st) 131252, ¶¶ 125–27, 29 N.E.3d 60, 84. As with *Accetturo*, see *supra* note 36 (discussing NOA filing and notice requirements), though *Adeyiga* has its own analytical failings, discussed *infra* in Part IV.B (discussing how notice claims must be pled under GPN), its summary of how the failure to properly send a GPN plays out is quite accurate. *See also* Banco Popular N. Am. v. Gizynski, 2015 IL App (1st) 142871, ¶¶ 60–61, 39 N.E.3d 205, 217 (stating that because the purpose of the GPN is to provide a preforeclosure opportunity to engage in workout discussions, the failure to send the GPN requires vacation, regardless of prejudice or lack thereof to borrowers).

51. The Homeowner Protection Act provided for effectivity upon becoming law; it was approved, and therefore effective, on April 6, 2009. Illinois Homeowner Protection Act of 2009, Pub. Act 95-1047, § 99. *See also* HSBC Bank, USA, N.A. v. Morales, 2015 IL App (1st), 130706-U, ¶¶ 7, 22 (noting where the complaint was filed *on* April 6, 2009, GPN compliance was mandatory).

52. Illinois Homeowner Protection Act of 2009, Pub. Act 95-1047, § 35(k) (2009) (stating that the GPN statute is repealed by its terms "2 years after the effective date of [April 6, 2009]"). Interestingly, before the Homeowner Protection Act was even signed, a bill was proposed to extend the GPN's grace period to sixty days, with an additional sixty days for housing counseling. H.B. 2004, 96th Gen. Assemb., Amend. of Mar. 17 (Ill. 2009). Berton J. Maley, *Coming Soon: Pre-Foreclosure Grace Period in Illinois*, NORTHERN L. BLOG (Mar. 31, 2009), http://www.northernlawblog.com/2009/03/coming-soon-pre-foreclosure-grace.html. The amendment died in committee, and no further attempt to extend the period appears to have been made.

53. Save Our Neighborhoods Act of 2010, Pub. Act 96-1419, § 15(k) (2010) (extending the repeal date to July 1, 2013); Act of June 20, 2013, Pub. Act 98-25, § 5(k) (extending the repeal date to July 1, 2016).

54. 735 ILL. COMP. STAT. 5/15-1502.5(k) (repealed July 1, 2016) ("This Section is repealed July 1, 2016."). Despite its broad applicability and repeated extensions, the GPN statute was always a temporary provision. *See, e.g.*, *Adeyiga*, 2014 IL App (1st) 131252, ¶ 2 n.1, 29 N.E.3d at 62 n.1 (characterizing GPN as a "temporary provision").

at this time.[55]

Though as of this writing no appellate court has squarely addressed the effect of the GPN's repeal provision on pending cases, it is likely that courts will find the effect of the repeal to be immediate and draconian: the GPN is no longer a consideration in any form.[56] Illinois case law is quite clear that, when a statute has been unconditionally repealed without a savings clause or other indication of persistence, the statute no longer applies to any case in which a court has not rendered a final judgment.[57]

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55. *See* Diana Carpintero & Blake Strautins, *Several Illinois Foreclosure Provisions Sunset . . . But Will They Rise Again?*, DS NEWS (Nov. 22, 2016), http://www.dsnews.com/uncategorized/11-22-2016/several-illinois-foreclosure-provisions-sunset-will-rise (noting the Illinois General Assembly's "uneven treatment" of IMFL provisions, and suggesting that other provisions may be re-extended, but that the GPN statute will not). *See also* Ill. Credit Union League, *Grace Period Notification Requirement Repealed*, ILL. CREDIT UNION LEAGUE (July 7, 2016), http://accomplus.net/wp-content/uploads/2016/08/Bulletin-Homeowner-Protection-1.pdf (describing the GPN repeal, speculating that advocacy groups were likely to seek its reinstatement, and suggesting that credit unions keep sending GPNs until the effect of the repeal is settled).

56. The Author is informally aware of several parallel proceedings concerning the matter, and suspects this issue will develop into a proverbial race to the courthouse to see which case—or appellate district—will resolve it first. As of this writing, one case has partially addressed the issue: *U.S. Bank v. Heikkinen*, an unpublished decision from the Illinois Appellate Court, Second District. 2017 IL App (2d) 160253-U. In *Heikkinen*, the court remanded for an evidentiary hearing on a GPN issue, largely tracking *Adeyiga*. *Id.* ¶¶ 57–60 (citing *Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 125–47, 29 N.E.3d at 60). But along the way, the *Heikkinen* court dismissed a challenge to the GPN statute's validity, holding in a footnote that the "[p]laintiff is under the mistaken belief that this section [i.e., the GPN statute] 'expired' on July 1, 2016. Only section 5/15-1502.5(k) 'expired;' which does not affect the required 30-day grace period notice." *Id.* ¶ 54 n.3. This appears to suggest that the "repeal" language of the GPN statute, section 5/15-1502.5, only applies to the "repeal" clause itself—section 5/15-1502.5(k)—rather than to the GPN as a whole. It furthermore appears to suggest that the language of section 5/15-1502.5(k), in applying to "this section," applies only to section 5/15-1502.5(k) itself, rather than the entirety of section 5/15-1502.5. The *Heikkinen* court's suggestions are *ludicrous*. The court itself *misquotes* the GPN statute—which is "repealed," not "expired," a distinction that matters when discussing the effect of a statutory repeal. The language of section 5/15-1502.5(k) refers to "this section," but so does every other numbered subsection of 5/15-1502.5; "section" clearly refers to section 5/15-1502.5 as a whole. Most importantly, it is obvious that the GPN statute was always intended to be a temporary statute: upon a certain date, the statute was to be repealed in its entirety. *See supra* notes 51–55 (discussing the history of repeal provision of GPN). Repeal was the unquestioned legislative intent, repeal was how it was interpreted, and until January 30, 2017, every single court to ever address the issue treated the GPN statute as a whole with an expiration date. *See, e.g.*, *Adeyiga*, 2014 IL App (1st) 131252, ¶ 2 n.1, 29 N.E.3d at 62 n.1 (characterizing GPN as a "temporary provision").

57. *E.g.*, Merlo v. Johnston City & Big Muddy Coal & Mining Co., 101 N.E. 525, 527 (Ill. 1913) (citing South Carolina v. Gaillard, 101 U.S. 433, 438 (1879) (discussing extensively the types of repeal and effects of each)). Note that this principle applies even on appeal: if a GPN appeal were pending after July 1, 2016, the appellate court would have to rule as if the statute no longer applied. *Id. But see* Bank of Am., N.A. v. Shlyapochnik, 2016 IL App (1st), 151848-U, ¶¶ 18–20 (ruling, on September 20, 2016, on the merits of a GPN, without reference to section 5/15-1502.5(k)'s repeal provision—though, depending on when briefing occurred, perhaps the repeal had not yet taken effect).

Any such repeal is therefore retrospective: as soon as the repeal occurs, the statute is obliterated, and it may offer no further relief.[58] Because the GPN specifically provides that it "is repealed"—as opposed to "shall become inoperative" or similar, less absolute language[59]—it is likely that the GPN is, for all intents and purposes, no longer a factor in foreclosure cases.[60]

Despite its mootness,[61] the GPN provisions and accompanying case law provide a useful analogy for discussion of the NOA. Both set forth specific and technical requirements for preforeclosure notices to residential homeowners, both are generally discharged by means of a

58. *E.g.*, People *ex rel.* Eitel v. Lindheimer, 21 N.E.2d 318, 322 (Ill. 1939) (citing *Merlo*, 101 N.E.525 (Ill. 1913) (providing that an absolute repeal obliterates the statute and wipes out its remedies)). Note that the general savings clause provided for by the Statute on Statutes, 5 ILL. COMP. STAT. 70/4 (1874), would not apply. The Statute on Statutes, by its terms, only applies to any *new* law that repeals a former law; the GPN statute expired by its *own* terms. *See* Randall v. Wal-Mart Stores, Inc., 673 N.E.2d 452, 455–56 (Ill. App. Ct. 1996) (stating repeals are presumptively retroactive, and the Statute on Statutes will only interfere if there is a clear expression of contrary legislative intent). Furthermore, it is unclear what sort of relief a dismissal based on the GPN could offer. If a court found, for example, that the GPN requirement applied to all cases filed prior to July 1, 2016, and that the GPN was not sent, the default—indeed, the only available—remedy would be dismissal, with the expectation that the lender send a proper GPN, wait thirty days, and then refile its case. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 127, 29 N.E.3d at 84. But because the GPN statute has been repealed, the lender would not *now* be obligated to send a GPN—so the lender could refile the same case immediately, on the same day the case was dismissed, without changing a single word of its complaint or taking any other action, and the new case would be perfectly compliant. Indeed, res judicata would apply to push the new case into the same posture on the merits as the old case. This is exactly the sort of perfectly futile act that courts are unwilling to twist a statute to mandate. Goldberg v. Astor Plaza Condo. Ass'n, 2012 IL App (1st) 110620, ¶¶ 66–68, 971 N.E.2d 1, 18.

59. Such as, for instance, the language in section 5/15-1508(d-5) concerning whether a judicial sale may be set aside upon proof that a Home Affordable Modification Program ("HAMP") application was pending at the time of sale: such provisions "shall become inoperative on January 1, 2018." 735 ILL. COMP. STAT. 5/15-1508(d-5) (1991). *But see Heikkinen*, 2017 IL App (2d) 160253-U, ¶ 54 n.2 (characterizing section 5/15-1502.5(k) as an "expired" provision, rather than a "repealed" provision). *Heikkinen*'s reading is, to say the least, problematic for other reasons. *See supra* note 56 (discussing *Heikkinen*).

60. At most, an exceptionally strained reading of section 5/15-1502.5(k) could argue that the repeal provision was prospective, rather than retrospective: that is, the GPN requirement still would apply to all cases filed before July 1, 2016. *But see, e.g.*, *Randall*, 673 N.E.2d at 455 (noting that repeals are presumptively retrospective). Even if GPNs somehow remained at issue, they would become less relevant overall, as the number of cases to which they would apply would be fixed, and could only diminish. *See, e.g.*, Rehman v. Pierce & Assocs., P.C., No. 16 C 5178, 2017 WL 131560 (N.D. Ill. Jan. 13, 2017) (litigating, in 2017, the propriety of a GPN sent in 2015).

61. Here and henceforth, this Article assumes that the GPN statute has been fully mooted as a result of its expiration, *see supra* notes 57–59 and accompanying text (discussing the expiration of the GPN statute), and can have no effect on any further litigation. This Article also disregards the *Heikkinen* holding on the issue in its entirety. *See supra* note 57 (discussing flaws of *Heikkinen*).

letter from the lender to the borrower,[62] and because of their similarities, both are usually found together, raised at the same time in the same manner.[63] Though the GPN may be gone, because the cases interpreting it may inform the NOA, it is by no means forgotten.

C. Federal Factors

The relationship between borrower and lender, including any acceleration clause, is a matter of contract; the broader foreclosure process, including provisions such as the GPN, is governed by state law. But both contract and state law exist within the shadow of a much wider body of regulation designed to cover mortgages, foreclosures, and consumer protections in general: federal law.

One of the most prominent federal responses to the 2008 financial crisis was the Dodd-Frank Act which, among many other things, created the Consumer Financial Protection Bureau ("CFPB") to oversee mortgage servicing regulation.[64] The CFPB inherited rulemaking authority over two key federal statutes: the Truth in Lending Act ("TILA") and the Real Estate Settlement Procedures Act ("RESPA") respectively.[65]

Though several federal laws may interact with the foreclosure process,

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62. Though not, of course, the *same* letter. *See supra* note 46 (discussing the differences in the letters). *See also supra* Part I.B.2 (discussing the typical resolution of GPN and NOA issues).

63. Obviously the case law as to *how* GPN and NOA should be raised differs. *Compare infra* Parts III.A–B (analyzing NOA as deemed and construed allegation), *with infra* Part III.C (reviewing GPN as an affirmative defense). But because they are so similar, defendants tend to raise them as a pair: both as denials of deemed and construed allegations, both as affirmative defenses, and so forth. *See, e.g.*, Chic. Patrolmen's Fed. Credit Union v. Walker, 2016 IL App (1st), 153414-U, ¶¶ 5, 31 (noting that the court saw "no reason to distinguish" GPN and NOA, either procedurally or in resolution on the merits).

64. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111–203, 124 Stat. 1376–2223 (2010). Title X of Dodd-Frank established the Consumer Financial Protection Bureau ("CFPB"). *Id.* §§ 1011–18. *See generally* Margaret R.T. Dewar, Comment, *Regulation X: A New Direction for the Regulation of Mortgage Servicers*, 63 EMORY L.J. 175 (2013) (arguing that CFPB's amendments to the Real Estate Settlement Procedures Act ("RESPA") lay within the scope of the agency's power under the *Chevron* doctrine). *But see* Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017) (proposed bill to end *Chevron* deference); State Nat'l Bk. of Big Spring v. Lew, 795 F.3d 48 (D.C. Cir. 2015) (finding that the plaintiff-bank had standing to challenge the constitutionality of the CFPB, and remanding for further proceedings); Ryan Tracy, *Donald Trump's Transition Team: We Will 'Dismantle' Dodd-Frank*, WALL STREET J. (Nov. 10, 2016), http://www.wsj.com/articles/donald-trumps-transition-team-we-will-dismantle-dodd-frank-1478800611 (noting the threat to the Dodd-Frank Act).

65. RESPA, 12 U.S.C. §§ 2601–17 (1974); The Truth in Lending Act, 15 U.S.C. §§ 1601–16 (1976). The Truth in Lending Act ("TILA") imposes its own requirements. Though as its name suggests, the TILA focuses on the *lending* process itself, regulating the origination of mortgages, rather than their foreclosure. Such procedures are outside the scope of this Article.

this Article focuses solely on RESPA's requirements. In turn, it highlights three of RESPA's provisions: the federal delinquency notice, the federal stay period, and the face-to-face counseling requirements.[66]

1. Federal Delinquency Notice

The most directly analogous federal requirement to Illinois' GPN is 12 C.F.R. § 1024.39 (i.e., RESPA's implementing statute, Regulation X): "Early intervention requirements for certain borrowers"—or, as this Article calls it, the Federal Delinquency Notice ("FDN").[67] As with the GPN, the FDN is intended to provide delinquent borrowers with information about potential loss mitigation options. Unlike the GPN, however, the FDN is not causally linked to a foreclosure suit—and also unlike the GPN, the FDN was recently amended and expanded.

Pursuant to its mandate, the CFPB in 2013 amended RESPA's implementing regulation—the memorably named "Regulation X"—adding a host of procedures and requirements designed to protect consumers and enable more effective oversight.[68] The CFPB took care to note that its amendments to Regulation X were not meant to mandate loss mitigation, but rather to ensure access to loss mitigation options where such were available.[69] Consequently, several of the central amendments to Regulation X were designed to ensure notice of, and

66. Respectively, 12 C.F.R. § 1024.39 (2013), 12 C.F.R § 1024.41(f) (2013), and 24 C.F.R. § 203.604 (1996), discussed *infra* Parts II.C.1–3.

67. 12 C.F.R. § 1024.39 (2013). Between NOA, GPN, RESPA, TILA, F2F, and the other alphabet soup of the contemporary foreclosure vocabulary, 12 C.F.R. § 1024.39's Federal Delinquency Notice ("FDN") would not quite fit unless it too received a snappy TLA. *See* WILLIAM SAFIRE, SAFIRE'S POLITICAL DICTIONARY 15 (5th ed. 2008) (providing an entry for New Deal–era "alphabet agencies").

68. Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696 (Feb. 14, 2013) (to be codified at 12 C.F.R. pt. 1024) (final rule amending Regulation X). *See also* Regulation X, 12 C.F.R. § 1024 (2011). TILA, which is implemented by the creatively named Regulation Z, 12 C.F.R. § 226, was amended concurrently by Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z). Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 10,902 (Feb. 14, 2013) (to be codified at 12 C.F.R. pt. 1026). *See generally* John Rao, *Consumer Corner*: *New Servicing Regulations Adopt Sensible Approach*, 32-4 AM. BANKR. INST. J. 16 (2013) (providing an overview of CFPB's amendments to RESPA and TILA).

69. *E.g.*, 12 C.F.R. § 1024.41(a) (2013) ("Nothing in [this section outlining loss mitigation procedures] imposes a duty on a servicer to provide any borrower with any specific loss mitigation option.") *See also* Rao, *supra* note 68, at 96 (discussing the purpose of the CFPB amendments). *But see* Judith Fox, *The Future of Foreclosure Law in the Wake of the Great Housing Crisis of 2007–2014*, 54 WASHBURN L.J. 489, n.83 ("No specific form of loss mitigation is mandated by [12 C.F.R. § 1024.39(b)]. In fact, a lender would be in compliance if it contacted a homeowner to tell him that no loss mitigation options are available.").

create procedures for, loss mitigation.[70] The FDN requires written notice to borrowers within forty-five days of their delinquency:

> (2) Content of the written notice. The notice required by paragraph (b)(1) of this section shall include:
>
> (i) A statement encouraging the borrower to contact the servicer;
>
> (ii) The telephone number to access servicer personnel assigned pursuant to § 1024.40(a) and the servicer's mailing address;
>
> (iii) If applicable, a statement providing a brief description of examples of loss mitigation options that may be available from the servicer;
>
> (iv) If applicable, either application instructions or a statement informing the borrower how to obtain more information about loss mitigation options from the servicer; and
>
> (v) The Web site to access either the Bureau list or the HUD list of homeownership counselors or counseling organizations, and the HUD toll-free telephone number to access homeownership counselors or counseling organizations.

On its face, the FDN appears quite similar to the GPN; though the GPN sets out a script, as opposed to a bulleted list, both encourage loss mitigation and housing counseling and set out contact information for the same.[71] Unlike the GPN or NOA, however, the FDN does not operate as a condition precedent to foreclosure. Acceleration clauses provide that sending a NOA prior to acceleration is a *condition* of acceleration and, as a practical matter, therefore a condition to the foreclosure; the GPN flatly barred any foreclosure action until a proper GPN was provided.[72] The FDN does neither. Though its language is mandatory—providing that the servicer *shall* provide the notice—there is no causal link to the foreclosure itself. Failure to send a FDN may expose a foreclosing lender to liability for damages, but it will not enjoin or bar a foreclosure.[73]

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70. *See, e.g.*, 12 C.F.R. § 1024.38 (2013) (noting general recordkeeping procedures); *id.* § 1024.40 (stating provisions for maintaining a single contact person for servicers), *id.* § 1024.41 (2013) (setting guidelines for loss mitigation review procedures). *See also* Dewar, *supra* note 64, at 178 (highlighting CFPB's 2013 amendments to RESPA).

71. 12 C.F.R. § 1024.39's model clauses are effective, if uninspired, and set forth substantially the same points as the FDN itself, except framed in the declarative. 12 C.F.R. § 1024, App'x MS-4 (2013); 78 Fed. Reg. 10,887, 10,887 (Feb. 14, 2013).

72. *See supra* note 25 (offering the text of a standard acceleration clause); *see also* 735 ILL. COMP. STAT. 5/15-1502.5(c) (repealed July 1, 2016).

73. *See* 12 U.S.C. § 2605(f)(1) (2010) (limiting damages claims to the sum of actual damages plus a maximum of $2,000 in additional damages); Roosevelt Cayman Asset Co. II v. Mercado, No. 15-2314 (BJM), 2016 WL 3976627, at * 3–4 (D.P.R. July 22, 2016) (holding 12 C.F.R. § 1024.39(b) violations, even if properly alleged, would not bar foreclosure, because Regulation X limits borrowers to monetary remedies only). *See also* Gresham v. Wells Fargo Bank, N.A., 642 Fed. App'x 355, 359 n.16 (5th Cir. 2016) (noting that 12 C.F.R. § 1024.39 does not provide for a

And yet the FDN is not set in stone. The current version, as implemented by the CFPB's amendments in 2013 and effective as of 2014, requires the borrower to make a good-faith effort at live contact and to send the FDN, providing logical exemptions when a debtor is in bankruptcy or has requested that the lender cease communication.[74] Yet even before its implementation, observers noted that the amendments were far from perfect.[75]

Perhaps in recognition of the deficiencies of the 2013 Regulation X amendments, the CFPB has already approved a second set of amendments, effective October 19, 2017, which include amendments to 12 C.F.R. § 1024.39.[76] The forthcoming iteration adds one major change: the FDN's notice requirements are to be recurring, with good-faith attempts at live contact required within thirty-six days of *every* missed payment, and written notice of delinquency required every forty-five days so long as the loan remains delinquent.[77]

None of the forthcoming amendments would make the FDN a condition precedent.[78] Nevertheless, Regulation X is an exceedingly

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private right of action so as to give borrowers standing to enforce it, regardless of the remedy sought). Note that, as of this writing, the Seventh Circuit has not addressed the FDN at all, and the only Illinois district court to do so addressed it in the context of communications at issue in the Fair Debt Collection Practice Act ("FDCPA") claims, without taking a stance on its effect (or lack thereof) on a foreclosure. Matmanivong v. Nat'l Creditors Connection, Inc., 79 F. Supp. 3d 864 (N.D. Ill. 2015).

74. 12 C.F.R. § 1024.39 (2013). The good-faith contact requirement is much less onerous than the face-to-face meeting requirements of 24 C.F.R. § 203.604, as 12 C.F.R. § 1024.39(a) only requires a "good faith effort" at live contact, which can be satisfied through a telephone call. Note further that, to be exempt from the FDN requirements, a lender must have sent a FDCPA notification pursuant to 15 U.S.C. § 1692c(c), acknowledging the borrower's request that communications cease. 12 C.F.R. § 1024.39(d)(2) (2013).

75. *See, e.g.*, Dewar, *supra* note 64, at 214–21 (discussing gaps in Regulation X amendments, and suggesting fixes). *See also* Rao, *supra* note 68, at 96 (observing that it was "not surprising" that Regulation X amendments had some problems given the abbreviated implementation timeframe); Frederick Tung et al., Symposium, *Consumer Bankruptcy Panel: Recent Developments in Bankruptcy Regulation: Mortgage Servicing Rules, the FDCPA, and the CFPB*, 32 EMORY BANKR. DEV. J. 303 (2016) (comments of Sarah B. Mancini) (discussing the conflict between bankruptcy rules and Regulation X).

76. Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and Truth In Lending Act (Regulation Z), 81 Fed. Reg. 72,160, 72,373 (Oct. 19, 2016, effective Oct. 19, 2017) (to be codified at 12 C.F.R. pts. 1024, 1026).

77. 12 C.F.R. §§ 1024.39(a), 1024.39 (b)(1) (effective Oct. 19, 2017). The amendments also significantly revise and complicate the bankruptcy exception in an attempt to streamline interaction between Regulation X, the Bankruptcy Code, the FDCPA, and other sundry objections. 12 C.F.R. § 1024.39(c), 1024.39 (d) (effective Oct.19, 2017). *See also* Tung et al., *supra* note 75 (discussing interaction between bankruptcy rules, 12 C.F.R. § 1024.39, and Regulation X in general).

78. *But see* 12 C.F.R. § 1024.39(d)(3)(i) (effective Oct. 19, 2017) (noting that if a borrower has sent the FDCPA-compliant request to cease contact, but loss mitigation options are available, the

complex set of guidelines, obligations, and other requirements, and though the FDN does not currently affect the timing of foreclosure filing, other portions of Regulation X do.[79] Because the FDN is so similar in purpose and content to the GPN, and because borrowers and lenders are about to see and send a whole lot more of them, the statute bears keeping in mind.

2. Federal Stay Period

Whereas the FDN only provides for notice, and does not interact with foreclosure proceedings, a related provision of Regulation X explicitly provides for a grace period on foreclosures. 12 C.F.R. § 1024.41(f), "Prohibition on Foreclosure Referral," essentially provides for a 120-day grace period between the borrower's default and initiation of foreclosure proceedings.[80] 12 C.F.R. § 1024.41(f), which this Article will refer to as the federal stay period ("FSP"), provides in part:

> (1) Pre-foreclosure review period. A servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless:
>
> (i) A borrower's mortgage loan obligation is more than 120 days delinquent;
>
> (ii) The foreclosure is based on a borrower's violation of a due-on-sale clause; or
>
> (iii) The servicer is joining the foreclosure action of a superior or subordinate lienholder.

The purpose of the federal stay period is to provide a 120-day "pre-foreclosure review period," and ensure that diligent borrowers have an opportunity to apply for loss mitigation.[81] The only exceptions to the

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lender must provide a modified FDN, no more than once every 180 days, including a statement that it may or will proceed to foreclosure). Though the implementation of new 12 C.F.R. § 1024.39(d)(3)(i) is entirely speculative, its explicit reference to foreclosure suggests that, under certain highly specific conditions, it contemplates a FDN sent *prior* to the foreclosure action. This is likely not enough to turn the FDN into a highly specific condition precedent, but the direct reference is unusual.

79. *E.g.*, 12 C.F.R. § 1024.41(f) (2013) (barring foreclosure until a loan is more than 120 days delinquent, discussed *infra*). 12 C.F.R. § 1024.41(f) has also been amended, *see supra* note 50 (discussing the amendment), with a new version effective October 19, 2017. 81 Fed. Reg. 72,160, 72,373 (Oct. 19, 2016). Note also that the 120-day limitation of 12 C.F.R. § 1024.41(f) is remarkably absent in Illinois case law, appearing only once in an Illinois district court decision. Stephens v. Capital One, N.A., No. 15-cv-9702, 2016 WL 4697986, at *2 (N.D. Ill. Sept. 7, 2016) (finding that the borrowers-plaintiffs unsuccessfully appealed to, but did not allege a violation of, 12 C.F.R. § 1024.41(f)).

80. 12 C.F.R. § 1024.41(f) (2013).

81. Note that the 120-day federal stay period ("FSP") must elapse prior to "the *first notice* or filing required by applicable law." *Id.* § 1024.41(f)(1) (emphasis added). The NOA is imposed as

120-day stay occur if the property was sold, but the lender was not paid—in which case loss mitigation is not exactly on the table—or if the borrower is already delinquent on a separate mortgage and the property is already in foreclosure.[82] Section 2 of the FSP imposes a separate stay: if a borrower submitted a complete loss mitigation package during the 120-day stay, foreclosure is stayed until the lender addresses the loss mitigation application.[83]

Despite its phrasing in the mandatory—"*shall not* foreclose"[84]—failure to comply with the FSP will not invalidate a foreclosure. As with the FDN, the FSP is implemented through Regulation X under RESPA, which is not intended to bar a foreclosure.[85] 12 C.F.R. § 1024.41(a) provides for enforcement of the FSP, stating that a borrower may bring suit in response to a FSP violation, but the borrower's only recourse is money damages.[86] Injunctive relief (i.e. dismissal of a foreclosure, vacation of a judicial sale, or similar) is simply not available.[87]

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a matter of contract, not state or federal law—but the GPN was a first notice requirement imposed through state law. This leaves open the question as to whether the FSP's 120-day period had to expire *before* the GPN could even be sent. *Banking Law Bulletin: Foreclosure: Ready, Set, Go?*, SCHMIEDESKAMP ROBERTSON NEU & MITCHELL LLP (2013), http://www.srnm.com/foreclosure.html. *Compare supra* note 45 (discussing GPN and NOA running concurrently). No Illinois court appears to have addressed the interaction of FSP and GPN, and because the GPN repeal moots the issue, it is increasingly unlikely that any ever will.

82. 12 C.F.R. § 1024.41(f)(1)(ii)–(iii) (2013). The statute encompasses any foreclosure action by any other lienholder, not necessarily another mortgagee; the provision would be triggered by foreclosure of, for instance, a mechanic's or other professional lien. But the provision is triggered most frequently by interaction between mortgages. If a borrower pays the senior mortgage but not the junior, the junior may initiate a foreclosure. Foreclosure by a junior is an event of default under the senior, and 12 C.F.R. § 1024.31(f)(1)(iii) ensures that the senior mortgagee need not wait around four months before intervening to protect its interest.

83. 12 C.F.R. § 1024.41(f)(2) (2013). As a practical matter, this means that foreclosure is stayed until the loss mitigation package is denied—after all, if the lender *granted* a loss mitigation alternative such as a loan modification or forbearance, and the offer was accepted and performed by the borrower, then why would the lender proceed to foreclosure?

84. 12 C.F.R. § 1024.41(f)(1) (2014) (emphasis added).

85. *See* Gresham v. Wells Fargo Bank, N.A., 642 Fed. App'x 355, 359 n.16 (5th Cir. 2016) (discussing FDN's effect, or lack thereof, on pending foreclosure).

86. 12 U.S.C. § 2605(f) (2013) (providing for only money damages equal to actual damages, costs, and up to $2,000 in what are essentially discretionary punitive damages); 12 C.F.R. § 1024.41(a) (2014) ("A borrower may enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. § 2605(f)) (2013))."). As a practical matter, this means that a borrower's redress is limited to attorney's fees. While this is of course a welcome provision, providing a public policy incentive to keep lenders accountable, it does not provide the get-out-of-foreclosure-free card that borrowers might hope it would.

87. Though only one Illinois case addresses 12 C.F.R. § 1024.41(f) explicitly, its position is relatively clear. Stephens v. Capital One, N.A., No. 15-cv-9702, 2016 WL 4697986, at *4 (N.D. Ill. Sept. 7, 2016) (discussing how RESPA violations are only cognizable as money damages, and simply proceeding to foreclosure does not create actual damages). In perfect accord, a Michigan

As with the FDN, the FSP was modified in 2016, with amendments to take effect in October 2017.[88] Unlike the FDN's amendments, however, the FSP amendment is minor at best, correcting a slight omission in the original text, and does not affect either the timing of the stay or its enforcement.[89]

Though a violation of the FSP will not provide a defense to an otherwise valid foreclosure, the fact that it provides an explicit, mandatory stay makes it a statute worth keeping in mind. The only functional difference between the FSP and the GPN is that the FDN is not procedurally coupled to foreclosure proceedings as a mandatory precondition. Though there is no indication that the FSP will be made an intrinsic part of the foreclosure process like the GPN was, the FSP still bears note as a federal requirement designed to supplement notice requirements.[90]

3. Face-to-Face Counseling

Aside from more general obligations present in Regulation X, federal laws and regulations are downright rife with specific obligations, which may apply to any given mortgage. As a class, specific obligations are beyond the scope of this Article, but one bears mentioning due to the frequency with which it appears in mortgage foreclosure actions: the Department of Housing and Urban Development ("HUD")'s face-to-face counseling requirement.[91]

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district court addressed the issue more squarely: "[H]owever, the principal relief sought by Plaintiff—to set aside the sheriff's sale — is unavailable to him under RESPA." Brimm v. Wells Fargo Bank, N.A., Civ. No. 15-11327, 2016 WL 3522315, at *20 (E.D. Mich. June 28, 2016).

88. Mortgage Rules Under the Real Estate Settlement Procedures Act and the Truth in Lending Act, 81 Fed. Reg. 72,160, 72,373 (Oct. 19, 2016) (to be codified at 12 C.F.R. pts. 1024–26).

89. *Id.* The only change is in 12 C.F.R § 1024.41(f)(1)(iii), which now provides that a mortgagee may skip the 120-day stay if it is joining the existing foreclosure action of a subordinate *or superior* lienholder, instead of only a subordinate lienholder. This is perfectly consistent with the original text, and was likely the original intent of the section all along. The only practical effect of the FSP amendment is to swap "senior" and "junior" in the example described *supra* in note 82; the borrower and his or her rights are entirely unaffected.

90. The FSP could be coupled to foreclosure proceedings in three primary ways. First, RESPA could be amended, either by amending 12 C.F.R. § 1024.41(f) directly or by broadening the "damages only" enforcement provisions of 12 C.F.R. § at 2605(f). Second, a revived Illinois GPN could directly condition Illinois foreclosures on compliance with the federal FSP requirement. *But see supra* note 48 (explaining that GPN revival is unlikely). And third, courts could always take a different tack on interpreting the FSP's mandatory language, and read the existing statute as a mandatory precondition—though given the current structure of RESPA and existing judicial interpretations of its various loss mitigation provisions, that seems increasingly unlikely.

91. 24 C.F.R. § 203.604 (2015). Specific obligations, like the face-to-face requirement, tend to be imposed as a matter of regulation, and are consequently subject to change. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111–203, 124 Stat. 1376–2223

HUD insures certain loans made by private lenders.[92] Lenders of such loans are bound to additional restrictions in HUD regulations designed to encourage loss mitigation.[93] The face-to-face counseling requirement provides in part as follows:

> (b) The mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid.
> . . .
> (d) A reasonable effort to arrange a face-to-face meeting with the mortgagor shall consist at a minimum of one letter sent to the mortgagor certified by the Postal Service as having been dispatched. Such a reasonable effort to arrange a face-to-face meeting shall also include at least one trip to see the mortgagor at the mortgaged property, unless the mortgaged property is more than 200 miles from the mortgagee, its servicer, or a branch office of either, or it is known that the mortgagor is not residing in the mortgaged property.[94]

24 C.F.R. § 203.604(c) and 24 C.F.R. § 203.604(e), omitted above, adds and elaborates upon requirements, but the core face-to-face requirement is simple: for certain types of HUD-insured loans, a lender must reasonably attempt to secure a face-to-face meeting by sending both

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(2010) (incoming federal administration's intent to curtail CFPB regulations). But the face-to-face requirement itself has proven remarkably resilient. *See* Mellon Mortg. Co. v. Larios, No. 97 C 2330, 1998 WL 292387, at *2 (N.D. Ill. May 20, 1998) (discussing how the face-to-face requirement remained in effect despite termination and reshuffling of certain relevant U.S. Department of Housing Urban Development ("HUD") programs).

92. The National Housing Act of 1934, passed as part of the New Deal, created the Federal Housing Administration—a core HUD predecessor, and now an agency under HUD's aegis—to provide and insure home mortgage loans. Pub. L. 84-345, 48 Stat. 847 (1934). HUD remains statutorily authorized to issue and condition mortgage insurance. 12 U.S.C. § 1709 (2016).

93. As one court observed, the extra loss mitigation obligations are part and parcel of the HUD insurance program:

> The importance of making reasonable efforts to arrange for a face-to-face meeting cannot be overstated. . . . [A] fundamental understanding of the government-insured mortgage program that when lower income individuals are confronted with even relatively minor financial difficulties, they will often have trouble keeping up with their mortgage payments. As such, the regulations require mortgagees, who benefit greatly from the protections afforded them through the issuance of [Federal Housing Administration ("FHA")] backed mortgage loans, to work with mortgagors to give them a chance to take the reasonable steps necessary to save their homes.

HSBC Bank USA, N.A. v. Teed, 4 N.Y.S. 3d 826, 828–29 (N.Y.C.C. 2014).

94. Housing and Urban Development, 24 C.F.R. § 203.604(b), (d) (2015). Note that both actions are required; a lender's "reasonable effort" must include *both* a certified letter *and* a personal visit to the property. *E.g.*, Countrywide Home Loans v. Wilkerson, No. 03 C 50391, 2004 WL 539983, at *2 (N.D. Ill. Mar. 12, 2004) (denying a motion for summary judgment); *accord Teed*, 4 N.Y.S. 3d at 828 (examining that where only a letter was sent, "foreclosure action cannot be maintained").

a certified letter and a real, live human being to the property to try and engage in loss mitigation.[95]

Unlike the FDN or FSP, however, the face-to-face requirement is explicitly linked to the initiation of foreclosure proceedings.[96] If applicable, HUD servicing regulations are mandatory, and borrowers may raise the lender's failure to comply with the regulations as an affirmative defense.[97] A successfully pled and proven face-to-face defense is a complete defense to a mortgage foreclosure, requiring dismissal of the case, so as to permit the lender to send its letter and attempt its visit prior to initiating a proper foreclosure.[98]

Though it appears more rarely than either the statutory GPN did or contractual NOA does, the face-to-face counseling requirement is equally noteworthy in that it can provide a total defense to foreclosure in a way that the FDN and FSP requirements do not. With the repeal of the GPN statute, the face-to-face and NOA requirements stand as perhaps the two most impactful notice-based foreclosure defenses available; if they are successful, they mandate dismissal. But, and as lenders would be quick to point out, the key word is "if."

III. THE CASES: THREE CENTRAL FRAMEWORKS

In Illinois, three seminal cases govern the proper pleading of preforeclosure notices: *Adeyiga*, *Bukowski*, and *Accetturo*. Dating from 2014, 2015, and 2016 respectively, the three cases build upon each other, establishing, altering, and otherwise generally setting the stage for how to properly plead notice defects.

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95. The primary exceptions are fairly common sense: a face-to-face meeting is not required if the mortgagor does not live at the property, has already entered into a loss mitigation program, indicated that he or she does not wish the contact to occur, or lives more than 200 miles away from an office of either the lender or a servicer. 24 C.F.R. § 203.604(c) (2015). Much face-to-face litigation surrounds whether a particular loan is or is not within the applicable class of HUD regulations; this Article's discussion of face-to-face counseling requirements remains deliberately general. *E.g.*, Fed. Nat'l Mortg. Ass'n v. Schildgen, 625 N.E.2d 227, 229 (Ill. App. Ct. 1993) (holding a face-to-face defense meritless where HUD did not insure the loan).

96. 24 C.F.R. § 203.604 (2015).

97. JP Morgan Chase Bank v. Moore, 2015 IL App (1st) 142971-U, ¶ 57 (citing Bankers Life Co. v. Denton, 458 N.E.2d 203 (Ill. App. Ct. 1983)).

98. Mortg. Assocs. v. Smith, No. 86 C 1, 1986 U.S. Dist. LEXIS 20384, at *5–6 (N.D. Ill. Sept. 16, 1986). Note that the discussion of the face-to-face requirement is surprisingly thin in Illinois appellate case law, with only three appellate court holdings on the matter. Of those, *Bankers Life Co v. Denton* is central, having declared that failure to meet the face-to-face requirement was a viable affirmative defense and would bar a foreclosure. *Denton*, 458 N.E.2d at 203–04. Though *Denton* was a pre-IMFL case, both subsequent appellate holdings affirm it as good law under the IMFL's statutory scheme. *Schildgen*, 625 N.E.2d at 231; *accord* JP Morgan Chase Bank, N.A. v. Moore, 2015 IL App (1st) 142971-U.

Adeyiga strongly suggested that GPN issues were to be pled as affirmative defenses, analyzing the IMFL and finding that the GPN issue fell outside of the IMFL's deemed and construed allegations.[99] Though the GPN and NOA issues are quite similar, *Bukowski* did not follow *Adeyiga*'s lead. *Bukowski* instead demurred, holding that NOA issues should *not* be pled as affirmative defenses and should instead be pled as denials of the deemed allegations.[100] *Bukowski*'s approach largely abandoned the *Adeyiga* framework as being founded upon a fundamental misinterpretation of the IMFL. This combination set up an uncomfortable dichotomy: GPN issues were affirmative defenses, but NOA issues were denials of deemed allegations.

Accetturo, a case addressing the NOA, held that certain NOA claims were to be pled as denials of deemed allegations, as per *Bukowski*—but further held that certain other NOA claims were to be pled as affirmative defenses.[101] Rather than reconciling the *Adeyiga* and *Bukowski* positions, *Accetturo* further muddied the waters, reintroducing some of *Adeyiga*'s rhetoric into the realm of NOA issues.

A. Adeyiga*: Fixing Something That Was Not Broken*

Adeyiga was the first Illinois Appellate Court decision to address the proper procedural mechanism through which to raise GPN issues.[102] Though the GPN went into effect on April 6, 2009, it did not provide for an obvious mechanism by which homeowners could raise the issue.[103] Prior to *Adeyiga*, courts dealt with GPN issues at virtually every stage of litigation: as the basis for a motion to dismiss,[104] as denials of allegations

99. Bank of Am., N.A. v. Adeyiga, 2014 IL App (1st) 131252, ¶¶ 62–64, 29 N.E.3d 60, 72.

100. CitiMortgage v. Bukowski, 2015 IL App (1st) 140780, ¶¶ 17–19, 26 N.E.3d 495, 500.

101. Cathay Bank v. Accetturo, 2016 IL App (1st) 152783, ¶¶ 43–46, 66 N.E.3d 467, 480.

102. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 124, 29 N.E.3d at 83–84. As *Adeyiga* itself notes: "This is a case of first impression." *Id.* ¶ 1, N.E.3d at 62.

103. Illinois Homeowner Protection Act of 2009, Pub. Act 95-1047, 2007 Ill. Laws 1047, § 99. *See supra* note 51 (noting that the Illinois Homeowner Protection Act, and GPN, had the effective date of April 6, 2009). In this respect, of course, the GPN is no different from the majority of laws, very few of which spell out specifically *how* the issues are to be procedurally addressed.

104. *E.g.*, Bank of Am., N.A. v. Beeman, 2014 IL App (2d) 140313-U; *accord* HSBC Bank USA, N.A. v. Thomas, No. 11-CV-1170, 2011 U.S. Dist. LEXIS 84848 (C.D. Ill. Aug. 2, 2011).

of the complaint,[105] as affirmative defenses,[106] as a response to a plaintiff's motion for summary judgment,[107] as a section 5/2-1203 motion to vacate,[108] as a section 5/2-1401 petition to vacate,[109] and even as a separate counterclaim for damages.[110]

Adeyiga's two principal holdings directly addressed the procedure surrounding the GPN statute. First, the court explicitly held that proper sending of a GPN was not a deemed and construed allegation of a properly pled foreclosure complaint.[111] Second, the court implied that issues concerning the GPN should be raised as affirmative defenses, ultimately remanding for an evidentiary hearing to determine whether the GPN was, in fact, sent.[112]

1. *Adeyiga* at First Instance

At the trial court level, *Adeyiga* was a fairly unremarkable contested residential foreclosure. In 2011, BAC Home Loans Servicing—Bank of America's predecessor in interest—filed its complaint, a one-count pleading that used the statutory short form complaint proscribed in the IMFL.[113] One of the defendants filed a form pro se answer thereafter.[114]

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105. *Bukowski*, 2015 IL App (1st) 140780, ¶ 17, 26 N.E.3d at 499. *See* 735 ILL. COMP. STAT. 5/15-1504(c)(9) (2013) (deemed and construed allegations in a well-pled foreclosure complaint). Indeed, the *Adeyiga* trial court's own decision, reversed by the appellate court, suggested that a GPN was properly raised as a denial of the deemed and construed allegations, rather than as an affirmative defense. Bank of Am., N.A. v. Adeyiga, 11 CH 02979 (Ill. Cir. Ct. Dec. 8, 2011) (order granting the plaintiff's motion for summary judgment). The appellate court's rejection of such reasoning is the principal flaw in the *Adeyiga* decision. *See Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 100–02, 29 N.E.3d at 79–82; *see also infra* Part IV.B (criticizing *Adeyiga*'s holding concerning the effect and scope of deemed and construed allegations).

106. *E.g.*, Bayview Loan Servicing, LLC v. Szpara, 2014 IL App (2d) 140331-U.

107. *E.g.*, Brickyard Bank v. Feigenbaum, 2013 IL App (1st) 130220-U.

108. *E.g.*, Bank of Am., N.A. v. Luca, 2013 IL App (3d) 120601, ¶¶ 12–13, 999 N.E.2d 361, 363–64; *see also* 735 ILL. COMP. STAT. 5/2-1203 (2011) (requiring a 5/2-1203 motion for postjudgment relief to be filed within thirty days of judgment).

109. *E.g.*, Aurora Loan Servs., LLC v. Pajor, 2012 IL App (2d) 110899, ¶¶ 15–17, 973 N.E.2d 437, 441. *See also* 735 ILL. COMP. STAT. 5/2-1401 (2016) (requiring 5/2-1401 petition for postjudgment relief to be filed after thirty days, but within two years, of judgment).

110. *E.g.*, Boyd v. U.S. Bank, N.A., *ex rel.* Sasco Aames Mortg. Loan Tr., Series 2003-1, 787 F. Supp. 2d 747 (N.D. Ill. 2011) (examining how courts viewed GPN issues at various stages of litigation). But note that such a claim necessarily fails on the merits; the GPN does not create a separate right of action, for damages or otherwise. *Id.* at 750, 752.

111. Bank of Am., N.A. v. Adeyiga, 2014 IL App (1st) 131252, ¶¶ 68–70, 29 N.E.3d 60, 73.

112. *Id.* ¶ 59, 29 N.E.3d at 64, 71, 83. *But see infra* note 162 (discussing *Adeyiga* on remand, and noting that evidentiary hearing was never held, as the GPN statute was repealed).

113. *Id.* ¶¶ 2, 35–36, 29 N.E.3d at 63, 67; s*ee also* 735 ILL. COMP. STAT. 5/15-1504(a) (2013) (setting forth statutory form complaint).

114. The answer was drafted by completing a foreclosure answer form provided by the Richard J. Daley Center's Chancery Division Advice Desk, the courthouse's legal aid center. *Adeyiga*,

The answer denied the plaintiff's standing to sue, but made no mention of the GPN.[115]

Thereafter, the defendant filed a number of motions, including three discovery motions and a motion for leave to file an amended answer, affirmative defenses, and counterclaim.[116] The trial court denied the discovery motions as largely incoherent—appealing to non-Illinois law; requesting production of answers, rather than documents; and referring to "telephonic coordinates;" among other oddities—and stated that it would consider reopening discovery "when and if" the defendant meaningfully participated in Cook County's court-annexed mediation program.[117] It further denied the defendant's request for leave to amend his answer, noting that because the proposed answer was "inexplicable," "confusing," and "bizarre," it was clearly prepared by someone other than the defendant not licensed to practice law, and that the defendant did not understand the nature or content of the arguments raised therein.[118] The

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2014 IL App (1st) 131252, ¶¶ 14–15, 29 N.E.3d 60, 64; *see* Verified Answer to Complaint to Foreclose Mortgage, Bank of Am., N.A. v. Adeyiga, 11 CH 02979 (Ill. Cir. Ct. Feb. 8, 2011). Note that the form used by the *Adeyiga* defendant was a 2002 draft form. Shortly before the issuance of *Adeyiga*, the Clerk's Office in April of 2014 revised their draft foreclosure answer form. The 2014 revised form, still in use today, specifically provides that "[a]ny responses set forth in this answer shall not be construed to be an admission of the deemed allegations set forth in [the IMFL]." *Appearance and Answer to Complaint for Foreclosure Mortgage, Form CCCH 0315 A*, CLERK CIR. CT. COOK COUNTY, ILL. (Apr. 8, 2014), http://12.218.239.52/Forms/pdf_files/CCCHN315.pdf.

115. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 27, 29 N.E.3d at 65. The trial and appellate courts disagreed on whether the specific statement in the answer was a denial of plaintiff's *standing*, or merely its *capacity*. *Compare id.* ¶ 33–34, 29 N.E.3d at 66, *with id.* ¶¶ 61–62, 29 N.E.3d at 72 (analyzing the trial court's judgment and inaccuracy of discussion therein). Because the issue is not relevant to the present analysis, this Article will not discuss the various allegations concerning, and resolutions of, standing and capacity in *Adeyiga*. With respect to standing, the appellate court's holding is conventional and largely unremarkable. *See infra* note 134 (examining why the case was remanded to the trial court); *see also generally* U.S. Bank, N.A. v. Kosterman, 2015 IL App (1st) 133627, 39 N.E.3d 245 (Ill. App. Ct. 2015) (discussing standing in the mortgage foreclosure context).

116. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 15, 29 N.E.3d at 64.

117. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 16, 29 N.E.3d at 64; *Adeyiga*, 11 CH 02979 (Ill. Cir. Ct. Mar. 25, 2011) (order denying motion to file an amended answer, affirmative defenses, jury demand, and counterclaim).

118. *Adeyiga*, 11 CH 02979 (Ill. Cir. Ct. Mar. 25, 2011) (order denying motion to file an amended answer, affirmative defenses, jury demand, and counterclaim). Because the trial court did not permit the filing of the pleading, it does not appear in the trial court record. The court's written denial of the motion for leave, however, allows us to infer the general nature of the answer. The language used by the trial court indicates that the proposed answer was, in the vernacular of mortgage foreclosure practice, *eccentric*. *See* Bank of Am., N.A. v. Adeyiga, 11 CH 02979 (Ill. Cir. Ct. Mar. 25, 2011) (order denying motion to file an amended answer, affirmative defenses, jury demand, and counterclaim). Neither the trial nor appellate courts mentioned whether the unfiled proposed answer or affirmative defenses raised the GPN issue, though given their mutual

denial was without prejudice to the issues, so long as they were raised appropriately—presumably, in a coherent manner.[119] The defendant did not attempt to replead.

The plaintiff eventually moved for summary judgment and a judgment of foreclosure and sale on its complaint.[120] The motion did not address any GPN issues.[121] In response, the defendants retained counsel, and through counsel, concurrently filed a response to the motion for summary judgment and a separate section 5/2-619 motion to dismiss the complaint.[122] Both the response to summary judgment and the motion to dismiss raised GPN issues, asserting that the plaintiff had failed to provide evidence that it had mailed a GPN.[123] Both defendants submitted affidavits in support of their response to summary judgment, denying that they had ever received a GPN.[124]

The plaintiff's reply to summary judgment and response to dismissal rested largely on a theory of waiver: because one defendant's answer did not address the GPN, and the other defendant had not answered at all, it argued that the defendants had therefore admitted the deemed and construed allegation that the plaintiffs sent the GPN, and consequently that the defendants were barred from subsequently challenging the GPN on summary judgment.[125] The plaintiff also raised a procedural objection to the GPN being the basis for a motion to dismiss, as the sending of the GPN was an allegation of the underlying complaint.[126]

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silence on the issue one may infer that it did not. *Adeyiga*, 29 N.E.3d at 64; *Adeyiga*, 11 CH 02979 (Ill. Cir. Ct. Mar. 25, 2011) (order denying motion to file an amended answer, affirmative defenses, jury demand, and counterclaim). The fact that the answer contained any argument at all is probably a good indication as to the unsuitability of the pleading.

119. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 16, 29 N.E.3d at 64; *Adeyiga*, 11 CH 02979 (Ill. Cir. Ct. Mar. 25, 2011) (order denying motion to file an amended answer, affirmative defenses, jury demand, and counterclaim).

120. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 20, 29 N.E.3d at 64.

121. *Id.* ¶ 20; 29 N.E.3d at 64.

122. *Id.* ¶ 25; 29 N.E.3d at 65; *see also* 735 ILL. COMP. STAT. 5/2-619 (1983) (setting forth the standard for a section 5/2-619 motion to dismiss).

123. *Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 26–27, 29 N.E.3d at 65; Defendants' Response in Opposition to Plaintiff's Motion for Summary Judgment at 4–5, *Adeyiga*, 11 CH 02979 (Ill. Cir. Ct. Nov. 9, 2011).

124. *Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 26, 28, 29 N.E.3d at 65; Defendants' Response in Opposition to Plaintiff's Motion for Summary Judgment at ex. 5, 8, *Adeyiga*, 11 CH 02979 (Ill. Cir. Ct. Nov. 9, 2011).

125. *Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 33, 29 N.E.3d at 66; *see also* 735 ILL. COMP. STAT. 5/15-1504(c)(9) (2013) (incorporating deemed and construed allegations concerning notices into form complaint).

126. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 34, 29 N.E.3d at 66. The plaintiff also argued that, because the defendant had answered, the time for filing any sort of motion to dismiss had long since

The trial court largely agreed with the plaintiff and entered summary judgment, taking the unusual step of issuing a written judgment order to memorialize its ruling.[127] It noted that the IMFL provided that where a foreclosure complaint was in substantially the same form as the section 5/15-1504(a) form complaint, it, as a matter of law, was deemed and construed to include the twelve statutory allegations of section 5/15-1504(c).[128] Because the plaintiff's complaint was a form complaint, it therefore included the deemed and construed allegation "that any and all notices of default or election to declare the indebtedness due and payable or other notices required to be given have been duly and properly given."[129] Because the GPN was one such notice, and it was not denied (or even addressed) in the answer, it was deemed admitted.[130] Consequently, not only were the defendants barred from raising the GPN for the first time on summary judgment, but the plaintiff had no obligation to present evidence on the issue.[131]

Following the entry of summary judgment, the plaintiff eventually proceeded to a judicial sale of the subject property; though defendants further litigated the case, the GPN issue was not raised again.[132] The trial court confirmed the sale and entered an order of possession, and the

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expired. Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Summary Judgment at 10–11, *Adeyiga*, 11 CH 02979 (Ill. Cir. Ct. Nov. 22, 2011). Given the multitude of other flaws with the defendants' arguments, though, the objection appears to have been relatively minor.

127. *Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 34–35, 29 N.E.3d at 66; *Adeyiga*, 11 CH 02979 (Ill. Cir. Ct. Dec. 8, 2011) (order granting the plaintiff's motions for default, summary judgment, and judgment of foreclosure).

128. *Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 35–36, 29 N.E.3d at 67; *Adeyiga*, 11 CH 02979 (Ill. Cir. Ct. Dec. 8, 2011) (order granting the plaintiff's motions for default, summary judgment, and judgment of foreclosure); s*ee also* 735 ILL. COMP. STAT. 5/15-1504(a), (c) (2013) (setting forth IMFL form complaint, and deemed and construed allegations attaching thereto).

129. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 35, 29 N.E.3d at 67; *see also* 735 ILL. COMP. STAT. 5/15-1504(c)(9) (2013) (noting that the "statements contained in a complaint in the form set forth in [section 5/15-504(a)] are deemed and construed to include," for example, "any and all notices of default").

130. *Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 36–37, 29 N.E.3d at 67; *Adeyiga*, 11 CH 02979 (Ill. Cir. Ct. Dec. 8, 2011) (order granting the plaintiff's motions for default, summary judgment, and judgment of foreclosure).

131. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 35, 29 N.E.3d at 67; *Adeyiga*, 11 CH 02979 (Ill. Cir. Ct. Dec. 8, 2011) (order granting the plaintiff's motions for default, summary judgment, and judgment of foreclosure).

132. *Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 41–43, 29 N.E.3d at 68–69. The defendants' counsel withdrew shortly after entry of summary judgment. *Id.* ¶ 29, 29 N.E.3d at 66. But the defendants later retained new counsel, who filed an emergency section 5/2-1301 motion to vacate in an attempt to block the sale. *Id.* ¶¶ 42–43, 29 N.E.3d at 68–69. The arguments in the motion concerned the plaintiff's standing and the propriety of certain mortgage documents. *Id.* ¶¶ 42–43, 29 N.E.3d at 68–69.

defendants timely appealed.[133]

2. *Adeyiga* on Appeal

The appellate court disagreed with the trial court's analysis of the deemed and construed allegations as applied to the GPN statute and reversed for an evidentiary hearing concerning whether the plaintiff had sent a GPN.[134]

Briefly setting forth the relevant GPN guidelines, the appellate court recited the undisputed facts and the parties' positions on the issue: the defendants asserted, and the plaintiff did not dispute, that they had not received a GPN.[135] But the plaintiff's argument was that the GPN statute mandated the *sending* of a GPN, not the receipt of one.[136] And, rather than separately assert that a GPN had been sent, the plaintiff relied on admission of the deemed and construed allegations to make the pleading.[137] The defendants' failure to address the issue in their answer, according to the plaintiff, functioned as the defendants' waiver of the issue, thus obviating the need for separate pleadings or proofs.[138]

The *Adeyiga* appellate court's principal disagreement was with the scope of the deemed and construed allegations.[139] Specifically, it ruled that that "the trial court's interpretation of the [IMFL] does not reflect the intent of the legislature," and continued to "find that the language 'other notices required to be given' in section 15-1504 does not include the grace period notice required by section 15-1502.5."[140] The appellate court offered seven primary bases underlying its holding: timing of the legislation, nonwaivability of the GPN, injustice in a contrary holding,

133. *Id.* ¶¶ 48–49, 29 N.E.3d at 69–70.

134. *Id.* ¶ 52, 29 N.E.3d at 70. The appellate court affirmed the trial court's rulings as to the plaintiff's standing, though on different grounds: whereas the trial court held that standing was not pled in the answer, and consequently waived, the appellate court held that standing was sufficiently pled and therefore not waived, but that the standing arguments that were actually advanced were insufficient. *Compare id.* ¶¶ 33–34, 29 N.E.3d at 66, *with id.* ¶ 64, 29 N.E.3d at 72 (discussing and review the trial court's judgment, and affirming on different grounds). The appellate court also directly affirmed the trial court's rulings as to the defendants' allegations of fraud. *Id.* ¶¶ 78–82, 29 N.E.3d at 74–75. Because the two other arguments on appeal—standing and fraud—were dealt with fairly conventionally, and ultimately affirmed, this Article has not and will not address them. It is the novel GPN analysis that distinguishes *Adeyiga*.

135. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 90, 29 N.E.3d at 76.

136. *Id.* ¶ 90, 29 N.E.3d at 76; *see also* 735 ILL. COMP. STAT. 5/15-1502.5(c) (2013) (providing that "the mortgagee *shall send*" a GPN, without requirements concerning receipt).

137. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 90, 29 N.E.3d at 76.

138. *Id.* ¶ 90, 29 N.E.3d at 66, 76.

139. *Id.* ¶ 102, 29 N.E.3d at 79.

140. *Id.*

inconvenience of a contrary holding, sufficiency of an allegation of nonreceipt, lack of prior precedent on the issue, and a technical parsing of the deemed and construed allegations themselves.[141] None of the bases appears to have been individually dispositive; rather, taken as a whole, they guided the court to its conclusion.

First, the court looked to the timing of the legislation.[142] The deemed and construed allegations were added to the IMFL in 1990, nineteen years before the GPN statute went into effect in 2009.[143] Therefore, the court reasoned that the Illinois General Assembly could not have meant the deemed and construed allegations to encompass the GPN, because the GPN statute did not yet exist.[144]

Second, the court noted that the GPN statute itself barred waiver, as it provided quite broadly that "[t]here shall be no waiver of any provision of this section."[145] In the court's view, a finding that the defendants' inaction resulted in a waiver would conflict with the GPN statute itself.[146]

Third, the court stated that permitting parties to waive the GPN issue would be unjust and contrary to the General Assembly's intent.[147] The

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141. *Id.* ¶¶ 94–95, 103–07, 29 N.E.3d at 76–77, 80–81.

142. *Id.* ¶¶ 106–07, 29 N.E.3d at 79–80.

143. *Id.* ¶ 103, 29 N.E.3d at 79–80.

144. *Id.* ¶ 103, 29 N.E.3d at 79–80. This, despite the fact that the deemed and construed allegations themselves are written broadly and prospectively, encompassing without qualification "*any and all* notices of default . . . or other notices required to be given." 735 ILL. COMP. STAT. 5/15-1504(c)(9) (2013) (emphasis added).

145. *Id.* at 5/15-1502.5(h).

146. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 105, 29 N.E.3d at 80. No other courts have squarely addressed the scope of the "waiver" clause in section 5/15-1502.5(h). But "waiver" in this context often has two definitions: either a *contractual* waiver of a given issue written in to the loan documents at origination, or a *procedural* waiver of that issue once a case has been filed. For example, a party might waive a NOA entirely by simply not including it in the mortgage document or contracting around it in the mortgage, or it might waive the NOA at trial by not alleging a failure to comply with it in its pleadings. *E.g.*, Prairie Lakes Inv. Grp., Inc. v. Am. Nat'l Bank, 2011 IL App (2d) 110182-U, ¶ 8 (explaining that acceleration in that case was waived in the note). Interpreting section 5/15-1502.5(h)'s bar of waiver to simply mean that parties cannot contract around the GPN—as they could with a NOA—would be consistent with similar waiver provisions. *See, e.g.*, RBS Citizens, Nat'l Ass'n v. RTG-Oak Lawn, LLC, 943 N.E.2d 198, 203–04 (Ill. App. Ct. 2011) (holding that contractual waivers of any and all general defenses are permissible, but some specific defenses may not be subject to waiver). *Compare, e.g.*, 815 ILL. COMP. STAT. 505/10c (2005) (concluding Illinois Consumer Fraud Act ("ICFA") claims may not be contractually waived), *with* Maywood-Proviso State Bank v. Sotos, 419 N.E.2d 668, 669 (Ill. App. Ct. 1981) (holding that an ICFA claim was procedurally waived at oral argument); *e.g.*, First Bank & Tr. Co. of Ill. v. Hoeper, 2012 IL App (2d) 110003-U, ¶ 52 (stating that certain TILA requirements may not be waived).

147. *Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 105–07, 29 N.E.3d at 80–81; *see In re* Application of the Cty. Treasurer, 1 N.E.3d 617, 620 (Ill. 2014) (analyzing how courts "always presume that the legislature did not intend to create absurd, inconvenient, or unjust results").

purpose of the GPN statute was to encourage workout plans, and "under the [plaintiff's] interpretation of the statute, [the defendant] lost his right to a grace period notice."[148]

Fourth, the court suggested that a different finding would be contrary to public policy, because the ease with which GPN issues could otherwise be waived would incentivize lenders to not send them.[149] Furthermore, because the purpose of the GPN is to encourage loss mitigation, a decrease in the number of GPNs sent would result in fewer successful negotiated solutions and consequently to more foreclosures.[150]

Fifth, the court noted that, though the defendants' uncontroverted affidavits indicated only that they did not *receive* a GPN, nonreceipt could serve as evidence that the plaintiff never *sent* the GPN in the first place.[151] Though the court does not elaborate, it is reasonable to infer that it thought that the inference thereby derived was sufficient to create a genuine issue of material fact so as to preclude summary judgment.[152]

Sixth, the court commented on the lack of precedent to guide it.[153] It notably censured the plaintiff for citing two unpublished circuit court

148. *Id.* at 622. This is an overly simplistic view because it reverses the chronology of the entitlement. When the GPN statute was in effect, parties were entitled to a GPN, *regardless* of when (or whether!) a foreclosure case was ever filed. If a party waives the GPN issue through court proceedings, see *supra* note 146, then, by definition, the time for a GPN has come and gone. Whether a party is in the future entitled to *raise* a certain issue is entirely independent of whether, at some point in the past, that party had a right concerning that issue.

149. *Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 105–07, 29 N.E.3d at 80–81. The court specifically described this result as "inconvenient," which in this context is a term of art referring to situations where the effects of a legislative interpretation run contrary to the General Assembly's legislative intent. *See* In re *Application of the County Treasurer*, 1 N.E.3d at 619–20 (stating that courts "always presume that the legislature did not intend to create absurd, inconvenient, or unjust results").

150. *Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 105–07, 29 N.E.3d at 81. Insofar as this is a negative incentive, the link is tenuous at best, once again because of chronology. *See id.* ¶¶ 107–08, 29 N.E.3d at 80–81 (discussing chronology). A lender will not (and indeed, cannot) know ahead of time whether a borrower will contest a foreclosure. Consequently, the lender must make the decision to send a GPN long before it will know whether it could have gotten away with *not* sending one. The effects of a GPN failure—dismissal of the case and a "reset" of the foreclosure process—are severe enough so as to drastically outweigh the relatively trivial administrative burden of mailing a single letter.

151. *Id.* ¶ 109, 29 N.E.3d at 81.

152. Indeed, it is quite odd that the *Adeyiga* court did not extend the argument out to its logical conclusion. The argument that evidence of nonreceipt can establish nonmailing is a well-worn chestnut in foreclosure defense, where borrowers as a practical matter will not be able to make any evidentiary assertions as to what the lender ever did. For a thorough appellate dissection of an average "non-receipt" defense, see *Chicago Patrolmen's Federal Credit Union v. Walker*, 2016 IL App (1st) 153414-U, ¶¶ 20–25 (addressing mailing sufficiency of GPN, where the defendant averred nonreceipt, but the plaintiff tendered an affidavit of mailing and copies of the notices).

153. *Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 92–95, 29 N.E.3d at 76–77, 81.

opinions describing the IMFL's procedures generally and the proper procedural vehicle for the GPN, respectively.[154] Without binding authority, the appellate court could therefore decide the issue de novo.[155]

Seventh and finally, the *Adeyiga* court parsed out the deemed and construed allegations specifically.[156] Even if the GPN statute were within the scope of the deemed and construed allegations, that would at most include the allegation that the notice was properly sent.[157] But that is not enough: the GPN statute requires that the lender both send the notice *and wait* thirty days before initiating foreclosure.[158] Under the *Adeyiga* court's parsing, a waiver of the deemed and construed allegations would result in a waiver of the sending issue, but not of the thirty-day-stay issue, and consequently the GPN as a whole would remain a live issue.[159]

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154. *Id.* ¶¶ 92–95, 29 N.E.3d at 76–77. Specifically, it identified *CitiMortgage v. Schroedter* and *U.S. Bank v. Olavarria*. *See* CitiMortgage v. Schroedter, 11 CH 07639 (Ill. Cir. Ct. Aug. 30, 2011) (order denying the defendants' motion to dismiss) (noting the structure of IMFL); U.S. Bank v. Olavarria, 10 CH 32532 (Ill. Cir. Ct. Aug. 5, 2011) (order denying the defendant's section 5/2-619 motion to dismiss the complaint) (assessing the proper vehicle for GPN issues). Though the appellate court did not examine the circumstances of the citations, the chronology is worth noting: the cited rulings from *Schroedter* and *Olavarria* were each issued about four months before the trial court's summary judgment ruling in *Adeyiga*. More importantly, all three cases were before the same trial judge: then–Circuit Judge Mathias Delort. *See infra* note 184 (discussing Justice Delort's later appellate rulings touching on *Adeyiga*). It is the Author's experience that, when trial judges cite their own prior holdings, they do not do so because of any misapprehension that their own precedent is binding. Rather, citing a prior written opinion addressing a specific issue of law is an easy way to provide parties with applicable legal reasoning and selected authorities. Mortgage foreclosure cases tend to present the same highly specific issues of law on a regular basis; there is no need to reinvent the wheel for each and every case.

155. Though, given the appellate court's resolution of the issues, it might have done better to pay attention to the circuit court opinions—which, while obviously not precedential, fairly and adequately explained what the general foreclosure practice was (and, to this day, still is). Note in particular that the portion of the *Schroedter* opinion emphasized by the *Adeyiga* court—"Borrowers benefit from the many windows of opportunity the law provides them to rescue their properties out of the foreclosure process and the extraordinary length of time it takes to litigate even an uncontested case"—appears *word for word* in subsequent appellate case law as a fair and accurate description of the IMFL's statutory scheme. *Compare Adeyiga*, 2014 IL App (1st) 131252, ¶ 110 N.E.3d at 81 (citing CitiMortgage v. Schroedter, 11 CH 07639 (Ill. Cir. Ct. Aug. 30, 2011) (order denying the defendants' motion to dismiss)), *with* Wells Fargo Bank, N.A. v. Simpson, 2015 IL App (1st) 142925, ¶¶ 45–46, 36 N.E.3d 266, 280 (noting that *Adeyiga* is not dispositive).

156. *Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 111–12, 29 N.E.3d at 81.

157. *Id.* ¶¶ 111–12, 29 N.E.3d at 81.

158. 735 ILL. COMP. STAT. 5/15-1502.5(c) (2013).

159. *Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 111–12, 29 N.E.3d at 81. This interpretation requires a myopic read of the deemed and construed allegations in section 5/15-1504(c). Allegation 5/15-1504(c)(9) provides that all notices were properly sent—and allegation 5/15-1504(c)(10) provides "that any and all periods of grace or other period of time allowed . . . have expired." 735 ILL. COMP. STAT. 5/15-1504(c) (2013). Furthermore, allegation 5/15-1504(c)(9) alone is probably

Ultimately, the *Adeyiga* court remanded with a conditional reversal: the trial court was to conduct an evidentiary hearing as to whether a GPN was sent.[160] If the trial court ultimately decided that the plaintiff never sent the GPN, the judicial sale was to be vacated, and the case dismissed; if the GPN was properly sent, the judgment and sale were to be affirmed.[161]

Though the trial court ultimately took an uncontemplated third route—following the GPN's repeal, ruling that GPN issues no longer provided a valid defense and thereby allowing the judgment to stand[162]—the *Adeyiga* appellate ruling had immediate consequences for foreclosure practice. After *Adeyiga*, deemed and construed allegations were out, and affirmative defenses were in—at least, insofar as the GPN was concerned.

B. Bukowski*: A Clean Analysis*

Because GPN and NOA issues are so often found hand in hand, *Adeyiga*'s ruling regarding the GPN begged the question: What about the NOA?[163] The Illinois Appellate Court had the opportunity to provide a clean answer in *Bukowski*,[164] which presented a very similar fact pattern—except this time the issue lay with the NOA.

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sufficient. Alleging that a GPN was sent necessarily entails that a *proper* GPN was sent, and if the GPN was sent, but the titular *grace period* was not observed, then the GPN could hardly be proper.

160. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 127, 29 N.E.3d at 84.

161. *Id.* ¶ 127, 29 N.E.3d at 84.

162. Upon remand, an evidentiary hearing was scheduled, but was never held due to the GPN statute's repeal. Back at the trial court, the plaintiff promptly filed a motion for partial summary judgment, arguing that the evidentiary hearing contemplated by the appellate court was unnecessary—attaching an affidavit of mailing and copies of the GPNs it sent. Bank of America's Motion for Partial Summary Judgment, Bank of Am., N.A. v. Adeyiga, 11 CH 02979 (Ill. Cir. Ct. Mar. 4, 2016). The issue ultimately triggered discovery, and the plaintiff served a Rule 216 Request to Admit upon the defendants, asking them to admit they received the GPN. Plaintiff's Motion for a Directed Finding on the Grace Period Notice Issue at 1, *Adeyiga*, 11 CH 02979 (Ill. Cir. Ct. Mar. 4, 2016); *see also* ILL. SUP. CT. R. 216(a) (setting the procedure for requests for admissions of fact). The defendants provided no forthcoming response, and the plaintiff filed a motion for a directed finding, arguing first that the factual issue had been admitted, and second that, in any event, the GPN statute had been repealed, mooting the issue entirely. Plaintiff's Motion for a Directed Finding on the Grace Period Notice Issue, *Adeyiga*, 11 CH 02979 (Ill. Cir. Ct. Mar. 4, 2016); *see also supra* Part II.B.2 (examining the repeal of GPN). On November 29, 2016, the trial court granted the directed finding based on the GPN repeal issue alone. *Adeyiga*, 11 CH 02979 (Ill. Cir. Ct. Nov. 29, 2016) (order granting the plaintiff's motion to deem facts admitted). The thirty-day clocks for reconsideration and appeal have both long since run. On appeal, *Adeyiga* may have made a bang, but on remand, the case ended with not much more than a whimper.

163. Curiously, *Adeyiga* does not so much as mention a NOA. It is unusual that one notice would be raised without the other. *See, e.g.*, Chi. Patrolmen's Fed. Credit Union v. Walker, 2016 IL App (1st), 153414-U, ¶¶ 31–33 (explaining that NOA and GPN are normally mailed concurrently).

164. CitiMortgage v. Bukowski, 2015 IL App (1st) 140780, 26 N.E.3d 495.

In *Bukowski*, the plaintiff filed its complaint and the defendants answered, raising the plaintiff's failure to send a NOA as an affirmative defense.[165] In response, the plaintiff filed a motion to dismiss the affirmative defense pursuant to section 5/2-619.1.[166] The plaintiff's argument addressed primarily the procedural vehicle of the claim: because it was "premised on the claim that a condition precedent to the foreclosure action had not been met," the NOA issue was properly raised as a denial of the appropriate deemed and construed allegation and not a separate affirmative defense.[167] In the alternative, the plaintiff provided an affidavit of mailing from one of its employees, including a copy of the NOA, attesting that it was properly mailed.[168]

The trial court agreed with plaintiff's procedural argument, striking the defense with leave to amend the affirmative defenses.[169] Thereafter, one of the two defendants filed a set of amended affirmative defenses, which contained identical NOA allegations as the previous, stricken, defense.[170] The amended defense was not stricken, but the plaintiff's affidavit of mailing remained of record.

The plaintiff eventually moved for entry of summary judgment and a judgment of foreclosure.[171] The defendants did not raise the NOA issue in briefing,[172] and the trial court entered judgment for the plaintiff.[173] Pursuant thereto, a sale was held, the court confirmed the sale, and the

165. *Id.* ¶¶ 3–6, 26 N.E.3d at 497. The defendants also raised a second affirmative defense, concerning TILA violations for failure to properly notify defendants of provisions of the Illinois Mortgage Escrow Account Act. *Id.* ¶¶ 5–6, 26 N.E.3d at 497; *see also* 765 ILL. COMP. STAT. 910/11 (2007). The appeal requested review of both affirmative defenses. Just as with the standing and fraud issues in *Adeyiga*, see *supra* note 134 and accompanying text, the TILA issues here are not relevant to this Article's discussion of *Bukowski*, and will not be discussed further herein.

166. *Bukowski*, 2015 IL App (1st) 140780, ¶ 6, 26 N.E.3d at 497; s*ee also* 735 ILL. COMP. STAT. 5/2-619.1 (1990) (providing for a bifurcated motion to dismiss, combining section 5/2-619 legal deficiencies and section 5/2-615 pleading deficiencies).

167. *Bukowski*, 2015 IL App (1st) 140780, ¶ 6, 26 N.E.3d at 497.

168. *Id.* ¶ 6, 26 N.E.3d at 497.

169. *Id.* ¶ 7, 26 N.E.3d at 497.

170. *Id.* ¶¶ 7–8, 26 N.E.3d at 497–98. The trial court's electronic docket does not contain a record of any subsequent answer having been filed; though counsel later filed an appearance for the defendant at issue, there is no answer on record. Additional Appearance, CitiMortgage v. Bukowski, 12 CH 07426 (Ill. Cir. Ct. Feb. 19, 2013). The trial court's *paper* docket, as anyone who has tried to get one in anything resembling a timely manner knows, is not easily accessible.

171. *Bukowski*, 2015 IL App (1st) 140780, ¶ 8, 26 N.E.3d at 498.

172. *Id.* ¶¶ 8–11, 26 N.E.3d at 498. Though it is possible that counsel raised the issue at the hearing, it is not so much as mentioned in the briefing. Response to Summary Judgment, *Bukowski*, 12 CH 07426 (Ill. Cir. Ct. July 19, 2013).

173. *Bukowski*, 2015 IL App (1st) 140780, ¶ 8, 26 N.E.3d at 498.

defendants appealed.[174]

On appeal, the *Bukowski* court held that the NOA requirement was a condition precedent and not an affirmative defense.[175] A proper affirmative defense is one that gives color to the opposing claim but raises a new matter that defeats an apparent right of that opposing claim.[176] Here, however, the defense did not give color to the foreclosure complaint, nor did it assert a separate matter outside the scope of the complaint. It was purely a condition: "If CitiMortgage had not sent an acceleration notice, it would not be entitled to foreclose."[177] Consequently, the court held that the trial court's dismissal of the NOA as raised through affirmative defense was proper.[178]

Furthermore, because one of the two defendants had filed an amended affirmative defense concerning the NOA, even though it contained the same allegations as the prior dismissed defense, the *Bukowski* court ruled as to the evidentiary sufficiency of the denial.[179] The defendant merely asserted that no NOA was received, without supporting the allegations through affidavit.[180] The plaintiff, by contrast, introduced an affidavit attesting to the mailing along with copies of the NOA sent.[181] Because the plaintiff introduced competent evidence, the defendant was obligated to provide evidence in rebuttal, rather than resting on the denials of her pleading; because she did not do so, summary judgment as to the merits of the NOA issue was proper.[182]

On the surface, *Bukowski* shares very little with *Adeyiga*: the former

174. *Id.* ¶ 8, 26 N.E.3d at 498. The defendants appealed from the order approving the judicial sale, without specifically indicating that they intended to challenge the entry of judgment or the dismissal of their defenses. *Id.* ¶¶ 9–10, 26 N.E.3d at 498. As the *Bukowski* court sets out in great detail, however, an appeal from a final judgment necessarily entails an appeal of any orders that form "a step in the procedural progression leading" to the entry of that judgment. *Id.* ¶ 13, 26 N.E.3d at 498. (quoting Fitch v. McDermott, 929 N.E.2d 1171, 1179 (Ill. App. Ct. 2010) (internal citations omitted)). Because dismissal of the defenses led to the judgment, and the judgment led to the sale, appeal from the sale was sufficient to provide for an appeal of the defenses. *Id.* ¶ 13, 26 N.E.3d at 498–99. Because in a foreclosure, the entry of summary judgment is typically *not* the final order, and the order approving the sale is, most appeals are taken from the order approving the sale itself, regardless of what they end up challenging. *See, e.g.*, Parkway Bank & Tr. Co. v. Korzen, 2013 IL App (1st) 130380, ¶¶ 12–16, 2 N.E.3d 1052, 1064–65 (Ill. App. Ct. 2013) (appealing from the order approving the sale to challenge virtually every aspect of the case).

175. *Bukowski*, 2015 IL App (1st) 140780, ¶ 16, 26 N.E.3d at 499.

176. *Id.* ¶¶ 15–16, 26 N.E.3d at 499.

177. *Id.* ¶ 16, 26 N.E.3d at 499.

178. *Id.* ¶ 16, 26 N.E.3d at 499.

179. *Id.* ¶ 19, 26 N.E.3d at 500.

180. *Id.* ¶ 19, 26 N.E.3d at 500.

181. *Id.* ¶ 19, 26 N.E.3d at 497, 500.

182. *Id.* ¶¶ 19–22, 26 N.E.3d at 500–01.

concerned a NOA, the latter a GPN. Even with regards to their evidentiary thresholds, the cases fit surprisingly well: *Bukowski* overruled a notice claim where the plaintiff provided an affidavit and the defendant did not, while *Adeyiga* reversed for consideration of a notice claim where the defendant provided an affidavit and the plaintiff did not even deny the charge.[183] But procedurally, the two cases are diametrically opposed: whereas *Adeyiga* as a practical matter held that the proper pleading vehicle for a GPN was an affirmative defense, generally disparaging the IMFL's unique statutory scheme of deemed and construed allegations, *Bukowski* flatly rejected affirmative defenses in place of the IMFL's existing foreclosure pleading scheme.[184]

In many respects, *Bukowski* functioned as a rebuttal to *Adeyiga*, providing relatively clear guidelines concerning the proper pleading vehicle for notice-based allegations, and generally according with existing trial court practice and procedures. Perhaps most importantly, *Bukowski* generally reaffirmed the existence, relevance, and effect of the IMFL's deemed and construed allegations.

C. Accetturo*: Distinction Without Difference*

Accetturo came as somewhat of an unexpected clarification to the NOA procedure.[185] *Bukowski*, the first appellate court to squarely address NOA procedure, held that the issue should be raised as a denial of the deemed and construed allegations, and that the NOA was *not* an affirmative defense.[186] *Accetturo*, by contrast, held that a NOA challenge *was* an affirmative defense, where the challenge was based on the content of the notice, rather than whether it was sent.[187] The resulting conflict was clear.[188]

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183. *Compare id.* ¶ 19, 26 N.E.3d at 500 (denying a NOA claim where the defendant offered no affidavit, but the plaintiff did), *with* Bank of Am., N.A. v. Adeyiga, 2014 IL App (1st) 131252, ¶¶ 87–100, 29 N.E.3d 60, 76–79 (upholding a GPN defense where the plaintiff offered no affidavit, but the defendant did).

184. Indeed, *Adeyiga*'s treatment of the IMFL's deemed and construed allegations has been subsequently criticized. *See, e.g.*, Wells Fargo Bank, N.A. v. Simpson, 2015 IL App (1st) 142925, ¶ 48, 36 N.E.3d 266, 280–81 (Ill. App. Ct. 2015) (declining to follow *Adeyiga*). Though it bears note that some of *Adeyiga*'s rejection may be more than coincidental: *Wells Fargo Bank, N.A. v. Simpson* was authored by Justice Mathias Delort, who a few years prior had been a circuit judge, assigned to a mortgage foreclosure calendar, and who had presided over—and been reversed on appeal by—*Adeyiga*.

185. Cathay Bank v. Accetturo, 2016 IL App (1st) 152783, ¶ 2, 66 N.E.3d 467, 470.

186. *Bukowski*, 2015 IL App (1st) 140780, ¶ 16, 26 N.E.3d at 499; *see generally supra* Part III.B (analyzing and discussing the outcome in *Bukowski*).

187. *Accetturo*, 2016 IL App (1st) 152783, ¶¶ 46–47, 66 N.E.3d at 480.

188. As of this writing, neither the core holding of *Accetturo* nor the procedures concerning a

1. *Accetturo* at First Instance

In *Accetturo*, the plaintiff filed its complaint and the defendant answered, raising an affirmative defense challenging the NOA.[189] The plaintiff eventually moved for summary judgment on its complaint and the NOA affirmative defense. In support of its motion, the plaintiff attached copies of five separate notices it had sent the defendant.[190] The defendant in response did not dispute that the plaintiff sent notices, but argued that the content of the notices was insufficient because they neither warned of acceleration nor advised defendant of her ability to raise defenses in a potential foreclosure.[191] The plaintiff in reply argued that the defendant waived any NOA issues by not raising them in the answer: whereas the answer denied receipt but nothing more, the response to summary judgment admitted receipt, but denied sufficiency.[192] In the alternative, the plaintiff maintained its position that the content of the letters was sufficient.[193]

The trial court granted summary judgment in the plaintiff's favor but, unlike in *Adeyiga* or *Bukowski*, the *Accetturo* court bypassed the procedural objections and ruled on the merits, specifically finding that

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NOA have been further addressed by the appellate court. Though its impact has not yet percolated up to subsequent appeal, *Accetturo* certainly created confusion and raised concerns at the trial court level—enough of them to prompt this Article's creation.

189. *Accetturo*, 2016 IL App (1st) 152783, ¶¶ 8–10, 66 N.E.3d at 472. Though the appellate court did not comment on same, the answer itself also denied the deemed and construed allegation of section 5/15-1504(c)(9)—proper delivery of notices. Verified Answer and Affirmative Defense at 2, Cathay Bank v. Accetturo, 13 CH 21936 (Ill. Cir. Ct. June 3, 2014).

190. *Accetturo*, 2016 IL App (1st) 152783, ¶ 11, 66 N.E.3d at 473; Motion for Default Judgment and Summary Judgment and Other Relief, *Accetturo*, 13 CH 21936 (Ill. Cir. Ct. Sept. 22, 2014). But note that the letters were directly attached as exhibits to the plaintiff's motion for summary judgment, rather than offered through an affidavit. To be sure, no affidavit was required, see 735 ILL. COMP. STAT. 5/2-1005(a) (1985) ("[A] plaintiff may move with or without supporting affidavits for a summary judgment in his or her favor for all or any part of the relief sought."). But to admit such business records, an affidavit is customarily offered. *See* ILL. SUP. CT. R. 191(a), 236 (discussing the admissibility of affidavits).

191. *Accetturo*, 2016 IL App (1st) 152783, ¶ 13, 66 N.E.3d at 473; Defendant's Response to Plaintiff's Motion for Summary Judgment, *Accetturo*, 13 CH 21936 (Ill. Cir. Ct. Feb. 5, 2015). The defendant also raised issues pertaining to the aldermanic notice requirement of the IMFL, both by briefing them on summary and filing a separate motion to dismiss. *See also* 735 ILL. COMP. STAT. 5/15-1503(b) (2013) (discussing when and where aldermanic notice of foreclosure must be sent). The aldermanic notice discussion in *Accetturo* is both conventional and outside of this Article's scope.

192. *Accetturo*, 2016 IL App (1st) 152783, ¶ 14, 66 N.E.3d at 473; Reply in Support of the Motion for Summary Judgment and Other Relief, *Accetturo*, 13 CH 21936 (Ill. Cir. Ct. Feb. 19, 2015).

193. Reply in Support of the Motion for Summary Judgment and Other Relief, *Accetturo*, 13 CH 21936 (Ill. Cir. Ct. Feb. 19, 2015).

"the Notices provided to Defendant Accetturo satisfied the Mortgage requirements."[194] The defendant moved to reconsider, and the plaintiff added procedural objections: that the NOA issue was not properly pled as an affirmative defense at all, and was waived in the answer.[195]

The trial court denied reconsideration.[196] In so ruling, the court affirmed its prior holding on the merits (i.e., that the letters sent to defendant were sufficient to satisfy the mortgage's NOA clause).[197] But the court also agreed with the plaintiff's position, finding that the NOA claim had procedural deficiencies in the first place, because it was raised as an affirmative defense.[198] The distinction was ultimately one without a difference: the defendant's NOA-based objections would not prevent the entry of summary judgment. The property went to sale, the trial court approved the sale, and the defendant timely appealed.[199]

2. *Accetturo* on Appeal

The sequence of the trial court's rulings in *Accetturo* presented an unusual anomaly: the court first granted summary judgment on the merits of the NOA issue, and then upon reconsideration, the court both affirmed its prior holding on the NOA's merits *and* separately affirmed on the basis

194. *Accetturo*, 2016 IL App (1st) 152783, ¶ 14, 66 N.E.3d at 473. As the appellate court's order indicates, no transcript or bystander's report was produced from the summary judgment hearing. *Id.* ¶ 14, 66 N.E.3d at 473. But the specific factual finding on summary judgment was a handwritten addition to an otherwise typeset prepared order. *Accetturo*, 13 CH 21936 (Ill. Cir. Ct. Mar. 5, 2015) (order denying the defendant's motion to dismiss). It is the Author's experience that such handwritten additions to otherwise routine orders generally only occur after the issue was raised and thoroughly argued so as to justify a deviation from a flat grant or denial of summary.

195. *Accetturo*, 2016 IL App (1st) 152783, ¶ 17, 66 N.E.3d at 474. The answer, after all, bluntly denied a deemed and construed allegation of section 5/15-1504(c)(9) concerning sending of notice—but the defendant's argument was not that she never received the NOA, but that the letters sent were insufficient. *See id.* ¶ 11, 66 N.E.3d at 473 (attaching five separate notices the plaintiff had sent to the defendant); Verified Answer and Affirmative Defense at 2, Cathay Bank v. Accetturo, 13 CH 21936 (Ill. Cir. Ct. June 3, 2014) (same).

196. *Accetturo*, 2016 IL App (1st) 152783, ¶ 19, 66 N.E.3d at 474. The appellate opinion quotes from a transcript, indicating that someone brought a court reporter to the reconsideration hearing; unfortunately, the transcript is not readily available as part of the public record.

197. *Id.* ¶ 19, 66 N.E.3d at 474.

198. *Id.* ¶ 19, 66 N.E.3d at 470.

199. *Id.* ¶¶ 20–23, 66 N.E.3d at 475. The defendant raised the NOA issue at the confirmation of sale. Given that an extensive hearing on the issue appears to have been conducted, see *supra* note 194 (discussing the hearing), and that it was addressed again on a fully briefed motion to reconsider, *Accetturo*, 2016 IL App (1st) 152783, ¶¶ 17, 19, it is unsurprising that the objection did not carry. To the extent the defendant raised the issue at the sale stage to preserve it for appeal, such action was unnecessary; the summary judgment is a valid target of appeal from the order approving sale alone. CitiMortgage v. Bukowski, 2015 IL App (1st) 140780, ¶ 8, 26 N.E.3d 495, 498; Bank of Am., N.A. v. Adeyiga, 2014 IL App (1st) 131252, ¶¶ 118–23, 29 N.E.3d 60, 82–83.

that the NOA defense was procedurally improper.[200] The case, therefore, presented both a procedural and a merits-based challenge to the NOA issue. The appellate court could have reversed on one of the two challenges alone—but instead, the *Accetturo* appellate court waded into both issues, reversing as to both merit and procedure.[201]

On the merits of the NOA challenge, the appellate court examined the five letters sent and held that they were not sufficient to discharge the mortgage's requirements.[202] The NOA at issue was a standard acceleration clause.[203] To satisfy the clause, the NOA sent was required to, among other things, specify that a default had occurred, give the action required to cure, identify the date by which the default must be cured, warn as to the consequences of an uncured default, and give in any event thirty days prior to acceleration.[204] The appellate court found that each of the five letters sent were defective, and even combined they did not discharge the NOA requirements.[205]

The first three letters stated that the loan was "seriously delinquent," and gave a series of increasing arrearages, but did not advise as to a default, warn as to the effects of a default, warn of acceleration, or give notice of rights.[206] The fourth letter asserted a default, but did not mention acceleration, give a thirty-day cure period, or give notice of rights.[207] And though the fifth letter was styled as a "notice of default and acceleration," it advised that acceleration had *already* occurred—rather than giving notice that acceleration *would* occur in thirty days.[208]

200. *Accetturo*, 2016 IL App (1st) 152783, ¶ 19, 66 N.E.3d at 474.

201. Because the trial court's first ruling was based on the merits of the NOA argument, the procedural argument was secondary; the appellate court could have reversed—or affirmed—on the merits, alone, without ever mentioning procedure. The court could have, for example, held that the plaintiff waived its procedural challenge by not raising it on summary judgment, or that the grant of summary judgment as to the issue cured any procedural irregularity, or that the acceptance of the affirmative defense triggered application of the law-of-the-case doctrine. *See, e.g.*, Gauger v. Hendle, 954 N.E.2d 307, 328 (Ill. App. Ct. 2011) (defining this doctrine). After all, if the appellate court was going to affirm, it could affirm on any basis in the record below, regardless of what the trial court did. Harlin v. Sears Roebuck & Co., 860 N.E.2d 479, 484 (Ill. App. Ct. 2006). And if it was going to reverse, a reversal on either the merits or the procedure would of course be sufficient.

202. *Accetturo*, 2016 IL App (1st) 152783, ¶ 28, 66 N.E.3d at 476.

203. *Compare id.* ¶ 5, 66 N.E.3d at 470–71 (quoting the specific NOA at issue), *with Form Mortgage*, *supra* note 23, ¶ 22 (discussing acceleration clauses in form mortgage instruments). The numbering is off by one paragraph—*Accetturo*'s clause was paragraph 21, and the form paragraph is 22—but the content is identical.

204. *Accetturo*, 2016 IL App (1st) 152783, ¶¶ 36–37, 66 N.E.3d at 477–78.

205. *Id.* ¶¶ 39–42, 66 N.E.3d at 478.

206. *Id.* ¶¶ 6, 39, 66 N.E.3d at 471, 478.

207. *Id.* ¶¶ 6, 40, 66 N.E.3d at 471, 478.

208. *Id.* ¶¶ 6, 41, 66 N.E.3d at 471, 478.

The appellate court therefore held that the plaintiff did not send a valid NOA, and reversed the trial court's contrary finding on the merits as against the manifest weight of the evidence.[209]

Because the trial court's ruling was principally a factual one, reversing the factual finding would likely have been sufficient to grant the defendant's requested relief and vacate the judgment.[210] Instead, however, the *Accetturo* court decided to further address the procedural posture of the NOA defense.

Accetturo first recognized the core of *Bukowski*, holding that the acceleration clause was a condition precedent.[211] It then explicitly discussed *Bukowski*, reciting that *Bukowski* stood for the proposition that defendants cannot raise the NOA as an affirmative defense.[212] The *Accetturo* court then distinguished *Bukowski*, finding the case at bar more analogous to *Bankers Life Co. v. Denton*, an older appellate decision that held that the failure to comply with HUD servicing regulations could be raised as an affirmative defense.[213] It buttressed this distinction with references to the Restatement of Property for the proposition that compliance with an acceleration clause can be both mandatory and enforceable.[214]

Summarizing the obligations under the NOA clause, the *Accetturo* court characterized the NOA as a "servicing obligation" under the mortgage.[215] Treating NOA compliance as a servicing obligation, the court held that it was therefore an affirmative matter validly pled under

209. *Id.* ¶ 42, 66 N.E.3d at 479 (citing Corral v. Mervis Indus., 839 N.E.2d 524, 530 (Ill. 2005) (providing the standard for review of the trial court's findings of fact)).

210. *See* CitiMortgage v. Bukowski, 2015 IL App (1st) 140780, ¶ 16, 26 N.E.3d 495, 499 (finding that a proper affirmative defense is one that gives color to the opposing claim, but raises a new matter that defeats an apparent right of that opposing claim).

211. *Accetturo*, 2016 IL App (1st) 152783, ¶ 37, 66 N.E.3d at 478.

212. *Id.* ¶ 43, 66 N.E.3d at 479.

213. *Id.* ¶ 44, 66 N.E.3d at 479 (quoting Bankers Life Co. v. Denton, 458 N.E.2d 203, 206 (Ill. App. Ct. 1983)). *Denton* is unquestionably still good law—at least with respect to the HUD servicing regulations it addressed. *See* Mortg. Assocs. v. Smith, No. 86 C 1, 1986 U.S. Dist. LEXIS 20384, at *5–6 (N.D. Ill. Sept. 16, 1986) (discussing HUD servicing regulations under 24 C.F.R. § 203.606 (2012)); *supra* note 98 and accompanying text (same).

214. *Accetturo*, 2016 IL App (1st) 152783, ¶ 44, 66 N.E.3d at 479 (quoting RESTATEMENT (THIRD) OF PROPERTY § 8.1 (1997)).

215. *Accetturo*, 2016 IL App (1st) 152783, ¶ 46, 66 N.E.3d at 480. This holding neatly ignores the fact that *Denton*, the only actual authority cited by the *Accetturo* court, specifically discussed HUD's face-to-face servicing requirements. HUD's face-to-face requirements are imposed by Regulation X, not contract law, and consequently, to appeal to them, a defendant must affirmatively plead that the loan falls within their scope, no small task given the complexity of RESPA. *See generally supra* Part II.C.3 (discussing face-to-face issues).

Denton as an affirmative defense in the first place.[216]

Having reached its conclusion of law, *Accetturo* distinguished *Bukowski* by noting the *type* of challenge brought to the NOA provisions. Whereas *Bukowski* dealt with a claim that the NOA had not been received, the defendant in *Accetturo* conceded that the letters were received, but disputed the sufficiency of their content.[217] The *Accetturo* court concluded that, because the letters were insufficient and the issue had been properly raised, summary judgment was improper, and judgment must be vacated.[218]

Whereas *Bukowski* was quite clear as to the pleading regime it implemented for arguments concerning the NOA, *Accetturo* muddied the waters, appearing to draw a very narrow distinction based on the content of the NOA challenge.[219] Under *Accetturo*, if a NOA defense challenges *whether* a notice was sent, it is to be raised as a denial of the deemed and construed allegations.[220] If, however, the NOA defense challenges the *content* of the notice, it is to be raised as an affirmative defense.[221]

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216. *Accetturo*, 2016 IL App (1st) 152783, ¶ 46, 66 N.E.3d at 480. A party must plead HUD servicing obligations as affirmative defenses, because they require pleading that the loan fits within certain categories as defined by Regulation X—in other words, a face-to-face defense necessarily requires looking beyond the four corners of the complaint. By definition, a NOA will be within the mortgage attached to the complaint—no extra pleadings required. *See generally supra* Part II.C.3 (discussing face-to-face issues).

217. *Accetturo*, 2016 IL App (1st) 152783, ¶ 46, 66 N.E.3d at 480; c*f.* CitiMortgage v. Bukowski, 2015 IL App (1st) 140780, ¶ 16, 26 N.E.3d 495, 499 (discussing the nature of the defendant's claim).

218. *Accetturo*, 2016 IL App (1st) 152783, ¶ 55, 66 N.E.3d at 481. In yet another procedural irregularity, the *Accetturo* court *reversed*, but did not actually *remand*. *Id.* at ¶¶ 57–58, 66 N.E.3d at 481. Absent a mandate, the case languished in limbo for nearly eight months before the parties returned to the trial court, with all agreeing that the appellate court's intent was a remand. Order, *Accetturo*, 13 CH 21936 (Ill. Cir. Ct. Apr. 26, 2017). As of this writing, the case remains on the trial status call. At this point, however, a dismissal seems inevitable, given that the NOA must be sent *before* filing a new action. *See* Bank of Am., N.A. v. Adeyiga, 2014 IL App (1st) 131252, ¶ 124, 29 N.E.3d 60, 84 (providing the plaintiff would likely have to dismiss the action, send a proper NOA, wait thirty days, and file a second foreclosure). The plaintiff could appeal to judicial economy, send a NOA, and simply file an amended pleading in the existing action, but a new filing would be cleaner and unquestionably proper. And, given that sloppy drafting of what should have been an open-and-shut procedural step was the direct cause of *Accetturo*'s reversal on appeal, it would be wiser to simply start over.

219. *See infra* Part IV.A.4 (critiquing *Accetturo*).

220. *Accetturo*, 2016 IL App (1st) 152783, ¶¶ 43–44, 47, 66 N.E.3d at 479–80. This is consistent with the pre-*Accetturo* regime established by *Bukowski*. *See* CitiMortgage v. Bukowski, 2015 IL App (1st) 140780, ¶ 16, 26 N.E.3d 495, 499 (noting the defendants' claim is not a proper affirmative defense).

221. *Accetturo*, 2016 IL App (1st) 152783, ¶¶ 46–47, 66 N.E.3d at 480. This distinction is illogical. *See generally infra* Part IV (proposing possible solutions to create a more consistent analysis of claims).

IV. THE THEORY: HOW NOTICE CLAIMS SHOULD BE PLED

Claims concerning preforeclosure notices should be pled as denials of the deemed and construed allegations of a plaintiff's foreclosure complaint. Such an analysis must follow, given the nature of the claim, the IMFL's statutory scheme, and the mechanics of how a notice issue plays out.

Under this analysis, and contra *Accetturo*, the NOA should always be pled as a specific denial, rather than an affirmative defense. The GPN is no longer a valid defense, but if it were, it too would be logically pled as a denial of the deemed allegations.[222] Issues concerning the FDN and FSP should be pled, if at all, as counterclaims for damages.[223] Lastly, the face-to-face counseling requirement, which operates in a different manner than the NOA, GPN, FDN, or FSP, is properly pled as an affirmative defense, making it the only notice issue appropriately raised as such.

A. Notice of Acceleration: A Deemed and Construed Issue

Issues pertaining to the NOA should be raised through a denial of the deemed and construed allegations of the plaintiff's complaint. Contrary to *Accetturo*, all NOA-related issues should be raised through such a denial, regardless of whether the challenge focuses on the notice's receipt or its content.

Five largely independent grounds compel this conclusion. First, the NOA, by its nature, is a condition precedent, which is not in this context an affirmative matter that gives color to the allegations of the complaint to as to warrant pleading as an affirmative defense. Second, treating the NOA as a denial of a deemed and construed allegation is consistent with the IMFL's unique statutory scheme and form complaint, which provide a ready-made mechanism through which it may be put at issue. Third, regardless of how it is pled, the NOA should not be raised as the basis for a motion to dismiss, as it is already at issue, forming an integral part of the complaint. Fourth, preferring a denial of the deemed and construed allegations results in more flexibility for both the trial court and the parties at later points in the process. Fifth and finally, pleading as a denial, rather than an affirmative defense, shifts the burden of proof to the lender, which makes for an interpretation that is both fairer and more

222. *See supra* Part II.B.2 (discussing repeal of the GPN).

223. *See supra* Parts III.C.1–2 (discussing FDN and FSP, respectively). Neither the FDN nor FSP currently provides a basis upon which to halt a foreclosure, so raising them as either denials or affirmative defenses serves no purpose. To the extent either issue should be raised directly in the foreclosure, it is appropriate to do so as denials of the deemed and construed allegations, tracking the same logic of the NOA.

in line with how NOA issues tend to be resolved.

1. Not Properly an Affirmative Defense

It is this Article's contention that a borrower's challenge to a NOA is not an action that fits within the scope of affirmative defenses. The Illinois Code of Civil Procedure enumerates a series of affirmative defenses, and then generally defines further affirmative defenses as "any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint."[224]

The common law definition of an affirmative defense is fairly well known: an affirmative defense is one that gives color to the opposing claim and then asserts a new matter that defeats the claim.[225] An intuitive example of this in the foreclosure context is release: if a mortgage was released, then the plaintiff can no longer sue on it.[226] The complaint may attach a mortgage and promissory note, and standing alone that would suffice.[227] An affirmative defense of release would assert that, though the mortgage and note are facially valid, they were later released—and thus the existence of the release, an affirmative matter not otherwise evidenced within the complaint, defeats the foreclosure claim.[228]

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224. 735 ILL. COMP. STAT. 5/2-613(d) (1985). The affirmative defenses listed are generally comprehensive, but are not exhaustive. Radkiewicz v. Radkiewicz, 818 N.E.2d 411, 418 (Ill. App. Ct. 2004).

225. *E.g.*, Mountain States Mortg. Ctr. v. Allen, 628 N.E.2d 1052, 1059 (Ill. App. Ct. 1993); Space v. E.F. Hutton Co., Inc., 544 N.E.2d 67, 69 (Ill. App. Ct. 1989) (laying out the test for whether a defense is an affirmative defense). A common affirmative defense is payment, which is also one of the enumerated affirmative defenses. 735 ILL. COMP. STAT. 5/2-613(d) (1985); *see also* Farm Credit Bank v. Biethman, 634 N.E.2d 1312, 1318 (Ill. App. Ct. 1994) (noting that payment is properly an affirmative defense). But payment in the foreclosure context is rarely successful because the borrower's payment obligation requires payments at specific *times*. In other words, at the point in time when a payment is missed, a default occurs, and it is that default which forms the basis for the foreclosure. Payments made after a default, even if accepted by the lender, do not necessarily cure the default, but rather advance the default date. Harris N.A. v. Chhabria, No. 1-10-1580, 2011 WL 10069432, at *5 (Ill. App. Ct. 2011).

226. Release of a mortgage instrument would bar an action on that instrument, but it would not necessarily foreclose on other causes of action, such as an equitable mortgage. Such a scenario quickly becomes fact intensive. *See* Hatchett v. W2X, Inc., 993 N.E.2d 944, 958 (Ill. App. Ct. 2013) (discussing and defining constructive and equitable mortgages); *see, e.g.*, Flack v. McClure, 565 N.E.2d 131, 134–35 (Ill. App. Ct. 1990) (permitting an amendment to add an equitable mortgage claim after the contract claim failed).

227. Under the IMFL, a foreclosure complaint must attach a copy of the mortgage and note as it exists at the time of filing. ILL. SUP. CT. R. 113(b).

228. *See, e.g.*, Walker v. Ocwen Loan Servicing, LLC, 2016 IL App (3d) 150034-U, ¶ 9 (discussing an affirmative defense of release and finding it invalid in that case because the release was not properly executed). Note that the described example of a release could also be raised as a section 5/2-619 motion to dismiss, as the existence of a valid release is an easily proven issue of fact. 735 ILL. COMP. STAT. 5/2-619(a)(9) (1983); *see also* Advocate Health & Hosps. Corp. v.

Turning, then, to the issue of notice: If a lender did not send a NOA, does the borrower get a free house? Of course not; the lender sends the notice, refiles its suit, and the foreclosure proceeds.[229] The claim survives, as the plaintiff's cause of action is not defeated, but rather merely *delayed*.

Because a NOA argument attacks the plaintiff's ability to maintain the claim, rather than defeating the claim itself, parties should not plead NOA issues as affirmative defenses.[230]

2. Consistency with the Illinois Mortgage Foreclosure Law

The IMFL is a comprehensive procedural statute, laying out the process for foreclosures in Illinois. Not only does the IMFL cover every aspect of foreclosure procedure, but it also explicitly provides that, in case of conflict between a provision of the IMFL and a provision of the Code of Civil Procedure generally, the IMFL takes precedence.[231] Though the IMFL does not explicitly provide a procedure for pleading defects in notices, it *does* lay out an otherwise comprehensive pleading scheme.

Section 5/15-1504(a) provides for a form foreclosure complaint, which is used in virtually every mortgage foreclosure action.[232] Where a plaintiff's complaint is in substantially the same form as the form complaint, it is presumptively sufficient.[233] Form foreclosure complaints are thus generally immune from a pleading-based attack.[234]

But the form complaint does not stand alone. Section 5/15-1504(c)

Bank One, N.A., 810 N.E.2d 500, 504 (Ill. App. Ct. 2004) (discussing the standard for factual findings in the course of a section 5/2-619(a)(9) motion).

229. Theoretically, a plaintiff refiling following a post–NOA-based dismissal could file the identical complaint, without having to change any allegations.

230. With the notable exception of *Accetturo*, contemporary NOA case law, as discussed *infra* in Part IV.A.3, is generally in accord with this position. *See* CitiMortgage v. Bukowski, 2015 IL App (1st) 140780, ¶ 16, 26 N.E.3d 495, 498, 499 ("[D]efendants' assertion that CitiMortgage failed to send the notice attacks CitiMortgage's ability to maintain the action and does not raise new matter that defeats the claim.").

231. 735 ILL. COMP. STAT. 5/15-1107(a) (2013). This comports with the general interpretive principle that a specific statute will govern over a general statute. *See* People v. Crawford, 414 N.E.2d 25, 27 (Ill. App. Ct. 1980) (discussing statutory construction).

232. 735 ILL. COMP. STAT. 5/15-1504(a) (2013). The Author has yet to see—or hear of—a *non*-form foreclosure complaint. After all, why reinvent the wheel, particularly when the wheel is a fill-in-the-blank statutory provision?

233. Deutsche Bank Nat'l Tr. Co. v. Puma, 2016 IL App (1st) 153513, ¶¶ 16, 26, 65 N.E.3d 899, 902, 904; s*ee also* 735 ILL. COMP. STAT. 5/15-1504(b) (2013) (noting a complaint need only set forth those form allegations "as may be appropriate for the relief sought").

234. Wells Fargo Bank, N.A. v. Simpson, 2015 IL App (1st) 142925, ¶¶ 46–47, 36 N.E.3d 266, 280.

also provides that every form complaint is deemed and construed to contain *additional* "deemed allegations."[235] Deemed allegation 5/15-1504(c)(9) alleges "that any and all notices of default or election to declare the indebtedness due and payable or other notices required to be given have been duly and properly given."[236] The other allegations are equally pedestrian: allegation 5/15-1504(c)(2) states that the exhibits attached are true and accurate; allegation 5/15-1504(c)(6) provides that the named defendants are the proper owners to name as defendants; allegation 5/15-1504(c)(12) alleges that the purchaser of the property at judicial sale is entitled to possession of that property.[237] The deemed allegations are, in a nutshell, housekeeping.[238]

The difference between the section 5/15-1504(a) form allegations and the section 5/15-1504(c) deemed allegations is simple: the form allegations need to change from case to case, and the deemed ones do not. Section 5/15-1504(a)'s form allegations each require the addition of information specific to the complaint, such as the name of the mortgagor, the date of the mortgage, the legal address of the subject property, and so forth.[239] Section 5/15-1504(c)'s deemed allegations, on the other hand, are independent of the specific complaint. The specific *date* of a default will change and form allegation section 5/15-1504(a)(3)(j) provides a place to state that information, if the plaintiff wishes.[240] But every complaint will allege that the *fact* of a default occurred, which is the substance of deemed allegation section 5/15-1504(c)(5).[241]

The distinction between the section 5/15-1504(a) form allegations and section 5/15-1504(c)'s deemed allegations is one of efficiency, not of

235. 735 ILL. COMP. STAT. 5/15-1504(c) (2013). Note that section 5/15-1504(d) also provides a set of form allegations that specifically relate to the inclusion of fees and costs in the plaintiff's relief sought. Though no one ever seems to talk about them, and for the purposes of this Article they are not strictly relevant, in all respects section 5/15-1504(d)'s deemed and construed allegations are subject to the exact same rationale as section 5/15-1504(c)'s deemed and construed allegations.

236. *Id.* at 5/15-1504(c)(9).

237. *Id.* at 5/15-1504(c)(2), (6), & (11).

238. The IMFL's statutory scheme of including unspoken, but fully effective, deemed and construed allegations has been held constitutional. Wells Fargo Bank N.A. v. Bednarz, 2016 IL App (1st) 152738, ¶¶ 8, 13, 53 N.E.3d 1079, 1081.

239. 735 ILL. COMP. STAT. 5/15-1504(a), (b), & (c), (2013).

240. *Id.* at 5/15-1504(a)(3)(j).

241. *Id.* at 5/15-1504(c)(5). Note that the *type* of the default might change; potential sources of default include simple failure to pay the mortgage; more nuanced failure to provide proof of insurance when requested; or a more specialized failure to maintain the property, more common in reverse mortgages. Though it would be awfully helpful if a complaint simply identified the type and date of the default at issue, the complaint need not provide any specifics.

kind. Because the deemed allegations will be alleged in every complaint, and do not have to be tailored to each complaint, there is no purpose in pleading them separately, but identically, every time. Much as bespoke pleadings often incorporate previous paragraphs by reference as if set forth fully later on, the deemed and construed allegations are, by operation of law, included in every form foreclosure complaint as if set forth fully therein.[242]

Turning then to issues concerning notice, pleading the NOA as a denial of the deemed and construed allegations follows easily. Section 5/15-1504(c)(9)'s deemed allegation provides that all applicable notices were properly given.[243] If a plaintiff specifically wrote out an allegation in its complaint, and the defendant wished to dispute that allegation, the proper way to do so is by denying the allegation. The deemed and construed allegations are no different. To be sure, the denial must be made with specific contrary factual pleadings, but as the issue of notice is already present in the pleadings, the correct procedural response is to deny, rather than to separately raise the issue as an affirmative defense.[244]

When in doubt, defendants often lean toward raising issues as affirmative defenses.[245] Here, though, that is simply unnecessary: the IMFL's comprehensive pleading regime already includes a mechanism through which to raise notice issues.

3. Pleading Is Appropriate; Dismissal Is Not

Though the most recent cases on the issue disagree on the form with which to raise notice challenges, all are generally in agreement that the NOA must be pled—affirmatively or otherwise—rather than used as grounds for a motion to dismiss. This is both because the IMFL and Code of Civil Procedure indicate that such challenges should be pled, and because a motion to dismiss is not an appropriate vehicle for such a challenge.

The IMFL clearly contemplates that notice challenges would be raised as pleadings, rather than as dispositive motions. The section 5/15-1504(a) form complaint is intended as a comprehensive complaint,

242. *Id.* at 5/15-1504(c).

243. *Id.* at 5/15-1504(c)(9).

244. *See* ILL. SUP. CT. R. 133(c) (providing that a condition precedent must be denied with specific contrary factual allegations, rather than as a general denial). *See, e.g.*, Radkiewicz v. Radkiewicz, 818 N.E.2d 411, 417–19 (Ill. App. Ct. 2004) (holding specific denials of conditions precedent may be raised in a number of ways).

245. *E.g.*, Konczak v. Johnson Outboards, 439 N.E.2d 16, 19 (Ill. App. Ct. 1982) (noting that payment was properly pled as an affirmative defense).

largely immune to pleading challenges.[246] It would be contrary to the purpose of a statutory form complaint if the complaint could be so readily challenged. Furthermore, the section 5/15-1504(c) deemed allegations already include pleadings as to notices; it would not make sense to include NOA allegations within the complaint if the NOA was to be raised outside the complaint.

Setting aside the pleading indications within the IMFL, squeezing a NOA issue within the context of a motion to dismiss makes for an uncomfortable fit. The Code of Civil Procedure has two different mechanisms through which a party may seek involuntary dismissal: section 5/2-615 and section 5/2-619.[247] Challenging a NOA does not fit easily within either type of dismissal.

A section 5/2-615 motion to dismiss challenges the legal sufficiency of a complaint based on facial defects.[248] The relevant inquiry is whether the complained-of facts, if true, are sufficient to entitle the plaintiff to relief.[249] Because such a motion is a facial challenge, the defense only properly raises affirmative matters apparent on the complaint.[250] Already the NOA conflict is clear: the IMFL's form complaint, if followed properly, is *presumptively* sufficiently pled.[251] And because the complaint's deemed allegations allege that the plaintiff properly sent all notices, a section 5/2-615 motion arguing that a notice was *not* sent necessarily fails.

A section 5/2-619 motion to dismiss, by contrast, looks beyond the four corners of the complaint and permits dismissal based on issues of law or easily proven issues of fact.[252] Unlike a section 5/2-615 motion, an affidavit must be tendered in support of such a challenge.[253] This inevitably leads to an issue of fact: Was the notice sent? The plaintiff

246. *See* Wells Fargo Bank, N.A. v. Simpson, 2015 IL App (1st) 142925, ¶ 44, 36 N.E.3d 266, 280 (analyzing aspects of section 5/15-1504).

247. 735 ILL. COMP. STAT. 5/2-615, 2-619 (1982). Section 5/2-619.1 permits a party to bring a combined motion to dismiss, raising both section 5/2-615 and section 5/2-619 challenges in a single motion. *Id.* at 5/2-619.1.

248. 735 ILL. COMP. STAT. 5/2-615 (1982); Bueker v. Madison Cty., 2016 IL 120024, ¶ 7.

249. Chi. City Day Sch. v. Wade, 697 N.E.2d 389, 392–93 (Ill. App. Ct. 1998).

250. Advocate Health & Hosps. Corp. v. Bank One, N.A., 810 N.E.2d 500, 504 (Ill. App. Ct. 2004).

251. 735 ILL. COMP. STAT. 5/15-1504 (2013). *See generally supra* Part IV.A.2 (discussing consistency with IMFL).

252. *Id.* at 5/2-619; Czarobski v. Lata, 882 N.E.2d 536, 539 (Ill. 2008). Technically, section 5/2-619(a) is only available to defendants; plaintiffs would move under section 5/2-619(b), which triggers the same standard as a section 5/2-619(a) motion. 735 ILL. COMP. STAT. 5/2-619 (1983).

253. *Id.* at 5/2-619(a).

will say it was, the defendant will say it was not,[254] and this creates a disputed issue of fact that puts the issue beyond the scope of a pleadings challenge.[255] To be sure, the court could convert the section 5/2-619 motion to a motion for partial summary judgment,[256] but it is more appropriate—and more consistent with the IMFL's statutory scheme—for a court to simply deny the motion without prejudice to raising the issue in the pleadings.[257]

Though a NOA issue may be cognizable as a section 5/2-619 motion to dismiss, it is inefficient to raise it as such. Because the burdens on a motion to dismiss tilt in favor of what will always be a statutory form complaint, it is a motion that a defendant as a practical matter cannot win.[258] And because the plaintiff will eventually move for summary judgment anyway, putting the NOA challenge directly at issue—except with the burdens tilted the other direction, in defendant's favor—an early motion to dismiss can achieve nothing.[259]

4. *Accetturo*'s Unavailing Distinction

Bukowski's holding that NOA issues are to be pled as denials of the deemed allegations is consistent with the above-described notice issue analysis. *Accetturo*, in a word, is not. *Accetturo* hinges on a key distinction: that, while *sending* challenges may be pled as denials of the deemed allegations, *content* challenges should be pled as affirmative defenses.

Accetturo's distinction from *Bukowski* is not fully drawn out in the text. *Accetturo* recognized *Bukowski*—not for its ultimate rule that NOA issues should be pled as denials, but rather for its proposition that a NOA

254. At least, usually. *See supra* Part I.B.1 (explaining the normal disposition of a sending challenge to notice).

255. *See Advocate Health*, 810 N.E.2d at 504 ("Section 5/2-619 allows for the dismissal of a complaint on the basis of issues of law or easily proven issues of fact [citations], while disputed questions of fact are reserved for trial proceedings, if necessary.").

256. *See* Rand Rd. Prop. v. LD Holdings, LLC, 2015 IL App (1st), 141230-U, ¶¶ 21–24 (discussing conversion generally from a section 5/2-619 motion to a summary judgment motion). Conversion might be appropriate in some circumstances, but given that motions to dismiss appear, if at all, at the very beginning of a case, neither party might be prepared to face summary judgment at such an early stage.

257. *E.g.*, Etten v. Lane, 485 N.E.2d 1177, 1182 (Ill. App. Ct. 1982) (remanding on motion to dismiss with directions to either hold a hearing on the proofs offered, or deny the motion without prejudice to raising the issue by answer).

258. *See* Wells Fargo Bank, N.A. v. Muhammad, 2017 IL App (1st) 160430-U, ¶ 13 ("By filing a [section 5/2-619] motion for involuntary dismissal, the defendant fixed the standards to be applied.").

259. Except, perhaps, additional delay—which may be all the defendant was going for in the first place.

is a condition precedent to foreclosure.[260] From there, the appellate court in *Accetturo* analyzed the notices actually sent and disagreed with the trial court's factual finding that they were sufficient.[261] This alone would be ample grounds to reverse—but the *Accetturo* court continued.[262]

The *Accetturo* court looked to *Denton*, the seminal face-to-face-requirement case, and defined the NOA as an additional "servicing requirement."[263] Because the NOA challenge was therefore a challenge to the mortgage's servicing requirements, as per *Denton*, the court held that the NOA issue could be raised as an affirmative defense.[264] Lastly, *Accetturo* reconciled its holding with that of *Bukowski* by stating that, whereas *Bukowski* involved a sending challenge, *Accetturo* involved a content challenge.[265]

By implication, the rule from *Accetturo* is that sending challenges should be denials of deemed allegations, whereas content challenges should be affirmative defenses. This rule is flawed for three principal reasons. First, the distinction *Accetturo* itself draws is not supported by its own legal reasoning. Second, *Denton* is an inappropriate precedent to draw upon. Third and finally, there is no rational basis for the distinction in the first place.

First, the *Accetturo* distinction relies on treating the NOA as a "servicing requirement" of the mortgage, and from there, appealing to the *Denton* precedent for the flat proposition that all servicing requirements should be raised as affirmative defenses. But this proposition is irreconcilable with *Bukowski*, which clearly holds that at least *some* NOA challenges should *not* be pled as affirmative defenses. If the NOA is a servicing requirement, and servicing requirements should be raised as affirmative defenses, then *Bukowski* must have been wrongly decided—something *Accetturo* does not suggest.[266] And if either some NOAs are not servicing requirements, or some servicing requirement challenges can be raised other than by affirmative defense, then *Accetturo*'s definitions

260. Cathay Bank v. Accetturo, 2016 IL App (1st) 152783, ¶ 33, 66 N.E.3d 467, 477.

261. *Id.* ¶ 42, 66 N.E.3d at 479.

262. *See, e.g.*, Aurora Loan Servs., LLC v. Pajor, 2012 IL App (2d) 110899, ¶¶ 27–31, 973 N.E.2d 437, 444 (ignoring significant procedural hurdles to address a GPN challenge on its merits, even when the defendant raised the issue for the first time as a section 5/2-1401 petition).

263. *Accetturo*, 2016 IL App (1st), 152783, ¶¶ 44–46, 66 N.E.3d at 479–80 (citing Bankers Life Co. v. Denton, 458 N.E.2d 203 (Ill. App. Ct. 1983)).

264. *Accetturo*, 2016 IL App (1st), 152783, ¶ 46, 66 N.E.3d at 480.

265. *Id.* ¶ 47, 66 N.E.3d at 480.

266. *E.g.*, *id.* ¶ 44, 66 N.E.3d at 479 (finding "reliance on *Bukowski* [to be] misplaced," rather than critiquing *Bukowski* itself); *id.* ¶ 47, 66 N.E.3d at 480 (distinguishing, rather than disparaging, *Bukowski*).

must have some wiggle room—again, something *Accetturo* and its definitions do not suggest.[267] The textual tension within *Accetturo*'s own distinction is not reconcilable, at least not without jettisoning portions of *Accetturo* itself.

Second, *Accetturo* relies exclusively on *Denton* for the proposition that servicing requirements must be pled as affirmative defenses.[268] But *Denton* is not a NOA case, nor even a GPN case: it is a *face-to-face* case, discussing a wholly different type of preforeclosure notice issue.[269] *Denton* addressed the face-to-face servicing requirement, issued by HUD and implemented by Regulation X, directly applicable to the mortgage by operation of federal law.[270] The face-to-face requirement is palpably different from a NOA challenge: not only is it imposed in a different manner, but it operates differently. While a NOA challenge can be pled as a flat denial on the face of the complaint, a face-to-face challenge necessarily requires the introduction of material outside the scope of the complaint, which can only be accomplished through pleading as an affirmative defense.[271] Lastly, *Denton* predates the IMFL by several years.[272] While pre-IMFL cases can still be relevant, it is difficult to see how such a case could be relied upon in disfavoring the later-enacted IMFL's own procedural scheme.

Third and finally, *Accetturo*'s distinction is not particularly compelling. There is no logical reason as to why sending and content challenges should be pled in such significantly different forms. Both challenge the sufficiency of compliance with a condition precedent. Furthermore, both types of challenges ultimately assert that a proper NOA was never sent: a sending challenge argues that *no* NOA was ever sent, while a content challenge argues that the NOA sent was improper.

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267. *E.g.*, *id.* ¶ 46, 66 N.E.3d at 480 (defining NOA as a servicing requirement, and finding that an affirmative defense challenging such was "properly raised," without exception or other suggestion of alternative potential analyses).

268. *Id.* ¶¶ 44, 46, 66 N.E.3d at 479–80 (citing *Denton*, 458 N.E.2d at 203). *Accetturo* also appeals to the *Third Restatement of Property* for language concerning whether a NOA is binding or not—it is; whether a NOA clause is binding is essentially a non-issue—but *Denton* is the only source for *Accetturo*'s affirmative defense analysis. *See id.* ¶ 45, 66 N.E.3d at 479–480 (citing RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 8.1 (1997)).

269. *See generally Denton*, 458 N.E.2d (discussing the face-to-face counseling requirement). *See also supra* Part II.C.3 (discussing face-to-face requirement).

270. *Denton*, 458 N.E.2d at 205.

271. Such as, for example, the insured statute of the loan, the location of the plaintiff's nearest office, and the inapplicability of various statutory exceptions. 24 C.F.R. § 203.604. *See also infra* Part IV.C.2 (discussing why face-to-face challenges should be pled affirmatively).

272. *Denton* was first filed in 1981, and the appellate ruling at issue was handed down in 1983. 458 N.E.2d at 203. The IMFL was enacted in 1987. 735 ILL. COMP. STAT. 5/15-1106 (1987).

Either way, both types of challenges raise nearly identical issues, stemming from the same clause, with the same ultimate goal and effect: dismissal of the complaint. *Accetturo*'s distinction—that the type of challenge should result in radically different procedural postures—is simply untenable.

5. Burden Shifting

For the most part, whether a NOA issue is raised as an affirmative defense or a denial of a deemed and construed allegation has little bearing on the actual resolution of the issue. Once at issue, NOA challenges are almost always resolved in the same manner: affidavit by the defendant, affidavit by the plaintiff, ruling for the plaintiff.[273] But the choice of procedural mechanism through which to bring a NOA challenge has one significant effect: the burden of proof.

Upon filing a section 5/15-1504 form complaint, with an attached copy of mortgage and note, a plaintiff establishes a prima facie case for foreclosure.[274] If a defendant raises affirmative defenses, it becomes that defendant's burden to prove those defenses.[275] Even if a defendant could raise an issue in a way other than by an affirmative defense, such as by motion to dismiss or by denial, by choosing to take on the issue as an affirmative defense, a defendant inherits the burden thereupon.[276]

By contrast, if a defendant denies an allegation of the complaint, and a plaintiff moves for summary judgment as to the complaint and answer, the burden of proof shifts to the plaintiff—for, on summary judgment, all reasonable inferences must of course be drawn in favor of the nonmoving

273. *See generally supra* Part I.B.1 (discussing how NOA issues are generally resolved).

274. Farm Credit Bank v. Biethman, 634 N.E.2d 1312, 1318 (Ill. App. Ct. 1994) (describing a prima facie case for foreclosure). *See also* Aurora Bank FSB v. Perry, 30 N.E.3d 1166, 1172 (Ill. App. Ct. 2015) (citing Rosestone Invs., LLC v. Garner, 2 N.E.3d 532, 540 (Ill. App. Ct. 2013)) (attaching a mortgage note to a complaint is prima facie evidence of ownership of the note, and consequently of standing to foreclose). Note that the copies attached to the complaint must represent the documents at time of filing, an additional requirement imposed not by statute, but by an Illinois Supreme Court Rule. ILL. SUP. CT. R. 113(b) (2013).

275. *Biethman*, 634 N.E.2d at 1318.

276. Capitol Plumbing & Heating Supply, Inc. v. Van's Plumbing & Heating, 373 N.E.2d 1089, 1091 (Ill. App. Ct. 1978) (holding where the defendant chose to raise subject-matter jurisdiction as an affirmative defense, the defendant took on burden of proving it). *See also* Roy v. Coyne, 630 N.E.2d 1024, 1032 (Ill. App. Ct. 1994) (holding that the plaintiff has no obligation to anticipate an affirmative defense, thereby taking on the burden of disproving the defendant's case); Cunningham v. Sullivan, 147 N.E.2d 200, 204 (Ill. App. Ct. 1958) (holding that when a defendant must raise an issue as an affirmative defense, the plaintiff may add allegations on that issue in the complaint, but by doing so would take the burden back). *See also supra* Parts IV.A.1–3 (discussing the ways in which NOA issues could be raised).

party.[277] To be sure, the plaintiff is not obligated to prove its entire case on summary judgment, but it must provide evidence that supports a finding in its favor.[278]

This distinction is particularly relevant given the method by which defendants usually challenge a NOA: by implication. Defendants will almost never be able to affirmatively prove that a plaintiff never *sent* a notice; at most, they might prove that they never received notice, and use evidence of nonreceipt to rebut a presumption of mailing.[279] If defendants must prove that the plaintiff did not send the notice, they will likely never be able to do so, for the presumption of mailing is drawn *against* them. But if all defendants need do is provide evidence to rebut the presumption, then a defendant's NOA argument might have a fighting chance.

B. The Grace Period Notice

The GPN statute has now been repealed, and as a practical matter is moot.[280] It is increasingly unlikely that questions concerning the proper procedural form of a GPN issue will surface again, either at the trial or appellate levels; to the extent GPN litigation continues in any way, it will likely involve case-by-case analysis.[281] Should the issue arise again, however, it bears noting that a GPN challenge should be treated in the same manner as a NOA challenge: as a denial of the deemed and construed allegations, and not as an affirmative defense.

Each and every one of the bases articulated above concerning the NOA is equally applicable, *mutatis mutandis*, to the GPN. Both the NOA and the GPN are notices required to be given prior to foreclosure, and both operate in the exact same way. Both must be sent thirty days prior to

277. *See, e.g.*, Schweihs v. Chase Home Fin., LLC, 2016 IL 120041, ¶ 48. *See also* 735 ILL. COMP. STAT. 5/2-1005 (1985) (describing the standard for summary judgment).

278. *E.g.*, Nordness v. Mitek Corp. Surgical Prods., 677 N.E.2d 19, 19 (Ill. App. Ct. 1997) (discussing the requisite burden of proof for the plaintiff on summary judgment). As a practical matter, plaintiffs in mortgage foreclosure *do* prove their entire case on summary judgment. Once a judgment of foreclosure is entered, the balance of interests shifts: unless the defendant redeems or the plaintiff agrees to settle, the property *will* go to sale. *See Parkway Bank & Trust Co v. Korzen*, 2013 IL App (1st) 130380, ¶ 60, 2 N.E.3d 1052, 1074 (summary judgment, and the concurrent judgment of foreclosure, dispose of "virtually every issue" in a foreclosure, and thereafter, that "[t]he only remaining tasks are for the sale to take place and the court to confirm the sale").

279. *See supra* Part 1.B.1 (discussing how NOA issues are generally resolved). *See also* Donnelly v. Wash. Nat'l Ins. Co., 482 N.E.2d 424, 430–31 (Ill. App. Ct. 1985) (noting mailing can be proven by custom, but custom only establishes presumption of mailing).

280. 735 ILL. COMP. STAT. 5/15-1502.5(k) (repealed July 1, 2016).

281. Assuming any litigation still may occur. *See supra* Part II.B.2 (discussing repeal).

foreclosure, and the failure to give either results in the exact same outcome. The NOA is a contractual duty and the GPN a statutory one, but the distinction is one without a difference: section 5/15-1504(c)'s deemed allegations cover "any and all notices . . . or other notices required to be given," regardless of *why* those notices are required.[282]

Adeyiga offers seven bases for its holding that defendants should plead GPN issues as affirmative defenses, and none of them are compelling.[283] The court asserts that the GPN postdates the deemed and construed allegations, and therefore was not intended to be included in the allegations.[284] But the allegations themselves are written broadly, encompassing "any and all" notices, not just those then in existence.[285] The court misinterprets the GPN's "non-waiver" provision.[286] It suggests that the risk of an easy GPN waiver might improperly incentivize lenders to skimp out on sending them, but such a negative incentive is tenuous at best.[287] And when the *Adeyiga* court parsed out the deemed allegations, it added a distinction with no textual support, suggesting that the deemed allegation at most alleged a sending, but not an expiring of the grace period—an interpretation belied by both the content of the deemed allegations and a natural reading thereof.[288]

The *Adeyiga* court recognized that it was facing a question of first impression.[289] And in any other type of litigation, pleading notice issues such as the GPN as affirmative defenses would not be unreasonable. The GPN, however, existed as part of the IMFL, a highly specialized statute that already accounted for the possibility of raising challenges to notice as a simple denial of a pled allegation. Given the existence and scope of the deemed allegations, and the development of NOA case law in more recent years, as exemplified by *Bukowski* and to a significant extent *Accetturo*, *Adeyiga*'s holding that GPN issues are to be affirmative

282. 735 ILL. COMP. STAT. 5/15-1504(c)(9) (2013).

283. *See* Bank of Am., N.A. v. Adeyiga, 2014 IL App (1st) 131252, ¶¶ 58–67, 29 N.E.3d 60, 71–73 (stating bases for affirmative defenses).

284. *Id.* ¶¶ 100–12, 29 N.E.3d at 79–80; *see also supra* note 145 (discussing how the allegations were written to encompass "any and all" notices).

285. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 101, 29 N.E.3d at 79; *see also supra* note 144 (reviewing the language of the allegations).

286. *Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 100–12, 29 N.E.3d at 80; *see also* 735 ILL. COMP. STAT. 5/15-1502.5(h) (non-waiver provision) (repealed July 1, 2016); *supra* note 146 (defining waiver).

287. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 108, 29 N.E.3d at 80–81; *see also supra* note 148 (examining how the court erred in applying the GPN non-waiver provision).

288. *Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 108–12, 29 N.E.3d at 81; *see also supra* note 159 (discussing how the court misinterpreted the statute).

289. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 1, 29 N.E.3d at 62.

defenses is simply no longer tenable. Should GPN-pleading issues surface again, parties should raise the issue as a denial of the deemed allegations, rather than as an affirmative defense.

C. Federal Notices

Unlike the GPN, all three of the federal notices (i.e., FDN, FSP, and face-to-face counseling requirement) remain valid issues.[290] To the extent cases implicate the FDN and FSP, the pleading question is somewhat academic, as neither will stop a foreclosure: at most, FDN and FSP violations would give rise to a counterclaim for damages.[291]

The face-to-face requirement, however, *is* properly pled as an affirmative defense, because a successful face-to-face allegation requires bringing in significant factual pleadings beyond the scope of the complaint.[292]

1. FDN and Stay Period: Counterclaims, At Most

The FDN is somewhat akin to a federal GPN, except unlike the former GPN statute, the FDN will not provide a basis with which to stay or dismiss a foreclosure.[293] If a defendant wanted to raise the FDN as an issue, the best way to do so would be as a denial of a deemed and construed allegation, for largely the same reasons as the NOA. The FDN is a notice that a plaintiff is required to give before filing a foreclosure complaint, and certainly appears to fall within the scope of section 5/15-1504(c)'s deemed allegations. It is unclear what purpose raising a FDN violation could serve with respect to the foreclosure, because even if pled and proven, it would not affect the foreclosure. Even so, if a defendant were inclined to raise the issue, the best way to do so would be as a denial of the deemed allegations.[294]

The FSP is a different mechanism than the FDN, but both federal requirements have a similar pleading procedure. For example, if

290. 12 C.F.R. § 1024.39 (2014) (Federal Delinquency Notice), 12 C.F.R. § 1024.41(f) (2014) (Federal Stay Period), 24 C.F.R. § 203.604 (2002) (face-to-face counseling requirement), respectively.

291. *See supra* notes 73, 86 (discussing effect, or lack thereof, of FDN and FSP on foreclosures, respectively).

292. *See supra* note 98 (discussing proper pleading method of face-to-face challenge).

293. *E.g.*, Roosevelt Cayman Asset Co. II v. Mercado, No. 15-2314 (BJM), 2016 WL 3976627, at * 3–4 (D.P.R. July 22, 2016) (discussing CFPB regulations).

294. Given that a successful FDN claim would not actually *do* anything, it is also unclear why a defendant would raise it in the first place. That being said, given that the FDN is in the process of being revised, it is not unreasonable to ask what is, for the time being, a largely theoretical question. *See supra* note 74 (discussing updates to FDN).

successfully pled and proven, a violation of the FSP will not provide a basis with which to stay or dismiss a foreclosure.[295] And again, if a defendant wanted to raise a FSP violation, it too would fall within the scope of the section 5/15-1504(c) deemed allegations.

Though neither FDN nor FSP would affect the foreclosure process directly, violations of either could give rise to a claim for damages.[296] Any such damages would be limited to recovery of actual damages, attorney's fees, costs, and up to $2,000 in additional damages.[297] Such a claim could not be brought as an affirmative defense—as it would be improperly seeking damages[298]—but would be properly brought as a counterclaim.[299]

2. Face-to-Face Counseling: An Affirmative Defense

Unlike most other types of notices, a challenge to the face-to-face counseling requirement is properly raised as an affirmative defense. In part, this may well be due to judicial inertia: Illinois has only seen three face-to-face cases reach the appellate court, and all three have approved of the affirmative defense as the appropriate pleading vehicle.[300] In large part, however, this is due to the nature of the claim.

A defendant wishing to allege a NOA or GPN failure essentially brings a single factual allegation: that the notice was not sent. The factual allegation is neatly encapsulated in the deemed and construed allegations.

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295. *E.g.*, Stephens v. Capital One, N.A., No. 15-cv-9702, 2016 WL 4697986, at *4 (N.D. Ill. Sept. 7, 2016) (analyzing actual damages under RESPA).

296. *See supra* notes 73, 86 (noting that FDN and FSP violations create liability for money damages).

297. Both FDN and FSP are part of Regulation X, and consequently governed by the recovery limitations of 12 U.S.C. § 2605(f)(1) (effective Jan. 7, 2011).

298. Generally speaking, the only proper prayer for an affirmative defense is for dismissal of the complaint, in whole or in part, or similar relief to that effect. *See* Peoria Hous. Auth. v. Sanders, 298 N.E.2d 173, 174 (Ill. 1973) (affirming the trial court's strike of an affirmative defense for damages); *accord id.* at 176 (Ryan, J., dissenting) (agreeing that counterclaim seeks affirmative relief, but an affirmative defense only seeks to defeat the complaint).

299. *E.g.*, *Stephens*, 2016 WL 4697986, at *4 (discussing how the FSP claim was brought separately). The claim could be brought either separately or as a counterclaim within the foreclosure action. Either way, the procedural posture would be different from that of a denial or affirmative defense. This makes the matter more complicated: not only would the burden be on the borrower to prove the claim, but it could also be subject to additional procedural complications, such as RESPA's general three-year statute of limitations. 12 U.S.C. § 2614 (effective Jan. 3, 2012). Further discussion of the procedure or substance of either FDN or FSP counterclaims is outside the scope of this Article.

300. Bankers Life Co. v. Denton, 458 N.E.2d 203, 205 (Ill. App. Ct. 1983); *see* JPMorgan Chase Bank v. Moore, 2015 IL App (1st), 142971-U, ¶ 57 (quoting *Denton*); Fannie Mae v. Schildgen, 625 N.E.2d 227, 232 (Ill. App. Ct. 1993) (citing *Denton*).

A face-to-face challenge, on the other hand, requires the defendant to allege, among other things, that the loan is HUD-insured, that the lender did not make a reasonable effort to contact the borrower, and that none of the numerous statutory exceptions apply.[301] These additional factual pleadings, by necessity, extend the required elements of the defense well beyond the four corners of the complaint.[302]

Theoretically, a defendant could also bring a face-to-face challenge as a motion to dismiss under section 5/2-619(a)(9) as an "affirmative matter avoiding the legal effect of or defeating the claim."[303] At that point, however, the number of factual averments necessary to plead and prove a face-to-face claim puts it well beyond the scope of the "easily proven issues of fact" that a section 5/2-619 motion is intended to address.[304] But while an affirmative defense might be preferred, either procedural mechanism would be proper—making a face-to-face challenge the only notice-based challenge to foreclosure proceedings to fall outside the scope of the deemed and construed allegations.

V. THE PRACTICE: ADAPTING EXISTING CASES

Dealing with NOA issues is, in theory, quite straightforward. The NOA *should* be pled as a denial of the deemed and construed allegations. If not so pled, it *should* be admitted, and the inquiry ends there.

But, though the appellate holdings concerning NOA issues address them in sometimes significantly different ways, they consistently take a more generous approach to the defense, generally sharing common ground on two major points. First, notices are a pleading issue, and the farther along a case progresses, the greater the risk of waiver. Second, if a party timely raises the NOA issue, the appellate court strongly disfavors procedural dismissals, encouraging resolution of the issue on its merits.

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301. 24 C.F.R. § 203.604 (2002). *See also generally Schildgen*, 625 N.E.2d at 227 (discussing whether the face-to-face claim was sufficiently alleged, and whether the loan fell within the scope of the face-to-face counseling requirement).

302. By way of egregious example, one of the exceptions requires alleging that the subject property is within 200 miles of an office of the mortgagor or servicer. 24 C.F.R. § 203.604(c)(2) (2002). Parties simply cannot identify the physical location of the mortgagor or servicer relative to the subject property without looking to facts outside the complaint—not the least of which being that the complaint does not usually identify the servicer, much less their office locations!

303. 735 ILL. COMP. STAT. 5/2-619(a)(9) (1983). *See also, e.g.*, Groark v. Thorleif Larsen & Son, Inc., 596 N.E.2d 78, 80 (Ill. App. Ct. 1992) (explaining that the appropriate question for a section 5/2-619 motion is whether the facts pled constitute an affirmative defense to the cause of action).

304. 735 ILL. COMP. STAT. 5/2-619 (1983); Czarobski v. Lata, 882 N.E.2d 536, 539 (Ill. 2008).

A. Back to the Pleadings

All cases agree that a NOA-related issue is properly an issue for the pleadings, but the contemporary dispute in NOA case law concerns *how* the NOA itself should be pled. If a notice issue is properly raised as a denial of the deemed and construed allegations, then it can be dealt with on summary judgment directly.[305] If a notice issue is raised as the basis for a motion to dismiss, it is appropriate for a court to deny the motion without prejudice to raising the issue in the answer.[306] And if the issue is raised only by way of a separate NOA affirmative defense, the defense should be stricken, without prejudice to raising the issue as a denial in the answer, and with concurrent leave to amend the answer.[307]

A more difficult case emerges if a defendant raises a NOA challenge for the first time in its response to summary judgment. A motion for summary judgment looks, as it must, to the pleadings and other materials of record to determine whether a genuine issue of material fact exists.[308] But if the NOA is not part of the pleadings at the time a motion for summary judgment is filed, then it is in a sense too late to raise the issue anew. The resolution to this issue usually depends on how the plaintiff chooses to respond to it.

Often, a plaintiff will simply accept that the issue has been raised and address the NOA on its merits during the summary judgment stage.[309] This neatly sidesteps waiver concerns and results in a much simpler procedure: because the issue will likely be addressed anyway, it is simpler and easier to move to that resolution directly, rather than stand on

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305. This would of course be the paradigmatic case, as ratified by *Bukowski*. CitiMortgage v. Bukowski, 2015 IL App (1st) 140780, ¶¶ 17–19, 26 N.E.3d 495, 499.

306. *E.g.*, U.S. Bank Nat'l Ass'n v. Gaitan, 2013 IL App (2d), 120105-U, ¶¶ 6–7 (noting that after a denied motion to dismiss, defendants used the NOA issue as an affirmative defense). *Accord* Bank of Am., N.A. v. Beeman, 2014 IL App (2d), 140313-U, ¶ 5 (discussing when a motion to dismiss is properly denied under GPN); *accord* HSBC Bank USA, N.A. v. Thomas, No. 11-CV-1170, 2011 U.S. Dist. LEXIS 84848, at *3 (C.D. Ill. 2011) (discussing when a motion to dismiss is properly denied under GPN).

307. This procedural posture is relatively rare in appellate case law, because the amend-to-deny position is a relatively new one—trial cases in which this approach was taken simply haven't filtered up to the appellate court yet. But rare is not unknown, and the approach has been ratified at least once on appeal. PNC Bank, N.A. v. Merritt, 2017 IL App (1st), 152188-U, ¶¶ 7, 20–21 (noting that, where defendants sought leave to amend their pleadings post-judgment, the trial court short-circuited the process by holding a hearing as to NOA issue).

308. 735 ILL. COMP. STAT. 5/2-1005 (1985); Valfer v. Evanston Nw. Healthcare, 52 N.E.3d 319, 325 (Ill. 2016).

309. *E.g.*, Brickyard Bank v. Feigenbaum, 2013 IL App (1st), 130220-U, ¶ 4 (raising GPN for the first time on a response to summary judgment). Plaintiffs may certainly raise the procedural objection of waiver, but will still usually tender an affidavit of mailing, so as to avoid the plaintiff's fate in *Adeyiga*. *See supra* note 162 (discussing proceedings on remand in *Adeyiga*).

procedural points.

But if a plaintiff chooses to stand on a procedural objection, they do so at their own risk.[310] The Code of Civil Procedure commands courts to allow parties to amend their pleadings at any time before judgment on just and reasonable terms.[311] In such a position, the trial court can allow the defendant to amend his or her answer instanter so as to deny the deemed and construed allegations, deem the motion for summary judgment to apply to the amended answer, and proceed to briefing the motion for summary judgment. Thus, in one fell swoop the court can straighten the record, put the notice issue squarely at issue, and proceed to judgment briefing without further delay.[312]

Once judgment has been entered, a party might seek to raise the issue as a section 5/2-1203 motion to reconsider. Such an attempt should fail: a motion to reconsider is intended to bring to the court's attention new evidence not previously discoverable, changes in the law, or errors in the court's application of existing law.[313] A post-judgment NOA challenge fits none of these criteria. It cannot fit under the "new facts" prong, because by definition, the NOA either is, or is not, sent *before* the suit is filed. This means that any evidence or argument concerning the NOA could have been raised previously, and would always have been previously available.[314] And the challenge cannot fit under the "misapplication of law" or "change in law" prongs, because in such a

310. This was the substance of the plaintiff's argument contra the GPN issue in *Adeyiga*: defendants raised it for the first time on summary judgment, and the plaintiff argued that it was at that point waived by operation of admission of the deemed and construed allegations. Bank of Am., N.A. v. Adeyiga, 2014 IL App (1st) 131252, ¶ 31, 29 N.E.3d 60, 66. The trial court agreed. *Id.* at 66–67. The appellate court did not, going to great lengths to rewrite GPN procedure to justify reversal. *See id.* at 75–82 (analyzing GPN case law and statutory interpretation).

311. 735 ILL. COMP. STAT. 5/2-1005(g) (1985); *see also* Ragan v. Columbia Mut. Ins. Co., 701 N.E.2d 493, 498–99 (Ill. 1998) (discussing scope of amendment to pleadings at the judgment stage).

312. This results in some modicum of prejudice toward the plaintiff, who might otherwise have tendered an affidavit or other argument in its underlying motion, and is now forced to address the issue for the first time on reply. But, because courts almost always resolve NOA issues on single competing affidavits, *see supra* Part I.B.1 (discussing how resolution of the notice issue usually becomes a matter of law), the missed opportunity does not change much: the plaintiff can get its affidavit on file on the reply. Because such an affidavit would be new material in the reply, the defendant would generally get the opportunity to address the issue in surbriefing, limited in scope to that affidavit. The surbriefing adds time, but is much more efficient than either unwinding the case back to the pleadings stage or risking a reversal on appeal.

313. N. River Ins. Co. v. Grinnell Mut. Reinsurance Co., 860 N.E.2d 460, 468–69 (Ill. App. Ct. 2006).

314. *See In re* Marriage of Rosen, 467 N.E.2d 962, 968 (Ill. App. Ct. 1984) (explaining that where evidence had been previously available, but was not sought or tendered due to trial strategy, evidence was not newly discovered within meaning of section 5/2-1203).

scenario the argument was not previously raised. A motion to reconsider is no place for new argument, and the NOA is no exception.[315] If a NOA issue was raised but not fully litigated on summary judgment, a motion to reconsider may provide an opportunity—proper or otherwise—to litigate it out through affidavit.[316] But even so, if the issue is new, it may well have been waived; as a practical matter, the trial court can generally exercise discretion in deciding whether to let such a challenge proceed.[317]

Once the judgment is final, however, courts are understandably much less willing to entertain NOA challenges. If a defendant arrives postjudgment with a section 5/2-1301 motion to vacate default judgment, the overarching standard is whether vacation would do substantial justice.[318] A NOA challenge can be a meritorious defense cognizable under section 5/2-1301, but it is just one element; a court can deny the petition on other grounds without addressing the defense, NOA or otherwise.[319]

A section 5/2-1401 petition to vacate is similarly multifaceted; in addition to a meritorious defense, such a petition must allege diligence in pursuing the claim and in bringing the petition.[320] The presence of additional diligence requirements would authorize a court's denial of a NOA-centric section 5/2-1401 petition on alternative grounds.[321] A

315. This perhaps harsh result is a simple consequence of the nature of a motion to reconsider: it is not a "second chance." Gardner v. Navistar Int'l Transp. Corp., 571 N.E.2d 1107, 1111 (Ill. App. Ct. 1991) ("Trial courts should not permit litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling. Civil proceedings already suffer from far too many delays, and the interests of finality and efficiency *require* that the trial courts not consider such late-tendered evidentiary material, no matter what the contents thereof may be." (emphasis in original)).

316. PNC Bank, N.A. v. Merritt, 2017 IL App (1st), 152188-U, ¶¶ 7, 20–21.

317. *See id.* ¶ 23 (noting the trial court's discretion). Consider, for example, if a defendant moves to reconsider summary judgment, raising a NOA challenge for the first time. If a judge were inclined to strictly find waiver, he or she could deny the motion on its face. But if the judge were less convinced, he or she could invite briefing as to the issue—and thereby imply that the plaintiff might want to introduce evidence going to the merits of the issue on its response.

318. 735 ILL. COMP. STAT. 5/2-1301(e) (1983); *see* Wilkin Insulation Co. v. Holtz, 542 N.E.2d 157, 160 (Ill. App. Ct. 1989) (discussing extensively the standard).

319. *E.g.*, Nationstar Mortg., LLC v. Cheetam, 2016 IL App (1st) 143192-U, ¶ 5, 20 (noting that the acceleration clause was present, permitting a possible NOA issue, but that the section 5/2-1301 petition was properly denied on other grounds).

320. 735 ILL. COMP. STAT. 5/2-1401 (2016); Aurora Loan Servs., LLC v. Pajor, 2012 IL App (2d) 110899, ¶¶ 13–15, 973 N.E.2d 437, 440–41 (discussing types of section 5/2-1401 petitions).

321. *But see Pajor*, 2012 IL App (2d) 110899, ¶ 19, 973 N.E.2d at 442 (denying the section 5/2-1401 petition addressing GPN issues grounds other than diligence). The trial court in *Aurora Loan Services, LLC v. Pajor* denied the section 5/2-1401 petition on diligence, but the appellate court, held that the section 5/2-1401 petition looked to whether the court's ruling comported with the uncontradicted facts of record. Thus, the appellate court addressed the GPN on its substance,

section 5/2-1401 petition in this context requires showing that the court's ruling was contrary to the record, but the deemed allegations—which, by this postjudgment point, would have been admitted or adjudicated as true—allege a proper sending, and if the issue was not properly raised previously, the record would be devoid of evidence to the contrary. A section 5/2-1401 petition introduces a host of other factors on top of existing issues concerning waiver and timeliness, making it an even more challenging vehicle through which to raise a NOA issue for the first time.[322] A court may still use its equitable powers to maneuver into addressing a NOA issue for the first time on a section 5/2-1401 petition, but by this point its discretion is highly circumscribed.[323]

Ultimately, defendants must raise a NOA issue on the pleadings, if at all possible. Though trial courts retain discretion to address it at different stages—discretion which the appellate court has generally encouraged—consideration is by no means guaranteed. Raising the issue through pleadings is far and away the ideal method of doing so.

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suggesting that a copy of the GPN had been included in the underlying pleadings. *Id.* ¶¶ 19–20, 973 N.E.2d at 442. This leads to a curious conclusion: if there had been no GPN included in the complaint, then the record would only include the deemed allegation of sending, which of course would be consistent with entry of judgment. This leads to the counterintuitive conclusion that, if a GPN is *not* present in the complaint, no basis for further investigation into the allegation on a section 5/2-1401 petition exists. Given that *Pajor* appears to be the only appellate case to discuss the interaction between a section 5/2-1401 petition and a notice of this type, it is unlikely that any further clarity on this issue will be forthcoming.

322. Such as, for instance, section 5/15-1509's claims bar. 735 ILL. COMP. STAT. 5/15-1509(c) (1990). Once an order approving sale is entered, the issuance of a judicial deed will bar most claims of parties to the foreclosure. *Id.* This operates somewhat like a *bona fide* purchaser bar: to get around section 5/15-1509, a petitioner must allege that the underlying judgment was not only flawed but *void*, a higher standard than the already-strict section 5/2-1401 standard. *See* Deutsche Bank Nat'l Tr. Co. v. Brewer, 974 N.E.2d 224, 227 (Ill. App. Ct. 2012) (discussing that judgment could be overturned as void where there was no personal jurisdiction, despite section 5/15-1509's bar). *See also* Wells Fargo Bank, N.A. v. McCluskey, 2013 IL 115469, ¶¶ 18–26, 999 N.E.2d 321, 328–29 (discussing general hurdles imposed by section 5/15-1508 surrounding the order approving sale itself).

323. *See generally* U.S. Bank Nat'l Ass'n v. Prabhakaran, 2013 IL 111224, 986 N.E.2d 169 (discussing standards for section 5/2-1401 petition in foreclosure cases). *But see Pajor*, 2012 IL App (2d) 110899, ¶¶ 13–14, 973 N.E.2d at 440 (discussing a notice challenge raised for the first time as a section 5/2-1401 petition). In *Pajor*, the appellate court largely ignored the waiver and diligence arguments (upon which the trial court denied the petition) and affirmed on the *merits* of the underlying GPN challenge. *Id.* ¶¶ 13–14, 973 N.E.2d at 440. It bears note that the challenge in *Pajor* was not a sending challenge, but instead a challenge to the *content* of the GPN, which perhaps elevates the issue to one bearing more in-depth analysis. *See supra* Part I.B (discussing sending versus content challenges to notice). In any event, *Pajor* demonstrates that courts certainly have the ability to address notices on their merits for the first time on a section 5/2-1401 petition, even if doing so is highly irregular.

B. A Question of Evidence

The procedural posture of raising notice claims necessarily entails a variety of presumptions, burdens, and other assorted effects based on when and how the issue is raised. But a secondary theme also runs through both the NOA and the GPN case law: where a defendant raises a coherent notice challenge, the preferred resolution is on the merits—rather than on a procedural basis—even when a procedural objection might otherwise be expected to prevail.

This is perhaps most visible by contrasting the three central notice cases of *Adeyiga*, *Bukowski*, and *Accetturo*. In *Adeyiga*, the defendants denied receipt of the notice with an affidavit. The plaintiff did not counter the defendants' claim by stating it did send notice, but instead, relied on a procedural defense that failure to deny the deemed allegations resulted in an admission, putting the issue beyond proof.[324] The defendant offered evidence, the plaintiff did not, and so the court, despite the seemingly dispositive procedural defect, remanded for a hearing on the issue.[325] In *Bukowski*, by contrast, though there was also a procedural defect—failure to deny the deemed and construed allegations—the defendant did not offer an affidavit, but the plaintiff did, and the court subsequently affirmed for the plaintiff.[326]

And yet in *Accetturo*, the appellate court clearly indicated that procedure mattered. The case presented an interesting dichotomy. The trial court first resolved the issue on the merits, holding that the notices were sufficient. But the court then proceeded to address the procedural issues, holding that the NOA challenge was *also* procedurally barred.[327] The court could have reversed on the merits alone, perhaps holding that the plaintiff had waived procedural objections by not raising them earlier.[328] Instead, the *Accetturo* court went out of its way to distinguish *Bukowski*'s procedural discussion—not directly, but by separately deriving a different conclusion.[329] *Accetturo*'s ultimate conclusion may

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324. Bank of Am., N.A. v. Adeyiga, 2014 IL App (1st) 131252, ¶¶ 25–31, 29 N.E.3d 60, 65–66.

325. *Id.* ¶ 127, 29 N.E.3d at 84.

326. CitiMortgage v. Bukowski, 2015 IL App (1st) 140780, ¶¶ 6–8, 26 N.E.3d 495, 497–98.

327. Cathay Bank v. Accetturo, 2016 IL App (1st) 152783, ¶¶ 13–16, 19, 66 N.E.3d 467, 473–74.

328. This position would have been an entirely reasonable position to take, and thoroughly consistent with prior case law on either side of the issue. For further discussion of this possibility, see *supra* note 201 and accompanying text (noting the appellate court could have affirmed or reversed on the merits alone because the trial court's first ruling was based on the merits of the NOA argument).

329. *Accetturo*, 2016 IL App (1st), 152783, ¶¶ 32–50, 66 N.E.3d 467, 476–80.

not have been well founded,[330] but it is clear that the NOA's procedural posture is still significant—though it is not entirely clear what that posture ought to be.

To be sure, there exist many examples of purely procedural dispositions of notice issues.[331] But it is equally telling that the *Adeyiga* and *Accetturo* courts went to such great lengths to reverse such procedural dispositions. The takeaway for courts and practitioners alike is to tread carefully. When a NOA issue surfaces, procedural defects should be abated if at all possible. But unless those defects are so pervasive as to affect other aspects of the case,[332] parties should be prepared to address the NOA on the merits—just in case.

CONCLUSION

Notice challenges in Illinois foreclosures are common, and by and large are relatively easy to address and resolve. But the Illinois Appellate Court's pronouncements as to how such issues should be raised have been unnecessarily confusing and, in some instances, do not appear to fully account for the nature of the claim or the extant provisions of the IMFL.

Procedurally, all notice issues should be raised as denials of the IMFL's deemed and construed allegations. This applies equally to challenges founded on the NOA as to challenges to the GPN, to the extent the latter is still an applicable law. Pleading notice issues as denials of deemed allegations is consistent with both the type of challenge a notice claim brings and the comprehensive pleading regime established by the IMFL.

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330. *See supra* Parts III.C, IV.A.4 (discussing and critiquing *Accetturo*, respectively).

331. *E.g.*, Wells Fargo Bank, N.A. v. Simpson, 2015 IL App (1st) 142925, ¶¶ 41–46, 36 N.E.3d 266, 279–80. This happens much more frequently at the trial level; the proportion of cases that make it to an appeal is much smaller—and if a defendant appears litigious, a plaintiff may well decide to offer an affidavit on the merits, rather than take a chance on the appellate court's unequal treatment of the deemed allegations. *E.g.*, PNC Bank, N.A. v. Merritt, 2017 IL App (1st) 152188-U, ¶ 7 (noting that the plaintiff tendered an affidavit on a motion to reconsider, rather than relying on procedural waiver arguments).

332. This would be something like *Parkway Bank & Trust Co v. Korzen*, in which the defendant took a shotgun approach to litigation—throwing everything at the wall, and appealing because nothing stuck. 2013 IL App (1st) 130380, ¶ 4, 2 N.E.3d 1052, 1055. Ironically enough, *Korzen* did not address a NOA, and only tangentially addressed the GPN. *Id.* ¶¶ 67–69, 2 N.E.3d at 1076. Perhaps the closest NOA example would be *Nationstar Mortgage, LLC v. Cheetam*, a similar shotgun-litigation approach where the appellate opinion suggests that the NOA was at one point at issue. Nationstar Mortg., LLC v. Cheetam, 2016 IL App (1st) 143192-U. A less eccentric, but equally procedurally convoluted, example is found in *FV-I v. Noonan*, where the defendant's GPN and NOA affirmative defenses were stricken two years before he filed the GPN-NOA motion to dismiss that formed the basis for the ultimately unsuccessful appeal. FV-I v. Noonan, 2016 IL App (1st) 152485-U.